No. PC-2016-3137
Superior Court of Rhode Island, Providence

Balanicheva v. SMG

Decided Jan 25, 2023

PC-2016-3137

01-25-2023

SVITLANA BALANICHEVA; DAYANA COSTA; VIKTORIIA LIAKHOVA; VIKTORIYA MEDEIROS; STEFANY NEVES; WIDNY NEVES; SAMANTHA PIT ARD; AND JULISSA SEGRERA Plaintiffs v. SMG; RHODE ISLAND CONVENTION CENTER AUTHORITY; AND JOHN AND JANE DOES 1-10 Defendant / Third-Party Plaintiff v. FELD ENTERTAINMENT, INC. Third-Party Defendant

For Plaintiff: Zachary M. Mandell, Esq.; Marc Desisto, Esq. For Defendant: Judah H. Rome, Esq.; John P. Ryan, Esq. For Interested James A. Ruggieri, Esq.; Lawrence Kenney, Esq.; Party: Vaughn A. Crawford, Esq.; Morgan Petrelli, Esq.; Rick Erickson, Esq.; Brian W. Haynes, Esq.; Tanya A. Arruda, Esq.; Alicia Roe, Esq.; Dianne Morin, Esq.; Kimberly Watson, Esq.; Donna Snover, Esq.

VAN COUYGHEN, J.

For Plaintiff: Zachary M. Mandell, Esq.; Marc Desisto, Esq.

For Defendant: Judah H. Rome, Esq.; John P. Ryan, Esq.

For Interested James A. Ruggieri, Esq.; Lawrence Kenney, Esq.;

Party: Vaughn A. Crawford, Esq.; Morgan Petrelli, Esq.;

Rick Erickson, Esq.; Brian W. Haynes, Esq.; Tanya

A. Arruda, Esq.; Alicia Roe, Esq.; Dianne Morin, Esq.;

Kimberly Watson, Esq.; Donna Snover, Esq.

DECISION

VAN COUYGHEN, J.

The case before this Court involves a third-party claim for contractual indemnification. Third-Party Plaintiff (SMG) was sued by Plaintiffs in the underlying action. SMG has since settled those claims with Plaintiffs. SMG now seeks indemnification from Third-Party Defendant Feld Entertainment, Inc. (FEI). SMG bases its claim upon the contractual language of a licensing agreement which included an indemnity provision. In the course of discovery regarding the third-party claim, SMG designated one of its attorneys as a witness to testify at trial. FEI asserts that as a result of SMG's designation of its attorney as a witness, SMG has waived the attorney-client privilege and thus seeks discovery regarding the attorney's involvement in the case. Jurisdiction
2 is pursuant to Rules 26 and 45 of the Superior Court Rules of Civil Procedure. *2

I

Facts and Travel[1]

[1] The facts of this case have been condensed in order to address the issues imminently before the Court.

This case originates from a horrific accident which occurred during a circus performance at the Dunkin' Donuts Convention Center (Convention Center) on May 4, 2014. (Pls.' Compl. ¶ 25). The owner of the circus at the time of the accident was FEI doing business as the Ringling Brothers and Barnum and Bailey Circus. *Id.* ¶ 17. SMG was the management company of the Convention Center at the time. *Id.* ¶ 9.

The accident occurred while eight female performers were involved in a stunt called the Medeiros Hair Hang Act. *Id.* ¶ 25. The performers were connected to an apparatus by their hair and hoisted more than twenty feet above the Convention Center floor. *Id.* During the course of the performance the apparatus malfunctioned causing it and the performers to fall to the cement floor below. *Id.* The injuries were catastrophic.

As employees of FEI, Plaintiffs pursued workers compensation claims against FEI and also sued SMG and the Convention Center based upon negligence. *Id.* ¶ 9. Prior to the commencement of the show, SMG and FEI entered into a Licensing Agreement which contained indemnification provisions in favor of SMG. (SMG's Obj. to FEI's Mot. to Strike Fourth Suppl. Answers, Ex. 3: Licensing Agreement.) After commencement of the lawsuit against SMG, SMG demanded that FEI defend the claim based upon the indemnity agreement. (SMG's Third-Party Compl. ¶ 6.) FEI refused and SMG provided its own defense.

The underlying litigation continued, and the matter was scheduled for mediation. Apparently, all parties were
3 involved in the mediation. At the mediation, SMG settled Plaintiffs' *3 claims for $52.5 million. Discovery was reopened for limited purposes related to the indemnity claim. (Order, submitted Jan. 7, 2022, Van Couyghen, J.) Through the course of discovery, SMG listed Attorney Lawrence J. Kenney (Attorney Kenney) as a witness regarding the issue of the reasonableness of SMG's settlement with Plaintiffs.[2] Attorney Kenney has represented SMG in this litigation since its beginning stages.

[2] See SMG's Second Supplemental Response to FEI's Interrogatory Number Eleven which sets forth Attorney Kenney's anticipated testimony. Said response is hereby incorporated by reference and is marked as Exhibit 1 to this Decision.

As a result of SMG's designation of Mr. Kenney as a witness, FEI asserts that SMG has waived its attorney-client privilege as to Mr. Kenney and other attorneys involved in the litigation that previously represented SMG. (FEI's Mem. in Supp. of Mot. to Compel.) In furtherance of this assertion, FEI has propounded a variety of discovery requests which would otherwise be protected by the attorney-client privilege.

SMG also filed an additional supplemental response to FEI's interrogatories[3] and has alleged that Attorney Kenney is merely a fact witness and thus it has not waived the attorney-client privilege. SMG has filed a Motion for Protective Order for Mr. Kenney and his firm Sloane and Walsh, LLP in which previous council for SMG have joined. SMG maintains its assertion that attorney-client privilege is still applicable to Attorney Kenney and the other attorneys previously involved in its representation.

[3] See SMG's Third Supplemental Response to FEI's Interrogatory Number Eleven which attempts to scale back Attorney Kenney's anticipated testimony. Said response is hereby incorporated by reference and is marked as Exhibit 2 to this Decision.

4 This Decision will address the claims of attorney-client privilege currently before the Court. *4

II

Standard of Review

Rule 26(b)(1) of the Superior Court Rules of Civil Procedure allows "discovery regarding any matter, *not privileged,* which is relevant to the subject matter involved in the pending action[.]" Super. R. Civ. P. 26(b)(1) (emphasis added). A matter is relevant and discoverable under Rule 26(b)(1) if it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. *Id.* A party or person from whom discovery is sought may move for a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expensef.]" *Id.* at 26(c).

Discovery conducted by subpoena is also governed by Rule 45 of the Superior Court Rules of Civil Procedure. Super. R. Civ. P. 45. Witnesses under subpoena have a duty to respond promptly and completely. Super. R. Civ. P. 45(c)(2)(B) and (d). If an objection or motion is grounded on a claim of privilege, such "claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." *Id.* at 45(d)(2).

A party who withholds discovery materials based on attorney-client privilege must provide sufficient information, usually in the form of a privilege log, to enable the other party to evaluate the applicability of the protection. *State v. Lead Industries Association, Inc.,* 64 A.3d 1183, 1197 (R.l. 2013). Rule 26(b)(5) states:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or

5 *5

> protected, will enable other parties to assess the applicability of the privilege or protection. Super. R. Civ. P. 26(b)(5).

The party withholding discoveiy materials must be specific enough in its privilege log to support its claim of protection and to provide a means to assess the claim. *Id.* Rule 37(d) of the Superior Court Rules of Civil Procedure provides that if a party withholding material fails to adequately state the reasons for an objection, he or she may be held to have waived the objections, including those based on privilege. However, courts assessing the adequacy of a privilege log "should avoid hair-trigger findings of waiver." *Lead Industries,* 64 A.3d at 1197. That said, this Court has little tolerance for inadequate privilege logs that do not attempt to, in good faith, provide the necessary information in order to give opposing council confidence that the claim of privilege is justified.

III

Analysis

A

Attorney-Client Privilege and the Work-Product Doctrine

1

Attorney-Client Privilege

FEI asserts that SMG's Second and Third Supplemental Responses to FEI's Interrogatory Number Eleven relating to Attorney Kemiey's proposed testimony waived attorney-client privilege. The attorney-client privilege is one of the oldest privileges known to the common law. *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). The purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* This privilege not only encourages candid communications between attorneys
6 and their clients, *6 but the privilege also increases the likelihood that an attorney's client will comply with the law, particularly because the privilege permits the lawyer to give sound legal advice. *Id.* at 390. Specifically, if clients were fearful of disclosure of confidential information, clients presumably would be disinclined to share such information with their attorneys, thereby rendering attorneys' attempts to provide clients with sound legal advice ineffective. *See Hunt v. Blackburn,* 128 U.S. 464, 470 (1888) (stating that the attorney's "assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

However, privileges "are not favored in the law and therefore should be strictly construed." *Gaumond v. Trinity Repertory Co.,* 909 A.2d 512, 516 (R.l. 2006) (internal quotation omitted). Privileges are not favored in the law because "'[privileges, by their nature,' create limitations on the legal process" and attempt to "'shut out the light on the ascertainment of the truth.'" *Id.* at 517 (quoting *State v. Almonte,* 644 A.2d 295, 298 (R.l. 1994)). When a party resists discovery of so-called confidential or protected information, the party advancing attorney-client privilege has the burden of establishing the privilege. *State v. von Bulow,* 475 A.2d 995, 1005 (R.L 1984). With that said, the attorney-client privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Fisher v. United States,* 425 U.S. 391, 403 (1976). Thus, the protection afforded by the attorney-client privilege is determined on a case-by-case basis, based upon the facts and circumstances presented to the court. *Upjohn,* 449 U.S. at 396.

The attorney-client privilege "is a personal privilege . . .; therefore, only the client can implicitly or explicitly assert or waive the privilege." *DeCurtis v. Visconti, Boren &Campbell, Ltd.,* 152 A.3d 413, 423 (R.L 2017) (citing *Mortgage Guarantee &Title Co. v. Cunha,* 745 A.2d 156, 159 (R.L 2000). When a party asserts that its
7 adversary has waived attorney-client privilege, *7 it is vitally important to first determine whether the alleged waiver is explicit or implicit. *Bittaker v. Woodford,* 331 F.3d 715, 719 (9th Cir. 2003). Such a determination is fundamental to establishing the extent of the waiver and what remedies are available to the waiving party thereafter.

i Explicit Waiver of Attorney-Client Privilege

An explicit waiver of attorney-client privilege occurs when a party discloses confidential information to a third party who is not bound by the privilege or otherwise shows disregard for the privilege by making the information public, *von Bulow,* 475 A.2d at 1005; *see also Glassie v. Doucette,* No. NP-2016-0265, 2020, WL 6736278, *8 (R.I. Super. Nov. 6, 2020). Once privileged documents or statements have been revealed to another party, the privilege is gone, and the litigant may not thereafter reassert it to block its adversaries from discovering the information and related communications. *Bittaker,* 331 F.3d at 720 (once a party has made an express waiver, "the privilege is gone, and the litigant may not thereafter reassert if'); *see also Genentech, Inc. v. United States International Trade Commission,* 122 F.3d 1409, 1416 (Fed. Cir. 1997) ("Once the attorney-client privilege has been [explicitly] waived, the privilege is generally lost for all purposes and in all forums."); *see also* Paul R. Rice, *Attorney Client Privilege in the United States,* 87 (2021-2022 ed. Vol. 2) ("Once there has been a waiver [of attorney-client privilege] and the confidentiality upon which the privilege is premised has been relinquished, the privilege cannot be revived either in subsequent stages of the action in which the waiver occurred, or in future actions.").

In *von Bulow,* Martha von Bulow's family (the Family) hired former Manhattan District Attorney Richard Kuh (Kuh) to investigate Mr. von Bulow (defendant) due to the Family's *8 suspicions that the defendant poisoned Mrs. von Bulow on two separate occasions, *von Bulow,* 475 A.2d at 1000-1002. With the Family's permission, Kuh turned over all the information and evidence he uncovered throughout his investigation to the Rhode Island State Police. *Id.* at 1002, 1006. This evidence included various drugs found in the defendant's bedroom, medical records, and Kuh's narrated summary of what he had learned from his interviews with potential witnesses. *Id.* The defendant sought this material prior to trial. The trial court denied the defendant's motion based upon the attorney-client privilege. The defendant was eventually convicted.

On appeal, the Rhode Island Supreme Court held that the aforementioned disclosures of documents made by Kuh, with the Family's consent, constituted an explicit waiver of attorney-client privilege, and thus, the documents should have been provided to the defendant. *Id.* The Rhode Island Supreme Court reasoned that the Family waived attorney-client privilege once the Family chose to disclose to the State Police all of the information that Kuh uncovered during the course of his investigation. [4] *Id; see also* Edna Sela Epstein, *The Attorney Client Privilege and the Work-Product Doctrine,* 398 (5th ed. Vol. I 2007) ("Once confidential material is in the public domain, particularly if it has come to be in the public domain by virtue of some affirmative act or failure to take adequate precautions by the holder of the privilege, courts generally reason that it is by definition no longer confidential."). *9

[4] The Rhode Island Supreme Court also found, *arguendo,* that even if verbatim confidential communications were not disclosed to the Rhode Island State Police, the Family implicitly waived attorney-client privilege because the extent of the disclosures relating to the subject matter of the attorney-client relationship were made sufficient to waive the privilege.

ii Implicit Waiver of Attorney-Client Privilege

While an explicit waiver of attorney-client privilege occurs when a party turns over or reveals privileged documents or communications to a third party, it is not necessary that actual privileged communications or documents reflecting such communications be disclosed to effect an implicit waiver of attorney-client privilege. *See Cunha,* 745 A.2d at 160; *see also von Bulow,* 475 A.2dat995.

In *Cunha,* 745 A.2d at 160, the Rhode Island Supreme Court adopted the test promulgated in *Metropolitan Life Insurance Company v. Aetna Casualty and Surety Company,* 730 A.2d 51, 52-53 (Conn. 1999), as it relates to implicit waiver of attorney-client privilege. Our Supreme Court stated that implicit waiver exists when:

> [T]he contents of the [attorney-client] communication is integral to the outcome of the litigation in situations where a party specifically pleads, as an element of the claim, his or her reliance on an attorney's advice, or voluntarily testifies regarding portions of the actual advice contained in the communication, *or places in issue the nature of the attorney-client relationship during the course of the litigation.* In those instances, we are satisfied that a party has waived the right to confidentiality by placing the content of the communication directly in issue and the issue cannot be determined without an examination of that advice. *Cunha,* 745 A.2d at 159 (internal quotation omitted) (emphasis added).

a

Can Implicit Waiver be Cured?

Courts have held that the attorney-client privilege may be reasserted after it has been waived by implication. *Diamond Staffing Solutions, Inc. v. Diamond Staffing, Inc., Ho.* 05-40046-FDS, 2005 WL 8176474, *4 (D. Mass. 2005) (providing DSI the choice between waiving the privilege or filing a notice with the court withdrawing reliance on the advice of counsel); *see also* Rice, *supra,* at 338-49 ("Once advice of counsel has
10 been placed in issue by a claim or defense, *10 the privilege proponent generally can avoid waiver by withdrawing the claim or representing to the court that the defense will not be asserted") (internal case cites omitted). Thus, in implicit waiver cases, the holder of the privilege is given a choice. The holder of the privilege may continue to assert reliance upon an attorney's advice to assist in proving the litigant's claim, thus affirming its implicit waiver of attorney-client privilege, or the litigant may withdraw reliance upon the attorney's advice and reassert the attorney-client privilege. *Lyons v. Johnson,* 415 F.2d 540, 541-42 (9th Cir. 1969); *see also Bittaker,* 331 F.3d at 721; *see also* Rice, *supra,* at 338-49.

In *Diamond Staffing Solutions,* plaintiff filed suit against the defendant and asserted that the defendant infringed upon their trademark by selecting its name in bad faith. In response, the defendant filed an affidavit which contended that it relied upon its attorney's advice to establish that it did not select its name in bad faith. *Diamond Staffing Solutions,* 2005 WL 8176474, at *3. In *Diamond Staffing Solutions,* the United States District Court for the District of Massachusetts held that because the defendant placed the advice of its counsel at issue, the defendant implicitly waived attorney-client privilege for communications between the attorney and the defendants relating to the claimed reliance. However, the District Court, acknowledging the importance of the attorney-client privilege, exclaimed that "waiver of attorney-client privilege is not something to be taken lightly." *Id.,* at *4 (citing *Mushroom Associates v. Monterey Mushrooms, Inc.,* No. C-91-1092 TEH (PSH), 1992 WL 442892, *3 (N.D. Cal. 1992). Thus, the District Court ordered that unless the defendant served and filed within five days a written notice that the defendant intended to withdraw reliance on the advice of counsel in connection with the issue of its intent in adopting its name, then the defendant waived attorney-client privilege
11 and had to comply with the plaintiffs discovery requests. *Id.,* at *4. *11

2 Work-Product Doctrine

The work-product doctrine was first defined by the United States Supreme Court in *Hickman v. Taylor,* 329 U.S. 495 (1947) as a privilege protecting "materials obtained or prepared by an adversary's counsel with an eye toward litigation[.]" *Hickman,* 329 U.S. at 511. Although both the attorney-client privilege and the work-product doctrine might apply to the same material, the attorney-client privilege covers only confidential communications between attorney and client. *von Bulow,* 475 A.2d at 1009. The work-product privilege, on the other hand,

> protects both the attorney-client relationship and a complex of individual interests particular to attorneys that their clients may not share. And because it looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, the work product privilege is not automatically waived by any disclosure to a third party. *Id.*

Nevertheless, "the work-product doctrine is not absolute. Like other qualified privileges, it may be waived." *United States v. Nobles,* 422 U.S. 225, 239 (1975); *see also von Bulow,* 475 A.2d at 1009 ("The work-product doctrine does not, however, provide an absolute privilege.").

Since *Hickman* and *von Bulow,* the Rhode Island Supreme Court has further differentiated work-product between "fact" work-product and "opinion" work-product. *Henderson v. Newport County Regional Young Men's Christian Association,* 966 A.2d 1242, 1247 (R.I. 2009). Factual work-product covers a wide spectrum of work-product and "covers . . . *any material* gathered in anticipation of litigation." *Id.* at 1248. Whereas

opinion work-product is "a document or other written material containing the mental impressions of an attorney or his or her legal theories." *Id.* The former is subject to less protections than the latter. *Hickman, 329* U.S. at 510 ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the
12 mental impressions of an attorney."). *12

The mental impressions or conclusions of an attorney, which are normally protected by the work-product doctrine, are waived by a client when the client places them into issue to assist in proving a claim. In *von Bulow,* after the Rhode Island Supreme Court determined that the Family's actions waived attorney-client privilege, the Court also found that the Family waived the protections afforded by the work-product doctrine, *von Bulow,* 475 A.2d at 1008. The Rhode Island Supreme Court held that, although the documents handed over to the Rhode Island State Police may have contained Attorney Kuh's own thoughts or mental processes in synthesizing information, the protections afforded by the work-product doctrine were nevertheless waived based upon the Family's controlled and aggressive use of the allegedly privileged information to help prove that the defendant attempted to murder Mrs. von Bulow. *Id.* at 1011; *see also* Epstein, *supra,* at 601 ("When an attorney's opinions are put into issue, broad discovery of all materials likely to reflect, explain, or impeach those opinions will become discoverable."). The Rhode Island Supreme Court reasoned that the effect of denying the defendant access to the requested material, after it had been disclosed by the Family, was to "block the flow of potentially relevant evidence that may have been vital to his defense." *Id.* at 1011-12.

Further, in *Cordis Corp. v. SciMed Life Systems, Inc.,* 980 F.Supp. 1030 (D. Minn. 1997), the United States District Court for the District of Minnesota held that the defendant waived protections afforded by the work-product doctrine when the defendant argued that it relied, in good faith, upon the legal opinions of its law firm to refute a claim that the defendant willfully infringed upon the plaintiffs patent. *Cordis Corp.* 980 F.Supp. at 1032. In *Cordis Corp.,* the United States District Court for the District of Minnesota held that the plaintiff could discover any of the defendant's attorneys' work papers containing factual information which "served, or should
13 have served, as a factual predicate for counsel's opinion" on the issue of infringement. *Id.* at 1034. *13

Accordingly, the issue squarely before the Court is whether SMG's responses to FEI's Interrogatory Number Eleven waived protections afforded by both the attorney-client privilege and/or the work-product doctrine as it relates to Attorney Kenney and the other aforementioned attorneys.

B

Did SMG Waive Attorney-Client Privilege When It Provided its Second Supplemental Responses to FEI's Interrogatories as it Relates to Attorney Kenney?

At the outset, it should be noted that SMG has not yet made an explicit waiver of the attorney-client privilege. In other words, SMG has not revealed the factual basis or circumstances which support Attorney Kenney's purported opinion. SMG has only painted a broad brush, stating that Attorney Kenney will testify regarding the reasonableness of the proposed settlement. Thus, any purported waiver of attorney-client privilege by SMG is implicit at this point.

As stated above, a client implicitly waives attorney-client privilege when it places the nature of an attorney-client relationship at issue or attempts to prove the reasonableness of a settlement based upon the advice of counsel. *Cunha,* 745 A.2d at 159 (citing *Metropolitan Life,* 730 A.2d at 60). In *Metropolitan Life,* 730 A.2d at 52, the Supreme Court of Connecticut held that the plaintiff did not implicitly waive attorney-client privilege where, in that case, the plaintiff provided a privilege log related to the defense and settlement of an underlying asbestos tort action. The Supreme Court of Connecticut reasoned that the plaintiff did not implicitly waive

attorney-client privilege because the plaintiff "has not pleaded reliance on any information or advice contained in the privileged documents." *Id.* at 54. The Supreme Court of Connecticut noted that, "[w]here ... an insured alleges that an insurer improperly has failed to defend and provide coverage for underlying claims that the
14 insured has settled the insured has the burden of proving *14 that the claims were within the policy's coverage *and* that the settlements were reasonable." *Id.* at 55 (citing *Alderman v. Hanover Insurance Group,* 363 A.2d 1102, 1107 (Conn. 1975)) (in order to be covered by the insurer, settlement made by the insured must have been reasonable and made in good faith). Thus, the *Metropolitan Life* court explained that "[i]t would be quite different if the plaintiff sought to prove reasonableness based upon the advice of counsel. In that instance, counsel's advice would be at issuef.]" *Metropolitan Life,* 730 A.2d at 56.

This later scenario is exactly the issue in this case. To prevail in the indemnity action, SMG first needs to prove at trial that it was a reasonable litigation decision to attempt to liquidate its potential liability to plaintiffs because SMG was potentially liable and that the settlement amount was, under the circumstances, within the range of potentially reasonable settlements. Unlike *Metropolitan Life,* SMG's disclosure clearly reveals that SMG intended to prove the reasonableness of its settlement with Plaintiffs based upon the advice of Attorney Kenney.

During discovery in the current indemnity action, FEI's Interrogatory Number Eleven requested that SMG " [l]ist all lay persons SMG intends to call to testify at trial in the proof of this case and a description of their anticipated testimony." (Ex. 1.) Thereafter, in its Second Supplemental Answers to FEI's Interrogatories, SMG disclosed that Attorney Kenney would testify as to "his personal involvement and exercise of his professional judgment in recommending to SMG that it participate in mediation to settle the plaintiffs' claims and [that, in] his professional judgment,... the decision to settle under the best terms available, was prudent and reasonable and necessary under the circumstances[.] *Id.* Additionally, Attorney Kenney would testify as to his "personal involvement and exercise of his and others professional judgment in advising SMG of the necessity of settling the plaintiffs' claims against SMG[.]" *Id.* Moreover, SMG disclosed that Attorney Kenney would testify as to
15 "his personal involvement in reviewing and evaluating the *15 prospective evidence that he reasonably anticipated would have been admissible in the trial of the plaintiffs' claims against SMG . . . and ... the potential impact of the plaintiffs' evidence on the likelihood of a verdict being entered against SMG in a trial of the plaintiffs' claims." *Id.* SMG further disclosed that Attorney Kenney would testify as to the "prospective range of jury verdict exposure presented to SMG should a jury trial have proceeded with regard to the plaintiffs' claims against SMG." *Id.*

When considering the plain language of Attorney Kenney's proposed testimony, SMG effectively disclosed that Attorney Kenney would testify that based upon his experience as an attorney, and based upon all the evidence that Attorney Kenney had reviewed in the underlying action, and considering the possible range of damages that SMG could have paid out had the underlying action gone to trial, that SMG's settlement with Plaintiffs was reasonable under the circumstances. Therefore, SMG clearly implicitly waived attorney-client privilege as to Attorney Kenney because SMG disclosed that Attorney Kenney would testify as to whether or not the settlement was reasonable, and the issue of whether or not the settlement was reasonable is the crux of SMG's claim in the indemnity action.

In this case, it is clear that the reasonableness of SMG's settlement with Plaintiffs is integral to the instant indemnity action. What is not clear, however, is whether the reasonableness of the indemnity claim can be proven without Attorney Kenney's testimony. In other words, the case before this Court may be distinguishable from the cases cited above if SMG determines that Attorney Kenney's testimony is not essential to prove the

reasonableness of the settlement. Nevertheless, the above rationale is still applicable to the case at bar, as this case is within the parameters of *Cunha's* implicit waiver test because SMG has clearly put the attorney-client relationship at issue in this litigation by designating Attorney Kenney as a witness. *16

C.

Did SMG's Third Supplemental Answers to FEI's Interrogatory Cure its Implicit Waiver of Attorney-Client Privilege?

SMG contends that its Third Supplemental Answers to FEI's Interrogatory cured any purported waiver because it offered Attorney Kenney to testify solely as a fact witness as to the "attendant facts and circumstances" surrounding SMG's decision to settle with Plaintiffs. (SMG Reply Mem. in Further Supp. of its Mot. to Quash and/or Protective Order, 3). However, an attorney who has been involved with a case from the beginning cannot testify as a simple fact witness. Such an attorney's observations can be said to be "filtered through the prism of his expertise." *Cf. B.H. ex rel. Holder v. Gold Fields Mining Corp.,* 239 F.R.D. 652, 660 (N.D. Okla. 2005) (stating that an environmental expert involved with a case from the beginning is not a "simple fact witness," [such as] the ordinary bystander to an auto accident, prepared to testify as to what he saw, because the expert's entire involvement with the case arises from his expertise, and thus, all the expert's observations are "filtered through the prism of his expertise"). Additionally, an attorney cannot testify solely about the facts and circumstances surrounding a case "without relying in some measure on privileged information from his files." *Rutgard v. Haynes,* 185 F.R.D 596, 601 (S.D. Cal. 1999); *see also* Epstein, *supra,* at 572 ("When an attorney is called as an expert or, for that matter, even when a lawyer is called as a fact witness under certain circumstances, any privilege that otherwise attaches to the communications between the party calling that attorney as a witness and the attorney is deemed placed into issue and waived.").

In tliis case, Attorney Kenney is not a "simple fact witness, [such as] the ordinary bystander to an auto accident, prepared to testify as to what he saw." *GoldFields Mining Corp.,* 239 F.R.D. at 660. All of Attorney Kenney's observations, whose entire involvement with this case arises from his expertise as an attorney, are "filtered through the prism of his expertise." *Id.* *17

Further, Attorney Kenney would not be able to testify solely as to the "attendant facts and circumstances" surrounding SMG's decision to settle with the Plaintiffs "without relying in some measure on privileged information from his files." *See Rut gar d,* 185 F.R.D at 601; *see also Gold Fields Mining Corp.,* 239 F.R.D. at 660.

Further, this Court believes that it is a fiction to characterize Attorney Kenney as a fact witness in this case because Attorney Kenney could not testify as to the "attendant facts and circumstances" without some subjective analysis associated with determining which facts are important and which are not. Attorney Kenney cannot simply check his expertise at the door when testifying about what relevant facts he uncovered throughout his involvement as SMG's attorney in this case.

Lastly, even if Attorney Kenney were allowed to testify as a so-called fact witness, it would be impossible to draw an imaginary line distinguishing what Attorney Kenney will or will not testify to. Such a designation in this case is unworkable and would impede moving this case to trial. Either Attorney Kenney is a witness or he is not. Thus, SMG's assertion that Attorney Kenney can testify merely as a fact witness is without merit.

Therefore, SMG's Third Supplemental Response to FEI's Interrogatory Number Eleven did not cure SMG's implicit waiver of attorney-client privilege. If SMG continues to rely upon Attorney Kenney's testimony in this case, then this Court will deem SMG to have affirmed its implicit waiver of attorney-client privilege between

SMG and Attorney Kenney. *18

D

Can SMG Cure its Implicit Waiver of Attorney-Client Privilege in this Case?

In the case at bar, the reasonableness of SMG's settlement with Plaintiffs is an essential element of SMG's indemnity claim against FEI. SMG cannot abandon the reasonableness of the settlement claim if it wishes to prevail. However, in implicit waiver cases, such as the case here, the holder of the privilege may preserve the confidentiality of the privileged communications by choosing to abandon the claim or reliance upon the attorney's advice which gives rise to the waiver condition. *See Lyons,* 415 F.2d at 541-42; *see also Diamond Staffing Solutions,* 2005 WL 8176474, at *4; *see also* Rice, *supra,* at 338-49. Thus, SMG, as the holder of the privilege, may preserve the confidentiality of the privileged communication by choosing to abandon Attorney Kenney as a witness and electing to prove reasonableness by other means.

Therefore, based upon the facts and circumstances before the Court, and in accordance with the model set forth by the United States District Court for the District of Massachusetts, in *Diamond Staffing Solutions,* and other cases cited above, this Court Orders that unless SMG serves and files within five days of the date of this Decision a written notice that SMG has withdrawn Attorney Kenney as a witness, then SMG must comply with FEI's Motion to Compel and discovery requests as to Attorney Kenney, relating to the reasonableness of SMG's settlement with Plaintiffs, consistent with this Decision. *See infra.* This model balances the sanctity of the attorney-client privilege and work-product privilege with the facts and circumstances before the Court regarding waiver. *19

E

Scope of Discovery if SMG Fails to Withdraw Attorney Kenney as a Witness 1

Attorney-Client Privilege

A witness's credibility is always relevant as contemplated by the Rhode Island Rules of Evidence. Rule 401 of the Rhode Island Rules of Evidence states that evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." R.I. R. Evid. 401. When an attorney's opinions are put into issue, broad discovery of all materials likely to reflect, explain, or impeach those opinions will become discoverable. Epstein, *supra,* at 601. When a party asserts, as an essential element of its claim or defense, reliance upon the advice of counsel, "the party waives the attorney-client privilege with respect to all communications, [not otherwise privileged] whether written or oral, to or from counsel concerning the transactions for which counsel's advice was sought." *Panter v. Marshall Field &Co.,* 80 F.R.D. 718, 721 (N.D. Ill. 1978) (citing *Smith v. Bentley,* 9 F.R.D. 489, 490 (S.D.N.Y. 1949)).

In this case, as discussed above, SMG's disclosure clearly implicitly waived attorney-client privilege by designating Attorney Kenney as a trial witness. Thus, if SMG fails to withdraw Attorney Kenney as a witness, then SMG affirms its implicit waiver of attorney-client privilege with respect to all communications not otherwise privileged,[5] whether written or oral, to or from Attorney Kenney related to the reasonableness of SMG's settlement with Plaintiffs. *Panter,* 80 F.R.D. at 721 (citing *Smith,* 9 F.R.D. at 490); *see also* Epstein, *supra,* at 601. *20

[5] Correspondence from co-counsel remain privileged. *See* Section G.

2 Work-Product Doctrine

In this case, similar to *von Bulow* and *Cordis Corp.,* SMG is attempting to prove that its settlement with the Plaintiffs was reasonable based upon the testimony of Attorney Kenney. For instance, SMG disclosed that Attorney Kenney would testify as to, among other things, "his personal involvement and exercise of his professional judgment in recommending to SMG that it participate in mediation to settle the plaintiffs' claims and his professional judgment that the decision to settle under the best terms available, was prudent and reasonable and necessary under the circumstances[.]" (Ex. 1.)

Because SMG is attempting to prove that its settlement with Plaintiffs was reasonable through the testimony of Attorney Kenney, if SMG does not withdraw Attorney Kenney as a witness, this Court cannot allow SMG to assert the protections afforded by the work-product doctrine as it applies to documents relevant to Attorney Kenney's mental impressions or conclusions that the settlement with Plaintiffs was reasonable. To do so would be to "block the flow of potentially relevant evidence that may [be] vital" to FETs defense against SMG's claim that SMG's settlement with Plaintiffs was reasonable, *von Bulow,* 475 A.2d at 1011-12; *see also Cordis Corp.,* 980 F.Supp. at 1034 (the United States District Court for the District of Minnesota permitted plaintiff to discover any of the defendant's attorneys' work papers containing factual information which "served, or should have served, as a factual predicate for counsel's opinion" on the issue of infringement). The information may also be highly relevant to the issue of credibility because it may provide evidence regarding Attorney Kenney's
21 purported testimony that the settlement was reasonable. *21

Therefore, if SMG does not withdraw Attorney Kenney as a witness, FEI may properly discover the work product of Attorney Kenney insofar as it relates to his opinion that the settlement with Plaintiffs was reasonable.

F

Attorney Kenney Must Be Disqualified if SMG Fails to Withdraw Him as a Witness

Rule 3.7(a) of the Rhode Island Rules of Professional Conduct could not be more specific in its mandate: "[a] lawyer *shall not* act as *advocate* at a trial in which the lawyer is likely to be a necessary witness[.]" *State v. Vocatura,* 922 A.2d 110, 116 (R.I. 2007). Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client. Sup. Ct. R. Prof. Conduct 3.7(a) cmt. [1]. Additionally, allowing one's attorney to serve as both an advocate and a fact witness blurs the line in the jurors' minds between the attorney's legal arguments as counsel and his or her testimony as a witness, potentially inducing the jury to give undue weight to his or her arguments as counsel. *In re Guidry,* 316 S.W.3d 729, 740-41 (Tex. App. 2010). In other words, while a witness is required to testify on the basis of personal knowledge, an advocate is expected to explain and comment on evidence given by others. Sup. Ct. R. Prof. Conduct 3.7(a) cmt. [2]. Thus, when an attorney testifies, it may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of proof. *Id.*

In *In re Guidry,* the Court of Appeals of Texas was presented with the question of whether a trial court abused its discretion by refusing to disqualify a lawyer who testified as a fact witness. The Court of Appeals of Texas overturned the trial court, disqualified the lawyer, and held that allowing attorneys to "occupy dual roles as trial lawyer and fact witness" "would cause actual prejudice ... by blurring the line in the jurors' minds between . . .
22 legal arguments as counsel and *22 ... trial testimony as a fact witness[.]" *In re Guidry,* 316 S.W.3d at 740-41. The Court of Appeals reasoned that the attorney's testimony was necessary to establish an essential fact, and that allowing an attorney to serve dual roles as fact witness and attorney potentially induces a jury to give

undue weight to an attorney's argument as counsel because of his extensive personal knowledge of the facts or because the jury could not recall whether statements he made during the trial were made from the counsel table or the witness stand. *Id.* at 741.

In this case, Attorney Kenney cannot serve a dual role as both a trial lawyer and a witness because Rule 3.7(a) of the Rhode Island Rules of Professional Conduct specifically states: "[a] lawyer *shall not* act as *advocate* at a trial in which the lawyer is likely to be a necessary witness[.]" *Vocatura,* 922 A.2d at 116. Additionally, this Court is persuaded by the Texas Court of Appeal's reasoning that allowing an attorney, Attorney Kenney in this case, to serve such a dual role would blur the line in the jurors' minds between Attorney Kenney's legal arguments as counsel and his testimony as a witness, potentially inducing the jury to give undue weight to his arguments as counsel. *In re Guidry,* 316 S.W.3d at 740-41; *see also* Sup. Ct. R. Prof. Conduct 3.7(a) cmt. [2].

Further, allowing Attorney Kenney to act as both advocate and witness creates a potential for a conflict of interest between Attorney Kenney and SMG. Any situation which results in Attorney Kenney's testimony being adverse to SMG would create a conflict of interest. This potential conflict could very well cause delay at trial and hinder this Court's ability to try this case.

Thus, SMG has two choices. On the one hand, SMG can continue to attempt to prove the reasonableness of its settlement through the testimony of Attorney Kenney, thus disqualifying Attorney Kenney from representing SMG at trial, and also waiving protected attorney-client communications and any work-product related to the reasonableness of SMG's settlement with Plaintiffs. Or, SMG can withdraw Attorney Kenney as a witness,
23 reassert the attorney-client *23 privilege, and then Attorney Kenney can continue to represent SMG at trial. Therefore, if SMG fails to withdraw Attorney Kenney as a witness, he must be disqualified from representing SMG at trial.

G

SMG Did Not Waive Attorney Client Privilege as to the Other Lawyers Subpoenaed

FEI asserts that SMG's Second Supplemental Answer Number Eleven also waived attorney-client privilege as to Thomas Angelone, Esq., Sean Brousseau, Esq., Hodosh Spinella &Angelone, P.C., Judah H. Rome, Esq., and Sloane and Walsh, LLP, based upon the following disclosure: "Mr. Kenney is generally expected to testify as to . . . his personal involvement and exercise of his and others professional judgment in advising SMG of the necessity of settling the plaintiffs' claims against SMG." (Ex. 1.) As mentioned above, an implicit waiver of attorney-client privilege occurs when a party specifically pleads reliance on an attorney's advice as an element of a claim or defense, voluntarily testifies regarding portions of the attorney-client communication, or specifically places at issue, in some other manner, the attorney-client relationship. *Cunha,* 745 A.2d at 160 (citing *Metropolitan Life,* 730 A.2d at 61).

In this case, we do not know who the "others" are that SMG refers to or if they were in fact lawyers. The issue here is whether SMG's settlement was reasonable. To implicitly waive attorney-client privilege, SMG would have had to specifically disclose that it relied on the professional judgment and advice of the other attorneys by name, not merely just "others," when it decided to settle with Plaintiffs. Or, SMG would have had to specifically place the attorneyclient relationship between SMG and the "others" at issue. Although SMG specifically disclosed that it relied upon the advice of Attorney Kenney to determine that the settlement with
24 Plaintiffs was reasonable, it did not do so for any other attorney. Therefore, SMG did not waive privilege *24 as to Thomas Angelone, Esq., Sean Brousseau, Esq., Hodosh Spinella &Angelone, P.C., Judah H. Rome, Esq.,

and Sloane &Walsh, LLP, because SMG did not specifically disclose that it relied on their advice as attorneys at the time it made its decision to settle with Plaintiffs, nor did SMG place its other attorney-client relationships at issue.

IV

Conclusion

In conclusion, SMG's second set of interrogatories implicitly waived attorney-client privilege as to Attorney Kenney because SMG placed the attorney-client relationship at issue and specifically disclosed that it relied upon Attorney Kenney's advice when determining whether or not the settlement with Plaintiffs was reasonable. Additionally, SMG's Third Supplemental Interrogatories did not cure the implicit waiver because Attorney Kenney would not be able to testify solely as to the "attendant facts and circumstances" surrounding SMG's decision to settle with the Plaintiffs "without relying in some measure on privileged information from his files" or without some subjective analysis, based upon his expertise as an attorney, in determining which facts are important and which are not. *See Rutgard,* 185 F.R.D at 601; *see also Gold Fields Mining Corp.,* 239 F.R.D. at 660.

Furthermore, if SMG fails to withdraw Attorney Kenney as a witness, the scope of discovery will include all attorney-client communications between Attorney Kenney, SMG, and others as they relate to the reasonableness of the settlement, as well as all of Attorney Kenney's work-product that relates to the reasonableness of the settlement. Moreover, Attorney Kenney must be disqualified as SMG's trial attorney if Attorney Kenney testifies, because an attorney cannot serve a dual role as witness and trial attorney. Lastly, SMG did not waive attorney-client privilege as to Thomas Angelone, Esq., Sean Brousseau, Esq., Hodosh
25 Spinella &Angelone, P.C., *25 Judah H. Rome, Esq., and Sloane and Walsh, LLP, because SMG did not specifically disclose that it relied on their advice as attorneys at the time it made its decision to settle with Plaintiffs, nor did SMG place its other attorney-client relationships at issue.

Therefore, from the time that this Decision enters, SMG has five days, until January 31, 2023, to withdraw Attorney Kenney as a witness, or it must comply with FEI's Motion to Compel discovery requests consistent with this Decision.

SMG's Motion to Quash and/or for Protective Order as to Thomas Angelone, Esq., Sean Brousseau, Esq., Hodosh Spinella &Angelone, P.C., Judah H. Rome, Esq., and Sloane and Walsh, LLP is *GRANTED.*

This case is hereby scheduled for hearing on outstanding pending motions for February 1, 2023 at 11:00 a.m.
27 Counsel for FEI should prepare, circulate, and submit the appropriate form of order. *26 *27

DEFENDANT S / THIRD PARTY PLAINTIFF S, SMG, SECOND SUPPLEMENTAL ANSWERS TO INTERROGATORIES OF THIRD PARTY DEFENDANT, FELD ENTERTAINMENT, INC.

INTERROGATORY NO. 8

State the name, current residential address, business address, and occupation of each person whom you expect to call as an expert witness on behalf of the plaintiff in the above-entitled matter, including as to each person:

a. The subject matter on which such person is expected to testify;

b. The substance of the facts to which such person is expected to testify;

c. The substance of the opinions to which such person is expected to testify; and

d. A summary of the grounds for each such opinion.

ANSWER TO INTERROGATORY-NO, 8

Objection is made to the extent the interrogatory seeks information with respect to experts consulted, it seeks information that is beyond the scope of discovery permitted by Rule 26, and is protected by the attorney-client privilege and/or work product octrine. Without waiving said objection, experts have not been identified at this time; this answer will be supplemented consistent with the scheduling order in this matter and the *Rhode Island Superior Court Rules of Civil Procedure.*

SECOND SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 8 Without waiving such objection SMG answers as follows:

28 Exhibit 1 *28

See, Third Supplemental Answers of SMG to Plaintiffs Interrogatory No. 2, a copy of which as to the following proposed experts is appended hereto as Exhibit 1 and is incorporated herein by reference.

Please see also for a more complete description of the expected testimony of each such expert witnesses:

1. Delbert L. Hall, Ph.D. Please see the deposition of Delbert L. Hall, Ph.D. taken on June 26, 2020;

2. James Heath. Please see the deposition of James Heath taken on July 29, 2020:

3. Adonis Sporty Jeralds FCE. Please see the deposition of Adonis Sporty Jeralds FCE, taken on July 14, 2020.

See, Plaintiff Svitlana Balanicheva Supplemental Answers to Interrogatories, Interrogatory No. 8, a copy of which as to the following proposed experts is appended hereto as Exhibit 2 and incorporated herein by reference.

4. Robert O'Shea, P.E., Wheaton, Ill. Please see the deposition of Robert O'Shea, P.E. taken on June 17, 2020.

5. Mohammad Ayub, P.E, SE, Washington D.C. Mr. Ayub is expected to testify consistent with the OSHA report he authored and prepared relating to the Medeiros Hair Hang Act Accident.

INTERROGATORY NO. 11

List all lay persons SMG intends to call to testify at trial in the proof of this case and a description of their anticipated testimony.

ANSWER TO INTERROGATORY NO. 11

Objection: the interrogatory is beyond the scope of discovery provided for by the Rhode Island Superior Court Rules of Civil Procedure and is protected by the attorney-client privilege and/or work product doctrine.

SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 11 Without waiving such objection SMG answers as follows:

1. Deposition transcript and or trial testimony and exhibits of Go Arii. See transcript taken on September 9, 2015 and February 13, 2018. Please review such depositions for a description of his expected testimony, 2. Deposition transcript and or trial testimony and exhibits of Thomas Dashiell taken on April 24, 2019. Please

review such deposition for a description of his expected testimony.

3. Deposition transcript and or trial testimony and exhibits of Andre Medeiros taken on April 24, 2019. Please review such deposition for a description of his expected testimony. . .. .. .

29 Exhibit 1 *29

4. Steven Siczkiewicz. See deposition transcript and exhibits of taken on May 15, 2017, Please review such deposition for a description of his expected testimony.

5. Robert Lauro. See deposition transcript and exhibits of taken on May 18, 2017, Please review such deposition for a description of his expected testimony.

6. Lawrence Lepore. See deposition transcript and exhibits of taken on May 14, 2017. Please review such deposition for a description of his expected testimony.

7. Lawrence J. Kenney, Jr. Esq., Boston, Massachusetts.

Mr. Kenney is expected to testify generally regarding his 40 years of experience in the field of defending wrongful death and often serious and sometime catastrophic personal injury cases, such as that involved in the present action, including his experience in conducting discovery, pretrial motion practice, trials, post judgment motion practice and appellate practice in the field of defending serious personal injury cases.

Mr. Kenney is further expected to testify generally regarding his extensive experience in analyzing the applicable law, reasonably anticipated admissible evidence, all other relevant available information of the kind normally reviewed, prospective jury trial outcomes, reasonably projected jury verdict exposures and reasonable settlement ranges when advising a defendant client in determining whether or not to settle personal injury cases. Mr. Kenney is further expected to testify generally regarding the exercise of his professional judgment in providing such advice to a defendant client when confronted with the potential of an enormous jury verdict in the setting of a catastrophic and multiple personal injury cases.

Mr. Kenney is generally expected to testify as to the circumstances and factors which are present in (1) Defendants/Third-Party Plaintiffs, SMG, Supplemental Answers to Expert Interrogatories, (2) Plaintiffs' Memorandum is Support of their Motion for Partial Summary Judgment, and (3) Plaintiffs' Objection and Memorandum in Opposition to Third-Party Defendant Feld Entertainment's Motion for Summary Judgment, and the significance of those circumstances and factors as related to the potential liability of SMG, the risk of going to verdict in the underlying action and in recommending, with others, that SMG settle the plaintiffs' claims on the best terms available rather than acquiesce to the potential for a devastating jury verdict as the only defendant available to the jury, and subject to the imposition of significant interest on any judgment.

Mr. Kenney is generally expected to testify as to his personal involvement as defense counsel for SMG with regard to the defense of the claims advanced by the plaintiffs in the current action, including; his personal involvement during the discovery phase of the plaintiffs' claims in the current action; his personal involvement and attendance at numerous depositions conducted during the discovery phase of the plaintiffs' claims in the current action, including but not limited to (1) his personal involvement and attendance at numerous depositions of expert witnesses proposed by counsel for the plaintiffs and third party defendant to be presented at the trial of the plaintiffs' claims against SMG, (2) his review of the depositions of the plaintiffs, (3) his review of the depositions of representatives of Feld Entertainment, Inc. (hereinafter referred to as "Feld")

(including, but not limited to, the deposition of Feld through its designated representative, (4) his review of disclosures by Feld of proposed liability experts by Feld, (5) his personal involvement in reviewing and evaluating the prospective

30 Exhibit 1 *30 evidence that he reasonably anticipated would have been admissible in the trial of the plaintiffs' claims against SMG, including, but not limited to, all testimonial evidence, expert evidence, photographic evidence, video evidence, documentary evidence and demonstrative evidence (hereinafter referred to collectively as the "plaintiffs evidence"), (6) his personal involvement in evaluating and judging the potential impact of the plaintiffs evidence on the likelihood of a verdict being entered against SMG in a trial of the plaintiffs' claims, (7) the prospective range of jury verdict exposure presented to SMG should a jury trial have proceeded with regard to the plaintiffs' claims against SMG, (8) his personal involvement and exercise of his and others professional judgment in advising SMG of the necessity of settling the plaintiffs' claims against SMG, (9) his personal involvement and exercise of his professional judgment in advising SMG and supporting its decision to prudently settle the plaintiffs' claims a for the total sum of $52.5 million during mediation proceedings and (10) the impact of Feld's refusal to assume the defense and indemnification of SMG pursuant to the License Agreement governing Feld's performance of the Medeiros Hair Hang Act which resulted in personal injuries to each of the plaintiffs.

Mr. Kenney is further generally expected to testify as to his personal involvement and exercise of his professional judgment in evaluating the negligence of Feld, the law applicable to the claims that were asserted against SMG by the plaintiffs, including, but not limited to, his professional judgment that SMG was subjected to by controlling Rhode Island legal precedent and generally accepted and near universal appellate authority to a non-delegable vicarious responsibility for the negligent conduct of Feld as the Medeiros Hair Hang Act would very likely and reasonably be considered by any Court to constitute conduct that was inherently or unreasonably dangerous, and for which then SMG would have been held legally responsible for the conduct of Feld even though it was not negligent itself and did not participate in or have control over either the design, construction or performance of the Medeiros Hair Hang Act.

Mr. Kenney is further generally expected to testify as to his personal involvement and exercise of his professional judgment in evaluating the law applicable to the claims that were asserted against SMG by the plaintiffs relative to the jury's capacity to award monetary damages to the plaintiffs as a result of the personal injuries which they sustained as a result of the design and performance of the Medeiros Hair Hang Act by Feld, including the reasonable range of projected jury verdict exposures in the circumstances of the current case.

Mr. Kenney is further generally expected to testify as to his personal involvement and knowledge of the demand and opportunity that SMG first provided to Feld to honor its contractual obligation to defend and indemnify SMG with respect to SMG's exposure to liability as a result of Feld's conduct and Feld's refusal to accept the defense and indemnification of SMG, which left SMG with no alternative but to seek to mediate and settle the plaintiffs' underlying claims against it

Mr. Kenney is further generally expected to testify as to his personal involvement and exercise of his professional judgment in recommending to SMG that it participate in mediation to settle the plaintiffs' claims and his professional judgment that the decision to settle under the best terms available, was prudent and
31 reasonable and necessary under the circumstances to protect the interests of SMG. *31

32 (Image Omitted) *32

DEFENDANT'S / THIRD PARTY PLAINTIFF'S, SMG, THIRD SUPPLEMENTAL ANSWERS TO INTERROGATORIES OF THIRD PARTY DEFENDANT, FELD ENTERTAINMENT, INC.

INTERROGATORY NO, 11

List all lay persons SMG intends to call to testify at trial in the proof of this case and a description of their anticipated testimony.

ANSWER TO INTERROGATORY NO. 11

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SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 11 Without waiving such objection SMG answers as follows:

1. Deposition transcript and or trial testimony and exhibits of Go Arii. See transcript taken on September 9, 2015 and February 13, 2018. Please review such depositions for a description of his expected testimony.

33 Exhibit 2 *33

2. Deposition transcript and or trial testimony and exhibits of Thomas Dashiell taken on April 24, 2019. Please review such deposition for a description of his expected testimony.

3. Deposition transcript and or trial testimony and exhibits of Andre Medeiros taken on April 24, 2019. Please review such deposition for a description of his expected testimony.

4. Steven Siczkiewicz. See deposition transcript and exhibits of taken on May 15, 2017. Please review such deposition for a description of his expected testimony.

5. Robert Lauro. See deposition transcript and exhibits of taken on May 18, 2017. Pleasereview such deposition for a description of his expected testimony.

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Mr. Kenney is expected to testify generally regarding his 40 years of experience I in the field of defending wrongful death and often serious and sometime catastrophic personal injury cases, such as that involved in the present action, including his experience in conducting discovery, pretrial motion practice, trials, post judgment motion practice and appellate practice in the field of defending serious personal injury cases.

I

Mr. Kenney is further expected to testify generally regarding his extensive experience in analyzing the applicable law, reasonably anticipated admissible evidence, all other relevant available information of the kind normally reviewed, prospective jury trial outcomes, reasonably projected jury verdict exposures and reasonable settlement ranges when advising a defendant client in determining whether or not to settle personal injury cases. Mr. Kenney is further expected to testify generally regarding the exercise of his professional judgment in providing such advice to a defendant client when confronted with the potential of an enormous jury verdict in the setting of a catastrophic and multiple personal injury cases.

Mr. Kenney is generally expected to testify as to the circumstances and factors which are present in (1) Defendants/Third-Party Plaintiffs, SMG, Supplemental Answers to Expert Interrogatories, (2) Plaintiffs' Memorandum is Support of their Motion for Partial Summary Judgment, and (3) Plaintiffs' Objection and Memorandum in Opposition to Third-Party Defendant Feld Entertainment's Motion for Summary Judgment, and the significance of those circumstances and factors as related to the potential liability of SMG, the risk of going to verdict in the underlying action and in recommending, with others, that SMG settle the plaintiffs' claims on the best terms available rather than acquiesce to the potential for a devastating jury verdict as the only defendant available to the jury, and subject to the imposition of significant interest on any judgment.

Mr. Kenney is generally expected to testify as to his personal involvement as defense counsel for SMG with regard to the defense of the claims advanced by the

34 Exhibit 2 *34 plaintiffs in the current action, including; his personal involvement during the discovery phase of the plaintiffs' claims in the current action; his personal involvement and attendance at numerous depositions conducted during the discovery phase of the plaintiffs' claims in the current action, including but not limited to (1) his personal involvement and attendance at numerous depositions of expert witnesses proposed by counsel for the plaintiffs and third party defendant to be presented at the trial of the plaintiffs' claims against SMG, (2) his review of the depositions of the plaintiffs, (3) his review of the depositions of representatives of Feld Entertainment, Inc. (hereinafter referred to as "Feld") (including, but not limited to, the deposition of Feld through its designated representative, (4) his review of disclosures by Feld of proposed liability experts by Feld, (5) his personal involvement in reviewing and evaluating the prospective evidence that he reasonably anticipated would have been admissible in the trial of the plaintiffs' claims against SMG, including, but not limited to, all testimonial evidence, expert evidence, photographic evidence, video evidence, documentary evidence and demonstrative evidence (hereinafter referred to collectively as the "plaintiffs evidence"), (6) his personal involvement in evaluating and judging the potential impact of the plaintiffs evidence on the likelihood of a verdict being entered against SMG in a trial of the plaintiffs' claims, (7) the prospective range of jury verdict exposure presented to SMG should a jury trial have proceeded with regard to the plaintiffs' claims against SMG, (8) his personal involvement and exercise of his and others professional judgment in advising SMG of the necessity of settling the plaintiffs' claims against SMG, (9) his personal involvement and exercise of his professional judgment in advising SMG and supporting its decision to prudently settle the plaintiffs' claims a for the total sum of $52.5 million during mediation proceedings and (10) the impact of Feld's refusal to assume the defense and indemnification of SMG pursuant to the License Agreement governing Feld's performance of the Medeiros Hair Hang Act which resulted in personal injuries to each of the plaintiffs.

Mr. Kenney is further generally expected to testify as to his personal involvement and exercise of his professional judgment in evaluating the negligence of Feld, the law applicable to the claims that were asserted against SMG by the plaintiffs, including, but not limited to, his professional judgment that SMG was subjected to by controlling Rhode Island legal precedent and generally accepted and near universal appellate authority to a non-delegable vicarious responsibility for the negligent conduct of Feld as the Medeiros Hair Hang Act would very likely and reasonably be considered by any Court to constitute conduct that was inherently or unreasonably dangerous, and for which then SMG would have been held legally responsible for the conduct of Feld even though it was not negligent itself and did not participate in or have control over either the design, construction or performance of the Medeiros Hair Hang Act.

Mr. Kenney is further generally expected to testify as to his personal involvement and exercise of his professional judgment in evaluating the law applicable to the claims that were asserted against SMG by the plaintiffs relative to the jury's capacity to award monetary damages to the plaintiffs as a result of the personal

injuries which they sustained as a result of the design and performance of the Medeiros Hair Hang Act by Feld,
35 including the reasonable range of projected jury verdict exposures in the circumstances of the current case. *35

Mr. Kenney is further generally expected to testify as to his personal involvement and knowledge of the demand and opportunity that SMG first provided to Feld to honor its contractual obligation to defend and indemnify SMG with respect to SMG's exposure to liability as a result of Feld's conduct and Feld's refusal to accept the defense and indemnification of SMG, which left SMG with no alternative but to seek to mediate and settle the plaintiffs' underlying claims against it.

Mr. Kenney is further generally expected to testify as to his personal involvement and exercise of his professional judgment in recommending to SMG that it participate in mediation to settle the plaintiffs' claims and his professional judgment that the decision to settle under the best terms available, was prudent and reasonable and necessary under the circumstances to protect the interests of SMG.

Mr. Kenney's anticipated testimony is expected to be based upon his personal involvement in, and knowledge derived from, defending SMG in the current action and his personal knowledge of the professional judgment he employed throughout the defense and settlement of the plaintiffs' claims against SMG.

Mr. Kenney's anticipated testimony is further expected to be based upon his personal involvement in, and knowledge of, SMG's tender of its defense and indemnification to Feld under the terms of its contract with Feld and Feld's refusal to honor its contractual obligations to SMG, thus necessitating the settlement of the plaintiffs' claims against SMG.

The Third Party Defendant reserves the right to supplement this witness list.

SECOND SUPPLEMENTAL ANSWER TO INTERROGATORY NO. 11 Without waiving such objection SMG answers as follows:

1. Deposition transcript and or trial testimony and exhibits of Go Arii. See transcript taken on September 9, 2015 and February 13, 2018. Please review such depositions for a description of his expected testimony.

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4. Steven Siczkiewicz. See deposition transcript and exhibits of taken on May 15, 2017. Please review such deposition for a description of his expected testimony.

5. Robert Lauro. See deposition transcript and exhibits of taken on May 18, 2017. Please review such deposition for a description of his expected testimony.

Exhibit 2

6. Lawrence Lepore. See deposition transcript and exhibits of taken on May 14, 2017. Please review such deposition for a description of his expected testimony.

7. Lawrence J. Kenney, Jr. Esq., Boston, Massachusetts.

Mr. Kenney is expected to testify generally regarding his 40 years of experience in the field of defending wrongful death and often serious and sometime catastrophic personal injury cases, such as that involved in the present action, including his experience in conducting discovery, pretrial motion practice, trials, post judgment motion practice and appellate practice in the field of defending serious personal injury cases.

Mr. Kenney is further expected to testify generally regarding his extensive experience in analyzing the applicable law, reasonably anticipated admissible evidence, all other relevant available information of the kind normally reviewed, and prospective jury trial outcomes.

Mr. Kenney is generally expected to testify as to the circumstances and factors which are present in (1) Defendants/Third-Party Plaintiffs, SMG, Supplemental Answers to Expert Interrogatories, (2) Plaintiffs' Memorandum is Support of their Motion for Partial Summary Judgment, and (3) Plaintiffs' Objection and Memorandum in Opposition to Third-Party Defendant Feld Entertainment's Motion for Summary Judgment, and the significance of those circumstances and factors as related to the potential liability of SMG.

Mr. Kenney is generally expected to testify as to his personal involvement as defense counsel for SMG with regard to the defense of the claims advanced by the plaintiffs in the current action, including; his personal involvement during the discovery phase of the plaintiffs' claims in the current action; his personal involvement and attendance at numerous depositions conducted during the discovery phase of the plaintiffs' claims in the current action, including but not limited to (1) his personal involvement and attendance at numerous depositions of expert witnesses proposed by counsel for the plaintiffs and third party defendant to be presented at the trial of the plaintiffs' claims against SMG, (2) his review of the depositions of the plaintiffs, (3) his review of the depositions of representatives of Feld Entertainment, Inc. (hereinafter referred to as "Feld") (including, but not limited to, the deposition of Feld through its designated representative, (4) his review of disclosures by Feld of proposed liability experts by Feld, (5) his personal involvement in reviewing and evaluating the prospective evidence that he reasonably anticipated would have been admissible in the trial of the plaintiffs' claims against SMG, including, but not limited to, all testimonial evidence, expert evidence, photographic evidence, video evidence, documentary evidence and demonstrative evidence (hereinafter referred to collectively as the "plaintiffs evidence"), (6) his personal involvement in evaluating and judging the potential impact of the plaintiffs evidence on the likelihood of a verdict being entered against SMG in a trial of the plaintiffs' claims, and (7) the impact of Feld's refusal to assume the defense and indemnification of SMG pursuant to the License Agreement governing Feld's performance of the Medeiros Hair Hang Act which resulted in personal injuries to each of the plaintiffs.

Mr. Kenney is further generally expected to testify as to his personal involvement and exercise of his professional judgment in evaluating the negligence of Feld, the law applicable to the claims that were asserted against SMG by the plaintiffs, including, but not limited to, his professional judgment that SMG was subjected to by controlling Rhode Island legal precedent and generally accepted and near universal appellate authority to a non-delegable vicarious responsibility for the negligent conduct of Feld as the Medeiros Hair Hang Act would very likely and reasonably be considered by any Court to constitute conduct that was inherently or unreasonably dangerous, and for which then SMG would have been held legally responsible for the conduct of Feld even though it was not negligent itself and did not participate in or have control over either the design, construction or performance of the Medeiros Hair Hang Act.

Mr. Kenney is further generally expected to testify as to his personal involvement and exercise of his professional judgment in evaluating the law applicable to the claims that were asserted against SMG by the plaintiffs relative to the jury's capacity to award monetary damages to the plaintiffs as a result of the personal

injuries which they sustained as a result of the design and performance of the Medeiros Hair Hang Act by Feld.

Mr. Kenney is further generally expected to testify as to his personal involvement and knowledge of the demand and opportunity that SMG first provided to Feld to honor its contractual obligation to defend and indemnify SMG with respect to SMG's exposure to liability as a result of Feld's conduct and Feld's refusal to accept the defense and indemnification of SMG.

Mr. Kenney's anticipated testimony is expected to be based upon his personal involvement in, and knowledge derived from, defending SMG in the current action and his personal knowledge of the professional judgment he employed throughout the defense and settlement of the plaintiffs' claims against SMG.

Mr. Kenney's anticipated testimony is further expected to be based upon his personal involvement in, and knowledge of, SMG's tender of its defense and indemnification to Feld under the terms of its contract with Feld and Feld's refusal to honor its contractual obligations to SMG.

The Third Party Defendant reserves the right to supplement this witness list.

__deposes and states that he is a representative of SMG, and that he'signs ana answers these interrogatories for and on behalf of the plaintiff and is duly authorized to do so; that the matters stated in the foregoing answers are not all within the personal knowledge of the deponent; and that such facts as are stated in said answers which are not within the personal knowledge of the deponent have been assembled by authorized employees and counsel of the plaintiff; and that the deponent is informed and believes that the facts stated in these answers are true.