UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

EVERPORT TERMINAL SERVICES, INC.

And **Case 32-CA-172286**

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1546, AFL-CIO, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1414, AFL-CIO

INTERNATIONAL LONGSHOREMEN AND WAREHOUSE UNION

and **Case 32-CB-172414**

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1546, AFL-CIO, AND INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 190, LOCAL LODGE 1414, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF ON RESPONDENT EVERPORT TERMINAL SERVICES, INC.'S AND PACIFIC MARITIME ASSOCIATION'S ASSERTION OF COMMON INTEREST DOCTRINE

In accordance with the request made by presiding Administrative Law Judge Sharon Levinson Steckler on the record on April 6, 2017, comes now Counsel for the General Counsel and files the following brief in response to the assertion by Respondent Everport Terminal Services, Inc. (Everport) and Pacific Maritime Association (PMA) of the common interest

doctrine as a basis for refusing to permit counsel for the charging party International Association of Machinists and Aerospace Workers, District Lodge 190, Local Lodges 1546 and 1414 (IAM) (and by implication Counsel for the General Counsel) to question Everport President George Lang about the subject matters discussed at various meetings between Everport, PMA and others during 2015. The basis for the assertion of common interest doctrine is set forth in an April 6, 2017 email message from PMA outside counsel Jonathan Fritts to the ALJ and the parties which has been received into evidence in this matter.[1] While Counsel for the General Counsel perceives this particular discrete dispute as primarily between IAM on the one hand and PMA and Everport on the other hand, Counsel for the General Counsel understands that the ALJ seeks the positions of all parties with respect to the common interest doctrine issues presented in this case, and submits the instant brief accordingly.

Applicable Legal Standard

The common interest doctrine preserves the confidentiality of privileged communications that are distributed or disclosed in confidence to other parties having a common legal interest in furtherance of that interest. It is an exception to the general rule that disclosing an otherwise confidential communication to third-party outsiders or strangers to the attorney-client relationship waives the privilege. *U.S. v. BDO Seidman, LLP*, 492 F.3d 806 (7th Cir. 2007); *Schaeffler v. U.S.*, 806 F.3d 34, 40-41 (2d Cir. 2015); *Parts Depot*, 332 NLRB 670 677 (2000). Thus, the common interest doctrine only applies if a communication otherwise satisfies the

[1] The present brief assesses only the common interest doctrine issue. To the extent that the April 6, 2017 email from PMA counsel Jonathan Fritts to ALJ Steckler and the parties also asserts a privilege arising out of *Berbiglia, Inc.*, 233 NLRB 1476 (1977), Counsel for the General Counsel intends to address any *Berbiglia* issues in its brief to be filed on April 18, 2017 with respect to various privilege issues as between Everport and the General Counsel. Counsel for the General Counsel also wishes to note that since the Region has not yet received the transcripts from any of the hearing dates during the week of April 3-7, 2017, Counsel for the General Counsel must and can only rely upon notes taken at the hearing for purposes of preparing the present brief.

requirements of the attorney-client privilege or attorney work product doctrine. In other words, the doctrine only applies when a valid underlying privilege (either attorney-client privilege or attorney work product) already exists; it is not an independent basis for privilege. *Cavallaro v. U.S.*, 284 F.3d 236, 250 (1st Cir. 2002); *MGA Entertainment, Inc. v. National Products Ltd.*, 2012 WL 3150532 (C.D. Cal. 2012); *Griffith v. Davis*, 161 F.R.D. 687, 691 (C.D. Cal. 1995). As with the attorney-client privilege, the burden of demonstrating the appropriateness of the common interest doctrine in a given case is on the party asserting it. See *Ishee v. Federal National Mortgage Association*, 2014 WL 2162753 (S.D. Miss. 2014); *In re Santa Fe International Corp.*, 272 F.3d 705, 710 (5th Cir. 2001).

The common interest doctrine is to be narrowly construed and a party asserting the doctrine must show that there was an agreement embodying a cooperative and common enterprise towards an identical legal strategy. *Denney v. Jenkins & Gilchrist*, 362 F.Supp. 2d 407, 415 (S.D. N.Y. 2004). See *Maplewood Partners, L.P. v. Indian Harbor Insurance Company*, 295 F.R.D. 550, 607-608 (S.D. Fla. 2013) (common interest doctrine does not render legal system more efficient nor necessarily serve purposes of justice; common interest doctrine increases litigation as it creates uncertainty as to boundaries of privilege). Merely having similar desires does not meet the doctrine's requirements of a common legal interest. *SR Int'l Bus. Ins. Co. v. World Trade Center Prop.*, 2002 WL 133482 (S.D.N.Y. 2002) (sharing a desire to succeed in an action does not create a common interest); *Verigy US, Inc. v. Mayder*, 2008 WL 5063873 (N.D. Cal. 2008) ("enemy of my enemy is my friend" does not create common interest; shared desire to see a party succeed in an action is insufficient and desire to maintain a cordial business relationship is commercial, not legal, interest). See also *Bass Public Ltd. Co. v. Promus*

Companies, Inc., 868 F.Supp. 615, 621 (S.D.N.Y. 1994) (no common interest where two companies were not co-defendants and there was no evidence that they anticipated being so).

With the above principles in mind, Counsel for the General Counsel submits that the information set forth in the April 6, 2017 email from PMA counsel, combined with the statements on the record from Everport counsel, fall short of satisfying the burden which PMA and Everport must meet in order to invoke protection under the common interest doctrine or the threshold attorney-client privilege.

Factual Background

Respondent Everport and PMA, at minimum, assert the common interest doctrine with respect to meetings that took place on September 2, 2015, October 7, 2015 and November 4, 2015.[2] Per the notes of Counsel for the General Counsel, the attendees at the September 2, 2015 meeting were PMA President George Lang, PMA counsel Joseph Akrotirianakis, PCMC President Joe Gregorio, PCMC executive Darrin Del Conte, PMA President James McKenna, PMA Senior Vice President Labor Relations and Chief Operating Officer Stephen Hennessey, then-PMA Coast Director Richard Marzano, and one or both of PMA Senior Vice President, General Counsel, and Secretary Craig Epperson and PMA in-house counsel Todd Amidon. However, due to the assertion of the common interest doctrine by Everport immediately upon the attempt by counsel for the IAM to ask Lang about the September 2, 2015 meeting, the notes from Counsel for the General Counsel reflect that no testimony was received with respect to the names of the persons attending the October 7, 2015 and/or November 4, 2015 meetings. While the April 6, 2017 email from Fritts/PMA suggests that representatives of ILWU were present for

[2] These dates are derived from Fritts' April 6, 2017 email. Counsel for the General Counsel's notes also indicate that Everport counsel Joseph Akrotirianakis even made a reference on or off the record to a possible fourth meeting to which the common interest doctrine should attach, although no party followed up with respect to the date of, attendees, or other circumstances surrounding any alleged fourth meeting.

the October 7, 2015 meeting but not the September 2, 2015 meeting, Fritts' email does not list the attendees at any of the three pertinent meetings. The parties are thus left with only the very generalized description from paragraph 29 of the Declaration of George Lang in Opposition to Petition for Temporary Injunction in Case CV-17-0804-RS in the proceeding in the United States District Court for the Northern District of California, wherein it states "I attended meetings on September 2, 2015 and October 7, 2015. Present for each meeting were members of PMA's executive leadership team, Mr. Gregorio, myself, as well as counsel for PMA, Mr. Gregorio, and Everport." Thus, Lang's declaration suggests that counsel for PCMC was potentially present for the September 2, 2015 and October 7, 2015 meetings but Lang did not testify to the presence of PCMC counsel (or his/her name or names) while on the stand in the instant hearing. There is no evidence in the present record (or the Lang district court declaration) with respect to the attendees at the November 4, 2015 meeting.

Legal Analysis

The above-described lack of complete information as to the exact participants/attendees in the pertinent meetings is alone a sufficient basis for refusing to apply common interest doctrine protection at the present juncture. Furthermore, there is other basic foundational information needed for the ALJ to assess the common interest doctrine that is not evident from the present record. For example, there is no evidence of whether the purpose(s) of these meetings were discussed by participants in advance of the meeting(s), how long each meeting lasted and whether each participant was present for all or only part of the meeting(s), whether, when and by whom participants were told that the meeting(s) or their subject matter was to be confidential, what topics were discussed at the meeting(s) and how much time was spent on each topic, who opened the meeting(s) and what was said about the purpose(s) of the meeting(s),

whether any notes and/or minutes were taken in the course of the meeting(s), and/or whether any written materials were distributed at any of the meeting(s).

In the absence of this type of foundational evidence, it would be premature at best for the ALJ to find that protection under the common interest doctrine has been established. While one can easily imagine a situation in which a common interest is found as between a multiemployer association and a member employer of that association, neither PMA nor Everport have pointed to any case which establishes that the common interest doctrine automatically applies in situations in which a multiemployer association meets with one or more of its employer members with counsel for both the multiemployer association and the employer member present (let alone that it applies to every communication made at such meetings).

When IAM counsel sought to question Lang about the meetings at the hearing, Everport counsel argued among other things that the presence of Joe Gregorio (of PMA-member PCMC) and unnamed counsel for PCMC at no less than two of the pertinent meetings in no way detracted from the applicability of the common interest doctrine because PCMC, like Everport, is a member of PMA. Counsel for the General Counsel respectfully disagrees on at least two grounds. First, the present record is insufficient to demonstrate why Gregorio or his counsel was present for any of the pertinent meetings. As set forth in the Restatement (Third) of the Law Governing Lawyers sec. 68, the attorney-client privilege may be invoked with respect to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client. It is not possible at this point to assess whether Gregorio is a "privileged person" or whether statements made at the pertinent meetings were made "in confidence" without further evidence of the reason for the attendance of Gregorio (and his counsel). Put plainly, if the idea behind confidentiality is that information should only

be shared with those who "need to know", why did Gregorio need to know about the matters discussed at these meetings? Gregorio's presence suggests that the meeting(s) was/were not confidential. Everport was not in any type of contractual relationship with PCMC as of the dates of the pertinent meetings (at least at the Nutter Terminal in Oakland). Indeed, given the insufficiency of the present record, as well as the previous testimony by Lang that he did not really care which of Gregorio's companies Gregorio decided to utilize if Gregorio were to agree to perform the marine maintenance and repair work at the Nutter Terminal for Everport, one cannot presently rule out the possibility that Gregorio attended the meetings not on behalf of PCMC but rather in his capacity as President of Pacific Marine Maintenance Company (PMMC), the Gregorio-owned company which is not a member of PMA at all. The case for attorney-client privilege and the common interest doctrine would be even more attenuated in that event.

Second, there are no apparent limits on the rationale which we understand Everport to be advancing. The 2016 PMA Annual Report already in evidence as ILWU Exh. 27 shows that PMA had eighty employer members as of 2016 (set forth alphabetically from American President Lines, Ltd. to Zim American Integrated Shipping Service Company, Inc.). Per Everport's rationale, at least as presently understood by Counsel for the General Counsel, the common interest doctrine would cover and privilege a PMA meeting at which all eighty employer members and their counsel were represented, even if the subject matter of that meeting was actual or potential litigation involving only one of the members. Such a sweeping and expansive interpretation of the common interest doctrine should not be countenanced.

The cases relied upon by PMA in its April 6, 2017 email are not to the contrary. *In re Plasma-Derivative Protein Therapies Antitrust Litigation*, 2013 WL 5274296 (N.D. Ill 2013) is not on point insofar as it involved an attempt by the plaintiffs in that case to take the depositions

of the attorneys for the non-profit trade association, whereas no party is presently seeking to receive testimony from PMA counsel Epperson and/or Amidon with respect to the meetings in the instant case. The court in *Plasma-Derivative* also noted that deposing an opponent's attorney is a particularly drastic measure, and further noted the availability to plaintiffs therein of traditional discovery tools like interrogatories and requests for admissions which are not available to the IAM or the General Counsel in the instant case. Similarly, *In re Imperial Corporation of America*, 179 F.R.D. 286 (S.D. Cal. 1998) involved communications between a debtor-in-possession and a creditors committee in a bankruptcy proceeding which is in no way analogous to the relationship between Everport and PMA in the present case. Nor does Counsel for the General Counsel quarrel with the general principle set forth in *In re Grand Jury Subpoenas*, 902 F.2d 244, 248-249 (4th Cir. 1990) and other cases that clients who share a common interest in a legal matter cannot waive the attorney-client privilege for the other without their consent. Counsel for the General Counsel simply contends that the threshold requirements for valid application of the attorney-client privilege and common interest doctrine have not yet been met in this case.

In the event that the ALJ disagrees and finds that the common interest doctrine has been properly asserted herein, the IAM and the General Counsel should nevertheless be permitted to question Lang about his own statements at any of the pertinent meetings. As made clear in the *Maplewood Partners, L.P. v. Indian Harbor Insurance Company*, 295 F.R.D. 550, 605-606 (S.D. Fla. 2013) case cited by PMA/Fritts, "one member of a joint defense group cannot waive the privilege that attached to the information shared another member of the group without the consent of that member, but any defendant could, of course, testify as to her own statements at any time."

Finally, the ALJ has requested the parties' positions on when any common interest doctrine protection should be deemed to have come into effect. In accordance with our position as set forth above that it is premature to apply common interest doctrine protection at the current time and on the present record, Counsel for the General Counsel takes no position at this time on the question of when the common interest should be deemed to have arisen. It is especially difficult to assess this question in light of the uncertainties discussed above with respect to the role of Gregorio, PCMC or PMMC at the above meeting(s).

DATED AT Oakland, California this 14th day of April, 2017.

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