STATE OF NORTH CAROLINA COUNTY OF BUNCOMBE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION CIVIL ACTION NO.: 23 CVS 5013
JEFF JACKSON, Attorney General, *ex rel.* DOGWOOD HEALTH TRUST, Plaintiff, v. MH MASTER HOLDINGS, LLLP, Defendant.	**ORDER ON DEFENDANT'S MOTION TO COMPEL**

1. **THIS MATTER** is before the Court on Defendant's Motion to Compel Production of Improperly Withheld or Redacted Public Records (the "Motion"), (ECF No. 85).

2. Having considered the Motion, the related briefs, other appropriate matters of record, and the arguments of counsel at a hearing held 12 December 2024, the Court **ORDERS** the parties to submit the documents at issue to the Court for an *in camera* review.

I. BACKGROUND

3. On 14 December 2023, the North Carolina Attorney General[1] filed this action against MH Master Holdings, LLLP ("MH Master Holdings" or "Defendant"). (*See generally*, Compl., ECF No. 3.)

[1] On 1 January 2025, Mr. Jackson took the oath of office to become North Carolina's Attorney General, replacing Joshua H. Stein, the original Plaintiff in this action pursuant to Rule 25 of the North Carolina Rules of Civil Procedure.

4. MH Master Holdings is a limited liability limited partnership formed under the laws of the State of Delaware and registered with the North Carolina Secretary of State. (Def.'s Answ. and Countercls. to Pl.'s Am. Compl. ["Def.'s Answer" or "Countercls."] ¶ 1, ECF No. 55.) It is a subsidiary of HCA Healthcare, Inc. ("HCA"). (Countercls. ¶ 3.)[2]

5. The case centers on the terms of an Amended and Restated Asset Purchase Agreement (the "APA") between MH Master Holdings and Mission Health System ("Mission Health") memorializing MH Master Holdings' acquisition of Mission Health, a six-campus hospital system serving western North Carolina. (Countercls. 49.)[3]

6. On 26 April 2024, Plaintiff amended his Complaint as a matter of right. (Am. Compl. ¶ 1, ECF No. 50.) MH Master Holdings filed its Answer and Counterclaims on 6 May 2024. (Def.'s Answ., ECF No. 55.)

7. Thereafter, Defendant served a Rule 34 document request. In response, the Attorney General withheld documents that he identified in a privilege log as communications and documents (a) providing, requesting, or discussing legal advice concerning review of the Mission-HCA transaction and/or negotiation of the APA, (b) providing, requesting, or discussing legal advice concerning HCA's compliance

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[2] MH Master Holdings is authorized to do business under names that include "Mission Health," "Mission Health System," and "HCA." (Am. Compl. ¶ 9.) For purposes of the Motion, the Court at times refers to MH Master Holdings as "HCA."

[3] Defendant's introduction to the counterclaims contains unnumbered paragraphs; consequently, the Court refers to these introductory allegations by the page number of Defendant's pleading rather than paragraph number.

with the APA; or (c) providing, requesting, or discussing legal advice about communications with persons outside of NCDOJ concerning the Mission-HCA transaction. (Privilege Log, ECF No. 86.4.)

8. After complying with Business Court Rule 10.9, on 16 September 2024, Defendant filed this Motion and a supporting brief seeking an order compelling Plaintiff to produce documents that Defendant alleges have been improperly withheld or redacted in response to Defendant's document requests. (Def.'s Br. Supp. Mot. Compel Prod. Improperly Withheld or Redacted Pub. Recs. [Def.'s Br.], ECF No. 86.) Plaintiff filed his response in opposition on 28 October 2024. (Pl.'s Resp. Opp'n Def.'s Mot. Compel Pl.'s Privilege Log Materials [Pl.'s Resp.], ECF No. 92.)

9. After full briefing, the Court held a hearing on 12 December 2024, during which both parties were present and heard. (Not. Hr'g, ECF No. 95.) The Motion is now ripe for disposition.

II. ANALYSIS

10. Rule 26 of the North Carolina Rules of Civil Procedure allows parties to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" N.C. R. Civ. P. 26(b)(1). Evidence is relevant if it "appears reasonably calculated to lead to the discovery of admissible evidence." N.C. R. Civ. P. 26(b)(1).

11. In this case, because the party responding to discovery is the State of North Carolina and the documents requested may be public records, the North

Carolina Public Records Act (the "Act") must also be considered. N.C.G.S. §§ 132-1, *et. seq*. The Act requires custodians of public records to allow members of the public to inspect those records. N.C.G.S. § 132-6.

12. Our courts have construed the Act liberally in favor of the general public's right of access. *See News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 281 (1984) ("[I]t is clear that the legislature intended to provide that, as a general rule, the public would have liberal access to public records."); *Advance Publ'n, Inc. v. City of Elizabeth City*, 53 N.C. App. 504, 506 (1981) ("good public policy is said to require liberality in the right to examine public records" (quoting 66 Am. Jur. 2D *Records and Recording Laws* § 12 (1973)) (cleaned up)); *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 462 (1999) (stating that the Public Records Act "provides for liberal access to public records.").

13. Therefore, "in the absence of clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records Law must be made available for public inspection." *News and Observer Publ'g Co., Inc. v. Poole*, 330 N.C. 465, 486 (1992); *see also Gray Media Grp., Inc. v. City of Charlotte*, 290 N.C. App. 384, 386 (2023) ("The Act is intended to be liberally construed to ensure that governmental records be open and made available to the public, subject only to a few limited exceptions."). Further, "[e]xceptions and exemptions to the Public Records Act must be construed narrowly." *Carter-Hubbard Publ'g Co.*, 178 N.C. App. 621, 624 (2006); *DTH Media Corp. v. Folt*, 374 N.C. 292, 300–01 (2020).

14. Plaintiff argues that both the attorney-client privilege and the work product doctrine shield the documents at issue from discovery. Because Plaintiff represents that the majority of the documents were redacted or withheld because they reflect and contain work product, (Pl.'s Resp. 10), the Court addresses that objection first.

A. Application of the Work Product Doctrine to Public Records

15. The Court begins by examining the interplay between the Public Records Act and the work product doctrine. The Act defines a public record broadly as "all documents . . . made or received . . . in connection with the transaction of public business by any agency of the North Carolina government or its subdivisions." N.C.G.S. § 132-1(a).

16. However, section 132-1.9 of the North Carolina General Statutes provides in relevant part:

> (a) Scope. —A request to inspect, examine, or copy a public record that is also trial preparation material is governed by this section, and, to the extent this section conflicts with any other provision of law, this section applies.
>
> (b) Right to Deny Access. —Except as otherwise provided in this section, a custodian may deny access to a public record that is also trial preparation material.
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> * * * *
>
> (d) During a Legal Proceeding. —
>
> (1) When a legal proceeding is subject to G.S. 1A-1, Rule 26(b)(3), or subject to Rule 26(b)(3) of the Federal Rules of Civil Procedure, a party to the pending legal proceeding, including any appeals and postjudgment proceedings, who is denied access to a public record that is also claimed to be trial preparation material that pertains to the pending proceeding

> may seek access to such record only by motion made in the pending legal proceeding and pursuant to the procedural and substantive standards that apply to that proceeding.
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> * * * *
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> (f) Effect of Disclosure. —Disclosure pursuant to this section of all or any portion of a public record that is also trial preparation material, whether voluntary or pursuant to an order issued by a court, or issued by an officer in an administrative or quasi-judicial legal proceeding, shall not constitute a waiver of the right to claim that any other document or record constitutes trial preparation material.
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> (g) Trial Preparation Materials That Are Not Public Records. —This section does not require disclosure, or authorize a court to require disclosure, of trial preparation material that is not also a public record or that is under other provisions of this Chapter exempted or protected from disclosure by law or by an order issued by a court, or by an officer in an administrative or quasi-judicial legal proceeding.
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> (h) Definitions. —As used in this section, the following definitions apply:
>
> (1) Legal proceeding. —Civil proceedings in any federal or State court. Legal proceeding also includes any federal, State, or local government administrative or quasi-judicial proceeding that is not expressly subject to the provisions of Chapter 1A of the General Statutes or the Federal Rules of Civil Procedure.
>
> (2) Trial preparation material. —Any record, wherever located and in whatever form, that is trial preparation material within the meaning of G.S. 1A-1, Rule 26(b)(3), any comparable material prepared for any other legal proceeding, and any comparable material exchanged pursuant to a joint defense, joint prosecution, or joint interest agreement in connection with any pending or anticipated legal proceeding.

N.C.G.S. § 132-1.9.

17. Accordingly, this section of the Act incorporates Rule 26(b)(3) of the North Carolina Rules of Civil Procedure and recognizes application of the work product doctrine to public records that qualify. Rule 26(b)(3) provides:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought or work product of the attorney or attorneys of record in the particular action.

N.C. R. Civ. P. 26(b)(3).

18. "The party asserting work product protection bears the burden of proof of establishing entitlement to it." *Suggs v. Whitaker,* 152 F.R.D. 501, 505 (M.D.N.C. 1993).[4] "[I]t is incumbent upon the party to come forward with a specific demonstration of facts supporting the requested protection." *Id.* In addition, " '[b]ecause work product protection by its nature may hinder an investigation into the true facts, it should be narrowly construed consistent with its purpose[,]' which is to 'safeguard the lawyer's work in developing his client's case.' " *Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 29 (2001) (quoting *Suggs*, 152 F.R.D. at 505).

i. Anticipation of Litigation

19. Key to application of the work product doctrine is whether the materials were prepared in anticipation of litigation. *See, e.g., Sessions v. Sloane*,

[4] "Decisions under the federal rules are . . . pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules[,] 'including Rule 26(b)(3) of the North Carolina Rules of Civil Procedure, which defines the work product doctrine.' " *Buckley LLP v. Series 1 of Oxford Ins. Co. NC LLC*, 2020 NCBC LEXIS 136, at **27 n. 7 (N.C. Super. Ct. Nov. 9, 2020) (quoting *Turner v. Duke Univ.*, 325 N.C. 152, 164 (1989)).

248 N.C. App. 370, 383 (2016). "For the work product doctrine to apply, '[materials] must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation.' " *Buckley LLP*, 2020 NCBC LEXIS 136, at **27–28 (quoting *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992)). "Indeed, the work product doctrine does not apply to materials that 'would have been created in essentially similar form irrespective of the litigation.' " *Id.* (quoting *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998)); *see also, e.g., Cook v. Wake Cty. Hosp. Sys.*, 125 N.C. App. 618, 625 (1997) (finding an investigatory report not protectable work product where the "report would have been compiled, pursuant to [its] policy, regardless of whether . . . litigation was ever anticipated.").

20. Nevertheless, the phrase "in anticipation of litigation" is an elastic concept without sharply defined boundaries. *Cook*, 125 N.C. App. at 623. For example, our Supreme Court has explained that work product protection extends not only to documents prepared after a party has secured an attorney but also to "those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." *Willis v. Power Co.*, 291 N.C. 19, 35 (1976).

21. Defendant argues that Plaintiff lacks a good faith basis to assert work product protection over the withheld documents because they were prepared in connection with the negotiation of a contract, not in anticipation of litigation. (Def.'s Br. 2, 14–17.) Defendant points out that many of the documents were drafted years

ago, during a time when it contends that the Attorney General was simply performing his statutory duty to review the transaction and long before he could have anticipated possible litigation. (Def.'s Br. 8−9, 16.) It concludes, therefore, that most of the documents were generated by the Attorney General's Office in the ordinary course of business pursuant to the authority vested in the Attorney General by statute. (Def.'s Br. 8–9.)

22. Plaintiff responds that litigation was anticipated as a possibility from the start of the Attorney General's review of this transaction given its size and unique nature. (Pl.'s Resp. 13–15.) He argues that the Attorney General's Office made over fifty requests for information to delve into issues he found potentially problematic, considered all legal options available to remedy his concerns, and, ultimately, negotiated modified terms for inclusion in the Asset Purchase Agreement. (Pl.'s Resp. 2.) Had the Attorney General not been able to reach those terms, he maintains that his team was prepared to file legal action to enjoin the transaction. (Pl.'s Resp. 2, 14.) As for later documents, Plaintiff contends that they include discussion of contemplated litigation against Defendant following complaints the Attorney General's office received post-closing. (Pl.'s Resp. 6–7.)

23. While it is true that the Attorney General initially undertook a review of the transaction as a matter of course in the performance of his duties, there is evidence in the record to support the Attorney General's position that litigation may have been contemplated early on. (*See* Ex. B, Thomas Dep. Tr. 38:5−22, ECF No. 92.3 (discussing several litigation alternatives Plaintiff contemplated with respect

to the proposed acquisition); Ex. C, Harrod Dep. Tr. 23:23–25, 116:11–24, ECF No. 92.4 (discussing the impact this transaction might have on the community due to its complexity).) Consequently, it is possible that the documents at issue include work product prepared in anticipation of litigation. An *in camera* review of the documents will be necessary to make a final determination.

ii. Substantial Need

24. Even if the work product doctrine applies, Defendant argues that the documents are still subject to production because work product protection is qualified. It points to language in Rule 26 stating that protection is lost if the requesting party shows a "substantial need of the materials in the preparation of the case" and is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." N.C. R. Civ. P. 26(b)(3).

25. Defendant contends that it has substantial need for the documents at issue here. It argues that, if the Court concludes that the operative language in the APA underlying this matter is ambiguous, determining the intent of the parties with respect to that language requires assessing all the surrounding circumstances, including the construction the parties placed on the language at issue prior to this dispute. Because the Attorney General is the only source of information concerning his contemporaneous understanding of the language at issue, Defendant argues that it has substantial need for the withheld information and cannot obtain the substantial equivalent of the documents by other means. (Def.'s Br. 17–18.)

26. But Plaintiff responds that virtually all of the documents protected by the work product doctrine reflect the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Attorney General and were "prepared in connection with determining a legal strategy to pursue following notification of the proposed HCA-Mission deal." (Pl.'s Resp. 16.) This fact, Plaintiff argues, trumps Defendant's "substantial need" argument and permits Plaintiff to withhold the information. (Pl.'s Resp. 16.)

27. Defendant is correct that, unlike the attorney-client privilege, "[t]he protection given to matters prepared in anticipation of trial, or 'work product,' is not a privilege, but a 'qualified immunity.' " *Evans,* 142 N.C. App. at 28 (quoting *Willis*, 291 N.C. at 35). However, Plaintiff is correct that the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party in the instant litigation, as well as the work product of an attorney of record in this action, are not discoverable. *See, e.g*., *Willis*, 291 N.C. at 36. Once again, an *in camera* review is required to determine whether any document (or information within a document) is entitled to this heightened work product protection.[5]

28. **WHEREFORE**, the Court, in its discretion, hereby **ORDERS** as follows:

a. On or before 14 March 2025, Plaintiff shall provide the documents at issue to the Court for an *in camera* review. Counsel may contact the

[5] The Court does not ignore Plaintiff's attorney-client privilege objection and will address that objection, to the extent necessary, in the event an *in camera* review with respect to the attorney work product doctrine does not resolve this dispute in its entirety.

Court's law clerk to determine the most cost-effective and efficient method of transmission.

b. Contemporaneous with Plaintiff's provision of the documents at issue to the Court, Plaintiff shall provide the Court and serve Defendant with a privilege log compliant with Rule 26(b) of the Rules of Civil Procedure. The log shall identify each document by bates number and state Plaintiff's specific objection(s). If Plaintiff's objection is only to a portion of a document, that portion shall be highlighted on the document provided to the Court.

c. Depending on the volume of documents submitted, and after a further hearing with the parties, the Court reserves the right to appoint a discovery referee to conduct the *in camera* review and to tax the costs of that review against one or both parties.

SO ORDERED, this the 28th day of February, 2025.

/s/ Julianna Theall Earp
Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases