

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jul 12, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STANLEY MILLER,

Plaintiff,

v.

BOILERMAKER-BLACKSMITH
NATIONAL PENSION TRUST; and
JOHN FULTZ, agent of John Fultz as
Fiduciary of the Boilermaker-
Blacksmith National Pension Fund,

Defendant.

NO: 2:20-CV-317-RMP

ORDER DENYING PLAINTIFF'S
MOTION FOR RECONSIDERATION

BEFORE THE COURT is Plaintiff's Motion for Reconsideration of Order Compelling Discovery or for Clarification, ECF No. 49. If the Court denies reconsideration, Plaintiff also moves to further stay enforcement of the Order Compelling Discovery pending Miller's petition for review of the Order by the Ninth Circuit, and requests that the Court certify the issue[s] for appeal pursuant to 28 U.S.C. § 1292(b). *See* ECF No. 48. The Court has considered the motions, the record, and is fully informed.

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION~ 1

1 **BACKGROUND**

2 Plaintiff Stanley Miller (“Miller”), former owner of PSF Industries, Inc.
3 (“PSF”), filed suit seeking declaratory relief holding that the loan payments he
4 received from PSF in July 2017 and June 2018 did not violate 29 U.S.C. §1392(c)
5 because “a principal purpose” was not to “evade or avoid” PSF’s withdrawal
6 liability. ECF No. 1 at 5.

7 Defendants Boilermaker-Blacksmith National Pension Fund and John Fultz
8 (collectively, the “Fund”) asserted counterclaims against Plaintiff seeking to recover
9 the payments made by PSF to Miller. ECF No. 9. The Fund alleges that the
10 transactions between PSF and Miller were made with a principal purpose of evading
11 or avoiding withdrawal liability to the Fund, *see* 29 U.S.C. § 1392(c), and with the
12 intent to hinder, delay or defraud the Fund and other creditors, in violation of
13 Washington State law, RCW 19.40.041. *Id.* at 13–19. The Fund further alleges that
14 the payments to Miller constituted a transfer by an insolvent debtor to an insider for
15 an antecedent debt in violation of RCW 19.40.051, and that Miller knew at the time
16 of the transfers that PSF was insolvent. *Id.* at 19–20.

17 On March 21, 2021, the Fund moved to compel responses to its Requests for
18 Production, seeking communications or correspondence regarding or relating to any
19 payments on or repayment of loans between Miller and PSF. *See* ECF No. 28. The
20 requested correspondence was withheld by Miller on the basis of attorney-client
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1 privilege, work-product doctrine, and the common interest privilege. *See* ECF No.
2 36. Miller failed to timely provide a privilege log. ECF No. 28 at 3.

3 Miller argued that exchanges among the participants to a Joint Defense
4 Agreement (“JDA”), entered into to defend against the Fund’s underlying
5 withdrawal liability claim against PSF, were properly withheld as confidential
6 communications not subject to disclosure. *See id.*

7 On April 16, 2021, the Court granted the Fund’s Motion to Compel. ECF
8 No. 44. In so holding, upon considering the *Burlington* factors, the Court found that
9 the deficiencies of Miller’s privilege log, the delay in producing the log, and the
10 absence of mitigating circumstances justified a waiver of any applicable privileges.
11 ECF No. 44 at 5–10; *see Burlington N. & Santa Fe Ry. Co. v. United States Dist.*
12 *Court for the Dist., of Montana*, 408 F.3d 1142, 1149 (9th Cir. 2005) (“Boilerplate
13 objections or blanket refusals inserted into a response to a Rule 34 request for
14 production of documents are insufficient to assert a privilege.”). The Court further
15 found that although Miller’s untimely privilege log identified several
16 communications between Miller and his attorney, Miller failed to establish that the
17 nature and content of the communications were privileged. ECF No. 44 at 11.

18 Finally, in rejecting Miller’s assertion of the common interest privilege to
19 shield the withheld correspondence, the Court held that communications or
20 correspondence related to loans from Miller to PSF and payments or repayment of
21 the same were not communications made in furtherance of the common interest or

1 joint legal strategy identified by Miller as defending against PSF’s withdrawal
2 liability. ECF No. 44 at 14–15.

3 However, the Court allowed a “limited exception” to Plaintiff’s previously
4 found waiver with respect to Request for Production Nos. 9 and 10–12 subpart (d),
5 seeking correspondence “regarding or related to any money owed, or potentially
6 owed, to the fund by PSF and/or any withdrawal liability, or potential withdrawal
7 liability, owed to the Fund by PSF.” ECF Nos. 29-1 at 4–5, 44 at 16 (“[T]o the
8 extent that the responsive documents to Request for Production Nos. 9, and 10–12
9 subpart (d) were made in furtherance of the purported joint interest in defending
10 against withdrawal liability, Plaintiff may continue to assert the privileged nature of
11 those documents, and supplement its privilege log accordingly.”).

12 Miller now moves for reconsideration of the Court’s Order Granting
13 Defendants’ Motion to Compel pursuant to Federal Rules of Civil Procedure
14 60(b)(1) and (6), arguing that the Court’s Order, ECF No. 44, should be
15 reconsidered because “it is based in material part on a mistaken understanding of the
16 facts and a misapprehension of the extent of the privileges allowed under the law.”
17 ECF No. 49 at 10. In the alternative, Miller requests that the Court “clarify its Order
18 to only require production of communications regarding Miller’s loans, and not
19 PSF’s withdrawal liability.” *Id.* at 2. The Court stayed enforcement of its previous
20 Order, ECF No. 44, pending Miller’s Motion for Reconsideration. ECF No. 53.

1 In the event the Court denies reconsideration, Miller moves to further stay
2 enforcement of the Order pending Miller’s petition for appellate review and requests
3 that the Court certify the issue[s] for appeal pursuant to 28 U.S.C. § 1292(b). ECF
4 No. 48 at 4–5. The Fund contends that a stay beyond the Court’s present ruling is
5 unnecessary because Miller has failed to establish that this case is suitable for
6 interlocutory appeal. ECF No. 52 at 6–9.

7 LEGAL STANDARDS

8 “Reconsideration [of a prior order] is appropriate if the district court (1) is
9 presented with newly discovered evidence, (2) committed clear error or the initial
10 decision was manifestly unjust, or (3) if there is an intervening change in controlling
11 law.” *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263
12 (9th Cir. 1993). Rule 60(b)(1) permits a court to grant relief from an order where
13 there has been “mistake, inadvertence, surprise, or excusable neglect.” Fed. R. Civ.
14 Pro. 60(b)(1); *see also Liberty Mut. Ins. Co. v. E.E.O.C.*, 691 F.2d 438, 441 (9th Cir.
15 1982) (“The law in this circuit is that errors of law are cognizable under Rule
16 60(b).”) (citation omitted).

17 Reconsideration is an “extraordinary remedy, to be used sparingly in the
18 interests of finality and conservation of judicial resources.” *Carroll v. Nakatani*, 342
19 F.3d 934, 945 (9th Cir. 2003). “A [motion for reconsideration] may not be used to
20 raise arguments or present evidence for the first time when they could reasonably
21 have been raised earlier in the litigation.” *Kona Enterprises, Inc. v. Estate of*

1 *Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). “The overwhelming weight of authority
2 is that the failure to file documents in an original motion or opposition does not turn
3 the late filed documents into ‘newly discovered evidence.’” *Sch. Dist. No. 1J*, 5
4 F.3d at 1263 (citation omitted).

5 Alternatively, Miller asks the Court to further stay enforcement pending
6 Miller’s petition for review of the Order by the Ninth Circuit and certify the issue[s]
7 for appeal pursuant to 28 U.S.C. § 1292(b).

8 “When a district judge, in making in a civil action an order not otherwise
9 appealable under this section, shall be of the opinion that such order involves a
10 controlling question of law as to which there is substantial ground for difference of
11 opinion and that an immediate appeal from the order may materially advance the
12 ultimate termination of the litigation, [the district judge] shall so state in writing in
13 such order.” 28 U.S.C. §1292(b).

14 **DISCUSSION**

15 As a threshold matter, Miller takes issue with the Court’s use of the terms
16 “allegedly” and “purportedly” in referring to the Joint Defense Agreement (“JDA”).
17 ECF No. 49 at 3. To the extent that the Court’s use of “allegedly” and “purportedly”
18 in the Order suggests that the Court “questions the credibility of Miller’s
19 representation about the JDA,” as Miller suggests, the Court notes that the record
20 was devoid of the JDA when ruling upon the Fund’s Motion to Compel. Even
21 though Miller had not provided a copy of the JDA with his response brief, the Court

1 proceeded with the premise that a valid, JDA existed in rendering its decision. *See*
2 *id.*

3 **I. Motion for Reconsideration**

4 Miller argues that the Court should reconsider its previous ruling because (1)
5 the Order is based upon the factual misunderstanding that the communications at
6 issue already had been produced in the underlying litigation; and (2) the Order is
7 based upon the factual misapprehension that the communications at issue were in
8 furtherance of a commercial transaction. ECF Nos. 49 at 4, 7–9, 71 at 3–6.

9 **1. Previous Production**

10 Miller identifies as error the Court’s “mistaken belief that Miller stated the
11 communications at issue here previously had been produced in discovery or
12 otherwise in the underlying litigation when that was not the case.” ECF No. 49 at 4,
13 6.

14 In analyzing the third *Burlington* factor, regarding the magnitude of document
15 production, the Court noted in the Order an apparent contradiction between the
16 following statements by Miller: “[M]any or most of the documents and
17 communications at issue were prepared and exchanged during the course of the
18 actual litigation with the Fund,” ECF No. 36 at 10, and “the task of producing the
19 privilege log was not insignificant. It required a search through hundreds of separate
20 email files . . . which had never been vetted, organized, compiled or produced in any
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1 prior proceeding[,]” ECF No. 36 at 17. *See* ECF No. 44 at 9–10 (citing *Burlington*
2 *Northern*, 408 F.3d at 1149).

3 On reconsideration, Miller clarifies his statements to mean that many or most
4 of the documents and communications at issue were prepared and exchanged
5 between the participants to the JDA during the course of actual litigation with the
6 Fund, but none was produced in that litigation or any other proceeding. ECF No. 49
7 at 4.

8 However, Miller’s clarification does not materially alter the Court’s previous
9 “holistic analysis,” specifically with respect to the third *Burlington* factor regarding
10 the magnitude of document production. *See Burlington*, 408 F.3d at 1149. Given
11 only Miller’s representations that the “task of producing the privilege log was not
12 insignificant” and that “[c]ounsel for Miller was hampered by constraints on
13 available paralegal resources, due to a heavy office caseload,” ECF No. 36 at 18,
14 Miller failed to persuade the Court that the magnitude of vetting email
15 communications, even over a span of 27 months, posed an undue burden.

16 Furthermore, any concerns as to the burden imposed by compiling a privilege
17 log should have been articulated to the opposing party before the Court’s
18 intervention. *See Burlington*, 408 F.3d at 1149 n. 3 (“We are well aware that,
19 particularly in discovery-intensive litigation, compiling a privilege log within 30
20 days may be exceedingly difficult . . . at the outset of discovery or, at the latest,
21 before Rule 34’s 30–day time limit has expired, [litigants] may either secure an

1 appropriate agreement or stipulation from the relevant litigants or, failing that, apply
2 for a discovery or protective order.”).

3 To the extent this “misapprehension” with respect to the previous disclosure
4 or nondisclosure of the documents and communications at issue was an “error,” it
5 does not materially alter this Court’s previous application of the *Burlington* factors.
6 Accordingly, the Court declines to reconsider the Order notwithstanding the fact, as
7 presented by Miller, that the documents and communications at issue were not
8 produced in previous litigation with the Fund or any other proceeding.

9 **2. Applicability of Privileges in the Context of the Lender & Borrower** 10 **Relationship**

11 In the Order, the Court held that, even if application of the *Burlington* factors
12 led to the conclusion of non-waiver, Miller had failed to demonstrate that the
13 asserted privileges apply to each responsive document that has been withheld. ECF
14 No. 44 at 10. In his Motion for Reconsideration, Miller disputes the Court’s
15 conclusion that the communications at issue regarding Miller’s loans to PSF and
16 repayment of the same occurred between Miller and PSF as lender and borrower,
17 rather than because of and in anticipation of litigation. ECF No. 49 at 7–9.

18 Miller concedes that Miller and PSF “may have been *technically* adverse by
19 virtue of their status as borrower and lender,” but contends that “in reality[,] they
20 were not adverse” because the communications at issue would not have occurred but
21 for the Fund’s claims. ECF No. 49 at 8 (emphasis in original) (citing *In*

1 *re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004)) (“[A] document should
2 be deemed prepared ‘in anticipation of litigation’ and thus eligible for work product
3 protection under Rule 26(b)(3) if ‘in light of the nature of the document and the
4 factual situation in the particular case, the document can be fairly said to have been
5 prepared or obtained because of the prospect of litigation.’”) (citation omitted).

6 However, communications regarding or relating to any payments or
7 repayment of any loans would have existed, provided that Miller wanted to be
8 repaid, notwithstanding any litigation with the Fund. In other words,
9 communications regarding, for example, “when and how [the loans] would be
10 repaid,” ECF No. 49 at 9, occurred because of the existence of outstanding loans, not
11 because of the Fund’s claims. *See also* ECF No. 9 at 13 (The Fund claiming that
12 “PSF transferred \$898,000 to Miller on July 19, 2017 and \$800,000 to Miller on
13 August 21, 2017.”); *and* ECF No. 50 at 6 (written JDA entered into effective August
14 30, 2017, purportedly memorializing a previous oral JDA and applying
15 “retroactively to [participants’] previous claims and discussions in support of their
16 common interests.”).

17 Although the Fund’s claims may have caused these communications related to
18 the loans and repayment to occur sooner rather than later, the Fund’s claims did not
19 change that Miller and PSF were “technically” adverse parties in regard to the loans
20 and repayment. ECF No. 44 at 10. The Joint Defense Agreement did not create,
21 alter, or dissolve the preexisting relationship between Miller and PSF as lender and

1 borrower. Furthermore, Miller's privilege log failed to sufficiently identify and
2 distinguish those communications between Miller and PSF as participants to the
3 JDA, from those communications between Miller and PSF made in the context of
4 the lender and borrower relationship.

5 In the absence of newly discovered evidence, clear error, an intervening
6 change or mistake in controlling law, the Court declines to reconsider its substantive
7 analysis regarding the inapplicability of the claimed privileges.

8 Accordingly, consistent with the Court's previous Order, Plaintiff shall
9 produce all responsive documents to Requests for Production Nos. 6 through 13 and
10 16 related to the loans between Miller and PSF and repayment of the same. The
11 Court will allow a limited exception to Plaintiff's previously found waiver, and to
12 the extent that the responsive documents to Request for Production Nos. 9, 10(d),
13 11(d), and 12(d) were made in furtherance of the purported joint interest in
14 defending against withdrawal liability, Plaintiff may continue to assert the privileged
15 nature of those documents. However, to the extent that the responsive documents to
16 Request for Production Nos. 9, and 10-12 subpart (d) do not relate to PSF's alleged
17 withdrawal liability, but rather, are related to the loans by Miller and payments by
18 PSF, those documents shall be produced.

19 With respect to those documents highlighted by the Fund at ECF No. 60-1, the
20 Court orders production of the highlighted entries unless those documents are
21 responsive to Request for Production Nos. 9, 10(d), 11(d), and 12(d). If so, Plaintiff

1 must provide a more complete description demonstrating that the communication at
2 issue is privileged in the first instance, and if made with third parties, was made in
3 furtherance of the purported joint interest in defending against withdrawal liability.
4 *See* ECF No. 44 at 7 (“[T]he common interest privilege is an ‘anti-waiver exception’
5 which ‘comes into play only if the communication at issue is privileged in the first
6 instance.’”) (citing *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D.
7 Cal. 2007)).

8 The entries dated May 7, 2018, and July 19, 2018, and identified merely as
9 “Email,” with no further information aside from the identity of the author and
10 recipients, must be produced as Miller has failed to supplement his privilege log
11 with respect to those entries and has thus waived any applicable privileges by
12 continuing to assert boilerplate objections. ECF No. 60-1 at 5, 6.

13 **II. Certification for Interlocutory Appeal**

14 Since Miller’s Motion for Reconsideration has been denied, the Court turns to
15 Miller’s request that the Court certify the issue[s] for appeal pursuant to 28 U.S.C. §
16 1292(b). *Id.* As presented by Miller, the question is “whether the communications
17 at issue are protected by the attorney-client privilege, work [product] privilege, and
18 the common interest doctrine[.]” ECF No. 48 at 5. Miller also contends that “to the
19 extent the Order ruled that Miller and PSF could not have joint defense privileged
20 communications because, as lender and borrower they were necessarily adverse,”
21 this case merits review under *Mohawk Indus. Inc. v. Carpenter*, 558 U.S. 100, 110–

1 11 (2009) because it “involves a new legal question or is of special consequence.”
2 ECF No. 48 at 5.

3 Defendants oppose a further stay of enforcement of the Order and contend that
4 Miller’s request to certify its Order for interlocutory appeal to the Ninth Circuit via
5 28 U.S.C. § 1292(b) should be denied. ECF No. 52 at 6–11.

6 **A. 28 U.S.C. § 1292(b)**

7 As noted above, “[w]hen a district judge, in making in a civil action an order
8 not otherwise appealable under this section, shall be of the opinion that such order
9 involves a controlling question of law as to which there is substantial ground for
10 difference of opinion and that an immediate appeal from the order may materially
11 advance the ultimate termination of the litigation, [the district judge] shall so state in
12 writing in such order.” 28 U.S.C. §1292(b).

13 To grant a § 1292(b) motion, a district court must first find “that the
14 certification requirements of the statute have been met.” *In re Cement Antitrust*
15 *Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981). “These certification requirements are
16 (1) that there be a controlling question of law, (2) that there be substantial grounds
17 for difference of opinion, and (3) that an immediate appeal may materially advance
18 the ultimate termination of the litigation.” *Id.* The party pursuing the interlocutory
19 appeal bears the burden of demonstrating that the certification requirements have
20 been met. *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (citation
21 omitted).

1 “Section 1292(b) is a departure from the normal rule that only final judgments
2 are appealable, and therefore must be construed narrowly.” *James v. Price Stern*
3 *Sloan, Inc.*, 283 F.3d 1064, 1068 n. 6 (9th Cir. 2002). Section 1292(b) is “to be used
4 only in exceptional situations in which allowing an interlocutory appeal would avoid
5 protracted and expensive litigation.” *In re Cement Antitrust Litig. (MDL No. 296)*,
6 673 F.2d 1020, 1026 (9th Cir. 1981) (citing *United States Rubber Co. v. Wright*, 359
7 F.2d 784, 785 (9th Cir. 1966)). “It was not intended merely to provide review of
8 difficult rulings in hard cases.” *United States Rubber Co.*, 359 F.2d at 785.

9 “Even where the district court makes such a certification, the court of appeals
10 nevertheless has discretion to reject the interlocutory appeal, and does so quite
11 frequently.” *James*, 283 F.3d at 1067 n.6 (9th Cir. 2002) (citation omitted); *see, e.g.*,
12 *Avrahami v. Clark*, CV-19-04631-PHX-SPL. 2021 WL 1022542, at *2 (D.C. Ariz.
13 Feb. 12, 2021) (finding that question as to whether attorney-client privilege applied
14 did not “on its face . . . appear to be a controlling question of law” but nonetheless
15 certifying issue for appeal); *but see Avrahami v. Clark*, No. 21-80011, Docket Entry:
16 4 (9th Cir. Apr. 15, 2021) (Order denying petition for permission to appeal pursuant
17 to 28 U.S.C. § 1292(b)).

18 **1. Controlling Question of Law**

19 A “controlling question of law” is one that will “materially affect the outcome
20 of litigation in the district court.” *In re Cement Antitrust Litig.*, 673 F.2d at 1026
21 (citing *United States Rubber Co.*, 359 F.2d at 785). Examples of “controlling

1 questions” include “determinations of who are necessary and proper parties, whether
2 a court to which a cause has been transferred has jurisdiction, or whether state or
3 federal law should be applied.” *United States v. Woodbury*, 263 F.2d 784, 787 (9th
4 Cir. 1959).

5 “[T]he question of privilege . . . involves nothing as fundamental as the
6 determination of who are necessary and proper parties, whether a court to which a
7 cause has been transferred has jurisdiction, or whether state or federal law shall be
8 applied.” *Id.* (holding that privilege issue was collateral and thus not a controlling
9 question within the meaning of § 1292(b)). “Ordinarily it is difficult to believe that
10 a discovery order will present a controlling question of law or that an immediate
11 appeal will materially advance the termination of the litigation.” Wright & Miller, §
12 2006 Appellate Review of Discovery Orders, 8 Fed. Prac. & Proc. Civ. § 2006 (3d
13 ed.).

14 As presented by Miller, the question for appeal is “whether the
15 communications at issue are protected by the attorney-client privilege, work
16 [product] privilege, and the common interest doctrine[.]” ECF No. 48 at 5. This is
17 not a “pure question of law,” but rather, would require the court of appeals to apply
18 the law to a particular set of facts. *See McFarlin v. Conseco Servs., LLC*, 381 F.3d
19 1251, 1259 (11th Cir. 2004) (“[Section] 1292 appeals were intended, and should be
20 reserved, for situations in which the court of appeals can rule on a pure, controlling
21

1 question of law without having to delve beyond the surface of the record in order to
2 determine the facts.”).

3 The basic issue in this case is whether the loan payments from PSF to Miller
4 were made with the purpose to “evade or avoid” withdrawal liability or otherwise in
5 violation of federal and state law, not whether Miller waived any privileges as to
6 communications regarding the loans or repayment on the same. *Woodbury*, 263
7 F.2d at 788. Therefore, the issue of whether the communications are privileged is
8 collateral to the basic issues of the case and is not a “controlling question of law.”
9 *See City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984) (noting that
10 review of a discovery order is not available under 28 U.S.C § 1292(b) because it is
11 not a “controlling question of law” that would be appropriate for certification).

12 To the extent the question for appeal should be whether parties cannot have
13 joint defense privileged communications because as lender and borrower they are
14 necessarily adverse, and the Court should certify this question for appeal based
15 upon the “new legal question or is of special consequence” language from
16 *Mohawk*, ECF No. 48 at 5, this Court joins the District Court for the Western
17 District of Washington in rejecting the proposition that a privilege issue
18 purportedly involving a new legal question meets § 1292’s requirements,
19 notwithstanding the language from *Mohawk*. *See, e.g., In re Examination of*
20 *Privilege Claims*, No. MC15-0015-JCC-JPD, 2016 WL 11713117, at *2 (W.D.
21 Wash. Jan. 25, 2016).

1 Furthermore, the Court’s Order did not rule that parties in a lender and
2 borrower relationship cannot have any joint defense privileged communications,
3 and such interpretation of the Court’s Order is incorrect. Rather, the Court’s Order
4 acknowledges that such communications may exist even in the context of the
5 lender and borrower relationship in granting a limited exception to Miller’s
6 previously found waiver, allowing Miller to continue assert the privileged nature of
7 communications that are responsive to Requests for Production Nos. 9 and 10–12
8 subpart (d) regarding withdrawal liability. *See* ECF No. 44 at 15–16 (“Such
9 communication or correspondence as it relates to PSF’s withdrawal liability could
10 have been made in furtherance of the purported joint interest in defending against
11 PSF’s withdrawal liability.”).

12 Accordingly, Miller has failed to establish that the issue of “whether the
13 communications at issue are protected by the attorney-client privilege, work
14 [product] privilege, and the common interest doctrine” is a “controlling question of
15 law” under 28 U.S.C. § 1292(b).

16 **2. Substantial Ground for Difference of Opinion**

17 “To determine if a ‘substantial ground for difference of opinion’ exists under
18 § 1292(b), courts must examine to what extent the controlling law is unclear.”
19 *Couch*, 611 F.3d at 633. A party’s disagreement with the Court’s ruling is not
20 sufficient for there to be “substantial ground for difference of opinion.” *Id.*

1 Miller “respectfully submits that fair-minded judges could disagree whether
2 the communications at issue are privileged attorney work product and/or under the
3 common interest doctrine.” ECF No. 58 at 5. However, the Court’s finding as to the
4 inapplicability of the privileges is secondary to the Court’s finding of waiver.
5 Additionally, Miller’s disagreement with the Court’s ruling is insufficient to show
6 that a “substantial ground for difference of opinion” exists.

7 **3. Materially Advance the Ultimate Termination of Litigation**

8 Although the Court need not examine the third prong in great detail because
9 the first two prongs are not met, the third prong also supports denying Miller’s
10 request for certification. Immediate appeal of the issue as to whether the
11 communications at issue are protected by the attorney-client privilege, work product
12 privilege, and the common interest doctrine will not necessarily materially advance
13 the ultimate termination of litigation in this case. Even if the appellate court found
14 that Miller had not waived the privileges, and those privileges applied to the
15 withheld communications, the parties’ claim and counterclaims related to “evade or
16 avoid” liability would remain.

17 Therefore, the Court will not certify for interlocutory appeal the issue of
18 “whether the communications at issue are protected by the attorney-client privilege,
19 work product privilege, and the common interest doctrine.”

20 / / /

21 / / /

1 **B. Perlman Rule**

2 Alternatively, Miller argues that review is warranted as a matter of right to
3 protect a third party’s privileged information under *Perlman v. United States*, 247
4 U.S. 7 (1918). ECF No. 58 at 9. Miller contends that there “is no meaningful
5 difference for purposes of applying the *Perlman* policy” between a motion to compel
6 directed at Miller and a discovery order directed at PSF because “an appeal by
7 Miller is the only vehicle to protect PSF’s privileged information.” ECF No. 58 at
8 10.

9 Under the *Perlman* rule, “a discovery order directed at a ‘disinterested third-
10 party custodian of privileged documents’ is immediately appealable because ‘the
11 third party, presumably lacking a sufficient stake in the proceeding, would most
12 likely produce the documents rather than submit to a contempt citation.’” *United*
13 *States v. Krane*, 625 F.3d 568, 572 (9th Cir. 2010) (citing *United States v. Griffin*,
14 440 F.3d 1138, 1143 (9th Cir. 2006)).

15 The Fund asserts that the *Perlman* rule does not apply to the Court’s Order
16 Granting Defendants’ Motion to Compel Discovery for three reasons: (1) the
17 *Perlman* rule does not apply in the context of ongoing civil litigation, *see*
18 *In re Nat’l Mortg. Equity Corp. Mortg. Pool Certificates Litig.*, 857 F.2d 1238, 1240
19 (9th Cir. 1988) (“Thus, we conclude that the *Perlman* rule does not apply to render
20 appealable discovery orders issued in an ongoing civil case.”); (2) the denial of
21 immediate review does not render impossible “any review whatsoever”; and (3) the

1 rule only applies to subpoenas that are directed to disinterested third parties, and
2 does not apply to third parties who are “closely affiliated” with parties to the
3 litigation, *see Waymo LLC v. Uber Tech., Inc.*, 870 F.3d 1350, 1366 (Fed. Cir.
4 2017). ECF No. 79 at 2–7.

5 Given the Ninth Circuit’s conclusion that “the *Perlman* rule does not apply to
6 render appealable discovery orders issued in an ongoing civil case,” *In re Nat’l*
7 *Mortg. Equity Corp.*, 857 F.2d at 1240, the Court concludes that the *Perlman* rule is
8 inapplicable here. Furthermore, PSF’s actions are central to the Fund’s
9 counterclaims and therefore, “it seems clear that [PSF] is no ‘disinterested’ third
10 party.” *Waymo LLC*, 870 F.3d at 1366 (citation omitted).

11 **III. Request to Maintain Stay**

12 Miller requests that the Court maintain the stay of enforcement of the Order
13 Granting Defendants’ Motion to Compel Discovery pending Miller’s petition for
14 review. ECF No. 48 at 4 (citing 9th Circuit Rule 27-1. Motions for Stays Pending
15 Appeal) (“If a district court stays an order or judgment to permit application to the
16 Court of Appeals for a stay pending appeal, an application for such stay shall be
17 filed in the Court of Appeals within 7 days after issuance of the district court’s
18 stay”). Having declined to certify the issue for appeal, and finding that an appeal of
19 the Court’s Order would be futile, the Court declines to further stay enforcement of
20 the Order.

1 The Fund may move for reasonable expenses, including attorneys' fees,
2 incurred in preparing its Response to Miller's Motion for Reconsideration, as well as
3 responding to Miller's Motion to Stay, as they directly relate to the Fund's Motion to
4 Compel Discovery. *See* Fed. R. Civ. P. 37(a)(5)(A).

5 Accordingly, **IT IS HEREBY ORDERED:**

6 1. Plaintiff's Motion for Reconsideration of Order Compelling Discovery
7 or for Clarification, **ECF No. 49**, is **DENIED**.

8 Plaintiff shall produce all responsive documents Requests for Production Nos.
9 6 through 13 and 16 in Defendants' First Set of Discovery Requests relating to any
10 payments on or repayment of any loans within **fourteen (14) days** of this Order.

11 Plaintiff may continue to assert the privileged nature of documents which are
12 responsive to Requests for Production Nos. 9, 10(d), 11(d) and 12(d), provided those
13 communications and correspondence were made in furtherance of the asserted joint
14 interest in defending against withdrawal liability.

15 2. The stay of enforcement of the Order Granting Defendants' Motion to
16 Compel Discovery, **ECF No. 44**, is **lifted**.

17 3. The Court declines to certify the issue of "whether the communications
18 at issue are protected by the attorney-client privilege, work product privilege, and the
19 common interest doctrine" for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

20 4. Defendants may, within fourteen (14) days of this Order, move for
21 reasonable expenses in responding to Plaintiff's Motion for Reconsideration, ECF

1 No. 49, and Motion to Stay, ECF No. 48, including attorneys' fees. Fed. R. Civ. P.
2 37(a)(5)(A). Plaintiff shall respond to any such motion within fourteen (14) days
3 thereafter, and Defendants may reply within seven (7) days thereafter.

4 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
5 Order and provide copies to counsel.

6 **DATED** July 12, 2021.

7
8 *s/ Rosanna Malouf Peterson*
9 ROSANNA MALOUF PETERSON
10 United States District Judge
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