

EXHIBIT H-1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

IN RE INTEL CORPORATION MICROPROCESSOR ANTITRUST LITIGATION	}	MDL No. 05-1717-JJF
ADVANCED MICRO DEVICES, INC. and AMD INTERNATIONAL SALES & SERVICE, LTD.,	}	C. A. No. 05-441-JJF
Plaintiffs,	}	
vs.	}	
INTEL CORPORATION and INTEL KABUSHIKI KAISHA,	}	
Defendants.	}	
PHIL PAUL, on behalf of himself and all others similarly situated,	}	C. A. No. 05-485-JJF
Plaintiffs,	}	CONSOLIDATED ACTION
vs.	}	
INTEL CORPORATION,	}	
Defendant.	}	

**SECOND AMENDED STIPULATION REGARDING ELECTRONIC DISCOVERY
AND FORMAT OF DOCUMENT PRODUCTION**

WHEREAS, this action was commenced on June 27, 2005 by plaintiffs Advanced Micro Devices, Inc. and AMD International Sales & Service, Ltd. (hereafter jointly, "AMD") against defendants Intel Corporation and Intel Kabushiki Kaisha (hereafter jointly, "Intel");

WHEREAS, the Delaware District Court Default Standards for Discovery of Electronic Documents recommend that parties cooperatively reach agreement on electronic discovery issues prior to the Federal Rule of Civil Procedure 16 scheduling conference;

35. Processes for the review and protection of privileged information will be implemented by each party. Those processes will be generally described to the other parties, and any objections to those procedures will be raised immediately, so that any failure to object will constitute an acknowledgement that the procedures described, if implemented, are sufficient to protect against any claim that the Producing Party failed to implement reasonable procedures. To the extent any Producing Party provides access to, or produces privileged documents, data or information, it shall not be deemed a waiver of any privilege. If a Producing Party notifies a Receiving Party that it has produced or provided access to privileged documents, data or information, the Receiving Party shall cease any review of the potentially privileged material. If a Receiving Party reasonably believes that the Producing Party has allowed access to any documents, data or information that is potentially privileged, the Receiving Party shall notify the Producing Party and specifically identify the information. The Receiving Party shall cease any review of the potentially privileged material. The Receiving Party shall not reduce or request reduction to TIFF or .pdf format of any information that it reasonably believes contains privileged information without specifically notifying the Producing Party and identifying the documents.

36. Nothing herein shall constitute any agreement that a document is authentic or admissible at trial. The parties shall meet and confer on such issues at a later time.

37. Should any part of this Stipulation prove to be unworkable or cause undue delay, the Parties agree to meet and confer to try to resolve any issues.

EXHIBIT I



LEXSEE 2008 U.S. DIST. LEXIS 98898

**IN RE INTEL CORPORATION MICROPROCESSOR ANTITRUST
LITIGATION; ADVANCED MICRO DEVICES, INC., a Delaware Corporation,
and AMD INTERNATIONAL SALES & SERVICES, LTD., a Delaware
corporation, Plaintiffs, v. INTEL CORPORATION, a Delaware Corporation, and
INTEL KABUSHIKI KAISHA, a Japanese corporation, Defendants. PHIL PAUL,
on behalf of himself and all others similarly situated, Plaintiffs, v. INTEL
CORPORATION, Defendants.**

MDL No. 05-1717-JJF, C.A. No. 05-441-JJF, C.A. No. 05-485-JJF CONSOLIDATED

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

2008 U.S. Dist. LEXIS 98898

May 9, 2008, Decided

May 9, 2008, Filed

PRIOR HISTORY: *Advanced Micro Devices, Inc. v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.), 2008 U.S. Dist. LEXIS 98895 (D. Del., May 9, 2008)*

COUNSEL: [*1] For Intel Corporation (1:05-md-01717-JJF), In Re: David Mark Balabanian, Joy K. Fuyuno, LEAD ATTORNEYS, Bree Hann, David C. Beach, Diane Barker, Donn P. Pickett, Dustin Brown, Frank Hinman, Kristen A. Palumbo, Milton S. Winter, Sujal Shah, Bingham McCutchen LLP, San Francisco, CA; Richard L. Horwitz, LEAD ATTORNEY, W. Harding Drane, Jr., Potter Anderson & Corroon, LLP, Wilmington, DE; Richard A. Ripley, LEAD ATTORNEY; Bree Hann, Daniel S. Floyd, Darren B. Bernhard, Kay E. Kochenderfer, Peter E. Moll, Robert E. Cooper, PRO HAC VICE; Gregory F. Wells, Bingham McCutchen LLP, Washington, DC.

For Phil Paul (1:05-md-01717-JJF), Intervenor Plaintiff: James L. Holzman, LEAD ATTORNEY, Prickett, Jones & Elliott, P.A., Wilmington, DE; Brent W. Landau; Daniel A. Small; Ian Otto; Jon T. King; Nathan Cihlar; Robert J. Bonsignore, Robert J. Wozniak, PRO HAC VICE.

For Avnet, Inc. (1:05-md-01717-JJF), Defendant:

Thomas G. Macauley, Zuckerman Spaeder LLP, Wilmington, DE.

Clerk Jeffery N. Luthi (1:05-md-01717-JJF), Defendant, Pro se, Washington, DC.

For Ingram Micro Inc. (1:05-md-01717-JJF), ThirdParty Defendant: Thomas G. Macauley, Zuckerman Spaeder LLP, Wilmington, DE.

For Apple Inc. (1:05-md-01717-JJF, [*2] 1:05-cv-00441-JJF, 1:05-cv-00485-JJF), ThirdParty Defendant: Bartholomew J. Dalton, LEAD ATTORNEY, Wilmington, DE.

For The National Plaintiffs Group (1:05-md-01717-JJF), Movant: Robert D. Goldberg, Biggs & Battaglia, Wilmington, DE.

For Union Federale Des Consommateurs - Que Choisir (1:05-md-01717-JJF, 1:05-cv-00441-JJF, 1:05-cv-00485-JJF), Intervenor: James L. Holzman, LEAD ATTORNEY, J. Clayton Athey, Laina M. Herbert, Melissa N. Brochwicz Donimirski, Prickett, Jones & Elliott, P.A., Wilmington, DE.

For Advanced Micro Devices, Inc., a Delaware

corporation (1:05-cv-00441-JJF), Plaintiff: Frederick L. Cottrell, III, LEAD ATTORNEY, Chad Michael Shandler, Steven J. Fineman, Richards, Layton & Finger, Wilmington, DE; Adam Balick, Balick & Balick, LLC, Wilmington, DE; Charles P. Diamond, Jed I. Bergman, Jennifer Laser, Laurin Grollman, Linda J. Smith, Mark A. Samuels, Pro Hac Vice.

For AMD International Sales & Service LTD, a Delaware corporation (1:05-cv-00441-JJF), Plaintiff: Frederick L. Cottrell, III, LEAD ATTORNEY, Chad Michael Shandler, Steven J. Fineman, Richards, Layton & Finger, Wilmington, DE; Adam Balick, Balick & Balick, LLC, Wilmington, DE; Charles P. Diamond, Laurin Grollman, [*3] Linda J. Smith, Mark A. Samuels, Pro Hac Vice.

For Intel Corporation, a Delaware corporation (1:05-cv-00441-JJF), Defendant: Richard L. Horwitz, LEAD ATTORNEY, W. Harding Drane, Jr., Potter Anderson & Corroon, LLP, Wilmington, DE; Anthony L. Marks, Daniel S. Floyd, Darren B. Bernhard, Joel W. Nomkin, Kay E. Kochenderfer, Peter E. Moll, Robert E. Cooper, Pro Hac Vice.

For Intel Kabushiki Kaisha, a Japanese corporation (1:05-cv-00441-JJF), Defendant: Richard L. Horwitz, LEAD ATTORNEY, W. Harding Drane, Jr., Potter Anderson & Corroon, LLP, Wilmington, DE; Darren B. Bernhard, Pro Hac Vice.

For The New York Times Company, Situation Publishing Ltd., Dow Jones & Co., Inc., The Washington Post, Reporters Committee for Freedom of the Press, Computer & Communications Industry Association (1:05-cv-00441-JJF), Intervenors: David L. Finger, LEAD ATTORNEY, Finger & Slanina, LLC, Wilmington, DE.

For Phil Paul, on behalf of himself and all others similarly situated (1:05-cv-00485-JJF), Plaintiff: James L. Holzman, LEAD ATTORNEY, David William Gregory, J. Clayton Athey, Laina M. Herbert, Prickett, Jones & Elliott, P.A., Wilmington, DE; Michael D. Hausfeld, LEAD ATTORNEY, Cohen Milstein Hausfeld & Toll [*4] P.L.L.C., Washington, DC; Allyson B. Baker; Brent W. Landau; Daniel A. Small; Eric M. Andersen, Cooch & Taylor, Wilmington, DE; Ian Otto; Jon T. King; Nathan Cihlar; Richard L. Horwitz, Potter Anderson & Corroon, LLP, Wilmington, DE; Robert J. Bonsignore; Robert J. Wozniak.

For Intel Corporation (1:05-cv-00485-JJF), Defendant: David Mark Balabanian, Joy K. Fuyuno, LEAD ATTORNEYS, Christopher B. Hockett, Bingham McCutchen LLP, San Francisco, CA; Harvey W. Gurland, LEAD ATTORNEY, Duane Morris, Miami, FL; Jef Feibelman, LEAD ATTORNEY, Burch Porter & Johnson, Memphis, TN; Jerry W. Laughlin, LEAD ATTORNEY, Rogers Laughlin Nunnally Hood & Crum, Greeneville, TN; Richard L. Horwitz, W. Harding Drane, Jr., Potter Anderson & Corroon, LLP, Wilmington, DE; Richard A. Ripley, LEAD ATTORNEY; Daniel S. Floyd, Darren B. Bernhard, Kay E. Kochenderfer, Peter E. Moll, Robert E. Cooper, Pro Hac Vice.

For The New York Times Company, Reporters Committee for Freedom of the Press, Computer & Communications Industry Association, The Washington Post, Dow Jones & Co., Inc., Situation Publishing Ltd. (1:05-cv-00485-JJF), Intervenor: David L. Finger, LEAD ATTORNEY, Finger & Slanina, LLC, Wilmington, DE.

JUDGES: Vincent J. Poppiti [*5] (Del Bar. ID No. 100614), Special Master.

OPINION BY: Vincent J. Poppiti

OPINION

SPECIAL MASTER'S REPORT AND RECOMMENDATION -- (DM 4A)

The captioned cases are brought against the Intel Corporation ("Intel") as the manufacturer of microprocessors that run the Microsoft Windows and Linux families of operating systems (the "x86 Microprocessor Market"), a market in which Intel is alleged to hold revenues. The 05-441 action is brought by Advanced Micro Devices, Inc. and AMD International Sales & Service, Ltd. (collectively, "AMD"), an American-based manufacturer and competitor of Intel in the x86 Microprocessor Market.

The 05-485 action is brought on behalf of a class of consumers (the "Class Plaintiffs") who allege economic injury resulting from Intel's alleged anticompetitive and monopolistic practices. The 05-485 action has been consolidated with over 70 other consumer-related actions by the Judicial Panel on Multidistrict Litigation and assigned to this Court, where it is docketed as MDL Docket No. 05-1717 (collectively, the "Class Litigation").

As used herein, the term "Parties" refers to Intel, AMD and the Class Plaintiffs. Presently before the Special Master is the Motion of AMD and the Class Plaintiffs [*6] to compel Intel to produce the notes of Intel's counsel investigation interviews ("Weil Materials")¹ of designated employees ("custodians") conducted by Intel's counsel, Weil Gotshal & Manges, LLC ("Weil") concerning Intel's compliance with its evidence preservation obligations. (D.I. 467).²

1 The Weil Materials included notes taken during and after the custodian interviews, meeting notices, emails between attorneys regarding the interviews, etc.

2 For convenience, all Docket Identification numbers will only reference C.A. No. 05-441-JJF (except for the final recommendation).

Having read and considered the papers submitted by the parties, having heard and considered the parties respective oral arguments made before the Special Master in a hearing on December 27, 2007, and having conducted an exhaustive *in camera* review of all Weil Material, including notes, the Special Master recommends that the requested Weil Materials, as redacted by the Special Master, be produced.³

3 To understand the *in camera* process that took place, see Appendix.

BACKGROUND

On June 27, 2005, AMD filed its complaint (the "Complaint") against Intel.⁴ On the same date, upon learning of the filing of the Complaint, Intel [*7] assembled a team to put into place a process to "identify and preserve relevant paper and electronic documents" across six different continents. (D.I. 321 at 1-13). Intel describes its document retention plan (the "Plan") as being tiered and having multiple layers of retention. The Plan included:

. The day after the Complaint was filed, Intel began to preserve a company-wide snapshot of e-mail and other electronic documents stored in Intel servers as of the week the Complaint was filed ("Complaint Freeze Tapes").

. Two days after the Complaint was filed, Intel sent a hold notice bulletin to

4,000 sales and marketing group employees with instructions to retain documents related to competition with AMD and competition concerning the sale of CPUs generally.

. Four days after the Complaint was filed, Intel distributed a more detailed litigation hold notice to 629 employees and now has provided such notices to approximately 1,500 employees.

. Within days of the filing of the Complaint, Intel began collecting the electronic and hard copy documents from certain employees.

. In the Fall of 2005, Intel began a process of preserving, on a weekly basis, the backup tapes containing e-mails of employees [*8] identified as having potential relevance to the lawsuit ("Weekly Backup Tapes"). These tapes were not the primary preservation method, but [rather] a mechanism to fall back on in the event documents could not be obtained directly from the individual employees who originally generated or received e-mails.

(D.I. 321 at 1-2).

4 Since the triggering event for Intel's document preservation obligation is the first-filed AMD complaint, the Special Master does not reference the complaint filed on behalf of Class Plaintiffs.

Absent from Intel's preservation activities was its decision not to suspend, that is turn off, the so-called "auto delete" function of its e-mail system, which automatically deletes e-mails remaining in an employees mailbox after they have aged for 35 days.⁵ (D.I. 489 at Ex. 2 at 1). In this regard, Intel claims that the ongoing operation of auto delete would not interfere with its preservation obligations because: (1) it had instructed all custodians subject to the hold to preserve all relevant e-mails and (2) Intel would move all custodians to a group of isolated exchange servers that would backup on a regular weekly interval and would, in turn, preserve backup tapes through [*9] the litigation. (D.I. 489 at 1-2).

5 Intel described its auto delete function to Judge Joseph J. Farnan, Jr., in correspondence dated March 5, 2007, as follows:

Like many companies, Intel's e-mail system routinely deletes e-mails remaining in the mailbox after they have aged a certain period of time. Aging does not apply to e-mails moved to a person's hard drive or personal folders. The system is common in many companies to maintain the efficient functioning of the complex, dynamic environment of e-mail servers. Intel employees are educated on the operation of the purge system and instructed on the methods of saving e-mails to prevent them rolling off the system once they reach the end of the aging period. Congress recently enacted *Rule 37(f) of the Federal Rules of Civil Procedure* in recognition of the unique document preservation challenges presented by the manner in which most large computer systems operate. The Committee Notes regarding the impetus of *Rule 37(f)* point out that: "[T]he regular purging of e-mails or other electronic communications is necessary to prevent a build-up of data that can overwhelm the most robust electronic information system." See Report of the Judicial Conference [*10] Committee on Rules of Practice and Procedure (Sept. 2005) at 14.

(D.I. 489, Ex. 1 at 3 n.3).

Absent from Intel's description to Judge Farnan is the following language from the referenced Advisory Committee Note:

Good faith in the routine operation of an information system may involve a party's intervention

to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. . . . The good faith requirement of *Rule 37(f)* means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending . . . litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold."

Fed. R. Civ. P. 37(f) advisory committee's note.

AMD, the Class Plaintiffs and Intel recognize that this litigation could be the "largest electronic production in history" (Jan. 25, 2007 Tr. at 10-11) resulting in Intel's production [*11] of "somewhere in the neighborhood of a pile 137 miles high." (Apr. 20, 2006 Tr. at 43:22). Given this expectation the parties negotiated and ultimately agreed to the production of documents by Order dated May 17, 2006. (D.I. 124). The parties agreement is described as a three-step approach:

. Step 1 -- AMD and Intel were required to exchange custodian lists accompanied by a representation that after reasonable investigation, the individuals on the list comprised all of their personnel in possession of an "appreciable quantity of non-duplicative documents and things responsive to [the party's document request]" ("Custodian List"). Intel guaranteed that its Custodian List would include no fewer than 1,000 custodians and AMD guaranteed that its Custodian List would include no fewer than 400 custodians.

. Step 2 -- Each party then agreed to designate no fewer than 20% of the

custodians on its own Custodian List "whose paper and electronic files will be reviewed and produced in the first instance in response to the other parties' initial document requests" ("Party Designated Production Custodian List").

. Step 3 -- Following the exchange of the Party Designated Production Custodian Lists, [*12] the parties would cooperate in and complete an informal discovery process to allow each side to collect additional information so they could designate additional custodians for production from the other side's list. Each side was entitled to select not more than 15% of the persons identified in the other's Custodian List ("Adverse Party Designated Production Custodian List"). Intel could request production from up to 50 additional custodians in AMD's custodian list and AMD could request up to 100 additional custodians from Intel's custodian list.

(D.I. 321 at 17-18) (footnotes omitted).

Independent of its implementation of the document preservation plan, Intel, in the Fall of 2006, discovered some lapses in the plan. Intel subsequently hired attorneys at Weil, who began the then undisclosed process of interviewing each of Intel's 1,023 custodians for the purpose of determining their e-mail preservation habits and their level of compliance with Intel's litigation hold notices/instructions.

Intel first advised AMD and the Class Plaintiffs of the lapses during a telephone conversation that was followed up by e-mail correspondence in February 8, 2007. (D.I. 467 at Ex. A). The referenced e-mail [*13] advised in part as follows:

The problem we are seeing is confined to e-mails that post-date the complaint. . . .

* * * *

PROBLEMS WITH SOME INDIVIDUALS' COMPLIANCE WITH HOLD INSTRUCTIONS. In October of 2006, Intel first became aware that a

couple of individuals subject to the hold notice had not fully complied with the instructions as to e-mail retention. This problem prompted an additional follow-up program -- to date of more than 200 custodians -- to make sure Intel custodians were complying with the retention instructions. In the course of these reviews, we have discovered further inadequacies in preserving e-mails.

For example, a common mistake was a failure to retain all items from the custodians' sent e-mail box, and as a result only received e-mails were fully retained. . . . Other mistakes occurred for various different reasons. For example, a few thought that their e-mails were being retained automatically by Intel's IT department....

PROBLEMS WITH "WEEKLY BACK-UP TAPES". . . . [T]hey do serve as a back-up for those who didn't fully comply with the hold instructions. . . .

Since the "weekly back-up tapes" cover the time period of October 2005 forward, they leave a maximum possible [*14] gap of about four months between the end of June and October. . . .

Intel has also discovered some issues with the overall coverage of the back-up tapes. In late January 2007, Intel first learned that 151 (out of some 900 or so) custodians that were supposed to be migrated to the dedicated servers were not migrated. . . . Further, custodians added after the first 900 were not migrated to the servers. Finally, although these "weekly back-up tapes" were supposed to be preserved for the duration of the litigation, in Europe Intel's IT department mistakenly began recycling the weekly tapes after one year.

(D.I. 467 at Ex. A). In addition to describing what Intel had been doing to address issues implicated by the disclosure lapses, Intel assured AMD that, "In any event, we certainly want to provide you with complete

information and full cooperation." (D.I. 467 at Exh. A).

By correspondence dated March 5, 2007, in anticipation of a March 7, 2007 status conference, Intel advised Judge Faman that it had:

identified a number of inadvertent mistakes in the implementation of [its] described preservation process. These document retention issues are the result of human errors in implementation, and [*15] include the following: some employees' retention practices were incomplete on an individual level, some employees were not given timely notice to retain materials, some terminated employees' documents may not have been saved and the fail-safe plan to prepare back-up tapes missed some employees.

(D.I. 293 at 3).

In the referenced correspondence, Intel provided Judge Faman with greater detail about the lapses and its remediation efforts to that date. Intel also proposed that it continue its remediation efforts, complete its review in a short period of time and report back to the Court. Intel also advised the Court that it "made it clear to counsel for AMD and the [Class Plaintiffs] that it is prepared to share information regarding Intel's efforts in that regard and to work with them going forward in addressing the issues and minimizing any potential losses, if any, of information." (D.I. 293 at 7).

AMD also filed a Status Conference Statement on March 5, 2007. (D.I. 294). For its part, AMD described Intel's document retention issues as follows:

Through what appears to be a combination of gross communication failures, an ill-conceived plan of document retention and lackluster oversight [*16] by outside counsel, Intel has apparently allowed evidence to be destroyed.

* * *

Intel chose to adopt and rely on a highly-risky system of document preservation . . . From [what] AMD can tell, Intel's preservation strategy:

. Allowed the continued, automatic purge on a 35 day (or longer) schedule of all e-mail communications to, from and within the company;

. Relied exclusively on a move-it-or-lose-it "honor system" that required individual custodians to correctly identify, segregate and proactively move relevant evidence to media or their local computer before that data was destroyed by a network purge;

. Backstopped this "honor system" beginning in October 2005 with a weekly back-up of e-mail that required Intel's IT personnel to identify and correctly migrate custodian's data to dedicated servers subject to backup.

[T]his "honor system" was defeated by a combination of apparently erroneous unclear or incomplete "litigation hold" instructions, lack of adequate monitoring to ensure those instructions were understood and followed and a wholesale failure [to] timely . . . deliver any preservation instructions to a third of the employee-custodians Intel itself identified.

(D.I. 294 at 1, 5-6) [*17] (footnote omitted).

AMD further advised the Court that, on February 15 and February 23, 2007, it had requested that Intel supply, among other data, the following:

A spreadsheet listing each of Intel's 1027 custodians with the following information for each: (1) the custodian's name; (2) whether that custodian has been designated by Intel on its "20% list" or, alternatively, adversely designated by AMD; (3) the "harvest" date, i.e., date that the custodian's data was collected (if applicable); (4) the date upon which the custodian's email was migrated to the dedicated server, if it was; (5) a useful description of the exact nature of any retention deficiency or data loss; (6) the date that Intel discovered the retention deficiency or data loss; and (7) the time

period during which these problems persisted.

(D.I. 294 at 7).

AMD proposed that Intel provide to the Special Master and the parties "a complete accounting of its preservation problems, a custodian-by-custodian tally of issues, identification of data that appears to have been lost, and an inventory of back-up tapes that exist and can be successfully restored." (D.I. 294 at 8).

The parties ultimately stipulated to a disclosure order, [*18] on March 16, 2007, which provided:

6. On April 17, 2007 Intel shall submit in writing an updated and final report regarding 239 Intel Custodians for which Intel provided preliminary information to AMD on February 22, 2007, which will reflect Intel's best information gathered after reasonable investigation and which shall contain the following information for each such Intel custodian [footnote addressing the same information from former employees omitted]:

a. The Intel Custodian's name;

b. A detailed written description of the preservation issues affecting the Intel Custodian, including the nature, scope and duration of any preservation issue(s).

7. On April 27, 2007, Intel shall provide the same information identified in paragraph 6 for those custodians identified

in paragraph 2. ("Paragraph 7 Summaries").

8. With respect to the remainder of Intel's Custodians not on the list of 239 Intel custodians referred to in Paragraphs 6 and 7, commencing after April 27, 2007, Intel shall provide the same information called for by Paragraph 6 in a reasonable time frame, on a rolling basis and prioritizing those Intel custodians in senior positions. ("Paragraph 8 Summaries").

(D.I. 301 at 4-5).

Absent [*19] from the March 16, 2007 Order were any references to the attorney-client privilege or the work-product protection. The Order does speak to a reservation of rights, but only refers to the rights of both AMD and the Class Plaintiffs to seek additional information from Intel, by providing:

This order is without prejudice to the rights of AMD or the Class Plaintiffs to request the disclosure of additional information from Intel with respect to its evidence preservation issues, including formal discovery, or to seek any other relief, remedy or order with respect thereto.

(D.I. 301 at 6).

As required by the disclosure order, from April 27, 2007 through March 24, 2008, Intel has filed one Paragraph 7 Summary and over 1,000 Paragraph 8 Summaries. In this regard, Intel claims that it "spent many hours preparing roughly 400 pages of custodian-specific retention reports which drew upon thousands of pages of attorney notes, as well as other information." (D.I. 469 at 2). The Paragraph 8 Summaries were produced in spread sheet fashion and generally provided the following information:

Custodian	Intel or AMD Designated	Description	Location	Complaint	Weekly Back-Up Tapes
				Freeze Tapes	

Name	I/A	Generally, e-mail	US, etc.	Yes	Yes
		archiving activity,			(Date)
		whether IM (Instant			
		Messaging) was used,			
		whether reminded of			
		retention obligation,			
		confirmation that would			
		archive relevant e-mail			
		going forward, Intel's			
		preservation of			
		complaint freeze tapes,			
		harvesting and			
		preservation activity.			
		Many contained specific			
		information about any			
		preservation issues info,			
		e.g. whether the hard			
		drive had failed or any			
		other relevant custodian			
		specific issues.			

Custodian	Best
	Approximation
	of E-Harvest
	Dates
Name	Dates

On [*20] July 10, 2007, the Special Master issued a stipulated Order regarding AMD's and Class Plaintiffs' Initial Remediation Discovery, directing Intel to promptly produce all responsive documents from certain shared custodians and from additional custodians who "have been retaining the materials responsive to the Initial Remediation Discovery either in response to specific litigation hold notices and/or as a matter of general practice." (D.I. 394 at P1). The parties agreed that:

in producing documents pursuant to this Order Intel shall not withhold any attorney work product unless it contains the mental impressions, conclusions, opinions or legal theories of an attorney or party representative within the meaning of *F.R.C.P. 26(b)(3)*, and Intel's production of such materials will not be deemed a

waiver of any protection applicable to such "opinion work product" under *F.R.C.P. 26(b)(3)*. However, AMD and Class Plaintiffs' fully reserve any and all other rights or grounds to challenge any assertions of privilege or work product protection.

(D.I. 394 at P 7).

The July 10, 2007 Order made no reference to the disclosure Order of May 11, 2007, which required the preparation of the Paragraph 8 Summaries, [*21] discussed *supra*.

In support of the matter *sub judice*, AMD and the Class Plaintiffs contend that in order to test Intel's assertions that the lapses in its document preservation efforts were "misunderstandings or errors by individual employees" and that its "investigation has revealed no instance of deliberate deletion to deny AMD access to any information responsive to the allegations in the Complaint," (D.I. 321 at 3-4) AMD and the Class Plaintiffs must review the "notes of investigation interviews conducted by Intel's counsel concerning Intel's [custodian] employees' compliance with their evidence preservation obligations." (D.I. 467 at 1).

AMD and the Class Plaintiffs' Request for Production No. 34, which supports the instant motion, requests:

All documents evidencing, referring or relating to the failure or suspected failure of any Intel custodian to comply with a Litigation Hold Notice or retention instruction, including the timing and means by which it was discovered.

(D.I. 312, Ex. B at 6).

Intel responded to Request for Production No. 34 as follows:

Intel incorporates its General Objections and General Response to Document Requests by reference. Intel will produce the relevant documents [*22] from the Collection as set forth in its General Response.

(D.I. 479, Ex. A at 46).

In its General Objections to AMD's Request for Production of Documents Intel stated:

Intel objects to each Request herein to the extent that it seeks documents or information protected from disclosure by the attorney-client privilege or work product doctrine (other than the limited non-core work product information that Intel has agreed to produce pursuant to the non-waiver stipulation that the parties have entered into in this litigation [in the July 10, 2007 Order, Paragraph 7]), joint defense privilege, or any other applicable privilege.

(D.I. 479, Ex. A at 3).

AMD and the Class Plaintiffs further contend that, in response to Intel's concerns about the potentially privileged nature of some of the requested documents, the parties entered into an agreement which brought additional documents under Paragraph 7 of the May 11, 2007 disclosure Order. (D.I. 467). Intel claims that the asserted agreement is contained in an e-mail exchange between James Pearl on behalf of AMD and Daniel Floyd on behalf of Intel. In this exchange, on August 22, 2007, Mr. Pearl stated:

In terms of culpability discovery, we believe [*23] that Intel should produce the eight boxes of "Investigative Documents" in the first instance. Once we get those in hand, we will have a better lay of the land in terms of whether a custodial production makes sense for culpability discovery.

With respect to privilege waiver, we will agree that the production of the Investigation Documents will proceed under the same-core/non-core non-waiver agreement laid out in Paragraph 7 of the Order Re: AMD's and Class Plaintiffs' Initial Remediation Discovery. After our review of the Investigation Documents, we will discuss with you whether and to what extent this same agreement should apply

to the remainder of Intel's culpability discovery.

(D.I. 467, Ex. D).

On August 24, 2007, Mr. Floyd responded that:

we will be producing the non-privileged "Investigation Documents" next week in hard copy form. We will accept the agreement on privilege waiver for this production subject to the terms of paragraph 7 of the Order re: AMD's and Class Plaintiffs' Initial Remediation Discovery.

(D.I. 467, Ex. D).

Intel maintains for reasons discussed hereinafter that no agreement was reached.

The Special Master will address *seriatim* the issues of whether there was a privilege [*24] waiver agreement as to the Weil Materials, and if there was no agreement, whether the attorney-client privilege and/or the work-product protection applies.

DISCUSSION AND CONCLUSIONS WITH RESPECT TO THE WEIL MATERIALS

A. DID THE PARTIES AGREE TO EXTEND THE PRIVILEGE WAIVER AGREEMENT CONTAINED IN PARAGRAPH 7 OF THE JULY 10, 2007 ORDER (D.I. 394) TO THE WEIL MATERIALS?

The Special Master concludes that the answer is no. In the Special Master's view, the answer to the question is found by examining the transcript of the hearing conducted on May 3, 2007 and the e-mail chain of August 22 and 24, 2007, referenced *supra* at page 12.

On Thursday, May 3, 2007, the Special Master held a regularly scheduled teleconference. (D.I. 368). No agenda had been established for the teleconference. One issue discussed related to the production of 8 boxes of documents by 17 Intel employees that were sent to outside counsel to assist in conducting the investigation into Intel's document retention problems. (May 3, 2007 Tr. at 14:11-24:17:16). The Special Master was also advised that, with respect to the production of these

documents, there were privilege issues that had yet to be addressed. (May 3, 2007 Tr. at [*25] 22:23, 26:4). At no time during the May 3, 2007 teleconference was there any discussion of the Weil Materials.

The teleconference concluded with the expectation that the parties would meet and confer and present a proposed form of order on the document production issues addressed during the hearing. In the resulting July 10, 2007 Order, Intel agreed to produce documents retained by certain custodians either in response to specific litigation hold notices and/or as a matter of the custodian's general practice. (D.I. 394, P1). Over the objection of AMD and the Class Plaintiffs, the referenced order provided that "Intel has excluded from its list of Intel Remediation Discovery Custodians in Paragraph 1 its attorneys and legal staff, inside and outside, on the basis that the non-duplicative documents held by those individuals are almost entirely protected from discovery by the attorney client privilege or the work product doctrine." (D.I. 394, P3). Notwithstanding this limitation, the parties agreed that "in producing documents pursuant to this Order, Intel shall not withhold any attorney work-product unless it contains the mental impressions, conclusions, opinions or legal theories of [*26] an attorney or party representative within the meaning of *F.R.C.P.26(b)(3)*" (D.I. 394, P7).

The Special Master is also mindful that prior to the entry of the July 10, 2007 Order the Special Master had not been provided with any documentation of the history of any meet and confer process regarding the Weil Materials. Further, there was no discussion of the Weil Materials with the Special Master prior to the filing of the instant motion -- even in the nature of a status "heads-up" similar to the discussion that took place during the May 3, 2003 teleconference.

As for the e-mail chain of August 22 and 24, 2007, it is clear from the plain language of the e-mails that the subject was limited to Intel's production of 8 boxes of documents from 17 employees. Mr. Floyd could not have been more clear, "we will discuss . . . whether and to what extent this same agreement should apply to the remainder of Intel's culpability discovery." (D.I. 467, Ex. D). Intel's response was equally clear: Intel "will accept the agreement on privilege waiver for this production subject to the terms of paragraph 7 of the Order." (*Id.*) (Emphasis added).

CONCLUSION:

Nothing on the record before the Special Master [*27] would permit the Special Master to conclude that the parties agreed to extend the privilege waiver agreement contained in Paragraph 7 of the July 10, 2007 Order to the Weil Materials.

B. ACCEPTING AS A CONCESSION AMD AND THE CLASS PLAINTIFFS' STATEMENT THAT THE "WEIL [MATERIALS] MAY HAVE ONCE CONSTITUTED PRIVILEGED ATTORNEY-CLIENT COMMUNICATIONS," HAS THE PRIVILEGE BEEN WAIVED?

The Special Master concludes that the answer is yes. However, waiver exists only as to those portions of the Weil summaries that reveal the substance of the custodian statements already voluntarily disclosed in the Paragraph 8 Summaries.

AMD and the Class Plaintiffs maintain that Intel waived the attorney-client privilege with respect to the interviews themselves. AMD argues that Intel provided the Court and the Plaintiffs with "self-serving summaries" of the Weil interviews and, in turn, "asked the Court to rely on them to conclude that its preservation failures were the result of 'human error.'" (D.I. 467 at 2-3).

The Third Circuit in the case of *Westinghouse Electric Corp. v. Republic of the Philippines*, addressed the question of:

whether a party that discloses information protected by the attorney-client privilege [*28] and the work-product doctrine in order to cooperate with a government agency that is investigating it waives the privilege and the doctrine only as against the government, or waives them completely, thereby exposing the documents to civil discovery in litigation between the discloser and a third party.

951 F. 2d 1414, 1417 (3d Cir. 1991).

The facts in the *Westinghouse* can be succinctly stated:

[T]he SEC commenced an investigation into whether Westinghouse had violated

United States securities laws by making illegal payments to obtain the contract [for the first Philippine nuclear power plant]. . . . Westinghouse retained the law firm Kirkland & Ellis to conduct an internal investigation into whether company officials had made improper payments. In the course of the internal investigation . . . Kirkland & Ellis produced two letters reporting its findings.

The law firm, at the behest of Westinghouse, showed the SEC investigators one of the letter reports and, in addition, orally presented its findings to the agency. Kirkland & Ellis did not supply the SEC with any of the documents underlying the presentation and the report, and the SEC agreed not to retain the report.

Id. at 1418.

During the [*29] course of discovery, the Republic of the Philippines requested that Westinghouse produce the documents that it had provided to the SEC. Westinghouse objected to the request on the grounds of attorney-client privilege and the work-product doctrine -- asserting in part that it had relied on SEC confidentiality regulations as well as the Eighth Circuit's decision in *Diversified Industries, Inc. v. Meredith*, 572 F. 2d 596 (8th Cir. 1997) (supporting a reasonable expectation of continuing confidentiality for documents shown to the SEC). *Westinghouse*, 951 F. 2d at 1418.

Westinghouse articulated the difference between selective waiver, "which permits the client who has disclosed privileged communications to one party to continue asserting the privilege against other parties," and a partial waiver, which "permit[s] a client who has disclosed a portion of a privileged communication to continue asserting the privilege as to the remaining portions of the same communication." *Id. at 1423, n.7.* After acknowledging that the often stated purpose of the attorney-client privilege "is to encourage full and frank communications between attorneys and their clients,"⁶ and that, "[b]ecause the attorney-client [*30] privilege obstructs the truth-finding process, it is construed narrowly," *Westinghouse* rejected the so called "selective waiver" theory of *Diversified* by observing that:

The court [in *Permian Corp. v. United States*, 214 U.S. App. D.C. 396, 665 F.2d 1214 (D.C. Cir. 1981)] reasoned that selective waiver "has little to do with" the privilege's purpose-protecting the confidentiality of attorney-client communications in order to encourage clients to obtain informed legal assistance. The court explained that while voluntary cooperation with government investigations "may be a laudable activity, ... it is hard to understand how such conduct improves the attorney-client relationship."

Id. at 1425-1426. (internal citations omitted).

6 See, e.g., *Upjohn v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).

Although *Westinghouse* recognized a partial waiver, the court also stated that the "fairness doctrine" may be invoked in cases of partial disclosure cases. *Westinghouse* held:

When a party discloses a portion of otherwise privileged materials while withholding the rest, the privilege is waived only as to those communications actually disclosed, unless a partial waiver would be unfair to the party's adversary.

Id. at 1426, n. 12 (citations [*31] omitted).

Stated differently:

The client cannot be permitted to pick and chose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality for others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit . . . the attorney-client privilege is not designed for such tactical employment.

Permian, 665 F. 2d at 1221.

The fairness doctrine "aims to prevent prejudice to a party and distortion of the judicial process that may be

caused by the privilege holder's selective disclosure during litigation of otherwise privileged information." *In re Kidder Peabody Sec. Litig.*, 168 F. R. D. 459, 469 (S.D.N.Y. 1996) (citing *In re von Bulow*, 828 F. 2d 94 (2d Cir. 1987)). And, the "extent of the waiver by implication turns on the circumstances of the disclosure." *Kidder*, 168 F. R. D. at 468.

The court in *Kidder*, finding that the final report of findings which was released to the public contained "not only a factual summary based on the interview documents, but explicit paraphrases from the interviews" and that defendant "has made repeated and extensive use of the . . . report . . . in this litigation,"⁷ [*32] ordered the production of attorney notes and memoranda reflecting employee interviews conducted by defendant's trial counsel during an internal fraud investigation. *Id.* at 468. Disclosure in a "judicial setting" may then trigger an implied waiver for related and otherwise privileged or protected materials. *Id.* *Kidder* explained:

The Second Circuit in *von Bulow* acknowledged that one traditionally recognized form of waiver is found when a privilege holder makes assertions in a litigation context that, in fairness, call for the revelation of privileged communications. (Citation omitted). The quintessential example is the defendant who asserts an advice-of-counsel defense and is thereby deemed to have waived his privilege with respect to the advice that he received. (Citation omitted). Nonetheless, this principle is somewhat broader in scope, and has been generally recognized as requiring disclosure "when defendant asserts a claim that in fairness requires examination of protected communications."

The waiver may be found even if the privilege holder does not attempt to make use of a privileged communication; he may waive the privilege if he makes factual assertions the truth of which can [*33] only be assessed by examination of the privileged communication. The governing principle was summarized in *Hearn v. Rhay*, in a passage cited with approval by the Second Circuit:

All of these established exceptions to the rules of privilege have a common denominator; in each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party. The factors common to each exception may be summarized as follows: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense. Thus, where these three conditions exist, a court should find that the party asserting a privilege has impliedly waived it through his own affirmative conduct.

Id. at 470 (citations omitted). The waiver may be even broader to include [*34] "the entirety of the communications that a party has disclosed only in part and all other communications insofar as they touch upon subjects voluntarily disclosed by the privilege holder." *Id.* at 469. See also *Granite Partners, L.P. v. Bear Stearns & Co., Inc.*, 184 F. R. D. 49, 56 (S.D.N.Y. 1999) (finding

that plaintiff's use of selective quotes of interview notes waives the unquoted portions of the interview notes where plaintiff placed the accuracy of the data and analysis at issue).

7 The Special Master need not discuss the implications of a public disclosure, as none is present here.

Intel makes much of the fact that *Westinghouse* and *Kidder* involved the disclosure of the entire report, arguing that, by contrast, here Intel only provided factual information, in summary form, "derived in part from attorney's notes, pursuant to Court Order,⁸ but did not disclose or even paraphrase the attorney-client communications themselves." (D.I. 469 at 3).

8 Intel neglects to admit that the Order was by Stipulation.

The Special Master is satisfied that the principles of waiver articulated in both *Westinghouse* and *Kidder* apply with equal force to the voluntary disclosure of the verbatim privileged [*35] communication itself, a full report containing references to same, or to a memorandum or summary of the privileged communication. As in *Westinghouse*, it appears to the Special Master that the disclosure of the privileged information to AMD, the Class Plaintiffs and to the Court were not "disclosures necessary to encourage clients to seek informed legal advice," but rather were for the purpose of supporting Intel's litigation position. *Westinghouse*, 951 F. 2d at 1426

Further, Intel's suggestion that it was somehow hood-winked into the position of now having to argue for protection for what it agreed to divulge is simply without merit. Intel maintains that:

attorney-prepared summaries -- and the detail required, were specifically agreed upon in advance and then ordered by the Court. Plaintiffs received the full benefits of that agreement. And the parties contemplated that Intel would have its attorneys conduct an investigation to obtain the information, which touched on numerous legal issues, but there was no order or agreement that the investigative materials themselves be produced. To now rewrite the order under these

circumstances would be manifestly unfair.

(D.I. 469 at 3).

As to this [*36] argument, first, there is nothing in the meet-and-confer process that has been brought to the Special Master's attention where the parties had agreed to permit Intel to preserve a claim of attorney-client privilege or the work-product protection with respect to the Paragraph 8 Summaries.

Second, the Special Master is mindful that counsel for all parties are highly qualified and experienced trial attorneys and that counsel for Intel could have at least proposed such protection if not forged an agreement with respect to same.

Finally, the language of the March 16, 2007 Order regarding Intel's Evidence Preservation Issues itself belies Intel's position. Indeed, the only preservation of rights language in the March 16, 2007 Order is on behalf of the Plaintiffs. See March 16, 2007 Order language referenced *supra* at 8-9.

Rather than being hood-winked, Intel decided to include in its production to the parties and in its filings with the Court the Paragraph 8 Summaries. In the Special Master's view, by so doing, Intel placed the accuracy and validity of the information contained in these summaries at issue, thus waving the attorney-client privilege on the underlying documents. *Granite Partners, 184 F.R.D. at 54* [*37] (finding privilege waiver where bankruptcy trustee used partial quotes of privileged communications in a publicly distributed document). To conclude otherwise would place Intel in the position of being able to use its sword to assert facts while at the same time shield AMD, the Class Plaintiffs and the Court from the accuracy of Intel's assertion that:

Despite its extensive preservation mechanisms, Intel has discovered a number of human errors in the post-complaint period in the execution of its [preservation] plan. . . . [T]hese human errors were misunderstandings or errors by individual employees, with ongoing day to day business responsibilities, working diligently to carry out the complex and unprecedented scope of preservation obligations in this case. Intel's investigation has revealed no instance of

deliberate deletion to deny AMD access to any information responsive to the allegations in the complaint.

(D.I. 321 at 3).

AMD and the Class Plaintiffs cannot in fairness be expected to blindly rely on Intel's assertions in performing their critically important role of fully informing the Court on the issue. Indeed, although in the context of a *Fed. R. Civ. P. 26(b)(4)(B)* so called [*38] safe harbor analysis, this Court in *CP Kelco U.S. Inc. v. Pharmacia Corp., 213 F. R. D. 176, 179 (D. Del. 2003)* observed:

Waiver is the deliberate relinquishment of a right which might otherwise be claimed.

In the context of an assertion of privilege, the inviability of that rule is of fundamental importance. It would be manifestly unfair to allow a party to use a privilege to shield information which if deliberately chose to use offensively . . . Hence the truism that a privilege cannot be used as both a shield and a sword. (Internal citation omitted). The non-legal equivalent of that truism is equally to the point. "You can't have it both ways."

Intel also makes the point that the Paragraph 8 Summaries are akin to answers to interrogatories. While the Special Master understands that they were prepared by a Weil attorney, and while the Special Master knows that they were prepared based on underlying privileged communications, the Paragraph 8 Summaries are different from interrogatory responses in several critically important respects:

1. The information contained in each Paragraph 8 Summary was agreed to by all parties.
2. The Paragraph 8 Summaries were unlike interrogatory responses [*39] because they were filed with the Court. *F. R. Civ. P. 5(a)(1)*.
3. The Paragraph 8 Summaries were,

unlike interrogatory responses, not signed by Pat Doe,⁹ the person who prepared them. *F. R. Civ. P. 33(b)(5)*.

4. The clear purpose of the Paragraph 8 Summaries is to provide facts to the Court regarding Intel's preservation issues and permit Intel to build and prove its assertion that permit AMD and the Class Plaintiffs to test Intel's position and assist in informing the Court in this regard.

9 As this review and all information submitted pursuant to it was submitted as confidential material, the Special Master will not reveal the attorney's name that submitted the declaration. Rather, any reference to this attorney will to "Pat Doe." For more information on this process, please reference the Appendix.

Intel also argues that were the Paragraph 8 Summaries treated like interrogatory responses, some how information divulged cannot be the subject of a waiver of attorney-client privilege, the work-product protection or by extension could not be the subject of a *F. R. Civ. P. 26(b)(3)* application. In this regard the Special Master concludes that the analysis of either waiver or *F. R. Civ. P. 26(b)(3)* [*40] in the context of the cited cases would be no different in the context of interrogatory responses. See generally *Wright, Miller & Marcus Federal Practice and Procedure: Civil 2d* § 2016.1, 2016.2, 2025.

CONCLUSION:

The Special Master concludes:

. The waiver of the privilege was a result of Intel's claim to the Plaintiffs and to the Court that its retention lapses are the result of human error and not the result of deliberate deletion. Further, Intel took the affirmative step of providing to AMD, the Class Plaintiff and to the Court the Paragraph 8 Summaries -- which in no small measure forms the leitmotif of Intel's position.

. There is no question that the

protected information, namely the custodian's information given to Intel through Weil attorneys describing in "detail . . . the preservation issues affecting [each] Intel custodian including the nature, scope and duration of any preservation issue(s)," (D.I. 301 at 4) is at issue. Indeed, the parties and the Special Master have spent and will continue to spend a significant amount of time and resources focused on the question of spoliation and, if appropriate, sanctions.

. An application of the privilege would effectively deny AMD and [*41] the Class Plaintiffs the opportunity to fully test Intel's positions and would ultimately deprive the Court from having the benefit of having been informed by the adversarial process prior to making any judgment on the issue of spoliation.

. The Paragraph 8 Summaries are fundamentally different from interrogatory responses, and in any event, the waiver analysis would be the same.

C. AS IT IS NOT DISPUTED THAT THE WEIL MATERIALS ARE OTHERWISE PROTECTED BY THE WORK-PRODUCT DOCTRINE, HAS INTEL WAIVED THE PROTECTION OF THE DOCTRINE?

The Special Master concludes that with respect to core work-product the answer is no, and with respect to non-core work-product, the answer is yes.¹⁰

10 AMD and Class Plaintiffs concede that they are not seeking the production of core work-product, rather they are seeking fact work-product only. (D.I. 467).

Intel argues that the work-product doctrine shields the Weil Materials. The doctrine set forth in *Fed. R. Civ. P. 26(b)(3)*, "shelters the mental processes of the attorney, providing a privileged area within which [the attorney] can analyze and prepare [the] client's case." *In re Cendant Corp. Sec. Litig.*, 343 F. 3d 658, 661-662 (3d Cir. 2003) (internal citation [*42] omitted). The Court in

Cendant reminds us that the essential nature of the doctrine was articulated by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 510-511, 67 S. Ct. 385, 91 L. Ed. 451 (1947):

In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed ... as the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not [*43] be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.

In contrast then to the attorney-client privilege, the work-product doctrine "promotes the advocacy system directly." *Westinghouse*, 951 F. 2d at 1428.

There can be no question that in the matter *sub judice*, the interviews conducted by Weil and Weil Materials thereof were prepared for Intel in preparation for matters that are being litigated. *Cendant*, 343 F. 3d at 663. Indeed the Special Master adopts the view of AMD and the Class Plaintiffs that the Paragraph 8 Summaries are at the heart of Intel's defense [on issues related to spoliation] and remediation plan and work-product. (Jan. 3, 2008 Tr. at 27).

1. Are the Weil interview notes core or non-core work-product?

Core or opinion work-product encompasses the "mental impressions, conclusions, opinion or legal theories of an attorney or other representative of a party concerning the litigation," and is "generally afford near absolute protection from discovery." *Fed. R. Civ. P. 26(b)(3)*, *Cendant*, 343 F. 3d at 664 (citing *In re Ford Motor Co.*, 110 F. 3d 954, 962 n.7 (3d Cir. 1997)). Non-core [*44] work-product or fact work-product contains raw factual information. *Baker v. General Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000). See also *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 326 U.S. App. D.C. 332, 124 F. 3d 1304, 1307-08 (D.C. Cir. 1997) (stating that a lawyer's interview notes are not always core work-product, and "purely factual material embedded in attorney notes may not deserve the super-protection afforded to a lawyers' mental impressions"); *Lopez v. City of New York*, 2007 U.S. Dist. LEXIS 19694, 2007 WL 869590, at *2 (E.D.N.Y. 2007) (according documents that are simply verbatim statements of witnesses' recollection of events a lower degree of protection than mental impressions of attorneys).

The Special Master is also mindful that where a document contains both fact and opinion work-product the analysis and consideration becomes more difficult. Such is the case in the matter *sub judice* where notes of witnesses' oral statements may be so intertwined with an attorney's mental impressions that it is not possible to sort between the fact work-product and the core work-product. *In re Vitamins Antitrust Litig.*, 211 F. R. D. 1, 4 (D.D.C. 2002). In *Vitamins*, defendants' counsel took handwritten notes [*45] from *Fed. R. Civ. P. 30(b)(6)* witness interviews, and defendants' counsel later developed these interview notes into written statements and served the written statements as the "sum total of defendants corporate knowledge respecting certain *Rule 30(b)(6)* deposition topics and to substitute for live testimony on these deposition topics." *Id.* at 4.

In adopting the report and recommendation of the Special Master pending an *in camera* review of the materials, the Court tentatively concluded the materials to be discoverable. The Court's observations are instructive:

The [Special Master's Report] notes [the] difficulty, as well as the admonition

of the Supreme Court that disclosure of "notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes." [Master's Report] (quoting *Upjohn v. United States*, 449 U.S. 383, 399, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)). However, as the Special Master further points out, a distinction may be made between attorney notes of the type obtained in a wide ranging inquiry such as that done in an initial interview, and those obtained in a litigation-related investigation where "facts elicited [*46] necessarily reflect [] a focus chosen by the lawyer." *Id.* at 33 (quoting *In re Sealed Case*, 326 U.S. App. D.C. 317, 124 F. 3d 230, 236-37 (D.C. Cir. 1997)).

* * *

The Special Master reached the conclusion that the Source Materials were largely, if not wholly, fact work product based on the parties' own description of the materials as counsel's attempts to record questions and responses as accurately and completely as possible. (Citation omitted). As the Special Master notes, such a determination cannot be definitively made until the Source Materials are produced *for in camera* review. . . . On such review, should the Special Master find that the attorney's mental impressions are so thoroughly intertwined with factual information that the entire memoranda should be treated as opinion work product, the Source Materials cannot be produced. *Fed. R. Civ. P. 26(b)(3)*.

Id. at 4-5.

The Special Master having had the benefit of conducting an exhaustive *in camera* review (as described in the Appendix) concludes that the Weil Materials contain both core and non-core work-product. The core work-product, however, is not so intertwined with fact information that the entirety of the Weil Materials from each interview should be [*47] treated as core. Rather,

the facts can be easily separated from any core work-product.

2. Are AMD and the Class Plaintiffs entitled to the fact work-product contained in the Weil Materials because Intel waived the work-product protection otherwise afforded by the Rule?

The Special Master concludes that the answer is yes.

As explained in the Special Master's Report and Recommendation (DM 8), entered on March 6, 2008, adopted by the Court without objections taken, on March 20, 2007, the Advisory Committee Notes to rejected Fed. R. Evid. 511 is instructive:

The central purpose of most privileges is the promotion of some interest or relationship by endowing it with a supporting secrecy or confidentiality. It is evident that the privilege should terminate when the holder by his own act destroys the confidentiality. (Internal citation omitted). The rule is designed to be read with a view to what it is that the particular privilege protects.

Special Master Report and Recommendation at 22 (D.I. 562) (quoting 26A Wright & Graham, *Federal Practice and Procedure* § 5721 (1992)).

The stated purpose of the work-product protection is to promote the adversary system, *Westinghouse*, 951 F.2d at 1428. The [*48] Court in *Westinghouse*, accepting the majority view, held that:

[T]he purpose of the work-product doctrine requires us to distinguish between disclosures to adversaries and disclosures to non-adversaries.

Id. And the Court went on to acknowledge that, "courts generally agree that disclosure to an adversary waives the work-product doctrine." *Id.* See also 8 Wright Miller & Marcus, *Federal Practice & Procedure* § 2016.2 (2d ed. 1994).

In the context of the discovery phase of Intel's preservation issues, Intel, by and through its attorneys, agreed to this form of discovery. Intel agreed to produce, "detailed written description[s] of the preservation issues

affecting [every] Intel Custodian, including the nature, scope and duration of any preservation issue(s)." (D.I. 301 at P 9). Intel could have left AMD and the Class Plaintiffs to their own devices, forcing them down the path of protracted world-wide preservation depositions. It did not. Rather it trumpeted its willingness to have AMD, the Class Plaintiffs and the Court informed as to fact work-product gathered and provided "a detailed written description of the information provided by each custodian [to Weil] during the interviews." (D.I. [*49] 434 at 4-5, n.6).

CONCLUSION:

The Special Master concludes, therefore, that Intel cannot now mask its agreed to discovery of custodian information by asserting the work-product privilege with respect to fact work-product which, in the Special Master's view, lies at the heart of Intel's position on its preservation issues.

D. WERE THE INSTANT APPLICATION TO HAVE BEEN PURSUANT TO *F.R.C.P. 26(b)(3)(A)(ii)*, ARGUING SUBSTANTIAL NEED AND UNDUE HARDSHIP, WOULD THE APPLICATION HAVE BEEN GRANTED?

The Special Master concludes that the answer is yes as to fact work-product. The Special Master is mindful that were the instant application to have been pursuant to *Fed. R. Civ. P. 26(b)(3)(A)(ii)*, the Special Master would be required, as discussed above, to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party." *Fed. R. Civ. P. 26(b)(3)(B)*. See *Cendant*, 343 F.3d at 661-62.

The facts in the matter *sub judice* are in no way similar to the facts in *Cendant*. In *Cendant* what was left of a federal securities class action involving *Cendant*'s alleged accounting fraud were claims asserted by *Cendant* and Ernst & Young -- [*50] against each other. In the course depositions of former Ernst & Young senior manager and auditor who prepared the *Cendant* financial statements at issue, *Cendant* inquired into communications that occurred between the deponent, Ernst & Young's counsel who also represented the deponent and a consulting expert who had been retained as a non-testifying trial expert by Ernst & Young. The Court concluded that the experts discussions with Ernst & Young's counsel and notes of these discussions were

protected by the work-product doctrine. The Court stated:

The discussions were at all times understood and intended to be confidential by all participants. Furthermore, in connection with these discussions, [the expert] was provided with documents prepared by Ernst & Young's counsel reflecting counsel's mental impressions, opinions, conclusions and legal theories. In addition, [the expert's] notes may reflect the mental theories of Ernst & Young's counsel. Discovery of this information goes to the core of the work product doctrine and therefore is discoverable only upon a showing of extraordinary circumstances.

Cendant, 343 F.3d at 667.

Here, the Special Master has already concluded after an *in camera* [*51] review that the core work-product is not so intertwined with fact information that the entirety of the Weil Materials should be treated as core and, therefore, subject to the higher *Cendant* standard.

Moreover, the Special Master believes it is important to note that to the extent the primary focus of the interviews reflect the mental impressions of Intel counsel, it cannot be said that the focus was chosen by Intel counsel alone. Rather, the focus was developed collaboratively with all of the parties with the ultimate *imprimatur* of the Court. While the Special Master is mindful that some interviews were conducted as early as December 2006, the ultimate focus of the interviews framed by Paragraph 8 of the March 17, 2007 Order were conducted after that date.

Turning to the issue of substantial need the Special Master concludes:

. First, there can be no question that AMD and the Class Plaintiffs are entitled to test Intel's version of what went wrong.

. Second, AMD and the Class Plaintiffs cannot be forced to rely on Intel's description of what the custodians reported.

. Third, AMD and the Class Plaintiffs,

as they play their critically important role of informing the Court through the adversary [*52] process can not be restricted to Intel's assertions of what was the custodians' report.

In sum, the Special Master concludes that AMD and the Class Plaintiffs have demonstrated substantial need for non-core work-product in the Weil Materials to meet Intel's case on preservation issues.

Finally, addressing the issue of undue hardship, simply stated, the Special Master agrees with AMD and the Class Plaintiffs that "Plaintiffs merely seek an efficient mechanism to get the whole story out without embarking on a world tour of costly . . . preservation depositions." (D.I. 467 at 4).

In this regard, the Special Master concludes AMD and the Class Plaintiffs should not be saddled with the prospect of deposing over 1,000 custodians, nor can it be forced to settle for something less in the form of a sampling of the custodian pool. *See Jarvis, Inc. v. American Tel. & Tel. Co.*, 84 F.R.D. 286, 293 (D. Col. 1979) (finding undue hardship warranting production of work-product where the movant would otherwise be forced to depose 1500).

During the argument on the motion, counsel for AMD and the Class Plaintiffs argued in substance that the Special Master should not have to consider whether Intel waived the [*53] attorney-client privilege and/or the work-product protection because Intel never intended that the materials in question be covered by either. The Special Master is not satisfied, however, that this record -- submitted in papers only -- permits me to make any findings and recommendations in this regard. The Special Master therefore declines to do so.

CONCLUSION

For the reasons set forth above, the Special Master concludes that Intel must produce the Weil Materials as redacted by the Special Master.

IT IS THEREFORE, HEREBY RECOMMENDED THAT:

(a) AMD and the Class Plaintiffs' Motion to Compel be Granted (D.I. 467 [in 05-441], D.I. 533 [in 05-485], D.I. 667 [in 05-1717]).

(b) Production shall occur not later than five (5) business days after either the Special Master's Report and Recommendations become final order of the Court, or five (5) business days after any order of the Court subsequent to a *Fed. R. Civ. P. 53 (f)* objection, unless otherwise ordered by the Court.

The Special Master's Report and Recommendations will become a final order of the Court unless objections are taken within five (5) business days as provided by the Court's Order of June 28, 2006. (D.I. 178 [in 05-441], D.I. 353 [*54] [in 05-485], D.I. 465 [in 05-1717])

ENTERED THIS 9TH DAY OF May, 2008

/s/ Vincent J. Poppiti

Vincent J. Poppiti (Del Bar. ID No. 100614)

Special Master

v

United States District Court,
District of Columbia.
Sidney BLUMENTHAL and Jacqueline Jordan
Blumenthal, Plaintiffs,
v.
Matt DRUDGE, Defendant.
Civ.A. No. 97-1968(PLF).

April 22, 1999.

Former president aide brought defamation action against journalist. Aide moved to compel further discovery responses. The District Court, Friedman, J., held that: (1) handwritten notes of conversations between aide and other journalists were not covered by attorney-client privilege; (2) aide could decline to disclose information potentially subject to presidential privilege, in order to give President opportunity to determine whether to exercise privilege; (3) aide was required to identify and describe generally documents claimed to be subject to privilege; (4) documents sent to non-lawyer were not covered by attorney-client privilege; (5) reporter's privilege protected disclosure of sources by journalist, in absence of showing by aide that information could not be obtained from other sources; and (6) journalist was not required to disclose identity of legal defense fund members.

Motion granted in part, denied in part.

West Headnotes

[1] Federal Civil Procedure ↪1558.1

170Ak1558.1 Most Cited Cases

Trial court has discretion to excuse untimely objections to document requests. Fed.Rules Civ.Proc.Rule 34(b), 28 U.S.C.A.

[2] Privileged Communications and Confidentiality ↪102

311Hk102 Most Cited Cases

(Formerly 410k198(1))

The attorney-client privilege protects confidential

communications made between clients and their attorneys when the communications are for the purpose of securing legal advice or services.

[3] Privileged Communications and Confidentiality ↪102

311Hk102 Most Cited Cases

(Formerly 410k198(1))

Attorney-client privilege applies only when a client communicates something to his or her lawyer with the intent that it remain confidential and for the purposes of securing either an opinion on law, legal services or assistance in some legal proceeding.

[4] Privileged Communications and Confidentiality ↪137

311Hk137 Most Cited Cases

(Formerly 410k204(2))

Handwritten notes made by defamation complainant, of conversations with various journalists, was not covered by attorney-client privilege; notes did not involve communication to or from attorney for purpose of obtaining legal advice or services.

[5] Federal Civil Procedure ↪1604(1)

170Ak1604(1) Most Cited Cases

(Formerly 170Ak1600(3))

In order for material to be immune from disclosure as "work product," a court must find the material was prepared or obtained because of the prospect of litigation, after the court has considered the nature of the material and the factual situation in the particular case. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[6] Federal Civil Procedure ↪1604(1)

170Ak1604(1) Most Cited Cases

(Formerly 170Ak1600(3))

Work product that contains the attorney's mental impressions, opinions, theories or analysis, so-called "opinion work product," is at the heart of the adversary system, and is entitled to greater protection from disclosure than is ordinary work product. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[7] Federal Civil Procedure ↪1604(1)

170Ak1604(1) Most Cited Cases

(Formerly 170Ak1600(3))

The attorney work product privilege is a qualified privilege that in the case of ordinary work product may be overcome by a sufficient showing of necessity for the information and its unavailability by other means. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[8] Privileged Communications and Confidentiality ↪355

311Hk355 Most Cited Cases

(Formerly 410k216(1))

The "presidential communications privilege" is a governmental privilege intended to promote candid conversations between the President and his advisors concerning the exercise of his constitutional duties. U.S.C.A. Const. Art. 4, § 2, cl. 1.

[9] Privileged Communications and Confidentiality ↪355

311Hk355 Most Cited Cases

(Formerly 410k216(1))

The presidential communications privilege is limited to communications in performance of a President's responsibilities of his office, and made in the process of shaping policies and making decisions. U.S.C.A. Const. Art. 4, § 2, cl. 1.

[10] Privileged Communications and Confidentiality ↪355

311Hk355 Most Cited Cases

(Formerly 410k222)

Once the President invokes the presidential communications privilege, the information in question becomes presumptively privileged. U.S.C.A. Const. Art. 4, § 2, cl. 1.

[11] Privileged Communications and Confidentiality ↪355

311Hk355 Most Cited Cases

(Formerly 410k217)

Only President can invoke presidential communications privilege. U.S.C.A. Const. Art. 4, § 2, cl. 1.

[12] Privileged Communications and Confidentiality ↪355

311Hk355 Most Cited Cases

(Formerly 410k216(1))

Presidential aide bringing defamation action against journalist could decline to answer deposition questions, on grounds that answers would violate presidential communications privilege, even though only President himself could invoke privilege, in order to preserve privilege long enough to allow President to determine whether to claim it. U.S.C.A. Const. Art. 4, § 2, cl. 1.

[13] Privileged Communications and Confidentiality ↪26

311Hk26 Most Cited Cases

(Formerly 410k222)

Under discovery rules defamation complainant was required to identify each communication to which he was party addressing allegedly defamatory information, describe parties, give dates of communication and set forth their general subject matter, regardless of whether communication was claimed to be privileged. Fed.Rules Civ.Proc.Rule 26(b)(5), 28 U.S.C.A.

[14] Privileged Communications and Confidentiality ↪168

311Hk168 Most Cited Cases

(Formerly 410k219(3))

Normally, the attorney-client privilege is destroyed once information is shared with any person other than the attorney and the client. Fed.Rules Civ.Proc.Rule 26(b)(5), 28 U.S.C.A.

[15] Privileged Communications and Confidentiality ↪137

311Hk137 Most Cited Cases

(Formerly 410k204(2))

Draft legal document presented by journalist defending defamation suit to law professor was covered by attorney-client privilege; document contained insights into mental processes of journalist's attorney and allegedly libelled party did not show substantial need for document. Fed.Rules Civ.Proc.Rule 26(b)(5), 28 U.S.C.A.

[16] Privileged Communications and Confidentiality ¶159311Hk159 Most Cited Cases

(Formerly 410k206)

Extension of the attorney-client privilege to non-lawyers, employed to assist lawyer in rendering of professional legal services, must be strictly confined within the narrowest possible limits consistent with the logic of its principle, and should only occur when the allegedly privileged communication was made in confidence for the purposes of obtaining legal advice from the lawyer. Fed.Rules Civ.Proc.Rule 26(b)(5), 28 U.S.C.A.

[17] Privileged Communications and Confidentiality ¶160311Hk160 Most Cited Cases

(Formerly 410k206)

Communications prepared by journalist defending defamation action, that were seen by president of civil rights organization, were not covered by attorney-client privilege, despite claim that president was retained as litigation consultant; evidence indicated president was retained for value of his own advice. Fed.Rules Civ.Proc.Rule 26(b)(5), 28 U.S.C.A.

[18] Privileged Communications and Confidentiality ¶158311Hk158 Most Cited Cases

(Formerly 410k206)

E-mail messages originating from third parties, and forwarded to journalist defending defamation action by his counsel, were not covered by attorney-client privilege, although privileged messages added to original could be redacted. Fed.Rules Civ.Proc.Rule 26(b)(5), 28 U.S.C.A.

[19] Federal Civil Procedure ¶1558.1170Ak1558.1 Most Cited Cases

There was no general right to privacy protecting documents sought to be withheld from discovery by journalist defending defamation suit.

[20] Constitutional Law ¶207492k2074 Most Cited Cases

(Formerly 92k90.1(8))

[20] Privileged Communications and Confidentiality ¶404311Hk404 Most Cited Cases

(Formerly 410k196.1, 92k90.1(8))

While the First Amendment provides some protection for the identity of a reporter's confidential sources, there is no absolute bar to disclosure of confidential sources under all circumstances. U.S.C.A. Const.Amend. 1.

[21] Constitutional Law ¶207492k2074 Most Cited Cases

(Formerly 92k90.1(8))

[21] Privileged Communications and Confidentiality ¶404311Hk404 Most Cited Cases

(Formerly 410k196.1, 92k90.1(8))

First Amendment protection afforded to the reporter's privilege to withhold disclosure of his sources may be overcome when (1) the information cannot be discovered through alternative sources, (2) the party seeking the information has exhausted all reasonable alternative means of identifying the source, and (3) the information sought goes to the heart of plaintiffs' claim. U.S.C.A. Const.Amend. 1.

[22] Privileged Communications and Confidentiality ¶404311Hk404 Most Cited Cases

(Formerly 410k196.1)

A party seeking disclosure of a reporter's confidential sources has the burden of demonstrating that he or she has exhausted every reasonable alternative source of information. U.S.C.A. Const.Amend. 1.

[23] Privileged Communications and Confidentiality ¶404311Hk404 Most Cited Cases

(Formerly 410k196.1)

Reporter's privilege shielded identities of reporter's sources from discovery in defamation action; defamation complainant made no showing that information sought to be obtained from disclosure of sources was unavailable from other sources. U.S.C.A. Const.Amend. 1.

[24] Constitutional Law ↪1440

92k1440 Most Cited Cases

(Formerly 92k91)

[24] Federal Civil Procedure ↪1275

170Ak1275 Most Cited Cases

Request to compel disclosure of members of legal defense fund, organized to pay legal expenses of journalist sued for defamation by former presidential aide, would be denied; there was insufficient showing that disclosure could lead to information relating to journalist's sources of information, necessary to overcome possible harm to associational rights of fund members arising from disclosure. U.S.C.A. Const. Amend. 1.

*238 William Alden McDaniel, Jr., McDaniel & Marsh, Baltimore, MD, for plaintiffs.

Manuel S. Klausner, Los Angeles, CA, for defendant.

OPINION

FRIEDMAN, District Judge.

The Court has before it ripe motions to compel discovery from both parties. Defendant first filed a motion to compel plaintiffs to respond fully to three categories of defense discovery requests: (1) all of defendant's interrogatories and requests for production of documents to which plaintiffs objected out of time, (2) defendant's request for plaintiff Sidney Blumenthal's notes of his conversations with David Brock and several other journalists, and (3) a number of questions that Mr. Blumenthal refused to answer at his deposition on grounds of executive privilege. Defendant also requested that the Court impose monetary sanctions on plaintiffs and their counsel under Rule 37 of the Federal Rules of Civil Procedure for engaging in improper conduct requiring the litigation of this discovery dispute. Plaintiffs responded that (1) they did not waive their objections to defendant's written discovery requests by responding late, (2) Mr. Blumenthal's notes are protected as attorney-client communications or attorney work product, and (3) some of Mr. Blumenthal's answers to the deposition questions

would be protected by executive privilege.

Plaintiffs then moved to compel defendant to respond to a number of their interrogatories and document requests. Specifically, plaintiffs requested the Court to compel defendant to respond to (1) a number of interrogatories and requests for production of documents that appear to have been shared with third parties who are not lawyers for which defendant nevertheless asserted the attorney-client privilege, (2) interrogatories and document requests regarding defendant's sources of information about plaintiffs, and (3) interrogatories and document requests regarding the membership of defendant's legal defense fund. Defendant responded that (1) the third party with whom information was shared is a litigation consultant, (2) information about defendant's journalistic sources is protected under the California Constitution and the First Amendment, and (3) plaintiffs' request for the membership of defendant's legal defense *239 fund is irrelevant and violates the First Amendment rights of the fund members. [FN1]

[FN1] It appears that defendant's objections to plaintiffs' interrogatories and document requests on the grounds of vagueness and irrelevance have been resolved through the clarification given in plaintiffs' motions to compel.

I. BACKGROUND

The circumstances from which this action arose were fully described in the Court's Opinion of April 22, 1998. See Blumenthal v. Drudge, 992 F.Supp. 44 (D.D.C.1998). In general, plaintiffs allege that defendant Matt Drudge published defamatory material about them on his world wide web site, the "Drudge Report." Plaintiffs originally filed suit against both Mr. Drudge and his internet service provider, America Online, Inc. ("AOL"). The Court granted summary judgment in favor of AOL, finding that AOL was immune from suit under the Communications Decency Act of 1996. *Id.* at 49-53. In the same Opinion, the Court held that it had personal jurisdiction over Mr. Drudge and

ordered the matter to proceed to discovery. *See id.* at 53-58.

Once discovery began, the parties and their lawyers quickly devolved to the kind of conduct that rightly gives the legal profession a bad name. The papers filed by lawyers on both sides, and the correspondence and deposition excerpts that accompany them, are replete with examples of rudeness, childish bickering, name-calling, personal attacks, petty arguments and allegations of stonewalling and badgering of witnesses. There is such mistrust and suspicion that counsel refuse even to talk to each other on the telephone to attempt to resolve discovery disputes. [FN2] While the Court is not at this stage inclined to waste its time resolving these matters and declines defendant's request for the imposition of sanctions on this occasion, it reminds counsel of a few rudimentary principles.

FN2. The Court notes that plaintiffs' counsel is still refusing to accept phone calls from defendant's counsel, requiring communication between counsel to occur by facsimile. This practice is unacceptable. Counsel should be able to communicate in a civil and professional manner using the telephone.

First, if Mr. Blumenthal is "a very busy man, involved in many high stakes matters that require constant attention" and Mrs. Blumenthal also is "busy in her job," *see* Plaintiffs' Opposition at 8, perhaps they are too busy to be plaintiffs in this lawsuit. Plaintiffs brought this lawsuit and thereby voluntarily subjected themselves to the discovery process, which by its nature is not always pleasant and not always compatible with one's personal or business travel schedules or professional obligations. If plaintiffs are too busy for discovery, they are free to drop their lawsuit. The choice is theirs.

Second, defendant is reminded that not all subjects are relevant to the claims brought against him or the legitimate defenses he might raise in this lawsuit. *See Rule 26(b)(1), Fed.R.Civ.P.* Nor is the ex-

ploration of such wide-ranging subjects likely to lead to the discovery of admissible evidence. *Id.* This Court cannot fathom, for example, why defendant and his counsel believe it is appropriate to ask plaintiffs questions about Geraldo Rivera, Henry Hyde, Robert Dole, the emotional state or alleged extra-marital relationships of various public figures, grand jury subpoenas, the "vast right wing conspiracy," or the address of the parents of the girlfriend of a particular reporter. There are limits under the Federal Rules of Civil Procedure, as well as limits set by both common sense and common decency. The purpose of the court system is to resolve civil disputes--and in a civil way. Litigation is not just another arrow in the quiver of those with a political agenda or who are practitioners of the "gotcha" mentality of some journalists and purveyors of infotainment.

Third, counsel are reminded that they--not their clients--have a professional obligation to control the means and methods used to achieve the goals of this litigation and that they must act as professionals even if that requires them to tell their clients that certain tactics are beyond the pale. *See D.C. Rules of Professional Conduct, Rule 1.2 (1996).* Lawyers are not to reflect in their conduct, attitude or demeanor their clients' ill feelings toward other parties and may not *240 "even if called upon by a client to do so, engage in offensive conduct directed towards other participants in the legal process," or "bring the profession into disrepute by ... making ad hominem attacks..." D.C. Bar Voluntary Standards for Civility in Professional Conduct ¶¶ 3, 15 (1997); *see* American Bar Association, Guidelines for Litigation Conduct ¶¶ 2, 4, 10, 14, 20, 22, 24, 26, 27 (1998).

Finally, both the Federal Rules of Civil Procedure and the disciplinary rules of this Court provide for sanctions and discipline which the Court will not hesitate to invoke as this lawsuit proceeds. *See Rule 11, Fed.R.Civ.P.*; Local Rules 703, 706, 707. Counsel who have been admitted *pro hac vice* are also reminded that their continued participation is

subject to the discretion of the Court. See Local Rule 104(d).

II. DEFENDANT'S MOTION TO COMPEL

A. Defendant's Written Discovery Requests

[1] Defendant first argues that plaintiffs waived all objections to his written discovery requests by serving their responses after they were due. [FN3] While "[a]ny ground not stated in a timely objection [to an interrogatory] is waived unless the party's failure to object is excused by the court for good cause shown," Rule 33(b)(4), Fed.R.Civ.P., the rule by its terms gives the Court discretion to excuse the failure. The same principle applies to written document requests under Rule 34(b) of the Federal Rules of Civil Procedure. Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1473 (9th Cir.1992); see 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2176 (1994) (courts have "broad discretion" to determine waiver). It is undisputed that plaintiffs submitted their responses late--either five or nine days after they were due, depending on whether one accepts plaintiffs' or defendant's representation as to when they were served. It is also clear that plaintiffs' counsel never filed a motion seeking an extension of time.

[FN3] The Court notes that defendant too has missed court-imposed deadlines in this litigation without requesting an extension of time. Recently, defendant filed his oppositions to plaintiffs' motions to compel five days after they were due.

Discovery deadlines are intended to ensure the efficient progress of a lawsuit and counsel are expected to comply with them. If plaintiffs' counsel were not able to meet a discovery deadline, they should have sought an agreement with defendant's lawyer to submit their responses at a later date. See Local Rule 108(m). If such consent was not provided by counsel as a professional courtesy, plaintiffs' counsel should then have sought an extension of time from the Court by motion. See Rule 6(b)(1), Fed.R.Civ.P. Plaintiffs' counsel's assertion that it

believed "it would be a much better use of counsel's time to prepare the discovery responses rather than take time out to prepare a motion for extension of time," Plaintiffs' Opposition at 8, is an unacceptable response and certainly does not constitute "good cause." While the Court likely would have granted a motion for an extension of time had such a request been made in advance of the due date, counsel was required by the Rules to make the request in writing and have it granted before acting contrary to the discovery deadlines. Counsel is expected to do so in the future. Nonetheless, in the exercise of its broad discretion, the Court finds that plaintiffs have not waived their right to raise their objections even at this late date. [FN4] With the exception of plaintiffs' claims of privilege for Mr. Blumenthal's notes, however, defendant has not challenged the merits of any of plaintiffs' objections to defendant's interrogatories or requests for production of documents.

[FN4] On these facts, a number of courts might treat plaintiffs' objections as waived. See, e.g., Starlight Int'l v. Herlihy, 181 F.R.D. 494, 496-97 (D.Kan.1998); Demary v. Yamaha Motor Corp., U.S.A., 125 F.R.D. 20, 21 (D.Mass.1989). Counsel is admonished that the Court may adopt this position if faced with future disputes.

B. Mr. Blumenthal's Notes

Defendant asks the Court to compel plaintiffs to produce notes made by Mr. Blumenthal *241 containing the substance of his conversations with various journalists, including David Brock. Mr. Blumenthal asserted in his deposition that he was seeking information for use in this litigation through his conversations with Mr. Brock and other journalists and that he prepared the notes at the request of his attorneys. He therefore argues that the notes are protected by the attorney-client privilege and as attorney work product. See Plaintiffs' Opposition at 22.

[2][3][4] "The attorney-client privilege protects confidential communications made between clients

and their attorneys when the communications are for the purpose of securing legal advice or services." In re Lindsey, 158 F.3d 1263, 1267 (D.C.Cir.1998). In this circuit, the privilege is narrowly construed to apply only when a client communicates something to his or her lawyer with the intent that it remain confidential and for the purposes of securing "either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding." Id. at 1270 (quoting In re Sealed Case, 737 F.2d 94, 98-99 (D.C.Cir.1984)). As described, Mr. Blumenthal's notes do not appear to contain protected information since they contain only the substance of conversations between a non-lawyer, Mr. Blumenthal, and Mr. Brock and other third parties who also are not lawyers. If the notes contain the substance of Mr. Blumenthal's conversations with these third parties, they cannot be information communicated "for the purposes of securing legal advice or services." In re Lindsey, 158 F.3d at 1267. In short, the argument that the notes of Mr. Blumenthal's conversations with Mr. Brock and other journalists are attorney-client protected communications is far-fetched, if not frivolous.

[5][6][7] The attorney work product argument is slightly more plausible. Under Rule 26(b)(3) of the Federal Rules of Civil Procedure, "documents and tangible things otherwise discoverable" that were "prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative" may be protected from disclosure as work product. Rule 26(b)(3), Fed.R.Civ.P. Such material may be prepared by an attorney, by the attorney's agent, by the party's agent, or--if the language of the Rule is read literally--in some cases, by a party itself. Id. In order for it to be work product, the material must have been found to be "prepared or obtained because of the prospect of litigation" after consideration of "the nature of the document and the factual situation in the particular case." In re Sealed Case, 146 F.3d 881, 884 (D.C.Cir.1998). Furthermore, work product that contains the attorney's mental impressions, opinions, theories or analysis (so-called "opinion work

product")--those matters at the heart of the adversary system--is entitled to greater protection than ordinary work product. See, e.g., Director, Office of Thrift Supervision v. Vinson Elkins, LLP, 124 F.3d 1304, 1307 (D.C.Cir.1997). Finally, unlike the attorney-client privilege, the work product privilege is not absolute; it is a qualified privilege that in the case of ordinary work product may be overcome by "a sufficient showing of necessity for the information and its unavailability by other means." In re Sealed Case, 856 F.2d 268, 273 (D.C.Cir.1988); see Rule 26(b)(3), Fed.R.Civ.P. ("substantial need").

In this case, defendant argues both that Mr. Blumenthal's notes are not work product and that, if they are, the privilege is overcome by defendant's substantial need for the notes because he cannot rely on the testimony of Mr. Blumenthal and may not be able to depose Mr. Brock and the other journalists. The Court need not rule on the question of whether defendant has shown a substantial need for the notes at this stage until it first determines whether the notes qualify as work product at all. To that end, the Court will examine all such notes withheld from production on the basis of attorney work product *in camera*.

C. Executive Privilege

Defendant has moved to compel Mr. Blumenthal's answers to a number of deposition questions relating to his work as an advisor to the President of the United States. [FN5] Mr. *242 Blumenthal refused to answer each of these questions, raising the executive, or presidential communications, privilege. Defendant argues that Mr. Blumenthal does not have standing to invoke the privilege and, even if it were invoked, the privilege would be inapplicable in this case.

[FN5] Defendant also argued that he is entitled to further deposition time for Mr. Blumenthal as a result of plaintiffs' counsel's alleged speaking objections and soliloquies in violation of Rule 30(d) of the Federal Rules of Civil Procedure. Upon

review of the excerpted portions of the deposition transcripts, the Court finds that plaintiffs' counsel generally complied with Rule 30(d) and that most of the lengthy discussions between counsel were initiated by defendant's counsel. Counsel on both sides of this case are reminded that objections to deposition questions must be stated "concisely and in a non-argumentative and non-aggressive manner." Rule 30(d), Fed.R.Civ.P. The deposition room is no place for speeches, insults or arguments. Speaking objections, interruptions, statements and lectures are not appropriate and a witness may be instructed not to answer only if the question calls for privileged information. *Id.* Failure to comply with the Rule may result in sanctions. *See Rule 30(d)(3), Fed.R.Civ.P.*

[8][9][10] The presidential communications privilege "is a governmental privilege intended to promote candid conversations between the President and his advisors concerning the exercise of his Article II duties." *In re Grand Jury Proceedings*, 5 F.Supp.2d 21, 25 (D.D.C.1998). The privilege is "limited to communications 'in performance of [a President's] responsibilities,' 'of his office,' and made 'in the process of shaping policies and making decisions.'" *In re Sealed Case*, 121 F.3d 729, 744 (D.C.Cir.1997) (quoting *Nixon v. Adm'r of General Services*, 433 U.S. 425, 449, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977)). Once the President invokes the privilege, the information becomes "presumptively privileged." *Id.*; *see In re Grand Jury Proceedings*, 5 F.Supp.2d at 25-26.

[11] Mr. Blumenthal acknowledges that neither he nor his counsel can invoke executive privilege. The President alone possesses this authority. *See In re Sealed Case*, 121 F.3d at 744 ("The President can invoke the privilege when asked to produce documents and other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential");

Nixon v. Adm'r of Gen. Services, 433 U.S. at 448-51, 97 S.Ct. 2777 (past presidents, as well as the incumbent President, may invoke the privilege).

[12] Still, Mr. Blumenthal does have an obligation to preserve the presidential communications privilege long enough for the President to invoke it if he so desires. Contrary to defendant's assertions, the privilege should not be ignored in this case simply because the White House Counsel's Office did not have an attorney available to send to the deposition on short notice when Mr. Blumenthal's lawyer called the White House from the deposition room. If defendant wishes to pursue the lines of questioning to which Mr. Blumenthal asserted executive privilege, he may reopen the deposition of Mr. Blumenthal and provide plaintiffs either with sufficient notice so that they may secure the presence of a White House lawyer or with a list of the subjects for the deposition that might touch on privileged areas so plaintiffs can request White House review in advance. [FN6] If the President chooses to invoke executive privilege and the defendant seeks Court review, the Court will consider the merits of the claim at that time.

[FN6] At this point, it would seem that the easiest way to address the matter in this case is to provide White House Counsel with the excerpts from Mr. Blumenthal's deposition that contain the questions which Mr. Blumenthal declined to answer on grounds of executive privilege.

II. PLAINTIFFS' MOTION TO COMPEL

A. Attorney-Client Privilege

[13] Plaintiffs argue that defendant improperly invoked the attorney-client privilege in response to a number of their interrogatories and document requests. First, plaintiffs requested that defendant identify all communications to which defendant was a party that addressed the allegedly defamatory information at issue in this case. Defendant claimed that many of these communications were protected by the attorney-client privilege. Even if defendant is correct that the *substance* of the com-

munications is privileged in some cases, he has no right to decline to *identify* *243 the privileged communications. Under Rule 26(b)(5) of the Federal Rules of Civil Procedure, a party invoking a privilege must "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." Rule 26(b)(5), Fed.R.Civ.P. Under the Rules, the defendant at least must describe the parties to the communications, the dates on which the communications occurred and their general subject matter.

[14][15] Plaintiffs also request that the Court compel defendant to answer interrogatories regarding communications with third parties and the production of documents that were shared with third parties. [FN7] The majority of the communications and the documents at issue apparently involved or were shared with David Horowitz, president of the Individual Rights Foundation. [FN8] Normally, the attorney-client privilege is destroyed once information is shared with any person other than the attorney and the client because the presence of a third party is inconsistent with the client's intent that the communication remain confidential. *See In re Lindsey*, 158 F.3d at 1270. Defendant contends, however, that the attorney-client privilege extends to Mr. Horowitz because defendant has retained him as a "litigation consultant" who is using his media, journalistic and political consulting experience to assist defendant's attorneys. The Court is more than a little skeptical of this claim and has seen no evidence to support it.

[FN7] Defendant invokes the attorney-client privilege for communications with third parties in response to interrogatory numbers 1, 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 17, 18, 23, 24 and 25 and document request numbers 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 35, 36,

38, 39, 40 and 41. He also invokes the privilege with regard to document numbers 60, 97, 107, 107, 112, 113, 116, 117, 120, 125, 127, 134, 138 and 167 from his privilege log, all of which were shared with third parties.

[FN8] Defendant also claims that document number 60 from his privilege log, a draft legal document that was provided to University of Southern California law professor Susan Estrich, is protected as attorney work product. Because a draft of a legal document contains insights into the mental processes of defendant's attorney, and because plaintiffs have not shown a substantial need for the document, it is properly shielded from disclosure as attorney work product. *See Rule 26(h)(3), Fed.R.Civ.P.*

[16][17] It is true that in some cases the attorney-client privilege may be extended to non-lawyers who are "employed to assist the lawyer in the rendition of professional legal services." *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1514 (D.C.Cir.1993). This extension of the privilege to non-lawyers, however, must be "strictly confined within the narrowest possible limits consistent with the logic of its principle" and should only occur when "the communication [was] made in confidence for the purposes of obtaining legal advice from the lawyer." *Id.* (citations omitted); *see United States v. Kovel*, 296 F.2d 918, 922 (2d Cir.1961) ("If what is sought is not legal advice ... or if the advice itself is the accountant's rather than the lawyer's, no privilege exists"). Here, it appears that Mr. Horowitz was retained for the value of his own advice, not to assist the defendant's attorneys in providing their legal advice, and defendant has not carried the burden of demonstrating that the privilege applies. *See In re Lindsey*, 158 F.3d at 1270 ("It is settled law that the party claiming the privilege bears the burden of proving that the communications are protected"). The communications with Mr. Horowitz were not

made for the purpose of obtaining advice from a lawyer and therefore are not protected by the attorney-client privilege. They must be disclosed. [FN9]

FN9. While defendant also claims in his objections to plaintiffs' interrogatories and document requests and on his privilege log that the communications shared with Mr. Horowitz are protected as attorney work product, he makes no argument in support of this position.

[18][19] Plaintiffs also point out that several documents on defendant's privilege log were electronic mail messages that were forwarded by defendant's counsel to the defendant or his co-counsel. If any of these messages originally were sent by third parties, *244 then the message is not privileged. Defendant may redact any privileged communications between himself and counsel that were added to the original electronic mail message from a third party, but he must produce the original electronic mail message. [FN10]

FN10. Plaintiffs also contend that the Court should compel defendant to produce a number of documents from his privilege log for which he asserted the "Right of Privacy." Defendant asserted the "Right of Privacy" with regard to document numbers 10, 13, 19, 24-32, 49, 55, 57-59, 62 and 63. No such privilege is generally recognized in this context, however, and defendant may not withhold any documents on this basis. With the exception of document numbers 25-28, which appear to be protected by the attorney-client privilege, and document numbers 10, 13, 31, 49, 57-59, 62 and 63, which pertain to the membership of defendant's legal defense fund, the Court will compel production of these documents.

B. Information Regarding Defendant's Sources
Plaintiffs also objected to defendant's withholding

of information about his sources for the allegedly defamatory information that is the subject of this litigation. Defendant maintains that such information is protected under the reporter's shield provision of the California Constitution and the First Amendment reporter's privilege. [FN11] Defendant's invocation of the California Constitution is curious, as he has provided no basis for the application of California law in this case. His argument regarding the First Amendment reporter's privilege, however, warrants more attention.

FN11. Defendant asserted these privileges with regard to plaintiffs' interrogatory numbers 1, 2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 17, 18, 23, 24 and 25 and document request numbers 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40 and 41. For interrogatory number 2 and document request number 31, both of which request that defendant identify the thousands of people to whom he disseminated the Drudge Report, the Court concludes that compliance would be oppressive and burdensome and therefore will not compel defendant to respond.

[20][21] While the First Amendment provides some protection for the identity of a reporter's confidential sources, there is no absolute bar to disclosure of confidential sources under all circumstances. The reporter's privilege is only a qualified privilege that can be overcome by a sufficient showing of need by the party seeking the information. In civil cases, the court must look at the specific facts of the case before it and "weigh[] the public interest in protecting the reporter's sources against the private interest in compelling disclosure." Zerilli v. Smith, 656 F.2d 705, 712 (D.C.Cir.1981) (citing Carey v. Hume, 492 F.2d 631, 636 (D.C.Cir.1974)). The protections of the First Amendment may be overcome when (1) the information cannot be discovered through alternative sources, (2) the party seeking

the information has exhausted all reasonable alternative means of identifying the source, and (3) the information sought goes to the heart of plaintiffs' claim. International Union v. National Right to Work Legal Defense and Educ. Found., 590 F.2d 1139, 1152 (D.C.Cir.1978); see Clyburn v. News World Communications, Inc., 903 F.2d 29, 35 (D.C.Cir.1990) ("If the plaintiff exhausts all reasonable alternative means of identifying the source, the privilege may yield"). "When the journalist is a party, and successful assertion of the privilege will effectively shield him from liability, the equities weigh somewhat more in favor of disclosure." Zerilli v. Smith, 656 F.2d 705, 714 (D.C.Cir.1981).

[22][23] A party seeking disclosure of a reporter's confidential sources has the burden of demonstrating that he or she has "exhausted every reasonable alternative source of information." See Zerilli v. Smith, 656 F.2d at 713 ("Even when the information is crucial to a litigant's case, reporters should be compelled to disclose their sources only after the litigant has shown that he has exhausted every reasonable alternative source of information") (emphasis added). At this point, plaintiffs have not provided the Court with sufficient information for the Court to evaluate their request. Plaintiffs have proffered nothing to satisfy their burden, and the Court cannot find that the First Amendment's protections have been outweighed absent such a showing. [FN12]

FN12. In addition, plaintiffs' document request number 25 asks for information regarding defendant's sources for stories beyond the scope of this litigation. Defendant's interactions with his sources for other stories do not go to the heart of plaintiffs' claims.

*245 Nor have plaintiffs expressed a view on whether either Mr. Blumenthal or Mrs. Blumenthal is a public figure. If they are, of course, their arguments for disclosure become stronger, but their ultimate burden of proof on the issue of liability simultaneously becomes higher because, as public fig-

ures, they would be held to the rigorous standard at trial of proving that the defendant acted with actual malice. See Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 163-64, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1508 (D.C.Cir.1996). Because defendant's sources would be the only insight into defendant's frame of mind other than the defendant's own testimony, information from the sources would go to the "heart of the matter" and be "crucial to [plaintiffs'] case" in a public figure case, making the argument in favor of disclosure more compelling. See Zerilli v. Smith, 656 F.2d at 713-14 (proof of actual malice "will frequently depend on knowing the identity of the newspaper's informant").

C. The Membership of Defendant's Legal Defense Fund

[24] Finally, plaintiffs request the Court to compel the disclosure of the membership of defendant's legal defense fund. [FN13] While plaintiffs assert that the information could lead to the discovery of information relating to defendant's sources of information, they provide no grounds for this conclusion. [FN14] Certainly without a more substantial basis for the request it must be denied because the disclosure of the list might implicate the First Amendment right to association of the fund members. See, e.g., NAACP v. Alabama, 357 U.S. 449, 462, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) ("compelled disclosure of affiliation with groups engaged in advocacy" may constitute an effective restraint on freedom of association). Because plaintiffs have not satisfied their burden of showing that the membership list is within the scope of permissible discovery, and because such discovery might implicate the First Amendment rights of the fund members, defendant will not be forced to disclose it.

FN13. Plaintiffs make this request in interrogatory numbers 17 and 25 and document request number 29. Documents 10, 13, 31, 49, 57-59, 62, and 63 from defendant's

privilege log are also responsive to this request.

FN14. Plaintiffs also attempt to justify document request number 5, which inquires into the general funding of the Drudge Report, on the grounds that it could lead to the discovery of information relating to defendant's sources of information. Because plaintiffs also have not provided any basis for this conclusion, the Court will not compel defendant to respond to this request.

SO ORDERED.

END OF DOCUMENT

738 F.2d 587, 39 Fed.R.Serv.2d 519, 1984-2 Trade Cases P 66,085, 16 Fed. R. Evid. Serv. 435
(Cite as: 738 F.2d 587)

▽

United States Court of Appeals,
Third Circuit.

Paul BOGOSIAN and Louis Parisi, on behalf of
themselves and all others
similarly situated, Petitioners,

v.

GULF OIL CORPORATION, American Oil Com-
pany, Exxon Corporation, Mobil Oil
Corporation, Phillips Petroleum Company, Shell
Oil Company, Sun Oil Company of
Pennsylvania, Texaco, Inc., Cities Service Com-
pany, Atlantic Richfield Company,
Union Oil Company of California, Amerada Hess
Corporation, Getty Oil Company,
Chevron Oil Co., and BP Oil, Inc., Respondents,

and

Honorable Donald W. VanArtsdalen, Judge, United
States District Court, Nominal
Respondent.

No. 84-3013.

Submitted Under Third Circuit Rule 12(6) Feb. 8,
1984.

Decided June 28, 1984.

Rehearing and Rehearing In Banc Denied July 18,
1984.

Class action representatives in antitrust suit brought on behalf of lessee dealers against major oil companies petitioned for writ of mandamus to direct district court to vacate orders compelling production of certain memoranda prepared by petitioners' counsel. The Court of Appeals, Sloviter, Circuit Judge, held that rule authorizing discovery relating to expert witnesses did not limit rule restricting disclosure of attorney work product containing mental impressions and legal theories, where memoranda prepared by attorneys containing mental impressions and thought processes relating to legal theories of the case were shown to expert witnesses who were scheduled to give what the parties had agreed to be treated as trial depositions.

Remanded.

Becker, Circuit Judge, filed dissenting opinion.

West Headnotes

[1] Federal Courts ⤵594

170Bk594 Most Cited Cases

Pretrial order for production of documents was not appealable under statute governing jurisdiction of appeals from final decisions of district courts. Fed.Rules Civ.Proc.Rule 26(b)(4)(A), 28 U.S.C.A.; 28 U.S.C.A. § 1291.

[2] Contempt ⤵66(2)

93k66(2) Most Cited Cases

Unlike nonparty witness, party has no immediate right to appeal even if party has been adjudicated in civil contempt to gain compliance with discovery order.

[3] Mandamus ⤵4(3)

250k4(3) Most Cited Cases

Where district court ordered production of documents over plaintiffs' claim of privilege not to disclose under attorney work product rule, appeal after final decision would be inadequate remedy and, in view of plaintiffs' unsuccessful attempt to obtain interlocutory appeal, Court of Appeals would exercise its mandamus power and consider merits of the claimed privilege. 28 U.S.C.A. §§ 1291, 1292(b), 1651; Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[4] Mandamus ⤵32

250k32 Most Cited Cases

Mandamus is not to be used as an ordinary vehicle to obtain interlocutory relief from discovery orders, but is available when necessary to prevent grave injustice. 28 U.S.C.A. §§ 1292(b), 1651.

[5] Federal Civil Procedure ⤵1604(2)

170Ak1604(2) Most Cited Cases

(Formerly 170Ak1600(5), 170Ak1600.4)

Protection for attorney work product was not

waived where attorneys showed memoranda, prepared by the attorneys containing their mental impressions and thought processes relating to legal theories of the case, to expert witnesses who were scheduled to give depositions. Fed.Rules Civ.Proc.Rule 26(b)(3). 28 U.S.C.A.

161 Federal Civil Procedure ⚡1604(1)

170Ak1604(1) Most Cited Cases

(Formerly 170Ak1600(3), 170Ak1600.2)

Rule authorizing discovery relating to expert witnesses did not limit rule restricting disclosure of attorney work product containing mental impressions and legal theories where memoranda prepared by attorneys containing mental impressions and thought processes relating to legal theories of the case were shown to expert witnesses who were scheduled to give what the parties had agreed to be treated as trial depositions. Fed.Rules Civ.Proc.Rule 26(b)(3). 4). (b)(4)(A)(i. ii). 28 U.S.C.A.

171 Federal Civil Procedure ⚡1604(1)

170Ak1604(1) Most Cited Cases

(Formerly 170Ak1600(3), 170Ak1600.2)

171 Federal Civil Procedure ⚡1623

170Ak1623 Most Cited Cases

Where same document contains both facts and legal theories of an attorney, adversary party is entitled to discovery of the facts; where such combinations exist, it will be necessary to redact the document so that full disclosure is made of facts presented to expert and considered in formulating his or her opinion, while protection is accorded legal theories and attorney-expert dialectic. Fed.Rules Civ.Proc.Rule 26(b)(3. 4). 28 U.S.C.A.

181 Federal Civil Procedure ⚡1623

170Ak1623 Most Cited Cases

Documents claimed to contain legal theories fall within small class of documents requiring in camera examination if the adversary is not satisfied with the attorney's claim of total work product protection. Fed.Rules Civ.Proc.Rule 26(b)(3). 28 U.S.C.A.

*588 David Berger, H. Laddie Montague, Jr., Warren D. Mulloy, Howard Langer, Martin I. Twersky, Alan Sandals, Berger & Montague, P.C., Philadelphia, Pa., Harold Brown, Boston, Mass., Norman Zarwin, Zarwin & Baum, P.C., Philadelphia, Pa., for petitioners/class representatives.

Charles I. Thompson, Jr., Michael L. Lehr, George E. Moore, Stephen D. Schutt, Ballard, Spahr, Andrews & Ingersoll, Ralph W. Brenner, Howard D. Scher, Gilbert F. Casellas, Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pa., William Simon, Howrey & Simon, Washington, D.C., Adlai S. Hardin, Jr., Milbank, Tweed, Hadley & McCloy, New York City, Andrew J. Kilcarr, Donovan, Leisure, Newton & Irvine, Washington, D.C., Edward W. Mullinix, Schnader, Harrison, Segal & Lewis, Philadelphia, Pa., Henry H. Janssen, Warren L. Simpson, Jr., Rawle & Henderson, Philadelphia, Pa., Hoyt H. Harmon, Jr., The Gulf Companies, Houston, Tex., David L. Doyle, Chicago, Ill., John H. Lewis, Morgan, Lewis & Bockius, Philadelphia, Pa., Thomas O. Kuhns, Fred H. Bartlit, Jr., Kirkland & Ellis, Chicago, Ill., Joseph P. Foley, Texaco Inc., White Plains, N.Y., for respondents.

Before GIBBONS, SLOVITER and BECKER, Circuit Judges.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

Before us is a Petition for Mandamus filed by representatives of a national class action brought under the antitrust laws against the fifteen major oil companies on behalf of their lessee dealers. Petitioners seek the writ to direct the district court to vacate its orders compelling production of certain memoranda prepared by petitioners' counsel that petitioners contend are protected from discovery because they consist of work product containing solely mental impressions, thought processes, opinions and legal theories of counsel. The district court directed production because these memoranda were reviewed by expert witnesses who are scheduled to give what the *589 parties agree are to be treated as trial de-

positions. In resolving this issue, we must analyze the interaction between Fed.R.Civ.P. 26(b)(3) and 26(b)(4), an issue which has received only scant consideration in the case law.

I.

Procedural Background

In the antitrust suit, petitioners allege concerted action by the defendants in imposing a tying arrangement on their lessee-dealers that eliminated or lessened price competition with respect to sales of gasoline. The allegations were reviewed in our prior decision, Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir.1977), cert. denied, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978), which reversed the district court's entry of summary judgment in favor of certain defendants and remanded the class certification issue for reconsideration. Petitioners concede that they will rely primarily on expert testimony to prove their claims. They have designated eight trial experts hired to testify concerning gasoline marketing, statistics, economics, chemistry and automotive engineering. The district court ruled, and counsel agreed, that all designated trial experts will be subject to deposition pursuant to Fed.R.Civ.P. 26(b)(4)(A).

In Class Action Order No. 83, entered on November 29, 1983, the district court ordered petitioners to identify and produce documents with respect to expert witnesses. That order provided:

1. Exxon's motion to compel plaintiffs to answer Interrogatory No. 17 and to identify and produce certain documents with respect to each expert witness is denied, subject, however, that plaintiffs' obligation to identify and produce documents (whether or not subject to any past, pending or future interrogatory, request to produce, subpoena or any other discovery) in reference to each expert witness shall be limited to identifying and producing the following documents:

(1) All documents including final reports (but not preliminary or draft notes or reports), prepared in whole or in part by the expert on the subject mat-

ter and in connection with those matters about which the expert is expected to testify at trial.

(2) All documents sent to the expert by the plaintiffs or their counsel in reference to this litigation.

(3) All documents upon which the expert will rely for the opinion or opinions that the expert will express at trial.

(4) All documents utilized, relied upon, consulted and/or reviewed by the expert in connection with this litigation to the best of the expert's recollection.

(5) All documents setting forth any compensation agreement between plaintiffs and the expert.

(6) Transcripts of testimony given by the expert in any litigation, provided, however, that plaintiffs may object to producing transcripts on the ground that production would unduly invade the privacy of the expert. Plaintiffs shall, however, identify by court, term, number and date any and all litigation wherein the expert was either a party or testified as a witness.

(7) All documents used or relied upon by the expert in preparing answers to expert interrogatories.

(8) All documents that have been or will be shown to the expert during or in preparation of the expert's testimony at deposition or trial.

(9) All documents, including a curriculum vitae, that plaintiffs contend will establish the expert's qualifications for trial purposes.

App. at B.

Because plaintiffs' counsel had objected to the production of documents that constituted their work product, Class Action Order No. 83 permitted plaintiffs only to identify without producing documents as to which they asserted an attorney-client privilege or work product protection. The order provided:

*590 3. Any document as to which plaintiffs assert an attorney-client privilege or work product immunity shall be expressly identified as to date, author, recipients and such description of the subject matter as will provide an adequate basis to

determine the validity of the claims without revealing the privileged or immune content, but such document need not be produced, subject to agreement of counsel or order of court.

App. at B.

Following the entry of Class Action Order No. 83, petitioners produced over 700 documents and identified hundreds of additional documents which were otherwise publicly available. They identified but did not produce an additional 115 documents specified as attorney work product. Thereafter, one of the defendants filed a motion to compel production of these additional documents.

On December 30, 1983, the district court issued Class Action Order No. 88, directing plaintiffs "to produce forthwith to defendants each of the documents identified by plaintiffs in their Identification of Documents pursuant to Class Action Order No. 83 but not produced on the ground of work product immunity." App. at E. Plaintiffs' motion for reconsideration of Class Action Order No. 88 was denied in an order denominated Class Action Order No. 91. Petitioners sought certification of the district court's order pursuant to 28 U.S.C. § 1292(b). In denying that motion, the district court judge explained that he was unable to certify that an immediate appeal, with the concomitant requested stay, "may materially advance the ultimate termination of the litigation," which is part of the certification required under 28 U.S.C. § 1292(b). The court acknowledged plaintiffs' intention to file an application for a writ of mandamus, and stated, "Personally, I would welcome a review of the ruling by the appellate courts, by whatever procedure such may be obtained." App. at A.

In explanation of its ruling requiring plaintiffs to produce work product documents, the district court reasoned that because the depositions of the experts could also be used as trial depositions, and because it was important that defendants have the right of thorough and complete examination of the experts, the need of the attorneys to prepare themselves before such depositions entitled them to "all of the in-

formation which the expert had and was given to him by counsel or otherwise." Tr. at 39, App.F.

The court believed that "logic dictates that an attorney should not be able to converse with a hired expert of his choosing and have all such communications protected simply because the attorney expresses some opinion." *Id.*

The court had earlier recognized that plaintiffs' counsel contended that the documents at issue "contained our thought processes" and "our own intellectual process or otherwise that we put down on a piece of paper and give to an expert." Tr. at 72, App.C. However, the court stated:

It is obvious to me that there is a tension between the two sections of Rule 26 in situations where an attorney provides in writing to an expert witness retained by the attorney's client the attorney's thoughts or opinions about the case, which is sometimes called opinion work product. Under Rule 26(b)(3) such thought processes are to be protected. Yet, under Rule 26(b)(4) the opposing party is entitled to the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

I emphasize "the grounds for each opinion."

Clearly, the attorney's thoughts and opinions given to an expert witness can constitute part of the grounds for the expert witness' opinion. In such a situation, one of the Federal Rules' conflicting policies, it seems to me, would have to give way to the other. I conclude in this case that it is the attorney work product-qualified immunity which must give way.

Tr. at 35-36, App.F.

Thus, it is apparent that the district court ordered production of the documents because it construed Rule 26(b)(4)(A) as overriding *591 the work product privilege of Rule 26(b)(3) as to all documents shown to an expert who is identified as an intended trial witness, even though such documents contain the mental impressions and thought processes of counsel. That is the legal issue presented

to us by the petition for writ of mandamus.

II.

The Availability of a Writ of Mandamus

[1][2] Under the All Writs Act, 28 U.S.C. § 1651 (1982), the federal courts may issue all writs "necessary or appropriate in aid of their respective jurisdictions." We have explained that issuance of the writ may be "in aid of some present or potential exercise of appellate jurisdiction." United States v. RMI Co., 599 F.2d 1183, 1185 (3d Cir.1979). It is conceded that this case "may at some future time come within the court's appellate jurisdiction." United States v. Christian, 660 F.2d 892, 894 (3d Cir.1981). It is also evident that an adequate appellate remedy does not otherwise exist. The production order is plainly not appealable under 28 U.S.C. § 1291 (1982), see, e.g., Borden Co. v. Sylk, 410 F.2d 843 (3d Cir.1969). Unlike the non-party witness, a party has no immediate right to appeal even if it has been adjudicated in civil contempt to gain compliance with a discovery order. DeMasi v. Weiss, 669 F.2d 114, 122 (3d Cir.1982). Also, plaintiffs were unsuccessful in their attempt to obtain interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

[3][4] Thus, petitioners come within the line of cases recognizing that mandamus may properly be used as a means of immediate appellate review of orders compelling the production of documents claimed to be protected by privilege or other interests in confidentiality. See, e.g., Iowa Beef Processors, Inc. v. Bagley, 601 F.2d 949, 953-54 (8th Cir.), cert. denied, 441 U.S. 907, 99 S.Ct. 1997, 60 L.Ed.2d 376 (1979) (disclosure of documents constituting trade secrets); Diversified Industries v. Meredith, 572 F.2d 596, 599 (8th Cir.1977) (attorney-client privilege); Usery v. Ritter, 547 F.2d 528, 532 (10th Cir.1977) (disclosure of identity of informer); United States v. United States District Court, 444 F.2d 651, 655-56 (6th Cir.1971) (disclosure to conspiracy defendant of monitored conversations), aff'd, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); Harper & Row Publishers

v. Decker, 423 F.2d 487, 492 (7th Cir.1970) (per curiam) (attorney-client privilege), aff'd by an equally divided court, 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971); Hartley Pen Co. v. United States District Court, 287 F.2d 324, 331 (9th Cir.1961) (disclosure of trade secret acquired under license forbidding disclosure).

When a district court orders production of information over a litigant's claim of a privilege not to disclose, appeal after a final decision is an inadequate remedy, Harper & Row Publishers v. Decker, 423 F.2d at 492; Pfizer, Inc. v. Lord, 456 F.2d 545, 548 (8th Cir.1972), for compliance with the production orders complained of destroys the right sought to be protected. Jenkins v. Weinshienk, 670 F.2d 915, 917 (10th Cir.1982). Thus, in these circumstances, where there is no adequate, alternative procedure for review, a writ of mandamus does not constitute a device for avoiding the final judgment rule, see United States v. RMI, 599 F.2d at 1187. Rather, to delay review in such cases is to deny it altogether. Consequently, an appellate court may exercise its mandamus power and consider the merits of the claimed privilege.

We caution that mandamus is not to be used as an ordinary vehicle to obtain interlocutory relief from discovery orders. It is, however, available when necessary to prevent grave injustice. In Schlagenhauf v. Holder, 379 U.S. 104, 110, 85 S.Ct. 234, 238, 13 L.Ed.2d 152 (1964), the Supreme Court held that the Court of Appeals "had the power to review on a petition for mandamus the basic, undecided question of whether a district court could order the mental or physical examination of a defendant." As in Schlagenhauf, the legal issue presented by this petition is new to this court, and indeed there is only sparse discussion *592 of it in the reported cases. Without mandamus review, litigants might be compelled to disclose documents that are protected from disclosure by strong public policy. Because "review would comport with the instructional goals of mandamus," United States v. Christian, 660 F.2d at 897, this is an appropriate case in

which to consider the merits of the underlying discovery order through the vehicle of mandamus. Therefore, we turn to the merits of petitioners' claim.

III.

Work Product Protection

The genesis of the doctrine of attorney work product is the Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. 495, 512, 67 S.Ct. 385, 394, 91 L.Ed. 451 (1947), where the Court recognized "the general policy against invading the privacy of an attorney's course of preparation". The Court gave the following rationale for the policy:

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

Id. at 510-11, 67 S.Ct. at 393.

The work product of the lawyer covers the "written materials obtained or prepared by an adversary's counsel with an eye toward litigation." *Id.* at 511, 67 S.Ct. at 394. It includes "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs" *Id.* As first ruled in *Hickman*, and now substantially codified in the Federal Rules of Civil Procedure, an attorney's work product may be discovered

only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial

equivalent of the materials by other means.

Fed.R.Civ.P. 26(b)(3). The basis for requiring a showing of necessity was explained by the *Hickman* Court:

Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. at 511, 67 S.Ct. at 393.

In this case, there is no contention by petitioners before us that defendants have failed to make the showing of need that would ordinarily satisfy Rule 26(b)(3). Instead, petitioners contend that the material that they resist disclosing falls within a special category of attorney's work product that is entitled to particular protection because it reflects the attorney's mental impressions. The distinction was recognized in *Hickman* where the Court said, "But as to oral statements made by witnesses to [the lawyer], whether presently in the form of mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production." *Id.* at 512, 67 S.Ct. at 394. Protection against disclosure of such material is explicitly required under Rule 26(b)(3):

In ordering discovery of such materials when the required showing has been made, the court shall *protect against *593 disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.* (emphasis added).

The particular protection to be accorded such work product, denominated "opinion work product," was reiterated in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct 677, 66 L.Ed.2d 584 (1981). Justice

Rehnquist, writing for a unanimous Court, stressed the "special protection to work product revealing the attorney's mental processes." *Id.* at 400, 101 S.Ct. at 688. In the *Upjohn* case, a magistrate had directed production of notes and memoranda prepared by an attorney of oral interviews with witnesses. The magistrate had applied the "substantial need" and "without undue hardship" standard applicable to work product in general, without recognizing that such a standard is not appropriate for work product based on oral statements that would reveal the attorney's mental processes. In reversing, the Court stated, "It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection." *Id.*

The Court recognized the division among the courts of appeals as to whether any showing of necessity could ever overcome protection of work product based on oral statements from witnesses. Compare *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir.1973) (no showing of necessity can overcome such protection) with *In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir.1979) ("special considerations ... must shape any ruling on the discoverability of interview memoranda"). The *Upjohn* Court commented,

While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure.

449 U.S. at 401-02, 101 S.Ct. at 688-89.

It is significant for the case before us that the work product that the Court held required "a far stronger showing of necessity and unavailability," *id.* at 402, 101 S.Ct. at 689, was an attorney's interview notes. The work product in this case merits even greater protection. Petitioners contend that the material here relates to the legal theories of their attorneys. In their Petition for a Writ of Mandamus, they describe the material as "documents prepared

by attorneys containing solely their mental impressions and thought processes relating to the legal theories of a complex case." Since respondents are willing to accept this description for purposes of the Petition, we also assume that the documents at issue may reflect the legal theories of petitioners' attorneys. The documents thus described represent core work product, entitled to even more heightened protection than witness interview notes. If attorneys are to feel free to commit to writing the mental processes by which they sift and evaluate various possible theories on which they will base their cases, they must feel confident that such material will be protected from disclosure. Otherwise, the freedom of thought essential to carefully reasoned trial preparation would be inhibited.

With these principles in mind, we examine the grounds relied on by the district court in ordering disclosure of the work product material.

IV.

Disclosure to Expert Witnesses

[5][6] The district court concluded that showing the material to the witnesses did not waive the protection for attorney work product, a view we accept as supported by persuasive authority. See *United States v. American Telephone and Telegraph Co.*, 642 F.2d 1285, 1299 (D.C.Cir.1980); 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 612[04], at 612-41 to 612-42 (1982). [FN1] *594 The district court held, however, that disclosure of the material was required first, because Rule 26(b)(3) is limited by a proviso that it is "[s]ubject to the provisions of subdivision (b)(4)" (covering discovery as to experts), and second, because "a party who is examining [the] witness [should be able] to examine into the material which the expert witness had received." Tr. at 39, App.F.

[FN1] The situation is distinguishable from that before the Court in *United States v. Nobles*, 422 U.S. 225, 239-40, 95 S.Ct. 2160, 2170-71, 45 L.Ed.2d 141 (1975), where the Court held that a defense investigator waived protection over his own re-

ports of witness statements when he testified that those statements contradicted testimony introduced at trial.

We believe the district court misread the import of the proviso that introduces Rule 26(b)(3). A parsing of Rule 26(b)(3), which appears in the margin, [FN2] makes clear that the proviso does not expand discovery of work product in the manner the district court believed. The first paragraph of Rule 26(b)(3) consists of two sentences. As we discussed in section III of this opinion, the first sentence requires a showing of "substantial need" before work product must be produced. The second sentence requires protection against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party. The proviso introduces the first sentence of Rule 26(b)(3) ("*Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents ... prepared in anticipation of litigation or for trial ...*") and signifies that trial preparation material prepared by an expert is also subject to discovery, but only under the special requirements pertaining to expert discovery set forth in Rule 26(b)(4). The proviso does not limit the second sentence of Rule 26(b)(3) restricting disclosure of work product containing "mental impressions" and "legal theories". Thus, it does not support the district court's conclusion that Rule 26(b)(3), protecting this category of attorney's work product, "must give way" to Rule 26(b)(4), authorizing discovery relating to expert witnesses. Tr. at 36, App.F.

FN2. Rule 26(b)(3) provides in relevant part:

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (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 representat-

ive (including his attorney, 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 his case and that he 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 shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Nor can we find any support in Rule 26(h)(4) for the district court's conclusion. The Advisory Committee Notes explain that this Rule, included for the first time by the 1970 amendments, was designed to overcome cases that had limited or prohibited discovery of information held by expert witnesses. The Committee describes this rule as intended to "repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert." The Rule rejects "as ill considered the decisions which have sought to bring expert information within the work-product doctrine" and instead adopts an approach that allows some discovery and gives the district court discretion to order further discovery, subject to sharing of costs.

Rule 26(h)(4)(A)(i) permits interrogatories "to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions as to which the expert is expected to testify and a summary of the grounds for each such opinion." There is nothing in Rule 26(b)(4)(A)(i) that can justify requiring production of the material at issue here. It is expressly limited to interrogatories.

Rule 26(b)(4)(A)(ii) provides that "the court may order further discovery by other *595 means, sub-

ject to such restrictions as to scope and such provisions ... of [the] rule, concerning fees and expenses as the court may deem appropriate." The district court reasoned that since the opposing party is entitled to the substance of the facts and opinions as to which the expert is expected to testify and a summary of the grounds for each opinion, and since "the attorney's thoughts and opinions given to an expert witness can constitute part of the grounds for the expert witness' opinion", discovery of *counsel's* opinion work product utilized by an expert witness "is a necessary corollary of the right to examine into an expert's basis for forming his opinion." Tr. at 36, 37, App.F. We do not agree with the conclusion.

The thrust of Rule 26(b)(4) is to permit discovery of facts known or opinions held by the expert. Examination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory. Even if examination into the lawyer's role is permissible, an issue not before us, the marginal value in the revelation on cross-examination that the expert's view may have originated with an attorney's opinion or theory does not warrant overriding the strong policy against disclosure of documents consisting of core attorney's work product. [FN3] The Advisory Committee Notes to Rule 26(b)(3) state in part:

FN3. We believe that the same reasoning applies to reject the contention made before the district judge, but not pressed on appeal, that Fed.R.Evid. 612 governing documents used to refresh a witness' memory requires disclosure. Even assuming that this provision applies to documents shown before trial to an outside expert, the purposes of Rule 612 are generally fully served without disclosure of core work product. Rule 612, like Fed.R.Civ.P. 26(b)(4), does not displace the protections of Fed.R.Civ.P. 26(b)(3). See 3 J. Wein-

stein & M. Berger, *supra*, at 612-41 to 612-42; Note, *Interactions Between Memory Refreshment and Work Product Protection Under the Federal Rules*, 88 Yale L.J. 390, 404-06 (1978).

Rules 33 and 36 have been revised in order to permit discovery calling for opinions, contentions, and admissions relating not only to fact but also to the application of law to fact. Under those rules, a party and his attorney or other representative may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep confidential documents containing such matters prepared for internal use.

Thus, the Notes recognize that even if interrogatories may permissibly require disclosure that verges on mental impressions, opinions, or conclusions, the documents themselves should be protected.

V.

Procedure to Protect Core Work Product

[7] Of course, where the same document contains both facts and legal theories of the attorney, the adversary party is entitled to discovery of the facts. It would represent a retreat from the philosophy underlying the Federal Rules of Civil Procedure if a party could shield facts from disclosure by the expedient of combining them or interlacing them with core work product. Where such combinations exist, it will be necessary to redact the document so that full disclosure is made of facts presented to the expert and considered in formulating his or her opinion, while protection is accorded the legal theories and the attorney-expert dialectic. The Advisory Committee Notes also recognize this need. They state, "In enforcing [the Rule 26(b)(3) protection of lawyers' mental impressions and legal theories], the courts will sometimes find it necessary to order disclosure of a document but with portions

deleted."

[8] We do not generally encourage extensive *in camera* examination of documents by the district court. The district courts are overburdened with discovery *596 matters, and most disputed issues are capable of resolution between attorneys if a serious attempt is made to do so. On the other hand, in the few situations where public policy requires protection of portions of a document, *in camera* inspection by the trial judge or magistrate is unavoidable. Documents claimed to contain legal theories fall within that small class of documents requiring *in camera* examination if the adversary is not satisfied with the attorney's claim of total work product protection. See *Kerr v. United States District Court*, 426 U.S. 394, 405, 96 S.Ct. 2119, 2125, 48 L.Ed.2d 725 (1976); *United States v. Nixon*, 418 U.S. 683, 706, 94 S.Ct. 3090, 3106, 41 L.Ed.2d 1039 (1974).

VI.

Conclusion

When Rules 26(b)(3) and 26(b)(4) are viewed as set forth here, we believe they do not present the "tension" that the district court saw, and that the policies underlying each section can be satisfied. Judge VanArtsdalen, who has supervised this litigation for thirteen years, is both experienced and judicious, and we are confident that he can proceed in accordance with this opinion without formal issuance of the writ of mandamus. [FN4]

[FN4. Judge Becker in his dissent dwells on our failure to actually issue the writ. Our action in this respect is in accordance with a long line of precedent in this court. See, e.g., *United States v. RMI Co.*, 599 F.2d 1183, 1190 (3d Cir.1979); *Rapp v. Van Dusen*, 350 F.2d 806, 814 (3d Cir.1965) (in banc). As the court stated in the latter case, "Petitioners may ... apply to this court for a formal order directing the issuance of the writ of mandamus if the need therefor should arise." *Id.*

For the foregoing reasons, we will remand this case

to the district court for further proceedings consistent with this opinion.

BECKER, Circuit Judge, dissenting.

I agree with many of the sentiments expressed by the majority concerning the desirability of enabling attorneys to put their thoughts on paper without having to fear that their recollections will be subject to the eyes of adversaries during litigation. [FN1] Sharing the majority's high regard for Judge Van Artsdalen, I also understand the delicacy of the majority in its refusal to grant a writ of mandamus despite what it apparently believes to be the "clear legal error" of the district court. See *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1074 (3d Cir.1983) (setting forth standard for mandamus). [FN2] I believe, however, that observance of the formalities is the better and more certain practice. I would issue the writ in this case, though the course I would direct the district court to follow upon remand differs significantly from that suggested by the majority.

[FN1. In particular, I agree that the district court erred in ordering production of the "work product" without apparent consideration of factors set forth in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). I also agree with the majority that Rule 26(b)(4) cannot be read as wholly overriding Rule 26(b)(3), and that the conclusion that it does is the linchpin of the district court's decision.

[FN2. Though it might conceivably be so read, I do not understand the majority opinion to be creating an exception to the "clear legal error" rule of our mandamus jurisprudence for cases in which there is an order for production over a litigant's claim of privilege or immunity.

I. THE REFUSAL TO ISSUE MANDAMUS

To begin with, I believe it is a mistake for the majority to refuse to issue a writ of mandamus after

having written an opinion that in essence directs the district court to reverse itself and protect the work product. [FN3] First, there is mischief resulting from this discrepancy between opinion and judgment. If, as I assume will happen, the district court heeds the majority's advice and denies production of the documents the defendants had sought, the defendants will, as a practical matter, have lost this case. Because of the failure of the court to issue *597 the writ, however, the defendants may technically have won and thus be foreclosed from petitioning the Supreme Court for certiorari review of today's decision. [FN4] Second, because the impact of the majority opinion is not clear, at least to me, in certain of its aspects, [FN5] I think the better practice is to issue a clearly worded writ lest the district court be confused as to its charter on remand.

[FN3]. Were the majority to issue the writ of mandamus (as its opinion suggests), my opinion would be a concurrence and not a dissent.

[FN4]. At the very least, the majority has created a problem for the Supreme Court. If the defendants' petition for certiorari on grounds that as a practical matter they have lost this dispute, the Supreme Court will have to decide whether its certiorari statute, 28 U.S.C. § 1257 (1982), permits it to review the record upon petition from a party that in the most technical sense has won. While I would anticipate that the Supreme Court would respond that its certiorari jurisdiction did not extend so far--it review judgments, not opinions--or would deny certiorari on discretionary grounds, that body has far better things to worry about. Supreme Court review of the issue in this case might also be obtained were the plaintiffs (who technically have lost) to petition for certiorari. I regard this possibility, however, as remote. Indeed, the scenario can be extended. In the event

that the district court were to read the entire majority opinion as dicta and, in light of the failure of the court of appeals to issue a writ of mandamus, continued to order discovery of the "core work product," our denial of mandamus might, by law of the case and our Internal Operating Procedures Chapter VIIC prevent any subsequent panels of this circuit from granting the new mandamus petition from the plaintiffs that would surely follow. Such a result would be as unfair to the plaintiffs in this litigation as is the possible foreclosure of certiorari to the defendants. While the example is fanciful here, it points up the problem with the majority's approach.

[FN5]. What happens, for example, if the defendants revive their attempt to subpoena these documents under Fed.R.Civ.P. 45(d)?

II. THE MERITS

Although the majority does not so state in terms, as I read its opinion, there is no absolute protection against discovery of "core work product." Rather, under the majority's approach, core work product is subject to an extremely high degree of protection that can be overcome only by a kind of showing that has yet to be made in any reported case but that may yet be made on some extraordinary, as yet unforeseeable record. *Accord In re Murphy*, 560 F.2d 326 (8th Cir.1977). Because the majority has itself conducted a balancing and found the value of the documents sought after to be only "marginal," I also read the majority as advising Judge Van Artsdalen to vacate his order (Class Action Order # 88) for production of attorney core work product, without any further proceedings.

In holding as it has, the majority has failed to consider the most important interest of the defendants in discovering this material at this point in the litigation: the need to impeach plaintiffs' expert economist at his deposition. Although ordinarily this interest would not be sufficient to require the pro-

duction of "core work product," in this case, as Judge Van Artsdalen understood, the plaintiffs might well seek to introduce the deposition as evidence at trial, in lieu of live testimony. Under these circumstances, I believe the question we must confront is whether the defendants' interest in having this material available for cross-examination of the expert economist "at trial" outweighs the plaintiffs' interest in protecting this core work product.

Under Rules of Evidence 802 and 804(b)(1), deposition testimony is admissible into evidence only if adverse parties had an opportunity to cross-examine the deponent. This opportunity must, of course, be roughly comparable to that which would have been available at trial. See Mancusi v. Stubbs, 408 U.S. 204, 213-16, 92 S.Ct. 2308, 2313-14, 33 L.Ed.2d 293 (1972); United States v. Franklin, 235 F.Supp. 338, 341 (D.D.C.1964). Accordingly, the majority is implicitly holding that the district court would commit a mandamus-worthy abuse of discretion if it failed to quash a subpoena duces tecum aimed at the "work product" for use in impeaching an expert testifying at trial, and is also suggesting that the unavailability of such documents during discovery does not so deprive the defendants in this case of the right to cross-examine that the deposition testimony would be inadmissible under Rules 802 and *598 804(b)(1). [FN6] These are different--and much more difficult--questions than those the majority actually addresses. Whether the district court under such circumstances would commit an abuse of discretion either by failing to quash the subpoena duces tecum or by excluding the deposition transcript depends on the circumstances, I believe. This very fact suggests that it is primarily a matter for the exercise of district court discretion in the crucible of trial.

[FN6] Though I doubt it, it is, of course, possible that the majority is not ruling at all on either the admissibility of the deposition transcript at trial or on the propriety of a subpoena duces tecum aimed at obtaining these materials for trial. It may

simply be ruling that no discovery of the work product may be had now. I suspect, however, the plaintiffs would be astonished with the Pyrrhic victory they would have obtained today were they to find that, because of the inadequate opportunities for cross-examination, the deposition of their expert could not be introduced at trial or to discover that a subpoena duces tecum aimed at their work product would not be quashed.

Were we in an ordinary discovery situation, I might go as far as the majority does in protecting the work product. Since the primary value of the communications between expert and attorney does not come from its capacity to lead to admissible evidence, see Fed.R.Civ.P. 26(b)(1), but rather in its value as impeachment, there is no great need early in the litigation for these documents. Thus, in the ordinary situation where the deponent will testify at trial, if at all, concerns over work product doctrine may best be resolved at an in limine hearing just prior to or during the trial. By that time, the problem may have disappeared or be more carefully focused than it is at discovery, when the issues in the case and the probative value of testimony is often uncertain. Where as here, however, the witness will apparently be unavailable at trial, the district court may not have this luxury.

Turning to the exercise of discretion, one circumstance that must guide the district court in determining whether to quash the subpoena or, equivalently in this case, to deny discovery, is the adverse parties' need for the work product. I disagree with the majority's pronouncement--which it apparently believes to be one of law--that evidence demonstrating that an economist's theory did not originate or evolve as a result of his own research, but rather as a result of the hiring lawyer's suggestion, is of only "marginal value." Rather, such a revelation could, in some cases, critically alter the finder of fact's assessment of the expert's testimony. While the majority would (I think) concede that the expert

could be cross-examined concerning the attorney's role in the development of this theory, [FN7] *see* Fed.R.Evid. 705, the issue here is whether (and when) extrinsic evidence can be used to impeach an economist who denies or minimizes the lawyer's role in "shaping" his "expert" findings.

[FN7]. I would so hold, as did Judge Van Artdalen. On the other hand, under the majority's approach without benefit of any examination of the documents, the adverse parties' attorney might not have the requisite good-faith basis for cross-examination of the expert on this point.

The majority would apparently exclude the extrinsic evidence under almost all circumstances. As I read his opinion, Judge Van Artdalen apparently would have admitted it under almost all circumstances. I would take a more flexible and more particularized approach. Specifically, I would suggest that the judge inspect the documents *in camera* and decide whether their impeachment value in the particular case would significantly outweigh the chill on development of legitimate attorney work product that would admittedly accompany disclosure. As I have acknowledged, this latter consideration is entitled to great weight. Ordinarily this inspection would take place at an in limine hearing before trial; [FN8] under the unusual circumstances of this case, it could take place either before *599 or at the economist's deposition. [FN9] In this case, the district court undertook no such inspection and made no such balancing. Instead, it simply declared there to be a need for the material to facilitate cross-examination and thereupon ordered production. This order amounted to clear legal error and requires the writ of mandamus to issue.

[FN8]. The use of pre-trial in limine hearings to resolve difficult evidentiary problems in complex cases was approved in In re Japanese Electronics Products, 723 F.2d 238, 260 (3d Cir.1983).

[FN9]. The judge may, of course, preside at

trial depositions.

While the test I have proposed admittedly suffers the defects of balancing incommensurables, it is at least sensitive to the interests at stake. The majority's holding, however, is in significant and unacknowledged tension with contrary authority from impressive sources discussing the relationship between work product doctrine and Federal Rule of Evidence 612, which allows production of material used to refresh a witness' recollection. In Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y.1977), Judge Frankel held that whenever core work product is shown by counsel to a witness in preparation for trial, the protection of the work product doctrine [FN10] is waived. [FN11] Judge Schwartz held similarly in his excellent opinion in James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D.Del.1982). *See also* Wheeling-Pittsburgh, Inc. v. Underwriters Laboratories, Inc., 81 F.R.D. 8 (N.D.Ill.1978). Academic commentators have also recognized that work product may be significantly less protected when its content becomes a subject of testimony. *See* Note, Interactions Between Memory Refreshment and Work Product Protections Under the Federal Rules, 88 Yale L.J. 390, 404-06 (1978). While these cases do not deal with the precise issue that is faced in this case--the collision of Rule 705 requiring disclosure of the basis for an expert's opinion and the work product doctrine--they seem similar enough to render the majority's confident tone somewhat suspect. I would not fully apply the holdings of these cases to the situation at bar--even assuming Berkey and James Julian are right, there is a difference between use of work product to refresh memory and to create beliefs in the first place. I believe, however, that the interests those courts focused upon must guide the district courts here. [FN12]

[FN10]. The Supreme Court has been assiduous in terming the protection offered work product as a "doctrine" and as an "immunity," not as a "privilege." *See* United States v. Arthur Young & Co., 465 U.S.

805, 104 S.Ct. 1495, 79 L.Ed.2d 826 (1984); *Upjohn Co. v. United States*, 449 U.S. 383, 397-402, 101 S.Ct. 677, 686-89, 66 L.Ed.2d 584 (1981).

738 F.2d 587, 39 Fed.R.Serv.2d 519, 1984-2 Trade Cases P 66,085, 16 Fed. R. Evid. Serv. 435

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FN11. It is not clear whether these cases proceeded on the theory that the work product doctrine's protections were waived when the attorney refreshed his witness' memory, or whether the limited protections of the doctrine were overcome by the need of adverse parties to cross-examine the witness effectively concerning his testimonial capacities. I do not believe this issue matters much, however.

FN12. The majority's opinion is also in unacknowledged opposition to the decision in *Boring v. Keller*, 97 F.R.D. 404, 406-08 (D.Colo.1983). Although the *Boring* court relied in part on two circuit court opinions in reaching its conclusion, *United States v. Meyer*, 398 F.2d 66 (9th Cir.1968), and *United States v. McKay*, 372 F.2d 174 (5th Cir.1967) (per Maris, J., sitting by designation), my review of those cases suggests that the issues there were somewhat different. Thus, I do not think our opinion today creates a circuit conflict.

In summary, I would grant the writ of mandamus in this case not because communications between the lawyer and his expert are absolutely (or almost absolutely) immune from discovery and privileged, but because the district court did not conduct an *in camera* inspection and make the factual findings needed to determine whether the need for the documents in order to impeach in this case outweighs the general and weighty presumption against disclosure of work product. The majority's failure to issue the writ may well leave the district court confused as to its charter on remand. I would issue mandamus and advise the district court to conduct an *in camera* inspection and make findings on these matters. Therefore, I respectfully dissent.



Only the Westlaw citation is currently available.

United States District Court,
 E.D. Louisiana,
 ESTATE OF J. Edgar MONROE, et al
 v.
 BOTTLE ROCK POWER CORPORATION, et al
 No. 03-2682.

April 2, 2004.

David F. Waguespack, Bailey Henderson Gomila,
 Lemle & Kelleher, LLP, New Orleans, LA, for
 Plaintiffs.

Walter C. Thompson, Jr., Jan K. Frankowski,
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Robert N. Habans, Jr., Habans & Carriere, Slidell,
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 Wakefield & Spedale, Metairie, LA, Greg C.
Noschese, William J. Moore, Munsch, Hardt, Kopf,
 Harr, P.C., Dallas, TX, for Defendants.

ORDER AND REASONS

KNOWLES, Magistrate J.

*1 On March 31, 2004, the matter of plaintiffs' Motion to Compel Defendants to Produce Certain Documents came on for hearing before the undersigned Magistrate Judge. Counsel for the defendants filed a formal memorandum in opposition, to which plaintiffs formally replied. For the following reasons, plaintiffs' motion to compel is GRANTED IN PART and DENIED IN PART, all as more specifically set forth below.

BACKGROUND

On September 25, 2003, plaintiffs, Estate of J. Edgar Monroe and Robert J. Monroe ("Monroe"), filed the captioned lawsuit against defendants, Bottle Rock Power Corporation ("Bottle Rock"), David N. Jones ("Jones"), Jimmy Winemiller ("Winemiller"), Monterrey Farms, Inc. ("Monterrey Farms") and A & B Farms, Inc. ("A & B Farms") (collectively referred to as the "Arkansas Defend-

ants"), seeking to recover in excess of four million (\$4,000,000.00) dollars, allegedly representing unpaid interest due on a note.

The driving force and urgency behind the plaintiffs' Motion to Compel are the imminent depositions of the Arkansas Defendants, Winemiller and Jones, and the defendants' pending Motion to Dismiss premised on alleged lack of personal jurisdiction and alternatively, transfer for *forum non conveniens*. The hearing on the defendants' motion to dismiss/transfer was continued by agreement and reset for oral hearing on April 28, 2004, so as to permit the opportunity for jurisdictional discovery. The depositions of the Arkansas Defendants are scheduled for Monday, April 5, 2004 in Little Rock, Arkansas and the deposition of James R. Hagan and the Hagan Law Firm is set for April 14, 2004 in Palo Alto, California. [Rec. Doc. Nos. 21-25]. The return date on plaintiffs' Request for Production was March 11, 2004 and the return date on the subpoena duces tecum was March 15, 2004. By agreement, the scope of the discovery requests was limited to matters relevant to the defendants' Motion to Dismiss. The background of the case and allegations relevant to the instant motion to compel are set forth below.

Plaintiffs' claims emanate from alleged financial representations, dealings and agreements which culminated in the multi-million dollar purchase of a geothermal power plant in California by the defendant, Bottle Rock, a California corporation. Sometime prior to 2001, Bottle Rock entered into a purchase agreement to acquire a power plant from the State of California, Department of Water Resources; the closing date was set for June 28, 2001. [FN1] To consummate the purchase, Bottle Rock was required to pay an amount of cash exceeding one million five hundred thousand (\$1,500,000.00) dollars to the State of California and to deliver a surety bond in the amount of five million (\$5,000,000.00) dollars. [FN2] Plaintiffs aver, on information and belief, that on June 1, 2001, Wine-

millers and Jones, through their closely-held corporations, Monterrey Farms and A & B Farms, owned eighty-eight percent (88%) of the outstanding stock of Bottle Rock and that Jones owned a controlling interest in Monterrey Farms and Winemiller owned a controlling interest in A & B Farms.

FN1. Complaint at ¶ 11 [Rec. Doc. No. 1].

FN2. *Id.* at ¶ 12.

*2 In June of 2001, Winemiller and Jones requested that Louisiana plaintiff Monroe loan the funds (\$1,500,000.00) necessary to acquire the California geothermal power plant. FN3 Prior to making the loan, Monroe required the Arkansas defendants to submit financial statements. Winemiller provided Monroe a package of financial statements, to wit: (1) "Jimmy and/or Rebecca Winemiller Balance Sheet" detailing cash assets of \$350,000.00, as well as the assets of operating companies and entities, including Delta Plantation, Inc. (100% owned), U.S. Investment Realty Co., Inc. (100% owned), Winemiller Farms (100% owned), Dahomey Plantation (50% owned), Tulip Farms, Inc. (100% owned), Conn Property--1601 Acres, Conn Property--401 Acres, Donnicks, Inc. (50% owned) and JDW, Inc. (50% owned), *inter alia*; (2) U.S. Investment Realty Co., Inc. Balance Sheet dated February 15, 2001, listing assets including but not limited to Con Farm Louisiana 1280 acres valued at \$1,150,000.00; (3) Tulip Farms, Inc. Balance Sheet dated February 15, 2001 listing assets including but not limited to Conn Property--3413 acres [in] Louisiana valued at \$3,400,000.00; and JDW, Inc. Balance Sheet dated February 15, 2001, listing the asset of a "House, Concordia Parish, Louisiana" valued at \$450,000.00. FN4

FN3. Complaint at ¶ 14.

FN4. See Plaintiffs' Motion to Compel at *in globo* Exhibit "D."

In support of their motion to compel, plaintiffs further highlight that the Secretary of State's records

reflect that Winemiller is an officer of Rosedale Farms, Inc. and Nachitoches Land Co., Inc., both of which are registered to do business in Louisiana and whose principal offices are in Louisiana. Plaintiffs further note that Winemiller is listed as a partner in Ashland Industrial Park Partnership and a member of St. Martin Property, LLC, both of which are registered to do business in Louisiana and have principal offices in Louisiana. Rebecca Winemiller is listed as an officer of Angelina Grain Elevators, Inc., and Ophelia Land Co., Inc., which are registered to do business in Louisiana, with principal offices in this state. FN5 Plaintiffs argue that all of the Arkansas Defendants' contacts with the forum may be relevant to the jurisdictional inquiry, since the plaintiffs contend that there is both specific personal jurisdiction and general personal jurisdiction over the defendants.

FN5. See Plaintiffs' Motion to Compel at *in globo* Exhibit "E."

Turning to the defendant Jones, plaintiffs highlight the fact that he also submitted financial statements allegedly for the purpose of inducing the plaintiff to loan the funds requested and to issue a \$5,000,000.00 letter of credit to secure the \$5,000,000 surety bond necessary to close the deal. For his part, Jones provided Monroe with a financial statement entitled "Statement of Financial Condition as of January 15, 2001, David J. Jones and Betty Jones, Jones Family Limited Partnership." FN6 Additionally, the plaintiff directs the Court's attention to Louisiana Secretary of State's records reflecting that the Joneses are officers in the Sunflower Corporation, Inc., a Louisiana company with a principal place of business in Monterey, Louisiana and that David Jones, Rebecca Winemiller and Sunflower Corporation are partners in Angelina Farms, which is also domiciled in Monterey, Louisiana. The records further reflect that David Jones and Rebecca Winemiller are officers and directors of Angelina Grain Elevators, Inc., which is registered to do business in Louisiana and whose principal office is in Monterey, Louisiana. FN7

Plaintiff further notes that there are several Louisiana corporations in which David and/or Betty Jones are listed as officers.

FN6. See Plaintiffs' Motion to Compel at *in globo* Exhibit "F."

FN7. See Plaintiffs' Motion to Compel at *in globo* Exhibit "G".

*3 In addition to the cash borrowed, a five million dollar bond was necessary to close the deal. At Winemiller's and Jones' request, Monroe lent Bot-lerock, Winemiller and Jones the funds to acquire the power plant and the defendants executed a Promissory Note dated June 27, 2001. On or about August 23, 2001, Bottle Rock acquired the power plant. Shortly after the loan, Jones and Winemiller requested that Monroe provide a \$5,000,000.00 letter of credit to secure the \$5,000,000.00 bond, advising that such a letter of credit was necessary to consummate the deal (*i.e.*, purchase of the power plant). According to the plaintiffs, Monterrey and A & B agreed to cause the surety on the bond to release the Monroe letter of credit upon the sale of their Bottle Rock stock; however, they allegedly failed to do so. Plaintiffs claim that, pursuant to the promissory note, the Arkansas Defendants' failure to secure release of the Monroe letter of credit constituted breach of their obligation under an Extension Agreement. Plaintiffs allegedly pledged \$5,000,000.00 to secure the letter of credit and incurred costs in excess of \$12,000.00, renewing the letter of credit in August of 2003. Plaintiffs further include claims for lost profit, and other damages resulting from plaintiffs' alleged loss of business and loss of investment and other opportunities for which the aforesaid pledged sum could have been used.

After the captioned lawsuit was filed, plaintiffs note that the defendants requested a delay to have time to have the Monroe Letter of Credit replaced and to resolve the amount due under the note. Thereafter, defendants obtained an additional extension of time to plead through January 31, 2004 in exchange for

agreeing to accept service. The district judge has temporarily stayed the case through April 1, 2004, but only as to defendants, IPIC International, Bottle Rock Power Corporation, and Bottle Rock Holdings Corporation. [FN8]

FN8. See *Agreed Order* [Rec. Doc. No. 16].

CONTENTIONS OF THE PARTIES

There are a number of broad areas of dispute discussed below. However, generally defendants contend that their objections to the discovery and the temporal scope of discovery are proper. Additionally, the Arkansas Defendants submit that they have already produced all relevant non-privileged discovery, as well as a privilege log identifying several responsive documents which were withheld, either on the basis of attorney-client privilege, the work-product privilege or both. Defendants contend that depositions should go forward in Arkansas and California, without any further production of documents, and that, if the deposition testimony establishes that other relevant documents may exist, the parties can address those matters after the fact of the Arkansas Defendants' depositions. Finally, the Arkansas Defendants contend that they have no control over documents in the possession of Bottle Rock's counsel, Hagan, and that, if additional documents in his possession are sought, Bottle Rock and/or Hagan are the best source.

*4 Additionally, the Arkansas Defendants contend that actions taken in Louisiana by themselves on behalf of various juridical entities referred to by the plaintiffs, as well as the business and non-business contacts of their respective wives, if any, are not properly the subject of discovery. More particularly the defendants argue that such contacts are irrelevant for purposes of establishing personal jurisdiction and urge this Court to apply the "fiduciary shield" doctrine, since the Arkansas defendants were sued individually. Similarly, defendants argue that the contacts of their respective wives are not imputable for purposes of the jurisdictional inquiry.

The plaintiffs counter that, pursuant to the case law governing the jurisdictional inquiry, the Arkansas defendants' business and non-business contacts are clearly relevant to establish "general jurisdiction," which attaches when the defendant's contacts with the forum state are substantial, continuous and systematic. Moreover, plaintiffs submit that contacts of the defendants on behalf of other juridical entities and the contacts of the defendants' wives may be imputed to the defendants on the basis of alter-ego doctrine and that these contacts are fair grist for discovery, since it goes directly to the inquiry encompassing either or both general and specific personal jurisdiction.

Plaintiffs contend that their discovery requests are properly aimed at uncovering information which may well warrant the imputation of the corporate contacts to the individual defendants. They argue that denying the discovery in this regard will foreclose the opportunity to conduct reasonable discovery relevant to the issue of imputation of jurisdictional contacts. Plaintiff's highlight the facts that, in order to secure the instant loan plus bond/letter of credit, the defendants submitted (1) financial statements jointly with their wives, (2) in the case of David Jones, the financial statement included the assets of what was termed, the "Jones Family Limited Partnership" and (3) the balance sheets of a number of closely-held, fifty percent owned and one-hundred percent owned corporations and other entities with extensive assets in Louisiana were submitted for purposes of inducing Monroe to loan the purchase amount and to issue a five million dollar letter of credit to secure the five million dollar surety bond.

Plaintiffs contend that "the Arkansas Defendants' financial information and the records of the Louisiana Secretary of State stand in stark contrast to the contacts admitted by Jones and Winemiller in their affidavits." [FN9] Plaintiffs ennuui is fueled by the affidavit testimony of Jones stating that he briefly visited a farm in Concordia Parish that was owned by a partnership which his family had an interest

and further attests that: "I have not *personally* had any other *business* dealings in the State of Louisiana within the past 10 years." [FN10] Plaintiffs are equally concerned with the affidavit testimony of Winemiller, who claims that, other than the loans obtained from or guaranteed by banks in Louisiana and 70 acres of farmland owned in Concordia Parish for approximately three months, he has not "*personally* had any other *business* dealings in the State of Louisiana within the past 10 years." [FN11]

[FN9]. Plaintiffs' Memorandum in Support of Motion to Compel at p. 12.

[FN10]. *See id.* (quoting Jones's Affidavit ¶ 15) (italicized emphasis).

[FN11]. *See* Plaintiffs' Memorandum in Support of the Motion to Compel at p. 12 (quoting Winemiller's Affidavit at ¶ 13) (italicized emphasis added).

*5 In light of what discovery has revealed to date, plaintiffs submit that the aforesaid representations by the Arkansas Defendants warrant a closer inspection to determine the true extent and nature of their Louisiana contacts. Moreover, plaintiffs submit that the defendants cannot avoid divulging contacts, which they, and no one else, have deemed to be not "personal" and thus not discoverable. Plaintiffs contend that it is apparent, based on the defendants' written submissions and what plaintiffs' investigation has revealed to date, that the Arkansas Defendants have not revealed all of their contacts with state of Louisiana and thereby have failed to afford the plaintiffs any opportunity to test the veracity of defendants' affidavit testimony. Plaintiffs contend that it is for the district judge to determine, on the basis of a full and complete discovery record, whether the defendants' contacts with this forum, business or non-business and in whatever capacity, are imputable to the defendants, individually.

The Court now turns to the applicable law and a discussion of the broad categories of discovery,

which are disputed by the parties, including the temporal restriction sought by the defendants.

ANALYSIS

Personal Jurisdiction--Imputability of Contacts
Fed.R.Civ.P. 26(b)(1) defines the scope of discovery in pertinent part as "any matter, not privileged, which is relevant to the subject matter involved in the pending action...." Fed.R.Civ.P. 26(b)(1). At this stage of the proceedings, discovery is limited by agreement to the jurisdictional issues inherent in the motion to dismiss and/or transfer.

In determining whether *in personam* jurisdiction can be exercised over a non-resident defendant, courts must look to the restrictions of the state long-arm statute and the Due Process Clause. Because the Louisiana Long-Arm Statute is coextensive with the confines of federal due process, questions of jurisdiction in Louisiana generally constitute a unitary inquiry within the framework of the Constitutional restraints of Due Process. [FN12] There are two means of establishing jurisdiction over a defendant's person under the Fourteenth Amendment--*i.e.*, specific and general jurisdiction--each are addressed in turn.

[FN12. See Icee Distributors, Inc. v. J & J Snack Foods Corp., 325 F.3d 586, 591 (5th Cir.2003) (citing Patin v. Thoroughbred Power Boats, Inc., 294 F.3d 640, 652 (5th Cir.2002)).

Under either specific or general personal jurisdiction analysis, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts.'" [FN13] The "purposeful availment" requirement of the minimum contacts inquiry "ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous or attenuated contacts ... or of the unilateral activity of another person." [FN14]

[FN13. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).

[FN14. Burger King Corp., 471 U.S. at 474 (internal quotation marks omitted); see also Dickson Marine, Inc. v. Palpina, Inc., 179 F.3d 331, 337 (5th Cir.1999).

Specific jurisdiction may be found when a foreign defendant "has 'purposefully' directed his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." [FN15] A single act may support specific jurisdiction where the act is directed at residents of the forum, and the cause relates to the act. [FN16]

[FN15. Burger King Corp., 471 U.S. at 472 (emphasis added); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

[FN16. Burger King Corp., 471 U.S. at 476 n. 18 (citing McGee v. International Life Insurance Co., 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957)); Guidry v. United States Tobacco Co., 188 F.3d 619, 625 (5th Cir.), *reh'g denied*, 199 F.3d 441 (5th Cir.1999); D.J. Investments, Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc., 754 F.2d 542, 547-48 (5th Cir.1985).

*6 In the context of specific jurisdiction, only those acts which relate to formation of the contract and the subsequent breach are relevant. It is well-established that "with respect to interstate contractual obligations ... parties who reach out beyond one state and create ... obligations with citizens of another state are subject to regulation and sanctions in the other state for consequences of their activities...." [FN17] Nevertheless, the existence of a contract alone is insufficient to establish minimum contacts with the forum. [FN18] The district judge must examine prior negotiations and contemplated future consequences of the contract in addition to the parties actual course of dealings. [FN19] When a non-resident defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the bur-

den of demonstrating jurisdiction over the defendant. [FN20]

FN17. *Burger King*, 471 U.S. at 473.

FN18. See *United States v. Swiss American Bank, Ltd.*, 274 F.3d 610, 621 (1st Cir.2001) (citing *Burger King*, 471 U.S. at 479).

FN19. See *Stuart v. Spademan*, 772 F.2d 1185, 1193 (5th Cir.1985); see also *Peyman v. The Johns Hopkins University*, 2000 WL 973665 ---- 2- 4 (E.D.La.) (McNamara, J.) (finding both specific and general jurisdiction).

FN20. *Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 592 (5th Cir.1999).

Turning to the issue of "general jurisdiction," such jurisdiction exists where a "defendant's contacts with the forum state are substantial, continuous and systematic, but unrelated to the instant cause of action." [FN21] The residency of a defendant in the forum state routinely creates such systematic and continuous contact. In evaluating whether general jurisdiction exists, the court examines (1) whether and to what extent the defendant conducts business within the state, (2) whether the defendant maintains offices in the state, (3) whether the defendant sends agents into the forum state to conduct business, (4) whether the defendant advertises or solicits business in the forum, and (5) whether the defendant has a designated agent for service of process in the forum state. [FN22]

FN21. *Central Freight Lines, Inc. v. APA Transport Corp.*, 322 F.3d 376, 381 (5th Cir.2003) (internal quotations omitted); *Helicopteros Nacionales*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); *Alpine View Co., Ltd. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir.2000).

FN22. *Helicopteros Nacionales*, 466 U.S. at 416.

Here, the Arkansas Defendants, while contracting on behalf of themselves, Bottle Rock and others, contacted the Louisiana plaintiff for the purpose of securing a loan and a five million dollar letter of credit issued by a bank in Louisiana to secure the bond necessary to consummate the real estate transaction involving a power plant in California. In so doing, the Winemillers jointly submitted a Financial Statement, together with the balance sheets of a number of juridical entities purportedly owned and/or controlled by the Winemillers, some of which had and may still have extensive land holdings in Louisiana. The Joneses likewise submitted a joint financial statement and further listed of assets under the aegis of the Jones Family Partnership. The statements submitted by the defendants are more specifically detailed above; however, together the financial statements listed assets in excess of \$11 million dollars and were allegedly provided to induce and did in fact induce Monroe to extend the loan pursuant to the promissory note which is the subject of this case, and to provide the letter of credit securing the surety bond.

In the instant case, the Arkansas Defendants deny that they are residents of Louisiana and submit that they, *personally*, have insufficient business contacts with Louisiana. As discussed above, plaintiff has submitted records of the Louisiana Secretary of State, which indicate that both Winemiller and Jones and/or their respective spouses are officers and directors of various juridical entities with extensive land holdings in Louisiana and entities that are domiciled in Louisiana and authorized to do business in this state.

*7 The issue to be addressed by the district judge upon the jurisdictional inquiry is whether the contacts by the Arkansas Defendants on behalf of corporations referred to above are imputable to the individual defendants. In other words, the asserted basis of plaintiffs' argument is that all contacts by the Joneses and the Winemillers, whether individually or allegedly on behalf of another juridical entity, are properly the subject of discovery, and may

be relevant to either or both the specific and general personal jurisdiction inquiries, and it is for the court determine whether certain contacts are properly imputed to the defendants individually.

In *Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640 (5th Cir.2002), the Fifth Circuit observed:

In support of their contention that personal jurisdiction cannot be "imputed" ..., the Defendants rely on ... *Rush v. Savchuk*, 444 U.S. 320, 332, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980), suggesting that, while "the parties' relationships with each other may be significant in evaluating their ties to the forum," the due process requirements of *International Shoe* "must be met as to each defendant over whom a state court exercises jurisdiction."

This language in *Rush*, however, does not preclude us from imputing the jurisdictional contacts of predecessor corporation to its successor or corporation or individual alter ego. As the Plaintiffs correctly point out, federal courts have consistently acknowledged that it is compatible with due process for a court to exercise personal jurisdiction over an individual or a corporation that would not ordinarily be subject to jurisdiction in that court *when the individual ... is an alter ego ... of a corporation* that would be subject to the courts jurisdiction. [FN23]

FN23. *Patin v. Thoroughbred Power Boats, Inc.*, 294 F.3d 640, 653 (5th Cir.2002)(bolding and underlining emphasis added).

The Arkansas Defendants cite *Quantel Corporation v. Niemuller*, 771 F.Supp. 1361 (S.D.N.Y.) in support of their argument that their respective wives' contact with this forum are "personal", irrelevant, not imputable, and thus not discoverable. Nevertheless, discoverability of contacts, "personal" or otherwise, was not addressed in *Quantel, supra*. Indeed, the information regarding various contacts of the husband and wife were known to both the plaintiff and the defendant. The husband/defendant did not challenge personal jurisdiction of the New

York court over himself. The allegations of the complaint were that he allegedly traveled to New York and committed acts of fraud there in connection with the transaction at issue. The defendant's wife was a Canadian citizen and had never traveled to New York or committed any alleged acts of fraud there. Under the circumstances presented, the Court refused to impute the husband's contacts to the wife, for purposes of finding personal jurisdiction. *Quantel Corporation, supra*, is inapposite.

The Arkansas Defendants direct this Courts attention to *Soares v. Roberts*, 417 F.Supp. 304 (D.R.I.1976) and argue that, based on the reasoning of the Rhode Island district judge, this Court should find that any actions taken by the defendants on behalf of any corporation or other juridical entity in which they have an interest, direct, own or control are irrelevant and therefore not discoverable. The *Soares* court rejected the plaintiffs' assertion that personal jurisdiction over the employee defendant may rest simply upon his or her status as a non-resident agent of a principal, which had sufficient contacts with the forum state. It is most apparent that the plaintiffs in the case at bar do not intend to rest that argument merely upon the defendants' status of non-resident agents of the juridical entities previously discussed. Discovery is aimed at amassing the requisite information and documentary proof to support their argument regarding the imputability of contacts.

*8 Now turning to the Louisiana Fourth Circuit's decision, *Escoto v. U.S. Lending Corp.*, 675 So.2d 741 (La.App. 4th Cir.1996), that court rejected the defendant's assertion of the "fiduciary shield doctrine," finding that the contacts of a corporate president in his official capacity as such, were sufficient to subject the president to the jurisdiction of the Louisiana court, even though the corporate president had never physically entered Louisiana. The *Escoto* court did in fact note "that jurisdiction over individual officers and employees of a corporation may not be predicated *merely upon jurisdiction over the corporation itself.*" [FN24] However, the

circumstances presented in that case apparently warranted imputation of contacts and the determination that the fiduciary shield doctrine was not applicable.

FN24. *Escoto v. U.S. Lending Corp.*, 675 So.2d 741, 745 (La.App. 4th Cir.1996) (emphasis added), cert. denied, 679 So.2d 1343 (La.1996); see also *Briley Marine Service v. Toups*, 551 So.2d 755, 759-60 (La.App. 5th Cir.1989), cert. denied, 553 So.2d 476 (La.1989).

Addressing the "fiduciary shield doctrine," the court in *Bollinger Industries, L.P. v. May*, 2003 WL 21281634 (N.D.Tex.) recognized that the doctrine proscribes the imputation of contacts to an agent of the principal and that there are well-recognized exceptions to the application of the aforesaid doctrine. The *Bollinger Industries* court observed:

"This circuit has long held that when officers or agents direct purposeful, tortious activity towards a particular forum, they should anticipate being haled into court in that forum." *Intermed Labs. v. Perbadanan Geta Felda*, 898 F.Supp. 417, 420 (E.D.Tex.1995) (citing *D.J. Invs. v. Metzeler Motorcycle Tire*, 757 F.3d 542, 545 (5th Cir.1985) (defendant corporate officer accused of fraud had sufficient contacts as he engaged in correspondence with defendant's forum, phoned defendant and visited the forum to negotiate); see *Brown v. Flowers Indus., Inc.*, 688 F.2d 328, 333-34 (5th Cir.1982) (single defamatory phone call sufficient to create personal jurisdiction); *Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1189-90 (5th Cir.1984); *Admiral Ins. Co. v. Briggs*, 2002 WL 1461911 * 6 (N.D.Tex. July 2, 2002) ("However removed the [defendant's] physical presence from Texas, his alleged direction to remove property gave rise to an intentional tort within the state that constitutes purposeful availment of the benefit and protection of Texas law"). [FN25]

FN25. *Bollinger Industries, L.P. v. May*, 2003 WL 21281634 * 2 (N.D.Tex.).

Additionally, the fiduciary shield doctrine will not protect the agent of the corporation if the individual defendant is the alter ego or if he perpetrated a fraud directed at the forum. [FN26] The fiduciary shield that cloaks corporate agents and officers usually prevents a court from attributing actions made on behalf of the corporation to the agents or officers who performed them. [FN27] In summary, it is clear that courts within the Fifth Circuit have recognized two exceptions: (1) the district court may disregard the corporate form and exercise of jurisdiction over an individual officer if the corporation is the "alter ego" of the corporation and, in the appropriate case, the exercise of jurisdiction is predicated on the practical identity of the officer and his corporate shell as one and the same person; [FN28] and (2) the court may exercise personal jurisdiction over an officer who allegedly committed an intentional tort or fraud directed at the forum state. [FN29]

FN26. See *Spademan*, 772 F.2d at 1198 n. 12; *Bollinger*, 2003 WL 21281634 * 1; *Sefton v. Jew*, 201 F.Supp.2d 730 (W.D.Tex.2001); *Credit Cheque Corp. v. Zerman*, 1997 WL 786251 * 3 (N.D.Tex. Dec.11, 1997).

FN27. See *Spademan*, 772 F.2d at 1197.

FN28. See *Miller v. American General Financial Corp.*, 2002 WL 2022536 * 12 (E.D.La. September 4, 2002).

FN29. See *Credit Cheque Corp.*, 1997 WL 786251 * 3.

*9 For all of the above and foregoing reasons and considering the applicable law, it is the opinion of this Court that information and documents evidencing the defendants' contacts with this forum, even if allegedly on behalf of one the entities discussed above, is fairly within the ambit of appropriate jurisdictional discovery. It is for the district judge to determine whether any such contacts may be imputed to the defendants and whether the Arkansas

Defendants contacts with the forum are sufficient for purposes of either finding specific or general personal jurisdiction. As to documentary discovery pertaining to the wives' contacts with Louisiana, particularly in the case of Jones, who submitted a balance sheet entitled "Jones Family Partnership," the Court finds that the Arkansas Defendants' wives' contacts are also properly the subject of jurisdictional discovery. The undersigned reiterates that it will not issue an advisory opinion on the imputability of any such contacts, particularly in light of the fact that the extent of the wives' contacts is presently not known. As aforesaid, it is for the district judge to determine the imputability of any contacts and the merits of the motion to dismiss.

Temporal Scope of Discovery

Plaintiffs point out that, in the defendants' affidavits filed in support of their Motion to Dismiss, the term "never" frequently arises in relation to their characterization of contact with the forum state. Monroe contends that the Arkansas defendants cannot claim that they "never" had contact with the forum state and then object to the plaintiffs' inquiry into the nature and extent of Arkansas Defendants' Louisiana contacts over a commensurate period of frame.

The defendant has the better argument that the temporal scope of a lifetime and/or thirty years is excessive. Unquestionably, the plaintiffs should be accorded the opportunity to conduct discovery over a sufficiently lengthy period of time so as to determine whether defendants contacts with Louisiana are sufficient for personal jurisdiction purposes. However, even under the general jurisdiction analytical framework, the contacts must be not only be systematic and substantial, they must be continuous. At this time, the Court is not convinced that thirty years is necessary. Ten years, while not generous, is sufficient and not reasonably subject to serious dispute. Most notably, both the Winemiller and the Jones affidavits, quoted in pertinent part above, contemplate a "10 year" time period for the purposes of discerning and identifying contacts with the forum state. If for no other reason, the tem-

poral restriction of at least ten years is necessary, so as to allow the plaintiffs the opportunity to test the sufficiency of the defendants' attestations. The Court recognizes that the exercise of the utmost good faith will not permit the opportunity to review, copy and produce discovery spanning a ten-year time frame prior to the depositions on Monday. Nevertheless, the Court trusts that the parties make their best efforts to satisfy the defendants' requests for production as soon as possible, understanding that it may well occur after the depositions of the Arkansas Defendants on Monday.

*10 In light of the foregoing and considering that production may well post-date the depositions, the Court fully reserves the plaintiffs' right to redepose the Arkansas Defendants, should circumstances warrant.

Fed.R.Civ.P. 34 Custody, Possession and Control

As to Rule 34 possession, custody and control, defendants submit that they are not required to produce documents in the possession of their wives. Plaintiffs have the better argument regarding the production of documents that may only technically be in the possession of the defendants' respective wives. In this regard, Monroe's request for a copy of any separate property agreement between Jones, Winemiller and their respective spouses is not beyond the pale. Plaintiff points out that, Ms. Winemiller, as president, signed most of the balance sheets provided to the plaintiff to secure the loan. Additionally, both Joneses and Winemillers submitted Joint Balance Sheets, indicating the existence of either a "community of assets" or a "family partnership."

Rule 34(a) of the Federal Rules of Civil Procedure states that "[a]ny party may serve on any other party a request (1) to produce ... any designated documents ... which are in the possession, custody or control of the party upon whom the request is served." FRCP Rule 34(a). Federal courts have consistently held that documents are deemed to be within the "possession, custody or control" of a party for purposes of Rule 34 if the party has actual

possession, custody or control, or has the legal right to obtain the documents on demand or has the practical ability to obtain the documents from a non-party to the action.

Generally a "party is charged with knowledge of what its agents know or what is in records available to it." See Pooler v. Textron, Inc. 192 F.R.D. 494, 501 (D.Md.). Rule 34 is broadly construed and documents within a party's control are subject to discovery, even if owned by a nonparty. See Commerce and Industry Insurance Co. v. Grinnell Corp. 2001 WL 96377 * 3 (E.D.La.). The burden is on the party seeking discovery to make a showing that the other party has control over the material sought. When determining the sufficiency of control of material for purposes of Rule 34, the nature of the relationship between the party and the non-party is the key. See Goh v. Baldor Electric Co. 1999 WL 20943 at * 2 (N.D.Tex.).

Typically what must be shown is a relationship, either because of some affiliation, employment or statute, such that a party is able to command release of certain documents by the non-party person or entity in actual possession. The applicable test is whether the litigant has the ability to obtain the documents on request to a related party, either as a matter of law or as a matter of practical fact.

The relationships at issue are husband/wife and, in the case of Jones, a family partnership. Certainly, if the evidence submitted regarding the parties' dealings leading up to the consummation of the loan demonstrate nothing else, the evidence submitted in support of the motion to compel argues decidedly in favor of the conclusion that Jones and Wine-miller exert sufficient sway or control over their wives' assets and business interests. As to the corporation/shareholder relationship and insofar as the Louisiana corporations are concerned, plaintiffs highlight that La. R.S. 12:103D(1)(a) gives a shareholder the right to obtain documents from the corporation.

Non-Privileged Documents in the Possession and

Control of Defense Counsel

*11 Mr. Hagan, Arkansas Defendants' counsel, submitted an affidavit in support of the Motion to Dismiss, purportedly made on personal knowledge and based upon business records, documents and information available and personally reviewed by him, all of which were maintained in the ordinary course of business. Plaintiffs contends that they are entitled, at the very least, to review the documents upon which Hagan's affidavit testimony is based. Moreover, plaintiff argue that, the fact that Hagan may be required to "search through three years of voluminous dead files," does not provide a legal basis to obstruct relevant jurisdictional discovery.

Non-privileged documents in Hagan's possession responsive to the plaintiffs' requests should be produced. Defendants do not specifically address the plaintiff's argument in this regard in their written submission, except under the rubric of alleged "undue burden." However, in oral argument, counsel for the Arkansas Defendants' argued convincingly that, as to documents retained by Hagan, the motion to compel is more appropriately directed to Bottle Rock and/or directly to Hagan. Without question, plaintiffs are entitled to review non-privileged documents upon which Hagan's affidavit testimony is based. However, for reasons previously stated, the Court finds the motion misdirected in this regard and DENIES the motion in part, subject to the plaintiffs' right to reurge same against the appropriate party or non-party.

Attorney-Client Privilege

Plaintiff notes that the Arkansas Defendants assert a blanket objection based upon the attorney-client privilege and that they failed to submit a detailed privilege log. However, since the motion to compel was filed and prior to motion hearing, the Arkansas Defendants have in fact produced a detailed privilege log. Accordingly, plaintiffs' claim of waiver due to the Arkansas Defendants' failure to provide a privilege log is moot and the motion to compel is DENIED IN PART, subject to the plaintiffs' right to re-urge their motion in the form of a motion for in

camera review and to compel production of defendants' privilege log documents, if circumstances warrant.

Retainer Agreements

Generally speaking, attorney's retainer agreements are not privileged. The identity of Hagan's clients and the purposes for which he was retained is not privileged. [FN30] Additionally, information relating to billing, contingency fee contracts, fee-splitting arrangements, hourly rates, hours spent by attorneys working on the litigation, and payment of attorney's fees does not fall within either the attorney-client or the work product privilege. [FN31] Billing statements, phone logs, transmittal letters, fax cover sheets and/or records which simply reveal the amount of time spent, the amount billed and the type of fee arrangement are fully subject to discovery and, similarly, the purpose for which an attorney was retained and the steps taken by the attorney in discharging his obligations are not privileged. [FN32] Accordingly,

FN30. See *Nguyen v. Excel Corp.*, 197 F.3d 200, 206 (5th Cir.1999).

FN31. *Southern Scrap Material Co. v. Fleming, et al*, 2003 W. 21474516 * 13 (E.D.La.) (Knowles, M. J.) (citing *In re Central Gulf Lines*, 2001 WL 30675 *2 (E.D.La.), *Tonti Properties v. The Sherwin-Williams Co.*, 2000 WL 506015 (E.D.La.), *C.J. Calamia Const. Co., Inc. v. Ardco/Traverse Lift Co., LLC*, 1998 WL 395130 * 2 (E.D.La.) (Clement, J.).

FN32. *Id.* at n. 40.

*12 IT IS ORDERED that the plaintiffs' Motion to Compel is GRANTED IN PART and DENIED IN PART, all as more specifically set forth above.

Not Reported in F.Supp.2d, 2004 WL 737463 (E.D.La.)

END OF DOCUMENT

H

United States District Court,
W.D. Pennsylvania.
Mark HOHIDER, and Robert Dipaolo, On Behalf
of Themselves and All Others
Similarly Situated, Plaintiff,
v.
UNITED PARCEL SERVICE, INC., and Does
1-100, Defendant.
Preston Eugene Branum, On Behalf of Himself and
All Others Similarly Situated,
Plaintiffs,
v.
United Parcel Service, Inc., and Does 1-100, De-
fendants.
Civil Action No. 04-363.

April 28, 2009.

Background: Defendant filed emergency motion to stay court's order requiring in camera review of certain documents pending appeal of that order.

Holding: The District Court, Joy Flowers Conti, J., held that in camera review of withheld documents was not only proper, but necessary in order to determine whether they were subject to discovery privilege as "core" work product documents. Motion denied.

West Headnotes

[1] Federal Civil Procedure ↪1551

170Ak1551 Most Cited Cases

A duty to preserve is an affirmative obligation, which arises when the party in possession of the evidence knows that litigation by the party seeking the evidence is pending or probable and the party in possession of the evidence can foresee the harm or prejudice that would be caused to the party seeking the evidence if the evidence were to be discarded; while a litigant is under no duty to keep or retain every document in its possession, even in advance of litigation, it is under a duty to preserve what it

knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation.

[2] Federal Civil Procedure ↪1623

170Ak1623 Most Cited Cases

In camera review of withheld documents was not only proper, but necessary in order to determine whether they were subject to discovery privilege as "core" work product documents.

Anita M. Laing, David R. Scott, Erin G. Comite, Scott & Scott, Colchester, CT, Arthur L. Shingler, III, Donald A. Broggi, Luis E. Lorenzana, Scott & Scott LLP, Gary D. Foster, Stephanie A. Hackett, San Diego, CA, Beth A. Kaswan, Judith Scolnick, Scott & Scott, LLP, New York, NY, Christian Bagin, Wienand & Bagin, Pittsburgh, PA, Geoffrey M. Johnson, Scott & Scott, Chagrin Falls, OH, Walter W. Noss, Scott & Scott, LLP, Cleveland Heights, OH, Judith B. Goldstein, Equal Justice Foundation, Columbus, OH, for Plaintiffs.

Charles A. Gartland, II, Glenn G. Patton, Leslie E. Wood, R. Steve Ensor, Alston & Bird, Atlanta, GA, David J. McAllister, Joseph E. Culleiton, Perry A. Napolitano, Reed Smith, Pittsburgh, PA, Dori K. Bernstein, Equal Employment Opportunity Commission Office of General Counsel, Washington, DC, for Defendants.

MEMORANDUM ORDER

JOY FLOWERS CONTI, District Judge.

*1 Pending before the court is an emergency motion to stay (Doc. No. 394) filed by defendant United Parcel Service, Inc. ("UPS"). UPS seeks to stay (Doc. No. 379) this court's order requiring *in camera* review of certain documents (the "withheld documents") pending appeal of that order to the United States Court of Appeals for the Third Circuit. For the reasons set forth below and as more fully set forth on the record at the hearing held April 23, 2009, the court will deny the motion to stay until the special master's report and recommendation number 3 on the disposition of defend-

ant's assertions of privilege over its litigation hold materials is resolved in accordance with the directive set forth below.

As explained at the April 23, 2009 hearing, this court has serious concerns about defendant's conduct and the events preceding this motion which cause the court to question the timing of the filing of this motion as well as the timing of defendant's application to enforce stay in the United States Court of Appeals for the Third Circuit.

Background of Appointment of the Special Master

On July 16, 2007, this court certified a class of plaintiffs in this case. Defendant appealed that decision, and on February 8, 2008, the United States Court of Appeals for the Third Circuit stayed proceedings in this case pending decision on the appeal. Prior to the appeals court staying the proceedings, plaintiffs had filed a motion for preservation order [FN1] and motion for sanctions alleging that UPS had not sufficiently preserved e-discovery materials for this litigation (the "motions"). On December 19, 2007, the court appointed a special master to prepare a report and recommendation concerning the motions. After the court of appeals stayed the proceedings in this case, the parties disputed whether the stay affected the jurisdiction of this court to resolve the collateral issues raised in plaintiffs' motions. The special master suspended his duties, and this court inquired of the court of appeals whether the stay extended to the motions. On July 31, 2008, after the parties had a full opportunity to brief the issue, the court of appeals determined that the stay did not extend to the motions. In August 2008, the special master resumed his duties under the order appointing him.

After August 2008, the court received regular updates from the special master, held a status conference with the parties specifically to discuss the duties of the special master, and did not receive any objection from the parties concerning the nature, scope, or expense of the special master's duties. The

special master has filed two comprehensive reports with the court. The first report, dated February 18, 2009, addressed the trigger of the duty to preserve and the scope of relevant evidence. (Special Master Report and Recommendation No. 1, Preliminary Determination of Relevant Evidence (Docket No. 309).) The second report, dated February 25, 2009, addressed most of the privilege issues associated with defendant's litigation hold efforts. (Special Master Report and Recommendation No. 2, First Disposition of the Parties' Assertions of Privilege and Protection (Doc. No. 310).) The special master sought and received the court's approval to file a replacement to Report and Recommendation No. 2 (the "replacement report") so that all the parties' arguments and evidence relating to the privileges asserted for litigation hold materials could be addressed in a single report. (Order Granting Special Master Request for Modification of Schedule (Doc. No. 315).) This court expected to receive that replacement report in April 2009. The defendant's recent procedural maneuvering prevented the court from having the replacement report timely filed.

Duty to Preserve

*2 [1] A duty to preserve is an "affirmative obligation," which arises "when the party in possession of the evidence knows that litigation by the party seeking the evidence is pending or probable and the party in possession of the evidence can foresee the harm or prejudice that would be caused to the party seeking the evidence if the evidence were to be discarded." Kounelis v. Sherrer, 529 F.Supp.2d 503, 518 (D.N.J.2008). "While a litigant is under no duty to keep or retain every document in its possession, even in advance of litigation, it is under a duty to preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation." Scott v. IBM Corp., 196 F.R.D. 233, 249 (D.N.J.2000); see Winters v. Textron, Inc., 187 F.R.D. 518, 520 (M.D.Pa.1999) (finding that knowledge of even a potential claim is sufficient to impose a duty to preserve evidence); Bowman v. American Medical Systems, Inc., No. 96-7871,

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1998 WL 721079, at *3 (E.D.Pa. Oct. 9, 1998) ("A party which reasonably anticipates litigation has an affirmative duty to preserve relevant evidence"); Barsoum v. NYC Housing Authority, 202 F.R.D. 396, 400 (S.D.N.Y.2001) (citing Kronisch v. United States, 150 F.3d 112, 126 (2d Cir.1998) ("A party has a duty to retain evidence that it knows or reasonably should know may be relevant to pending or future litigation.")).

Duty of Candor to the Court

Rule 3.3 of the Pennsylvania Rules of Professional Conduct, applicable to attorneys appearing before this court, states in relevant part:

Rule 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

In certain circumstances, "failure to make disclosure is the equivalent of an affirmative misrepresentation." Rule 3.3 Pa. Rules Prof. Conduct cm. ¶ 3.

Possible Misrepresentations or Omissions by UPS to Plaintiffs and to the Court

It is apparent to the court that UPS was not forthright in informing plaintiffs and the court about the nature and scope of UPS's preservation efforts. For example, defendant's counsel wrote a letter to plaintiffs' counsel in 2005 stating that defendant was "in the process of placing a 'Hold,' as that term is defined in the UPS Records Manual, on all categories of documents requested by Plaintiffs in the litigation." (J. Culleiton letter to C. Bagin at 3-4, May 3, 2005.) It was also represented to plaintiffs' counsel that defendant was "even going a step further and disseminating a memorandum to applicable managers throughout the Company which describes the litigation and further details the records that are to be held from destruction." (*Id.*)

Defendant, however, did not issue the hold at that time, did not disseminate the hold memorandum,

and it did not advise plaintiffs of its failure to do so. Similarly defendant did not disclose, until after the special master investigation was commenced in August 2008, that a litigation hold was not issued until February 2006--approximately two years after this case was filed.

*3 The court directs the special master to review these and other statements made or not made by defendant and its counsel and to make findings and recommendations in the replacement report regarding whether any of defendant's conduct affects its privilege assertions.

Circumstances Surrounding Defendant's Motion to Stay

The court is very troubled by defendant's efforts to delay or stop the court's resolution of the motion concerning whether defendant failed to preserve electronically stored information ("ESI"). The court reviewed Report and Recommendation Number 1 and Report and Recommendation Number 2. In the first report, the special master made numerous findings and recommendations regarding the trigger to the duty to preserve and the scope of relevant information. The special master recommended that the court reject a number of positions taken by defendant on issues critical to the spoliation analysis. For example, defendant took the position that it had no duty to preserve relevant ESI until the case was certified, some three years after the lawsuit was filed. The special master recommended that the court find that defendant's duty to preserve included ESI. (Report and Recommendation No. 1 at 11-14.) The special master also recommended that the court (a) reject defendant's arguments that certain workers' compensation information was not subject to a duty to preserve (*id.* at 21-24), (b) find that the duty to preserve encompassed a broader scope of evidence than defendant contends (*id.* at 25-35), (c) and reject defendant's argument that this case be limited to defendant's formal ADA accommodation request process (*id.* at 36-44). [FN2]

In his report and recommendation on privilege, the

special master also recommended that the court reject certain positions asserted by defendant, while at the same time recommending that the court sustain other of defendant's privileges. For example, the special master recommended that the court reject defendant's assertion of privilege over an e-mail dated May 12, 2005 sent by L. Herron (the "Herron Email"). (Report and Recommendation No. 2 at 40-46.) As the court noted at the April 23, 2009 hearing, this email is central to defendant's 2005 preservation efforts and, based upon the court's own review of this email and the evidence defendant offered in support of this privilege, the court concludes there is little likelihood that this court could find the Herron Email to be privileged. The special master also recommended that the court overrule defendant's privilege assertions relating to the emails sent by non-lawyers to other non-lawyers forwarding the Herron Email. (*Id.* at 46-49.)

After the special master issued these two reports, defendant undertook certain actions to delay or stop the investigation ordered by this court. First, defendant asked the United States Court of Appeals for the Third Circuit to stay the court-ordered special master's completion of his duties. Second, defendant refused to submit the withheld documents for *in camera* review. The defendant's timing and motives appear suspicious for the reasons more fully explained at the April 23, 2009 hearing.

*4 With regard to defendant's application to stay the special master's completion of his duties, the court is very troubled that defendant did not ask this court to address whether the special master's actions were inappropriate or unduly expensive before seeking intervention from the court of appeals. Under the special master appointment order, defendant has the right and ability to seek this court's review of anything the special master did or did not do. In addition, if defendant honestly believed that this court was violating the stay issued by the court of appeals, defendant should have raised that issue in the first instance with this court. If defendant was truly concerned about the scope and cost of the

investigation, there was no reason for it not to bring those concerns to the court. Because defendant did not do so, the court is skeptical about the timing of defendant's recent actions. In particular, the court is concerned that defendant is seeking to delay or stop the court's ability to resolve the pending motion for sanctions, because the special master is uncovering information defendant was otherwise loathe to disclose in a timely and cooperative manner and because defendant does not like the recommendations the special master has already made to the court. At the hearing April 23, 2009, defense counsel represented to the court that the withheld documents are innocuous emails. The court, however, can not determine the import of the withheld documents without reviewing them *in camera*.

[2] With respect to the court's order requiring defendant to produce documents for *in camera* review, the court found no precedential authority in support of the defendant's refusal to comply with that order. No lawyer had ever previously advanced to this court the argument that a trial court may not review allegedly privileged documents *in camera*. Indeed, the court is frequently called upon to review such documents because it is the *only* way, in many cases, to determine whether the documents are privileged. In this case, the court finds that *in camera* review is not only proper, but necessary for several reasons:

- Given the number of documents already produced, the withheld documents (approximately 40-50 emails) are a minuscule portion of those documents. Review of those documents *in camera* would not be time consuming or expensive.
- No litigation hold was issued by defendant for approximately two years after this case was filed and the withheld documents relate to the delay in issuing the litigation hold.
- Despite defendant's assertions that the withheld documents are "core" work product, the court cannot make that determination without seeing them. In fact, defendant produced other seemingly "core" work product documents for *in camera* review in this case, but it has chosen for un-

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disclosed reasons to draw the line on these allegedly "core" work product documents.

- Based upon the descriptions and recipients of some of the withheld documents from defendant's privilege log, the court doubts defendant's "core" work product claims can be sustained for all the withheld documents.

- *5 • Without reviewing the documents, it is impossible to determine whether the privilege over such documents was waived through defendant's conduct in this case--conduct that the court views as troubling and which may implicate a potential basis for waiver.

- The special master's inability to review these documents *in camera* will render him unable to make findings and recommendations to the court in his next report, thereby adding time and expense for the parties and the court to resolve finally this motion concerning preservation of evidence.

ORDER

AND NOW this 28th day of April 2009, for the reasons set forth above and as set forth on the record, the Emergency Motion to Stay (Doc. No. 394) filed by defendant, United Parcel Service, Inc. is hereby DENIED.

IT IS FURTHER ORDERED that the special master shall submit his report and recommendation on the disposition of the parties' assertion of privilege not later than May 4, 2009, excluding the withheld documents. The parties shall have seven calendar days to file their objections to, or motions to adopt or modify, the special master's report. If the special master recommends that the Herron Email is not privileged and the court adopts that recommendation, 1) defendant shall turn over the withheld documents to the special master within two business days of the court's entry of an order adopting that finding; and 2) the special master shall file a supplemental report and recommendation concerning whether any or all of the withheld documents are privileged.

The special master's April 30, 2009 deadline to sub-

mit a report to the Court on phase two (*see* Order Regarding Special Master Proceedings at 4, Dec. 23, 2008 (Docket No. 285)) is postponed to a date to be determined.

FN1. The motion for preservation order was resolved by the parties through a consent order in which the parties agreed to the efforts which should be taken in the future to preserve potential relevant electronic evidence. (Doc. No. 286 filed December 23, 2008.)

FN2. The parties were not required to object to this first report since it was an interim report by the special master to provide guidance for the parties. At this time, the court has not yet adopted or rejected the special master's recommendations.

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United States Court of Appeals,
Third Circuit.

Arnold HOLMES; Lawrence Hollyfield, Fiduciary
to the Estate of Collins
Hollyfield

v.

PENSION PLAN OF BETHLEHEM STEEL COR-
PORATION and Subsidiary Companies; Employee
Benefits Administration Committee of Bethlehem
Steel Corporation; Michael P.

Dopera; John/Jane Does 1-10

Arnold Holmes and Lawrence Hollyfield, Fiduciary
to the Estates of original
named plaintiff Collins Hollyfield, individually and
on behalf of all members

of the proposed class and subclasses, Appellants at
No. 99-1619.

Arnold Holmes; Lawrence Hollyfield, Fiduciary of
the Estate of Collins
Hollyfield

v.

Pension Plan of Bethlehem Steel Corporation and
Subsidiary Companies; Employee
Benefits Administration Committee of Bethlehem
Steel Corporation; Michael P.

Dopera; John/Jane Does 1-10

The Pension Plan of Bethlehem Steel Corporation
and Subsidiary Companies, the
Employee Benefits Administration Committee of
Bethlehem Steel Corporation and

Michael P. Dopera, Appellants at 99-1620.

Nos. 99-1619, 99-1620.

Argued April 11, 2000

Filed May 23, 2000

Pension plan participants brought action against plan administrator under Employee Retirement Income Security Act (ERISA), seeking interest on wrongfully delayed benefits and challenging offset of union retirement benefits against ERISA pension benefits. The United States District Court for the Eastern District of Pennsylvania, Franklin S. Van

Antwerpen, J., denied participants' motion for class certification, 1998 WL 633700, found that memorandum prepared by administrator's attorney was protected work product, entered summary judgment for administrator on interest claims, 1998 WL 901545, dismissed offset claim, held that interest was limited under doctrine of laches, 1999 WL 124392, held on reconsideration that participants were entitled to interest but that it should be calculated at statutory interest rate, 1999 WL 179794, and denied participants' renewed motion for class certification and entered final judgment for participants, 1999 WL 554591. Appeal was taken. One of the participants filed separate action reasserting offset claim. The District Court entered summary judgment for administrator, 2000 WL 633007, and appeal was taken. Appeals were consolidated. The Court of Appeals, Nygaard, Circuit Judge, held that: (1) District Court did not abuse its discretion in calculating interest on delayed benefits based on post-judgment interest rate established by statute, rather than on actual rate of return earned by plan; (2) District Court erred in its application of doctrine of laches; (3) participants could not represent class challenging plan's offset of union retirement benefits, inasmuch as participants' claims were moot before they filed complaint; (4) proposed class of participants and beneficiaries who had received or would receive retroactive payments of delayed benefits was overbroad; (5) District Court abused its discretion in determining that legal memorandum prepared by plan's attorney was work product; and (6) Court of Appeals would not entertain administrator's cross-appeal ostensibly challenging decision that participants were entitled to interest.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Interest ↪31

219k31 Most Cited Cases

District court did not abuse its discretion in calculating interest on wrongfully delayed ERISA pen-

(Cite as: 213 F.3d 124)

sion benefits on statutory post-judgment interest rate, rather than on actual rate of return that pension plan earned during period when it wrongfully delayed payment; return realized by plan in excess of rate established by statute was result of plan's investment expertise and labor, as well as risk that plan, not participants, bore. 28 U.S.C.A. § 1961; Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[2] Federal Courts ↪763.1170Bk763.1 Most Cited Cases

Review of district court's interpretation and application of prior Third Circuit case would be plenary.

[3] Interest ↪13219k13 Most Cited Cases

A beneficiary may bring an action under ERISA against a pension plan to recover interest on benefits the plan paid after some delay, but without the beneficiary having sued under ERISA to recover the benefits themselves. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[4] Interest ↪13219k13 Most Cited Cases

Interest on delayed ERISA benefits is an equitable remedy left to the discretion of the trial court. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[5] Interest ↪67219k67 Most Cited Cases

Interest on delayed ERISA benefits is presumptively appropriate. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[6] Labor and Employment ↪403231Hk403 Most Cited Cases

(Formerly 296k21)

ERISA does no more than protect the benefits which are due to an employee under a plan. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[7] Interest ↪63219k63 Most Cited Cases

District court erred in its application of Pennsylvania doctrine of laches to ERISA plan participants' action for interest on wrongfully delayed benefits, in that court concluded that laches should follow general six-year statute of limitations given absence of fraud or concealment, but failed to determine that the two elements of laches, i.e., inexcusable delay and prejudice, were satisfied. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[8] Equity ↪84150k84 Most Cited Cases

As an equitable doctrine, the decision to apply laches is left to the sound discretion of the district court.

[9] Federal Courts ↪813170Bk813 Most Cited Cases

General.

Appellate review of a lower court's application of the doctrine of laches is limited to a review for abuse of discretion; nevertheless, in the exercise of its discretion, the district court must correctly apply the governing law.

[10] Equity ↪72(1)150k72(1) Most Cited Cases

Under Pennsylvania law, the doctrine of laches has two elements: (1) inexcusable delay, and (2) prejudice.

[11] Federal Civil Procedure ↪161.1170Ak161.1 Most Cited Cases

In addition to the requirements expressly enumerated in the rule governing class actions, class actions are subject to more generally applicable rules such as those governing standing and mootness. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[12] Federal Civil Procedure ↪103.7170Ak103.7 Most Cited Cases

A plaintiff who lacks the personalized, redressable injury required for standing to assert claims on his

or her own behalf would also lack standing to assert similar claims on behalf of a class.

[13] Federal Civil Procedure ↪164.5

170Ak164.5 Most Cited Cases

Even a plaintiff with standing is generally disqualified from representing a class if his or her individual claim becomes moot before the proposed class is certified; however, there are exceptions to this general rule.

[14] Federal Civil Procedure ↪164.5

170Ak164.5 Most Cited Cases

So long as a class representative has a live claim at the time he or she moves for class certification, neither a pending motion nor a certified class action need be dismissed if his or her individual claim subsequently becomes moot; if, on the other hand, the putative class representative's individual claim becomes moot before he or she moves for class certification, then any subsequent motion must be denied and the entire action dismissed.

[15] Federal Courts ↪817

170Bk817 Most Cited Cases

A decision to certify, or to deny certification of, a class action is reviewed for abuse of discretion.

[16] Federal Courts ↪817

170Bk817 Most Cited Cases

The Court of Appeals may find an abuse of discretion with respect to a decision to certify, or to deny certification of, a class action where the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact.

[17] Federal Civil Procedure ↪164.5

170Ak164.5 Most Cited Cases

ERISA pension plan participants could not represent class challenging plan's offset of union retirement benefits against their ERISA pension plan benefits, inasmuch as participants settled their offset claims through administrative channels, rendering their claims moot, before they filed complaint. Employee Retirement Income Security Act of 1974, §

2 et seq., 29 U.S.C.A. § 1001 et seq.

[18] Federal Civil Procedure ↪184.5

170Ak184.5 Most Cited Cases

District court did not clearly err in determining that proposed class of participants and beneficiaries who had received or would receive retroactive payments of delayed ERISA pension plan benefits was overbroad, in action seeking interest on such payments; interest was equitable remedy dependent upon individual facts of each claim, and need for individualized determinations was valid reason for denying class certification. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[19] Federal Civil Procedure ↪1604(1)

170Ak1604(1) Most Cited Cases

(Formerly 170Ak1600(3))

District court abused its discretion in determining that legal memorandum prepared by ERISA plan's attorney analyzing merits of participant's administrative claim for interest on delayed benefits was protected from discovery by doctrine of work-product immunity, inasmuch as district court's conclusion that memorandum was prepared in anticipation of possible future litigation was based on assumptions. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.; Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[20] Federal Courts ↪820

170Bk820 Most Cited Cases

Discovery orders are reviewed for abuse of discretion.

[21] Federal Civil Procedure ↪1604(1)

170Ak1604(1) Most Cited Cases

(Formerly 170Ak1600(3))

The doctrine of work-product immunity shelters the mental processes of the attorney, providing a privileged area within which he or she can analyze and prepare his or her client's case.

[22] Federal Civil Procedure ↪1604(1)

170Ak1604(1) Most Cited Cases
(Formerly 170Ak1600(3))

A party claiming work-product immunity bears the burden of showing that the materials in question were prepared in the course of preparation for possible litigation.

[23] Federal Civil Procedure ↪ **1604(1)**
170Ak1604(1) Most Cited Cases
(Formerly 170Ak1600(3))

Work product prepared in the ordinary course of business is not immune from discovery. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[24] Courts ↪ **90(2)**
106k90(2) Most Cited Cases

[24] Federal Courts ↪ **612.1**
170Bk612.1 Most Cited Cases

[24] Federal Courts ↪ **915**
170Bk915 Most Cited Cases

Court of Appeals would not entertain ERISA plan administrator's appeal ostensibly challenging decision that participants were entitled to interest on delayed benefits, but limiting its argument to challenge to Court of Appeals' decision in prior case, inasmuch as administrator failed to raise such issue below and thus waived it, administrator's arguments were hypothetical, lacking concrete, particularized facts necessary to support sound judicial decision, and prior decision could be overturned only by en banc court. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.
***127** Alan M. Sandals, Esq. (argued), Howard I. Langer, Esq., Sandals, Langer & Taylor, Philadelphia, PA, Attorneys for Appellants.

G. Stewart Webb, Jr., Esq. (argued), Venable, Baetjer & Howard, Baltimore, MD, Attorney for Appellees.

***128** BEFORE: NYGAARD, ALITO, and JOHN R. GIBSON, [FN*] Circuit Judges.

[FN*] The Honorable John R. Gibson,
United States Circuit Judge for the Eighth

Circuit Court of Appeals, sitting by designation.

OPINION OF THE COURT

NYGAARD, Circuit Judge.

Appellants, Arnold Holmes and Lawrence Hollyfield, filed a civil action against Appellees pursuant to §§ 404 and 502(a) of the Employment Retirement Income Security Act. 29 U.S.C. §§ 1104 & 1132(a). The District Court had jurisdiction over the action pursuant to 29 U.S.C. § 1132(e)(1). We have jurisdiction to review the District Court's final order pursuant to 28 U.S.C. § 1291.

Appellants, plaintiffs below, successfully prosecuted their claim to interest on pension benefits they received after a decade and a half of delay. Nevertheless, Appellants challenge two equitable limitations the District Court placed on the interest it awarded. They also challenge the District Court's refusal to certify two classes of plaintiffs they proposed for class action purposes. Finally, they challenge the District Court's ruling that a legal memorandum they sought to discover was protected by the doctrine of work-product immunity. We will affirm in part, and reverse in part.

Appellees, defendants below, cross appeal, ostensibly raising an issue as to whether the District Court erred by concluding that Appellants were entitled to any interest at all, regardless of the limitations it imposed. Rather than directly challenging the District Court's decision, however, they limit their argument to a critique of our decision, which the District Court correctly found controlling, in Fotta v. Trustees of the United Mine Workers of Am. Health & Retirement Fund, 165 F.3d 209 (3d Cir.1998) (holding that ERISA permits actions to recover interest on wrongly withheld benefits even where the benefits were paid before litigation). We hold that the argument is not properly presented in this appeal, and decline to entertain it.

I. Background Facts & Procedure

Appellants, as well as the members of the plaintiff

classes they seek to certify, are participants in, or beneficiaries of, the Pension Plan of Bethlehem Steel Corporation and its Subsidiary Companies (hereafter referred to as "the Plan"). Prior to a 1977 amendment, the Plan required that benefits due under the Plan be offset (i.e., reduced) by the amount of any pension benefits the relevant participant received from any source other than the Plan itself. In July 1977, the Plan was amended so that the offset requirement applied only to non-plan pension benefits "attributable to employment with an Employing Company." See Bethlehem 1977 Salaried Pension Plan § 3.8 (J.A. at 128-29). In other words, after the 1977 amendment, non-Plan pension benefits received from sources falling outside the definition of an Employing Company are not deducted from benefits received from the Plan itself.

The Plan defines an "Employing Company" to mean Bethlehem Steel, any Bethlehem Subsidiary that has adopted the Plan, and "any corporation which, prior to July 31, 1966, was merged into or consolidated with any such subsidiary company or with" Bethlehem Steel. See Bethlehem Steel 1977 Salaried Pension Plan at 2 (J.A. at 120). Additionally, the Plan provides that benefits received from sources falling within the definition of an Employing Company are offset only to the extent they were earned during a period in which the participant was being "credited with continuous service for the purpose of calculating the amount of any regular pension under[the] Plan." *Id.* at 19-20 (J.A. at 128-29).

Appellants Holmes and Hollyfield both worked for Bethlehem Steel subsidiaries prior to their respective retirements, and both participated in the Plan. After retiring *129 in 1977, Hollyfield applied for pension benefits from both the Plan, and from the United Mine Workers of America Retirement Fund. Unlike the Plan, the UMWA Fund is not employer specific. Rather, it is a multi-employer plan providing benefits to all workers represented by the UMWA. Like the Plan, however, it is funded entirely by employer contributions, including contributions

from Bethlehem Steel and its subsidiaries.

Following his retirement, the Plan awarded Hollyfield \$214.13 in monthly pension benefits, effective December 1, 1977. Nearly a year later, in November 1978, his application for UMWA benefits was granted in the amount of \$250 per month, retroactive to September 1, 1977. Thereafter, the Plan notified Hollyfield that his Plan benefits would be reduced by the full amount of his UMWA benefits. Thus, because his UMWA benefits were greater than this Plan benefits, Hollyfield's Plan benefits were eliminated altogether. Additionally, because his UMWA benefits award was retroactive, the Plan also required Hollyfield to repay all Plan benefits he had previously received. Hollyfield complied, paying the Plan \$2,449.56 in previously received benefits. The Plan did not request, and Hollyfield did not pay, interest on the repaid benefits.

Appellant Holmes retired in 1980 and, like Hollyfield, applied for pension benefits from both the Plan and from the UMWA Fund. The Plan awarded him a monthly benefit of \$1,224.36, effective February 1, 1981. In October 1981, the UMWA Fund awarded Holmes a monthly benefit of \$290.00, retroactive to November 1980. As it did with Hollyfield, the Plan determined that all of Holmes' UMWA benefits should be offset against his Plan benefits. And, again, it required Holmes to repay all offset amounts already received. Thereafter, Holmes repaid the Plan \$2,825.00, reflecting principal only and no interest.

In 1994, Hollyfield's son contacted Plan administrators regarding his father's Plan benefits. In a subsequent investigation, the Plan determined that none of Hollyfield's UMWA benefits were earned during a period in which he was being credited with continuous service for purposes of calculating his Plan benefits. In other words, the Plan concluded that none of Hollyfield's UMWA pension should have been offset against his Plan benefits during the 17-year period since he had retired. Consequently, the Plan paid Hollyfield a lump sum of \$47,553 in past-due benefits. That sum represented past-due

principal only, and did not include any interest payments for the period of delay.

A similar series of events in 1997 led to Holmes' collection of \$24,514 in past-due Plan benefits. In contrast to Hollyfield's case, however, the Plan determined that Holmes earned 65% of his UMWA benefits at the same time he was being credited with continuous service for purposes of calculating his benefits under the Plan. Therefore, his lump-sum payment amounted to only 35% of the Plan benefits that had been offset in the sixteen years since his retirement, not the 100% that Hollyfield had recovered.

Shortly after Holmes received his past-due benefits, his attorney placed a call to the Plan's offices. In a conversation with an assistant to the Plan's administrator, the attorney claimed that Holmes was entitled to interest on his past-due benefits as well as the principal. In response, a Plan attorney prepared a memorandum analyzing the legal issues surrounding Holmes' interest claim. The memorandum was circulated to other Plan attorneys, as well as to its administrator. Thereafter, the administrator informed Holmes' attorney that nothing in the Plan provided for interest payments on delayed benefits, and that the administrator had determined such a payment would not be appropriate. *See* Letter from Dopera to Thornton of 07/22/1997 (J.A. at 185). Holmes then appealed the denial of his interest claim to the Plan's Employee Benefits Administration Committee. The Committee affirmed. *130 *See* Letter from Dopera to Thornton of 10/10/1997 (J.A. at 191).

In March 1998, Holmes and Hollyfield filed a civil complaint against the Plan and its administrators. In Count One of the complaint, both Holmes and Hollyfield sought interest on their delayed benefits, as well as disgorgement of any additional profits the Plan may have earned on those benefits during the period of delay. Holmes also challenged the continuing 65% offset of his UMWA benefits against his Plan benefits, arguing that the UMWA benefits were not received from an "Employing

Company." *See* App. at 20. Count Two alleged violations of the fiduciary duty to disclose accurate information. *See id.* at 21.

The complaint also sought certification of two proposed classes of Plan participants and beneficiaries: (1) those whose benefits had been, were or would one day be erroneously offset; and (2) those who had received or one day would receive past-due benefits but neither interest nor disgorgement of unjust gains. On August 12, 1998, the District Court denied the motion for class certification without prejudice, granting Appellants leave to refile their motion after additional discovery.

During the course of discovery, Appellants sought to compel production of the legal memorandum prepared in response to Plaintiff Holmes' initial claim to interest on his delayed benefits. The defendants argued that the memorandum was protected by both the attorney-client privilege and the doctrine of work-product immunity. A Magistrate Judge rejected the attorney-client privilege claim, but concluded that the memorandum was protected from discovery under the work-product immunity doctrine. The District Court affirmed, concluding that the Magistrate Judge's reasoning was neither clearly erroneous nor contrary to law.

After answering Appellants' complaint, the defendants moved for summary judgment on both of its counts. With respect to Count One, the defendants argued that neither ERISA nor the Plan required payment of interest "when retroactively awarding benefits to a participant." *See* Def.'s Motion for S.J. at 4 (J.A. at 49). The District Court agreed, and granted summary judgment in favor of the defendants on Count One's interest claims.

The court also ruled that Plaintiff Holmes had failed to exhaust his administrative remedies with respect to his continuing-offset claim. Consequently, the court dismissed the claim without prejudice. Holmes subsequently reasserted the claim in a separate law suit. *See Holmes v. Pension Plan of Bethlehem Steel and Subsidiary Cos.,*

No. 99-CV-2369 (E.D. Pa., filed May 7, 1999) (J.A. at 591). The District Court also granted summary judgment for the Defendants on Count Two's breach-of-fiduciary-duty claims, ruling that they were barred by the statute of limitations. Thereafter, the court entered final judgment and closed the case.

On February 4, 1999, the District Court granted Appellants' motion for reconsideration of their interest claims based on our intervening decision in *Fotta v. Trustees of the United Mine Workers of Am. Health & Retirement Fund*, 165 F.3d 209 (3d Cir.1998) (holding that ERISA permits actions to recover interest on wrongly withheld benefits even where the benefits were paid before litigation). At the same time, the court also ruled that the doctrine of laches would limit the period for which interest could be recovered, and that Pennsylvania's general six-year statute of limitations provided the appropriate limitations period. See Mem. & Order of 02/04/1999 at 5-7 (J.A. at 528-30).

In a subsequent Memorandum and Order, the District Court ruled that Appellants were entitled to interest on their delayed benefits. But, based on a balancing of the equities, the court also ruled that such interest should be calculated at the post-judgment interest rate specified in 28 U.S.C. § 1961. See Mem. & Order of 03/25/1999 at 3-9 (J.A. at 528-30). Thus, *131 the court ordered the Plan to pay Appellants Holmes and Hollyfield \$1391.50 and \$459.68 respectively as interest on their delayed benefits. On March 25, 1999, the court closed the case for a second time.

A few days earlier, Appellants had renewed their motion for class certification, once more proposing two classes of prospective plaintiffs. Consequently, on April 7, Appellants moved the District Court to reconsider its order closing the case, and to consider their renewed motion for class certification. The District Court granted the motion to reconsider, but ultimately denied certification of both proposed classes. That denial was based on the court's conclusion that the proposed class definitions were

overly broad, and that neither class satisfied the prerequisites for certification. See Mem. & Order of 06/30/99 at 7-29 (J.A. at 607-29). The court then closed the case for a third time, and Appellants filed this appeal.

On appeal, Appellants argue that the District Court erred by: (1) awarding interest at the statutory rate rather than requiring the Plan to disgorge the actual profits it earned on their delayed benefits; (2) concluding that the doctrine of laches applied to limit the period for which they could recover interest; (3) denying certification of their proposed plaintiff classes; and (4) concluding that the legal memorandum they sought to discover was entitled to work-product immunity.

II. Discussion

A. Appellant's Interest Rate Claims

[1][2] Though ultimately awarded interest on their delayed pension benefits, Appellants argue that the District Court erred by calculating the award based on the post-judgment interest rate established at 28 U.S.C. § 1961. Relying on our decision in *Fotta*, Appellants argue that they are entitled to recover interest at the actual rate of return that the Pension Plan earned during the period it wrongfully delayed payment of their benefits. Our review of the District Court's interpretation and application of *Fotta* is plenary. See *Holmes v. Millcreek Township Sch. Dist.*, 205 F.3d 583, 589 (3d Cir.2000) (citing *Louis W. Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762, 765-66 (3d Cir.1994)). We conclude, however, that it is Appellants, not the District Court, who have misinterpreted *Fotta*.

[3] In *Fotta*, we held that a beneficiary may bring an action under ERISA against a pension plan "to recover interest on benefits the plan paid after some delay, but without the beneficiary having sued under ERISA" to recover the benefits themselves. See *id.* at 210. In earlier decisions, we had already recognized that prejudgment interest was available where the beneficiary had brought suit under ERISA to recover unpaid benefits. See *Fotta*, 165 F.3d at 212 (citing *Schake v. Colt Indus. Operating*

Corp. Severance Plan for Salaried Employees, 960 F.2d 1187, 1192 n. 4 (3d Cir.1992); Anthuis v. Colt Indus. Operating Corp., 971 F.2d 999, 1010 (3d Cir.1992)).

Those earlier decisions were based on recognition of the fact that

"[t]o allow the Fund to retain the interest it earned on funds wrongfully withheld would be to approve of unjust enrichment. Further the relief granted would fall short of making [the claimant] whole because he has been denied the use of the money which was his."

Id. (quoting Short v. Central States, Southeast and Southwest Areas Pension Fund, 729 F.2d 567, 576 (8th Cir.1984)). Those principles applied, we held in *Fotta*, whether the beneficiary ultimately recovered the wrongfully withheld benefits through judicial action, or through non-judicial means. *See id.*

[4][5] Although *Fotta* makes clear that interest on delayed ERISA benefits is an equitable remedy left to the discretion of the trial court, *id.* at 213-15, we also held that "interest is presumptively appropriate." *Id.* at 214. We did not, however, *132 offer extensive guidance for deciding what rate of interest is appropriate in a given case. Recognizing the need to fill this gap, as well as its discretion in doing so, the District Court in this case turned to *Fotta's* two primary justifications for interest awards: (1) ensuring full compensation to the plaintiff; and (2) preventing unjust enrichment. *See* Mem. of 03/25/1999 at 5, (J.A. at 571) (citing *Fotta*, 165 F.3d at 213). In considering these two justifications, the District Court concluded that *Fotta* did not qualify one as more important than the other, and that each could result in a different interest rate. *See id.*

Focusing solely on compensating the plaintiff, the court concluded that it would be inappropriate to award interest at a rate higher than the essentially zero-risk yield on Treasury Bills provided for in 28 U.S.C. § 1961. *See id.* at 6. In the court's view, it would be "highly speculative" to simply assume

that Appellants would have invested their benefits in higher-risk, higher-yield securities, and that to so assume would be to reward them for risks they did not take. *See id.* On the other hand, if the only objective were to prevent unjust enrichment, disgorgement of the defendant's actual profits would be the appropriate measure of interest to be awarded. *See id.* Ultimately, the District Court concluded that the best way to resolve this apparent conflict was to resort to equitable principles. *See id.* at 7.

Balancing the equities, the District Court concluded that requiring the Plan to disgorge its profits "would be essentially punitive in nature," and that punitive measures were inappropriate where the delayed payment of benefits was inadvertent rather than intentional. *See id.* The court further concluded that "the fact that the Appellants have been paid amounts on all of the years, rather [than] the amount they are legally entitled to is further evidence of good faith." *Id.* at 7-8. [FN1] Therefore, the court ruled, restitution was the most equitable measure of interest due, and restitution would be achieved by awarding interest at the Treasury Bill yield rate as calculated according to the analogous provisions in 28 U.S.C. § 1961. Performing the necessary calculations, the District Court then awarded Appellants interest at the rate of 5.01%. *See id.* at 575-76.

[FN1] The court had previously concluded that had Appellants been forced to sue for recovery of their past-due benefits, the statute of limitations would have barred them from recovering benefits due more than six years prior to the filing of their suit.

Appellants argue that they are entitled to recover the much higher rate of interest that the Plan actually earned while their benefits were withheld, approximately 12%, and allege several flaws in the District Court's analysis. First, they argue that the District Court erred by concluding that requiring the Plan to disgorge all profits earned by delaying

payment of their benefits would be "punitive in nature." See Appellants' App. at 26. "As a matter of logic," they argue, "when a defendant is stripped of a benefit it had no right to retain, it is not being 'punished.'" *Id.* Although we can find flaws in Appellants' own analysis, we ultimately conclude that whether disgorgement is deemed punitive or otherwise, the District Court did not abuse its discretion by declining to adopt it as a remedy in this case.

As an initial matter, we note that any return the Plan realized in excess of the risk-free yield on Treasury Bills during the relevant period would be the result of the Plan's investment expertise and labor, as well as additional risk that the Plan, not Appellants, bore. Had the Plan's investments yielded a lower rate of return than Treasury Bills, or even a loss, it would have been the Plan rather than Appellants that would have been required to bear the resulting loss.

Indeed, as Appellants concede, in such circumstances they would have sought, and likely would have recovered, interest based on the Treasury Bill yield or some other "minimal standard rate." Appellant's Br. *133 at 29 n. 2. Consequently, requiring the Plan to disgorge profits earned as a result of risks irreversibly borne and labor otherwise uncompensated could be viewed as punitive. Alternatively, awarding interest at a rate higher than the statutory rate might be viewed as punitive merely because it would be higher than necessary to compensate Appellants. See *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 619 (6th Cir.1998) (concluding that awarding interest at a rate that would overcompensate the plaintiff would be punitive and would contravene "ERISA's remedial goal of simply placing the plaintiff in the position he or she would have occupied but for the defendant's wrongdoing.").

In any event, what matters is not how the District Court characterized disgorgement, but whether its balancing of the equities amounted to an abuse of discretion. We find no such abuse in the District Court's conclusion that the Plan had acted in good

faith, and that Appellants would be fully compensated by interest paid at the statutory post-judgment rate.

Appellants next argue that deeming disgorgement of profits as punitive defies the law as well as logic. The District Court's approach, they argue, contravenes *Fotta's* "paramount goal" of deterring ERISA violations by denying wrongdoers the profits of their misconduct. See Appellant's Br. at 26. Again, however, the argument misconstrues our decision in *Fotta*. Deterrence was not the paramount goal in *Fotta*, but only one of the decision's two primary goals--providing restitution and preventing unjust enrichment "at beneficiaries' expense." *Fotta*, 165 F.3d at 214 (emphasis added). Interest earned in excess of what Appellants themselves would have earned is not earned at their expense.

Appellants next argue that the District Court "impermissibly imposed a requirement of" culpability on the Defendants' part not found in *Fotta*. See Appellants' Br. at 27. But the mere fact that *Fotta* did not impose a requirement of culpability does not mean that the District Court, in its discretionary application of equitable principles, could not do so.

In their final argument on this issue, Appellants contend that although this court "has not yet ruled on the appropriate measure of prejudgment interest under ERISA," it "has made clear that selection of an appropriate rate of prejudgment interest must be made in light of the goals of the statute involved." *Id.* at 31. They then argue, implicitly rather than expressly, that only disgorgement can effectuate ERISA's goals.

As an initial matter, the cases cited by Appellants in support of this argument did not hold that a statutorily-established rate of interest was *per se* inadequate, as Appellants imply. Rather they merely upheld the relevant decision maker's discretion to award interest at a higher rate according to equitable principles. See *Peterson v. Crown Financial Corp.*, 661 F.2d 287, 292-93 (3d Cir.1981) (holding

that where a "claim sounds in restitution, it calls for the exercise of the court's broader equitable powers," leaving the trial judge with the discretion to award interest above the statutory rate); North Cambria Fuel Co., Inc. v. NLRB, 645 F.2d 177, 181 (3d Cir.1981), cert. denied, 454 U.S. 1123, 102 S.Ct. 970, 71 L.Ed.2d 110 (1981) (holding that the NLRB's "broad discretion in fashioning remedies ... extends to the imposition of an interest rate.").

[6] Additionally, ERISA's goals do not mandate total disgorgement. As we recently noted, "ERISA does no more than protect the benefits which are due to an employee under a plan." Bennett v. Conrail Matched Savings Plan, 168 F.3d 671, 677 (3d Cir.1999). As the United States Court of Appeals for the Sixth Circuit has recognized, the purpose of granting equitable relief under ERISA is simply to place "the plaintiff in the position he or she would have occupied but for the defendant's wrongdoing." Ford, 154 F.3d at 619.

*134 Awarding Appellants in this case interest at a higher rate than they would have earned had they invested their benefits on their own behalf would go beyond making them whole. Therefore, ERISA's goals can be achieved by awarding interest below the rate actually earned by the Plan. Thus, Appellants' own argument on this point weighs in favor of affirming the District Court's decision to award interest at the statutory rate. Accordingly, we will affirm.

B. Laches

[7] Though the District Court awarded Appellants interest on their delayed pension benefits, it also ruled that the doctrine of laches limited the period for which interest could be recovered. According to the court, "under Pennsylvania law, in the absence of fraud or concealment, laches generally follows the statute of limitations." Mem. & Order of 02/04/1999 at 5 (J.A. at 528) (citing United National Ins. Co. v. J.H. France Refractories Co., 542 Pa. 432, 668 A.2d 120 (1995)). Concluding that there was no fraud or concealment in this case, the District Court determined that Pennsylvania's general

six-year statute of limitations was the most appropriate limitations period, and restricted the period for which Appellants could recover interest accordingly. See *id.* at 7. On appeal, Appellants do not challenge the District Court's findings regarding the absence of fraud or concealment. Rather, they argue that the District Court misinterpreted United National Ins. Co., and erred in its application of the laches doctrine. We agree.

[8][9] As an equitable doctrine, the decision to apply laches is left to the sound discretion of the District Court. See Gruca v. U.S. Steel Corp., 495 F.2d 1252, 1258 (3d Cir.1974). Consequently, appellate review of a lower court's application of the doctrine is limited to a review for abuse of discretion. See *id.* Nevertheless, in the exercise of its discretion, the District Court must correctly apply the governing law. In this case, the District Court did not make the necessary findings and we must remand.

In United National Ins. Co., the Pennsylvania Supreme Court did, as the District Court correctly noted, iterate that " '[i]n the absence of fraud or concealment, it is a general rule that laches follows the statute of limitations.' " 668 A.2d at 124 (quoting Silver v. Korr, 392 Pa. 26, 139 A.2d 552, 555 (1958)), and (citing City of Philadelphia v. Louis Labs., Inc., 201 Pa.Super. 16, 189 A.2d 891, 893 (1963)). But the court's opinion did not discuss, much less define, the doctrine of laches itself.

[10] Under Pennsylvania law, the doctrine of laches has two elements: (1) inexcusable delay; and (2) prejudice. See, e.g., Jacobs v. Halloran, 551 Pa. 350, 710 A.2d 1098, 1102 (1998) ("Laches arises when a defendant's position or rights are so prejudiced by length of time and inexcusable delay, plus attendant facts and circumstances, that it would be an injustice to permit presently the assertion of a claim against him.") (emphasis in the original); DiLucia v. Clemens, 373 Pa.Super. 466, 541 A.2d 765 (1988) ("In order to prevail on his assertion of the equitable defense of laches, [the defendant] must establish both undue delay from [the plaintiff's]

failure to exercise due diligence and prejudice resulting from the delay."). See also Burke v. Gateway, 441 F.2d 946, 949 (3d Cir.1971) (noting that before a district court can apply the doctrine of laches, it must find "inexcusable delay in light of the equities of the case and prejudice to the defendant."). The District Court applied the doctrine of laches, but did not determine that its two required elements were satisfied. Accordingly, we will reverse the District Court on the issue of laches, and remand for a proper application of the doctrine.

C. Class Certification

After the District Court denied Appellants' initial motion for class certification *135 without prejudice, the parties undertook discovery on the issue of whether class certification would be proper. Thereafter, Appellants renewed their motion, seeking certification of the following two classes of plaintiffs:

Class One [Offset Claims]:

All persons who retired on or after July 31, 1977 and their beneficiaries who are or were entitled to pension benefits under the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies but whose benefits were denied or reduced due to their receipt of benefits from another pension plan or fund that were attributable to employment with a former employer that was not an "Employing Company" within the meaning of the Plan.

Class Two [Interest Claims]:

All persons, including beneficiaries, who are or were entitled to pension benefits under the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies whose benefits were delayed, reduced or denied by the Plan for more than 90 days and who have received or will receive a retroactive payment by the Plan of such withheld pension benefits.

Mem. & Order of 06/30/99 at 4 (J.A. at 604) (citing Pls.' Renewed Motion at 1).

In a 29-page Memorandum and Order, the District Court denied certification of both proposed

classes, finding them deficient in several respects. On appeal, Appellants argue that the District Court's certification analysis contains numerous errors. They also claim that the "principle basis for denying class certification was the fact that after the renewed class motion was filed, but before the class ruling, the court elected to grant final relief to the two named Appellants and their claims were no longer actively pending." Appellants' Br. at 39-40 (citing Mem. & Order of 06/30/1999 at 8-10 (J.A. at 608-10)). That claim grossly mischaracterizes the District Court's decision.

1. Requirements for Class Actions

Under the Federal Rules of Civil Procedure, a civil suit may proceed as a class action only if it satisfies four prerequisites. Accordingly,

[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

[11][12][13] In addition to the requirements expressly enumerated in Rule 23, class actions are also subject to more generally applicable rules such as those governing standing and mootness. For instance, a plaintiff who lacks the personalized, redressable injury required for standing to assert claims on his own behalf would also lack standing to assert similar claims on behalf of a class. See Davis v. Thornburgh, 903 F.2d 212, 222 (3d Cir.1990). Additionally, even a plaintiff with standing is generally disqualified from representing a class if his individual claim becomes moot before the proposed class is certified. See Rosetti v. Shalala, 12 F.3d 1216, 1225 (3d Cir.1993); Lusardi

v. Xerox Corp., 975 F.2d 964, 974 (3d Cir.1992) (citations omitted). Not surprisingly, however, there are exceptions to this general rule. One such exception is at issue in this case.

[14] So long as a class representative has a live claim at the time he moves for class certification, neither a pending motion nor a certified class action need be dismissed if his individual claim subsequently becomes moot. *See id.* at 1228. If, on the other hand, the putative class representative's individual claim becomes *136 moot before he moves for class certification, then any subsequent motion must be denied and the entire action dismissed. *See Lusardi*, 975 F.2d at 978.

2. Standard of Review

[15][16] We review a decision to certify, or to deny certification of, a class action for abuse of discretion. *See In re Prudential Ins. Co. of Am. Sales Litig.*, 148 F.3d 283, 299 (3d Cir.1998) (citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 782 (3d Cir.1995)); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 923 (3d Cir.1992). We may find an abuse of discretion "where the 'district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.'" *Id.* (quoting *In re General Motors Corp.*, 55 F.3d at 783) (additional quotation marks and citations omitted).

3. Class One (Offset Claims)

The District Court identified multiple, alternative grounds for denying certification of the Class One "offset" claims. First, it concluded that the proposed class had been defined too broadly to permit certification. Stated differently, the District Court concluded that Appellants sought to assert claims on behalf of the proposed class that they had not, and could not, assert on their own behalf. Consequently, they were not qualified to represent the proposed class. Second, the court concluded that even if the proposed class were properly defined, it failed to satisfy three of Rule 23(a)'s four prerequisites for certification. Appellants raise separate

challenges to each of these conclusions.

[17] The District Court based its conclusion that proposed Class One was overbroad on several factors. First, the court noted that after it had dismissed Plaintiff Holmes' "continuing-offset claim" without prejudice, he had reasserted that claim in a separate lawsuit. Consequently, there was no live continuing-offset claim pending before the court for which a class could be certified. *See Mem. & Order of 06/30/99 at 8 (J.A. 608)*. The court then noted that both Appellants had settled their "mistaken-offset claims" through administrative means before filing their complaint seeking interest on those claims. Consequently, they lacked live claims at the time they filed their motion for class certification, requiring that it be denied. *See id.* at 8- 10.

On appeal, Appellants argue that under the law of this Circuit, the fact that their mistaken-offset claims had become moot did not disqualify them from representing the proposed class, and thus did not mandate denial of certification. Again, they miscomprehend the relevant law. The status of their own claims would be irrelevant only if those claims were live at the time they moved for class certification. Their claims, however, were moot before they even filed their complaint. Consequently, they are disqualified from representing the proposed class and the District Court did not err by denying certification. *See Lusardi v. Xerox Corp.*, 975 F.2d 964, 978 (3d Cir.1992).

In addition to concluding that Appellants lacked the live claims required for class certification, the District Court also concluded that certification of proposed Class One should be denied on several alternative grounds. For instance, the court concluded that the proposed class was "so highly diverse and so difficult to identify that [it] is not adequately defined or ascertainable." *Mem. & Order of 06/30/1999 at 12 (J.A. 612)* (listing six areas that would require detailed inquiry). In addition, the court concluded that even if the proposed class had been properly defined, it did not satisfy Rule 23(a)'s

commonality, typicality, and adequacy-of-representation requirements. *See id.* at 17-19, 23, 25; *see also* Fed.R.Civ.P. 23(a)(2)-(4).

On appeal, Appellants raise separate challenges to each of these alternative bases *137 for denying certification. Here we need not decide whether the District Court erred, because the fact that Appellants lacked live claims at the time they moved for certification bars certification of proposed Class One in any event. Consequently, there is no need to consider the validity of Appellants' additional challenges, and denial of certification of Class One will be affirmed.

4. Class Two (Interest Claims)

As it did with respect to proposed Class One, the District Court identified several alternative grounds for denying certification of proposed Class Two. First, the District Court concluded that Class Two was defined too broadly "because it includes every plan participant, past or future, who has received or will be receiving a delayed payment of benefits." Mem. & Order of 06/30/1999 at 13 (J.A. 613) (citation omitted). The court had "particular misgivings with respect to the 'future' members of the class because of the infeasibility of auditing the Plan in order to determine whether each participant may or may not have some present or future claim regarding delayed benefits." *Id.* (citation omitted). The court further concluded that the proposed class was "ill-defined" because it included individuals who had received or may one day receive delayed benefits for any reason. In contrast, Appellants' claims focused on "incorrect offsets since the Plan's amendment in 1977." *Id.* at 13-14.

Appellants argue that the District Court incorrectly concluded that proposed Class Two was overbroad. *See* Appellants' Br. at 43-45. They do not, however, expressly claim that the conclusion was "clearly erroneous" as required for reversal on appeal. Nor, in fact, are the District Court's conclusions clearly erroneous.

[18] Appellants first argue that "[a]lthough the

court believed that determining interest for the members of Class Two would require individualized determinations, this is not correct." *Id.* at 44 (internal citation omitted). Yet Appellants fail to explain why such a belief is incorrect. Based on their subsequent arguments, Appellants appear to believe that the interest entitlement of every class member can be calculated using a single, objective formula, and that the parties, not the court, would be responsible for performing the requisite calculations. *See id.* Such a belief ignores *Fotta's* clear holding that interest on delayed ERISA benefits is an equitable remedy dependent upon the individual facts of each claim. Thus, there is no single, objective formula for calculating each class member's interest entitlement. Moreover, it is the province of the court, not the parties, to balance the equities in each claim. Therefore, the District Court's conclusion that individualized determinations would be required is not clearly erroneous.

Appellants next argue that even if individualized determinations are required, that fact alone is not a "legally valid ground to deny class certification." *Id.* at 44. But the cases on which Appellants rely do not support their argument. For instance, in *Bogossian v. Gulf Oil Corp.*, we held that:

it has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate. *E.g., Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 457 (E.D.Pa.1968); *Dolgow v. Anderson*, 43 F.R.D. 472, 490-91 (E.D.N.Y.1968). If for any reason the district court were to conclude that there would be problems involved in proving damages which would outweigh the advantages of class certification, it should give appropriate consideration to certification of a class limited to the determination of liability. *See Rule 23(c)(4)(A)*.

561 F.2d 434, 456 (3d Cir.1977) (emphasis added). As already noted, the issue of *138 liability itself requires an individualized inquiry into the

equities of each claim. Thus, the District Court did not err by concluding that proposed Class Two was overly broad and we will affirm denial of certification.

D. Work-Product Immunity

[19] Before seeking relief in the District Court, Appellant Holmes pursued his interest claim through administrative channels. His original claim to interest prompted a Plan attorney to prepare a legal memorandum analyzing the merits of the claim. Once judicial action had been initiated, Appellants moved to compel production of that memorandum during discovery. A Magistrate Judge denied the motion, concluding that the memorandum was protected from discovery by the doctrine of work-product immunity. See Mem. of 01/08/1999 at 5-6 (J.A. at 514-15). Appellants then appealed to the District Court, which affirmed. In the final issue raised in their appeal, Appellants argue that the Magistrate Judge erred by denying their production request, and that the District Court erred by affirming the Magistrate Judge's order.

[20] We review discovery orders for abuse of discretion. See Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n, 107 F.3d 1026, 1032 (3d Cir.1997) (citing Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 90 (3d Cir.1987); Marroquin-Manriquez v. INS, 699 F.2d 129, 134 (3d Cir.1983)). We agree that the Magistrate Judge erred, and that the District Court thus erred by affirming denial of Appellants' motion to compel discovery.

[21][22][23] The doctrine of work-product immunity "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." In re Grand Jury (Impounded), 138 F.3d 978, 981 (3d Cir.1998) (quoting United States v. Nobles, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975)). A party claiming work-product immunity bears the burden of showing that the materials in question "were prepared in 'the course of preparation for possible litigation.'" Haines v. Liggett

Group, Inc., 975 F.2d 81, 94 (3d Cir.1992) (quoting Hickman v. Taylor, 329 U.S. 495, 505, 67 S.Ct. 385, 91 L.Ed. 451 (1947)); Conoco, Inc. v. United States Dept. of Justice, 687 F.2d 724, 730 (3d Cir.1982). Work product prepared in the ordinary course of business is not immune from discovery.

If the party asserting the privilege bears its burden of proof, the party seeking production may obtain discovery "only upon a showing that the party ... has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. 26(b)(3).

In concluding that the memorandum at issue in this case was protected by work-product immunity, the Magistrate Judge noted that the Plan's attorney had prepared it shortly after Plaintiff Holmes' attorney placed a telephone call to a subordinate of the Plan's administrator. In that telephone conversation, Holmes' attorney claimed that Holmes was entitled to interest on his delayed benefits and further asserted that failure to pay interest violated ERISA. See Mem. of 01/08/1999 at 2 (J.A. 511). Thereafter, the Plan's attorney prepared a memorandum analyzing the merits of Holmes' interest claim.

Based on this factual background, the Magistrate Judge concluded that "it is apparent the [memorandum] was prepared in anticipation of possible future litigation. In addition, it is reasonable to conclude that the document would not have been prepared but for the prospect of litigation." *Id.* at 6. The District Court determined that the Magistrate Judge's reasoning was "not clearly erroneous or contrary to law," and entered an order affirming denial of Appellants' request for production. See Dist. Ct. Order of 02/03/1999 at 1-2 n. 1 (J.A. 522-23).

*139 The Magistrate Judge's conclusions may be reasonable, but they are based on nothing more than assumptions. There is nothing in the record indicating that the Defendants have carried their burden

of showing that the memorandum was, in fact, prepared in anticipation of possible litigation. Indeed, the Defendants appear to have claimed nothing more than that "the memorandum was written in connection with the claim by Plaintiff Holmes ... and ... is, therefore, privileged and immune from discovery under ... the work product doctrine." Def.s' Answers to Pl.s' Second Set of Interrogs. at 14 (J.A. 517). The mere fact that the memorandum was prepared "in connection with" Plaintiff Holmes' administrative claim to interest on his delayed benefits hardly establishes that it was prepared in anticipation of litigation. The Magistrate Judge abused his discretion in assuming otherwise. Therefore, we will reverse the order denying Appellants' request for production.

E. The Cross Appeal

Raising a single issue in their cross appeal, the Cross-Appellants (defendants below) suggest that our decision in *Fotta* is:

unclear to the extent it does not address situations in which a participant brings a claim for interest, but the plan at issue expressly disallows such payment, or the plan administrator, who has discretionary authority, has construed the plan to mean that such payment is not allowed.

Cross-Appellants' Br. at 37. They therefore invite us to modify *Fotta* "to hold that under appropriate circumstances, plan provisions will be given effect and deference paid to plan administrators' decisions to deny interest on delayed benefits and overpayments." *Id.* at 37-38.

[24] We decline the invitation for three reasons. First, the Cross-Appellees did not raise this issue below, and have thus waived it on appeal. See *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1115 (3d Cir.1993). Second, the Bethlehem Steel Plan at issue does not contain a provision preventing the payment of interest on delayed benefits. Consequently, the Cross-Appellees' arguments on this point are entirely hypothetical, lacking the concrete, particularized facts necessary to support a sound judicial decision.

Third, only an *en banc* court can overturn *Fotta's* holding that interest on delayed payment of plan benefits is an implied term of the plan contract.

See *Fotta*, 165 F.3d at 213-14; see also United States Court of Appeals for the Third Circuit, Internal Operating Procedure 9.1 (Policy of Avoiding Intra-circuit Conflict of Precedent). Therefore, we decline to entertain the arguments presented in the cross appeal.

III. Conclusion

The District Court correctly concluded that interest awards on delayed employment benefits are an equitable remedy left to its discretion. The court did not abuse that discretion by awarding Appellants interest at the post-judgment statutory rate, and we affirm the award. Nor did the District Court abuse its discretion in refusing to certify the two classes of plaintiffs proposed in Appellants' complaint and subsequent motion for certification. Accordingly, we also affirm the District Court's denial of class certification.

The District Court did err in two respects, however. First, the court erred by applying the doctrine of laches without first determining that its two required elements were satisfied. Consequently, we reverse on this issue and remand the case for further findings of fact. Additionally, the court erred by concluding that the legal memorandum Appellants sought to discover was entitled to work-product immunity. The memorandum may well be entitled to immunity, but, on this record, the Defendants have not carried their burden of showing that it is. Therefore, we reverse the District Court's ruling on work-product immunity and remand for further findings.

•Arnold HOLMES: Lawrence Hollyfield, Fiduciary to the Estate of Collins Hollyfield. v. PENSION PLAN OF BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES; Employee Benefits Administration Committee of Bethlehem Steel Corporation; Michael P. Dopera; John/Jane Does 1-10, Arnold HOLMES and Lawrence Hollyfield, Fiduciary to the Estate of original named

plaintiff Collins Hollyfield, individually and on behalf of all members of the proposed class and, 1999 WL 33613376 (Appellate Brief) (C.A.3 1999), Reply Brief for Appellants/Cross-Appellees

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•Arnold HOLMES: Lawrence Hollyfield, Fiduciary to the Estate of Collins Hollyfield, v. PENSION PLAN OF BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES; Employee Benefits Administration Committee of Bethlehem Steel Corporation; Michael P. Dopera; John/Jane Does 1-10; Arnold HOLMES and Lawrence Hollyfield, Fiduciary to the Estate of original named plaintiff Collins Hollyfield, individually and on behalf of all members of the proposed class and, 1999 WL 33613497 (Appellate Brief) (C.A.3 1999), Brief of Cross-Appellants/Appellees

•Arnold HOLMES: Lawrence Hollyfield, Fiduciary to the Estate of Collins Hollyfield, v. PENSION PLAN OF BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES; Employee Benefits Administration Committee of Bethlehem Steel Corporation; Michael P. Dopera; John/Jane Does 1-10; Arnold HOLMES and Lawrence Hollyfield, Fiduciary to the Estate of original named plaintiff Collins Hollyfield, individually and on behalf of all members of the proposed class and, 1999 WL 33613498 (Appellate Brief) (C.A.3 1999), Reply Brief of Cross-Appellants/Appellees

•Arnold HOLMES: Lawrence Hollyfield, Fiduciary to the Estate of Collins Hollyfield, v. PENSION PLAN OF BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES; Employee Benefits Administration Committee of Bethlehem Steel Corporation; Michael P. Dopera; John/Jane Does 1-10; Arnold HOLMES and Lawrence Hollyfield, Fiduciary to the Estate of original named plaintiff Collins Hollyfield, individually and on behalf of all members of the proposed class and, 1999 WL 33613662 (Appellate Brief) (C.A.3 1999), Brief for Appellants/Cross-Appellees

213 F.3d 124, 47 Fed.R.Serv.3d 339, 24 Employee Benefits Cas. 2243