THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Atlantic Anesthesia, P.A.

v.

Ira Lehrer, et al.

Docket No. 218-2019-CV-933, 218-2019-CV-1683, 219-2019-CV-424

ORDER

This consolidated matter consists of three cases involving various contract, tort, and statutory claims and counterclaims. (*See generally* 218-2019-CV-933 Compl.; 218-2019-CV-1683 First Am. Compl.; 219-2019-CV-424 Compl.) Presently before the Court are Plaintiff/Counterclaim Plaintiff Atlantic Anesthesia, P.A. ("Atlantic") and North American Partners in Anesthesia (New Hampshire)'s ("NAPA-NH") (collectively, "Atlantic/NAPA-NH") motions to: (1) resume depositions of WDH employees Ellen Caille and Gregory Walker, to which WDH objects; (2) strike privilege assertions made by Defendant Wentworth Douglass Hospital ("WDH") and compel production of documents, to which WDH objects; (3) strike privilege assertions made by Defendants Drs. Ira Lehrer, Nathan Jorgensen, and George Kenton Allen (collectively, "Physician Defendants"), to which Physician Defendants object; and (4) compel depositions of Attorneys Robert Best, who represented Physician Defendants, and Daniel Mulholland, who represented WDH, to which Physician Defendants and WDH object. After consideration of the record, the parties' arguments, and the applicable law, the Court concludes that Atlantic/NAPA-NH are entitled to communications between Physician Defendants and WDH and/or between their respective counsel pertaining to joint efforts

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towards WDH directly employing Physician Defendants because of the application of the crime-fraud exception to attorney-client privilege as it pertains to the common interest doctrine. The Court, however, concludes that Atlantic/NAPA-NH are not entitled to the communications between Physician Defendants and their own counsel or between WDH and its counsel.

Factual Background

Detailed descriptions of the facts underlying this case are set forth in the Court's prior orders, incorporated by reference herein. (*See* Oct. 15, 2020 *Order* at 1−4; March 28, 2022 *Order* at 1−7). By way of brief and additional background, WDH had an exclusive contract with Atlantic for the provision of anesthesia and pain management services to WDH's patients. In 2014, during the pendency of this contractual relationship, Drs. Lehrer and Jorgensen sold Atlantic to NAPA-NH for $12.6 million pursuant to a Stock Purchase Agreement, and became Atlantic/NAPA-NH employees. Atlantic/NAPA-NH hired Dr. Allen in 2016. As part of their employment, Physician Defendants were subject to various non-competition and non-solicitation provisions. (*See e.g.*, Ex. 16, Privileged, p. 167.)

On November 29, 2016, WDH and Atlantic/NAPA-NH entered into the Anesthesia Services Agreement (the "Agreement"), which was set to expire on November 30, 2019. The Agreement automatically renewed unless either party provided 180 days' notice of nonrenewal. (Ex. A to WDH's Mem., Sieffert 4, Doc. 173, p. 18.) In June 2018, Atlantic/NAPA-NH and WDH began negotiations to amend the Agreement to include expanded services as requested by WDH. (Ex. B, Loiacono Dep. 150:12−151:13.) Between August and October 2018, the parties discussed a potential services ramp-up schedule. (Exs. H, Loiacono-3; B, Loiacono Dep. 237:7−238:9.) At

this time, Atlantic/NAPA-NH became aware of some dissatisfaction among the anesthesiology providers based on their working conditions. (*See* Ex. C, Atlantic-312 (showing that, on June 29, 2018, Dr. Lehrer emailed Dr. Michael Loiacono, with whom he was negotiating on behalf of Atlantic/NAPA-NH over the renewal, that the department was being tasked with provide more staffing services than the staff could accommodate, and that raising salaries could help with retention and recruitment)).

While negotiations over renewal of the Agreement were ongoing, Physician Defendants and other anesthesia providers were discussing seeking changes to their compensation. On September 6, 2018, Dr. Lehrer emailed Drs. Jorgensen and Scott Lauer, another Atlantic/NAPA-NH provider, that "the topic of physician compensation is again at our doorsteps," and that Atlantic/NAPA-NH would be willing to increase their salaries but that this would result in decreased vacation time. (Ex. 5, Atlantic-309.) He further wrote that Atlantic/NAPA-NH believed that they would become more profitable once the practice grew. (*Id*.) Dr. Jorgensen responded the same day that, "[s]hort of a mass exodus and an inability to staff the practice I can't see them changing th[eir] minds." (*Id*.) On September 10, 2018, Dr. Lauer replied that the providers would probably not be satisfied with what Atlantic/NAPA-NH would offer, and asked "[i]s it reasonable to explore what the hospital will offer? I really do not see how we would grow our way to increasing our salary." (*Id*.)

On November 8, 2018, Ms. Caille—WDH's Executive Vice President—sent a text message[1] to Dr. Lehrer, asking him to meet with her and Mr. Walker on November 13, 2018, "to discuss NAPA contract and next steps per our discussion," to which Dr. Lehrer

[1] Ms. Caille testified that she would sometimes communicate with Dr. Lehrer via text message both for convenience and because she did not always want whatever she was communicating to him to be shared widely. (Ex. 7, Caille Dep. 23:1−11.)

responded, “OK.” (Ex. 6, Atlantic-397, WDH00011650.) Ms. Caille sent an invite for the meeting to Dr. Lehrer’s WDH email address. (*Id*.) No one from Atlantic/NAPA-NH, such as Dr. Loiacono, or Jeremy Sieffert, who was also representing Atlantic/NAPA-NH in the negotiations, was invited. (Ex. 7, Caille Dep. 26:12−18.)

At the November 13, 2018 meeting, which included Ms. Caille, Mr. Walker, and Drs. Lehrer and Jorgensen, WDH indicated that it was happy with the anesthesiology department’s clinical services but was considering not renewing the Agreement because of concerns about Atlantic/NAPA-NH’s ability to meet WDH’s staffing and other service needs. (Exs. 9, Atlantic-38; 4, Jorgensen Dep. 145:13−22; 10, Lehrer Dep. 146:14−19.) While Dr. Lehrer did not recall if the meeting included a discussion of whether Physician Defendants could become WDH employees, or of the restrictive covenants in their employment agreements, Dr. Jorgensen testified that there was some discussion about the existence of such covenants. (Ex. 4, Jorgensen Dep. 147:23−148:6.) He testified that the reason for the discussion was because WDH liked the anesthesiology department, but “we have these restrictive contracts . . . if [WDH] were going to go ahead and do what [WDH was] planning on doing.” (*Id*. 148:10−15.)

Around this time, WDH was considering a range of options if they did not renew their agreement with Atlantic/NAPA-NH, including asking Massachusetts General Hospital to support WDH’s anesthesia group or employing its own group. (Ex. 7, Caille Dep. 33:7−14.) Ms. Caille testified that she told Dr. Loiacono and Mr. Sieffert that she wanted their relationship to work, but that she was “very unhappy,” and that she indicated to them that WDH would seek alternatives. (Ex. I, Caille Dep. 50:20−51:4.)

On November 15, 2018, Ms. Caille sent Dr. Lehrer a text message in which she wrote “I believe it is very important to understand your contract with NAPA ASAP. You

and [Dr. Jorgensen] should engage a highly reputable New Hampshire attorney to review and guide." (Ex. 6, Atlantic-397, WDH00011650.) Dr. Lehrer replied that he was "[a]lready on it." (*Id*.)

Also on November 15, 2018, Ms. Caille emailed her colleagues that it was "time for us to explore the potential for Anesthesia services at WDH given the growing needs of our hospital." (Ex. 12, Atlantic-41.) She wrote that the idea was for her, Dr. Lehrer, and others to meet to "begin the conversation re training and to determine a potential broader relationship . . . however it would have to be confidential since NAPA contract is still in effect at this time." (*Id*.)

On November 19, 2018, Dr. Lehrer sent an email titled "Executive meeting" to Drs. Jorgensen, Allen, and Robert Jarrett, another Atlantic/NAPA-NH provider, that said the following:

> I would like to develop a strategy moving forward on whether we stay with NAPA or become hospital employees. That involves finalizing and sending a letter to NAPA requesting an increase in our compensation. The amount we ask NAPA will be important, regarding our expectation with WDH too . . .
>
> Nathan, I also have a copy of our original employment contract with NAPA. If we decide to move full steam forward with becoming hospital employees, we should hire legal representation, ASAP, just to make sure we truly understand our options. Also, moving forward, I would like to keep Liz [Welch-Marsh][2] out of the loop as much as possible regarding conversations around this topic.

(Ex. 13, Atlantic-295.)

On November 26, 2018, after a departmental meeting with Physician Defendants and other Atlantic/NAPA-NH providers, Dr. Allen wrote to Attorney Best:

[redacted]

[2] It is not clear from the pleadings or exhibits who Liz Welch-Marsh is.

[redacted]

(Ex. 14, Atlantic-45.)

By December 2018, Drs. Lehrer and Allen had asked Attorney Best [redacted] (Ex. 15, Privileged-4.) [redacted] (*Id*., p. 6.) [redacted] (*Id*.)

On January 23, 2019, Ms. Caille emailed Mr. Walker, WDH's Chief Financial Officer, Peter Walcek, and Dr. Paul Cass, WDH's Chief Medical Officer and Vice President of Clinical Integration, the following:

> I am sure [Dr. Lehrer] shared with you that [Mr. Walker] and I have discussed with him and [Dr. Jorgensen] the need to understand [employment agreements] as well as their partner corporate agreement. He and others have hired a lawyer to vet so we can develop a plan moving forward. I am working very closely with [Dr. Lehrer] re our mutually shared intent of our plan. At the same time, [Mr. Walcek], [WDH's Perioperative Services Director Tim Nesmith], and I are currently working on the NAPA amendment that memorialize[s] WDH expectations for increased OR staffing. . . . NAPA is looking for significant dollar guarantees that we will not be supporting . . . .

(Ex. 17, Atlantic-276.)

On January 28, 2019, Ms. Caille called and left a message for Dr. Lehrer "re[:] contract." (Ex. 6, Atlantic-397, p. 11783.) On January 31, 2019, she emailed him to ask if there was a particular time he would be able to talk. (Ex. 19, Atlantic-65.) [redacted].

[redacted] (Ex. 20, Allen-2, p. 588.) [redacted]

[redacted]

[redacted]

On February 4, 2019, Physician Defendants, Anna Goodkin, Atlantic/NAPA-NH's Chief Certified Registered Nurse Anesthetist ("CRNA"), and other Atlantic/NAPA-NH providers executed an engagement letter to retain Attorney Best. (Ex. 16, Privileged, p. 216.) The same day, Dr. Allen emailed Attorney Best the engagement letter. Dr. Allen also wrote in this email:

[redacted]

(Ex. 21, Privileged 13, p. 124.) Dr. Allen added, [redacted]

[redacted] He further [redacted]

[redacted] (*Id*.)

On February 7, 2019, Dr. Allen emailed Attorney Best [redacted]

[redacted] By this point, Attorney Best [redacted]

[redacted] Dr. Allen wrote:

[redacted]

(*Id*., p. 122.) On February 15, 2019, Attorney Best responded to Dr. Allen [redacted] (*Id*., p. 121.)

On February 22, 2019, Drs. Lehrer and Allen exchanged text messages about the fact that a surgeon had told a CRNA that the group of providers would be leaving Atlantic/NAPA-NH, and how they should "continue as we are and just play dumb and squelch the rumors. The more CRNA's that know, the more likely this gets back to NAPA." (Ex. 20, Allen-2, ALLEN000599.) On the same day, Dr. Allen wrote Attorney Best [redacted]

(Ex. 21, Privileged 13, p. 121.) At his deposition, Dr. Allen indicated that, at this time, they were feeling the stress of the "increasing evidence of a fractured relationship," and that they had been asked by WDH "whether there are restrictive covenants within our contracts." (Ex. 26, Allen Dep. 203:2−17.)

On March 1, 2019, Dr. Jorgensen emailed Dr. Lehrer that "I guess the only way to get their attention is to have us (the docs) all quit. In one way or another that may happen." (Ex. 27, Atlantic-73.)

On March 12, 2019, Dr. Lehrer emailed Dr. Loiacono and Mr. Sieffert to express concerns about provider discontent. He wrote that short staffing issues could lead some providers to "jump ship due to their frustrations with the practice." (Ex. K, Loiacono 12.) Dr. Loiacono replied the same day that he and Mr. Sieffert understood his concerns and discussed a plan they had all spoken about at a meeting to address the concerns including, for example, by providing raises for CRNAs. He also wrote that he understood that the consequence of not addressing the issues was that they could "ultimately [lose] the Hospital contract." (*Id*.)

On April 10, 2019, Dr. Lehrer received a calendar invite from a WDH employee for a meeting set to occur on May 6, 2019, the subject line of which was "Non Renewal of NAPA Agreement." (Ex. 28, Atlantic-303.) The list of invitees included Mr. Walker, Ms. Caille, Mr. Nesmith, Mr. Walcek, WDH employee Michelle Hansen, Attorneys Mulholland and Best, Dr. Lehrer, and "any other anesthesiologists [who] would like to attend." (*Id*.) Neither Dr. Loiacono nor Mr. Sieffert was invited to or informed about this meeting. (Ex. 10, Lehrer Dep. 265:4−15.) On April 11, 2019, Attorney Best spoke on the phone with Drs. Lehrer and Allen [redacted] (Ex. 29, Privileged-17, p. 855.) In a May 1, 2019 email, Attorney Best wrote Dr. Lehrer [redacted] (Ex. 30, Privileged 21.)

On May 2, 2019, WDH sent another calendar invite to Drs. Lehrer, Jorgensen, and Allen for the May 6, 2019 meeting also with the subject line "Non-Renewal of NAPA Agreement." (Ex. 31, Jorgensen 10, p. 137.) Dr. Lehrer told Drs. Allen and Jorgensen to delete the invitation from their work email, calendar, and trash because he did not want Atlantic/MAPA-NH to know about the meeting. (Ex. 10, Lehrer Dep. 257:16−258:20.) Also on May 2, 2019, WDH's counsel, Physician Defendants, and the rest of the group of other Atlantic/NAPA-NH providers executed a common interest agreement, which stipulated that their shared interest was in "exploring potential future relationships." (Exs. 37, Privileged-25; 74, Atlantic-90, NAPA-WDH_000541.)

The goal of the May 6, 2019 meeting was "to figure out what options were available . . . if becoming hospital employees was an option based off our Non-Competes." (Ex. 10, Lehrer Dep. 247:18−21.) Ms. Caille testified that, at the meeting, WDH informed Physician Defendants that WDH was inclined not to renew the

Agreement. (Ex. 18, Caille Dep. 288:1−5.) Dr. Lehrer testified that most of the discussion was between Attorneys Best and Mulholland. (Ex. 10, Lehrer Dep. 259:22−260:1.) Dr. Allen testified that Attorney Best told the attendees [redacted] (Ex. 26, Allen Dep. 225:1−5.) Dr. Lehrer could not recall if there was discussion of WDH "buying out" Physician Defendants from their covenants, or of the potential terms of employment with WDH. (Ex. 10, Lehrer Dep. 262:14−23.) Dr. Lehrer further testified that:

> I remember [Attorney] Best . . . [redacted]

(*Id*. at 259:21−260:17.) Dr. Allen testified that there was no discussion of "employment or potential employment with" WDH. (Ex. C, Allen Dep. 227:5−10.) He testified that he had not informed Atlantic/NAPA-NH about the meeting, but that he assumed they would have been aware of it. He also testified that the information would have been material in light of the ongoing Agreement negotiations. (Ex. 26, Allen Dep. 214:17−215:11.)

On May 14, 2019, Physician Defendants, other Atlantic/NAPA-NH providers, and Attorney Best met. (Exs. 36, Lehrer 10; 25, Jorgenson 4, p. 138−39.) At this meeting, Attorney Best [redacted]. (Ex. 26, Allen Dep. 240:10−15.) [redacted] (*Id*. at 241:5−15.) [redacted]

[redacted]

(Ex. 4, Jorgensen Dep. 273:10-22.) [redacted]

[redacted] (*Id*. at 273:4−9.) This discussion was not shared with Dr. Loiacono or Mr. Sieffert. (*Id*. at 11−14.)

On May 17, 2019, Attorney Mulholland emailed Attorney Best and other attorneys[3] a draft agenda for a second meeting between Physician Defendants and WDH to be held on May 20, 2019. (Ex. 37, Privileged 25, p. 871.) The agenda indicated that the following subjects would be discussed: [redacted]

[redacted] *Id*., p. 876.) Neither Dr. Loiacono nor Mr. Sieffert was invited. Attorney Best and Attorney Mulholland spoke via telephone on the morning of the meeting. (*See id*., p. 870.)

Dr. Lehrer could not remember if he attended the meeting, and Dr. Jorgensen lacked specific recollection of what was discussed. (Exs. 10, Lehrer Dep. 272:11−20; 4, Jorgensen Dep. 281:11−288:21.) Dr. Allen testified that the discussion topics included [redacted] (Ex. 26, Allen Dep. 248:22−265:11.) However, Dr. Jorgensen testified that the WDH representatives [redacted]

[3] The others were Attorneys Cinde Warmington, Bill Christie, and Elizabeth Azano.

[redacted] (Ex. B, Jorgensen Dep. 289:22−290:1.) The lawyers, including Attorneys Best and Mulholland, spoke "[redacted] (Ex. 26, Allen Dep. 253:14−257:11.) Physician Defendants did not discuss the meeting with Dr. Loiacono or Mr. Sieffert, though Dr. Allen acknowledged the information shared by WDH was "material" to the ongoing negotiations pertaining to the Agreement. (*Id*., 264:5−265:10.)

On May 22, 2019, WDH sent a letter of nonrenewal to Atlantic/NAPA-NH, along with an offer, to be held open for 30 days, to extend the Agreement for one year. (Ex. 38, Sieffert-9.) In early June, Mr. Sieffert and Dr. Loiacono, on behalf of Atlantic/NAPA-NH, negotiated the terms of the proposed extension with WDH. One issue was whether an amendment to the Agreement, which pertained to WDH's requested expansion of services and about which WDH and Atlantic/NAPA-NH had been negotiating for months, would be incorporated into the extension. (Ex. 40, Sieffert Dep. 89:2−92:9.)

On June 6, 2019, Mr. Sieffert circulated a draft email to Drs. Loiacono and Lehrer. (Ex. 41, Atlantic-97.) The draft email was addressed to the Atlantic/NAPA-NH providers and was intended to inform them about the nonrenewal and proposed extension. Mr. Sieffert wrote that "this may be a process by which we work through the details of a new contract and move into one-year terms just as we believe they may be doing with other providers." (*Id*.) He noted that "[t]his may also be a tactic to get us to agree to a level of service that we don't have the staff just yet to fully commit to." (*Id*.)

On June 10, 2019, Ms. Caille sent Mr. Sieffert an email in which she stated that WDH was working on the amendment to the Agreement. (Ex. 42, Atlantic-101.) On the same day, Dr. Lehrer emailed Mr. Sieffert and Drs. Loiacono and Jorgensen that, in light of recent events and the "dissatisfaction communicated to me from [WDH]

administration," he and other anesthesiology providers had "sought out legal representation." (Ex. 43, Atlantic-301.) In this email, Dr. Lehrer also wrote:

> The purpose of this motion[4] is a precautionary approach to make sure we understand the legal landscape and potential impact of various possible outcomes. Hope you understand that we are just doing our due diligence to make sure we are protected and able to maintain the ability to work and raise a family where most of us have for many years.
>
> As you have been transparent, I too want to be upfront and clear w[here] we stand.

(*Id*.)

At some point between June 6, and June 18, 2019, Dr. Lehrer provided Ms. Caille with a copy of Mr. Sieffert's draft June 6, 2019 email. (Exs. 18, Caille Dep. 34:16−35:22; 41, Atlantic-97.) Sometime shortly thereafter, Ms. Caille recommended to Mr. Walker that WDH rescind the extension offer. (Ex. 44, Caille Dep. 65:11−20.) She testified that the draft email had given her "a lack of confidence," and led her to conclude that Atlantic/NAPA-NH were not aligned with WDH and could not "live up" to verbal commitments the latter had made about staffing. (*Id*. at 66:9−67:9.) On June 18, 2019, prior to the 30 day offer lapse, WDH sent correspondence to Atlantic/NAPA-NH rescinding the extension offer. The letter did not provide a reason. (Ex. N, Sieffert 11.)

On June 20, 2019, Dr. Loiacono and Mr. Sieffert met with Ms. Caille and Mr. Walcek. According to Ms. Caille's memorandum of that meeting, Dr. Loiacono and Mr. Sieffert sought explanation as to how they went from negotiating a three-year renewal to WDH extending and then rescinding a one-year extension offer. (Ex. 45, Atlantic-109.) Dr. Loiacono indicated that Atlantic/NAPA-NH intended to enforce the restrictive

[4] The Court assumes that by "purpose of this motion," Dr. Lehrer meant the reason why the providers sought out legal representation. (Ex. 43, Atlantic-301.)

covenants in the providers' employment agreements, and planned to reassign the providers to other healthcare facilities upon expiration of the Agreement. Dr. Loiacono asked whether WDH had approached any of the Atlantic/NAPA-NH providers about WDH employment. Ms. Caille wrote in the memorandum that she responded "no," and that, "WDH Management respects the NAPA employment relationship." (*Id*.)

On June 21, 2019, Dr. Allen texted Dr. Lehrer: "Although I'm glad the contract is terminated – I assume that means we start preparing to be hospital employees in December instead of a year from December." (Ex. 20, Allen 2, p. 626.) Dr. Lehrer replied that they would be "[e]ither hospital employees or deployed to another napa hospital." (*Id*.) Dr. Allen then wrote that he would "begin putting together a proposal . . . for what we would want an employment contract with wdh to look [like]." (*Id*.)

On June 25, 2019, counsel for WDH sent Atlantic/NAPA-NH correspondence to inform them that WDH intended to enter into discussions with the providers about them continuing to provide services after the expiration of the Agreement. (Ex. O, Atlantic-269.) On June 27, 2019, Atlantic/NAPA-NH wrote to WDH informing it of their intention to enforce the restrictive covenants. (Ex. P, Atlantic-270.) On July 2, 2019, Dr. Loiacono emailed the Atlantic providers, asking which NAPA-NH locations they would prefer to be sent to after expiration of the Agreement. (Ex. 48, Atlantic-141.)

On July 10, 2019, Mr. Walker drafted a memorandum to be sent to WDH's Operating Room and Center for Pain Management employees, which specified WDH's intention to create a new anesthesia group. In the memorandum, Mr. Walker noted that WDH had been "very pleased" with the Atlantic anesthesiology providers. (Ex. 49, Atlantic-133.) He acknowledged that there were questions as to whether the providers would be subject to non-competes and whether these would be enforceable. He wrote

that such agreements entered into after August 5, 2016, for physicians, and June 2018 for CRNAs, were not enforceable under New Hampshire law. (*Id*.)

On July 11, 2019, Atlantic/NAPA-NH terminated Dr. Lehrer's employment. Atlantic/NAPA-NH commenced a civil action against him on July 16, 2019, asserting breach of contract, tortious interference, and misappropriation of trade secrets. (*See* 218-2019-CV-993 Compl.) On July 19, 2019, WDH filed suit against Atlantic/NAPA-NH, seeking to bar the enforcement of the restrictive covenants. (*See* 218-2019-CV-1683 First Am. Compl.)

On July 30, 2019, WDH accepted resumes from Atlantic/NAPA-NH providers Dr. Michael Lane, Dr. Scott Lauer, and Ms. Goodkin. (Ex. 50, Hanson 10, WDH000008828.) WHD thereafter communicated with the Atlantic providers to negotiate financial terms as part of their potential employment. (Exs. 51, Atlantic-154; 52, Atlantic-155.) Norman Heine, WDH's Director of Physician Compensation and Provider Affairs, made these communications, as he was directed, using the providers' personal email addresses. (Ex. 53, Heine Dep. 322:12−324:16.)

On August 9, 2019, with respect to the SPINE Clinic, Mr. Nesmith emailed Ms. Caille the following:

> The sooner we can get this clinic up and running the better. . . . If we can get a provider [to] begin this work who has no ties with NAPA now, get experienced staff who are willing to defect, and a location to put this, we can hit the ground running as opposed to having a lull or transitional period from December through possibly late January.
>
> I understand all of the staff at the Spine Center may be willing to defect now.

(Ex. 56, Atlantic-168.) Later on the same day, he wrote Ms. Caille:

> Assimilate their staff as we build ours and our new practice. Their ability to see patient follow ups and new patients dwindles while ours increases. . . .

> We will already [have] transitioned a portion of their patient population. This one should be a quick surgical strike.
>
> It would also be great to send targeted communication to our pain patients who do and have come to CPM for their care. While we won't be able to capture all patients from their practice, we will get a large portion that way.

(*Id*.)

On August 28, 2019, Dr. Lane emailed Mr. Heine that "most members submit their letters of resignation with some trepidation to NAPA later this week," citing insufficient pay and poor work-life balance. (Ex. 57, Atlantic-266.) Dr. Lane also wrote that "[o]ur group desires to move forward in partnership with WDH after the NAPA contract ends on November 30." (*Id*.)

On August 28, 2019, Dr. Allen emailed Attorney Best [redacted] (Ex. 59, Privileged-55.)

On August 30, 2019, Dr. Allen emailed Attorney Best [redacted] (Ex. 54, Privileged-57.) Dr. Allen also wrote in this email [redacted] Attorney Best [redacted] Dr. Allen [redacted] (*Id*.)

Also on August 30, 2019, Ms. Caille texted Mr. Walker that, "[t]his has been an amazing day. Proof that our leadership has brought trust among people who trust we will protect them. They have voted with their feet. Their loyalty cannot be ignored. We must go out on a limb if need be. It is the right thing to do." (Ex. 7, Caille Dep.

104:1−105:19.) Ms. Caille testified that, by voting with their feet, she meant that the providers were leaving Atlantic/NAPA-NH to become WDH employees, and that by going out on a limb for them, she meant indemnifying them. (*Id*. 104:13−17.) Drs. Jorgensen and Allen provided their 90 days' notices of resignation to Atlantic/NAPA-NH on August 30, 2019, and September 22, 2019, respectively. By around late August 2019, all but one of the Atlantic/NAPA-NH anesthesiology providers had submitted their resignations to Atlantic/NAPA-NH. Attorneys Best and Mulholland continued to negotiate the providers' employment with WDH, which included discussions about salary and indemnification. (Exs. 64, Privileged-60, 65, Privileged-61; 66, Privileged-62; 67, Privileged-63.)

On October 1, 2019, after the providers had received offers of employment from WDH, Dr. Jorgensen had a conference call with Dr. Jim McKenna, WDH's Chair of its Credentialing Committee and a former Atlantic/NAPA-NH provider, as well as Mr. Heine and WDH's Martha Munhall. Mr. Heine testified that this call had to do with "recruiting for anesthesiologists," and said that Dr. Jorgensen "was trying to help get input into recruiting for other physicians." (Exs. 70, Atlantic-360; 53, Heine Dep. 313:8−319:13.) Dr. Jorgensen sent a text message to other providers that he was "not recruiting. But I discussed things with [Heine] and [Munhall]." (Ex. 24, Allen-4.)

Nearly all of the Atlantic/NAPA-NH providers signed employment contracts with WDH by mid-October 2019, with Dr. Lehrer signing his on November 4, 2019, with Attorney Best as the witness. (*See, e.g.*, Exs. 71, Atlantic-255; 72, Atlantic-362; 73, Atlantic-124.) Atlantic/NAPA-NH brought suit against Drs. Jorgensen and Allen on December 31, 2019. (*See* 218-2019-CV-424 Compl.)

Analysis

In its Order dated October 15, 2020, the Court found that Atlantic/NAPA-NH had made a prima facie showing that the crime-fraud exception applied to certain discovery Physician Defendants had been withholding based on their argument that it was privileged. The Court ordered Physician Defendants to submit the documents at issue for in camera review. (*See* Oct. 15, 2020 *Order* at 9.) Subsequent to that Order, and after the Court reviewed a small number of documents in camera, Physician Defendants produced more than a thousand documents designated as privileged and for attorneys' eyes only. Also relevant to this Order, Ms. Caille and Mr. Walker were deposed but did not answer certain questions on the basis of the common interest doctrine associated with the attorney-client privilege. Attorneys Best and Mulholland have not been deposed.

Atlantic/NAPA-NH now seek to be provided with the still-withheld discovery, and to depose witnesses about communications between Physician Defendants, WDH, and their attorneys. Specifically, Atlantic/NAPA-NH move to: (1) resume depositions of Ms. Caille and Mr. Walker; (2) strike WDH's privilege assertions and compel production of withheld materials; (3) strike Physician Defendants' privilege assertions; and (4) compel depositions of Attorneys Best and Mulholland. (*See generally* Court Docs. 129−32.)

With respect to all pending motions, Atlantic/NAPA-NH assert that: (1) Defendants cannot properly withhold discovery under the common interest doctrine; and (2) even if the doctrine applies, the crime-fraud exception nevertheless vitiates it. (Court Doc. 137 at 34−44.) Defendants respond that the sought discovery is subject to attorney-client privilege and the common interest doctrine, and that the crime-fraud

exception is inapplicable. (Court Docs. 172 at 13−20; 176 at 4.) The Court will first address these arguments before turning to the specific motions.

Common Interest Doctrine to Attorney-Client Privilege

It is well settled that "[w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications related to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser unless the protection is waived by the client or his legal representatives." *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 273 (1966). The burden to prove the existence of the attorney-client relationship lies with the party asserting the privilege. *McCabe v. Arcidy*, 138 N.H. 20, 25 (1993).

"Although occasionally termed a privilege itself, the common interest doctrine is really an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person." *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007). The common interest doctrine applies when two or more clients consult or retain the same attorney to represent them on a matter of common interest. *Cavallaro v. United States*, 284 F.3d 236, 249 (1st Cir. 2002). "In such a situation, the communications between each of them and the attorney are privileged against third parties." *Id*. "[T]he privilege [also] applies to communications made by the client or the client's lawyer to a lawyer representing another in a matter of common interest." *Id*. at 249–50; *see also N.H. R. Evid*. 502(b) (codifying the common interest doctrine and providing that it applies to "confidential communications made for the purpose of facilitating the rendition of professional legal services," when between, inter alia, the client's lawyer and a lawyer "representing another party in a pending action and concerning a matter of common interest therein.").

The doctrine "is not an independent basis for privilege, but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party." *Cavallaro*, 284 F.3d at 250. It generally does not protect communications that did not include an attorney or another privileged person. *See United States v. Krug*, 868 F.3d 82, 87 (2d Cir. 2017) (noting that, while the doctrine "somewhat relaxes the requirement of confidentiality by defining a widened circle of persons to whom clients may disclose privileged communications," a communication only among the clients is only privileged if it was "made for the purpose of communicating with a privileged person, i.e., the lawyer," or the lawyer's agent or client's agent). "The application of properly formulated doctrine to the facts remains a matter of discretion for the district court." *Massachusetts Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 225 (1st Cir. 2005).

As the proponents of the common interest privilege, Defendants bear the burden to establish that: (1) there was an action pending at the time the communications were made; and (2) the communications pertained to a matter of common interest. *See N.H. R. Evid*. 502(b)(3); *McCabe*, 138 N.H. at 25. Atlantic/NAPA-NH claim that there was no pending action when the communications were made, and that Defendants lacked a common interest because they were adverse parties to a business negotiation. (Court Doc. 137 at 3.) Defendants assert that the doctrine applies because it is not limited to when litigation is pending or even anticipated, and that they were pursuing a common interest, as evidenced by the fact that, at the May 2019 meetings, they discussed legal guardrails and the law relating to non-competes. (*See, e.g.*, Court Doc. 172 at 14.)

Addressing the second question under Rule 502 first, the Court concludes that the communications pertained to a common interest. *See N.H. R. Evid.* 502(b)(3). The

District Court of New Hampshire has held that "[w]hile a written agreement is not a prerequisite for invoking the common interest doctrine, parties seeking to invoke the exception must establish that they agreed to engage in a joint effort and to keep the shared information confidential from outsiders." *Micronics Filtration Holdings, Inc. v. Miller*, No. 18-CV-303-JL, 2019 WL 9104172, at *3 (D.N.H. Nov. 5, 2019) (finding no common interest where defendants failed to establish "any explicit agreement to pursue a joint legal effort"). In this case, the parties executed a common interest agreement.

Moreover, other evidence on record indicates that they had a common interest. First, both parties engaged counsel to assist in the discussions. *Cf. Cavallaro*, 284 F.3d at 250 (holding common interest inapplicable in the case of an accountant being made privy to the communications because "the accountant does not share an interest in receiving legal advice from the lawyer and cannot logically be said to have an interest in common with the represented party or parties"). While Defendants may have had some diverging interests, as would be expected in dealing with a potential employer-employee relationship, their interests did not need to be identical. The parties clearly had in common an intent for the providers to become WDH employees despite the potential obstacles from Atlantic/NAPA-NH's contractual relationships with both. *See F.D.I.C. v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000) (noting there must be "cooperation in fact toward the achievement of a common objective"); *In re Regents of Univ. of California*, 101 F.3d 1386, 1389 (Fed. Cir. 1996) (finding patent applicant and licensee had sufficient common interest where both had interest in obtaining valid, enforceable patents); *O'Boyle v. Borough of Longport*, 94 A.3d 299, 317 (N.J. 2014) (concluding that the parties' interests "need not be identical; a common purpose will suffice").

As to the first factor under Rule 502, the common interest privilege does not apply to communications between Physician Defendants and WDH, and/or between their respective counsel until litigation was pending.[5] *See N.H. R. Evid.* 502(b)(3). The Court concludes that this occurred on June 27, 2019, which is when Atlantic/NAPA-NH provided written notice to WDH about their intent to enforce the restrictive covenants in response to WDH's correspondence to Atlantic/NAPA-NH informing them that WDH intended to begin discussions with the providers about working at WDH, because at this point the threat of litigation was very real. (*See* Ex. O, Atlantic-269; Ex. P, Atlantic-270.) Thus, any claim of privilege as to communications between Physician Defendants and WDH and/or between their counsel is waived if the communications were made before this date, even if the communications pertained to the common interest.

Although there may be circumstances in which a relationship between two parties becomes adversarial such that there could be a common interest long before the actual initiation of a lawsuit, that is not the case here. Atlantic/NAPA-NH and WDH were engaged in contract renewal negotiations until close in time to when suit was threatened. The Court declines to expand the conception of the common interest doctrine such that it encompasses the period during which Physician Defendants and WDH were pursuing their common goal in the absence of an actual threat of litigation. *See BDO Seidman, LLP*, 492 F.3d at 815; *Klonoski v. Mahlab*, 953 F. Supp. 425, 432

[5] As set forth above, the doctrine does not protect communications that were made only between Physician Defendants and WDH that did not include legal counsel unless made for the purpose of communicating with a privileged person, such as an attorney. Determining whether the doctrine protects each communication at issue that was only between Physician Defendants and WDH would require making a determination as to whether each communication was made for the purpose of communicating with a privileged person. *See Krug*, 868 F.3d at 87. The Court need not do so because, even if the doctrine applied to all communications without counsel, those communications would still be subject to disclosure because of the application of the crime-fraud exception, discussed below. For ease of reading, the Court will refer inclusively to communications between Physician Defendants and WDH, and/or between their counsel, when talking about the common interest doctrine in this case.

(D.N.H. 1996) ("Given that evidentiary privileges have traditionally been construed narrowly by the courts of this state, it is . . . unlikely that the New Hampshire Supreme Court would, if presented with the opportunity to do so, expand the attorney-client privilege in the manner urged by defendants."). However, even those communications between Physician Defendants and WDH and/or their attorneys that occurred after the initiation of litigation and that would ordinarily be protected by the common interest doctrine may be subject to disclosure because of the crime-fraud exception.

Crime-Fraud Exception

Pursuant to Rule of Evidence 502(d)(1), "[t]here is no privilege . . . [i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit in the future what the client knew or reasonably should have known to be a crime or fraud." The party invoking the crime-fraud exception must "present evidence: (1) that the client was engaged in (or was planning) criminal or fraudulent activity when the attorney-client communications took place; and (2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity." *In re Grand Jury Proceedings*, 417 F.3d 18, 22 (1st Cir. 2005).

The party asserting crime-fraud must "demonstrate that there is a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud. A reasonable basis is something less than a mathematical (more likely than not) probability that the client intended to use the attorney in furtherance of a crime or fraud." *Rockwood Select Asset Fund XI, (6)-1, LLC v. Devine, Millimet & Branch, PA*, 113 F. Supp. 3d 471, 477 (D.N.H. 2015) (describing this standard as "the lower-than-preponderance quantum of proof"); *see also In re Grand Jury Proceedings*, 417 F.3d at 23 ("The circuits—although divided on articulation and on some important practical

details—all effectively allow piercing of the privilege on something less than a mathematical (more likely than not) probability that the client intended to use the attorney in furtherance of a crime or fraud.").

However, that there is a reasonable basis to believe the client engaged in a crime or fraud is insufficient, as "[f]orfeiture of the privilege requires the client's use or aim to use the lawyer to foster the crime or the fraud." *Rockwood Select,* 113 F. Supp. 3d at 478. "The client's state of mind controls this analysis." *Id*. at 477. For example, "the attorney-client privilege is forfeited inter alia where the client sought the services of the lawyer to enable or aid the client to commit what the client knew or reasonably should have known to be a crime or a fraud." *Id*. at 477−78; *see also In re Grand Jury Investigation*, 445 F3d 266, 274−276, 279 & n. 4 (3rd Cir. 2006) (noting that the exception applies regardless of whether client initiated contact or whether lawyer acted improperly or was even aware of client's conduct).

As the Court wrote in its October 15, 2020 Order, while New Hampshire has not done so, many courts take a broad view of the crime-fraud exception and apply it to conduct other than strict crimes or frauds. Relevant here, this includes breach of fiduciary duty and tortious interference with contractual relations. The Court determined that Atlantic/NAPA-NH had made a prima facie showing that the crime-fraud exception applied, warranting an in camera review. (*See* Oct. 15, 2020 *Order* at *5−6.) Atlantic/NAPA-NH now argue that the intervening discovery shows that they are entitled to be provided with materials withheld by Defendants as privileged.

Claimed Breach of Physician Defendants' Fiduciary Duties

Atlantic/NAPA-NH first assert that Physician Defendants engaged in a course of conduct that breached the fiduciary duties they owed to Atlantic/NAPA-NH, thereby

vitiating attorney-client privilege. (Court Doc. 137 at 32−33, 41.) Physician Defendants reply that there is insufficient evidence they knew or reasonably should have known their engagement of Attorney Best constituted a crime or fraud. They further argue [redacted] (Court Doc. 176 at 19−20, 24.) WDH adds that Physician Defendants owed fiduciary duties to WDH as well as Atlantic/NAPA-NH, and that Physician Defendants had broad discretion to act when those duties conflicted. (Court Doc. 172 at 17−19.)

As discussed in the Court's prior Order, a number of courts have found that the crime-fraud exception applies where there has been a breach of fiduciary duty. (*See* Oct. 15, 2020 *Order* at *5−6 (citing *Harris Mgmt., Inc. v. Coulombe*, 151 A.3d 7, 17 (Me. 2016); *Mueller Indus., Inc. v. Berkman*, 927 N.E.2d 794, 808-09 (Ill. App. Ct. 2010), abrogated on other grounds by *People v. Radojcic*, 998 N.E.2d 1212 (Ill. 2013); *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 487 (Ky. 1991)).) The Court concluded that, while the supreme court has yet to hold that the scope of the crime-fraud exception encompasses more than strict crimes or frauds, the cited cases' reasoning was persuasive as to breach of fiduciary duty. (Oct. 15, 2020 *Order* at 4.)

It is axiomatic that there can be no breach of fiduciary duty in the absence of owing such a duty in the first place. *See, e.g.*, *Gibson v. Williams, Williams & Montgomery P.A.*, 186 So.3d 836, 851 (Miss. 2016); *Graphic Directions, Inc. v. Bush*, 862 P.2d 1020, 1022 (Colo. App. 1993). While Physician Defendants were not corporate officers or directors of Atlantic/NAPA-NH, they did not need to be to owe them fiduciary duties. "A fiduciary relationship has been defined as a comprehensive term and exists wherever influence has been acquired and abused or confidence has been

reposed and betrayed." *Lash v. Cheshire Cnty. Sav. Bank, Inc.*, 124 N.H. 435, 438 (1984) (noting that "[t]he trend is toward liberalizing the term [fiduciary] in order to prevent unjust enrichment"). Determining whether a fiduciary relationship exists "involves a highly individualized inquiry into whether the facts of a given transaction establish that 'there has been a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence.'" *Mulligan v. Choice Mortg. Corp. USA*, No. CIV. 96-596-B, 1998 WL 544431, at *9 (D.N.H. Aug. 11, 1998) (quoting *Lash*, 124 N.H. at 439). Consistent with these principles, many courts have found that non-officers owe their employers fiduciary duties. *See, e.g.*, *Berry v. Goodyear Tire & Rubber Co.*, 242 S.E.2d 551, 552 (S.C. 1978) (holding that tire salesman owed duty of loyalty to employer); *E.J. McKernan Co. v. Gregory*, 623 N.E.2d 981, 993-994 (Ill. App. Ct. 1993) (finding non-officer employee owes duties "since an agent must act solely for the principal in all matters related to the agency and refrain from competing with the principal").

Physician Defendants were not mere employees and instead held leadership roles with respect to the Atlantic practice. Dr. Jorgensen was the head of Atlantic/NAPA-NH's pain management clinic, Dr. Lehrer the chief of the anesthesiology group, and Dr. Allen the director of the Wentworth Surgery Center. (Exs. 4, Jorgensen Dep. 151:8−152:3; 18, Caille Dep. 67:6−7; 26, Allen Dep. 274:14−19.) Managers and supervisors owe fiduciary duties to their employers because such positions require trust and confidence. In their Atlantic roles, Physician Defendants had authority over other Atlantic/NAPA-NH employees, and they managed the practice on behalf of Atlantic/NAPA-NH, which indicates that the latter placed trust and confidence in the former. *Compare Stine v. Sanders*, 987 S.W.2d 289, 296 (Ark. Ct. App. 1999) (holding

that business manager "controlled virtually every aspect of the business, [and thus] owed appellees a fiduciary duty"), *and Futch v. McAllister Towing of Georgetown*, 518 S.E.2d 591, 609 (S.C. 1999) (concluding tugboat captain and local manager of defendant's port operations owed loyalty), *with White v. Ransmeier & Spellman*, 950 F. Supp. 39, 43 (D.N.H. 1996) (finding secretary who was an at-will employee in a nonmanagerial role owed no duty of loyalty).

In addition, Drs. Lehrer and Jorgensen became Atlantic/NAPA-NH employees because of their sale of Atlantic to NAPA-NH, for which they received over $12 million. Although the Court has not found support in case law for the proposition that the considerable amount of money they received heightened the duties they owed, the Court nevertheless reaches this conclusion. As an analogy, restrictive covenants that are ancillary to the sale of a business are more liberally construed than other restrictive covenants in the employment context. This is because, in such a case, "the parties presumably bargain from positions of equal bargaining power. The covenantor is paid a premium as consideration for his agreeing not to compete with the buyer, and the proceeds from the sale assure that the covenant will not result in undue hardship." *Centorr-Vacuum Indus., Inc. v. Lavoie,* 135 N.H. 651, 654 (1992).

The fact that covenants in such a case are more readily found to be enforceable indicates that those who profit from the sale of a business have a duty not to compete because when they do, they undermine the business they sold. So as not to undermine the business, Drs. Lehrer and Jorgensen owed Atlantic/NAPA-NH a duty not to mismanage the practice. Relatedly, the fact that Physician Defendants led the practice for Atlantic/NAPA-NH following the sale, rather than selling and then detaching, further indicates they owed Atlantic/NAPA-NH a fiduciary duty. *Cf. Webber Oil Co. v. Murray*,

551 A.2d 1371, 1375 (Me. 1988) (finding no common law fiduciary duty of fair dealing without a relationship of confidence, where there was instead one resulting from a "conventional business deal").

Finally, Dr. Lehrer was representing Atlantic/NAPA-NH in their ongoing negotiations with WDH over the Agreement, and so owed Atlantic/NAPA-NH duties to disclose material information. *See Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 285 (5th Cir. 2007) ("At the very minimum, a fiduciary who negotiates on behalf of his employer must disclose any adverse interest in the matter of the negotiation.").

All of these facts support the conclusion that Physician Defendants owed fiduciary duties to Atlantic/NAPA-NH. Having so concluded, the Court next addresses the sufficiency of the evidence adduced that they breached those duties. It is true that "[a]n at-will employee may properly plan to go into competition with his employer and may take active steps to do so while still employed." *Augat, Inc. v. Aegis, Inc.*, 565 N.E.2d 415, 419 (Mass. 1991). "Such an employee has no general duty to disclose his plans to his employer, and generally he may secretly join other employees in the endeavor without violating any duty to his employer." *Id*.

However, "the right to make such arrangements is not absolute," *Feddeman & Co., C.P.A., P.C. v. Langan Assocs., P.C.*, 530 S.E.2d 668, 672 (Va. 2000), though "the line separating mere preparation from active competition may be difficult to discern in some cases," *Sec. Title Agency, Inc. v. Pope*, 200 P.3d 977, 989 (Az. Ct. App. 2008). "In determining whether a breach occurred, [the Court] focus[es] on the nature of the defendant's preparations to compete." *Pope*, 200 P.3d at *989; see also MSC Safety Sols, LLC v. Trivent Safety Consulting, LLC*, No. 19-CV-00938-MEH, 2020 WL 7425874, at *14 (D. Colo. Dec. 18, 2020) ("Factors to be weighed are the nature of the

employment relationship, the impact or potential impact of the employee's actions on the employer's operations, and the extent of any benefits promised or inducements made to obtain their services in the competing business.").

Here, beginning in November 2018, Physician Defendants participated in numerous discussions with WDH representatives about whether Physician Defendants could become WDH employees, which would supplant WDH's contractual relationship with Atlantic/NAPA-NH. (*See, e.g.*, Ex. 10, Lehrer Dep. 247:18−21.) Relatedly, Physician Defendants knew that WDH was disinclined to renew the Agreement even though WDH continued to negotiate with Atlantic/NAPA-NH. This information was not shared with Dr. Loiacono or Mr. Sieffert despite it being "material" to the negotiations. (Ex. 26, Allen Dep. 264:5−265:10.) Drs. Lehrer and Allen even communicated about trying to keep the information about the group leaving Atlantic/NAPA-NH's employ from Atlantic/NAPA-NH. (Ex. 20, Allen-2, ALLEN000599).

Because this information would likely have impacted the negotiations, there is a "reasonable basis" to believe these omissions constitute a breach of Physician Defendants' duties. *See Rockwood Select*, 113 F. Supp. 3d at 477; *see also Stine*, 987 S.W.2d at 296 (holding that, where manager owed employer a fiduciary duty, a jury "could properly infer that [employer] relied on [manager] to continue to act in good faith towards them and to disclose any facts within her knowledge that were detrimental to their business during the period leading up to the sale and the brief transition period thereafter"). Further, Dr. Lehrer was representing Atlantic/NAPA-NH in their negotiations with WDH. By not disclosing the information that would be averse to their interests, he likely breached a duty. *See Wilkinson*, 508 F.3d at 285.

It also appears Physician Defendants coordinated their resignations. For example, on March 1, 2019, Dr. Jorgensen emailed Dr. Lehrer that "I guess the only way to get their attention is to have us (the docs) all quit. In one way or another that may happen." (Ex. 27, Atlantic-73.) On June 21, 2019, after they found out the Agreement was not going to be renewed, Dr. Allen texted Dr. Lehrer that "I assume that means we start preparing to be hospital employees in December instead of a year from December." (Ex. 20, Allen 2, p. 626.) There is also evidence Physician Defendants worked to recruit the providers. While Dr. Jorgensen told the other providers that he was not recruiting, Mr. Heine testified that an October 1, 2019 call that involved himself and Dr. Jorgensen had to do with "recruiting for anesthesiologists," and that Dr. Jorgensen "was trying to help get input into recruiting for other physicians." (Exs. 70, Atlantic-360; 53, Heine Dep. 313:8−319:13.) Further, the fact that Physician Defendants [redacted] Attorney Best [redacted] (*See* Ex. 21, Privileged 13, p. 124 [redacted]); *see ABC Trans Nat'l Transp., Inc. v. Aeronautics Forwarders, Inc.*, 413 N.E.2d 1299, 1306 (Ill. App. Ct. 1980) (holding coordinated resignation of key managers, resulting in "sudden, potentially crippling loss of half of [the employer's] business and major customers, as well as substantial numbers of its personnel" breached fiduciary duty). *Compare Feddeman & Co.*, 530 S.E.2d at 673 (finding firm employees breached fiduciary duties by formulating plan to resign en masse and secure firm's clients and employees, and then encouraging employees to resign and join rival), *with Motorola, Inc. v. Fairchild*

Camera & Instrument Corp., 366 F. Supp. 1173, 1177−78 (D. Ariz. 1973) (concluding no improper solicitation where, before accepting competitor's offer, employee discussed it with other employees to get their advice and provided them with competitor's telephone, but refused to discuss whether they could become employees).

Importantly, this conduct occurred while Physician Defendants were still employed by Atlantic/NAPA-NH and so still owed them fiduciary duties. *Cf. Pediatric Nephrology Assocs. of S. Florida v. Variety Children's Hosp.*, 226 F. Supp. 3d 1346, 1356 (S.D. Fla. 2016) (dismissing complaint against former partner-doctor that he breached his fiduciary duty to the practice group by taking steps to directly compete, including by stealing patients and referrals, because plaintiffs failed to identify what conduct occurred prior to his disassociation from the group).

With respect to the argument Physician Defendants owed competing fiduciary duties, the Court finds the case law cited by WDH to be inapposite, as it dealt with pension plan trustees owing duties to preserve plans' security and to use those funds to maximally benefit the beneficiaries. (Court Doc. 172 at 19 (citing *Silver v. Glaziers Loc. Union No. 252 Health & Welfare Fund*, No. CIV. A. 90-2734, 1991 WL 209776, at *4 (E.D. Pa. Oct. 9, 1991), aff'd sub nom. *Silver v. Glaziers Loc. Union No. 252*, 968 F.2d 14 (3d Cir. 1992).). Physicians undoubtedly owe duties to their patients. However, the Court finds no support for the proposition that physicians owe duties to hospitals where they have admitting privileges, nor that one who owes fiduciary duties to two entities may elect to benefit one at the expense of the other or withhold information from one. *See O'Donnell v. CBS, Inc.*, 782 F.2d 1414, 1420, n. 2 (7th Cir. 1986) ("[A] dual agent owes a number of fiduciary duties to each principal at all times, including the duty to inform each principal of facts which may be valuable to the principal."); *St. Paul at*

Chase Corp. v. Mfrs. Life Ins. Co., 278 A.2d 12, 24 (Md. Ct. App. 1971) ("[W]hen one acts in such a dual capacity, one has an even greater responsibility to be sure that he walks a straight line and acts in a fair manner towards both principals, than if he were acting for only one party.").

The Court concludes that Atlantic/NAPA-NH have set forth a "reasonable basis" for believing Physician Defendants were planning an action that would constitute a breach of their fiduciary duties, *see Rockwood Select*, 113 F. Supp. 3d at 477, meeting the first of the two crime-fraud exception factors as to Physician Defendants, *see In re Grand Jury Proceedings,* 417 F.3d at 22 (providing that the party invoking the exception must adduce evidence to show "that the client was engaged in (or was planning) criminal or fraudulent activity when the attorney-client communications took place").

Claimed Tortious Interference by WDH with Atlantic/NAPA-NH's Contractual Relations

As for WDH, in support of their argument that it intentionally interfered with Atlantic/NAPA-NH's contractual relations such that the first *In Re Grand Jury Factor* is met with respect to WDH, 417 F.3d at 22, Atlantic/NAPA-NH point to the fact that WDH knew of the provider contracts since at least November 2018. They argue that WDH knew that the restrictive covenants were a barrier to employing the providers, but that over the next year, WDH nevertheless actively courted them. Atlantic/NAPA-NH assert that as a result, they were forced to close the SPINE Clinic and were deprived of the benefit of their bargains with the providers. (Court Doc. 137 at 43−44.) WDH replies that merely discussing hiring another company's employees cannot constitute tortious interference, even if the employees were subject to non-competes. (Court Doc. 172 at 11.)

Tortious interference with contractual relations is shown where: (1) plaintiff had a contractual relationship with its employees; (2) defendant knew of this relationship; and (3) defendant "wrongfully induced the employees to breach that contract." *Nat'l Emp't Serv. Corp. v. Olsten Staffing Serv., Inc.*, 145 N.H. 158, 162 (2000). Physician Defendants and the other providers had economic relations with Atlantic/NAPA-NH because they were employees. WDH clearly knew of the existence of those relationships because Defendants discussed the employment agreements numerous times. (*See, e.g.*, Ex. 17, Atlantic-276.) Accordingly, the Court must address the third factor: whether WDH intentionally and improperly interfered with Atlantic/NAPA-NH's economic relations with the providers. *See Olsten Staffing*, 145 N.H. at 162.

This factor requires the Court to consider whether there was "an improper purpose, beyond lawful competition, on the part of the competitor or the employee." *Id*. at 163. Showing improper purpose requires looking at whether the interference with the employer's "contractual relations was either desired by the [defendant] or known by him to be a substantially certain result of his conduct." *Demetracopoulos v. Wilson*, 138 N.H. 371, 374 (1994). In determining whether a competitor's conduct was improper, courts consider: (1) the nature of the competitor's conduct; (2) the competitor's motive and interests; (3) the employer's interests with which the competitor interferes; (4) the parties' relations; (5) societal interests in protecting the competitor's freedom of action and employer's contractual interests; and (6) how close the competitor's conduct was to the interference. *Roberts v. Gen. Motors Corp.*, 138 N.H. 532, 540–41 (1994).

With respect to an at-will employee specifically, "[a] competitor may offer better contract terms, as by offering an [at-will] employee of the plaintiff more money to work for him . . . and he may make use of persuasion or other suitable means, all without

liability." *Olsten Staffing*, 145 N.H. at 162. Accordingly, for there to be liability, there must be "an improper purpose, beyond lawful competition." *Id*. A competitor may also pursue its own interests, and determining when a competitor's efforts go beyond the permissible pursuit of its own interest can be difficult. "Certainly, in nearly all cases of interference, the defendant hopes to benefit by way of a resulting advancement of its personal or business interests." *Jim-Bob, Inc. v. Mehling*, 443 N.W.2d 451, 462–63 (Mich. Ct. App. 1989). However,

> these ends do not necessarily justify the means undertaken. A defendant may not, with impunity, sabotage the contractual agreements of others, and that defendant's cry that its actions were motivated by purely business interests cannot, standing alone, operate as a miracle cure making all that was wrong, right. On the contrary, the defendant's motive is but one of several factors which must be weighed in assessing the propriety of the defendant's actions.

Id. (listing the factors, which mirror those in *Roberts* cited above, 138 N.H. at 540–41).

It cannot be disputed that WDH intended to poach the providers and patients from the SPINE clinic. (*See* Ex. 56, Atlantic-168 (in which Mr. Nesmith emailed Ms. Caille that WDH would "[a]ssimilate their staff as we build ours and our new practice. Their ability to see patient follow ups and new patients dwindles while ours increases.")). Once the providers left for WDH, Atlantic/NAPA-NH had to close the SPINE Clinic. These facts support finding that WDH engaged in improper interference. *See Certified Lab'ys of Tex., Inc. v. Rubinson*, 303 F. Supp. 1014, 1026 (E.D. Pa. 1969) ("[T]he interference with the at-will employment relationship itself by a competitor is privileged, unless the purpose is to cripple and destroy."); *ReNew Windows & Siding, LLC v. Anderson*, No. CV116011172, 2013 WL 1406232, at *4 (Conn. Super. Ct. Mar. 18, 2013) (finding defendant's use of contact information to poach customers showed, by a preponderance of the evidence, that defendant interfered with plaintiff's business

relations); *Bancroft–Whitney Co. v. Glen*, 411 P.2d 921, 940–41 (Cal. 1966) (new employer that "cooperated" with employee in his breach of fiduciary duty to former employer and "received the benefits" thereof, cannot "disclaim the burden" of liability).

Further, WDH intentionally kept its discussions with the providers secret from Atlantic/NAPA-NH, and even attempted to mislead them about its intentions with respect to the providers. (Ex. 45, Atlantic-109 (Ms. Caille's memorandum of the June 20, 2019 meeting between WDH and Atlantic/NAPA-NH, in which she wrote that she told Atlantic/NAPA-NH that "WDH Management respects the NAPA employment relationship").) The fact that WDH apparently intentionally misled Atlantic/NAPA-NH as to its respect for the providers' covenants bears on the nature of WDH's conduct and motive and supports finding WDH had an improper purpose. *See Roberts*, 138 N.H. at 540; *Applied Predictive Tech., Inc. v. MarketDial, Inc.*, 598 F. Supp. 3d 1264, 1287 (D. Utah 2022) (noting that improper means can be shown through deceit or misrepresentation). Finally, the fact that the result was Atlantic/NAPA-NH lost their Atlantic anesthesiology department indicates that WDH interfered with Atlantic/NAPA-NH's significant interests. *See Roberts*, 138 N.H. at 540–41.

In sum, there is a reasonable basis to find that WDH's conduct tortiously interfered with Atlantic/NAPA-NH's contractual relations such that the first factor of the crime-fraud exception is met with respect to WDH. *See In re Grand Jury Proceedings,* 417 F.3d at 22.

Second *In re Grand Jury* Factor – Use of Attorney Communications to Facilitate or Conceal Breach of Fiduciary Duties and Tortious Interference

The Court next concludes that Atlantic/NAPA-NH have made a sufficient showing that the services of Attorneys Best and Mulholland were used to perpetuate breach of

fiduciary duty and tortious interference as set forth above. *Id*. The Court first notes the close relationship between those communications and the wrongful conduct. *See In re Grand Jury Proceedings # 5,* 401 F.3d 247, 251 (4th Cir. 2005) (noting the factor may be met "with a showing of a close relationship between the attorney-client communications and the possible criminal or fraudulent activity"). It is undisputed that the attorneys were present for the May 2019 meetings and were party [redacted] For example, the draft agenda for the May 20, 2019 meeting provided that one of the topics was [redacted]," to be led by Attorneys Mulholland, Best, and others. (Ex. 37, Privileged 25, p. 876.) The meetings and communications indicate that Defendants engaged Attorneys Best and Mulholland [redacted] *Compare United States v. Jacobs*, 117 F.3d 82, 88 (2d Cir. 1997) (holding it was reasonable to believe intent behind obtaining attorney's opinion was to further fraudulent debt elimination plan in part because, prior to obtaining counsel, [client] had obtained false identification and juristic identification in Mexico, indicating he "had formed an intent to become involved" in the fraudulent activity prior to receiving his attorney's advice), *with In re Grand Jury Proceedings #5*, 401 F.3d at 255 (holding it was "unclear if the communications . . . bear a close relationship to the alleged criminal conduct," where the evidence showing that "the attorney was present at meetings in which the alleged criminal conduct could have been discussed" was unpersuasive). The Court also notes that Defendants signed a common interest agreement before WDH let Atlantic/NAPA-NH know the Agreement was not being renewed and before Physician Defendants resigned. As the Court

indicated in its October 15, 2020 Order, this further evidences that Defendants were using the attorneys' services for what they understood or at least suspected were contrary to their obligations to Atlantic/NAPA-NH.

In sum, there is at least a reasonable basis to conclude Defendants used the services of Attorneys Best and Mulholland to perpetrate a breach of fiduciary duty and tortiously interfere with Atlantic/NAPA-NH's contractual relations. *See Rockwood Select*, 113 F. Supp. 3d at 477; *In re Grand Jury Proceedings*, 417 F.3d at 22.

The Court notes that not all jurisdictions use the reasonable basis standard. For example, Massachusetts and Maine use the higher preponderance of the evidence standard. However, even under this standard, the Court would find the above-described evidence shows it is more likely than not Defendants used their attorneys to perpetrate a breach of fiduciary duty and interfere with contractual relations. *See Harris Mgt., Inc. v. Coulombe*, 151 A.3d 7, 19−20 (Me. 2016) (finding lower court properly found application of crime-fraud exception, by preponderance of the evidence, based on evidence defendant did not intend to hire employee to manage golf course while also taking actions to convince employee it did in order to prevent employee from competing to purchase the club and to get a reduced price for the club, and that communications with the attorney showed use of that attorney to help with the deception); *In re Motion to Quash Bar Counsel Subpoena*, 982 A.2d 330, 337 (Me. 2009); *In re Grand Jury Investigation*, 772 N.E.2d 9, 22 (Mass. 2002).

Effect of Conclusions on Communications Including Attorneys

As discussed above, under Rule 502, the communications between Physician Defendants and WDH and/or between their respective attorneys prior to when litigation was pending, on June 27, 2019, are deemed waived and so Atlantic/NAPA-NH are

entitled to them. *See N.H. R. Evid.* 502(b)(3). Beyond this date and until the completion of the alleged wrongful conduct, Atlantic/NAPA-NH are also entitled to be provided with communications between Physician Defendants and WDH and/or between their respective attorneys because of the application of the crime-fraud exception. The Court concludes the completion occurred once the last Atlantic/NAPA-NH provider, Dr. Lehrer, had signed a contract with WDH on November 4, 2019.[6] By this point, Physician Defendants were no longer employed by Atlantic/NAPA-NH and so no longer owed the fiduciary duties at issue in this Order, and WDH could no longer have tortiously interfered with Atlantic/NAPA-NH's provider contracts. *See Pihlman v. State*, 664 S.E.2d 904, 907 (Ga. App. 2008) ("Communications occurring after a fraud or a crime has been completed are privileged, but those which occur before the perpetration of a fraud or commission of a crime and which relate thereto are not protected by the privilege."); *Magnetar Techs. Corp. v. Six Flags Theme Park Inc.*, 886 F. Supp. 2d 466, 483 (D. Del. 2012) ("Communications made after the fraud . . . are protected and are not subject to the crime-fraud exception. The aim of protecting these communications is to allow legal consultation for the purpose of establishing a defense.").

In reaching this conclusion, the Court is cognizant of the importance of the attorney-client privilege. As set forth above, in New Hampshire, unless there is a waiver, "[w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications related to that purpose, made in confidence

[6] In a now-vacated Order, the Court had determined that initiation of the lawsuit was an appropriate point at which to distinguish those communications that were subject to disclosure as a result of the crime-fraud exception, and those that were not. However, further examination of the relevant case law indicates that it is the conclusion of the crime or fraud, rather than when litigation commences, that should determine when communications may still be withheld despite the application of the crime-fraud exception.

by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser . . . ." *Riddle Spring Realty Co.*, 107 N.H. at 273. The purpose of the privilege "is to encourage full disclosure of information between an attorney and his client by guaranteeing the inviolability of their confidential communications." *Petition of Stompor*, 165 N.H. 735, 739 (2013); *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (holding that the privilege also "promote[s] broader public interests in the observance of law and administration of justice."). Consistent with these principles, the Court is cautious not to compel the disclosure of more information than Atlantic/NAPA-NH are entitled to, and must determine the proper scope of the discovery subject to disclosure.

The Court does not find case law addressing the exact issue presently before it—that is, what communications must be disclosed once the crime-fraud exception, here based on alleged breach of fiduciary duty and tortious interference, is applied in the context of the common interest doctrine. Nevertheless, the Court finds guidance from cases examining the reach of the crime-fraud exception as applied to communications between an attorney and client, limiting the reach to those communications pertaining to the alleged wrongful conduct. For example, in *In re Burlington Northern, Inc.*, the Fifth Circuit held that documents prepared by a company in connection with lawsuits were protected to the extent that the litigation activities were legitimate even if they related to a larger improper scheme, and thus found that the district court had incorrectly ordered discovery "without considering whether the specific litigation activities were illegitimate." 822 F.2d 518, 525 (5th Cir. 1987). The court noted that attorney-client privilege protects those "communications and papers generated when a client engaged his attorney for legitimate purposes." *Id*. Accordingly, "[t]o the extent the [clients] sought out their

attorneys to bring lawful suits and consulted with them in connection with such suits, they were within the scope of this protection." *Id*. Further, the fact that "the [clients] might also have consulted and received the help of their attorneys in connection with other activities that are not lawful does not change this conclusion." *Id*.; *see also United States v. Dyer*, 722 F.2d 174, 177 (5th Cir. 1983) (finding, as the proper balance of the interests of the government in obtaining evidence and protecting attorney-client privilege, that the evidence to be disclosed based on a prima facie showing of the crime-fraud exception should be limited to that pertaining "to the events immediately surrounding the preparation of" a letter written by the attorney as part of the alleged crime or fraud).

Considering these and other cases, the Fifth Circuit, in *In re Grand Jury Subpoena*, held that "the proper reach of the crime-fraud exception when applicable does not extend to all communications made in the course of the attorney-client relationship, but rather is limited to those communications and documents in furtherance of the contemplated or ongoing criminal or fraudulent conduct." 419 F.3d 329, 343 (5th Cir. 2005); *see also In re Grand Jury Subpoenas*, 144 F.3d 653, 661 (10th Cir. 1998) (holding that "district courts should define the scope of the crime-fraud exception narrowly enough so that information outside of the exception will not be elicited before the grand jury."); *Cendant Corp. v. Shelton*, 246 F.R.D. 401, 406−07 (D. Conn. 2007) (applying the second crime-fraud factor looking at whether the attorney's services were used to further a crime or fraud to determine if the sought communications were in furtherance thereof in order to distinguish them from those that merely occurred contemporaneously to the fraud).

The Court concludes from these cases that, once litigation was pending and until the completion of the alleged wrongdoing, Atlantic/NAPA-NH are only entitled to be provided with discovery sufficiently connected to the claimed crime or fraud—here, Physician Defendants' alleged breaches of fiduciary duties and WDH's alleged tortious interference, which would have resulted from their joint efforts towards WDH directly employing Physician Defendants. As set forth by the *In re Burlington* court, it is important to consider whether attorney-client communications were made "for legitimate purposes." 822 F.2d at 525. Accordingly, based on the record before the Court, discussions between Physician Defendants and Attorney Best, and between WDH and Attorney Mullholland, about [redacted] are presumably legitimate, such as Physician Defendants asking Attorney Best [redacted]. *See Lender Processing Servs., Inc. v. Arch Ins. Co.*, 183 So.3d 1052, 1058–59 (Fla. Dist. Ct. App. 2015) ("One of the chief purposes of the attorney-client privilege is to encourage clients to disclose their circumstances fully to lawyers whose assistance they seek in ascertaining their legal rights and obligations."). Physician Defendants and WDH may well have discussed the allegedly wrongful activity independently with their respective counsel. However, again, that they may have received their attorneys' assistance with unlawful activities does not alone render the totality of the assistance received disclosable. To hold otherwise could lead to clients fearing they cannot in good faith consult with attorneys about their legal rights. *See In re Burlington*, 822 F.2d at 525. Mindful of the importance of protecting a client's right to seek advice from an attorney, the Court declines to find the fact of just some discussion about wrongful conduct to be sufficient to breach the privilege.

On the other hand, there is ample evidence, as discussed above, that the communications between Physician Defendants and WDH, as well as between their respective attorneys, were intended to further the alleged wrongful conduct. In fact, there is ample evidence that it is this conduct that led to the May 2019 meetings and execution of the common interest agreement and resulting discussions, such as pertaining to WDH's offers to indemnify the providers. Accordingly, the Court is hard-pressed to find a sufficiently legitimate purpose to these communications that would justify withholding them from Atlantic/NAPA-NH, as compared to communications in the individual attorney-client relationship. *See Shelton*, 246 F.R.D. at 406−07 (holding that, where evidence showed two entities were formed and operated by defendant "as vehicles for carrying out the fraud," those communications were discoverable).

The Court concludes that compelling the disclosure only of the communications between Physician Defendants and WDH and/or between their respective counsel until the completion of the alleged wrongful conduct properly balances Atlantic/NAPA-NH's ability to access discovery on the basis of the crime-fraud exception with respecting the importance of the protections afforded by the attorney-client privilege. Accordingly, those communications between Physician Defendants and WDH and/or between their respective attorneys made until November 4, 2019, are subject to disclosure while those that were between just Physician Defendants and Attorney Best or between WDH and Attorney Mulholland, being outside of the strict confines of the common purpose, are not. The Court also finds this conclusion to be consistent with the purpose of the common interest doctrine: "to preserve the confidentiality of communications ordinarily outside the scope of the attorney-client privilege, where a common legal interest or defense strategy has been decided upon and undertaken by the parties and their

respective counsel." *Pampered Chef v. Alexanian*, 737 F. Supp. 2d 958, 966 (N.D. Ill. 2010). Here, the communications to be turned over are those that are outside of the ordinary scope of attorney-client privilege because they involved others besides each Defendant and respective attorney.

Effect of Conclusions on Communications Not Including Attorneys

Lastly, some sought discovery pertains to communications that were just between Physician Defendants or other providers, or just between WDH personnel, not in the presence of their respective attorneys. For example, Atlantic/NAPA-NH seek to depose Ms. Caille and Mr. Walker about their communications with each other as well as with respect to "advice they gave to their clients as to future actions of intentional conduct in violation of the crime-fraud exception." (Court Doc. 130 at 2.) The Court notes that these communications, not involving both Defendants or both attorneys, would seem to fall outside the scope of the common interest doctrine even where the common interest between Physician Defendants and WDH was in effect. They would also be disclosable unless privileged for another reason, such as by attorney-client privilege independent of the common interest between Physician Defendants and WDH, or the work product doctrine.

First, communications are not protected by attorney-client privilege just because the communicators happen to be represented by counsel. The privilege is meant to "protect from discovery confidential communications between a client and his or her attorney made for the purpose of obtaining legal advice." *Rockwood Select*, 113 F. Supp. 3d at 476. As discussed above and to the extent Physician Defendants or WDH personnel would be joint clients of Attorneys Best or Mulholland, respectively, communications between such clients are only privileged if expressly made for the

purpose of communicating with a privileged person, such as an attorney. *See Krug*, 868 F.3d at 87. Importantly, the party asserting the existence of the privilege has the burden of proof. *McCabe*, 138 N.H. at 25. Given this burden, and because "evidentiary privileges have traditionally been construed narrowly by the courts of [New Hampshire]," the Court declines to find that communications that did not include attorneys are privileged absent a sufficient showing that those communications were made for the purpose of obtaining legal advice or otherwise communicating with an attorney. *See Klonoski*, 953 F. Supp. at 432.

"[U]nder the work product doctrine, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." *Rockwood Select*, 113 F. Supp. 3d at 476. The purpose of the doctrine is to "shelter[] the mental processes" of a party so that it "can analyze and prepare" the case. *Balzotti Glob. Grp., LLC v. Shepherds Hill Proponents, LLC*, 173 N.H. 314, 324 (2020). The supreme court has "defined work product as the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation." *Id*. As with attorney-client privilege, the party invoking the protections of the work product doctrine has the burden of establishing that it applies. *Pacamor Bearing, Inc. v. Minebea Co., Ltd.*, 918 F. Supp. 491, 512 (D.N.H. 1996). Accordingly, again bearing in mind the importance of narrowly construing evidentiary privileges, for a sought communication to be shielded by the work product doctrine, the proponent must show that it was prepared in anticipation of litigation. *See id*.; *Balzotti Glob. Grp.*, 173 N.H. at 324; *Klonoski*, 953 F. Supp. at 432.

The Court will next discuss the specific implications of these conclusions with respect to each motion.

Motion to Resume Witness Depositions (Court Doc. 130)

At their respective depositions, Ms. Caille and Mr. Walker were instructed by counsel not to answer questions about the May 6 and May 20, 2019 meetings based on the asserted common interest doctrine. (*See, e.g.*, Exs. 11, Walker Dep. 116:24−131:17; 18, Caille Dep. 121:12−124:3; 11.) Atlantic/NAPA-NH now move to resume these depositions so that they can ask Ms. Caille and Mr. Walker about the May 2019 meetings and also about advice they provided "to their clients as to future actions" pertaining to the alleged breaches of fiduciary duties and tortious interference. (Court Doc. 130.) WDH replies that the sought information is privileged, cumulative, and irrelevant, and that Ms. Caille and Mr. Walker have already been extensively deposed. (Court Doc. 169 at 1.)

As set forth above, WDH cannot rely on the common interest between Physician Defendants and WDH to shield communications between them or their attorneys occurring prior to June 27, 2019, when litigation was reasonably anticipated. *See N.H. R. Evid.* 502(b)(3). Further, because of the application of the crime-fraud exception, WDH cannot rely on the doctrine with respect to communications between Physician Defendants and WDH and/or their attorneys that occurred between this date and November 4, 2019, which was when Dr. Lehrer signed on with WDH. Relevant here, this means that Ms. Caille and Mr. Walker cannot refuse to answer questions pertaining to what was discussed at the May 2019 meetings because they occurred in the presence of third parties. *See Riddle Spring Realty Co.*, 107 N.H. at 273.

The Court also concludes that communications between Ms. Caille and/or Mr. Walker and other WDH personnel are disclosable to the extent they occurred outside of the presence of WDH's legal counsel and pertained to communications with Physician

Defendants and/or Attorney Best about the plan to directly hire the providers. To the extent WDH would argue that these communications should be protected by attorney-client privilege just with respect to WDH, WDH has failed to sufficiently articulate why. *See McCabe*, 138 N.H. at 25. In fact, based on the record, it appears to the Court that they were not made to obtain legal advice or communicate with an attorney with respect to their own representation but rather pertained to the plan to hire the providers, and so are not privileged. *See id*.; *Krug*, 868 F.3d at 87. However, Ms. Caille and Mr. Walker may refuse to answer questions that pertain to conversations between only themselves, other WDH personnel, *and* their legal counsel, or that do not pertain to discussions about the plan to hire the providers.

To the extent WDH broadly asserts such communications would be subject to the work product doctrine, because WDH has failed to specifically explain how such communications were made in anticipation of litigation or otherwise explain why the doctrine applies, *see Rockwood Select*, 113 F. Supp. 3d at 476, the Court declines to so find, *see Pacamor Bearing, Inc.*, 918 F. Supp. at 512.

In sum, Ms. Caille and Mr. Walker must be made available to answer questions pertaining to what was discussed at the May 2019 meetings and what they discussed with other WDH personnel without legal counsel and pertaining to directly hiring the providers. This motion is GRANTED in part.

Motion to Strike WDH's Privilege Assertions and Compel Discovery (Court Doc. 132)

In connection with the October 15, 2020 Order but prior to consolidation of the cases, WDH intervened and claimed it had its own basis to assert the common interest doctrine. (Court Doc. 46.) Since then, WDH has withheld certain communications on the basis of its claimed privilege. (Court Doc. 132, Exs. A, B.) Atlantic/NAPA-NH now

ask the Court to strike WHD's privilege assertions with respect to a number of the communications; in particular, those about the May 2019 meetings and September 2019 communications between Physician Defendants' counsel and WDH pertaining to the terms of the providers' employment with WDH. They also assert that notes taken by Ms. Caille on May 17, 2019 must be produced, as these were about a meeting between Physician Defendants and WDH. (*See generally*, Court Doc. 132.) WDH replies that it properly asserted the privilege and provided Atlantic/NAPA-NH with a privilege log. (Court Doc. 168 ¶ 1.) WDH further asserts that Atlantic/NAPA-NH have failed to set forth argumentation as to why confidentiality assertions should be stricken, and that they failed to confer on striking such assertions, as was required by Section 9 of the Court's August 7, 2021 Amended Protective Order. (Court Doc. 172 at 25.)

Consistent with the Court's conclusions on when the common interest doctrine applies and on the applicability of the crime-fraud exception, the privilege assertions are hereby stricken as to those communications between WDH and Physician Defendants or between their respective attorneys that occurred prior to November 4, 2019. *See Diamant v. Sheldon L. Pollack Corp.*, 216 B.R. 589, 592 (Bankr. S.D. Tex. 1995) (finding that because a sufficient showing of the application of the fraud exception was made, Chapter 7 trustee was entitled to depose attorney and "to have produced those documents which tend to prove fraudulent intent"); *Superintendent of Ins. of State v. Chase Manhattan Bank*, 43 A.D.2d 514, 516 (N.Y. App. Div. 2007) (granting motion to compel where there was a sufficient showing of an alleged fraud, breach of fiduciary duty, or other wrongful conduct to pierce attorney-client privilege).

WDH also must turn over Ms. Caille's notes from May 17, 2019, as this was prior to when Defendants may rely on the common interest doctrine, and pertain to a meeting

that occurred in the presence of a third party. *See Riddle Spring Realty Co.*, 107 N.H. at 273. To the extent WDH would argue these notes should be shielded because of the work product doctrine, the privilege logs state that these notes were being withheld only on the basis of attorney-client privilege, and WDH has not argued why work product should apply. WDH also has not made a specific argument as to how those communications were made between a client and attorney or pertained to obtaining legal advice such that they are privileged attorney-client communications. *See id*.

The Court reaches the same conclusions with respect to sought communications made between WDH personnel without legal counsel. WDH has not argued why such communications, specifically and separately from communications including Physician Defendants and/or Attorney Best, are subject to attorney-client or work product privileges. Further, based on the logs, the Court does not know whether these communications pertained to the acquisition of legal advice or were prepared for litigation. Accordingly, WDH has not met its burden to show the communications should be withheld on either attorney-client or work product bases. *See McCabe*, 138 N.H. at 25; *Pacamor Bearing, Inc.*, 918 F. Supp. at 512.

However, the Court agrees with WDH that Atlantic/NAPA-NH have failed to show why the confidentiality designations should be stricken as to any of the communications at issue with respect to this motion. They have not provided a specific argument on this issue, and there is no indication they complied with the requirement to meet and confer on such designations.

In sum, WDH must: (a) strike the privilege assertions made as to the exhibits in Exhibits A and B that are between WDH and Physician Defendants and/or their respective counsel until November 4, 2019, as well as for all sought communications

between WDH personnel not including counsel; (b) produce these communications; and (c) produce Ms. Caille's notes from May 17, 2019. WDH does not need to strike the designations or produce documents if they only included WDH and Attorney Mulholland. *See Riddle Spring Realty Co.*, 107 N.H. at 273; *Pampered Chef*, 737 F. Supp. 2d at 966. WDH also does not need to strike confidentiality designations. This motion is GRANTED in part.

Motion to Strike Physician Defendants' Privilege Assertions (Court Doc. 131)

As indicated above, after the Court's October 15, 2020 Order, Physician Defendants submitted thousands of documents from their privilege log marked as privileged and for attorneys' eyes only, some of which Atlantic/NAPA-NH used to depose various witnesses. At the depositions, Physician Defendants designated some of the record as being highly confidential. (Court Doc. 131, Exs. A, B.) Atlantic/NAPA-NH now move to strike the assertions of attorney-client privilege and confidentiality. (Court Doc. 131.) Physician Defendants reply that Atlantic/NAPA-NH failed to make the necessary showing to pierce the privilege. (Court Doc. 163 ¶¶ 3, 4.)

Physician Defendants cannot rely on their privilege assertions as to communications with WDH or with WDH's counsel, or between the attorneys, up until November 4, 2019, and so the privilege assertions are now stricken as to those communications. *See Diamant*, 216 B.R. at 592; *Chase Manhattan Bank*, 43 A.D.2d at 516. However, this is not the case with respect to any communications that were only between Physician Defendants and Attorney Best, because these are protected by attorney-client privilege. Communications involving only Physician Defendants and other Atlantic/NAPA-NH providers are disclosable because they would not implicate attorney-client privilege, except to the extent those communications specifically pertain

to obtaining legal representation. For example, emails between the providers about legal representation, legal fees, and meeting with Attorney Best are not disclosable. *See Riddle Spring Realty Co.*, 107 N.H. at 273; *Pampered Chef*, 737 F. Supp. 2d at 966. The Court also concludes, as it did above, that the confidentiality assertions need not be stricken.

In sum, Physician Defendants must: strike the privilege assertions made as to the exhibits in Exhibit B from before November 4, 2019 that are between WDH and Physician Defendants and/or their respective attorneys, as well as for all communications made between themselves and/or with other providers that do not include legal counsel nor pertain to acquiring legal advice. They need not strike the confidentiality assertions as to the exhibits summarized in Exhibit B. This motion is GRANTED in part.

Motion to Compel Attorney Depositions (Court Doc. 129)

Atlantic/NAPA-NH lastly move to compel the depositions of Attorneys Best and Mulholland, asserting that they engaged in numerous communications about how WDH would employ the providers in violation of the restrictive covenants. As a result, Atlantic/NAPA-NH claim the attorneys are the only remaining fact witnesses who have not been deposed that may recall the May 6 and May 20, 2019 meetings, which are material to Atlantic/NAPA-NH's claims and counterclaims. (*See generally*, Court Doc. 129.) Physician Defendants object, arguing that Atlantic/NAPA-NH have failed to demonstrate there are no other means to obtain the information sought. (Court Doc. 164 ¶¶ 2−4.) WDH also objects, adding that the information sought is covered by attorney-client and/or work product privilege, and is not crucial to Atlantic/NAPA-NH's case. (*See generally*, Court Doc. 170.)

As discussed above, Defendants cannot fully rely on the common interest doctrine with respect to communications between Physician Defendants and WDH and/or between their attorneys, from prior to November 4, 2019. Nevertheless, a party's attorney should not be ordered to sit for a deposition except when: "(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986).

Addressing the second factor first, even where the common interest was in effect, the crime-fraud exception vitiates it up until November 4, 2019 as to communications between Attorneys Best and Mulholland. *Id*. Further, Atlantic/NAPA-NH's claims against Defendants involve allegations that Defendants colluded in order to get around the providers' restrictive covenants. (*See, e.g.*, Court Doc. 137 at 41.) As a result, what the attorneys discussed as to whether the providers could become WDH employees despite those covenants is relevant. *See Shelton*, 805 F.2d at 1327. In fact, information about what the attorneys discussed just between themselves about WDH hiring the providers is likely crucial to Atlantic/NAPA-NH's claims, as only the attorneys could testify as to these discussions. *See id*. Finally and relatedly, as to the first *Shelton* factor, Atlantic/NAPA-NH have no other means to obtain the information discussed only between Attorneys Best and Mulholland except by deposing them. However, this is not the case with respect to communications that other witnesses were privy to; for example, conversations that included other witnesses. *See id*.

The Court orders Attorneys Best and Mulholland to sit for depositions but only as to conversations they had with each other not in the presence of other witnesses who have been or will be deposed and that relate to the alleged breaches of fiduciary duties

and tortious interference up until November 4, 2019. Anything discussed in the presence of other witnesses would be cumulative and unnecessary. *See id*.; *Goldberg v. Dufour*, No. 16-21301, 2020 WL 373206, at *7 (D. Vt. Jan. 23, 2020) (requiring depositions of attorneys because the depositions might reveal evidence relevant to plaintiff's claim and proportional to the needs of the case but "exercise[ing] its discretion to limit their depositions to the communications, issues, and subject matter set forth in Plaintiff's Offer of Proof"). This motion is GRANTED in part.

Conclusion

Consistent with the foregoing, the Court hereby GRANTS in part Atlantic/NAPA-NH's motions, and orders WDH and Physician Defendants to strike the specified privilege assertions as discussed above, and produce the specified documents from before that date. Furthermore, Ms. Caille and Mr. Walker's depositions must be resumed consistent with the discussion above, and Attorneys Best and Mulholland must sit for depositions limited as discussed above. This Order will be published under seal for ten (10) days from the date on the notice of decision accompanying this Order. During that time, the parties are to confer and determine whether any information in this Order is confidential or subject to protective order, and inform the Court of any redactions that they desire made. Hearing no notifications to the contrary, this Order will otherwise be made public in its entirety.

SO ORDERED.

April 18, 2023

David A. Anderson
Associate Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/19/2023