

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 7/24/2013

-----X

SWIFT SPINDRIFT, LTD., :

Plaintiff, :

-against- :

ALVADA INSURANCE, INC., et al., :

Defendants. :

-----X

**MEMORANDUM  
DECISION AND ORDER**

09 Civ. 9342 (AJN) (FM)

**FRANK MAAS**, United States Magistrate Judge.

Plaintiff Swift Spindrift, Ltd. (“Swift”) brings this insurance coverage action against several insurance carriers and an insurance broker to recover damages allegedly arising out of the protracted detention of one of its cargo ships by Libyan authorities in Tripoli. The defendants (collectively, “Alvada”) have moved to compel the production of certain documents that Swift has withheld on the basis of attorney-client privilege. (ECF No. 41). For the reasons that follow, that motion is granted in part and denied in part.

I. Background

A. Factual Background

Swift is a Liberian single-asset corporation that operated the M/V Swift Spindrift (“Swift Spindrift”), an oceangoing cargo ship. (See ECF No. 21 (“Amended Complaint” or “Am. Compl.”) ¶¶ 3-4). The Swift Spindrift was one of several vessels

comprising the “Grace Line,” a fleet of ships owned by John Grace (“Grace”) and Lola Grace through a number of closely-held companies and family trusts. (See Decl. of Joseph G. Grasso, Esq., sworn to on Dec. 28, 2012 (ECF No. 43) (“Grasso Decl.”), Ex. B at 9-14).

In November 2008, the Swift Spindrift arrived in Tripoli with a cargo of corn being shipped to a Libyan importer. (Am. Compl. ¶¶ 39-40). Alleging that the corn was defective, the importer obtained a court order arresting the Swift Spindrift in port pending resolution of the dispute. (Id. ¶¶ 41-42 & Ex. A). The Libyan court further directed that, to obtain the vessel’s release, Swift post security, which, according to Swift, was to take the form of a \$1.6 million bank guarantee. (Id. ¶¶ 42-43). In January 2009, Swift posted an irrevocable letter of credit in that amount, but the Libyan government never released the Swift Spindrift. (Id. ¶¶ 44-45). Despite numerous applications and motions before the Libyan court, as well as an appeal, the Swift Spindrift remained detained in port until June 17, 2010, when Swift sold the ship to a third party on an “as-is, where-is” basis for \$2.3 million. (Id. ¶¶ 46-48, 52).

Swift brings this case under the Court’s admiralty and maritime jurisdiction. (Id. ¶ 1). Swift seeks to recover the difference between the fair market value of the vessel and its sales price under two marine war-risk policies on the theory that the prolonged detention of the Swift Spindrift rendered it a “constructive total loss.” (Id. ¶¶ 53-113). Swift also seeks reimbursement for alleged “sue and labor” expenses associated with its

efforts to recover the vessel, including the cost of counsel in Libya. (Id. ¶¶ 69-83, 100-113). The total damages claimed exceeds \$10 million. (Id. at 35 ¶ H).

During discovery, Swift produced approximately 8,000 documents, including two email chains containing communications from Charles Cumming (“Cumming”), an in-house lawyer for Grace Line, who also handled operational matters. (Pl.’s Resp. in Opp. to Defs.’ Mot. to Compel (ECF No. 44) (“Pl.’s Opp. Mem.”) at 8; Grasso Decl., Ex. A at 29-32, 73).

The first email chain (the “Coverage Emails”) contains, among other matters, advice addressed to Peter Metz (“Metz”), Swift’s sole director, as to whether the circumstances in Libya gave rise to a valid claim under Swift’s war-risk policies. (Grasso Decl, Ex. C at 1). Cumming’s advice to Metz was that, although “[a]bandonment [of the Swift Spindrift] may be an option, . . . there [was] no war risk involved in this situation and[, thus,] coverage would not come into play.” (Id.). Cumming also noted that the ship had “suffered no physical damage so Hull and Machinery cover[age also would] not come into play.” (Id.).

The second email chain (the “Libya Emails”) reflects communications among Cumming, Swift’s local counsel in Libya, lawyers at a London firm representing Swift in a related arbitration, and staff at “V-Ships,” a company hired by Swift to manage the Swift Spindrift’s daily operations. (Grasso Decl., Ex. D). These emails primarily concern the status of the Libyan proceedings and the issuance of the letter of credit. In an email dated November 26, 2008, Swift’s Libyan counsel estimated that a \$1.6 million

letter of credit would be sufficient to secure the release of the Swift Spindrift. (See id.). Later, on July 1, 2009, counsel in Libya informed Cumming that the amount assessed by the Libyan court was actually closer to \$2.9 million. (Id.). Cumming expressed his “alarm[]” at this development and noted that a judgment in that amount might render the Swift Spindrift a constructive total loss. (Id.).

In March 2012, Grace and Metz were deposed. Both testified generally about advice they had received from Cumming related to the Swift Spindrift’s detention in Libya. Metz testified that, although the Libyan importer was seeking to recover close to \$3 million, Swift had furnished a letter of credit for only \$1.6 million because he believed that amount was “sufficient” to satisfy the Libyan court and secure the release of the ship. (Id., Ex. A at 114-19, 191-93). According to Metz, in arriving at that determination, he “relied” on Cumming, as well as Swift’s local counsel in Libya, “who was in a position to know the facts on the ground better than [he] did.” (Id. at 192-94). When he was asked why Swift had failed to secure the full amount sought by the Libyan importer, Metz responded that his understanding was that “[d]eviating from the \$1.6 million [letter of credit] would not have made a difference in changing when the ship would have been released.” (Id. at 117-18).

Grace’s testimony was less detailed. He acknowledged discussions with Metz and Cumming regarding the situation in Libya, but could not recall any specifics of those conversations. (Id., Ex. B at 81-84, 87-88). He also did not testify about any specific legal advice that he had received from Cumming.

B. Motion to Compel

The present discovery dispute arises out of Swift's 163-page privilege log, which includes emails relating to a wide variety of topics concerning the Swift Spindrift's detention in Libya, including the need to obtain legal services in Tripoli, Swift's legal obligations under the ship's charter agreement, the unloading of the Swift Spindrift's cargo, potential legal claims against Swift, securing a bank guarantee to satisfy the judgment of the Libyan court, delays in the ship's release, efforts to obtain assistance from the State Department, and the orders entered by the Libyan court. (See Grasso Decl., Ex. E). Many of these emails involve communications between or among Cumming, Swift's principals, Swift's solicitors in London, and local counsel in Libya. (Id.). Many others, however, appear to be messages sent to third parties or communications between or among non-lawyers. (Id.).

Alvada contends that it is entitled to all of the documents identified in Swift's privilege log because Swift waived its attorney-client privilege by voluntarily disclosing the Coverage and Libya Emails and allowing Metz and Grace to testify about the information and advice that they had received from counsel. (Defs.' Mem. of Law in Supp. of Mot. to Compel (ECF No. 42) ("Defs.' Mem.") at 3). Alvada further contends that any documents on the privilege log that were disclosed to third parties are no longer privileged and must be disclosed. (Id. at 5-6). Finally, Alvada alleges that Swift's assertion of privilege is overbroad because many of the withheld communications relate solely to business, rather than legal, matters. (Id. at 5).

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.