


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IMPOSSIBLE FOODS INC.,)	
)	
Plaintiff,)	C.A. No. 22-311 (WCB)
)	
v.)	
)	
MOTIF FOODWORKS, INC.,)	REDACTED - PUBLIC VERSION
)	Original Filing Date: May 16, 2023
Defendant.)	Redacted Filing Date: May 23, 2023

**LETTER TO THE HONORABLE WILLIAM C. BRYSON
FROM JEREMY A. TIGAN SEEKING A PROTECTIVE
ORDER AND AN ORDER COMPELLING PRODUCTION**

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I. Statement of Facts

We recently learned that [REDACTED]. Based on what we currently know, [REDACTED]. [REDACTED] at least Sarah Nasir (who went by the pseudonym “Sarah Jamil”) and “Bill Weller” to approach Motif with the fabricated interest of using Motif’s products in their meal kit business, “Food 4 Thought.” *See* Brozek Decl. at ¶¶ 5-8; Kennedy Decl. at ¶¶ 6, 13-15; Dacri Decl. at ¶¶ 13-19. They corresponded with senior Motif employees over the course of many months, feigning interest in Motif’s products and collaboration. *See* Brozek Decl. at ¶¶ 6-8; Dacri Decl. at ¶¶ 5, 7, 20-26. For example, Motif’s Director of Business Development, Joanne Kennedy, had a meeting with Nasir and Weller on December 6, 2022. *See* Kennedy Decl. at ¶¶ 7-10. Nasir and Weller mentioned that their attorney “Eric” was listening in on the conversation. *See id.* at ¶ 11. They described false origins of their business, proffered fictitious email addresses and requested samples of Motif food products under the guise of a proposed product distribution relationship. *See id.* at ¶¶ 13-17.

After discovering their true affiliations, Motif ceased all communications. Kennedy Decl. at ¶¶ 25; Dacri Decl. at ¶ 19; Brozek Decl. at ¶ 8. In addition to Nasir and Weller, Motif has been subject to additional suspicious attempts to obtain information about its products. Dacri Decl. at ¶¶ 5-12; Brozek Decl. at ¶¶ 9-11. Motif now suspects [REDACTED] as well. On April 25, 2023, Motif [REDACTED]. Ex. 1 at 1. In response, [REDACTED]. Ex. 2 at 1.

II. Protective Order Is Warranted

Motif is a party represented by counsel in an active litigation. Under well-established rules, [REDACTED] “shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter.” RPC 4.2.¹ This includes Motif’s employees, who among other things are responsible for managing Motif’s sales and business development (*see* SOF). *See* Delaware Lawyers’ Rules of Professional Conduct at Rule 4.2, comment 7 (“In the case of a represented organization, this Rule [4.2] prohibits communications with a constituent of the organization . . . whose act or omission in connection with the matter may be imputed to the organization for purposes of civil . . . liability.”). And “engag[ing] in *ex parte* communications . . . using [a] private investigator” is a “violation of RPC 4.2.” *In re Complaint of PMD Enterprises Inc.*, 215 F. Supp. 2d 519, 532 (D.N.J. 2002); *see also* *Midwest Motor Sports v. Arctic Sales, Inc.*, 347 F.3d 693, 698 (8th Cir. 2003) (“[T]he [ABA] Rules also prohibit contact performed by an investigator acting as counsel’s agent.”).

[REDACTED]. In doing so, [REDACTED], including the Court’s power to manage discovery. The use of such false

¹ Herein, “RPC” refers to the both the American Bar Association and Delaware Lawyers’ Rules of Professional Conduct because the cited rules appear identically in both RPC.

pretenses is alarming, unethical, and warrants a protective order. For example, in *Meyer v. Kalanick*, the Court held that a protective order was appropriate where an investigator hired by one party “made materially false statements about why he was contacting” the other party. 212 F. Supp. 3d 437, 440 (S.D.N.Y. 2016). The Court enjoined the offending party and its investigator from undertaking any further investigations. *Id.* at 450. Additionally, a protective order is warranted to ensure [REDACTED]. *Id.* at 449.

Impossible opposes a protective order based solely on [REDACTED]
[REDACTED]
[REDACTED] Ex. 3 at 2. But, respectfully, there is no reason to accept this representation. Here, [REDACTED]
[REDACTED]
[REDACTED]. *See* SOF.

III. Impossible Should be Compelled to Produce [REDACTED]

As a practical matter, Motif and the Court will only know the full extent of [REDACTED]
[REDACTED] and what the appropriate remedies may be if [REDACTED]
[REDACTED]. However, Impossible refuses to produce any information exchanged between either [REDACTED]
[REDACTED] is (1) not relevant (Ex. 3 at 1), and (2) “obviated” by [REDACTED]
[REDACTED] (*id.*).

First, communications exchanged [REDACTED] are relevant to whether [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. These [REDACTED]
[REDACTED] to Motif’s employees. *See* SOF. Therefore, these communications are relevant to whether [REDACTED] are “responsible for the conduct of” their investigators pursuant to RPC 5.3(c) because they knowingly ordered or ratified [REDACTED] (RPC 5.3(c)(1)) or knew of the conduct in advance but failed take remedial action (RPC 5.3(b)(2)). Furthermore, these communications are probative of whether they violated RPC 8.4(a) by knowingly assisting or inducing a violation of the RPC.

Second, these communications are relevant to whether [REDACTED]
[REDACTED]. In *Site 2020 Inc. v. Superior Traffic Servs.*, “the Court ha[d] no difficulty finding by clear and convincing evidence that [plaintiff] acted willfully and in bad faith” based on “evidence demonstrating that while this litigation was pending, [plaintiff] accepted [defendant’s] offer to demonstrate its [products] to what it thought was a potential customer” but was actually plaintiff’s agent. C.A. No. 21-63-M-DLC-KLD, D.I. 132 at 27-28 (D. Mont. March 27, 2023) (Ex. 4). The *Site 2020* court found that “[e]mails exchanged between [plaintiff’s principals] prior to [defendant’s] product demonstration reflect that [plaintiff’s principals] were both directly involved in planning to have [plaintiff’s agent] attend the demonstration posing as a” potential business partner. *Id.* at 28. All communications related to [REDACTED] should be produced to determine [REDACTED]. Impossible is wrong that the need for this discovery is “obviated” by its claim that [REDACTED]

Ex. 3 at 1. As the *Site 2020* court held, “[e]ven accepting [plaintiff’s] assertion that it has not and will not use any information obtained during the meeting with [defendant] in this litigation, this does not change the fact that [plaintiff’s] principals willfully engaged in deceptive conduct toward an opposing party during the course of litigation, circumvented the discovery rules to obtain information relevant to the merits of [plaintiff’s] claims, and in doing so deprived [defendant] of the benefit of counsel.” Ex. 4 at 36. Where, as here,

██████████ Motif and Court should be given the opportunity to assess the extent to which Impossible

Third, Motif has reason to believe that, despite [REDACTED]
[REDACTED]. For example, [REDACTED]. Ex. 2 at 1. To date, however, [REDACTED]
[REDACTED]
[REDACTED]. *See* SOF. Nor have [REDACTED]
[REDACTED] the earlier suspicious attempts to solicit information and materials from Motif’s employees. *See id.*

IV. [REDACTED] Are Not Protected By Any Privilege

Impossible also opposes production of communications with WSGR [REDACTED] on the grounds that they are protected by attorney-client and/or work product privileges. Ex. 2 at 2. However, Impossible and its counsel waived any right to claim privilege when [REDACTED]. In *Meyer*, given RPC violations and the serious nature of the illicit conduct, the court ordered production of “[a]ll documents concerning or relating to any kind of investigation or background research,” including but not limited to communications between the client, its counsel and the investigators. C.A. No. 15-9796-JSR, D.I. 63 at 6-7 (S.D.N.Y. May 27, 2016) (Ex. 5). Although the bad actors in *Meyer* later objected to the production of documents ostensibly covered by the attorney-client and/or work product privileges, the court nevertheless held that they were subject to the crime-fraud exception. 212 F. Supp. 3d at 447.

Here, Motif “ha[s] provided a sufficient basis to suspect that [REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] *Id.* at 442. Just like in *Meyer*, no privilege applies
because, [REDACTED]
[REDACTED] *Id.* at 440, 444. And “[work product]
protection [is] overcome in light of [Motif’s and the Court’s] substantial need for, and inability to
obtain by other means, [REDACTED] or their substantial equivalent, without undue
hardship.” *Id.* at 443 (citing Fed. R. Civ. P 26(b)(3)(A)(ii)). [REDACTED] attempt
to shield [REDACTED] from discovery should be rejected.

In light of the above, Motif requests that the Court enter its Proposed Order. *See* Ex. 6.

Respectfully,

/s/ Jeremy A. Tigan

Jeremy A. Tigan (#5239)

Attachment(s)

Declaration of Julia Dacri

Declaration of Joanne Kennedy

Declaration of Joe Brozek

cc: Clerk of the Court (via hand delivery)
All Counsel of Record (via CM/ECF and email)