

21st Century Diamond, LLC v Allfield Trading, LLC

2017 NY Slip Op 31618(U)

August 2, 2017

Supreme Court, New York County

Docket Number: 650331/2009

Judge: Lawrence K. Marks

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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21st CENTURY DIAMOND, LLC, :

Plaintiff, :

- against - : Index No. 650331/2009

ALLFIELD TRADING, LLC, et al., :

Defendants, :

- and - :

ALLFIELD TRADING, LLC, et al., :

Third-Party Plaintiffs, :

- against - :

EXELCO NORTH AMERICA, INC, et al., :

Third-Party Defendants. :

-----X

LAWRENCE K. MARKS, J.

This motion, seq #25, originally addressed the requests of third-party plaintiffs Allfield Trading, LLC, Joshua Allen, and Robert Cornfield (together, "Allfield")¹ to obtain additional disclosure from non-party Sterling Jewelers, Inc. ("Sterling"), to allow a computer forensic specialist designated by Allfield to access Sterling's email servers in an effort to try to recover missing or destroyed communications, to produce witnesses for

¹ This motion was briefed, supplemented and supplemented again over a lengthy period of time. For clarity, in this decision, the Court refers to these parties as "Allfield."

additional deposition testimony following supplemental document productions, and for cost-shifting related to same. Mov Br at 1.

BACKGROUND

This action has been the subject of multiple decisions at the trial and appellate level, familiarity with which is presumed. Briefly, and most pertinent to the motion at issue, the third-party defendants (together, “Exelco”) and Sterling aver that they entered into a Common Interest and Confidentiality Agreement (the “Agreement”), that was signed on January 17, 2012. Sterling 2nd Supp Br at 4. Both Sterling and Exelco assert that certain communications and documents between them are privileged, pursuant to the common interest exception to the rules regarding the attorney-client privilege and the waiver of that privilege.² Allfield argues that the common interest exception does not apply.

² As the Court of Appeals has stated, the exception at issue in this motion

has come to be known by many names: ‘common interest arrangement,’ ‘common legal interest doctrine,’ ‘joint litigant privilege,’ ‘pooled information privilege,’ ‘allied lawyer doctrine,’ and ‘allied litigant privilege,’ among others. The nomenclature is less important than a determination of the outer boundaries of the doctrine. For purposes of this [decision, the Court will] use the phrase ‘common interest doctrine’ or ‘common interest exception,’ to make clear that the doctrine is not an independent privilege but an exception to the general rule that communications shared with third parties are not privileged.

Ambac Assurance Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 625 n.1 (2016).

A Decision and Order of this Court, entered November 2, 2015, found that if the common interest exception to the attorney-client privilege had applied to the discovery sought by Allfield, that privilege had been waived by, *inter alia*, Sterling not asserting the privilege earlier and by affirmatively asserting that there were no documents withheld as privileged, that there were no further documents beyond what had already been produced, and that Sterling was neutral in the underlying dispute. The Court also found that further depositions would need to be held or reopened. The remainder of the motion was denied, without prejudice.

That decision, to the extent appealed from, was unanimously reversed by the Appellate Division, finding that if the common interest exception applies, it had not been waived. *21st Century Diamond, LLC v. Allfield Trading, LLC*, 142 A.D.3d 913, 913-14 (1st Dep't 2016). The First Department remanded for further proceedings to determine whether the common interest exception applies to the documents as to which Sterling asserts such exception. *Id.* at 914.

Thereafter, the parties and Sterling further supplemented and updated their briefing of the motion. Counsel were aware, prior to commencing their supplements to the motion, that they had a difference of views as to whether there was a need for the Court to conduct an *in camera* review of the Sterling documents for which the common interest exception is alleged to apply, and addressed that in their papers. *See, e.g.*, Mov 2nd Supp Br at 2, 11-15; Exelco 2nd Supp Br at 1 n1, 9-10. The Court, after reviewing

the arguments of counsel, instructed counsel to provide a full set of the documents at issue.

Documents were sent to the Court from Sterling. Following receipt of the cover letter and an updated privilege log, Allfield requested a conference call with the all parties, Sterling and the Court. Allfield objected to the fact that certain of the documents that Sterling sent to the Court for the *in camera* review were redacted, at least in part. Allfield requested that the documents be produced for the Court's *in camera* review in full or, at minimum, that Sterling confirm that content redacted does not address the question of why the agreement was entered into. Sterling would not do so, claiming that the materials redacted were covered by the regular, traditional attorney-client privilege.³

DISCUSSION

The Appellate Division has stated in this case that

a question of fact exists as to whether Sterling entered into the common-interest agreement with Exelco to protect its business relationship with Exelco (in which case the common-interest privilege would not apply under *Ambac*) or out of a reasonable concern that plaintiffs might decide to add Sterling as a defendant (in which case the common-interest privilege would apply under *Ambac*).

21st Century Diamond, LLC, 142 A.D.3d at 914.

³ On the same conference call, Allfield suggested that if Sterling was unwilling to show the Court the documents in full, *in camera*, further discovery on the question of the intention behind the Agreement might be necessary. Sterling and Exelco opposed this request, and no discovery on this issue was ordered.

Legal Standards

The CPLR generally sets forth the scope of disclosure: “There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” CPLR 3101(a). This applies to parties, as well as others, such as “any other person, upon notice.” *Id.* at (1), (4). “The words ‘material and necessary’ as used in the statute are to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial.” *Anonymous v. High Sch for Envtl. Studies*, 32 A.D.3d 353, 358 (1st Dep’t 2006).

Since there is a “tension” “between the policy favoring full disclosure and the policy permitting parties to withhold,” “the burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underling immunity.” *Spectrum Systems Intern. Corp. v. Chemical Bank*, 78 N.Y.2 371, 377 (1991). *See also Anonymous*, 32 A.D.3d at 358 (“The burden of establishing that the documents sought are covered by a certain privilege rests on the party asserting the privilege.”). Because “the privilege shields from disclosure pertinent information and therefore constitutes an obstacle to the truth-finding process, it must be narrowly construed.” *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016) (internal quotations omitted). That is, the rules are “to ensure that the privilege is strictly confined within the narrowest possible limits consistent with the logic of its principle.” *Id.* In order for a

communication to be covered by the attorney-client privilege, a “communication from attorney to client must be made ‘for the purpose of facilitating the rendition of legal advice or services’” and the “communication itself must be primarily or predominantly of a legal character.” *Spectrum Systems Intern. Corp.*, 78 N.Y.2 at 377-78.

In *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, the Court of Appeals held that under the common interest exception,

an attorney-client communication that is disclosed to a third party remains privileged if the third party shares a common legal interest with the client who made the communication and the communication is made in furtherance of that common legal interest. We hold . . . that any such communication must relate to litigation, either pending or anticipated, in order for the exception to apply.

Ambac Assurance Corp., 27 N.Y.3d at 620. The Court stated that the common interest exception “limits the circumstances under which attorneys and clients can disseminate their communications to third parties without *waiving* the privilege, which our courts have reasonably construed to extend no further than communications related to pending or reasonably anticipated litigation.” *Id.* at 630 (emphasis in original).

The Court of Appeals stated that it “need not decide in this appeal what it means to share common legal interests in pending or anticipated litigation. We hold only that such litigation must be ongoing or reasonably anticipated, and the exchanged communication must relate to it, in order for the common interest exception to apply.” *Id.* at 630, n.4. It

interest' outside the context of litigation could result in the loss of evidence of a wide range of communications between parties who assert common legal interests but who really have only non-legal or exclusively business interests to protect." *Id.* at 629. As an exception, the common interest exception "is limited to situations where the benefit and the necessity of shared communications are at their highest, and the potential for misuse is minimal." *Id.* at 628. The benefits of the expansion sought in *Ambac* were "outweighed by the substantial loss of relevant evidence, as well as the potential for abuse." *Id.* at 629.⁴

The First Department has provided further guidance, stating that absent traditionally privileged communication, any assertion of this doctrine "is unavailing," as the doctrine does not, in and of itself, "constitute a source of privilege." *Peerenboom v. Marvel Entertainment, LLC*, 148 A.D.3d 531, 533 (1st Dep't 2017). *See also Levy v. Arbor Commercial Funding, LLC*, 138 A.D.3d 561 (1st Dep't 2016) ("the common interest doctrine does not create a privilege. Rather, it operates only to prevent waiver of the attorney client privilege"). Thus, for a communication to be covered by the common interest exception: (i) it must be a communication that meets the standard for coverage of the traditional/direct form of attorney-client privilege; (ii) that communication must have been shared with someone not covered by the underlying privilege; and (iii) the

⁴ Indeed, the language used by the Court of Appeals includes "valuable safeguard" and notes a concern in a treatise that the common interest exception is "'spreading like crabgrass.'" *Ambac*, 27 N.Y.3d 616, 631-32 (2016).

communication was shared in pursuit of common legal interests, in pending or anticipated litigation. This is the underlying rule, the action that would otherwise constitute a waiver of the rule, and the exception to the waiver.

Additionally, the question with regard to the common interest exception is not whether there is an intention for communications to be kept private, but whether the actual requirements were met. For example, in *Fewer v. GFI Group Inc.*, the First Department reversed, and required the production of a "joint defense agreement," finding that the burden of establishing protection from disclosure was not met, and that the agreement itself

is not a communication from an attorney to a client 'made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship. Rather, it is a statement of [the signers'] intention that all information they share with each other remain subject to the attorney-client privilege, despite their disclosure to each other.

78 A.D.3d 412, 413 (1st Dep't 2010) (also noting that "in the absence of an attorney-client privilege, the common-interest rule does not apply").

Key Arguments

Multiple arguments are raised by the parties and non-party Sterling. Of particular import are arguments regarding the known business relationship between Sterling and Exelco, the assertion that Sterling was or is concerned with being sued, and the role of the discovery process itself. These arguments are interrelated.

Concern Regarding the Business Relationship

There is no question that Sterling has had “a long-standing business relationship” with the Exelco parties for over a decade. Sterling Opp Br at 2. Allfield argues that Sterling has repeatedly admitted that its sole interest in this litigation is based on the longstanding business relationship that it has with Exelco. Mov 2nd Supp Br at 1.

Allfield argues that Sterling’s counsel stated on the record that this was the sole basis for assertion of the privilege at the deposition of Sterling executive Leslie Smith, and then asserted the same privilege the next day at the deposition of Sterling executive Stuart Lee and confirmed that Sterling has no “stake” in the litigation. *Id.* at 5-7; Schalk Mov Aff, Exh O at 114-16 (deposition transcript of Ms. Smith); Schalk Mov Aff, Exh M at 44-45 (deposition transcript of Mr. Lee). Allfield stresses that Mr. Lee’s deposition was held the day after the assertion of the common interest exception at Ms. Smith’s deposition, and counsel had time to confer with his client and with Exelco off the record, yet did not supplement or change the basis asserted for the common interest exception. Allfield asserts this time lapse is further proof that the basis Sterling put forth for its claim regarding the common interest exception was accurate and an admission. Mov 2nd Supp Br at 7.

Allfield also contends that it was only after it served and filed its moving papers in this motion, and Sterling had notice of the standard for the common interest exception, that Sterling began to refer to its interest in this lawsuit as a “legal interest.” *Id.* at 5.

Even then, Allied argues, Sterling merely stated that the “Common Interest Agreement came about because Sterling and [Exelco] recognize that they have mutual interests in the legal strategies and defenses which are asserted in this litigation. Those mutual interests arise from the fact that Sterling and [Exelco] have a long-standing business relationship which may be impacted by this litigation.” *Paranac Opp Aff*, at ¶ 3; *Sterling Opp Br* at 3. *See also Sterling Opp Br* at 18; *Sterling Supp Br* at 6. Allfield contends that this is simply a restatement that the common interest Sterling and Exelco share is “nothing more” than their longstanding business relationship. *Mov 2nd Supp Br* at 8. Allfield argues that the fact that Sterling is “profiting handsomely” from its business with Exelco “does not vest it with a common legal interest in this proceeding.” *Reply Br* at 5

Sterling argues that that it “did not enter into the Common Interest Agreement to protect its business relationship” with Exelco. *Sterling 2nd Supp Br* at 7. It asserts that it did not enter into the Agreement

to obtain advice of a predominately business nature. Indeed, the business relationship between Sterling and [Exelco] has long been in place; it was the pending litigation and the potential for Sterling to be dragged into this litigation – as it very apparently has been, even if as a ‘nonparty’ – the precipitated the need for the Common Interest Agreement. The fact that Sterling remains in the middle of this contentious battle more than three (3) years after the Subpoena was served only further confirms that Sterling’s and [Exelco’s] concerns about their mutual legal interests were well-founded.

Sterling Supp Br at 7.

Exelco, among its other statements, refers to the legal interest that it asserts it has with Sterling as “a common legal/strategic interest in protecting a commercial sales program.” Exelco Supp Br at 5.

Concern Regarding Being Sued

Allfield contends that the only support for the argument that Sterling entered into the Agreement out of concern for being named a party to this litigation is an affidavit from Exelco’s then counsel, and contends that this basis was “made up after-the-fact.” Mov 2nd Supp Br at 4-5. Allfield claims that Sterling, and Exelco, took this position in opposition to this motion, not when the common interest exception was asserted at the depositions. Reply Br at 7.

Allfield also argues that if it was ever credible that Sterling was concerned about being added as a party, that period of concern could only have lasted from December 2011 until January 2012. Mov 2nd Supp Br at 2. Allfield contends that this is the time period between its own counsel allegedly advising counsel for Exelco that Allfield intended to move to add new parties and the filing of Allfield’s first amended third-party complaint, which only added “Doe” entities out of uncertainty about which unknown entities might be owned or controlled by third-party defendant Jean Paul Tolkowsky. *Id.* at 9-10; Reply Br at 8. Allfield stresses that many entries on Sterling’s privilege log fall outside this time period.

Sterling argues that based upon “the record before this Court, there can be no dispute that Sterling entered into the common interest agreement with [Exelco] out of a reasonable concern that [Allfield] might add Sterling as a defendant in this matter or otherwise assert claims against Sterling.” Sterling 2nd Supp Br at 1. *See also id.*, at 6. It contends that this concern has been “ever-present.” *Id.* It avers that “Sterling was (and is) concerned that [Allfield] might in the future bring an action against Sterling relating to the same matters.” *Id.* at 2 (parenthetical in original). Sterling claims that at the time it entered into the Agreement, it had a legitimate concern that it would be brought into this matter as a party. Sterling Supp Br at 6. *See also* Sterling Opp Br at 4 (stating its concern that it would be brought into the litigation as a party).

Sterling argues that it entered into the Agreement with Exelco, recognizing their “mutual legal interest with respect to this litigation,” and to avoid waiving privileges. Sterling 2nd Supp Br at 3. *See also* Sterling Supp Br at 7 (where Sterling contends it “has a mutual interest with [Exelco] in the legal strategies that are advanced in this litigation”). Sterling argues that because of its reasonable concern of litigation, it shares a common legal interest with Exelco. Sterling 2nd Supp Br at 6. Sterling also notes that it sought indemnity from Exelco for matters related to the subject of this litigation. *Id.* at 6. Sterling further argues that the multiple times it was referenced in claims filed by Allfield, whether looking at the original third-party claims asserted or the current version,

now the third amended third-party complaint, support its position that Allfield had or has “intentions to drag Sterling into this litigation clear . . . even if as a nonparty.” *Id.* at 7.

Exelco argues that Allfield has filed five different versions of the third-party complaint, as well as an entirely new but highly related action. Exelco 2nd Supp Br at 2, 8. Exelco avers that the concern by Sterling that it may be “dragged into this litigation” resulted in Sterling seeking and obtaining an indemnification agreement to minimize its potential litigation exposure. *Id.* at 7. Exelco contends that it “is self-evident that, if Sterling had no real concern regarding liability, it would have no reason to seek such an indemnification.” *Id.* Exelco argues that when Allfield retained new counsel, that counsel -- Allfield’s current counsel -- stated that Allfield was still trying to determine what entities it ultimately intended to sue. *Id.* at 9. Exelco also argues that Allfield’s statements that it never intended to sue Sterling are belated and self-serving. Exelco Supp Br at 4; Exelco 2nd Supp Br at 9.

Concern Regarding Discovery

Allfield asserts that the timing of the subpoena and the Agreement “gives rise to the inference” of the Agreement’s real purpose. Reply Br at 10. *See also* Mov Supp Br at 4. Allfield argues that “if Sterling can successfully assert the [common interest exception to the privilege waiver] here, any third party who does business with a litigant can shield all communications with that litigant under the common interest” exception. Reply Br at 5-6.

Sterling argues that the communications at issue relate to the ongoing litigation, Sterling's response to being subpoenaed, and its "participation in other onerous discovery in this case." Sterling 2nd Supp Br at 6. Sterling claims it is "nothing but inflammatory rhetoric that is highly offensive in light of Sterling's cooperation" that Allfield contends that the purpose of the Agreement was to facilitate the evasion of discovery under the Sterling subpoena. Sterling Supp Br at 7. Sterling contends that it "has been subjected to extensive and expensive discovery" but Allfield always wants more. Sterling 2nd Supp Br at 1-2.

Exelco argues that Allfield's conduct in discovery validates Sterling's concern regarding it being a potential litigation target. Exelco 2nd Supp Br at 2. Exelco contends that the "extensive and onerous discovery" sought by Allfield from Sterling constitutes a genuine litigation concern on Sterling's part. *Id.* at 2-3. Exelco opposes additional disclosure from non-party Sterling. *Id.* at 1. It requests that this Court find that the common interest exception applies, both generally and with regard to the communications at issue. *Id.* at 3, 5, 9.

Analysis

In its assertion that the common interest exception applies, Sterling focuses on the current litigation, distinguishing the facts in this action from those in *Ambac*. Sterling 2nd Supp Br at 5. Sterling points to a New York County decision, issued after the Court of Appeals decision in *Ambac*, as instructive. *Id.* at 5. In *ACE Sec. Corp. v. DB*

Structured Products, Inc., there was a motion to compel documents, for which privilege was asserted under the common interest exception. 40 N.Y.S.3d 723 (Sup Ct. N.Y. County 2016). In that case, the court found that the “determination of whether two parties share a common legal interest cannot be made categorically, and it cannot be based solely on their relationship.” *Id.*, at 734 (internal citations omitted). “What is important is not whether the parties theoretically share similar interests but rather whether they demonstrate actual cooperation toward a common legal goal.” *Id.* The court found that communications regarding certain repurchase demands, pertaining to how to enforce rights of a trust, were a sufficient common legal interest. *Id.*, at 735. In the instant case, however, there is no analogous common legal interest that is articulated and demonstrated, other than asserted concerns regarding having claims brought against Sterling.

In another case, *Yemini v. Goldberg*, the court found that the common interest exception did not apply to a witness, with regard to his preparation for a hearing in ongoing litigation. 12 Misc.3d 1141, 1144 (Sup Ct. Nassau County 2006). There, the non-party individual invoking the exception was a fact witness in that case, but he was also a defendant in a related case brought by the same plaintiff. *Id.* The court found that the witness’s “interest in the outcome of this aspect of the litigation can only be viewed as personal or business oriented,” and was therefore not covered by the common interest exception. Sterling distinguishes the instant case from *Yemini*, arguing that, in this case

Sterling's "business relationship" with the Exelco parties is "at the very center of this litigation and may be impacted by its outcome." Sterling Opp Br at 19. This argument, by Sterling, is problematic, because it highlights that Allfield always knew of the Sterling business relationship, without bringing claims against it, and does not provide or support an interest between Sterling and Exelco that is legal in nature.

Arguments that are "only conclusory and unsubstantiated allegations" by those asserting the common interest exception, that they "shared some 'legal' interest," are insufficient. *Peerenboom v. Marvel Entertainment, LLC*, 2016 NY Slip Op 31957 (U), *8-9 (Sup Ct. NY County 2016), *aff'd Peerenboom v. Marvel Entertainment, LLC*, 148 A.D.3d 531 (1st Dep't 2017). In *Peerenboom*, shared cost of attorneys' fees was insufficient to establish a common "legal" interest, even where those asserting it were co-defendants in another action. *Id.* at *9. The case law is clear that mere assertions of a shared legal interest are not a sufficient basis for finding one. That must be established from something beyond the assertions.

The Court has reviewed the documents provided *in camera*. Those documents, taken together, do not support Sterling's position or sustain its burden of proof. The Agreement itself, asserting the common interest exception, is signed by Sterling and Exelco. It unquestionably states that the parties have common interests in the pending litigation. It states the information exchanged is intended to remain confidential and protected. The Agreement does not, however, provide any further detail as to a specific

common interest or joint strategy that is specific to this case. Any party in any pending litigation could sign such an agreement with a non-party who does not want to provide “liberal discovery” in that litigation.

The drafts of the indemnification agreement include a statement of concern that Allfield may bring an action against it, relating to this litigation. The indemnification provides, *inter alia*, for coverage relating to liability and expenses. There was clearly an intention to treat the communications as privileged. Indeed, in support of the common interest exception, Exelco argues that it “is self-evident that, if Sterling had no real concern regarding liability, it would have no reason to seek such an indemnification.” Exelco 2nd Supp Br at 7. This argument, however, speaks not at all to the question of whether the concern is a business concern, for example regarding discovery expenses or business costs, or one stemming from a shared *legal* interest. Again, a similar document could be signed by any business parties with an ongoing business relationship, if that business relationship is at issue in a litigation.

There are certainly documents among those reviewed *in camera* that suggest a clear business context to Sterling’s view of this litigation. This includes communications regarding information included in discovery, and not exchanged in discovery. Such communications might (or might not) legitimately be covered by the common interest exception, if a separate and distinct legal interest was established as shared by Sterling and Exelco. On their own, however, they do not support Sterling’s position.

Significantly, out of more than four thousand pages, a large number of them would not be appropriate for inclusion on a privilege log, even where the attorney-client privilege is most direct. There were numerous documents that concerned items such as scheduling phone calls or transmitting non-privileged material, sometimes public documents or transcripts of depositions. Such communications are not privileged because they are not “primarily or predominantly of a legal character.” *Spectrum Systems Intern. Corp. v. Chemical Bank*, 78 N.Y.2 371, 377-78 (1991). *See also Arkin Kaplan Rice LLP v. Kaplan*, 118 A.D.3d 492, 493 (1st Dep’t 2014) (finding that the privilege was not waived by an email forwarded because it “was a mere transmittal email” containing non-privileged communication); *N.Y.S. Joint Commn. On Pub. Ethics v. Campaign for One N.Y., Inc.*, 37 N.Y.S.3d 851, 862 (Sup Ct. Albany County 2016) (noting that where the only information in email relates to the scheduling of a phone call, there is no demonstration that the communication was predominantly of a legal character or that the attorney-client privilege applies).

There are communications with regard to Mr. Ed Hrabak’s affidavit, and that Sterling and Exelco worked together on it, but this was already known. There are redactions submitted to the Court, even *in camera*, but what is not redacted does not demonstrate that this endeavor was for a common *legal* interest, rather than a business goal. There is some language regarding the reasoning of edits, but what is there could be applicable to business or discovery avoidance purposes.

There are multiple communications regarding the impact certain events in the litigation will have on discovery and/or the timing for same. There is clearly strategy addressed regarding limiting discovery, the timing and content of same, and coordinating efforts. There is even case law and draft court papers exchanged. However, again, nothing in those communications establish a common interest that is legal in nature, rather than coordinated for strategic or joint business purposes.

Publicly, Sterling continually cites to Allfield's requests for discovery and depositions. See, e.g., Sterling Opp Br at 1, 10, 18; Sterling Supp Br at 4; Sterling 2nd Supp Br at 1, 3, 6. At least one document provided *in camera* evidences that Sterling may be genuinely concerned about the burden of the discovery. However, this document is wholly without any reference to any legal issue. It does not establish a non-business reason for not wanting to be involved in the litigation in this action.

The documents reviewed *in camera* do not provide support for Sterling's position that it was and is concerned about having claims brought against it by Allfield. To the extent that the documents that the Court has reviewed *in camera* reflect any common interest, they reflect, at most, communications regarding a lack of enthusiasm for fulsome or speedy discovery and an awareness of the financial cost of discovery. However, this Court cannot conclude that a shared desire to avoid discovery is sufficient to establish a common *legal* interest. Such an interest is palpably different from, for example, the

specified interest the court found in *ACE Sec. Corp. v. DB Structured Products, Inc.*, 40 N.Y.S.3d 723, 735 (Sup Ct. N.Y. County 2016).

To rule otherwise, would create an exception to disclosure requirements that would unquestionably lead to abuse. This Court understands that because of costs, and other reasons, many parties do not relish the realities of liberal discovery. This sentiment may be even more strongly felt, in some cases, by non-parties. However, liberal discovery is unquestionably the standard in New York.

This Court is in no way implying anything malicious or nefarious about a lack of enthusiasm for engaging in another individual's or entity's litigation. It is the very normality of this position that makes it so dangerous. What non-party with an ongoing business interest at issue in any litigation would not prefer to stay as uninvolved as possible? What non-party would ever want the business risk, costs, and time diversion? Indeed, many responsible, professional attorneys, well-versed in current case law, would recommend to their clients that they sign an agreement regarding the common interest exception, if there was to be discovery from a non-party with a shared business interest -- if putting such an agreement in place were a legitimate basis for shielding efforts to limit or closely coordinate the discovery. Doing so would often make good business sense.

However, the Court of Appeals has been clear that the well-settled standards for liberal discovery do not change with regard to a nonparty, nor do they require a demonstration that the discovery cannot be obtained elsewhere. *Kapon v. Koch*, 23

NY3d 32, 38 (2014). Further, the person or entity “seeking to quash a subpoena bears ‘the burden of establishing that the requested documents and records are utterly irrelevant.’” *Ledonne v. Orsid Realty Corp.*, 83 A.D.3d 598, 599 (1st Dep’t 2011) (citing *Velez v. Hunts Point Multi-Serv. Ctr., Inc.*, 29 A.D.3d 104, 112 (1st Dep’t 2006).

In the context of this case, this burden and the burden required for establishing the common interest exception are particularly important. Sterling’s discovery obligations have been at issue for many years in this intensely contested litigation. Sterling’s, or Exelco’s, assertion of the common interest exception has been an issue for less time, but still several years. There have been numerous briefings, arguments, an appeal, more submission, and an *in camera* review. For this reason, the Court notes that Sterling’s decision to redact documents sent for *in camera* review is particularly significant. It knows it has the burden of proof on this motion.

The Court, obviously, can say virtually nothing about content it has not seen. Sterling stated to the Court, in response to Allfield’s request, that it would not provide un-redacted copies of the documents, and that it was protecting the “regular” attorney-client privilege. As the common interest exception requires an underlying privileged communication, shielding those communications may have been a missed opportunity to convince the Court that there was a genuine common legal interest. Or, maybe there nothing not before the Court would have supported Sterling’s position. But the Court

need not make that determination. In this motion, Sterling has the burden of proof.

Similarly, Exelco has been submitting its arguments at every step of this motion.

Accordingly, it is this Court's determination that proof of only a desire to minimize or avoid discovery is not a "common legal interest" for purpose of the common interest exception. Without more, it is simply a commercial or business interest. This is true irrespective of whether that interest comes from a desire to protect a business relationship or project, or from a desire to minimize time and costs spent on discovery. To find otherwise would run the risk of the exception swallowing the rule -- not simply with regard to the rules governing privilege but with regard to liberal discovery. The potential for misuse is simply too high.

Genuine and reasonable concern about being sued can be a basis for a joint legal interest sufficient to establish a common legal interest. However, statements that are conclusory and unsubstantiated, on their own, are insufficient to establish a shared legal interest, as required for the common interest exception. The burden of establishing protection under the common interest exception is on the party (or non-party) asserting it. It is this Court's further determination that this burden was not met, by either Sterling or Exelco.

With regard to the portions of the motion that seek a computer forensic specialist designated by Allfield to access Sterling's email servers in an effort to try to recover missing or destroyed communications, and for cost-shifting, those are not addressed in

the most recent submissions. *See generally* Mov 2nd Supp Br; Sterling 2nd Supp Br; Exelco 2nd Supp Br. Nor are they addressed in the Appellate Division's decision. *21st Century Diamond, LLC v. Allfield Trading, LLC*, 142 A.D.3d 913 (1st Dep't 2016). However, in an abundance of caution, and to the extent they are still sought, those requests are denied at this time, without prejudice. There is no doubt that questions stemming from the assertion of the common interest exception have been heavily litigated. However, there has also been particularly relevant developments in the case law, and the Court declines to find, on the current record before it, that any party or non-party before it cannot be trusted to comply with the orders of this Court without the oversight of a forensic expert designated by the other side. Further, it is the determination of this Court, at least at this time, that although cost-shifting may be appropriate, that issue is best addressed with regard to the totality of the case, and not issue by issue.

The Court has considered the other arguments of movant and the parties, and finds them to be unavailing.

Accordingly, it is

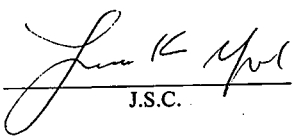
ORDERED that the portion of this motion that seeks to obtain additional document disclosure from non-party Sterling Jewelers, Inc. is granted, and it is Ordered to review and produce all remaining documents in accordance with this decision; and it is further

ORDERED that the portion of this motion that seeks to obtain and recall witnesses for additional deposition testimony following supplemental document productions from non-party Sterling Jewelers, Inc. is granted; and it is further

ORDERED that the portions of this motion that seek a computer forensic designated by the movants to access Sterling Jewelers, Inc.'s email servers and for cost-shifting to Sterling Jewelers, Inc. are denied, without prejudice.

Dated: August 2, 2017

ENTER:


J.S.C.