IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THOR ZURBRIGGEN et al., on behalf of themselves and on behalf of all others similarly situated,	)	
Plaintiffs,	)	Case No. 1:17-cv-05648
v.	)	Hon. John J. Tharp, Jr.
TWIN HILL ACQUISITION COMPANY, INC., a California corporation, AMERICAN AIRLINES GROUP INC., a Delaware corporation, AMERICAN AIRLINES, INC., a Delaware corporation, PSA AIRLINES, INC., a Pennsylvania corporation, ENVOY AIR INC., a Delaware corporation,	)	Magistrate Judge Jeffrey Cole
Defendants.	)	

PLAINTIFFS' SURREPLY IN OPPOSITION TO DEFENDANT AMERICAN AIRLINES, INC.'S MOTION TO QUASH

American's reply brief, ostensibly in response to Plaintiffs' Opposition, contains new arguments and new evidentiary support. That new material does not render American's claims of possible privilege any more credible, but does require a surreply to clear the smoke created by this new evidence.

First, American sets forth two declarations from attorneys in an effort to establish some basis for its claim that Dr. Scheman and Intertek could be in possession of privileged materials. It is too late. American was required to set forth arguments and support for its Motion when it filed its Motion, not by way of injecting new facts in a Reply. *See Mendez v. Perla Dental*, 646 F.3d 420, 423–24 (7th Cir. 2011) ("it is well-established that arguments raised for the first time in the reply brief are waived."); *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 586 (7th Cir.

1999) ("fail[ure] to develop [a point] until [the] reply brief . . . is a day late and a dollar short."); *see also Bryant v. Astrue*, No. 1:10-CV-00197-JMS, 2010 WL 4638424, at *1 (S.D. Ind. Nov. 4, 2010) ("[movant] was required to present that affidavit—if at all—when he first made his motion; the law deems litigants to have waived arguments held back until reply."). This is particularly so when in connection with the parties' meet and confer on this motion American provided Plaintiffs' counsel with one obtuse email chain about Dr. Scheman and nothing about Intertek at all.

Second, notably absent from American's Reply is any declaration from either Dr. Scheman or Intertek that either one considered themselves to be working as litigation consultants for American's lawyers, or that either ever agreed to treat any information exchanged with American's counsel as privileged. Just because an American lawyer talked with Dr. Scheman or Intertek does not render those communications attorney work product.

Third, American claims that it only seeks to protect certain unidentified documents in Intertek's possession from November 2016 when it started working with Intertek in a "different capacity." Given that much of Intertek's document production will likely involve documents concerning the tests performed in 2015 and April 2016, why should American be entitled to review all of Intertek's document production in advance? Moreover, in the letter it attaches to its Reply from its Managing Director of Labor Relations to the APFA from January 2017, its Managing Director touts that "three rounds of independent tests have now been completed" by Intertek and goes on to claim, wrongly, that "nothing in this exhaustive testing has indicated any health risk related from the uniform." (Dkt. 132-4 at PageID#2084.)[1] Those statements both shed doubt on any claim that Intertek was a litigation consultant—American claims to the APFA that Intertek is

[1] This is yet another document that American failed to produce as part of the MIDP process, or identify during the parties' meet and confer process.

"independent"—or that the work Intertek did was somehow privileged. Indeed, the February 2017 Intertek report was available on the internet prior to this litigation, notwithstanding that it too was labeled "Privileged and Confidential." (*See* Dkt. 127 at 6.) If any work product privilege existed, surely American would not have waived it so readily by publicly sharing that work product and then publicly proclaiming that it supported, albeit falsely, its claim that the uniforms are safe. American cannot have it both ways.

Fourth, American concedes there can be no claim for any privilege prior to November 2016, when it claims American lawyers began consulting with Dr. Scheman and Intertek for litigation purposes. Yet, American proposes that it be put in charge of the entirety of Dr. Scheman's and Intertek's document productions. That is far too broad.

Fifth, American's new claim that Mr. Grant was not an attorney for American, but rather for Americans' presumably independent workers' compensation insurer,[2] undercuts rather than supports its claimed privilege with regard to Dr. Scheman. Dr. Scheman's communications with an independent third party—and attorney for American's insurer—waives any privilege. Notably, those communications took place in August and December of 2017—well after American's claim that it was using Dr. Scheman as a litigation consultant.

Finally, American refuses to address a basic problem with its Motion. American claims it must review all the documents in possession of Intertek and Dr. Scheman in order to provide a real basis for why the documents are privileged, but American must necessarily have copies of any communications that it claims were prepared in anticipation of litigation, and should be able to provide Dr. Scheman and Intertek with a list of those materials and ask those entities to refrain

[2] American did not include any of this information about Mr. Grant's role in its Motion.

from producing those documents pending a privilege challenge by Plaintiffs.[3] It has not even described in any fashion what such documents might be, even though it surely must have some idea from what is in its possession. That American has not done so, and still refuses to do so, indicates that American really has no basis for any privilege claims, but rather wishes to see the documents first and then construct reasons why they *might* be privileged. Again, if there are documents that contain attorney work product or attorney mental impressions as a result of their "consultations" with either Dr. Scheman or Intertek, presumably Mr. Johnson and Mr. Rothenberg, who submitted declarations with American's Reply, have copies and can readily identify them. They have not.

Dated: December 21, 2018

Respectfully submitted,

By: */s/ Todd L. McLawhorn*

Todd L. McLawhorn
tmclawhorn@siprut.com
Stewart M. Weltman
sweltman@siprut.com
Michael Chang
mchang@siprut.com
SIPRUT PC
17 North State Street
Suite 1600
Chicago, Illinois 60602
Phone: 312.236.0000
Fax: 312.754.9616

Warren T. Burns*
wburns@burnscharest.com
BURNS CHAREST LLP

[3] Or, as Plaintiffs proposed, Dr. Scheman and Intertek can produce their documents just like any other third-party, and if there is anything that American believes is privileged, it can claw-back those documents under the Protective Order, and if Plaintiffs disagree, they can challenge the specific privilege claim.

500 North Akard Street
Suite 2810
Dallas, Texas 75201
Phone: 469.904.4550

Korey A. Nelson*
knelson@burnscharest.com
Charles J. Gower*
jgower@burnscharest.com
BURNS CHAREST LLP
365 Canal Street
Suite 1170
New Orleans, Louisiana 70130
Phone: 504.799.2845

*Admitted Pro Hac Vice

Attorneys for Plaintiffs
and the Proposed Putative Classes

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that the foregoing **Plaintiffs' Surreply in Opposition to Defendant American Airlines, Inc.'s Motion to Quash** was filed electronically with the Clerk of the Court using the CM/ECF system on this 26th day of December 2018, and served electronically on all counsel of record.

/s/Todd L. McLawhorn