UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States Securities and Exchange Commission,

Plaintiff,

v.

David B. Welliver,
Dblaine Capital, LLC,

Defendants.

Civil No. 11-CV-3076 (RHK/SER)

ORDER

Benjamin J. Hanauer, John E. Birkenheier, Thu E. Ta, Esqs., U.S. Securities and Exchange Commission, 175 West Jackson Boulevard, Suite 900, Chicago, Illinois 60604, for Plaintiff.

James S. Alexander, Esq., United States Attorney's Office, 300 South Fourth Street, Suite 600, Minneapolis, Minnesota 55415, for Plaintiff.

Benjamin R. Skjold, Christopher P. Parrington, Jared D. Kemper, Thomas W. Pahl, Esqs., Foley & Mansfield, PLLP, 250 Marquette Avenue, Suite 1200, Minneapolis, Minnesota 55401, for Defendants.

Patrick D. Boyle, Esq., Law Office of Patrick D. Boyle, 222 South Ninth Street, Suite 3220, Minneapolis, Minnesota 55402, for Defendants.

STEVEN E. RAU, United States Magistrate Judge

The Securities and Exchange Commission ("SEC") brings this enforcement action alleging numerous violations of federal securities statutes and related regulations. Specifically, the SEC claims David B. Welliver ("Welliver") and Dblaine Capital, LLC ("Dblaine Capital") (Welliver and Dblaine Capital, collectively, "Defendants") engaged in improper *quid pro quo* transactions with Lazy Deuce Capital Co. ("Lazy Deuce") and Semita Partners, LLC ("Semita") in breach of their fiduciary duties to Dblaine Fund (the "Fund"), a mutual fund advised by

Defendants. (Compl.) [Doc. No. 1 ¶¶ 1–2, 44]. This case is presently before the Court on the SEC's Motion for an Order Finding Waiver of Attorney-Client Privilege as to Attorney Wanda Weber ("Weber").[1] [Doc. No. 34]. The parties filed formal briefing and a hearing was held on the Motion. (July 23, 2012 Minute Entry) [Doc. No. 67]. In response to a dispute at the hearing as to the attorney-client relationship between Weber and Dblaine Capital, Defendants submitted additional letter briefing. (July 30, 2012 Letter) [Doc. No. 72]. Subsequently, the Court conducted a telephone status conference with the parties regarding the issue and requested further direction based on the representations made during that call. (Aug. 21, 2012) [Doc. No. 75]. The parties filed a stipulation laying out the contours of Weber's representation of the Defendants at the end of August 2012. (Stipulation Regarding Attorney-Client Relationships Involving Wanda Weber and David Jones) [Doc. No. 77]. Based on the files, records, and proceedings, and for the reasons set forth below, the SEC's Motion is granted.

I. BACKGROUND

A. The Underlying Dispute

The SEC alleges that the Defendants obtained approximately $4 million in high-interest loans from Lazy Deuce in exchange for agreeing to invest significant mutual fund assets in "alternative investments" recommended by Lazy Deuce. (Compl. ¶¶ 39–49). Further, the SEC alleges that pursuant to that agreement, Defendants inappropriately directed the Fund to invest in an illiquid private placement offered by Semita, an affiliate of Lazy Deuce. (*Id.* ¶¶ 50–68). Finally, the SEC alleges that the Defendants later made additional Fund investments in Semita, knowing those investments violated various Fund investment restrictions and policies. (*Id.* ¶¶ 61–68).

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[1] This matter has been referred to the undersigned for resolution of pretrial matters pursuant to 28 U.S.C. § 636 and District of Minnesota Local Rule 72.1.

Throughout this time, Welliver controlled Dblaine Capital. (*Id.* ¶ 15); (Am. Answer of Defs. David B. Welliver and Dblaine Capital, LLC to the Compl., "Am. Answer") [Doc. No. 62 ¶ 15]. He founded Dblaine Capital in 2005 and served as Chief Executive Officer and Chief Investment Officer during most of its existence. (Compl. ¶ 15); (Am. Answer ¶ 15). Dblaine Capital's primary function was to advise the Dblaine Investment Trust, a registered investment company comprised of multiple funds, including the Fund. (Compl. ¶ 16); (Am. Answer ¶ 16). Welliver also served as the President, Chief Executive Officer, Treasurer, Chief Financial and Accounting Officer, Secretary, and Chairman of the Board of Trustees of the Fund and Dblaine Investment Trust. (Compl. ¶ 15); (Am. Answer ¶ 15).

B. Production of Documents in SEC's Pre-Suit Investigation

About three months before this lawsuit was filed, the SEC issued two subpoenas relating to an investigation of Defendants. (July 22, 2011 Subpoenas, Ex. A, Attached to Index of Exs. in Supp. of Pl.'s Mot. for an Order Finding Waiver of Attorney-Client Privilege) [Doc. No. 36]. The subpoenas required production of "communications between the Board of Trustees of Dblaine Investment Trust, or any committees of the Board, and the Trust's Chief Compliance Officer"; "[Dblaine Capital]'s investment in [Semita]"; "[the] Fund's investment in [Semita]"; and "Lazy Deuce." (*Id.*). The subpoena required compliance "on or before July 28, 2011." (*Id.*).

Defendants produced responsive documents on or about August 1, 2011. (Mem. in Supp. of Pl.'s Mot. for an Order Finding Waiver of Att'y-Client Privilege, "Pl.'s Mem.") [Doc. No. 35 at 3]; (August 1, 2011 Email, Ex. B, Attached to Index of Exs. in Supp. of Pl.'s Mot. for an Order Finding Waiver of Attorney-Client Privilege); (Decl. of Jean M. Javorski, Ex. C , Attached to Index of Exs. in Supp. of Pl.'s Mot. for an Order Finding Waiver of Attorney-Client Privilege,

"Javorski Decl.") [Doc. No. 36 ¶ 4]. Among those documents were at least two hundred emails between Weber and Defendants. (Pl.'s Mem. at 3); (Javorski Decl. ¶ 5). Many of those emails were communications solely between Weber and Welliver, or Weber, Welliver, and David Jones ("Jones"), the Chief Compliance Officer for Dblaine Investment Trust. (Pl.'s Mem. at 3); (Javorski Decl. ¶ 5).

C. Production of Documents in Discovery

Following the SEC's investigation, the Complaint in this matter was filed and the parties served discovery. (Compl.). On or about April 26, 2012, Defendants again produced a large number of emails between Welliver and Weber, and Welliver, Weber, and Jones in response to the SEC's document requests.[2] (Pl.'s Mem. at 3–4); (Javorski Decl. ¶ 9). Several of the same emails Defendants provided during SEC's pre-suit investigation were produced again. (Javorski Decl. ¶ 9). At Jones's deposition on April 30, 2012, Defendants introduced as exhibits at least two emails between Welliver, Jones, and Weber regarding the agreement between Lazy Deuce and Dblaine Capital that is central to this case. (Jones Dep. Ex. 32, Ex. B, attached to Index of

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[2] Defendants were represented by different counsel at the time of the pre-suit disclosures and the discovery responses. At the time of the pre-suit disclosures, Felhaber, Larson, Felon, & Vogt, P.A. represented Defendants. (Mem. in Supp. of Pl's Mot. for an Order Finding Waiver of Attorney-Client Privilege, "Pl.'s Mem.") [Doc. No. 35 at 3 n.1]. At the onset of this lawsuit in fall 2011, Defendants retained Blank Rome and Greene Espel. *See* (Answer at 24–25); (Waiver of the Service of Summons) [Doc. No. 5]. On March 27, 2012, approximately one month before the discovery disclosures, attorneys Skjold, Parrington, and Boyle from Skjold Parrington, P.A. noticed an appearance on behalf of Defendants. (Not. of Appearance) [Doc. No. 24]. Blank Rome and Greene Espel withdrew their representation the following day. (Withdrawal of Counsel) [Doc. No. 26]. It appears Foley & Mansfield, PLLP acquired the relevant practice groups of the Skjold Parrington, P.A. at some point in the pendency of this litigation. *See* Skjold Parrington Business Attorneys, http://www.skjoldparrington.com/ (last visited Oct. 23, 2012) ("Skjold Parrington is pleased to announce that our transactional and commercial litigation practices have been acquired by the national litigation and business powerhouse of Foley & Mansfield."). Based on the record, attorneys Parrington and Skjold are now affiliated with Foley & Mansfield; attorney Boyle, however, maintains a solo practice. While this Motion was pending, Defendants also retained T. Jay Salmen as co-counsel. (Notice of Appearance) [Doc. No. 74].

Exs. to Pl.'s Reply in Supp. of Mot. for an Order Finding Waiver of Att'y-Client Privilege); (Jones Dep. Ex. 33, Ex. C, attached to Index of Exs. to Pl.'s Reply in Supp. of Mot. for an Order Finding Waiver of Att'y-Client Privilege) [Doc. No. 58].

Five weeks later, Defendants sent a letter to the SEC claiming that the production of certain documents in this matter resulted in inadvertent disclosures of attorney-client privileged communications and work product. (June 4, 2012 Letter, Ex. D, Attached to Index of Exs. in Supp. of Pl.'s Mot. for an Order Finding Waiver of Attorney-Client Privilege). Defendants requested the return or destruction of documents identified in their letter.[3] (*Id.*).

D. Defendants' Reliance Defenses

In their Answer, Defendants asserted two explicit reliance on counsel defenses.[4] (Answer of Defs. David B. Welliver and Dblaine Capital, LLC to the Compl.) [Doc. No. 7 ¶¶ 169, 174].

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[3] The versions of the documents Defendants introduced at Jones's deposition submitted in connection with this Motion were not Bates numbered. (Jones Dep. Ex. 32, Ex. B, attached to Index of Exs. to Pl.'s Reply in Supp. of Mot. for an Order Finding Waiver of Att'y-Client Privilege); (Jones Dep. Ex. 33, Ex. C, attached to Index of Exs. to Pl.'s Reply in Supp. of Mot. for an Order Finding Waiver of Att'y-Client Privilege). Thus, it is not clear if they were included among the documents listed in the appended Schedule A of Defendants' clawback letter. (June 4, 2012 Letter, Ex. D, Attached to Index of Exs. in Supp. of Pl.'s Mot. for an Order Finding Waiver of Attorney-Client Privilege).

[4] The second and seventh affirmative defenses pleaded in Defendants' original Answer provided:

> **SECOND AFFIRMATIVE DEFENSE**
>
> 169. The claims are barred by Welliver's and Dblaine Capital's warranted reliance on the expert opinions of the Fund's and Dblaine Capital's Chief Compliance Officer, external auditors, accountants, legal counsel, the Fund's administrator and other outside professionals.
>
> . . .
>
> **SEVENTH AFFIRMATIVE DEFENSE**

After the SEC filed the instant Motion, the parties stipulated to grant Defendants leave to amend their answer "solely to withdraw the Second and Seventh affirmative defense, but only to the extent each references a reliance on the advice of counsel defense." (Stip. to Amend Answer of Defs. to Withdraw Affirmative Defenses) [Doc. No. 61]. Defendants filed their amended answer shortly thereafter.[5] (Am. Answer of Defs. David B. Welliver and Dblaine Capital, LLC to the Compl., "Am. Answer") [Doc. No. 62].

> 174. Welliver was entitled to, and did, rely upon the opinions of professionals and experts in affixing his signatures to, and authorizing the filing of, documents with the SEC. Welliver believed that these experts were, in fact, experts in their field and were competent to render the opinions they had provided. Welliver had no notice that the opinions provided by these experts were in any way inadequate, unfounded, or incorrect as to the matters on which the experts had opined. Welliver had no reasonable grounds to believe, and did not believe, that the statements contained in any such filings were untrue or that there was an omission of a material fact required to be stated therein or necessary to make the statements therein not misleading.

(Answer of Defendants David B. Welliver and Dblaine Capital, LLC to the Complaint ¶¶ 169, 174).

[5] The Amended Answer asserts:

> **SECOND AFFIRMATIVE DEFENSE**
>
> 169. The claims are barred by Welliver's and Dblaine Capital's warranted reliance on the expert opinions of the Fund's and Dblaine Capital's Chief Compliance Officer, external auditors, accountants, the Fund's administrator and other outside professionals, other than legal counsel.
>
> . . .
>
> **SEVENTH AFFIRMATIVE DEFENSE**
>
> 174. Welliver was entitled to, and did, rely upon the opinions of professionals and experts, other than legal counsel, in affixing his signatures to, and authorizing the filing of, documents with the SEC. Welliver believed that these experts were, in fact, experts in their field and were competent to render the opinions they had provided. Welliver had no notice that the opinions provided by these experts were in any way inadequate, unfounded, or incorrect as to the matters on which the experts had opined. Welliver had no reasonable grounds to believe, and did not

II. DISCUSSION

The issue presented in this Motion is whether Defendants' voluntary production of privileged documents on three occasions constitutes a waiver of their attorney-client privilege with Weber. The alleged waiver occurred with the disclosure of (1) documents in the pre-suit investigation, (2) documents by Defendants in Jones's deposition, and (3) documents responsive to a request in discovery. According to the SEC, Defendants also waived privilege when they asserted two defenses implicating their intent. Although Defendants' disclosures waived any attorney-client privilege applicable to those documents, subject-matter waiver is not warranted based on the disclosures. Nevertheless, because Defendants' remaining defenses result in a waiver the privilege, subject-matter waiver is appropriate on that basis.

A. Attorney-Client Privilege

Federal common law provides the applicable framework to resolve claims of attorney-client privilege in this action. *See* Fed. R. Evid. 501; *Hemmah v. City of Red Wing*, 592 F. Supp. 2d 1134, 1143 n.4 (No. 06-cv-3887 JNE/JJG). "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citation omitted); *see also Citibank, N.A. v. Andros*, 666 F.2d 1192, 1195 (8th Cir. 1981). In general, attorney-client privilege protects confidential communications between individuals and attorneys for the purposes of obtaining or rendering legal advice. *See Upjohn*, 449 U.S. at 394–95; *United States v. Horvath*, 731 F.2d 557, 561 (8th Cir. 1984). The privilege exists for the benefit of the client and not the attorney. *Schwimmer v.*

> believe, that the statements contained in any such filings were untrue or that there was an omission of a material fact required to be stated therein or necessary to make the statements therein not misleading.

(Am. Answer ¶¶ 169, 174).

United States, 232 F.2d 855, 863 (8th Cir. 1956) (citation omitted). The party asserting the attorney-client privilege bears the burden of providing a factual basis for its assertions. *Triple Five of Minn., Inc. v. Simon*, 212 F.R.D. 523, 528 (D. Minn. 2002) (citation omitted); *see also In re Grand Jury Proceedings*, 791 F.2d 663, 666 (8th Cir. 1986). The purpose of the attorney-client privilege is to encourage "full and frank communication between attorneys and their clients." *Upjohn*, 449 U.S. at 389. Full and frank communication is not an end in itself, however, but merely a means to achieve the ultimate purpose of the privilege: "promot[ing] broader public interests in the observance of law and administration of justice." *Id.*

The SEC's Motion assumes that privilege attaches to each of the documents at issue. In doing so, the SEC effectively relieves the Defendants of their burden of establishing that the documents are privileged.[6] Because the Court finds that any attorney-client privilege potentially applicable to the documents was waived, it is unnecessary to decide whether the communications were privileged. Instead, the Court addresses waiver.[7] *See Beiter Co. v. Blomquist*, 156 F.R.D.

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[6] Defendants challenged the existence of an attorney-client relationship between Dblaine Capital and Weber at the hearing on this Motion. In response, the SEC produced two documents that purportedly established the existence of such a relationship. The Court accepted the documents and permitted the Defendants to respond via letter brief. (July 30, 2012 Letter) [Doc. No 72]. In their letter brief, Defendants maintained their challenge as to the existence of an attorney-client relationship between Dblaine Capital and Weber. (*Id.* at 1–2). During a telephone status conference on August 21, 2012, the parties informed the Court that Welliver's testimony at his July 31, 2012 deposition established a privileged relationship between Dblaine Capital and Weber. (Aug. 21, 2012 Status Conference Minutes) [Doc. No. 75]. Because of a continuing lack of clarity on the very issue on which the Court was being asked to rule, the Court requested that the parties attempt to reach agreement regarding the contours of Weber's representation of Dblaine Capital. (*Id.*). On August 28, 2012, the parties filed a stipulation defining the scope of Weber's relationship with Dblaine Capital. (Aug. 28, 2012 Stipulation) [Doc. No. 77]. Based on that stipulation, an attorney-client relationship existed between Dblaine Capital and Weber from approximately January 1, 2007 to May 31, 2012 and between Welliver and Weber from approximately January 1, 2006 to present. (*Id.* ¶¶ 1, 2). Any attorney-client privilege could only extend to communications within that timeframe.

[7] The Court recognizes that many of the documents at issue involve communications between Welliver, Weber, and Jones. Not all communications between a client and lawyer are

173, 176 n.3 (D. Minn. 1994) (No. 03:89-cv-759 DDA/FLN) (assuming that attorney-client privilege attached to communications to address issue of waiver).

B. Waiver of Attorney-Client Privilege by Disclosure

Generally, voluntary dissemination of a privileged document to an opposing party or a third party waives the attorney-client privilege. *United States v. Workman*, 138 F.3d 1261, 1263 (8th Cir. 1998) (citation omitted); *S&S Forage & Equip. Co., Inc. v. Up N. Plastics, Inc.*, No. 98-cv-565 (DWF/RLE), 1999 WL 34967061, at *4 (D. Minn. Oct. 25, 1999). Although not cited by either party, Federal Rule of Evidence 502 dictates the scope of any waiver resulting from Defendants' disclosures in this matter. *See* Fed. R. Evid. 502(a) ("When the disclosure is made in a federal proceeding or to a federal office or agency . . . ."); Fed. R. Evid. 502(b) ("When made in a federal proceeding or to a federal office or agency . . . ."); *see, e.g., Trs. of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors*, 266 F.R.D. 1 (D.D.C. 2010) (applying Rule 502 where jurisdiction was based on federal question).

Rule 502 provides in pertinent part:

> (a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
>
> (1) the waiver is intentional;
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> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> (3) they ought in fairness to be considered together.

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privileged, however. The privilege does not apply simply because a statement was made by or to an attorney. *Diversified Induss., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977).

> (b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
>
> > (1) the disclosure is inadvertent;
> >
> > (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
> >
> > (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Fed. R. Evid. 502(a)–(b). Thus, the scope of any potential waiver under Rule 502 depends on whether the waiver of the privilege—rather than the act of disclosing the information—is deemed intentional or inadvertent. *See Bear Republic Brewing Co. v. Cen. City Brewing Co.*, 275 F.R.D. 43, 47 (D. Mass. 2011); Advisory Comm. on Evidence Rules, Minutes of Meeting of April 12–13, 2007, at 8, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes /EV04-2007-min.pdf [hereinafter Advisory Comm. on Evidence Rules April 12–13 Minutes] ("After discussion, the Committee determined that subject[-]matter waiver should not be found unless it could be shown that the party specifically intended to waive the privilege by disclosing the protected information. Committee voted unanimously to amend proposed Rule 502(a) to provide that subject matter waiver could only be found if 'the waiver is intentional.'").

If an intentional waiver is found, Rule 502(a) limits the scope of the waiver to the disclosed communication or information, unless a broader waiver is made necessary by the intentional and misleading use of privileged or protected communications or information:

> The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re United Mine Workers of America Employee Benefit*

> *Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994) (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner.

Advisory Comm. Notes, Fed. R. Evid. 502(a). Accordingly, a court should find subject-matter waiver only in situations where the privilege holder seeks to use the disclosed privileged material for a tactical advantage in the litigation, but invokes the privilege to deny its adversary access to additional materials that could provide an important context for proper understanding of the privileged materials. *See id.* ("subject[-]matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. . . . [A] party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation."). In contrast, under Rule 502(b) an inadvertent waiver will never result in a subject-matter waiver. *Id.*; *see* Fed. R. Evid. 502(b).

1. Rule 502(a) Intentional Disclosure: Documents Introduced as Exhibits in Jones's Deposition

The first two prongs of Rule 502(a) are easily satisfied with respect to documents produced at Jones's deposition. First, Defendants intentionally waived attorney-client privilege within the meaning of Rule 502(a)(1) by voluntarily introducing the documents as exhibits.[8] As

[8] At the hearing on this Motion, Defendants' counsel claimed that the emails produced at the Jones deposition were not privileged because a third party (Jones) was privy to the exchange between Welliver and Weber. *See Workman*, 138 F.3d at 1263; *S&S Forage & Equip. Co., Inc.*, 1999 WL 34967061, at *4. At that time, Defendants took the position that no attorney-client relationship existed with Dblaine Capital. Subsequently, however, the parties stipulated to the existence of an attorney-client relationship between Dblaine Capital and Weber at the time the emails were exchanged. *See supra* footnote 6 (discussing Defendants' initial position and later filings clarifying the attorney-client relationship between Weber, Welliver, and Dblaine Capital). Because Jones was the Chief Compliance Officer to Dblaine Investment Trust at the time the emails were exchanged, privilege may attach if he was acting in his capacity as an employee

to the second prong, the SEC seeks to depose Weber about undisclosed information relating to the same subject matter as these documents produced—"Defendants' dealings with Lazy Deuce and Semita."[9] (Pl.'s Mem. at 1–2); *see also* Fed. R. Evid. 502(a)(2).

The third prong, however, is not satisfied. This final prong determines whether a subject-matter waiver is appropriate through an analysis of whether the disclosed and undisclosed information "ought in fairness . . . be considered together." Fed. R. Evid. 502(a)(3). The attorney-client privilege is sacred and vital to the administration of justice; courts must exercise great caution in finding a subject-matter waiver of that privilege. Obviously, Defendants' disclosure and waiver were intentional, but the current record does not support a conclusion that a subject-matter waiver is appropriate. Neither party described the context in which the deposition exhibits were used. Further, it is not clear if and how the parties relied on or intend to rely on those documents. Simply put, nothing in the present record suggests that Defendants deliberately disclosed this information to gain a tactical advantage. *See* Advisory Comm. Notes, Fed. R. Evid. 502(a). Based on the current record, the Court cannot conclude that this is one of

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under the test laid forth in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977) (en banc) ("[T]he attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his [or her] corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents"). Because the SEC's Motion assumes privilege attaches to these exchanges and this analysis ultimately concludes that any applicable privilege was waived, the Court declines to address the privileged nature of these documents and moves to the ultimate question of waiver. *See Beiter Co.*, 156 F.R.D. at 176 n.3.

[9] Only two documents at issue were submitted to the Court. (Jones Dep. Ex. 32, Ex. B, attached to Index of Exs. to Pl.'s Reply in Supp. of Mot. for an Order Finding Waiver of Att'y-Client Privilege); (Jones Dep. Ex. 33, Ex. C, attached to Index of Exs. to Pl.'s Reply in Supp. of Mot. for an Order Finding Waiver of Att'y-Client Privilege). Both documents relate to the agreement between Dblaine Capital and Lazy Deuce. Given the nature of that agreement, those communications also relate to Dblaine Capital's "dealings" with Semita.

"those unusual circumstances" where the disclosure was made in a "selective, misleading and unfair manner," such that Rule 502(a) mandates a subject-matter waiver. *Id.*

2. Rule 502(b) Inadvertent Disclosures: Pre-Suit Investigation Disclosures and Documents Produced in Response to Discovery Requests

Although Defendants intentionally disclosed documents during the pre-suit investigation and discovery, they did not intentionally waive any applicable attorney-client privilege. Accordingly, Rule 502(b)'s framework for inadvertent disclosure applies. *See Bear Republic Brewing Co.*, 275 F.R.D. at 47; Advisory Comm. on Evidence Rules April 12–13 Minutes at 8, The Advisory Committee Notes to Rule 502(b) reference multiple factors to consider in determining whether an inadvertent disclosure results in a waiver:

> The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. . . . Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production.

Advisory Comm. Notes, Fed. R. Evid. 502(b). This is essentially the same approach applied historically in this District under *Starway v. Independent School District No. 625*, 187 F.R.D. 595, 597 (D. Minn. 1999) (adopting the five-factor test from *Hydraflow, Inc. v. Enidine Inc.*, 145 F.R.D. 626, 637 (W.D.N.Y. 1993), for determining whether an inadvertent production constitutes a waiver of privilege in non-diversity cases).

Under the *Starway* approach, a court may consider the following factors to determine if an inadvertent disclosure results in a waiver:

> (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in light of the extent of document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) the promptness of measures taken to remedy the problem, and (5) whether justice is served by relieving the party of its error.

187 F.R.D. at 597. Although Rule 502(b) does not explicitly codify the *Starway* test, it is flexible enough to accommodate all of those factors. Advisory Comm. Notes, Fed. R. Evid. 502(b). In other words, the *Starway* test has been folded into the Rule 502(b) inquiry. Thus, to analyze whether the Defendants' pre-suit and discovery disclosures waived attorney-client privilege under Rule 502(b), the Court applies the *Starway* test. As a whole, the *Starway* factors weigh in favor of waiver for both disclosures.

Regarding the first *Starway* factor, the record is devoid of any mention of a review conducted, precautions taken, or extensions requested by Defendants in either disclosure. *See also* Fed. R. Evid. 502(b)(2). Defendants' memorandum fails to identify a single step taken to prevent an inadvertent error. It does not refer to the depth of a document review, when such a review occurred, what documents were reviewed, how much time Defendants took to review the documents, or other basic details. There is not even a bare allegation that a review was conducted. Defendants argue only that the pre-suit disclosures ought to be excused because of the SEC's "aggressive and unreasonable timeframe for production." (Defs.' Mem. at 3). Although Defendants "objected" to the SEC's timeline, they never requested an extension or sought other arrangements to maintain the privilege. (*Id.*). While the six-day timeframe is likely shorter than the Defendants would have requested, it provided enough time to take "reasonable steps to prevent disclosure," including: conducting a key-word search and pulling those communications that contained Weber as a sender or recipient for further privilege review; requesting a Rule 502(e) agreement regarding privileged information; or seeking protection from the court in the form of a Rule 502(d) order. *See* Fed. R. Evid. 502(b)(2). Because Defendants failed to explore any of these options, seek additional time from the SEC, or take any other measure to prevent disclosure, their argument regarding the subpoenas' timeline for the pre-suit

document production finds no traction. Given the lack of evidence that Defendants took any steps to prevent inadvertent production in either disclosure, the Court cannot credit Defendants "safeguards," if any, as "reasonable."

The second and third *Starway* factors also weigh in favor of waiver under Rule 502(b). The Defendants produced more than two hundred emails between Welliver or Dblaine Capital personnel and Weber in the pre-suit investigation disclosures. (Javorski Decl. ¶ 5). Many of the documents were produced again in discovery. (*Id.* ¶ 9). Courts may decline to find a waiver where only a handful of privileged documents slipped through otherwise robust screening procedures. *See Edelen v. Campbell Soup Co.*, 265 F.R.D. 676, 698 (N.D. Ga. 2010) (finding that the attorney-client privilege was not waived by Rule 502(b) where "only four pages out of a more than 2,000 page production were privileged, the documents were checked by three different attorneys prior to production, and counsel immediately sought the return of the documents once they discovered their mistake"). Where a small number of privileged documents are disclosed in a large batch, however, privilege may still be waived where the screening procedures were unreasonable. *See Conceptus, Inc. v. Hologic, Inc.*, No. 09-02280, 2010 WL 3911943, *2 (N.D. Cal. Oct. 5, 2010) (Rule 502 privilege waived with respect to single document produced in batch of 95,000 where subsequent counsel simply relied on its belief earlier counsel had reviewed the documents; "Plaintiff does not . . . describe any reasonable steps taken to prevent disclosure of the letter.").

Although neither party provided the total number of documents or pages produced, more than two hundred communications could not have gone unnoticed during a cursory review of the documents produced given the identity of the parties to the communications. The emails produced were exchanges between Welliver and his counsel or Dblaine Capital personnel and

Dblaine Capital's counsel. These communications warranted a heightened level of scrutiny, given the identity of the parties or authors. As noted above, however, Defendants failed to employ basic screening procedures. Thus, even if these documents represent only a fraction of the total documents produced, this *Starway* factor weighs in favor of waiver.[10]

The fourth *Starway* factor is the promptness of measures taken to remedy the problem. *See also* Fed. R. Evid. 502(b)(3). Defendants did not take any measures to rectify the disclosures made in the pre-suit investigation. Indeed, it seems the only action Defendants have taken to acknowledge that error was to respond to this Motion. Such inactivity weighs in favor of waiver.

As to the disclosures made in discovery, Defendants did not seek to rectify their inadvertent disclosure for forty days. (June 4, 2012 Letter, Ex. D, Attached to Index of Exs. in Supp. of Pl.'s Mot. for an Order Finding Waiver of Attorney-Client Privilege). The delay relevant to the analysis of this factor, however, is the time between the disclosing party's realization of the error and their efforts to correct it. *Starway*, 187 F.R.D. at 589; *see also Clarke v. J.P. Morgan Chase & Co.*, No. 08 Civ. 02400, 2009 WL 970940, at *5–6 (S.D.N.Y. Apr. 20, 2009) (finding waiver where defendant's failure to raise privilege more than two months after it "learned" or "should have learned" of the privileged document's disclosure was an "inexplicably long time"). Neither party provides any description of how Defendants' clawback letter relates temporally to the Defendants' discovery of the inadvertent disclosure. Thus, this factor does not influence the Court's determination of the waiver effect of the inadvertent disclosures made in response to the document requests.

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[10] It is not clear how much the pre-suit and discovery disclosures overlap. Nonetheless, because Defendants' efforts in both disclosures fall short of the "reasonableness" required for protection under Rule 502(b), the Court finds that the extent of the overlap does not impact this analysis.

Finally, as to the fifth *Starway* factor, the interests of fairness and justice would not be served by relieving Defendants of the consequences of these errors. Parties must recognize there are potentially harmful consequences if they do not take even minimal precautions to prevent against the disclosure of privileged documents—either to agencies in pre-suit investigations or opposing parties in the course of discovery. *See* Advisory Comm. Notes, Fed. R. Evid. 502(b) ("The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation."). The acts and omissions of Defendants waived any privilege that applied to the documents produced during the pre-suit investigation and during discovery pursuant to Federal Rule of Evidence 502(b). Accordingly, the Court grants the SEC's Motion to the extent it seeks waiver of attorney-client privilege as to those documents disclosed in the pre-suit investigation and discovery.

C. Waiver of Attorney-Client Privilege by Implication Based on Affirmative Defenses

Even when a communication is made in confidence between attorney and client for the purpose of legal advice and not disclosed to a third party, the attorney-client privilege may be vitiated for a variety of reasons. "There is no settled rule for finding implied waiver of attorney-client privilege." *Medtronic, Inc. v. Intermedics, Inc.*, 162 F.R.D. 133, 135 (D. Minn. 1995) (No. 4:93-cv-626 JRT/JMM). "In determining whether there has been an implied waiver, two elements must be examined: (1) implied intention and (2) fairness and consistency." *Sedco Intern., S. A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir. 1982) (citations omitted); *see Minn. Specialty Crops v. Minn. Wild Hockey Club, L.P.*, 210 F.R.D. 673, 675 (D. Minn. 2002). Courts have found waiver by implication when a client testifies concerning portions of the attorney-client communication, when a client places the attorney-client relationship directly at issue, and

when a client asserts reliance on an attorney's advice as an element of a claim or defense. *Sedco Intern., S. A.*, 683 F.2d at 1206; *see also* Advisory Comm. Notes, Fed. R. Evid. 502 ("common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product."). At-issue waiver is commonly found where "proof of a party's legal contention implicates evidence encompassed in the contents of an attorney-client communication . . . ." *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1055 (8th Cir. 2000) (citations omitted). If a party waives attorney-client privilege by putting privileged communications at issue, "the scope [of the waiver] must of necessity be somewhat broad and is, in fact, a 'subject matter' waiver." *Minn. Specialty Crops*, 210 F.R.D. at 676 (citation omitted). The primary question here is whether the defenses place Defendants' privileged communications with Weber "at issue," thereby waiving the attorney-client privilege.

Because the Defendants amended their Answer to delete explicit claims of reliance on counsel, it may seem that an implied waiver based on the Amended Answer is no longer a concern in this matter. *See generally* 71 C.J.S. *Pleading* § 464 (2012) (describing the superseding effect of amended pleadings). Nevertheless, a finding of implied waiver is warranted if the remaining defenses "require[] examination of protected communications." *States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (citing *United States v. Exxon Corp.*, 94 F.R.D. 246, 249 (D.D.C. 1981) (finding a claim of good faith reliance on governmental representations waived attorney-client privilege)). This principle is rooted in the often cited maxim that in fairness a party may not use the attorney-client privilege as a sword and a shield. *See Bilzerian*, 926 F.2d at 1292.

In their Amended Answer, Defendants assert that the SEC's claims are barred by Defendants' "warranted reliance" on Jones and professionals, "other than legal counsel." (Am. Ans. ¶ 169). Further, Defendants state that

> Welliver had no notice that the opinions provided by these experts were in any way inadequate, unfounded, or incorrect as to the matters on which the experts had opined. Welliver had no reasonable grounds to believe, and did not believe, that the statements contained in any such filings were untrue or that there was an omission of a material fact required to be stated therein or necessary to make the statements therein not misleading.

(*Id.* ¶ 174). In addition, Defendants argue that they "did not act knowingly," (*Id.* ¶ 173), and "acted in good faith" (*Id.* ¶ 170). Defendants also claim they lacked "scienter," (*Id.* ¶ 172), and "knowledge or reasonable grounds to believe in the existence of facts on which any liability is alleged to exist," (*Id.* ¶ 171). Thus, these remaining defenses necessarily revolve around Defendants' knowledge of the law and the legality of their actions, as well as the basis for their understanding of both. Accordingly, those matters are at issue.

Fairness requires that the attorney-client privilege give way to the SEC's right to investigate the facts underlying the remaining defenses for two primary reasons: (1) to provide the SEC and the fact-finder with the evidence necessary to evaluate the defenses and (2) Defendants' dilatoriness in amending the answer. First, Weber's input undoubtedly influenced Defendants' understanding of the law and the legality of their actions. In response to the subpoenas and discovery requests from the SEC that sought documents related to the Defendants, Lazy Deuce, and Semita, Defendants produced over two hundred emails. Many of the emails "involve[] communications solely between Weber, Welliver, and Jones." (Decl. of Javorski ¶¶ 4–9). According to the SEC, among those documents were emails related to Weber's drafting, editing, or advice regarding the agreements central to this matter. (*Id.* ¶ 6). The documents submitted in connection with this Motion support that assertion and a finding that

Weber's advice shaped Defendants' understanding of their legal rights and obligations with respect to the drafting of the relevant agreements with Lazy Deuce. (Jones Dep. Ex. 32, Ex. B, attached to Index of Exs. to Pl.'s Reply in Supp. of Mot. for an Order Finding Waiver of Att'y-Client Privilege); (Jones Dep. Ex. 33, Ex. C, attached to Index of Exs. to Pl.'s Reply in Supp. of Mot. for an Order Finding Waiver of Att'y-Client Privilege). Notably, in one document, Weber states that she "attached a draft" of an agreement with Lazy Deuce, seeks input from Jones and Welliver, and notes she intends to later insert additional language from Jones. (Jones Dep. Ex. 33, Ex. C, attached to Index of Exs. to Pl.'s Reply in Supp. of Mot. for an Order Finding Waiver of Att'y-Client Privilege).

Weber was among the seeming choir of professionals from whom Defendants sought and received advice. Defendants cannot simply omit overt reference to a reliance on counsel defense to avoid the corresponding subject-matter waiver. Nor can Defendants assert a "warranted reliance" defense from the advice of professionals on the one hand, and attempt to exclude examination about whether that advice was truly "warranted" by denying inquiry into the full range of advice received. To permit otherwise in this case would allow Defendants to use the privilege as a sword and a shield—that is, to introduce only the evidence that supports their claim rather than providing the fact-finder with the full picture. *See Bilzerian*, 926 F.2d at 1292.

Examination of any conversations Defendants had with Weber, Jones, or other professionals regarding their dealings with Lazy Deuce and Semita is the only way to assess the validity of the defenses. *See Exxon Corp.*, 94 F.R.D. at 249. There is no other reasonable way for the SEC to explore the basis for Defendants' "good faith" beliefs and state of mind, considerations central to this suit. Thus, despite the Amended Answer, Defendants' have voluntarily injected the advice they received from Weber into this dispute and placed it at issue.

The SEC is entitled to discovery on advice Defendants received from Weber regarding Defendants' dealings with Lazy Deuce and Semita to compare it with the advice from the other professionals and, ultimately, test the veracity of Defendants' "warranted reliance" and similar defenses.

Fairness also requires a finding of implied waiver because of Defendants' amendment of the answer at the eleventh hour. Defendants amended their answer approximately six weeks before the close of discovery.[11] As a result of their failure to take action in a timely manner, the SEC engaged in discovery and developed its case for at least four months, unimpeded with respect to potentially privileged communications with Weber.[12] During that time, Defendants produced privileged communications with Weber on the very agreements between Defendants and Lazy Deuce that are central to this case. Indeed, between the discovery and pre-trial investigation disclosures, Defendants produced what appears to be every email communication related to the agreements at issue. *See* (Pl.'s Mem. at 3) ("In response [to the subpoenas], Defendants produced to the Commission what Defendants represented to be all emails relating to Jones and all emails relating to Lazy Deuce/Semita."). Additionally, Defendants offer no explanation for the delay in amending the answer. Certainly, the relevant facts were available to Defendants months ago, if not at the time the original answer was filed. The timing of their

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[11] On February 24, 2012, the Court entered a Pretrial Scheduling Order that provided that fact discovery closed on June 1, 2012. (Pretrial Scheduling Order) [Doc. No. 14 at 1]. "Following the entry of the Pretrial Scheduling Order, the parties diligently began discovery." (Agreed Mot. to Amend the Pretrial Scheduling Order) [Doc. No. 27 at 2]. In early April, the Court granted a joint motion to amend the scheduling order and filed an Amended Pretrial Scheduling Order that provided for the close of discovery on September 1, 2012. (*Id.*); (Am. Pretrial Scheduling Order) [Doc. No. 33 at 1].

[12] The original Answer was filed in December 2011. (Answer at 24). It stood, unamended, for seven months. (Am. Answer at 24). The record suggests, however, that the parties did not begin discovery in earnest until late February 2012. (Agreed Mot. to Amend the Pretrial Scheduling Order at 2)

filing is suspect. Defendants cannot permit discovery into Weber's communications and produce relevant emails and then claim, months later, that privilege s further inquiry into the subject matter of those emails. *See Bilzerian*, 926 F.2d at 1292. Thus, fairness requires a finding that Defendants waived the attorney-client privilege by placing privileged communications at issue and a subject-matter waiver is appropriate.

III. CONCLUSION

Based upon all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Plaintiff's Motion for an Order Finding Waiver of Attorney-Client Privilege as to Attorney Wanda Weber [Doc. No. 34] is **GRANTED**.

Dated: October 26, 2012

s/Steven E. Rau
STEVEN E. RAU
United States Magistrate Judge