

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NERIUM SKINCARE, INC., on behalf of	§	
itself and in a derivative capacity for	§	
Nerium International, LLC, and NERIUM	§	
BIOTECHNOLOGY, INC.	§	
	§	
Plaintiffs,	§	
	§	CIVIL ACTION NO. 3:16-CV-1217-B
VS.	§	
	§	
NERIUM INTERNATIONAL, LLC, JEFF	§	
A. OLSON, and JO PRODUCTS, LLC	§	
	§	
Defendants.	§	

SPECIAL MASTER ORDER NO. 13

As part of its Second Motion to Compel, Defendant Nerium International, LLC (“NI”) seeks “[a]ll documents and communications exchanged between Plaintiffs (including their counsel) and Levick, or any other public relations firm, concerning Nerium International or the subject matter of this litigation.” (Def. Mot. App. at 029, NI RFP No. 161). Plaintiffs object to this document request on multiple grounds, including that some of the Levick-related communications are protected by the attorney-client privilege.¹ (*Id.*). In support of this objection, Plaintiffs rely on a privilege log identifying eight emails withheld from production, the affidavit of Alexander Toney, and 1,386 pages of documents submitted to the Special Master for an *in camera* review. The privilege objection is now ripe for determination.

¹ Plaintiffs also contend that the document request is overbroad, unduly burdensome, not relevant to a claim or defense, and not proportional to the needs of the case. (*See* Def. Mot. App. at 029). Those objections were considered by the Special Master at a hearing on August 29, 2017, and Plaintiffs were ordered to produce any non-privileged responsive documents to NI. *See* Sp. Master Order No. 11 at 2. To the extent Plaintiffs claim that some of the Levick-related communication constitute attorney work product, they have failed to offer any evidence or argument to support that objection.

The elements of the attorney-client privilege are: (1) a confidential communication; (2) made for the purpose of facilitating the rendition of professional legal services; (3) between or amongst the client, lawyer, and their representatives; and (4) the privilege has not been waived. *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 473 (N.D. Tex. 2004) (Kaplan, J.), *citing* Tex. R. Evid. 503(b). The burden is on the party asserting the privilege to demonstrate how each document or communication satisfies these elements. *Id.* A general allegation of privilege is insufficient to meet this burden. *Id.* Instead, “a clear showing must be made which sets forth the items or categories objected to and the reasons for that objection.” *Id.* The proponent must provide sufficient facts by way of detailed affidavits or other evidence to enable the court to determine whether the privilege exists. *Id.* Although a privilege log and an *in camera* review of documents may assist the court in conducting its analysis, a party asserting the privilege must still provide “a detailed description of the materials in dispute and state specific and precise reasons for their claim of protection from disclosure.” *Id.* “[R]esort to an *in camera* review is appropriate only *after* the burdened party has submitted detailed affidavits and other evidence to the extent possible.” *Id.* (emphasis in original).

Plaintiffs have failed to adduce sufficient evidence to establish that the Levick-related communications withheld from production are protected by the attorney-client privilege. Other than a privilege log and the documents themselves, the only evidence submitted by Plaintiffs is the affidavit of one of its lawyers, Alexander Toney, who states:

My communications with Levick Strategic Communications, LLC have been for the purpose of gathering evidence from the Internet for use in briefing and giving legal advice to the client. These communications were and remain confidential. I have directed Levick not to perform any public relations work.

(Plf. Resp. App. at 020-021, ¶ 3). As an initial matter, the Special Master observes that Toney addresses only *his* communications with Levick. Most of the emails withheld from production are neither to nor from Toney. More importantly, the Toney affidavit fails to show how each document, or category of documents, falls within the scope of the attorney-client privilege. Notwithstanding this failure of proof, the Special Master has reviewed a sampling of the 1,386 pages of documents submitted by Plaintiffs in an attempt to glean information that might shed additional light on the privilege issue. Some of the documents and attachments, such as court filings and public relations materials, clearly are not privileged. However, in most instances, the Special Master has been left to speculation and guess-work in interpreting the documents. Without evidence explaining these documents and the information contained therein, Plaintiffs cannot establish their claim of privilege. *See LaneLogic, Inc. v. Great Am. Spirit Ins. Co.*, No. 3-08-CV-1164-BD, 2010 WL 1839294 at *3 (N.D. Tex. May 6, 2010) (Kaplan, J.) (court unable to determine existence of privilege absent adequate factual foundation); *Jacobs v. Tapscott*, No. 3-04-CV-1968, 2006 WL 1140460 at *2 (N.D. Tex. May 1, 2006) (Kaplan, J.) (same).

Plaintiffs shall produce all documents responsive to NI's Request for Production No. 161, including those documents withheld from production under a claim of privilege, by no later than **September 29, 2017**.

SO ORDERED.

DATED: September 5, 2017.

/s/ Jeff Kaplan
Hon. Jeff Kaplan (Ret.)
Special Master