UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

ANDREA ROSSI and LEONARDO CORPORATION,

Plaintiffs,

v.

THOMAS DARDEN; JOHN T. VAUGHN; INDUSTRIAL HEAT, LLC; IPH INTERNATIONAL B.V.; and CHEROKEE INVESTMENT PARTNERS, LLC,

Defendants.

INDUSTRIAL HEAT, LLC and IPH INTERNATIONAL B.V.,

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO CORPORATION,

Counter-Defendants,

and

J.M. PRODUCTS, INC.; HENRY JOHNSON; UNITED STATES QUANTUM LEAP, LLC; FULVIO FABIANI; and JAMES A. BASS,

Third-Party Defendants.

CASE NO. 1:16-cv-21199-CMA

DEFENDANTS' OPPOSITION TO PLAINTIFFS' APPEAL OF JUDGE O'SULLIVAN'S APRIL 20, 2017 RULING THAT DOCUMENT IH-00079768 IS A PRIVILEGED COMMUNICATION

On April 20, 2017, Magistrate Judge O'Sullivan admonished Plaintiffs' counsel with respect to the subject of this appeal: "You can't just keep bringing stuff to me over and over and over again and hoping that something's going to happen." Tr. at 66-67. And yet, here we are. By this appeal, Plaintiffs seek to invade the attorney-client privilege as to a document that Magistrate Judge O'Sullivan has reviewed *in camera* and found, in three separate hearings, is privileged and immune from disclosure and use in this litigation (hereinafter, "November 9 email"). In particular, Plaintiffs urge this Court to reverse Magistrate Judge O'Sullivan's April 20, 2017 ruling—which adhered to and reinforced his February 23, 2017, and March 9, 2017 rulings—that the inadvertently-produced attorney-client communication remains privileged, and that Plaintiffs must destroy or return it pursuant to the Protective Order dated October 14, 2016 (the "Protective Order"). D.E. 65. The Magistrate Judge's third ruling is not clearly erroneous or contrary to law. This Court should affirm the April 20 ruling and put an end to Plaintiffs' ceaseless efforts to invade the privilege.

As Magistrate Judge O'Sullivan noted, the very purpose of the Protective Order is to avoid this kind of "gotcha" litigation over inadvertent productions of privileged material. *See generally* Fed. R. Civ. P. 26(b)(5)(B), Advisory Committee Notes, 2006 Amendment (enacting claw-back provisions because the risk of privilege waivers and the amount of work necessary to avoid them would substantially add to the cost and delay of ESI discovery). This Court should deny this appeal and award Defendants their fees and costs in being forced to repeatedly re-litigate the same issue.

BACKGROUND

On February 1, 2017, Industrial Heat requested pursuant to the Protective Order that all parties destroy two inadvertently-produced privileged documents, including a November 9, 2015

email between Industrial Heat's President Tom Darden and an outside counsel (the "November 9 email"). Plaintiffs' counsel refused to destroy the documents.

Plaintiffs' refusal to return or otherwise destroy the subject documents by February 8, 2017, was a clear violation of the Protective Order. Paragraph 21 of the Protective Order states:

> If a party inadvertently or unintentionally produces Materials subject to a claim of privilege or work-product protection, *the Materials for which a claim of inadvertent or unintentional production is thereafter made shall be returned* to the producing party within seven (7) calendar days of the producing party's written request or otherwise destroyed, and the production *will not operate as a waiver* of the applicable privilege or work-product protection.

(Emphasis added). The Protective Order is triggered by a *claim* of privilege and does not grant Plaintiffs the option to retain covered documents for any reason. The Protective Order also explicitly states that an inadvertent production does *not* operate as a waiver.

After Defendants clawed back the documents on February 1, 2017, Plaintiffs' counsel improperly attempted to use the November 9 email as an exhibit during the deposition of Tom Darden on February 16, 2017. Darden Dep. Tr. 154-156 (excerpts attached hereto as Exhibit A).

Plaintiffs then challenged Defendants' privilege claim before Magistrate Judge O'Sullivan at a hearing on February 23, 2017. The Magistrate Judge examined the November 9 email *in camera*, and ruled that it was privileged, that it must be destroyed or returned, and that it may not be used in this litigation:

> [Y]ou receive a document that's privileged, then you should stop looking at it. I think that's what the rules indicate.
> . . .
> I mean, the whole idea of a protective order is to allow clawback so that the parties aren't, you know, wrapped up in making sure that every document is not privileged. That's the idea of it. That's why they came up with this whole clawback thing is give them your documents, if you find something that's privileged, give it back or destroy it.
> . . .
> As to the first document, I find that it remains privileged, can't be used in the litigation and should be destroyed by the Plaintiff or—I don't know if you want it destroyed or returned. If you have any copies, destroy it.

> . . .
> Under the protective order that you entered, you're supposed to destroy it if you receive something that is protected. And it was clearly protected, you should have put it in an envelope or destroyed it and not used it anymore.

Feb. 23 Hrg. Tr. at 6-7, 11-12; D.E. 152. To the last statement, Plaintiffs' counsel responded, "I understand." Feb. 23 Hrg. Tr. at 12.

Rather than complying with the Magistrate Judge's February 23, 2017 ruling under the Protective Order, Plaintiffs sought reconsideration of it at a hearing on March 9, 2017. The Magistrate Judge again found that the November 9 email was privileged and covered by the Protective Order. Plaintiffs' counsel again argued that the November 9 email was not privileged because it "didn't mention what the scope of the legal representation was." Mar. 9 Hrg. Tr. at 12. The Magistrate Judge responded that "you don't need to have a document" defining the scope of representation for an attorney-client privilege to attach. *Id.* He then chided Plaintiffs' counsel for attempting to revisit his ruling:

> Well, now you are rearguing what I already ruled. You are rearguing the argument that you lost last week and I am not inclined to hear reargument on that. . . So if you are arguing that I was wrong before, you know, I am denying that request because I examined that document carefully before making my ruling.

Id. at 12-13.

At the March 9 hearing, Plaintiffs' counsel also raised the crime-fraud exception but on different grounds than those presented in the instant appeal. The Magistrate Judge considered an ambiguous declaration provided by Plaintiffs and rejected their argument, repeating that the document is privileged:

> The motion for reconsideration is denied. I find that although counsel has provided an unsworn declaration of Mr. Levi, who is located in Italy, where he indicates that at certain points he feels as if he has been harassed, threatened, or coerced based on contacts from people who have a connection to the Defendants that that's not sufficient evidence of crime or fraud to override the attorney/client

> privilege, which I've previously found applies to the document at hand which I believe is a November 4th e-mail from Mr. Darden to Mr. Zalli.

Tr. at 17. Plaintiffs appealed the March 9 Order to this Court on March 23, 2017. D.E. 217. Based on Plaintiffs' counsel acknowledging that he had not raised with the Magistrate Judge an unpublished decision setting forth heightened attorney-client privilege standards for corporations, this Court returned the matter to Magistrate Judge O'Sullivan for possible consideration of that case. D.E. 231.

Magistrate Judge O'Sullivan reheard the issue again at a hearing on April 20, 2017 – the third hearing in which Magistrate Judge O'Sullivan was asked to consider the privilege status of the November 9 email. Adding an additional layer of confusion, Plaintiffs presented their privilege challenge to the Court in tandem with a motion for sanctions based upon alleged "bad faith litigation conduct." *See* Apr. 20 Hrg. Tr. at 50. The Court expressed frustration regarding Plaintiffs' perpetual re-litigation of the Court's prior rulings on these issues:

> Didn't we – this sounds vaguely familiar. Didn't we address this one before?

Id. at 53.

…

> And it was denied, wasn't it?

Id.

…

> You're bringing the same issue to me over and over again and saying well, if you didn't find it before, let's find it now. . . You're cutting it very thin. This is stuff I've already addressed or at least that portion I've already addressed. I've asked you guys about this before. You can't just keep bringing stuff to me over and over and over again and hoping that something's going to happen.

Id. at 66-67. The Magistrate Judge carefully considered and enumerated each of the factors raised by Plaintiffs in the *Denture Cream Prods.* decision, and, in a carefully-reasoned opinion rendered from the bench, rejected Plaintiffs' arguments on the merits, and upheld the privilege

for the third time. D.E. 266; *see* Plfs' Appeal at 3-4 (quoting Magistrate Judge's decision). Plaintiffs' counsel queried, "what was the legal advice being sought, what does the court find that legal advice was?" The Magistrate Judge responded that, based on his *in camera* review, "I think that's privileged. . . The final paragraph asks for—asks for him to act as an attorney in developing—in addressing issues that are raised throughout the memo." Apr. 20 Hrg. Tr. at 89-90. This was also supported by the testimony of Mr. Darden provided to the Magistrate Judge. *See* page 9 infra.

In this appeal, Plaintiffs conflate arguments raised in connection with their motion for sanctions based upon bad faith litigation conduct with the issues ripe for appeal before this Court. As a result, it is important to note that Magistrate Judge O'Sullivan ruled that Plaintiffs failed to demonstrate "bad faith conduct" and denied their motion for sanctions. *Id.* at 88. An appeal of the denial of that motion is not before this Court. The Magistrate Judge's April 20, 2017 decision, only with respect to the privileged nature of the November 9 email, gave rise to this appeal.

ARGUMENT

This Court reviews an objection to a non-dispositive order of Magistrate Judge O'Sullivan to determine whether the order was clearly erroneous or contrary to law. *See* 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week old, unrefrigerated dead fish." *Hiram Walker Sons, Inc. v. Kirk* Line, 30 F.3d 1370, 1378 n.2 (11th Cir. 1994); *see also Willis v. Menotte*, No. 09-823030-CIV., 2010 WL 1408343, at *3 (S.D. Fla Apr. 6, 2010) (Altonaga, J.) (applying "dead fish" analogy and noting that the standard "imposes an especially heavy burden on the appellant") (quotation omitted); *Smoliak v.*

Greyhound Lines, Inc., No. 5:04CV245PSPMAK, 2005 WL 3434742, at *1 (N.D. Fla. Oct. 17, 2005) ("Under this standard, the court will affirm the magistrate judge's order unless the court has a definite and firm conviction that error has occurred.") (citations omitted). Here, Plaintiffs fail to argue—let alone show—that the Magistrate Judge's decision was clearly erroneous or contrary to law. Accordingly, this Court must affirm.

I. Plaintiffs Cannot Satisfy the High Threshold for Reversal of the Magistrate Judge's Multiple Rulings That the November 9 Email Is Privileged.

As an initial matter, Plaintiffs do not claim that any of the Magistrate Judge's multiple findings regarding the November 9 email are clearly erroneous. At Plaintiffs' insistence, the Magistrate Judge applied the heightened standard applicable to corporations set forth in *In re Denture Cream Prods. Liab. Litig.*, No. 09-2051-MD, 2012 WL 5057844, at *4 (S.D. Fla. Oct. 18, 2012), in his third look at this issue. But as Defendants argued at the April 20 hearing (Apr. 20 Hrg. Tr. at 72), application of this heightened standard was unnecessary because North Carolina law applies to this analysis, not Florida law.[1] There is no case law applying a heightened standard for corporations under North Carolina law.

Nevertheless, even if Florida law applied, the November 9 email is protected under the attorney-client privilege. As *Denture Cream Prods.* made clear, Florida Statute § 90.502 defines "lawyer" as "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state *or nation*." 2012 WL 5057844, at *5 (quoting Fla. Stat. § 90.502(1)(a)) (emphasis added). It is undisputed that, as an Israeli attorney, Mr. Jaffe qualifies. Plaintiffs'

[1] Florida's choice of law rules dictate the applicable law for this analysis. *See Campero USA Corp. v. ADS Foodservice, LLC*, 916 F.Supp.2d 1284, 1291 n.8 (S.D. Fla. 2012). Florida courts employ the "most significant relationship" test to determine which law applies in this context. *Grupo Televisa, S.A. v. Telemundo Comm. Group, Inc.*, 485 F.3d 1233, 1240 (11th Cir. 2007). North Carolina has the most significant relationship to the present issue because Mr. Darden and Industrial Heat are based in North Carolina.

argument—in *toto*—is that Defendants bore a heavier burden of proving an attorney-client relationship than the Magistrate Judge's *in camera* review alone could sustain. *See* Plfs' Appeal at 7. They further suggest that "[t]he absence of any such additional communications [from Mr. Zalli] leads to the conclusion that no legal services were ever provided." *Id.*

In this appeal, it is *Plaintiffs' burden* to show that the Magistrate Judge's *in camera* reading of the November 9 email was clearly erroneous. At the February 23 re-argument, the Magistrate Judge underscored that "I examined that document carefully before making my ruling." Tr. at 13. So, this appeal amounts to a "he-said, she-said" conflict between Plaintiffs' counsel's recollection of the privileged document and the spot-on review by the Magistrate Judge.[2]

Clearly, Plaintiffs cannot meet their burden. In *Willis*, this Court found that an appellant failed to satisfy the clearly erroneous standard where he "presents no rationale for why the designated statements are wrong, he suggests distinctions without apparent differences, and fails to cite record evidence sufficient to overcome the findings." 2010 WL 1408343, at *4. Here too, Plaintiffs provide no legitimate rationale for why Magistrate Judge O'Sullivan's decision is wrong. As a matter of law, whether Mr. Jaffe ultimately provided legal advice is completely beside the point, as the Florida statute covers a person "who consults a lawyer with the purpose of obtaining legal services" *as well as* one "who is rendered legal services by a lawyer." 2012 WL 5057844, at *5 (quoting Fla. Stat. § 90.502(1)(b)). Nevertheless, Plaintiffs are well aware of the privileged nature of Mr. Darden's communications with Mr. Jaffe in the November 9 email.

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[2] Notwithstanding Magistrate Judge O'Sullivan's repeated directive under the Protective Order that Plaintiffs cannot use the privileged November 9 email in this litigation, Plaintiffs in their brief purport to describe its contents "[u]pon recollection of undersigned counsel." Plfs' Appeal at 2. This is a violation of the Protective Order and Magistrate Judge O'Sullivan's order not to use the document. D.E. 65; D.E. 152.

Indeed, Plaintiffs questioned Mr. Darden about this very issue during his deposition. Darden Dep. Tr. at 154. Mr. Darden testified that Industrial Heat retained Mr. Jaffe for purposes of seeking advice about issues related to international fraud. *Id.* Mr. Darden also agreed to the statement by Plaintiffs' counsel that he asked Mr. Jaffe "to provide [you] with legal services." *Id.* at 155.

After *in camera* review, the Magistrate Judge found that the November 9 email reflected Mr. Darden's consultation of Mr. Jaffe regarding international fraud issues. This is a straightforward garden-variety privileged communication. The only reason Plaintiffs remain on the attack is that they invest (false) hope that the privileged document will somehow buttress their claims on the merits. Of course, rewarding Plaintiffs in this way would completely undermine the purpose of the attorney-client privilege, which is to encourage confidential communications without fear that an opponent can discover and take tactical advantage of them.

At bottom, Plaintiffs' argument amounts to an assertion that a federal Magistrate Judge is incapable of determining that a document *on its face* is covered by the attorney-client privilege, and that, after considering their arguments in three separate hearings, Magistrate Judge O'Sullivan's third order that the document is privileged is contrary to law. But Plaintiffs cite no authority for the proposition that privilege assertions require extraneous evidence to withstand clearly erroneous review (even though here the Magistrate Judge had such evidence via the testimony of Mr. Darden). Indeed, most privilege assertions are made—and protected—through a privilege log, which is allowed under Rule 26(b)(5)(A) of the Federal Rules of Civil Procedure. To suggest that it was clear error for the Magistrate Judge *not* to require more than *in camera* review in the event of inadvertent disclosure flies in the face of the Protective Order as well as common sense. Nothing in Plaintiffs' appeal sheds any doubt on the propriety of Magistrate

Judge O'Sullivan's rulings here—particularly in light of the multiple bites at the apple that Plaintiffs have taken on this issue. *Cf. Edelen v. Campbell Soup Co.*, 165 F.R.D. 676, 698 (N.D. Ga. 2010) (finding it "clear on the face of the documents that they are protected by the attorney-client privilege," as well as "clear that the return of the documents is required because they were inadvertently produced").

Moreover, to the extent that Plaintiffs take issue with Magistrate Judge O'Sullivan's findings under the inapplicable *Denture Cream* test, their accusations do not approach a "clearly erroneous" threshold. Plaintiffs argue that the communication was for business—not legal—purposes. Plfs' Appeal at 6. This statement presumably stems from counsel's recollection of the privileged document which, by Plaintiffs' account, was not destroyed until after the March 9 hearing, despite Magistrate Judge O'Sullivan's admonition at the February 23 hearing that "you receive a document that's privileged, then you should stop looking at it. I think that's what the rules indicate. . . And it was clearly protected, you should have put it in an envelope or destroyed it and not used it anymore," Tr. at 6-7, 11-12; and his written order that the document was "not to be used." D.E. 152. In any event, Magistrate Judge O'Sullivan considered Plaintiffs' argument at the hearing, reviewed the November 9 email (again), and disagreed with Plaintiffs' recollection.

Plaintiffs' arguments directly contravene Magistrate Judge O'Sullivan's *in camera* findings. At the April 20, 2017 hearing, Plaintiffs' counsel challenged the Magistrate Judge to justify his contrary reading of the document *in camera*, to which the Magistrate Judge replied: "I think that's privileged. . . The final paragraph asks for—asks for him to act as an attorney in developing—in addressing issues that are raised throughout the memo." Tr. at 89-90. That should be the end of the matter here.

II. Plaintiffs arguments pursuant to the crime-fraud exception are not ripe for consideration and are wholly without merit.

During the April 20 hearing, Plaintiffs argued that Defendants should be sanctioned and/or the November 9 email should be stripped of its privileged because of purported witness tampering/intimidation. *See* April 20 Hrg. Tr. at 55-56. Defendants provided evidence to the Court contradicting those allegations (*see* Uzi Shaya Decl., attached hereto as Exhibit B) and the Court denied Plaintiffs' motion. April 20 Hrg. Tr. at 88; D.E. 266. But Plaintiffs do not take issue with Magistrate Judge O'Sullivan's ruling with respect to the alleged witness tampering/intimidation for purposes of this appeal. Instead, Plaintiffs raise a different crime-fraud argument before this Court that was only raised before Magistrate Judge O'Sullivan in connection with their sanctions motion.

Plaintiffs argue that the November 9 email is subject to the crime-fraud exception because it purportedly demonstrates Mr. Darden committed perjury at his deposition. Plfs' Appeal at 8. As Defendants explained at the April 20 hearing on Plaintiffs' sanctions motion, Plaintiffs' accusation are complete unfounded. Apr. 20 Hrg. Tr. at 75. Furthermore, Plaintiffs' fail to demonstrate in any way that the November 9 email was made or performed in furtherance of a crime or fraud. Instead, Plaintiffs are trying to use the November 9 email to demonstrate that at some later time a crime (allegedly perjury) occurred.

Finally, Plaintiffs raised this argument before Magistrate Judge O'Sullivan in connection with their sanctions motion, which they have not appealed to this Court. Therefore, there is nothing for this Court to review on this argument under Fed. R. Civ. 72(a), which—by Plaintiffs' admission—governs their appeal.

CONCLUSION

For the foregoing reasons, this Court should affirm the Magistrate Judge's rulings that the November 9 email is privileged and covered by the Protective Order. Defendants further request that they be awarded their fees and costs in connection with litigating this issue.

Dated: May 18, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 18, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel or parties of record.

/s/ Christopher Lomax
Christopher Lomax