

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X



**INTERNATIONAL CARDS COMPANY, LTD.,**

**Plaintiff,**

**13-CV-02576 (LGS)(SN)**

**-against-**

**ORDER**

**MASTERCARD INTERNATIONAL INC.,**

**Defendant.**

-----X

**SARAH NETBURN, United States Magistrate Judge:**

On July 24, 2014, the plaintiff, International Card Company, Ltd. (“ICC”), filed a letter challenging the sufficiency of the privilege log produced by the defendant, MasterCard International Inc. (“MasterCard”). In its July 30, 2014 order, the Court instructed the parties to each identify 10 documents as exemplars for the Court’s *in camera* review and to file letters setting forth their positions as to MasterCard’s privilege assertions and the adequacy of the privilege log. On August 1, MasterCard filed a letter informing the Court that, since ICC filed its July 24 letter, MasterCard had provided ICC with a revised privilege log and the parties had conferred regarding some of the disputed documents. As a result of the meet and confer, the parties resolved the specific issues raised by ICC regarding MasterCard’s privilege log, but did not resolve the dispute as to MasterCard’s assertion of attorney-client privilege and work product protection. On August 6, 2014, MasterCard submitted to the Court the 20 exemplar documents, in both redacted and unredacted form where applicable, along with its letter setting forth its basis for withholding or redacting the documents. MasterCard also provided to ICC the redacted

versions of the 10 documents ICC identified for *in camera* review. On August 7, 2014, ICC filed its letter objecting to MasterCard's assertions of privilege.

## LEGAL STANDARDS

### I. Attorney-Client Privilege

The purpose of the attorney-client privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” Upjohn Co. v. United States, 449 U.S. 383, 393 (1981); see also In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983, 731 F.2d 1032, 1036 (2d Cir. 1984). Because the privilege “stands in derogation of the public’s right to every man’s evidence . . . it ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.” In re Grand Jury Proceedings, 219 F.3d 175, 182 (2d Cir. 2000) (internal quotation marks and citation omitted).

The attorney-client privilege applies to “(1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential and (3) was made for the purpose of obtaining legal advice.” In re Cnty. of Erie, 473 F.3d 413, 419 (2d Cir. 2007); see also United States v. Mejia, 655 F.3d 126, 132 (2d Cir. 2011).<sup>1</sup> The party asserting the privilege bears the burden of establishing facts to prove “the essential elements of the privileged relationship.” In re Grand Jury Subpoena Dated Jan. 4, 1984, 750 F.2d 223, 224-25 (2d Cir. 1984). “The privilege

---

<sup>1</sup> An alternative articulation of the attorney-client privilege states:

(1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, 119 F.3d 210, 214 (2d Cir. 1997) (quotation marks and citation omitted); see also Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers LLP, 03 Civ. 5560 (RMB)(HBP), 2007 WL 473726, at \*7 (S.D.N.Y. Feb. 14, 2007).

protects not only the advice of the attorney to the client, but also the information communicated by the client that provides a basis for giving advice.” United States v. Ghavami, 882 F. Supp. 2d 532, 536 (S.D.N.Y. 2012).

The question of whether communications are protected by attorney-client privilege can be “complicated . . . by the fact that the attorney involved is in-house counsel,” and “is further muddled [when] . . . that in-house counsel is merely copied on [the emails at issue].” Varughese v. Mount Sinai Med. Ctr., 12 Civ. 8812 (CM)(JCF), 2014 WL 349698, at \*2 (S.D.N.Y. Jan. 31, 2014). Because the attorney-client privilege applies to legal advice only, and not business advice, “the question [concerning in-house attorneys] usually is whether the communication was generated for the purpose of obtaining or providing legal advice as opposed to business advice.” In re Cnty. of Erie, 473 F.3d at 419; see also Complex Systems, Inc. v. ABN AMRO Bank N.V., 279 F.R.D. 140, 150 (S.D.N.Y. 2011). A document may be privileged as an attorney-client communication when “the predominant purpose of the communication is to render or solicit legal advice.” In re Cnty. of Erie, 473 F.3d at 420. “Moreover, even 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.” Complex Systems, Inc., 279 F.R.D. at 150 (internal quotation marks and citation omitted).

With some exceptions, the attorney-client privilege is automatically waived when a privileged communication is disclosed to a third party or litigation adversary. See Ricoh Co., Ltd. v. Aeroflex Inc., 219 F.R.D. 66, 70 (S.D.N.Y. 2003); Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers LLP, 03 Civ. 5560 (RMB)(HBP), 2007 WL 473726, at \*2 (“The attorney-client privilege is not absolute, however, and may be waived through, among other things, the voluntary disclosure of a privileged communication to a third party, especially a

litigation adversary.”) (collecting cases). A corporate entity’s attorney-client privilege can also be waived by disclosure of the communication to employees of the corporation who are not in a position to act or rely on the legal advice contained in the communication. See JA Apparel Corp. v. Abboud, 07 Civ. 7787 (THK), 2008 WL 111006, at \*2 (S.D.N.Y. Jan. 10, 2008) (“[I]f McMullen is a low-level employee to whom the legal advice in the Cowan Memo would have had no significance, his presence [at the board meeting where the memo was disclosed] may have constituted a waiver of the privilege.”); E.B. v. New York City Board of Educ., 2002 Civ. 5118(CPS)(MDG), 2007 WL 2874862 at \*4 (E.D.N.Y. Sept. 27, 2007) (“Courts determining whether dissemination of a document to employees amounts to a waiver of an entity’s attorney-client privilege apply a need to know standard: did the recipient need to know the content of the communication in order to perform her job effectively or to make informed decisions concerning, or affected by, the subject matter of the communication?”) (internal quotation marks omitted).

## **II. Work Product Doctrine**

The work product doctrine is set forth generally in Federal Rule of Civil Procedure 26(b)(3)(A), which states:

Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But . . . those materials may be discovered if: (i) they are otherwise [within the scope of discovery] under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

See also Hickman v. Taylor, 329 U.S. 495 (1947) (establishing and articulating the application of the work product doctrine). Courts have summarized Rule 26(b)(3)(A) as setting forth three requirements for work product protection to apply: “The material must (1) be a document or

tangible thing, (2) that was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by or for his representative.” SEC. v. Yorkville Advisors, LLC, \_\_\_ F.R.D. \_\_\_, 2014 WL 2208009, at \*6 (S.D.N.Y. May 27, 2014) (quoting In Re Grand Jury Subpoenas Dated December 18, 1981 & January 4, 1982, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982)). The party asserting the privilege has the burden of proving that the contested documents are protected by the work product doctrine. See Kingsway Fin. Servs., Inc., 2007 WL 473726, at \*4.

When a party withholds a discovery document on the basis of either work product or attorney-client privilege, the Local Rules in this district require that the party provide complete identifying information, date, type of document, and subject matter in a privilege log at the time the party responds to discovery. Dey, L.P. v. Sepracor, Inc., 07 Civ. 2353 (JGK)(RLE), 2010 WL 5094406, at \*2 (S.D.N.Y. Dec. 8, 2010) (citing Local Civil R. 26.2(c)).

## DISCUSSION

ICC identified 10 exemplar documents comprising two categories: emails (Docs. 89, 93.1, 105, 565, 710.1) and internal records and reports (Docs. 138, 189, 246, 260, 645). MasterCard identified 10 exemplar documents, all consisting of emails. (Docs. 300-309). All 20 of the exemplar documents to some extent involve MasterCard’s in-house attorneys, who represent multiple legal departments (e.g., attorneys in the Litigation Department are distinguished from Regional Counsel, and several documents make reference to the Legal Department).

### I. ICC’s Exemplars

MasterCard provided ICC with versions of the 10 identified documents with redactions ranging from the entire document (e.g., Docs. 105, 138, 710.1) to a few sentences (e.g., Doc. 246). Some of these documents contain redactions that were agreed upon by both parties. (See

Docs. 189, 246, 260, 645.) As an initial matter, the Court notes that several of the allegedly privileged exemplar documents were disclosed to or prepared by various MasterCard employees, including high-ranking corporate officers but also including at least nine people identified only as a “MasterCard employee.” (Doc. No. 52-2.) Nevertheless, the Court lacks sufficient information to evaluate whether these disclosures constitute waiver, and waiver has not been asserted by ICC. *Cf. JA Apparel Corp.*, 2008 WL 111006, at \*2 n.1 (“[I]n the context of the attorney-client privilege, . . . the weight of authority suggests that the burden of showing a waiver rests with the opponent of the privilege.”). Thus, the Court does not consider the issue of waiver on this ground.

**A. Emails**

Regarding the email category of ICC’s exemplars, the Court finds that none of the documents, each of which contains multiple emails, is privileged such that any document may be withheld in its entirety. Generally, these documents are not privileged because the predominant purpose of each document as a whole was not to render or solicit legal advice, but rather to discuss or advise on business matters. Additionally, none of the emails in the five documents was prepared in anticipation of litigation. At the time the emails were sent, ICC was a “customer” or “member” of MasterCard. These emails discuss ICC in the context of this business relationship, not in the context of ICC as a potential legal adversary. The emails thus cannot be protected by the work product doctrine. Specific emails or portions of emails, however, do constitute attorney-client communications because they contain legal advice. This advice is in the context of MasterCard’s ongoing business relationship with ICC, not in the context of prospective litigation. Thus, certain emails and sections of emails may be redacted, as elaborated below.

Document 89: The first email in this email chain was sent on February 23, 2012, by Khalil M. Alami, ICC's Chief Executive Officer, to Jenifer D'Souza, MasterCard's Program Leader in the Customer Risk Management Department, attaching a letter from ICC. D'Souza drafted a response letter to ICC, which is the subject of the remaining emails in Document 89. D'Souza sent her draft response in the body of an email to Chun Keat Then, identified by MasterCard only as a "MasterCard employee" in the privilege log MasterCard created for the purposes of this *in camera* review. (Doc. No. 52-2). D'Souza's draft letter to ICC contains financial assessments and informs ICC that its delay in paying merchants is exposing "MasterCard to a substantial amount of brand risk" and is in violation of "MasterCard's policies and procedures." (Doc. 89 at 9.)<sup>2</sup> D'Souza refers in her email to a separate letter that was to be issued to ICC by MasterCard's Legal Department. After Chun Keat Then approved D'Souza's letter, she emailed it on February 27, 2012, to Lucas Sork, MasterCard's Regional Counsel, Middle East and Africa. D'Souza wrote that she wanted to talk with Sork before she sent the response letter to ICC. Later that day, D'Souza emailed Sork, stating that, based on their discussion, she had revised the letter, the text of which she pasted in the email. D'Souza copied three businesspeople<sup>3</sup> on the email, including Shaun Rashid, who replied later that night with changes that should be made to the letter. On March 13, 2012, Sork attached "a draft legal letter to ICC" to an email sent to D'Souza and several other businesspeople. (Doc. 89 at 5-6.) In the body of the email, Sork made a suggestion regarding timing. The next email from Sork was sent on March 14, 2012, to two MasterCard employees in the Franchise Department. Sork attached the draft letter to ICC for the Franchise Department's approval and queried whether the letter

---

<sup>2</sup> Unless the exemplar document contains a Bates number, the Court's citations to specific page numbers are in relation to the full document, *i.e.*, page 9 of Document 89 refers to the ninth page of the PDF.

<sup>3</sup> "Businesspeople" or "businessperson" in this order refers to any MasterCard employee who is not an in-house attorney.

should be issued by the Franchise Department instead of the Legal Department. The remainder of the emails in Document 89 consist of Sork and various businesspeople discussing which department should issue the letter.

The Court finds that portions of Document 89 are protected by the attorney-work privilege because they are communications sufficiently related to D'Souza's request for Sork's legal advice. The predominantly legal nature of Sork's advice is evident from the revisions D'Souza made to the ICC response letter after she conferred with Sork. MasterCard may therefore redact the following portions of Document 89: the sentence following "Can you please advise . . ." and preceding "Regards" in Sork's email on page 2, all of page 5, the text above Shaun Rashid's email on page 6, all of page 7, and the text above Chun Keat Then's email on page 8. The remainder of Document 89 predominantly concerns business advice and is thus not protected by attorney-client privilege. And because this document was not prepared in preparation of litigation, but rather to address ICC as an existing customer, the work product privilege does not apply. Based on this same rationale, the work product doctrine cannot apply to any of the documents contained in ICC's 10 exemplars.

Document 93.1: These emails sent on April 15 and 16, 2012, are related to MasterCard's decision to impose a collateral penalty on ICC in response to the complaints MasterCard received from merchants. Some of the emails in Document 93.1 involve Sork's advice regarding the proper fee that should be demanded as a penalty in light of MasterCard's rules and policies. The Court construes this as legal advice protected by the attorney-client privilege because Sork's analysis of MasterCard's internal rules and determination of the parameters of a potential penalty were legal in nature. MasterCard may redact the following portions of Document 93.1: the second sentence in D'Souza's email on the bottom of page 5 (following the sentence, "I've

attached a draft copy. . . .”), the email from Sork on page 6, and all of page 7. The remainder of Document 93.1 refers primarily to business matters involving penalizing ICC and is thus not protected by attorney-client privilege. These communications are in reference to MasterCard’s penalization of ICC based on its own rules; it does not refer to legal action against ICC.

Document 105: This email was sent from a businessperson to 11 businesspeople and one in-house attorney. It concerns a future meeting at which the participants planned to discuss items including “business strategy in regards to ICC” and the “financials of ICC.” Document 105 is predominantly a business document that does not evince any legal advice or legal matters. Therefore, Document 105 is not privileged and must be produced in its entirety.

Document 565 and Document 710.1: These emails were sent to and from businesspeople who copied Sork and others in the “cc” field. Document 565 contains draft terms between MasterCard and a MasterCard member regarding the business benchmarks that the member must meet to receive different levels of support, e.g., rebates. Document 710.1 is an “update on ICC merchant issues” regarding ICC’s payment delays and complaints from merchants and includes steps being taken toward potentially “winding down [ICC’s] acquiring business.” These topics are discussed between businesspeople as business matters only, and any legal advice reflected is too remote and ambiguous to satisfy the purpose of the attorney-client privilege. Documents 565 and 710.1 are predominantly business communications sent from one businessperson to other businesspeople, with multiple other businesspeople and one in-house attorney copied in the “cc” field. “A corporation cannot be permitted to insulate its files from discovery simply by sending a ‘cc’ to in-house counsel.” In re Grand Jury Proceedings, M 11–189, 2001 WL 1167497, at \*24 n. 41 (S.D.N.Y. Oct. 3, 2001) (quoting U.S. Postal Service v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 163-64 (E.D.N.Y. 1994)). MasterCard has not satisfied its burden of showing that

these emails seek or reflect legal advice. Documents 565 and 710.1 are therefore not privileged and must be produced without redaction.

**B. Internal Records and Reports**

Document 138: This document consists of minutes from a March 19, 2013 conference call attended by 11 MasterCard employees, including in-house attorneys Sork and Hiang Choong, Regional Counsel, Singapore. The topic of the conference call was the potential suspension or termination of ICC's license as a MasterCard member. The minutes include a brief summary of discussions held by a "working group" comprised of representatives from MasterCard's Franchise Department, Customer Risk Management Department, Customer Support Department, and Legal Department. Almost all of Document 138 concerns business matters and reflects predominantly business advice; it is thus not privileged. One paragraph, however, summarizes legal advice provided by an in-house attorney and thus constitutes a privileged attorney-client communication. Cf. In re Currency Conversion Fee, MDL 1409, 2003 WL 22389169, at \*3 (S.D.N.Y. Oct. 21, 2003) (finding a summary of in-house counsel's legal advice written by a non-lawyer employee privileged because it "characterizes legal advice sought and obtained by a[n] . . . employee"). MasterCard may redact the second paragraph from the bottom of the first page, consisting of three lines immediately below the bullet points.

Documents 189, 246, and 260 are MasterCard's "Watch List" Overview PowerPoint Presentations, which are prepared by businesspeople on a regular basis. It is not clear who receives these presentations, and MasterCard only identifies the author of Document 189 (Jennifer Jennings, Business Leader, Franchise Development Customer Risk Working Group). The author of Documents 246 and 260 is identified as "Administrator." MasterCard seeks limited redactions of these documents.

Document 189: MasterCard seeks to redact two paragraphs on the last page, Bates numbered M0103313. The Court finds that two sentences in this document constitute a summary of an in-house attorney's legal advice and thus may be redacted. MasterCard may redact the two sentences following "CRM is closely following up with all parties" and preceding "ICC's latest audited financials . . . ." The remainder this paragraph and the subsequent paragraph do not summarize legal advice or strategy, but rather provide a factual narrative of business decisions and broadly describe the Legal Department's current activity (e.g., "working on a response letter to ICC"). Especially given that this document predominantly concerns business matters and was prepared by a businessperson for an unidentified audience, the Court does not interpret "the predominant purpose" of these factual, non-substantive updates as rendering, soliciting, or reflecting legal advice. In re Cnty. of Erie, 473 F.3d at 420; see id. at 418 ("[W]e construe the [attorney-client] privilege narrowly . . . ; we apply it only where necessary to achieve its purpose.") (internal quotation marks omitted). Therefore, other than the two sentences identified above, Document 189 must be produced without redactions.

Document 246: MasterCard seeks to redact a paragraph on page M0104552 and a paragraph on page M0104553 of Document 246. The paragraph on page M0104552 summarizes the topics of a conference call in which multiple departments, including Legal, participated. This paragraph does not reflect legal advice or strategy and thus may not be redacted. The paragraph on page M0104553 describes letters drafted by the Legal Department and circulated to other business departments for review. The first sentence of this paragraph is a factual statement by a non-lawyer regarding letters drafted by in-house counsel. This sentence does not reflect legal advice and may not be redacted. The next two sentences describe the substance of the two letters drafted by the Legal Department. While these sentences may constitute legal advice and thus

may be privileged, the Court finds that MasterCard has waived any potential privilege. In the redacted version of Document 645 that MasterCard produced to ICC, MasterCard did not redact any text from the “Actions Planned and Timeline” section of the October 26, 2012 entry on page M0102062. The first action point contains identical information regarding the substance of the two letters drafted by the Legal Department that MasterCard seeks to redact in Document 246. Thus, while the attorney-client privilege may apply here, it has been waived by MasterCard’s disclosure of the communication to ICC. See Kingsway Fin. Servs., Inc., 2007 WL 473726, at \*2. The final sentence in the paragraph appears to be the author’s statement regarding the steps MasterCard will take against ICC if necessary after the actions described in the two letters. It reflects a business decision, not legal advice, and thus is not privileged. Therefore, because the attorney-client privilege either does not apply or has been waived, Document 246 must be produced with no redactions.

Document 260: MasterCard seeks to redact all text in the “March Status” section of the entry regarding ICC on pages M0104814 and M0104815. These paragraphs summarize a conference held by the working group. In-house attorneys participated in this working group, but the discussions summarized in Document 260 are predominantly of a business nature. There is no indication that this communication reflects legal advice. Document 260 therefore is not protected by the attorney-client privilege and must be produced with no redactions.

Document 645: This document is a spreadsheet prepared by a businessperson (Ian Webb, Group Head, Customer Risk Management); it contains status updates regarding MasterCard’s member companies, including ICC. MasterCard seeks to redact almost all entries regarding ICC that mention the Legal Department. Most of these entries are simply records of the fact that a meeting was held or scheduled among several departments, including Legal. The redactions

sought by MasterCard here would render all meetings attended by an in-house attorney off-limits for discovery purposes due to the attorney-client privilege. For example, the Status Update section for the 11/09/12 entry on page M0102062 contains redacted information that is very similar to the non-redacted information in other entries, such as those for 11/02/12 and 10/26/12. The basis for the redaction thus appears to be the language, “Call with Franchise, Legal, CRM, Business including the Asst. Treasurer, scheduled on 07th Nov[.]” There is no justification for applying a blanket privilege to every portion of a communication that mentions the Legal Department. The Court, however, finds that one entry in Document 645 does reflect legal advice and may thus be redacted. For the 5/11/12 entry on page M0102063, MasterCard may redact the first paragraph, consisting of two sentences, in the “Status Update” column. The remainder of Document 645 must be produced without redaction.

## **II. MasterCard’s Exemplars**

Documents 300-309 submitted by MasterCard are emails sent during the course of this litigation between businesspeople and in-house attorneys from MasterCard’s Litigation Department. Most of the emails are designated as “Privileged and Confidential” or “Attorney Work Product,” and some of the emails include MasterCard’s outside counsel. ICC did not address these documents in its August 7, 2014 letter.

MasterCard has established that these emails are communications with counsel soliciting or rendering legal advice and strategy regarding this litigation and that they were intended to be confidential. These emails were written by counsel or a party regarding this case. Therefore, Documents 300-309 are protected under either the attorney-client privilege or the work product doctrine and thus may be withheld from MasterCard’s discovery production.


### CONCLUSION

For the above reasons, the Court finds that Documents 300-309 are privileged and may be withheld in their entirety. No other exemplar documents may be withheld entirely.

MasterCard may produce the documents identified in this order with the redactions as directed above. The Court takes no position as to whether any documents, in whole or in part, are appropriate to produce under the parties' March 5, 2014 Stipulated Confidentiality Agreement and Protective Order.

MasterCard is directed to review the documents it has withheld or redacted and to produce all documents that do not contain communications seeking or reflecting direct legal advice from in-house attorneys in accordance with the guidance in this order. Documents shared with in-house attorneys are not presumptively privileged, nor are documents arising from conferences at which in-house attorneys were present. A business document vetted by the Legal Department is unlikely to be privileged, while a communication from the Legal Department containing advice as to the document is likely to be privileged. With respect to the work product doctrine, the Court has not reviewed any documents originating before this lawsuit that satisfy the requirement of being prepared in anticipation of litigation. If MasterCard seeks to withhold documents on this ground that were prepared before the complaint was filed in this case, there must be a showing that the documents were prepared in anticipation of litigation, not in anticipation of business actions taken against ICC as a member pursuant to MasterCard's own internal rules and policies.

**SO ORDERED.**

  
\_\_\_\_\_  
SARAH NETBURN  
United States Magistrate Judge

DATED: New York, New York  
August 27, 2014