



## Narayanan v. Sutherland Global Holdings Inc.

2018 | Cited 0 times | W.D. New York | January 25, 2018

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK  
MUTHU NARAYANAN, DECISION & ORDER  
Plaintiff, 15-CV-6165T v. SUTHERLAND GLOBAL HOLDINGS INC., Defendant.

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PRELIMINARY STATEMENT Pending before this Court is p d to produce documents as to which it has asserted attorney-client privilege. 1

(Docket # 45). First, Narayanan seeks unredacted preliminary and final versions of a report prepared for Sutherland by Freed Maxick CPAs, P.C. consulting and accounting firm. The Freed Maxick report -based law firm hired by

Sutherland. Although Sutherland previously produced a copy of the Report, it redacted those portions that reflected Second, Narayanan seeks emails and documents from the period September 2013 through March 2014 between and among Rank, Sutherland, and a certified public accountant and Managing Director of Freed Maxick (see Docket # 59-2 at ¶ 7). Sutherland opposes the motion. (Docket # 52).

1 Narayanan originally moved to compel a third set of documents email communications to an individual named Ramarao, a non-attorney financial advisor not employed by Sutherland. (Docket # 47 at 7-10). Sutherland has since agreed to produce those emails, acknowledging that they Docket # 52 at 6 n.1). Accordingly, those emails are not addressed herein.

involvement in communications between Rank and Sutherland waived the attorney-client privilege. Narayanan also maintains that Sutherland has waived any privilege attaching to the communications by placing the advice provided by Rank at issue in the litigation. Sutherland counters that the privilege remains intact because Russo was an agent of Sutherland whose involvement was -client communications between Rank and Sutherland, or, alternatively, because employee. In addition, Sutherland maintains that it has not placed the communications at issue in this litigation. On May 17, 2017, the Court heard oral argument on the motion. (Docket # 58). The Court thereafter granted Sutherland leave to supplement the record and provided Narayanan the opportunity to respond. (Docket # 56). The parties completed supplemental briefing on June 21, 2017, and the Court heard further argument on August 17, 2017. (Docket ## 59, 61, 64). Based on the record before the Court and for the reasons explained more fully herein, I find that the communications at issue are not protected by any privilege. 2



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Because I find that the communications at issue are not protected, I do not reach the issue of whether Sutherland waived any privilege by putting the subject matter of the withheld communications at issue in this litigation.

2 As is discussed at length infra, I find that some of the communications simply did not constitute attorney-client communications, while other communications may have constituted attorney-client communications, but the inclusion of a third party in those communications, which this record does not demonstrate was necessary, waived any privilege attaching to those communications. Because the communications at issue encompass both types

BACKGROUND Narayanan commenced this diversity action on March 25, 2015, against Sutherland, asserting claims for breach of contract and unjust enrichment. (Docket # 1). Narayanan was a director of Sutherland and a director and/or officer of certain Sutherland overseas subsidiaries for more than ten years. (Id. at ¶ 8). In connection with his employment, Narayanan exercised his option to purchase company shares. (Id. at ¶ 19). In October 2014, the to be sold back to the company for approximately \$2 million. (Id. at ¶¶ 4-7). Narayanan claims that despite performing his obligations under the agreements, he has not received the purchase price for his shares. (Id. at ¶ 7). According to Narayanan, he resigned from Sutherland in October 2014. (Id. at ¶ 29). In its Answer, Sutherland asserts a defense of set-off, maintaining that Narayanan owes it a sum exceeds, and will be a complete set-off to, the amount of money # 12 at ¶¶ 59-86). Sutherland also asserts a counterclaim against Narayanan for breach of fiduciary duties, for which it claims damages of approximately \$6 million. (Id. at ¶¶ 97-104). The district judge denied Narayan counterclaim and to strike the set-off defense. (Docket # 37).

-off defense and counterclaim arise out of a series of transactions conducted by Narayanan in India. According to Sutherland, Narayanan was responsible for acquiring on behalf of Sutherland 26 contiguous acres of land in India. (Docket # 12 at ¶ 62). In connection with the expected acquisition, approximately \$10 million was allocated to be paid to third parties in exchange for deeds and to register the land. (Id. at ¶ 63). Sutherland claims that despite acquiring only 11 non-contiguous acres, Narayanan advanced the funds to a third-party

land aggregator named Mr. S. Venkataramanan ), primarily in exchange for promissory notes as opposed to deeds. (Id. at ¶¶ 64, 68). According to Sutherland, when it discovered that the funds had been advanced without the acquisition of the desired land, it concluded that but to work with [Narayanan] and Ramanan in an effort to Id. at ¶ 71). These efforts were ultimately unsuccessful. (Id.). In August 2013, Sutherland engaged Freed Maxick to investigate the Ac and detail its findings and recommendations in the Report. (Docket ## 47 at 7; 52 at 8). which was signed by Russo on behalf of Freed Maxick, the Report was expected to detail, among other things, its

[Sutherland]recommendations for improvements to internal controls at # 50-1). Vellodi has explained that Sutherland chose Russo to conduct the investigation because he had a long history with



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Sutherland with # 59-1 at ¶ 6). Between 1996 and 1998 Russo worked as Sutherland Senior Vice President of Finance, and between July 2014 and July 2015 as its interim Chief Financial Officer. (Docket ## 52 at 8-9; 59-2 at ¶ 6). Since April 2014, Russo, who is not an attorney (Docket # 46-16 at 54-60), has also served as Legal Coordinator (Docket # 59-2 at ¶ 4). Sutherland maintains that Russo is responsible for is matter. (Id. at ¶ 6). Also in August Indian- Id. at ¶ 11). Russo testified at

his deposition Case 6:15-cv-06165-EAW-MWP Document 91 Filed 01/25/18 Page 4 of 21 looking for and he asked Sutherland to retain a law firm. (Docket # 53-3 at 4). According to Vellodi, Rank was retained

to recoup the money that had allegedly been given to the land aggregator, Ramanan, but was now unaccounted for with no land having been regist (Docket # 59-1 at ¶ 8). Russo and his Freed Maxick team began the investigation of the Sutherland Land Acquisition in August 2013 and submitted the Report to Vellodi on or about September 12, 2013. (Docket # 50-2). The first paragraph of the Report states:

We have provided the consulting services summarized below, which were agreed to by Sutherland Global Services, Inc. and subsidiaries (Sutherland) in an [engagement] letter dated August 20, 2013, solely to assist you in the evaluation of certain real estate transactions entered into by Sutherland Development Company Private Limited (SDC) and to provide a limited general review of . . . Sutherland is also responsible for the design, implementation and maintenance of internal controls. (Id.). Of the twelve-page single-spaced Report, less than one page was redacted; the redacted section follows the paragraph that provides:

During the course of the engagement, we had various discussions with S.C. Raghuram from Rank Associates, a law firm in India that was retained by the company to advise on this matter. During these discussions, Mr. Raghuram provided the following advice. You should consider and seek further advice as necessary. (Id. (Id.)). Russo admits that during various occasions in order to provide, and explain, information uncovered during the investigation and how it was impacting Sutherland Global[,], includ[ing] but . . . not limited to,

the information 59-2 at ¶ 12). Rank partner S.C. ose conversations, as evidenced from . (See generally Docket # 50-7).

ries on the privilege logs identify communications during the September 2013 to March 2014 period in which Russo was a participant. 3

The earliest communications between Rank, Sutherland, and Russo are dated September 12, 2013, and were from Raghuram to Russo and Vellodi. (Docket # 50-7 at 2, items 1, 3, 5). These communications relate to [F] Id.). Raghuram also sent emails and documents to Russo and Vellodi in id. at 5- id. at 6-8, items 12, 13, 14, 18, 20, 22, 23, 24, 28). According to Sutherland, all of these emails



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and client communication[s] regarding [the] investigation into [the] Id.).

Communications between Rank, Russo, and Sutherland continued in November and December 2013. From November 13, 2013 to November 19, 2013, Raghuram and Russo exchanged emails regarding a meeting, regarding [the] Id. at 5, 8, items 5, 6, 29). Also, on

November 13, 2013, Russo sent himself a spreadsheet, with no attorneys copied therein; the log describes the communication as ion[s] regarding [the] Id. at 8, item 32). On November 29, 2013,

3 and Redaction Log. (Docket # 50-7). The Court notes that these privilege logs were submitted in a Delaware state court proceeding between the same parties. (Docket # 46 at ¶ 31). Narayanan has twice confirmed first in his memorandum of law (Docket # 47 at 9) and second at the August 17, 2017, oral argument (Docket # 64) that the documents he seeks to compel Sutherland to produce are those identified in the logs.

of Sutherland in India (Docket # 58 at 9), regardi [s] [the] sale of certain land

# 50- land acquisition did. at 2, item 2). Finally, on December 2, 2013, Kumar sent an email to [the] scope of work to be conducted by lawyers in connection with [the] Id. at 5, item 3).

DISCUSSION United States v. Sanders, 211 F.3d 711, 720 (2d Cir.), cert. denied, 531 U.S. 1015 (2000), and

handling of pre-trial discovery, In re Finch, Inc., 330 F.3d 104, 108 (2d Cir. 2003) (citations and quotation marks omitted). Rule 26 of the Federal Rules of Civil Procedure allows parties to obtain 26(b)(1). The current dispute turns on whether the documents at issue are privileged.

Attorney-Client Privilege New York, 4

the attorney-client privilege protects confidential communications Homeward Residential, Inc. v. Sand Canyon Corp., 2017 WL 4676806, \*5 (S.D.N.Y. 2017).

4 Pursuant to Rule 501 of the Federal Rules of Evidence, New York law governs claims of privilege in this diversity action. See Fed. R. Evid. 501; Ceglia v. Zuckerberg diversity action, insofar as [p]laintiff invokes the attorney-client privilege, the court is required to apply New York , , 2012 WL 3527935 (W.D.N.Y. 2012).

privilege exists requires common sense . . . in light of reason and experience, and should be determined on a case-by-case basis. Green v. Beer, 2010 WL 3422723, \*3 (S.D.N.Y. 2010) (quoting United States v. Adlman, 68 F.3d 1495, 1500 n.1 (2d Cir. 1995)). [T]he privilege is narrowly construed, and the party seeking to invoke it bears the burden of establishing that it applies, Ravenell v. Avis



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Budget Grp., Inc., 2012 WL 1150450, \*1 (E.D.N.Y. 2012), and that it has not been waived, Egiazaryan v. Zalmayev, 290 F.R.D. 421, 428 (S.D.N.Y. 2013). In general, such showings must be based on competent evidence, usually through affidavits, deposition testimony, or other admissible evidence, id. at 428, and cannot be met by mere conclusory or ipse dixit assertions, In re Grand Jury Subpoena Dated Jan. 4, 1984, 750 F.2d 223, 225 (2d Cir. 1984). A. Agency Exception Disclosure of attorney-client communications to persons outside the relationship generally waives the privilege. Ravenell v. Avis Budget Grp., Inc., 2012 WL 1150450 at \*2. Courts have recognized an exception where communications are made to counsel through a hired interpreter, or one serving as an agent of either attorney or client to Allied Irish Banks v. Bank of America, N.A., 240 F.R.D. 96, 103 (S.D.N.Y. 2007) (alterations and quotation marks omitted). exception must show: (1) a reasonable expectation of confidentiality under the circumstances,

and (2) that disclosure to the third party was necessary for the client to obtain informed legal Homeward Residential, Inc. v. Sand Canyon Corp., 2017 WL 4676806 at \*5 (quotation marks omitted).

With respect to attorney-client communication will remain confidential is ordinarily necessary to sustain the privilege, but a mere expectation ; it must also be reasonable. Training Grp., Inc. v. Skillsoft Corp., 1999 WL 378337, \*4 (S.D.N.Y. 1999); see also Ross v.

UKI Ltd., 2004 though a formal agency relationship is not required, the relationship between the client and the third party must be sufficiently close that the With respect to the second element, necessity Allied Irish Banks v. Bank of America, N.A., 240 F.R.D. at 103. Rather, the third party some specialized purpose in facilitating the attorney- Id. In other

words Id. at 104. s client. Therefore, communications with Freed Maxick disclosing attorney-client advice waived the privilege unless they fell within the agency exception at the time they were made. As an initial matter, I find that Sutherland has adequately demonstrated that its subjective belief that Russo and his investigative team would keep confidential the communications with Rank was reasonable under the circumstances. Vellodi

confidential had every reason to believe that any communications with Mr. Russo (Docket # 59-1 ¶ 10). Furthermore, Russo affirmed (Docket # 59-2 at ¶ 14).

Here, the applicability of the agency exception depends on whether Sutherland has demonstrated -client communications was -client See Allied Irish Banks, 240 F.R.D. at 103. To make that assessment, I address in turn the four categories of documents and communications identified in the logs: (1) those between Rank and Russo; (2) those from Rank to Russo and Sutherland; (3) those from Sutherland to Rank and Russo; and, (4) those from Russo to himself.

### 1. Communications between Rank and Russo



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(Docket # 50-7 at 5, 8, items 5, 6, 29) Sutherland has submitted no affidavits from any Rank attorneys concerning the nature of communications with Russo. Russo, on the other hand, has submitted an affidavit averring that he provided and explained information to Rank that was uncovered 59-2 at ¶ 12). Russo states that his disclosures and explanations to Id. at ¶ 13). Vellodi has affirmed

[Sutherland] employees were involved in the investigation, and the short time frame involved, absent Mr. Russo and his team gathering and analyzing the underlying facts, [Rank] would not have been able to provide [Sutherland] with competent legal advice with respect to Plaintiff and # 59-1 at ¶ 9). Stated another way, Russo provided Rank with the facts necessary for Rank to provide legal advice to Sutherland. (See Docket # team at Freed Maxick . . . provided the factual foundation and analysis upon which Rank based

Based on the record bef

one rejected by the Second Circuit in *United States v. Ackert*, 169 F.3d 136 (2d Cir. 1999). In *Ackert* had several conversations with a third-party investment banker concerning an investment proposal the investment banking firm had made to Paramount transaction and its potential tax consequences, so that he could advise his client . . . about the legal and financial *United States v. Ackert*, 169 F.3d at 138. Contending that these communications were privileged, Paramount its counsel] to advise [it] without these further contacts with [the banker], because [ counsel] could Id. at 139. The court held that, even assuming that the attorney the communications were not privileged. Id. As the court reasoned:

the banker] to translate or interpret information given to [the attorney] by [Paramount]; [r]ather, [the attorney] sought out [the banker] for information Paramount did not have about the proposed transaction and its tax s] role was not as a translator or interpreter of client communications, the [agency exception]

Id. at 139-40. The court emphasized that a communication between an attorney and a third party does not become shielded by the attorney-client privilege solely because the Id. at 139. The reasoning of *Ackert* compels a similar conclusion in this case. Here, Russo provided factual information to Rank that Sutherland did not itself possess; although it may have been helpful or convenient to Rank to speak directly to Russo, the record does not prove that Rank needed Russo to interpret the information for it. Indeed, Russo testified that Rank did not

provide advice about accounting matters. (Docket # 46-17 at 3). Accordingly, I find that the communications between Russo and Rank are not privileged. See *Ackert*, 169 F.3d at 139; see also *In re Application Pursuant to 28 U.S.C. Section 1782*, 249 F.R.D. 96, 101-02 (S.D.N.Y.

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### 2. Exchanges from Rank to Russo and Sutherland

(Docket # 50-7 at 2, items 1, 3, 5; at 5-8, items 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 20, 22, 23, 24, 28, 33) Regarding communications from Rank to Russo and Sutherland, Vellodi proffers one conclusory statement about :

my conferral with Mr. Russo was necessary and indispensable to [Rank], with respect to . . . how best to address the missing money that had allegedly been given by Plaintiff to [Ramanan]. (Docket # 59-1 at ¶ 9). As an initial matter, a proponent of privilege cannot meet the applicable burden In re Grand Jury Subpoena Dated Jan. 4, 1984, 750 F.2d at 225. Second, a review of the privilege log entries suggests that most of these communications relate to preliminary and final versions of the Report. Sutherland has offered no explanation for the purported need to include the purpose of which, according to the engagement letter, was to detail regarding the Sutherland Land Acquisition and to recommend internal controls. In the absence of proof to the contrary, I find that the decision to include l advice in the Report was one of convenience, rather than necessity. See Allied Irish Banks, 240 F.R.D. at 104. Moreover, there is no evidence that Rank attorneys could not have understood the Sutherland Land Acquisition or rendered legal advice to Sutherland about its options for recovering the advanced funds Indeed, Rank, an Indian-based law

# 59-2 at ¶ 11), was retained by Sutherland to advise on Indian-based real estate transactions. conclusory assertion, no specific factual showing has been made that Rank or Sutherland

required Russo to facilitate the provision of legal advice from Rank to Sutherland. Cf. United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) [h]ence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not to destroy the privilege, any more than would that of a linguist . . . of [a] . In short, the record is devoid of facts to demonstrate that Freed Max involvement ve[d] some specialized purpose in facilitating attorney- Allied Irish Banks, 240 F.R.D. at 103. Rather, the proof suggests that attorney-client communications was merely useful and convenient. That alone does not shield the privilege from waiver. See id. at 104.

### 3. Exchanges from Sutherland to Rank and Russo

(Docket # 50-7 at 5, item 3) The privilege logs reflect one communication from Sutherland to Rank and Russo a December 2, 2013, email from Kumar conducted by lawyers in connection with land transaction. 50-7 at 5, item 3). No

proof on the record justifies declaration addresses only his conferral with Russo, and not the involvement in communications from Kumar to addresses his communications with Rank, and does not reference his involvement in



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communications between Kumar and Rank several months after the issuance of the Report. Accordingly, Sutherland has failed to show that this communication is privileged.

### 4. Exchanges from Russo to Himself

(Docket # 50-7 at 8, item 32) Sutherland also asserts that a spreadsheet Russo emailed to himself is privileged. The log does not reflect that Rank was party to the communication, and the record does not otherwise demonstrate that the spreadsheet reflects privileged communications, let alone how such communications came to be included in the spreadsheet. Without more, Sutherland has not demonstrated that this communication is privileged.

\* \* \* In sum, on this record, I find that Sutherland has not met its burden of showing that Freed Maxick acted as its agent in any of the communications at issue. As a result, the communications at issue, including the redacted information in the Report, are not privileged under the agency exception. B. Functional Equivalent Doctrine Alternatively, Sutherland argues that attorney-client communications shared with Russo are privileged because Russo was a Sutherland employee. (Docket ## 52 at 13; 59 at 4-6). several within this Circuit, have adopted [the functional equivalent doctrine], it has never been

See *Church & Dwight Co. Inc. v. SPD Swiss Precision Diagnostics, GmbH*, 2014 WL 7238354, \*1 (S.D.N.Y. 2014). Assuming the viability of the doctrine in this Circuit, I nonetheless find that Sutherland has failed to demonstrate that Russo was the functional equivalent of a Sutherland employee. [C] merit [attorney-client privilege] protection if, by virtue of assuming the functions and duties of [a] full-time employee, the contractor is a de facto Exp.-Imp. Bank

of the United States v. Asia Pulp & Paper Co., Ltd., 232 F.R.D. 103, 113 (S.D.N.Y. 2005). In determining whether a third-party consultant should be considered the functional equivalent of a employee, courts evaluate:

whether the consultant had primary responsibility for a key corporate job, whether there was a continuous and close working relationship between the c rincipals osition in litigation, and whether the consultant is likely to possess information possessed by no one else at the company. *Id.* (internal citations omitted). The party asserting privilege bears the burden of showing that the third- *Id.* Here, the record demonstrates that Sutherland engaged Russo, a Director of Freed Maxick, outsourced internal control assessment services. (Docket # 50-1 at 2 (emphasis added)). His role included

# 59-1 at ¶ # 50-1 at 2), all of which were to be detailed in the Report. The record also reveals that Russo and his team traveled to India for less than two weeks to conduct the investigation. (Docket ## 60-2 at 2 (stating that Russo and his team were in India for 10 or 12 days in connection with the investigation); 50- visited the Chennai, India office and land holdings between August 28 and September 2, 2013 to





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. According to Sutherland, Russo was pursue the investigation as [he] (Docket # 59-1 at ¶ 8), and no Sutherland employees were involved in the investigation (Docket ## 59-1 at ¶ 9; 59-2 at ¶ 10). Russo provided the Report on Freed Maxick letterhead to Sutherland in September 2013. (Docket # 50-2). The

Report noted that although Sutherland had retained Freed Maxick to, among other things, Sutherland, and not Freed Maxick, ementation and

Id.). Sutherland cites several cases in support of its argument that Russo was the functional equivalent of a Sutherland employee. (Docket # 59 at 5-6). All are materially distinguishable from this case. In *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213 (S.D.N.Y. 2001), the defendant, a Japanese company, a dispute that had led to a

government investigation and civil litigation. *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. at 215. The company hired the public relations firm because the company in dealing with issues relating to publicity arising from high profile litigation, and because [the

company Id. The public relations firm the Tokyo headquarters and acted as the the dispute. Id. -house and outside counsel, the firm prepared internal statements establishing the scope of permitted communications by the employees concerning the dispute. Id. at 216. The firm also made statements on behalf of the company and had the authority to the company] concerning its public relations Id. at 215-16, 219. In these functions, the firm also sought advice from the counsel. Id. at 216. On this record, the court found:

[the public relations firm] was the functional equivalent of an in-house public relations department with respect to Western media relations having authority to make decisions and statements from t unsel with respect to the performance of its duties. Id. As the court reasoned, the public relations firm was [ ] incorporated into [the ] staff to perform a corporate function that was necessary . . mely, to make public relations decisions and statements on behalf of the company, recognizing that those statements Id. at 216, 219. In *American Manufacturers Mutual Insurance Company v. Payton Lane Nursing Home, Inc.*, 2008 WL 5231831 (E.D.N.Y. 2008), another case upon which Sutherland relies, the defendant sought production of communications between plaintiffs counsel and a non-party construction management services company, Greyhawk , which plaintiffs had retained Am. Mfrs. Mut. Ins. Co. v. Payton Lane Nursing Home, Inc., 2008 WL 5231831 at \*2. Grey

Id. at \*3. In a

subcontractors had clear legal ramifications Id. Based on these considerations, the court found Greyhawk to be . Id. Finally, Sutherland relies on *Twentieth Century Fox Film Corporation v. Marvel Enterprises, Inc.*, 2002 WL 31556383 (S.D.N.Y. 2002). There, the documents at issue were disclosed by independent contractors, who provided production-related services. *Twentieth Century Fox Film*



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Corp. v. Marvel Enters., Inc.,

2002 WL 31556383 at \*1-2. Fox claimed that the documents were protected by the attorney-client privilege because it made an Twentieth Century Fox Film Corp., 2002 WL 31556383 at \*1. The court held that the independent contractors were the functional equivalent of employees. Id. at \*2. The court reasoned:

determination to conduct its business through the use of independent contractors is a result of the sporadic nature of employment in the motion picture industry . . . . The fact that the nature of the industry dictates the use of independent contractors over employees should not, without more, create greater limitations on the scope of the attorney-client privilege. Id. Here, by contrast, Sutherland has proffered no evidence that it retained Freed Maxick as part of an ntractors rather than employees. See id. at \*1-2. Indeed, the engagement letter makes clear that Sutherland, not Freed Maxick, retained the authority to make decisions on the issues about which Freed Maxick was consulted a distinction of material significance. Cf. In re Copper Mkt. Antitrust Litig., 200 F.R.D. at 219 the public relations firm] possessed authority to make decisions on behalf of [the company] concerning its public relations strategy[,] [and] [t]he legal ramifications and potential adverse use of such communications were material factors in the development of the communications[;] [i]n formulating communications on [ ] behalf, [the public relations firm] sought advice from [ ] counsel and was privy to advice concerning the scandal and attendant Am. Mfrs. Mut. Ins. Co. [m] services in connection with pursuing payment from [the defendant], including articulating positions on behalf of [the plaintiffs], required consultation with and the receipt of legal advice Unlike the cases cited by Sutherland, the record in this case does

not demonstrate that Russo (or Freed Maxick) had similar authority. Rather, Freed Maxick was engaged to conduct a fact-gathering investigation and to propose recommendations concerning internal controls to Sutherland, not to decide whether to adopt them. See, e.g., Steinfeld v. IMS Health Inc., 2011 WL 6179505, \*4 (S.D.N.Y. 2011) (finding compensation consultant was not

[consultant] exercise[d] any measure of independent decision-making authority within [;] [i]nstead, it a comments, and (non- Indeed, Freed Maxick explicitly represented in the Report

maintenance of internal controls. (Docket # 50-2 at 2). Moreover, no evidence exists in the record that Russo and his team held themselves out to third parties as representatives of Sutherland or were viewed by others as employees of Sutherland. See, e.g., Steinfeld v. IMS Health Inc., 2011 WL 6179505 at \*3 [consultant] has ever appeared on behalf of [defendant], corresponded with third parties as a representative of [defendant], or . Nor, on this record,

[anticipated] at the time of the communications. See Exp.-Imp. Bank of the United States v. Asia Pulp & Paper Co., Ltd., 232 F.R.D. at 113. Sutherland argues:



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i -long relationship with Mr. Vellodi and Sutherland Global, including his subsequent employment as Legal Director, he was hired to acquire and articulate the underlying facts which, ultimately, formed the basis against both [p]laintiff and Ramanan.

(Docket # 59 at 5). The simple uncovered and developed facts that were used in this litigation does not prove the existence of that type of relationship. That Russo himself was a Sutherland employee during periods before and after his investigation of the Sutherland Land Acquisition also does not demonstrate that he was he learned the attorney-client communications at issue. See *Exp.-Imp. Bank*, 232 F.R.D. at 113. In addition, even if Russo learned factual information about the Sutherland Land Acquisition that no one else at Sutherland knew, that fact alone does not transform Russo into a functional equivalent of a Sutherland employee. See *Homeward Residential, Inc.*, 2017 WL 4676806 at \*14 (finding that third-party data storage and management company was not the functional equivalent even if it had information possessed by ; carry out important functions and services, including but not limited to shipping, accounting, customer service, and, as here, data storage and management[;] [i]f this relationship satisfied the functional ). On the record before this Court, I find that Sutherland has not carried its burden of demonstrating that Russo functioned as a de facto employee of Sutherland at the time the challenged communications occurred, and I conclude that its assertion of privilege as to those communications is not justified. Because I conclude that the communications are not protected, I need not address whether Sutherland waived any privilege by placing the communications at issue in the litigation.

CONCLUSION For these reasons, compel (Docket # 45) is GRANTED. Sutherland is directed to disclose the unredacted Report and the following communications and documents reflected on the privilege logs: Redaction Log, and items 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 20, 22, 23, 24, 28, 29, 32, # 50-7). IT IS SO ORDERED.

s/Marian W. Payson MARIAN W. PAYSON United States Magistrate Judge Dated: Rochester, New York January 25, 2018

