

PREPARED BY THE COURT

**IN RE: PELVIC MESH/BARD
LITIGATION**

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* **SUPERIOR COURT OF NEW JERSEY**
* **LAW DIVISION: BERGEN COUNTY**
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* **CASE No. 292**
* **MASTER DOCKET NO. BER-L-17717-14**
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* **Civil Action**
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**DECISION AND ORDER
REGARDING PRIVILEGE LOG**

I. INTRODUCTION

Before this court is an application submitted by Adam Slater, Esq., on behalf of plaintiffs, seeking to have this court reconsider the adequacy of defendant C.R. Bard's privilege log.

The relevant procedural history surrounding plaintiffs' current application is as follows. A federal multi-district litigation (MDL), *In Re: Avaulta Pelvic Support Systems Product Liability Litigation*, MDL No. 2187, was formed by the Judicial Panel of Multidistrict Litigation (JPML) on or about October 21, 2010. A pelvic mesh multi-county litigation (MCL), was formed in New Jersey in October of 2010 and assigned to the Honorable Carol E. Higbee of the Superior Court of Atlantic County. On October 31, 2014, the MCL was reassigned to Bergen County before the Honorable Brian Martinotti U.S.D.C.¹, as *In re:*

¹ At the time of the reassignment, the Hon. Brian R. Martinotti U.S.D.C., was a judge presiding over the MCL docket in Bergen County Superior Court. He presently sits as a judge in the United States District Court for the District of New Jersey.

Pelvic Mesh/Bard Litigation under master docket no.: BER-L-17717-14. In September of 2016, the MCL was reassigned to the Honorable James J. DeLuca and then again in August of 2018 to the Honorable Mary F. Thurber. Finally, in November of 2018, the MCL was transferred to this court.

By virtue of Case Management Order No. 9, Mr. Slater was named plaintiffs' co-liaison counsel on September 16, 2015. In or around April of 2017, Mr. Slater first raised the current privilege log issue before Judge DeLuca.² In response, twenty random documents were selected from the privilege log for in-camera review by the court. Judge DeLuca ruled that seven of the random documents were at least in part, not privileged and ordered to be produced. Thereafter, pursuant to Case Management Order No. 36 and Judge Thurber's directives at the August 24, 2018 Case Management Conference, Bard undertook a review of the privilege log to identify whether any of the remaining documents were the same or similar to any of the seven documents Judge DeLuca ordered to be produced. Defendants represented that through the use of "relativity analytics" duplicates for five of the seven documents were discovered and produced.³ After the MCL transfer to this court, the issue was again raised during the January 10, 2019, Case Management Conference. Pursuant to Case Management Order No. 38, this court ordered plaintiffs to challenge twenty additional documents and for defendants to then produce said documents to the court for an in-camera review. Of these twenty, Bard found that they had previously produced two of the documents in their entirety and then after this further review, produced an additional two documents. Therefore, sixteen challenged documents remain at issue.

This ruling will address two issues. First, this court will rule on defendant's claim of privilege for the sixteen remaining challenges. Second, this court will address the overarching adequacy of the privilege log and thus give the issue the finality it now requires.

² Letter from Melissa Geist to the Hon. Mary F. Thurber, dated August 7, 2018.

³ Letter from Melissa Geist to the Hon. Mary F. Thurber, dated October 17, 2018.

II. IN-CAMERA REVIEW OF SIXTEEN REMAINING CHALLENGED DOCUMENTS

Of the twenty privilege log entries challenged by plaintiffs, sixteen remain at issue. For each of the challenged documents, Bard claims that attorney-client privilege bars its production. In New Jersey, the attorney-client privilege applies to communications if they are “expressed by an individual acting in [the] capacity as a client while seeking or receiving legal advice or services from an attorney while acting in his or her capacity as such.” *Horon Holding Corp. v. McKenzie*, 341 N.J. Super. 117, 125 (App Div. 2001).

A. Standards

The mere fact that an attorney is involved in a communication does not automatically make that communication privileged. *See Margulis v. Hertz Corp.*, 2017 U.S. Dist. LEXIS 28311, at *14-15 (D.N.J. 2017):

“[E]mails in which in-house or outside attorneys are merely sent copies of the text of the email, or in which they are merely one of many addresses, should not be privileged, unless the email is directed to the attorney or sent by the attorney [t]o rule otherwise would allow parties to evade the privilege limitations by sending copies of every company-generated email to the company's attorney so as to protect the communication from discovery, regardless of whether legal services were sought or who the other recipients of the email were.” (quoting *In re Avantel, S.A.*, 343 F.3d 311, 321 n.11 (5th Cir. 2003)).

Furthermore, even when an attorney is actively involved in the communications at issue, said attorney must be providing certain types of services in order for the privilege to apply. “While a...corporation...can be a client for purposes of the privilege, a fine line exists between an attorney who provides legal services or advice...and one who performs essentially non-legal duties. An attorney who is not performing legal services or providing legal advice in some form does not qualify as a lawyer for purposes of the privilege.” *Payton v. N.J. Tpk. Auth.*, 148 N.J. 524, 550-551; *See also In re: Human Tissue Prods. Liab. Litig.*, 255 F.R.D. 151, 164 (D.N.J. 2015) (“[C]ommunications made to an attorney by a

client seeking business advice are not privileged...merely copying a lawyer on an e-mail does not, by itself, make the e-mail privileged.”); *Compare with Leonen v. Johns-Manville*, 135 F.R.D. 94, 98 (D.N.J. 1990) (“[I]n the corporate community, legal advice 'is often intimately intertwined with and difficult to distinguish from business advice.'”)⁴ (quoting *Sedco Int'l SA v. Cory*, 683 F.2d 1201, 1205 (8th Cir. 1982)).

This court must also address the scenario in which no Bard attorney(s) appear in the particular email thread, but rather the emails are comprised of non-attorney Bard employees purportedly sharing requests and/or information from Bard attorneys. New Jersey does in fact recognize an exception to the principle that only communications between a client and an attorney can be privileged. The exception provides that the privilege will, “[Also] extend to 'the necessary intermediaries and agents through whom the communications are made.’” *Tractenberg v. Township of West Orange*, 416 N.J. Super. 354, 376 (citing *State v. Kociolek*, 23 N.J. 400, 414 (1957)); See also *Id.*:

“Because it is often necessary for clients to communicate with their attorneys with the assistance or through the agency of others...the privilege extends to a communication prepared by an agent or employee, whether it is transmitted directly to the attorney by the client or his agent or employee...[w]here a document is prepared by an agent or employee by direction of the employer for the purpose of obtaining the advice of the attorney or for use in prospective or pending litigation, such document is in effect a communication between attorney and client. The client is entitled to the same privilege with respect to such a communication as one prepared by himself.” (quoting *Schmitt v. Emery*, 211 Minn. 547, 552).

Schmitt is contemplating a situation in which an employee, agent, intermediary, etc. of a client is tasked with communicating with the client’s attorney; i.e., if the client has an assistant who has been given the responsibility of passing along information *to* an attorney on their principal’s behalf. There are emails

⁴ “[M]erely attaching something to a privileged document does not, by itself, make the attachment privileged.” *Leonen* 135 F.R.D. at 98

in this privilege log in which non-attorney Bard employees are passing along requests, messages, and/or information *from* Bard attorneys.

B. Analyses of Challenged Documents

This court will now address the defendant's assertion of privilege as to the sixteen challenged documents at issue (for reference the court is identifying the challenges by their challenge no. as listed in the chart provided to the court, and served on plaintiffs' counsel, by defense counsel in their February 14, 2019 letter).⁵

Challenge #1: N/A. Defendants assert this document has previously been produced in its entirety.

Challenge #2: N/A. Defendants assert this document has previously been produced in its entirety

Challenge #3: Privilege upheld. This is a four email thread in which Bard's outside counsel provides legal analysis.

Challenge #4: Privilege denied. This is a three email thread which originates with Jonathan Conta (Senior Project Manager at Bard), writing to David Ciavarella (Vice President at Bard), on March 25, 2008 at 4:17 PM. The purpose of the original email is to attach a revised "suture line management memo" to be used at an upcoming meeting. There is nothing in this email itself, nor the attachment which would make either document subject to attorney client privilege. No attorney authored, received, or is copied on the email. No attorney authored, or is mentioned in

⁵ In her letter to the court of February 14, 2019, Melissa Geist provided a chart which describes the privilege log entries for each of the twenty challenged documents. As described within, all of the challenged documents provided to the court for in-camera review consist of email threads. Under the "author" and "recipient" sections of the February 14th chart, only the applicable information for the topmost email is provided. However, Ms. Geist represented to the court in her August 7, 2018 letter to Judge Thurber that there is in fact an individual entry in the privilege log for every piece of every email thread. The court finds that there is no reason for this ruling to address only the topmost portions of the email thread. The entire thread is in the privilege log somewhere, therefore a full examination of what has actually been provided to the court presents no prejudice to defendants. Therefore, this ruling addresses privilege or lack thereof of all of the emails in the threads provided to the court.

the attachment. The second email in the thread is authored by Paul Kowalczyk (Regulatory Affairs at Bard), and sent to Mr. Ciavarella, Gina Dunsmuir (Assistant General Counsel at Bard), Brian Leddin (Associate General Counsel at Bard), Al Jacks (Vice President at Bard), James Howard (Vice President at Bard), and John Knorpp (Manager at Bard) on March 31, 2008 at 11:16 AM. The email is a summary of a conversation between Mr. Jacks, Mr. Kowalczyk, and Mr. Howard. Although two Bard attorneys are copied on the email, their mere presence does not automatically invoke the privilege. Rather, “the express purpose of the communication must be to relay information for the purpose of seeking legal advice . . .” *Legends Mgmt. Co. v. Affiliated Ins. Co.*, 2017 U.S. Dist. LEXIS 154773, at *10-11 (D.N.J. 2017). Based on this court’s in-camera review, counsel were cc’d on the emails; the express purpose of the communication was not to seek their legal advice. As it states in the first line of the email, the purpose of the communication is to “ensure that all Corporate Copy Reviewers are on the same page”. For this reason, despite the presence of counsel on the cc line, the email is not privileged. The final email in the thread is an email from Mr. Jacks to George Cavagnaro (Vice President at Bard), Mr. Knorpp, Neal Scott (unknown), Jonathan Conta (Senior Project Manager at Bard), and Adam Silver (Director of Marketing at Bard), sent on March 31, 2008, at 3:24 PM. The email is simply a mechanism for distributing the attachment, a position paper titled “Management of the Vaginal Mucosa with Biologic and Synthetic Vaginal Grafts” by Dr. Jim W. Ross. There is nothing before this court to indicate that anything in the position paper or underlying email are subject to attorney client privilege. These documents should be provided to plaintiffs’ counsel within 5 days.

Challenge #5: Privilege upheld. This is a five email thread in which Bard's outside counsel provides legal analysis.

Challenge #6: Privilege upheld. This is a five email thread in which a Bard employee solicits legal advice from in-house counsel.

Challenge #7: Privilege upheld. This is a two email thread in which Bard's in-house counsel requests information from a Bard employee in order to complete a legal analysis.

Challenge #8: Privilege upheld. This is an eleven email thread which originates with an email from Mr. Leddin on November 14, 2007, at 3:07 PM, in which legal advice is requested and received by and from other Bard employees.

Challenge #9: N/A. This document is being produced to plaintiffs' counsel.

Challenge #10: Moot. This is a smaller piece of the email thread described in Challenge #8. This court's ruling on #8 subsumes this challenge.

Challenge #11: Privilege upheld. This is a three email thread beginning with an email from Claire Gloeckner (Bard Research and Development), to Brian Burn (Bard's General Counsel) on December 5, 2007 at 5:09 PM, regarding a request for legal advice.

Challenge #12: Privilege upheld. This is a seven email thread beginning on February 16, 2007 and ending on February 19, 2007 at 9:03 PM. The emails reflect a request for legal advice.

Challenge #13: Privilege upheld. This is a four email thread and contains a request and subsequent supply of legal advice.

Challenge #14: Privilege upheld. This is a two email thread beginning with an email sent on July 15, 2011, at 12:53 PM from Melissa Johnson, Marketing Manager at Bard, to a group of non-attorney Bard employees and John O'Farrell, Assistant General Counsel at Bard. The purpose of this email was to seek legal advice.

Challenge #15: Privilege upheld. This (combined with the emails comprising Challenge #16) is a five email thread beginning with an email sent on May 1, 2010 at 4:24 PM, from Ms. Johnson to several Bard employees. Ms. Johnson is requesting information from the employees as part of an attorney request.

Challenge #16: Privilege upheld. Continuation of thread discussed in Challenge #15.

Challenge #17: Privilege upheld. This is a ten email thread, the purpose of which is to seek legal advice from Mr. Burn on November 1, 2006 at 3:29 PM.

Challenge #18: Privilege upheld. This is a six email thread in which legal advice is requested.

Challenge #19: Privilege upheld. This is a four email thread which begins with an email from Richard Francis, Engineering at Bard, to Edward Groom, Materials Manager, and cc'd to Ms. Johnson and Mr. O'Farrell on September 17, 2012 at 5:10 PM, seeking legal advice.

Challenge #20: N/A. This document is being provided to plaintiffs' counsel.

III. ADEQUACY OF PRIVILEGE LOG

Plaintiffs have asserted that the entirety of the privilege log is wholly inadequate. Plaintiffs assert that the privilege log, “contains inaccuracies, the descriptions are inaccurate, and there are documents that have been withheld despite there being no legitimate basis to claim privilege.”⁶

Defendants have represented to this court that the majority of the privilege log, initially created for the MDL, has been in the plaintiffs’ possession since 2013.⁷ Furthermore, defendants state that after the privilege log was served, “there were four rounds of privilege challenges, including two that were resolved in the MDL over multiple meet and confers between Bard’s counsel and the MDL’s Plaintiffs’ Steering Committee (PSC).”⁸

In Case Management Order No. 2, ¶ 23, dated June 29, 2011, Judge Higbee wrote:

“[t]o streamline the litigation, it is the parties’ intentions that all discovery taken in [the MDL]...may be used in the New Jersey Litigation, subject to, and without waiver of, all objections and legal arguments and evidentiary rule requirements, provided that adequate protections for commercially-sensitive trade secret information are in place, for example, as agreed in advance by the party claiming protection and the party seeking disclosure of the information for use in this litigation, or by adequate protective order. To facilitate this coordination, Defendants will provide Plaintiffs’ Liaison Counsel⁹ with copies of all such discovery, and service on Motley Rice in the MDL shall constitute service on Plaintiffs in this Litigation provided so indicated in writing.”

⁶ Letter from Adam Slater, Esq. to Hon. Rachelle L. Harz, dated February 22, 2019.

⁷ Letter from Melissa Geist to Hon. Mary F. Thurber, dated August 7, 2018.

⁸ Letter from Melissa Geist to Hon. Mary F. Thurber, dated August 7, 2018.

⁹ At this point in time, Motley Rice LLC served as liaison counsel.

This court finds that Judge Higbee's direction in CMO No. 2 created a requirement of discovery coordination between the MDL and MCL.^{10 11} Likewise, in several subsequent Case Management Orders, issued over a span of several years, after the MCL was transferred to Bergen County, Judge Martinotti included MDL status reports, "[t]he court has been and will continue to coordinate efforts with Judge Goodwin who is presiding over the MDL."¹²

This court has examined the privilege log and notes that the log does include dates, authors, recipients, cc's, bcc's, descriptions, and the basis for the privilege assertion. Defendants have represented that each and every portion of each email thread is accounted for in the privilege log.¹³ Furthermore, as previously mentioned, this court analyzed the entirety of each thread provided for in-camera review, not just the specific "to" and "from" portion challenged by the plaintiffs.

Plaintiffs' counsel maintains that challenges to the privilege log by the MDL leadership were never fully pursued because lead counsel entered into settlement negotiations with Bard and that at no time was there a court determination in the MDL as to the adequacy of the privilege log. This court cannot be aware of, nor can it opine on the considerations and strategies of plaintiffs' counsel in the MDL. Mr. Slater maintains that Motley Rice did not meaningfully challenge the privilege log in the MDL and therefore the privilege log was never truly challenged in this court's MCL. While this may be true, counsel cannot be

¹⁰ See Christopher M. Placitella, *2015 New Jersey Mass Torts & Class Action Treatise* Chapter 2, § III(D) (2015) ([S]tate and federal court judges must seek to cooperate with one another where there are related cases pending in federal MDLs and state courts. As mass torts in New Jersey often have related matters pending in federal courts...one of the most important functions for a mass tort judge in state court is coordinating with federal courts...This mutual relationship can be accomplished through formal procedures...informal status updates from liaison counsel, or from federal judges themselves. Doing so helps ensure consistent results across the inventory of cases, avoids duplicative litigation, and allows for more efficient handling of matters in all court systems.

¹¹ See 1 New Jersey Judiciary, *New Jersey Mass Tort (Non-Asbestos) Resource Book* at 9 (2005) (advising that, at the outset of the litigation, the mass tort judge should craft a litigation plan, taking into consideration the nature of the litigation, the number of similar cases outside the court's jurisdiction, and whether an multidistrict case is pending in the federal courts.

¹² *E.g.* Case Management Order No. 8, § III(2), dated July 23, 2015.

¹³ Letter from Melissa Geist to Judge Mary F. Thurber, dated August 7, 2018.

permitted to challenge a privilege log indefinitely. The logical extension of this is unsustainable. Once a PSC makes a decision, which was done here in the MDL with equal application to this MCL, an individual attorney at some point in the future may not be able to seek to reconsider the decisions of the PSC. Now, in 2019, with over 14,000 entries in the privilege log, the time to challenge this privilege log has passed.

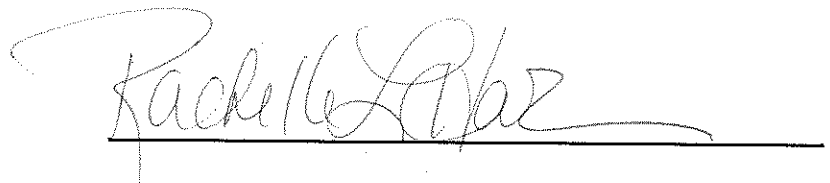
Furthermore, although only sixteen challenges were entertained by this court, the number of documents actually reviewed is much greater. The sixteen challenges contain a total of 71 emails, all of which this court reviewed. Of those sixteen, only one (Challenge #4, which contains three total emails) was found to be improperly withheld. Challenges #9 and #20 were provided after defendants' review of the twenty challenges. Those contain two emails each. Therefore, a total of 7 emails out of 75 were improperly withheld. On a percentage basis, this comes to 7/75 documents reviewed, approximately nine percent, being improperly withheld.

IV. CONCLUSION

In light of the overall purpose of MDL and MCL coordination fully discussed above, the history of the privilege log in this MCL, together with the finding of only nine percent of the documents to be improperly withheld, this court holds that no further action is required of defendant Bard in connection with its privilege log.

As set forth above, defendants shall provide to plaintiffs, within five days, the contents of challenge #4.

Dated: 5/30/2019



Rachelle L. Harz J.S.C.