

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

When Disclosure Does Not Constitute Privilege Waiver

The disclosure of privileged communications to a third party typically constitutes a waiver of privilege as to those communications. Exceptions to the third-party waiver rule exist, however. In *Spectrum Dynamics Medical Limited v. General Electric Company*, No. 18-11386 (S.D.N.Y. Sept. 9, 2021), Southern District Magistrate Judge Katharine H. Parker addressed three notable exceptions to the third-party waiver rule: (1) the essential third-party consultant exception; (2) the functional equivalent exception (which has been adopted and applied in other Circuits, but has never been recognized by the Second Circuit); and (3) the common-interest exception. In applying these exceptions, Judge Parker concluded that

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'Spectrum'

Plaintiff Spectrum Dynamics Medical Limited (Spectrum) sued defendant General Electric Company (GE) for breach of contract and trade secret misappropriation. During discovery, Spectrum produced 42 emails it later determined were privileged and sought to claw back those inadvertently produced documents. 2021 WL 4131650, at *1. GE consented as to most of the

emails, but challenged the attempt to claw back four of them, claiming that they included third parties and therefore, any privilege that otherwise applied to them had been waived. *Id.*

The four challenged emails related to Spectrum's 2005 corporate restructuring and name change. Spectrum, then known as V-Target LLC, was owned and controlled by Dr. Shlomo Ben-Haim. Dr. Ben-Haim also owned another entity, Hobart Holding Ltd. (Hobart). Hobart, acting pursuant to a services agreement with Spectrum, tasked two Hobart employees—Guy Wollman and Miki Eden—to provide financial consulting services to Spectrum, which did not then employ any individuals who could provide financial consulting services. In the challenged emails, Wollman and Eden provided advice to, and received information from, Spectrum's legal counsel in connection with the corporate restructuring.

GE asserted that the inclusion of Wollman and Eden on the emails eliminated any claim of

privilege. In response, Spectrum argued that, during the relevant period, Spectrum and Hobart used the same counsel, and that Wollman and Eden (1) were de facto employees or agents of Spectrum; (2) provided information to counsel that was essential to counsel's ability to provide legal advice regarding the restructuring; and (3) "respected the confidential and privileged nature of communications with counsel." *Id.* at *1-2. The upshot, in Spectrum's view, was that Wollman and Eden either were not third parties for purposes of a privilege analysis or were third-party agents of Spectrum who provided information that was necessary for Spectrum's counsel to provide legal advice, and either way, their inclusion on otherwise privileged communications did not waive privilege.

Exceptions to The Third-Party Waiver Rule

In evaluating whether the inclusion of Wollman and Eden on the emails waived privilege, Judge Parker began by citing the well-established general rule that "disclosure to a third party by the party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed." *Id.* at *2 (quoting *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973)). In GE's view, the analysis should have ended there: Wollman and Eden

were not Spectrum employees, and any Spectrum emails that included them—even those involving Spectrum's counsel—could not be privileged. *Id.*

Judge Parker rejected GE's argument, instead finding that three exceptions to the third-party waiver rule applied: (1) the essential third-party consultant exception; (2) the functional equivalent exception; and (3) the common-interest exception.

Turning first to the essential third-party consultant exception, Judge Parker observed that the privilege otherwise applicable to a confidential communication is not eliminated by virtue of its disclosure to a third party where that third party is "necessary, or at least highly useful, for the effective consultation between the client and the lawyer." *Id.* at *3 (quoting *United States v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995)). Judge Parker recognized that, for the privilege to be preserved, the third party must be "nearly indispensable" or "serve[] some specialized purpose in facilitating the attorney-client communication." *Id.* (quoting *Nat'l Educ. Training Grp. v. Skillsoft*, 1999 WL 378337, at *4 (S.D.N.Y. June 10, 1999)). Judge Parker stressed that it is not enough that the communication with the third party "proves important to the attorney's ability to represent the client"; rather, to preserve privilege, the third-party's

"purpose" on the communication must be "to improve the comprehension of the communications between attorney and client." *Id.* (quoting *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999)). Examples include third parties who convey specialized information to a lawyer for purposes of the lawyer advising the client or helping the lawyer overcome a language barrier with the client.

Here, Judge Parker found that Hollman and Eden's "involvement improved the comprehension of the communications between attorney and client." *Id.* at *4. Specifically, Hollman and Eden provided counsel to Spectrum with "specialized financial expertise and knowledge" that was necessary for Spectrum to complete a complex business transaction, i.e., its 2005 corporate restructuring, and thus for counsel to advise Spectrum regarding that transaction. *Id.* at *5; accord *In re Keurig Green Mt. Single-Serve Coffee Antitrust Litig.*, 2019 WL 6736132, at *9 (S.D.N.Y. July 22, 2019) (no privilege waiver where third party provided specialized forensic accounting assistance to lawyer).

Although the essential third-party consultant exception itself was sufficient to justify the continued withholding of the emails as privileged, Judge Parker nevertheless also addressed the functional equivalent and common-interest

exceptions. With respect to the functional equivalent exception, an otherwise privileged communication does not lose its privilege by virtue of disclosure to a third party where that third party is the functional equivalent of an employee. The factors relevant to considering the applicability of this exception include whether the third party (1) “exercised independent decision-making on the company’s behalf”; (2) “possessed information held by no one else at the company”; (3) “served as a company representative to other third parties”; (4) “maintained an office at the company or otherwise spent a substantial amount of time working for it”; and (5) “sought legal advice from corporate counsel to guide his or her work for the company.” 2021 WL 4131650, at *3 (citing, *inter alia*, *Narayanan v. Sutherland Glob. Holdings*, 285 F. Supp. 3d 604, 617-18 (W.D.N.Y. 2018)). Here, Judge Parker concluded that, “to the extent the [functional equivalent] exception applies” in the Second Circuit, the exception would preserve the privilege as to the challenged emails, because Wollman and Eden were de facto Spectrum employees who, although employed by Hobart, had been “incorporated into [Spectrum’s] staff,” including to advise and consult with Spectrum’s legal counsel on Spectrum’s corporate restructuring. *Id.* at *5.

Finally, with respect to the common-interest exception, Judge Parker observed that the disclosure of an otherwise privileged communication to a third party does not waive privilege where that communication is “made in the course of an ongoing common enterprise and intended to further the enterprise.” *Id.* at *3 (quoting *United States v. Krug*, 868 F.3d 82, 86 (2d Cir. 2017)). For this exception to apply, a “joint

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defense effort or other legal strategy” must have been undertaken by the parties and counsel. *Id.* Here, Judge Parker appeared to find that the common-interest exception also applied, because (1) Spectrum and Hobart were commonly owned by Dr. Ben-Haim; (2) the two entities had entered into a services agreement pursuant to which Wollman and Eden provided services to Spectrum; and (3) the challenged emails involving Wollman and

Eden were intended to further that common enterprise.

Conclusion

Having concluded that exceptions to the general rule of third-party waiver applied—whether because Wollman and Eden were essential third-party consultants, or because they were the functional equivalent of Spectrum employees, or because Spectrum and Hobart were engaged in an ongoing common enterprise—Judge Parker denied GE’s challenge to the four disputed emails. A useful lesson for practitioners can be drawn here. The court’s fact-specific analysis, which relied heavily on evidentiary submissions and supporting documents—highlights that, when it comes to privilege disputes, few bright-line rules exist; rather, the particular factual circumstances are critical.