

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ZHAOYIN WANG
Plaintiff,

v.

BETA PHARMA, INC., DON ZHANG,
AND ZHEJIANG BETA PHARMA
CO., LTD.,
Defendants.

Civil Action No. 3:14-cv-01790-VLB

APRIL 7, 2015

**PLAINTIFF'S SUBSTANTIVE MEMORANDUM IN OPPOSITION TO DEFENDANTS'
EMERGENCY MOTION FOR ENTRY OF PROTECTIVE ORDER
TO DISQUALIFY COUNSEL**

Plaintiff hereby files his substantive opposition to defendant's Emergency Motion for Entry of Protective Order to Disqualify Counsel. Plaintiff has previously opposed defendants' claim for expedited "emergency" relief on this motion. See Docket Entry 50.

Defendants have moved for the entry of a protective order to authorize them to make a limited and temporary waiver of otherwise attorney-client privileged documents authored by one Attorney Lance Liu during his work for Beta Pharma between July, 2011 and "November or December, 2012." They move for permission to reveal these documents to the Court and counsel only for use during the litigation of the Motion to Disqualify, so that, after that motion is determined, the documents will regain their former privileged character, and not

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be available to adverse counsel or the Court for any other use in this litigation.

They describe their proposed order as follows:

Defendants intend to submit for the Court's consideration, as exhibits supporting that Motion [to Disqualify], certain documents that contain their confidential and privileged information. The Proposed Order will avoid any waiver of their privileges with respect to such information, and prevent Defendants' privileged information from being used against them in the litigation of this case's merits.

"Emergency Motion for Entry of Protective Order," Docket Entry 49, Page 2.

Defendants' Motion for Protective Order should be denied. The order they seek is contrary to the expressed meaning of the Federal Rules of Evidence and clearly established case law in this Circuit governing assertion and waiver of the attorney-client privilege. Although these legal infirmities exist in a protective order entered in another case pending in this District between defendants and different plaintiffs, the Court in that case was not called upon to address these infirmities. Thus, the entry of defendants requested order in that case does not provide persuasive authority here. See discussion, infra. The order proposed by defendants, if entered, prejudices plaintiff and creates significant logistical problems for the Court. For these reasons, it should be denied.

1. The Proposed Protective Order violates Federal Rule of Evidence 502 and this Circuit's Established Law Governing Assertion and Deliberate Waiver of Attorney Client Privilege.

Defendants' proposed protective order is contrary to Fed.R.Evid. 502(a) and (d). In particular, defendants seek to waive their privilege as to purportedly attorney-client and work product protected documents for purposes of pressing their motion to disqualify plaintiffs' attorney, while at the same time preventing the use of those documents for any other purpose in this litigation – no matter

the relevance of those waived documents to the central issues presented by plaintiffs' complaint. This is precisely the kind of strategic use of selective disclosure that Rule 502(a) was intended to prevent.

Rule 502(a) provides:

(a) Disclosure Made in a Federal Proceeding or to a Federal Officer or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

As the 2007 Advisory Committee Notes to Rule 502(a) make clear, a party may not “intentionally put[] protected information into the litigation in a selective, misleading and unfair manner.” Thus, Rule 502(a) prevents a party’s selective disclosure of privileged information, and imposes a “subject matter waiver” on the communications when “fairness requires a further disclosure of related, protected information in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.” *Id.*¹ Indeed, in explaining the language “ought in fairness” used in subsection (a)(3), the Advisory Committee clarified that: “[t]he language concerning subject matter waiver – ‘ought in fairness’ – is taken from Rule 106, because the animating principle is the same.

¹ “Both attorney-client privilege and work product protection may be waived on a subject-matter basis.” Freedman v. Weatherford International Ltd., No. 12Civ.2121, 2014 WL 3767034 (S.D.N.Y. July 25, 2014).

Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.” Id.

Accordingly, “[s]ubject matter waiver is reserved for the rare case where a party either places privileged information affirmatively at issue, or attempts to use privileged information as both a sword and a shield in litigation.” See Freedman, 2014 WL 3767034 at *3 (citing Favors v. Cuomo, 285 F.R.D. 187, 198-99 (E.D.N.Y. 2012); Shinnecock Indian Nation v. Kempthorne, 652 F.Supp.2d 345, 365-66 (E.D.N.Y. 2009)). See also Nolan v. City of Yonkers, No. 92 CIV 6067, 1996 WL 120685 (S.D.N.Y. March 19, 1996) (“The Second Circuit has stated that because the subject matter waiver rests on these fairness considerations, it ‘has been invoked most often where the privilege-holder has attempted to use the privilege as both “a sword” and “a shield” or where the attacking party has been prejudiced at trial.’”) (quoting In re Von Bulow, 828 F.2d 94, 103 (2d Cir. 1987)).

Here, the record is quite clear that defendants are attempting to use their purportedly privileged communications as both sword and shield in this litigation. Specifically, defendants are prepared to voluntarily disclose claimed attorney-client privileged and/or work product protected information in an effort to disqualify plaintiffs’ counsel – an effort which is severely prejudicial to plaintiffs because it deprives them of their chosen counsel, including that counsel’s extensive knowledge and experience in the case, and it exposes plaintiffs’ to substantial litigation expense should defendants’ motion to disqualify succeed. In short, defendants are more than willing to disclose

protected information as a sword to disadvantage plaintiffs in this litigation. However, defendants also seek to shield that same information from use during any other facet of this same litigation, claiming that such information should then remain privileged. Defendants make this claim notwithstanding that the privileged materials at issue are highly relevant to the central issues in this case—whether defendants breached the 2010 Partnership Offering Agreement and their commitments to Beta Pharma Canada, and the damages plaintiff suffered thereby. Defendants have already asserted that the allegedly privileged documents pertain to “. . . . tax issues associated with BPC [Beta Pharma Canada] and the 2010 Agreement,” and to defendants’ investigation of the possible dissolution and redrafting of that Agreement. See Docket Entry 49 at pp. 3–4. Thus, the documents may constitute defendants’ admissions that they breached their contract with plaintiff. Defendants’ position that they should be permitted a selective and temporary waiver of the attorney-client privilege with respect to these documents is highly prejudicial to plaintiffs in this litigation.

Such “strategic and manipulative use of the attorney-client privilege and work product doctrine has been explicitly rejected by the Second Circuit.” Gruss v. Zwirn, No. 09 CIV. 6441, 2013 WL 3481350 *11 (S.D.N.Y. July 10, 2013) (citing In Re Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993)).² As the Steinhardt court observed, “selective assertion of privilege should not be merely another

² The Gruss court also recognized that there are “numerous” reasons “to reject selective, manipulative and strategic use of evidentiary privileges,” including the fact that “because all evidentiary privileges impede the truth-finding process, they must be narrowly construed.” Id. at *11.

brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage." Id. Plaintiffs respectfully submit that this Court should reject defendants' attempt to use the attorney-client privilege in such a selective and strategic manner. See U.S. v. Weissman, No. S1 94 cr 760 (CSH), 1996 WL 751384 *2 (S.D.N.Y. Dec. 26, 1996) (recognizing that selective disclosure for tactical purposes waives the privilege, and that "[d]isclosure is inconsistent with confidentiality, and courts need not permit hide-and-seek manipulation of confidences in order to foster candor.").

Essentially, defendants' proposed protective order seeks to allow plaintiffs' counsel to review defendants' purported attorney-client privileged documents for purposes of defendants' motion to disqualify him, but then requires him to ignore those documents and their contents for the balance of the litigation, no matter their relevance. This tactic misconstrues Rule 502, and is extremely prejudicial to plaintiff. See, e.g. Robbins & Myers, Inc. v. J.M. Huber Corporation, 274 F.R.D. 63, 94 (W.D.N.Y. 2011) (stating that "[s]uch implied, or subject matter waivers of the attorney-client privilege are properly found by courts where voluntary disclosure of confidential client-attorney communications 'involve[] material issues raised by a client's assertions during the course of a judicial proceeding.'") (quoting Von Bulow, 828 F.2d at 102). See also U.S. v. Locascio, 357 F.Supp.2d 536, 550 (E.D.N.Y. 2004) (noting that, where a party puts at issue matters covered by the attorney client privilege, that privilege "will be waived in order to prevent the privilege from being used for the purpose of prejudicing an opponent's case by providing only selective disclosure").

Indeed, the “. . . general rule is that a one-time voluntary disclosure of privileged documents to an adverse party is sufficient to destroy both the attorney-client privilege and work product protection.” Gruss v. Zwirn, 2013 WL 3481350 *12 (citing Steinhardt, 9 F.3d at 235 (“Once a party allows an adversary to share the otherwise privileged thought processes of counsel, the need for the privilege disappears”; “The waiver doctrine provides that voluntary disclosure of work product to an adversary waives the privilege as to other parties.”); U.S. v. Mass. Inst. of Tech., 129 F.3d 681, 687 (1st Cir. 1997) (“[D]isclosure to an adversary, real or potential, forfeits work product protection.”); Jacob v. Duane Reade, Inc., No. 11 Civ. 0160(JMO)(THK), 2012 WL 651536 at *3 (S.D.N.Y. Feb. 28, 2012) (“The attorney-client privilege is waived if the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the communication to a third party or stranger to the attorney-client relationship.”); Abu Dhabi Commercial Bank v. Morgan Stanley & Co., Inc., No. 08 Civ. 7508(SAS), 2011 WL 4716334, at *4 (S.D.N.Y. Oct.3, 2011) (“[I]t is well-established that voluntary disclosure of confidential material to a third party typically waives any applicable attorney-client privilege....”); Complex Sys., Inc. v. ABN AMRO Bank N.V., 279 F.R.D. 140, 147 (S.D.N.Y.2011) (“Work product protection is waived by the disclosure of documents to third parties ... if the disclosure ‘substantially increases the opportunity for potential adversaries to obtain the information.’”)).

Defendants’ reliance on Fed.R.Evid. 502(d) does not change the analysis.

Rule 502(d) provides:

“(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the

litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding.”

As they state in their motion for protective order, defendants rely on Rule 502(d) so “that any disclosure of information or materials that are protected by the attorney-client privilege or the work product doctrine in connection with the Motion to Disqualify shall not, for any purposes, be deemed a waiver of the attorney-client privilege or the work product doctrine in this or any other proceedings. . . This eliminates the danger that disclosure of the documents at issue will waive Defendants’ privileges with respect to them. Thus, it avoids placing Defendants in the position of either litigating the Motion to Disqualify and waiving privileges, or permitting Katz’ conflicted representation to continue.” (Document No. 49 at 9).

Defendants’ own motion makes manifest their intention to use their privilege as both a sword (defendants’ forthcoming motion to disqualify) and a shield in this litigation.³ As discussed supra, this is barred by Rule 502(a)’s

³ The record will demonstrate that defendants’ forthcoming motion to disqualify plaintiffs’ counsel lacks merit. Rather, defendants’ motion -- made after defendants filed a motion to transfer, a motion to dismiss, a joint Rule 26 planning report and after exchange of initial disclosures, and after plaintiff noticed the deposition of defendants’ Connecticut CPA -- constitutes a litigation tactic intended to disadvantage plaintiffs. Indeed, “[i]n general, the Second Circuit ‘disfavors motions to disqualify because of the potentially adverse effect on a client’s right to engage counsel of his or her choosing, and because such motions are often made for tactical reasons.’” Ardemasov v. Citibank, No. 3:12cv1570, 2014 WL 1614165 (D.Conn. April 23, 2014) (Haight, J.) (quoting Rodriguez v. City of New Haven, 214 F.R.D. 66, 68 (D.Conn. 2003)). See also Board of Education of City of New York v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) (acknowledging that the Second Circuit’s reluctance to disqualify attorneys “probably derives from the fact that disqualification has an immediate adverse

prohibition on unfair and tactical selective disclosure, and Rule 502(d) does nothing to avail defendants under these circumstances. Rule 502(d) is intended to apply to inadvertent disclosures of privileged information during exchange of discovery – not to voluntary, selective disclosures under Rule 502(a). See, e.g., Jeanbaptiste v. Wells Fargo Bank, N.A., Civil No., 3:14 CV 0264, 2014 WL 6790737 (N.D.Tex. Dec. 1, 2014) (holding that “. . . the cases that have interpreted Rule 502 in the discovery context also note that Rule 502(d) protects parties against ‘inadvertent’ disclosure of privileged information.”); Hostetler v. Dillard, No. 3:13cv351, 2014 WL 6871262 (S.D.Miss. Dec. 3, 2014) (noting that “[a]lthough Fed.R.Evid. 502(d) is not expressly limited to unintentional disclosures, the purpose and intent of Rule 502 is to protect litigants from inadvertent disclosures.”).

In fact, Rajala v. McGuire Woods, LLP, Civ. No. 08-2638, 2013 WL 50200 (D.Kan. Jan. 3, 2013) summarized the Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence, noting that Congress has explained that subsection (d) “‘is designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously, without the need for

effect on the client by separating him from counsel of his choice, and that disqualification motions are often interposed for tactical reasons.”).

As will be made clear by the factual record, defendants’ anticipated motion to disqualify plaintiffs’ counsel is such a tactical motion, and defendants’ proposed protective order attempts to do that which Rule 502(a) was contemplated to proscribe.

exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege," and Rajala further recognized that "[i]n other words, a court may fashion an order, upon a party's motion or its own motion, to limit the effect of waiver when a party inadvertently discloses attorney-client privileged information or work product materials." Id. at *3 (emphasis added) (quoting Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence). Thus, because Rule 502(d) is intended to facilitate expeditious exchange of discovery absent the need for onerous and time-consuming privilege review, it does little to assist defendants here.

Defendants' proposed protective order demonstrates a transparent attempt to circumvent Rule 502(a) and the concept of litigation fairness that it embodies. Plaintiffs respectfully submit that the Court deny entry of defendants' protective order.

2. The Entry of Defendant's Proposed Protective Order in Shao v. Beta Pharma does not Justify its Entry Here.

Defendants argue that this court should grant their protective order because another judge granted it in a different case. They assert that the protective order they seek here has already been entered in Shao, et al., v., Beta Pharma, Inc., et al., No. 3:14-cv-01177 (CSH) (D. Conn.), which is currently pending before the Hon. Charles S. Haight. At the outset, Dr. Wang, plaintiff here, is not a party to the Shao case. The claims he makes for breach of partnership agreement against Beta Pharma and Dr. Zhang are very different from those made by Shao and her four fellow purchasers of unregistered private shares in Zhejiang Beta Pharma. Importantly, the procedural history of the protective order in the

Shao case did not provide plaintiffs there with an opportunity to brief the issue of whether federal law prohibited defendants from making a selective and temporary waiver of the attorney-client privilege.

Plaintiff is not a party to the Shao case. The fact that undersigned counsel represents the Shao plaintiffs does not compel this court to prejudice plaintiff here by entering the Shao protective order, as the two cases are entirely different⁴. Plaintiff here alleges that he entered into a partnership agreement with defendants whereby he rendered services and established Beta Pharma Canada, half-owned by Don Zhang. In exchange, defendants transferred to him a 1% interest in Zhejiang Beta Pharma, but failed to register the shares in China. Defendants also promised him an increasing ownership interest in U.S. Beta Pharma.

The Shao plaintiffs make very different claims. Those plaintiffs allege they purchased shares of the Chinese company Zhejiang Beta Pharma from Beta Pharma and Don Zhang, for cash, in 2010 and 2011 while defendants were doing business in Branford, Connecticut. In the summer of 2013, defendants offered to repurchase these shares from the Shao plaintiffs for cash, based on the assumption that Zhejiang Beta Pharma was then worth \$600 million. Defendants then breached the repurchase agreements by reducing their offer by approximately 50%, ostensibly because defendants had to fund the purchase with after-tax dollars. Litigation ensued.

⁴ It is noteworthy that neither side has ever moved to consolidate the Shao and Wang cases. Shao was first-filed.

The Shao litigation has proceeded differently from the instant case. Defendants in Shao moved to disqualify undersigned counsel on October 14, 2014. See Shao Docket Entry 20. On November 18, 2014, plaintiffs filed their opposition to the Motion to Disqualify in the Shao case. See Shao Docket Entry 32. After reviewing the opposition, defendants determined that they needed to allege a nexus between the allegations in the Shao complaint and the work Lance Liu had previously performed for Beta Pharma. They decided to supplement the record in their Motion to Disqualify by submitting attorney-client privileged documents to the Court.

Defendants filed a "Motion for Scheduling of Conference" in the Shao case, (Shao Docket Entry 35). In their motion, defendants stated that the documents they sought to offer contained "confidential and privileged information" and that "service of the Documents on Plaintiffs' counsel" would waive the privilege. (Shao Docket Entry 35 at 2). At the resulting telephone conference, plaintiff's counsel objected to defendants making any ex parte submission to the court. Judge Haight then ordered the parties to develop a joint protective order. The parties could not agree on a joint order. Each side submitted a draft, as ordered, and the Court issued its Opinion and Order, each dated January 16, 2015.⁵ Notably, defendants were never required to submit legal authority in support of their construction of FRE 502 in the order they obtained, and plaintiffs in Shao never had an opportunity to oppose it. Thus, the important consequences of the

⁵ Copies of Judge Haight's Opinion and Order are attached to defendants' Emergency Motion as Exhibits E and F. See Docket Entry 49-5 and 49-6.

waiver of the attorney client privilege built into Federal Rule of Evidence 502 (a) were never briefed by the parties, or discussed with the Court.

Judge Haight's Opinion on Proposed Protective Orders adopted defendants' interpretation of the Rule without citing any authority. Notably, it sharply criticized defendants for tendering to the Court a draft Protective Order which omitted key provisions of Federal Local Rule 5 (e)(4) (d). The Court wrote:

One of Plaintiffs' principle concerns raised at the telephone conference was an assurance that their counsel be given an opportunity to view the documents filed under seal so that he might fairly address Defendants' disqualification arguments based upon those documents. In spite of the Court's direction to the parties to work together to address each other's respective concerns, Defendants' proposed protective order does not even attempt to fashion a mechanism by which Plaintiffs' counsel may view and respond to documents filed under seal.

Shao Opinion, Docket Entry 49-6, at pages 8 – 9. Had the Court adopted defendants' proposed order without change, it would have inadvertently provided for unlawful ex-parte communication between the defense and the Court and deprived plaintiffs' counsel of the right to see sealed submissions. See Shao Opinion, Document 49-6 at pp. 8 to 10.

Although defendants rely heavily on Judge Haight's entry of the Shao protective order, defendants do not contend that this Court is bound by the discovery order that entered in the Shao court. Indeed, the two cases are separate. One does not control the other. This Court is free to make an independent determination. Because defendants' proposed order blatantly disregards both the Federal Rules of Evidence and established precedent in

opposition to temporary and selective waivers, defendants' motion should be denied.

3. The Record Demonstrates that Defendants' Emergency Motion is Likely Infected by Ulterior Motive.

The record and chronology of this case provide a strong inference that defendants have filed this motion in an effort to block discovery of defendants' Federal tax records.⁶ On March 12, 2015 plaintiff noticed the deposition of Teplitzky & Company, defendants' accounting firm in Woodbridge, Connecticut, and subpoenaed defendants' Federal tax returns and work papers. As Exhibit A to plaintiff's complaint in this matter shows, these records are clearly relevant to this case, because the March, 2010 partnership agreement provides for annual increases in Dr. Wang's stock interest in Beta Pharma based upon the financial performance of the company. Defendant Zhang had repeatedly advised plaintiff by email that he and Beta Pharma had serious Federal tax trouble and that he feared criminal prosecution. In an email to plaintiff on September 23, 2013 which preceded his statement that his lawyer was fully loaded, Zhang wrote: "There are a lot of things going on here such as the IRS audit related tax matters that easily lead anyone has trouble end up with jail." See Docket Entry 52; Exhibit 2 at page 2 of 3.

Eight months later, Zhang was more explicit in an email which is the second communication (Email 2) in the long thread attached as Docket Entry 51,

⁶This Court has previously ordered discovery to proceed in this matter (Docket Entries 23 and 57).

Plaintiff's Exhibit 1. The thread began on May 14, 2014 with Dr. Wang castigating Zhang for his "failure to fulfill your obligation" to certain investors who purchased shares in Zhejiang Beta Pharma from Zhang, including Qian Liu, a plaintiff in the Shao case. Zhang's response, of May 14, 2014 reads in full as follows:

Hi Zhaoyin,

Thanks for the note! We will try to communicate with those investors to find out solutions that both meet the IRS rules and also are acceptable to them. As managers of U.S. corporation, as long as stay outside of jails, we are under restricted tightly by the IRS laws and enforced to handle every transaction and report everything (even small transactions) to the IRS. And though stay outside of jail, cash penalty is pretty sever [sic] sometimes from the IRS and Jirong and Gary are handling penalty payments for our company for those wrong transactions related with those deals.

Nevertheless we are willing to talk with those peoples who are related with both you and our company and try to work out something that make us stay outside jail and also make the friends feel acceptable. Gary is our financial manager who is handling our finance now. Hope you help him should he needs some paper works from you in order to satisfy the IRS. Thank again!

Regards,

Don.

The full email exchange, which defendants failed to provide in their moving papers, suggests very clearly that Defendants are using the instant motion -- and the threatened Motion to Disqualify -- purely as a litigation tactic, namely, to block discovery of Zhang and Beta Pharma's potentially incriminating tax documents.

4. Defendant's Motion, if Granted, May Permanently Contaminate the Truth-Finding Process in this Case.

Defendants' proposed mechanism for obtaining a limited and temporary waiver of the attorney-client privilege threatens to contaminate the truth-finding

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2015, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/

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