

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NESTLÉ PURINA PETCARE COMPANY,)
)
Plaintiff/Counterclaim Defendant,)
)
vs.) Case No. 4:14 CV 859 RWS
)
THE BLUE BUFFALO COMPANY LTD.,)
)
Defendant/Counterclaim Plaintiff,)
)
vs.)
)
BLUE STATE DIGITAL, INC.,)
PRCG/HAGGERTY LLC and JOHN DOES 1 – 8)
Counterclaim Defendants.)
)
_____)
)
THE BLUE BUFFALO COMPANY LTD.,)
)
Third-Party Plaintiff,)
)
vs.)
)
WILBUR ELLIS COMPANY and)
DIVERSIFIED INGREDIENTS, INC.,)
)
Third Party Defendants.)

ORDER

Having carefully reviewed the parties’ briefs, attachments, relevant legal authority, and having heard oral argument on each of the motions that are the subject of this Order,

IT IS HEREBY ORDERED that Purina’s Motion to Remove the Confidentiality Designations from certain Blue Buffalo Documents and Deposition Testimony #[225] is **DENIED** without prejudice and Blue Buffalo’s Cross-Motion (in the Alternative) to Declassify

Documents #[240] is **DENIED** without prejudice as moot. While the parties' confidentiality designations over discovery materials provided pursuant to the Protective Order may remain, any future Court filing that the parties seek to file under seal because they are related to or include materials designated as confidential under the Protective Order, including motions, memoranda of law, oppositional briefs, and any attachments must be filed subject to the following conditions:

The parties to this action must seek leave from the Court to file anything under seal. Along with any motion for leave to file under seal, the moving party must attach a one-page document outlining the confidential subject matter of the brief and/or attached exhibit(s) that is the basis of the motion to file under seal. Additionally, the party must file a public version of any sealed filing. The public version may only redact information that is truly related to or revealing of information designated as confidential under the Protective Order.

IT IS FURTHER ORDERED that Blue Buffalo's Motions for Leave to File Sealed Document #[334] and #[338], and Purina's Motions for Leave to File Sealed Document #[342], #[345], and #[348], are **GRANTED** subject to the filing of public versions of these materials.

IT IS FURTHER ORDERED that Blue Buffalo's Motion to Compel Discovery Improperly Withheld by Purina on the Grounds of Attorney-Client Privilege and Work-Product Immunity #[283] is **GRANTED** in part and **DENIED** in part without prejudice. First, I will deny without prejudice Blue Buffalo's request to re-open deposition testimony of Mr. Wade and Mr. Crimmins, subject to reconsideration after all the newly-added parties have been properly joined and have had an opportunity to participate in a discovery conference. However, I caution Purina that, while it is proper to instruct Purina employees not to answer deposition questions regarding the content of meetings that were held for the purpose of obtaining legal advice related

to this lawsuit, it is *not* appropriate to instruct them not to answer questions about “attendant media issues,” as counsel for Purina indicated was the case in his declaration. In other words, witnesses should not be prevented from answering questions about meetings or the parts of meetings that discuss Purina and PRCG/Haggerty’s public relations campaign. If there is any future refusal to answer such questions or instruction by counsel to witnesses not to answer these questions, the Court will conduct a thorough review to determine whether the conduct is inconsistent with the Federal Rules of Civil Procedure and this Court’s local rules, and whether sanctions against the offending party and/or counsel is appropriate.

Second, I find it highly implausible that *all* of the documents and communications that have been exchanged between Purina and PRCG/Haggerty are privileged or protected materials. As a result, Purina shall review and revise its log of privileged documents and communications relating to PRCG/Haggerty’s work on Purina’s media campaign with the following principles in mind. There is generally no attorney-client privilege for documents and communications discussing public relations activity or Purina’s media campaign against Blue Buffalo. For example, discussions about topics such as the design and development of Petfoodhonesty.com and other “Project Truth” campaign materials are generally not privileged. Likewise, documents and communications regarding Purina and PRCG/Haggerty’s public relations strategies would generally not be privileged legal advice. However, if those documents and communications reveal legal advice on topics such as what can be said in the media campaign without creating liability, or in communications discussing, with counsel, strategies for the instant litigation, they would generally be privileged. Additionally, materials generally will not qualify as protected work product unless they were prepared by or for counsel, in anticipation of litigation, and

discuss Purina's litigation – as opposed to public relations or brand – strategy. This is true even if the public relations and brand strategy is related to this suit.

With these general principles in mind, Purina should review and revise its privilege log in an effort to narrow it, and produce any documents it no longer deems privileged no later than **July 10, 2015**. If Blue Buffalo has any remaining concerns after that time, the parties shall meet and confer in good faith and make *sincere* efforts to resolve the remaining challenges on their own before seeking Court involvement.

IT IS FURTHER ORDERED that Purina's Motion to Compel Deposition Testimony of Messrs. Bishop, Yamka, Brennan, de Bruyn and Schmidt Improperly Blocked by Blue Buffalo on the Grounds of Attorney-Client Privilege #[288] (and #[309] (corrected version)) is **GRANTED** in part and **DENIED** in part without prejudice.

First, Purina's request to compel additional deposition testimony will be denied without prejudice, subject to reconsideration after all the newly added parties have been properly joined and have had an opportunity to participate in a discovery conference.

Second, although the Court does not rule on hypothetical disputes, Blue Buffalo (and Purina) should apply the following principles that are at issue in the instant motion to any future depositions. While attorney-client privilege and work product protections may protect documents and communications between counsel and a company's employees regarding an internal investigation such as the one Blue Buffalo's General Counsel conducted here, it does not prevent disclosure of underlying facts. Even the cases that Blue Buffalo cites explicitly recognize that "the attorney-client privilege 'only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.'" In re Kellogg Brown & Root, Inc., 756 F.3d 754, 764 (D.C. Cir. 2014) (citing Upjohn Co. v. United

States, 449 U.S. 383, 396 (1981). Purina may pursue the facts underlying Blue Buffalo's investigation. But Purina is not entitled to Blue Buffalo's own investigation files. See id. As a result, counsel for Blue Buffalo should not instruct Blue Buffalo's employees not to answer questions about the facts they possess knowledge of, even if those facts were learned during an investigation commenced by Blue Buffalo General Counsel. For example, questions about an employee's knowledge of the presence of by-product in Blue Buffalo products, or when that information was acquired (as long as it was not acquired from counsel), would not be protected. Additionally, there is generally no protection for information Blue Buffalo's employees discussed with a third party. The Court will thoroughly review any future refusal to answer questions by witnesses or instruction by counsel to witnesses not to answer these kinds of questions to determine whether the conduct is inconsistent with the Federal Rules of Civil Procedure and this Court's local rules, and whether sanctions against the offending party and/or counsel is appropriate. On the other hand, communications employees had with counsel about the investigation or the results of the investigation would generally be privileged. Likewise, if testimony about the facts would reveal counsel's instructions, impressions, or strategy regarding this case, that testimony would likely be protected by work product.

Finally, if not abundantly clear from the last status conference and the Court's most recent orders, the Court has reached the limits of its considerable patience with discovery disputes in this case. Such future contentious litigation tactics with no regard for the extreme burden these tactics place on the administration of justice will result in the appointment of a Special Master at the parties' expense. It should not be necessary, but given their past behavior, the Court feels compelled to remind all counsel of their ethical obligations to this Court, each

other, and this noble profession. In short, play nice.

A handwritten signature in black ink, appearing to read "Rodney W. Sippel", written in a cursive style.

RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 16th day of June, 2015.