STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION Docket Nos. 173-4-20 Wncv & 207-6-20 Wncv

ENERGY POLICY ADVOCATES,
Plaintiff,

v.

ATTORNEY GENERAL'S OFFICE,
Defendant.

DEFENDANT ATTORNEY GENERAL'S OFFICE'S OPPOSITION TO PLAINTIFFS' MOTIONS FOR LEAVE TO FILE SUPPLEMENTAL SUMMARY JUDGMENT BRIEFING

Defendant Vermont Attorney General's Office ("AGO"), hereby opposes Plaintiff's January 16th and February 10th Motions for Leave to File a Supplemental Brief in opposition to the AGO's pending and fully briefed Motion for Summary Judgment, filed July 7, 2020. In support hereof, Defendant AGO offers the following Memorandum.

MEMORANDUM

Plaintiff's Motions fail to present any legally material new evidence that would justify re-opening and expanding the factual record pertinent to the AGO's Motion for Summary Judgment. Supplemental summary judgment briefing is therefore unneeded and inappropriate.

I. BACKGROUND

These consolidated cases seek the production of certain documents from the AGO under the Vermont Public Records Act, 1 V.S.A. § 315, *et seq.* ("PRA"). In Docket 173-4-20 Wncv, Plaintiff seeks 7 withheld common interest agreements and confidentiality agreements prepared for and entered into by the AGO on behalf of the State of Vermont in 2019 and 2020 with other state attorneys general offices and certain other parties in anticipation of litigation concerning matters of common interest relating to the environmental impacts of greenhouse gases

(hereinafter, collectively, "the Common Interest Agreements" or "the CIAs"). As detailed more fully in its pending Motion for Summary Judgment and accompanying *Vaughn* Index for this docket, the CIAs are subject to the work product, lawyer-client and common interest privileges, as reflected in V.R.C.P. 26(b)(4) and V.R.E. 502(b)(3), and therefore exempt from inspection and production under the PRA pursuant to 1 V.S.A. § 317(c)(4).

In Docket No. 207-6-20 Wncv, Plaintiff seeks approximately 85 records, consisting of emails and their attachments, that collectively comprise over 2700 pages of documents (the "AGO Emails and their Attachments"). The AGO Emails and their Attachments were all exchanged between the AGO and other state attorney general offices pursuant to the terms of (and in reliance upon) the CIAs described above, as well as additional environmental-related common interest agreements to which the Vermont AGO and other state attorneys general offices are party.

The AGO Emails and their Attachments were all prepared, sent and received by or for the AGO and its state attorneys general office partners (i) in anticipation of litigation concerning matters of common interest and (ii) for the use, benefit and reliance of the Vermont AGO in rendering legal advice to the State and participating in such litigation. Many of the AGO Emails and Attachments reflect the mental impressions, conclusions, opinions and legal theories of the attorneys who prepared and/or selected them for attachment concerning filed or anticipated litigation. Therefore, as discussed in the Motion for Summary Judgment and reflected in the accompanying *Vaughn* Index for this docket, the AGO Emails and their Attachments are also exempt from inspection and production under 1 V.S.A. § 317(c)(4) because they are protected by the work product, lawyer-client and common interest privileges reflected in V.R.C.P. 26(b)(4) and V.R.E. 502(b)(3).

II. THE AGO'S COMMON INTEREST PRIVILEGE IN THE WITHHELD DOCUMENTS HAS NOT BEEN WAIVED

In its February 10th Second Motion for Leave to File Supplemental Brief, Plaintiff represents that the Minnesota Attorney General's Office has recently released to it two of the seven CIAs withheld by the Vermont AGO in Docket 173-4-20 Wncv -- the GHG Litigation CIA and the Climate Change CA -- as a result of "open records litigation" brought by Plaintiff in Minnesota to compel the release of such documents. *See* Pltf. 2d Motion for Leave ¶ 4 & Exs. A-C. Therefore, Plaintiff "seeks to address in supplemental briefing whether the production of documents by Vermont's fellow signatories to the various agreements constitutes a waiver of the privilege that is imputed to Vermont, and whether the content of these records as released by other states demonstrates that the agreements are not privileged as defendant claims." *Id.* ¶ 7.

However, there is no need for such briefing because "the case law is clear that one party to a JDA [joint defense agreement] cannot unilaterally waive the privilege for other holders." *United States v. Gonzalez*, 669 F.3d 974, 982 (9th Cir. 2012); *see also United States v. BDO Seidman, LLP,* 492 F.3d 806, 817 (7th Cir. 2007) (noting that the "privileged status of communications falling within the common interest doctrine cannot be waived without the consent of all of the parties."). Therefore, the Minnesota AGO's purported release of two of the CIAs at issue in Docket 173-4-20 Wncv, either voluntary or compelled through litigation, does

not waive the common interest privilege held by the Vermont AGO and other state attorney general offices who are parties to these CIAs.[1]

Plaintiff is also incorrect and disingenuous in suggesting that the Vermont AGO consented to the Minnesota AGO's release of the two CIAs. Plaintiff has selectively and misleadingly quoted the CIAs to argue that "since the documents at issue here expressly require that 'the other Parties consent to disclosure or release of Protected Information' (See Agreements, ¶ 8), it is inescapable that either the parties acknowledge that no protections against disclosure may be asserted, or that these agreements are not 'protected information.'" Pltf. 2d Motion for Leave ¶ 6.

In fact, Paragraph 8 of both CIAs released by Minnesota reads in pertinent part: "Unless the other Parties consent to disclosure or release of Protected Information, the Party receiving the request for disclosure shall assert, to the extent authorized by law, and subject to any mandatory disclosure laws or court orders, all relevant and applicable privileges and other objections to the disclosure of such information." Pltf. 2d Motion for Leave Exs. B, C ¶ 8 (emphasis added); *see also id.*, ¶ 7 ("Protected Information may not be shared by a recipient with any non-party to this

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[1] The Minnesota AGO's disclosure of two of the CIAs to Plaintiff has also not waived work product protection. "A party only waives its work product privilege when 'the client, the client's lawyer, or another authorized agent of the client . . . discloses the material to third persons in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it.'" *Wash. Coal. for Open Gov't v. Pierce Ctny.*, No. 50718-8-II, 2019 WL 761585, at *6 (Wash. Ct. App. Feb. 20, 2019), *review denied*, 193 Wash. 2d 1020, 448 P.3d 66 (2019) (quoting Restatement (Third) of the Law Governing Lawyers § 91(4) (Am. Law Inst. 2000)). Because the Minnesota AGO disclosed the CIAs to Plaintiff, rather than to the states' prospective litigation adversaries identified in the GHG Litigation CIA and the Climate Change CA -- the federal government and certain private producers of fossil fuels -- the Minnesota AGO has not created a significant likelihood that these relevant litigation adversaries will obtain the CIAs.

agreement without prior written waiver from all parties to this Agreement, unless the relevant party determines that disclosure is required by applicable law") (emphasis added). Thus, under the plain language of the CIAs, it is not an "inescapable" or even plausible inference that the Vermont AGO or other signatories consented to Minnesota AGO's release of the two CIAs.[2]

Rather, Minnesota's release of the two CIAs during ongoing litigation with Plaintiff seems to indicate that the Minnesota AGO "determine[d] that disclosure [wa]s required by [Minnesota] law," *id.*, and/or because Minnesota "disclosure laws or court orders" required their release. *See id.*, ¶ 8. Consistent with this conclusion is Plaintiff's own position that "Minnesota . . . has not adopted the common interest doctrine." Pltf. 2d Motion for Leave ¶ 6.

However, unlike the arguably uncertain status or limited scope of the common interest privilege under Minnesota law, Vermont law clearly protects confidential communications between lawyers for separate clients "concerning a matter of common interest." V.R.E. 502(b)(3). Plaintiff's repeated contention that "Vermont[] has not adopted the common interest doctrine," *id.*, is also belied by the decisions of the Vermont Superior Court and the Vermont Environmental Court in *Munson Earth Moving Corp. v. City of South Burlington,* Docket No. S0805-08 Cncv, 2009 WL 8019258 (Vt. Super Ct. Mar. 30, 2009) and *In re Champlain Marina Dock Expansion*, Docket No. 28-2-09 Vtec, 2010 WL 2594034 (Vt. Envtl. Ct. June 16, 2010)

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[2] Plaintiff is also mistaken in suggesting that the Minnesota AGO's release of the two CIAs necessarily implies that the CIAs themselves were never considered by the parties to constitute "protected information" within the scope of the CIAs. Pltf. 2d Motion for Leave ¶ 6. In fact, the parties "agreed that this [Common Interest] Agreement itself, any amendments thereto, and all discussions among the Parties related to the Agreement are themselves subject to the attorney-client privilege, common interest privilege, and work product doctrine." Pltf. 2d Motion for Leave Exs. B, C ¶ 12.

that plainly did recognize such a privilege. Finally, although no Vermont decision has yet expressly addressed whether written common interest agreements are themselves privileged, the clear weight of authority outside Vermont has found that they are. *See R.F.M.A.S., Inc. v. So*, No. 06 CIV 13114 VM MHD, 2008 WL 465113, at *1 (S.D.N.Y. Feb. 15, 2008) (noting "joint-defense agreement fits within the broad definition of work product" and "most courts to address the matter have so found or assumed").[3]

III. THE WITHHELD DOCUMENTS ARE ALSO PROTECTED BY THE WORK PRODUCT PRIVILEGE

In Plaintiff's first Motion for Leave to File Supplemental Brief dated January 16th, Plaintiff argues that none of the records withheld by the Vermont AGO in these consolidated cases "have been created, obtained, or shared in anticipation of litigation" because of certain alleged statements by the Attorneys General of New York and Oregon to the *Wall Street Journal* in late November 2020 concerning the prospect of litigation by certain states against the federal government to compel federally-mandated reductions of greenhouse gas emissions. *See* Pltf. 1st Motion for Leave ¶¶ 4-6.[4] However, all of the requested documents withheld by the AGO in

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[3] *AMEC Civil, LLC v. DMJM Harris, Inc.*, No. CIV.A. 06-064 FLW, 2008 WL 8171059, at *4 (D.N.J. July 11, 2008) (noting that "joint defense agreements are protected by work product privilege, and are therefore not discoverable without showing substantial need" and holding, after *in camera* review, all of JDA except for tolling agreement subject to work product and common interest privileges); *A.I. Credit Corp. v. Providence Wash. Ins. Co., Inc.*, No. 96CIV7955AGS AJP, 1997 WL 231127, at *4 (S.D.N.Y. May 7, 1997) (holding "joint defense agreements are generally considered privileged").

[4] Litigation by states against the federal government to compel federally-mandated greenhouse gas emission reductions is just one aspect of a much broader range of anticipated litigation by Vermont and other states against diverse parties that motivated preparation of the various withheld documents in these consolidated cases. *See* AGO's Docket No. 173-4-20 First Amended *Vaughn* Index at 3, 7-10, 13-14, submitted as Exhibit A to AGO's July 7, 2020 Motion

these consolidated cases were authored or created, by the terms and timing of Plaintiff's public records requests, between January 2019 and April 2020.

Obviously, statements by the New York and Oregon Attorneys General in late November 2020 about the likelihood of future climate change litigation against the Biden administration have little probative value in determining whether, seven to nineteen months earlier, climate change litigation against the Trump administration and its very different environmental policies was "a real possibility at the time of [the withheld documents'] preparation." *Harris v. Provident Life & Accident Ins. Co.*, 198 F.R.D. 26, 30 (N.D.N.Y. 2000) (citation omitted; emphasis added); *see also United States ex rel. Fago v. M & T Mortg. Corp.*, 242 F.R.D. 16, 18 (D.D.C. 2007) ("[A]t the time the document was prepared or obtained, there must have been at least 'a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable'") (citation omitted). In determining whether "the work product doctrine is applicable," courts do not require demonstration that the anticipated "litigation was a certainty" but only ask "whether the document was created 'with an eye toward litigation.'" *A.*

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for Summary Judgment (disclosing anticipated litigation relating to "oil and gas leasing," "petroleum development," as well as climate change litigation targeting private producers of fossil fuels and procedural changes to the National Environmental Policy Act); *see also* AGO's Docket No. 207-6-20 *Vaughn* Index at 37-38, 43-44 submitted as Exhibit B to AGO's July 7, 2020 Motion for Summary Judgment (disclosing anticipated litigation relating to "regulation of landfill emissions," "engine emission standards and fuel economy standards," "electric power system and natural gas system infrastructure and regulation and wholesale electricity markets," and "EPA enforcement policy adopted in response to the Coronavirus Pandemic").

Michael's Piano, Inc. v. FTC, 18 F.3d 138, 146 (2d Cir. 1994) (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)).

In addition, the standard for determining whether a document was "prepared in anticipation of litigation" is whether "the document can fairly be said to have been prepared or obtained because of the prospect of litigation" or that "the preparation of those materials was 'principally prompted' by the prospect of litigation." *LaRoche v. Champlain Oil Co.*, Docket No. 363-10-15 Bncv, 2016 WL 9453682, at *2 (Vt. Super. Ct. July 27, 2016) (quoting 8 Wright & Miller, Fed. Prac. & Proc. Civ. § 2024 (3d ed.)). Here, Plaintiff has still adduced no evidence disputing the AGO's sworn affidavit testimony from Assistant Attorney General Persampieri that, at the time of their preparation in 2019 and early 2020, all of the withheld documents were prepared because of either filed litigation, or the real possibility and reasonably likely prospect of litigation. *See* July 7, 2020 AGO Statement of Undisputed Material Facts ("SUMF") ¶¶ 14, 53. Certainly, none of the withheld documents were prepared in the normal or routine course of affairs, or because of a remote or speculative chance of litigation. *See id.* ¶¶ 15-16, 55-56. Plaintiff does not contend otherwise.

However, even if the availability of work product protection for all of the withheld documents were, contrary to law, determined based on the current likelihood of climate change litigation against the federal government, neither of the quoted November 2020 statements by the New York and Oregon attorneys general suggest that such litigation is now no more than a "remote possibility." *Harris*, 198 F.R.D. at 30. On the contrary, the New York Attorney General stated that "all options must be on the table." Pltf. 1st Motion for Leave ¶ 4. The Oregon Attorney General likewise noted that his state, in the previous three years, had joined "180 challenges to federal actions that would weaken or eliminate climate and environmental

protections" and insisted that "[w]e will never give up on the health of our communities and the future of our planet." *Id.* ¶ 5. If anything, such statements indicate that future climate change litigation continues to be "a real possibility," *Harris*, 198 F.R.D. at 30, not a remote or purely hypothetical one, as Plaintiff misleadingly suggests using selective quotes from two state officials in one newspaper article.

CONCLUSION

For the foregoing reasons, Defendant Vermont Attorney General's Office requests that Plaintiff's Motions for Leave to File a Supplemental Brief in opposition to the AGO's Motion for Summary Judgment be denied.

DATED at Burlington, Vermont this 26th day of February 2021.

STATE OF VERMONT

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day February 2021, I served DEFENDANT ATTORNEY GENERAL'S OFFICE'S OPPOSITION TO PLAINTIFFS' MOTIONS FOR LEAVE TO FILE SUPPLEMENTAL SUMMARY JUDGMENT BRIEFING by sending same via email to Matthew D. Hardin, Esq., MatthewDHardin@gmail.com

DATED at Burlington, Vermont this 26th day of February 2021.

STATE OF VERMONT

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