

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA**

MARINKA PESCHMANN,

Plaintiff,

vs.

BLOGTALKRADIO, INC., CINCHCAST,
INC., STEPHEN QUAYLE, DOUGLAS
HAGMANN and DOES 1-20,

Defendants.

Civil Action No. 17-cv-00259(SPB)(RAL)

**DEFENDANT HAGMANN'S
MOTION FOR PROTECTIVE ORDER**

Defendant, Douglas Hagmann, by and through his counsel, Marsh Schaaf, LLP, submits this Motion for Protective Order pursuant to Fed.R.P. 26(c)(1) and in support thereof states as follows:

1. On January 17, 2020, Plaintiff served her First Set of Interrogatories and Requests for Documents and Things to Defendant Hagmann.
2. On February 18, 2020, counsel for Defendant Hagmann served Defendant Hagmann's response to Plaintiffs discovery requests via email.
3. Counsel had intended to email a clean PDF of these responses to Plaintiff, but inadvertently "clicked" on a Microsoft Word document, which contained comments from Hagmann intended for Counsel only (the "Privileged Document").
4. A copy of this Privileged Document can be provided to the Court *in camera* or under seal if the Court deems it necessary.

5. The drafters of the Federal Rules of Evidence and Civil Procedure specifically recognized (a) the possibility that privileged information could be inadvertently disclosed and (b) provided a method for rectifying this problem.

6. Federal Rule of Evidence 502(B) provides that when an “inadvertent disclosure” occurs in a federal case, the disclosure does not operate as a waiver of the attorney-client privilege if: (1) the disclosure was inadvertent; (2) the holder of the privilege took reasonable steps to prevent disclosure; (3) and the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

7. Fed. R. Civ. P. 26(b)(5)(B) allows for a party who inadvertently disclosed privileged information to notify the receiving party of the inadvertent disclosure. After being notified, the Rule requires that a party must promptly “return, sequester, or destroy the specified information and any copies it has, and must not use or disclose the information until the claim is resolved; must takes reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim.” *See* Fed. R. Civ. P 26(b)(5)(B).

8. In this case, the disclosure of the Privileged Document was clearly inadvertent. It was the result of counsel selecting the wrong electronic file to attach to the email sent to Plaintiff. Defendant Hagmann, the holder of the privilege, only sent this document to his counsel and thus took reasonable steps to prevent its disclosure.

9. As such the first two requirements of F.R.E. 502(B) are met.

10. The third requirement of F.R.E. 502(B) was met when, two days after the Privileged Document was sent, counsel realized his error and sent an email to Plaintiff pursuant to F.R.E. 502(B) and F.R.Civ.P. 26(b)(5)(B).

11. This email notified Plaintiff of counsel's error and informed her of her obligation to destroy and/or delete the Privileged Document that had been inadvertently sent to her. Counsel also requested that Plaintiff confirm that this deletion had occurred. *See* Email from Attorney Michael Agresti to Plaintiff and Attorney Bruce Rosen dated February 20, 2020, attached hereto as Exhibit A.

12. Plaintiff did not respond to this request for confirmation.

13. Instead, on February 25, 2020, Plaintiff served her Second Set of Discovery Requests to Defendant Haggmann.

14. Upon reviewing these discovery requests, counsel for Haggmann was concerned that Plaintiff was intending to utilize the Privileged Document. This prompted Counsel for Haggmann to request a Rule 26(c)(1) telephone conference with Plaintiff and Attorney Rosen.

15. This telephone conference occurred on March 12, 2020.

16. During that telephone conference, counsel for Haggmann specifically asked Plaintiff if she would agree to destroy/delete the Privileged Document and not utilize the inadvertently disclosed privileged communications.

17. Plaintiff refused to make that commitment.

18. Plaintiff and counsel for Haggmann again spoke on March 16, 2020. During this phone call Plaintiff verbally committed to not using the Privileged Document.

19. Thereafter, through a series of emails, counsel sought to obtain Plaintiffs' stipulation to a protective order based on the verbal commitment she had made.

20. Ultimately, when Plaintiff refused to stipulate to a protective order, counsel sought a simple written confirmation via email of Plaintiff's promise to not use the Privileged Document.

21. Plaintiff refused this request.

22. As a result, Defendant Hagmann is left with no choice but to file the instant Motion to preserve his right to the attorney-client privilege and preclude any use of the Privileged Document or its contents.

23. Based upon the clear language of Fed. R. E. 502(B) and Fed. R. Civ. P. 26(b)(5)(B), Plaintiff should be precluded from disclosing and/or using the Privileged Document (or its contents) in this matter or for any other purpose.

WHEREFORE, Defendant, Douglas Hagmann, hereby requests that this Court enter an Order finding that Defendant Hagmann's claim of attorney-client privilege with respect to the Privileged Document was properly preserved and that Plaintiff is precluded from using or disclosing that information in any manner in this proceeding or for any other purpose.

MARSH SCHAAF, LLP

By: /s/ Michael A. Agresti, Esq.

Michael A. Agresti
300 State Street, Suite 300
Erie, PA 16507
(814) 456-5301
Attorney for Defendant, Douglas Hagmann

Dated: March 20, 2020