IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

STEVEN M. ANDERSON, *Plaintiff/Counterclaim Defendant,* v. FLUOR INTERCONTINENTAL, INC. et al., *Defendants/Counterclaim Plaintiffs*	Case No. 1:19-cv-289 Hon. Liam O'Grady

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Plaintiff's Motion to Stay, Dkt. 69, and Plaintiff's Objection to the Order of October 4, 2019, Dkt. 78. The Motion and Objection have been fully briefed and the Court dispensed with oral argument because it would not aid in the decisional process.

I. Background

This case arises from a government contractor's internal investigation and subsequent termination of an employee. Plaintiff, Brigadier General Anderson, sued his former employer, Defendants Fluor Intercontinental, Inc. and related entities, after Plaintiff was terminated following an internal investigation. Plaintiff's claims generally revolve around the conduct of the investigation. Defendants counterclaimed, and those claims generally revolve around Plaintiff's conduct in the course of his employment.

In March of 2018, after the internal investigation concluded, Defendants sent a summary of the investigatory findings to the Inspector General ("IG") of the Department of Defense (referred to herein as "the Disclosure"). Unbeknownst to Plaintiff, that disclosure led to a criminal investigation. Plaintiff initiated this case a year later, in March of 2019.

On June 25, 2019, Judge Buchanan issued a Rule 16(b) Scheduling Order. The Order provided that the discovery phase of litigation would conclude on October 11. Dkt. 22 ¶ 1. The Order also provided that "To the extent any party intends to assert a claim of privilege or protection as to trial preparation material, any such claim must be made in a timely manner and in accordance with Fed. R. Civ. P. 26(b)(5)." Dkt. 22 ¶ 9.

During the course of discovery, Defendants produced documents which indicated the existence of the criminal investigation. They did not, however, ensure that either Plaintiff or Plaintiff's counsel were aware of the investigation. On August 16, before he was aware of the investigation, Plaintiff was deposed and did not assert his Fifth Amendment privilege. Plaintiff and Plaintiff's counsel became aware of the criminal investigation after his deposition.

On September 27, Plaintiff moved to compel production of discovery related to the internal investigation. Dkt. 40. The motion was fully briefed, argument occurred on October 4. The motion was denied. Dkt. 60.

On October 10, Plaintiff filed the instant Objection to Judge Buchanan's denial of the motion to compel. Dkt. 78. The Objection was fully briefed, and this Court dispensed with oral argument because it would not assist in the decisional process. Also on October 10, Defendants provided Plaintiff with a privilege log listing the investigative materials withheld.

II. Discussion

1. A Stay Is Not Warranted

Plaintiff/Counterclaim Defendant moved to stay this action due to a parallel criminal investigation, and the potential Fifth Amendment implications of that proceeding. The Fifth Amendment provides a privilege against self-incrimination. U.S. Const. amend. V. "It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or

adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (footnotes omitted).

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). "Because of the frequency with which civil and regulatory laws overlap with criminal laws, American jurisprudence contemplates the possibility of simultaneous or virtually simultaneous parallel proceedings and the Constitution does not mandate the stay of civil proceedings in the face of criminal proceedings." *Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 379 (4th Cir. 2013) (quoting *Ashworth v. Albers Med., Inc.*, 229 F.R.D. 527, 530 (S.D.W. Va. 2005)).

In cases of parallel litigation, "[t]he noncriminal proceeding . . . might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery . . . expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case." *Sec. & Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980). At the same time, an "assertion of the privilege against self-incrimination in civil cases can impose severe burdens on civil litigants." *In re Grand Jury Subpoena*, 836 F.2d 1468, 1473 (4th Cir. 1988). Thus, courts may employ the inherent power to control their dockets to stay a noncriminal proceeding. *See In re Phillips, Beckwith & Hall*, 896 F. Supp. 553, 557 (E.D. Va. 1995).

A stay is not constitutionally required, *id.*, and is generally not granted before an indictment has issued, *Universal Elections, Inc.*, 729 F.3d at 379. Factors courts consider in deciding whether to grant a stay include "(1) interest of plaintiff in proceeding expeditiously

balanced against prejudice to plaintiff caused by delay, (2) burden on defendant, (3) convenience to the court, (4) interests of persons not party to the civil litigation and (5) the public interest." *Avalonbay Communities, Inc. v. San Jose Water Conservation Corp.*, No. CIV A 07-306, 2007 WL 2481291, at *2 (E.D. Va. Aug. 27, 2007), *aff'd*, 325 F. App'x 217 (4th Cir. 2009). A stay is most appropriate where the parallel proceedings involve the same subject matter and are both brought by government. *See Dresser Indus., Inc.*, 628 F.2d at 1375-76.

The first and second factors weigh heavily against a stay. Here, these factors should be applied to both parties because the original Defendants are now Counterclaim Plaintiffs. Defendants have a notable interest in expeditious resolution of the claims because, as a government contractor which works closely with the military, allegations such as these from a General grade officer pose a substantial risk of reputational harm for as long as they remain unresolved. Even more persuasive is that denial of the stay does not burden Plaintiff. Here, since no indictment has issued, he is not in need of funds or attention to devote to a criminal defense. Most importantly, a stay is incapable of addressing the harm which the Fifth Amendment privilege protects against. Plaintiff in this case has already testified by deposition. He also made numerous other statements, including in two interviews with Defendants' investigators, and in an affidavit regarding debarment in 2018.

Finally, the third factor also weighs against a stay. "[A] stay is not convenient to the Court because this judicial district has a policy of efficient and expeditious resolution of cases." *Avalonbay Communities, Inc.*, 2007 WL 2481291, at *4.

It is not appropriate to stay the case at this time. First, as noted above, stays are rarely granted before an indictment has issued. At this point, no indictment relevant to this case has

issued. Relatedly, though the parallel proceedings here involve the same subject matter, the government is not involved with the civil case.

The Court notes that although a stay is inappropriate now, the results of the analysis above are susceptible to change. If a stay becomes necessary later, the Court will review the situation again upon Plaintiff's motion. Any future motion for a stay must identify the specific harm or prejudice further testimony would present, given the multiple statements Plaintiff has already provided that could already be used against him in a criminal proceeding. The instant motion to stay, Dkt. 69, is therefore denied without prejudice.

2. Subject Matter Waiver of Attorney-Client Privilege

Plaintiff's motion to compel broadly sought documents and responses relating to and regarding Defendants' internal investigation. Dkt. 40 at 20. Plaintiff did not have Defendants' privilege log at the time of filing either the motion to compel or the objection.

Plaintiff's motion to compel was filed on September 27, and an Opposition, Reply, and Surreply were each also filed. After briefing and argument at an October 4 hearing, Judge Buchanan denied Plaintiff's motion to compel. The Court found the investigation was by and at the direction of counsel and for the purpose of providing legal advice. Dkt. 68 at 7-8. The requested documents and information were subject to both the attorney-client and work product privileges.

The instant objection was filed on October 10. At the time it was filed Plaintiff asserted that Defendants had not yet submitted a privilege log. Defendants provided a privilege log that same day, Dkt. 100 at 9, and since then Defendants have filed a Response and Plaintiff filed a Reply. These later filings to this Court gave greater substance and clarity to the waiver argument than at the hearing before Judge Buchanan.

A. Standard of Review

A party may object to the non-dispositive ruling of a Magistrate Judge, such as a discovery order. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). A district court reviews a Magistrate Judge's discovery order under the "clearly erroneous or contrary to law" standard. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). Factual findings are reviewed under the "clearly erroneous" standard, and legal conclusions are reviewed under the "contrary to law" standard. *Bruce v. Hartford*, 21 F. Supp. 3d 590, 594 (E.D. Va. 2014). "A court's 'finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Id.* at 593-94 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). "For questions of law 'there is no practical difference between review under Rule 72(a)'s contrary to law standard and [a] de novo standard.'" *Id.* at 594 (quoting *HSBC Bank USA, Nat. Ass'n v. Resh*, No. 3:12–CV–00668, 2014 WL 317820, at *7 (S.D.W. Va. Jan. 28, 2014)).

B. Privilege Law

The Federal Rules of Civil Procedure provide for the discoverability of any matter which is relevant to a claim or defense and proportional to the needs of the case, so long as that matter is nonprivileged. Fed. R. Civ. P. 26(b)(1). The two privileges at issue here are the attorney-client privilege and the work product doctrine.

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Hawkins v. Stables*, 148 F.3d 379, 382 (4th Cir. 1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). The privilege protects certain confidential communications between a lawyer and client from disclosure to encourage

"'full and frank' communication between" them. *Id.* at 382-83 (quoting *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985)).

This Circuit uses the "classic test" to determine the existence of an attorney-client privilege:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

In re Grand Jury Subpoena, 341 F.3d 331, 335 (4th Cir. 2003) (quoting *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982)). The law is "clear that fact-finding which pertains to legal advice counts as professional legal services." *In re Allen*, 106 F.3d 582, 603 (4th Cir. 1997) (citing *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996)).

The proponent of the privilege bears the burden to "establish not only that an attorney-client relationship existed, but also that the particular communications at issue are privileged and that the privilege was not waived." *Jones*, 696 F.2d at 1072 (citations omitted). Clients "can waive it either expressly, or through conduct." *Hawkins,* 148 F.3d at 384 n. 4 (citation omitted).

"Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege. Any voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter." *Jones,* 696 F.2d at 1072. This is known as subject matter waiver. It "is limited to 'other communications relating to the same subject matter.'" *Hawkins*, 148 F.3d at 384 (quoting *Jones*, 696 F.2d at 1072). Further still, when a client "communicates information to his attorney with the understanding that the

information will be revealed to others, that information as well as 'the details underlying the data which was to be published' will not enjoy the privilege." *In re Martin Marietta Corp.*, 856 F.2d 619, 623 (4th Cir. 1988) (quoting *United States v. (Under Seal),* 748 F.2d 871, 875 (4th Cir. 1984)). Federal Rule of Evidence 502 "provides that a waiver resulting from a disclosure of protected information in a federal proceeding extends to undisclosed protected material 'only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.'" *United States Airline Pilots v. Pension Ben. Guar. Corp.*, 274 F.R.D. 28, 31 (D.D.C. 2011) (quoting Fed. R. Evid. 502).

The second privilege at issue is the work product doctrine. "Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." Fed. R. Civ. P. 26(b)(3). The work product doctrine protects an attorney's mental processes and can encompass "material prepared by agents for the attorney." *United States v. Nobles*, 422 U.S. 225, 238 (1975). Both fact work product and opinion work product are protected. Fact work product includes documents prepared by the attorney which do not contain the attorney's mental impressions, conclusions, or opinions. *In re Doe*, 662 F.2d 1073, 1076 n. 2 (4th Cir. 1981). "'Opinion work product' is work product that contains those fruits of the attorney's mental processes." *Id.*

"[*F*]*act* work product, [] is discoverable 'upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship.'" *In re Allen*, 106 F.3d 582, 607 (4th Cir. 1997) (emphasis in original) (quoting *In re Grand Jury Proceedings, Thursday Special Grand Jury,* 33 F.3d 342, 348 (4th Cir. 1994)). In contrast, "*opinion* work product 'enjoys a nearly absolute immunity and can be discovered only

in very rare and extraordinary circumstances." *Id.* (emphasis in original). "To qualify for protection under the work product doctrine, a lawyer must create the document in anticipation of litigation. Once that threshold is met, opinion work product is that which contains an attorney's mental impressions, conclusions, opinions or legal theories . . . concerning the litigation." *In re Allen*, 106 F.3d at 607 (quotation marks and citations omitted).

"[T]o effect a forfeiture of work product protection by waiver, disclosure must occur in circumstances in which the attorney cannot reasonably expect to limit the future use of the otherwise protected material." *In re Doe*, 662 F.2d at 1081. "[S]ubject matter waiver applies to non-opinion work-product when testimonial use of non-opinion work-product is made." *In re Martin Marietta Corp.*, 856 F.2d 619, 625 (4th Cir. 1988). But even when there is subject matter waiver of work product, it does not apply to opinion work product. *Id.* at 625-26.

C. Analysis

Here, Judge Buchanan found that the broad matters sought by Plaintiff are protected by both the attorney-client privilege and work product privilege. The parties failed to provide Judge Buchanan with a privilege log, and the exact documents being sought were unspecified. Even so, Defendants bear the burden of establishing that privilege was not waived.

The Court is cognizant that on the one hand, attorney-client privilege protects only the disclosure of communications—not underlying facts—and on the other, privilege must be examined on a case-by-case basis to obey the spirit of the Federal Rules. *Upjohn Co. v. United States,* 449 U.S. 383, 395, 396-97 (1981). Here, Defendants failed to meet their burden of establishing that privilege was not waived regarding four statements:

(i) Plaintiff "appears to have inappropriately assisted . . .";

(ii) "Fluor considers [that] a violation . . .";

(iii) Plaintiff "used his position . . . to pursue [improper opportunities] and . . . to obtain and improperly disclose nonpublic information . . ."; and

(iv) "Fluor estimates there may have been a financial impact . . . [due to] improper conduct."

These statements were made in the Disclosure. In the context of an internal investigation, these "legal conclusions as to past events, as well as recommendations for future conduct, [are] conclusions which only a lawyer is qualified to make." *In re Allen*, 106 F.3d at 605. Though the Disclosure purports to reveal mere facts, these statements are legal conclusions which characterize Plaintiff's conduct in a way that reveals attorney-client communications. Those communications were originally made in the context of Defendants' privileged internal investigation, were communicated between Defendants and counsel in the course of fact finding and the provision of legal advice, and their purpose related to both employment and government contracting legal issues. Ultimately, the inclusion of these statements in the Disclosure is not a factual representation but instead shares what counsel communicated to the client.

Because those statements were privileged, that privilege may be waived. Moreover, waiver of the attorney-client privilege may also result in subject matter waiver. Although they have subsequently argued otherwise, Defendants' pleadings admit the Disclosure was voluntary. Under the judicial admission rule, they are bound by the admission.

"A judicial admission is a representation that is conclusive in the case unless the court allows it to be withdrawn." *Minter v. Wells Fargo Bank, N.A.*, 762 F.3d 339, 347 (4th Cir. 2014) (quotation marks omitted) (quoting *Meyer v. Berkshire Life Ins. Co.*, 372 F.3d 261, 264 (4th Cir. 2004)). "Judicial admissions 'go to matters of fact which, otherwise, would require evidentiary proof.'" *Everett v. Pitt Cty. Bd. of Educ.*, 788 F.3d 132, 141 (4th Cir. 2015) (quoting *New*

Amsterdam Cas. Co. v. Waller, 323 F.2d 20, 24 (4th Cir. 1963)). They "include 'intentional and unambiguous waivers that release the opposing party from its burden to prove the facts necessary to establish the waived conclusion of law.'" *Minter*, 762 F.3d at 347 (quoting *Meyer*, 372 F.3d at 264-65). Thus, the judicial admission rule is that "a party is bound by the admissions of his pleadings." *Lucas v. Burnley*, 879 F.2d 1240, 1242 (4th Cir. 1989).

The Fourth Circuit has found that where an issue is raised in a complaint and admitted in the answer, a judicial admission may be binding. *See id.* at 1242-43. Similarly, courts within this Circuit have found a judicial admission in an amended answer and crossclaim. *See Brown v. Sikora & Assocs., Inc.*, No. 04-0579, 2007 WL 1068241, at *4 (D.S.C. Mar. 30, 2007) (citing *Lucas*, 879 F.2d at 1242), *aff'd* 311 F. App'x. 568 (4th Cir. 2008). Issues which are "not only raised by the pleadings," but also "admitted" are "therefore resolved by those pleadings." *Lucas*, 879 F.2d at 1243.

Defendants here admitted in their Answer and Counterclaim that the Disclosure was voluntary. Within that pleading Defendants refer to the "voluntary disclosure" to the IG eight times. *See* Dkt. 33 at 10 ¶¶ 33 (two references), 35; at 11 ¶¶ 37, 38; at 55 ¶ 110; at 58 ¶ 119; at 61 ¶ 130. Similarly, Defendants used the word "admit" in reference to the voluntary disclosure. *See, e.g.*, Dkt. 33 at 10 ¶ 35. These judicial admissions are binding because they are clear, unambiguous, and intentional assertions in Defendants' pleadings. The issue of the disclosure to the IG was first raised by Plaintiff's Complaint, and Defendants subsequently addressed the issue specifically within both the Answer and Counterclaims. The admissions are clear and unambiguous because the word "voluntary" is both the word chosen by Defendants to describe the Disclosure and the disputed element of waiver. Moreover, the fact that Defendants used the term "voluntary" eight separate times to describe the disclosure demonstrates intentionality.

Defendants have thus admitted their disclosure to the IG, a third-party, was voluntary. They cannot claw back that admission by subsequently referring to it as mandatory or otherwise offering to amend pleadings or arguments, simply because the admission is inconvenient to their current legal argument.[1] Therefore any attorney-client privileged material pertaining to those statements in the Disclosure was waived.

This case is similar to the Fourth Circuit's *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988). There, like here, a former employee sought discovery from his former employer.[2] There, the district court discovered the employer was withholding documents which had been quoted in the employer's prior disclosures to the government—either the United States Attorney, the Department of Defense, or both. And finally, there, like here, the employer argued

---

[1] Regarding the voluntariness of disclosure in the face of the so-called mandatory disclosure regulation, 48 C.F.R. § 52.203-13(b)(3)(i), the Court notes the regulation does not require disclosure of investigatory findings, the credible evidence which triggers the requirement, a summary, or any details. It instead requires a mere notice disclosing the fact that the contractor has credible evidence. *See id.* ("The **Contractor shall timely disclose, in writing,** to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, **whenever**, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, **the Contractor has credible evidence** that a principal, employee, agent, or subcontractor of the Contractor has committed . . .) (emphasis added). Additionally, the Court notes that the regulatory privilege protection referred to in some pleadings pertains to "Full cooperation," as that defined phrase is used in the regulation. § 52.203-13(a)(2)(i). That defined phrase is not present in either regulatory mandatory disclosure provision. Full cooperation is a regulatory requirement, separate and in addition to mandatory disclosure. § 52.203-13(c)(2)(ii)(G). The definition also suggests that, unlike the mandatory disclosure provisions which are initiated by contractors, full cooperation occurs when contractors act in response to a government request. § 52.203-13(a)(2)(i).

[2] In *In re Martin Marietta Corp.*, the former employer was indicted, subpoenaed the employer records, and the rules of criminal discovery were implicated. These differences are immaterial here because the differences in the scope of discovery between civil and criminal cases had no effect on the privilege rulings. *See In re Martin Marietta Corp.*, 856 F.2d at 622 ("even if the documents were within the scope of a [Fed. R. Crim. P.] Rule 17(c) subpoena, they are protected from disclosure by either or both of the attorney-client and work-product privileges. A subpoena *duces tecum* should be quashed or modified if it calls for privileged matter.").

the documents were nonetheless privileged. Since "privileged materials were disclosed to the United States Attorney and the DOD" the issue faced by the Court was "the extent of the implied waiver thereby created." *Id.* at 622.

In that case the Court reiterated "that if a client communicates information to his attorney with the understanding that the information will be revealed to others, that information as well as 'the details underlying the data which was to be published' will not enjoy the privilege." *Id.* at 623 (quoting *United States v. (Under Seal),* 748 F.2d 871, 875 (4th Cir. 1984)). Because the employer's disclosure included parts of audit papers and witness statements in *In re Martin Marietta*, the attorney-client privilege for those underlying documents was waived. *Id.*

The employer there also waived the work product privilege "as to all non-opinion work-product on the same subject matter as that disclosed." *Id.* at 625. Subject matter waiver had resulted from testimonial use of fact work product, but even so, subject matter waiver does not extend to opinion work product. *Id.*

Similarly, here, a plaintiff former employee seeks discovery from a defendant former employer who has made a voluntary testimonial disclosure to the government. And here, like there, the government disclosure serves as a voluntary waiver of attorney-client privilege and fact work product.

Defendants' admissions of voluntary disclosure, which were asserted eight times in their Answer and Counterclaim, are binding. Further, the substance that was disclosed was not mandated by regulation. They have therefore waived the attorney-client privilege as to the communications identified above, their subject matter, and the underlying details. Moreover, any privilege as to fact work product regarding the Disclosure has also been waived. Opinion

work product, the privilege over lawyer mental impressions and the fruits of attorney mental processes, is not waived.

III. Conclusion

For the reasons stated above, Plaintiff's Motion to Stay, Dkt. 69, is hereby **DENIED WITHOUT PREJUDICE**.

Defendants are hereby **ORDERED** to timely address the deficiencies in their privilege log. Since the privilege log was not presented in the proceedings below, and specific documents were not referred to in the arguments, it is further **ORDERED** that subsequent discovery disputes, pursuant to Local Rule 26(C), "shall be specifically stated."

Based on the late filed privilege log and issues of waiver and work product which have not yet been resolved, the Court hereby **REMANDS** the case to Judge Buchanan for review of the privilege log and breadth of waiver.

Plaintiff's Objection, Dkt. 78, is hereby **SUSTAINED IN PART AND OVERRULED IN PART**, and the Magistrate Judge's Order is **AFFIRMED IN PART AND REVERSED IN PART**.

It is **SO ORDERED**.

November 8, 2019
Alexandria, Virginia

Liam O'Grady
United States District Judge