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United States District Court, S.D. Florida.

Jamal COLEMAN and Sheena Coleman, Movant,
v.
LENNAR CORPORATION, Respondent.

Case No. 18-mc-20182-WILLIAMS/TORRES
|
Signed 06/14/2018

Attorneys and Law Firms

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ORDER ON PLAINTIFF'S MOTION TO COMPEL

EDWIN G. TORRES, United States Magistrate Judge

***1** This matter is before the Court on Jamal and Sheena Coleman's ("Movants") Motion to Compel ("Movants' Motion") Lennar Corporation ("Lennar") to produce documents [D.E. 8] in response to a subpoena served on November 29, 2017. [D.E. 8-2]. Lennar responded to Movants' Motion on March 23, 2018, [D.E. 12] and Movants replied on March 29, 2018. [D.E. 14]. Lennar filed a Sur-Reply on May 9, 2018. [D.E. 17]. Therefore, Movants' Motion is now ripe for disposition. After careful consideration of the Motion, Response, Reply, Sur-Reply, relevant authority, and for the reasons discussed below, Movants' Motion is **GRANTED in part** and **DENIED in part**.

I. BACKGROUND

Movants brought the underlying class action suit against Weyerhaeuser ("Defendant") in Delaware District Court on August 4, 2017, seeking damages related to allegedly defective joists produced and sold by Defendant. [D.E. 8-2]. Movants claim that the joists emit formaldehyde—a toxic chemical that presents health risks to those exposed to its fumes. [D.E. 8-2]. Movants assert causes of action against Defendant for breach of express warranty, breach of implied warranty, violation of the Magnuson-Moss Warranty Act, negligence, failure to warn, violation of the Delaware Consumer Fraud Act, and unjust enrichment. [D.E. 8-2]. Movants also seek a declaration from the Delaware District Court that the joists are defective under the Delaware Judgment Act. [D.E. 8-2]. Among other things, Movants and Defendant disagree as to whether the joists are defectively designed, whether Defendant knew or should have known of the defects, and whether Defendant failed to warn against dangers presented by the defects. [D.E. 8-2]. Movants seek a variety of remedies for the alleged wrongs committed by Defendant. [D.E. 8-2]. [1]

In the action before this Court, Movants seek to compel non-party Lennar to produce documents they claim are relevant to proving their case in the underlying action against Defendant. [D.E. 8-1]. Movants allege that Lennar is in a unique position to produce relevant documents [D.E. 8-1] because Lennar built approximately one-fifth of the homes containing the joists at issue in this litigation. [D.E. 14]. Movants served Lennar with a subpoena on November 29, 2017, requesting production of eighteen categories of documents. [D.E. 8-2]. Pursuant to Federal Rule of Civil Procedure 45(d), Lennar objected to all eighteen document requests on December 13, 2017. [D.E. 8-2]. In a series of emails between the parties' attorneys, Movants narrowed their requests to the following eight categories of documents [D.E. 8-2]:

***2** (1) All documents related to diminution in value of homes due to defective joists.

(2) Purchase and sale agreements for all homes in the affected homes' developments, along with documents sufficient to determine which homes have similar layout/features and which homes had/did not have the joists.

(3) Documents sufficient to show how long homes (with bad joists vs. without bad joists) remained on the market.

(4) All disclosures to buyers/realtors about the problematic joists and remediation.

(5) Documents sufficient to show what kind of remediation was performed on the affected homes.

(6) Any internal documents or analysis showing the effectiveness of remediation.

(7) If Lennar contracted with its own companies/engineers independent of Weyerhaeuser with respect to remediation and communications with those entities.

(8) Formaldehyde testing results for affected homes (pre and post remediation).

Still, Lennar objected to all document requests. [D.E. 8-2]. In response, Movants filed the current Motion to Compel against Lennar on February 20, 2018. [D.E. 8-1]. Lennar continued to object to all document requests in its Response and Sur-Reply, asserting a variety of reasons including, but not limited to, irrelevancy, undue burden, and privilege. [D.E. 12, 17]. This Court must now weigh the parties' arguments and determine if, and which, document requests are reasonable in light of the Federal Rules of Civil Procedure and relevant case law.

II. ANALYSIS

A. General Principles Under Rule 45

Federal Rule of Civil Procedure 45 addresses the issuance and enforcement of subpoenas. It imposes an affirmative obligation on the issuing party to not unduly burden the party subject to the subpoena:

> (d) Protecting a Person Subject to a Subpoena; Enforcement.
>
> (1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

Fed. R. Civ. P. 45(d)(1). Although Rule 45 does not identify irrelevance or overbreadth as grounds for quashing a subpoena, courts treat the scope of discovery under a subpoena the same as the scope of discovery under Rule 26. *Am. Fed'n of State, County & Mun. Employees (AFSCME) Council 79 v. Scott*, 277 F.R.D. 474, 476 (S.D. Fla. 2011); *see also Digital Assurance Certification, LLC v. Pendolino*, No. 6:17-cv-72-Orl-41TBS, 2017 WL 4342316 *8 (M.D. Fla. Sept. 29, 2017) (stating "The scope of discovery under Rule 45 is the same as the scope of discovery under Federal Rule of Civil Procedure 26."); *Commissariat A L'Energie Atomique*, 2006 WL 5003562, at *2 (M.D. Fla. June 14, 2006) (noting that while Rule 45 does not include relevance as an enumerated reason for quashing or modifying a subpoena, it is well settled that the scope of discovery under a subpoena is the same as the scope of discovery under Rule 26(b), Federal Rules of Civil Procedure, and, as a result, a court must examine whether a request contained in a subpoena duces tecum is overly broad or seeks irrelevant information under the same standards set forth in Rule 26(b)).

***3** Federal Rule of Civil Procedure 26, in turn, provides:

> Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). The Federal Rules afford the Court broad authority to control the scope of discovery, *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1307 (11th Cir. 2011), but "strongly favor full discovery whenever possible." *Reilly*, 2016 WL 10646561, at *1 (quoting *Farnsworth v. Procter & Gamble Co.*, 758 F.3d 1545, 1547 (11th Cir. 1985)). Courts must consequently employ a liberal and broad scope of discovery in keeping with the spirit and purpose of these rules. *See Rosenbaum*, 708 F. Supp. 2d at 1306. However, while the scope of discovery is broad, it is not without limits. *See Washington v. Brown & Williamson Tobacco*, 959 F. 2d 1566, 1570 (11th Cir. 1992); *Rossbach v. Rundle*, 128 F. Supp. 2d 1348 (S.D. Fla. 2000) (citing *Oppenheimer Fund v. Sanders*, 437 U.S. 340 (1978)). Rule 26 specifically requires that discovery be proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). In making this determination, the Court is guided by the non-exclusive list of factors in Rule 26(b)(1). *Digital Assurance Certification, LLC v. Pendolino*, No. 6:17-cv-72-Orl-41TBS, 2017 WL 4342316 *8 (M.D. Fla. Sept. 29, 2017) (citing *Graham & Co., LLC v. Liberty Mutual Fire Ins. Co.*, No. 2:14–cv–2148–JHH, 2016 WL 1319697, at *3 (N.D. Ala.

April 5, 2016)) ("Any application of the proportionality factors must start with the actual claims and defenses in the case, and a consideration of how and to what degree the requested discovery bears on those claims and defenses.").

Finally, the burden of proof in demonstrating that compliance with a subpoena presents an undue burden lies with the party opposing the subpoena, while the party seeking to enforce a subpoena bears the burden of demonstrating that the request is relevant. *Fadalla v. Life Auto. Products, Inc.*, 258 F.R.D. 501, 504 (M.D. Fla. 2007). In order to determine whether a subpoena imposes an undue burden, the Court must balance the requesting party's need for the discovery against the burden imposed upon the subpoenaed party. *Id.* The objecting party must demonstrate with specificity how the objected-to request is unreasonable or otherwise unduly burdensome. *See Rossbach*, 128 F. Supp. 3d at 1354. Boilerplate objections and generalized responses are improper. *See Alhassid v. Bank of America*, No. 14–20484, 2015 WL 1120273, at *2 (S.D. Fla. Mar. 12, 2015). This District has frequently held that objections which fail to sufficiently specify the grounds on which they are based are improper and without merit. *See, e.g., v. Bradshaw*, No. 11–80911–CIV, 2014 WL 6459978 (S.D. Fla. Nov. 14, 2014); *Abdin v. Am. Sec. Ins. Co.*, No. 09-81456-CIV, 2010 WL 1257702 (S.D. Fla. March 29, 2010). More specifically, objections simply stating that a request is "overly broad, or unduly burdensome" are meaningless. *Abdin*, 2010 WL 1257702, at *1 (quoting *Guzman v. Irmadan, Inc.*, 249 F.R.D. 399, 400 (S.D. Fla. 2008)). In the Eleventh Circuit, objections should be "plain enough and specific enough so that the court can understand in what way the [discovery sought is] alleged to be objectionable." *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1559 (11th Cir. 1985). Courts in the Eleventh Circuit have also cautioned parties that boilerplate objections are borderline frivolous. *See Steed v. EverHome Mortgage Co.*, 308 F. App'x 364, 371 (11th Cir. 2009); *Guzman*, 249 F.R.D. 399, 400 (S.D. Fla. 2008) ("Parties shall not make nonspecific, boilerplate objections.").

***4** Courts in this District consider the following six factors in determining whether a subpoena is unduly burdensome:

> (1) [the] relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed. Further, if the person to whom the document request is made is a non-party, the court may also consider the expense and inconvenience to the non-party.

Plouffe v. GEICO Gen. Ins. Co., No. 16-25145-Civ-COOKE/TORRES, 2017 WL 7796323, at *1-2 (S.D. Fla. Aug. 8, 2017) (quoting *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004)). Thus, in ruling on Movants' Motion, we will focus on the relevance of documents requested, the burden imposed upon Lennar, the proportionality of requests to the needs of this case, and any specific objections asserted by Lennar in resisting production of the requested documents.

B. Lennar's Threshold Objection Based on the Arbitration Clause in Movants' PSA

As a threshold matter, Lennar argues that Movants' subpoena is invalid due to a mandatory arbitration clause contained in Movants' purchase and sale agreement ("PSA") with K. Hovnanian Homes ("K. Hov."), the builder of Movants' affected home. [Del. Docket Entry ("D.D.E") 22]. [2] The PSA provides the following relevant language:

> Arbitration of Disputes: Post-Closing. Purchaser and Seller agree that all disputes between them or their affiliated, related or contracted persons or entities, that are asserted after closing and that arise in connection with, out of, or are related to this Agreement, whether based in contract, statute, tort, or on any other grounds, including any disputes as to the arbitrability of the dispute itself, and that are not resolved by or are not subject to the routine customer service procedures of seller, shall be submitted to mandatory arbitration and not a litigation in court before a judge or jury. Disputes that arise in connection with, out of, or are related to the PWC Limited Warranty, the design or construction of the home or the

> common elements, the sale of the home, or the transfer of title to the common elements, shall be resolved solely in accordance with the binding arbitration procedure set forth in the PWC Limited Warranty.

Lennar contends that Defendant is an "affiliate" or "contracted entity" of K. Hov., and that as such, any dispute between Movants and Defendant arising in connection with the home must submit to arbitration. [D.D.E. 22]. Furthermore, as noted in the PSA, Movants entered into another agreement with K. Hov.—the PWC Limited Warranty Agreement—which provides that the parties agree to mandatory arbitration for all disputes arising out of the "design or construction of the home." [D.D.E. 22]. The PWC Agreement applies to K. Hov.'s "contractor[s], subcontractors, agents, vendors, suppliers, design professionals, materialmen, and any of [K. Hov's] direct or indirect subsidiaries or related entities alleged to be responsible for any construction defect." [D.D.E. 22]. As with the PSA, the parties disagree over the scope and meaning of terms contained in the PWC Agreement. Lennar argues that the agreement applies to the dispute because defective joists constitute a "construction defect" and Defendant falls within the meaning of a "vendor," "supplier," or "related entity." [D.D.E. 22]. Lennar contends that by virtue of both the PSA and PWC Agreement, the dispute between Movants and Defendant belongs in arbitration.

***5** Movants disagree. They argue that Defendant is not a "vendor," "supplier," "related entity", "affiliate," or "contracted entity" of K. Hov. and that the defective joists are not accurately considered a "construction defect." [D.D.E. 30]. Thus, Movants conclude that the arbitration clauses contained in both the PSA and PWC Agreement do not apply to their dispute with Defendant over defective joists.

Not unsurprisingly, Defendant agrees with Lennar and filed a motion to compel arbitration in the Delaware action on February 6, 2018. [D.E. 12]. Lennar argues here that because the Defendant's motion to compel arbitration remains pending, the subpoena should not be enforced. [D.E. 12]. But Lennar's argument is unpersuasive. Regardless of whether the PSA or PWC Agreement governs the scope of this dispute, we can find no case or principle that supports the proposition that a subpoena is rendered invalid merely because a motion to compel arbitration is pending—especially where no party has sought or received a stay of discovery.

Lennar asserts that it is "inappropriate for federal courts to issue and enforce subpoenas when the dispute belongs in arbitration." [D.E. 12]. But each case it cites in support of this claim is distinguishable. In fact, courts have routinely held that a subpoena issued under Rule 45 of the Federal Rules of Civil Procedure is only improper in a case like this where either the matter has already been referred to arbitration or the parties have sought a stay of discovery. *See Scurtu v. Int'l Exch.*, No. 07-cv-0410, 2008 WL 2669270, at *1 (S.D. Ala. June 30, 2008) (matter already stayed pursuant to 9 U.S.C. § 3 pending arbitration); *Suarez-Valdez v. Shearson Lehman/Am. Exp., Inc.*, 858 F.2d 648, 649 (11th Cir. 1988) (parties moved to stay action pending arbitration); *Klepper v. SLI, Inc.*, 45 F. App'x 136, 139 (3d Cir. 2002) (party moving for arbitration had already sought stay on discovery); *Hunt v. Munlake Contractors, Inc.*, No. CV409-084, 2009 WL 10678628, at *1 (S.D. Ga. Oct. 14, 2009) (party moved to stay discovery). Thus, this Court holds that Movants' subpoena is not invalid merely because Defendant filed a motion to compel arbitration in the underlying action. The dispute between Movants and Defendant has not been referred to arbitration, and neither party has moved for a stay of discovery.

C. Lennar's Objection Based on Alleged Bifurcation of Discovery

Lennar also attempts to defeat Movants' subpoena by asserting that Movants' requests improperly seek merits discovery when no class has yet been certified. [D.E. 12]. Lennar contends that the Scheduling Order entered into on November 20, 2017, in the Delaware District Court limits discovery to class certification because it states that "all discovery relating to class certification" shall be completed by August 1, 2018. [D.E. 12]. Lennar reads into the Scheduling Order "an implicit suggestion that only discovery relating to class certification should be conducted at this point." [D.E. 12]. In making this argument, Lennar broadly objects to most of Movants' requests on the basis that the requests seek irrelevant information. If discovery is limited to class certification as Lennar suggests, then all requests related to merits discovery are plainly irrelevant and improper under Rule 45 of the Federal Rules of Civil Procedure. *See Commissariat A L'Energie Atomique v. Samsung Electronics Co.*, No. 8:06-mc-44-T-30TBM, 2006 WL 5003562, at *2 (M.D. Fla. June 14, 2006) (noting that while Rule 45 does not include *relevance* as an enumerated reason for quashing

a subpoena, it is well settled that the scope of discovery under a subpoena is the same as the scope of discovery under Rule 26(b), and, as a result, a court must examine whether a subpoena duces tecum seeks *irrelevant information* under the same standards set forth by Rule 26(b)) (emphasis added); *Reilly v. Chipotle Mexican Grill, Inc.*, No. 15-23425-Civ-COOKE/TORRES, 2016 WL 10646561, at *1 (S.D. Fla. Sept. 22, 2016) (quoting *Rosenbaum v. Becker & Poliakoff, P.A.*, 708 F. Supp. 2d 1304, 1306 (S.D. Fla. 2010)) ("overall purpose of discovery under the Federal Rules is to require the disclosure of all *relevant information*") (emphasis added).

***6** But this argument also fails. Nothing in the Scheduling Order shows that the Delaware District Court strictly limited discovery to class certification at this time. The Scheduling Order merely states that the "parties agree to prioritize class discovery" and sets a deadline for completing such discovery. [D.D.E 14]. We are reluctant to write into the Delaware District Court's Scheduling Order material provisions that were explicitly left out. Furthermore, the Supreme Court has made clear in recent decisions that class certification and merits discovery will often overlap. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (a "rigorous analysis" of the prerequisites for class certification "will entail some overlap with the merits of the plaintiff's underlying claim"); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (criticizing lower court's "refusal to entertain arguments [based upon] class certification, simply because those arguments would also be pertinent to the merits determination"); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2414-15 (2014) (allowing defendants to rebut merits-based arguments not only during the merits phase of discovery but also during the class certification phase). In response to these cases, an increasing number of district courts are now "reluctant to bifurcate class-related discovery from discovery on the merits." *Chen-Oster v. Goldman Sachs & Co.*, 285 F.R.D. 294, 300 (S.D. N.Y. 2012); *see also In re Groupon Secs. Litig.*, No. 12 C 2450, 2014 WL 12746902, at *3 (N.D. Ill. Feb. 24, 2014) (denying defendant's motion for bifurcated discovery and noting that "in terms of bifurcation, the lesson of [*Comcast*] is more detrimental to the defendant's argument than helpful").

In light of these cases, we see no basis to bifurcate discovery in the present action—especially where the Scheduling Order does not explicitly order us to do so. Moreover, some district courts have suggested that bifurcating discovery can increase the costs of litigation and thwart the primary goal of the Federal Rules to provide a "just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1; *see Groupon*, 2014 WL 12746902, at *14 ("bifurcation can actually increase the costs of litigation because of disputes over what constitutes merits and what constitutes class discovery"). That holds true here. Subjecting non-party Lennar to multiple rounds of discovery would unnecessarily increase the costs of this litigation. Therefore, we reject Lennar's argument that Movants' subpoena is premature due to an implied order to bifurcate discovery. Accordingly, we hold that discovery in this action is not limited to class certification and that Lennar cannot assert this relevance theory as a reason not to comply.

D. Specific Review of Requests

1. Requests No. 1-4

Movants request production of the following categories of documents:

> (1) All documents related to diminution in value of homes due to defective joists.
>
> (2) Purchase and sale agreements for all homes in the affected homes' developments, along with documents sufficient to determine which homes have similar layout/features and which homes had/did not have the joists.
>
> (3) Documents sufficient to show how long homes (with bad joists vs. without bad joists) remained on the market.
>
> (4) All disclosures to buyers/realtors about the problematic joists and remediation.

This Court **GRANTS** Movants' Motion to Compel for Requests No. 2, 3, and 4 and **DENIES** Movants' Motion to Compel for Request No. 1. Movants argue that Requests No. 2, 3, and 4 are plainly relevant to their claims against Defendant. Specifically, Movants argue that these documents are needed to analyze the putative class members' damages related to diminution in value and decreased marketability of their affected homes. [D.E. 8]. In order to effectively analyze how the presence of defective joists may have affected home values, Movants contend that they need information about home prices and time on the market. [D.E. 8]. Moreover, to the extent that Lennar disclosed the defect to prospective purchasers, Request No. 4 may provide information demonstrating a link between the marketability of affected homes and the presence of the joists. [D.E. 8].

Movants argue that Request No. 1 is relevant for the same enumerated reasons.

Lennar asserts a series of boilerplate objections in response to Requests No. 1-4. Lennar claims that the requests are overly broad and unduly burdensome, vague and ambiguous, and poorly tailored so as to be disproportional to the needs of this case. [D.E. 8-2]. Additionally, Lennar objects to these requests on the grounds that they seek irrelevant information and are subject to attorney-client privilege, work-product doctrine, joint defense or common interest privilege, or any other privilege or protection. [D.E. 8-2]. Yet, Lennar offers no cost analysis in its formal objections to support its burden claim, nor does it produce a privilege log in accordance with the Federal Rules of Civil Procedure and Local Rules.

***7** Only Lennar's objections to Request No. 1 are well taken. Movants fail to show that Request No. 1 is either non-duplicative or sufficiently narrow in scope to warrant compelled production. Federal Rule of Civil Procedure 26 provides that a "court must limit the frequency or extent of discovery ... if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative." Fed. R. Civ. P. 26(b)(2)(C)(i). Request No. 1 appears to seek production of an all-encompassing array of documents that are already included in Requests No. 2, 3, and 4. Furthermore, the language of Request No. 1—seeking "all" documents related to diminution in value "due to" defective joists—is vague and overly broad and would result in a non-party being tasked with an evaluative review of documents unnecessarily so. Thus, this Court **DENIES** Movants' Motion to Compel with respect to Request No. 1.

On the other hand, we find that Requests No. 2, 3, and 4 are relevant, do not unduly burden non-party Lennar, and are proportional to the needs of this case. Data from purchase and sale agreements, disclosures to buyers or realtors, and other documents showing how long affected homes remained on the market are relevant to Movants' claims concerning diminution in value of their homes. Furthermore, each request is sufficiently narrow so as to not unduly burden Lennar. The requests carefully target an identifiable group of documents such that Lennar will not have to make qualitative judgments as to which documents to include or exclude. Moreover, Lennar's boilerplate burden objections are without merit. *See Reilly*, 2016 WL 10646561, at *2 (objections merely stating requests are "overly broad, or unduly burdensome" are meaningless and without merit) (quoting *Guzman*, 249 F.R.D. at 400). It was not until the Response to Movants' Motion that Lennar presented any sort of cost analysis demonstrating undue burden or expense. And even then, Lennar's analysis falls short. The bulk of expenses Lennar claims it will have to incur derive from privilege review, but Lennar has not complied with the Federal or Local Rules in objecting to Movants' requests on the basis of privilege. Thus, this Court cannot even legitimately assess the validity of Lennar's burden claims with respect to privilege. Rule 45 requires that:

> [a] person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must: (i) expressly make the claim; and (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

Fed. R. Civ. P. 45(e)(2)(A). In addition to the Federal Rules, the Local Rules also provide that where a claim of privilege is asserted, the objecting party must prepare "a privilege log with respect to all documents, electronically stored information, things and oral communications withheld on the basis of a claim of privilege or work product protection" except for "written and oral communications between a party and its counsel after commencement of the action and work product material created after commencement of the action." S.D. Fla. L.R. 26.1(g)(3)(C).

Courts have held that the failure to produce a privilege log of sufficient detail constitutes a waiver of the underlying privilege or work product claim. *See Grossman v. Schwarz*, 125 F.R.D. 376, 386-87 (S.D.N.Y. 1989) (holding that failure to comply with privilege rules "will be considered presumptive evidence that the claim of privilege is without factual or legal foundation"). However, we are not persuaded that Lennar's failure to produce a timely privilege log constitutes a waiver given the circumstances presented. While a waiver of privilege *may* occur when a privilege log is not timely produced, courts have generally found a waiver to be a harsh sanction, especially in the absence of any prejudice to the opposing party. *See Henderson v. Holiday CVS, L.L.C.*, 269 F.R.D. 682, 686 (S.D. Fla. 2010) ("[T]he Court agrees with Defendants that finding a waiver under

the circumstances presented, where Defendant with the tacit approval of Plaintiffs, submitted an untimely privilege log, is an extreme sanction, too harsh under the circumstances.") (citing *Tyne v. Time Warner Entertainment Co., L.P.,* 212 F.R.D. 596, 597 (M.D. Fla. 2002)) (declining to find waiver of privilege where Defendants served an incomplete privilege log eight months late and three days before the close of discovery); *Knights Armament Co. v. Optical Sys. Technology, Inc.,* No. 6:07–cv–1323–Orl–22KRS, 2009 WL 331608, *6–7 (M.D. Fla. Feb. 10, 2009) (refusing to find assertions of privileges waived where defendant delayed six months before producing a privilege log, and then produced an incomplete log).

***8** Lennar filed its objections to the subpoena on December 13, 2017, and Movants' filed their Motion to Compel on February 20, 2018. The parties have since then engaged in a series of responses and replies where they have contested the merits of the requests. While approximately four months have passed since the filing of Movants' Motion to Compel and one month has passed since the filing of Lennar's Sur-Reply, we cannot find that the failure to produce a privilege log is so late and prejudicial that it waives all of the applicable privileges, if any, with respect to the documents requested. Because of the small amount of time that has passed, the lack of prejudice to Movants, and the fact that a waiver of privilege *may* occur without a timely privilege log, we find that Lennar's actions do not rise to the level of a waiver in this case. *See Henderson v. Holiday CVS L.L.C.*, NO. 09-80909-CIV-MARRA/JOHNSON, 2010 WL 11505169, at *1 (Sept. 24, 2010) ("The operative word in these cases, however, is '*may.*' Simply put, the Court finds Defendants' actions in this case do not rise to the level warranting the harsh sanction of waiver.").

To be clear, this does not excuse Lennar from proffering a proper privilege log if the documents Movants seek are, in fact, being withheld on the basis of privilege. *See Benfatto v. Wachovia Bank, N.A.*, No. 08-60646-CIV, 2008 WL 4938418, at *2 (S.D. Fla. Nov. 19, 2008) (finding that defendants "may not claim that all of Plaintiff's discovery requests are privileged and non-discoverable without providing a privilege log in accordance with the Federal and Local Rules."); *see also Pepperwood of Naples Condo. Ass'n, Inc. v. Nationwide Mutual Fire Ins. Co.*, No. 2:10–cv–753–FtM–36SPC, 2011 WL 4382104, at *8 (M.D. Fla. Sept. 20, 2011) ("[Defendant] also notes that some of the information sought by [plaintiff] invades the attorney-client privilege. If this is the case, [defendant] is *obligated* to provide [plaintiff] with a privilege log setting forth this information. The party invoking the privilege bears the burden of proof.") (emphasis in original). In doing so, Lennar needs to specify which privilege is at issue for each request, if at all, and be *specific*. *See In re Pimenta*, 942 F. Supp. 2d 1282, 1290 (S.D. Fla. 2013) ("Blanket assertions of privilege before a district court are usually unacceptable."); *Maryland Cas. Co. v. Shreejee Ni Pedhi's, Inc.*, No. 3:12–cv–121–J–34MCR, 2013 WL 3353319, at *4 (M.D. Fla. July 2, 2013) (finding that the objecting party "has the burden to demonstrate the work product doctrine applies and failed to make its work product objection with any specificity.").

A proper privilege log should contain the following information for each withheld document: "(1) the name and job title or capacity of the author of the document; (2) the name and job title or capacity of each recipient of the document; (3) the date the document was prepared and, if different, the date(s) on which it was sent to or shared with persons other than the author(s); (4) the title and description of the document; (5) the subject matter addressed in the document; (6) the purpose(s) for which it was prepared or communicated; and (7) the specific basis for the claim that it is privileged." *Anderson v. Branch Banking & Tr. Co.*, No. 13–CV–62381, 2015 WL 2339470, at *2 (S.D. Fla. May 14, 2015) (citing *NIACCF, Inc. v. Cold Stone Creamery, Inc.,* No. 12–CV–20756, 2014 WL 4545918, at *5 (S.D. Fla. Sept. 12, 2014)).

In sum, Lennar must produce documents in response to Requests No. 2, 3, and 4 within thirty (30) days from the date of this Order. To the extent that Lennar objects to producing specific documents on the grounds these requests seek privileged information, Lennar must prepare a privilege log detailing any documents withheld on that basis or otherwise represent that no responsive documents were in fact withheld. In this respect, Movants' Motion with respect to Requests No. 2, 3, and 4 is **GRANTED**. Movants' Motion with respect to Request No. 1 is **DENIED**.

2. Requests No. 5-8

***9** Movants request production of the following categories of documents:

> (5) Documents sufficient to show what kind of remediation was performed on the affected homes.

(6) Any internal documents or analysis showing the effectiveness of remediation.

(7) If Lennar contracted with its own companies/engineers independent of Weyerhaeuser with respect to remediation and communications with those entities.

(8) Formaldehyde testing results for affected homes (pre and post remediation).

This Court **DENIES** Movants' Motion to Compel for Requests No. 5, 6, and 8 and **GRANTS** Movants' Motion to Compel for Request No. 7.

Movants argue that documents showing the type of remediation performed and the results or effectiveness of that remediation are plainly relevant to their case against Defendant. [D.E. 8-1]. Whether the remediation methods worked, Movants contend, has a "huge impact" on putative class members with respect to implications for their health and the future value of their homes. [D.E. 8-1]. Furthermore, Movants assert that information demonstrating uniformity, or lack thereof, in the effectiveness of different remediation methods is relevant to class certification as it goes to the question of whether all putative class members are similarly situated. [D.E. 8-1]. And, Movants claim that due to the limited time period for which the requests seek documents—the 8 months during which Defendant performed remediation—the requests cover a reasonable time period in light of their relevance to Movants' case. [D.E. 8-1]. Movants also claim that they cannot retrieve any of these documents from Defendant. [D.E. 8-1].

Lennar concedes that the time period covered by Requests No. 5-8 is reasonable [D.E. 12] but contests Movants' claim that production would not be unduly burdensome. Lennar asserts that the majority of remediation was performed by Defendant. Hence, Defendant already possesses documents on remediation methods and their effectiveness. [D.E. 12]. And, to the extent Lennar has sole possession of any formaldehyde testing results, Lennar claims these documents are protected by work-product privilege. [D.E. 12]. Similarly, to the extent Lennar has possession of any testing results provided to it by Defendant, Lennar claims these documents are protected by the parties' Joint Defense Agreement. [D.E. 12]. Lennar also claims that Movants' subpoena imposes an undue burden because responding would be "very expensive." [D.E. 12]. Lennar estimates that complying with the subpoena would cost in excess of $300,000, with nearly all costs stemming from attorney privilege review. [D.E. 12].

The problem with this latter argument, as discussed in Subsection D(1) of this Order, is that Lennar's failure to comply with the Federal and Local Rules in producing a privilege log makes it impossible for this Court to assess the merits of Lennar's cost burden claims. Additionally, Lennar's cost analysis is based upon proposed search terms for all eight document requests without taking into account that the most broad document requests (such as Request No.1) are now being denied in this Order.

***10** Lennar further argues that conducting privilege review would itself be unduly burdensome, and it points to a series of cases in this District to support its assertion. [D.E. 12]. But each case Lennar cites is distinguishable. *See Great Am. Ins. Co. v. Veteran's Support Org.*, 166 F. Supp. 3d 1303, 1311 (S.D. Fla. 2015) (court quashed a subpoena requiring privilege review but only when subpoena requests sought *irrelevant* information) (emphasis added); *McMullen v. GEICO Indem. Co.*, No. 14-CV-62467, 2015 WL 2226537, at *8 (S.D. Fla. May 13, 2015) (court quashed subpoena that sought documents from *6-year period*) (emphasis added); *see also Woodbridge Structured Funding, LLC v. Pina*, No. 9:16-CV-81408, 2016 WL 8739995, at *2 (S.D. Fla. Nov. 23, 2016) (court quashed subpoena that sought confidential documents because of request's *limited relevance* and *redundancy*) (emphasis added). In each of these cases, the subpoena either sought irrelevant information or covered an unreasonably broad time period. Neither issue presents itself in this case. Thus, to the extent that Requests No. 5-8 contain privileged documents, Lennar must produce a privilege log within thirty (30) days from the date of this Order.

This Court next turns to the question of whether Movants can retrieve documents in Requests No. 5-8 from Defendant, and, if it can, whether that precludes Movants from recovering the documents from Lennar. As a threshold matter, we conclude that Requests No. 5-8 seek relevant documents. Movants' arguments that documents on remediation and testing results are relevant to their case are well taken. And this Court agrees with both parties that the 8-month time period is not by itself unduly burdensome.

Yet, the Federal Rules require courts to limit discovery when "the discovery sought ... can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(C)(i). Thus, to the extent

that any documents sought in Requests No. 5, 6, and 8 can be obtained from Defendant, Movants shall retrieve those documents from Defendant. Because documents sought in Request No. 7, however, can only be in Lennar's possession, we order Lennar to produce such documents. Accordingly, we **DENY** Movants' Motion to Compel with respect to Requests No. 5, 6, and 8 and **GRANT** Movants' Motion to Compel with respect to Request No. 7.

III. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that Movants' Motion to Compel is **GRANTED in part and DENIED in part**. [D.E. 8].

A. With respect to Requests No. 2, 3, 4, and 7, Movants' Motion to Compel is **GRANTED**. All responsive documents shall be produced by July 13, 2018. To the extent that any documents are being withheld on the basis of any applicable privilege in response to Movants' subpoena, Lennar is ordered to produce a proper privilege log (detailing the specific privilege that applies) by such date.

B. With respect to Requests No. 1, 5, 6, and 8, Movants' Motion to Compel is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 14th day of June, 2018.

All Citations

Slip Copy, 2018 WL 3672251

Footnotes

1 A. All costs associated with repairing, removing, and/or replacing defective joists.
B. All costs of repairing any related damage to other property.
C. Damages for diminution in the value and future value of effected homes.
D. All out-of-pocket expenses associated with dealing with problems caused by defective joists, including delays in settlement and relocation costs and compensation for time spent away from work.
E. Injunctive relief requiring Defendant to pay for ongoing monitoring of formaldehyde levels in Movants' and putative class members' homes.
F. Injunctive relief requiring Defendant to pay for Movants' and class members' ongoing medical monitoring.
G. Injunctive relief requiring Defendant to modify its warranty claims process.
H. Declaration from the Court that the joists are defective.

2 D.D.E. refers to Delaware Docket Entries in the underlying action between Movants and Defendant in Delaware District Court.