E-FILED
7/18/2017 3:09 PM
CLERK & MASTER
DAVIDSON CO. CHANCERY CT.

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

COVENANT DOVE, LLC,	)	
	)	
Plaintiff and Counter-Defendant,	)	
	)	
VS.	)	**NO. 16-0541-BC**
	)	
PHARMERICA CORPORATION,	)	
	)	
Defendant and Counter-Plaintiff.	)	

MEMORANDUM AND ORDER: (1) DENYING PHARMERICA'S MOTION TO COMPEL AND (2) HOLDING IN ABEYANCE POTENTIAL SANCTIONS

This case is before the Court on *PharMerica's Motion To Compel Production Of Unprivileged Documents*. In issue in Defendant's motion is a privilege log prepared by the Plaintiff. The Defendant seeks an order from this Court that all documents listed on the Plaintiff's privilege log shall be promptly produced. The grounds asserted for production are that "one or more individuals listed on the privilege log" have been determined by the Defendant to "actually [be] employed by a third party consultant, Health Care Navigator, LLC. As a result of their inclusion on these communications, the communications are not protected from disclosure by the attorney-client privilege." *PharMerica's Motion to Compel Production of Unprivileged Documents*, June 19, 2017, at 1. An alternative basis for ordering production is "alleged substantive deficiencies: the entries lack sufficient information to determine whether a privilege even arguably applies. None of the entries indicates that legal advice was provided or that information

was sought to provide legal advice." *Memorandum In Support Of Motion To Compel Production Of Unprivileged Documents*, p. 6 (June 19, 2017).

After considering the law, arguments of Counsel and the record, it is ORDERED that the Defendant's *Motion To Compel* is denied because: (1) Plaintiff's consultant, Health Care Navigator ("HCN"), constitutes an "insider" to whom the attorney-client privilege applies and therefore the documents are protected by the attorney-client privilege and are not discoverable; and (2) the Declaration of Raymond Mulry, filed by the Plaintiff, provides sufficient information to establish that each of the documents is protected by the attorney-client privilege.

It is further ORDERED that it appears that the designations of HCN employees on the privilege log as "Plaintiff's Associate General Counsel" and "in-house counsel" instead of providing HCN's identity and the nature of its work was sharp practice, and the failure of the Plaintiff to be forthright may warrant the imposition of the sanction of the Plaintiff paying attorneys fees for the unnecessary cost of Defendant preparing, filing and replying on part of the Motion. A determination of whether sanctions should be imposed and the amount shall be held in abeyance until the conclusion of the lawsuit.

The bases for the Court's ruling are as follows.

Parties' Positions

In support of its *Motion to Compel*, PharMerica argues that:

> The privilege log does not include sufficient information to comply with Tennessee law. The log also appears to be incomplete in that additional documents have been withheld for alleged privilege but not listed on the

> log, likely due to Plaintiff's counsel unilaterally implementing search terms for certain custodians in order to find privileged documents, as opposed to finding all responsive documents and *then* reviewing and withholding any document that, in fact, contains attorney-client communications protected by the privilege. Furthermore, *all* of the documents on the privilege log include communications with individuals employed by a third party, which breaks and/or waives any privilege that would otherwise exist.

Memorandum In Support Of Motion To Compel Production Of Unprivileged Documents, p. 1 (June 19, 2017).

In the *Plaintiff's Opposition To Defendant's Motion To Compel Production Of Unprivileged Documents*, the Plaintiff argues that the Plaintiff's "[p]rivilege log provides sufficient descriptions to support its claim of attorney-client privilege. Indeed, the descriptions on [the Plaintiff's] Privilege Log are similar to the descriptions on PharMerica's Privilege Log." *Plaintiff's Opposition To Defendant's Motion To Compel Production Of Unprivileged Documents*, p. 3 (June 30, 2017).

In opposition to the PharMerica's argument that attorney-client privilege was waived because the documents were disclosed to Health Care Navigator, LLC ("HCN"), a third-party consultant, the Plaintiff relies on two Tennessee cases for the legal proposition that HCN is not a true "third-party" within the context of the attorney-client privilege, but rather is an agent of the Plaintiff.

> HCN is contracted – much as an outside law firm would be – to provide legal advice to [the Plaintiff]. HCN is thus an *agent* of [the Plaintiff], not a third party as PharMerica contends. *See Smith County Educ. Ass'n v. Anderson*, 676 S.W.2d 328, 333 (Tenn. 1984) (presence of a professional negotiator at a meeting between a local school board and its attorney did not obviate the privilege because, "[w]hen the third party in whose presence such [privileged] communications take place ***is an agent of the client***, the confidentiality is not destroyed"); *see also Jones v. Nissan N. Am., Inc.*, No. 3:07-0645, 2008 WL 4366055, at *7 (M.D. Tenn. Sept. 17, 2008) (presence

> of a non-employee medical director in meeting with company's in-house and outside trial counsel did not waive privilege where non-employee medical director was custodian of company's medical records, including medical restrictions for plaintiff employee, as medical director had a "significant relationship" to company's employment dispute with plaintiff). These cases support a finding that confidential communications between [the Plaintiff] and HCN in which [the Plaintiff] employees seek legal advice are privileged.

Plaintiff's Opposition To Defendant's Motion To Compel Production Of Unprivileged Documents, pp. 7-8 (June 30, 2017) (emphasis in original).

In *Reply* to the Plaintiff's argument, PharMerica argues that HCN "is not a law firm and therefore is forbidden from providing legal advice" and even if permitted to provide legal advice, the necessary agency relationship was not formed between HCN and the Plaintiff to apply the attorney-client relationship.

> Despite having claimed on its privilege log that all attorneys listed on the log were "in house counsel," Plaintiff now admits that all attorneys listed are actually employees of a third party consulting company, Health Care Navigator. Plaintiff nevertheless claims that its conversations with Health Care Navigator's attorneys are attorney-client privileged because Health Care Navigator is allegedly "contracted – much as an outside law firm would be – to provide legal advice to Orianna" and this contract with Health Care Navigator is allegedly "no different than a relationship between outside counsel … and a corporate client." There are a number of problems with this argument, beginning with the fact that Health Care Navigator *is not a law firm* and could not legally form an attorney-client relationship with Plaintiff. In addition, the contract Plaintiff alleges creates this attorney-client relationship does not appear intended to create an attorney client relationship at all; rather, it appears more consistent with an entity providing administrative "legal services" rather than legal advice. A review of this contract makes clear that Plaintiff did not *and could not* have formed an attorney-client relationship with Health Care Navigator, and therefore none of Plaintiff's communications with Health Care Navigator are privileged.

****

Furthermore, even if Health Care Navigator could legally provide legal advice to Plaintiff, the contract Plaintiff alleges established an attorney-client relationship (Plaintiff's Exhibit 4) never states that an attorney-client relationship is being formed or that legal advice is to be provided under the contract. Instead, the contract states that Health Care Navigator will perform certain "legal services" which appear to be administrative in nature: hiring outside counsel as needed to represent Plaintiff, managing litigation, responding to discovery requests, keeping corporate books and records, monitoring regulatory licensing, evaluating acquisition targets, and responding to surveys. (*See* Pl. Ex. 4 at Ex. E.) Plaintiff's contract is thus consistent with Health Care Navigator providing only those administrative services a non-lawyer may provide, and hiring outside counsel to represent Plaintiff as necessary.

****

Plaintiff admits that the following non-lawyer third parties were included on many communications listed in the log: Arlette Moussa, Julie Gutzmann, and Eric Roth, who are all employees of Health Care Navigator. Plaintiff claims that Health Care Navigator is its agent – despite the contractual language to the contrary which denies agency – and that it can generally have privileged conversations in the presence of an agent without waiving the privilege. The cases Plaintiff cites in support do allow communications in the presence of an agent to occur without waiving the privilege, but only in narrow circumstances that do not appear to apply in this case. In *Smith Cty. Educ. Ass'n v. Anderson*, the Tennessee Supreme Court held that a meeting between public officials, their attorney, and a negotiator was not subject to the Open Meetings Act, because there was an implied exception for attorney-client privileged meetings regarding pending litigation. 676 S.W.2d 328, 335 (Tenn. 1984). Importantly, the negotiator's actions on behalf of the public officials were a subject of the litigation, and the meeting occurred after the litigation was filed. *Id.* at 330. Similarly, in *Jones v. Nissan N. Am., Inc.*, the court held that privilege is not waived when communications are made in the presence of an agent "whose involvement in the matter at issue is so integral as to be considered an 'insider' with respect to communications with the client." No. 3:07-0645, 2008 WL 4366055, at *7 (M.D. Tenn. Sept. 17, 2008). This "insider" reasoning is consistent with *Anderson.* Plaintiff has not shown that any of the communications at issue fit the "insider" criterion, instead arguing that status as an agent completely immunizes the communication from scrutiny. Moreover, the contract with Health Care Navigator states that it is *not* Plaintiff's agent, and thus these cases do not apply. Thus, at minimum, all communications involving Arlette Mousa, Julie Gutzmann, and Eric Roth

> should be produced even if the Court holds there was an attorney-client relationship between Plaintiff and Health Care Navigator's attorneys.

Reply In Support Of PharMerica's Motion To Compel Production Of Unprivileged Documents, pp. 2-3; 4; 6-7 (July 5, 2017).

In addition to arguing waiver, Defendant maintains its position that the privilege log is not only inadequate but also actively mislead PharMerica when it "inexcusably, actively, and without explanation mischaracterized its relationship with the HCN attorneys as that of in-house counsel, both in its privilege log and in its sworn interrogatory responses. This misconduct justifies waiver of the privilege." *Reply In Support Of PharMerica's Motion To Compel Production Of Unprivileged Documents*, pp. 2-3; 4; 6-7 (July 5, 2017).

Subsequently, on July 11, 2017, the Plaintiff filed the Declaration of Raymond Mulry, the General Counsel and a Vice President of HCN, who provides a 10-paragraph explanation of HCN, its work for the Plaintiff, and the categories of communications between HCN and the Plaintiff.

In a July 14, 2017 filing the Defendant asserts that the Mulry Declaration does not cure the deficiencies of the privilege log.

Legal Analysis

In denying the *Motion To Compel*, the Court concludes, from the case law below, that the documents identified on the privilege log are not discoverable because HCN constitutes an "insider" to whom the attorney-client privilege applies. In reaching this

conclusion, the Court has studied the two cases cited by the Plaintiff – *Smith County Educ. Ass'n v. Anderson*, 676 S.W.2d 328 (Tenn. 1984) and *Jones v. Nissan N. Am., Inc.*, No. 3:07-0645, 2008 WL 4366055 (M.D. Tenn. Sept. 17, 2008) – for the proposition that HCN's role was more akin to that of an agent rather than a third party and therefore the attorney-client privilege was not waived.

In *Smith County Educ. Ass'n v. Anderson*, the Tennessee Supreme Court held that the chief negotiator for the Board of Education who had been designated by the Board of Education to negotiate a collective bargaining agreement between the Board of Education and the Smith County Education Association was an "agent" of the Board of Education and as such, his presence in a meeting with the Board of Education and its attorney did not waive the attorney-client privilege:

> The attorney-client evidentiary privilege only extends to communications from the client to the attorney. D. Paine, *Tennessee Law of Evidence,* § 96, p. 111–112 (1974), and confidentiality is destroyed when those communications take place in the presence of a third party. *Hazlett v. Bryant,* 192 Tenn. 251, 257, 241 S.W.2d 121, 123 (1951). The privilege is designed to protect the client and because it belongs to the client, may be waived by him. When the third party in whose presence such communications take place is an agent of the client, the confidentiality is not destroyed. McCormick § 91 (2d ed. 1972); D. Paine, *Tennessee Law of Evidence,* § 97, p. 112 (1974).
>
> When the Board discussed the present lawsuit with its attorney on September 3 and 16, 1982, it did so in the presence of Dr. Fields. As chief negotiator for the Board, Dr. Fields was the Board's agent; therefore, the confidentiality of those communications was not waived by his presence. However, the evidentiary privilege afforded by T.C.A. § 23–3–105 was waived by the passage of the Open Meetings Act.

Smith Cty. Educ. Ass'n v. Anderson, 676 S.W.2d 328, 333 (Tenn. 1984) (emphasis added).

Similarly, in *Jones v. Nissan N. Am., Inc.*, Magistrate John S. Bryant of the Middle District of Tennessee Case, applying federal common law, held that the presence of a doctor who was not an employee of the Defendant did not waive the attorney-client privilege because of the significant relationship and involvement the doctor had with the Defendant client in the transaction that was the subject of the legal services.

> Plaintiff argues that the foregoing inquiries do not seek privileged information or, alternatively, that any applicable privilege for some of this information was waived by Nissan by the presence of Dr. Anne Kubina, an employee of Comprehensive Health Services who, by contract, served as medical director of Nissan's health care facility. (Kerry Dove depo., pp. 6-8).
>
> ****
>
> Although it is generally accepted that disclosure of otherwised privilege communication to a third party constitutes waiver of the attorney-client privilege, this case raises the question whether disclosure to Dr. Kubina, the medical director of Nissan's medical department, albeit employed by Comprehensive Health Services, constitutes a waiver of the privilege. Neither party has offered Sixth Circuit authority on this question, and the undersigned has found such authority to be scanty. Nevertheless, the District Court for the Western District of Tennessee, construing Tennessee privilege law, has held that the attorney-client privilege is not waived by disclosure to a third-party whose involvement in the matter at issue is so integral as to be considered an "insider" with respect to communications with the client. *Royal Surplus Lines Ins. co. v. Sofamor Danek Group, Inc.*, 150 F.R.D. 463, 471-72 (W.D.Tenn.1999). In *Royal Surplus Lines,* the Western District cited with approval *In re Bieter Co.,* 16 F.3d 929 (8th Cir.1994). In *Bieter,* the court held that an independent contractor, not an agent or employee of the client, was so intimately involved with real estate development project that disclosure to him of otherwise privileged documents in the course of confidential communications with counsel did not destroy the privilege. 16 F.3d at 939-40.
>
> Though the nature of the transaction here is markedly different, the undersigned Magistrate Judge finds that Dr. Kubina, as medical director of Nissan's medical clinic and custodian of records of medical restrictions applicable to Nissan employees, had a "significant relationship to the

> [client] and the [client's] involvement in the transaction that is the subject of the legal services." 16 F.3d at 938. Here, the inquiry consisted of the legal implications of medical restrictions mentioned by Chancellor Smith in Mr. Jones's workers compensation case, and their effect, if any, on Mr. Jones' continued employment at Nissan. Dr. Kubina, as medical director, was the custodian of employees' medical records and the repository of information on medical restrictions applicable to Nissan employees. The undersigned Magistrate Judge finds that, under these circumstances, Dr. Kubina's presence during discussions by and among Mr. Coss and Mr. Berger, both in-house counsel to Nissan, and Kitty Boyte, Nissan's trial counsel in the workers compensation case, did not constitute a waiver of the attorney-client privilege.

Jones v. Nissan N. Am., Inc., No. 3:07-0645, 2008 WL 4366055, at *6–7 (M.D. Tenn. Sept. 17, 2008), *aff'd*, No. 3:07-0645, 2008 WL 5114652 (M.D. Tenn. Dec. 2, 2008) (footnotes omitted).

Although both of these cases are factually distinguishable as pointed out by PharMerica, significant to the Court is the principle of law that is cited to with authority and applied in both *Jones v. Nissan N. Am., Inc.* and *Smith Cty. Educ. Ass'n v. Anderson*, 676 S.W.2d 328, 333 (Tenn. 1984). The rule of law cited and applied in both decisions is that when a third party in whose presence otherwise privileged communications take place is either an "agent of the client" or "so integral as to be considered an 'insider' with respect to communications with the client" the confidentiality of such communications is not destroyed and the attorney-client privilege applies to prevent disclosure. In applying this principle of law to the facts of this case, the Court studied, in particular, the case of *Royal Surplus Lines Ins. v. Sofamor Danek Grp.*, 190 F.R.D. 463 (W.D. Tenn. 1999) cited with authority in *Jones v. Nissan N. Am., Inc.*

In *Royal Surplus Lines Ins. v. Sofamor Danek Grp.*, the Court discussed in detail the attorney-client privilege as it relates to the presence of a third-party. 190 F.R.D. 463, 469 (W.D. Tenn. 1999). In that case, the third-party was an insurance broker hired by the Defendant who helped negotiate an insurance policy with the Plaintiff. *Id.* at 467. At issue on the motion to compel was the Plaintiff's claim that it was entitled "to discover documents generated by [the third party] before, during and after the negotiations for the insurance policy in hopes of uncovering some evidence that [the Plaintiff] was fraudulently induced into writing the coverage." *Id.* In response to the discovery requests, one of the defenses raised by the third party was the attorney-client privilege. *Id.*

Significant for the facts of this case are that the Court in *Royal Surplus Lines Ins.* not only discussed the Tennessee Supreme Court's decision in *Smith Cty. Educ. Ass'n v. Anderson*, but also applied other relevant federal case law and concluded that the third party relationship justified extending the attorney-client privilege to protect communications. Although lengthy, the reasoning, analysis and citation to authority is relevant to applying the law to the facts and circumstances of this case, and therefore is quoted extensively.

A. *Confidentiality and the Presence of Third Persons*

> In this case, the disputed communications involved a variety of people: in-house counsel and employees of Sedgwick and in-house counsel and employees of SDG as well as outside counsel for SDG. Generally, Royal argues that the inclusion of parties who are strangers to the various attorney-client relationships destroys any privilege and evidences a lack of intent by the parties that the communications remain confidential. Sedgwick and SDG, however, contend Sedgwick was not a stranger to the attorney-client relationship. Instead, they argue that Sedgwick is more

properly seen as a agent or representative of SDG and should be considered an "insider" for purposes of the privilege.

The degree to which the presence of third parties destroys the privilege is not a subject which has received much attention from the state courts in Tennessee. One supreme court case has held that the presence of a professional negotiator at a meeting between a local school board and its attorney did not destroy the privilege. The court stated:

> The attorney-client evidentiary privilege only extends to communications from the client to the attorney. D. Paine, Tennessee Law of Evidence, § 96, p. 111–112 (1974), and confidentiality is destroyed when those communications take place in the presence of a third party. *Hazlett v. Bryant,* 192 Tenn. 251, 257, 241 S.W.2d 121, 123 (1951). The privilege is designed to protect the client and because it belongs to the client, may be waived by him. When the third party in whose presence such communications take place is an agent of the client, the confidentiality is not destroyed. McCormick § 91 (2d ed.1972); D. Paine, Tennessee Law of Evidence, § 97, p. 112 (1974).

Smith County Education Association v. Anderson, 676 S.W.2d 328, 333 (Tenn.1984). Although the *Smith* court clearly indicated a willingness to extend the privilege in order to cover agents of the client, the Tennessee courts have not further illuminated the type of agency relationship needed to justify application of the privilege. In the absence of any clear authority on point, it is the role of the federal court in diversity cases to consider all of the available legal sources in order to formulate a rule of decision. *See Anderson Development Company v. Travelers Indemnity Company,* 49 F.3d 1128, 1131 (6th Cir.1995). The authorities cited by the *Smith* court provide little insight into the requirements of the third party relationship, however, there is a growing body of federal law on the subject.

The issue received its most extensive treatment in *In re Bieter,* 16 F.3d 929 (8th Cir.1994). In that case the petitioner, a partnership, sought mandamus to direct the district court to vacate an order compelling discovery of information it claimed to be protected by the attorney-client privilege. *Id.* The partnership argued the privilege should extend to include an independent consultant who had been extensively involved with the underlying transaction that was the subject matter of the suit. The consultant had also been significantly involved in subsequent communications between the partnership and its attorney. The consultant

had met with the partnership's attorney, both alone and with a partner, and he had received many communications from the attorney, some sent to him directly and some on which he was merely copied.

The magistrate judge ruled that the partnership had waived its privilege by disclosing these materials to the consultant. The magistrate found that the consultant was neither an employee of the partnership nor a client of the attorney and any disclosure to him destroyed whatever privilege may have otherwise applied. The Eighth Circuit granted the petition for mandamus holding under these circumstances there was no principled reason to distinguish between the consultant and an employee.

The *Bieter* court based its holding on two controlling principles which this court finds very persuasive. First, the court recognized that a rigid approach to analyzing the parameters of the attorney client relationship did not accurately reflect the realties and complexities of corporate activities. The *Bieter* court cited *Upjohn v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) in support of this principle. *Bieter,* 16 F.3d at 938. In that case the Supreme Court had rejected the "control group" test then used by some lower courts to determine the parameters of the corporate attorney-client privilege. *Upjohn,* 449 U.S. at 393, 101 S.Ct. 677. The *Upjohn* Court viewed this type of formalistic approach as too restrictive "in light of the vast and complicated array of regulatory legislation confronting modern corporations." *Id.* at 392, 101 S.Ct. 677. The court instead opted for a case by case determination based on whether the employee was communicating with counsel at the direction of superiors in order to secure legal advice. *Id.* at 394, 101 S.Ct. 677.

Second, the *Bieter* court recognized that sound legal advice and advocacy serves important public interest and depends on the free flow of information to the attorney. *Bieter,* 16 F.3d at 937–38. The court also noted "there undoubtedly are situations ... in which too narrow a definition of "representative of the client" will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely. *Id.*

With these theoretical considerations in mind, the *Bieter* court examined the relationship between the consultant and the partnership. Because the consultant had been so intimately involved with the members of the partnership as well as with the underlying transaction which formed the basis for the lawsuit, the court reasoned that he likely possessed information possessed by no other and this made him precisely the sort of

person with whom a lawyer would wish to confer confidentially in order to fully advise his client. *Id.*

i. *The Nature of the Relationship Between Sedgwick and SDG*

The first task is to define the relationship between Sedgwick and SDG. Then, based on the principles outlined by the *Bieter* court, the court must determine if the relationship is worthy of the protections of the privilege.

The analysis of the relationship which exists between Sedgwick and SDG is complicated somewhat by a Tennessee statute that declares:

> Every insurance agent or limited insurance representative who solicits or negotiates an application for insurance of any kind shall, in any controversy arising from the application for insurance or any policy issued in connection therewith between the insured or insured's beneficiary and the insurer, be regarded as the agent of the insurer and not the insured or insured's beneficiary.

Tenn.Code Ann. § 56–6–147 (1994). Royal argues that the mere presence of this statute forecloses any expectation by SDG that Sedgwick might be considered clothed with the protections of the privilege. Royal is correct in pointing out that no Tennessee case has construed the statute in a context similar to the one presented here. Indeed, research by the court reveals that this statute was intended to protect consumers by binding insurance companies to the representations of local, sometimes unethical, solicitors. *See Industrial Life & Health Insurance v. Trinkle,* 30 Tenn.App. 243, 204 S.W.2d 827 (1947)(decision under prior statute). Furthermore, the overlap in nomenclature between insurance law and privilege law should not be allowed to cloud the inquiry. The term "agent" is used in a myriad of different contexts. What the *Smith* court meant by "agent" in the context of privilege law is clearly quite different from what the statute is attempting to classify for the purposes of insurance law. *See e.g. Glisson v. *471 Stone,* 4 Tenn.App. 71 (1926)(stating in the course of determining whether the defendant was an insurance broker or agent, "the law cares little about names. The questions is, what was the relation of the parties.") *Id.* at 74; *see also Upjohn,* 449 U.S. at 392, 101 S.Ct. 677 (eschewing labels when analyzing attorney client privilege in corporate communications).

Both Sedgwick and SDG characterize Sedgwick as SDG's "broker or representative." *Couch on Insurance 3rd.* § 45:4 (1996) describes a broker as a "middleman between the insured and the insurer" "employed in each

instance as a special agent for a single purpose" usually "involved in what can be viewed as a series of discrete transactions." *Id.* Couch goes on to list several factors to consider when determining whether a person acts as a broker or agent, (1) who first set the agent in motion; (2) who controlled agent's actions; (3) who paid agent; and (4) whose interest agent was attempting to protect. *Id.* Aside from the lack of evidence regarding who paid Sedgwick once the coverage was written, it is clear that the remaining factors weigh heavily in favor of viewing Sedgwick as SDG's broker for the purposes of this transaction. *See generally Couch on Insurance 3rd,* Chapter 45 (1996). Because the court finds that Sedgwick was SDG's insurance broker, rather than either party's insurance agent, the Tennessee statute is not applicable to the instant case.

Royal next argues that since Sedgwick was not hired at the direction of SDG's attorneys, it cannot be viewed as an extension of SDG's attorneys and therefore, the privilege should not apply. However, the *Smith* court and the authorities cited therein do not require that the representative be hired at the direction of the attorney in order to fall within the privilege. *See Smith,* 676 S.W.2d at 333; McCormick 3rd § 91; Cohen on Evidence § 501.4.

Turning to the instant case, the court believes the relationship which existed between Sedgwick and SDG, as well as Sedgwick's involvement in the underlying transaction, justifies extending privilege. In support of the motion for protective order Sedgwick submitted the Affidavit of Douglas W. Pera ("Pera Aff."), senior vice-president of Sedgwick and account manager in charge of brokering coverage for SDG. According to Pera, he was the main conduit of information between Royal and SDG during the negotiations for the policy. Royal's Memorandum in Support of the Motion to Compel confirms, "Sofamor Danek supplied information concerning the risks involved and coverage sought to Sedgwick, who would then supply that information to Tri–City and the information was then submitted to Royal." (Royal Mem. in Support of Mot. to Compel at 3.) Royal even goes so far as to refer to Sedgwick as SDG's "insurance agent." *Id.* According to SDG's Memorandum, SDG had no employees knowledgeable about complex commercial insurance. Furthermore, SDG knew that substantial on-going exposure from personal injury suits related to the manufacture of orthopedic bone screws would make obtaining coverage a "complex and difficult undertaking raising many possible legal issues and would require a great deal of care to avoid future insurance problems." (SDG Memo. at 4.)

Although the policy in question was issued on November 24, 1995, this did not end Pera's involvement with SDG. Rather things were just getting started. Almost immediately, Royal began to question its obligation to

> cover costs of additional bone screw claims presented by SDG. At this point, Pera claims he met with Sedgwick's assistant general counsel, Darryl Martin to discuss the controversies. Apparently, it was agreed that since Sedgwick and SDG shared a common interest in the dispute, Pera would continue to work with SDG and its attorneys to defeat attempts by Royal to avoid its obligations. To this end, Pera participated in meetings and strategy sessions with SDG and SDG's counsel.
>
> Given the level of complexity involved in the transaction, and the extent to which Sedgwick, through Pera, was involved in the negotiations on behalf of SDG, the court concludes he should be deemed an "insider" with respect to communications he shared in both before and after the issuance of the policy.
>
> As a final point, the court notes that SDG did not merely utilize the services of Pera individually, but also the resources of Sedgwick in general. Therefore, Sedgwick's in-house counsel Daryll Martin and Carol Son, administrative assistant to Pera, could reasonably be expected to contribute their help and expertise to the brokerage services provided by Sedgwick. However, the court is not inclined to extend the attorney client privilege[5] any further to cover more remote Sedgwick employees without a more detailed showing of the necessity of their involvement.

Royal Surplus Lines Ins. v. Sofamor Danek Grp., 190 F.R.D. 463, 469–72 (W.D. Tenn. 1999) (footnotes omitted).

Discussed at length and applied in *Royal Surplus Lines Ins. v. Sofamor Danek Grp.*, was the Eighth Circuit Court Appeals case of *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994). The case of *In re Bieter Co.* presented and addressed the legal issue of "whether communications either between this consultant and counsel or merely disclosed to the consultant necessarily fall outside of the scope of the attorney-client privilege because the consultant was neither the client nor an employee of the client" or, in other words "whether an independent consultant can be a representative of the client for purposes of

applying the attorney-client privilege." *In re Bieter Co.*, 16 F.3d 929, 934 & 936 (8th Cir. 1994).

In reversing the District Court's decision that the independent contractor/consultant was "neither an employee of [the company] nor the client [of the law firm], so any disclosure to him destroyed whatever privilege may have otherwise applied," the Court of Appeals held that the independent contractor/consult was the "functional equivalent of an employee" for purposes of applying the attorney-client privilege. *Id.* at 931.

> There is no principled basis to distinguish [the independent contractor/consultant's] role from that of an employee, and his involvement in the subject of the litigation makes him precisely the sort of person with whom a lawyer would wish to confer confidentially in order to understand [the company's] reasons for seeking representation. *See Upjohn*, 449 U.S. at 389, 101 S.Ct. at 682; Sexton, *supra*, at 498. As we understand the record, [the independent contractor/consultant] was in all relevant respects the functional equivalent of an employee. *See McCaugherty*, 132 F.R.D. at 239.
>
> ****
>
> We hold, then, that on the basis of the record before us, the privilege applies to communications made between [the independent contractor/consultant] and [the law firm], and that the disclosure of otherwise privileged documents to [the independent contractor/consultant] in the course of his confidential communications with counsel did not destroy the privilege. [The independent contractor/consultant] is, for purposes of the privilege, the functional equivalent of [the company's] employee, and the communications in question fell within the scope of his duties, were made at the behest of his superior, and were made for the purpose of seeking legal advice for [the company].

In re Bieter Co., 16 F.3d 929, 938, 939–40 (8th Cir. 1994).[1]

[1] In addition to the cases cited by the Plaintiff, the Court also located a federal court decision from the Eastern District of Tennessee that applied Sixth Circuit precedent in denying a motion to compel on the

Based on the foregoing legal authority, the Court concludes that HCN's relationship with the Plaintiff constitutes the kind of "insider" that requires application of the attorney-client privilege to the documents identified in the Plaintiff's privilege log.

As to the Defendant's argument that, even assuming that HCN formed an attorney-client relationship with the Plaintiff, it would be illegal under Tennessee law because HCN is not a law firm and is not authorized to practice law, that is a separate, disciplinary and regulatory matter outside the purview of this lawsuit. HCN is not a party to this lawsuit, and an "unauthorized practice of law" claim would need to be presented to the Tennessee and/or New York Board of Professional Responsibility with any relevant ruling to then be provided to this Court.

---

issue of whether the attorney-client privilege had been waived due to the disclosure of documents to third party contractors.

> The plaintiffs also argue that the defendant has waived its attorney-client privilege by enlisting the add of third party contractors who helped prepare some of the privileged documents at issue. However, the Sixth Circuit has held that an agency relationship between a party and a third-party agent serves to protect against the waiver of privilege when otherwise privileged communications are shared between the party and the third-party agent. *Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co.*, No. 93–3084, 1994 U.S.App. LEXIS 3828, at *19–20 (6th Cir. Feb. 25, 1994); *see also Broessel v. Traid Guaranty Ins. Corp.*, 238 F.R.D. 215, 218–19 (W.D.Ky.2006) ("confidential communications disclosed to or made in the presence of certain agents of the attorney (e.g., accountants, engineers, or experts) to further the rendition of legal advice or in connection with the legal representation are subject to the attorney-client privilege").
>
> In this instance, the Court finds that the third party agents at issue, such as Buck and Mercer, were acting as agents of the defendant and/or defense counsel, and were assisting in the rendition of legal advice. Accordingly, the Court finds that the inclusion of such third-party consultants in otherwise privileged communications did not result in a waiver of the privilege.

Curtis v. Alcoa, Inc., No. 3:06-CV-448, 2009 WL 838232, at *11–12 (E.D. Tenn. Mar. 27, 2009).

As it relates to PharMerica's alternative argument that the Plaintiff has waived the attorney-client privilege because it "did not provide adequate information either on its [privilege] log or in its brief to support its burden for any document listed," the Courts find that the Declaration of Raymond Mulry satisfies the standard of explaining "the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege protection." TENN. R. CIV. P. 26.02(5).

Lastly, there is Defendant's argument that the "privilege log was not merely inadequate – it was actively misleading" because it identified HCN counsel and employees as "Plaintiff's Associate General Counsel" and "in-house counsel" for the Plaintiff, and that this also constitutes a waiver of the privilege. These circumstances, the Court finds, do not constitute waiver. Defendant, however, is correct that the information contained on the privilege log is a clear misstatement. Mr. Mulry states explicitly in his Declaration that he and the others are employees of HCN.

Under these circumstances it is difficult to see how individuals employed by HCN could have mistakenly been designated as Plaintiff's Associate General Counsel or in-house counsel.

Moreover, this misstatement resulted in delay and confusion described by the Defendant as follows.

> Mr. Mulry . . . included "Health Care Navigator" next to his signature on interrogatory verification sheets. (Mulry Declaration at ¶ 9.) Given that the

> verification swore under oath that Mr. Mulry was Plaintiff's Associate General Counsel, and given that the party, not its outside counsel, must verify interrogatory answers under Tennessee Rule of Civil Procedure 33.01, counsel for PharMerica assumed the interrogatory answer was accurate. Moreover, counsel for PharMerica was understandably focused on the answers, not the signature block of the verification sheet. It is clear now that Plaintiff never properly verified any of its interrogatories, ...

Sur-Sur-Reply in Support of Motion to Compel Production of Unprivileged Documents, July 14, 2017, at 2.

The foregoing facts have the appearance of sharp practice and of possibly causing unnecessary expense from delay and confusion. Accordingly, at the conclusion of the lawsuit, the Court shall determine whether to convene a hearing to decide if sanctions should be imposed for the representations on the privilege log of Mr. Mulry as "Plaintiff's Associate General Counsel," and the representation of him and other HCN employees as "in-house counsel."

/s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
TENNESSEE BUSINESS COURT
PILOT PROJECT

cc by U.S. Mail, email, or efiling as applicable to:

J. Cole Dowsley, Jr.
Alex S. Fisher
Karen A. Doner
Lucas R. Smith
Sarah B. Miller
Michael Hess
Benjamin Fultz
Jennifer Stinnett