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9

UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

11

SAN JOSE DIVISION

12

13

SECURITIES AND EXCHANGE  
COMMISSION,

14

Plaintiff,

15

v.

16

CARL W. JASPER,

17

Defendant.

18

19

CASE NO. CV 07-6122 JW (HRL)

DEFENDANT CARL W. JASPER'S NOTICE  
OF MOTION AND MOTION TO COMPEL  
RESPONSES TO FIRST SET OF REQUESTS  
FOR PRODUCTION; MEMORANDUM OF  
POINTS AND AUTHORITIES

Date: November 10, 2009  
Time: 10:00 a.m.  
Place: Courtroom 2, Fifth Floor  
Hon. Howard R. Lloyd

20

PLEASE TAKE NOTICE that Defendant Carl W. Jasper's Motion to Compel  
21 Responses to First Set of Requests For Production is set to be heard before the Honorable R.  
22 Lloyd, Courtroom 2, 5<sup>th</sup> Floor, United States District Court, 280 1<sup>st</sup> St., San Jose, California on  
23 November 10, 2009 at 10:00 a.m.

24

**STATEMENT OF ISSUES TO BE DECIDED**

25

Whether plaintiff Securities and Exchange Commission can withhold notes and  
26 documents from the only nonprivileged interview with the now-deceased head of the Maxim  
27 Integrated Products, Inc. ("Maxim") Interim Options Committee based on work product,  
28

1 deliberative process, and settlement communications grounds in this options backdating case?

2 Jasper's original request was as follows:

3 **REQUEST FOR PRODUCTION NO. 2:**

4 All DOCUMENTS that refer to, relate to, or reflect any communications,  
5 discussions, statements, meetings, interviews, teleconferences involving YOU and John F.  
6 Gifford or any of his attorneys. This request is meant to include (but is not limited to) all notes  
7 and memoranda of statements by Mr. Gifford, notes of statements by his representatives,  
8 memoranda or communications referencing any such statements, documents exchanged or  
9 referred to in any discussions, and any PowerPoint presentations shown or provided to YOU by  
10 Mr. Gifford or his counsel.

11 The SEC's response was as follows:

12 **RESPONSE TO REQUEST NO. 2:**

13 The general objections and objections to definitions and instructions are hereby  
14 incorporated. The Commission further objects on the grounds that the Request is vague and  
15 ambiguous in its undefined use of the terms "refer to," "relate to," "reflect," and  
16 "representatives." The Commission also objects to the extent that the request calls for documents  
17 protected from disclosure by the attorney-client privilege and the attorney work-product doctrine.

18 Subject to, and without waiving the foregoing objections, the Commission  
19 responds that in its Rule 26 disclosures, the Commission disclosed a cover letter from Steve  
20 Mansfield dated July 25, 2007 and documents numbered MXM SC 29032 and MXM SC 29043.  
21 Subject to, and without waiving the foregoing objections, the Commission also will produce  
22 additional non-privileged documents that evidence communications between the staff and Mr.  
23 Gifford.

24 In a privilege log it produced with the responses, the SEC listed several sets of  
25 handwritten notes from the SEC's September 11, 2007 interview with Gifford, and in a follow up  
26 letter dated February 18, 2009, identified another set of notes. *See infra* \_\_\_. It is on these notes  
27 that Mr. Jasper now moves to compel production.

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**MEMORANDUM****I. INTRODUCTION**

The SEC has charged former Maxim CFO Carl Jasper with intentionally backdating and failing to expense stock option grants awarded by the Maxim Interim Stock Options Committee. The SEC's key allegation (in Paragraph 27 of the complaint) is that Maxim CEO and Silicon Valley legend Jack Gifford – the sole member of the options “Committee” – handwrote notes to defendant Jasper, telling him to expense certain option grants, but that Jasper ignored these instructions. First Amended Complaint (“FAC”) ¶¶ 19, 27. The SEC charged Gifford only with negligently failing to force Jasper to follow his instructions, and Gifford immediately settled the case “without admitting or denying the allegations.”<sup>1</sup> Mr. Jasper, however, faces fraud charges, significant penalties, and a lifetime bar on continuing his career as a public company officer.

Throughout the SEC's lengthy investigation, the “Committee” has responded only once in an unprivileged setting to questions about stock options awards and these handwritten notes. That was on September 11, 2007, when three SEC staffers interviewed Gifford for several hours. For some reason, the SEC broke from its usual practice in this investigation by declining to swear the witness and to transcribe the interview. Fortunately, the SEC complied with its recent procedures manual and ensured a staff accountant was present to take notes and to be available as a witness.<sup>2</sup>

Whatever Gifford said during this interview is important to discovering the truth

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<sup>1</sup> Declaration of Margaret A. Tough in Support of Carl W. Jasper's Motion to Compel Responses to First Set of Requests for Production (“Tough Decl.”), Ex. 3 (SEC Litigation Release 20381, dated December 4, 2007, announcing filing of complaints against Gifford and Maxim on the one hand, and Jasper on the other). Both Maxim and Gifford had pre-arranged settlements with the SEC, which were announced as part of the same press release. *Id.* Gifford agreed to pay approximately \$800,000 in financial penalties, including “a portion of his bonuses.” *Id.* See also, *id.*, Ex. 4.

<sup>2</sup> Privilege logs produced by the SEC reveal that there are four sets of notes from this interview – two sets by attorneys and two more by SEC accountant Michael Fortunato. Tough Decl., Exs. 5, 6. This comports with the SEC's Enforcement Manual, which recommends that at least two staffers attend an interview in part because “one of the staff members may subsequently need to serve as a witness at trial.” Tough Decl., Ex. 7 at 76.

1 about the Maxim options program. As the sole member of the options “committee,” he awarded  
 2 the options, he chose the price, and he picked the dates. FAC ¶¶ 19, 22. He also scrawled the  
 3 Paragraph 27 notes in his own hand. In fact, much of the recent discovery in this litigation has  
 4 focused on whether or not the Gifford notes are real – or were themselves fabricated by Gifford  
 5 during the investigation to exonerate himself and to blame his employees. Whatever Gifford told  
 6 the SEC about stock options backdating at Maxim passes any discovery relevance test, and the  
 7 SEC has not argued otherwise.<sup>3</sup> That Gifford suddenly passed away during negotiations for his  
 8 deposition does not make his unprivileged statements any less likely to lead to the discovery of  
 9 admissible evidence. To the contrary, the fact that he is no longer available to testify strongly  
 10 favors disclosure.

11 The SEC, however, refuses to reveal what Gifford said. Its basis for keeping this  
 12 information to itself is the complete laundry list of possible objections: work product,  
 13 deliberative process, and settlement communication “privileges.”<sup>4</sup> It has even threatened Jasper  
 14 with sanctions for making this motion.<sup>5</sup> As we explain below, none of these objections is  
 15 appropriate. We respectfully request that the Court order the SEC immediately to disclose its  
 16 notes from the Gifford interview and the documents reviewed with Gifford during that  
 17 interview.<sup>6</sup>

---

18  
 19 <sup>3</sup> In its summary judgment motion, filed yesterday, the SEC argued that there was a  
 20 “substantial need” for similar testimony from Jasper – regarding his “first-hand recollection  
 21 of Maxim’s backdating practice” and related topics. SEC’s Motion for Summary Judgment  
 (Dkt. #63) at 24. The same is true of the only statements on these subjects from the now-  
 deceased option “Committee,” Jack Gifford.

22 <sup>4</sup> Jasper previously tried to deal with the SEC’s refusal to disclose its notes by noticing a  
 23 30(b)(6) representative deposition of the SEC regarding Gifford’s statements in the  
 24 interview. The SEC moved successfully for a protective order. The Court emphasized,  
 however, that it was *not* ruling on whether the notes themselves were discoverable. *See*  
 Tough Decl., Ex. 8 (2/24/09 Tr. at 18:22-23) (“this is not a motion to compel production of  
 [the interview notes]”); Dkt. # 52 at 2:20-21 (“Neither the Commission’s document  
 production nor its interrogatory responses are at issue here.”).

25 <sup>5</sup> Tough Decl., Exs. 9 and 10.

26 <sup>6</sup> In addition to the notes, Jasper has asked the SEC to identify the documents about which it  
 27 questioned Gifford. Tough Decl., Ex. 11. The SEC has taken the position that the identity of  
 28 these documents – *which it turned over to Gifford’s lawyers in the days preceding the*  
*interview* – are protected attorney work product. *Id.*, Ex. 12. Somehow, documents revealed

1 **II. FACTUAL BACKGROUND**

2 Back in May 2005, an associate professor of the business school at the University  
3 of Iowa published a study in an academic journal which suggested the possibility of pervasive  
4 stock options backdating throughout corporate America.<sup>7</sup> His study was based on publicly  
5 available information and it gained widespread attention in the mainstream media. After Merrill  
6 Lynch identified Maxim as a potential backdater in a May 2006 report (again based on public  
7 information), the SEC began investigating Maxim and other companies.<sup>8</sup>

8 **A. The Maxim Stock Options “Committee”**

9 Maxim’s CEO, Jack Gifford, made no secret of his deep-seated opposition to  
10 taking expense charges for stock option grants. He sent a six-page letter to the FASB arguing  
11 against expensing options in 2003. Later, he sent out a press release railing against option  
12 expensing rules, asserting that Maxim “believes that options expensing is bad accounting, a bad  
13 rule.” He even referred readers to a website established to promote his objections:  
14 [www.expensingisbadaccounting.com](http://www.expensingisbadaccounting.com).<sup>9</sup>

15 What Gifford thought about stock options mattered at Maxim. He was Maxim’s  
16 larger-than-life founder, CEO, and Chairman of the Board.<sup>10</sup> Gifford was also appointed by his  
17 Board to be the sole member of Maxim’s Interim Option Committee, and was responsible for  
18 selecting the dates on which *all* options were granted for employees and directors. FAC at ¶¶ 19,

---

19 to counsel for an adverse party two years ago are magically transmogrified into protected  
20 work product?

21 <sup>7</sup> Professor Lie’s study was based on a review of publicly-available data concerning thousands  
22 of executive stock option grants from 1992-2002. His article is cited as key to one of the  
SEC’s expert’s reports in this case.

23 <sup>8</sup> Tough Decl., Ex. 13. When the backdating allegations arose, Maxim appointed a Special  
24 Committee to investigate. *Id.* The SEC ultimately investigated over 100 companies for  
alleged backdating, including such notable names as Apple, Barnes & Noble, Home Depot,  
Pixar and McAfee. *See, e.g.*, Tough Decl., Ex 14.

25 <sup>9</sup> Tough Decl., Exs. 15 and 16. While these statements were a matter of public record as early  
26 as 2003, we know for certain that the SEC received copies of these documents from Maxim  
in January 2007. *Id.*, ¶¶ 18-20, Ex. 17.

27 <sup>10</sup> In fiscal year 2007 alone, when he resigned from the company in the wake of the backdating  
28 allegations and was negotiating with the SEC, Gifford earned tens of millions of dollars in  
compensation from Maxim. Tough Decl., Ex. 18 at 56-57.

1 22. He alone authorized each and every employee and director stock option grant that the SEC  
2 now alleges was backdated.<sup>11</sup>

3 Gifford was the central figure at Maxim for stock options – and for essentially  
4 everything else. Even if this was all we knew, his statements to Maxim’s federal regulators  
5 surely would be discoverable in civil litigation. But discovery suggests there is much more to  
6 the story.

7 **B. The Gifford Handwritten Notes**

8 In making the distinction between Gifford’s “negligence” and Jasper’s “fraud,”  
9 the complaint repeatedly states that Gifford had instructed Jasper to expense options, which  
10 Jasper allegedly ignored. FAC ¶¶ 27, 31, 33. The “instructions” themselves are found in a series  
11 of handwritten notes that Gifford purportedly gave Jasper. The SEC has continued to emphasize  
12 this distinction throughout the litigation. Its press release announcing the suit chastised Jasper  
13 for “disregard[ing] instructions from CEO Gifford to record an expense in connection with  
14 certain backdated options.”<sup>12</sup> In a hearing earlier this year, the SEC argued that the fact that  
15 Gifford and Jasper were both aware they were selecting dates with hindsight was not “in and of  
16 itself fraud.” What was fraud, according to the SEC, was “not to account for that transaction  
17 properly” and the SEC went on to explain the central importance of Gifford’s supposed  
18 directives to expense, stating that the “documentary evidence provides a compelling case” that  
19 “the evidence is simply different vis-à-vis Mr. Gifford.”<sup>13</sup> Recently, the SEC revised its Rule 26  
20 disclosures to attempt to lay some kind of evidentiary foundation for three of the notes.<sup>14</sup> We  
21 also know from discovery that Gifford’s lawyers emphasized the notes in their presentations to  
22 the SEC.<sup>15</sup>

23 The evidence uncovered to date, however, raises serious questions about the

24 \_\_\_\_\_  
25 <sup>11</sup> Tough Decl., Ex. 19 (Response to Interrogatory No. 1).

26 <sup>12</sup> Tough Decl., Ex. 3.

27 <sup>13</sup> Tough Decl., Ex. 8 at 16-17.

28 <sup>14</sup> Tough Decl. ¶23, Ex. 20 (Van Wert declaration).

<sup>15</sup> Tough Decl., Ex. 21.

1 authenticity of these notes. From the time they were first produced, they have been suspicious.  
 2 One of the notes, for example, has two different versions. The first is a typed memo with a  
 3 handwritten notation from Gifford reading “Hot! Carl – These options are approved.”<sup>16</sup> The  
 4 second version, on the identical typed memo, has an altogether different handwritten note: “Carl  
 5 – I’ve made changes on the attached. Just use a \$20/22 price. It’s too late to do in Oct. It’s an  
 6 expense but it’s OK.”<sup>17</sup> The two documents are irreconcilable on their face. The first has a fax  
 7 header dated “Mar 03 03,” and Florence Malae, Jasper’s former assistant, testified that she  
 8 recalls sending this document to Tim Ruehle on that date in 2003.<sup>18</sup> In contrast, the second  
 9 version, which includes the handwritten instruction to book an expense, has a fax header of  
 10 “DEC-14-2006.” This was months into the Special Committee’s investigation and shortly before  
 11 Gifford resigned from the company. Furthermore, Ms. Malae testified that she has no  
 12 recollection of this version of the document.<sup>19</sup> That there were two versions of this note,  
 13 moreover, was known to the SEC before it filed this suit against Jasper.<sup>20</sup> The defense has  
 14 uncovered similar problems with all the “expensing” notes that Gifford purportedly wrote.

15 Depositions of those most familiar with Gifford’s practices cast further doubt on  
 16 the notes’ authenticity. For example, one executive assistant recently testified that he has no  
 17 recollection of one of the “expensing” notes referred to in the complaint.<sup>21</sup> Sheila Raymond,  
 18 Maxim’s former stock option administrator, testified in July that she could not recall *ever*  
 19 receiving an instruction from Gifford to expense options, as it was contrary to his nature:

20 Q. Is it true that you don’t recall ever receiving an instruction from Gifford to  
 21 expense any options?

22 A. I would say it’s probably true.

23 Q. And that Mr. Gifford didn’t like to expense options, correct?

24 A. That is correct.

25 <sup>16</sup> Tough Decl., Ex. 22.

26 <sup>17</sup> *Id.*, Ex. 23.

27 <sup>18</sup> Tough Decl., Ex. 24 at 119-120.

28 <sup>19</sup> *Id.* at 126.

<sup>20</sup> Tough Decl., ¶25, Ex. 25 (Response to Request for Admission No. 6).

<sup>21</sup> Tough Decl., Ex. 26 at 52 (document referred to in FAC ¶ 31).

1 Q. In fact, isn't it true that it was part of his culture not to have any expenses  
2 related to options, right?

3 A. That is true.

4 Q. And you understood that, correct?

5 A. I did.

6 Q. And as far as you know, Ruehle, Jasper, Rigg, Medlin, all those folks knew  
7 that as well?

8 A. Yes.<sup>22</sup>

9 The most striking testimony yet came very recently. In a September 25  
10 deposition, the Maxim Board of Directors Special Committee's lead counsel testified that he told  
11 the SEC back in *February 2007* that he had at least five reasons to doubt the authenticity of  
12 Gifford's notes, and that he reiterated those points in a second meeting with the SEC in June  
13 2007.<sup>23</sup> These included:

- 14 • “[T]he notion of Mr. Gifford proposing that the company take an expense  
15 charge was very much at odds with what I had come to learn about Mr.  
16 Gifford's nature, that he was very opposed to expens[ing].”
- 17 • The Special Committee was never able to obtain the handwritten original  
18 versions of these notes, despite numerous requests.
- 19 • Gifford's handwriting – which was “known to have been very sloppy” –  
20 appeared suspiciously legible, as if he were writing for an audience.
- 21 • The notes were mostly written on separate pieces of paper, and “at least one  
22 witness had expressed concern that that was not consistent with [Gifford's]  
23 regular course of business.”
- 24 • Concerns about the circumstances under which some of the notes were  
25 found.<sup>24</sup>

26 Another lawyer for the Special Committee, deposed the same day, explained that  
27 the Special Committee had retained an independent handwriting analyst to examine the notes (or,  
28 more accurately, the photocopied versions of them), and that this fact was conveyed to the SEC  
in February 2007. The expert's findings were “inconclusive” because he was unable to  
determine whether the notes were made at or about the time they were purported to have been.<sup>25</sup>

<sup>22</sup> Tough Decl., Ex. 27 at 222.

<sup>23</sup> During its investigation, counsel for the Special Committee apparently met with the SEC in  
“real time” on at least five occasions. Tough Decl., Ex. 28 at 2.

<sup>24</sup> Tough Decl., Ex. 29 at 12-21.

<sup>25</sup> Tough Decl., Ex. 30 at 75-78.

1           **C.     The SEC's Interactions With Gifford**

2           Against this backdrop, the SEC interviewed Jack Gifford on September 11, 2007.  
3           According to its privilege logs, two SEC attorneys and one staff accountant were present (*see*  
4           *supra*, note 2), in addition to Gifford and his lawyers. The SEC's sit-down with Gifford is  
5           unusual for at least three reasons:

6                     *First*, unlike the SEC's interviews with most other Maxim personnel, which were  
7           transcribed by a court reporter (and produced to the defense early in discovery), the SEC broke  
8           with its practice and chose not to take Gifford's testimony under oath. There is no official  
9           transcript of Gifford's interview.

10                    *Second*, within three days of the interview, the SEC had agreed on all material  
11           terms of its settlement with Gifford. To wit, that he would be charged with negligence rather  
12           than fraud (unlike Jasper) and would pay the Treasury approximately \$800,000. Notably, his  
13           lawyer successfully managed to have the SEC remove language from the draft complaint  
14           charging Gifford with any actual knowledge that Maxim "did not properly account for" its stock  
15           option expenses in public filings.<sup>26</sup>

16                    *Third*, very little is known of Gifford's response to the backdating charges.  
17           Gifford died while the parties were attempting to set the date for his deposition in this matter  
18           (after months of effort). While we cannot know whether he would have re-asserted his Fifth  
19           Amendment rights or testified under oath here, the fact remains that the only time Gifford spoke  
20           on these topics in a non-privileged setting before his untimely death was during his interview  
21           with the SEC.

22                    Quite simply, there is no witness available with Gifford's knowledge. Given his  
23           role, there can be no question that whatever Gifford told the SEC about the backdating charges is  
24           material to Jasper's defense and whatever he said will surely lead to the discovery of other  
25           critical and admissible evidence. For example, if he told the SEC that he followed the  
26

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27 <sup>26</sup> Compare Tough Decl., Ex. 31 at ¶47 (redline of draft complaint from Gifford's lawyers to  
28 the SEC suggesting removal of "knew or") with Ex. 4 at ¶47 (final complaint).

1 instructions of his attorneys in granting options, or that Jasper was not involved in the selection  
 2 of grant dates, Jasper is entitled to use such evidence to prepare his defense. Moreover, given the  
 3 focus on the notes by Gifford, his lawyers and the SEC, as well as the doubts raised by counsel  
 4 for the Special Committee, we expect that the SEC asked Gifford about these notes when it met  
 5 with him, along with whatever other details were salient to its allegations.

6 **D. Jasper's Attempts To Obtain Discovery Regarding The SEC's September 11,**  
 7 **2007 Interview Have Been Consistently Rebuffed**

8 Given Gifford's centrality to the allegations, Jasper propounded his First Set of  
 9 Requests for Document Production – while his motion to dismiss was still pending – seeking the  
 10 SEC's evidence against him, including all documents reflecting the SEC's communications with  
 11 Gifford and his lawyers.<sup>27</sup> The SEC responded by referencing three documents it had turned  
 12 over with its Rule 26 disclosures: a cover letter to Gifford scheduling a meeting on September 7,  
 13 2007 and copies of two handwritten notes, allegedly written by Gifford.<sup>28</sup> It declined to produce  
 14 its interview notes, instead noting their existence on a privilege log.

15 Jasper also sought this information through interrogatories. Specifically, he asked  
 16 the SEC to “describe in full all communications between the SEC and Jack Gifford, former CEO  
 17 of MAXIM.” The SEC responded by simply referring back to its earlier document production.<sup>29</sup>

18 Jasper also tried to get the discovery directly from Gifford. By the time Jasper  
 19 answered the complaint on October 20, 2008, the SEC had served a deposition subpoena on  
 20 Gifford, having agreed with Jasper's counsel to set it in early 2009.<sup>30</sup> Before the parties could  
 21 agree on a final date, Gifford passed away on January 11, 2009.

22 In yet another effort to obtain this information, Jasper noticed a person most  
 23 knowledgeable deposition of the SEC. Rather than offer a witness, the SEC moved for a  
 24

25 <sup>27</sup> Tough Decl., Ex. 1.

26 <sup>28</sup> Tough Decl., Ex. 2 (Response to Request No. 2).

27 <sup>29</sup> Tough Decl., Ex. 32.

28 <sup>30</sup> Tough Decl., Exs. 33, 34, 35, 36.

1 protective order, which was granted by the Court on May 25, 2009.<sup>31</sup>

2           Since that order, Jasper has sought this information in other ways. Following the  
3 Court's suggestion, he served deposition subpoenas on Gifford's lawyers. All responded that  
4 they did not take notes during the interview and/or that their recollections of events are so  
5 intertwined with privileged conversations with their client that they could not testify without  
6 divulging attorney-client privileged information.<sup>32</sup> The lawyer for Gifford's estate has likewise  
7 confirmed that he intends to continue to assert all privileges over these communications.<sup>33</sup>

8           In short, there is no way other than by requiring the SEC to turn over its interview  
9 notes for Jasper to obtain this clearly discoverable information that is critical to his defense.<sup>34</sup>

### 10 **III. DISCUSSION**

11           The bedrock principle of civil discovery is that parties are entitled to discover  
12 "any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P.  
13 26(b)(1); *Cable & Computer Tech. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 650 (C.D. Cal.  
14 1997) ("[I]nformation is 'relevant' if it relates to the claim or defense of the party seeking  
15 discovery or any other party...."), *quoting* Schwarzer, Tashima & Wagstaff, *California Practice*  
16 *Guide: Federal Civil Procedure Before Trial*, § 11.21 (1995 revised). Given Gifford's central  
17 role in options granting at Maxim, there is no question that his statements to the SEC are  
18 relevant. Moreover, since his untimely death, the notes constitute the *only* extant non-privileged  
19 source of information about what he said.

20           The SEC has not advanced a relevance objection. Instead, the SEC has resisted  
21 disclosure of Gifford's statements on the basis that the notes recording them constitute attorney  
22 work product and may also be covered by the deliberative process privilege and/or the so-called

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23  
24 <sup>31</sup> Docket # 52.

25 <sup>32</sup> Tough Decl., Exs. 37, 38.

26 <sup>33</sup> Tough Decl., Ex. 39.

27 <sup>34</sup> Jasper has attempted to meet and confer with the SEC regarding its failure to produce the  
28 notes, most recently on July 9, 2009. Tough Decl., Ex. 40. Counsel made clear that Jasper  
seeks only those documents that reflect the actual statements made by Gifford to the SEC.  
*Id.*

1 “confidential settlement privilege.”<sup>35</sup> None of the SEC’s privilege contentions has merit.

2 **A. Discovery Of Gifford’s Statements To The SEC Are Not Precluded By The**  
 3 **Attorney Work Doctrine**

4 The SEC objects that all discovery of Gifford’s statements – no matter where they  
 5 may be contained – is barred by the work product doctrine. The SEC ignores controlling law.  
 6 The protections of the work product doctrine apply only to “documents and tangible things,” and  
 7 not the actual facts that they may contain. Fed. R. Civ. P. 26(b)(3)(A); *Castaneda v. Burger*  
 8 *King Corp.*, 2009 WL 2748932, \*3 (N.D. Cal. Aug. 19, 2009) (“[D]ocuments can be privileged  
 9 while the facts contained within them may not be.”). “[B]ecause the work product doctrine is  
 10 intended only to guard against the divulging of attorney’s strategies and legal impressions, it  
 11 does not protect facts concerning the creation of work product *or facts contained within the work*  
 12 *product.*” *Garcia v. City of El Centro*, 214 F.R.D. 587, 591 (S.D. Cal. 2003) (emphasis in  
 13 original); *Laxalt v. McClatchy*, 116 F.R.D. 438, 442 (D. Nev. 1987) (“Work product immunity  
 14 does not protect the facts which an adverse party may have learned...”), *citing Eoppolo v.*  
 15 *National Railroad Passenger Corp.*, 108 F.R.D. 292 (E.D. Pa. 1985); *In re Rice*, 224 B.R. 464,  
 16 472 (Bankr. D. Or. 1998) (Work product “does not protect disclosure of the underlying facts in  
 17 the documents”). Nor does the simple fact that witness statements are incorporated into attorney  
 18 memoranda automatically render them work product and therefore undiscoverable. *See Laxalt*,  
 19 116 F.R.D. at 443 (citing with approval the proposition that a government attorney cannot  
 20 protect witness statement merely by including its text in a memorandum prepared for litigation),  
 21 *citing Mervin v. Federal Trade Commission*, 591 F.2d 821, 825 (D.C. Cir. 1978). Accordingly,  
 22 Gifford’s statements to the SEC, like all statements by third party witnesses, are not themselves  
 23 protected by the work product doctrine.

24 Indeed, the SEC’s Enforcement Manual suggests as much. In the subsection  
 25 entitled “Notetaking,” the Manual encourages the taking of notes during witness interviews,  
 26 suggesting that “[a] minimum of two staff members are encouraged to be present to conduct a

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27 <sup>35</sup> *See, e.g.*, Tough Decl., Ex. 2 (no relevance objection to Response No. 2), Ex.9; *see also* Dkt.  
 28 # 43 at 8-10.

1 witness interview” in part because “one of the staff members may subsequently need to serve as  
 2 a witness at trial.”<sup>36</sup> The Manual further recommends that “for litigation reasons,” SEC  
 3 investigators “should consider having only one staff member take notes.” Given that the SEC’s  
 4 own Manual clearly contemplates that SEC employees may need to testify about what occurred  
 5 in an interview and/or to turn over their notes in litigation, it is hard to accept the SEC’s position  
 6 that the statements made in an interview are privileged.

7 1. The SEC’s Behavior In This Case Demonstrates That There Is No Merit  
 8 To Its Work Product Claims With Respect To Gifford’s Factual  
 9 Statements

10 The SEC’s position is even less tenable under the facts of this case. The SEC  
 11 produced transcripts from 11 other interviews with Maxim-related personnel (and provided them  
 12 to its expert witnesses), and has not claimed work product over any of them.<sup>37</sup> Surely if there  
 13 was merit to its contention that the questions it asks in an investigation need be shrouded in  
 14 mystery, it would not have revealed its other interviews. Furthermore, the SEC produced  
 15 correspondence with Gifford’s lawyers, including the cover letters it sent to them enclosing the  
 16 documents it intended to review with Gifford in the interview.<sup>38</sup> The SEC’s willingness to  
 17 disclose its thinking to Gifford’s lawyers more than two years ago belies any claim that it needs  
 18 special protection now. *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d  
 19 18, 25 (9th Cir. 1981) (noting that the burden of proving that an evidentiary privilege applies and  
 20 has not been waived “rests not with the party contesting the privilege, but with the party  
 21 asserting it”)

22 2. Even If The SEC Had A Valid Work Product Claim, Jasper Has  
 23 Demonstrated A Need For This Material And There Are Ways Of  
 24 Protecting The SEC’s Stated Interests

25 Assuming the SEC could carry its burden to establish a valid work product claim

26 <sup>36</sup> Tough Decl., Ex. 7 at 76.

27 <sup>37</sup> Tough Decl., Ex. 17 at Exhibit B (listing 11 interview transcripts).

28 <sup>38</sup> As noted above in footnote 6, when we asked the SEC to provide us with copies of the documents it provided Gifford’s counsel prior to his interview, it refused to do so, stating its belief that “the specific documents that the SEC’s staff reviewed with Mr. Gifford [an adverse witness] is protected work product.” Tough Decl., Exs. 11, 12.

1 over its interview notes, factual information contained in documents prepared in anticipation of  
2 litigation is nonetheless discoverable upon a showing that the party seeking discovery has a  
3 “substantial need for the materials to prepare its case and cannot, without undue hardship, obtain  
4 their substantial equivalent by other means.” Fed. R. Civ. P. 26(b)(3)(A)(ii). This standard is  
5 clearly met here. Due to Gifford’s death, and the inability of his counsel to recall and/or testify  
6 as to what transpired in that interview, the only remaining record of his statements is contained  
7 in the SEC’s interview notes.

8           Without question, the death of a key witness such as Gifford constitutes sufficient  
9 need to overcome the qualified protection afforded work product. *See United States v. Graham*,  
10 555 F. Supp. 2d 1046, 1050-51 (N.D. Cal. 2008) (granting defendant’s motion to compel  
11 production of Government’s notes of key witnesses whom defendant had been unable to  
12 interview); *see also In re Grand Jury Investigation*, 599 F.2d 1224, 1231-32 (3d Cir. 1979)  
13 (ordering production of memorandum revealing content of an interview with deceased employee,  
14 holding that witness’ death constituted sufficient need); *Copperweld Steel Co. v. Demag-*  
15 *Mannesmann-Bohler*, 578 F.2d 953, 963 n.14 (3d Cir. 1978) (trial court acted within its  
16 discretion in ordering production of plaintiff’s counsel’s memorandum of interview with  
17 important witness who died before being deposed).

18           Moreover, if the SEC’s notes actually contain attorney impressions and analysis –  
19 and the SEC thus far has made no showing that they do – there is a common way of dealing with  
20 this. The notes could be redacted. Courts have consistently affirmed this approach. *See, e.g.,*  
21 *Tennison v. City & County of San Francisco*, 226 F.R.D. 615, 624 (N.D. Cal. 2005) (where fact  
22 but not opinion work product protection had been waived, the court ordered the production of all  
23 fact work product with any opinion work product redacted); *Burlingame v. County of Calaveras*,  
24 2007 WL 2317301, \* 3 (E.D. Cal. Aug 7, 2007) (“Where, as here, a document includes both the  
25 attorneys’ mental impressions and legal theories, as well as discoverable information, disclosure  
26 may be ordered with portions deleted.”); *see also* Adv. Comm. Notes to 1970 Amendment to  
27 Rule 26(b)(3) (noting that in enforcing the work product rule, “the courts will sometimes find it  
28 necessary to order disclosure of a document but with portions deleted”).

1           **B.       Gifford’s Statements Are Not Confidential Settlement Communications**

2           To the extent the SEC maintains that its communications with Gifford are covered  
3 by a “settlement communication” privilege, this contention does not pass muster.<sup>39</sup> “Neither the  
4 U.S. Supreme Court nor the Ninth Circuit [has] recognized a blanket settlement privilege as a  
5 matter of federal common law.” *Ray v. BlueHippo Funding, LLC*, 2008 WL 3399392, \*1 (N.D.  
6 Cal. 2008) (internal citations omitted). Any protection afforded by Federal Rule of Evidence 408  
7 pertains to *admissibility at trial*, and not to discovery. *See, e.g., Phoenix Solutions Inc. v. Wells*  
8 *Fargo Bank, N.A.*, 254 F.R.D. 568, 584 (N.D. Cal. 2008) (“Rule 408 does not warrant protecting  
9 settlement negotiations from discovery. . . the rule applies to the admissibility of evidence at  
10 trial, not to whether evidence is discoverable.”).

11           Leaving that aside, the SEC produced over 400 pages of documents of  
12 correspondence back and forth with Gifford’s lawyers. Many of these documents were marked  
13 by the SEC with the label “\*CONFIDENTIAL\*FOR SETTLEMENT PURPOSES ONLY.”<sup>40</sup>  
14 Thus, whatever confidentiality may at some time have applied, it has clearly been waived.

15           **C.       Gifford’s Statements Are Not Protected By The Deliberative Process  
16           Doctrine**

17           The SEC has made the equally misguided objection that these notes are protected  
18 by the deliberative process privilege. Again, the law is to the contrary. Witness statements, and  
19 other “purely factual material,” cannot themselves be subject to this privilege. *Cal. Native Plant*  
20 *Society v. U.S.E.P.A.*, 251 F.R.D. 408, 413 (N.D. Cal. 2008); *see also, Dept. of the Interior v.*  
21 *Klamath Water Users Protective Ass’n*, 532 U.S. 1, 12 (2001) (communications between an  
22 agency and individuals communicating “in their own interest or on behalf of any person or group  
23 whose interests might be affected by government action” are not protected by the deliberative  
24 process privilege); *Habeas Corpus Res. Ctr. v. United States DOJ*, 2008 WL 5000224, \*2 (N.D.

25 <sup>39</sup> It is unclear whether the SEC maintains that either the deliberative process or “confidential  
26 settlement communication” “privileges” applies here. The SEC advanced these theories in  
27 its earlier motion for protective order, but recent correspondence with the SEC has referred  
28 only to work product protections. Nonetheless, Jasper addresses these alternative grounds  
here to dispel any notion they could apply.

<sup>40</sup> Tough Decl., ¶ 34, Ex. 31.



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(Cite as: 2007 WL 2317301 (E.D.Cal.))



Only the Westlaw citation is currently available.

United States District Court,  
E.D. California.  
Eloisa BURLINGAME, Plaintiff,  
v.  
COUNTY OF CALAVERAS, Defendants.  
**No. 1:06cv1734 AWI DLB.**

Aug. 7, 2007.

David De-Ben Cheng, Mayall, Hurley, Knutsen,  
Smith & Green, Stockton, CA, for Plaintiff.

Michael G. Woods, Deborah A. Byron, Mc-  
Cormick, Barstow, Sheppard, Wayte & Carruth,  
Fresno, CA, for Deborah A. Byron.

ORDER GRANTING DEFENDANT'S MOTION  
TO QUASH NOTICES OF TAKING DEPOS-  
ITIONS AND SUBPOENAS FOR RECORDS IN  
PART

DENNIS L. BECK, United States Magistrate Judge.

\*1 Defendant County of Calavaras ("County") filed the instant motion to quash notices of taking depositions and subpoenas for records on May 25, 2007. The matter was heard on July 6, 2007, before the Honorable Dennis L. Beck, United States Magistrate Judge. David De-Ben Cheng appeared on behalf of Plaintiff Eloisa Burlingame ("Plaintiff") and Michael Woods appeared on behalf of County.

**BACKGROUND**

Plaintiff filed the instant action for damages against County on October 27, 2006, asserting claims for discrimination and harassment on the basis of both gender and race; failure to prevent said discrimination and harassment; intentional and negligent infliction of emotional distress; and negligent super-

vision. The discrimination and harassment claims are brought pursuant to both 42 U.S.C. § 2000(e) et seq. (hereinafter "Title VII") and California Government Code § 12900 et seq. (hereinafter the "Fair Employment and Housing Act" or "FEHA"). The remainder of the claims arise under California law. All of Plaintiff's claims are predicated on alleged severe and pervasive discrimination and harassment she experienced while working at the County's landfill. Among other things, Plaintiff claims she was constantly a) belittled, denigrated, disparaged or ignored by other employees and her superiors; b) denied the opportunity to learn to operate equipment; c) not considered for promotion or expansion of her responsibilities; d) exposed to pornography throughout the workplace; e) forced to endure offensive sexual and/or racial jokes and slurs; and f) threatened and/or assaulted, all due to her gender and race. As a result, Plaintiff alleges she became extremely uncomfortable at work, found it increasingly difficult to perform her job responsibilities, and eventually was disabled due to extreme anxiety or panic and severe depression.

Plaintiff initially filed a discrimination/harassment complaint form with County on January 30, 2006. The investigation was undertaken at County's request by attorney Julie A. Gonzales of Palmer & Kazanjian, LLP. County contends an independent investigation by an outside attorney was initiated by Human Resources Director Francine Osborn because of the breadth of the complaint and the likelihood of future litigation. This litigation followed.

Plaintiff served two separate notices of depositions on the custodian of records for Palmer & Kazanjian, LLP, each with an attached Subpoena in a Civil Case. The first Notice with attached Subpoena was served on April 26, 2007, setting the deposition for May 29, 2007. The Subpoena was directed to Julie A. Gonzales. The second Notice with attached Subpoena was served on May 1, 2007, setting the deposition for June 7, 2007. The Subpoena is directed to the Custodian of Records for Palmer & Kazanji-

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an LLP. Both deposition notices are for records only and do not require a personal appearance. Both Notices seek the same documents for inspection, namely the investigation report prepared by Ms. Gonzales, as well as all supporting investigative materials. County contends the investigative report and all related documentation were prepared on behalf of County in anticipation of litigation and are therefore work product, privileged and confidential trial preparation materials. Plaintiff argues the workplace investigation was not performed in anticipation of litigation and Ms. Gonzales was not acting as County's counsel when she performed the investigation and therefore the documents are not protected or privileged.

### DISCUSSION

\*2 The “work product” doctrine protects trial preparation materials that reveal an attorney's strategy, intended lines of proof, evaluation of strengths and weaknesses. *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Federal Rule of Civil Procedure 26(b)(3) provides:

[A] party may obtain discovery 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 representative (including the other party's 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 the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of the attorney or other representative of a party concerning the litigation.

Fed.R.Civ.P. 26(b)(3); see *Hickman v. Taylor*, 329

U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

The work product doctrine provides qualified, not absolute, protection which, like other qualified privileges, may be waived. *United States v. Nobles*, 422 U.S. 225, 239-40, 95 S.Ct. 2160, 45 L.Ed.2d 141(1975). “The work product doctrine protects from discovery materials prepared by an attorney in anticipation of litigation.” *United States v. Bergonzi*, 216 F.R.D. 487, 494 (N.D.Cal.2003) citing *Hickman v. Taylor*, 329 U.S. at 511. The privilege is intended to preserve the privacy of attorneys' thought processes, and to prevent unnecessary intrusion by opposing parties and their counsel. *Id* “The Supreme Court has held that the work product doctrine applies to documents created by investigators working for attorneys, provided the documents were created in anticipation of litigation. *United States v. Nobles*, 422 U.S. 225, 239, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975).

The Ninth Circuit has held that “to qualify for protection against discovery under Rule 26(b)(3), documents must have two characteristics: (1) they must be ‘prepared in anticipation of litigation or for trial,’ and (2) they must be prepared ‘by or for another party or by or for that other party's representative.’” *United States v. Torf*, 357 F.3d 900, 907 (9th Cir.2003) quoting *In re California Pub. Utils. Comm'n*, 892 F.2d 778, 780-81 (9th Cir.1989) (quoting Fed.R.Civ.P. 26(b)(3)).

In *United States v. Torf*, 357 F.3d 900, 907, the Ninth Circuit also addressed the question whether protection under the work product doctrine may be extended to “dual purpose” documents (i.e., documents to assist a business decision that also involves pending or prospective litigation) and held that a document should be deemed prepared “in anticipation of litigation” and thus eligible for work product protection under Rule 26(b)(3) if “in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.” *United States v. Torf*, 357 F.3d 900, 907 citing Charles Alan

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Wright, Arthur R. Miller, and Richard L. Marcus, 8 *Federal Practice & Procedure* § 2024 (2d ed. 1994) (“Wright & Miller”). The court noted that the “because of” standard does not consider whether litigation was a primary or secondary motive behind the creation of a document. *Id.* Rather, it considers the totality of the circumstances and affords protection when it can fairly be said that the “document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation[.]” *Id.* The Supreme Court has held that the work product doctrine applies to documents created by investigators working for attorneys, provided the documents were created in anticipation of litigation. *United States v. Nobles*, 422 U.S. 225, 239, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975).

\*3 Attorney Gonzales was hired by County for the purpose of securing an independent investigation. Declaration of Francine Osborn, ¶ 3. County sought an outside investigator, with experience in employment law matters, to conduct the investigation, rather than having the case investigated internally, in part because County anticipated the matter would end up in litigation. *Id.* Thus, the investigative report prepared for the County by an attorney in anticipation of litigation is protected by the attorney work product doctrine. Because the report reflects Ms. Gonzales' mental impressions, conclusions, legal theories and/or legal theories, it is entitled to greater protection. *Upjohn Co. v. United States*, 449 U.S. 383, 399, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). The Court finds no waiver by County's written disposition of the complaint and even if there was a waiver, the waiver would not extend to the mental impression, conclusion or opinions of the attorney. See *Walker v. County of Contra Costa*, 227 F.R.D. 529, 535 (N.D.Cal.2005).

Nevertheless, the identity and location of persons having knowledge of any discoverable matter are discoverable as are the underlying factual information included in the report. See *Rule 26(b)(1)*. These various matters are not protected as work

product. Where, as here, a document includes both the attorneys' mental impressions and legal theories, as well as discoverable information, disclosure may be ordered with portions deleted. See Adv. Comm. Notes to 1970 Amendment to *FRCP 26(b)(3)*.

### **ORDER**

Based on the foregoing, County's motion to quash notices of taking depositions and subpoenas for records is GRANTED IN PART. Within 20 days of this Order, County shall produce the report and all documents included in the report, redacting Ms. Gonzales' mental impressions, conclusions and/or opinions.

IT IS SO ORDERED.

E.D.Cal.,2007.

Burlingame v. County of Calaveras

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END OF DOCUMENT

--- F.R.D. ----, 2009 WL 2748932 (N.D.Cal.)  
 (Cite as: 2009 WL 2748932 (N.D.Cal.))

## H

Only the Westlaw citation is currently available.

United States District Court,  
 N.D. California.  
 Miguel CASTANEDA, Plaintiff,  
 v.  
 BURGER KING CORPORATION, et al., Defendants.  
 No. C 08-4262 WHA (JL).

Aug. 19, 2009.

**Background:** Patron of franchised restaurant sued franchisor and its parent corporation on behalf of himself and others similarly situated for violations of Americans with Disabilities Act and state law, claiming access violations at leased, franchised restaurants in California. Plaintiffs moved to compel production of surveys, and defendants moved for return of inadvertently produced privileged document.

**Holding:** The District Court, James Larson, United States Magistrate Judge, held that exceptional circumstances existed warranting franchisor's production of work product.

Plaintiffs' motion granted; defendants' motion denied.

West Headnotes

### [1] Federal Civil Procedure 170A ⚡1604(1)

170A Federal Civil Procedure  
 170AX Depositions and Discovery  
 170AX(E) Discovery and Production of Documents and Other Tangible Things  
 170AX(E)3 Particular Subject Matters  
 170Ak1604 Work Product Privilege;  
 Trial Preparation Materials  
 170Ak1604(1) k. In General. **Most Cited Cases**  
 To extent that work product contains relevant, non-

privileged facts, party seeking discovery must show adequate reasons why work product should be subject to discovery, but to extent that work product reveals opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and party seeking discovery must show extraordinary justification. **Fed.Rules Civ.Proc.Rule 26(b)(3)(A), 28 U.S.C.A.**

### [2] Federal Civil Procedure 170A ⚡1604(1)

170A Federal Civil Procedure  
 170AX Depositions and Discovery  
 170AX(E) Discovery and Production of Documents and Other Tangible Things  
 170AX(E)3 Particular Subject Matters  
 170Ak1604 Work Product Privilege;  
 Trial Preparation Materials  
 170Ak1604(1) k. In General. **Most Cited Cases**

Documents can be privileged under work product doctrine while facts contained within them may not be. **Fed.Rules Civ.Proc.Rule 26(b)(3)(A), 28 U.S.C.A.**

### [3] Privileged Communications and Confidentiality 311H ⚡143

311H Privileged Communications and Confidentiality  
 311HIII Attorney-Client Privilege  
 311Hk143 k. Factual Information; Independent Knowledge; Observations and Mental Impressions. **Most Cited Cases**  
 Attorney-client privilege only protects disclosure of communications; it does not protect disclosure of underlying facts by those who communicated with attorney.

### [4] Federal Civil Procedure 170A ⚡1604(1)

170A Federal Civil Procedure  
 170AX Depositions and Discovery  
 170AX(E) Discovery and Production of Documents and Other Tangible Things

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170AX(E)3 Particular Subject Matters

170Ak1604 Work Product Privilege;

Trial Preparation Materials

170Ak1604(1) k. In General. Most

#### Cited Cases

Exceptional circumstances existed warranting franchisor's production of measurements of ramp slopes, counter heights, and related matters in its leased franchised restaurants during class period in action alleging violations of Americans with Disabilities Act (ADA) and state law, even if documents constituted work product, where franchisor did not identify leased restaurants until after remediation work had commenced, and plaintiffs attempted in good faith to obtain this information on their own, but it was not available from any other source. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.; Fed.Rules Civ.Proc.Rule 26(b)(3)(A), 28 U.S.C.A.

Bill Lann Lee, Andrew Lah, Julia Campins of Lewis, Feinberg, Lee, Renaker & Jackson, P.C., Oakland, CA; Amy F. Robertson and Timothy P. Fox of Fox & Robertson, P.C., Denver, CO; Linda D. Kilb of Disability Rights Education and Defense Fund, Berkeley, CA; Mari Mayeda, Berkeley, CA; and Antonio M. Lawson, Lawson Law Offices, Oakland, CA, for Plaintiff.

Michael D. Joblove and Jonathan E. Perlman of Genovese, Joblove & Battista, P.A., Miami, FL; Clement L. Glynn and Adam Friedenberg of Glynn & Finley, LLP, Walnut Creek, CA, for Defendant.

### **DISCOVERY ORDER (Granting Docket # 121, Denying Docket # 123)**

JAMES LARSON, United States Magistrate Judge.

#### **I. Introduction**

\*1 All discovery in this case has been referred by the district court (Hon. William H. Alsup) pursuant to 28 U.S.C. ¶ 636(b).

#### **II. Discovery at Issue**

Plaintiffs filed a motion to compel production of documents or for permission to serve and receive responses to Interrogatory # 24; and Defendants filed a motion for an order compelling return of inadvertently produced privileged document. (Both motions were initiated in a Joint Statement filed at Docket # 103, then Plaintiffs' motion to compel was renewed at Docket # 121. Defendants did not file a formal noticed motion to compel and for protective order, but their position is stated in their document filed at Docket # 123, captioned "Defendant Burger King Corporation's Opening Supplemental Brief In Opposition ..."). Attorney for Plaintiffs is Amy Robertson, (pro hac vice), FOX & ROBERTSON, P.C., Denver, Colorado; Attorney for Defendants is Michael D. Joblove, (pro hac vice), GENOVESE, JOBLOVE AND BATTISTA, P.A., Miami, Florida. There are two relevant motions before Judge Alsup: Burger King Corporation filed a Motion to Add Restaurant Franchisees/Lesseees as Additional Defendants under Rules 19(a) and 21, set for hearing September 10, 2009; Plaintiffs filed their Motion to Certify the Class, which is set for hearing September 17. Judge Alsup has not bifurcated or stayed any discovery on certification, merits and damages.

The Court carefully considered the moving and opposing papers and the record in this case and hereby grants Plaintiffs' motion to compel production of documents and denies as moot the motion to propound Interrogatory # 24, since the information in the documents will hopefully suffice to answer the questions in Interrogatory # 24. The Court denies Defendants' motion for return of inadvertently produced privileged document and for protective order, since the document is one of those which the Court is ordering Defendants to produce to Plaintiffs.

The Court notes that Defendants produced two documents under seal, one is the inadvertently produced document from the franchisee Joseph N. Rubin, the other is a survey for an entirely different restaurant. Defendants should inform the Court

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whether the second document was inadvertently produced to the Court.

### III. Background

Plaintiffs are suing Defendants for violating the Americans with Disabilities Act in their leased Burger King restaurants (“BKL’s”). There are 90 leased restaurants at issue out of 673 Burger Kings nationwide. Almost one year after Plaintiffs notified Burger King in January 2008 that their restaurants were out of compliance with the ADA, in December 2008 Burger King began issuing work orders to make changes to the allegedly noncompliant restaurants. (Robertson declaration at Ex. 12-scope of work documents and verification punchlist, and consulting recommendations listing on Def. Privilege Log.)

Burger King would not provide Plaintiffs with a list of which were the leased restaurants, until after the remediation work had already begun. Consequently, Plaintiffs could only have either conducted surveys of all 673 Burger Kings to obtain the measurements of such things as ramp slopes and counter heights, wasting time and money on the 580 restaurants which were not leased restaurants, or waited until Defendants gave them the list of leased restaurants, and then obtained these measurements, but only after the remediation work had been begun or even completed, in which case the measurements would have been useless to Plaintiffs. (Decl. Of Timothy Fox ISO Pltf MTC, dkt # 121-2 ¶ 3-5).

\*2 Plaintiffs, by contrast, had, by May 28, 2008, sent Burger King all of the 31 surveys that Plaintiffs had done of Burger King restaurants in California. (Second Robertson Decl. Ex. 5) Burger King then informed Plaintiffs that only three of those restaurants were leased. (“BKL”) Later Burger King identified two more, for a total of five out of the 31 that Plaintiffs had surveyed, out of 90 total Burger King leased or “BKL” restaurants. Plaintiffs have no other way of obtaining this in-

formation, now that the restaurants' are being brought into compliance. In order to establish the status of each of the 90 restaurants during the class period, Plaintiffs have only Defendants' surveys to rely on.

### IV. Legal Analysis

#### A. General Principles

The scope of discovery under [Rule 26](#) is broad; “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* If a party withholds otherwise discoverable material by claiming that it is privileged or should be protected as trial-preparation material, “the party must: (I) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed-and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” [Fed.R.Civ.P. 26\(b\)\(5\)\(A\)](#).

The work product privilege protects “documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).” [Fed.R.Civ.P. 26\(b\)\(3\)\(A\)](#). Trial preparation materials are discoverable, however, “if: (I) they are otherwise discoverable under [Rule 26\(b\)\(1\)](#); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” *Id.* The purpose of the work product doctrine “is the promotion of the adversary system by safeguarding the fruits of an attorney's trial preparations from the opponent.” *U.S. ex rel. Fago v. M & T Mortgage Corp.*, 242 F.R.D. 16, 19 (D.D.C.2007). See also *United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir.1995) (“The purpose of the doctrine is to establish a zone of privacy for strategic litigation planning and to prevent one party

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from piggybacking on the adversary's preparation.”).

[1] To the extent that the work product contains relevant, nonprivileged facts ... the party seeking discovery [must] show “adequate reasons” why the work product should be subject to discovery. However, to the extent work product reveals the opinions, judgments, and thought processes of counsel, it receives some higher level of protection, and a party seeking discovery must show extraordinary justification. *In re Sealed Case*, 676 F.2d 793, 809 (D.C.Cir.1982).

### B. Surveys, Scope of Work Documents and Checklists

\*3 Plaintiffs are asking for the surveys that Defendants' consultants did before the remediation work, to obtain measurements and photographs, nothing else, no opinions, no advice, just the objective quantitative inches and feet and degrees of slope of the restaurants during the class period, at the time when Plaintiffs are claiming the restaurants were out of compliance with the ADA. (See Plaintiffs' Brief in Response at page 7-“Plaintiffs do not seek litigation strategies, interpretations, mental impressions, or evaluations, but merely objective facts: What were the measurements of relevant features? What was done to any relevant features?”)

Burger King argues that these documents are unquestionably privileged work product:

The work product doctrine, codified in [Federal Rule of Civil Procedure 26\(b\)\(3\)](#), protects “‘from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation.’ ” *In re Grand Jury Subpoena (Torf)*, 357 F.3d 900, 906 (9th Cir.2004) (citation omitted). See also *S.E.C. v. Schroeder*, No. C07-03798, 2009 WL 1125579, at \*6 (N.D.Cal. April 27, 2009); *AMCO Ins. Co. v. Madera Quality Nut LLC*, No. 1:04-cv-06456, 2006 WL 931437, at \*14-15 (E.D.Cal. April 11,

2006). Documents qualify for protection under [Rule 26\(b\)\(3\)](#) so long as the documents are prepared (1) in anticipation of litigation or for trial (2) by or on behalf of a part [Torf](#), 357 F.3d at 907 (citation omitted); [AMCO](#), 2006 WL 931437, at \*14-15 (citation omitted). The documents at issue easily satisfy these prerequisites.

(Def. Opening Supp. Brief at 8:23-9:10)

Plaintiffs argue that Burger King has waived the privilege by not listing the surveys on its privilege log. For reasons which will become clear, this Court does not rule on this question, but is willing to consider it at another juncture, if necessary. For the purposes of this motion, the Court proceeds as if Burger King had not waived its privilege, but analyzes whether Plaintiffs have shown substantial need for the documents and that they could not obtain the relevant information contained in them, without undue hardship.

Burger King argues that it produced “Facility Inspection Reports,” “FIRS,” in response to Plaintiffs' Interrogatory Number 23, which requested surveys. Plaintiffs reject these documents as essentially overview descriptions of various parts of a Burger King restaurant that evaluate compliance with BKC's standards. They do not require or contain comprehensive measurements of the elements at issue. (Second Robertson Decl. At Ex. 1).

[2][3] The Court may grant Plaintiff's motion to compel Defendants to produce the surveys even if the documents are work product and therefore privileged, because documents can be privileged while the facts contained within them may not be. See *Pltfs' Mot. To Compel* at 12-13; Advisory Committee Notes to [Rule 26](#), 48 F.R.D. 487, 501 (1970) (“[O]ne party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.”) Similarly, the attorney-client privilege “only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.”

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*Upjohn Co. v. United States*, 449 U.S. 383, 395, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

\*4 In addition, a requesting party may obtain work product if the material is relevant, and the requesting party makes a showing of substantial need sufficient under [FRCP 26\(b\)\(3\)\(A\)\(ii\)](#) to defeat the work product protection. The rule requires that:

“the party shows that it has substantial need for the materials to prepare its case, and cannot, without undue hardship, obtain their substantial equivalent by other means.” (*Id.*)

Plaintiffs can't do the surveys themselves now, because work has already started or even been completed on Defendants' restaurants. This makes it impossible for Plaintiffs to obtain measurements for the restaurants. This is similar to the circumstances in *Braun v. Lorillard, Inc.*, 84 F.3d 230, 235-236 (7th Cir.1996)(holding that “exceptional circumstances” existed to produce nontestifying expert's test results where that test had destroyed the sample in question); *Bank Brussels Lambert v. Chase Manhattan Bank. N.A.*, 175 F.R.D. 34, 44-45 (S.D.N.Y.1997) (holding “exceptional circumstances” existed where nontestifying accounting expert had access to company's records immediately after the discrepancy at issue was discovered, but before records may have been lost.)

[4] The Facility Inspection Reports (“FIRS”) are inadequate, showing only part of the information, what has already been done, nothing about what condition the restaurant was in during the class period. Plaintiffs also reject Burger King's contention that information the Plaintiffs obtained from various Building Departments about work on the restaurants is adequate (BKC Opening Brief at 17). Plaintiffs reviewed those documents and discovered they did not contain measurements of BKL stores during the class period (Robertson Decl. at ¶ 40). Consequently, Plaintiffs show that they have both a substantial need for the documents and cannot obtain the information anywhere else, despite their previous efforts to obtain Defendants' cooperation

in conducting their own surveys prior to the remediation work.

Defendants rely on several cases for the proposition that Plaintiffs should not be allowed to “piggyback” on Defendants' work product.

“The reach of the work product privilege is broad; ‘even factual portions of documents may be withheld, so long as the document as a whole was created in anticipation of litigation.’ ” *Equal Rights Ctr. v. Post Props., Inc.*, 247 F.R.D. 208, 211 (D.D.C.2008) (quoting *Gen. Elec. Co. v. Johnson*, No. CIV.A.00-2855 (JDB), 2006 WL 2616187, at \*12 (D.D.C. Sept. 12, 2006)) (citing also *Tax Analysts v. I.R.S.*, 117 F.3d 607, 621 (D.C.Cir.1997) (holding that “[a]ny part of a [document] prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine”). See also *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1261-62 (3d Cir.1993) (rejecting, as overbroad, “argu [ment] that the work product doctrine should not apply to [consultant's] report because it contained purely factual material.”) (citing *U.S. v. Nobles*, 422 U.S. 225, 238-39, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), and other authority).

\*5 (Def. Supplemental Opening Brief at 10:7-17)

The *Equal Rights Center* and *Bally* cases are distinguishable because in neither of them did the court find the requesting party had met its burden to show substantial need or exceptional circumstances.

In *ERC*, an ADA access case, the Court rejected Plaintiff's argument in favor of obtaining attorney-consultant reports:

ERC asserts that “the need for disclosure is clear” because “Post is in the process of altering the Subject Properties.” (Pl.'s Mem. at 14.) ERC further asserts that “[t]he data collected by Post and its consultants regarding the condition of the properties, to the extent that they document non-

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compliance with the FHA and ADA, will greatly reduce the burden and costs to the litigants to inspect each of these properties again.” (*Id.* at 15.) Even if the Court accepts these arguments, and finds that Post's alleged alteration of its properties and the costs of investigation constitute an “extraordinary justification” for disclosure, ERC would still fall short of meeting its burden. Rule 26 requires that a party show “substantial need for the materials” and that it cannot “without undue hardship, obtain their substantial equivalent by other means.” Fed.R.Civ.P. 26(b)(3)(A). As Post points out, ERC has not reviewed “any development and construction files or site plans and maps that have been offered at Post's office since October 17, 2007” and has not “noticed any depositions of Post employees that may have knowledge of the changes Post has and has not made at its properties.” (Def.'s Opp'n at 12.)

*Equal Rights Center v. Post Properties, Inc.* 247 F.R.D. 208, 212 (D.D.C., 2008)

In *Bally*, a case involving an allegedly defective commercial dishwasher, the court affirmed an OSHA Commission ruling that a plaintiff had failed to show substantial need:

[t]he Commission found that, even assuming OSHA had “substantial need” of the report, the agency had failed to establish that it could not obtain “substantially equivalent” materials without “undue hardship.” In this regard, the Commission made several factual findings. It found that since there was no evidence that Bally's precluded OSHA from conducting its own test on the dishwasher, OSHA could in fact have done so. The Commission rejected OSHA's claim that it could not have tested the dishwasher because Bally's had removed it from regular service, noting that OSHA could have requested Bally's to retrieve the dishwasher for this purpose. It is undisputed that OSHA did not explore this possibility with Bally's.

*Martin v. Bally's Park Place Hotel & Casino*, 983

F.2d 1252, 1256 (3d Cir.1993)

In this case, Plaintiffs have reviewed over 100,000 documents produced by Defendants, attempted to conduct their own surveys of the BKL restaurants, but were thwarted by Burger King, and noticed a 30(b)(6) deposition of Burger King on topics related to the state of compliance of the BKL's during the class period in June, which has been objected to and re-scheduled by Burger King. Plaintiffs have attempted in good faith to obtain this information on their own but now have no recourse but Burger King's surveys, to assess the status of the 90 BKL restaurants during the class period, prior to remediation.

\*6 Burger King argues that Plaintiffs have waived any right to assert exceptional circumstances because they delayed seeking the surveys until now:

*AT & T Corp. v. Microsoft Corp.*, No. 02-0164 MHP (JL), 2003 WL 21212614, at \*6 (N.D.Cal. April 18, 2003) (citing Fed.R.Civ.P. 26(b)(3) and Hickman). “[W]hen a party argues that substantial need exists because of the passage of time, the party seeking discovery must make a showing that the passage of time was not caused by avoidable negligence on their part.” *Garcia*, 214 F.R.D. at 598 (citation omitted).

(Def. Opening Supp. Brief at 15:5-9)

In this case, the 90 BKL restaurants were at issue from early 2008 and yet Burger King would never allow Plaintiffs to survey them. The delay is not Plaintiffs' fault.

### C. Privilege Log and Plaintiffs' Proposed Order

Plaintiffs' Proposed Order overreaches somewhat. It provides for Burger King to redact to delete opinion work product. That is legitimate. However, the proposed order also states that “Defendant has waived its privileges and must produce all documents covered by items 1707-1710, 1713-1717, and 1737-38 or else provide a compliant privilege log

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including:

“a. Document-by-document descriptions of items 1707-1710, 1713-17, and 1737-38 including all of the information required by Judge Alsup's Supplemental Order; and

b. All documents relevant to the assertion of the privileges themselves including, for example, any and all joint defense agreements.”

These last two provisions seem redundant. If this Court orders Burger King to produce the surveys, then why should it also have to concede that it waived privileges AND provide a Privilege Log?

Plaintiffs have shown the exceptional circumstances exception to the work product doctrine—that they have a substantial need for the documents and can't obtain them or their equivalent anywhere else. That is not really a waiver of Defendants' privilege. It merely overrides it, and only for the facts contained in the documents, not for the whole documents themselves or for any opinion work product contained in them.

#### **D. Interrogatory 24**

In the alternative, if the Court didn't order Defendants to produce the surveys, Plaintiffs asked the Court for permission to propound Interrogatory Number 24, which would exceed the limit on Interrogatories in the Civil Local Rules. This asks for all the measurements of the 90 restaurants at issue. Defendants protest that the Interrogatory is impermissibly burdensome, contains subparts, and asks for thousands of bits of information. All these objections are remedied by Defendants' producing the surveys.

Defendants plead hardship at the prospect of having to provide the information via answering another Interrogatory, Plaintiffs' proposed Interrogatory 24. The Interrogatory is not a good alternative, when the Defendants could mitigate their own burden by producing the surveys, which would be responsive

to Interrogatory 24 anyway, pursuant to the Business Records Option of [FRCP 33\(d\)](#). The easiest path for everyone is for Defendants to produce the surveys and work order checklists.

#### **E. Defendants request return of inadvertently produced privileged document.**

\*7 Defendants ask the Court to order Plaintiffs to return one of the surveys, which was inadvertently produced by the owner of one of the franchisee restaurants, Burger King # 3157, in Petaluma—(Declaration of Joseph N. Rubin). Mr. Rubin, the owner of Centennial Restaurants, LLC, the operator of Burger King # 3157, received a subpoena from Plaintiffs' attorney Julia Campins and forwarded to his attorney, Stanley Rubin. He says in his Declaration that he “neglected to inform Mr. Stanley Rubin that I had previously entered into this Joint Defense Agreement with Burger King Corporation and neglected to provide Mr. Stanley Rubin with a copy of this Joint Defense Agreement.” Mr. Rubin the franchisee and Mr. Rubin his attorney produced the surveys and scopes of work to Plaintiffs' attorney, Ms. Campins. He requests the return of the document at Bates Numbers CEN-03157-00002 through CEN-03157-00013.

Burger King argues it did not waive the work product privilege by producing the survey to a third party, that is the franchisee, because Burger King and its franchisees have a Joint Defense Agreement. (Burger King Opening Brief at 15-16) Burger King has refused to produce the Joint Defense Agreement to Plaintiffs to verify its existence, but is willing to produce it to the Court for in camera review. Burger King did not list the Joint Defense Agreement on its Privilege Log, but that is probably legitimate if Plaintiffs didn't make a formal discovery request for it. Plaintiffs sequestered the document, the survey inadvertently produced by the franchisee, but have refused to return it to Burger King voluntarily. The inadvertently produced survey itself would be produced, if the Court grants Plaintiffs' motion to compel. If the Court grants

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Plaintiff's motion to compel, then Defendants' motion for return of inadvertently produced privileged document and for protective order would be moot.

## V. Conclusion and Order

This Court concludes that Plaintiffs have shown that the requested documents are relevant, that they have a substantial need for the factual information they contain, that they made a good faith effort to discover the information by other means, and that the information the documents contain cannot be obtained in any other way. Consequently, even though the documents themselves may be protected by the work product doctrine, the factual material within them is discoverable and Defendants shall produce the documents, redacted to remove opinions and legal strategies. The Court finds that Interrogatory 24 would be a cumbersome burdensome way for Defendants to provide the same information which is already available in the surveys, and that the surveys satisfy the business records option of [Rule 33, Federal Rules of Civil Procedure](#), if Defendants were to respond to Plaintiffs' request via interrogatory. Accordingly, Plaintiffs' motion to compel production of the surveys in their motion to compel is granted, the motion to propound Interrogatory 24 is denied as moot, and Defendants' motion for return of an inadvertently produced privileged document is denied.

**\*8 IT IS SO ORDERED.**

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END OF DOCUMENT

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## H

Only the Westlaw citation is currently available.

United States District Court,  
N.D. California.  
HABEAS CORPUS RESOURCE CENTER,  
Plaintiff,  
v.  
UNITED STATES DEPARTMENT OF JUSTICE  
and Michael B. Mukasey, in his official capacity as  
Attorney General of the United States, Defendants.  
**No. C 08-2649 CW.**

Nov. 21, 2008.

West KeySummary

**Records 326**  **58**

[326 Records](#)

[326II Public Access](#)

[326II\(B\) General Statutory Disclosure Requirements](#)

[326k53 Matters Subject to Disclosure; Exemptions](#)

[326k58 k. Personal Privacy Considerations in General; Personnel Matters. Most Cited Cases](#)

Department of Justice could be compelled to disclose two documents to resource center pursuant to the Freedom of Information Act (FOIA). FOIA provided an exemption which allowed DOJ to withhold “personnel and medical files which would constitute a clearly unwarranted invasion of personal privacy.” Although the documents contained professional opinions about the hiring of an employee, the authors had little to say and they contained no personal information. [5 U.S.C.A. § 552\(b\)\(1\)-\(9\)](#).

[Michael David Laurence](#), Barbara Susan Saavedra, San Francisco, CA, for Plaintiff.

[Joel McElvain](#), U.S. Department of Justice, Washington, DC, for Defendants.

## ORDER GRANTING IN PART DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDG- MENT ON EXEMPTIONS

[CLAUDIA WILKEN](#), District Judge.

\*1 Defendants U.S. Department of Justice (DOJ) and Michael Mukasey move for partial summary judgment on the issue of the propriety of their withholding certain documents in response to Plaintiff Habeas Corpus Resource Center's Freedom of Information Act (FOIA) request. The request sought documents related to the DOJ's development of a proposed regulation detailing the certification process for state capital counsel systems. In particular, the request focused on communications between the DOJ and outside groups and individuals. Plaintiff is concerned that certain interests may have been permitted to exercise undue influence over the development of the regulation. The Court has reviewed *in camera* the withheld documents and has determined that they were properly withheld from disclosure except as noted herein.

## LEGAL FRAMEWORK

FOIA entitles private citizens to access government records. “The Supreme Court has interpreted [FOIA's] disclosure provisions broadly, noting that the act was animated by a ‘philosophy of full agency disclosure.’ ” [Lion Raisins v. U.S. Dep't of Agric.](#), 354 F.3d 1072, 1079 (9th Cir.2004) (quoting [John Doe Agency v. John Doe Corp.](#), 493 U.S. 146, 152, 110 S.Ct. 471, 107 L.Ed.2d 462 (1989)). However, FOIA exempts nine categories of government documents from disclosure. [See 5 U.S.C. § 552\(b\)\(1\)-\(9\)](#). “Unlike the disclosure provisions of FOIA, its statutory exemptions ‘must be narrowly construed.’ ” [Lion Raisins](#), 354 F.3d at 1079, (quoting [John Doe Agency](#), 493 U.S. at 152). The Court reviews the government's withholding of agency records *de novo*, and the government bears the burden of justifying its nondisclosure. [5 U.S.C.](#)

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§ 552(a)(4)(B).

## DISCUSSION

### I. Exemption 5

The bulk of the documents at issue were withheld pursuant to FOIA Exemption 5. Under this exemption, the government can refuse to disclose “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). “This provision shields ‘those documents, and only those documents, normally privileged in the civil discovery context.’ “ *Carter v. U.S. Dep’t of Commerce*, 307 F.3d 1084, 1088-89 (9th Cir.2002) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975)). Exemption 5 incorporates the executive “deliberative process” privilege, the purpose of which is “ ‘to prevent injury to the quality of agency decisions’ by ensuring that the ‘frank discussion of legal or policy matters’ in writing, within the agency, is not inhibited by public disclosure.” *Maricopa Audobon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir.1997) (quoting *Sears*, 421 U.S. at 150-51.)

To qualify for the deliberative process privilege, a document must be both “predecisional” and “deliberative.” *Carter*, 307 F.3d at 1089. “A ‘predecisional’ document is one prepared in order to assist an agency decisionmaker in arriving at his decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency .” *Assembly of the State of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 916, 920 (9th Cir.1992) (citations and internal quotation marks omitted). In this case, the relevant decision was that of the DOJ to propose promulgating the version of the certification regulation that was published in the Federal Register. A document is “deliberative” if its dis-

closure “would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.” *Id.* (quoting *Dudman Commc’ns Corp. v. Dep’t of the Air Force*, 815 F.2d 1565, 1568 (D.C.Cir.1987)). The deliberative process privilege “does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment.” *Tigue v. U.S. Dep’t of Justice*, 312 F.3d 70, 80 (2d Cir.2002) (quoting *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir.1994)). Although the predecisional and deliberative requirements are distinct, “they tend to overlap in practice.” *Carter*, 307 F.3d at 1089.

\*2 Having reviewed the withheld documents, the Court concludes that, contrary to Defendants’ assertion, the following documents or portions thereof are not protected by the deliberative process privilege:

- (1) Document No. 4 <sup>FN1</sup>: This document summarizes issues raised by outside groups. It does not reflect deliberations within the DOJ and does not contain the opinions of the author. <sup>FN2</sup> It must be disclosed in its entirety. *See Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 12, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2002) (communications between an agency and individuals “communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action” are not protected by the deliberative process privilege).

<sup>FN1</sup>. The document numbers listed here refer to the entries on Defendants’ main *Vaughn* index (Docket No. 36).

<sup>FN2</sup>. The single-page document that was submitted for *in camera* review appears to be incomplete. The bottom of the page lists participants in a meeting between the DOJ

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and the National Association of Attorneys General, but the document does not go on list the issues that were raised at that meeting. In contrast, the previous part of the document lists the participants and then the issues that were discussed at a meeting with the American Bar Association. Defendants must determine whether the original document consists of more than one page, and shall produce the entire document to Plaintiff unless they believe the additional pages contain information that, consistent with the Court's determination with respect to the first page, is exempt, in which case they must submit the document for *in camera* review.

- (2) Document No. 8: The third sentence in the body of the cover email is not deliberative in that it is peripheral to and does not bear on substantive policy development. The cover email must be disclosed, although Defendants may redact the first two sentences of the email if they wish. The attachment may be withheld.
- (3) Document No. 9: The first paragraph of the email discusses communications between the DOJ and Senator Kyl's office. It is not privileged. The second and third paragraphs of the email contain a proposed response to an undisclosed question from a member of the news media.<sup>FN3</sup> This portion of the document is not predecisional or deliberative because it was not prepared to assist an agency decision-maker in arriving at a substantive policy decision and does not bear on the formation of any such decision. The email must therefore be disclosed in its entirety.

<sup>FN3</sup>. Defendants shall review the email to which Document No. 9 is a response and ensure that it is in fact not responsive to Plaintiff's FOIA request. If it is responsive, it must be disclosed.

- (4) Document No. 29: The last sentence of the first

paragraph of the body of the email refers to communication from individuals outside the DOJ and thus is not privileged. The email must be disclosed, but Defendants may redact the remainder of the body of the email as well as the author's mobile phone number.

- (5) Document No. 35-1: The withheld paragraph does not discuss substantive policy and is peripheral to the DOJ's decision. It must be disclosed.
- (6) Document No. 35-9: The last two paragraphs of the document discuss proposed communications with Senator Kyl's office. They do not reflect the author's view on substantive policy and must be disclosed. The redacted email from Ryan Bounds also concerns this communication. Although it contains a minimal amount of information regarding the status of the regulation, it is not deliberative in nature and disclosure of this information would not expose the DOJ's decisionmaking process in such a way as to discourage candid discussion within the agency. In addition, according to the email string, this information was communicated to Senator Kyl's office. It must be disclosed. Defendants may continue to withhold the redacted portion of the first paragraph of David Kemp's email.
- (7) Document Nos. 35-11, 35-12, 36-2, 36-3 and 36-4: The withheld portions of these documents discuss proposed communications with outside interests. They are peripheral to the formation of substantive policy and must be disclosed.

\*3 A number of additional withheld documents refer to revisions to the draft regulation that were made as a result of review by the Office of Management and Budget (OMB). Plaintiff points out that [Executive Order 12,866](#) provides:

After the regulatory action has been published in the Federal Register or otherwise issued to the public, the agency shall:

...

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- (ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and
- (iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

Exec. Order No. 12,866, 58 Fed.Reg. 51735 (Sept. 30, 1993), § 6(a)(3)(E). Some of the withheld documents reflect the revision process after OMB review, and Plaintiff contends that this material must be disclosed. However, the executive order on its face requires only that an agency summarize the changes that were ultimately made to a regulation as a result of OMB/OIRA review; it does not purport to require disclosure of all documents reflecting the deliberative process that led to such changes. In addition, as Defendants note, the executive order also provides:

Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

*Id.* § 10. Therefore, the Court may not order disclosure of documents that are subject to the deliberative process privilege on the basis that Executive Order 12,866 carves out an exception to the privilege.

Plaintiff also argues that documents “reflecting information that formed the basis of the regulations as proposed-and thus reflect the policy of the agency-[ ] do not come within the deliberative process privilege.” Pl.’s Opp. at 7. This is a sweeping proposition that would potentially require the disclosure of many documents that are both pre-decisional and deliberative. But it is not an accurate

description of the law, and the cases Plaintiff cites are not on point. For example, *Assembly of the State of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 916 (9th Cir.1992), the primary case on which Plaintiff relies, simply holds, “Material which predates a decision chronologically, but did not contribute to that decision, is not predecisional in any meaningful sense.” *Id.* at 921. Similarly, *Sears*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29, holds that intra-agency communication that explains a policy already adopted becomes the “working law” of the agency. As such, it is not pre-decisional and is not protected by the deliberative process privilege. *Id.* at 152. These cases do not apply to the material Defendants have withheld.

\*4 Plaintiff also argues that Defendants may not invoke Exemption 5 because the withheld records may shed light on government misconduct. This argument is based on the premise that the privilege is a qualified one that can be overcome under certain circumstances-in particular, where documents to which the privilege applies are sought during civil discovery and are central to a plaintiff’s claim of government misconduct. *See, e.g., North Pacifica, LLC v. City of Pacifica*, 274 F.Supp.2d 1118, 1122 (N.D.Cal.2003). However, whether particular documents may theoretically be subject to discovery in a particular civil action is irrelevant to whether they are exempt from disclosure under FOIA Exemption 5. The “test under Exemption 5 is whether the documents would be ‘routinely’ or ‘normally’ disclosed upon a showing of relevance.” *FTC v. Grolier Inc.*, 462 U.S. 19, 26, 103 S.Ct. 2209, 76 L.Ed.2d 387 (1983). “It makes little difference whether a privilege is absolute or qualified in determining how it translates into a discrete category of documents that Congress intended to exempt from disclosure under Exemption 5. Whether its immunity from discovery is absolute or qualified, a protected document cannot be said to be subject to ‘routine’ disclosure.” *Id.* at 27. In addition, case law addressing the circumstances under which the deliberative process privilege may be overcome in non-FOIA litigation cannot be applied here. Unlike

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in the context of a civil discovery dispute, in this case it is inapposite to ask whether the withheld documents are so central to Plaintiff's claim that the privilege may not be invoked. Here, production of documents is the beginning and the end of Plaintiff's claim. In any event, the Court has reviewed the withheld documents, and none of them would be central to any hypothetical future claim based on the government misconduct that Plaintiff alleges.

## II. Exemption 6

FOIA Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). To determine whether an invasion of privacy is clearly unwarranted, courts must balance four factors: "(1) the plaintiff's interest in disclosure; (2) the public interest in disclosure; (3) the degree of the invasion of personal privacy; and (4) the availability of any alternative means of obtaining the requested information." *Multnomah County Medical Soc. v. Scott*, 825 F.2d 1410, 1413 (9th Cir.1987).

Plaintiff maintains that the DOJ's decision to hire Jennifer Goldstein, an attorney who played a key role in developing the certification regulation, was politically motivated. Plaintiff's FOIA request sought information concerning Ms. Goldstein's hiring in order to determine whether the regulation's development may have been tainted by bias. Defendants have withheld two documents-Nos. 36-1 and 36-5 on the *Vaughn* index-that contain email chains regarding the decision to hire Ms. Goldstein. Although these documents contain professional opinions about Ms. Goldstein, the authors had little to say and the emails contain no personal information. Plaintiff's interest-and the public's interest-in determining whether Ms. Goldstein's hiring was improper is sufficient to outweigh any minimal privacy interest Ms. Goldstein may have in keeping these opinions from the public. Accordingly, these documents must be disclosed. However, Defendants

may redact the mobile telephone number of Ryan Bounds, which appears on each document.

## CONCLUSION

\*5 For the foregoing reasons, Defendants' motion for summary judgment is granted in part and denied in part. Defendants must forthwith disclose the documents or portions thereof as discussed herein.

IT IS SO ORDERED.

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Only the Westlaw citation is currently available.

United States District Court,  
N.D. California.  
Roylene RAY, et al., Plaintiffs,  
v.  
BLUEHIPPO FUNDING, LLC, et al., Defendants.  
**No. C-06-1807 JSW (EMC).**  
**Docket Nos. 149, 152, 156.**

Aug. 11, 2008.

[David John Marshall](#), [Debra S. Katz](#), Gary Peller, Maura J. Dundon, Katz, Marshall & Banks, LLP, Gary Peller, Washington, DC, [Monique Olivier](#), The Sturdevant Law Firm, San Francisco, CA, [Robert M. Bramson](#), Bramson, Plutzik, Mahler & Birkhaeuser, LLP, Walnut Creek, CA, for Plaintiffs.

[Morgan Todd Jackson](#), [Anthony Paul Schoenberg](#), [Carl Brandon Wisoff](#), [Douglas R. Young](#), Farella, Braun & Martel, LLP, San Francisco, CA, [Stan Karas](#), Quinn, Emanuel, Urquhart, Oliver & Hedges, Los Angeles, CA, for Defendants.

**ORDER REQUIRING FURTHER MEET AND  
CONFER RE PLAINTIFFS' MOTION TO  
COMPEL; GRANTING DEFENDANTS' MO-  
TION FOR PROTECTIVE ORDER; AND  
GRANTING PLAINTIFFS' MOTION FOR EX-  
PEDITED CONSIDERATION**

[EDWARD M. CHEN](#), United States Magistrate Judge.

\*1 The Court held a telephonic conference call on August 8, 2008, during which it made rulings on Plaintiffs' motion to compel (Docket No. 149); Defendants' motion for a protective order (Docket No. 152); and Plaintiffs' motion to strike Defendants' motion for a protective order or, in the alternative,

for expedited consideration thereof (Docket No. 156). This order memorializes the Court's rulings and provides additional explanation where necessary.

**I. DISCUSSION****A. Plaintiffs' Motion to Compel****1. Document Request No. 24**

The Court rejects BlueHippo's position that no documents should be produced because they are privileged. "Neither the U.S. Supreme Court nor the Ninth Circuit have recognized a blanket settlement privilege as a matter of federal common law." *United States v. Union Pacific R.R. Co.*, No. CIV 06-1740 FCD KJM, 2007 U.S. Dist. LEXIS 40178, at \*15-16, 2007 WL 1500551 (E.D.Cal. May 23, 2007); *see also Matsushita Elec. Indus. Co. v. Mediatek, Inc.*, No. C-05-3148 MMC (JCS), 2007 U.S. Dist. LEXIS 27437, at \* 15, 20, 2007 WL 963975 (N.D.Cal. Mar. 30, 2007) (noting that "courts have reached widely divergent conclusions about whether or not a federal settlement privilege exists"; ultimately "conclud[ing] that a federal settlement privilege should not be implied" under [Federal Rule of Evidence 501](#)). BlueHippo argues that, even if there is no privilege, the Court could rely on [Federal Rule of Evidence 408](#) to limit what settlement communications should be produced during discovery, *see Union Pacific*, 2007 U.S. Dist. LEXIS 40178, at \*18, 2007 WL 1500551 (adopting this approach), but admissibility and discoverability are two different issues.

The Court, however, agrees with BlueHippo that Document Request No. 24 is overbroad. Although BlueHippo's business practices may have been nationwide, it is likely that some of the information provided by BlueHippo to FTC and the non-California states is either completely irrelevant or

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marginally relevant-*e.g.*, financial information about non-California customers, who are not part of the potential class in the instant case. During the conference call, Plaintiffs claimed that BlueHippo had failed to produce specific types of documents (*e.g.*, internal memoranda, e-mails) and documents concerning certain subject matters (*e.g.*, documents related to why and when BlueHippo changed its business models). If these are the documents that Plaintiffs seek, Document Request No. 24 is an inefficient and ineffective way to obtain them and is grossly overbroad as written. The parties should discuss meaningful ways of narrowing the documents at issue. The Court therefore orders the parties to further meet and confer. During the meet and confer, Plaintiffs must articulate with specificity what kinds of documents it seeks (whether pursuant to Document Request No. 24 or another request). The Court emphasizes, as it did during the conference call, that counsel with full and complete authority on discovery matters (and a client representative if needed to authorize resolution) must participate in the meet and confer and that, if either party continues to maintain an extreme position, the Court may well impose sanctions if that position is not substantially justified. Thus far, the meet and confer process has been inadequate. Neither side has described any effort to compromise and relinquish their respective absolutist positions.

\*2 The parties shall file a joint letter no later than August 15, 2008, to report back on their meet and confer efforts and to inform the Court what, if any, discovery dispute remains. The joint letter shall be no longer than two single-spaced pages.

## 2. Production Deadline

The documents in question shall be produced at least 14 days in advance of the deposition to which they may pertain to permit review and resolution of any disputes over the production prior to the deposition.

## 3. Interrogatory No. 17

The Court agrees with BlueHippo that the interrogatory is overbroad since it seeks information about all of BlueHippo's California customers, regardless of whether they are members of the putative class. However, even if the interrogatory were narrowed to only members of the putative class, BlueHippo argues that the undertaking to respond to the interrogatory would be unduly burdensome. According to BlueHippo, "the putative class alone ... potentially has almost 40,000 members." Burcham Decl. ¶ 3. BlueHippo estimates that, because of the size of the class and the need for human review of database information, it would take approximately 2,000 hours to respond to the interrogatory. *See id.* ¶¶ 4-8. BlueHippo notes that, even if it were to respond to the interrogatory based on a sampling-*e.g.*, 10%-that would still take some 200 hours.

In order to better evaluate the alleged burden, the Court orders BlueHippo to provide a declaration as to the number of hours BlueHippo spent creating the chart provided in the Florida proceedings. *See* Docket No. 149 (Ex. 4). The declaration shall also address (1) what categories of information are maintained on BlueHippo's databases (*e.g.*, is there information comparable or similar to what is sought in the interrogatory) or (2) what exactly would be involved with the human review of data extracted from the databases and why such review is necessary. The declaration shall be filed no later than August 15, 2008.

## B. Defendants' Motion for Protective Order and Plaintiffs' Motion to Strike or, in the Alternative, for Expedited Consideration

Both BlueHippo Defendants move for a protective order to prevent a 30(b)(6) deposition from proceeding on August 12, 2008. Plaintiffs move to strike Defendants' motion or, in the alternative, ask the Court to consider Defendants' motion on shortened time.

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In light of the noticed deposition date of August 12, the Court grants Plaintiffs' request for shortened time. Turning to the merits of Defendants' motion, the Court is at a loss as to why this discovery dispute was not resolved by the parties without the need for judicial intervention. Finding a mutually agreeable deposition date should not be beyond the parties' abilities. Presenting this issue for the Court's resolution is a waste of judicial resources not to mention the parties'. Given the unavailability of counsel for Gateway on August 12, and the lack of prejudice to any party by having the deposition held on September 5, 2008, when all parties appear to be available, the Court grants the motion for a protective order. The 30(b)(6) deposition shall be held on September 5, 2008.

\*3 Although no motion for a protective order has yet been filed with respect to the deposition of Joseph Rensin, currently scheduled for August 14, 2008, the Court notes that, given the unavailability of counsel for Gateway on that date, the deposition shall not proceed on August 14. The Court is not prejudging whether the deposition should in fact go forward at all and if so on what other date. Defendants are advised to file their motion for a protective order with respect to the Rensin deposition promptly. Once filed, Plaintiffs shall have three court days to file an opposition.

## II. CONCLUSION

For the foregoing reasons, the Court orders a further meet and confer with respect to Plaintiffs' motion to compel, grants Plaintiffs' motion for expedited consideration of Defendants' motion for a protective order, and grants Defendants' motion for a protective order.

If these disputes are not resolved through meet and confer, the Court will order personal attendance of lead trial counsel at a further meet and confer at a place and time to be ordered by the Court.

IT IS SO ORDERED.

N.D.Cal.,2008.

Ray v. BlueHippo Funding, LLC

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