UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:18-cv-80311-REINHART

DIAMOND RESORTS U.S. COLLECTION DEVELOPMENT, LLC, a Delaware limited liability company; and DIAMOND RESORTS HAWAII COLLECTION DEVELOPMENT, LLC, a Delaware limited liability company,

Plaintiffs,

v.

US CONSUMER ATTORNEYS, P.A., et al,

Defendants.
_____/

ORDER REGARDING ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGE

Plaintiffs, Diamond Resorts International, Inc., Diamond Resorts Corporation, Diamond Resorts U.S. Collection Development, LLC, and Diamond Resorts Management, Inc. (collectively "Diamond") operate timeshare properties. They have sued multiple defendants for (1) unfair competition, false advertising, and trademark dilution under the Lanham Act, and (2) unfair competition and tortious interference under Florida law. ECF No. 272. One of those defendants is DC Capital Law Firm, LLP ("DC Capital"); others are Newton Group Transfers, LLC, Newton Group Exit, LLC, and Interval Brokers Direct, LLC. Newton Group ESA, LLC (collectively "the

Newton Defendants").[1] ECF No. 272. The defendants all assist consumers who are trying to get out of timeshare contracts.

In response to Diamond's requests for production, DC Capital asserts the attorney-client and work product privileges over documents that it has identified in a privilege log. ECF No. 468. Diamond seeks an Order compelling production of all of the allegedly privileged documents.

I held an evidentiary hearing on December 2 and December 10, 2020. ECF Nos. 500 and 508. I have reviewed DC Capital's Brief in Support of its Assertion of the Attorney-Client Privilege Between DC Capital Law Firm, LLP, its Clients, and the Newton Group Defendants (ECF No. 468), Plaintiffs' Response to DC Capital's Brief in Support of its Privilege Assertions (ECF No. 476), DC Capital's Reply Brief in Support of its Assertion of the Attorney-Client Privilege (ECF No. 485), all supplemental authorities, and the evidence introduced at that hearing. I am fully advised and this matter is ripe for decision. For the reasons stated herein, DC Capital's assertion of the attorney-client and work product privileges is GRANTED in part and DENIED in part.[2]

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[1] The term "Newton NGT/NGE" will be used throughout this Order to collectively refer to Newton Group Transfers, LLC, Newton Group Exit, LLC, and Interval Brokers Direct, LLC. Newton Group ESA, LLC will be referred to as "Newton ESA."

[2] On September 17, 2019, the parties filed a consent authorizing me to conduct all proceedings in the case. ECF No. 303.

I. ISSUES PRESENTED

On April 19, 2019, Diamond served its First Request for Production ("1st RFP") on DC Capital, which included a request for DC Capital's "complete customer file for each Diamond Owner." ECF No. 476-1 at 7. [3] In its Response to Diamond's 1st RFP, DC Capital objected based on the attorney-client and work product privileges. ECF No. 468-1. Diamond challenged the existence of a valid attorney-client privilege regarding five specific Diamond Owners: the Brights, the Drakes, the Bartas, the Barbers, and the Canciks (the "Five Diamond Owners"). DC Capital produced privilege logs pertaining to each of the Five Diamond Owners. ECF No. 468-2. Thus, one issue before me is whether a valid privilege exists based on an attorney-client relationship between the Five Diamond Owners and DC Capital.

On September 4, 2019, Diamond filed its Second Request for Production ("2nd RFP") seeking, among other things, "[a]ll communications between DC [Capital] and any Newton Defendant regarding Plaintiffs, Diamond, Diamond Owners, or this lawsuit." ECF No. 476-8 at 7. DC Capital responded to the 2nd RFP with an amended privilege log plus heavily redacted documents that included communications between DC Capital and Newton Defendants regarding Diamond or Diamond owners. ECF No. 468-2. The second issue before me is whether these communications between DC Capital and the Newton Defendants are privileged.

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[3] The term "Diamond Owners" will be used throughout this Order to collectively refer to all owners of Diamond timeshares who were clients of DC Capital, with the exception of the Five Diamond Owners.

1. DC Capital's Arguments

Newton Group Exit, LLC and Newton Group Transfers, LLC are timeshare exit companies that provide advice and assistance to timeshare owners who wish to exit their timeshare contracts. ECF No. 468 at 4. At times, Newton NGT/NGE hired a law firm on behalf of a client in order to "provide legal services to that specific client." *Id.; see also* ECF No. 468-3 at 98:19–24. Here, Newton NGT/NGE hired DC Capital to assist its clients with legal representation. ECF No. 468 at 4. DC Capital is a law firm based in Washington D.C. that helps timeshare owners out of "oppressive contractual obligations" to timeshare resort developers. *Id.* at 1. As permitted by District of Columbia Rule of Professional Conduct 5.4(b), DC Capital has three non-lawyer partners who are also partners of Newton NGT/NGE. *See* D.C. Bar Appx. A, Rule 5.4(b).

When Newton NGT/NGE takes on a new timeshare owner client, it has the client execute a durable power of attorney ("POA"). *Id.* at 4–8. *See, e.g.*, ECF No. 468-4. DC Capital argues that in executing the POA, Newton NGT/NGE is appointed the timeshare owners' attorney-in-fact and therefore has the power to hire outside counsel, such as DC Capital, to represent the client. ECF No. 468 at 5. When they retain DC Capital on behalf of the timeshare owners, Newton NGT/NGE sends a letter of engagement to the Diamond Owners. *Id.* at 6*; see also* ECF No.468-9, ¶ 12.

DC Capital argues that, thereafter, Newton NGT/NGE remains the Diamond Owners' attorney-in-fact and provides essential services such as facilitating attorney-client communication. ECF No. 468 at 6; *see also* ECF No. 468-9, ¶ 13. More

specifically, DC Capital argues that the communications between DC Capital, Diamond Owners, and Newton NGT/NGE sought in the 1st and 2nd RFPs are privileged because (1) an attorney-client relationship exists between DC Capital and the Diamond Owners because of the POA and subsequent retainer, (2) all subsequent communications between DC Capital, the Diamond Owners, and Newton NGT/NGE are "in furtherance of the rendition of legal services to Diamond Owners in order to assist the clients in obtaining an exit from their oppressive timeshares" (ECF No. 468 at 10–11; *see also* ECF No. 468-9, ¶ 13), and (3) the attorney-client privilege is not waived by DC Capital's communications with Newton NGT/NGE because, as the attorney-in-fact for the Diamond Owners, NGT/NGE steps into the shoes of the client (Diamond Owners). ECF No. 468 at 12–13.

DC Capital also argues that some documents sought by the 1st and 2nd RFPs are privileged under the work product privilege because they were created in anticipation of litigation. ECF No. 485 at 14. With regard to the Five Diamond Owners specifically, DC Capital argues that although the POAs post-date Newton NGT/NGE's hiring of DC Capital, the Five Diamond Owners ratified the retention of DC Capital. *See* ECF No. 485-8.

DC Capital further argues that it had an administrative services agreement whereby Newton ESA would provide DC Capital "with a variety of administrative and back-office services." ECF No. 468 at 5; *see also* Plaintiff's Ex. 29. DC Capital claims that Newton ESA provided administrative office support only and did not provide any "legal advice, direction, research, analysis, opinions or judgments

concerning DC Capital's practice of law." ECF No. 468 at 5. DC Capital claims Newton ESA's contribution is "indispensable to DC Capital's attorney's [sic] work and communications with its clients." *Id.* at 13. DC Capital argues that Newton ESA is providing crucial administrative services and that, much like the situation in *E.E.O.C. v. DiMare Ruskin, Inc.*, Case No. 2:11-cv-158-FtM-99SPC, 2012 WL 12067868, at *8 (M.D. Fla. Feb. 15, 2012), this Court should extend the attorney-client privilege not only to the claimant and their attorney, but to Newton ESA employees who, acting as valid agents, provided necessary services to facilitate communication between clients and their attorneys. ECF No. 468 at 14. Thus, if this Court finds that Newton ESA is acting as an agent of DC Capital, then the attorney-client privilege is not waived by Newton ESA's involvement in the communications.

2. Diamond's Arguments

Diamond contends that communications between non-lawyers at DC Capital and Newton NGT/NGE are not protected by the attorney-client privilege because these communications are not regarding the Diamond Owners and their legal matters. ECF No. 476 at 9–11. In other words, there is no legal advice being given and thus a key requirement of the attorney-client privilege is not met. *Id.* Furthermore, the non-lawyer Newton NGT/NGE/ESA employees involved in these communications, Diamond argues, destroy the privilege because they were neither (1) ministerial assistants to DC Capital attorneys, nor (2) necessary to the representation of DC Capital's clients. *Id.* at 11. Thus, the presence of third parties renders these communications not privileged. *Id.* Diamond contends the work product

doctrine does not apply to these communications because litigation was not a central or material part of DC Capital's strategy and thus the communications were not created in anticipation of litigation. *Id.*

Regarding the Five Diamond Owners' client files, Diamond points to the fact that the POAs were not signed until after DC Capital was already hired. *Id.* at 15. Without the POA in place, Diamond argues, Newton NGT/NGE did not have authority to hire DC Capital on behalf of the Five Diamond Owners. *Id.* Thus, a valid attorney-client relationship was never established between the Five Diamond Owners and DC Capital, and there is no other evidence of an attorney-client relationship being otherwise formed between the Five Diamond Owners and DC Capital. *Id.* at 16. Finally, Diamond argues that all other privilege assertions should be denied because the crime-fraud exception applies.

II. LEGAL STANDARDS

1. Choice-of-Law Analysis

I must first determine whether federal or state law applies to the attorney-client and work product privileges asserted by DC Capital. I begin with Federal Rule of Evidence 501, which provides:

> The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:
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> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.

> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Fed. R. Evid. 501. Federal common law applies to attorney-client privilege claims (or defenses) arising under federal law, *Willy v. Admin. Review Bd.*, 423 F.3d 483, 495 (5th Cir. 2005), whereas a state's evidentiary privilege applies in diversity cases, *Dunn v. Wash. Cty. Hosp.*, 429 F.3d 689, 693 (7th Cir. 2005). Here, Plaintiff's Third Amended Complaint asserts a federal question as well as state law claims under Florida law. ECF No. 272.[4] Therefore, formalistically, federal common law applies to the federal claim and Florida law applies to the state law claims. As a practical matter, for the issues presented here, there is no material distinction between the attorney-client privilege available under Florida state law and federal common law.[5]

Each of the POAs at issue contain a provision stating that "[a]ll questions as to the validity of this power and the construction of its provisions shall be governed by the laws of the District of Columbia." *See, e.g.*, ECF No. 488-2 at 5. DC Capital argued both in its brief and in oral argument that since the POA is the underlying contract between Newton NGT/NGE and the Diamond Owners, District of Columbia law controls whether Newton NGT/NGE is a valid agent for purposes of the attorney-

[4] Counts I-IV of Plaintiff's Third Amended Complaint allege various violations by Defendants of the Lanham Act, 15 U.S.C. § 1125(A)(1), counts V and VI allege Tortious Interference with Contractual Relations, count VII alleges civil conspiracy, and count VIII alleges Defendants violated Florida's Deceptive and Unfair Trade Practices Act (Fla. Stat. § 501.211). ECF No. 272 at 31–48.

[5] *Compare, e.g., In re 3M Combat Arms Earplug Prod. Liab. Litig.*, No. 3:19-MD-2885, 2020 WL 1321522, at *10 (N.D. Fla. Mar. 20, 2020) *with Absolute Activist Value Master Fund Ltd. v. Devine*, 262 F. Supp. 3d 1312, 1318 (M.D. Fla. 2017).

client privilege. I agree that District of Columbia law determines whether the POAs are valid and empower Newton NGT/NGE, as attorney-in-fact, to hire DC Capital on behalf of the Diamond Owners. Nevertheless, District of Columbia law does not determine whether an attorney-client privilege exists among DC Capital, the Diamond Owners, and Newton NGT/NGE.

Federal law governs the work product privilege. *See, e.g.*, *Milinazzo v. State Farm Ins. Co.*, 247 F.R.D. 691, 699–700 (S.D. Fla. 2007) (J. Torres); *see also Frontier Ref., Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 702 n.10 (10th Cir. 1998) (stating that "[u]nlike the attorney client privilege, the work product privilege is governed, even in diversity cases, by a uniform federal standard embodied in Fed. R. Civ. P. 26(b)(3)").

2. Attorney-Client Privilege

The attorney-client privilege is the oldest of the common-law privileges. *See 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 . . . ." *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 360 (3d Cir. 2007) (citing *Upjohn Co.*, 449 U.S. at 389). "The attorney-client privilege exists to protect confidential communications between client and lawyer made for the purpose of securing legal advice." *In re Grand Jury Matter No. 91-01386*, 969 F.2d 995, 997 (11th Cir. 1992) (quoting *In re Slaughter*, 694 F.2d 1258, 1260 (11th Cir. 1982)). Thus, in order to claim attorney-client privilege, the proponent of the privilege must prove that what is sought to be protected is (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance

for the client. *Id; see also MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 582–83 (S.D. Fla. 2013) (J. Hoeveler). "'Privileged persons' include the client, the attorney(s), and any of their agents that help facilitate attorney-client communications or the legal representation." *In re Teleglobe*, 493 F.3d at 359 (quoting Restatement (Third) of the Law Governing Lawyers § 70 (2000)). In addition to demonstrating the elements required to initially establish the privilege, the asserting party must prove that it has not waived the privilege. *United States v. Noriega*, 917 F.2d 1543, 1550 (11th Cir. 1990); *see also Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981).

The privilege is "not absolute. Because it 'serves to obscure the truth, ... it should be construed as narrowly as is possible consistent with its purpose.'" *Noriega*, 917 F.2d at 1551; *see also United States v. Nixon*, 418 U.S. 683, 710 (1974) ("Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.") (footnote omitted); *Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Yet the privilege is not all-inclusive and is, as a matter of law, construed narrowly so as not to exceed the means necessary to support the policy which it promotes."). Thus, the burden to sustain a claim of privilege is a heavy one. *Wyndham Vacation Ownership, Inc. et al., v. Reed Hein & Assocs., LLC, et.al.*, No. 6:18-cv-2171-Orl-31DCI, 2019 WL 9091666, at *7 (M.D. Fla. Dec. 9, 2019) (citing *Nixon*, 418 U.S. at 710).

It is well established that "the party invoking the attorney-client privilege has the burden of proving that an attorney-client relationship existed and that the particular communications were confidential." *United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir. 1991); *MapleWood Partners,* 295 F.R.D. at 583 ("The proponent must establish the existence of the privilege by a preponderance of the evidence.") (citing *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 593 (1993)); *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir.1995) ("A party asserting the attorney-client privilege has the burden of establishing the relationship *and* the privileged nature of the communication.") (emphasis added). "A failure of proof as to any element causes the claim of privilege to fail." *Bridgewater v. Carnival Corp.*, 286 F.R.D. 636, 639 (S.D. Fla. 2011) (J. McAliley) (quoting *N. Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 110 F.R.D. 511, 515 (M.D.N.C. 1986)).

The party asserting the privilege "must demonstrate that each essential element of the privilege is present with respect to the specific communication or document whose disclosure is sought." *Purdee v. Pilot Travel Ctrs., LLC*, No. CV407-028, 2008 WL 11350099, at *1 (S.D. Ga. Feb. 21, 2008). "That burden is not, of course, discharged by mere conclusory or ipse dixit assertions, for any such rule would foreclose meaningful inquiry into the existence of the relationship, and any spurious claims could never be exposed." *In re Bonanno*, 344 F.2d 830, 833 (2d Cir. 1965). "The Court should not have to guess or speculate about the applicability of the privilege, for the party asserting it has the affirmative duty to demonstrate that it applies to

each document or communication sought to be disclosed." *Purdee*, 2008 WL 11350099, at *1 (citing *United States v. Davis*, 636 F.2d 1028, 1044 n.20 (5th Cir. 1981).

The first step in this process is to provide a privilege log. *See* S.D. Fla. L.R. 26.1(e)(2)(C). Sometimes, the privilege log will be sufficiently detailed to meet the proponent's burden. Typically, however, the log should be supported by "affidavit or other evidence identifying each document or communication claimed to be protected by the privilege and setting forth sufficient facts to allow a judicial determination as to whether the particular communication or document is, in fact, privileged." *Reed Hein*, 2019 WL 9091666, at *7 (citing *Purdee*, 2008 WL 11350099, at *1 and *Bridgewater*, 286 F.R.D. at 639 ("The party claiming the privilege must provide the court with underlying facts demonstrating the existence of the privilege, which may be accomplished by affidavit.")). Additionally, the party may request that the Court conduct an *in camera* review of the allegedly privileged documents; *in camera* review, however, "is not to be used as a substitute for a party's obligation to justify its withholding of documents." *CSX Transp. Inc. v. Admiral Ins. Co.*, No. 93-132-CIV-J-10, 1995 WL 855421, at *5 (M.D. Fla. July 20, 1995) (citing *Diamond State Ins. Co. v. Rebel Oil Co., Inc.*, 157 F.R.D. 691, 700 (D. Nev. 1994)).

3. Agency Exception

Since confidentiality is a requirement of the attorney-client privilege, no privilege attaches to a communication made in the presence of a third party, nor to

an already-privileged communication that is subsequently disclosed to a third party.[6] *See MapleWood Partners*, 295 F.R.D. at 584 ("[W]aiver can be found by voluntary disclosure, as disclosure is inconsistent with the confidentiality requirement of purportedly privileged communications.") (internal citations omitted). One well-known exception to waiver is the so-called "agency exception." *United States v. Kovel*, 296 F.2d 918, 921–922 (2d Cir. 1961); *United States v. Pipkins*, 528 F.2d 559, 562 (5th Cir. 1976) ("In appropriate circumstances the privilege may bar disclosures made by a client to non-lawyers who … [have] been employed as agents of an attorney."). The party seeking the benefit of the privilege bears the burden to prove—by a preponderance of the evidence—that the agency exception applies, "as the burden always rests in the final analysis with the party seeking the protection of the privilege." *Maplewood Partners*, 295 F.R.D. at 584 (citing *Noriega*, 917 F.2d at 1550).

There are two approaches to the agency exception, as described by Judge Kimball in *In re International Oil Trading Co.*:

> The narrow approach applies the exception only to persons identified as "translators," meaning those who interpret information the client and attorney already possess. *See* [Michele DeStefano, *Claim Funders and Commercial Claim Holders: A Common Interest or a Problem?*, 63 DePaul L. Rev. 305, 331–41 (2014)]. In this category fall paralegals, law clerks, secretaries, and language translators, in addition to some non-attorney professionals such as accountants, depending on

[6] These are distinct concepts. In one scenario, the communication is never privileged because it was not confidential when made. In the other, a privileged communication loses that status because it is disclosed to a third party. Technically, only the latter involves a waiver. In the former, the attorney-client privilege never applied to that communication at all and thus it cannot be "waived." Nevertheless, for ease of discussion in this Order, I will use the term "waiver" to refer to both situations.

> the tasks performed. *See, e.g.*, *Young v. Taylor*, 466 F.2d 1329, 1332 (10th Cir. 1972) (applying exception to secretaries and law clerks); *In re G–I Holdings Inc.*, 218 F.R.D. 428, 434 (D.N.J. 2003) (limiting exception to certain tasks performed by accountants).
>
> The second approach to the agency exception is to extend the waiver to a broader array of professionals with whom communication may be necessary for the provision of legal advice. For example, the Southern District of New York applied the agency exception to communications with a public relations firm in *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F.Supp.2d 321, 326 (S.D.N.Y. 2003). In that case, the court noted that the firm provided much-needed "outside help" to assist the attorney, and that the firm's assistance "ha[d] a close nexus to the attorney's role in advocating the client's cause before a court or other decision-making body." *Id.* Similarly, the Third Circuit in *U.S. v. Alvarez* protected a client's communications with a psychiatrist because "the effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney [the expert] is assisting." 519 F.2d 1036, 1046 (3rd Cir.1975). . . The Court believes the case law applying the broader approach to the "agency exception" is more consistent with the purpose for the exception and thus better reasoned.

In re Int'l Oil Trading Co., LLC, 548 B.R. 825, 834 (Bankr. S.D. Fla. 2016) (J. Kimball) (first brackets added). Applying the broad definition of the agency exception, Judge Kimball found that the plaintiff's litigation funder was "integral to his pursuit of legal advice," and thus, the plaintiff did not waive the privilege by communicating with the funder about otherwise privileged information. *Id.* at 835.

In a case from the Middle District of Florida, with facts similar to ours, Magistrate Judge Irick also adopted the broad definition of the agency exception. He applied the rule that a third party's services must be "reasonably necessary for the effective representation of the client." *Reed Hein*, 2019 WL 9091666, at *13–14 (citing

Louisiana Mun. Police Employees Ret. Sys. v. Sealed Air Corp., 253 F.R.D. 300, 311 (D.N.J. 2008) and *In re Int'l Oil Trading Co., LLC,* 548 B.R. at 833–34).

I agree with the well-reasoned decisions in *In Re International Oil Trading Co.* and *Reed Hein*. I adopt Judge Irick's formulation that the third party's involvement must be "reasonably necessary for the effective representation" of the client."

4. Work Product Doctrine

Federal Rule of Civil Procedure 26(b)(3) codifies the work product privilege. It states in pertinent part:

> **(A) Documents and Tangible Things.** 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 (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).

Fed. R. Civ. P. 26(b)(3)(A) (emphasis added). "The work product doctrine protects from disclosure documents and tangible things prepared in anticipation of litigation by or for a party or by or for that party's attorney acting for his client." *Atriums of Palm Beach Condo. Assn., Inc. v. QBE Ins., Co.*, No. 08-80543-CIV, 2009 WL 10667478, at *3 (S.D. Fla. June 17, 2009) (J. Johnson).

As the proponent of the work product privilege, DC Capital bears the burden of establishing it by a preponderance of the evidence. *MapleWood Partners*, 295 F.R.D. at 584; Fed. R. Evid. 104(a). In order for the protection to apply, DC Capital must prove that it anticipated litigation at the time each document or communication was created. *Holladay v. Royal Caribbean Cruises, Ltd.*, 333 F.R.D. 588, 592 (S.D.

Fla. 2019) (J. Goodman) (citing *Milinazzo*, 247 F.R.D. at 698). "[I]n determining whether a document was made in anticipation of litigation, the primary focus is the reason or purpose for creating the document." *Place St. Michel, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 06-21817-CIV, 2007 WL 1059561, at *2 (S.D. Fla. Apr. 4, 2007) (J. Torres) (quoting *Guidry v. Jen Marine LLC*, No. Civ. A 03-0018, 2003 WL 22038377, at *2 (E.D. La. Aug. 22, 2003)). The proponent of the privilege must prove that the document was "prepared with the primary motivating purpose of aiding in possible litigation." *Reed Hein*, 2019 WL 9091666, at *15; *see also Davis*, 636 F.2d at 1040 (holding that, to sustain work product claim, "the primary motivating purpose behind the creation of the document [must have been] to aid in possible future litigation").

To meet its burden, the proponent of the work product privilege must provide the Court with underlying facts demonstrating the existence of the privilege, which may be accomplished by affidavit. *Bridgewater*, 286 F.R.D. at 639. In other words, "the onus is on the party claiming immunity to provide competent *evidence* that the materials in question were created in anticipation of litigation." *Holladay*, 333 F.R.D. at 592 (quoting *Place St. Michel*, 2007 WL 1059561, at *3) (emphasis added). The mere fact that the party seeking work product protection submits an affidavit is not necessarily sufficient to sustain the work product assertion. *See, e.g.*, *Fid. Nat'l Title Ins. Co. v. Wells Fargo Bank, N.A.*, No. 12-22437, 2013 WL 12138558, at *2 (S.D. Fla. July 19, 2013) (J. Torres) (noting that plaintiff submitted an affidavit but finding it "wholly conclusory and [with] few details to substantiate her claim that 'Notes' were

created 'in anticipation of litigation'"). The Court retains the obligation to weigh the evidence in light of all circumstances of the case including the method of presenting the evidence and whether it was subject to adversary testing.

Unlike the attorney-client privilege, it is not necessary that work product be intended to remain confidential, so disclosure to a third party does not necessarily destroy the privilege. "[T]he purpose of the work product rule is not to protect the evidence from disclosure to the outside world but rather to protect it only from the knowledge of opposing counsel and his client, thereby preventing its use against the lawyer gathering the materials." Wright & Miller, Fed. Prac. & Proc. Civ. § 2024 (3d ed. 2019). The proper analysis is whether the putative work product is created in a way that is reasonably designed to conceal it from the opposing party, not whether it was intended to be kept confidential from all third parties. *Raymond James Fin. Servs., Inc. v. Arijos*, No. 19-81692-CIV, 2020 WL 1492993, at *3 (S.D. Fla. Mar. 27, 2020) (J. Reinhart).

III. ANALYSIS

1. Communications Between DC Capital, Newton NGT/NGE, and Newton ESA

a. Attorney-Client Relationship Between Diamond Owners and DC Capital

The first step in the attorney-client privilege analysis is determining whether the party asserting the privilege has proved that an attorney-client relationship was formed. *Schaltenbrand*, 930 F.2d at 1562 ("the party invoking the attorney-client privilege has the burden of proving that an attorney-client relationship existed . . .").

Here, that analysis is slightly more complicated because this is not the conventional scenario in which one client directly consults one lawyer or law firm. DC Capital must establish that a valid attorney-client relationship was formed between the Diamond Owners and DC Capital when Newton NGT/NGE (acting under authority of the POAs) retained DC Capital to represent the Diamond Owners. I find that DC Capital has met that burden.

First, I find that the Diamond Owners signed valid POAs that gave Newton NGT/NGE full authority to hire a law firm on their behalf. A review of the POAs submitted by DC Capital reveals that each POA is valid on its face according to District of Columbia law. D.C. Code states in relevant part that

> A durable power of attorney is a power of attorney by which a principal designates, in writing, another as his or her attorney in fact and the writing contains the words 'This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time', or 'This power of attorney shall become effective upon the disability or incapacity of the principal', or similar words showing the intent of the principal that the authority conferred shall be exercisable . . . .

D.C. Code § 21-2081 (2021).

Each POA contains a clear statement in which a principal (here, the Diamond Owners) is designating another (here, Newton NGT/NGE) as his or her attorney in fact. *See, e.g.*, ECF Nos. 468-4 at 211–16 (POAs for the Casianos), 488-1 at 4–7 (POAs for the Fullers), and 488-2 at 4–7 (POAs for the Farrars). The POAs also contain clear language indicating that the POA will continue to be in effect even if the Diamond Owner becomes "disabled, incapacitated, or incompetent." *See id.* Finally, each of the

POAs is notarized. *See id.* Since the POAs were valid under District of Columbia law, Newton NGT/NGE was legally authorized to hire DC Capital on behalf of each of the Diamond Owners.

The POAs alone are not enough to establish the existence of a valid attorney-client relationship between DC Capital and the Diamond Owners; there must also be a valid retainer agreement or evidence of the Diamond Owners' reasonable subjective belief that they were represented by DC Capital. *Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1281 (11th Cir. 2004) (stating the test used to determine whether a lawyer-client relationship exists *in the absence of a formal retainer* "is a subjective one and 'hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention is to seek professional legal advice.' However, '[t]his subjective belief must ... be a reasonable one.'") (quoting *Bartholomew v. Bartholomew*, 611 So.2d 85, 86 (Fla. 1st DCA 1992)) (emphasis added).

DC Capital has provided retainer agreements for each Diamond Owner. *See* ECF Nos. 468-13 and 468-14. Each of the retainer agreements outlines the scope of representation (including the name of the specific Diamond Owner to which it applies) and provides details regarding fees, payment, and terms of withdrawal and termination. *Id.* At the end of each retainer agreement is the signature of Gordon A. Newton (President of Newton NGT/NGE) acting appropriately under the valid executed POAs and agreeing to the terms of the representation. *Id.* Thus, I find that

DC Capital has provided sufficient evidence to establish the existence of an attorney-client relationship between DC Capital and each of the Diamond Owners.

Independently, even if the retainer agreements alone were not enough, DC Capital provided sufficient evidence to establish that the Diamond Owners held a reasonable subjective belief that they were represented by DC Capital attorneys. *Reed Hein*, 2019 WL 9091666, at *9. DC Capital submitted declarations from many Diamond Owners, all of which include general descriptions of their relationship with DC Capital. *See, e.g.*, ECF Nos. 468-12, 468-19, 468-21, 482-1, 482-2, 482-3, 488-1, 488-2, and 507-1. By way of a few examples, the Farrars' declaration states that after they signed the POA and Newton NGT/NGE hired DC Capital as their lawyers, they "worked with and sought legal advice from, [their] attorneys at DC Capital Law, LLP." ECF No. 488-2, ¶ 6. Since the test is a subjective one, and the Diamond Owners are stating their subjective and personal experience with DC Capital attorneys, I find this portion of the Diamond Owners' declarations to be persuasive that they did in fact have a subjective belief that DC Capital represented them. Demonstrating the reasonableness of that belief, many of the declarations include two letters—one is a letter from DC Capital notifying the Diamond Owner that Newton NGT/NGE had hired DC Capital to represent the Diamond Owner in their timeshare exit (*see*, *e.g.*, *id.* at 8), and the other is a letter from a DC Capital lawyer notifying Diamond that the Diamond Owners are represented by legal counsel and requesting documents contained within Diamond's client files (*see, e.g.*, *id.* at 9–10). The privilege log itself also references various DC Capital attorneys speaking to Diamond Owners via either

phone or email about their respective cases. *See, e.g.*, ECF No. 468-2 at 7. Thus, I find that the declarations coupled with the letters from DC Capital lawyers are sufficient evidence to satisfy DC Capital's burden of proving the Diamond Owners' subjective and reasonable belief that they were represented by DC Capital attorneys.

Reed Hein is distinguishable. In *Reed Hein*, Wyndham sued Reed Hein for allegedly engaging in a timeshare cancellation scheme in which Reed Hein would assist customers (timeshare owners) in fraudulently exiting timeshare contracts. 2019 WL 9091666, at *1. Reed Hein would often hire law firms to act on behalf of the customers. *Id.* Much like Newton NGT/NGE, Reed Hein would also serve as an intermediary between its customers and the hired law firm. *Id.* Reed Hein then claimed that many communications between Reed Hein, the timeshare owners, and the hired law firm were protected by the attorney-client privilege and thus exempt from disclosure. *Id.* at 2. Ultimately, the Court found that the law firm failed to establish the existence of an attorney-client relationship with timeshare owners because it did not "provide any competent evidence that any owner consulted with [the law firm] or held the belief (reasonable or otherwise) that [the law firm] represented him as counsel." *Id.* at 8. There, the law firm only provided five heavily redacted "Limited Scope of Representation Agreements." *Id.* at 9 ("[T]here was no evidence that these five timeshare owners ever consulted [the law firm], and there is no evidence – beyond a signature – that these owners subjectively believed they were consulting [the law firm] for professional legal advice or that [the law firm] represented them as counsel."); *see also Quail Cruises Ship Mgmt. Ltd. v. Agencia*

De Viagens CVC Limitada, No. 09-23248-CIV, 2019 WL 2926042, at *4 (S.D. Fla. July 23, 2010) (J. Garber) (finding no attorney-client relationship was established where Defendants provided no evidence that a consultation ever took place). Here, DC Capital has presented more evidence than was offered in *Reed Hein*.

Although I find there to be a valid attorney-client relationship between the Diamond Owners and DC Capital, the inquiry does not end there. We now move to the next prong of the analysis to determine which communications, if any, are covered by the attorney-client privilege.

b. Intent for Communication Between DC Capital and Newton NGT/NGE Executives to Remain Confidential

The mere existence of an attorney client-relationship does not mean that every communication between the two is privileged. "[T]he argument that *any* communication between an attorney and client is protected by the privilege is overbroad." *In re Grand Jury Matter No. 91-01386*, 969 F.2d at 997 (emphasis in original).

Citing *Jones v. Brooks*, 97 A.3d 97, 104 (D.C. 2014), DC Capital argues that Newton NGT/NGE's presence in communications does not preclude them from being privileged. DC Capital argues that under District of Colombia law the executed POAs alone are enough to render Newton NGT/NGE the attorney-in-fact for the Diamond Owners, and thus Newton NGT/NGE acts as the Diamond Owners' agent for all purposes, including in communication with DC Capital. ECF No. 468 at 12–13. In *Jones*, a landlord-tenant dispute, the tenant was living in Jamaica. Her daughter

brought suit under a power of attorney. The District of Columbia Court of Appeals said in dictum, "a valid power of attorney authorized Ayanna Brooks to act on her mother's behalf as the client in an attorney-client relationship." *Jones*, 97 A.3d at 103.

Jones does not address the issue presented here. *Jones* stands for the proposition that a valid POA can be used by an attorney-in-fact to create an attorney-client relationship on behalf of a principal. As discussed above, there may be situations where the attorney-in-fact's participation in the communications is reasonably necessary for the attorney to provide effective legal representation. In those situations, the communications remain privileged. One such situation might be (as in *Jones)* where the client is temporarily geographically unavailable. In other situations, where the attorney-in-fact's involvement is not reasonably necessary, that involvement waives the privilege. Nothing in *Jones* runs contrary to these principles.

In analyzing the question presented here, *Reed Hein* is particularly instructive. There, like Newton NGT/NGE, Reed Hein had timeshare owners sign POAs and then hired law firms on behalf of the timeshare owners. *Reed Hein*, 2019 WL 9091666, at *1. Reed Hein, like Newton NGT/NGE, also served as an intermediary between the timeshare owners and the hired law firm. *Id.* Reed Hein claimed that many communications among Reed Hein, the timeshare owners, and the hired law firm were protected by the attorney-client privilege and thus exempt from disclosure under the agency exception to waiver of the attorney-client privilege. *Id.* at 2. Ultimately, the Court found that Reed Hein's services were not reasonably

necessary for the effective representation of the client." *Id.* at 13. Furthermore, the Court in *Reed Hein* made clear that a third party's services do not become reasonably necessary based solely on business convenience: "The issue is whether the services were necessary for each individual timeshare owner to obtain legal advice. Not whether the services were necessary to execute – and profit from – a particular business model." *Id.* Ultimately, the *Reed Hein* Court held that the agency exception did not apply because the evidence failed to prove that "any of the timeshare owners at issue were incapacitated or otherwise incapable of adequately communicating with their attorneys directly." *Id.* at 14.

The privilege log reflects numerous conversations between DC Capital lawyers and four Newton NGT/NGE executives: Theodoros Panopoulos (a Newton Group Partner and DC Capital non-lawyer Partner), Gordon Newton (Partner/President of the Newton Group and DC Capital non-lawyer Partner), Chuck Anderson (Partner/Executive Vice President of the Newton Group and DC Capital non-lawyer Partner), and Rohan Theophilus (Chief Operating Officer of the Newton Group). *See* ECF No. 468-2 at 46. No client is involved in these communications. DC Capital has failed to meet its burden of showing that the participation of the Newton executives in these communications was reasonably necessary to the effective representation of any particular Diamond Owner.

DC Capital has not provided any realistic explanation as to how the Newton NGT/NGE executives played a role that was necessary to ensure DC Capital could effectively provide *legal* representation to the Diamond Owners. DC Capital states in

its Amended Answers and Objections to Plaintiffs' First Set of Interrogatories that Mr. Newton, Mr. Anderson, and Mr. Panopoulos are "involved in *non-legal* business management for [DC Capital] Law Firm." ECF No. 505-2 at 6 (emphasis added). As evidence of the Newton NGT/NGE executives' purportedly integral role in providing effective representation, DC Capital provided the Court with the following evidence: (1) declarations from DC Capital lawyers Nadine Charbrier and Randolph Smith (ECF Nos. 468-9, 503-1, 504-1, and 468-17), (2) a declaration from Newton NGT/NGE executive Theodoros Panopoulos (ECF No. 507-2), and (3) the declarations from the Diamond Owners (ECF Nos. 468-10, 468-11, 468-12, 468-15, 468-19, 468-21, 477-1, 482-1, 482-2, 482-3, 488-1, 488-2, 495-1, 502-1, 502-2, 506-1, and 507-1).

Both Ms. Charbrier and Mr. Smith summarily state in their respective declarations that Newton NGT/NGE "facilitates communication" between the Diamond Owners and DC Capital, "discusses ongoing concerns," and "provides documentation to DC Capital in furtherance of the rendition of legal services and the attorney-client relationship." ECF Nos. 468-9, ¶ 13 and 468-17, ¶ 11. Ms. Chabrier's amended declaration also alludes to a new argument not raised in the briefs but addressed at oral argument – that the Newton NGT/NGE executives provided integral services to DC Capital by way of sharing their expert knowledge of the timeshare industry. ECF No. 503-1, ¶ 9. Ms. Chabrier concludes that their "experience and insider industry assistance and knowledge is necessary to providing legal services to DC Capital's clients." *Id.* Thus, DC Capital argues that Newton NGT/NGE is necessary to the provision of legal services not only because it helps to

facilitate communication, but because of the expert knowledge its executives bring to the table, akin to *Kovel*. F.2d 918 (2d Cir. 1961). Relevant to that argument, Mr. Panopoulos' declaration outlines his industry expertise and experience working with Diamond Resorts to assist owners in exiting their timeshares. ECF No. 507-2, ¶¶ 5–7.

DC Capital also submitted boilerplate sworn declarations from Diamond Owners that simply state the Diamond Owners "worked with representatives at Newton Group regarding the progress of [DC Capital's] efforts on our behalf" and that they "have been seeking legal advice from [their] lawyers, DC Capital Law, LLP, with the assistance of [their] attorney-in-fact, Newton Group." *See, e.g.*, *Farrar Decl.* ECF No. 488-2, ¶¶ 6–7. DC Capital also submitted a number of supplemental declarations from the Diamond Owners. *See, e.g.*, ECF Nos. 502-1, 502-2, 506-1, and 507-1. In these declarations, the Diamond Owners refer generally to Newton NGT/NGE's "extensive experience in the timeshare industry" and "wealth of experience and knowledge concerning Diamond Resorts" and the benefit Diamond Owners received from Newton NGT/NGE's "expertise in making the investigation far more efficient in furthering the legal services provided by DC Capital." *See, e.g.*, ECF No. 507-1, ¶¶ 6–7, 13. As an example of this benefit, the Diamond Owners cite a detailed questionnaire they filled out upon signing up for Newton NGT/NGE that was

developed by Newton NGT/NGE "based on their experience with timeshare resorts" and was then passed on to DC Capital to assist the attorneys. *Id.* at 14. [7]

The declarations on their own do little to convince this Court that the Newton executives were "necessary for the provision of legal advice" or even useful in "improving the comprehension of the communications between attorney and client." ECF No. 476 at 11 (quoting *In re Int'l Oil Trading Co., LLC*, 548 B.R. at 834). The declarations contain broad, conclusory, and self-serving statements with no outside evidence to support their legal conclusions. DC Capital also chose not to offer the testimony of a single witness, such as Ms. Chabrier, Mr. Smith, Mr. Panopoulos, or a single Diamond Owner at the evidentiary hearing. DC Capital also did not submit any of the challenged communications for *in camera* review.[8] Thus, I do not find the declarations to be compelling or persuasive, so I give them little weight. *See In re Bonanno*, 344 F.2d at 833; *see also Purdee*, 2008 WL 11350099, at *1 ("The Court should not have to guess or speculate about the applicability of the privilege, for the party asserting it has the affirmative duty to demonstrate that it applies to *each* document or communication sought to be disclosed.") (citing *Davis*, 636 F.2d at 1044 n.20) (emphasis added).

[7] DC Capital did not provide this questionnaire as evidence.

[8] To be clear, here and elsewhere in this Order, I am not drawing an inference that a missing witness' testimony would have been adverse to DC Capital's position. Rather I am simply noting the absence of evidence sufficient to meet DC Capital's burden of proof.

In its Reply brief, DC Capital gives the definition of a reasonably necessary intermediary, and then summarily states that "this is precisely what Newton is doing for DC Capital." ECF No. 485 at 8. DC Capital then points generally to "entries on the privilege log" where a Diamond Owner is communicating with a DC Capital lawyer to show that Newton NGT/NGE (including the Newton NGT/NGE executives) were facilitating communication between the two. *Id.* DC Capital provides no evidence that "any of the timeshare owners at issue were incapacitated or otherwise incapable of adequately communicating with their attorneys directly," *Reed Hein*, 2019 WL 9091666, at *14, or that Newton NGT/NGE provided "much-needed 'outside help' to assist the attorney, and that [Newton]'s assistance 'ha[d] a close nexus to the attorney's role in advocating the client's cause before a court or other decision-making body" such as translation services, paralegal services, secretarial services, accounting services, public relations services, litigation funding, investigator services, and non-testifying expert services. *See In re Int'l Oil Trading Co., LLC*, 548 B.R. at 834 (quoting *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003) (applying agency exception to a public relations firm)); *see also United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975) (applying agency exception to psychiatrist assisting attorney by evaluating client in preparation of insanity defense); *Young v. Taylor*, 466 F.2d 1329, 1332 (10th Cir. 1972) (applying agency exception to secretaries and law clerks); *In re G-I Holdings Inc.*, 218 F.R.D. 428, 434 (D.N.J. 2003) (applying agency exception to some tasks performed by

accountants); *NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 138 (N.D.N.Y. 2007) (applying agency exception to investigators and accountants).

DC Capital argues that the Newton NGT/NGE executives provided expert services, akin to those provided by the accountant in *Kovel*. In *Kovel*, the Second Circuit held that "the presence of an accountant . . . while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege" because the accountant is providing integral services to the attorney by interpreting complicated tax ideas that the attorney must understand in order to provide adequate legal advice to the client. 296 F.2d at 922. I do not find that *Kovel* applies to the Newton NGT/NGE executives because the record lacks sufficient detail about the exact services being provided and why they were *reasonably necessary*, even if helpful. Aside from the self-serving and conclusory declarations, there was no evidence of an agreement outlining a consulting relationship, nor was there testimony from any of the Newton NGT/NGE executives to explain their role as expert consultants. The Court also did not hear from a DC Capital lawyer, such as Ms. Chabrier, who could have provided the Court with sworn testimony regarding the specifics of this lawyer-consultant relationship and how it furthered the provision of legal services. Conclusory statements contained in self-serving declarations with no outside evidence to support or flesh out those statements do not meet DC Capital's burden. *See In re Bonanno*, 344 F.2d at 833; *see also Purdee*, 2008 WL 11350099, at *1; *Davis*, 636 F.2d at 1044 n.20.

In sum, DC Capital has failed to produce sufficient evidence that Newton NGT/NGE, through either its executives consulting as experts or other Newton NGT/NGE employees, was reasonably necessary for the effective representation of the Diamond Owners. I find that the involvement of Newton NGT/NGE executives in communications with DC Capital waives the attorney-client privilege and as such, any communications including Theodoros Panopoulos, Gordon Newton, Chuck Anderson, and/or Rohan Theophilus are not protected from disclosure.

c. Intent for Communications Between DC Capital and Newton ESA Employees to Remain Confidential

The balance of the privilege log entries involve communications between DC Capital lawyers and at least one of the following Newton ESA employees: Anthony Kirlew, Kynneth Crouse, Lisa Grosskopf, Edna Watson, Steve Ngo, Holly Ostertag, and Chloe Kenyon.[9] DC Capital argues that these Newton ESA employees provided

[9] Three of these entries include Ashley Burt (*see* ECF No. 468-2 at 2–3), however, Ms. Burt is not relevant to this discussion because although she does use a Newton ESA email address in a single instance, she is listed on the privilege log as a legal assistant at DC Capital Law and Diamond does not dispute her affiliation as such. *Id.* at 46. A legal assistant or secretary at a law firm typically is considered a valid agent of the attorneys in the firm and thus is covered under the attorney-client privilege. *See Young*, 466 F.2d at 1332 (applying agency exception to secretaries and law clerks). Entries in the privilege log further support that conclusion. For example, on August 20, 2018, Ms. Burt communicated with Ms. Kenyon and Ms. Wright "asking DC Capital about nature of representation and informing DC capital of client's decision regarding timeshare fees moving forward . . . ." ECF No. 468-2 at 3. In that same chain of emails, Ms. Burt is also included in the email to Ms. Kenyon for the purpose of "convey[ing] information to Chloe to convey to client about what the attorney said about proceeding forward and regarding form sent to client for DC Capital to send to resort . . . ." *Id.* These descriptions along with Ms. Burt's job title

services that were indispensable to DC Capital's attorneys' work and communications with its clients. ECF No. 468 at 13. DC Capital cites *DiMare Ruskin, Inc.*, as a particularly instructive case with similar facts in which the Court found that the Coalition of Immokalee Workers ("CIW") acted as an agent of the Plaintiffs' attorney where all of the communications with Plaintiffs' counsel were conducted through CIW staff members who translated, explained, and participated with them in meetings and interviews. *DiMare Ruskin, Inc.*, 2012 WL 12067868, at *8. Other courts have held that the agency exception can apply to "secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts." *Kovel*, 296 F.2d at 921.

In support of its argument that Newton ESA employees provided services akin to those of CIW, DC Capital submitted the declarations from Ms. Chabrier, Mr. Smith, and Mr. Panopoulos. *See* ECF Nos. 468-9, 503-1, 504-1, 468-17, and 507-2. Mr. Smith's declaration as well as Ms. Chabrier's original declaration both state that Newton ESA employees provided administrative services to DC Capital attorneys such as "set[ting] calls with clients, schedul[ing] meetings for attorneys, send[ing] correspondence as directed by the attorneys to DC Capital's clients, request[ing]

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as legal assistant for DC Capital are sufficient for this Court to find that Ms. Burt was assisting DC Capital attorneys to render legal services by facilitating communication between the Diamond owners and DC Capital lawyers. Thus, I find that Ms. Burt's presence in communications does not constitute a waiver of the attorney-client privilege. The same reasoning and conclusion applies to communications involving Oxana Wright, DC Capital's "Legal Operations Manager." *Id.* at 46.

documents from the clients as directed by the attorneys, [and] receiv[ing] mail and electronic mail and documents from the clients in furtherance of DC Capital's rendition of legal services." ECF Nos. 468-9, ¶ 8, and 468-17, ¶ 12. Ms. Chabrier's first amended declaration goes into somewhat more detail on this point and explains that since DC Capital's attorneys work remotely, they rely on the electronic case management system maintained by Newton ESA. ECF No. 503-1, ¶¶ 5–6. Ms. Chabrier describes the system as one that "contains electronic case files and communications, acts as a mail room by physically and electronically sending correspondence as directed by the attorneys to DC Capital clients and resorts, requests documents such as maintenance fees and purchase agreements from the clients as directed by the attorneys, and receives mail and electronic mail and documents from the clients in furtherance of DC Capital's rendition of legal services." *Id.* ¶ 6.

Mr. Panopoulos' declaration describes the administrative services Newton ESA provides Newton NGT/NGE. ECF No. 507-2, ¶ 10 ("copying, scheduling, coordinating telephone calls, document collection, document processing, and other ministerial tasks . . . services relating to NGE/NGT's acceptance of its position as attorney-in-fact on behalf of timeshare exit consumers, such as document collection, acting as a liaison between consumers and DC Capital . . . providing documents to DC Capital, and when necessary, acting on the NGE/NGT and/or the consumer's behalf in communicating with DC Capital"). Mr. Panopoulos also spoke to this topic in his deposition stating that Newton ESA "provides technology solutions, it provides

human resources, it provides a lot of back-office administrative things like that. Customer experience, things like that." ECF No. 468-3 at 25:12–15. He also described in greater detail Newton ESA's proprietary customer relationship management software ("CRM"), which is used by both Newton NGE/NGT and DC Capital employees. *Id.* at 15:4–18.

Again, the conclusory statements made in the declarations, alone, are not enough to convince this Court that each of the Newton ESA employees provided DC Capital with services reasonably necessary for the effective representation of the client or for "improving the comprehension of the communications between attorney and client." *Reed Hein*, 2019 WL 9091666, at *13; *see also In re Int'l Oil Trading Co.*, LLC, 548 B.R. at 834. DC Capital chose not to offer the testimony of a single Newton ESA employee, DC Capital lawyer, or Diamond Owner. Instead, they submitted as evidence declarations containing broad, conclusory, and self-serving statements with no outside evidence to support the legal conclusions drawn therein. *In re Bonanno*, 344 F.2d at 833; *see also Purdee*, 2008 WL 11350099, at *1; *Davis*, 636 F.2d at 1044 n.20. Thus, I do not find the declarations, on their own, to be compelling or persuasive.

In addition to the declarations, DC Capital also submitted at the end of the privilege log a chart that lists the title, position, or role of each person who appears in the individual privilege log entries. ECF No. 468-2 at 46. DC Capital did not submit evidence outlining the specific duties and job function of each person and chose not to call as witnesses any of the Newton ESA employees to testify regarding their specific

duties.[10] Thus, the only evidence for the Court to rely on to determine whether Anthony Kirlew, Kynneth Crouse, Lisa Grosskopf, Edna Watson, Steve Ngo, Holly Ostertag, and Chloe Kenyon provided services to DC Capital that were reasonably necessary for effective representation of the clients is the privilege log itself.[11]

Regarding Mr. Kirlew specifically, I find that DC Capital has not provided this Court with sufficient evidence to prove that Mr. Kirlew was acting as an agent of DC Capital providing services reasonably necessary for the effective representation of clients. Mr. Kirlew's title is listed as "Senior Manager of Marketing" (ECF No. 468-2 at 47), which as an initial matter does not strike this Court as a role that provides services reasonably necessary for the effective representation of the client or for "improving the comprehension of the communications between attorney and client." *In re Int'l Oil Trading Co.*, LLC, 548 B.R. at 834; *Kovel*, 296 F.2d at 921; *Reed Hein*, 2019 WL 9091666, at *13. A review of the summaries in the privilege log of communications in which Mr. Kirlew is included provides further support for that conclusion. For example, on September 17, 2018, Mr. Kirlew had an email exchange

[10] Diamond did submit as part of its evidence an employee spreadsheet for some employees (*See* Plaintiff's Ex. 41). The employee spreadsheet does not include the seven employees relevant to this discussion, so it is not useful for the Court.

[11] After conducting a detailed review of the privilege log, it is not entirely clear to this Court whether these six employees are employed by Newton ESA or Newton NGE/NGT. The privilege log lists all of the Newton employees and partners, whether they are under the Newton NGT/NGE umbrella or the Newton ESA umbrella, as generally part of "The Newton Group." ECF No. 468-2 at 46–47. Furthermore, a detailed review of the privilege log reveals that many Newton employees and DC Capital employees use a Newton ESA email address, regardless of whether they are an employee of Newton NGT, NGE, ESA, or DC Capital.

with DC Capital attorney, Randolph Smith "containing call logs with timeline with Client [the Riccardellis] discussing client matter also attaching client file documents." ECF No. 468-2 at 6. Even with that description of the subject matter of the emails, it is entirely unclear to this Court how the marketing manager was improving the comprehension of the communications between Mr. Smith and his clients, the Riccardellis, or why his involvement was necessary for the Mr. Smith to provide the Riccardellis effective representation. DC Capital could have called Mr. Kirlew to testify at the hearing to provide further explanation and justification, but they chose not to do so. The remaining privilege log entries involving Mr. Kirlew also fail to satisfy DC Capital's burden of establishing Mr. Kirlew as a valid agent of DC Capital, and thus, any communications involving Mr. Kirlew are not protected by the attorney-client privilege.

Similarly, DC Capital has not met its burden to establish Mr. Crouse as a valid agent of DC Capital. Mr. Crouse is listed as a sales employee for the Newton Group. *Id.* at 46. The privilege log entries in which he is included do not include any further detail or explanation as to how services provided by a sales associate were reasonably necessary for a DC Capital attorney to provide the Diamond Owner with effective legal representation, particularly when a DC Capital attorney is not included as recipient or sender of the email. *Reed Hein*, 2019 WL 9091666, at *13; *see, e.g.*, ECF No. 468-2 at 13. For example, on May 4, 2019, Mr. Crouse sent an email to Ms. Kenyon, Ms. Ostertag, and Oxana Wright. *Id.* at 38. The subject matter of the email exchange is described as "discussing communication with client" and the privilege log

further details that "[c]orrespondence from client [Allen Anderson] is discussed in this email regarding communication with DC Capital in furtherance of legal advice . . . ." *Id.* Once again, this Court is not persuaded that a sales associate's participation in emails regarding client correspondence was truly "in furtherance of legal advice" when (1) there is no lawyer included on this email chain and (2) DC Capital has not provided any additional evidence to illuminate this Court as to Mr. Crouse's specific duties as a sales associate and how they might improve the comprehension of the communications between a DC Capital attorney and the Diamond Owners. Even when viewed in conjunction with the declarations DC Capital submitted, without testimony or a declaration from Mr. Crouse, I am not persuaded that a sales associate was providing services such as "set[ting] calls with clients, schedul[ing] meetings for attorneys, send[ing] correspondence as directed by the attorneys to DC Capital's clients, request[ing] documents from the clients as directed by the attorneys, [and] receiv[ing] mail and electronic mail and documents from the clients in furtherance of DC Capital's rendition of legal services." ECF Nos. 468-9, ¶ 8, and 468-17, ¶ 12. The remaining privilege log entries involving Mr. Crouse also fail to satisfy DC Capital's burden of establishing him as a valid agent of DC Capital, and thus, any communications involving Mr. Crouse are not protected under the attorney-client privilege.

The same analysis and conclusion apply to both Ms. Watson and Mr. Ngo. Ms. Watson is listed in the privilege log as a "Consumer Advisor," while Mr. Ngo is listed as a "Senior Inventory Manager." ECF No. 468-2 at 46–47. Their entries in the

privilege log, much like Mr. Kirlew's and Mr. Crouse's, even when coupled with the declarations, are not persuasive to this Court that either of these employees were reasonably necessary to DC Capital attorneys' ability to effectively represent the Diamond Owners. Thus, I find that DC Capital has not met its burden to establish Ms. Watson and Mr. Ngo as agents of DC Capital. Any communications involving either of these two employees are not protected under the attorney-client privilege.

Regarding Lisa Grosskopf, DC Capital lists her job title as "Assistant Manager of Administration." *Id.* at 46. DC Capital did not provide a job description or list of responsibilities Ms. Grosskopf has as the Assistant Manager of Administration, however, when viewed together with declarations and the privilege log entries in which Ms. Grosskopf is included, this Court is satisfied that DC Capital has met its burden to prove that Ms. Grosskopf was acting as a valid agent of DC Capital attorneys by providing services such as document collection, document processing, and other ministerial tasks. For example, the privilege log indicates that Ms. Grosskopf and DC Capital attorney Brittany Salvatore-Perkins exchanged a few emails regarding the "status of client matter." *Id.* at 7. In these emails, the privilege log indicates, the two are "discussing letters of representation and whether they had been sent to Diamond for specific clients." This Court finds it reasonable that, much like a secretary or other office administrator, Ms. Grosskopf, as the assistant manager of administration, would assist DC Capital attorneys working remotely with administrative tasks such as sending letters on behalf of clients or speaking to other

office administrators to verify whether those letters had been sent.[12] I find the privilege log viewed in conjunction with the statements made in the declaration to be sufficient evidence that Ms. Grosskopf provided DC Capital with services "reasonably necessary for effective representation of the client." *Reed Hein*, 2019 WL 9091666, at *13. Thus, her involvement in communications does not preclude them from falling within the attorney-client privilege.

Regarding Holly Ostertag, the privilege log lists her job title as "Client and Vendor Relations Director." *Id.* at 46. Mr. Panopoulos spoke to her role with Newton ESA in his deposition. *See* ECF No. 476-11. First, he states that Ms. Ostertag is the "director of customer experience," not the "client and vendor relations director." ECF No. 476-11 at 34:6–7. He also states that one of her duties is to review invoices from the timeshare companies for assessments or maintenance fees sent to Newton by the client, and after she verifies that the bill is valid, she ensures that Newton NGT/NGE pays the timeshare company what they are owed. *Id.* at 261:19–262:20. Because Ms. Ostertag was not called to testify as to what her duties are, nor did she provide this court with a declaration to that effect, Mr. Panopoulos' deposition testimony is the only evidence in the record regarding Ms. Ostertag's duties and responsibilities at Newton ESA. I find that verifying the invoices Diamond sent to the Diamond Owners is not a role that is reasonably necessary in order for a DC Capital attorney to provide

[12] Although this communication is evidence of Ms. Grosskopf's role as agent for DC Capial lawyers, for other reasons explained in detail below, I find this communication is not privileged as an attorney-client communication.

the Diamond Owners with effective legal representation. Of course, it can be fairly assumed that Ms. Ostertag has other responsibilities in addition to reviewing the invoices, but DC Capital provided no evidence of what they are and how they improved the comprehension of the communications between attorney and client. *In re Int'l Oil Trading Co.*, LLC, 548 B.R. at 834.

Furthermore, the privilege log entries themselves are not sufficient to convince this Court that Ms. Ostertag was acting as a valid agent. For example, Ms. Ostertag is included in a series of emails on October 18, 2019 in which various Newton NGT/NGE executives, DC capital employees (both attorneys and legal support), and Ms. Kenyon are "discussing advice an attorney gave a client." ECF No. 468-2 at 18–19. The privilege log states that the emails include a "discussion of DC Capital strategy in assisting client with exiting unwanted timeshare in furtherance of possible litigation. Includes advice from DC Capital." *Id.* Nothing in this privilege log entry explains why Ms. Ostertag, as the "Client and Vendor Relations Director" is included on this email and, more importantly, how or why her presence is reasonably necessary for a DC Capital lawyer to be able to effectively represent the Diamond Owner. Each of the privilege log entries in which Ms. Ostertag is included are missing the same crucial detail. I do not find that DC Capital has provided this Court with sufficient evidence to establish Ms. Ostertag as a valid agent of DC Capital and thus, Ms. Ostertag's inclusion in any communication precludes it from falling within the attorney-client privilege.

Finally, DC Capital lists Chloe Kenyon's title as "Senior Customer Experience Specialist." *Id.* at 46. After reviewing the privilege log entries that include Ms. Kenyon in conjunction with the declarations DC Capital provided, I find that DC Capital has submitted sufficient evidence to prove that Ms. Kenyon provided DC Capital attorneys with services that were "reasonably necessary for effective representation of the client." *Reed Hein*, 2019 WL 9091666, at *13. For example, on February 27, 2018, Chloe Kenyon exchanged a number of emails with Robert Heieck, a DC Capital attorney. ECF No. 468-2 at 12–13. The subject of those emails is "[d]iscussing attorney seeking status of client matter," and the emails include a discussion regarding Mr. Heieck's conversation with Diamond Owners William and Connie Loker regarding contacts Diamond had with them. *Id.* It is believable to this Court that a "Customer Experience Specialist" was assisting a DC Capital attorney in making sure that the clients were fully aware of all aspects of his or her case including any updates on how the case is progressing, much like a secretary would. Thus, I find that Ms. Kenyon was acting as a valid agent of DC Capital. Her involvement in communications does not preclude them from being privileged.

In sum, I find that the only Newton ESA employees with whom communications were intended to remain confidential were Ms. Grosskopf and Ms. Kenyon. Their presence in communications does not prevent those communications from being privileged. Therefore, there are sixteen privilege log entries that are, up

to this point, still covered by the attorney-client privilege. They are as follows: 2, 3, 15, 17, 36, 37, 39, 42, 45, 47, 48, 58, 62, 67, 71, and 72.[13]

d. Communications Regarding Legal Advice

Only those communications in which legal advice is sought or given are protected under attorney-client privilege. Restatement (Third) of the Law Governing Lawyers § 68 (2000) (outlining the requirements for protection under attorney-client privilege as (1) a communication (2) made between privileged persons (3) in confidence *(4) for the purpose of obtaining or providing legal assistance for the client*) (emphasis added); *see also United States v. Chevron Corp*, No. C–94–1885 SBA, 1996 WL 264769, at *3 (N.D. Cal. 1996) (finding that the party claiming protection under the attorney-client privilege must prove that all of the communications were made "'primarily for the purpose of generating legal advice'") (quoting *Griffith v. Davis*, 161 F.R.D. 687, 697 (C.D. Cal. 1995)). I find that DC Capital has met that burden with fourteen out of the sixteen remaining entries listed above.

DC Capital has not met its burden of proving that the communications contained in entries 17 and 45 were made primarily for the purpose of providing or seeking legal advice. Entry 17 is an email sent from Lisa Grosskopf to DC Capital attorney Brittany Salvatore Perkins in which Ms. Grosskopf appears to be discussing with Ms. Salvatore Perkins whether letters of representation had been sent to specific Diamond Owners. ECF No. 468-2 at 6. That is not a communication made in

[13] For clarity, the numbered entries given here correspond to the numbers in ECF No. 476-10.

furtherance of obtaining or seeking legal advice. In Entry 45, Chloe Kenyon is emailing with DC Capital attorney Jennifer Bergh "Discussing conversation with client's son regarding questions client had and that attorney answered questions about timeshare contract and discussion of contacting Diamond and reflecting opinion as to strategy in anticipation of possible litigation." *Id.* at 14. First, I do not find that a conversation with a client's son is privileged, absent evidence (not present here) that the son is a valid agent of the client whose presence is reasonably necessary to providing the client with effective legal representation. Second, even a confidential conversation about an unprivileged conversation with a client's son does not somehow become cloaked in the attorney-client privilege.

The remaining privilege log entries are sufficient to show that the communications were made in furtherance of giving or seeking legal advice. For example, on December 20, 2018, Chloe Kenyon was in an email exchange with the Esteps (Diamond Owners) and their DC Capital attorney, Ms. Salvatore Perkins, about "strategy regarding maintenance fees for client to Diamond . . . ." *Id.* at 6. I find that description to be sufficient. It is reasonable that the Esteps were seeking legal advice from their lawyer about whether they should be paying or not paying their Diamond maintenance fees. In reviewing the other thirteen remaining entries, I find the same holds true – that they were made for the purpose of obtaining or providing legal advice to the client. Thus, the fourteen entries that remain privileged pursuant to the attorney-client privilege are as follows: 2, 3, 15, 36, 37, 39, 42, 47, 48, 58, 62, 67, 71, and 72.

e. Work Product Doctrine

The emails at issue are "documents and tangible things," so the inquiry next moves to whether or not these communications were "prepared with the *primary* motivating purpose of aiding in possible litigation." *Reed Hein*, 2019 WL 9091666, at *15; *see also Davis*, 636 F.2d at 1040 (holding that a document is deserving of work product protection "as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation."). Since DC Capital is the party claiming the privilege, DC Capital must provide competent evidence that the primary motivating purpose behind creating the document was litigation, and not a business purpose or some other non-litigation purpose. *Holladay*, 333 F.R.D. at 592; *see also Reed Hein*, 2019 WL 9091666, at *14. It is not enough that the document "may also be helpful in the event of litigation" or was prepared "with an eye toward litigation." See *Reed Hein*, 2019 WL 9091666, at *14–15. Primary purpose is typically shown through both the privilege log and affidavits; however, the mere fact that the party seeking work product protection submits an affidavit is not necessarily sufficient to sustain the work product assertion. *Fid. Nat'l Title Ins.*, 2013 WL 12138558, at *2. After reviewing the privilege log and the limited evidence presented by DC Capital in support of its work product privilege claim, I find that DC Capital has not met its burden of establishing, with the exception of a few communications detailed below, that the communications in question were prepared with a primary purpose of aiding in litigation or in anticipation of litigation.

This Court reviewed the "subject" and "purpose" descriptions DC Capital provided in the privilege log for each communication. ECF No. 468-2. I first note that in the "purpose" column for many of the work product claims DC Capital simply states at the end of the description that the communication was "in furtherance of" or "in anticipation of" possible litigation, but provides no further detail as to what possible litigation it is referring or why the communication was in furtherance of it. *See, e.g.*, *id.* at 2, 3, 4, etc. The "subject" column provides no further explanation of how the communication was created for a primary purpose of anticipated litigation. For example, DC Capital claims the work product privilege applies to email communications regarding Diamond Owners Milt and Christine Rebbert from May 29, 2019. *Id.* at 41. DC Capital describes the subject matter of the emails as "discussing potential advice an attorney will give to a client" and the purpose as "contain[ing] discussions between DC Capital client and attorney, advice to possibly be given to client in furtherance of legal advice, discussion of attorney opinion on professional responsibility all in furtherance of possible litigation." *Id.* This email was sent from DC Capital attorney Nadine Chabrier to DC Capital attorneys Robert Baldwin and Randolph Smith, as well as Newton NGT/NGE executives Theodoros Panopoulos, Chuck Anderson, and Gordon Newton. *Id.* A single conclusory reference to "possible litigation" does not discharge DC Capital's burden.

In another equally puzzling example, DC Capital claims the work product privilege applies to email communications regarding Diamond Owner "Krocka" from April 4, 2018. *Id.* at 31. DC Capital describes the subject matter of the emails as

"discussing potential conflict" and the purpose as "contain[ing] information from DC Capital attorney to Newton regarding other law firm and timeshares of specific client and that client's information from conversation Newton had with client in furtherance legal advice and in furtherance of strategy regarding client's Diamond timeshare." *Id.* This email was sent from Newton ESA "Support Services Manager" Katrena Anderson to Newton NGT/NGE executives Theodoros Panopoulos, Gordon Newton, and Chuck Anderson, and to DC Capital attorneys Nadine Chabrier and Robert Baldwin. *Id.* Again, I fail to see how this email satisfies the primary purpose test when it was sent to Newton NGT/NGE executives/DC Capital non-lawyer partners "involved in *non-legal* business management for [DC Capital] Law Firm." ECF No. 505-2 at 6. At times, privilege log entries where work product privilege is claimed do not even reference a specific timeshare owner at all. *See, e.g.*, ECF No. 468-2 at 5 (email sent on September 18, 2018 from Senior Manager of Marketing Anthony Kirlew to DC Capital Attorney Robert Heieck regarding "obtain[ing] legal advice regarding what to include in consumer guide and videos to be produced by Newton including quotes from timeshare contracts").

Without the emails themselves to review and since many of them either are regarding Diamond Owners who are not in ongoing litigation with Diamond or are not regarding a specific Diamond Owner at all, I find the privilege log entries by themselves to be wholly insufficient to support a claim of work product privilege. Thus, this Court looks to the other evidence submitted by DC Capital to support its work product claim.

DC Capital submitted declarations from Ms. Chabrier and Mr. Smith to establish that the communications were prepared by DC Capital (or its agent) in anticipation of litigation. ECF No. 485 at 14. Mr. Smith's declaration states in relevant part that attorneys at DC Capital directly communicate with the Diamond Owners to "discuss[] the risks and rewards associated with litigation against Diamond as well as various strategies to exit their timeshare interest obligations." ECF No. 468-17, ¶ 13. Ms. Chabrier's declaration states in relevant part that DC Capital attorneys communicate with Newton NGT/NGE employees and Diamond Owners regarding, among other things, "the pros and cons of various exit strategies such as litigation versus non-litigation, stopping payment, continuing payment, and negotiations with the resort to exit the timeshare interest." ECF No. 468-9, ¶ 14. DC Capital also submitted a list of six lawsuits that DC Capital has brought on behalf of five Diamond Owners. ECF No. 468-16.[14] In its Reply, DC Capital argues that although only a small percentage of its clients proceed to litigation, that does not mean that the materials in question, as a whole, were not prepared in anticipation of litigation. ECF No. 485 at 14.

The reasoning found in two applicable cases leads to the conclusion that DC Capital has provided insufficient evidence of the communications' "primary purpose." In *Fidelity National Title Ins. Co.*, 2013 WL 12138558, at *2, the Plaintiff initially

[14] Those five Diamond owners (not to be confused with the "Five Diamond Owners") are the Bennetts, the Gross, the Redferns, the Bartines, and the Campos. ECF No. 468-16.

submitted an affidavit that the Court found to be "wholly conclusory" with "few details to substantiate [the declarant's] claim that the 'Notes' were created 'in anticipation of litigation.'" *Id.* The plaintiff later submitted additional affidavits containing more background information regarding when and why the documents were created. *Id.* Ultimately, the Court found the three declarations were cumulatively sufficient to establish that the documents were created with a primary purpose of litigation. *Id.* at 3. In *Bridgewater*, the claimant of the privilege again relied on declarations with conclusory statements to prove primary purpose. *Bridgewater*, 286 F.R.D. at 641, 644–45. There, the Court held that the declaration was insufficient because "a party's 'burden is not, of course, discharged by mere conclusory or ipse dixit assertions.'" *Id.* at 642 n.6 (quoting *In re Bonanno*, 344 F.2d at 833). The Court went on to state that simply accepting the conclusory declaration would "require[ ] the Court to suspend common sense and logic, and to ignore other evidence in the record." *Id.*

Unlike the declarations in *Fidelity National Title Ins. Co.*, the declarations from Ms. Chabrier and Mr. Smith do not speak to the individual communications themselves, nor do they offer detail as to the reasons why any of them were sent. Instead, they contain broad, generalized statements about the DC Capital lawyers' communications with Newton NGT/NGE and the Diamond Owners, similar to the language that the Court found to be insufficient in *Bridgewater*. 286 F.R.D. at 644–45 (finding statements such as, "Rapsody will correspond with Carnival regarding incidents in a concerted effort of both parties to investigate incidents involving guests

in anticipation of litigation," to be conclusory and thus insufficient to establish primary purpose of litigation).

This Court does note that it is understandable that DC Capital, Newton NGT/NGE, and the Diamond Owners may have had an eye toward litigation with Diamond occurring in the future. That is not an unreasonable premonition given that it had occurred with other Diamond Owners, albeit only a few of them. I do not find persuasive Diamond's argument that because DC Capital resorted to litigation in a small percentage of cases, that these communications could not have been created in anticipation of litigation. DC Capital has only provided evidence that litigation with Diamond was a vague possibility down the line, and that these communications might be helpful in that event, but that alone is not enough to meet requirements of the work product doctrine. *Reed Hein*, 2019 WL 9091666, at *14–15 (finding that it is not enough that the document "may also be helpful in the event of litigation" or was prepared "with an eye toward litigation").

There are seventeen entries in the privilege log concerning three of the five Diamond Owners whose cases were ultimately litigated. Speaking first to the communications regarding the Campos (entries 4, 5, 78, and 79), I find that DC Capital has met its burden to establish that they were prepared with the primary motivating purpose of aiding in possible litigation. Mr. Smith's declaration states that he was the lead counsel in the Campos' case and that he discussed with the Campos' "possible legal strategy, analysis of the underlying facts concerning their purchase of a [Diamond] timeshare interest, analysis of the arbitration provisions in such

contracts, as well as the decision to ultimately bring litigation against Diamond . . . ." *Id.*, ¶¶ 14–15. The relevant entries are emails between Mr. Smith, his attorney colleagues at DC Capital, and Newton NGT/NGE executives in which they are "discussing strategic project on client matters," specifically the drafting of declarations "in anticipation of possible litigation with Diamond." *See* ECF No. 468-2 at 3, 25–26. DC Capital also submitted a declaration from the Campos stating the same, as well as a copy of the Campos' complaint. ECF Nos. 468-18 and 468-19. Taking into account the entries as a whole, the Smith declaration, the Campos declaration, and the Campos complaint showing the date their lawsuit against Diamond was filed, I find that DC Capital has submitted sufficient evidence that these communications were made with the primary motivating purpose of aiding in upcoming litigation with Diamond.[15]

There is one communication regarding the Bartines that falls within the work product privilege. ECF No. 468-2 at 23. The privilege log shows an email sent by a DC Capital paralegal to DC Capital lawyers and the Newton NGT/NGE executives regarding "a list of current status of cases in litigation . . . and of cases to be filed . . . status updates include strategy regarding causes of action as well as opinions on strength of cases and expected volume of litigation." *Id.* The privilege log entry as a

[15] This Court does not, of course, know when the decision to file a complaint against Diamond was ultimately made by the Campos and DC Capital, but it is a reasonable inference that in February of 2019, DC Capital had more than "an eye towards litigation" given that the complaint was filed only a few months later in May of 2019. ECF No. 468-18.

whole coupled with the fact that the Bartines were in the midst of litigation with Diamond at the time and thus included in that list of current cases in litigation is sufficient evidence to prove that the communication was made with the primary motivating purpose of aiding in ongoing litigation with Diamond. Thus, I find that this is proper work product.[16]

Finally, there are eleven communications regarding the Redferns that DC Capital claims are covered by the work product privilege. Their initial complaint shows their litigation began on April 15, 2019. ECF No. 468-22 at 50–67. The email communications DC Capital seeks to protect were sent in April and September of 2019. ECF No. 468-2 at 17–18, 33–36. I find that the descriptions in the privilege log entries coupled with the complaint provided is sufficient evidence that the communications regarding the Campos were prepared with the primary motivating purpose of aiding in litigation that had just begun. For example, on April 26, 2019, multiple emails were exchanged between DC Capital attorney Robert Heieck, Newton NGT/NGE executives, and Newton ESA employees regarding an email from Gregory Redfern "asking that attorney ensures his wishes are carried out . . ." and his attorney's response "explaining conversations with client including advice about how to proceed . . . ." *Id.* at 33–36. It is understandable that a client whose case had just recently been filed would discuss his litigation goals and priorities with his lawyer,

[16] DC Capital provided a copy of the Bartines' complaint, which was filed on August 17, 2018. ECF No. 468-22, at 24–49. Their lawsuit was not concluded until October of 2019. *Bartine et. al. v. Diamond Resorts Management, Inc., et al.*, 6:18-cv-01364-PGB-TBS (M.D. Fla. 2018).

and that his lawyer would then discuss his strategy to reach those goals with non-adversarial colleagues who may offer some insight or facilitate continued communication with the client. Thus, I find that DC Capital has provided sufficient evidence to show that the communications regarding the Redferns were created with the primary motivating purpose of aiding the client in ongoing litigation with Diamond. Thus, I find that entries 50–54 and 100–105 are proper work product and thus protected from disclosure.

In conclusion, with regard to entries 4, 5, 50–54, 73, 78–79, and 100–105, I find that DC Capital has met its burden of establishing that these communications were made with the primary motivating purpose of aiding in ongoing or upcoming litigation with Diamond. With respect to all other entries where work product is claimed, the evidence submitted is insufficient to indicate that these emails were generated to aid in litigation, other than potential litigation far down the line, and thus DC Capital has not met its burden. "To find otherwise would render meaningless the oft-repeated requirement that parties asserting a privilege justify that privilege with more than conclusory assertions. *Bridgewater*, 286 F.R.D. at 642.

2. Client Files for the Five Diamond Owners

a. Attorney-client Relationship Between the Five Diamond Owners and DC Capital

As with the rest of the Diamond Owners, the first question that must be addressed is whether there was a valid attorney-client relationship formed between DC Capital and the Five Diamond Owners. Diamond relies on the undisputed fact

that Newton NGT/NGE retained DC Capital to represent these Five Diamond Owners before the Five Diamond Owners had executed POAs appointing Newton NGT/NGE as their attorney-in-fact. Newton NGT/NGE alleges that at a later date the Five Diamond Owners ratified Newton NGT/NGE's retention of DC Capital. *See*ECF No. 485-8. I need not resolve the legal significance of this fact because DC Capital is not asserting a privilege over any communications that predate the signed POAs.

As discussed above, an attorney-client relationship can be created though a valid POA coupled with a retainer agreement, or (in the absence of a formal retainer) by a client's reasonable subjective belief that the lawyer is being consulted to provide professional legal advice. To that end, in *Jackson*, the Eleventh Circuit Court of Appeals stated that "there can be no attorney-client relationship when the client does not consult with the attorney, especially when there is no contact between them." *Jackson*, 372 F.3d at 1282–83.

I find that DC Capital has met its burden to prove the existence of an attorney-client relationship between DC Capital and the Five Diamond Owners. The declarations from the Five Diamond Owners, coupled with the retention letters and privilege logs showing communications between each of the Five Diamond Owners and DC Capital about legal matters, indicate the Five Diamond Owners' reasonable subjective belief that they were represented by DC Capital.

By way of example, the Drakes submitted to the Court a declaration. ECF No. 468-10. In that declaration, the Drakes state that they "worked with, and sought legal

advice from, [their] attorneys at DC Capital Law, LLP." *Id.*, ¶ 7. This declaration demonstrates the Drakes' subjective belief that they were represented by lawyers at DC Capital. The reasonableness of that belief is demonstrated by the fact that the Drakes received a letter from DC Capital on May 4, 2018 with subject line "Engagement For Legal Services." *Id.* at 10. The letter goes on to state the following: "The purpose of this letter is to confirm the arrangements under which our firm has agreed to represent you in connection with your timeshare ownership. The scope of our representation encompasses your timeshare ownership, and your desired exit therefrom." *Id.* After receiving this letter, the Drakes seemingly relied upon their reasonable belief that they were being represented by DC Capital lawyers because, as the privilege log indicates, they communicated with DC Capital about legal matters related to their timeshare. *Id.* at 16–21. For example, on January 9, 2019, at 3:30 pm, DC Capital attorney Brittney Salvatore-Perkins communicated with the Drakes "regarding the specific matter of the representation at issue in furtherance of ongoing attorney legal strategy to exit timeshare." ECF No. 476-4 at 2. Later that evening at 7:46 pm, Ms. Drake responded to Ms. Salvatore-Perkins' email and continued discussing "legal strategy to exit timeshare." *Id.* at 3. On March 6, 2019, DC Capital attorney Roya Graziano also communicated with the Drakes about their legal strategy. *Id.* Thus, I find that there is sufficient evidence to show that the Drakes held a reasonable belief that they were being represented by the lawyers at DC Capital.

Like the Drakes, the evidence shows that the Canciks also held a reasonable belief that they were being represented by DC Capital. First, their declaration states they "worked with, and sought legal advice from, [their] attorneys at DC Capital Law, LLP." ECF No. 495-1, ¶ 7. On November 29, 2018, the Canciks received a letter from DC Capital that begins, DC Capital Law, LLP is pleased to represent you in relation to your timeshare ownership . . ." *Id.* at 9. The privilege log indicates that after receiving that letter, the Canciks communicated with DC Capital attorneys many times about legal matters related to the timeshare. For example, on February 12, 2020, at 12:54pm, DC Capital attorney Jennifer Dorsey emailed the Canciks regarding "case status, communications with Diamond, strategy concerning exit, discussion of risks associated with strategy, and other options." ECF No. 476-7 at 3. On May 20, 2020, at 6:27pm, Ms. Cancik sent an email to Ms. Dorsey "seeking legal advice on case status. . ." and to ask some follow-up questions regarding Ms. Dorsey's previous email. *Id.* at 4. These communications, coupled with the declaration and the letter from DC Capital to the Canciks, are sufficient evidence of the Cancik's reasonable belief that DC Capital was representing them.

Similar examples of the Barbers', Bartas', and Brights' reasonable belief that they were represented by DC Capital are found in their respective declarations and exhibits attached thereto. *See* ECF Nos. 468-11, 468-15, and 477-1. Thus, I find that DC Capital has provided this Court with sufficient evidence to prove that the Drakes, Barbers, Bartas, Brights, and Canciks held a reasonable belief that they were

represented by DC Capital, and thus a valid attorney-client relationship was formed between the Five Diamond Owners and DC Capital.

b. Attorney-Client and Work Product Privilege Claims for the Canciks

DC Capital's privilege log describes nine entries from the Cancik client file that are covered by either the attorney-client or work product privilege. ECF No. 495-1 at 14–16. First, it should be noted that only communications are covered by the attorney client privilege. "The attorney-client privilege exists to protect confidential *communications* between client and lawyer made for the purpose of securing legal advice." *In re Grand Jury,* 969 F.2d at 997 (quoting *In re Slaughter*, 694 F.2d at 1260) (emphasis added). Thus, for those entries in the privilege log described as "attorney notes," although they may be privileged under the work product doctrine, they are not covered by the attorney-client privilege.[17]

I find that the privilege log entries are sufficient to establish that entries 6–8 are covered by the attorney-client privilege. These entries describe (1) communications (2) between the clients and their lawyer (3) intended to remain confidential and (4) for the purpose of securing legal advice. *In re Grand Jury, 969* F.2d at 997; *see also* Restatement (Third) of the Law Governing Lawyers § 68 (2000). The privilege log shows that the Canciks communicated with their DC Capital

[17] Diamond argued for the first time at the evidentiary hearing that the internal CRM client notes are not intended to remain confidential because Newton NGT/NGE employees can access these notes. Although it was arguably an untimely argument since it was not raised in the briefs, I need not address this issue because the notes are not privileged for other reasons.

lawyer, Jennifer Dorsey, "regarding the specific matter of the representation at issue in furtherance of ongoing legal strategy to exit timeshare." No other third parties were involved in these communications such as Newton NGT/NGE executives or non-agent Newton ESA employees whose presence likely would have waived the privilege. Thus, I find that entries 6–8 are protected from disclosure by the attorney-client privilege.

DC Capital also argues that all nine entries are privileged attorney work product. I disagree. DC Capital did not provide any evidence that the primary motivating purpose behind creating these notes and communications was litigation, and not some other non-litigation purpose. *Holladay*, 333 F.R.D. at 592; *see also Reed Hein*, 2019 WL 9091666, at *14. The Smith and Chabrier declarations do not speak to any potentially forthcoming or pending litigation involving the Canciks, nor do the Canciks' declarations even mention litigation as a possibility. ECF Nos. 468-9, 503-1, 504-1, 468-17, 495-1, and 506-1. It is not enough that the document "may also be helpful in the event of litigation" or was prepared "with an eye toward litigation." *See Reed Hein*, 2019 WL 9091666, at *14–15. Thus, I find that in the privilege log for the Cancik file, only entries 6–8 are privileged and only under the attorney-client privilege. *See* ECF No. 495-1 at 14

c. Attorney-Client and Work Product Privilege Claims for the Barbers

The privilege log describes thirty-five communications and notes concerning the Barbers' file that DC Capital argues are privileged under the attorney-client and/or work product privileges. ECF No. 468-11 at 22–31. For those entries regarding

communications between the Barbers (usually James Barber) and their DC Capital attorneys (usually Scott Olifant), I find that they are attorney-client communications in furtherance of legal advice that were intended to remain confidential. *In re Grand Jury,* 969 F.2d at 997. For example, entries 16 through 20 show a number of emails exchanged between Mr. Barber, Mr. Olifant, and DC Capital "Legal Operations Specialists" Joseph Jansen and Ariana Paulson. ECF No. 468-11 at 26–27. The log describes the subject matter of the communications as "email communication from client to attorney regarding additional information received from resort developer made for the purpose of securing legal advice concerning timeshare exit" and the purpose for which they were created as "communication between attorney and client regarding the specific matter of the representation at issue in furtherance of ongoing legal strategy." *Id.* For the reasons described earlier in this Order for DC Capital employees Ashley Burt and Oxana Wright, I find that Mr. Jansen and Ms. Paulson's inclusion in these emails does not preclude the privilege because they, as employees of DC Capital assisting attorneys in providing legal representation to the clients, are valid agents of the DC Capital attorneys. I also find sufficient the privilege log descriptions, coupled with the Barbers' declaration attesting as such, that these communications were made in furtherance of legal advice. Thus, I find that entries 5,

9, 11, 12, 16, and 21–24 are protected under the attorney-client privilege.[18] ECF No. 468-11 at 22–31.

For the same reasons described above, I do not find that any of these communications are protected by the work product privilege. DC Capital did not provide this Court with sufficient evidence to prove that the notes and communications were prepared in anticipation of litigation that was anything more than a distant possibility. Neither the declarations from Mr. Smith and Ms. Chabrier nor either of the Barbers' two declarations mention litigation or describe how these specific notes were created in furtherance of any anticipated litigation. Thus, I find that only entries 5, 9, 11, 12, 16, and 21-24 are protected from disclosure because they are privileged under the attorney-client privilege. All other entries in the Barber file are not covered by either privilege.

d. Attorney-Client and Work Product Privilege Claims for the Bartas

DC Capital argues that sixteen attorney and paralegal notes are immune from disclosure because they are protected by both the attorney-client and work product privilege. ECF No. 476-5 at 2–6. For the same reasoning described above, these notes also are not covered by the work product privilege because DC Capital has offered insufficient evidence to prove that they were created for the purpose of assisting with ongoing or anticipated litigation. In fact, there is not a single entry in which the

[18] I do not find the attachments to the emails described as "signature txt," "letter from Diamond Resorts," or "Copy of envelope of correspondence received from resort" to be privileged under either the attorney-client or work product privilege.

possibility of litigation is mentioned in the subject matter or purpose column. ECF No. 476-5 at 2–6. Thus, I do not find that DC Capital has met its burden to prove the notes are covered by either the work product or attorney-client privilege.

e. Attorney-Client and Work Product Privilege Claims for the Brights

DC Capital lists three "internal CRM notes" labeled as both attorney-client and work product privilege. ECF No. 477-1 at 20–21. Two are notes written by DC Capital attorneys and one is a note written by Legal Operations Specialist Joseph Jansen. *Id.* For the reasons set forth above, I do not find these internal notes to be privileged under the attorney-client privilege because they are not communications between the attorney and client made in furtherance of legal advice. For the same reasons outlined for the previous Five Diamond Owners, these notes are not covered by the work product privilege because DC Capital has offered insufficient evidence to prove that they were created for the purpose of assisting with ongoing or anticipated litigation. The entries do not mention litigation, but merely state the purpose of the notes as "in furtherance of the rendition of legal services and ongoing legal strategy to exit timeshare." *Id.* Furthermore, the declaration submitted by the Brights does not discuss litigation as part of the "ongoing legal strategy" and DC Capital did not call them – or a DC Capital attorney – to testify as such. ECF No. 477-1 at 1–3. Thus, I do not find that DC Capital has met its burden to prove the notes are covered by either the work product or attorney-client privilege.

f. Attorney-Client and Work Product Privilege Claims for the Drakes

The privilege log describes twenty-five communications and notes concerning the Drakes' file that DC Capital argues are privileged under the attorney-client and/or work product privileges. ECF No. 468-10 at 16–21.[19] For those entries regarding communications between the Drakes and their DC Capital attorneys and paralegals, I find that they are attorney-client communications in furtherance of legal advice that were intended to remain confidential. *In re Grand Jury*, 969 F.2d at 997. For example, on January 9, 2020, Brenda Drake exchanged emails with DC Capital attorney Brittney Salvatore-Perkins and DC Capital paralegal Karen Fanty regarding "case status update and communication with resort." ECF No. 468-10 at 20–21. I find the description to be sufficient to establish that these were emails sent between the clients and their attorney (and paralegal), made in furtherance of obtaining legal advice. It is perfectly reasonable that a lawyer would be updating a client on the status of his or her case, and that communication is quintessential

[19] It is not entirely clear based on the privilege log alone whether some of these notes were physically made on a copy of the attorney-client communication. For example, an attorney could have printed out the email between himself or herself and the client, taken handwritten notes on that hard copy, and then scanned it back into the internal CRM system. If that is the case here, then the underlying communication between the attorney and client is likely privileged under the attorney-client privilege so long as it was in furtherance of legal advice and confidentially made. To the extent DC Capital is arguing that scenario here, without the opportunity to review the document *in camera*, I do not find that the privilege log is written clearly enough to support this argument. "The Court should not have to guess or speculate about the applicability of the privilege, for the party asserting it has the affirmative duty to demonstrate that it applies to each document or communication sought to be disclosed." *Purdee*, 2008 WL 11350099, at *1 (citing *Davis*, 636 F.2d at1044 n.20 (5th Cir. 1981).

attorney-client privilege. The inclusion of a DC Capital paralegal working on behalf of the attorney does not constitute a waiver of the privilege. *See Owens v. First Family Fin. Servs., Inc*, 379 F. Supp. 2d 840, 848 (S.D. Miss. 2005) (holding that when a paralegal works on behalf of a lawyer who is representing a client, attorney-client privilege applies with equal force to paralegal) (citing 81 Am. Jur. 2d Witnesses § 400 (2005)). Therefore, entries 3–6, 9, 11, and 19–22 are covered by the attorney-client privilege. [20]

I have reviewed both of the Drake declarations (ECF Nos. 468-10 and 502-2) as well as the CRM notes for the Drakes (ECF No. 485-1) and find that DC Capital has failed to meet its burden to establish that any of these notes or emails were generated in anticipation of litigation. The privilege log makes no mention of possible litigation, nor do the internal CRM notes. The Chabrier and Smith declarations make broad conclusory references to litigation (other than Mr. Smith's reference to the Campos litigation) that without further supporting evidence, do not convince this Court that these particular notes and communications were generated in anticipation of litigation. Thus, I find that DC Capital's mere conclusory declarations and privilege log descriptions do not set forth sufficient facts to allow a judicial determination as to whether the particular communication or document is, in fact, privileged. *Reed Hein*,

[20] For reasons stated previously, a copy of a communication from Diamond attached to an email is not privileged because DC Capital has not established that the underlying letter itself is privileged. Thus, entry 12 is not privileged.

2019 WL 9091666, at *7. Thus, only entries 3–6, 9, 11, and 19–22 are privileged and protected from disclosure.

3. Crime-Fraud Exception

Diamond argues that the attorney-client and work product privileges should not be sustained because the crime-fraud exception applies. ECF No. 476 at 17. "The attorney-client privilege does not protect communications made in furtherance of a crime or fraud." *United States v. Cleckler*, 265 F. App'x 850, 853 (11th Cir. 2008) (internal quotation marks omitted); *see also Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994) (recognizing that the crime-fraud exception "applies to work product in the same way that it applies to the attorney-client privilege"). Notably, the existence of a crime or fraud does not create a blanket evisceration of the privilege; it only extinguishes the privilege for those communications and documents connected to the crime or fraud.

The Eleventh Circuit applies a two-pronged test for the crime-fraud exception. "First, there must be a *prima facie* showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it." *Cleckler*, 265 F. App'x at 853 (quoting *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1286, 1416 (11th Cir. 1994) (emphasis added). The *prima facie* standard "is satisfied by a showing of evidence that, if

believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed." *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir. 1987). Such a showing must have a foundation in fact and cannot rest upon mere allegation. *Gutter v. E.I. DuPont De Nemours*, 124 F. Supp. 2d 1291, 1299 (S.D. Fla. 2000) (J. Gold) (citing *Schroeder*, 842 F.2d at 1226). The attorney need not be aware he is assisting in a fraud for the exception to apply. *In re Grand Jury Investigation*, 842 F.2d at 1227; *Gutter*, 124 F. Supp. 2d at 1300–01.

Diamond did not present any evidence of crime or fraud being perpetrated by the Diamond Owners; to the contrary, it has been Diamond's position throughout this litigation that the Diamond Owners are being victimized by Newton NGT/NGE and DC Capital. The crime-fraud exception "overcome[s] attorney work product protection when the attorney or law firm was engaged in the crime or fraud but the client was not." *Drummond Co., Inc. v. Conrad & Scherer, LLP,* 885 F.3d 1324, 1337 (11th Cir. 2018). Neither party cites (nor have I found) an Eleventh Circuit decision holding that an attorney's fraud without the client's involvement implicates the crime-fraud exception to the attorney-client privilege. Other courts have held that wrongdoing by the attorney, alone, is enough to trigger the crime-fraud exception to the attorney-client privilege. *See Chevron Corp. v. Salazar,* 275 F.R.D. 437, 452–54 (S.D.N.Y. 2011) (collecting cases). I need not resolve this issue because I find that Diamond has not made the requisite *prima facie* showing of a nexus between a crime or fraud and the specific communications and documents at issue, here.

Diamond cites two particular narrative examples of Newton NGT/NGE's alleged fraudulent activity relating to the Drakes and the Reeves, respectively. *Id.* at 18–23. This evidence is insufficient to support a *prima facie* showing that the specific documents the court has found to be otherwise privileged were created by DC Capital attorneys in furtherance of the criminal or fraudulent activity or were closely related to it. *Drummond Co. Inc.*, 885 F.3d at 1337. The evidence relates to conduct by Newton executives, not by DC Capital attorneys. Diamond submitted evidence of Newton NGT/NGE executives' allegedly fraudulent activity. Even though the Newton executives are non-lawyer partners of DC Capital, Diamond has not made a sufficient initial showing that their alleged fraudulent scheme or behavior can be imputed to the DC Capital attorneys so as to eviscerate the privilege.

At the hearing, Diamond argued that the fraudulent conduct of Newton NGT/NGE qualifies for the crime-fraud exception because, as the attorney-in-fact for the Diamond Owners pursuant to the POAs, Newton NGT/NGE steps into the shoes of the Diamond Owners and thus is the "client" perpetuating the fraud. Although this argument is admittedly creative, Diamond cannot, in a sense "have its cake and eat it too." Diamond argues, and I have agreed, that the POAs alone are not enough to allow Newton NGT/NGE to step into the shoes of the Diamond Owners for all purposes. I have largely found that DC Capital did not meet its burden to establish that Newton NGT/NGE was *reasonably necessary* for the effective representation of the Diamond Owners. Therefore, the argument that, for the application of the crime-

fraud exception only, the Newton NGT/NGE executives can stand in the shoes of the clients based solely on the POAs falls flat.

Moreover, Diamond's proposed analysis leads to a troubling result. It would cause the innocent Diamond Owners, who are alleged to be fraud victims and who may have legitimate legal disputes with Diamond, to lose (to their potential legal adversary and through no fault of their own) the confidentiality of communications that they reasonably subjectively believed were for legitimate legal services. *See Moody v. I.R.S.,* 654 F.2d 795, 801 (D.C. Cir. 1981) (applying totality of circumstances balancing test to crime-fraud exception to work product privilege and noting "the client's interest in preventing disclosures about his case may survive the misfortune of his representation by an unscrupulous attorney.") *cited and discussed with approval in Drummond,* 885 F.3d at 1338. In a related context, where a non-lawyer defrauded his "client" by pretending to be a lawyer, courts have held, "the client should not be compelled to bear the risk of his 'attorney's' deception and he should be entitled to the benefits of the privilege as long as his bona fide belief in his counsel's status is maintained." *United States v. Boffa*, 513 F. Supp. 517, 523 (D. Del. 1981); *see Gucci Am., Inc. v. Guess?, Inc.*, No. 09 CIV 4373 SAS, 2011 WL 9375, at *2 (S.D.N.Y. Jan. 3, 2011) ("[T]he privilege may be successfully claimed if the client reasonably believed that the person to whom the communications were made was in fact an attorney."); *United States v. Crespo*, No. 11-CR-80112 (S.D. Fla. Sept. 7, 2011) (order on sealed motion for determination of status of attorney-client privilege and attorney work product, ECF No. 90 at 3) (J. Marra) ("[T]he privilege extends to

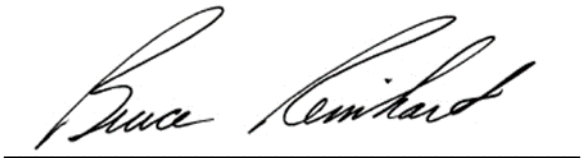
confidential communications made in the 'genuine, but mistaken, belief' that an imposter is an attorney.") (citing *Boffa*, 513 F. Supp. at 523). Even assuming *arguendo* that Newton NGT/NGE and/or DC Capital was using a Diamond Owner's POA in furtherance of a crime or fraud, the innocent Diamond Owner should not suffer the consequences.

I do not find that Diamond has provided sufficient evidence to make a *prima facie* showing that either the Diamond Owners or the DC Capital attorneys were engaged in criminal or fraudulent conduct when they sought or gave legal advice, were planning such conduct when they sought or gave legal advice, or committed a crime or fraud subsequent to giving or receiving the benefit of legal advice. *Cleckler*, 265 F. App'x at 853. Thus, I find that the crime-fraud exception does not apply to the remaining privileged items, and thus, they remain immune from disclosure either based on the attorney-client privilege or the work product privilege.

CONCLUSION

For the foregoing reasons, DC Capital's assertion of attorney-client and work product privilege is GRANTED IN PART AND DENIED IN PART as to the specific entries put forth in this Order. The relevant documents shall be produced **on or before February 25, 2021, at 5:00 p.m. Eastern time (U.S.).**

DONE and ORDERED in Chambers this 11th day of February, 2021, at West Palm Beach in the Southern District of Florida.



BRUCE E. REINHART
UNITED STATES MAGISTRATE JUDGE