IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and the STATE OF MICHIGAN, Plaintiffs, v.	)	Civil Action No: 2:10-cv-14155-DPH-MKM
BLUE CROSS BLUE SHIELD OF MICHIGAN, a Michigan nonprofit healthcare corporation, Defendant.	)	Hon. Denise Page Hood Mag. Judge Mona K. Majzoub

UNITED STATES' AND STATE OF MICHIGAN'S
MOTION FOR A PROTECTIVE ORDER AND SUPPORTING BRIEF

For the reasons set forth in the accompanying brief, Plaintiffs respectfully request the Court, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, issue a protective order to quash the deposition notices served by Defendant, pursuant to Federal Rule of Civil Procedure 30(b)(6), on the United States and State of Michigan because those depositions notices seek attorney work product and overbroad and unduly burdensome discovery of, at best, marginally relevant information.

Pursuant to Local Rule 7.1, attorneys for Plaintiffs conferred in good faith with attorneys for Blue Cross regarding the nature of this Motion and its legal basis but Blue Cross has elected not to withdraw its notice. Plaintiffs therefore now seek the Court's entry of a protective order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and the STATE OF MICHIGAN,	)	
Plaintiffs,	)	Civil Action No: 2:10-cv-14155-DPH-MKM
v.	)	
BLUE CROSS BLUE SHIELD OF MICHIGAN, a Michigan nonprofit healthcare corporation,	)	Hon. Denise Page Hood Mag. Judge Mona K. Majzoub
Defendant.	)	

BRIEF IN SUPPORT OF UNITED STATES' AND
STATE OF MICHIGAN'S MOTION FOR A PROTECTIVE ORDER

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Statement of Issues Presented

1) Whether Blue Cross should be able to depose attorneys for the United States and the State of Michigan's Office of the Attorney General?

2) Whether Blue Cross should be permitted to invade Plaintiffs' opinion work product?

3) Whether Blue Cross's Rule 30(b)(6) notice is overly broad and unduly burdensome?

4) Whether the relevance, if any, of Defendant's Rule 30(b)(6) notice outweighs the undue burden of preparing a witness to testify on those topics?

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Introduction

For the second time, the parties are before this Court as a result of Blue Cross's inappropriate attempts to discover Plaintiffs' work product. The Court previously denied Blue Cross's attempt to seek, by interrogatory, the facts learned by the government in witness interviews. *See* Doc. No. 178 (denying Blue Cross's motion to compel the United States to produce attorney work product in interrogatory responses). Blue Cross now seeks to depose counsel for the United States and the State of Michigan in Rule 30(b)(6) depositions, which necessarily seek protected work product. These depositions should therefore be prohibited.

Moreover, the five noticed topics–in fact twelve, if all discrete subparts are counted–are massively overbroad and would pose an immense burden on Plaintiffs if forced to testify. Furthermore, topics 3-5 are, at best, of marginal relevance, and the burden of a response far outweighs any possible utility to Blue Cross.

Background

Fact discovery in this case has been ongoing for eighteen months. Since filing this case, Plaintiffs have identified for Blue Cross all individuals and entities they believe have information likely to support their case, including providing Blue Cross with preliminary (on July 25, 2012) and final (on September 10, 2012) lists of

witnesses to be called live at trial.[1] The United States and State of Michigan have produced to Blue Cross all relevant, nonprivileged documents in their possession in response to Blue Cross's First and Second Requests for Documents. (Negotiations over Blue Cross's voluminous Third Request for the Production of Documents, served on the United States on September 25, 2012, remain ongoing.) Blue Cross has propounded more than 50 interrogatories to which the United States and State of Michigan provided extensive responses, including details of the factual basis for Plaintiffs' allegations relating to each market identified in the Complaint. And the United States has responded to more than 800 Requests for Admission promulgated by Defendant. More than one hundred depositions of nonparties have been taken, most noticed by Blue Cross.

[1] Blue Cross, by contrast, has refused to comply with the plain terms of the Court's amended scheduling order (Doc. 176) and has yet to identify to Plaintiffs all the witnesses it expects to call live at trial. *See* Exhibits 3 and 4.

Yet, with only thirteen business days remaining in fact discovery, Blue Cross served the United States and the State of Michigan ("Government Plaintiffs") with Rule 30(b)(6) deposition notices. These notices, attached as Exhibits 1 and 2, require the United States and the State of Michigan to designate representatives to testify about five topics.[2] The first topic, which has seven separate subparts, seeks essentially Plaintiffs' factual basis for each contested issue in the case.[3] The second

[2] Topics 1-3 of Blue Cross's deposition notices to the United States and State of Michigan are identical except for the recipients. Topics 4 and 5 were directed solely solely to the United States.

[3] In total, the first topic of each notice would require testimony concerning:

> 1. The specific facts, information, documents, and other evidence (as well as the sources of such specific facts, information documents, and evidence) relied upon by the Plaintiff, the United States of America, to support its cause of action and claim(s) for relief against Blue Cross Blue Shield of Michigan ("Blue Cross"), specifically:
>
> a. The scope and extent of the product markets in which Plaintiff contends Blue Cross's conduct challenged in this action ("Blue Cross's MFNs") unlawfully restrained trade, described as "commercial individual health insurance" and "commercial group health insurance" in Plaintiffs' Complaint at ¶¶ 20-24.
>
> b. The scope and extent of the geographic markets in which Plaintiff contends Blue Cross's MFNs unlawfully restrained trade, described in Plaintiffs' Complaint at Compl. ¶ 25-32, 82.
>
> c. Blue Cross's alleged market power, including for each relevant market Blue Cross's market share, the identities and market shares of any other market participants, trends in market shares, entry, expansion, and barriers to entry, and any other facts relating to market power. (*See* Compl. ¶¶ 33-35.)
>
> d. Whether Blue Cross has sought and obtained MFNs in any hospital contracts in exchange for increases in the prices it pays for the hospitals' services. (*See* Compl. ¶¶ 5, 44, 45.)
>
> e. The anticompetitive effects that you claim were caused or are likely to be caused by any of Blue Cross' MFNs, including but not limited to any claim that Blue Cross's MFNs caused any hospitals to raise prices to Blue Cross's competitors by substantial amounts, or demand prices that are too high to allow

topic seeks the factual basis for why "what occurs in one alleged market is illustrative of what would happen in another alleged market."

The remaining topics included in Blue Cross's notices are even broader and assuredly less relevant. The third topic seeks information regarding the use of MFNs by any part of the governments of the United States or State of Michigan, without identifying any purported MFN. The fourth topic addresses any analysis done by anyone associated with the entire United States government comparing any two "healthcare payers" anywhere in the United States. The fifth topic seeks the rationale for an eighteen-year old decision of the Department of Justice not to further investigate a Pennsylvania health insurer's use of a "prudent buyer" clause, where the Department concluded that a court would likely rule that the policy was exempt from federal antitrust law under the state-action doctrine by reason of Pennsylvania law.

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competitors to compete, effectively excluding them from the market, or harmed competition in another manner, as described in Plaintiffs' Complaint at ¶¶ 6, 41-48, 49-80, 82.

f. Whether Blue Cross's MFNs have procompetitive or efficiency-enhancing effects, including but not limited to whether Blue Cross has sought or used MFNs to lower its own cost of obtaining hospital services. (*See* Compl. ¶¶ 5, 44, 45, 81.)

g. Whether any anticompetitive effects of any Blue Cross MFNs in any relevant market outweigh the procompetitive benefits of any such MFNs.

I. This Court should issue a Protective Order because Blue Cross's Rule 30(b)(6) deposition notices seek to depose opposing counsel and impermissibly invade Plaintiffs' attorney work product.

A. The Rule 30(b)(6) deposition notices impermissibly seek testimony of opposing counsel for the United States and the State of Michigan.

The Department of Justice and Michigan Attorney General's investigative processes of learning facts relevant to this law enforcement action are directed or conducted entirely by attorneys.[4] Unlike Blue Cross, neither the United States Department of Justice nor the State of Michigan Attorney General's Office have *independent* knowledge of the relevant facts in this case. Instead, the Department of Justice and the Attorney General's office develop understandings of facts from documents and industry participants who do have first-hand knowledge of relevant facts. Thus, courts have repeatedly held that Rule 30(b)(6) depositions of plaintiff agencies in government law enforcement actions "would amount to an attempt to depose opposing counsel" because such depositions would necessarily "involve the testimony of attorneys assigned to the case, or require those attorneys to prepare other witnesses to testify." *S.E.C. v. Buntrock*, 217 F.R.D. 441, 444 (N.D. Ill. 2003); *see also S.E.C. v. Nacchio*, 614 F. Supp. 2d 1164, 1178 (D. Colo. 2009); *S.E.C. v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992); *In re Bilzerian*, 258 B.R. 846, 848 (Bank'y M.D. Fla. 2001) (Rule 30(b)(6) deposition of law enforcement agency "would

[4] See Doc. 88 (Ex. 1) at ¶¶ 9-10.

require counsel to appear and be deposed"); *S.E.C. v. Rosenfeld*, No. 97-CIV-1467-RPP, 1997 WL 576021, at *2 (S.D.N.Y Sept. 16, 1997).

Plaintiffs cannot merely designate a non-attorney witness to be their representative, as Blue Cross has blithely suggested. Ex. 5. Defendants have regularly made this argument when seeking Rule 30(b)(6) depositions in government enforcement actions, and the arguments have been regularly rejected as being "disingenuous[ ]." *Rosenfeld*, 1997 WL 576021, at *2. Where defendants seek information via deposition from an attorney-directed law-enforcement action, "even if a non-attorney witness were designated, the designee would have to be prepared by those who conducted the investigation…." *FTC v. U.S. Grant Resources, LLC,* Civ. 04-596, 2004 WL 1444951 at *10 (E.D. La. June 25, 2004) (*citing Rosenfeld*, 1997 WL 576021, at *2). Indeed, "because such investigations are conducted by the [government agency's] legal staff, a Rule 30(b)(6) deposition of an [] official with knowledge of the extent of that investigative effort, *amounts to the equivalent of an attempt to depose the attorney for the other side*." *Rosenfeld*, 1997 WL 576021 at *2.[5]

[5] *See also S.E.C. v. SBM Inv. Certificates, Inc.*, No. DKC 2006-0866, 2007 WL 609888, at *23-24 (D. Md. Feb. 23, 2007) (denying defendant's request that a non-attorney be designated); *Buntrock*, 217 F.R.D. at 444 (same) (citing *Rosenfeld* with approval). Here, in light of the massive scope of the notice, an attorney could not effectively represent the United States or State of Michigan in responding to the notice without imposing an undue burden. *See Nacchio*, 614 F. Supp. 2d at 1178 (upholding a magistrate judge's decision that preparing to respond to a Rule 30(b)(6) deposition notice would unduly burden the S.E.C. and any examination would "repeatedly tread on arguably privileged grounds.").

B. Good cause exists for issuing a Protective Order because Blue Cross cannot meet the heightened standard required to depose opposing counsel.

When measuring whether good cause exists for a protective order under Rule 26(c), a party that seeks to take the deposition of opposing counsel "bears the burden to show the propriety of and need for deposing the attorney of his opponent." *Invesco Institutional (N.A.), Inc. v. Paas*, 244 F.R.D. 374, 393 (W.D. Ky. 2007) (citing *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986)). The party *seeking* to depose opposing counsel must meet a heightened standard. That party must show "that (1) no other means exist to obtain the information . . . ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628 (6th Cir. 2002) (quoting *Shelton*, 805 F.2d at 1327).[6] Indeed, in most circumstances, the mere request to depose an opposing party's attorney constitutes the good cause required to obtain a Rule 26(c) protective order. *Morelli*, 143 F.R.D. at 47; *West Peninsular Title Co. v. Palm Beach County,* 132 F.R.D. 301, 302 (S.D. Fla. 1990). "'The adversarial system of justice presumes that attorneys for each side oppose one another, not depose one another.'" C. Wright, W. Miller, M. Kane & R. Marcus, *Federal Practice & Procedure* § 2102 (3d ed. 2012). Blue Cross's 30(b)(6)

[6] As courts in this district have previously observed, "*Shelton* persuasively articulates the valid policy considerations that require the parties' attorneys to be shielded from discovery, and alters the standard accordingly to grant greater protection. It provides the appropriate standard in a case such as this where one party to litigation seeks to take the deposition of opposing counsel." *Eschenberg v. Navistar Int'l Transp. Corp*, 142 F.R.D. 296, 299 (E.D. Mich. 1992). *See also Police and Fire Retire. Sys. of City of Detroit v. Watkins*, No. 08-12582, 2012 WL 3155988 at *1 (E.D. Mich. Aug. 3, 2012) (Pertinent case law "makes clear that the practice of taking opposing counsel's deposition is one that should be employed only in limited circumstances.") (quoting *Nationwide*).

deposition notices—which are not limited to the law enforcers' pre-complaint investigations but seek to discover their trial preparation—would require counsel to testify and a protective order should be granted on that basis alone.

The Court should issue a protective order here because Blue Cross's Rule 30(b)(6) deposition topics fail to satisfy two parts of the *Nationwide Mutual* test: (1) the information Blue Cross seeks is protected by the attorney work-product doctrine; and (2) there are other means by which Blue Cross can obtain the information it seeks. *Nationwide Mut. Ins. Co.*, 278 F.3d at 628.[7] Blue Cross cannot make a sufficient showing to overcome the severe skepticism courts have shown towards depositions of opposing counsel, let alone the nearly absolute protection for opinion work product. Blue Cross cannot make this showing because the Plaintiffs have already turned over to Blue Cross all relevant, non-privileged facts in their possession, including documents and deposition transcripts, requested before September 25. Further, Blue Cross has taken nearly one hundred depositions of its own, and has the United States' and State of Michigan's extensive interrogatory answers and responses to more than 800 Requests for Admission. And, on December 19, Blue Cross will receive Plaintiffs' expert report, which will set forth in detail the economic analysis of Plaintiffs' claims and the supporting facts. Moreover, Blue Cross will be able to depose the United States' economic expert for up to two days. Finally, in the process of preparing a pretrial order, in addition to the witness

[7] This is not to suggest that the Rules of Civil Procedure do not apply to the government when the government is a party in civil litigation, as Blue Cross has characterized Plaintiffs' position. Ex. 5. Instead, all of the Rules of Civil Procedure do apply, but those include the Rules protecting attorney work product from discovery and those that guard against overbroad and unduly burdensome, irrelevant discovery.

list already provided to Blue Cross, Plaintiffs will exchange deposition designations and exhibit lists with Blue Cross. Consequently, Blue Cross cannot show any need, let alone the requisite substantial need, to depose opposing counsel.

C. Blue Cross's Rule 30(b)(6) deposition notices seek information protected by the work product doctrine

Plaintiffs' only knowledge of the facts of this case resides with their attorneys and the attorneys' support personnel. Consequently, the Rule 30(b)(6) notice would necessarily result in a deposition of attorneys for the Department of Justice and the Michigan Attorney General. Moreover, because Blue Cross already has the same access as the Government Plaintiffs to all of the relevant facts in this case, the only possible purpose for Blue Cross to notice this deposition is to gain an understanding of how the United States and State of Michigan intend to *use* those facts at trial. That is core opinion work product and entitled to near absolute protection. *See, e.g.*, *In re Perrigo Co.*, 128 F.3d 430, 437 (6th Cir. 1997).

Blue Cross's argument for why it needs to take these depositions reveals that if permitted, the deposition would intrude on opinion work product. According to Blue Cross, it has been "unable to find" facts that support the government plaintiffs' case. Ex. 5. But the United States and State of Michigan know no facts that Blue Cross *does not* have access to. Blue Cross has access to the same non-party discovery responses, documents, and transcripts that Plaintiffs possess. Blue Cross is not entitled to learn through deposition of counsel the facts that counsel for the United States and State of Michigan deem most important, which is what the Rule 30(b)(6)

depositions noticed here would seek. Blue Cross has had every opportunity to learn the relevant facts in this case. No facts are being hidden from it.

Tellingly, Blue Cross does not dispute that it has access to the same facts the United States and State of Michigan have, let alone the substantial need for those facts required to obtain Plaintiffs' work product. *See* Doc. 178 at 4 (this Court's order, citing *Gruenbaum v. Werner Enter., Inc.*, 270 F.R.D. 298, 303 (S.D. Ohio 2010) and *Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 19 F.3d 1432 (6th Cir. 1994 (Table))). Instead, Blue Cross argues in essence that it needs to know what facts the Department of Justice and Attorney General have that *in their view* support the allegations against Blue Cross. However, this information is precisely the kind of discovery that intrudes on attorney work product. *Hickman v. Taylor*, 329 U.S. 495, 510-13 (1947). As the Court in *Hickman* observed, attorneys' testimony about the content of their files (in that case, witness interviews) "could not qualify as evidence." *Id.* at 513.

Merely cloaking a deposition notice as a request for facts does not alter the true nature of the request. Blue Cross is not entitled to learn through deposition of counsel the facts that counsel for the United States and State of Michigan deem most important, which is what the 30(b)(6) depositions noticed here seek. As one court held in rejecting a defendant's attempt to take a Rule 30(b)(6) deposition of the SEC: "[s]uch discovery clearly seeks not the facts, but the manner in which the SEC intends to marshal them." *Buntrock*, 217 F.R.D. at 445-46. Akin to the defendant in *Buntrock*, what Blue Cross seeks here are not facts at all, "but legal

theories and explanations of those theories," to which it is "certainly not entitled." *Id.* at 446. Similarly, in *Morelli*, the deposition topics listed in the Defendant's notice were purportedly limited to factual topics. Yet, because the defendant had already received all facts in the government's possession, the court held that the defendant "intended to ascertain how the SEC intend[ed] to marshal the facts, documents and testimony in its possession, and to discover the inferences that [it] believes properly can be drawn from the evidence. 143 F.R.D. at 47. *See also Nacchio*, 614 F. Supp. 2d at 1177 (Rule 30(b)(6) deposition of a law-enforcement agency would "almost certainly cross into territory protected by the work product [doctrine]." Blue Cross is not entitled to that discovery.[8]

[8] During the meet-and-confer process, Blue Cross professed to rely on *U.S., ex rel. Fry v. Health Alliance of Greater Cincinnati*, No. 1:03-cv-167, 2009 WL 5227661 (S.D. Ohio Nov. 20, 2009). Ex. 5. *Fry*, however, is inapposite. It was a false-claims action in which the United States was itself involved in the challenged conduct as the allegedly defrauded party, rather than, as here, in a law-enforcement capacity. The decision in *Fry* turned on an issue not present here, namely, the defendant's attempts to discover the United States's calculations of its *own* damages, which would not necessitate an attorney's testimony. *Id.* at *3. As the court observed in *Fry*, "the purpose of a Rule 30(b)(6) deposition is to gain the entity's knowledge." *Id.* Unlike *Fry*, here the United States and State of Michigan do not seek damages on their own behalf and thus, as noted previously, are not percipient witnesses to Blue Cross's conduct. In this law-enforcement action, the only knowledge possessed by the United States resides in its attorneys' work product derived from other sources. Moreover, *Fry* is not only inapposite, it is unpersuasive because it fails to address either the heightened standards for depositions of opposing counsel the Sixth Circuit adopted in *Nationwide*, or fully evaluate the plaintiff's work product claims. Accordingly, neither *Fry* nor any case relying wholly or partly on *Fry* should be followed here.

II. This Court should issue a Protective Order because Blue Cross's Rule 30(b)(6) deposition notices are overly broad, unduly burdensome, and the burden of preparing a witness to testify far outweighs the minimal relevance of the information sought.

The scope of information Blue Cross seeks is facially massive and burdens the United States and State of Michigan far beyond any relevance the topics may have to the issues in this case. Rule 26 allows the Court to issue protective orders upon a showing of good cause, to protect a person from, *inter alia*, "undue burden or expense." *Glanda v. Twenty Pack Mgmt. Corp.*, 07-cv-13263, 2007 WL 3172788, at *1 (E.D. Mich. Oct. 29, 2007) (Majzoub, M.J.). A rule 30(b)(6) deposition notice that is overbroad in "scope" and is not "reasonably tailored to matters relevant to th[e] case" constitutes good cause warranting the issuance of a protective order. *See, e.g.*, *Stacy v. H&R Block Tax Servs, Inc.*, No. 07-cv-13327, 2011 WL 807563, at *2 (E.D. Mich. Mar. 2, 2011) (Majzoub, M.J.).

We assess the burden and relevance of each proposed topic in turn.

Topics 1 and 2: Information regarding how Plaintiffs' attorneys intend to marshal the facts of this case

In addition to seeking protected attorney work product, Blue Cross's first and second topics are incredibly overbroad. They would have the United States and State of Michigan prepare witnesses to testify about essentially every fact in this case, distilled from more than 700,000 documents and more than 100 depositions, and how those facts support Plaintiffs' allegations. It would take months for Plaintiffs to educate a deponent or deponents on every pertinent fact relating to every issue in this complex antitrust litigation. Doing so here, where Blue Cross

already has access to precisely the same set of relevant, nonprivileged facts as the United States and State of Michigan,[9] is unnecessary and compounds the undue nature of the burden.[10]

Further, the United States has already, through written discovery, provided all of the underlying factual information Blue Cross is seeking. Several of Blue Cross's interrogatories, which plaintiffs responded to over a year ago—and which Blue Cross has not challenged the sufficiency of—address the same subjects. At this point, the only inference is that Blue Cross is seeking to harass counsel for the United States and State of Michigan.

Topic 3: Information on how the United States and State of Michigan use MFNs and their "justifications" for doing so

Blue Cross's third topic is irrelevant as applied to either the United States or the State of Michigan.[11] The issue in this case is the likely competitive effects of Blue Cross's MFNs on competition for health insurance in Michigan. Any MFNs used in different circumstances by the United States or the State of Michigan–which are

[9] Indeed, because counsel for Blue Cross has unimpeded access to Blue Cross employees, it may have *more* access to relevant, non-privileged facts than the Government Plaintiffs.

[10] The massive scope of topics 1 and 2 only reinforces that what Blue Cross actually seeks is Government Plaintiffs' attorney work product. If one party could simply take a Rule 30(b)(6) deposition of the other party's counsel at the close of discovery, as Blue Cross seeks to do here, the noticing party would have no need to take any discovery at all. Instead, it could rely on the work product of opposing counsel.

[11] In the parties' meet-and-confer on November 15, counsel for Blue Cross acknowledged that Topic 1, including its seven subparts, was all that Blue Cross was really interested in, and offered to withdraw the other four topics if the United States would agree to sit for a 30(b)(6) deposition on Topic 1. In addition, the parties are continuing to discuss how to narrow the scope of Topic 3.

not subject to the same laws as Blue Cross—are irrelevant to any of Plaintiffs' claims or Blue Cross's defenses.

Moreover, if for some reason Blue Cross's third topic were found to be relevant, any relevance would be swamped by the undue burden of searching for, collecting, reviewing, and committing to memory the information that preparing a deponent to testify on this topic would entail. The sheer impossibility of this task due to the overbreadth of the request is clear on its face. Deponents would need to be familiar with every Most Favored Nations clause sought or entered into by any department, agency, sub-agency, or executive officer from the entire federal government or State of Michigan. Plainly, requiring the Government plaintiffs to do so would constitute an undue burden.

Blue Cross suggested it might seek this same information from the United States as early as February 2011. Ex. 6. The United States then made clear its objections based on relevance and burden, and Blue Cross never raised the issue again until September 25, 2012 – the last day to serve written discovery – when it served document requests purporting to require searches of the entire federal and State of Michigan governments. Blue Cross's lack of diligence in pursuing this information belies any claim it might have about the need for the information, and further demonstrates the vexatious nature of its Rule 30(b)(6) notice.

Topic 4: Information regarding any health insurance payer comparisons done by the United States

Blue Cross's fourth topic is also irrelevant and responding to it would be unduly burdensome. How (if at all) the United States compares any two health insurance payers across the country does not bear on whether Blue Cross's use of MFN clauses in their hospital contracts violate the antitrust laws.

Even if marginally relevant, the burden of educating a deponent to testify accurately far exceeds that marginal relevance. Plaintiffs would be forced to review, collect, analyze and learn an enormous amount of information across the entire federal government for all fifty states. Because health insurance markets are local, the deponents would need to familiarize themselves with competitive conditions in thousands of different markets – in the overwhelming majority of which Blue Cross Blue Shield of Michigan is not found.

Blue Cross did not raise this issue until September 25, 2012. Blue Cross's lack of diligence in pursuing this information similarly belies any claim it might have about its need for this information, and suggests that its Rule 30(b)(6) notice was issued simply to harass Plaintiffs as the end of fact discovery approached.

Topic 5: Information regarding a law-enforcement decision made in 1994 regarding health insurers in Pennsylvania

Eighteen years ago, the Antitrust Division exercised its prosecutorial discretion and did not pursue an investigation of a Pennsylvania health insurer's prudent buyer clause. In a letter to the state insurance commissioner, an attorney for the United States wrote that "[w]e have concluded that a court would likely rule that

the Prudent-Buyer policy is exempt from federal antitrust scrutiny."[12] Blue Cross now seeks to learn nonpublic, privileged details of the basis for that decision via a Rule 30(b)(6) deposition.[13]

The exercise of prosecutorial discretion not to puruse an investigation of conduct by a different health insurer in a different state with different state law, located in a different judicial circuit, eighteen years ago has no relevance to this case.[14] There is no precedential value to decisions by government agencies *not* to investigate conduct. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.") Blue Cross cannot cite or rely on the decision not to further investigate the Pennsylvania insurer's conduct. And, even if it could do so, the fact that the investigation took place in a different judicial circuit would rob the analysis of value.

Further, Blue Cross has already lost its state-action argument in this case. Doc. 66. This court held *as a matter of law* that the Michigan legislature had not clearly articulated a policy to displace competition with regulation and that Blue Cross's MFNs were not the logical or foreseeable result of any legislative action. *Id.* at 16-

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[12] See http://www.justice.gov/atr/public/press_releases/1994/211842.htm

[13] In doing so, Blue Cross mischaracterizes the letter. The United States did not and could not determine that conduct *was* exempt under the antitrust laws; such decisions rest with the courts. Rather, the letter simply states a conclusion about how "a court would likely rule."

[14] For example, the Sixth Circuit's seminal state-action opinion was not decided until 2007. *See First Am. Title Co. v. Devaugh*, 480 F.3d 438 (6th Cir. 2007).

19. Thus, under the law of the case, Blue Cross no longer has a valid state-action defense. *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 697 F.3d 387, 2012-2 Trade Cases ¶78,027 at pg 18 (6th Cir. 2012)("Issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case.") This Court's ruling cannot change based on the Department of Justice's assessment of a Pennsylvania legislative scheme 18 years ago (which Blue Cross previously tried to rely on in its motion to dismiss denied by this Court). Doc. 12 at 26. Blue Cross's implication otherwise, embodied in its Rule 30(b)(6) notice, is flatly incorrect.

Conclusion

For the reasons stated above, the United States and State of Michigan respectfully request this Court to enter a protective order quashing the Rule 30(b)(6) notices issued to the United States and State of Michigan.

Respectfully submitted,

FOR PLAINTIFF
UNITED STATES OF AMERICA

/s Ryan Danks
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Filed: November 19, 2012

Certificate of Service

I hereby certify that on the date above, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of the filing to the counsel of record for all parties for civil action 2:10-cv-14155-DPH-MKM, and I hereby certify that there are no individuals entitled to notice who are non-ECF participants.

/s Ryan Danks
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EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA
and the STATE OF MICHIGAN,

Plaintiffs,

v.

Civil Action No. 10-cv-14155-DPH-MKM
Hon. Denise Page Hood
Hon. Mona K. Majzoub

BLUE CROSS BLUE SHIELD OF MICHIGAN, a Michigan nonprofit healthcare corporation,

Defendant.

NOTICE OF DEPOSITION OF PLAINTIFF UNITED STATES OF AMERICA PURSUANT TO FED. R. CIV. P. 30(B)(6)

TO: United States of America
c/o United States Department of Justice,
Antitrust Division

Amy Fitzpatrick, Esq.
Barry Joyce, Esq.
Steven Kramer, Esq.
David Gringer, Esq.
United States Department of Justice
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Please take notice that under Federal Rules of Civil Procedure 30(b)(6) and 26, Defendant Blue Cross Blue Shield of Michigan will take the deposition identified below of Plaintiff United States of America, which will be recorded by stenographic and videographic means. Plaintiff shall designate under Rule 30(b)(6) one or more persons to testify on its behalf regarding the areas of inquiry listed on Exhibit A attached hereto. The persons(s) Plaintiff designates must testify about information known or reasonably available to Plaintiff.

Name	**Location**	**Date**	**Time**
United States of America	Hunton & Williams LLP 2200 Pennsylvania Avenue, NW Washington, DC 20037	November 30, 2012	9:00 A.M.

Dated: November 9, 2012

HUNTON & WILLIAMS LLP

By: /s/ Todd M. Stenerson
Todd M. Stenerson (P51953)
Attorney for Defendant
2200 Pennsylvania Ave, N.W.
Washington, D.C. 20037
(202) 955-1500

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2012, I caused the foregoing Notice of Deposition to be served via electronic mail upon:

Attorneys for the United States:

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amy.fitzpatrick@usdoj.gov
Barry Joyce
barry.joyce@usdoj.gov
Steven Kramer
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David Gringer
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U.S. Department of Justice
450 Fifth Street, N.W.
Suite 4100
Washington, DC 20530

Attorneys for the State of Michigan:

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Thomas Marks
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Assistant Attorney General
Corporate Oversight Division
P.O. Box 30755
Lansing, MI 48909

Attorneys for Plaintiffs - The Shane Group, Michigan Regional Council of Carpenters Employee Benefits Fund, Scott Steele, Bradley A. Veneberg, Abatement Workers National Health and Welfare Fund, and Monroe Plumbers & Pipefitter Local 671 Welfare Fund:

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Attorneys for Plaintiff - Aetna Inc.:

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Veronica Lewis:	vlewis@gibsondunn.com
Cara Fitzgerald:	cfitzgerald@gibsondunn.com
Sarah Wilson:	sawilson@gibsondunn.com

/s/ Todd M. Stenerson

Todd M. Stenerson (P51953)
Hunton & Williams LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
Phone: 202-955-1500
Fax: 202-778-7436
tstenerson@hunton.com

EXHIBIT A

1. The specific facts, information, documents, and other evidence (as well as the sources of such specific facts, information documents, and evidence) relied upon by the Plaintiff, the United States of America, to support its cause of action and claim(s) for relief against Blue Cross Blue Shield of Michigan ("Blue Cross"), specifically:

   a. The scope and extent of the product markets in which Plaintiff contends Blue Cross's conduct challenged in this action ("Blue Cross's MFNs") unlawfully restrained trade, described as "commercial individual health insurance" and "commercial group health insurance" in Plaintiffs' Complaint at ¶¶ 20-24.

   b. The scope and extent of the geographic markets in which Plaintiff contends Blue Cross's MFNs unlawfully restrained trade, described in Plaintiffs' Complaint at Compl. ¶ 25-32, 82.

   c. Blue Cross's alleged market power, including for each relevant market Blue Cross's market share, the identities and market shares of any other market participants, trends in market shares, entry, expansion, and barriers to entry, and any other facts relating to market power. (*See* Compl. ¶¶ 33-35.)

   d. Whether Blue Cross has sought and obtained MFNs in any hospital contracts in exchange for increases in the prices it pays for the hospitals' services. (*See* Compl. ¶¶ 5, 44, 45.)

   e. The anticompetitive effects that you claim were caused or are likely to be caused by any of Blue Cross' MFNs, including but not limited to any claim that Blue Cross's MFNs caused any hospitals to raise prices to Blue Cross's competitors by substantial amounts, or demand prices that are too high to allow competitors to compete, effectively excluding them from the market, or harmed competition in another manner, as described in Plaintiffs' Complaint at ¶¶ 6, 41-48, 49-80, 82.

   f. Whether Blue Cross's MFNs have procompetitive or efficiency-enhancing effects, including but not limited to whether Blue Cross has sought or used MFNs to lower its own cost of obtaining hospital services. (*See* Compl. ¶¶ 5, 44, 45, 81.)

   g. Whether any anticompetitive effects of any Blue Cross MFNs in any relevant market outweigh the procompetitive benefits of any such MFNs.

2. The specific facts, information, and documents concerning why you believe that what occurs in one alleged market is "illustrative" of what would happen in another alleged market. (Compl. ¶ 80.)

3. Information concerning the use of MFNs by Plaintiff the United States of America and the justification for the same.

4. Information concerning any analysis Plaintiff United States of America has prepared comparing its current healthcare payer's pricing or other contract terms with the pricing or other contract terms of any other healthcare payer(s).

5. The specific facts, information, and documents concerning the reasons why the United States concluded that the Blue Plan's conduct in Pennsylvania was entitled to state action immunity, as described in the letter from Mr. Steven Kramer dated June 1994. (Attached at Ex. 1)

EXHIBIT 1

U.S. Department of Justice
Antitrust Division

GK:SBK
60-6324-0010

Judiciary Center Building
555 Fourth Street, N.W.
Washington, D.C. 20001

May 5, 1994

BY FEDERAL EXPRESS

The Honorable Cynthia M. Maleski
Insurance Commissioner
Commonwealth of Pennsylvania
Insurance Department
13th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

Re: Independence Blue Cross's Prudent-Buyer Policy

Dear Commissioner Maleski:

This letter follows up on my November 30, 1993, letter in which we advised you of the Antitrust Division's plan to commence a civil investigation to obtain additional information necessary to assess the competitive effects of IBC's Prudent-Buyer policy and to determine whether it violates the federal antitrust laws. The investigation was opened in December. We have now had the opportunity to analyze carefully information and arguments relevant to whether the Prudent-Buyer policy is exempt from scrutiny under the federal antitrust laws by virtue of the so-called state-action doctrine, as explained, for example, in F.T.C. v. Ticor Title Ins. Co., 112 S.Ct. 2169 (1992).

We have concluded that a court would likely rule that the Prudent-Buyer policy is exempt from federal antitrust scrutiny and have consequently decided to close our investigation. We would like to emphasize that, in reaching this decision, we did not reach any judgment about whether the Prudent-Buyer policy, on balance, reduces or raises health-care costs in southeastern Pennsylvania. We currently have insufficient information to make such a judgment and, in view of our conclusion about the likely applicability of the state-action doctrine to the Prudent-Buyer policy, would likely encounter legal objections by IBC if we sought to compel production of the information. We should add, however, that your staff was very helpful to us in providing information relevant to our assessment of the state-action issue.

Termination of our investigation leaves with your Department the judgment whether Prudent Buyer has, in fact, reduced health-care costs for Pennsylvania consumers. We expect that your Department is reviewing the Prudent Buyer policy in response to requests that your Department reconsider its approval of Prudent Buyer and to IBC's request that it be allowed to employ Prudent Buyer beyond June 30, 1995, in light of information now available to your Department about the policy's actual effects. If your Department might find it useful, we would like to express our willingness to provide limited assistance in analyzing the effects of the policy.

Should anyone in your Department have any question about our decision or interest in consulting with us, please have them telephone me at (202)307-0997.

Sincerely yours,

Steven Kramer

Steven Kramer
Attorney

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA
and the STATE OF MICHIGAN,

Plaintiffs,

v.

BLUE CROSS BLUE SHIELD OF MICHIGAN, a Michigan nonprofit healthcare corporation,

Defendant.

Civil Action No. 10-cv-14155-DPH-MKM
Hon. Denise Page Hood
Hon. Mona K. Majzoub

NOTICE OF DEPOSITION OF PLAINTIFF STATE OF MICHIGAN
PURSUANT TO FED. R. CIV. P. 30(b)(6)

TO: State of Michigan
c/o Michigan Office of Attorney General,
Corporate Oversight Division

M. Elizabeth Lippitt
Thomas Marks
Assistant Attorneys General
Corporate Oversight Division
P.O. Box 30755
Lansing, MI 48909

Please take notice that under Federal Rules of Civil Procedure 30(b)(6) and 26, Defendant Blue Cross Blue Shield of Michigan will take the deposition identified below of Plaintiff the State of Michigan, which will be recorded by stenographic and videographic means. Plaintiff shall designate under Rule 30(b)(6) one or more persons to testify on its behalf regarding the areas of inquiry listed on Exhibit A attached hereto. The persons(s) Plaintiff designates must testify about information known or reasonably available to Plaintiff.

Name	**Location**	**Date**	**Time**
State of Michigan	215 S. Washington Square Suite 200 Lansing, MI 48933-1816	November 30, 2012	9:00 A.M.

Dated: November 9, 2012

HUNTON & WILLIAMS LLP

By: /s/ Todd M. Stenerson
Todd M. Stenerson (P51953)
Attorney for Defendant
2200 Pennsylvania Ave, N.W.
Washington, D.C. 20037
(202) 955-1500

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Amy Fitzpatrick
amy.fitzpatrick@usdoj.gov
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David Gringer
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U.S. Department of Justice
450 Fifth Street, N.W.
Suite 4100
Washington, DC 20530

Attorneys for the State of Michigan:

M. Elizabeth Lippitt
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Thomas Marks
markst@michigan.gov
Assistant Attorney General
Corporate Oversight Division
P.O. Box 30755
Lansing, MI 48909

Attorneys for Plaintiffs - The Shane Group, Michigan Regional Council of Carpenters Employee Benefits Fund, Scott Steele, Bradley A. Veneberg, Abatement Workers National Health and Welfare Fund, and Monroe Plumbers & Pipefitter Local 671 Welfare Fund:

Mary Jane Fait: fait@whafh.com
John Tangren: tangren@whafh.com
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Casey Fry: caf@millerlawpc.com

Attorneys for Plaintiff - Aetna Inc.:

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Veronica Lewis: vlewis@gibsondunn.com
Cara Fitzgerald: cfitzgerald@gibsondunn.com
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/s/ Todd M. Stenerson

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tstenerson@hunton.com

EXHIBIT A

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   a. The scope and extent of the product markets in which Plaintiff contends Blue Cross's conduct challenged in this action ("Blue Cross's MFNs") unlawfully restrained trade, described as "commercial individual health insurance" and "commercial group health insurance" in Plaintiffs' Complaint at ¶¶ 20-24.

   b. The scope and extent of the geographic markets in which Plaintiff contends Blue Cross's MFNs unlawfully restrained trade, described in Plaintiffs' Complaint at Compl. ¶ 25-32, 82.

   c. Blue Cross's alleged market power, including for each relevant market Blue Cross's market share, the identities and market shares of any other market participants, trends in market shares, entry, expansion, and barriers to entry, and any other facts relating to market power. (*See* Compl. ¶¶ 33-35.)

   d. Whether Blue Cross has sought and obtained MFNs in any hospital contracts in exchange for increases in the prices it pays for the hospital's services. (*See* Compl. ¶¶ 5, 44, 45.)

   e. The anticompetitive effects that you claim were caused or are likely to be caused by any of Blue Cross's MFNs, including but not limited to any claim that Blue Cross's MFNs caused any hospitals to raise prices to Blue Cross's competitors by substantial amounts, or demand prices that are too high to allow competitors to compete, effectively excluding them from the market, or harmed competition in another manner, as described in Plaintiffs' Complaint at ¶¶ 6, 41-48, 49-80, 82.

   f. Whether Blue Cross's MFNs have procompetitive or efficiency-enhancing effects, including but not limited to whether Blue Cross has sought or used MFNs to lower its own cost of obtaining hospital services. (*See* Compl. ¶¶ 5, 44, 45, 81.)

   g. Whether any anticompetitive effects of any Blue Cross MFNs in any relevant market outweigh the procompetitive benefits of any such MFNs.

2. Information concerning why you believe that what occurs in one alleged market is "illustrative" of what would happen in another alleged market. (Compl. ¶ 80.)

3. Information concerning the use of MFNs by Plaintiff the State of Michigan and the justification for the same.

EXHIBIT 3

U.S. Department of Justice

Antitrust Division

Amy R. Fitzpatrick
Liberty Square Building
450 Fifth St., N.W., Suite 4100
Washington, DC 20530-0001
(202) 532-4553
amy.fitzpatrick@usdoj.gov

September 19, 2012

VIA EMAIL

Ashley Cummings, Esq.
Hunton & Williams LLP
Bank of America Plaza, St. 4100
600 Peachtree Street, N.E.
Atlanta, Georgia 30308

Re: *United States and State of Michigan v. Blue Cross Blue Shield of Michigan*
Case No. 2:10-cv-14155-DPH-MKM (E.D. Mich.)

Dear Ashley:

This letter addresses deficiencies with Blue Cross's September 10, 2012 witness list, and follows up on several calls we have had on these issues over the last two weeks.

Blue Cross's September 10 "witness list" violates Scheduling Order No. 2. Doc #176. That Order requires the parties to exchange on September 10, 2012, "Final" lists of "[a]ll witnesses to be called at trial." The purpose of the exchanges during discovery of preliminary and final witness lists under the Order was to enable the parties to identify those persons that they would need to depose during fact discovery. But Blue Cross served a list which it admits is not a final list. Instead, Blue Cross "identifies witnesses to the best of Blue Cross's knowledge to date, but [adds that] Blue Cross reasonably anticipates that this list will change." Blue Cross's September 10, 2012 Witness List at 3. Further, "Blue Cross reserves the right to add to [its] list as necessary, and as additional discovery further informs the issues and trial strategy in this action." *Id.* Though you have attempted to justify Blue Cross's deficient list by stating to us that Blue Cross now believes it is "premature" to provide a final witness list, and that such a list should not have to be provided until sometime after the close of expert discovery, that is neither what the parties agreed to when we filed our Joint Motion for Entry of a Stipulated Discovery Schedule, s*ee* Doc. #58, nor what the Court ordered. Doc. # 176.

There are many problems with Blue Cross's identification of witnesses on Blue Cross's list, involving both those specifically identified by name and the many whose identities are left unspecified. After insisting in your July 24 letter—and over plaintiffs' objection—that witnesses to be offered by deposition be included on plaintiffs' witness list, Blue Cross's September 10 list fails to indicate which of its approximately 180 named witnesses will or may be presented live at trial and which will be presented by deposition, as Rule 26(a)(3) requires. Blue Cross's list fails also to separately identify those witnesses Blue Cross "expects to present and those it may call if the need arises," as Rule 26(a)(3)(A)(i) also requires.

In addition to the 180 witnesses listed by name on Blue Cross's September 10 list, Blue Cross's list includes more than 225 witnesses to be named later. For example, Blue Cross's witness list includes unspecified "persons . . . to be identified" in more than 125 instances. *See, e.g.*, Blue Cross's September 10, 2012 Witness List at 8 ("Persons who are Individual Insureds located in the Western and Central Upper Peninsula, to be identified."). More than 100 additional entries on Blue Cross's list simply state by way of identification "the person responsible for." *See, e.g., id.* ("For any Competitors in the markets for Small Group, PPO, HMO, or Traditional Insurance Products or ASO Products, the person responsible for negotiations at each of the Hospitals listed in Section I.A above."). Finally, Blue Cross states that its witness list includes "[a]ny witness who may be identified in discovery following the exchange of this Witness List." *Id.* at 47. And Blue Cross expressly "reserves the right to amend, revise or alter its Witness List upon completion of discovery or upon the resolution of all pretrial matters, whichever occurrence is later in time." *Id.* at 47.

Faced with these multiple problems with Blue Cross's September 10 witness list, in a number of calls over the past two weeks, plaintiffs have sought further clarification from Blue Cross on the following issues, to which you have provided the following responses:

1. Plaintiffs asked how many individuals Blue Cross may add to its witness list and whether Blue Cross is willing to commit to adding no more than a specified number of additional witnesses. You responded that Blue Cross would not commit to any limit and would not provide even an estimate.

2. Plaintiffs asked by what date Blue Cross intended to stop adding individuals to its witness list and whether Blue Cross is willing to commit to stop adding witnesses after September 25, the date by which all document requests, interrogatories, requests for admission and Rule 45 document subpoenas must be served. You declined to make such a commitment and further responded that Blue Cross may add individuals to its witness list up until trial.

3. Plaintiffs asked what Blue Cross would consider to be "good cause" for adding additional individuals to its witness list after September 10. You responded that if Blue Cross identifies someone it believes is "material" that Blue Cross would have good cause.

Blue Cross's failure to provide a final witness list in compliance with the Court's Order prejudices plaintiffs in a number of ways. First, although Blue Cross acknowledges

that "[t]he Court reasonably required the parties to exchange witness lists before the close of discovery, so that the parties could assess whom they should depose during the discovery period," Blue Cross's September 10, 2012 Witness List at 3, Blue Cross's list does not allow plaintiffs to do that. Plaintiffs are unable to depose "persons . . . to be identified," "the person[s] responsible for," and all the other unnamed individuals on Blue Cross's witness list. Nor can plaintiffs serve those same individuals with Rule 45 document subpoenas by the court-ordered deadline of September 25.

Second, Blue Cross's failure to separately identify live witnesses from those who will be offered by deposition—particularly after insisting that the lists identify those persons who will be presented by deposition—further prejudices plaintiffs. If a party intends to offer testimony by deposition, the onus is on that party to make sure that the deposition occurs. By failing to separately identify its live trial witnesses, Blue Cross has ensured that plaintiffs cannot identify which of the 180 named individuals (let alone which of the unknown number of "persons . . . to be identified") on Blue Cross's list to depose before trial.

By contrast, plaintiffs served Blue Cross with a witness list containing the names of 25 witnesses plaintiffs expect to call at trial and the names of 15 witnesses that plaintiffs may call if the need arises. Plaintiffs separately listed 89 named individuals that plaintiffs expect to present by deposition.

You have stated that Blue Cross will attempt to provide additional names to plaintiffs in advance of the September 25 deadline for serving Rule 45 document subpoenas. We will accept Blue Cross's late submission of those names until Friday, September 21. After that date, if Blue Cross would like to add individuals, plaintiffs will expect Blue Cross to demonstrate an appropriate showing of good cause and address the prejudice to plaintiffs. If plaintiffs are not convinced that there is good cause for adding specific individuals, plaintiffs will oppose any efforts by Blue Cross to add such individuals to its witness list. In addition, Blue Cross can cure the prejudice resulting from its failure to separately identify live trial witnesses by providing plaintiffs this week with a revised list that does distinguish between witnesses to be offered live at trial and those to be offered by deposition.

Best regards,

/s/

Amy R. Fitzpatrick
Trial Attorney

cc: Elizabeth Lippitt, Esq.
Thomas Marks, Esq.
Mary Jane Fait, Esq.
John Tangren, Esq.
Beth Landes, Esq.

Daniel Small, Esq.
Rob Cacace, Esq.
Meghan Boone, Esq.
Dan Gustafson, Esq.
Dan Hedlund, Esq.
Ellen Ahrens, Esq.
E. Powell Miller, Esq.
Jennifer Frushour, Esq.
Veronica Lewis, Esq.
Joshua Lipton, Esq.
Sarah Wilson, Esq.
Dan Matheson, Esq.
Cara Fitzgerald, Esq.

EXHIBIT 4

HUNTON& WILLIAMS

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ATLANTA, GA 30308

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FILE NO: 77535.00002

September 28, 2012

Via Email

Amy Fitzpatrick, Esq.
United States Department of Justice
Antitrust Division, Litigation I Section
Liberty Square Building
450 Fifth Street, NW, Suite 4100
Washington, DC 20530

***United States v. Blue Cross Blue Shield of Michigan*,**
E.D. Mich., Case No. 10-cv-14155

Dear Amy:

We received your September 19, 2012 letter regarding Blue Cross's September 10, 2012 witness list. As we have discussed at length, the list that Blue Cross provided on September 10 was based on the best knowledge and information it had at the time.

Plaintiffs insist that their witness list is final. Plaintiffs, of course, engaged in months of pre-Complaint unilateral discovery and third-party interviews. Setting that aside, it is a fallacy to suggest that any of the parties can reasonably state with any finality, at this juncture, whom they will call or may call at trial. The trial of this matter is over ten months away, commencing August 12, 2013. Among other things, Plaintiffs' Complaint spans 34 mutually-exclusive markets throughout the State. Based on fact discovery taken to date, it is unlikely that any trial will encompass (or that Plaintiffs reasonably will pursue) all 34 markets.

Discovery is ongoing, with many third-party document subpoenas outstanding and third-party depositions to be taken. Indeed, there are dozens of depositions set in the next two months, including depositions of competitors, customers and other important non-party witnesses. And, this week, all parties in this and the related cases propounded additional written discovery and noticed additional depositions. Blue Cross believes that the discovery it propounded and the depositions it intends to take are likely to result in the discovery of additional relevant evidence and witnesses for trial. Of course, if Plaintiffs do not believe their discovery is likely to do the same, as appears to be the case based on your position concerning the finality of your September 10, 2012 witness list, we request that you withdraw your discovery and deposition notices.

HUNTON& WILLIAMS

Regarding whether Blue Cross will call witnesses at trial live or by deposition, Blue Cross expects to call all witnesses live. Plaintiffs sought the blanket determination that there is good cause to call witnesses live at trial, even though they are outside the subpoena power of the Court. Blue Cross will call a witness by deposition only if they are, in fact, unavailable at the time of trial.

Blue Cross has served additional subpoenas for documents and depositions. Plaintiffs should consider the persons or entities identified in those subpoenas added to Blue Cross's witness list. There is no "prejudice" to Plaintiffs, as the parties have agreed that deposition subpoenas may issue after September 25, 2012; and Blue Cross will not oppose Plaintiffs' service of post-September 25 document subpoenas to these or any other subsequently-identified persons. Good cause exists for many reasons, including those stated above, stated in our prior communications, and set forth in Blue Cross's September 10, 2012 witness list.

Sincerely,

/s/

Ashley Cummings

cc: *Attorneys for Defendant - Blue Cross Blue Shield of Michigan:*
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Michelle Alamo, Esq. (malamo@dickinson-wright.com)
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David Gringer, Esq. (david.gringer@usdoj.gov)

Attorneys for Plaintiff - State of Michigan:
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Thomas Marks, Esq. (markst@michigan.gov)

HUNTON& WILLIAMS

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Daniel Small, Esq. (dsmall@cohenmilstein.com)
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Dan Hedlund, Esq. (dhedlund@gustafsongluek.com)
Ellen Ahrens, Esq. (eahrens@gustafsongluek.com)
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Sarah Wilson, Esq. (sawilson@gibsondunn.com)
Dan Matheson, Esq. (dmatheson@gibsondunn.com)

EXHIBIT 5

From: Lasken, Jonathan H.
To: Lippitt, Elizabeth (AG)
Cc: Beach, Jason; Bell, Theo; Boone, Meghan; Brett Johnson; Hoffman, Bruce; caf@millerlawpc.com; CFitzgerald@gibsondunn.com; Danks, Ryan; DGustafson@gustafsongluek.com; DHedlund@gustafsongluek.com; DMatheson@gibsondunn.com; DSmall@cohenmilstein.com; eahrens@gustafsongluek.com; Epm@millerlawPC.com; Fitzpatrick, Amy; jef@millerlawpc.com; jlipton@gibsondunn.com; John Tangren; Joyce, Barry; Kramer, Steven; Landes, Beth; Liebeskind, Richard L; Marks, Thomas (AG); Martin, Jack; Mary Jane Fait; Michelle L. Alamo; Gilman, Neil; rcacace@cohenmilstein.com; SAWilson@gibsondunn.com; Stenerson, Todd M.; vlewis@gibsondunn.com; Gringer, David
Subject: RE: BCBSM (Government): Deposition Notices
Date: Tuesday, November 13, 2012 6:04:19 PM

David and Elizabeth,

If you think it would be helpful to resolving this dispute, we are happy to discuss narrowing the scope of the notice with you tomorrow. Otherwise, please file your motion and we will wait for the court's ruling before proceeding with a date.

Best,
Jonathan

From: Lippitt, Elizabeth (AG) [mailto:LippittE@michigan.gov]
Sent: Tuesday, November 13, 2012 11:10 AM
To: Lasken, Jonathan H.
Cc: Beach, Jason; Bell, Theo; Boone, Meghan; Brett Johnson; Hoffman, Bruce; caf@millerlawpc.com; CFitzgerald@gibsondunn.com; Danks, Ryan; DGustafson@gustafsongluek.com; DHedlund@gustafsongluek.com; DMatheson@gibsondunn.com; DSmall@cohenmilstein.com; eahrens@gustafsongluek.com; Epm@millerlawPC.com; Fitzpatrick, Amy; jef@millerlawpc.com; jlipton@gibsondunn.com; John Tangren; Joyce, Barry; Kramer, Steven; Landes, Beth; Liebeskind, Richard L; Marks, Thomas (AG); Martin, Jack; Mary Jane Fait; Michelle L. Alamo; Gilman, Neil; rcacace@cohenmilstein.com; SAWilson@gibsondunn.com; Stenerson, Todd M.; vlewis@gibsondunn.com; Gringer, David
Subject: RE: BCBSM (Government): Deposition Notices

Jonathan,

The State of Michigan concurs with David's email. The State of Michigan also will be moving for a protective order and requests that Blue Cross not set a date for the deposition until after the court rules on our motion.

Best Regards,
Elizabeth

M. Elizabeth Lippitt
Assistant Attorney General
Michigan Office of Attorney General
(517) 373-1160

From: Gringer, David [mailto:David.Gringer@usdoj.gov]
Sent: Monday, November 12, 2012 4:29 PM
To: Lasken, Jonathan H.
Cc: Beach, Jason; Bell, Theo; Boone, Meghan; Brett Johnson; Hoffman, Bruce; caf@millerlawpc.com; CFitzgerald@gibsondunn.com; Danks, Ryan; DGustafson@gustafsongluek.com; DHedlund@gustafsongluek.com; DMatheson@gibsondunn.com; DSmall@cohenmilstein.com; eahrens@gustafsongluek.com; Epm@millerlawPC.com; Fitzpatrick, Amy; jef@millerlawpc.com; jlipton@gibsondunn.com; John Tangren; Joyce, Barry; Kramer, Steven; Landes, Beth; Liebeskind, Richard L; Lippitt, Elizabeth (AG); Marks, Thomas (AG); Martin, Jack; Mary Jane Fait; Michelle L. Alamo; Gilman, Neil; rcacace@cohenmilstein.com; SAWilson@gibsondunn.com; Stenerson, Todd M.; vlewis@gibsondunn.com
Subject: RE: BCBSM (Government): Deposition Notices

Jonathan:

In response to your request for authority on the impropriety of a 30(b)(6) deposition to a law enforcement agency bringing a law enforcement action, I direct your attention to the following decisions: *SEC v. Buntrock*, 2004 WL 1470278 (N.D. Ill. June 29, 2004) (*Buntrock II*); *FTC v. U.S. Grant Resources, LLC*, 2004 WL 1444951 (E.D. La. June 25, 2004); *SEC v. Buntrock*, 217 F.R.D. 441 (N.D. Ill. 2003) (*Buntrock* I); *SEC v. Rosenfeld*, 1997 WL 576021 (S.D.N.Y. Sept. 16, 1997); *SEC v. Morelli*, 143 F.R.D. 42 (S.D.N.Y. 1992). These opinions represent not only the weight of authority, but, in our view, are the better-reasoned cases as applied to our present factual situation, because they involve law-enforcement agencies suing to enforce federal law.

In response to your concerns about whether Blue Cross knows the factual basis for plaintiff's allegations, the United States possesses no nonprivileged facts that Blue Cross does not currently also have access to that could possibly be reduced to admissible form for trial. Blue Cross has the same documents we have, has attended all the same depositions, and, unlike Blue Cross, the United States has given a final witness list to Blue Cross, so that Blue Cross can depose anyone on the list. Blue Cross also has plaintiffs' extensive response to your interrogatories, where we provided you with market-by-market detail of the factual basis for our allegations. Blue Cross is entitled to, and has received, all of those facts.

What Blue Cross is not entitled to is to learn which facts counsel for the United States deem important, which is necessarily and inexorably what a 30(b)(6) deposition of the United States would do in this case. Blue Cross has had every opportunity to learn the relevant facts. No facts are being hidden from it.

Your suggestion that the United States designate a non-attorney to be deposed further demonstrates that a 30(b)(6) deposition of the United States would do nothing more than reveal the United States' work product. No non-attorney is independently aware in sufficient detail of the facts related to this case (let alone the 1993-94 matter from a different state you are also seeking to learn about). Therefore, the attorneys for the United States would have to educate this non-attorney or non-attorneys about the facts and theories the United States deems important. Putting aside for a moment the massive undertaking this would entail, the non-attorney(s) would only have access to attorney work product – those facts that counsel for the United States deemed significant enough to write down and remember. Whether Blue Cross learns the United States' work product through an attorney or an attorney's representative, it is still invading our attorney

work product.

While we appreciate your invitation to offer ways to narrow the scope of your notice, the topics are so massively overbroad, both individually and collectively, that we wouldn't know where to begin. Further, as best we can tell, Blue Cross is only seeking our work product with these topics, which we would not agree to turn over in any event.

We do appreciate your flexibility on the date for the deposition. Since it appears that we are now at an impasse, we request that Blue Cross allow the issue to be briefed in full before the deposition takes place by not setting a date for the deposition until after the court rules on Plaintiff's motion. Should the court deny the United States' motion for a protective order, we will, of course, comply with the court's order, even if fact discovery has ended. Please let me know by Wednesday at 10:00 AM whether this is acceptable to Blue Cross.

Best,

David

From: Lasken, Jonathan H. [mailto:JLasken@hunton.com]
Sent: Monday, November 12, 2012 2:26 PM
To: Gringer, David
Cc: Beach, Jason; Bell, Theo; Boone, Meghan; Brett Johnson; Hoffman, Bruce; caf@millerlawpc.com; CFitzgerald@gibsondunn.com; Danks, Ryan; DGustafson@gustafsongluek.com; DHedlund@gustafsongluek.com; DMatheson@gibsondunn.com; DSmall@cohenmilstein.com; eahrens@gustafsongluek.com; Epm@millerlawPC.com; Fitzpatrick, Amy; jef@millerlawpc.com; jlipton@gibsondunn.com; John Tangren; Joyce, Barry; Kramer, Steven; Landes, Beth; Liebeskind, Richard L; lippitte@michigan.gov; markst@michigan.gov; Martin, Jack; Mary Jane Fait; Michelle L. Alamo; Gilman, Neil; rcacace@cohenmilstein.com; SAWilson@gibsondunn.com; Stenerson, Todd M.; vlewis@gibsondunn.com
Subject: RE: BCBSM (Government): Deposition Notices

David,

Let me assure you that this notice was intended to be neither vexatious nor harassing. Instead, it was intended to aid Blue Cross in determining the factual basis of the allegations against it. We are sure you share our view that Blue Cross is entitled to know the factual basis of the case against it before it is presented at trial. Indeed, *Hickman* requires no less. 329 U.S. 495, 507 (1947) ("Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.").

We note that the simple fact that some of Blue Cross's contracts contain most favored nations clauses is not a sufficient basis to bring or maintain an action under the rule of reason. We have diligently attempted to learn the factual basis of the allegations regarding *the effects of these clauses in relevant markets* (the issue to be tried in this case) through means other than a 30(b)(6) deposition. (In fact, we recently sought such information through written discovery but Plaintiffs' refused to respond to our requests—including these—nearly in their entirely.) But, to date, we continue to be unable to find any factual basis for many of the allegations in this case, other than the fact that most favored nations clauses exist. Plaintiffs' allegations regarding Sparrow hospital and blocked entry typify this issue: In written discovery, the United States refused to provide the

factual basis for this allegation and the State of Michigan acknowledged that the only basis was the existence of clause. If the only known facts supporting much or all of this case are the clauses' existence, we are entitled to know that and will act accordingly. If there are other facts relevant to this litigation, we are entitled to know them.

Further, you have provided no authority for the idea that Rule 30(b)(6) contains an implicit exception for "law enforcement agencies." This exception appears nowhere in the plain text of the rule and you have not directed us to any law recognizing it. We remain willing to review such law if you provide it.

We also note that we do not intend, nor require, that you produce an attorney—let alone one involved in this litigation—as your 30(b)(6) witness. You can educate or produce any witness with knowledge of the relevant facts. This is no greater or lesser burden than any other litigant bears under Rule 30(b)(6).

In short, Blue Cross seeks only the facts that create the basis of the violation you believe has occurred, and we do not care who provides such testimony. We have no interest in Plaintiffs' work product.

Finally, regarding breadth, Blue Cross is willing to negotiate over the scope of the topics to address these concerns. We are likewise willing to negotiate over a date (including a date in December if that is more convenient) to address your timing concerns. We find your professed concerns over timing puzzling given that it was Plaintiffs, not Blue Cross, who requested an extension in the time period to notice depositions (which Blue Cross accommodated) and given that the parties continue to notice and schedule depositions to this day. We further note that the reason we did not notice this deposition earlier in the discovery period is because we were hoping to learn much, if not all, of this information through written discovery instead of a deposition.

Best,
Jonathan

From: Gringer, David [mailto:David.Gringer@usdoj.gov]
Sent: Saturday, November 10, 2012 1:08 PM
To: Lasken, Jonathan H.
Cc: Beach, Jason; Bell, Theo; Boone, Meghan; Brett Johnson; Hoffman, Bruce; caf@millerlawpc.com; CFitzgerald@gibsondunn.com; Danks, Ryan; DGustafson@gustafsongluek.com; DHedlund@gustafsongluek.com; DMatheson@gibsondunn.com; DSmall@cohenmilstein.com; eahrens@gustafsongluek.com; Epm@millerlawPC.com; Fitzpatrick, Amy; Gringer, David; jef@millerlawpc.com; jlipton@gibsondunn.com; John Tangren; Lasken, Jonathan H.; Joyce, Barry; Kramer, Steven; Landes, Beth; Liebeskind, Richard L; lippitte@michigan.gov; markst@michigan.gov; Martin, Jack; Mary Jane Fait; Michelle L. Alamo; Gilman, Neil; rcacace@cohenmilstein.com; SAWilson@gibsondunn.com; Stenerson, Todd M.; vlewis@gibsondunn.com
Subject: RE: BCBSM (Government): Deposition Notices

Jonathan:

Thank you for your response earlier today to my November 2 email asking for authority as to the propriety of a 30(b)(6) deposition of a governmental law enforcement agency in a law enforcement

action. However, the case you cite does not address that situation. In the case you cite, the United States was not acting in a law enforcement capacity and instead was the alleged victim in a False Claims Act case. Moreover, we do not dispute that the Federal Rules apply to the United States, but that includes the Rules barring the intrusion into attorney work product and other protections against improper, overbroad, and untimely discovery.

Further, your attempt to distinguish "facts known to" the attorneys for the United States that "support its cause of action" from attorney work product is one that has already been rejected by the Court in this case. You have offered no justification for seeking work product here. Moreover, your notice plainly seeks opinion work product, which is entitled to near-absolute protection. For other authority, see the Supreme Court's decisions in *Upjohn* and *Hickman* as well as other cases cited in the United States' response to Blue Cross's motion to compel an answer to its first and second interrogatories. Blue Cross already has the testimony, documents and other sources of facts to which you are entitled.

In addition to improperly seeking the United States' attorney work product, your notice suffers from several other deficiencies. First, your notice, issued seventeen months into fact discovery and only thirteen business days before the *close* of fact discovery, is clearly untimely. Second, topics 3, 4, and 5 are not only irrelevant, but are overly broad and unduly burdensome. Third, preparing an attorney or other representative for the massive scope of this deposition, which far exceeds the scope of the underlying action, clearly imposes an undue burden, particularly given the, at best, marginal relevance of several of the topics. Fourth, topics 1 and 2 are highly duplicative of other discovery you have taken in this case. Finally, many of the topics, including several of the seven subparts that comprise topic 1, prematurely seek expert discovery.

In light of the above, coupled with the fact that proceeding with the deposition will almost certainly require an attorney for the United States who is involved *in this litigation* to be deposed, your notice is clearly vexatious, and we can only conclude that Blue Cross has issued this 30(b)(6) notice to harass the United States. Thus, we ask that you withdraw your 30(b)(6) notices immediately.

Given the Supreme Court and other authority, along with the arguments detailed above, if Blue Cross does not withdraw its 30b6 notices by Tuesday, November 13, at 10:00 A.M., we will consider the parties to be at an impasse.

Best,

David

From: Lasken, Jonathan H. [mailto:JLasken@hunton.com]
Sent: Saturday, November 10, 2012 10:25 AM
To: Gringer, David
Subject: FW: BCBSM (Government): Deposition Notices

David,

You asked for our authority supporting this request. Like any litigant, the United States must abide by the Federal Rules of Civil Procedure, including discovery and specifically including Rule 30(b)(6). *See, e.g.*, Fed. R. Civ. P. 30(b)(6) ("In its notice or subpoena, part may name as the deponent a … governmental agency …"); *United States, ex rel. Fry v. Health Alliance of Greater Cincinnati*, 2009 WL 5227661 (S.D. Ohio 2009) (""Like any ordinary litigant, the Government must abide by the Federal Rules of Civil Procedure. It is not entitled to special consideration concerning the scope of discovery, especially when it voluntarily initiates an action."). As you can see from the notice, Blue Cross is not seeking to inquire into the United States' work product, but simply to inquire into facts known to it that are relevant to the issues in the litigation. Therefore, the notice is proper.

If you are aware of authority to the contrary, please provide it to us.

Best,
Jonathan

From: Beach, Jason
Sent: Friday, November 09, 2012 08:09 PM
To: 'amy.fitzpatrick@usdoj.gov' <amy.fitzpatrick@usdoj.gov>; 'barry.joyce@usdoj.gov' <barry.joyce@usdoj.gov>; 'steven.kramer@usdoj.gov' <steven.kramer@usdoj.gov>; 'david.gringer@usdoj.gov' <david.gringer@usdoj.gov>; 'lippitte@michigan.gov' <lippitte@michigan.gov>; 'markst@michigan.gov' <markst@michigan.gov>; 'fait@whafh.com' <fait@whafh.com>; 'tangren@whafh.com' <tangren@whafh.com>; 'landes@whafh.com' <landes@whafh.com>; 'tbell@whafh.com' <tbell@whafh.com>; 'dsmall@cohenmilstein.com' <dsmall@cohenmilstein.com>; 'mboone@cohenmilstein.com' <mboone@cohenmilstein.com>; 'bjohnson@cohenmilstein.com' <bjohnson@cohenmilstein.com>; 'dgustafson@gustafsongluek.com' <dgustafson@gustafsongluek.com>; 'dhedlund@gustafsongluek.com' <dhedlund@gustafsongluek.com>; 'eahrens@gustafsongluek.com' <eahrens@gustafsongluek.com>; 'epm@millerlawpc.com' <epm@millerlawpc.com>; 'jef@millerlawpc.com' <jef@millerlawpc.com>; 'caf@millerlawpc.com' <caf@millerlawpc.com>; 'jlipton@gibsondunn.com' <jlipton@gibsondunn.com>; 'dmatheson@gibsondunn.com' <dmatheson@gibsondunn.com>; 'vlewis@gibsondunn.com' <vlewis@gibsondunn.com>; 'cfitzgerald@gibsondunn.com' <cfitzgerald@gibsondunn.com>; 'sawilson@gibsondunn.com' <sawilson@gibsondunn.com>
Subject: BCBSM (Government): Deposition Notices

Counsel,

Please see the attached deposition notices.

Sincerely,

Jason Beach
HUNTON & WILLIAMS LLP
Bank of America Plaza, St 4100
600 Peachtree Street, N.E.
Atlanta, GA 30308
Phone: (404) 888-4219
Fax: (404) 602-9079
email: jbeach@hunton.com
website: www.hunton.com

EXHIBIT 6

U.S. Department of Justice

Antitrust Division

Liberty Square Building
450 5th Street, NW
Washington, DC 20001
202-307-0997
steven.kramer@usdoj.gov

February 28, 2011

Via E-Mail
tstenerson@hunton.com

Todd M. Stenerson
Hunton & Williams LLP
1900 K Street, N.W.
Washington, DC 20006

Re: *United States v. Blue Cross Blue Shield of Michigan*, Civ. No. 2:10-cv-14155

Dear Mr. Stenerson:

This letter responds to your February 14, 2011 letter ("February 14 letter") to my colleague Barry Joyce concerning Plaintiffs having not responded to your January 14, 2011 letter ("January 14 letter") purporting to clarify Blue Cross' position regarding plaintiffs' document-preservation obligations. Though the first sentence of your January 14 letter observes correctly that the Complaint alleges that *Blue Cross* has violated the antitrust laws, through its use of Most Favored Nation (MFN) clauses, the rest of your letter discusses "*the Government[s']* need to preserve documents related to *their* use of MFNs." (emphasis added). Your January 14 letter recognizes that, at the parties' Rule 26(f) conference, "plaintiffs did not agree that these materials should be subject to preservation."

Your January 14 letter recognizes also that, at the Rule 26(f) conference, in view of plaintiffs' expressed disagreement about their obligation to preserve documents related to their use of MFN clauses, plaintiffs requested that Blue Cross further explain why such documents should be preserved. In response, your January 14 letter contends that plaintiffs' documents "relating to MFNs" are relevant to show "the pro-competitive purposes and effects of MFNs and their commonality in all forms of contracting for the sale of goods and services." Your January 14 letter further "notes that the Government's use of MFNs in pursing [sic] the lowest prices for health related goods and services is directly analogous to Blue Cross's use of these same provisions in this case." Finally, your January 14 letter claims "it is axiomatic that contracts between the Government and Blue Cross that containing [sic] MFNs would be relevant to this litigation."

What these explanations fail to address, however, is how any of plaintiffs' documents relating to plaintiffs' use of MFN clauses is relevant to any party's claim or defense in this action, which, as your January 14 letter acknowledges, involves a claim that "*Blue Cross* has violated the antitrust laws through *its* use of Most Favored Nations clauses." (emphasis added). Regardless of any pro-competitive purposes or effects that MFN clauses used by the federal or Michigan governments might or might not have, your January 14 letter does not demonstrate that either government's use of MFN clauses has any relevance to whether Blue Cross's MFN clauses, the conduct challenged in this action, violate the Rule of Reason. Your January 14 letter therefore fails to establish that plaintiffs' documents relating to plaintiffs' use of MFN clauses is either relevant or reasonably calculated to lead to the discovery of admissible evidence.

Accordingly, plaintiffs perceived no obligation to undertake (or to seek to narrow) the extremely burdensome tasks of inquiry and preservation that your January 14 letter demands be undertaken throughout the entire federal government and the Michigan government from at least 2004 to the present. In view of your January 14 letter's failure to demonstrate the relevance of the documents that your letter contends should be preserved—undue-burden issues aside—plaintiffs saw no need to respond to your letter, which did not ask for a response. Plaintiffs continue, however, to preserve all potentially discoverable documents in their investigative files.

Perhaps recognizing the unpersuasive grounds for preservation advanced in your January 14 letter and that it did not ask for a response, your February 14 letter notes that "Plaintiffs never responded to our [January 14] notification of their [purported] obligations to preserve documents pertinent to the Governments' use of MFNs." Your February 14 letter further states you "would expect notification should [we] not plan to abide by this [purported] obligation."

In view of your February 14 letter's stated expectation of notification to the contrary, this letter constitutes plaintiffs' notification that they have not taken the Herculean measures demanded in your letter "to preserve documents pertinent to the Governments' use of MFNs," based on their lack of demonstrated relevance to any claim or defense in this action.

Sincerely yours,

/s/

Steven Kramer

cc: David Higbee
Bruce Hoffman
Jonathan Lasken
Barry Joyce
Elizabeth Lippitt

EXHIBIT 7

19 F.3d 1432, 1994 WL 58999 (C.A.6 (Ohio))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 19 F.3d 1432, 1994 WL 58999 (C.A.6 (Ohio)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Sixth Circuit.
ARKWRIGHT MUTUAL INSURANCE COMPANY, Plaintiff,
v.
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., Defendant-Appellee,
Murray Sheet Metal Company, Inc.; UBA Fire & Explosion Investigators, Parties in Interest-Appellants.

No. 93-3084.
Feb. 25, 1994.

On Appeal from the United States District Court for the Northern District of Ohio; No. 92-MC-00113, Battisti, J.
N.D.Ohio

AFFIRMED IN PART, AND REMANDED.

Before: GUY and SILER, Circuit Judges; and ENGEL, Senior Circuit Judge.

PER CURIAM.

***1** Murray Sheet Metal Company, Inc., appeals the district court's order that partially granted defendant National Union Fire Insurance Company's motion to compel production of certain documents held by UBA Fire & Explosion Investigators. Murray asserts the documents in question are protected by work product immunity and attorney-client privilege. With one exception, we affirm.

I.

A fire broke out at the General Electric Company ("GE") plastics facility in Washington, West Virginia, on April 4, 1990. Murray employees were performing welding work at the GE facility when the fire started. Murray recognized the possibility of future involvement in litigation concerning the fire and immediately began an in-house investigation of its cause. On April 5, 1990, Murray reported the fire to its liability insurer, the Erie Insurance Company. Erie hired UBA Fire & Explosion Investigators and Gay & Taylor, Inc., to investigate the fire. UBA first examined the fire scene on April 6, 1990, when UBA investigator Mike Kendrick was granted access to the GE facility. Cleanup activities that altered the fire scene began during or shortly after the time of Kendrick's April 6 visit. On April 18, 1990, Erie hired the law firm of Steptoe & Johnson to represent Murray. Steptoe immediately began to supervise UBA's investigation of the fire.

Fire investigators quickly discovered that the fire had caused extensive polychlorinated biphenyl ("PCB") contamination at the GE facility. The cleanup of this PCB has already cost millions and is expected to cost millions more. GE submitted a claim for the PCB cleanup to its insurer, Arkwright, which Arkwright agreed to pay. Arkwright in turn presented a claim for the PCB cleanup to its reinsurer, National Union, which National Union refused to pay, on the grounds that the PCB contamination was a "pre-existing condition." National Union, however, had not been notified of the fact of the fire until June 18, 1990, and thus was unable to conduct its own investigation of the PCB contamination.

Arkwright thereafter filed a diversity action against National Union in the United States District Court for the Southern District of New York ("the New York action"). Neither Murray nor UBA is a party to the New York action, which is still pending. In the course of discovery in the New York action, National Union served subpoenas

duces tecum on Murray, Gay & Taylor, and UBA. These subpoenas demanded production of certain documents concerning the investigations of the PCB contamination. Murray filed, in the three judicial districts in which these documents were kept, motions to quash these subpoenas on the basis of attorney-client privilege and work product immunity. National Union responded by filing, in the same judicial districts, motions to compel production of these documents.

Murray's own documents were kept at Murray's headquarters in the Southern District of West Virginia. The district court for that district issued an order that denied National Union's motion to compel, *Arkwright Mutual Insurance Co. v. National Union Fire Insurance Co.,* 771 F.Supp. 149 (S.D.W.Va.1991), but the Fourth Circuit vacated this order in *National Union Fire Insurance Co. v. Murray Sheet Metal,* 967 F.2d 980 (4th Cir.1992). On remand, National Union's motion to compel was granted in part and denied in part. *Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co.,* 148 F.R.D. 552 (S.D.W.Va.1993).

***2** The subpoenaed Gay & Taylor documents were kept at Gay & Taylor's offices in the Northern District of Alabama. In unpublished opinions, the district court for that district granted National Union's motion to compel and the Eleventh Circuit affirmed.

The subpoenaed UBA documents that are the subject of this appeal were kept at UBA's offices in the Northern District of Ohio. Murray submitted to the district court a "privileged documents log," which lists and briefly describes 38 documents, held by UBA, that Murray claims are protected by attorney-client privilege, work product immunity, or both. The district court ordered UBA to turn over documents 21, 22, 27, and 28 to the court for an *in camera* inspection, because it found there is a substantial question as to whether they are protected by work product immunity. Similarly, the district court ordered UBA to turn over documents 20, 23, 24, 36, and 38 to the court for an *in camera* inspection, because it found there is a substantial question as to whether they are protected by attorney-client privilege. The district court stayed its decision with respect to documents 7 and 9-19, because the discoverability of copies of those documents was then being considered by the District Court for the Southern District of West Virginia after remand from the Fourth Circuit. [FN1] The district court held that documents 1-6, 8, 25, 26, 29-35, and 37 were not protected by attorney-client privilege or work product immunity, and granted National Union's motion to compel as to those documents. The district court, however, stated that UBA may redact any document portions that contain opinion work product or "that do not bear on the PCB contamination at the site but which tend to implicate Murray with regard to the origins of the fire." (App. at 151.) Murray filed a notice of appeal from the district court's order and filed a separate motion to stay the district court's order pending the outcome of this appeal. The district court has not ruled on the motion to stay, and UBA, at Murray's direction, has not provided any documents to the district court for *in camera* inspection or to National Union.

In an earlier order, we decided that we have jurisdiction to hear Murray's appeal. We accordingly turn to the merits of its appeal.

II.

A. Work Product Immunity

We review the district court's determinations of the discoverability of the documents for an abuse of discretion. *Toledo Edison v. GA Technologies, Inc.,* 847 F.2d 335, 341 (6th Cir.1988). Murray first argues that the documents are protected by the qualified work product immunity established by Fed.R.Civ.P. 26(b)(3), which provides in relevant part:

> (3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another

19 F.3d 1432, 1994 WL 58999 (C.A.6 (Ohio))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 19 F.3d 1432, 1994 WL 58999 (C.A.6 (Ohio)))

> 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.

***3** Murray does not dispute that the documents are "otherwise discoverable" under Rule 26(b)(1). Hence, we must determine whether Murray proved the documents were "prepared in anticipation of litigation ... by or for another party or by or for that other party's representative." If Murray met this burden, the documents are entitled to qualified work product immunity. This immunity is not absolute, because National Union may discover the documents if it proved it has "substantial need" of the materials and is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Toledo Edison,* 847 F.2d at 339-40.

The district court held that documents 21, 22, 27, and 28 should be reviewed *in camera* to determine whether they are protected by the qualified work product immunity provided by Rule 26(b)(3). The district court further held that none of the other documents were protected by Rule 26(b)(3) because they were not prepared in anticipation of litigation and because National Union could not obtain the substantial equivalent of the documents by other means.

The mere fact that a document is prepared when litigation is foreseeable does not mean the document was prepared in anticipation of litigation; rather, "[t]he document must be prepared *because* of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation." *National Union Fire Ins.,* 967 F.2d at 984 (emphasis in original). *See also* C. Wright & A. Miller, Federal Practice and Procedure § 2024, at 198 ("the test should be whether, in light of the nature of the document and the factual situation in a particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.")

Several facts support Murray's contention that each of the documents was prepared because of the prospect of litigation. First, each of the documents was prepared at a time when there was a clear and definite prospect of Murray's involvement in litigation concerning the fire. Second, the preparation of each document was part of an effort to assess the scope of Murray's potential liability for the fire. Third, Murray submitted the affidavit of Murray president Jack R. Murray ("Mr. Murray"), in which he stated:

> 3. Because of our workers' proximity to the fire site and their use of a cutting torch at the fire scene, I felt on April 4, 1990 that Murray Sheet Metal Co., Inc. might be involved in future litigation over the fire.
>
> 4. We began an immediate investigation of the fire's cause on April 4, 1990 to prepare for possible litigation.

(App. at 141.) That the documents were not prepared by Murray does not vitiate the probative force of Mr. Murray's affidavit. Mr. Murray directed Murray's post-fire actions, and those actions started the causal chain that led to the preparation of these documents. Thus, Mr. Murray's concerns bear a relationship to the reason the documents were prepared. Finally, that Steptoe & Johnson was quickly retained after the fire is important evidence that the possibility of litigation was the impetus for the UBA investigation generally and for the preparation of the documents in particular.[FN2] In summary, objective and subjective evidence shows that the documents were prepared because of the prospect of litigation.

***4** The district court, however, reasoned that "if an investigation by an independent firm demonstrates anticipation of litigation, almost all of the work undertaken by UBA, here and elsewhere,

would be given a privileged status." (App. at 149.) Without regard to whether work undertaken by UBA "elsewhere" might be protected under Rule 26(b)(3), the documents held by UBA in this case were prepared in anticipation of litigation, and the district court abused its discretion by finding to the contrary.

Rule 26(b)(3) also provides, however, that documents must be prepared "by or for another party or by or for that other party's representative[.]" *Cf.* Fed.R.Civ.P. 26(c) (providing, "the court ... may make any order which justice requires to protect a party *or person* from annoyance, embarrassment," etc.) (emphasis supplied). The Ninth Circuit accordingly has held that Rule 26(b)(3), "on its face, limits its protection to one who is a party (or a party's representative) to the litigation in which discovery is sought." *In Re California Pub. Util. Comm'n,* 892 F.2d 778, 781 (9th Cir.1989). We agree, because "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *United States v. Ron Pair Enter.,* 489 U.S. 235, 242 (1989) (citation omitted). The "by or for a party" language of Rule 26(b)(3) does not present such a "rare case," because neither Murray nor the Advisory Committee Notes present any reason to conclude that Congress did not mean what it so plainly said.[FN3] *Accord FTC v. Grolier,* 462 U.S. 19, 25 (1983) (dictum); C. Wright & A. Miller, Federal Practice and Procedure § 2024, at 201-2 ("[T]he protection [of Rule 26(b)(3)] extends only to documents obtained by 'another party' or his representative and in context this rather clearly means another party to the litigation in which discovery is being attempted.... [D]ocuments prepared for one who is not a party to the present suit are wholly unprotected even though the person may be a party to a closely related lawsuit in which he will be disadvantaged if he must disclose in the present suit.")[FN4]

Here it is undisputed that Murray, Erie, and UBA are neither parties to, nor representatives of any party to, the litigation from which the subpoena duces tecum arose, i.e. the New York action. We therefore hold that none of the documents are protected by Rule 26(b)(3).[FN5] Thus, contrary to the district court's order, no *in camera* review of documents 21, 22, 27, and 28 is necessary to determine whether those documents are protected by Rule 26(b)(3).

However, even if we were somehow to accord party status to Murray or UBA, our determination of the qualified work product immunity issue would be no different, because National Union proved it has "substantial need" of the documents and "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." In considering this issue, "attention is directed at alternative means of acquiring the information that are less intrusive to the lawyer's work and [at] whether or not the information might have been furnished in other ways." *Toledo Edison,* 847 F.2d at 340. Each of the documents in question contains information relating to UBA's investigation of the fire. The parties do not dispute that National Union had no opportunity to investigate the fire scene before June 18, 1990, which was the day it was notified of the fire. By that time the fire scene had been substantially altered by cleanup efforts. National Union thus had no opportunity to investigate the fire scene as UBA did, and hence one cannot say that the information sought by National Union "might have been furnished in other ways." Moreover, Murray does not contend that the Gay & Taylor or Murray in-house investigation documents, to which National Union has access, are the "substantial equivalent" of the documents held by UBA; thus, National Union does not have alternative, less intrusive means of acquiring the information it seeks.[FN6] We therefore agree with the district court that National Union made the showing necessary to overcome Murray's assertion of qualified work product immunity.

***5** Murray relatedly argues that the documents

are protected by Rule 26(b)(3) absolute work product immunity for an attorney's mental impressions or legal opinions.[FN7] Murray maintains that the documents reflect the mental impressions of Murray's counsel, Steptoe & Johnson. This argument fails for the same reason that Murray's qualified work product immunity argument failed. Rule 26(b)(3) protects "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative *of a party* concerning the litigation[,]" and Murray is not a party.

B. Attorney-Client Privilege

Murray further argues that documents 1-4, 8, 20, 23, 24, 27, 28, and 31-34 are protected by the attorney-client privilege. The elements of this privilege are well-settled in this circuit:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or the legal adviser, (8) except the protection be waived.

United States v. Goldfarb, 328 F.2d 280, 281 (6th Cir.), *cert. denied* 377 U.S. 976 (1964) (quoting 8 J. Wigmore, *Evidence in Trials at Common Law* § 2292, at 554 (McNaughton rev. 1961)). Murray contends that these documents are protected by the attorney-client privilege because they were "prepared by UBA following meetings with counsel and Murray[,]" and thus reveal confidential communications made by Murray to Steptoe & Johnson. Murray's brief at 10. Alternatively, Murray contends that these documents contain confidential communications that Murray made directly to UBA while UBA was closely cooperating with Steptoe & Johnson.

The district court did not abuse its discretion in holding that documents 1-4, 8, 27-28, and 31-34 are not protected by the attorney-client privilege. Murray describes these documents in the privileged document log. Documents 1 and 2 each are one page correspondence between UBA and Erie concerning the status of the fire investigation. Documents 3 and 4 are a UBA invoice and a UBA expense sheet, respectively. Document 8 is a one page "transmittal letter for witness interviews," sent by Erie to UBA. Documents 27 and 28 are summaries of work done by UBA on May 3, 1990, and May 25, 1990, respectively. Document 31 is a two page excerpt from a welding textbook. Documents 32 and 33 are each a "list of evidence obtained by Mike Kendrick." Document 34 is the "chain of custody record" sent by REIC Labs to UBA. These descriptions raise no substantial question as to whether any of these documents contain confidential communications made by Murray for the purpose of receiving legal advice.

The district court did hold, however, that documents 20, 23, 24, 36, and 38 should be reviewed *in camera* to determine if they are protected by the attorney-client privilege. This holding was not an abuse of discretion because these documents are communications between UBA and Murray's counsel. We note, however, that UBA is not a "client" of Murray's counsel. To find any of these documents to be privileged, therefore, the district court must find (1) that the document reflects privileged communications made by Murray to Murray's counsel, and that the communications did not lose their privileged status because of their disclosure to UBA; or (2) that the document reflects confidential communications made by Murray to UBA for the purpose of ultimately receiving legal advice, and that UBA was acting as the agent of Murray's counsel, *United States v. Kovel*, 296 F.2d 918, 921-22 (2nd Cir.1961) (Friendly, J.) (attorney-client privilege extends to communications made to an attorney's agent for the purpose of ultimately receiving legal advice); or (3) that the document contains a confidential communication, made by UBA as Murray's agent, for the purpose of receiving legal advice, Wigmore, *supra*, § 2317, at 618 (explaining that "[a] communication ... by *any form of agency* employed or set in motion by the client is within the privilege") (emphasis in original).

19 F.3d 1432, 1994 WL 58999 (C.A.6 (Ohio))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 19 F.3d 1432, 1994 WL 58999 (C.A.6 (Ohio)))

***6** The order of the district court is AFFIRMED, except that documents 21, 22, 27, and 28 should be produced without any *in camera* review, and this matter is REMANDED for proceedings consistent with this opinion.

FN1. We accordingly do not consider in this appeal whether documents 7 and 9-19 are discoverable by National Union.

FN2. Documents 30 and 32 were prepared on April 6, 1990. Steptoe was not retained until April 18, 1990. Since Steptoe's hiring so closely followed the preparation of these two documents, however, we think Steptoe's hiring is probative as to whether these two documents were prepared in anticipation of litigation.

Separately, Murray also contends in its reply brief that the documents were prepared in anticipation of litigation because "numerous subcontractors sent claims to Murray contending that Murray was responsible for the occurrence at the [GE] plant" We decline to consider this contention because it was raised for the first time in Murray's reply brief *Wright v. Holbrook,* 794 F.2d 1152, 1156 (6th Cir.1986).

FN3. The sharp edge of Rule 26(b)(3) is blunted somewhat by Rule 26(c), which allows the court to issue a protective order if necessary to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" Rule 26(c) is inapplicable here, however, for two reasons. First, the court may only make a Rule 26(c) order "[u]pon motion by a party or by the person from whom discovery is sought," and no Rule 26(c) motion has been made here. Second, resort to Rule 26(c) to protect nonparties whose work product is unprotected under Rule 26(b)(3) would effectively remove the "by or for a party" requirement from Rule 26(b)(3)

FN4. Murray says "[t]he fact that Murray has not been joined as a party in the instant action is immaterial[,]" and cites as support *Kent Corp. v. NLRB,* 530 F.2d 612 (5th Cir.), *cert. denied,* 429 U.S. 920 (1976), and *Duplan Corp. v. Moulinage et Retordene de Chavanoz,* 509 F.2d 730 (4th Cir.1974) (en banc), *cert. denied,* 420 U.S. 997 (1975). These cases are inapposite. In *Kent,* the plaintiff (Kent) sought production of certain NLRB documents under the Freedom of Information Act. NLRB had prepared the documents in anticipation of litigation with Kent, but the envisioned litigation did not happen. NLRB nonetheless asserted work product immunity for the documents. The court held that Rule 26(b)(3) applied, reasoning that the application of the rule "cannot properly be made to turn on whether [the envisioned] litigation actually ensued." 530 F.2d at 623. This case, however, only broadens the scope of the Rule 26(b)(3) protection afforded to *parties*-by protecting documents prepared in anticipation of litigation other than the litigation in which the discovery is sought-and by no means extends Rule 26(b)(3) protection to *non-parties,* because NLRB was a party to the litigation in which the discovery was sought, i.e. the FOIA litigation. Similarly, in *Duplan,* the plaintiff sought production of certain documents prepared by Chavanoz in connection with previous, terminated litigation. Chavanoz argued that the documents were protected by Rule 26(b)(3). The court agreed, holding that work product material "is immune from discovery although the litigation in which it was developed has been terminated." 509 F.2d at 732. Here again the court merely broadened the Rule 26(b)(3) protection afforded to *parties,* be-

cause Chavanoz was a party to the patent litigation in which the discovery was sought.

FN5. We are aware that the Fourth Circuit did not mention the Rule 26(b)(3) "by or for a party" requirement in considering Murray's work product argument in *National Union Fire Ins. v. Murray Sheet Metal,* 967 F.2d 980 (4th Cir.1992). We believe this omission was an oversight.

FN6. In its reply brief, Murray stresses that on April 29, 1993, the District Court for the Southern District of West Virginia ordered GE to turn over to National Union certain documents relating to GE's in-house investigation of the PCB contamination resulting from the fire. Murray contends that this order provides National Union with the substantial equivalent of the information sought from UBA. Murray, however, failed to make the fact of this order a part of the record in this appeal, by means of a motion for reconsideration or otherwise. National Union therefore has had no opportunity to refute the argument that Murray now makes to this court, and we decline to consider it.

FN7. Rule 26(b)(3) provides in relevant part:

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

C.A.6 (Ohio),1994.
Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.
19 F.3d 1432, 1994 WL 58999 (C.A.6 (Ohio))

END OF DOCUMENT

Not Reported in F.Supp.2d, 2004 WL 1444951 (E.D.La.)
(Cite as: 2004 WL 1444951 (E.D.La.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Louisiana.
FEDERAL TRADE COMMISSION
v.
U.S. GRANT RESOURCES, LLC et al

No. Civ.A. 04-596.
June 25, 2004.

Thomas Landers Watson, U. S. Attorney'sOffice, New Orleans, LA, W. David Griggs, Susan E. Arthur, Dallas, TX, for Plaintiff.

Pauline Hardin, Conrad Meyer, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, LA, for Defendants.

Isabel Barback Wingerter, Louisiana Department of Justice, Baton Rouge, LA, for Movant.

ORDER AND REASONS

KNOWLES, Magistrate J.

***1** Before the Court is the Federal Trade Commission's Motion to Quash Rule 30(b)(6) Notice of Deposition of the Plaintiff and for Protective Order. The defendants filed formal opposition. On this date, the matter was the subject of an expedited telephone hearing, following which the matter was submitted for determination. For the following reasons, the plaintiff's Motion to Quash and for Protection is GRANTED.

BACKGROUND

On March 2, 2004, the Federal Trade Commission (FTC) brought this action under § 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), against defendants, U.S. Grant Resources, LLC, National Grants, LLC, John B. Rodgers and Laurel A. Rodgers, to secure a permanent injunction, rescission of contracts and restitution, disgorgement of ill-gotten gains, and other equitable relief. The FTC alleges that the defendants engaged in deceptive acts or practices in connection with the advertising, marketing and sale of grant procurement services in violation of § 5(a) of the FTC Act.

The complaint alleges that since September 2001, in the course of marketing grant procurement services to consumers throughout the United States for fee, the defendants advertise "FREE GRANTS Never Repayacceptance guaranteed. Government and private sources $500-$500,000...." When consumers respond and answer questions purportedly to determine eligibility for a grant, they are told that they are grant eligible for a particular purpose, but must pay a one-time processing fee ranging from $95 to $199 for the company's services, which include finding a source for the grant and sending them the appropriate application package. Consumers who inquire about a refund are allegedly told that the grant is guaranteed and that they can obtain a refund. Many consumers agree to pay the fees by electronic bank draft. Thereafter, consumers are not sent an application package. Instead, they are sent a list of agencies or foundations to which the consumer must write to request funding. Many of the sources identified do not offer grants to individuals and some provide assistance only to nonprofit organizations. Defendants' package allegedly provides details of a refund policy which imposes conditions and restrictions not previously disclosed and which are difficult, if not impossible, to meet.

The FTC alleges that the defendants' representations are false and misleading in violation of § 5(a) of the FTC Act, which deceptive practices cause monetary loss to consumers and harm the public interest. The FTC submits that few, if any, refunds were ever made. They further allege that the defendants' ill-practices are widespread and have caused substantial consumer losses nationwide. The FTC has previously advised that the loss to consumers has been preliminarily been valued at over $3,000,000.00.

At the outset, the FTC's request for a temporary restraining order was granted. The district judge also granted the FTC's motion for preliminary injunction, together with an asset freeze, which is presently in effect and shall remain in effect through the completion of trial presently set to commence next on July 26, 2004. *See* Order dated April 23, 2004 [Rec. Doc. No. 40].

***2** The parties have appeared before the Court on multiple occasions, most recently regarding a Motion to Quash Subpoena Duces Tecum, seeking production of copies of the defendants' own documents, which was denied. The final pre-trial conference is imminent, *i.e.*, July 8, 2004, and the trial is set to commence on July 26, 2004.

CONTENTIONS OF THE PARTIES

Pursuant to Fed.R.Civ.P. 26(c), the FTC has moved for a protective order striking the defendants' Rule 30(b)(6) Notice of Deposition of the Federal Trade Commission. Plaintiff asserts that, although defendants do not meet any of the criteria for taking the deposition of plaintiff's counsel, they seek the testimony of the Commission's counsel or someone acting under their direction. Further, it is alleged that defendants seek protected work product and communications shielded from disclosure by the deliberative process privilege. Additionally, the plaintiff contends that some of the areas of inquiry are irrelevant.

Regarding the twenty-four areas of inquiry identified by the defendants, plaintiff asserts that only the Commission's trial attorneys have information regarding item numbers 1-4, 6-11, and 13-15. The FTC further argues that item numbers 5, 12, and 16-24 call for testimony relating to FTC policy and procedure invoked in the process of the investigation which presaged the instant claims, all of which it submits is protected from disclosure. Plaintiff notes that it has urged defendants to withdraw their notice and that it has furthered offered to answer numbers 1-4, 6-10, and 13-15 *via* Deposition upon Written Questions, and to provide relevant portions of the FTC Operating Manual for numbers 5, 12, and 16-24, to no avail. The FTC submits that the alternative is sufficient to provide the defendants with the relevant underlying facts necessary to defendant against this case. The FTC contentions regarding the noticed areas of inquiry are addressed serially below.

Specifications 1-4, 6-11, and 13-15

The FTC submits that the aforestated areas of inquiry are improper. The plaintiff argues that they are designed to illicit information about plaintiff's case which could only be supplied by trial counsel and that defendants fail to justify such a deposition. The specifications are set forth below:

> Specification # 1: “The names of the persons who took or gathered the consumer complaints against the Defendants listed in the FTC's Response to Interrogatories Nos. 9, 10, 14, 15(a), (b) and (c) or produced by the FTC in discovery.”
>
> Specification # 2: “The gathering of the complaints against the Defendants listed in the FTC's Response to Interrogatories Nos. 9, 10, 14, 15(a), (b) and (c) or produced by the FTC in discovery from various state and federal regulatory agencies or Better Business Bureas, including the dates of contact.”
>
> Specification # 3: “The FTC's procedures and actions in taking the affidavits of the consumers listed in the FTC's Response to Interrogatories Nos. 9 and 14.”
>
> ***3** Specification # 4: “The FTC's procedures and actions in taking the complaints of the consumers listed in the FTC's Response to Interrogatories Nos. 10, 15(a), (b) and (c) and any other consumer complaints against Defendants, including the dates of contact.”
>
> Specification # 6: “All actions the FTC took to determine the accuracy of the consumer complaints listed in the FTC's Response to Interrogatories Nos. 10, 15(a), (b) and (c) and any other consumer complaints against the Defendants.”

Specification # 7: "All actions the FTC took to determine the accuracy of the consumer complaints listed in the FTC's Response to Interrogatories Nos. 9 and 14."

Specification # 8: "All information in the possession of the FTC that customers who purchased services from the Defendants received grants and the FTC's knowledge of any inquiry made to determine whether grants were given to customers who purchased services from the Defendants."

Specification # 9: "The FTC's knowledge of which ad was seen by each customer listed in the FTC's Response to Interrogatories Nos. 9, 10, 14, 15(a), (b) and (c) or by any other customer listed in the documents produced by the FTC in discovery."

Specification # 10: "The FTC's knowledge of the ads placed by Defendants and an explanation of what portion of the ads listed in the FTC's Response to Interrogatory No. 19 was unfair or deceptive and how."

Specification # 11: "All contacts by the FTC with any newspaper or other similar news outlet which the FTC contends published any of Defendant's ads, or with any middlemen who placed the ads for the Defendants."

Specification # 13: "An explanation of the actual damages and/or restitution the FTC contends each customer listed in the FTC's Response to Interrogatories Nos. 9, 10, 14, 15(a), (b) and (c) or produced by the FTC in discovery sustained and the reasons for their inclusion in the calculation."

Specification # 14: "The formula and/or calculation for any additional damages and/or restitution and/or equitable relief the FTC claims on behalf of consumers and an explanation of the basis of the formula and/or calculation."

Specification # 15: "The name of the person(s) who made the determination/calculation as to restitution and/or damages to the consumers and/or the equitable relief sought."

Plaintiff argues that the only FTC employees who have the information sought above are its trial counsel. Such depositions are only permitted in limited circumstances, namely

(1) where no other means exists to obtain the information,

(2) the information is relevant and nonprivileged, and

(3) the information is crucial to the preparation of the case.

Plaintiff's citations of authority for the foregoing include *Shelton v. American Motors Corp.*, 850 F.2d 1323, 1327 (8th Cir.1986) and *Nguyen v. Excel Corp.*, 197 F.3d 200, 208 (5th Cir.1999). The FTC submits that the defendants have failed to satisfy any of the criteria. In particular, the plaintiff highlights that factual information responsive to these areas of inquiry could be satisfied by responses to a deposition upon written questions. Such format would obviate the potential for delving into the deliberative process and trial counsel's impressions and theories of the case. Further, plaintiff contends that most of the factual information has already been provided in response to previous interrogatories and requests for production.

***4** Plaintiff contends that areas of inquiry numbered 1, 2, and 11 are not related to a claim or defense nor are they reasonably calculated to lead to relevant information; as such, items 1 (names of persons who gathered complaints), 2 (the gathering of complaints), and 11 (contacts with newspapers) are not relevant.

The plaintiff argues that a Rule 30(b)(6) deposition is not crucial to their defense. The FTC suggests that the defendants have availed themselves of this mode of discovery in an attempt to crawl into the mind's of plaintiff's counsel and tap into opinion work product. Essentially, the requests require that counsel retrace the steps taken in the process of

their investigation and evaluation of claims at issue. Simply stated, the FTC urges the Court to close the "back door" as the defendants are not otherwise entitled to discovery of counsel's opinion, work product or the deliberative process. The plaintiff highlights that counsel's choices, counsel's arrangement of factual material upon which the claims are based, and information as to how the particular documentation in this case was compiled in preparation for litigation necessarily reveals the attorney's thought processes and his theories of the case or mental impressions *i.e.*, protected work product and the deliberative process.

Specifications 5, 12, and 16-24

Regarding this second grouping of specifications, the FTC argues that it calls for testimony relating to its policies and procedures, protected under the deliberative process and work product privileges.

> Specification # 5: "The FTC's policy and procedure for determining the accuracy of consumer complaints regarding an alleged business' misleading or deceptive practices."
>
> Specification # 12: "The FTC's policy and procedure for calculating damages for alleged aggrieved consumers by a businesses misleading or deceptive advertising."
>
> Specification # 16: "The Federal Trade Commission's policy and procedure regarding investigation of businesses for unfair and deceptive advertising."
>
> Specification # 17: "The FTC's Policy and procedure for evaluating a business ad to determine if it is unfair or deceptive."
>
> Specification # 18: "The FTC's policy and procedure for interviewing consumers who have allegedly been aggrieved by a business for unfair and deceptive practices."
>
> Specification # 19: "The FTC's policy and procedure for determining whether or not to file an injunction against a business for allegedly misleading and deceiving the public."
>
> Specification # 20: "The FTC's policy and procedure for gathering evidence to determine if a business entity is misleading or deceiving the public."
>
> Specification # 21: "The FTC's policy and procedures for procuring and handling consumer complaints after a business has been ordered to cease and desist from a TRO filed by the FTC."
>
> Specification # 22: "The FTC's policy and procedure regarding the handling of consumer complaints received from various agencies across the country."
>
> ***5** Specification # 23: "The FTC's policy and procedure for settling consumer complaints on behalf of other government agencies across the country."
>
> Specification # 24: "The FTC's policy and procedure for placing a business or entity on notice of a potential violation of Section 5 of the FTC act."

The FTC submits that the deliberative process privilege encompasses traditional attorney-client privilege and work-product privilege, and also provides an executive deliberative process privilege, designed to protect pre-decisional internal memoranda from public disclosure. *See Maricopa Audubon Society v. U.S. Forest Service*, 108 F.3d 1089, 1092 (9th Cir.1997). In order to qualify, a document must be both pre-decisional (prepared in order to assist agency decision maker in arriving at a decision) and deliberative (actually related to the process by which policies are formulated). *Id.*

Further, plaintiff asserts that the testimony regarding FTC policy and procedure contains mental impressions, interpretations, thoughts, and opinions, all protected by the work product privilege. Plaintiff contends that the policy, which is truly the focus of these areas of inquiry, is how the formal

policy was actually applied in practice to the facts which the Commission's investigation revealed in this case, *i.e.*, subjects of both the work product and deliberative process privileges. Plaintiff argues that any discovery beyond the relevant portions of the FTC's Operating Manual is therefore privileged and that plaintiff should not be compelled to produce a witness to testify regarding their application to this particular investigation and litigation.

Specifications 1, 2, 11, 16, 19, 21-24

Plaintiff argues that Specifications 1, 2, 11, 16, 19, and 21-24 are clearly irrelevant since they do not address the claims or defenses in this matter.

Defendants argue generally that the FTC's objection to literally every area of inquiry is frivolous and that their attempt to hide behind privilege is without merit. Additionally, the defendants specifically argue four points, enumerated below:

(1) The Accuracy and Authenticity of Declarations. Defendants note that the FTC filed an FRE 807 Notice of Intent to use declarations in lieu of live witnesses. Defendants argue that in order to have a fair opportunity to meet this evidence it must depose the FTC.

Defendants note that these declarations are hearsay and that they have evidence which conficts with testimony in each consumer declaration. Defendants highlight that of the 388 consumer complaints identified, only 13 consumers provided declarations. The balance are attached to declarations by individuals working for other regulatory agencies (i.e., hearsay within hearsay). Essentially, defendants submit that plaintiff is attempting to offer these as proof for the truth of the matter asserted; however, it refuses to engage in discovery regarding the authenticity, identity, genuineness or accuracy of the statement, which is a condition precedent to admissibility.

***6** Defendants contend that the most economical way for them to determine the trustworthiness of the declarations, particularly the consumer complaints, is a 30(b)(6) deposition and that FRE 807 specifically provides that the notice of intent is necessary to provide defendants a "fair opportunity to meet" the evidence.

Defendants argue that trial counsel could not have been acting as "trial counsel" during the taking of consumer complaints and cannot claim a privilege as to factual information gathered at that time.

(2) Plaintiff cannot choose the Defendants Mode of Discovery. Defendants highlight that the plaintiff has objected on the basis that trial counsel is the only person knowledgeable and capable of addressing the areas of inquiry. Nevertheless, plaintiff offers to answer questions 1, 2,3, 4, 6, 7, 8, 9, 10, 13, 14 and 15 *via* Deposition upon Written Questions as well as provide the defendants with the relevant portions of the FTC's operating manual in response to 5, 12, 16 to 24. Defendants cite *Muzak Corp. v. Muse-Art Corp.*, 16 F.R.D. 172, 173 (E.D.Pa.1954) for the proposition that a party himself, not his adversary, has the right to invoke any one or more of the pre-trial discovery procedures set forth in the federal rules. Essentially, the defendants submit that, if the plaintiff has agreed to respond by written deposition, then there exists no good reason why the FTC should not respond in Rule 30(b)(6) format, *i.e.*, an oral deposition.

Additionally, defendants argue that, because the plaintiff has agreed to answer the questions in writing, the FTC cannot now claim privilege.

(3) A 30(b)(6) deposition of the FTC is the most cost-efficient and expedient mode of obtaining factual information necessary to defend against the FTC's claims. Defendants note that they have audio tape recordings of each of the consumers that contradicts their oral declarations. In the usual case, the defendants claim that they would depose each and every consumer regarding the accuracy of their complaints; however, that is impossible because consumers are spread out all over the United States, this case is on the fast track to trial in one month,

the 30(b)(6) is the most efficient way to proceed, and the district judge has instructed the parties to minimize the costs of litigation.

(4) The FTC cannot claim privilege for factual information. Defendants note that a main issue in the case is the trustworthiness of the consumer complaints and questions 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 13 and 15 all center around the facts regarding same, *i.e.*, names of investigators, actual gathering of complaints, procedures for taking affidavits, the procedures in taking complaints, actions used to determine accuracy of the complaints, any knowledge FTC has regarding consumers who received grants, information regarding ads defendants placed, contacts with newspapers that published ads, explanation of damages, formula for calculation of damages, and names of people who calculated damages. Defendants contend that these questions do not seek mental impressions or opinions but rather merely the facts that support the consumer declarations.

***7** As to questions 5, 12, 16 to 24, defendants explain that they seek FTC policy and procedure regarding actions surrounding the case. Because the FTC has already agreed to provide defendants with copies of the FTC operating manual, plaintiff's argue that they cannot now claim privilege regarding the same information.

The defendants highlight that they have provided their depositions and answered all of the discovery addressed by the FTC, and yet, the "FTC has been asked to provide ONE DEPOSITION" which "goes squarely to the issue of the admissibility and trustworthiness of their evidence," but they have refused to comply. *See* Defendant's Opposition at p. 8. Because the FTC chose to proffer evidence pursuant FRE 807, the defendants urge the Court to find that they are entitled to a fair opportunity to meet that evidence and to avail themselves of Rule 30(b)(6) in that effort.

APPLICABLE LAW

Discovery

Under the Federal Rules of Civil Procedure, "parties may obtain discovery regarding any matter, not privileged that is relevant to the claim or defense of any party...." Fed.R.Civ.P. 26(b)(1). "Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* Discovery is essential trial preparation in that it is the proper vehicle by which parties may avail themselves of all of the relevant facts, a necessary prerequisite to streamlining the trial such that it addresses only issues in dispute, eliminating surprise and promoting settlement of the claims, if such a resolution is possible.

Rule 30(b)(6)

A party seeking a Rule 26(c) protective order prohibiting deposition testimony or document production must establish good cause and a specific need for protection. *Landry v. Air Line Pilots Association*, 901 F.2d 404, 435 (5th Cir.1990). "Good cause" exists when justice requires the protection of "a party or person from annoyance, embarrassment, oppression, or undue expense." Fed.R.Civ.P. 26(c). The burden is upon the movant to prove the necessity of a protective order. If both of the aforesaid requirements are met, the court may "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden and expense." Fed.R.Civ.P. 26(c).

Work-Product Doctrine

The federal work-product doctrine is codified in Federal Rule of Civil Procedure 26(b)(3), which states:

> Trial Preparation Materials: Subject to the provisions of subdivision (b)(4) of this rule a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's 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 mental impressions, conclusions, opinions, legal theories of an attorney or other representative of a party concerning the litigation.

***8** Fed.R.Civ.P. 26(b)(3). The work product doctrine provides qualified protection of documents and tangible things prepared in anticipation of litigation, including "a lawyer's research, analysis of legal theories, mental impressions, notes, and memoranda of witnesses' statements." *Dunn v. State Farm Fire & Casualty Co.*, 927 F.2d 869, 875 (5th Cir.1991) (*citing Upjohn Co. v. United States*, 449 U.S. 383, 400, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

The party who asserts work-product protection must show that the materials warrant such protection. *Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 721 (5th Cir.1985). Four criteria must be met to invoke work product protection, to wit:

(1) the materials must be documents or tangible things;

(2) materials must be prepared in anticipation of litigation;

(3) materials must be prepared by or for a party's representative; and

(4) if the party seeks to show that material is opinion work product, that party must show that the material contains the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party. Fed.R.Civ.P. 26(b)(3); *see also In re Kaiser Aluminum & Chemical Co.*, 214 F.3d 586, 593 (5th Cir.2000); *In re International Systems and Controls Corp. .*, 693 F.2d 1235, 1240 (5th Cir.1982); *Nutmeg Insurance Co. v. Atwell, Vogel & Sterling*, 120 F.R.D. 504, 508-509 (W.D.La.1988).

If a party proves that materials merit work product protection, the party seeking discovery must demonstrate why, in any event, those materials must be produced by showing that (1) a substantial need of the materials in the preparation of the party's case and (2) the inability, without undue hardship, of obtaining the substantial equivalent. *See Nutmeg Ins. Co.*, 120 F.R.D. at 508-509.

Deliberative Process Privilege

The deliberative-process privilege itself applies to "communications which are *predecisional* that is, generated before the adoption of agency policy, and *deliberative*, that is, reflecting the give-and-take of the consultative process." As the Fifth Circuit has stated of the common law version of the privilege, it is based on the reasoning that "certain governmental processes related to legal and policy decisions ... cannot be carried out effectively if they must be carried out under the public eye." *Branch v. Phillips Petroleum*, 638 F.2d 873, 881-82 (5th Cir.1981); *see also Kinoy v. Mitchell*, 67 F.R.D. 1, 11 (S.D.N.Y.1975) (privilege exists to protect "free expression, integrity and independence of those responsible for making the determinations that enable government to operate").

The deliberative process privilege is not limited to deliberations memorialized in writing. *In re Agent Orange Litigation*, 97 F.R.D. 427, 434 (E.D.N.Y.1983). Thus, the privilege would also bar inquiry by the defendants by means of any discovery tool, whether by interrogatory or deposition or otherwise, into the evaluations, expressions of opinions and recommendations on policy matters or matters essential to the deliberations within the agency in this matter. Allowing inquiry into these matters by a mode of discovery other than Rule 34 would sanction obtaining through the back door what the plaintiffs are not entitled to acquire through the front. This privilege protects advice, recommendations, and opinions that are part of the deliberate, consultative, decision-making processes

of the government.

ANALYSIS

***9** The defendants' notice would require the FTC to identify and produce for deposition a person who could testify on the commission's behalf and is knowledgeable as to the twenty four matters the notice delineates. The matters enumerated basically involve the results of the FTC's investigation of the allegations set forth above, the roles and identification of FTC employees involved in the investigation, the extent of FTC reliance on work product of various employees, the policies and procedures invoked in this particular investigation, *inter alia.*

Having reviewed the parties' submissions, record and the applicable law and considering the argument of counsel, the Court finds that the 30(b)(6) notice is an inappropriate attempt to depose opposing counsel and to delve into the theories, opinions and mental impressions of FTC attorneys. The defendants claim that they do not necessarily seek to depose trial counsel or to discover mental impressions and opinions. The Court observes that it is technically true that the FTC may designate any person under Rule 30(b)(6); however, from a practical standpoint the argument fails to pass muster. Rule 30(b)(6) requires that the responding party make a conscientious good faith effort to designate a person or persons having knowledge of the matters sought by the discovering party and to prepare those persons knowledgeable about the areas noticed so that they can fully, completely and unevasively address the questions posed.

The investigation in this matter was conducted by FTC attorneys and by FTC employees working under the direction of attorneys. Thus, the 30(b)(6) notice necessarily involves the testimony of one or more attorneys assigned to the case or it requires the FTC's attorneys to prepare other witnesses to testify. In *S.E.C. v. Rosenfeld*, 1997 WL 576021 (S.D.N.Y.1997), the court found that this amounted to an attempt to depose the adversary's attorney, because even if a non-attorney witness were designated, the designee would have to be prepared by those who conducted the investigation and that preparation would include disclosure of the SEC attorneys' legal and factual theories. Most notably, the *Rosenfeld* court commented:

> Although defendant is correct that a Rule 30(b)(6) witness is not required to have firsthand knowledge, and that discovery should be conducted as efficiently as possible, the notice of deposition clearly calls for the revealing of information gathered by the SEC attorneys in anticipation of bringing the instant enforcement proceedings, and if forced to designate witnesses to testify fully and completely concerning the matters described in the notice of deposition, testimony of the SEC attorneys conducting the investigation would be necessary.

Rosenfeld, 1997 WL 576021 at *2. *See also S.E.C. v. Buntrock*, 217 F.R.D. 441, 444 (N.D.Ill.2003); *S.E.C. v. Morelli*, 132 F.R.D. 42 (S.D. N. Y.1992).

This Court has considered the cases cited by the defendants, *i.e.*, *Goldberg v. Raliegh Manufacturers, Inc.*, 28 F.Supp. 975, 977 (D.Ma.1934); *Muzak Corp. v. Muse-Art Corp.*, 16 F.R.D. 172, 173 (E.D.Pa.1954). Both were decided decades before Rule 30(b)(6) was enacted. Neither one of those cases dealt with the appropriate subject matter for a deposition of an employee who had learned certain facts from an entity's attorney or the deposition of a party's attorney. The cases of *Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir.1999), *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir.1986), *S.E.C. v. Rosenfeld*, 1997 WL 576021 (S.D.N.Y.1997) and *SEC v. Morelli*, 143 F.R.D. 42 (S.D.N.Y.1992) are far more informative. Here, we are dealing with the results of an attorney-conducted and directed consumer fraud (law enforcement) investigation. *See S.E.C. v. Buntrock*, 217 F.R.D. 441, 444 (N.D.Ill.2003). After considering the “specifications” set forth in the defendants' Rule 30(b)(6) notice, the Court concludes that this mode of discovery is intended to ascertain how the FTC intends to marshal its facts, documents and other

evidence and to discern the deliberations, mental impressions and/or thought processes upon which this action was predicated.

***10** The notice at issue seeks either the deposition of opposing counsel or the practical equivalent thereof. Courts in this and other districts generally take a critical view of such a tactic. *See Nguyen,* 197 F.3d at 209; *Shelton*, 805 F.2d at 209; *Johnstone v. Wabick,* 220 F.Supp.2d 899 (N.D.Ill.2002); *Marco Island Partners v. Oak Development Corp.,* 117 F.R.D. 418 (N.D.Ill.1987). While there is no "blanket immunity" that exempts attorneys from being deposed, the aforesaid jurisprudence acknowledges that it presents a unique opportunity for harrassment. Indeed, one court observed that, "because deposition of a party's attorney is usually both burdensome and disruptive, the mere request to depose a party's attorney constitutes good cause for obtaining a Rule 26(c), Fed.R.Civ.P., protective order unless the party seeking the deposition can show both the propriety and the need for the deposition." *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.,* 117 F.R.D. 83, 85 (M.D.N.C.1987).

The defendants do not argue that the there is no other means to obtain the information sought and, under the circumstances of this case, this Court is not persuaded that the defendants have the right to choose Federal Rule of Civil Procedure 30(b)(6). During the past two months, a formidable amount of reciprocal discovery has occurred and the Louisiana Attorney General's Office has been directed to comply with defendants' subpoena requiring the reproduction of multiple boxes of documents and other materials. Relevant facts are certainly available in the materials produced and the defendants' opposition memorandum admits as much. Additional facts, if that is what the defendants are truly after, are available elsewhere and by other means. Throughout the defendants' memorandum in opposition, the argument is that they are entitled to discovery of the facts relevant to their defense to various consumer declarations and to the FTC's claims. However, a close reading reveals that defendants seek to discover the FTC's theories as to the underlying facts, the extent of the FTC's knowledge (how much it knows and how much it does not know) as a result of the investigative efforts of its attorneys, counsel's impressions regarding the significance of the facts, the nature of the FTC's work product, the FTC's legal position and how it arrived at that position. The defendants are not entitled to that type of discovery for reasons previously stated.

The work product doctrine protects not only materials prepared by a party, but also materials prepared by a representative of a party, including attorneys, consultants, agents, or investigators. *Nobles*, 422 U.S. at 228; *see also* Fed.R.Civ.P. 26(b)(3). In *United States v. Nobles,* 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), the Supreme Court explained:

> At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversarial system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation of trial. It is therefore necessary that the doctrine protect material *prepared by agents for the attorney* as well as those prepared by the attorney himself.

***11** *Nobles,* 422 U.S. at 238-39 (emphasis added).

Absent a showing of *compelling* need *and* the inability to discover the substantial equivalent by other means, work product evidencing mental impressions of counsel, conclusions, opinions and legal theories of an attorney are not discoverable. *See Conkling v.. Turner,* 883 F.2d 431, 434-35 (5th Cir.1989); *In Re Grand Jury Proceedings,* 219 F.3d 175, 190 (2nd Cir.2000); *Varel v. Banc One Capitol Partners, Inc.,* 1997 WL 86457 (N.D.Tex.) (Boyle M. J.). Indeed, opposing counsel may rarely, if ever, use discovery mechanisms to obtain the re-

search, analysis of legal theories, mental impressions, and notes of an attorney acting on behalf of his client in anticipation of litigation. *See Dunn v. State Farm Fire & Casualty Co.*, 927 F.2d 869, 875 (5th Cir.1991); *Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 721 (5th Cir.1985). Moreover, a document does not lose its privilege status merely because its contains factual information. *See High Tech Communications, Inc. v. Panasonic Co.*, 1995 WL 45847 at *6 (E.D.La., Feb.2, 1995). As aforestated, the deliberative process privilege encompasses the work-product privilege, as well as the traditional attorney-client privilege, and also provides an executive deliberative process privilege. *See Maricopa Audubon Society*, 108 F.3d at 1092. Additionally, the deliberative process privilege is not limited to deliberations memorialized in writing. *In re Agent Orange Litigation*, 97 F.R.D. at 434.

There is one additional matter this Court must address. It appears that the defendants contend that the FTC's agreement to provide factual responses to certain enumerated specifications, but in the format of a response to either interrogatory requests or a deposition upon written question, somehow constitutes subject matter waiver. More particularly, defendants suggest that because the FTC has agreed to provide its Operating Manual, the commission has waived all of the protections afforded with respect to the policies and procedures as applied or invoked with respect to the investigation at issue in this case. Courts have consistently held that there exists no subject matter waiver for the kind of work product expressly defined in Fed.R.Civ.P. 26(b)(3) as "the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation," *i.e.*, "opinion" work product. As to the FTC's agreement to provide responses consisting of factual knowledge only, waiver is not implicated, because the facts alone are not subject to any privilege.

For the foregoing reasons, the FTC is entitled to the protective order it seeks and the defendants' Rule 30(b)(6) notice must be quashed. Accordingly,

IT IS ORDERED that the FTC's Motion for Protective Order and to Quash Defendants Rule 30(b)(5) Deposition Notice is GRANTED.

IT IS FURTHER ORDERED that, pursuant to the agreement of the FTC, it shall respond to specifications numbered 1-4, 6-10, and 13-15 *via* Deposition upon Written Questions, and shall further provide relevant portions of the FTC Operating Manual for in response to specifications numbered 5, 12, and 16-24.

E.D.La.,2004.
F.T.C. v. U.S. Grant Resources, LLC
Not Reported in F.Supp.2d, 2004 WL 1444951 (E.D.La.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2007 WL 3172788 (E.D.Mich.)
(Cite as: 2007 WL 3172788 (E.D.Mich.))

H

Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
Richard GLANDA, Plaintiff,
v.
TWENTY PACK MANAGEMENT CORP., et al.,
Defendants.

Civil Action No. 07-CV-13263.
Oct. 29, 2007.

Donna M. Mackenzie, Jules B. Olsman, Olsman, Mueller, Berkley, MI, for Plaintiff.

Jonathan M. Jaffa, Sullivan, Ward, Southfield, MI, for Defendants.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO COMPEL PRODUCTION (DOCKET NO. 8)

MONA K. MAJZOUB, United States Magistrate Judge.

***1** This matter comes before the Court on Defendants' Motion to Compel Production of Harold Looney's Chart from Sunrise Assisted Living at North Farmington Hills filed on September 13, 2007. (Docket no. 8). There was no Response filed in this matter and Defendants stated in their Motion to Compel Production that "[P]laintiff counsel is not opposed to the relief being sought." (Docket no. 8 ¶ 6). This motion was referred to the undersigned for decision pursuant to 28 U.S.C. § 636(b)(1)(A). (Docket no. 9). The Court heard argument from counsel on October 24, 2007. The matter is now ready for ruling.

Plaintiff brings this action on behalf of an individual who was allegedly sexually accosted by co-resident Harold Looney [FN1] while residing at Defendant Sunrise Assisted Living at North Farmington Hills.

FN1. Harold Looney is not a party to this action.

Defendants filed this Motion to Compel Production seeking an order compelling Sunrise Assisted Living at North Farmington Hills to produce a copy of Mr. Looney's records. Defendants also ask that the Court's order state that the documents are to be used strictly in connection with this lawsuit and not to be publicly revealed or distributed. Defendants argue that Mr. Looney's records are relevant to the issues of the case and that their discovery is proper. (Docket no. 8 ¶¶ 3, 4). Neither party has served any discovery formally requesting production of Mr. Looney's chart. Under Rule 37, Fed.R.Civ.P., Defendants' Motion to Compel as to Mr. Looney's chart is premature.

Rule 26, Fed.R.Civ.P., sets forth the scope of discovery and allows the Court to issue protective orders for good cause shown to protect a person from annoyance, embarrassment, oppression, or undue burden or expense. The parties do not argue that these records are privileged. They are therefore discoverable under Fed.R.Civ.P. 26. The records are, however, of such a nature that some protective measures should be taken to ensure that only persons having a legitimate need to see the records have access to them. The parties are therefore ordered to draft and submit to the Court an appropriate stipulated protective order.

Accordingly, Defendants' Motion to Compel Production of Harold Looney's Chart from Sunrise Assisted Living at North Farmington Hills will be denied in part and granted in part.

IT IS THEREFORE ORDERED that Defendant's Motion to Compel Production (docket no. 8) is **DENIED** in part and **GRANTED** in part as set out above.

IT IS FURTHER ORDERED that the parties

will submit to the Court a stipulated protective order on or before November 9, 2007.

NOTICE TO THE PARTIES

Pursuant to Fed.R.Civ.P. 72(a), the parties have a period of ten days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28 U.S.C. § 636(b)(1).

E.D.Mich.,2007.
Glanda v. Twenty Pack Management Corp.
Not Reported in F.Supp.2d, 2007 WL 3172788 (E.D.Mich.)

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Slip Copy, 2012 WL 3155988 (E.D.Mich.)
(Cite as: 2012 WL 3155988 (E.D.Mich.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
POLICE AND FIRE RETIREMENT SYSTEM OF the CITY OF DETROIT, et al., Plaintiffs,
v.
Donald V. WATKINS, et al., Defendants.

No. 08–12582.
Aug. 3, 2012.

Joseph E. Turner, Peter A. Jackson, Jordan S. Bolton, Reginald M. Turner, Jr., Clark Hill PLC, Detroit, MI, for Plaintiffs.

Keefe A. Brooks, Brooks Wilkins Sharkey & Turco, PLLC, Birmingham, MI, Richard T. Hewlett , Varnum, Novi, MI, for Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

VICTORIA A. ROBERTS, District Judge.

***1** Before the Court is Defendants/Third Party Plaintiffs' Motion for Reconsideration of this Court's May 1, 2012 Order (Doc. # 207) affirming the Magistrate Judge's Opinion and Order (Doc. # 189) Granting in Part and Denying in Part Plaintiffs' Motion for a Protective Order Prohibiting Defendants from taking the Depositions of Plaintiffs' Counsel (Doc. # 176).

Local Rule 7.1(h)(3) provides the Court's standard of review:

> Generally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties and other persons entitled to be heard on the motion have been misled but also show that correcting the defect will result in a different disposition of the case.
>
> E.D. Mich. LR 7.1(h)(3).

Palpable defects are those which are "obvious, clear, unmistakable, manifest or plain." *Mich. Dep't of Treasury v. Michalec*, 181 F.Supp.2d 731, 734 (E.D.Mich.2002) (*citing Marketing Displays, Inc. v. Traffix Devices, Inc.*, 971 F.Supp. 262, 278 (E.D.Mich.1997), *rev'd in part on other grounds*, 200 F.3d 929 (6th Cir.1999)). "It is an exception to the norm for the Court to grant a motion for reconsideration." *Maiberger v. City of Livonia*, 724 F.Supp.2d 759, 780 (E.D.Mich.2010). "[A]bsent a significant error that changes the outcome of a ruling on a motion, the Court will not provide a party with an opportunity to relitigate issues already decided." *Id.*

The Court reviewed Defendants' motion; it does not provide a basis to grant reconsideration. Defendants do not demonstrate a palpable defect by which the Court has been misled. They ignore the pertinent case law, which makes clear that the "practice of taking opposing counsel's deposition [is] one that should be employed only in limited circumstances." *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir.1986); *see also Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628–29 (6th Cir.2002). Instead, they cite cases which do not deal with the unique discovery request involved here.

A review of the transcript of the hearing before Magistrate Judge Whalen on Plaintiffs' motion for a protective order reveals that he based his decision on the threepart test set forth in *Shelton* and *Nationwide*, (see 2/16/12 Tr. 28), and on his view that granting Defendants' discovery request in full would lead to a "fishing expedition," (*id.* at 30). *See Surles v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir.2007) ("Although a plaintiff should not be

denied access to information necessary to establish her claim, neither may a plaintiff be permitted 'to go fishing and a trial court retains discretion to determine that a discovery request is too broad and oppressive.' " (quoting *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 592 (5th Cir .1978)). Although he cites various evidentiary rules, the Magistrate Judge does not base his decision on trial standards of admissibility; he observes that Fed.R.Civ.P. 26 provides "relaxed standards" for discovery. (2/16/12 Tr. 30).

***2** Defendants' motion is **DENIED.**

IT IS ORDERED.

E.D.Mich.,2012.
Police and Fire Retirement System of City of Detroit v. Watkins
Slip Copy, 2012 WL 3155988 (E.D.Mich.)

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Not Reported in F.Supp., 1997 WL 576021 (S.D.N.Y.), Fed. Sec. L. Rep. P 90,116
(Cite as: 1997 WL 576021 (S.D.N.Y.))

United States District Court, S.D. New York.
SECURITIES AND EXCHANGE COMMISSION, Plaintiff,
v.
Simon M. ROSENFELD, Terry D. Kochanowski, and John F. Yakimczyk, Defendants.

No. 97 CIV. 1467 (RPP).
Sept. 16, 1997.

David G Rizzo, Esq., Securities and Exchange Commission, New York, NY, Counsel for Plaintiffs.

Shatzkin & Reiss, New York, NY, By Howard Reiss, Esq., Counsel for Defendants.

OPINION AND ORDER

PATTERSON, D.J.

***1** On July 25, 1997 plaintiff Securities and Exchange Commission ("SEC") received a notice of deposition from defendant Simon M. Rosenfeld ("Rosenfeld") requiring the SEC to designate a witness or witnesses to testify on its behalf pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure on August 25, 1997, concerning:

(1) all communications between the SEC and Herbert M. Jacobi (Item 1);

(2) all communications of any sort with the Ontario Securities Commission in any way relating to Rosenfeld or to any investigation formal or otherwise by the SEC of Rosenfeld or any business or corporation with which Rosenfeld was associated (Item 2);

(3) the circumstances, negotiations and arrangements surrounding the deposition of Rosenfeld under the authority of the Ontario Securities Commission including the authority under which David Rizzo (attorney for the SEC) was present and participated in the questioning of Rosenfeld (Item 3);

(4) the circumstances, negotiations and arrangements surrounding the possession by the SEC of the deposition of Rosenfeld taken by the Ontario Securities Commission (Item 4);

(5) all communications between anyone affiliated in any way with the SEC and Harry Pruitt, or anyone affiliated with Harry Pruitt (Item 5);

(6) all information in the possession, custody, or control of, or reasonably available to the SEC or its agents or employees, relating to the truth or falsity of statements in the complaint concerning (a)the ownership or interest of Synpro or Sherwood in property on the Isle of Rhodes, (b)any grants or loans from the government of Greece or any other government, (c)Synpro's ownership of the Hotel Medialuna, concerning the issuance of shares of stock to Euro-Pacific Investments & Trading Ltd., (d)a $5,000,000 line of credit for Synpro from Societe Financiere Privee S.A., (e)all services performed by Elije for Synpro or related or affiliated companies, (f)the proper accounting statement or treatment of asset value of the Hotel Medialuna on Synpro's balance sheet, and (g)the proper accounting statement or treatment of the $1,600,000 fee on Synpro's balance sheet (Items 6-13);

(7) all efforts to inflate the price of Synpro common stock (Item 14);

(8) all efforts improperly or illegally to affect the price of Synpro's common stock (Item 15);

(9) all information relating to Kochanowski's activities described in the complaint which indicates that those activities were in any way controlled by Rosenfeld (Item 16);

(10) all information relating to communications between Synpro and Kempisty CPA, PC and Synpro, and Grubman and Company, CPAs, relat-

ing to the audits of Synpro or related or affiliated entities (Item 17); and

(11) all documents relating to the allegations of the Complaint, either exculpatory or inculpatory (Item 18).

On July 28, 1997, Mr. Rizzo of the SEC wrote Rosenfeld's counsel requesting a retraction of the Notice of Deposition. Citing legal precedents he advised Rosenfeld's counsel that (1)the matters inquired into necessarily involved secondhand knowledge and were privileged as work product of the SEC attorneys' investigation of facts leading to the complaint filed in this action, and (2)that Rule 26(b)(3) clearly protected the information sought since defendant had only conducted limited discovery and had not shown a substantial need for seeking discovery in such a manner instead of taking discovery from witnesses who had knowledge of the facts.

***2** No retraction was forthcoming and, by letter dated July 30, 1997, Rizzo asked for the Court's intervention. On August 1, 1997, the Court held a conference with counsel which did not result in resolution of the dispute. Accordingly the Court stated that it would treat the SEC's letter dated July 30, 1997, as a motion for a protective order under Rule 26(c) of the Federal Rules of Civil Procedure, and ordered Rosenfeld to respond by August 22, 1997.

The responsive papers take the position that defendant Rosenfeld never requested the deposition of opposing counsel, but rather, the SEC is completely free to choose its designee and seems to have chosen counsel solely to inject the issue of privilege into the discovery question. The papers argue that the Rule 30(b)(6) deposition is not an illicit attempt to shortcut normal discovery but merely an attempt to use the federal rules in an efficient manner. Finally, defendant, citing *SEC v. Morelli*, 143 F.R.D. 42 (S.D.N.Y. 1992), asserts that Rule 30(b)(6) does not require that the designee have firsthand knowledge of the transactions at issue.

Defendant Rosenfeld's responsive papers disingenuously avoid the fact that this action is an SEC enforcement proceeding seeking a determination as to whether defendant has violated the securities laws of this country, and that because such investigations are conducted by the SEC's legal staff, a Rule 30(b)(6) deposition of an SEC official with knowledge of the extent of that investigative effort, amounts to the equivalent of an attempt to depose the attorney for the other side. Although defendant is correct that a Rule 30(b)(6) witness is not required to have firsthand knowledge, and that discovery should be conducted as efficiently as possible, the notice of deposition clearly calls for the revealing of information gathered by the SEC attorneys in anticipation of bringing the instant enforcement proceedings, and if forced to designate witnesses to testify fully and completely concerning the matters described in the notice of deposition, testimony of SEC attorneys or examiners working under the direction of the SEC attorneys conducting the investigation would be necessary. In this case the investigation was conducted under the direction of Mr. Rizzo, the attorney for the SEC in this proceeding. (Declaration of David G. Rizzo dated August 12, 1997 (“Rizzo Decl.”) at ¶¶ 6-9). As Judge Leisure stated in *SEC v. Morelli*, 143 F.R.D. 42,45 (S.D.N.Y. 1992), citing *Mitsui & Co. In. v. Puerto Rico Water Resource Authority*, 93 F.R.D. 62,67 (D.P.R. 1981), Rule 30(b)(6) requires the subject of the Rule 30(b)(6) notice to “prepare persons in order that they can answer fully, completely, unevasively, the questions posed ... as to the relevant matters.” Thus the witness designated would have to have been prepared by those who conducted the investigation and, since the investigation was conducted by the SEC attorneys, preparation of the witnesses would include disclosure of the SEC attorneys' legal and factual theories as regards the alleged

***3** violations of the security laws of this country and their opinions as to the significance of documents, credibility of witnesses, and other matters constituting attorney work product.

Defendant Rosenfeld's argues that he is entitled to cross-examine the SEC as to its position on which statements are false and why; what is fraudulent in the annual report and why it is fraudulent; and which sentences in the annual report contain the alleged misrepresentations (Rosenfeld Mem. at 11). He also argues that somewhere in the process the Court is entitled to know whether the client supports this Rule 30((b)(6) designation of the SEC attorney as witness and why the client made this designation. (Id.) These arguments highlight the fact that defendant is attempting to investigate the attorneys' work product and the attorneys' authority to conduct this litigation. Both objectives are inappropriate.

Furthermore, review of the subject matter into which defendant Rosenfeld seeks to inquire demonstrates that the motion for a protective order should be granted. Testimony with respect to items 1 and 5, communications with Herbert M. Jacobi and Harry Pruitt, could only be answered based on the witness's discussions with Mr. Rizzo since it was Mr. Rizzo who was a party to these communications. (Rizzo Decl at ¶ 6). Testimony about the import of these discussions would involve questions of attorney work product since they would reflect Mr. Rizzo's areas of interrogation, mental impressions, and opinions concerning credibility. *See Upjohn v. United States,* 449 U.S. 383 (1981); *SEC v. World-Wide Coin Investments Ltd.*, 92 F.R.D. 65,67 (N.D.Ga. 1981); *SEC v. Morelli,* 143 F.R.D. 42 (S.D.N.Y. 1992). It would also implicate the SEC's law enforcement privilege since it might reveal the SEC's techniques and procedures and how it develops relationships with informants, and strategies for eliciting information from individuals who provide it with information. *NLRB v. Robbins Tire & Rubber,* 437 U.S. 214 (1978); *J.P. Stevens & Co., Inc. v. Perry* 710 F.2d 136,143 (4th Cir. 1983).

With respect to items 6 through 18 the defendants do not provide any reason why they have failed to utilize preliminary interrogatories pursuant to Local Civil Rule 33.3(a) to learn the names of all persons with knowledge of the facts and circumstances surrounding those particular allegations in the complaint, or why that procedure would not provide the defendant Rosenfeld with the information necessary to conduct efficient fact discovery of the basis for the SEC's allegations in the complaint.

With respect to items 14 and 15 Rosenfeld does not provide any reasons why claim contention interrogatories at the close or towards the close of factual discovery, (Local Civil Rule 33.3(d)), will not provide him with the necessary claim contentions the SEC will make at trial.

Rather than using interrogatories as contemplated by the Local Civil Rules, and Requests to Produce Documents pursuant to Rule 34 of the Federal Rules of Civil Procedure, and then taking the necessary oral discovery from the witnesses with knowledge of the facts alleged in the complaint, Rosenfeld seeks to explore the extent of the SEC's knowledge (how much it knows and how much it does not know) as a result of the investigative efforts of its attorneys. This Rule 30(b)(6) discovery is obviously aimed at finding the nature of the SEC's attorney work product, and is denied for that reason.

***4** With respect to items 2,3 and 4, inquiry by way of a Rule 30(b)(6) deposition would inevitably tend to disclose the investigating attorneys' preliminary positions and legal theories concerning the suspected conduct of defendant Rosenfeld, and those factual areas which were of particular interest to the SEC investigators at the time of their discussions with the Ontario Securities Commission. The law enforcement privilege would also be implicated since the SEC and the Ontario Securities Commission have a common prosecutorial interest. *Nishnic v. Dept. of Justice,* 671 F.Supp. 771, 775 (D.D.C. 1987), *aff'd,* 828 F.2d 844 (D.C. Cir. 1987).

Lastly, to proceed by way of the Rule 30(b)(6) deposition sought by defendant Rosenfeld would undoubtedly place an undue burden on the SEC and the court, which would have to make a multitude of

otherwise unnecessary decisions about issues of attorney work product and law enforcement privilege, whereas no prejudice to defendant Rosenfeld has been shown if he is required to conduct discovery by the other methods suggested in this opinion.

Accordingly, good cause having been shown by plaintiffs, the motion for a protective order pursuant to Rule 26(c) is granted and the notice to take a Rule 30(b)(6) deposition of the SEC in this enforcement proceeding is quashed.

IT IS SO ORDERED.

Dated: New York, New York

September 12, 1997

S.D.N.Y.,1997.
S.E.C. v. Rosenfeld
Not Reported in F.Supp., 1997 WL 576021 (S.D.N.Y.), Fed. Sec. L. Rep. P 90,116

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Not Reported in F.Supp.2d, 2007 WL 609888 (D.Md.), Fed. Sec. L. Rep. P 94,166
(Cite as: 2007 WL 609888 (D.Md.))

United States District Court,
D. Maryland.
SECURITIES AND EXCHANGE COMMISSION
v.
SBM INVESTMENT CERTIFICATES, INC., et al.

Civil Action No. DKC 2006-0866.
Feb. 23, 2007.

Amy J. Greer, Nuriye C. Uygur, United States Securities and Exchange Commission, Philadelphia District Office, Philadelphia, PA, Larry D. Adams, Office of the United States Attorney, Baltimore, MD, for Securities and Exchange Commission.

Jody Adam Rosen, John Michael Fedders, Law Office of John M. Fedders, Edsel Jay Guydon, Guydon Love LLP, Stephen Louis Braga, Baker Botts LLP, Washington, DC, Jonathan Frederic Seamon Love, Guydon Love, LLP, Alexandria, VA, for SBM Investment Certificates, Inc., et al.

MEMORANDUM OPINION

DEBORAH K. CHASANOW, United States District Judge.

***1** Presently pending and ready for resolution in this securities case are the motions of Plaintiff, the Securities and Exchange Commission (SEC), for preliminary relief (paper 2), to amend the court's Scheduling Order (paper 41), and for a protective order (paper 61). Defendants SBM Certificate Company (SBMCC) and SBM Investment Certificates, Inc. (SBMIC) have moved to sell specified assets (papers 57 & 58). Defendant Geneva Capital Partners, LLC ("Geneva") has moved for judgment on the pleadings or summary judgment (paper 75), and Defendant Eric M. Westbury has joined in this motion (paper 80). The issues have been fully briefed and the court now rules pursuant to Local Rule 105.6, no further hearing being deemed necessary. FN1 For the reasons that follow, the court will grant in part the SEC's motion for preliminary relief and will grant the SEC's motions for amendment of the Scheduling Order and for a protective order. The court will deny the motions of SBMCC and SBMIC to sell assets and the motion of Geneva and Westbury for summary judgment or judgment on the pleadings.

FN1. Evidentiary hearings were held on May 12, 2006, and June 19, 2006, but these hearings related only to the SEC's motion for preliminary relief.

I. Background

There are four Defendants in this action. Two Defendants, SBMCC and SBMIC, are face amount certificate companies registered with the SEC pursuant to section 8(a) of the Investment Company Act, 15 U.S.C. § 80a-8(a). FN2 The two other Defendants are a corporate parent of the face amount certificate companies, Geneva, and an individual, Westbury, who controls each of the entity-Defendants. SBMCC is a Maryland corporation that is wholly owned by SBM Financial, LLC. SBM Financial, LLC is, in turn, wholly owned by Geneva. Geneva is wholly owned by Geneva Financial Holdings, LLC, which is wholly owned by Westbury. Westbury is also the Chairman of the Board of Directors, Chief Executive Officer, and President of SBMIC.

FN2. SBMIC was formerly known as 1st Atlantic Guaranty Corporation.

Andrea Dittert, a Supervisory Staff Accountant for the SEC who worked on the investigation in this case, explains that:

> [f]ace-amount certificate companies issue fixed-income debt securities; these companies agree to pay the principal amount of the instruments (the "face amount") plus accrued interest on maturity. Their profitability is dependent upon the difference between the return they generate on their investment portfolio and the expenses incurred from selling and satisfying certificate obligations. [FN3]

FN3. Defendants maintain that this explanation of the business of face amount certificate com-

panies is incomplete, but do not offer a fuller explanation. (Paper 10, at 3).

(Paper 2, Attachment 2, Dittert Decl., at 4 ¶ 16). SBMCC and SBMIC both maintain outstanding face amount certificates. These certificates require the issuing company to pay investors interest at specified intervals and to return the principal to the investor upon the maturity of the certificate. The certificates sold by SBMCC mature after either twenty-eight or thirty years and include successive three, five, seven, or ten-year guarantee periods prior to maturity. Within each guarantee period, the certificates pay a fixed amount of interest and any withdrawal of principal by investors incurs a penalty. At the end of each guarantee period, if an investor takes no action, the principal rolls over to the next guarantee period until the maturity date is reached. The investor has the option to request the withdrawal of the entire principal without penalty at the end of each interim guarantee period. If the investment is rolled over, the interest rate can be adjusted. SBMIC's certificates operate under similar terms, but have maturities of twenty years with interim guarantee periods of one, three, five, or ten years.

***2** Geneva is involved in financial transactions related to a charter school financing program operated by the District of Columbia. That program utilizes government funds to extend loans and guarantee private loans to charter schools in the District of Columbia. The District of Columbia invested approximately $15 million from its charter school financing program by purchasing fixed interest rate certificates from Geneva pursuant to terms contained in a Private Offer Memorandum (POM). As part of the same transaction, Geneva extended a revolving line of credit to the District of Columbia that it used to fund loans made to charter schools. The District of Columbia also deposited securities and other assets with Geneva. Geneva provided the District of Columbia with a total of approximately $15 million in funds under the revolving credit agreement.

In 2002, the SEC began investigating fraud by John Lawbaugh, a former executive of SBMCC and SBMIC, involving misappropriation of millions of dollars from these companies and from investors. The SEC ultimately filed a civil enforcement action based on that fraud that resulted in disgorgement against Lawbaugh and final injunctive relief against Lawbaugh and the face amount certificate companies. *Sec. & Exch. Comm'n v. Lawbaugh*, 359 F.Supp.2d 418 (D.Md.2005). Lawbaugh, formerly the majority shareholder in both SBMCC and SBMIC, filed bankruptcy and his estate was liquidated. The SEC supported Westbury and Geneva in their effort to take control of SBMCC and SBMIC, which succeeded when the bankruptcy court approved their purchase of the stock of both companies from Lawbaugh's bankruptcy estate in December 2003.

The SEC conducted a follow-up examination of SBMCC and SBMIC, which was concluded in September 2005, and as a result of that examination opened a formal investigation of these companies. The SEC filed its complaint in this case on April 4, 2006. The complaint asserts three claims for relief. First, it alleges that SBMCC and SBMIC violated the qualified reserve requirements for face amount certificate companies required by section 28 of the Investment Company Act of 1940, 15 U.S.C. § 80a-28. Second, the SEC alleges securities fraud, in violation of section 17a of the Securities Act of 1933, 15 U.S.C. § 77q(a); section 10b of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); and rule 10b-5 under the Securities Exchange Act, 17 C.F.R. § 240.10b-5. The SEC alleges that SBMCC, SBMIC, and Westbury committed fraud against investors who hold SBMCC and SBMIC face amount certificates. The SEC also alleges that Geneva and Westbury committed fraud against the District of Columbia. Finally, the SEC alleges that Westbury and Geneva violated fiduciary duties imposed by section 206(1) & (2) of the Investment Advisors Act of 1940, 15 U.S.C. § 80b-6(1) & (2), through the alleged fraud upon the District of Columbia.

The same day that the SEC filed its complaint, it also moved for preliminary relief. (Paper 2). In this motion, the SEC seeks a temporary restraining order and a preliminary injunction against future violations of the securities laws, a preliminary injunction freezing Defendants' assets, appointment of a receiver for the entity-Defendants, an order requiring a full accounting, a

preliminary injunction against destruction of evidence, and orders providing for expedited discovery and alternative means of service.

***3** This court issued an Order on April 4, 2006, imposing temporary relief pending a hearing. That Order requires Defendants to notify this court and the SEC upon receipt of any demand for payment from investors and to wait at least seven days after notification to make such a payment. (Paper 6). After conducting a hearing, this court issued a second Order on May 12, 2006, maintaining the provisions of the earlier Order in force, clarifying that the same provisions apply to interest payments due to investors, and requiring Defendants to produce all documents supporting SBMCC' s claim that it owns loans made to District of Columbia charter schools. (Paper 18). In response to these Orders, Defendants have pledged not to pay investor demands covered by this court's Orders except under the court's direction. (*See, e.g.*, paper 9). An evidentiary hearing was held on June 19, 2006, in which Defendants and the SEC presented witnesses relating to the status of District of Columbia charter school loans. The SEC also presented evidence about the reserves and financial condition of SBMCC and SBMIC.

In response to this court's preliminary Orders, Defendants have filed seven notifications regarding demands for payment by investors. (Papers 9, 12, 16, 27, 29, 34, 49). SBMCC reported requests by investors for return of principal, payments including principal and interest due in the ordinary course of its business, and interest payments due under the terms of its face amount certificates. SBMIC reported only interest amounts due under the terms of its face amount certificates. The requests for payment reported by Defendants are summarized in the following table.[FN4]

FN4. The values denoted with asterisks in the table indicate interest payments that SBMCC and SBMIC indicated they intended to immediately pay as of April 24, 2006. This court's May 12, 2006 Order clarified that interest payments were covered by the terms of the April 4, 2006 Order.

Notice Number	SBMCC redemption demands	SBMCC normal-course redemption due	SBMCC interest due	SBMIC interest due
1	$631,590.28	$281,383.89	$46,207.58*	$3,571.95*
2	$1,618,250.61	$136,703.37	$6,981.40	$0.00
3	$837,929.11	$33,111.17	$24,955.23	$0.00
4	$456,604.61	$6,643.12	$18,719.61	$219.59
5	$41,923.11	$0.00	$15,506.93	$0.00
6	$233,754.86	$0.00	$31,349.11	$219.59
7	$501,277.17	$284,611.82	$64,524.66	$5,165.90
Total	$4,321,329.75	$284,611.82	$208,244.52	$9,177.03

SBMCC and SBMIC have also moved to sell certain assets to take advantage of market gains. (Paper 57 & 58).

This court issued a Scheduling Order on July 13, 2006, establishing, among others, deadlines for Plaintiff's Rule 26(a)(2) expert disclosures on September 11, 2006; Defendants' Rule 26(a)(2) expert disclosures on October 11, 2006; and the end of discovery on November 27, 2006. (Paper 35). The SEC moves to amend this Order, requesting that expert disclosures be extended until after the close of fact discovery and requesting an extension of fact discovery. The SEC's motion was filed on August 15, 2006, well before the September 11, 2006 deadline originally established for Plaintiff's Rule 26(a)(2) expert disclosures and before

the close of fact discovery under the Scheduling Order. Defendants timely filed their own Rule 26(a)(2) expert disclosures on October 11, 2006, noting that the SEC had not yet filed any expert disclosures and disclosing that, as a result, Defendants would not call expert witnesses. (Paper 53).

***4** Defendants assert that they have completed fact discovery other than a deposition disputed by the SEC's motion for a protective order and certain other outstanding discovery requests directed to third parties. The SEC indicates that it has not yet completed fact discovery, and urges the issuance of a new scheduling order establishing an extended period of fact discovery and expert disclosures after the parties have an opportunity to review the court's ruling on the SEC's motion for preliminary injunctive relief. Defendants oppose Plaintiff's request for an extension of discovery.

Two other motions are also outstanding. The SEC seeks a protective order quashing a deposition noticed by Westbury, and Westbury and Geneva have moved for judgment on the pleadings or, in the alternative, for summary judgment as to the SEC's fraud allegations relating to Geneva's transactions with the District of Columbia.

II. Standards of Review

A. Preliminary Injunctive Relief

The SEC has statutory authority to seek injunctive relief barring conduct that violates the federal securities laws "[w]henever it shall appear to the Commission that any person has engaged or is about to engage in any act or practice constituting a violation" of the securities laws. 15 U.S.C. § 80a-41(d) (authorizing the SEC to sue to enjoin violations of the Investment Company Act); *see also* 15 U.S.C. §§ 77t(b), 78u(d), 80b-9(d) (authorizing the SEC to sue to enjoin violations of the Securities Act, Securities Exchange Act, Investment Advisors Act, and regulations thereunder).

There is some uncertainty as to the proper standard of review for preliminary injunctions sought by the SEC. The standard is different depending on whether the SEC seeks to enjoin future violations of the securities laws or seeks an ancillary preliminary injunction to preserve the status quo and effectuate permanent relief after trial. The United States Court of Appeals for the Fourth Circuit generally applies a four-factor balance of hardships test to evaluate a private plaintiff's request for a preliminary injunction:

> In determining whether to grant a preliminary injunction, a court must balance: (1) the likelihood of irreparable harm to the plaintiff if the injunction is denied; (2) the likelihood of harm to the defendant if it is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest.

Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Sch., 373 F.3d 589, 593 (4th Cir.2004). Some circuits hold that a federal agency does not have to show irreparable harm when it seeks to enjoin future violations of federal law based on a showing of an ongoing violation of that law. *See, e.g.*, *Gov't of Virgin Islands, Dept. of Conservation and Cultural Affairs v. Virgin Islands Paving, Inc.*, 714 F.2d 283, 286 (3d Cir.1983); *Sec. & Exch. Comm'n v. Unifund SAL*, 910 F.2d 1028, 1037 (2d Cir.), reh'g denied, 917 F.2d 98 (1990). The First Circuit has explicitly declined to dispense with the irreparable harm requirement. *Sec. & Exch. Comm'n v. Fife*, 311 F.3d 1, 8 (1st Cir.2002), *cert. denied*, 538 U.S. 1031 (2003).

1. Injunctions Against Future Violations

***5** To demonstrate the need for an injunction against future violations of the securities laws, SEC must demonstrate that it will likely be able to prove that Defendants have violated the securities laws and would be likely to commit a future violation. *Sec. & Exch. Comm'n v. Marker*, 427 F.Supp.2d 583, 590 (M.D.N.C 2006). Factors considered in this inquiry include:

> (1) the seriousness of the original violation; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved on the part of the defendant; (4) the defendant's recognition of his unlawful conduct and the sincerity of his assurances against future violations; and (5) the likelihood that the defendant's occupation will present opportunities for future

violations.

Id. (citing *Sec. & Exch. Comm'n v. Prater,* 289 F.Supp.2d 39, 49 (D.Conn.2003)).

The Fourth Circuit has yet to consider explicitly whether a showing of irreparable harm is also required when the SEC seeks a preliminary injunction against further violation of the securities laws. In *Kemp v. Peterson,* however, it affirmed a preliminary injunction against future statutory violations sought by a federal agency without referring to any evidence of irreparable harm and without considering any balancing of equities. *Kemp v. Peterson,* 940 F.2d 110, 112-13 (4th Cir.1991); *see also Commodity Futures Trading Comm'n v. IBS, Inc.,* 113 F.Supp.2d 830, 848-49 (W.D.N.C.2000) (interpreting *Kemp* to allow preliminary injunctions sought by an agency against future violations of the law without a showing of irreparable harm), *aff'd on other grounds,* 276 F.3d 187 (4th Cir.2002).

2. Ancillary Preliminary Injunctions

Preliminary injunctive relief ancillary to a direct injunction against future statutory violations, such as freezing assets or appointing a receiver, is judged against a different standard and may be appropriate even if the SEC has not made an adequate showing to obtain an injunction against future violations of the securities laws. *Unifund SAL,* 910 F.2d at 1041. A court has discretion to fashion appropriate remedies to effectuate permanent relief that would be available to the agency, but such preliminary relief requires a balancing of the equities. *See Kemp,* 940 F.2d at 112-14. In *Kemp,* the district court's preliminary injunction against future violations of the Interstate Land Sales Full Disclosure Act was affirmed, *id.* at 112-13, but its ancillary order freezing the defendants' personal assets to ensure fulfillment of a statutory disgorgement remedy was remanded for consideration of whether this relief was supported by the balance of the equities. *Id.* at 114. The Fourth Circuit observed in the context of the ancillary injunction in *Kemp* that the purpose of such an injunction is "to preserve the status quo 'where the balance of hardships tips decidedly toward the party requesting the temporary relief and that party has raised questions going to the merits so serious, substantial, and difficult as to make them a fair ground for litigation....' " *Kemp,* 940 F.2d at 114 (quoting *Int'l Controls Corp. v. Vesco,* 490 F.2d 1334, 1347 (2d Cir.), *cert. denied,* 417 U.S. 932 (1974)).

B. Motion for Judgment on the Pleadings

***6** A motion for judgment on the pleadings under Fed.R.Civ.P. 12(c) is governed by the same standard as a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6). *Burbach Broad. Co. of Del. v. Elkins Radio Corp.,* 278 F.3d 401, 405-06 (4th Cir.2002). The purpose of a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is to test the sufficiency of the plaintiff's complaint. *See Edwards v. City of Goldsboro,* 178 F.3d 231, 243 (4th Cir.1999). Accordingly, a 12(b)(6) motion ought not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Except in certain specified cases, a plaintiff's complaint need only satisfy the "simplified pleading standard" of Rule 8(a), *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 513 (2002), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2).

In its determination, the court must consider all well-pled allegations in a complaint as true, *see Albright v. Oliver,* 510 U.S. 266, 268 (1994), and must construe all factual allegations in the light most favorable to the plaintiff. *See Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 783 (4th Cir.1999) (citing *Mylan Labs., Inc. v. Matkari,* 7 F.3d 1130, 1134 (4th Cir.1993)). The court must disregard the contrary allegations of the opposing party. *See A.S. Abell Co. v. Chell,* 412 F.2d 712, 715 (4th Cir.1969). The court need not, however, accept unsupported legal allegations, *Revene v. Charles County Comm'rs,* 882 F.2d 870, 873 (4th Cir.1989), legal conclusions couched as factual allegations, *Papasan v. Allain,* 478 U.S. 265, 286 (1986), or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst,* 604 F.2d 844, 847 (4th Cir.1979).

C. Motion for Summary Judgment

Defendants Geneva and Westbury have moved for

judgment on the pleadings under Fed.R.Civ.P. 12(c) or, in the alternative, for summary judgment under Fed.R.Civ.P. 56. A court considers only the pleadings when deciding a Rule 12(b)(6) or 12(c) motion, which are addressed under the same standard. Where the parties present matters outside of the pleadings and the court considers those matters, as here, the motion is treated as one for summary judgment. *See* Fed.R.Civ.P. 12(b); *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 949 (4th Cir.1997); *Paukstis v. Kenwood Golf & Country Club, Inc.*, 241 F.Supp.2d 551, 556 (D.Md.2003). It is well established that a motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In other words, if there clearly exist factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment is inappropriate. *Anderson*, 477 U.S. at 250; *see also Pulliam Inv. Co. v. Cameo Props.*, 810 F.2d 1282, 1286 (4th Cir.1987); *Morrison v. Nissan Motor Co.*, 601 F.2d 139, 141 (4 th Cir.1979). The moving party bears the burden of showing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Catawba Indian Tribe of S.C. v. South Carolina*, 978 F.2d 1334, 1339 (4th Cir.1992), *cert. denied*, 507 U.S. 972 (1993).

***7** When ruling on a motion for summary judgment, the court must construe the facts alleged in the light most favorable to the party opposing the motion. *See United States v. Diebold*, 369 U.S. 654, 655 (1962); *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 595 (4th Cir.1985). A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. "[A] complete failure of proof concerning an essential element ... necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323. Thus, on those issues on which the nonmoving party will have the burden of proof, it is his or her responsibility to confront the motion for summary judgment with an affidavit or other similar evidence in order to show the existence of a genuine issue for trial. *See Anderson*, 477 U.S. at 256; *Celotex Corp.*, 477 U.S. at 324. However, "[a] mere scintilla of evidence in support of the nonmovant's position will not defeat a motion for summary judgment." *Detrick v. Panalpina, Inc.*, 108 F .3d 529, 536 (4th Cir.), *cert. denied*, 522 U.S. 810 (1997). There must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

III. Preliminary Injunction Against Violation of Face Amount Certificate Company Qualified Reserve Requirements

The SEC alleges that Defendants SBMCC and SBMIC violated section 28(a) & (b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-28(a) & (b), by maintaining insufficient qualified reserve assets to back the companies' outstanding face amount certificates. Section 28 of the Investment Company Act of 1940 makes it unlawful for "any registered face-amount certificate company to issue or sell any face-amount certificate, or to collect or accept any payment on any such certificate issued by such company. unless" reserves of qualifying assets are maintained "at all times." 15 U .S.C. § 80a-28(a). The statute establishes a complex formula for reserve requirements, subject to a minimum requirement. "At no time shall the aggregate certificate reserves herein required ..., be less than the aggregate surrender values and other amounts to which all certificate holders may be then entitled." *Id.* "Qualified investments" that can meet this reserve requirement include only:

> investments of a kind which life-insurance companies are permitted to invest in or hold under the provisions of the Code of the District of Columbia as heretofore or hereafter amended, and such other investments as the Commission shall by rule, regulation, or order authorize as qualified investments. Such investments shall be valued in accordance with the provisions of said Code where such provisions are applicable. Investments to which such provisions do not apply shall be valued in accordance with such rules, regulations,

or orders as the Commission shall prescribe for the protection of investors.

***8** 15 U.S.C. § 80a-28(b).

The SEC offers evidence that SBMIC and SBMCC maintain qualified reserves that are less than their outstanding face amount certificate obligations. Defendants' unaudited records indicate that SBMCC claimed qualified assets of only $30,288,180.02 compared to $30,883,385.36 of outstanding face amount certificates as of December 2005. (Paper 2, Ex. 1, at 1-2). Likewise, SBMIC's books indicate that it claimed qualified assets of only $1,339,441 as of December 31, 2005, compared to outstanding face amount certificates totaling $2,160,980.[FN5] (Paper 2, Ex. 2, at 4). The SEC also offers testimony of Ms. Dittert that "as of September 30, 2004 it appears that approximately 66% of SBM[CC]'s total investments-or $22,859,872 of $34,730,700 were unqualified." (Paper 2, Attachment 2, Dittert Decl., at 7 ¶ 30). Ms. Dittert indicates that SBMIC is similarly far from compliance with its qualified reserve requirements: "at the time of the Commission's last review of its books and records, almost half of [SBMIC' s] portfolio consisted of unqualified investments ... [and] six out of [SBMIC' s] last ten investment purchases, were not qualified, amounting to 98% of the total value of purchases made during that time period." (Paper 2, Attachment 2, Dittert Decl., at 9 ¶¶ 44-45).

> FN5. After this litigation commenced, Defendants provided revised figures for December 2005 that indicate higher asset balances and lower certificate liabilities. (Paper 11, at 15). Given the SEC's evidence that many of the qualified assets claimed by SBMIC and SBMCC were not actually qualified and the misstatement of the charter school loans on SBMCC's books, both discussed below, the SEC has demonstrated a sufficient likelihood that it will prevail on this issue.

The SEC also offers evidence that there will be an ongoing violation because SBMIC and SBMCC likely will not begin to have qualified reserves greater than face amount certificate liabilities in the near future. Ms. Dittert indicates that neither SBMIC nor SBMCC has been in compliance with reserve requirements since 2003 and that SBMCC has operated at significant losses during the past three years and, as a result, lacks income that could be used to increase qualified assets. (Paper 2, Attachment 2, Dittert Decl., at 6). SBMCC also included four loans to District of Columbia charter schools on its books as mortgages owned by SBMCC, (paper 26, at 5-7), that now appear to have been incorrectly reported. In response to this court's May 12, 2006 Order, (paper 18), Defendants produced documentation on May 26, 2006, revealing that SBMCC funded loans that were actually made by Geneva to the District of Columbia, which in turn loaned money to the charter schools. (Paper 26, at 7).

These assets represent approximately $4.5 million out of approximately $30 million in reserves that SBMCC claimed in its December 2005 financial statement. Defendants admit that these loans should properly be characterized as receivables due to SBMCC's transfer of assets to Geneva, (paper 26, at 7), and the SEC indicates that these receivables are a non-qualified asset. The details of the transactions through which the charter school loans were funded represent a further obstacle to SBMCC acquiring sufficient reserves to equal its face amount certificate liability. It also demonstrates that between late 2003 and early 2005, when these loans were funded, assets were transferred out of SBMCC to fulfill Geneva's obligation to fund the charter school loans. Ms. Dittert also testified that Geneva pledged assets belonging to SBMCC as collateral for the certificates purchased by the District of Columbia. (Paper 32, at 33-39).

***9** Defendants argue that the qualified reserve requirements do not apply to SBMCC and SBMIC because neither continues to sell face amount certificates to investors. The SEC argues that SBMIC and SBMCC sell securities when guarantee periods on their issued certificates expire and investors have the opportunity to roll over face amount certificates at a new interest rate or to withdraw principal without incurring a penalty.

The language of section 28 clearly demonstrates the intent of Congress to impose an ongoing obligation on

registered face amount certificate companies to maintain adequate reserves, as defined in the statute, to cover their outstanding certificate obligations. Section 28(a)(2) provides that "[i]t shall be unlawful for any registered face-amount certificate company to issue or sell any face-amount certificate ... unless ... such company maintains *at all times* minimum certificate reserves on all its outstanding face-amount certificates." 15 U.S.C. § 80a-28(a) (emphasis added). In addition, section 28(b) ("[a]sset requirements prior to sale of certificates") requires that registered face amount certificate companies maintain the same minimum reserves as calculated under section 28(a) prior to being allowed to sell certificates. In order for section 28(a) to have independent force, it should be interpreted to apply at and after the sale of certificates.

Furthermore, the SEC makes a persuasive argument that certificate rollovers constitute the sale or issuance of face amount certificates under section 28(a). The parties cite no decision, nor is this court aware of any, in which any court has considered whether a rollover transaction constitutes a sale of securities under section 28 of the Investment Company Act of 1940. Several courts have considered whether rollover transactions constitute a sale of securities in the context of establishing the limitations period in private suits alleging securities fraud. Courts considering that question have focused on whether there is " '... such a significant change in the nature of the investment or in the investment risks as to amount to a new investment.' " *Sanderson v. Roethenmund*, 682 F.Supp. 205, 209 (S.D.N.Y.1988) (quoting *Abrahamson v. Fleschner*, 568 F.2d 862, 868 (2d Cir.1977), *cert. denied*, 436 U.S. 905 (1978)). The *Sanderson* court reasoned that a rollover of short-term international certificates of deposit was not a new sale under the securities fraud provisions because the rollover was automatic and did not sufficiently change the nature of the security. "In substance, each rollover represented merely a periodic interest rate and maturity date adjustment ... [and] was something contemplated by the [plaintiffs] when they made the initial purchases." *Id.* The decision to dismiss in *Sanderson* also rested on the alternative ground that the plaintiffs failed to plead fraud adequately under Fed. R.Civ.P. 9(b). *Id.* at 207-08. In contrast, another court reasoned that a rollover of promissory notes for mortgages constituted a new purchase of these securities because the risks associated with the investment in the mortgage changed substantially at the time of the rollover.

> ***10** [A] renewal would constitute a significant change in the investment risks. At the point just prior to maturity, the risk level of the mortgage is dependent solely on the ability of the mortgagee to pay the principal at that moment. At the point just after the rollover, the risk level is dependent on the solvency of the mortgagee over the entire period of the mortgage.

Pollack v. Laidlaw Holdings, Inc., No. 90-5788, 1995 WL 261518, at *8 (S.D.N.Y. May 3, 1995).

The reasoning of *Pollack* is highly persuasive in this case, because, as the SEC points out, investors make a critical decision of whether to exercise their right to immediate repayment without penalty at the end of each guarantee period. As with the promissory note rollovers in *Pollack*, the risks undertaken by an investor in Defendants' face amount certificates change dramatically before and after the investor's decision to roll over a certificate at the end of its guarantee period. At the end of the guarantee period, investors in Defendants' face amount certificates run the risk that the issuing company will become insolvent over only a thirty-day period because the investor can demand repayment of principal without penalty and be entitled to repayment within thirty days. At the beginning of the next guarantee period, however, the investor faces the risk of the issuing company's financial failure over the full guarantee period of up to ten years, subject to the investor's ability to demand return of principal, less an early withdrawal penalty. The investor also is faced with a new interest rate term determined by the issuing company at the time of the investor's rollover decision.

The SEC has made a sufficient showing, at this preliminary stage, that it is likely to prevail on the question of whether Defendants SBMCC and SBMIC are required to maintain qualified reserves under section 28 of the Investment Company Act of 1940.[FN6]

FN6. The SEC also asserts that SBMIC is barred by this court's previous injunction, entered in connection with the fraud investigation, from denying that it is required to maintain adequate reserves under the terms of section 28 of the Investment Company Act of 1940, but it is unnecessary to resolve this argument to decide that the SEC will likely prevail on the issue of whether the asset reserve requirements apply to SBMIC.

Defendants also argue that the SEC was inconsistent in the methodology used to calculate the reserve required under section 28. Any inconsistencies as to the reserve are immaterial. Ms. Dittert testified at the June 19, 2006 hearing that both SBMCC and SBMIC fail to meet qualified reserve requirements under either calculation method because of the large proportion of non-qualifying assets held by each company. (Paper 32, at 25-26).

The SEC has offered sufficient evidence to conclude at this stage that SBMCC and SBMIC have likely violated the qualified reserve requirements and will likely continue to be in violation during the pendency of this action. Although it is not clear that a showing of irreparable harm is required, the low levels of qualified reserve assets at SBMCC and SBMIC indicate a risk of depleting reserve levels, the remaining reserve assets may be insufficient to satisfy the demands of all investors, causing irreparable harm to investors who otherwise could have been more fully compensated. Nevertheless, an injunction requiring Defendants to come into compliance with the reserve requirements is not appropriate relief at this time, because it is not clear that Defendants would have the ability to comply with such an order. The asset freeze restrictions that have been and will be imposed as ancillary injunctive relief are adequate to address this risk of irreparable harm.

IV. Securities Fraud

***11** The SEC alleges securities fraud against all Defendants, under section 10(b) of the Securities Exchange Act of 1934, rule 10b-5 thereunder, and section 17a of the Securities Act of 1933, based on two separate courses of alleged fraud. First, the SEC contends that SBMCC, SBMIC, and Westbury committed securities fraud upon certificate investors deciding whether to roll over their face amount certificates. Second, the SEC asserts that Geneva and Westbury committed fraud upon the District of Columbia in connection with the charter school certificates and loans. The SEC moves for preliminary injunctive relief based on these securities fraud claims, while Geneva and Westbury move for judgment on the pleadings or summary judgment as to the same claims. Because some elements of these claims are in dispute, both motions will be denied.

Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), prohibits the use or employment "in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." Rule 10b-5, 17 C.F.R. § 240.10b-5, contains more specific prohibitions. It provides that:

> [i]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), contains a similar prohibition, but targets fraudulent statements related to an offer to sell securities rather than to a sale of securities:

> [i]t shall be unlawful for any person in the offer or

> sale of any securities ... by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

The SEC must prove four elements when it brings an enforcement action for securities fraud under rule 10b-5: "the Commission must show that [Defendants] (1) made a false statement or omission (2) of material fact (3) with scienter (4) in connection with the purchase or sale of securities." *McConville v. Sec. & Exch. Comm'n*, 465 F.3d 780, 786 (7th Cir.2006).

> ***12** [A] fact stated or omitted is material if there is a substantial likelihood that a reasonable purchaser or seller of a security (1) would consider the fact important in deciding whether to buy or sell the security or (2) would have viewed the total mix of information made available to be significantly altered by disclosure of the fact.

Longman v. Food Lion, Inc., 197 F.3d 675, 683 (4th Cir.1999) (citing *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988)), *cert. denied*, 529 U.S. 1067 (2000). The question of materiality is generally fact-specific and thus typically cannot be resolved as a matter of law. *Krim v. Coastal Physician Group, Inc.*, 81 F.Supp.2d 621, 627 (M.D.N.C.1998) (citing *Basic, Inc.*, 485 U.S. at 236)), *aff'd*, 201 F.3d 436 (4th Cir.1999). The requisite scienter for securities fraud can be satisfied by recklessness, which requires "an act 'so highly unreasonable and such an extreme departure from the standard of ordinary care as to present a danger of misleading the [recipient] to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.' " *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 621 (4th Cir.1999) (quoting *Hoffman v. Estabrook & Co.*, 587 F.2d 509, 517 (1st Cir.1978)). A preliminary injunction against future securities law violations is a strong remedy that should be restricted to situations where a strong showing on the merits has been made.

> The prohibition against future securities law violations is among the sanctions that we have characterized as having grave consequences. Such an order subjects the defendant to contempt sanctions if its subsequent trading is deemed unlawful and also has serious collateral effects.... Though the order is prohibitory in form, rather than mandatory, it accomplishes significantly more than preservation of the status quo. For this form of relief, the Commission has to make a substantial showing of likelihood of success as to both a current violation and the risk of repetition.
>
> *Unifund SAL*, 910 F.2d at 1041.

A. Motion for Preliminary Injunction

The SEC has not yet provided sufficient evidence as to scienter to support an injunction against future violations of the anti-fraud provisions of the securities laws. The draft financial statements provided by the SEC indicate that SBMCC and SBMIC were not in reserve compliance by their own calculations, but these were not final financial calculations, and Defendants have now submitted financial estimates indicating that they were in compliance at that time. (Paper 11, at 14-15; paper 11, Ex. 11, Westbury Aff. ¶¶ 3-4). Based on this information, it is not clear what Defendants knew or should have known about the financial status of SBMCC and SBMIC. Furthermore, Defendants continue to assert that reserve requirements do not apply to these companies until they resume selling face amount certificates, which also suggests that they may not have had the requisite mental state for fraud. At this preliminary stage, the evidence does not adequately establish what SBMCC, SBMIC, or Westbury knew as to the truth or reliability of disclosures made to their investors.

The SEC alleges that SBMCC's accounting treatment of the charter school loans amounted to securities fraud, but Defendants contend that it represents only an accounting mistake that in one case was confirmed by the auditors of Defendant's financial statements.

***13** Likewise, the SEC has not provided sufficient evidence that Geneva and Westbury committed securities fraud against the District of Columbia and would commit future securities fraud to justify a preliminary injunction against future violations of the securities fraud provisions. The SEC alleges that this fraud involved Defendants' misleading disclosure that the investment was safe and Defendants' failure to disclose adequately their use of the investment funds for related companies and the nature of the District of Columbia's investment. The POM executed by Geneva and the District of Columbia disclosed to the District of Columbia that $5 million of its assets would be used to acquire SBMIC. (Paper 2, Ex. 19, at 7). The POM' s disclosure provisions also noted other risks and qualifications on the District of Columbia's investment with Geneva. *(Id.* at 3, 5-11). The SEC raises legitimate questions as to whether these disclosures were adequate, but introduces insufficient evidence that such fraud would be repeated to justify an injunction against future violation of the securities fraud laws. The District of Columbia has demanded the return of its assets, (paper 14, Ex. 1), and there is no evidence that Geneva is presently seeking to sell securities to other investors.

The SEC also asserts that Defendants and Westbury failed to disclose conflicts of interest in their transactions with the District of Columbia. The SEC asserts that Timothy Webb and Marie Williams had conflicts of interest because of their involvement both with Geneva and the District of Columbia. (Paper 2, Attachment 2, at 12). Defendants assert that they were unaware of Webb's role with the District of Columbia. (Paper 11, at 34). Defendants also assert that Williams, a member of the board of directors of SBMCC and SBMIC, served only as a consultant for the District of Columbia and did not participate in transactions involving Geneva. (Paper 11, Ex. 3, Williams Aff. at 1). As discussed above, the SEC has established insufficient evidence that any fraud by Geneva or Westbury would be repeated because the District has demanded the return of its investment, and there is no indication that Defendants are seeking additional investors. Furthermore, the SEC's showing as to scienter for fraud based on undisclosed conflicts of interest is lacking, because Defendants insist that they were unaware of any conflicts of interest that may have existed.

Finally, the SEC contends that Geneva fraudulently converted and disposed of District of Columbia securities, but this allegation is inferred from a lack of information in Geneva's financial statement. This is an insufficient showing to support such a sweeping preliminary injunction. As discussed above, the SEC also has not shown that Westbury or Geneva are likely to commit future securities fraud.

B. Motion for Judgment on the Pleadings or Summary Judgment

Geneva and Westbury request judgment on the pleadings or, in the alternative, summary judgment as to the SEC's securities fraud allegations under section 10(b), section 17(a), and rule 10b-5, which Geneva characterize as Count II of the complaint.[FN7]

> FN7. Geneva moved for judgment on the pleadings or summary judgment (paper 75) and Westbury joined that motion without offering any additional argument on behalf of the motion (paper 80).

***14** Geneva contends that in any securities fraud case "a plaintiff must allege that '(1) the defendant made a false statement or omission of material fact (2) with scienter (3) upon which the plaintiff justifiably relied (4) that proximately caused the plaintiff's damages.' " *Ottmann v. Hangar Orthopedic Group, Inc.*, 353 F.3d 338, 342 (4rth Cir.2003) (quoting *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 613 (4th Cir.1999) (internal quotation marks omitted)). *Ottmann*, however, states the legal standard for a private litigant's claim for compensatory damages in the implied cause of action under section 10(b) and rule 10b-5. The elements of reliance and damages prove an element of causation and demonstrate the private plaintiff's entitlement to relief, as in a common

law action for fraud. The prohibition imposed by rule 10b-5 is broader and necessarily applies to acts that tend to be fraudulent or deceptive, but are not successful. Rule 10b-5(c) prohibits "any act, practice, or course of business which operates *or would operate* as a fraud or deceit upon any person, in connection with the purchase or sale of any security." (Emphasis added). Thus, when the SEC brings an enforcement action for securities fraud under the statutes or its own regulations it must plead and prove only that the defendant "(1) made a false statement or omission (2) of material fact (3) with scienter (4) in connection with the purchase or sale of securities." *McConville,* 465 F.3d at 786.[FN8]

> FN8. The SEC argues in its response to the motion for judgment on the pleadings only that the allegations it has made and evidence it has advanced are sufficient to satisfy any requirement to plead and prove reliance or damages. This argument need not be addressed, however, because as the SEC argued in its memorandum of law supporting the motion for preliminary relief, the SEC need only plead and prove that Defendants made a material misstatement or omission with scienter in connection with the purchase or sale of a security.

Geneva also argues that "Plaintiff fails to provide any evidence whatsoever by the District of Columbia that they considered [Geneva] to have committed fraud." (Paper 75, at 3). In support of this argument, Geneva has introduced a report prepared by the Council of the District of Columbia, Committee on Education, Libraries, and Recreation examining the District of Columbia's transactions with Geneva relating to charter school financing. This argument and the Council report do not entitle Geneva or Westbury to summary judgment . [FN9] The SEC is not required to prove that the District of Columbia believed that it has been defrauded, *see McConville,* 465 F.3d at 786, and rule 10b-5 prohibits a covered misstatement or omission, even if it does not actually succeed in deceiving, if it "would operate as a fraud or deceit upon any person." Furthermore, the SEC has introduced testimony and a declaration of Deborah A. Gist, the District of Columbia's State Education Officer, who indicates that the District of Columbia is an injured investor with respect to these transactions. (Paper 30, Ex. 9, Gist Decl., at 2; paper 32, at 93). Although Geneva contends that the views expressed in the Council report and the fact that the Office of the Chief Financial Officer has not made any allegations of fraud should control over Ms. Gist's declaration, the conflicting evidence constitutes a dispute of fact and is an additional reason to deny Geneva and Westbury's motion for summary judgment.

> FN9. This argument must be addressed under the Fed.R.Civ.P. 56(c) standard for a motion for summary judgment because Geneva has introduced evidence outside the pleadings which the court has not excluded. *See* Fed.R.Civ.P. 12(b).

***15** Finally, Geneva argues that the POM executed with the District of Columbia contains sufficient qualifying language that its statements as to the types of investments Geneva would invest in cannot be considered a material misstatement or omission. This allegation would support only the entry of partial summary judgment because, as Geneva notes (paper 75, at 1-2), the SEC's allegations of securities fraud are based in part on alleged misrepresentations and omissions in the POM, but also on other alleged misrepresentations and omissions, including those alleged to have occurred in the subsequent collateral agreement.

In the POM, Geneva indicates that the proceeds of sales of certificates to the District of Columbia would be invested in specified assets:

> We intend to invest certain amounts of our offering proceed, as approved by the Buyer, primarily in the types of securities and other investments listed below. Except as specifically noted, we may invest our reserves in such investments without limitation. In addition, except as specifically noted, the limitations described below apply only at the time of investment. The assets that we hold are not subject to the limitations described below.

(Paper 2, Ex. 19, at 11). The POM then lists eight

types of investments: U.S. Government Securities, U.S. Government Agency Securities, Bank Obligations, Commercial Paper and Other Corporate Debt ("that meet the criteria for investment by life insurance companies under the laws of the District of Columbia ('qualified corporations')"), Equipment Related Instruments, Municipal Securities, Preferred and Common Stock ("of qualified corporations"), and Real Estate and Investments Secured by Real Estate. *(Id.* at 11-13).

The POM also cautions that "[t]he occurrence of unforeseen events or changes in business conditions ... could result in our applying the proceeds of this offering in a manner other than as described in the Memorandum. *(Id.* at 7). The POM also asserts that it does not constitute "legal, business, or tax advice" and encourages the District of Columbia to "consult your own attorney, business adviser and tax adviser for legal, business and tax advice regarding an investment in the Investment Note." (*Id.* at 2-3). The asset limitation statements in the POM are sufficiently explicit, despite these qualifying statements, that a jury could conclude that a reasonable investor would rely on them. *See Longman,* 197 F.3d at 683. Geneva and Westbury are thus not entitled to judgment on the pleadings or summary judgment on this basis.

V. Violation of the Investment Advisers Act

The SEC alleges that Westbury and Geneva violated section 206(1) & (2) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-6 (1) & (2), based on the same conduct that the SEC alleges constitutes securities fraud by Westbury and Geneva upon the District of Columbia. The SEC seeks preliminary injunctive relief based on these allegations, while Geneva and Westbury have moved for judgment on the pleadings or, in the alternative, summary judgment as to the Investment Advisers Act claims.

***16** Section 206 provides that:

> It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly-
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client ...

15 U.S.C. § 80b-6(1)-(2). Scienter is not required for a violation of section 206(2), but a showing of at least negligence is required. *Sec. & Exch. Comm'n v. Moran,* 922 F.Supp. 867, 897 (S .D.N.Y.1996); *c.f. Sec. & Exch. Comm'n v. Steadman,* 967 F.2d 636, 647 (D.C.Cir.1992) (interpreting "transaction, practice, or course of business" language common to 15 U.S.C. § 80b-6(2) & (4) to require only negligence rather than scienter).

An investment advisor for purposes of the Investment Advisers Act is defined as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities". 15 U.S.C. § 80b-2 (a)(11). The SEC's position is that "[a] determination as to whether a person ... is an investment adviser will depend upon whether such person: (1) Provides advice, or issues reports or analyses, regarding securities; (2) is in the business of providing such services; and (3) provides such services for compensation." Applicability of the Investment Advisers Act, Investment Advisers Act Release No. 1092, 52 Fed.Reg. 38,400, 38,402 (Oct. 16, 1987).

A. Motion for Preliminary Injunction

The SEC moves for a preliminary injunction against future violations of the Investment Advisers Act, but the SEC has not demonstrated that Geneva or Westbury was an investment adviser under the definition provided in the Investment Advisers Act itself or the SEC's further guidance. A preliminary injunction against future violations of the Investment Advisers Act, like a preliminary injunction against fraud, would substantially burden numerous transactions and go beyond preservation of the status quo. As discussed above, such an injunction therefore requires a substantial show-

ing on the merits as to a past violation and the likelihood of future violations of the Investment Advisers Act. *See Unifund SAL,* 910 F.2d at 1041.

The SEC argues that Westbury and Geneva were investment advisors in their management of the District of Columbia's assets. Westbury and Geneva contend that they do not offer investment advice for compensation, but instead own and manage their own assets while paying a fixed interest rate to the District of Columbia. There is some evidence that Westbury and Geneva may have given investment advice to the District of Columbia for a fee, but this evidence is insufficient to grant the SEC's motion for a preliminary injunction against future violations of the Investment Advisers Act. Geneva and Westbury provided the District of Columbia with the POM and a bid proposal regarding the purchase of certificates from Geneva, but this document explicitly disclaims offering advice and instructs the District of Columbia to seek its own advice in evaluating the desirability of the investment. (Paper 2, Ex. 2, at 2-3). Geneva also held some District of Columbia assets, (paper 2, Attachment 2, at 14), but there is insufficient evidence that it gave the District of Columbia advice about investment of these assets or that a fee was charged for this service to warrant a preliminary injunction. Westbury proposed an arrangement whereby Geneva would manage assets owned by the District of Columbia for a fee as a modification of the previous agreement between Geneva and the District of Columbia, (paper 2, Ex. 24), but there appears to be a factual dispute as to the effect of this proposal. Because the District of Columbia has requested the return of all of its assets, it is also unclear whether Geneva or Westbury would be likely to commit a future violation of the Investment Advisers Act. Therefore, the SEC has not made a sufficient showing on the merits as to past and likely future violations to justify a preliminary injunction based on the alleged violations of the Investment Advisers Act.

B. Motion for Judgment on the Pleadings or Summary Judgment

***17** Geneva and Westbury request judgment on the pleadings or, in the alternative, summary judgment as to the SEC's allegations under the Investment Advisers Act. Geneva makes only one argument that is unique to the Investment Advisers Act claim, that it did not act as an investment adviser as defined under the act.

Geneva and Westbury are not entitled to judgment on the pleadings or summary judgment on this basis. The SEC's complaint alleges that:

> ... [I]n connection with his efforts to mollify the District, on October 28, 2005, Westbury wrote a letter purporting to restructure the arrangement between Geneva and the D.C. Dept of Banking, by which he claims to have, essentially, set off from the amounts the District invested with Geneva, the amounts borrowed by the District from Geneva for charter school loans, terminating the revolving line of credit.
>
> Under these new terms, Westbury advises that, effective October 1, 2005, the new fee structure for Geneva's management of the District's investments would be 1.5% of assets under management.

(Paper 1, at 15). Such an arrangement would make Geneva and Westbury investment advisers, because they would be collecting a fee in exchange for managing the investment of assets owned by the District of Columbia. *See* 15 U.S.C. § 80b-2(a)(11). Based on the text of the letter Westbury wrote on behalf of Geneva, it is not clear whether the letter was effective unilaterally without the approval of the District of Columbia or whether that approval was later received. (Paper 2, Ex. 24). The SEC's allegations are sufficient to allege that Westbury and Geneva acted as investment advisers by providing services to manage assets owned by the District of Columbia, and the letter is sufficient to create a material dispute of fact as to the nature of the relationship between Geneva and the District of Columbia.

The SEC's claims based on the Investment Advisers Act are based on the same factual allegations of fraud that form the basis of the claims under rule 10b(6), section 10(b), and section 17(a) discussed above. Therefore, Geneva's arguments as to why the SEC's pleadings and evidence of securities fraud are insufficient would also apply to these claims. Neither Geneva nor West-

bury makes any argument that a different legal standard should apply to the fraud claims under the Investment Advisers Act. Therefore, for the same reasons discussed above, Geneva and Westbury are not entitled to either judgment on the pleadings or summary judgment as to these allegations. The SEC has pled and produced adequate evidence of material misstatements and omissions with the requisite mental state, which is negligence under the Investment Advisers Act, *see Moran,* 922 F.Supp. at 897, to create material questions of fact for trial.

VI. Other Preliminary Injunctive Relief

A. Order Freezing Assets

An order freezing assets is within a district court's power to enter relief designed to preserve the status quo and ensure the availability of final relief, but "must be supported by a showing of fraud, mismanagement, or other reason to believe that, absent the freeze order, the assets would be depleted or otherwise become unavailable." *Kemp,* 940 F.2d at 114.

***18** As discussed above in relation to the asset reserves of SBMCC and SBMIC, the SEC has made an adequate showing that these entities may not have sufficient assets to satisfy the demands of all investors. The unaudited financial statements of both companies from December 31, 2005 indicate that as of that time both held reserves insufficient to satisfy the principal owed to all certificate holders. (Paper 2, Ex. 1, at 1-2; paper 2, Ex. 2, at 4). In addition, each company has reported losses in the past three years, and an SEC review indicates that most of the assets held by each do not qualify as reserve assets under federal law because they involve too much risk. (Paper 2, Attachment 2, at 6, 9). Geneva has supported SBMCC through significant investment over the past three years, *(id.* at 7) but may not be able to continue this investment because most of its assets reflect investments by the District of Columbia, (paper 2, Ex. 5, at 1, 3), which has demanded the return of all of its investments.

On balance, the SEC has made a significant showing that SBMCC and SBMIC were in violation of the reserve requirements of section 28 of the Investment Company Act of 1940, and that there would be irreparable harm to investors without an injunction because these companies would have insufficient assets to satisfy the demands of all investors. Defendants will be restricted in their ability to make timely payments as required by their face amount certificates, but any harm to Defendants from this restriction is outweighed by the harm that would be done to investors if assets prove insufficient to satisfy the demands of all investors. The interests of investors in obtaining timely payments will also be impaired. The interest of these investors in each getting at least a fair share of the remaining assets of SBMIC or SBMCC, however, outweigh their interest in rapid payment, and the public interest that contracts be honored is furthered by this preliminary relief. Restrictions on distribution or expenditure of the proceeds of asset sales are also justified by the irreparable harm to investors from such a distribution if the assets of SBMIC and SBMCC are insufficient to satisfy the demands of all investors.

As a result, Defendants will continue to be required to comply with all aspects of this court's April 4, 2006, and May 12, 2006 Orders. Defendants will also continue to seek leave of this court to sell any assets of SBMIC or SBMCC, and will seek leave of this court to distribute the proceeds of the sale of any assets of SBMIC or SBMCC to investors or otherwise.

SBMCC and SBMIC have filed two motions seeking permission to sell specific assets to take advantage of appreciation in the value of these assets. SBMCC filed a motion (paper 57) on October 24, 2006, to sell a tax certificate, and SBMIC filed a motion (paper 58) on October 27, 2006, to sell corporate bonds issues by General Motors and Calpine Corporation. SBMCC also renewed and supplemented its motion to sell the tax certificate on January 9, 2007, stressing that a buyer for the tax certificate has been found, and had relied upon SBMCC' s past representation that the tax certificate would be sold. (Paper 77). The SEC responded to these motions jointly, and opposed the proposed sales because they contain no "assurance that the proceeds ... will be used to purchase qualified assets." (Paper 60, at 1). De-

fendants rejected a sale subject to such controls, indicating that the proposed sales are "for the benefit of the respective SBM Company, and indirectly benefit[ ] the security of the shareholders." (Paper 72, at 2).

***19** Allowing SBMIC and SBMCC to sell assets without safeguards to ensure that the sales would not further deplete their qualified asset reserves would contravene the reasoning and purpose underlying the asset freeze that was previously ordered by the court and that will be reaffirmed in the accompanying Order. Any harm Defendants or investors may suffer as a result of the inability to sell these assets at this time is outweighed by the irreparable harm some investors will suffer if no assets remain when the time comes for repayment of their investments.

The SEC has also requested an order freezing the assets of Geneva, but such an order is not warranted. As discussed above, the SEC has not established a sufficiently strong case as to its fraud-based allegations against Geneva to support preliminary injunctive relief.

B. Appointment of a Receiver and Requirement of an Accounting

SEC requests appointment of a receiver to provide an accurate accounting of Defendants' affairs or to run the entity-Defendants and bring them into compliance with the law. Appointment of a trustee to dispose of a defendant's assets is authorized by section 42(d) of the Investment Company Act of 1940, 15 U.S.C. § 80a-41(d), "to the extent [a court of equity] deems necessary or appropriate." Furthermore, "[t]he federal securities statutes confer upon district courts broad equitable powers to fashion appropriate remedies, including the appointment of a receiver, to effectuate the purposes of the securities laws." *Terry v. June*, 359 F.Supp.2d 510, 519 (W.D.Va.2005) (citing *Sec. & Exch. Comm'n v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1103-05 (2d Cir.1972)), *amended on other grounds by* 420 F.Supp.2d 493 (W.D.Va.2006).

Under the circumstances of this case, appointment of a receiver to provide an accounting of Defendants' affairs is not necessary to preserve the status quo. While Defendants' past misstatements as to the nature of the charter school loan transactions are troubling, Defendants responded to this court's May 12, 2006 Order by producing the required documents that establish the facts of these transactions. Appointment of a receiver would entail substantial cost and probably significant delay of this proceeding, and these costs outweigh any benefit that would be gained from independent investigation of Defendants' affairs. The discovery powers available to the SEC should be sufficient to produce accurate evidence of Defendants' financial affairs. If discovery proves inadequate in some way in the future, the SEC can move for appropriate relief at that time. There is no evidence that irreparable harm will result from allowing Defendants to continue their own management of their affairs subject to this court's Orders without the imposition of a receiver to manage those affairs. Therefore the SEC's motion to appoint a receiver and require a full accounting will be denied.

C. Other Equitable relief

The SEC also seeks a preliminary injunction against the destruction of any evidence, expedited discovery, a temporary restraining order, and an order providing alternative means of service. The SEC offers no evidence that Defendants have destroyed evidence or would do so without an injunction. As a result, there is nothing to suggest that such an injunction is necessary to maintain the status quo, and the SEC's request to enjoin destruction of evidence will be denied. The SEC's motion for expedited discovery will be denied as moot because the time for discovery under this court's July 13, 2006 Scheduling Order has already commenced. The SEC's motion for a temporary restraining order will also be denied as moot, because the court will now rule on the SEC's motion for a preliminary injunction. The SEC's motion for alternative means of service will be denied because Defendants have already been served with the complaint and alternative means of service of litigation documents on Defendants' counsel is unnecessary.

VII. Scheduling Order

***20** The SEC also moves (paper 41) to amend the July 13, 2006 Scheduling Order, (paper 35). The SEC argues that the Scheduling Order is inefficient because

it requires initial expert discovery before the close of fact discovery. The SEC suggests a scheduling order that would establish expert discovery deadlines after the close of discovery, currently scheduled for November 27, 2006. It suggests an amended schedule of deadlines delayed from a later fact-discovery deadline. The SEC also argues that it would be more efficient to conduct expert discovery with the benefit of this court's ruling on its motion for preliminary relief.

Pursuant to Fed.R.Civ.P. 16(b), a scheduling order may be modified only "upon a showing of good cause." A scheduling order "shall not be modified except upon a showing of good cause and by leave of the district judge [.]" Fed.R.Civ.P. 16(b). Indeed, the Scheduling Order issued on July 13 specifically provided that it "will not be changed except for good cause." (Paper 35).

The primary consideration of the Rule 16(b) "good cause" standard is the diligence of the movant. Lack of diligence and carelessness are "hallmarks of failure to meet the good cause standard." *W. Va. Hous. Dev. Fund v. Ocwen Tech. Xchange, Inc.*, 200 F.R.D. 564, 567 (S.D.W.Va.2000). "[T]he focus of the inquiry is upon the moving party's reasons for seeking modification. *If that party was not diligent, the inquiry should end." Marcum v. Zimmer*, 163 F.R.D. 250, 254 (S.D.W.Va.1995) (emphasis in original).

The SEC asserts that conducting fact discovery and expert discovery in this case simultaneously would be inefficient, because it would require significant revisions of expert reports in response to later-discovered facts.[FN10] This inefficiency is adequate cause to amend the Scheduling Order. The SEC has been adequately diligent despite ultimately failing to file its initial expert disclosures by the deadline set in the Scheduling Order because its motion was filed on August 15, 2006, before expert disclosures were due. Defendants, however, have a strong interest in the rapid resolution of this case, because of the significant restrictions imposed on Defendants' business operations at the SEC's request. As a result, the Scheduling Order will be amended with a view toward minimizing the delay in the prompt resolution of the case, and a teleconference to establish such a schedule will be set.

FN10. The SEC cites significant authority for the proposition that complex litigation often is conducted with expert discovery delayed until after some or all fact discovery is completed. *See, e.g., Manual for Complex Litigation*, § 11.481 at 98 (4th ed.2004).

VIII. Motion for Protective Order

The SEC has requested a protective order, pursuant to Fed.R.Civ.P. 26(c), to quash a deposition noticed by Westbury, on the ground that only an attorney or an individual working under an attorney could be designated, and that such a deposition would violate the protection afforded to attorney work product. Westbury noticed a deposition pursuant to Fed.R.Civ.P. 30(b)(6), requiring the SEC to designate and prepare a witness to be deposed as to ten topics named in the deposition notice. (Paper 83, Ex. 1). The topics designated for the deposition are:

***21** 1. All communications with Westbury, or any agents acting on Westbury's behalf, concerning John Lawbaugh's management of 1st Atlantic Guaranty Corp., SMB Certificate Company and/or any related companies.

2. All communications with Westbury, or any agents acting on Westbury's behalf, concerning Westbury's and/or Geneva Capital Partners, LLC's proposed purchase of 1st Atlantic Guaranty Corp., SBM Certificate Company and/or any related companies from John Lawbaugh's bankruptcy estate.

3. All communications to Judge Maness [sic, Mannes] of the United States Bankruptcy Court for the District of Maryland, Greenbelt Division, concerning the SEC's position with respect to Westbury's and/or Geneva Capital Partners, LLC's proposed purchase of 1st Atlantic Guaranty Corp., SBM Certificate Company and/or any related companies from John Lawbaugh's bankruptcy estate.

4. All communications with Westbury, or any agents acting on his behalf, concerning the reserve

methodology being used and/or to be used for face amount certificates by SBM Certificate Company, SBM Investment Certificates, Inc. and/or any related ompanies.

5. All positions taken by the SEC with respect to reserve requirements for face amount certificate companies from April 2001 through April 2006.

6. All communications with Westbury, or any agents acting on his behalf, concerning business transacted between Geneva Capital Partners, LLC and the District of Columbia.

7. All communications with any representatives of, or any agents acting on behalf of, the District of Columbia concerning Westbury.

8. All communications with any representatives of, or agents acting on behalf of, the District of Columbia concerning business transacted between Geneva Capital Partners, LLC and the District of Columbia.

9. All communications with any representative of the United States Department of Education, the Federal Bureau of Investigation or the United States Attorney's Office for the District of Columbia concerning Westbury, Geneva Capital Partners, LLC and/or any related companies.

10. The factual bases, if any, for the allegations made against Westbury in the SEC's Complaint in the case.

(Id.).

The general standard for discovery, as set forth in Fed.R.Civ.P. 26, is relatively broad:

> Rule 26 governs discovery entitlement and provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party...." Fed. R.Civ.P. 26(b)(1). While the Federal Rules of Civil Procedure do not define relevance, the Federal Rules of Evidence do, as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. Or, as rephrased in the commentary, "[d]oes the item of evidence tend to prove the matter sought to be proved?"

United Oil Co., Inc. v. Parts Assocs., Inc., 227 F.R.D. 404, 409 (D.Md.2005) (footnote omitted). Fed.R.Civ.P. 30(b)(6), under which Westbury noticed the disputed deposition, provides parties with the ability to effectively depose an entity regarding matters that are within its knowledge. It provides that:

> ***22** A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization.

The Fourth Circuit has explained that discovery requests may, however, be limited:

> On its own initiative or in response to a motion for protective order under Rule 26(c), a district court may limit "the frequency or extent of use of the discovery methods otherwise permitted" under the Federal Rules of Civil Procedure if it concludes that "(I) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit." Fed.R.Civ.P. 26(b)(2). Further, upon motion of a party and "for good cause shown," the court [in which the action is pending or, on matters relating to a deposition,] in the district in which a deposition is to be

> taken may "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including an order that the discovery not be had. Fed.R.Civ.P. 26(c).

Nicholas v. Wyndham Int'l., Inc., 373 F.3d 537, 543 (4th Cir.2004). With regard to discovery of materials created in preparation for litigation, Fed.R.Civ.P. 26(b)(3) provides protection for these materials and especially for attorney work product:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable ... and prepared in anticipation of litigation or for trial ... 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 an attorney or other representative of a party concerning the litigation.*

(Emphasis added). The Fourth Circuit has held that "opinion work product material, as distinguished from material not containing mental impressions, conclusions, opinions, or legal theories, is immune from discovery although the litigation in which it was developed has been terminated." *Duplan Corp. v. Moulinage et 0Retorderie de Chavanoz*, 509 F.2d 730, 732 (4th Cir.1974), *cert. denied*, 420 U.S. 997 (1975).

***23** A motion for a protective order and to quash a deposition noticed pursuant to Fed.R.Civ.P. 30(b)(6) against the SEC concerning its investigation of a defendant was considered in *Securities & Exchange Commission v. Rosenfeld*, No. 97-CIV-1467, 1997 WL 576021 (S.D.N.Y. Sept. 16, 1997). The *Rosenfeld* court granted the protective order and quashed the deposition notice, reasoning that:

> the notice of deposition clearly calls for the revealing of information gathered by the SEC attorneys in anticipation of bringing the instant enforcement proceedings, and if forced to designate witnesses to testify fully and completely concerning the matters described in the notice of deposition, testimony of SEC attorneys or examiners working under the direction of the SEC attorneys conducting the investigation would be necessary.... Thus the witness designated would have to have been prepared by those who conducted the investigation and, since the investigation was conducted by the SEC attorneys, preparation of the witnesses would include disclosure of the SEC attorneys' legal and factual theories as regards the alleged violations of the security laws of this country and their opinions as to the significance of documents, credibility of witnesses, and other matters constituting attorney work product.

Id. at *2-3. The court gave particular emphasis to the fact that the SEC is a law enforcement agency, and the deposition sought by the defendant would have involved inquiry into the law enforcement investigation conducted by the SEC's legal staff. *Id.* at *2. The *Rosenfeld* court also considered it significant that the defendant had not attempted to use other means of discovery, such as interrogatories or requests for documents, and had also not demonstrated how he would be prejudiced by being required to use these discovery tools instead of the noticed deposition. *Id.* at *3-4. The court concluded that it should grant the SEC's motion because:

> to proceed by way of the Rule 30(b)(6) deposition sought by defendant Rosenfeld would undoubtedly place an undue burden on the SEC and the court, which would have to make a multitude of otherwise unnecessary decisions about issues of attorney work product and law enforcement privilege, whereas no prejudice to defendant Rosenfeld has been shown if he is required to conduct discovery by the other methods suggested in this opinion.

Id. at * 4.

In this case, the SEC asserts that "[b]ecause the Commission is a law enforcement agency with no independent knowledge of wrongdoing at issue, it cannot designate a fact witness to testify about those events" and would have "to designate a person familiar with the investigative record, which would necessarily be a

Commission attorney who is part of the Commission's litigation team." (Paper 61, at 6). The SEC also acknowledges that other avenues are available to Westbury to acquire the information underlying the SEC's investigation, including deposition of fact witnesses, identification of fact witnesses through interrogatories, and requests for production of documents discovered through the investigation from the SEC. (Paper 61, at 10, 12).

***24** The reasoning expressed in *Rosenfeld* is persuasive, and applies with equal force to this case, which presents a nearly-identical factual situation. The ten areas of inquiry for the deposition noticed by Westbury would require preparation of a witness with opinion work product under the rationale of *Rosenfeld* . Topics one through three (paper 83, Ex. 1, at 1-2) relate to the SEC's investigation of SBMCC and SBMIC in relation to the Lawbaugh case, and would require the investigating attorneys' thought processes and opinions. Opinion work product remains privileged even when the litigation it was prepared for has ended, especially as here where the same parties are again involved in litigation over related matters. *See Duplan Corp.*, 509 F.2d at 732 . Topics seven through ten directly seek the results of the SEC's present investigation, and would require disclosure of the opinions, strategy, and "would inevitably tend to disclose the investigating attorneys' preliminary positions and legal theories concerning the suspected conduct of defendant [s] ... and those factual areas which were of particular interest to the SEC investigators...." *Rosenfeld*, 1997 WL 576021 at *4. Topics four and six likewise concern this investigation, and also concern communications made to Westbury or his agents, which he should be aware of through means other than the noticed deposition. Topic five implicates the SEC's investigation both in this case and in other cases, but would at least require disclosure of the details of the investigation, and thus implicates opinion work product in the same manner as topics six through ten. Furthermore, the information Westbury seeks through topic five may be available by way of a request for documents or interrogatory.

Westbury argues that the SEC could designate a witness other than an investigating attorney, such as Andrea Dittert, the SEC's Supervisory Staff Accountant for this case. A similar argument was raised by the defendant in *Rosenfeld,* and the *Rosenfeld* court's analysis on the point is persuasive. The designated witness would have to be fully and completely prepared by the investigating attorneys to discuss the noticed topics, *see* Fed. R.Civ.P. 30(b)(6), including the attorney's opinion work product, and in addition, an SEC examiner like Ms. Dittert works under the supervision of the SEC's investigating attorneys, and may already be familiar with such opinion work product. *See Rosenfeld,* 1997 WL 576021 at *2-3. Thus, attorney work product would inevitably be revealed if she were designated for the deposition for the same reasons that it would necessarily be revealed if an SEC investigating attorney were designated.

Westbury also argues that a protective order totally preventing a Rule 30(b)(6) deposition is inappropriate in a case where factual questions will be tried, relying on the analysis in *In re Bilzerian,* 258 B.R. 846 (Bankr.M.D.Fla.2001). In that case, the SEC sought and received a protective order to prevent a Rule 30(b)(6) deposition that would have required designation of one of the SEC's investigating attorneys. *Id.* at 849-50. The Bilzerian court stated that its conclusion was

> ***25** predicated on the position of the SEC that it is entitled to the relief requested as a matter of law based on a factual record totally supported by facts that have been conclusively established by other courts or statements of Bilzerian contained in court filings. The court will limit the record for purposes of the hearing on the Motion to Dismiss to be held on February 8, to such matters."

Id. at 849. The *Rosenfeld* court, however, did not impose such a caveat when it quashed a Rule 30(b)(6) deposition of the SEC, finding that other means of discovery available to the defendant weighed in favor of granting a protective order. Rosenfeld, 1997 WL 576021 at *3-4. Given the other means of discovery available to Westbury and the degree to which the designated topics would intrude upon the opinion work product of the SEC investigating attorneys, a protective order is warranted in this case in spite of the fact that

factual discovery has been available to and utilized by the SEC in this case.

Westbury argues that the court should follow the reasoning of *Wilson v. Lakner,* 228 F.R.D. 524 (D.Md.2005) to deny the protective order, but that reasoning does not support Westbury's position under the facts of this case. In *Wilson,* a plaintiff in a medical malpractice action sought a Rule 30(b)(6) deposition of the treating hospital regarding the circumstances of the plaintiff's treatment. The hospital objected to the deposition on the ground that the only investigation of these facts it had conducted was privileged under a Maryland statute. The court reasoned that the hospital, as an entity, had knowledge of what happened during treatment and what hospital records showed independent from any subsequent, privileged, investigation. *Id.* at 529. Thus, the fact that preparing a witness to testify would require investigating the same subject matter as the privileged investigation did not preclude the deposition. *Id.* The *Wilson* court held, however, that the results of the hospital's investigation themselves were not discoverable. *Id.* The factual situation presented by Westbury's deposition notice is distinct from that in *Wilson,* and is instead analogous to *Rosenfeld.* The SEC, a law enforcement agency, unlike the hospital in *Wilson,* has no independent knowledge of Defendants' financial affairs. Therefore, only the results of the SEC's investigation could be inquired into in a Rule 30(b)(6) deposition, and such inquiry would inevitably and improperly invade the work product of SEC investigating attorneys, as discussed above.

Finally, Westbury argues that a protective order and an order quashing the deposition notice are the incorrect procedure to protect the SEC's attorney work product, and that the deposition should go forward to allow for objections to individual questions on the basis that the answer would reveal work product. This argument was considered and persuasively rejected in *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.,* 117 F.R.D. 83 (M.D.N.C.1987). The *N.F.A.* court reasoned that, although there is a general rule against granting a motion totally to prohibit a deposition, such an extraordinary result is warranted when a party seeks to depose another party's attorney:

> ***26** Because deposition of a party's attorney is usually both burdensome and disruptive, the mere request to depose a party's attorney constitutes good cause for obtaining a Rule 26(c), Fed.R.Civ.P., protective order unless the party seeking the deposition can show both the propriety and need for the deposition. This procedure is superior to requiring the attorney to submit to a deposition and make his objections at that time. Sometimes there are very legitimate reasons for deposing a party's attorney. More often deposition of the attorney merely embroils the parties and the court in controversies over the attorney-client privilege and more importantly, involves forays into the area most protected by the work product doctrine-that involving an attorney's mental impressions or opinions.

N.F.A., 117 F.R.D. at 85 (footnotes omitted) (citing *Shelton v. American Motors Corp.,* 805 F.2d 1323, 1327 (8th Cir.1986)). For the same reasons, Westbury's deposition notice will be quashed and the SEC's motion for a protective order will be granted. Westbury has other means of discovery available to procure much of the information he seeks through the disputed deposition, and the burden on the court and the SEC in considering the work product issue as to an inevitable array of issues raised at the deposition are not warranted.

IX. Conclusion

For the reasons set forth above, the motion of the SEC for preliminary injunctive relief will be granted in part and denied in part. The motion of the SEC to modify the July 13, 2006 Scheduling Order will be granted and an amended scheduling order will be established at a scheduling teleconference. The SEC's motion for a protective order will also be granted. The motions of SBMIC and SBMCC to sell specified assets will be denied, and the motion of Geneva and Westbury for judgment on the pleadings or summary judgment will also be denied. A separate Order will follow.

D.Md.,2007.
S.E.C. v. SBM Inv. Certificates, Inc.
Not Reported in F.Supp.2d, 2007 WL 609888 (D.Md.), Fed. Sec. L. Rep. P 94,166

Not Reported in F.Supp.2d, 2007 WL 609888 (D.Md.), Fed. Sec. L. Rep. P 94,166
(Cite as: 2007 WL 609888 (D.Md.))

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Not Reported in F.Supp.2d, 2009 WL 5227661 (S.D.Ohio)
(Cite as: 2009 WL 5227661 (S.D.Ohio))

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Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
S.D. Ohio,
Western Division.
UNITED STATES of America, ex rel. Dr. Harry F. FRY, Plaintiffs,
v.
The HEALTH ALLIANCE OF GREATER CINCINNATI, et al., Defendants.

No. 1:03-cv-167.
Nov. 20, 2009.

George C. Vitelli, John Ashcroft, Evan C. Zoldan, Jennifer L. Cihon, United States Department of Justice, Washington, DC, Kenneth F. Affeldt, Andrew M. Malek, U.S. Attorney's Office, Columbus, OH, Glenn Virgil Whitaker, Michael J. Bronson, Patrick Michael Hagan, Victor A. Walton, Jr., Vorys Sater Seymour & Pease, Cincinnati, OH, for Plaintiffs.

David Paul Kamp, White Getgey & Meyer Co LPA, Pierre H. Bergeron, Mark John Ruehlmann, Squire Sanders & Dempsey, Kenneth Franklin Seibel, Mark Joseph Byrne, Jacobs, Kleinman, Seibel & McNally, Jennifer Orr Mitchell, Dinsmore & Shohl, Cincinnati, OH, Harry R. Silver, Laura F. Laemmle-Weidenfeld, Laurence J. Freedman, Patton Boggs LLP, Washington, DC, Stephen G. Sozio , Jones, Day, Reavis, & Pogue, Cleveland, OH, Chad A. Readler, Eric Earl Murphy, Jones Day, Columbus, OH, Heather M. O'Shea, Jones Day, Chicago, IL, for Defendants.

ORDER

TIMOTHY S. BLACK, United States Magistrate Judge.

***1** This civil action is before the Court on the motion to compel the United States to produce a 30(b)(6) deponent filed by Defendant the Ohio Heart & Vascular Center, Inc. ("Ohio Heart") and The Christ Hospital ("TCH") (Doc. 202), which motion The Health Alliance ("THA") joins (Doc. 215), and the parties' responsive memoranda (Docs.212, 217).

I. BACKGROUND FACTS

This case involves allegations by the United States that Defendants knowingly submitted false claims for payment in violation of the False Claims Act. 31 U.S.C. § 3729. As a result, two pivotal issues in this case are: (1) whether Defendants knowingly submitted claims which were false; and (2) the number and monetary value of the alleged false claims for payment Defendants submitted.

On September 18, 2009, Defendants served on the United States a notice of deposition pursuant to Fed.R.Civ.P. 30(b)(6). (Doc. 202, Ex. A). The topics requested in the notice to be addressed at deposition included: (1) identifying who prepared the previously provided claims data, how it was prepared, and what is included in that data; and (2) providing a description of the claims that the United States alleges are false and for which the United States will seek to hold any of the Defendants liable, including identifying the total number of claims, the individual or entity that submitted each claim, and the reasons why the United States alleges the claims were false. (*Id.*) In essence, Defendants seek a representative of the government to explain under oath how it calculated the hundreds of millions of dollars it seeks in this case.

In response, the United States agreed to provide a 30(b)(6) representative for deposition, and the deposition was scheduled for October 26, 2009. (Doc. 202, Ex. B). However, on October 8, 2009, counsel for the United States indicated that it would not produce a deponent. (*Id.*) That date was the day the Court had previously set as the cutoff for filing discovery motions. The Court sub-

sequently stayed briefing of discovery disputes pending the parties' negotiations regarding resolution, which allowed Defendants the opportunity to bring the issue before the Court. However, the United States indicated that Defendants would have to file a motion to compel in order to secure the deposition. (*Id.*, Exs.B, C).

Accordingly, pursuant to Fed.R.Civ.P. 30(b)(6) and 37, Defendants TCH, THA, and Ohio Heart move for an order compelling the United States to produce a representative for deposition. In response, the United States moves the Court for a protective order preventing Defendants from subjecting a government attorney to a deposition.

II. ANALYSIS

Federal Rule of Civil Procedure 30(b)(6) provides, in relevant part:

> "In its notice or subpoena, a party may name as the deponent a ... corporation ... and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more ... persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify ... The persons designated must testify about information known or reasonably available to the organization."

***2** Once served with the deposition notice, the responding party is required to produce one or more witnesses knowledgeable about the subject matter of the noticed topics. *Prosonic Corp. v. Stafford*, No. 2:07-cv-803, 2008 U.S. Dist. LEXIS 80778, at *3 (S.D. Ohio June 2, 2008). A Rule 30(b)(6) designee represents the corporation's position on the noticed topics. *Great American Ins. Co. v. Vegas Constr. Co., Inc.*, No. 2:06-cv-911, 2008 U.S. Dist. LEXIS 108488, at ¶ 10 (D.Nev. March 24, 2008). A corporation has a duty under Rule 30(b)(6) to provide a witness who is knowledgeable in order to provide binding answers on behalf of the corporation. *Id.* This includes preparing the witness to answer fully and without evasion all questions about the designated subject matter. *Id.* The duty to produce the prepared witness on designated topics extends to matters not only within the personal knowledge of the witness, but also on all matters reasonably known by the responding party. *Id.* at ¶ 12. Counsel has the responsibility to prepare its designee to the extent matters are reasonably available, whether from documents, past employees, or other sources. *Id.* The other sources may include information transmitted from the party's attorneys. *Id.* at ¶ 21.

A. The Federal Rules Apply To The Government

Rule 30(b)(6) authorizes a party to "name as the deponent a ... governmental agency, or other entity." The Rule "express[ly]" includes governmental agencies as entities subject to a deposition notice. *Yousuf v. Samantar*, 451 F.3d 248, 255 (D.C.Cir.2006). Accordingly, a government agency, when provided a notice under Rule 30(b)(6), "has the duty to name and produce one or more persons who consent to testify on its behalf as to matters known or reasonably available to the organization." *United States v. Magnesium Corp. of Am.*, No. 2:01-CV040DB, 2006 U.S. Dist. LEXIS 87734, at *15-16 (D.Utah Nov. 27, 2006) (granting motion to compel United States to comply with Rule 30(b)(6) notice as the United States "must comply" with reasonable requests for information even when such requests "will entail significant effort on the part of the United States"). "Like any ordinary litigant, the Government must abide by the Federal Rules of Civil Procedure. It is not entitled to special consideration concerning the scope of discovery, especially when it voluntarily initiates an action." *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y.2009).

Therefore, the government is not exempt from the 30(b)(6) requirement.

B. The United States Failed To Comply With The Federal Rules Of Civil Procedure

Defendants properly noticed a 30(b)(6) deposition and the parties agreed to a date to conduct it. FN1 Counsel for the United States then notified

Defendants that it refused to produce a deponent. This approach ignores Fed.R.Civ.P. 37(d)(2) which clearly states that "[a] failure [to attend a properly noticed deposition] is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c)." It "is not proper practice [ ] to refuse to comply with the [Rule 30(b)(6)] notice, put the burden on the party noticing the deposition to file a motion to compel, and then seek to justify non-compliance in opposition to the motion to compel." *New Eng. Carpenters Health Benefits Fund v. First Databank, Inc.*, 242 F.R.D. 164, 166 (D.Mass.2007) (granting motion to compel compliance with Rule 30(b) (6) notice and disregarding objection that information was more appropriately gained through interrogatories instead of a deposition because deponent failed to move for protective order prior to refusing to sit for deposition).

> FN1. Defendants stated this fact in their memorandum in support of the motion to compel (Doc. 202 at 4) and the United States did not dispute it in the opposition.

***3** Accordingly, on procedural grounds alone, this Court could grant Defendants' motion to compel.

C. Defendants Do Not Seek A Deposition Of Government Counsel

Despite the United States' contention, Defendants do not seek to depose government counsel. (Doc. 217 at 3). Rather they "seek a representative of the United States to explain under oath how it calculated the hundreds of millions of dollars it seeks in this case, and to detail evidence the United States has to support those allegations." (Doc. 202, Ex. A). The United States is able to prepare a non-attorney witness to testify on its behalf. *Magnesium Corp of Am.*, 2006 U.S. Dist. LEXIS 87734, at 15-16. While the United States offered to provide Ruben Steck (an individual retained by the United States to decipher claims data), it would only permit him to testify to his personal knowledge. However, the purpose of a Rule 30(b)(6) deposition is to gain the entity's knowledge. *Hooker v. Norfolk S. Ry.*, 204 F.R.D. 124, 126 (D.Ind.2001) (denying motion for protective order and explaining that Rule 30(b) (6) imposes a "duty upon the [entity] to prepare its selected deponent to adequately testify not only on matters known by the deponent, but also on subjects that the entity should reasonably know").

The United States claims that the topics set forth in the 30(b) (6) notice are, with one exception, topics to which only a government attorney can testify. However, the fact that government attorneys are the only individuals with the requisite knowledge to answer Defendants questions does not prevent them from preparing a designee to answer the questions. TCH did not refuse to comply with Plaintiffs' 30(b)(6) notice, which required CEO Susan Croushore to interview numerous current and former employees and review thousands of pages of documents in order to testify as a 30(b)(6) deponent. The United States, like any other litigant, has the duty to prepare a witness to testify under oath on its behalf.

D. The United States Cannot Dictate What Discovery Devices Defendants May Use To Obtain Information

Finally, the United States offered to provide responses to the topics Defendants included in their 30(b)(6) request as if those topics were served on the government in interrogatory form. However, Defendants are "not precluded from conducting oral depositions merely because plaintiff considers them less than the optimal means of securing information." *United Techs. Motor Sys., Inc. v. Borg-Warner Auto.*, No. 97-71706, 1998 U.S. Dist. LEXIS 21837, at *8 (E.D.Mich. Sept. 4, 1998) (rejecting argument that the information sought by defendant would be better obtained through interrogatories because "there is nothing which necessarily prohibits the pursuit of information by more than one discovery vehicle"). Parties "are entitled to test [assertions] in questioning witnesses during depos-

itions," and "[i]t is fundamental that parties may simultaneously utilize any or all of the discovery mechanisms authorized by the rules." *IRIS Corp. Berhad v. United States*, 84 Fed. Cl. 489, 494 (Fed.Cl.2008).

III. CONCLUSION

***4** For the reasons stated above, the motion to compel (Doc. 202) is **GRANTED.** The United States shall produce a 30(b)(6) deponent **forthwith.**

IT IS SO ORDERED.

S.D.Ohio,2009.
U.S., ex rel. Fry v. Health Alliance of Greater Cincinnati
Not Reported in F.Supp.2d, 2009 WL 5227661 (S.D.Ohio)

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and the STATE OF MICHIGAN, Plaintiffs, v. BLUE CROSS BLUE SHIELD OF MICHIGAN, Defendant.	Civil Action No. 2:10-cv-14155-DPH-MKM Hon. Denise Page Hood Mag. Judge Mona K. Majzoub

INDEX OF EXHIBITS TO PLAINTIFFS' MOTION FOR A PROTECTIVE ORDER

Exhibit 1: Notice of 30(b)(6) Deposition issued to United States of America (11-09-2012)

Exhibit 2: Notice of 30(b)(6) Deposition issued to State of Michigan (11-09-2012)

Exhibit 3: Letter from Amy Fitzpatrick to Ashley Cummings (09-19-2012)

Exhibit 4: Letter from Ashley Cummings to Amy Fitzpatrick (09-28-2012)

Exhibit 5: E-mail exchange among counsel (11-13-2012)

Exhibit 6: Letter from Steven Kramer to Todd Stenerson (02-28-2011)

Exhibit 7: Unpublished Opinions