UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARCUS BAGWELL and SCOTT LEVY, Individually and on behalf of all others Similarly situated,	:	Civil Action No. 3:16-cv-01350-JCH
Plaintiffs,	:	
vs.	:	Hon. Janet C. Hall
WORLD WRESTLING ENTERTAIMENT, INC.,	:	
Defendant.	:	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL REGARDING PRIVILEGE ISSUES

ORAL ARGUMENT REQUESTED

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INTRODUCTION

On March 16, 2016 Attorney Matthew Peterson sent a confidential email to Plaintiff Scott Levy in response to Levy's request for legal assistance. The email contained Peterson's analysis of Levy's case and was sent directly to Levy for purposes of providing legal advice. Defendant World Wrestling Entertainment, Inc. ("WWE") now improperly asserts that Attorney Peterson's March 16, 2016 confidential email to Plaintiff Scott Levy should be denied the protection of the attorney-client privilege because it was sent during Levy and Peterson's early discussions about the case and because it was reviewed by Levy prior to testifying at his deposition.

WWE fails to acknowledge that the March 2016 email was sent to Levy *in response to his request for legal assistance.* WWE refuses to consider that Levy (1) requested assistance from various colleagues to search for an attorney to investigate potential royalties claims and (2) was referred to Peterson for the purpose of obtaining legal advice. WWE attempts to obscure the well-established principle that preliminary legal consultations constitute privileged communications. The attorney-client privilege is a two-way street: it protects both the client's communications to an attorney and the attorney's legal advice to the client, even if an attorney has not been formally retained. The March 2016 email was not distributed as a mass-email to a group of individuals; rather, it was a confidential communication containing Peterson's work product for Levy's case. Accordingly, it is a privileged communication that is protected by both the attorney-client privilege and work-product doctrine.

WWE also contends that any privilege applicable to the March 16, 2016 email should be waived under Federal Rule of Evidence 612 because Levy reviewed the document prior to his deposition and it refreshed his recollection. Merely reviewing a document prior to a deposition does not destroy the protections afforded by the attorney-client privilege and work-product doctrine. WWE has not demonstrated that Levy's review of the March 16, 2016 email impacted his deposition testimony in any way so as to allow for the discovery of privileged communications. In fact, the opposite is true, and Levy did not use or rely on the March 16, 2016 email in any manner as to constitute a waiver of privilege. Consequently, considering the relevant factors and Levy's deposition testimony, the Court should not require Levy to disclose privileged communications with counsel.

Finally, using the fact that Levy's ex-wife attended a single meeting with counsel, WWE draws the conclusion that not only should Levy be compelled to testify about the discussions at that meeting, but he should also be required to produce *all communications* involving his ex-wife—regardless of the nature or content—which are properly listed on privilege logs. Levy testified that his ex-wife serves as his business manager, and she assists Levy with his wrestling endeavors. Levy's ex-wife attended the meeting with counsel to assist Levy in providing information to facilitate the rendition of legal advice. As Levy's manager and agent, the attorney-client privilege extends to Levy's ex-wife and protects against the disclosure of communications with counsel at the meeting in question. Additionally, even if it was determined that the discussions at the meeting are not privileged, there is no basis

to suggest that all communications involving Levy's ex-wife are similarly not privileged.

BACKGROUND

On March 16, 2016, Attorney Matthew Peterson sent a case analysis of Scott Levy's WWE Network royalties claim to Mr. Levy by email. Scott Levy testified in his deposition that though he had not specifically asked Mr. Peterson to analyze his claim for royalties on the WWE Network, he had asked others for the analysis. (Deposition Transcript of Scott Levy (hereinafter "Levy Dep."), attached hereto as Ex. B, at 55:3-5.) Mr. Levy testified that he began to inquire about attorneys to pursue the claim for royalties after he learned that the WWE Network was in operation "and that my likeness, my trademark likeness, was being used and I wasn't receiving royalties for it." (*Id.* at 58:23-59:4.) He testified that he was looking for an attorney in order to pursue relief against the WWE. (*Id.* at 55:6-12.) At the time of the deposition, Mr. Levy was not able to recall whom he had asked for help finding suitable counsel for his potential claim for Network royalties. (*Id.* at 55:13-14.) Mr. Levy testified that Attorney Peterson told him that someone had contacted him on Mr. Levy's behalf, though he could not recall who the referrer was. (*Id.* at 64:17-22.)

Defendant's summary of facts incorrectly asserts that Mr. Levy testified that he never provided Attorney Peterson with a copy of his contract with WWE before receiving the case analysis email from Peterson on March 16, 2016. In fact, Mr. Levy provided no testimony with respect to whether Attorney Peterson was in receipt of Mr. Levy's contract before drafting the March 16, 2016 case analysis:

Q: Had you produced your contract to Mr. Peterson by the time that E-mail had been sent to you?

A: That was the first time I had met him.

(*Id.* at 62:4-6.)

During the deposition, Mr. Levy testified that he had consulted with Attorney Bill Kyros about being a party to lawsuit against WWE for personal injuries, but declined to participate. (*Id.* at 152:10-153:1.) He testified that Attorney Peterson had told him that Peterson and Kyros knew each other. (*Id.* at 151:9-24.)

In a declaration attached to this Response, Mr. Levy now supplements his testimony at deposition. As part of the consultation with Attorney Kyros, Mr. Levy provided Attorney Kyros with confidential information about his employment relationship with WWE, the royalty provisions in his booking agreement, the appearance of his likeness on the WWE Network, and his suspicion that he had a legal right under his agreement with WWE to royalties from the WWE Network revenues. (Declaration of Scott Levy (hereinafter "Levy Decl."), attached hereto as Ex. A, at ¶¶7-8.) Mr. Levy asked Attorney Kyros to help him find an attorney who could provide an analysis of the merits of his claim for royalties from the WWE Network. (*Id.* at ¶9.) As part of that consultation, Mr. Levy authorized Attorney Kyros to share Levy's email address and the confidential information about Levy's contractual relationship with WWE. (*Id.* at ¶¶10-11.) Attorney Matthew Peterson contacted Mr. Levy on Attorney Kyros's referral. (*Id.* at ¶12.)

ARGUMENT

I. WWE's Motion to Compel Should be Denied.

A. Attorney Peterson's March 16, 2016 Email to Scott Levy is a Privileged Communication Between Attorney and Client.

WWE's motion to compel the disclosure of Attorney Peterson's email to his client Scott Levy is flawed in two ways. WWE wrongly relies on Connecticut state law and federal common law to set the contours of the attorney-client privilege. Under the Federal Rules of Evidence, state law governs privilege when state law supplies the rule of decision. Therefore, Connecticut's choice of law rules should determine which state's privilege laws should apply to Attorney Peterson's email to his client. Under the "most significant relationship" test of Restatement (Second) of Conflict of Laws, which has been widely adopted by the state of Connecticut, it is the laws of Illinois that should govern the issue of attorney-client privilege. When properly analyzed under Illinois law, it is clear that the communication is privileged.

Next, if the Defendant's reliance on Connecticut state law and federal common law decisions were appropriate, this Court should still find that Attorney Peterson's email falls within the protections of the attorney-client privilege. Even under the federal and Connecticut state court decisions cited by Defendant, Peterson's email still qualifies as privileged. Defendant insists that Attorney Peterson and Scott Levy had no attorney-client relationship — a necessary element under Connecticut state law — but it is well settled that an attorney-client relationship can arise at a preliminary stage of engagement, long before a client has signed a retention agreement. Under Defendant's proposed construction, initial inquiries from clients

and the responsive communications from attorneys to potential clients would be stripped of confidentiality and vulnerable to disclosure. The thoughts and impressions of an attorney responding to confidential information related to him — even if was related through a conduit — by an inquiring client are properly protected by the attorney-client privilege under federal and Connecticut state laws.

1. Illinois Privilege Law Should Govern the Court's Ruling on WWE's Motion to Compel.

Federal Rule of Evidence 501 generally provides for the application of common law "as interpreted by United States Courts" to questions of privilege. FED. R. EVID. 501. "But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." *Id.*; *Nelson v. Greenspoon*, 103 F.R.D 118, 122 (S.D.N.Y. 1984). To determine which state's privilege laws should govern the communications of an Illinois attorney to a Georgia client in a breach of contract case implicating Connecticut substantive law, the Court should look to the choice of law rules of the state of Connecticut.

Connecticut has adopted the Restatement (Second) Conflict of Laws to resolve conflicts in contract law cases. *Reichhold Chemicals, Inc. v. Hartford Acc. and Indem. Co.*, 243 Conn. 401, 413 (Conn. 1997). Under Section 188 of the Restatement (Second) of Conflict of Laws, "[t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6." Restatement (Second) of Conflicts of Laws § 188 (1971). Although the attorney-client privilege is not an issue in a contract, the most

significant relationship test of the Restatement (Second) Conflict of Laws is the logical test for a Connecticut court to apply in determining the appropriate governing law for privilege. The Connecticut Supreme Court has recognized the Restatement (Second) approach as the modern trend and has applied it in multiple contexts. *Reichhold Chemicals*, 243 Conn. at 412. Moreover, it is perfectly in line with the principles of the Restatement (Second) Conflicts of Law to determine choice of law on an issue-by-issue basis, resulting in the conclusion that Illinois is the state with the most significant relationship to privilege issues, even though Connecticut law has been chosen for the substantive contractual claims in the case.

Section 6 of the Restatement sets forth principles to guide the determination of most significant relationship: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states in the determination of the particular issue, (d) the protection of justified expectations, (e) basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result and (g) ease of the determination and application of the law to be applied. Restatement (Second) of Conflict of Laws § 6 (1971).

Three states — Connecticut (the forum state), Georgia (the residence of the plaintiff-client), and Illinois (the home of the attorney who communicated with his client relying on the privilege laws in his jurisdiction) — have an interest in the resolution of attorney-client privilege in this matter. Consideration of most of the Section 6 principles does not dictate a preference for any of the three states as the

state with the most significant relationship because the policies underlying the attorney-client privilege are similar in all three states: an interest in protecting broad discovery balanced against an interest in encouraging honest and forthcoming communications between attorneys and their clients. Likewise, there is ease of determination and application of the law of any of the three states.

Two principles, however, weigh heavily in favor of Illinois as the state with the most significant relationship to the issue of privilege: (d) the protection of justified expectations; and (f) certainty, predictability and uniformity of result. The issue of justified expectations strongly favors Illinois. An attorney who has a professional responsibility to tailor his communications with his clients so as to maintain privilege has a justified expectation that the law of the state in which he is licensed to practice will govern his conduct. Certainty, predictability and uniformity of result will all be better served if the law of the state where the attorney who made the communication is applied to determine privilege. Because of the weight of these two considerations, Illinois has the most significant relationship with the issue of privilege, and Illinois law should be applied.

2. Attorney Peterson's Email to Scott Levy is Privileged Under Illinois Law.

The Illinois Supreme Court has set forth the following definition of the attorney-client privilege: (a) where legal advice of any kind is sought, (b) from a professional legal advisor in his capacity as such, (c) the communications relating to that purpose, (d) made in confidence, (e) by the client, (f) are at his instance

permanently protected, (g) from disclosure by himself or by the legal adviser and (h) except the protection to be waived. *People v. Radojcic*, 2013 IL 114197 ¶40 (Ill. 2013).

Attorney Peterson's email to Scott Levy on March 16, 2016 satisfies all of the required elements under Illinois law. First, Attorney Peterson wrote the March 16, 2016 email in the context of Scott Levy's search for legal advice. During his deposition, Levy testified that he spoke with several colleagues in search of a lawyer that could investigate certain claims against WWE, including Levy's contractual claim that he was entitled to royalties for revenue derived from the WWE Network. (Levy Dep. at 55:6-12, 145:4-11.) Levy has clarified in his supplementary statement to this Court that he had consulted with Attorney Kyros about his rights to royalties from the WWE Network, and Attorney Kyros had agreed to investigate potential attorneys to whom he could refer Levy's case. (Levy Decl. at ¶¶7-11.) Attorney Peterson's March 2016 email to Scott Levy was responsive to that request and referral, and was based on information he learned, albeit through the conduit of Attorney Kyros, from Scott Levy. Significantly, this element of the Illinois test is expressed in general terms, focusing on when "legal advice is sought," instead of premising the privilege on the formation of an attorney-client relationship. Levy has testified that he sought legal advice.

Elements two and three are also satisfied. There is no dispute that Scott Levy's query was directed to Attorney Peterson exclusively in Peterson's capacity as a professional legal advisor, and Levy testified he was in search of a professional legal advisor to analyze his potential claim against WWE. It is equally clear that Attorney

Peterson's email to Levy was related to the purpose of providing professional legal advice. It was an analysis of the Levy's potential claim based on information that Levy had shared with Kyros and Kyros relayed to Attorney Peterson.

With respect to the element of confidentiality, Attorney Peterson's email to Scott Levy was confidential in the strictest meaning of that term, in that it was sent only to Scott Levy and not to any other recipients. Moreover, the contents of the email are of a nature that would only be conveyed in a confidential communication. The email described Attorney Peterson's impressions of the merits of Levy's claim against WWE for royalties from the WWE Network, which is obviously at the heart of this lawsuit. Although element five seems to suggest that the communications must be made by the client in order to be privileged, Illinois courts have recognized that communications made by the attorney are also included in privileged communications. In *Radojcic,* the Illinois Supreme Court noted that "the modern view is that the privilege is a two-way street, protecting both the client's communications to the attorney and the attorney's advice to the client." 2013 IL 114197 ¶40. Accordingly, Attorney Peterson's email to Scott Levy qualifies as a privileged communication.

Illinois law provides that preliminary legal consultations are privileged communications. *See Herbes v. Graham*, 180 Ill. App. 3d 692, 699 (Ill. App. Ct. 1989). Indeed, in a related area of the law addressing the absolute privilege of attorney-client communications in defamation suits, Illinois courts have recognized that statements made *by an attorney* to a potential client during a preliminary legal

consultation are privileged. *Popp v. O'Neil*, 313 Ill. App. 3d 638, 643 (Ill. App. Ct. 2000). Using arguments that could serve as a justification for traditional attorney-client privilege for Attorney Peterson's email to Scott Levy, the *Popp* Court wrote: "Even during an initial consultation, the attorney must be able to open and honestly discuss the potential client's situation in order to determine the desirability of initiating legal proceedings." *Id*. Attorney Peterson's email meets all of the elements of privilege under Illinois law.

3. Attorney Peterson's Email to Scott Levy is Equally Protected by the Attorney-Client Privilege under Federal and Connecticut State Law.

If this Court declines to apply Illinois privilege law and deems Defendant's application of federal and Connecticut state law is correct, Attorney Peterson's March 2016 email still merits the protection of privilege. WWE insists that Levy and Attorney Peterson did not have an attorney-client relationship, a prerequisite to attorney-client privilege. This purported lack of an attorney-client relationship is at the heart of the Defendant's position, but it is not supported by the courts' broad interpretation of an attorney-client relationship, encompassing preliminary consultations between attorney and prospective client before any formal agreement or payment is made, so long as such consultations are conducted with a view toward retention. *Cohen v. Cohen*, No. 09-cv-10230 (LAP), 2015 WL 745712, at *4 (S.D.N.Y. Jan. 30, 2015) (internal quotation marks and citations omitted). Contrary to WWE's position, preliminary discussions between an attorney and a prospective client are subject to the attorney-client privilege, even when those discussions do not result in

retention of the attorney. *Fierro v. Gallucci*, No. 06-cv-5189 (JFB)(WDW), 2007 WL 4287707, at *6-7 (E.D.N.Y. Dec. 4, 2007) (citations omitted); *see also Green v. Montgomery County*, 784 F. Supp. 841, 845 (M.D. Ala. 1992) (where plaintiff had telephonic conversation with attorney several months before filing lawsuit, court concluded that consultation developed into attorney-client relationship).

WWE only grudgingly acknowledges that an attorney-client relationship may be formed prior to the execution of a formal retention agreement "in certain circumstances where *the client* consults with an attorney in anticipation of retaining them." (Def. Mot. at 13, n.5 (emphasis in original).) Attempting to avoid well-established law, WWE wrongly claims that this case is "plainly distinguishable" because it involves a communication from *an attorney* prior to the existence of an attorney-client relationship. (*Id.*) WWE, however, fails to acknowledge that the attorney-client privilege is a two-way street: it encompasses confidential information provided to an attorney for the purpose of securing legal advice *and communications from an attorney to a prospective client containing legal advice*. *See Newmarkets Partners, LLC v. Sal. Oppenheim Jr. & Cie. S.C.A.*, 258 F.R.D. 95, 100 (S.D.N.Y. 2009) (holding attorney-client privilege protected "confidences and secrets" divulged to counsel with the intent to obtain legal advice and finding "[t]he same is true for e-mails from [counsel] to [the prospective clients] containing legal advice[.]").

Levy's testimony and his sworn statement show that there was a two-way street of communication between Levy and Attorney Peterson. After learning that he appeared on the WWE Network (Levy Dep. at 53:23-54:10), Levy approached several

contacts to locate an attorney that could investigate and pursue potential claims for relief (*id*. at 55:6-25). As a direct result of those efforts, Attorney Peterson was referred to Levy by someone acting on Levy's behalf. (*Id*. at 64:17-22.) Upon receiving Attorney Peterson's March 16, 2016 email, Levy reasonably believed that he had "engaged" Peterson for the purpose of securing legal advice and that Peterson "was acting as [his] lawyer[.]" (*Id*. at 69:10-16.) The evidence presented satisfies the Connecticut state law standard for the existence of an attorney-client relationship. Attorney Peterson undertook an investigation of those claims and provided a confidential case analysis for Levy after learning that Levy was in search of legal assistance. From the very first communication, Levy understood and believed that Attorney Peterson was investigating claims on Levy's behalf for the purpose of providing professional legal advice. (*Id*.) Those efforts ultimately resulted in Levy retaining Attorney Peterson's law firm to prosecute this matter.

Defendant's attempt to paint Peterson's March 16, 2016 email as a mere unilateral solicitation ignores that Levy made a request for legal assistance. Similarly, in *Sandoval v. American Building Maintenance Industries, Inc.*, when employees asked their union representative for an attorney to deal with the sexual harassment they were facing at the workplace, and the union arranged for an initial meeting with an attorney, the court deemed the initial communications between the employees and the attorney to be protected under the attorney-client privilege. 267 F.R.D. 257, 273-74 (D. Minn. 2007). The *Sandoval* Court found the employees' request for help from an attorney and the union's provision of an attorney for that

purpose to be a sufficient foundation to conclude that the communications between the plaintiffs and their prospective counsel (who later became their actual legal counsel), were protected by the attorney-client privilege. *Id.* at 274. Scott Levy's request for help from an attorney and Kyros's provision of Peterson as an attorney for that purpose is analogous and deserves an analogous finding of privilege.

Defendant's insistence that a preliminary communication *from an attorney* cannot be privileged is wrong. An initial letter from an attorney to the former employees of the defendant employer was deemed to be privileged in *Bauman v. Jacobs Suchard, Inc.*, 136 F.R.D. 460 (N.D. Ill. 1990). In *Bauman*, the attorney in question was the Equal Employment Opportunity Commission ("EEOC"), which functioned through its attorneys, as the court recognized, as *de facto* counsel for the employees. *Id.* at 461. The defendant sought to compel the disclosure of questionnaires that the EEOC sent to former employees, to which the employees could respond indicating that they wanted to be represented by the EEOC. *Id.* The court found that the letter from the EEOC containing the questionnaire was protected under the attorney-client privilege. *Id.* at 462. The *Bauman* court's finding of privilege for an attorney's initial, unprompted communication to a client is broader than necessary for this case because Peterson's letter was responsive to Levy's explicit request for counsel. Nonetheless, the *Bauman* court's determination makes clear that the categorical position that Defendant has taken with respect to initial attorney communications is insupportable.

As the Second Circuit has recognized, "[t]he key, of course, to whether an attorney/client relationship existed is the intent of the client and whether he reasonably understood the conference to be confidential." *U.S. v. Dennis*, 843 F.2d 652, 657 (2d Cir. 1998). Levy reasonably believed that Attorney Peterson was referred to him for the purpose of investigating potential claims and providing legal advice. (Levy Dep. at 69:10-16 ("I didn't retain him to file a lawsuit, but I felt that I had engaged him and that we were going to investigate things so I felt that he was acting as my lawyer on behalf of me.").) Importantly, Levy considered Attorney Peterson to be his lawyer from the very beginning. (Levy Decl. at ¶¶12-15.)

Further, there can be no dispute that Attorney Peterson and Levy both reasonably understood that the March 16, 2016 email was confidential in nature. First, as a threshold matter, the District of Connecticut has followed other courts in holding that email communications between lawyers and clients carry "a reasonable expectation of confidentiality and privacy." *Geer v. Gilman Corp.*, No. 3:06-cv-889 (JBA), 2007 WL 1423752, at *3 (D. Conn. Feb. 12, 2007) (citation omitted). Second, as shown in Plaintiffs' privilege log, Attorney Peterson sent the March 16, 2016 email containing a case analysis *only to Levy*. (*See* Def. Mot., Ex. C at 3.) This is not a situation where an attorney sent out a mass-email to a group of individuals that included the general details of a case investigation—i.e., a solicitation.

"An attorney-client relationship is established when the advice and assistance of the attorney is sought and received in matters pertinent to his profession." *Matthews v. Lynch*, No. 3:07-cv-739 (WWE), 2009 WL 2407363, at *4 (D. Conn. Aug.

6, 2009) (quoting *Somma v. Gracey*, 544 A.2d 668, 672 (Conn. App. Ct. 1988)). Levy's deposition testimony and declaration establish that the advice and assistance of the attorney was sought and received in matters pertinent to his profession. *Matthews*, 2009 WL 2407363, at *4. Consequently, an attorney-client relationship existed at the time Attorney Peterson sent the March 16, 2016 email containing a confidential case analysis pertaining to Levy, and the document should be protected from disclosure by the attorney-client privilege and work-product doctrine.

B. Attorney Matthew Peterson's March 16, 2016 Email is Protected by the Work-Product Doctrine.

Attorney Matthew Peterson's March 16, 2016 email to Scott Levy contained Peterson's detailed analysis of Levy's legal rights to royalties from the WWE Network. WWE's insistence that Peterson's work product in the March 16, 2016 email cannot claim protection under the work-product doctrine is premised entirely on its baseless and self-serving assertion that the email was a solicitation. An email to a prospective client containing an analysis of his case does not become a solicitation just because an adversary brands it so, particularly when there is evidence in the record that the prospective client had sought legal representation with respect to the very issue addressed in the email.

The work-product doctrine in federal diversity cases is governed by Federal Rule of Civil Procedure 26(b)(3) which prevents a party from discovering documents and tangible things "that are prepared in anticipation of litigation or for trial by or for another party or its representative," absent a showing by the requesting party of a substantial need for the materials to prepare its case. FED. R. CIV. P. 26(b)(3). The

March 16, 2016 email, containing an analysis of Levy's potential claim for royalties, was clearly prepared in anticipation of litigation, and it was prepared for Scott Levy, another party to this suit. It is precisely the type of document that Rule 26(b)(3) was designed to protect from discovery. Nor can WWE claim that it has a substantial need for Attorney Peterson's email to his client to prepare its case. This is a case concerning interpretation of a contractual provision in WWE's booking agreement with Scott Levy. Peterson's assessment of the merits of his client's interpretation of that contractual provision is by no means necessary for WWE to prepare its contrary interpretation. Accordingly, the March 16, 2016 email is protected from discovery by the work-product doctrine.

C. WWE Has Not Sufficiently Demonstrated That Any Privilege Has Been Waived to Allow for the Discovery of the March 16, 2016 Email.

WWE has not established the proper foundation for compelling the production of privileged documents under Federal Rule of Evidence 612. Merely reviewing a privileged document before testifying at a deposition does not abrogate the protections afforded by the attorney-client privilege or work-product doctrine. The March 16, 2016 email did not sufficiently impact Levy's testimony in order to trigger the application of Rule 612 to allow for the discovery of privileged communications. Further, Levy did not use the March 16, 2016 email in a manner which effectively waived any privilege. Nor is production of the March 16, 2016 email required in the interest of justice.

The purpose behind Rule 612 is to test the credibility and memory of a deponent's refreshed recollection. WWE cross-examined Levy extensively regarding

how he became involved in the lawsuit and his relationship with counsel. Levy never testified that the March 16, 2016 email would refresh his recollection relating to any substantive subject matter raised by WWE. Additionally, there is no evidence that any privileged information in the March 16, 2016 email was disclosed. Accordingly, the need to protect Levy's privileged communications outweighs any claimed need by WWE for the email.

Pursuant to Rule 612 of the Federal Rules of Evidence, if the court determines it necessary in the interest of justice, an adverse party may obtain a document and cross-examine a witness about such document where the witness, before testifying, uses the document to refresh his or her memory. FED. R. EVID. 612(a) & (b). However, "nothing in the Rule [should] be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory." *Id.* Advisory Committee's Notes. "In applying Rule 612, courts must balance the tension between the disclosure needed for effective cross-examination and the protection against disclosure afforded by any relevant privilege." *Suss v. MSX Int'l Eng'g Servs., Inc.*, 212 F.R.D. 159, 163 (S.D.N.Y. 2002).

The District of Connecticut has adopted the "functional analysis" test when determining whether privileged documents reviewed by a deponent must be disclosed. *Calandra v. Sodexho, Inc.*, No. 3:06-cv-49 (WWE), 2007 WL 1245317, at *4 (D. Conn. Apr. 27, 2007). Under that approach, "[b]efore ordering production of privileged documents, courts require that the documents can be said to have had sufficient impact on the [witness'] testimony to trigger the application of Rule 612."

Id. (quoting *In re Rivastigmine Patent Litig.*, 486 F. Supp. 2d 241, 243 (S.D.N.Y. 2007)). "If this threshold is met, courts then engage in a balancing test considering such factors as whether production is necessary for fair cross-examination or whether the examining party is simply engaged in a fishing expedition." *In re Rivastigmine*, 2007 WL 102716, at *2 (internal quotation marks and citation omitted).

"It is well-settled that, once properly invoked, the attorney-client privilege is not vitiated in the absence of an actual or implied waiver." *Suss*, 212 F.R.D. at 164-65. When considering whether the review of a document prior to testifying at a deposition constitutes a waiver of privilege, "the relevant inquiry is not simply whether the documents were used to refresh the witness's recollection, but rather whether the documents were used in a manner which waived the attorney-client privilege." *Id*. at 164. Because Levy's testimony was not substantially impacted by his review of the March 16, 2016 email, the court should not compel the production of privileged communications with counsel.

WWE has not demonstrated that the review of the email substantially impacted Levy's testimony. During his deposition, Levy explained that his first communication with counsel was through the March 16, 2016 email and that the document refreshed his recollection. (Levy Dep. at 18:15-22, 54:6-22). From that testimony, WWE improperly draws the conclusion that the March 16, 2016 email "clearly had an impact on Levy's testimony concerning how Attorney Peterson came in contact with him and how Levy ultimately became involved in the lawsuit." (Def. Mot. at 17.) Notably, the date and method of communication with counsel under these

circumstances are not privileged. Indeed, Levy previously produced a privilege log and discovery responses reflecting the March 16, 2016 email communication with counsel. (Dkt. No. 132-4 at 3, Entry 15; Dkt. No. 132-6 at 7, Response to Request No. 8.) Consequently, Levy's testimony regarding the date and method of the initial communication with counsel cannot be construed as constituting a waiver of any privilege. *See Calandra*, 2007 WL 1245317, at *4 (where plaintiff's privileged notes regarding facts underlying complaint had "minimal impact on his testimony[,]" court found no waiver and held notes did not need to be produced); *In re Managed Care Litig.*, 415 F. Supp. 2d 1378, 1381 (S.D. Fla. 2006) (denying motion to compel where attorney reviewed privileged document in preparation of deposition, but none of testimony during deposition established waiver of any privilege); *Suss*, 212 F.R.D. at 165 (where evidence at issue was "ambiguous, at best, concerning the impact of the documents on the testimony[,]" court upheld attorney-client privilege protection and refused to order disclosure).

Despite Levy's limited testimony of non-privileged material, WWE claims that Levy should produce *the entire March 16, 2016 email* so that it can examine him regarding "the events that led to his involvement in this lawsuit" and the basis for the claims asserted. (Def. Mot. at 18.) Contrary to WWE's position, "[e]ven where Rule 612 mandates the production of writings used to refresh a witness's recollection, it only does so with respect to portions of the document relating to the testimony that was based on the refreshed recollection." *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Litig.*, MDL No. 1358 (SAS), 2012 WL 2044432, at *3 (S.D.N.Y. June 6, 2012)

(citing FED. R. EVID. 612(b)). A review of Levy's deposition transcript clearly shows WWE conducted a comprehensive cross-examination regarding these matters. (*See* Levy Dep. at 69:10-16, 116:2-10, 120:6-121:2, 121:21-122:3, 124:12-24.) Levy never testified that the March 16, 2016 email would refresh his recollection in order to answer a single question or that he relied on the privileged portion of the March 16, 2016 email for the purposes of testifying.[1]

Where the privileged document at issue was simply reviewed to refresh a deponent's recollection, defense counsel "thoroughly questioned plaintiff regarding the underlying facts," and the document had a "minimal impact" on deposition testimony, the court found in favor of protecting against the disclosure of such privileged materials. *Calandra*, 2007 WL 1245317, at *4, n.1. By contrast, the cases on which WWE relies in favor of disclosure are factually distinguishable.

- Levy's review did not impact his testimony in any way, much less the substantial impact necessary to invade the privilege found in *Abu Dhabi Commercial Bank, Thomas, Johnson & Higgins, Inc.*, *Bank Hapoalim, B.M.* or *Jolly*.

- Levy did not review substantial volumes of privileged materials (*Barcomb*), and he was not given the email by counsel (*Lawson and In re Joint Eastern and Southern Dist. Asbestos Litig.*). Instead he went and reviewed a single email on his own accord.

- Levy did not use or refer to the email to refresh his recollection at the deposition as the witnesses did in *Jolly* and *Poseidon Capital Corp.* Further, Levy never testified that the March 2016 email would refresh his recollection to answer a question nor did he use the email for the purpose of testifying.

[1] Rule 612's Advisory Committee notes make clear that the purpose of the phrase "for the purpose of testifying" is "to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only those writings which may fairly be said in fact to have an impact upon the testimony of the witness." FED. R. EVID. 612 Advisory Committee's Notes.

Given the special protections afforded by the attorney-client privilege and work-product doctrine, and considering the relevant factors, the Court should not require Levy to disclose privileged communications with counsel.

D. The Presence of Levy's Ex-Wife and Agent at a Meeting with Counsel Does Not Destroy the Attorney-Client Privilege.

WWE argues that Levy should be compelled to testify about conversations with counsel which occurred during a meeting where Levy's ex-wife was present. (Def. Mot. at 19.) Essentially, WWE contends that Levy waived or otherwise destroyed the privilege by having his ex-wife at the meeting. (*Id.*) However, the attorney-client privileged nature of the communications in question was neither waived nor extinguished by the presence of Levy's ex-wife, as she serves as Levy's agent and attended the meeting to assist Levy in providing information to counsel for the purpose of obtaining legal advice.

The attorney-client privilege protects from disclosure oral or written communications between a client and his or her attorney that (i) had as its "predominant purpose" the solicitation or provision of legal advice or services, and (ii) were made and retained in confidence. *See, e.g., In re County of Erie*, 473 F.3d 413, 418 (2d Cir. 2007); *U.S. v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996). The protections of the privilege extend to communications between an attorney (or the attorney's representative) on the one hand, and the client, *representatives or agents of the client,* and other persons who are facilitating the rendition of legal services by the lawyer, on the other hand. *See, e.g., U.S. v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *Lawrence v. Cohn*, No. 90-cv-2396 (CSHMHD), 2002 WL 109530,

at *2 (S.D.N.Y. Jan. 25, 2002); 3 WEINSTEIN'S FEDERAL EVIDENCE §§ 503.11-503.12 (1990).

Marguerite Reynolds is Levy's ex-wife and business manager. (Levy Dep. 52:13-18, 53:14-20.) She helps and advises him on important matters in his professional life, including his employment as a sports entertainment performer and wrestler. (Levy Decl. at ¶¶17-18.) Because of her familiarity with Levy's wrestling career, Ms. Reynolds has assisted Levy in providing information to his counsel in this action for the purpose of obtaining legal advice. (*Id*. at ¶19.) Specifically, Ms. Reynolds has helped Levy recall or locate certain information, such as gathering relevant documents and remembering certain events, to facilitate the rendition of legal advice. (*Id*. at ¶20.)

The WWE Network contains video products featuring Levy while he wrestled for the WWE, World Championship Wrestling, and Extreme Championship Wrestling. (*Id*. at ¶21.) As his business manager, Ms. Reynolds accompanied Levy to the meeting at his request in order to assist Levy in providing information to counsel regarding his wrestling career, including his wrestling performances at those organizations. (*Id*. at ¶22.) During the meeting in question, Levy reasonably expected and understood that the communications regarding the case were confidential in nature. (*Id*. at ¶23.) Ms. Reynolds attended the meeting with Levy not just as his ex-wife or significant other, but as his agent to assist him in providing information to counsel for the purpose of obtaining legal advice. Accordingly, the attorney-client privilege properly extends to Ms. Reynolds and protects against the disclosure of

privileged communications with counsel at the meeting. *See Schwimmer*, 892 F.3d at 243 (acknowledging that attorney-client privilege protects communications made to agents assisting client); *SEC v. Wyly*, No. 10-cv-5760 (SAS), 2011 WL 3366491, at *2 (S.D.N.Y. July 27, 2011) (recognizing that presence of client's agent does not destroy privilege if agent's "presence was needed to facilitate effective communication of legal advice between the attorney and the client").

Finally, without providing any support for its position, WWE improperly concludes that because Ms. Reynolds attended the meeting with counsel, "Levy should be required to produce all of the communications listed on his privilege log that were sent or shared with Ms. Reynolds." (Def. Mot. at 22). However, even assuming *arguendo* that Ms. Reynolds was not acting as Levy's agent at that particular meeting, there is no sufficient basis to suggest that every document shown to Reynolds should be produced. WWE has made no showing whatsoever that privileged communications involving Ms. Reynolds are excluded from the protection afforded by the attorney-client privilege.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny WWE's motion to compel in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that a true and correct copy of the foregoing **Plaintiff's Response in Opposition to Defendant's Motion to Compel Regarding Privilege Issues** was filed this 13th day of November 2017 via the electronic filing system of the United States District Court for the District of Connecticut, which will automatically serve all counsel of record.

/s/Michael Silverman
Michael Silverman