

ORDER granting 133 Motion to Compel. The plaintiffs have moved to compel production of a document that the defendants initially produced in unredacted form, but clawed back and produced in redacted form under a claim of privilege. The Court reviewed the unredacted document in camera. The plaintiffs requested oral argument, but the defendants did not. The Court deems argument unnecessary to the resolution of this motion, and it decides the motion on the papers in the plaintiffs' favor for the following reasons."A party invoking the attorney-client privilege must show (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice." *In re Cnty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) (citing *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996)). The party invoking the privilege bears the burden of proving that each of the three elements is satisfied. *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000). Where, as here, the third element is contested, the privilege proponent does not meet its burden merely by showing that an attorney was copied on the communication, or that he was one of the communicants, or even that his advice was requested or given. *Pfizer Inc. v. Regor Therapeutics Inc.*, No. 3:22-cv-190 (JAM), 2023 WL 1766419, at *3 (D. Conn. Feb. 3, 2023). Rather, the proponent must show that the advice requested or given was legal in nature. *In re Cnty. of Erie*, 473 F.3d at 419. Attorneys are sometimes asked to give business as well as legal advice, and their communications are not privileged when they are advising in a business capacity. *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir. 1984). "[L]egal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct[,]" and it "requires a lawyer to rely on legal education and experience to inform judgment." *In re Cnty. of Erie*, 473 F.3d at 419. When a communication involves both legal and business advice, it is privileged from disclosure only if the legal advice was the "predominant purpose," as the defendants concede. (ECF No.

138, at 3) (citing *In re Cnty. of Erie*, 473 F.3d at 419). The Court has reviewed the unredacted document in camera, and it observes no legal advice or requests for legal advice in the two sections that the defendants redacted, notwithstanding their affiant's statements. The links of the email chain are as follows: (1) The internal portion of the email chain begins with a non-lawyer VP for contracting and payer relations asking a non-lawyer communications strategist to prepare a business communication to certain medical provider groups. The VP copies Attorney Daniel Kalosieh, among others. But there is no request for legal advice in this link of the chain, notwithstanding the VP's affidavit. The communication asks for action from the strategist, and the strategist only. (2) The strategist then sends a proposed communication back to the VP and one other non-lawyer, cc'd to three others, including Attorney Kalosieh. The strategist's email contained no request for legal advice, and while it requested "feedback" on the proposed communication, it requested it only from the VP. (3) In the first of the two redacted sections, Attorney Kalosieh responded to the strategist's email. But his response is not legal in nature, inasmuch as it shows no application of legal principles or anything requiring legal education or experience. To the contrary, it addresses only the business issue of how the communication might be received by its intended audience. (4) In the second redacted section, the VP responds, but the response likewise contains no legal advice or request for legal advice. The Court has carefully studied the VP's affidavit, including its claim that, when she copied Attorney Kalosieh on the first link of the chain, she "deliberately copied" him "for the sole purpose of obtaining legal advice regarding the potential legal implications of a proposed communication to ICP members and to ensure that it did not run afoul of any laws, regulations, or applicable... contracts." (ECF No. 139, at 2.) Although sworn to under penalty of perjury, the Court is unable to credit this claim. The email asks for no action from the attorney, and he evidently did not understand it to be asking for his legal opinion on compliance issues - because again, his response only concerned the

business problem of how the communication would be received by its audience. While it is true that a lawyer's advice does not have to be exclusively legal in nature, as the defendants note (ECF No. 138, at 3) (citing *Barbini v. First Niagara Bank, N.A.*, No. 16-c999, 2018 WL 11430863, at *3 (W.D.N.Y. July 16, 2018), the legal advice must predominate over the business advice. In *re Cnty. of Erie*, 473 F.3d at 419. Here, the legal advice not only does not predominate; it is entirely absent. The defendants bear the burden to prove each and every element of their privilege claim, including that the communication was legal in nature, *id.*, and they have not done so. The plaintiffs' motion is therefore granted, and the defendants are directed to produce the document in unredacted form by March 13, 2026. It is so ordered. Signed by Judge Thomas O. Farrish on 03/06/2026. (Farrish, Thomas) (Entered: 03/06/2026)