IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DRFP, LLC,	:	
Plaintiff,	:	
v.	:	Case No. 2:04-cv-793
The Republica Bolivariana de Venezuela, et al.,	:	JUDGE EDMUND A. SARGUS, JR. Magistrate Judge Kemp
Defendants.	:	

OPINION AND ORDER

On March 3, 2015, Albert J. Lucas, one of Venezuela's attorneys, signed a subpoena duces tecum commanding attorney Pierce E. Cunningham to produce a number of documents at Calfee, Halter & Griswold's Cincinnati office by March 16, 2105. The subpoena contained 28 definitional paragraphs and included nineteen separate categories of documents to be produced, but, because of the fact that several of the requests specified a large number of people with whom Mr. Cunningham may have communicated, the request easily encompassed over 100 different sets of documents. A second, virtually identical, subpoena was sent to one of Mr. Cunningham's clients, Venospa, LLC, an entity which had attempted to intervene in this case to assert a claim based on Bandagro notes which it owns. Apparently, there was no advance communication between any of Venezuela's lawyers and Mr. Cunningham about these subpoenas.

Ten days later, Mr. Cunningham filed a document entitled "Notice of Compliance with Subpoena and Motion of Trial Counsel, Pierce E. Cunningham and Venospa, LLC for Sanctions Pursuant to Fed.R.Civ.P. 45." (Doc. 496). The gist of that document is Mr. Cunningham's assertion (bolstered by a "Report" attached as

Exhibit B) that he had spent a good deal of time reviewing the responsive documents and that all were either work product or attorney client communications and could not be produced. He also asserted in his memorandum that the subpoenas were burdensome and vexatious and that it would take many more attorney hours to determine whether any production of documents were possible.

Venezuela's response is, unfortunately but predictably, another attempt on the part of its attorneys to paint every party they deal with in this case - from the Plaintiff and its principal to a host of non-party targets of discovery - as criminals, liars, and frauds. The Court has observed, but has refrained from commenting upon until now, this approach, which only serves to obscure the legal issues being presented to the Court for resolution and which reflects poorly on the authors of these diatribes. Just as an example, Venezuela's opposing memorandum and motion to compel (Doc. 520) describes, in the very first paragraph, Carlos Delgado Morean, Venospa's principal, as a "politically connected Venezuelan double-dealer," and it accuses both Mr. Delgado and Mr. Cunningham of being "not interested in complying with the subpoena" but instead "interested in stymying Venezuela's discovery efforts and preventing the Court from discovering the full history of the duplicitous Delgado and his involvement with Gruppo Triad's efforts to dupe the Ministry of Finance into finding in Gruppo Triad's claim for payment on bogus Bandagro notes." Id. at 5. Venezuela thinks poorly of Mr. Delgado and may have reason to do so; to attribute such motives to Mr. Cunningham without any foundation, however, could be viewed as more than just overblown rhetoric, and does nothing to advance the legal dialogue which necessarily has grown out of the service of and response to a Rule 45 discovery subpoena.

After peeling away the layers of name-calling contained in

Venezuela's briefs, two key issues have emerged. The first is whether the privilege log prepared by Mr. Cunningham is sufficiently detailed. A subissue relating to that question is how the "common interest" doctrine might apply here. The second issue is whether the crime-fraud exception - which the Court found potentially applicable here to certain actions taken by Gruppo Triad and its former principal, James Pavanelli, with respect to the notes at issue in this case - can also be used to compel, at a minimum, an *in camera* inspection of some or all of the documents which Mr. Cunningham has withheld. The Court addresses each of these separately.

I. The Privilege Logs

Fed.R.Civ.P. 45(e)(2) reads as follows:

> (2) ***Claiming Privilege or Protection***.
>
> (A) *Information Withheld*. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:
>
> (I) expressly make the claim; and
>
> (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

The privilege logs in this case, which are attached to Doc. 529, are fairly generic. Each identifies, by numbers corresponding to the document categories set forth in the subpoenas, which privilege is being asserted by two characterizations: either "Attorney Client" or "Common Interest." Where no documents exist, the word "None" appears on the log. No additional information about dates, senders, or recipients is provided.

Venezuela's reply memorandum asserts these logs do not comply with Rule 45's requirements. It also asserts, somewhat

conflictingly, that the logs do not delineate how the common interest doctrine applies here, and that Mr. Cunningham's and Venospa's claim of a common interest with others whom Venezuela has accused of fraud is evidence that the crime-fraud exception applies here. The Court agrees with the first contention; the privilege logs do not, with the possible exception of listing of persons or entities who were actually Mr. Cunningham's clients or Venospa's lawyers, provide sufficient information to permit the Court to assess the validity of the claim of privilege. See, e.g., Avis Rent A Car System, LLC v. City of Dayton, Ohio, 2013 WL 3781784 (S.D. Ohio July 18, 2013). In particular, they do not explain how the "common interest" doctrine, which allows the attorney-client privilege to be asserted for documents reflecting communications between two or more clients, or their separate attorneys, who both share a common interest in a legal matter and who have agreed to share information about it, applies here. Much more detail would be needed to assess that claim, but, perhaps because of the procedural posture of the matter - the log was not produced until Mr. Cunningham and Venospa filed what they deemed a reply, and the challenge to the log's sufficiency did not come until Venezuela had filed a reply in support of its motion to compel - they might not have believed they had another opportunity to address the issue. Consequently, the Court will direct a supplementation of the logs to occur within fourteen days.

II. The Crime-Fraud Exception

The Court has previously ruled that Venezuela made out a *prima facie* case of fraud with respect to Gruppo Triad and its efforts to redeem the notes which are the subject of this case. Venezuela asserts that even though the documents it seeks from Mr. Cunningham and Venospa did not come into existence until years later, they are part and parcel of the same scheme to

present "bogus" notes to the Venezuelan government for redemption, and that the crime-fraud exception therefore trumps any privilege that might otherwise exists with respect to these documents.

In its various filings on this issue, Venezuela does not appear to assert that Mr. Delgado was part of any effort to forge Bandagro notes, something which Venezuela accuses Gruppo Triad of. Rather, its theory appears to be that when Mr. Delgado assisted in the effort to validate the notes which Skye now holds (which are a different series of notes from the ones which Mr. Delgado and, later, Venospa acquired) he was induced by the promise of a reward to slant his efforts toward validation. According to Venezuela, his conclusions from his inspection of Gruppo Triad's notes that they were genuine led to the initially favorable report by Venezuelan authorities about those notes, but Mr. Delgado's conflict of interest - his working for Gruppo Triad at the same time - improperly influenced that decision. Venezuela claims that in exchange for his work, Gruppo Triad gave Mr. Delgado $100 million worth of notes from another series (not the same series involved in his investigation or the same series owned by Skye), and it is those notes he attempted to sue on when he moved to intervene in this case. Venezuela claims that this conduct was all part of a single fraudulent scheme and that Mr. Cunningham's otherwise privileged communications with his clients (including Mr. Delgado and Venospa) about the litigation effort are sufficiently related to Gruppo Triad's original alleged fraud - the forging of the notes, or the acquisition and attempted redemption of notes which Gruppo Triad knew to have been forged - that the privilege has been overcome.

Boiled down to its essence, Venezuela is asserting that once someone completes a course of fraudulent or criminal conduct that results in, as here, the creation of some document which purports

to give the holder of the document the right to sue upon it, every communication the holder has with an attorney about that right, including communications leading up to the filing (or attempted filing) of a legal action is an unprivileged communication. That simply is not the law.

As the Court of Appeals for the Ninth Circuit stated in In re Napster Copyright Litigation, 479 F.3d 1078 (9th Cir. 2006), abrogated on other grounds by Mohawk Industries, Inc., v. Carpenter, 558 U.S. 100 (2009),

> A party seeking to vitiate the attorney-client privilege under the crime-fraud exception must satisfy a two-part test. First, the party must show that "the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme." In re Grand Jury Proceedings, 87 F.3d [377 (9th Cir. 1996)] at 381 (internal quotation marks omitted). Second, it must demonstrate that the attorney-client communications for which production is sought are "sufficiently related to" and were made "in furtherance of [the] intended, or present, continuing illegality." Id. at 382–83 (internal quotation marks omitted) (emphasis added); see also In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir.1995).
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> The attorney need not have been aware that the client harbored an improper purpose. Because both the legal advice and the privilege are for the benefit of the client, it is the client's knowledge and intent that are relevant. In re Grand Jury Proceedings, 87 F.3d at 381–82; see also [United States v.] Chen, 99 F.3d [1495 (9th Cir. 1996)] at 1504. The planned crime or fraud need not have succeeded for the exception to apply. The client's abuse of the attorney-client relationship, not his or her successful criminal or fraudulent act, vitiates the privilege. In re Grand Jury Proceedings, 87 F.3d at 382.

Given the timing and apparent scope of Mr. Cunningham's representation of Mr. Delgado and Venospa, which did not begin until 2009, Venezuela cannot be asserting that these

communications assisted Mr. Delgado or any of his alleged partners in fraud, including Gruppo Triad, in activities such as forging the notes or attempting to persuade entities within the Venezuelan government that the notes were genuine. In fact, by the time Mr. Cunningham had been retained, whatever influence Mr. Delgado may have had on the governmental approval process had ended, and it was absolutely clear that the Venezuelan government took the position that no Bandagro notes, and particularly ones which had ever been possessed by Gruppo Triad, were authentic or valid. The crime or fraud which Venezuela alleges had long been completed by that time and had proven, to that point, unsuccessful, and there is no evidence that communications between Mr. Delgado, Venospa, and Mr. Cunningham played any part in the creation, execution, or unsuccessful completion of the alleged scheme.

Following the language in Napster, quoted above, and similar language in other cases such as Martensen v. Koch, 201 F.R.D. 562, 574 (D. Colo. 2014)("the evidence must demonstrate that the client was engaged in or was planning the criminal conduct when it sought the assistance of counsel and that the assistance was obtained in furtherance of the conduct or was closely related to it"), there is no evidence that Mr. Delgado was engaged in planning a crime or fraud when he sought Mr. Cunningham's counsel. There is similarly no evidence that his communications with Mr. Cunningham were "related" to the alleged fraud in the sense that they assisted him in executing or carrying out the scheme. That had all happened long before. And, as the court in United States v. Sabbeth, 34 F.Supp.2d 144, 151 (E.D.N.Y. 1999) observed, "even for ongoing schemes, only communications geared to further criminal conduct implicate the exception." To the extent that Venezuela is arguing that simply filing suit on the notes, even if they were fraudulently created, is itself either

fraud or criminal conduct, the Court rejects that expansive notion.

The Court is mindful, when considering this issue, of the basic premise upon which the crime-fraud exception rests. "It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy,' ... between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." United States v. Zolin, 491 U.S. 554, 563 (1989)(internal citations omitted). It is one thing to conclude, as this Court has done, that communications with attorneys about the creation or attempted sale of allegedly fraudulent notes, or made in furtherance of such activities, may be sufficiently related to the commission or perpetration on an ongoing fraud so as to justify an *in camera* inspection of the communications. It is quite another to conclude that any communication with any attorney, no matter how long after all of the activities constituting the alleged fraud have ceased, is unprivileged if it relates in any way to an effort to enforce the rights purportedly created by the fraud. If that were the case, Skye has had no privileged communications with its current trial counsel because all of its communications with its trial attorneys "relate" to Skye's effort to collect on allegedly fraudulent notes, just in the same way that Mr. Delgado's or Venospa's communications with Mr. Cunningham appear to have done. No court appears to have gone that far, and this Court will not be the first to do so.

III. Order

Based on the foregoing, Mr. Cunningham and Venospa shall, within fourteen days, supplement their privilege logs with respect to the claim of common interest, providing additional information to "enable the parties to assess the claim" as required by Rule 45. Any disagreements about the adequacy of the

logs, as supplemented, or the legal sufficiency of the claim of common interest, shall be brought to the Court's attention by way of a request for an informal discovery conference. Any non-privileged responsive documents shall also be produced within fourteen days to the extent that has not yet occurred. The Court denies the motions relating to this issue, including Doc. 496, in all other respects, but reserves the right to shift costs of compliance with the subpoenas to Venezuela should that appear appropriate under Rule 45.

IV. Motion to Reconsider

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 14-01, pt. IV(C)(3)(a). The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect even if a motion for reconsideration has been filed unless it is stayed by either the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.3.

/s/ Terence P. Kemp
United States Magistrate Judge