UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY,

Plaintiff,

v.

LILLIAN MILLS, *et al.*,

Defendants.

Case No. 1:23-cv-00129-DAE

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO COMPEL RE UT'S PRIVILEGE LOG

REPLY ARGUMENT

1. UT has repeatedly attempted to cover up Jay Hartzell's involvement with the silencing of Richard Lowery

For eight months, UT insisted that President Jay Hartzell never texted Mills or Burris about Richard Lowery's speech, presenting sworn DWQ answers to that effect. *See* ECF No. 31-2 at 8; ECF No. 31-3 at 4. Now UT reveals that Hartzell initiated a text chain with Mills and Burris on August 5, 2022, a week before those Defendants met with Carlos Carvalho and asked him to stop Lowery from speaking about Hartzell and Civitas Institute. ECF no. 61-1 at 5; ECF No. 8-2 at 3-4; *see* ECF Nos. 14-1 at 2 (Mills: "Dean Burris and I discussed with Dr. Carvalho… several incidents of Dr. Lowery's disruptive conduct."); 14-2 (Burris: "I did state, however, that Dr. Lowery was making false statements about the University and disparaging some of its employees, including President Jay Hartzell…"). Contrary to UT's argument—unsupported by declaration or other admissible evidence—that the failure to reveal the Hartzell text was due to a memory lapse (ECF No. 61 at 2-3 n. 1) by Mills and Burris, the omission is not a minor mistake. It is no coincidence that Hartzell texted Mills and Burris a week before they met with Carvalho, and UT's attempts to downplay the significance of the text must be viewed in the context of UT's pattern of hiding Hartzell's involvement in this case. Communications addressed to administrators and lawyers are presumptively non-privileged.

When a corporation "simultaneously sends communications to both lawyers and non-lawyers, it usually cannot claim that the primary purpose of the communication was for legal advice" because "the communication served both business and legal purposes." *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 805 (E.D. La. 2007); *see also* ECF no. 61-1 at 5-6. Here, Hartzell's text chain was a discussion among top administrators about "media coverage" of the Civitas Institute, which allegedly referred to legal advice provided to Hartzell days earlier.

ECF No. 61-2, ¶¶ 5-6. The Rosen email circulated "draft talking points including input from counsel," prepared so statements responding to syllabus inquires "would accurately represent [UT's] policies." ECF No. 61-2, ¶¶ 7-8; ECF No. 61-1 at 5.

2. Mixed communications containing some legal advice should be reviewed in camera and sparingly redacted

At best, UT's description suggests the Hartzell text and the PR talking points might be mixed business and legal communications, so that explicit advice (or the seeking of advice) would be redacted but the rest of the communication produced. Because in-house counsel give operational as well as legal advice, courts in the Fifth Circuit have "increased the burden that must be borne by the proponent" when—as here—communications are with in-house counsel. *Vioxx*, 501 F. Supp. 2d at 797, 799 (citations omitted); *see also* The Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 111-12 (2016) (describing the "additional scrutiny" on in-house communications). UT must make *"a clear showing* that the communication was *primarily* to render legal advice." *Chemtech Royalty Assocs., L.P. v. United States*, No. 05-944-BAJ-DLD, 2010 U.S. Dist. LEXIS 150890, at *22 (M.D. La. Sep. 23, 2010) (emphasis added).

UT has not met its burden. According to UT's self-serving characterization, these communications mixed law with business. *See BDO*, 876 F.3d at 696 ("where there is a mixed discussion of business and legal advice," courts glean "the manifest purpose"). These were group communications mostly between non-lawyers. ECF No. 61-1 at 4-5. The thread was primarily non-lawyer leaders deciding how to respond to media coverage and likely instructing underlings: unprivileged communications.

3. If Hartzell's text asked Mills or Burris to take action or conveyed Hartzell's decision about Lowery then it must be disclosed

"[W]hen a corporate executive makes a decision after consulting with an attorney, his decision is not privileged whether it is based on that advice or even mirrors it." *Vioxx*, 501 F. Supp. 2d at 805. Hartzell initiated the text chain here, ECF no. 61-1 at 5, and any portions not explicitly seeking or giving legal advice are subject to disclosure. Even UT does not assert Hartzell sought legal advice in the text.[1] But UT nonetheless claims that the whole thread should be withheld. The only way to sort this out is for the Court to review the text thread in camera.

"[R]esolving privilege challenges almost always requires the *in camera* examination of the documents," because logs are usually "of little value when trying to determine the accuracy of either the factual or legal basis" for the privilege. Sedona Conference, *supra*, at 103. With only a few documents at issue, review is "a relatively costless and eminently worthwhile method" for evaluating UT's privilege claim. *United States v. Bollinger Shipyards*, Inc., No. 12-920, 2015 U.S. Dist. LEXIS 48175, at *11 (E.D. La. Apr. 13, 2015) (citation omitted). If some discrete portion of the thread sought or gave legal advice, it can be redacted. But if an attorney advised Hartzell at some point before he sent the text, that does not make his opinions, directives, or decisions reflected in that text privileged.

4. The fact that a lawyer advised on the PR talking points does not make them privileged

The Rosen email and its attachment are not privileged just because counsel gave "input." Lawyers give input on many things—business, law, public relations—and their legal input is (sadly) sometimes ignored, wholly or in part. Administrators

[1] Mills (not Hartzell) eventually sought legal advice, and she did this only after texts had been exchanged for a while. *See* ECF No. 61 at 4; ECF No. 61-1 at 4.

make UT's day-to-day operational decisions, not lawyers. Nor may UT conceal its operational activities by seeking legal advice about those activities.

A document "prepared for simultaneous review by non-legal as well as legal personnel" is unprivileged. *Brooks v. Mid-America Apartment Cmtys.*, Inc., No. A-14-CV-1049-LY, 2016 U.S. Dist. LEXIS 75395, at *15 (W.D. Tex. June 9, 2016). If a corporation "take[s] a document and attachment that are privileged . . . and then subsequently send[s] the same document and attachment to other corporate personnel for non-legal purposes," the "subsequent conveyance" is unprivileged. *Vioxx*, 501 F. Supp. 2d at 809-10. The talking points may have included legal input—mixed with educational policies and PR advice—but Rosen sent the document so that fundraisers and administrators could better respond to inquiries from angry donors. And the talking points—far from confidential—circulated widely for non-legal purposes. *See* ECF No. 60-7.

UT has not met its burden of clearly showing these mixed communications were primarily legal advice. But as they may have included some legal advice, Plaintiff proposes this Court review them to determine if redactions are necessary.

5. UT's amended log resolves Lowery's concerns about the 2021 emails

UT's original privilege log described six emails (documents 1-6) in a conclusory manner. Lowery agrees that UT's amended log sufficiently describes those documents. The status of the 2022 documents must still be resolved by this motion.

6. UT's president and administrators cannot conceal that they sought legal advice about Lowery's speech, when, and from whom

In refusing to provide customary information about allegedly privileged communications, UT advances the astounding argument that its leaders may hide whether and when they sought legal advice about Lowery. ECF No. 61 at 6. But

"foundational questions as who was present, when did the communication take place, where did it take place, what if anything was said to establish the request for legal advice" are not privileged, nor is the subject matter or purpose of the communication. Edna Epstein, *The Attorney-Client Privilege and Work-Product Doctrine,* at 125-29 (2017; 6th ed.); *see also, e.g.*, *Amco Ins. Co. v. Madera Quality Nut LLC,* No. 1:04-cv-06456-SMS, 2006 U.S. Dist. LEXIS 21205, at *57 (E.D. Cal. Apr. 10, 2006); *In re Bank of La./Kenwin Shops Contract Litig.,* CIVIL ACTION NO. MDL 1193 SECTION "K" (1), 1999 U.S. Dist. LEXIS 12717, at *8 (E.D. La. Aug. 12, 1999). We know only that Cochran-McCall gave some "legal advice" regarding Lowery and the First Amendment before Aug. 5, 2022. ECF No. 61-1.

Lowery is entitled to know who requested that advice, whom she advised, how many times, and when, even if the specific content of that advice may be privileged. A fulsome answer to this interrogatory would probably show what Lowery has been alleging all along—that Jay Hartzell was involved. UT may not continue to conceal Hartzell's involvement in setting the events of this lawsuit in motion by refusing to provide foundational facts about supposedly privileged communications.

Conclusion

Plaintiff's motion should be granted as to 2022 communications and the interrogatory answers.

Respectfully submitted,

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