IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

OUT RAGE LLC, Plaintiff, v. 11-cv-701-bbc NEW ARCHERY PRODUCTS CORPORATION, Defendant. --- NEW ARCHERY PRODUCTS CORPORATION, Plaintiff, v. 12-cv-122-bbc OUT RAGE LLC, Defendant	ORDER

Before the court is NAP's motion to compel the disclosure of four emails for which Out RAGE has claimed attorney client privilege. *See* dkt.128 in Case No. 11-cv-701; dkt. 106 in Case No. 12-cv-122 (the court will use the 11-cv-701 docket numbers for the rest of this order). Out RAGE opposes disclosure of the emails, hewing to its position that the privilege applies. Dkt. 133. The unredacted emails have been provided to the court under seal, *see* dkt. 135-1.

The background noise accompanying this discovery dispute suggests that the motion is a stalking horse for NAP's true concern: that it is being "bandied" between Out RAGE and Kamylon Capital, LLC, Out RAGE's purported corporate doppelganger.[1] But there is no need–and no reason–for the court to address NAP's bandying concerns to answer the only question posed by NAP's motion: are the four emails protected from disclosure by the attorney-client privilege or the attorney work product privilege? The answer is No. Therefore, I am granting NAP's motion to compel and shifting costs.

[1] "Bandying" is a discovery-thwarting tactic by which the officers or managing agents of a corporation each in turn disclaims any personal knowledge of the relevant facts, so that the questioner never gets answers from the corporation. *See Black Horse Lane Assoc., L.P. v. Dow Chemical Corp.,* 228 F.3d 275, 304 (3rd Cir. 2000). F.R. Civ. Pro. 30(b)(6) pretty much put the kibosh on this as an intracorporate tactic, but bandying still is theoretically possible between separate but intertwined business entities.

Out RAGE claims that the four emails are privileged from disclosure because they reveal a strategic discussion regarding the best timing for asserting a claim of patent infringement against a manufacturer (G5 Outdoors, LLC) that is foreign to the instant lawsuits. According to Out RAGE, notwithstanding the facts that no attorney was involved in the discussion, no attorney had provided any input, and in fact, no attorney even had been *contacted* yet, the discussion still is privileged, apparently because the non-lawyers are talking *about* talking to their lawyer. This is an alarmingly simplistic view of the privilege.

Dealing first with Out RAGE's claim of attorney client privilege, the four disputed emails show that four executives in two tightly intertwined companies (Jon Syverson and Rich Krause of Out RAGE, Richard Spencer and Jason Brauer of Kamylon) were discussing between themselves whether, when and how to sic their patent attorney on G5's new products. In one email, Brauer reports that he has put a call into the attorney and will tell the others what he has learned after he and the lawyer have chatted. The main concern expressed in these emails is how to manipulate the reaction of the customer-retailers to Out RAGE's attack on G5 so that Out RAGE looks good and G5 looks bad.

This email discussion fails the first seven steps of the eight-part Wigmore formulation of the privilege used by the Court of Appeals for the Seventh Circuit. *See United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997). An attorney-client communication requires communication *between* an attorney and a client. Four senior managers making a business decision about whether and when to unleash their patent attorney (plus a report that the call was made and a message left) doesn't cut it. *See Denius v. Dunlap*, 209 F.3d 944, 952 (7th Cir. 2000) ("under the doctrine of attorney-client privilege, confidential communications between a client and an attorney for the purpose of obtaining legal advice are privileged"). To borrow Judge Shadur's observation in *Nedlog Co. v. ARA Services, Inc.*,

131 F.R.D. 116, 117 (N.D. Ill. 1989), Out RAGE's position reflects a Pavlovian reaction that any communication in which the word "lawyer" or "attorney" is mentioned is the bell that causes the dog named Privilege to salivate. "What is entitled to protection is really limited to the communication of confidences from client to lawyer (or sometimes the fact that confidences have been communicated) is disclosed in a client-authored document or a lawyer-authored response." *Id.* Nothing in the Out RAGE↔Kamylon emails meets these limitations. The cases cited by Out RAGE in support of its claim of privilege are easily distinguishable on their facts: here, no one is sharing advice already provided by an attorney; the four executives are brainstorming the most effective way to launch an attorney attack and then win the ensuing PR war. The attorney-client privilege has no application to these emails.

Out RAGE's claim of attorney work product privilege also fails. That privilege, which is not absolute, applies to documents prepared in anticipation of litigation. *See* F.R. Civ. Pro. 26(b)(3)(A). "The work-product doctrine is designed to serve dual purposes: (1) to protect an attorney's thought processes and mental impressions against disclosure; and (2) to limit the circumstances in which attorneys may piggyback on the fact-finding investigation of their more diligent counterparts." *Sandra T.E. v. South Berwyn School Dist. 100*, 600 F.3d 612, 621-22 (7th Cir. 2010); *see also Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006) ("the purpose of the qualified privilege for attorney work product . . . is to establish a zone of privacy in which lawyers can analyze and prepare their client's case free from scrutiny or interference by an adversary.") Nothing in the disputed emails qualifies for protection under these standards. Four executives agreeing that they will try to cast a cloud over G5's new launch by getting the patent attorneys involved is not attorney work product.

Out RAGE's claims of privilege were not well taken when made, did not justify a clawback, did not merit such an unyielding defense in motions practice and do not justify maintaining the four

disputed emails under seal. Frankly, Out RAGE's approach to this dispute was incorrect at every step.

Pursuant to F.R. Civ. P. 37(a)(5)(A), Out RAGE must pay NAP's reasonable expenses incurred in making this motion. *See also Rickels v. City of Sound Bend, Ind.*, 33 F.3d 785, 786-87 (7th Cir. 1994) (the "great operative principle of Rule [37(a)(5)] is that the loser pays.")

ORDER

It is ORDERED that:

(1) NAP's motion to compel production of non-privileged documents (dkt. 128 in Case No. 11-cv-701, dkt. 106 in Case No. 12-cv-122) is GRANTED; the four disputed emails are not subject to clawback and shall be unsealed.

(2) NAP's motion for leave to file a short reply (dkt. 136 in Case No. 11-cv-701, dkt. 113 in Case No. 12-cv-122) is DENIED as unnecessary.

(3) Not later than January 7, 2013, NAP may file an itemized request for reimbursement of the costs it incurred in making this motion; not later than January 14, 2103, Out RAGE may file a response to this request.

Entered this 28th day of December, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge