

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS 4014

CAMERON R. J. HOSIE and CRJH
HOLDINGS, LLC,

Plaintiffs,

v.

8 RIVERS CAPITAL, LLC; SK INC.,
TILLANDSIA, INC.,
CHAMAEDOREA, INC., ARECA,
INC., YOUNG-WOOK LEE;
EUNKYUNG SUNG; and
KYUNGWON RA,

Defendants.

**ORDER ON PLAINTIFFS' BCR 10.9
SUBMISSION REGARDING
PRIVILEGE DISPUTE
[PUBLIC]¹**

1. **THIS MATTER** is before the Court on Plaintiffs Cameron R. J. Hosie (“Hosie”) and CRJH Holdings, LLC’s (“CRJH”) (collectively, “Plaintiffs”) 5 December 2023 submission to the Court captioned “Plaintiffs’ Summary Pursuant to BCR 10.9(b) Regarding Privilege Dispute.” Plaintiffs allege that Defendant 8 Rivers Capital, LLC (“8 Rivers”) is improperly withholding documents in response to Plaintiffs’ pending discovery requests on the basis of the attorney-client privilege.

2. The Court, having considered the BCR 10.9 Submission and 8 Rivers’ response, the briefs and submissions of the parties, the arguments of counsel, the

¹ The Court elected to file this Order under seal on 7 February 2024. The Court then permitted the parties an opportunity to propose redactions to the public version of this document. The parties did not propose any redactions. Accordingly, the Court now files the unredacted, public version of this Order.

applicable law, and all appropriate matters of record, makes the findings of fact and conclusions of law set forth below.

FACTUAL BACKGROUND

3. 8 Rivers is a climate technology company that primarily works with the clean energy sector. (Am. Compl. ¶ 24, ECF No. 47.) The company is organized under Delaware law and has its principal place of business in Durham, North Carolina. (Am. Compl. ¶ 11.)

4. Hosie, through CRJH, owns a significant minority interest in 8 Rivers. (Am. Compl. ¶¶ 1, 31, 34.) He also currently serves as a Manager on 8 Rivers' Board of Managers (the "Board"). (Am. Compl. ¶ 1.)

5. Hosie formerly served as 8 Rivers' Chief Executive Officer ("CEO") from February 2021 until his termination in August 2023. (Am. Compl. ¶ 30.)

6. On 27 October 2023, Plaintiffs filed this lawsuit against 8 Rivers and three individual defendants—Young-Wook Lee, Eunkyung Sung and Kyungwon Ra (collectively, the "Individual Defendants"). The Individual Defendants serve as Managers on 8 Rivers' Board and as either officers or executives of additional Defendants Tillandsia, Inc.; Chamaedorea, Inc.; and Areca, Inc. (collectively, the "Entity Defendants"). Defendant SK Inc. ("SK") is a company that either directly or indirectly owns each of the Entity Defendants and—together with the Entity Defendants—owns a majority membership interest in 8 Rivers. (Am. Compl. ¶¶ 7, 12–14, 16–20.)

7. On 22 November 2023, Plaintiffs amended their complaint to add each of the Entity Defendants and SK (collectively, “SK Defendants”) as defendants, (*see* Am. Compl.).

8. In a nutshell, Plaintiffs assert in this lawsuit that the SK Defendants acted maliciously to cause 8 Rivers to terminate Hosie from his position as CEO (a termination that was initially deemed to be “without cause”) and to thereafter act in bad faith to conduct a baseless investigation into allegations of purported wrongdoing by Hosie so that they could retroactively characterize Hosie’s termination as having been “for cause.” (Am. Compl. ¶ 2.) Plaintiffs further allege that the SK Defendants undertook these actions as part of a scheme to withhold millions of dollars in severance pay to Hosie, while simultaneously allowing SK to seize greater control of 8 Rivers through a forced redemption of Hosie’s membership interest in the company. (Am. Compl. ¶¶ 2–3.)

9. On 31 October 2023, Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction (“PI Motion,” ECF No. 23). Plaintiffs’ PI Motion—which is still pending—requests that the Court preliminarily enjoin 8 Rivers from retroactively designating Hosie’s termination as having been “for cause” and taking steps to redeem Hosie’s membership interest as a consequence of the designation. (PI Mot., at 2–3.)

10. On 2 November 2023, the parties filed a Joint Stipulation Regarding Maintaining the Status Quo in which they memorialized their agreement to preserve

the status quo pending the issuance of an order by the Court on Plaintiffs' PI Motion. (ECF No. 26.)

11. On 8 November 2023, the Court received a submission from Plaintiffs pursuant to BCR Rule 10.9 (the "First 10.9 Submission"). This First 10.9 Submission outlined a dispute between the parties over Plaintiffs' claimed entitlement to engage in expedited discovery in advance of a hearing on the PI Motion. (ECF No. 36, at 1.)

12. On 17 November 2023—following a conference conducted by the Court via Webex with counsel for all parties on the issues raised in Plaintiffs' First 10.9 Submission—the Court directed 8 Rivers to respond to three of Plaintiffs' six expedited discovery requests that were listed in a joint letter filed earlier that day (*see Joint Letter Regarding Expedited Discovery*," ECF No. 35). (ECF No. 36.)

13. On 5 December 2023, Plaintiffs filed a second BCR 10.9 Submission (the "Second 10.9 Submission"), which is the dispute that is presently before the Court. The Second 10.9 Submission alleges that 8 Rivers has impermissibly withheld 102 documents in their entirety from its responses to Plaintiffs' expedited discovery requests on the basis of the attorney-client privilege, and has improperly produced other responsive documents subject to redactions (collectively, the "Withheld Documents"). Plaintiffs further allege that with regard to the 102 Withheld Documents that were withheld in their entirety, all 102 were sent or received during Hosie's tenure as a Manager on 8 Rivers' Board, 98 were sent or received during Hosie's tenure as 8 Rivers' CEO, and 48 were sent or received by Hosie himself.

14. Plaintiffs assert that the Withheld Documents contain communications between Hosie and 8 Rivers' then-General Counsel, Thomas W. Giegerich, concerning certain acts by Hosie, as CEO, that the Board later used to justify its retroactive designation of his termination as having been "for cause." Plaintiffs contend that these communications are central to their prosecution of this lawsuit and are not protected from disclosure by the attorney-client privilege.

15. On 7 December 2023, 8 Rivers submitted a response to the Second 10.9 Submission, contending that its assertion of the attorney-client privilege over the Withheld Documents was in accordance with applicable law.

16. On 8 December 2023, the Court conducted another conference with counsel via Webex to address the privilege issues raised by the Second 10.9 Submission. At the conclusion of the conference, the Court directed the parties to submit supplemental briefs addressing the disputed privilege issues. (ECF Nos. 60, 65.)

17. Following the parties' submission of supplemental briefs, the Court conducted a hearing on the issues raised in the Second 10.9 Submission on 11 January 2024.

18. This matter has now been fully briefed and is ripe for resolution.

ANALYSIS

A. Choice-of-Law

19. As a threshold matter, the Court must determine which state's laws concerning the attorney-client privilege govern the resolution of this dispute.

20. 8 Rivers argues that North Carolina’s privilege laws control because “the question of privilege in [a] discovery dispute is procedural” rather than substantive, (8 Rivers’ 14 Dec. Br., ECF No. 62, at 4 (quoting *Stack v. Abbott Laboratories, Inc.*, No. 12-CV-148, 2016 WL 6884936 (M.D.N.C. June 8, 2016)), and that North Carolina’s choice-of-law rules provide that courts must apply the law of the forum state when adjudicating parties’ procedural rights. (8 Rivers’ 14 Dec. Br., at 3 (citing *Boudreau v. Baughman*, 322 N.C. 331, 335 (1988) (“Our traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by *lex loci*, the law of the situs of the claim, and remedial or procedural rights are determined by *lex fori*, the law of the forum.”))).

21. Plaintiffs, conversely, contend that because the Court will ultimately have to apply Delaware law in interpreting 8 Rivers’ Operating Agreement, a resort to Delaware law on this issue is mandated based on the internal affairs doctrine. (Pls.’ 14 Dec. Br., ECF No. 64, at 3, 6.)

The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation’s internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.

Bluebird Corp. v. Aubin, 188 N.C. App. 671 (2008) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982); *see also* 1 Robinson on North Carolina Corporation Law § 32.05 (noting that “North Carolina decisions generally support [the] proposition” that “the law of the incorporating state should normally be applied to matters involving the internal affairs of a foreign corporation”).

22. 8 Rivers is organized under Delaware law and is governed by an Operating Agreement stating in relevant part that it is “governed by and shall be construed in accordance with the laws of the State of Delaware, exclusive of its conflict-of-laws principles.” (ECF No. 47.1, § 15.06.) Based on this provision, Plaintiffs argue that the effect of the attorney-client privilege on their access to the Withheld Documents should be deemed an issue “peculiar” to the relationship between Hosie, 8 Rivers, and 8 Rivers’ Board—thereby necessitating application of the internal affairs doctrine. (Pls.’ 14 Dec. Br., at 4, 6.)

23. Neither the parties’ briefs nor the Court’s own research has disclosed any case from North Carolina’s appellate courts addressing an analogous choice-of-law issue with regard to an attorney-client privilege issue. However, the United States District Court for the Middle District of North Carolina addressed a similar issue in *Stack v. Abbott Laboratories, Inc.*, No. 1:12CV148, 2016 WL 6884936 (M.D.N.C. June 8, 2016)).

24. In *Stack*, the plaintiff sought to access documents that the defendant corporation had withheld on the basis of the attorney-client privilege. *Stack*, 2016 WL 6884936, at *1, 3. The plaintiff argued that California privilege law applied because the consulting agreement at issue contained a California choice-of-law provision. *Id.* at *4. The *Stack* court rejected the plaintiff’s argument and instead held that the privilege law of the forum state (North Carolina) controlled.

Here, there is a dispute between the parties as to which state law should apply. Plaintiff argues that California state law should apply pursuant to the choice of law provision in the consulting agreement. [Defendant] asserts that this Court should apply the forum state’s choice of law rules,

thus North Carolina’s law regarding the scope of the attorney-client privilege should apply. . . . The consulting agreement between the parties states that “this Agreement shall be governed by, construed and enforced in accordance with the domestic laws of the State of California, without regard to choice of law provisions.”

. . . .

Although the parties do not dispute the validity of the choice of law provision in the consulting agreement, the Court finds that the question of privilege in the pending discovery dispute is procedural, thus collateral to the consulting agreement between the parties and the choice of law provision therein. . . . Consequently . . . the issue at bar is collateral to the contract and the choice-of-law provision contained therein. . . . Under North Carolina’s traditional approach to conflict of law rules, “remedial or procedural rights are determined by *lex fori*, the law of the forum.” . . . Thus, this Court will apply the North Carolina rules governing attorney-client privilege.

Stack, 2016 WL 6884936, at *4 (citations omitted).

25. Other courts have reached a similar conclusion. *See, e.g., ICI Americas Inc. v. John Wanamaker of Phila.*, CIV. A. No. 88-1346, 1989 WL 38647, at *2 (E.D. Pa. Apr. 18, 1989) (“Although the contract at issue includes a choice of law provision requiring questions under the contract to be governed by California law, the scope of attorney-client privilege is collateral to the contract and concerns issues of discovery, evidence, and privilege more associated with Pennsylvania civil practice than California contract law.”); *see also Harrisburg Auth. v. CIT Capital USA, Inc.*, 716 F. Supp. 2d 380, 392 (M.D. Pa. June 14, 2010) (holding that discovery and privilege issues were “collateral” to the underlying contract in the lawsuit).

26. The Court believes that the analysis in *Stack* properly applies North Carolina’s choice-of-law rules and provides a well-reasoned approach to resolving this

issue. Here, despite Plaintiffs' arguments to the contrary, the Court is satisfied that the privilege issue is collateral to the underlying substantive issues in this lawsuit.

27. Moreover, the Court rejects Plaintiffs' argument that the internal affairs doctrine applies to this issue. Even aside from the fact that no North Carolina court has previously extended the scope of the internal affairs doctrine to attorney-client privilege disputes, the present privilege issue simply does not relate to the types of issues involving corporate governance to which courts have traditionally applied the internal affairs doctrine.

28. The Court notes that a number of other courts have likewise rejected the application of the internal affairs doctrine to choice-of-law issues involving the attorney-client privilege. *See, e.g., Mooney v. Diversified Bus. Commc'ns*, 2017 Mass. Super. LEXIS 133, at *12–13 (Super. Ct. July 20, 2017) (“Privilege issues . . . arise in the context of litigation and discovery matters more generally; they are not ‘peculiar to’ the corporate context. Whether a privilege exists turns on the relationship between client and counsel, not on matters specific to corporate governance.”); *DeFrees v. Kirkland*, 2012 U.S. Dist. LEXIS 52780, at *49 (C.D. Cal. Apr. 11, 2012) (“Nor is the Court persuaded . . . that California’s ‘internal affairs doctrine,’ . . . requires the application of Delaware law to the issues of attorney-client privilege[.]”).

29. Accordingly, the Court concludes that North Carolina law governs the attorney-client privilege issue raised by the parties in the Second 10.9 Submission.

B. Holder of the Attorney-Client Privilege

30. Having concluded that North Carolina privilege law governs the Second 10.9 Submission, the Court now turns to the issue of who controls the privilege—that is, whether it is controlled solely by 8 Rivers or whether it can also be waived by Hosie himself.

31. Our Supreme Court has summarized the elements for the attorney-client privilege as follows:

[The attorney-client privilege exists if] (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

In re Investigation of Death of Miller, 357 N.C. 316, 335 (2003).

32. As the United States Supreme Court has recognized, “the administration of the attorney-client privilege in the case of corporations . . . presents special problems.” *Commodity Futures Trading Com. v. Weintraub*, 471 U.S. 343, 348 (1985). This is so because corporations—and LLCs for that matter²—“cannot speak directly to [their] lawyers. Similarly, [they] cannot directly waive the privilege when disclosure is in [their] best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the [entity].” *Id.*

² We have previously noted that “[t]here is limited case law that clarifies how the attorney-client privilege applies to a limited liability company.” *Morris v. Scenera Research, LLC*, 2011 NCBC LEXIS 34, at *18, n.3 (N.C. Super. Ct. Aug. 26, 2011). At least some courts in other jurisdictions, however, have treated corporations and LLCs alike for purposes of applying the privilege. *See, e.g., Montgomery v. eTrepid Techs., LLC*, 548 F. Supp. 2d 1175, 1179–83 (D. Nev. Apr. 18, 2008) (treating LLC as a corporation for purposes of the attorney-client privilege and citing cases).

Accordingly, courts adjudicating attorney-client privilege disputes in the corporate context must answer a fundamental question: Who is the “client?” Stated differently, who controls the privilege?

33. Most of the courts that have addressed this question follow one of two approaches: the “joint client” approach or the “entity-is-the-client” model. A minority of states (including Delaware) favor the “joint client” approach under which an LLC and its individual managers are treated as joint clients “for purposes of privileged material created during a [manager’s] tenure.” *Hyde Park Venture Partners Fund III, L.P. v. FairXchange, LLC*, 292 A.3d 178, 184 (Del. Ch. 2023). Under that framework, LLC managers enter into a metaphorical “circle of confidentiality” with their company, and, as a result, the LLC “cannot invoke [the attorney-client] privilege against [a manager] to withhold information generated during the [manager’s] tenure.” *Id.*

34. The “joint client” model, however, has drawn criticism from a number of courts. *See, e.g., Mooney*, 2017 Mass. Super. LEXIS 133, at *7–8 (stating that the “joint client” approach chills candid manager-counsel communications, “conflates the director/officer’s role as an individual and his role as a corporate representative,” and allows for the weaponization of a former manager’s corporate fiduciary obligations); *Fitzpatrick v. Am. Intern. Group., Inc.*, 272 F.R.D. 100, 106 (S.D.N.Y. Nov. 24, 2010) (noting that while “a few” federal cases have adopted the joint client approach, other federal courts and “many state courts” view the joint client approach as

“fundamentally at odds with basic principles of attorney-[client] privilege in the corporate context”).

35. By contrast, a majority of jurisdictions have adopted the “entity-is-the-client” approach. Under this framework, the entity *alone* is the client and thus controls the attorney-client privilege regarding communications with corporate counsel. See *Milroy v. Hanson*, 875 F. Supp. 646, 649–50 (D. Neb. Feb. 3, 1995) (“There is but one client, and the client is the corporation.”); *Lane v. Sharp Packaging Sys., Inc.*, 251 Wis.2d 68, 99 n.14, 640 N.W.2d 788, 802 n.14 (2002) (“[O]nly the client corporation or the corporation’s lawyer, acting on the corporation’s behalf, can waive the lawyer-client privilege.”); *Dexia Credit Local v. Rogan*, 231 F.R.D. 268, 277 (N.D. Ill. Dec. 21, 2004) (“[T]he [attorney-client] privilege does not belong to the individual agents of the corporation seeking the advice; the privilege belongs to the corporation, because the corporation is the client.”); *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. 643, 655, 331 P.3d 905, 913 (2014) (adopting the “entity-is-the-client” approach and noting that this model reflects “the modern trend in caselaw”); *Mooney*, 2017 Mass. Super. LEXIS 133, at *7, 2017 WL 4172592, at *3 (“[D]espite the fact that [an entity] can only act through individuals, officers and [managers] are not properly viewed as joint, independent clients of corporate counsel[.]”).

36. North Carolina’s appellate courts have not yet expressly adopted either of these approaches. However, upon careful review of the pertinent caselaw, the Court believes that the Supreme Court of North Carolina, if presented with the issue, would decline to adopt the “joint client” model and instead join the majority of state

and federal courts who utilize the “entity-is-the-client” approach. The Court believes that the latter approach is superior because—as another court has stated—it would be “paradoxical to allow a party to access information previously available to that individual only because of his or her role as a fiduciary once that party is adverse to the [entity] and no longer required to act in the [entity’s] best interests.” *Davis v. PMA Companies, Inc.*, No. CIV-11-359-C, 2012 WL 3922967, at *6 (W.D. Okla. 2012).

37. Accordingly, the Court concludes that 8 Rivers maintains complete control over the attorney-client privilege with respect to communications with its corporate counsel.

38. In an alternative argument, Plaintiffs argue that any privilege that might otherwise exist regarding the Withheld Documents does not actually apply on these facts based on the “fiduciary exception.” (Pls.’ 14 Dec. Br., at 15–18.) Where applicable, this exception precludes fiduciaries from offensively asserting the attorney-client privilege against their beneficiaries. *See Garner v. Wolfinbarger*, 430 F.2d 1093, 1101–04 (5th Cir. 1970) (analogizing the shareholder–director relationship to the beneficiary–trustee relationship and holding that in shareholder derivative lawsuits, “protection of [a shareholder’s] interests as well as those of the corporation . . . require that the availability of the [attorney-client] privilege be subject to the right of stockholders to show cause why it should not be invoked in the particular instance”).

39. However, the Court is unpersuaded by this argument. North Carolina courts have not recognized the fiduciary exception to the attorney-client privilege.

See Ford v. Jurgens, 2021 NCBC LEXIS 89, at **17 (N.C. Super. Ct. Oct. 5, 2021). Moreover, courts that do recognize this exception have typically limited its application to certain types of cases—namely, shareholder derivative lawsuits, *see id.* (citing *Marketel Media, Inc. v. Mediapotamus, Inc.*, No. 5:13-CV-427-D, 2015 U.S. Dist. LEXIS 76523, at *12 (E.D.N.C. 11 June 2015)), not individual breach of contract actions like this one.

40. Finally, Plaintiffs argue that the Court should hold that the attorney-client privilege does not apply to those documents within the Withheld Documents to which Hosie had actual access while serving as 8 Rivers' CEO and is therefore aware of their contents. (Pls.' 29 Dec. Br., ECF No. 80, at 7–8.) However, such a result is not permitted by the “entity-is-the-client” approach. Regardless of whether Hosie has previous familiarity with portions of the Withheld Documents, that does not change the fact that it is the *entity* (here, 8 Rivers) who controls the attorney-client privilege. Plaintiffs' suggestion that “privileged documents created when a person was within an attorney-client relationship may be disclosed to that person after he has left that relationship,” (Pls. 29 Dec. Br., at 8), is inapposite here because Hosie never *personally* entered into an attorney-client relationship with Giegerich. Instead, it was 8 Rivers who at all times maintained the attorney-client relationship.

C. Waiver of the Privilege

41. The final question before the Court relates to whether any existing attorney-client privilege with regard to the Withheld Documents has been wholly or partially waived by 8 Rivers.

42. Plaintiffs make two waiver arguments. First, they contend that to the extent the Withheld Documents would otherwise be subject to the attorney-client privilege, the privilege has been waived because the contents of those documents have been put at issue in this lawsuit. (Pls.’ 14 Dec. Br., at 18–19.)

43. “North Carolina’s appellate courts recognize that a client can waive the attorney-client privilege by putting privileged information at issue.” *U.S. Tobacco Coop., Inc. v. Certain Underwriters at Lloyd’s*, No. 5:19-CV00430-BO, 2021 U.S. Dist. LEXIS 69206, *37 (E.D.N.C. Apr. 9, 2021) (citing *State v. Taylor*, 327 N.C. 147, 152 (1990)). On several prior occasions, this Court has recognized a waiver of the privilege as to certain attorney-client communications when the party asserting the privilege has also raised an “advice of counsel” defense. *See, e.g., Richardson v. Frontier Spinning Mills, Inc.*, 2011 NCBC LEXIS 40, at *7 (N.C. Super. Ct. Oct. 6, 2011) (“[T]here is ample authority supporting the proposition that the act of raising an advice of counsel defense waives the attorney-client privilege with regard to certain matters in a particular dispute.”) (citing *State v. Fair*, 354 N.C. 131, 168 (2001) (“[E]ven if the communication had been confidential, defendant waived the attorney-client privilege when he presented the substance of the communication as part of his defense.”)); *see also Addison Whitney, LLC v. Cashion*, 2020 NCBC LEXIS 72, at *15 (N.C. Super. Ct. June 10, 2020).

44. The fatal flaw with Plaintiffs’ argument, however, is that 8 Rivers has not—at least up to this point in the litigation—sought to rely on the advice of counsel defense to justify its decision to terminate Hosie or to deem that termination for

cause. Conversely, it is only *Hosie* who is relying on an “advice of counsel” theory—namely, the theory that the acts he committed that 8 Rivers now claims justified deeming his termination to be “for cause” were pre-approved by Giegerich. Therefore, no waiver of the attorney-client privilege presently exists based upon a purported “advice of counsel” defense.

45. However, Plaintiffs’ second waiver argument cannot be dismissed so easily. In this argument, Plaintiffs submit that in the discovery conducted to date, 8 Rivers has *selectively* disclosed certain documents that contain communications between Hosie and Giegerich (or explicit references to such communications), while simultaneously withholding other documents containing similar communications as privileged. The implication of Plaintiffs’ argument is the notion that 8 Rivers has strategically disclosed otherwise privileged documents containing communications between Giegerich and Hosie that support *8 Rivers*’ position in this lawsuit while simultaneously withholding documents evidencing such communications that favor *Plaintiffs*’ position.

46. The Court disfavors the simultaneous use of the attorney-client privilege as a “sword” and a “shield” and has recognized limited waivers of the privilege in such circumstances to ensure fairness. *See, e.g., Technetics Grp. Daytona, Inc. v. N2 Biomedical, LLC*, 2018 NCBC LEXIS 116, at *16–18 (N.C. Super. Ct. Nov. 8, 2018) (“It is patently unfair for a party to use the privilege as a sword and a shield in litigation, making selective disclosures for tactical gain.”).

47. At the 11 January 2024 hearing, the Court conducted an in-depth discussion of this issue with counsel. The Court ultimately determined that an *in camera* review of some or all of the Withheld Documents was necessary and that in order for the Court to fully evaluate Plaintiffs’ “selective waiver” argument, the Court would also benefit from a review of documents already produced by 8 Rivers that allegedly contained communications between Hosie and Giegerich. For this reason, by order issued on 11 January 2024, the Court (1) directed 8 Rivers to submit for *in camera* review those portions of the Withheld Documents that contain communications between Hosie and Giegerich, and (2) instructed the parties to provide the Court with a representative sample of documents previously disclosed by 8 Rivers to Plaintiffs that contain communications between Hosie and Giegerich (the “Representative Sample”). (ECF No. 89.) The parties subsequently complied with the Court’s order by producing the above-referenced documents, and the Court has conducted a painstaking *in camera* review of them.

48. As a result of its review of the Representative Sample, the Court has determined that 8 Rivers did, in fact, produce a number of documents to Plaintiffs in this action containing communications between Hosie and 8 Rivers’ corporate counsel (either Giegerich or other counsel) covering certain distinct topics (the “Discrete Topics”). The Discrete Topics include:

- i. Interpretations of the provisions of the Fourth Amended and Restated Limited Liability Company Operating Agreement of 8 Rivers Capital, LLC, (“LLCA,” ECF No. 47.1). These interpretations

concern LLCA provisions related to a number of topics, including—without limitation—prerequisites for official actions by the company (or by an officer on behalf of the company); whether certain actions require approval (and from whom approval is required); company budgets; and the so-called “auto budget” provision(s).

- ii. The terms of Hosie’s, Giegerich’s, and G. William (Bill) Brown, Jr.’s³ employment (or relationship) with 8 Rivers, including—but not limited to—the salaries or payments rendered to those individuals.
- iii. The “equity-linked compensation plan,” including—but not limited to—the LLCA’s requirements for passing the plan.
- iv. The 2023 retention payments issued to 8 Rivers’ employees, as referenced during a 25 July 2023 Board meeting.
- v. The 9 March 2023, 24 April 2023, and 25 April 2023 transactions involving the sales of certain 8 Rivers members’ interests in the company to entities affiliated with SK (including “ROFR”⁴ waivers pertaining thereto).

49. “As a general rule, ‘when a party reveals part of a privileged communication to gain an advantage in litigation, the party waives the attorney-client privilege as to all other communications relating to the same subject matter.’”

³ Brown previously served as Chairman of 8 Rivers’ Board. (Am. Compl. ¶ 82.)

⁴ The LLCA contains a Right of First Refusal (“ROFR”) provision applicable to certain transfers of interests in the company. (LLCA ¶ 12.04.)

Technetics Grp. Daytona, Inc., 2018 NCBC LEXIS 116, at *18 (quoting *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982)). That said, when determining the contours of a subject-matter waiver of the attorney-client privilege, the Court's primary consideration is fairness. *See id.* at *17. "Sometimes fairness considerations favor a broad disclosure of related subject matter." *Id.* At other times, "when the disclosure does not create an unfair advantage, courts typically limit the waiver to the communications actually disclosed.'" *Id.* at *18 (quoting *Teleglobe Commc'ns. Corp. v. BCE, Inc.*, 493 F.3d 345, 361 (3d Cir. 2007)); *see also Addison Whitney, LLC*, 2020 NCBC LEXIS 72, at *16 (holding that "[a] relatively broad subject matter waiver [was] appropriate . . . to prevent any unfair advantage"); *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) (quoting 8 J. Wigmore, *Evidence in Trials at Common Law* § 2327 at 638 (J. McNaughton rev. 1961)) ("When a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter because 'the privilege of secret consultation is intended only as an incidental means of defense and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.'").

50. A court's application of a subject-matter waiver is not intended to be punitive. Rather, it is a means of remedying any unfair advantage. *See Technetics Grp. Daytona, Inc.*, 2018 NCBC LEXIS 116, at *17 (citing Roger P. Meyers, *An Analysis of Federal Rule of Evidence 502 and Its Early Application*, 55 Wayne L. Rev.

1441, 1455 (2009) (“[S]ubject-matter waiver should be applied for remedial rather than punitive purposes.”)).

51. Based on the Court’s review of the relevant caselaw, the record, and considerations of fairness, the Court finds that a subject matter waiver is appropriate here. The Court concludes that the privilege has been waived with regard to any of the Withheld Documents (or portions thereof) that would otherwise be subject to the attorney-client privilege but contain information falling under one or more of the above-referenced Discrete Topics. All such documents must be produced. The Court’s specific rulings with respect to each of the individual Withheld Documents that were submitted for *in camera* review are set out in Appendix A below.

52. Accordingly, the Court hereby **ORDERS** 8 Rivers to produce to Plaintiffs—within **seven (7) days** of the date of this Order—all of the Withheld Documents (or portions thereof) that either do not meet the criteria for the application of the attorney-client privilege or as to which the attorney-client privilege has been waived, as set out below in Appendix A.

SO ORDERED, this the 7th day of February, 2024.⁵

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge
for Complex Business Cases

⁵ This Order was originally filed under seal on 7 February 2024. This public version of the Order is being filed on 15 February 2024. To avoid confusion in the event of an appeal, the Court has elected to state the filing date of the public version of the Order as 7 February 2024.

APPENDIX A⁶

Document No. (from submission):	Document No. (from Privilege Log)	Court's Privilege Determination	Privilege Log Description
1 Doc00007578/ 1a Doc00007579	2	<ul style="list-style-type: none"> - All e-mails in chain contain privileged information, except for the first and second e-mails (8/8/22 – 2:37 A.M. & 7:07 P.M.). - Privilege WAIVED as to all privileged documents in e-mail chain on account of references to Discrete Topic (i). 	Email correspondence and attachment from in-house counsel regarding contract matters.
2 Doc00009803/ 2a Doc 00009804	3	<ul style="list-style-type: none"> - All e-mails in chain contain attorney-client privileged information. - Privilege WAIVED as to entire e-mail chain on account of references to Discrete Topic (i). 	Email correspondence from in-house counsel reflecting advice from outside counsel regarding board matters.
3 Doc00010713/ 3a Doc00010714	12	<ul style="list-style-type: none"> - All e-mails in chain (including attachment) contain privileged information, except 11/13/22 (3:59 AM) e-mail. Merely copying counsel on this e-mail does not make the communication privileged. - Privilege WAIVED as to entire e-mail chain (including attachment) on account of references to Discrete Topics (i) and (ii). 	Email correspondence and attachment reflecting the advice of outside counsel regarding board matters.
4 Doc00010716/ 4a Doc00010717/ 4b Doc00010718/ 4c Doc00010719/	14	<ul style="list-style-type: none"> - All e-mails in chain (including attachment) contain attorney-client privileged information, except 	Email correspondence and attachment reflecting the

⁶ Appendix A lists each Withheld Document provided to the Court for *in camera* review as numbered in 8 Rivers' submission. Additionally, because most of the Withheld Documents contain e-mail chains (some with attachments), the Court has attempted to match the most recent (last) e-mail in each chain with a corresponding document number from 8 Rivers' Privilege Log (submitted to the Court along with the Second BCR 10.9 Submission).

<p>4d Doc00010720/ 4e Doc00010721/ 4f Doc00010722</p>		<p>11/13/22 (3:59 AM) e-mail. Merely copying counsel on this e-mail does not make the communication privileged.</p> <ul style="list-style-type: none"> - Privilege WAIVED as to entire e-mail chain (including attachment) on account of references to Discrete Topics (i) and (ii). 	<p>advice of outside counsel regarding board matters.</p>
<p>5 Doc00010723/ 5a Doc00010724/ 5b Doc00010725/ 5c Doc00010726/ 5d Doc00010727</p>	<p>15</p>	<ul style="list-style-type: none"> - All e-mails in chain (including attachment) contain attorney-client privileged information, except 11/13/22 (3:59 AM) e-mail. Merely copying counsel on this e-mail does not make the communication privileged. - Privilege WAIVED as to entire e-mail chain (including attachment) on account of references to Discrete Topics (i) and (ii). 	<p>Email correspondence and attachment reflecting the advice of outside counsel regarding board matters.</p>
<p>6 Doc00011076</p>	<p>16</p>	<ul style="list-style-type: none"> - Only the last e-mail in the chain (12/2/22; 4:55:17 PM) contains privileged information. All other e-mails in the chain are not between counsel and client, so they are NOT privileged. - Privilege WAIVED as to last e-mail in e-mail chain (all other e-mails in chain are unprivileged) on account of references to Discrete Topic (i). 	<p>Email correspondence reflecting request for legal advice from outside counsel regarding board matters.</p>
<p>7 Doc00011130</p>	<p>18</p>	<ul style="list-style-type: none"> - E-mail contains attorney-client privileged information. - Privilege is WAIVED on account of references to Discrete Topic (i). 	<p>Email correspondence with in-house counsel reflecting advice from outside counsel regarding board matters.</p>
<p>8 Doc00011171</p>	<p>20</p>	<ul style="list-style-type: none"> - E-mail contains attorney-client privileged information. 	<p>Email correspondence with in-house counsel</p>

		<ul style="list-style-type: none"> - Privilege is WAIVED on account of references to Discrete Topic (i). 	regarding board matters.
9 Doc00011176	21	<ul style="list-style-type: none"> - E-mail chain contains attorney-client privileged information. - Privileged is WAIVED as to entire e-mail chain on account of references to Discrete Topic (i). 	Email correspondence with in-house counsel forwarding legal advice from outside counsel regarding board matters.
10 Doc00013527/ 10 Doc00013528 (repeated in 46 Doc00013528)	23	<ul style="list-style-type: none"> - E-mail is privileged because counsel is forwarding legal advice from outside counsel. - Attachment is also privileged because it contains legal advice from outside counsel. - The privilege is WAIVED over the e-mail and solely those portions of the attachment pertaining to Discrete Topics (i) and (v). 	Email correspondence with attachment from in-house counsel reflecting legal advice from outside counsel regarding board matters.
11 Doc00023458/ 11a Doc00023459	28	<ul style="list-style-type: none"> - First and second e-mails in the chain (3/10/23, 11:18 A.M.; 3/11/23, 8:11 A.M.) and the attachment thereto are NOT privileged either because not between SRC and its corporate counsel or not sent during the course of giving/seeking legal advice. - Remaining e-mail in the chain is privileged, but privilege is WAIVED on account of reference to Discrete Topic (i). 	Email correspondence and attachment with in-house counsel regarding transaction.
12 Doc00023460/ 12a Doc00023461/ 12b Doc00023462/ 12c Doc00023463	29	<ul style="list-style-type: none"> - First and second e-mails in the chain (3/10/23, 11:18 A.M.; 3/11/23, 8:11 A.M.) and the attachment thereto are NOT privileged either because not between SRC and its corporate counsel or not sent during the course of giving/seeking legal advice. - Remaining two e-mails in the chain are privileged, but privilege is WAIVED on 	Email correspondence and attachments with in-house counsel regarding transaction.

		account of references to Discrete Topic (i).	
13 Doc00023464	30	<ul style="list-style-type: none"> - First and second e-mails in the chain (3/10/23, 11:18 A.M.; 3/11/23, 8:11 A.M.) and the attachment thereto are NOT privileged either because not between SRC and its corporate counsel or not sent during the course of giving/seeking legal advice. - Remaining six e-mails in the chain are privileged, but privilege is WAIVED on account of references to Discrete Topic (i). 	Email correspondence with in-house counsel regarding transaction
13a Doc00023465	31	<ul style="list-style-type: none"> - First and second e-mails in the chain (3/10/23, 11:18 A.M.; 3/11/23, 8:11 A.M.) and the attachment thereto are NOT privileged either because not between SRC and its corporate counsel or not sent during the course of giving/seeking legal advice. - Remaining eight e-mails in the chain are privileged, but privilege is WAIVED on account of references to Discrete Topic (i). 	Email correspondence with in-house counsel regarding transaction.
14 Doc00108146	46	<ul style="list-style-type: none"> - E-mail chain contains attorney-client privileged information. - Privilege over the entire e-mail chain is WAIVED on account of references to Discrete Topics (i) and (iii). 	Email correspondence with in-house counsel regarding transaction and board matters.
39 Doc0034799	47	<ul style="list-style-type: none"> - All e-mails in this chain contain privileged information. - Privilege over the entire e-mail chain is WAIVED on account of references to Discrete Topic (i). 	Email correspondence reflecting legal advice from outside counsel regarding transaction and board matters.
40 Doc00347810	48	<ul style="list-style-type: none"> - All e-mails in this chain contain privileged attorney-client communications. 	Email correspondence reflecting legal

		<ul style="list-style-type: none"> - Privilege over the entire e-mail chain is WAIVED on account of references to Discrete Topic (i). 	advice from outside counsel regarding transaction and board matters.
41 Doc00350700/ 41a Doc00350701/ 41b Doc00350702	49	<ul style="list-style-type: none"> - First e-mail in the chain (3/16/23; 9:09 A.M.) is NOT privileged because not to/from 8 Rivers' corporate counsel. - Remaining e-mails are attorney-client privileged. - Attachments are also privileged because they contain legal advice from outside counsel. - The privilege over all e-mails in chain, and solely those portions of the attachments pertaining to Discrete Topics (i) and (v), are WAIVED. 	Email correspondence and attachments reflecting legal advice from outside counsel regarding transaction and board matters..
18 Doc00117686	50	<ul style="list-style-type: none"> - First four e-mails (3/30/23, 5:58 P.M.; 3/31/23, 9:17 A.M.; 3/31/23, 9:25 A.M.; 3/31/23, 9:32 A.M.) are NOT privileged. Merely copying counsel on these emails does not make the communications privileged. - Remaining e-mails in the chain are privileged. - The privilege as to all e-mails in the chain has been WAIVED on account of references to Discrete Topics (i), (ii), and (v). 	Email correspondence providing legal advice regarding employment matter.
19 Doc00117766 (repeated in 45 Doc00013527 and 47 Doc00117766)	51	<ul style="list-style-type: none"> - Both e-mails are privileged. - The privilege over these e-mails is WAIVED to the extent the e-mails reflect a discussion of Discrete Topic (v). 	Email correspondence discussing legal advice provided to Board of Managers regarding board matters.
20 Doc00117937/ 20a Doc00117687	52	<ul style="list-style-type: none"> - All e-mails are privileged. 	Email correspondence

		<ul style="list-style-type: none"> - The privilege over these e-mails is WAIVED to the extent the e-mails reflect a discussion of Discrete Topic (v). 	reflecting legal advice from outside counsel regarding board matters.
21 Doc00119893/ 21a Doc 00119894/ 21b Doc00119895/ 21c Doc00119896/ 21d Doc00119897	53	<ul style="list-style-type: none"> - All e-mails in this chain contain privileged information. - The privilege over solely those portions of the e-mail chain and attachments containing references to Discrete Topics (i) and (v) has been WAIVED. 	Email correspondence and attachments containing legal advice from outside counsel regarding contract and board matters.
22 Doc00120907/ 22a Doc00120908/ 22b Doc00120910	54	<ul style="list-style-type: none"> - All e-mails in this chain contain attorney-client privileged information. - The privilege over solely those portions of the e-mail chain containing references to Discrete Topics (i), (ii), (iii), and (v) has been WAIVED. 	Email correspondence providing legal advice regarding contract and board matters.
23 Doc00120909	55	<ul style="list-style-type: none"> - All e-mails in this chain contain privileged information. - The privilege over solely those portions of the e-mail chain containing references to Discrete Topics (i), (ii), (iii), and (v) has been WAIVED. 	Email correspondence reflecting legal advice regarding contract and board matters.
24 Doc00123683/ 24a Doc00123684	57	<ul style="list-style-type: none"> - Both the e-mail and attachment contain privileged information. - The privilege over the e-mail and solely those portions of the attachment containing references to Discrete Topics (i) and (v) has been WAIVED. 	Email correspondence and attachment reflecting legal advice from outside counsel regarding contract and board matters.
25 Doc00141585	60	<ul style="list-style-type: none"> - All e-mails in this chain contain privileged information. - The privilege as to the entire e-mail chain has been WAIVED on account of references to Discrete Topic (i). 	Email correspondence reflecting legal advice from in-house counsel regarding board matters.
26 Doc00141592	61	<ul style="list-style-type: none"> - All e-mails in this chain contain privileged information. 	Email correspondence

		<ul style="list-style-type: none"> - The privilege as to the entire e-mail chain has been WAIVED on account of references to Discrete Topic (i). 	reflecting legal advice to in-house counsel regarding board matters.
27 Doc00144223	62	<ul style="list-style-type: none"> - First four e-mails (3/30/23, 5:58 P.M.; 3/31/23, 9:17 A.M.; 3/31/23, 9.25 A.M.; 3/31/23, 9:32 A.M.) are NOT privileged. Merely copying counsel on these emails does not make the communications privileged. - The remaining e-mails in the chain are privileged. - The privilege as to all e-mails in the chain has been WAIVED on account of references to Discrete Topics (i) and (ii). 	Email correspondence discussing legal advice from in-house counsel regarding board and contract matters.
28 Doc00215624	63	<ul style="list-style-type: none"> - All e-mails in this chain contain privileged information. - The privilege over solely those portions of the e-mail chain containing references to Discrete Topics (ii) and (iii) has been WAIVED. 	Email correspondence reflecting request for legal advice from in-house counsel regarding board matters
29 Doc00215625	64	<ul style="list-style-type: none"> - All e-mails in this chain contain privileged information. - The privilege over solely those portions of the e-mail chain containing references to Discrete Topics (i), (ii), and (iii) has been WAIVED. 	Email correspondence reflecting legal advice from in-house counsel regarding board matters.
30 Doc00215626/ 30a Doc00215627	65	<ul style="list-style-type: none"> - All e-mails in this chain and the attachment contain privileged information. - The privilege over solely those portions of the e-mail chain and attachment containing references to Discrete Topics (i), (ii), and (iii) has been WAIVED. 	Email correspondence reflecting legal advice from in-house counsel regarding board matters.
32 Doc00215628	66	<ul style="list-style-type: none"> - All e-mails in this chain contain privileged information. 	Email correspondence reflecting

		<ul style="list-style-type: none"> - The privilege over solely those portions of the e-mail chain containing references to Discrete Topics (i), (ii), and (iii) has been WAIVED. 	request for legal advice from in-house counsel regarding board matters.
33 Doc00215629	67	<ul style="list-style-type: none"> - All e-mails in this chain contain privileged information. - The privilege over solely those portions of the e-mail chain containing references to Discrete Topics (i), (ii), and (iii) has been WAIVED. 	Email correspondence reflecting request for legal advice from in-house counsel regarding board matters.
34 Doc00215630	68	<ul style="list-style-type: none"> - All e-mails in this chain contain privileged information. - The privilege over solely those portions of the e-mail chain containing references to Discrete Topics (i), (ii), and (iii) has been WAIVED. 	Email correspondence reflecting request for legal advice from in-house counsel regarding board matters.
35 Doc00215632	69	<ul style="list-style-type: none"> - All e-mails in this chain contain privileged information. - The privilege over solely those portions of the e-mail chain containing references to Discrete Topics (i), (ii), and (iii) has been WAIVED. 	Email correspondence reflecting request for legal advice from in-house counsel regarding board matters.
36 Doc00215643	70	<ul style="list-style-type: none"> - All e-mails in this chain contain privileged information. - The privilege over solely those portions of the e-mail chain containing references to Discrete Topic (i) has been WAIVED. 	Email correspondence reflecting legal advice from in-house counsel regarding board matters.
37 Doc00215656	71	<ul style="list-style-type: none"> - All e-mails in this chain contain attorney-client privileged information. - The privilege over solely those portions of the e-mail chain containing references to Discrete Topic (i) has been WAIVED. 	Email correspondence reflecting request for legal advice from in-house counsel regarding board matters.
37 Doc00215704/ 37a Doc00215705	72	<ul style="list-style-type: none"> - E-mail and attachment contain privileged communications. - The privilege over solely those portions of the e-mail chain 	Email correspondence reflecting legal advice from in-

		and attachment containing references to Discrete Topic (i) and (iii) has been WAIVED .	house counsel regarding board matters.
38 Doc00264210	74	<ul style="list-style-type: none"> - All e-mails in this chain contain privileged information. - The privilege over solely those portions of the e-mail chain containing references to Discrete Topics (i), (ii), and (iii) has been WAIVED. 	Email correspondence reflecting legal advice from in-house counsel regarding board matters.
15 Doc 00109780	81	<ul style="list-style-type: none"> - E-mail chain contains attorney-client privileged communications. - Privilege over e-mail chain is WAIVED on account of references to Discrete Topic (i). 	Email correspondence reflecting legal advice from outside counsel regarding board matters.
16 Doc00109822	82	<ul style="list-style-type: none"> - E-mail chain contains attorney-client privileged communications. - Privilege over e-mail chain is WAIVED on account of references to Discrete Topic (i). 	Email correspondence reflecting legal advice from outside counsel regarding board matters.
17 Doc00116245/ 17a Doc00116246/ 17b Doc00116247	84	<ul style="list-style-type: none"> - First e-mail in the chain (3/16/23; 9:09 A.M.) is NOT privileged because not from 8 Rivers' counsel. - Remaining e-mails are privileged. - Attachments are also privileged because they contain legal advice from outside counsel. - The privilege over all e-mails in chain, and solely those portions of the attachments pertaining to Discrete Topics (i) and (v), are WAIVED. 	Email correspondence reflecting legal advice from outside counsel regarding board and contract matters.
42 Doc0397033	92	<ul style="list-style-type: none"> - All e-mails in chain contain attorney-client privileged information, except 11/13/22 (3:59 AM) e-mail. Merely copying counsel on this e-mail does not make the communication privileged. - Privilege WAIVED as to entire e-mail chain on account 	Email correspondence reflecting legal advice from outside counsel regarding board matters.

		of references to Discrete Topics (i) and (ii).	
43 Doc00397034	93	<ul style="list-style-type: none"> - All e-mails in chain contain attorney-client privileged information, except 11/13/22 (3:59 AM) e-mail. Merely copying counsel on this e-mail does not make the communication privileged. - Privilege WAIVED as to entire e-mail chain on account of references to Discrete Topics (i) and (ii). 	Email correspondence reflecting legal advice from outside counsel regarding board matters.
44 Doc00397829	94	<ul style="list-style-type: none"> - E-mail chain contains attorney-client privileged communications. - Privilege over e-mail chain is WAIVED on account of references to Discrete Topic (i). 	Email correspondence reflecting legal advice from outside counsel regarding board matters.