

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

IN RE PEANUT FARMERS
ANTITRUST LITIGATION

Case No. 2:19-cv-00463-RAJ-LRL

**Honorable Raymond A. Jackson
Honorable Lawrence R. Leonard**

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL
BIRDSONG CORPORATION TO PRODUCE CERTAIN DOCUMENTS**

Plaintiffs, by counsel and pursuant to Rule 37 of the Federal Rules of Civil Procedure and Local Rule 37, state the following in support of their *Motion to Compel Birdsong to Produce Certain Documents* (the "Motion"):

I. Summary

This dispute is about Defendant Birdsong Corporation's ("Birdsong") claim of attorney-client privilege regarding emails between non-attorney employees discussing a company antitrust presentation and related documents. Birdsong claims this privilege even though the nature of the information is not entitled to protection. The withheld documents are communications between non-attorney employees discussing Birdsong's policies regarding antitrust and price fixing without regard to any existing legal dispute, as well as handout materials distributed at the presentation summarizing general antitrust compliance guidance. Birdsong believes it can withhold these documents because the underlying antitrust guidance presentation was generated by an attorney. This expansive view of the attorney-client privilege urged by Birdsong is not supported by any authority.

II. Factual Background

Plaintiffs allege a conspiracy by Defendants to fix the price of Runner peanuts paid to peanut farmers, which began on an unknown date, but which injured Plaintiffs from at least as early as January 1, 2014, and continued at least through the filing of the Class Action Complaint (ECF No. 1) on September 5, 2019. SAC ¶ 100. Plaintiffs also allege that peanut prices began a period of volatility around 2011 that extended into 2013 and that precipitated Defendants' desire "to stabilize and depress Runner prices." *Id.* at ¶ 93.

On August 12, 2020, Birdsong produced a supplemental privilege log in connection with its response to Plaintiffs' Request for Production of Documents. The supplement was in response to an earlier dispute over Birdsong's deficient privilege log. Among the documents withheld by Birdsong were certain emails and attachments thereto (privilege log document ID nos. DOC-0000221867, DOC-0000221867-0001, DOC-0000221867-0002, DOC-000438279, DOC-0000438279-0001, DOC-0000438279-0002, DOC-0001546902-0001, DOC-0001475409-0001), described as containing "legal advice from Tom Craddock on anti trust [sic], price fixing, and confidentiality issues" and "legal advice from Tom Craddock on anti-competition issues." The basis for withholding these documents was the attorney-client privilege.

III. Argument

A. The withheld documents are not protected by the attorney-client privilege.

The Fourth Circuit has adopted a narrow interpretation of attorney-client privilege, holding "the privilege applies only when the person claiming the privilege has *as a client* consulted an attorney for the purpose of securing a legal opinion or services." *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355-56 (4th Cir. 1984) (emphasis added). While communications

between a company's attorney and its employees may be entitled to protection by the attorney-client privilege, the communication will lose that protection where the advice is disseminated within the company generally. Communications can only retain their privileged status "if the information is relayed from a non-lawyer employee or officer to other employees or officers of the corporation on a need to know basis." *F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A.*, 184 F.R.D. 64, 71 (D. Md. 1998) (citing *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 633 (M.D. Pa. 1997)).

The genesis of the disputed documents is an oral presentation by attorney Tom Craddock on antitrust and price fixing compliance in 2017. Attendees apparently took notes on the presentation. These notes were then circulated among no less than thirteen Birdsong employees. Further, Birdsong has not claimed that the presentation was in response to specific requests for legal advice on a pending matter. Instead, the presentation appears to be an attempt to guide the company's compliance with the law. These types of communications do not fit within the narrow confines of the attorney-client privilege outlined by the Fourth Circuit.

The few courts that have addressed the privileged nature of internal antitrust policies have concluded that they are not entitled to the protection of the attorney-client privilege. In *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407 (N.D. Ill. 2006), after defendants inadvertently produced its antitrust compliance manuals, it claimed the manuals were privileged and exempt from discovery. *Id.* at 412. Specifically, defendants argued the manuals were privileged because defendants' counsel prepared them, in response to a request for legal advice, to assist employees in complying with U.S. and Canadian competition laws. *Id.* at 430. Plaintiffs argued they were not privileged because they did not respond to "specific factual requests for legal advice." *Id.*

The court declined to extend privilege, stating that manuals that do not reveal client confidences or constitute legal advice fall “outside the scope of the attorney-client privilege, whether viewed broadly or narrowly.” *Id.* at 430. The court left open the possibility that certain hypothetical scenarios addressed in the manuals constituted legal advice and allowed further briefing. In its supplemental decision addressing the hypothetical scenarios, the court explained that privilege was still inappropriate because the hypotheticals were merely “instructional devices, not responses to requests for legal advice.” *In re Sulfuric Acid Antitrust Litig.* 432 F. Supp. 2d 794, 796-97 (N.D. Ill. 2006).

The court reached a similar result in *In re Domestic Drywall Antitrust Litig.*, No. 13-MD-2437, 2014 WL 5090032 (E.D. Pa. Oct. 9, 2014). There, plaintiff sought “[a]ll Documents relating to [defendant’s] policies, practices or guidelines concerning a) the United States antitrust laws, b) communications with competitors relating to price, output or supply, or c) any antitrust training provided to . . . officers and employees.” *Id.* at *1. Defendant refused to produce its antitrust compliance manual, asserting attorney-client privilege. *Id.* Plaintiff moved to compel. *Id.* Plaintiff argued the policy was (1) not privileged because it contained *general policies*, instead of legal advice regarding a specific action, and (2) was not a confidential communication because it was widely distributed within the company. *Id.* Defendant countered that the policy was privileged because it met that jurisdiction’s elements of privilege:(1) a communication, (2) between privileged persons—lawyers and company employees, (3) maintained in confidence—defendant never allowed disclosure outside the company, (4) for the purpose of providing legal advice to employees whose work implicates antitrust risk. *Id.* The court granted plaintiff’s motion because the subject document constituted the company’s general policy. *Id.* at *5.

Birdsong's expansive interpretation of the attorney-client privilege finds no support in the law. Birdsong employees' discussions of general company guidance and presentation cannot be withheld from Plaintiffs simply because an attorney was involved in the creation of that guidance and presentation. Were this the case, large swaths of communication could be shielded from discovery simply by alleging the involvement by an attorney in the subject matter at some point in the past. In the absence of a specific request for legal advice which reveals client confidences, Birdsong's position fails.

B. The parties have attempted in good faith to resolve this dispute without court intervention

On August 27, 2020, counsel conferred by telephone to discuss multiple withheld documents on Birdsong's supplemental privilege log. The conference was largely successful in that many of the disagreements over privilege were resolved and the need for court intervention was significantly narrowed. The parties were not, however, able to resolve the dispute over the emails and documents which are the subject of this Motion. The discussion was memorialized in an email from Plaintiffs' counsel to Birdsong's counsel and is attached hereto as *Exhibit A*. The Motion includes a certification of this good faith effort pursuant to Local Rule 37(E).

IV. Conclusion

Plaintiffs respectfully request that the Court grant Plaintiffs' Motion and order Birdsong to produce the withheld documents identified in Birdsong's privilege log as document ID nos. DOC-0000221867, DOC-0000221867-0001, DOC-0000221867-0002, DOC-000438279, DOC-0000438279-0001, DOC-0000438279-0002, DOC-0001546902-0001, and DOC-0001475409-0001.

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