

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. **22-2370**

<p>MAURA HEALEY, in her official capacity as ATTORNEY GENERAL of the COMMONWEALTH OF MASSACHUSETTS, Petitioner,</p> <p>v.</p> <p>USiDG LLC, Respondent.</p>

**MEMORANDUM OF LAW IN
SUPPORT OF PETITION FOR
ENFORCEMENT OF
CIVIL INVESTIGATIVE DEMAND
AND ORDER REGARDING WAIVER
OF THE ATTORNEY-CLIENT
PRIVILEGE**

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Introduction

Pursuant to the Massachusetts False Claims Act, G.L. c. 12, § 5N(10), Maura Healey, Attorney General for the Commonwealth of Massachusetts (the "Attorney General"¹), hereby submits this Memorandum of Law in Support of her Petition for Enforcement of Civil Investigative Demand and Order Regarding Waiver of the Attorney-Client Privilege (the "Petition"). Because the Attorney General has broad authority to investigate potential violations of the Massachusetts False Claims Act and because Respondent USiDG LLC ("USiDG") has waived its right to challenge the Civil Investigative Demand or to assert that documents voluntarily produced are attorney-client privileged, this Court should compel USiDG to comply fully with the Attorney General's Civil Investigative Demand and determine that the Attorney General may use certain voluntarily produced documents and a similarly-produced video in her investigation and in any subsequent legal action based thereon.

¹ The defined term of "Attorney General" as used in this Memorandum includes both the Attorney General and those Assistant Attorneys General in the False Claims Division working on this Massachusetts False Claims Act investigation.

The Petition concerns the enforcement of Civil Investigative Demand No. 2021-FCD-06 issued to USiDG as part of the Attorney General's investigation into multiple entities and individuals in connection with two March 2020 emergency purchase orders (the "Two EPOs") issued by the Commonwealth for protective face masks (the "Masks") and hand sanitizer (the "Hand Sanitizer") to be used to protect against COVID-19 (the "USiDG CID").²

The Attorney General is investigating transactions and conduct by and involving USiDG, among others, subsequent to the Commonwealth's termination of the Two EPOs as potential violations of the Massachusetts False Claims Act (the "MFCA" and the "MFCA Investigation"). The USiDG CID, with which USiDG refuses to comply, was issued on August 23, 2021. The USiDG CID seeks information that is critical to the Attorney General's MFCA Investigation for many reasons, including the following:

- after receiving in excess of \$15 million of the over \$16 million paid up front by the Commonwealth for the Masks, USiDG disregarded directions not to expend the Commonwealth's funds; and
- USiDG neither secured conforming Masks in a timely manner nor returned the Commonwealth's funds, except for \$18,000.00 paid in August 2021. USiDG characterizes the \$18,000.00 payment as a donation to the Commonwealth resulting from its sales to third parties of a portion of the masks purchased with Commonwealth funds.

While refusing to comply with the USiDG CID, USiDG has instead voluntarily produced certain documents to the Attorney General that it had previously produced to the United States

² Though this petition concerns the enforcement of the USiDG CID, the Attorney General is also investigating other entities and individuals regarding the Two EPOs and the Commonwealth reserves its right to bring similar enforcement proceedings against them.

Attorneys' Offices for both the Eastern District of New York and the District of Massachusetts as part of law enforcement proceedings. However, the voluntarily produced documents do not fully respond to the document requests set forth in the USiDG CID. Additionally, USiDG has refused to designate witness(es) and appear at the deposition mandated by the USiDG CID. For these reasons the Attorney General seeks to enforce the USiDG CID.

The Petition also pertains to the Attorney General's expectation to utilize seven specific documents and a certain video (the "Seven Documents and a Video") which contain communications with counsel and which USiDG voluntarily produced to the Attorney General. As described below, USiDG has produced the entire same set of documents three times to government agencies as part of law enforcement investigations, so the company cannot claim that any waiver of the attorney-client privilege was inadvertent. Thus, this Court should order that USiDG has waived the attorney-client privilege with respect to the Seven Documents and a Video, and the Attorney General may utilize the Seven Documents and a Video in the MFCA Investigation and in any subsequent legal action based thereon.

Factual Background

The factual background of this matter is set forth in the Petition filed herewith. For purposes of economy, it is not repeated here.

Procedural Background

As part of a larger investigation related to the Two EPOs, on August 23, 2021, the Attorney General issued the USiDG CID and USiDG's counsel accepted service that same day on behalf of USiDG. (Affidavit of Mary-Ellen Kennedy, Assistant Attorney General, In Support of Petition for Enforcement of Civil Investigative Demand and Order Regarding Waiver of the Attorney Client Privilege and *Ex Parte* Motion to Impound the Affidavit of Shannon Keating, Assistant Attorney General dated October 17, 2022, at ¶¶ 3-4 ("Kennedy Aff.")).

In accordance with G.L. 12, § 5N(9), the USiDG CID set forth the time by which USiDG had to file a motion to modify or set aside the USiDG CID and/or seek a protective order. That time was any time prior to the date specified for compliance (September 7, 2021) or within 21 days after the demand had been served, whichever period was shorter. Thus, USiDG had to file any motion to set aside or modify the USiDG CID, and/or seek a protective order, by September 7, 2021. (Exhibit A to the Petition at 1-2.)

The USiDG CID requested deposition testimony and production of documents including:

1. Organizational charts, incorporation documents, or other business records sufficient to identify USiDG's corporate organization, structure and ownership.
2. All documents and communications produced by you during the Relevant Time Period in connection with or concerning any investigation of your business methods, acts, or practices, including without limitation your purchase or sale of [Masks and Hand Sanitizer], and including without limitation all such documents and communications produced by you to the United States Attorney's Office for the Eastern District of New York and/or the United States Attorney's Office for the District of Massachusetts.
3. All documents and communications concerning sales of [Masks and Hand Sanitizer] by you during the Relevant Time Period, including such documents and communications sufficient to identify for each sale: the type of [Masks and Hand Sanitizer] sold, the date of the sale, the quantity sold, the sale price, the name of the buyer and the disposition of the sale proceeds.

(*Id.* at 6-7.)

On August 27, 2021, the Attorney General received a wire transfer in the amount of \$18,000.00 which was identified in the accompanying documentation as being sent by USiDG.

(Kennedy Aff. at ¶ 5.)

The Attorney General received no prior notice from USiDG or its counsel that these funds were arriving. (*Id.*)

On August 31, 2021, in response to the USiDG CID, USiDG's counsel wrote to the Attorney General stating, *inter alia*, as follows:

...After careful review of the [USiDG CID] and the facts of this case, [USiDG] respectfully declines to comply with the [USiDG CID]....[W]e believe that the Attorney General does not have the authority to issue the CID to USiDG because there is no personal jurisdiction and no venue....Nonetheless, pursuant to our earlier settlement communications, USiDG is willing to *voluntarily* produce to you all documents that were produced to the United States Attorneys' Offices for the Eastern District of New York and the District of Massachusetts....³

(*Id.* at ¶ 6.)

On September 8, 2021, the Attorney General emailed USiDG's counsel regarding the receipt of the \$18,000.00 wire transfer from USiDG and requesting an explanation. (*Id.* at ¶ 7.)

On September 9, 2021, USiDG's counsel responded to the Attorney General that USiDG had "sold a portion of the masks and wished to donate the proceeds of that sale to the Commonwealth." (*Id.*)

On September 9, 2021, USiDG's counsel emailed the Attorney General its "voluntary production" (the "Voluntary Documents"), again confirming that it contained all documents that the company previously had produced to the United States Attorneys' Offices for the Eastern District of New York and the District of Massachusetts pursuant to two separate law enforcement proceedings. (*Id.* at ¶ 8.)

On September 15, 2021, the Attorney General notified counsel for USiDG that the period within which USiDG could have moved to modify or set aside the USiDG CID and/or for a

³ USiDG's claim that the documents were produced to the Attorney General as part of settlement negotiations is false, and the Attorney General so advised USiDG's counsel on September 15, 2021. At this time in the MFCA Investigation, the Attorney General and USiDG had not engaged in meaningful settlement communications for many months and the Attorney General's MFCA Investigation was moving forward in due course.

protective order, had passed. (*Id.* at ¶ 9.) The Attorney General also advised USiDG's counsel that USiDG's deposition was rescheduled to occur on October 26, 2021 because the Attorney General was aware that USiDG's counsel was on trial in another matter. (*Id.*)

In a reply email to the Attorney General dated October 18, 2021, USiDG's counsel maintained USiDG's position that it was declining to comply with the USiDG CID and again stated: “[w]e believe that the attorney general does not have the authority to issue the [USiDG] CID to USiDG because there is no personal jurisdiction and no venue . . . There is therefore no need to move to modify or set aside the [USiDG] CID.” (*Id.* at ¶ 10.)

On October 20, 2021, the Attorney General replied to USiDG's counsel, reiterating that she disagreed with USiDG's previously stated positions and advising that USiDG's deposition was rescheduled to occur on December 2, 2021 because the Attorney General had not finished her review of the Voluntary Documents. (*Id.* at ¶ 11.) On October 21, 2021, USiDG's counsel emailed the Attorney General stating, *inter alia*, that with respect to the new December deposition date, USiDG was taking the same position as expressed in its August 31, 2021 letter and was continuing to decline to comply with the USiDG CID, including its refusal to appear and be deposed. (*Id.*)

Thereafter, the Attorney General provided several notices to USiDG's counsel of rescheduling of the USiDG deposition. (*Id.* at ¶ 12.) However, since its August 31, 2021 letter to the Attorney General, USiDG has maintained its blanket refusal to comply with the USiDG CID, including its rejection of the requirement to appear and be deposed. (*Id.*) Beyond the Voluntary Documents, no further documents have been produced to the Attorney General. (*Id.*)

As of the date of this Petition, the deposition of USiDG has been rescheduled by the Attorney General to occur on November 30, 2022. (*Id.* at ¶ 13.) As recently as July 12, 2022,

USiDG's counsel informed the Attorney General that USiDG still refuses to appear and be deposed, or otherwise comply with the USiDG CID. (*Id.*)

Argument

I. Compliance With The USiDG CID.

A. USiDG Has Waived Any Objection to the USiDG CID And Should be Compelled to Comply.

The Attorney General's Petition should be allowed because USiDG neither timely moved to modify or set aside the USiDG CID, nor did it seek a protective order from the Court.

USiDG's objections have therefore been waived.

G.L. c. 12, § 5N(9) provides that “[a]t any time prior to the date specified in the civil investigative demand, or within 21 days after the demand has been served, whichever period is shorter, the court may, upon motion for good cause shown . . . modify or set aside such demand or grant a protective order in accordance with the standards” of Mass. R. Civ. P. Rule 26(c) (a “CID”). Therefore, USiDG was required to move to modify or set aside the USiDG CID and/or seek a protective order, by September 7, 2021, the date specified in the USiDG CID. However, USiDG did not file any such motion, and this failure constitutes a waiver of all objections it may have had to the USiDG CID. *See Attorney General v. Bodimetric Profiles*, 404 Mass. 152, 154 (1989) (holding under an analogous section of G.L. c. 93A that a “failure to bring [a motion to modify or set aside a CID] constitutes a waiver by the person to whom the [Civil Investigative Demand] is served”).

USiDG's October 18, 2021 email, and other similar informal communications wherein USiDG claimed that the Attorney General had “no personal jurisdiction and no venue,” are not sufficient under Massachusetts law, since “[m]erely informing the Attorney General of its refusal to comply [with a Civil Investigative Demand] does not suffice to shift the burden to the

Attorney General to take the next legal step.” *Id.* at 155. Thus, here, USiDG’s repeated blanket refusals to comply with the USiDG CID are not an engagement with the Attorney General of the sort sufficient to maintain its right to object to the USiDG CID.⁴ After having received more than \$15 million in Commonwealth funds and returning only \$18,000.00, USiDG has refused to provide the Commonwealth with basic information on its corporate organization and structure and its sales of the masks purchased with Commonwealth funds. USiDG has repeatedly conveyed its unwillingness to appear for deposition to answer questions on a variety of issues, including its failure to return Commonwealth funds and its justification for entering into multimillion dollar contracts with mask manufacturers after being notified of the Commonwealth’s termination of the Two EPOs and demand for a return of funds. USiDG’s conduct was not sufficient to have preserved any right to move to modify or set aside the USiDG CID. Indeed, USiDG’s engagement with the Attorney General is analogous to that detailed in *Bodimetric Profiles* as USiDG has “refused to comply altogether.” *See Attorney Gen. v. Facebook, Inc.*, 487 Mass. 109, 121 (2021) (explaining that the recipient of the Civil Investigative Demand in *Bodimetric* refused to comply).

USiDG should not be granted an opportunity to object after the time frame allowed by the MFCA and at this late date, a year after the USiDG CID was issued, as “[t]he recipient may not remain passive, as [USiDG] has done, raising legal arguments only after the Attorney General brings a motion to compel.” *See Bodimetric Profiles*, 404 Mass. at 155. Accordingly,

⁴ In contrast, the Supreme Judicial Court in *Attorney Gen. v. Facebook, Inc.*, concluded that the defendant had not waived its objections to a CID issued by the Attorney General where, although the defendant had not preserved its objection by moving to modify or set aside the CID, the corporation’s engagement with the Attorney General was “far from passive,” in that the defendant worked with the Attorney General and communicated its objections to the CID, including making assertions of privilege, and complied with the requests in the CID that the defendant believed called for information that was not privileged. *See* 487 Mass. 109, 121 (2021). The Supreme Judicial Court emphasized and explained that a CID recipient must meet a threshold of active engagement with the Attorney General to preserve their right to object. *Id.* Here, USiDG cannot be said to have met this threshold.

having waived its right to modify or set aside the USiDG CID and/or seek a protective order, USiDG should be compelled to comply.

B. Even if USiDG Has Not Waived its Right to Object, the Company Should Be Compelled to Comply With The USiDG CID As It Falls Squarely Within The Attorney General's Authority To Investigate Potential Violations of the MFCA.

The Attorney General has clear and broad authority to investigate potential violations of the MFCA, including authority to issue CIDs. USiDG should therefore be compelled to comply.

“The Attorney General is the ‘chief law officer’ of the Commonwealth, empowered by the Legislature to ‘set a unified and consistent legal policy for the Commonwealth.’” *Com. v. Exxon Mobil Corporation*, 489 Mass. 724, 730 (2022) (quoting *Sec’y of Admin. & Fin. v. Attorney Gen.*, 367 Mass. 154, 159 (1975)). The Attorney General has general and specific statutory mandates to protect the public interest and “a common law duty to represent the public interest and enforce public rights.” *Com. v. Mass. CRINC et al.*, 392 Mass. 79, 88 (1984). One of the Attorney General’s specific statutory mandates is to investigate potential MFCA violations “involving state funds or funds from any political subdivision.” G.L. c. 12, § 5C(1).

The MFCA grants the Attorney General the power to issue CIDs as part of any MFCA investigation whenever she “has reason to believe that a person may be in possession, custody or control of documentary material or information relevant to a false claims law investigation.” MFCA, G.L. c. 12, § 5N(1). *See In the Matter of a Civil Investigative Demand Addressed to Yankee Milk, Inc.*, 372 Mass. 353, 358, 364 (1977) (explaining that the Attorney General has broad investigatory power and the statute granting this power must be liberally construed in favor of the government). This CID authority extends to entities that are based outside of Massachusetts, as the MFCA clearly gives the Attorney General authority to issue CIDs to out-of-state entities. *See* G.L. c. 12, § 5N(2) (stating that service of a CID may be made in a number

of ways, including by “mailing by registered or certified mail a copy thereof addressed to the person to be served . . . at the principal place of business in the Commonwealth or, *if said person has no place of business in the commonwealth*, to the person’s principal office or place of business”) (emphasis supplied).

Indeed, the language of the MFCA makes clear the broad nature of the Attorney General’s authority:

Notwithstanding any general or special law, procedural rule or regulation to the contrary, whenever the attorney general or a designee has reason to believe that a person may be in the possession, custody or control of documentary material or information relevant to a false claims law investigation, the attorney general or a designee may, before commencing a civil action . . . issue . . . a [CID]

G.L. c. 12, § 5N(1) (emphasis supplied).

“When interpreting a statute, [a court’s] primary duty is to ‘effectuate the intent of the Legislature in enacting it.’” *Exxon*, 489 Mass. at 726 (quoting *Wallace W. v. Com.*, 482 Mass. 789, 793 (2019)). A court determines this intent “from all [the statute’s] words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main objective to be accomplished, to the end that the purpose of its framers may be effectuated.” *Id.* (quoting *Conservation Comm’n of Norton v. Pesa*, 488 Mass. 325, 331 (2021)).

G.L. c. 12, § 5N(1), includes the words “notwithstanding” and “any.” The ordinary meaning of the word “notwithstanding” is “despite; in spite of.” *See Black’s Law Dictionary* (11th ed. 2019). Additionally, in interpreting the statute one must follow “the principle that “the word ‘any’ means ‘all’ or ‘every’ and imports no limitation.” *Cabot CSC Corp. v. Aearo Techs. LLC*, 91 Mass. App. Ct. 1120 (2017) (quoting *Zion v Kurtz*, 50 N.Y.2d 92, 104 (1980)). Thus,

the “notwithstanding” clause of § 5N(1) of the MFCA authorizes the Attorney General to issue a CID whenever she has reason to believe that a person has information or documentary material relevant to a false claims investigation and despite every “general or specific law, procedural rule or regulation to the contrary.”

The language of the MFCA with respect to false claims CIDs is broader than the language of G.L. c. 93A with respect to consumer protection CIDs, which does not contain a “notwithstanding” clause in its CID provision. Despite G.L. c. 93A’s more limited language, courts nevertheless have held that the Attorney General “‘need not be confident of the probable result of [her] investigation’ before she issues a CID.” *Harmon Law Offices, P.C. v. Attorney General*, 83 Mass. App. Ct. 830, 834 (2013) (quoting *CUNA Mut. Ins. Soc. v. Attorney Gen.*, 380 Mass. 539, 542 n. 5 (1980)); *see also Yankee Milk*, 372 Mass. 353, 364 (1977) (“effective investigation requires broad access to sources of information”).

The Attorney General’s authority to issue MFCA CIDs to out-of-state entities must logically include an equal ability to compel compliance with properly issued CIDs, as contemplated by G.L. c. 12, §5N(10). Indeed, in evaluating the Secretary of the Commonwealth’s role in enforcing G.L. c. 110A, the Massachusetts Uniform Securities Act, the Supreme Judicial Court has held that “authority to conduct investigations outside the Commonwealth would be meaningless without authorization to subject nonresidents to enforcement proceedings.” *Bulldog Invs. Gen. P’ship v. Sec’y of Com.*, 457 Mass. 210, 216 (2010). The primary purpose of the MFCA is to safeguard Commonwealth funds; the purpose of the statute would be frustrated if the Commonwealth were only permitted to enforce CIDs issued to Massachusetts-based entities.

C. USiDG Has No Basis To Challenge The Attorney General's Authority To Issue The USiDG CID.

In an attempt to avoid compliance with the USiDG CID, USiDG has made only an informal objection maintaining that the Attorney General did not have the authority to "issue" the USiDG CID because "there is no personal jurisdiction and no venue." This contention is incorrect and USiDG should be compelled to comply with the USiDG CID.

While a jurisdictional analysis is not required for this enforcement proceeding, given both USiDG's failure to move to modify or set aside the USiDG CID and/or seek a protective order, as well as the Attorney General's broad authority to investigate potential MFCA violations involving state funds or funds from any political subdivision, there is a sufficient connection between the Attorney General's MFCA Investigation and USiDG's Massachusetts-based activities that specific jurisdiction is established, as USiDG has transacted business in the Commonwealth under G.L. c. 223A, § 3(a) and has contracted to supply things in Massachusetts under G.L. c. 223A, § 3(b). At this stage in the MFCA Investigation, the Attorney General has established that USiDG received over \$15 million of Commonwealth funds; that both USiDG and its counsel directly contacted the Commonwealth about the Two EPOs; that USiDG knew the Commonwealth terminated the Two EPOs and demanded a return of its funds, yet ignored the Commonwealth's demand and proceeded to spend millions of dollars of the Commonwealth's money; and, that in August 2021, USiDG returned \$18,000.00 to the Commonwealth.

It is difficult to reconcile USiDG's groundless objection on jurisdiction and venue with the facts above, including that USiDG has acknowledged its significant role in the transactions by making its production of the Voluntary Documents to the Attorney General and by

purportedly “donating” \$18,000.00 to the Commonwealth. Accordingly, USiDG should be compelled to respond to the USiDG CID.⁵

D. Information from USiDG is Critical to the MFCA Investigation.

The Attorney General is conducting a complex and multi-pronged investigation into the Two EPOs, and the information in USiDG’s possession is necessary to provide a complete understanding of the transactions and the refusal of the parties to return Commonwealth funds. Despite receiving over \$15 million of Commonwealth funds to supply the Masks, USiDG has failed to return the Commonwealth’s funds and refused to comply with the CID. The refusal to comply with the USiDG CID has deprived the Commonwealth of a basic understanding of USiDG’s corporate organization, structure, and ownership. USiDG has also failed to provide information on any sales it has made of the masks, which were paid for by the Commonwealth, to any third parties. This information is relevant to determining whether USiDG has received an additional windfall by selling masks that were paid for by the Commonwealth.

Further, USiDG’s failure to appear for deposition has frustrated the Commonwealth’s investigation and deprived the Commonwealth of the opportunity to ask questions about USiDG’s failure to return the money the Commonwealth paid for the Masks, its communications with the Commonwealth shortly after the Two EPOs were canceled, and its decision to enter into multimillion dollar contracts with mask manufacturers after the Two EPOs had been canceled

⁵ USiDG also claimed that the Attorney General had no authority to issue the USiDG CID because she lacked “venue.” The Attorney General disagrees. Venue addresses the question of which court having subject matter jurisdiction over a case is the proper forum to hear the matter. “When jurisdiction exists, venue requirements should be read liberally to ensure access to the Commonwealth’s courts, for ‘[i]t cannot be presumed that the Legislature, when undertaking to confer jurisdiction upon our courts . . . could have intended in many conceivable instances to deprive the holder of [such] claims of all opportunity to bring an action.’” *Id.* (quoting *Potter v. LaPointe Mach. Tool Co.*, 201 Mass. 557, 563 (1909)). Here, Massachusetts courts do have jurisdiction over USiDG and it is unfathomable that a Court would find venue in Suffolk County to be improper. *See id.*

and to transfer millions of dollars of Commonwealth funds to these mask manufacturers after that cancellation.

USiDG should not be permitted to hide behind baseless and informal jurisdictional objections to interfere with the Attorney General's MFCA Investigation. Accordingly, USiDG should be compelled to comply with the USiDG CID.

II. USiDG Has Waived Any Claims Of Attorney-Client Privilege Regarding The Seven Documents And A Video that USiDG Voluntarily Produced.

The Attorney General is also entitled to an Order that USiDG has waived any potential claim of attorney-client privilege as to the Seven Documents and a Video because USiDG produced them to the Attorney General as part of its Voluntary Documents. (*Id.* at ¶ 14.) According to USiDG, the Voluntary Documents constituted the third time that the company produced the entire same set of documents to a government agency as part of a law enforcement investigation. (*Id.* at ¶ 8.) The Voluntary Documents were first produced by USiDG to the United States Attorney's Office for the Eastern District of New York and then again to the United States Attorney's Office for the District of Massachusetts. The Seven Documents and a Video are attached to the Affidavit of Shannon Keating, Assistant Attorney General, In Support of the Petition (the "Keating Affidavit").⁶ (*Id.* at ¶ 16.)

USiDG has waived any attorney-client privilege with respect to the Seven Documents and a Video as "[c]ompliance with a subpoena without first exhausting the available avenues to challenge it is deemed a waiver of any privileges that might otherwise apply." *Com. v. Philip Morris Inc.*, 1998 WL 1248003 at *5-6 (Mass. Super. July 30, 1998). Here, it is undisputed that prior to the service of the USiDG CID, USiDG had provided the same set of documents to the

⁶ The Keating Affidavit is the subject of an *Ex Parte* Motion To Impound submitted herewith and will be filed with the Court once that Motion is decided.

United States Attorneys' Offices for the Eastern District of New York and the District of Massachusetts in response to two subpoenas separately issued. "[E]very Circuit but the Eighth that has addressed the issue has ruled that voluntary disclosures to the government in an enforcement context destroy the attorney-client privilege." *In re Lupron Mktg. & Sales Pracs. Litig.*, 313 F. Supp. 2d 8, 12 (D. Mass. 2004); *see also In re Tyco Intern. Ltd.*, 2007 WL 2682763, at *2 (D.N.H. Sept. 7, 2007) ("all voluntary filings with the SEC and the New York District Attorney, therefore, have lost any privilege or work product protection."). It is undisputed that here, in connection with the MFCA Investigation, USiDG did not exhaust its available avenues to challenge the USiDG CID, including its ability pursuant to G.L. c. 12, § 5N(9) to move to modify or set aside the USiDG CID and/or to seek the grant of a protective order in accordance with the standards of Mass. R. Civ. P. Rule 26(c). Because of this failure, USiDG's production of the Voluntary Documents to the Attorney General was voluntary and, therefore, USiDG waived any claim of attorney client privilege.

Moreover, as this was the third time that USiDG produced the Voluntary Documents, including the Seven Documents and a Video, to a governmental agency as part of a law enforcement investigation, the company's production of the Seven Documents and a Video and its concomitant waiver of the attorney-client privilege were not inadvertent. The Massachusetts approach in determining whether a waiver of the attorney-client privilege has occurred via an inadvertent disclosure "empowers courts to consider a number of circumstances relating to the inadvertent production, including (1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the amount of time it took the producing party to recognize its error, (3) the scope of the production, (4) the extent of the inadvertent disclosure, and (5) the overriding interest of fairness and justice." *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287,

291 (D. Mass. 2000). USiDG cannot demonstrate that its production of the Voluntary Documents was inadvertent for a variety of reasons.

First, despite producing the documents to the United States Attorney's Office for the Eastern District of New York on or about June 2020, over two years ago, and making two subsequent productions of the same documents, USiDG has not made any effort to assert the attorney-client privilege or seek to recover the voluntarily-produced documents.

Second, beyond producing the same documents to three separate law enforcement agencies, USiDG took insufficient reasonable precautionary steps to prevent inadvertent disclosures. As one such indicia, USiDG voluntarily produced a two-page document, included in the Seven Documents and a Video, which was clearly marked as "Privileged and Confidential Attorney Client-Communication." The Video produced depicts two attorneys representing USiDG providing legal advice to one of USiDG's members about the masks. In addition, multiple documents within the Seven Documents and a Video contain names of attorneys representing USiDG which could have been identified in a simple terms search.

Third, the scope of the disclosure to the Attorney General was significant as there were Seven Documents and a Video produced, as opposed to just one document.

Fourth, as USiDG received over \$15 million of the Commonwealth's funds, which funds were intended for procurement of an emergency supply of Masks, and in return, the Commonwealth has received no Masks, no refund, and only a "donation" of \$18,000.00, the overriding interests of justice compel this determination.

In light of the foregoing, the Court should determine that any attorney-client privilege related to the Seven Documents and a Video has been waived and allow the Attorney General to

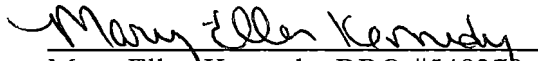
utilize the Seven Documents and a Video in the MFCA investigation and in any subsequent legal action based thereon.

Conclusion

For all of the foregoing reasons, this Court should allow the Commonwealth's Petition for enforcement of the USiDG CID and enter the requested orders regarding waiver of the attorney-client privilege.

Commonwealth of Massachusetts

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