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November 16, 2018

BY ECF

The Honorable Judge Roanne L. Mann
U.S. District Court for Eastern District of New York
225 Cadman Plaza East | Brooklyn, New York 11201

Re: LPD New York, LLC v. adidas America, Inc. and adidas AG
15-Civ-6360 (MKB) (RLM) | KLSE File: 6003

Dear Judge Mann:

We represent Plaintiff LPD New York, LLC (“LPD”) and hereby respectfully move to compel Defendants to produce (1) all “[e]mails with and/or about Plaintiff” as stated in their Fed.R.Civ.P 26 Disclosures (Exhibit 1), (2) a revised privilege log that identifies the exact dates of documents withheld or redacted; (3) all partially or wholly redacted emails with only the portions thereof claimed to be privileged redacted and not the sender, recipient, and date information; (4) unredacted document ADIL05, ADIL018, ADIL026, ADIL050, ADIL0140-141; and (5) the 3/16/2015 emails between Jarrett Mann and Jack Gray. LPD has advised Defendants of the objections made herein and does not yet have their final position thereon. LPD files this motion in an abundance of caution in light of the Court’s 27 February 2018 order.

(1) *Emails with or about LPD*: In Defendants’ Rule 26 Disclosures, they represented that they would produce “[e]mails with and/or about Plaintiff.” Defendants failed to produce its Rule 26 materials until 26 October 2018 and, when they did, they failed to produce all such emails. While Defendants will now claim that they did not intend to designate all such emails but only those that they will use to support their defenses and (not yet interposed) counterclaim(s), that assertion is belied by the fact that their privilege log includes materials wholly withheld from their production. If Defendants did not intend to designate all “[e]mails with and/or about [LPD],” then they would have had no reason to note the withheld materials on their privilege log as they did. Because they did it is clear that, like LPD, Defendants understood that they would be producing all “[e]mails with and/or about Plaintiff.” Accordingly, Defendants should be compelled to produce ADIL05 in unredacted form.

(2) *Privilege Log*: Defendants used “date families” in their privilege log (Exhibit 2) instead of identify the exact dates of documents withheld or redacted. Without this information, Defendants have frustrated LPD’s ability to evaluate Defendants’ claims of privilege.

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(3) *Impermissibly Redacted Sender, Recipient, and Date Information*: In the materials produced, Defendants impermissibly redacted sender, recipient, and date information that LPD also need to review to evaluate Defendants' claims of privilege.

(4) *Defendants' Claims of Privilege – Redactions*: ADIL05 (Exhibit 3¹): To maintain privilege, the client must be seeking predominantly legal advice or services. *In re County of Erie*, 473 F.3d 413 (2d Cir. 2007); *People v. Mitchell*, 58 N.Y.2d 368 (1983). “Attorneys frequently give to their clients business or other advice which, at least insofar as it can be separated from essentially professional legal services, give rise to no privilege whatsoever.” *Colton v. United States*, 306 F.2d 633, 638 (2d Cir.), cert. denied, 371 U.S. 951, 83 S. Ct. 505 (1963). Attorney client privilege “is ‘triggered only’ by a request for legal advice, not business advice.” *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir. 1984). The Second Circuit looks to whether the “predominant purpose” of the communication was to procure legal advice. *In re County of Erie*, 473 F.3d 413, 420, n.7 (2d Cir. 2007). “When an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged.” *Id.* at 421-22 (citing *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998)). If a business decision can be viewed as both business and legal evaluations, “the business aspects of the decision are not protected simply because legal considerations are also involved.” *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 643-44 (S.D.N.Y. 1987); see also *Fine v. Facet Aerospace Products Co.*, 133 F.R.D. 439, 444 (S.D.N.Y. 1990) (privilege not extended to management advice). In the communications surrounding ADIL05 (Exhibit 3, adidas' representatives were discussing whether the LPD/adidas collaboration “would affect [adidas's] retail position” and how “pull[ing] th[at] collection from the shelves . . . m[ight] give [adidas] a bad name.” This tends to confirm that, if anything, Mr. Jackiewicz was seeking predominantly business, as opposed to legal, advice when he wrote Ms. Vanderhoff. Accordingly, Defendants should be compelled to produce ADIL05 in unredacted form.

ADIL018 (Exhibit 4): The same holds true for ADIL018, which picks up from the discussions had with respect to ADIL05, which referenced the V Magazine incident “last summer.” Mr. Anderson raises the fact that the LPD/adidas collaboration was being sold on LPD's website and advertised on hypebeast.com. This tends to confirm that, if anything, Mr. Jackiewicz was seeking predominantly business, as opposed to legal, advice when he wrote Ms. Vanderhoff. Accordingly, Defendants should be compelled to produce ADIL18 in unredacted form.

ADIL026 (Exhibit 5): The Attorney-Client Privilege only protects 1. a communication 2. between client and counsel 3. made in confidence 4. for the purpose of obtaining legal advice. See, e.g., *United States v. International Board of Teamsters*, 119 F.3d 210, 214 (2d Cir. 1997). ADIL026 is not between a client and counsel. And because that email was in response to non-lawyer Brett Anderson's notification that “the ‘collab’ from last summer ha[d] resurfaced and it now looks like it is being sold on [LPD's] website,” it cannot be said to have been made “in fur-

¹ Because Defendants designated a number of the documents cited herein as Attorneys' Eyes Only, LPD will file them directly with the Court but not on CM/ECF.

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therance of an investigation undertaken *at the request of counsel*” as adidas claims in its privilege log. This is confirmed by the fact that Mr. Anderson states that adidas “may have to get legal involved” – not that adidas’s legal department was already involved. And even if the investigation was undertaken at counsel’s direction, which is denied, there is nothing to suggest that said investigation was undertaken in anticipation of litigation. Further, ADIL026 clearly does not seek legal advice as no attorney is copied thereon nor is there any proof that said email contains already provided legal advice or impressions. Accordingly, Defendants should be compelled to produce ADIL026 in unredacted form.

ADIL050 (Exhibit 6): The same holds true for ADIL050, so Defendants should be compelled to produce that document in unredacted form.

ADIL0140-141 (Exhibit 7): First, ADIL0140 and 141 were not created “in furtherance of an investigation undertaken *at the request of counsel*” as adidas claims in its privilege log. Instead, they were created to respond to an inquiry from adidas Japan k.k., a legal entity distinct from Defendants here. Second, because the email was from a non-lawyer to a lawyer, it is unclear how it could amount to attorney opinion work product, particularly since no litigation was anticipated at that time. Accordingly, Defendants should be compelled to produce ADIL0104-141 in unredacted form.

(5) *Defendants’ Claims of Privilege – Withheld Emails*: Defendants have impermissibly withheld the 3/16/2015 emails between Jarrett Mann and Jack Gray. Those emails are not between client and counsel and, therefore, clearly do not seek legal advice as no attorney is copied thereon nor is there any proof that said email contains already provided legal advice or impressions. Further, those emails *predate* both (1) non-lawyer Brett Anderson’s April 2015 notification that “the ‘collab’ from last summer ha[d] resurfaced and it now looks like it is being sold on [LPD’s] website” (see, e.g., ADIL026) and adidas Japan’s April 2015 inquiry as to whether adidas had an agreement with LPD for the collaboration (see, e.g., ADIL0113 (Exhibit 8)).

In fact, in light of adidas’s production and the timing of those emails, they could only have been exchanged in connection with the requests of LPD and its distributor, Manha Manha, for letters confirming the legitimacy of the collaboration (ADIL0117, ADIL0901, ADIL0894-ADIL0900, ADIL0129-ADIL0138, and ADIL0189-ADIL0193 (Exhibit 9)), which adidas provided (see, e.g., ADIL091, ADIL02-ADIL04 (*Id.*)). Therefore, it cannot be said that they were created “in furtherance of an investigation undertaken *at the request of counsel*” as Defendants have claimed. Accordingly, Defendants should be compelled to produce ADIL0104-141 in unredacted form.

CONCLUSION

In light of the foregoing, LPD respectfully requests that the Court compel Defendants’ production of the foregoing materials and a revised privilege log.

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Respectfully,

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By: s/ Nathan T. Williams

Nathan T. Williams

CC: All Counsel of Record (via ECF)