

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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SALLY ALSTON	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 06-2141-Mlv
	)	
NATIONAL SAFETY INCENTIVES, INC.)	)	
and DANIEL HALL, Individually	)	
and d/b/a NATIONAL SAFETY	)	
INCENTIVES, INC.,	)	
	)	
Defendants.	)	

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ORDER DENYING DEFENDANTS' RULE 26(b)(5)(B) MOTION AND GRANTING  
PLAINTIFF'S REQUEST FOR A PROTECTIVE ORDER

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Before the court is the August 20, 2007 motion of the defendants, National Safety Incentives, Inc. ("NSI") and Daniel C. Hall ("Hall") (collectively the "defendants"), pursuant to Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure, requesting that the court rule that the plaintiff, Sally Alston ("Alston"), waived any claims of attorney-client privilege as to two documents produced to the defendants by Alston during discovery. Alston opposes the motion on the grounds that disclosure was inadvertent and the attorney-client privilege has not been waived. Alston also asks the court to compel the defendants to return the documents and to issue a protective order preventing the defendants from utilizing information contained in the two documents. The motion

was referred to the United States Magistrate Judge for a determination.

#### FACTUAL AND PROCEDURAL BACKGROUND

Alston filed this action against the defendants alleging breach of contract and seeking a money judgment for unpaid commissions due to her since 2006 on the Merry Maids and Terminix accounts for NSI. On January 24, 2006, Alston received a phone call from Hall that terminated Alston's financial relationship with NSI. (Pl.'s Mem. Resp. 2.) Alston met with attorney Thomas L. Parker ("Parker") on January 29, 2006 to discuss possible litigation against the defendants, which resulted in the instant case being filed on March 3, 2006. (*Id.*)

During discovery, in May of 2007, Alston produced various documents in both paper format and on a CD-ROM disk (the "Disk"). Alston originally prepared the Disk, which contained an electronic file titled "AA Summary" (the "Narrative"). The Narrative was a three-page factual narrative Alston prepared in anticipation of meeting with Parker to discuss the case. (*Id.*) Another of Alston's attorneys, Jennifer Sink ("Sink"), reviewed the Disk before having the copy made that was provided to the defendants as part of discovery. (*Id.* 5.)

On May 21, 2007, the defendants reviewed the paper documents at Parker's office, marked certain pages for copying, and were

provided those copies by Parker's staff. (*Id.* 6-7.) The defendants' counsel, John Heflin ("Heflin"), did not get a chance to review all of the documents because some of them were being used to prepare for upcoming depositions in this case. (*Id.* 7.) Parker later made copies of the documents Heflin had not reviewed and delivered them to Heflin's home. (*Id.*) Included in these was a two-page document prepared by Alston to assist her attorneys in calculating damages in her case (the "Damages Calculation"). (*Id.*) The Narrative and the Damages Calculation are the two documents at issue in the present motion.

On July 27, 2007, during the deposition of Alston, the defendants' counsel questioned Alston about the documents provided during discovery, including the Narrative. (Mem. Supp. Defs.' Mot. 2.) It was during this questioning that Parker asserted that the Narrative was a privileged attorney-client communication that had been inadvertently disclosed. (*Id.*) The deposition was subsequently adjourned to be completed on another day. On July 31, 2007, Parker sent a letter to Heflin requesting the return of all copies of the Narrative. Through further correspondence regarding the claimed privilege of the Narrative, Parker learned that the Damages Calculation had also been inadvertently disclosed to Heflin and the defendants. (*Id.*) Parker immediately claimed attorney-client privilege as to the Damages Calculation also. (*Id.*) When

an agreement could not be reached between Parker and Heflin regarding the Narrative and Damages Calculation, the defendants filed the present motion.

The defendants argue that Alston waived the attorney-client privilege as to the Narrative and the Damages Calculation by disclosing them to the defendants during discovery. (*Id.* 5.) In opposition, Alston argues that mere inadvertent disclosure does not constitute waiver of the attorney-client privilege. (Pl.'s Mem. Resp. 12.)

#### ANALYSIS

Because the defendants have not argued that the attorney-client privilege does not apply to the Narrative and the Damages Calculation, the court assumes for the purposes of this order that there is no dispute as to the privileged nature of the two aforementioned documents and will treat the two documents as privileged. The sole, pivotal issue therefore is whether Alston's inadvertent disclosure waived the attorney-client privilege as to the Narrative and the Damages Calculation.

This court employs a five-factor balancing test, known as the "intermediate approach," to determine whether the attorney-client privilege was waived by disclosure. See Order Granting in Part and Denying in Part Defendant's Motion for Protective Order at 4, Doc. No. 30, *Azman Enters., Inc. v. Conocophillips Co.*, No. 05-2349 (W.D.

Tenn. March 31, 2006); *Fleet Bus. Credit Corp. v. Hill City Oil Co., Inc.*, No. 01-02417, 2002 WL 31741282 at \*3 (W.D. Tenn. Dec. 5, 2002). See also *Edwards v. Whitaker and MML Investors Servs., Inc.*, 868 F.Supp. 226, 229 (M.D. Tenn. 1994). The factors to consider include: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the promptness of measures taken to rectify the disclosure; (3) the scope of the production; (4) the extent of the disclosure; and (5) overriding issues of fairness. *Fleet*, 2002 WL 31741282 at \*3 (citations omitted).

The court also takes note of the Advisory Committee on Evidence Rules's proposed amendment to the Federal Rules of Evidence. In proposing Rule 502 as an amendment to the Federal Rules of Evidence, one of the Committee's unanimously agreed upon basic principles for the rule was that "[a]n inadvertent disclosure should not constitute a waiver [of the attorney-client privilege] if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error." COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FED. RULES OF BANKR. AND CRIMINAL PROCEDURE, AND THE FED. RULES OF EVIDENCE 396 (Aug. 2006). If adopted, Rule 502 would read:

(b) Inadvertent disclosure. - A disclosure of a

communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings - and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).

*Id.* at 397-98. The court notes that the proposed Rule 502 would suggest a determination of waiver by placing a heavy weight on the first two factors of the previously mentioned five-factor test from *Fleet*.

A. Reasonableness of Precautions Taken to Prevent Disclosure

The court finds that the precautions taken by Parker, Sink, and their firm, Baker Donelson, were reasonable to prevent inadvertent disclosure of materials that they considered covered by the attorney-client privilege. The attorneys at Baker Donelson received 3,794 documents in paper form from Alston alone. (Pl.'s Mem. Resp. 4, 14.) The Disk contained 906 electronic documents, containing thousands of pages, that required review. (*Id.* 4.) Sink created a folder entitled "Do Not Produce" into which privileged documents were sequestered. (*Id.* 14.) All documents were reviewed before being disclosed to the defendants. Of the almost 5,000 documents provided by Alston, only two documents amounting to five pages managed to be inadvertently disclosed. The court finds that such

a small amount could hardly be the result of careless or reckless reviewing on the part of Alston's attorneys, thus making the screening procedures reasonable in light of their purpose. It is understandable how the Narrative, labeled as "AA Summary," could easily be overlooked as insignificant amongst 906 other files, and similarly, how the Damages Calculation could accidentally get shuffled into a stack of papers being delivered to Heflin.

B. Promptness of Measures Taken to Rectify the Disclosure

From the time the documents were produced in May of 2007 until Alston's deposition in July of 2007, Alston's attorneys had no reason to reexamine the materials already disclosed to the defendants. At Alston's deposition, however, once Parker and Alston learned of the Narrative's earlier production to the defendants, they immediately claimed attorney-client privilege and requested return of the document and all its copies. Similarly, while trying to work out privilege claims related to the Narrative, Parker learned that Heflin had received a copy of the Damages Calculation and immediately claimed privilege as to it. Parker continued to work with Heflin to try and resolve the matter until the instant motion was filed. The court finds that Parker acted with sufficient promptness to rectify the inadvertent disclosures once he discovered that they existed.

C. Scope of the Production

As previously mentioned, Alston provided her attorneys with almost 5,000 documents. When combined with documents provided to Alston by Terminix and Merry Maids, the total number of documents required to be reviewed by Alston's attorneys was close to 10,000. (*Id.* 4.)

D. Extent of the Disclosure

When looked at in light of the large scope of production in this case, the inadvertent disclosure of two documents amounting to only five pages is exceedingly small. The court finds that the extent of disclosure here, when compared with the scope of production, is not enough to justify a waiver.

E. Overriding Issues of Fairness

The court does not find the "issues of fairness," as argued by the defendants, persuasive to the point of requiring a waiver of the highly regarded attorney-client privilege.

CONCLUSION

After fully and carefully weighing the five factors, with noted emphasis on the first two, this court finds that Alston did not waive the attorney-client privilege through her inadvertent disclosure. The attorney-client privilege is upheld for the Narrative and the Damages Calculation. The defendants' motion is denied. Alston's request for a protective order is granted as to the Narrative and the Damages Calculation. The defendants are

instructed to return these documents to Alston within ten (10) days of this order. The defendants are further instructed to make no use of the information these documents contain.

IT IS SO ORDERED this 24th day of September, 2007.

S/ Diane K. Vescovo  
DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE