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

UNIVERSAL STRATEGY GROUP, INC.,	)	
Plaintiff,	)	
	)	
VS.	)	**NO. 16-15-BC**
	)	
BRIAN DAVID HALSTEAD,	)	
Defendant.	)	
_____	)	
	)	
BRIAN DAVID HALSTEAD, in his individual capacity and derivatively for UNIVERSAL STRATEGY GROUP, INC.,	)	
Counter-Plaintiff,	)	
	)	
VS.	)	
	)	
UNIVERSAL STRATEGY GROUP, INC., and TIMOTHY SLEMP,	)	
Counter-Defendants.	)	
CONSOLIDATED WITH		
UNIVERSAL STRATEGY GROUP, INC.,	)	
Plaintiff,	)	
	)	
VS.	)	**NO. 17-136-BC**
	)	
BRIAN DAVID HALSTEAD,	)	
Defendant.	)	

MEMORANDUM AND ORDER GRANTING COUNTER-DEFENDANT SLEMP'S MOTION AND DETERMINING ATTORNEY-CLIENT PRIVILEGE WAS WAIVED

On March 28, 2018, Counter-Defendant Timothy Slemp's filed a *Motion For Determination Of Waiver Of Attorney Client Privilege And Memorandum In Support* seeking a determination that Defendant Halstead waived an attorney-client privilege with

regard to an email communication containing embedded communications between Defendant Halstead and his Counsel that was inadvertently sent to Mr. Slemp and read by him before he was notified and instructed by all Counsel to delete the email.

Counter-Defendant Slemp "requests that the Court determine that the communication at issue is not privileged, either initially or as a result of waiver, and order its production." *Motion For Determination Of Waiver Of Attorney Client Privilege And Memorandum In Support*, p. 10 (Mar. 28, 2018).

On May 8, 2018, following briefing by the parties, the Court ordered Defendant Halstead to file under seal a copy of the email communications in issue for an *in camera* inspection.

After conducting the *in camera* inspection, the Court concludes that the Defendant's inadvertent disclosure of the embedded email communications in this case operated as a waiver of the attorney-client privilege under Rule 502 of the Tennessee Rules of Evidence.[1]

[1] In analyzing the issue of waiver, Rule 502 of the Tennessee Rules of Evidence addresses the circumstances when an inadvertent disclosure could operate as a waiver.

> Inadvertent disclosure of privileged information or work product does not operate as a waiver [if]:[1]
>
> (1) the disclosure is inadvertent,
>
> (2) the holder of the privilege or work-product protection took reasonable steps to prevent disclosure, and
>
> (3) the holder promptly took reasonable steps to rectify the error.

TENN. R. EVID. 502 (West 2018).

It is therefore ORDERED that Counter-Defendant Timothy Slemp's *Motion For Determination Of Waiver Of Attorney Client Privilege* is granted and the embedded email communication filed under seal shall be produced to the Plaintiff and Counter-Defendant Slemp by May 22, 2018.

In reaching this conclusion, the Court finds that the Defendant is correct that the email communications at issue qualify as privileged communications under the attorney-client privilege. It is clear from the *in camera* inspection that the communications involved the subject matter of the representation of Defendant Halstead, and the communications were made with the intention that the they would be kept confidential. *State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Grp. Tr.*, 209 S.W.3d 602, 616 (Tenn. Ct. App. 2006) ("The communication must involve the subject matter of the representation and must be made with the intention that the communication will be kept confidential.").

Furthermore, the Court concludes from its review of the communications *in camera*, that the disclosure by Attorney Justin Adams was clearly inadvertent and accidental. In today's litigation world, correspondence via email with opposing counsel is extremely commonplace and borderline a necessity. Given the instantaneous ability that emails provide opposing attorneys to communicate, it is inevitable that glitches can and will occur from time to time.

As to the content of the privileged communications, it is not particularly revealing because it involves mostly the opinions, hopes and venting by a party embroiled in very personal litigation. The communications do not contain admissions and/or confessions by

the Defendant to any of the allegations in the lawsuit. While the content is potentially salacious and derogatory, its substantive value as related to the legal issues in this case is minimal. Further, hardly any legal advice was provided by Defendant's Counsel in response to the statements made by the Defendant. While trial strategy was discussed by the Defendant, all the attorneys in this litigation are seasoned and experienced and nothing was revealed in the communications that would be unexpected. To the extent something could be drawn from the embedded email communications, it is extremely speculative and not particularly helpful.

Nevertheless, after reviewing the authorities cited by Counter-Defendant Slemp discussing waiver of the attorney-client privilege through inadvertent disclosure and comparing them to the facts of this case, the Court concludes that the bell – so to speak – has been rung, despite the disclosure being inadvertent, and that the attorney-client privilege with respect to the email communication in issue can not meaningfully or practically be clawed back. The ruling on waiver in this case is pragmatic. Despite the inadvertence and minimal value of the information it must be open and not subject to privilege because there is no practical way for Mr. Slemp to disregard this information that he has already read, and to erase it from his memory in his planning and consultation with his attorney.

> [T]he overriding interest of justice would not be served by relieving Mr. Halstead of any error. Mr. Slemp received the email string for deposition scheduling purposes, and he read the entire string. Mr. Slemp cannot erase his memory and is extremely concerned by what he read. The document has been incorporated into his thoughts regard the litigation and protecting his and USGI's interests, and he should be entitled to use the information and document, including discussing it fully and frankly with his attorneys. *See*

> *MSP Real Estate*, 2011 U.S. Dis. LEXIS 81650, at *28 (fairness weighs in favor of waiver because MSP's executives "read the e-mails in their entirety before New Berlin asserted the privilege and MSP '[has] incorporated them into [its] thought relating to the prosecution of this lawsuit'") (citing, *e.g.*, *Wunderlich-Malec Sys., Inc. v. Eisenmann Corp.*, 2007 U.S. Dist. LEXIS 78620 (N.D. Ill. Oct. 18, 2007) (holding that "overriding concerns of fairness dictate that Wunderlich should not be allowed to 'unring the bell' and deprive Eisenmann of documents that could be important"); Harmony Gold U.S.A., Inc. vA Corp., 169 F.R.D. 113, 118 (N.D. Ill. 1996) ("[T]he bell has already rung, and the court cannot now unring it by denying defendant access to the document") (citation omitted); Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co., Inc., 132 F.R.D. 204, 209 (N.D. Ind. 1990) ("Given the extent of disclosure…fairness dictates that Golden Valley be allowed to utilize its windfall considering that it already has the document and has utilized it….")).

Counter-Defendant Slemp's Motion For Determination Of Waiver Of Attorney Client Privilege And Memorandum In Support, pp. 8-9 (Mar. 28, 2018).

Under these circumstances, case law provides that the attorney-client privilege with respect to these specific embedded email communications in issue have been waived. In reaching this conclusion, the Court adopts the reasoning and authorities at pages 4 through 10 of *Counter-Defendant Slemp's Motion For Determination Of Waiver Of Attorney Client Privilege And Memorandum In Support*.

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

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

Bryan K. Williams
J. Alex Little
W. Justin Adams
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D. Andrew Curtis