UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
STATE OF WISCONSIN,	)	
	)	
STATE OF ILLINOIS, and	)	
	)	
STATE OF MICHIGAN,	)	
	)	
Plaintiffs,	)	Civil Action No. 2:10-cv-00059-JPS
	)	
v.	)	
	)	
DEAN FOODS COMPANY,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' SUR-REPLY IN FURTHER RESPONSE TO DEFENDANT'S MOTION TO COMPEL A DISCOVERY RESPONSE TO THE FIRST INTERROGATORY OF DEAN FOODS COMPANY

This sur-reply is in response to two newly asserted arguments raised for the first time in Dean Foods Company's Reply in support of its Motion to Compel.

First, Dean argues that, based on the text of Federal Rule of Civil Procedure 26(b)(3), there are not two types of work product protected in response to interrogatories. See Dean Reply at 8-9. This is incorrect. Rule 26(b)(3) only partially codifies the work product doctrine and the traditional doctrine continues to have vitality outside the text of the rule itself. See, e.g., United States v. Deloitte LLP, 610 F.3d 129, 136 (D.C. Cir. 2010). The work product case law recognizes the distinction between opinion and fact work product in the context of an interrogatory and also holds that fact work product remains protected even in response to an

interrogatory. See Lamar Advertising of South Dakota, Inc. v. Kay, 2010 WL 758786, at *12 (D.S.D. Mar. 1, 2010).

Dean must attempt to narrow the scope of work product protection because otherwise it must grapple with the fact that courts have recognized that factual information learned through third-party interviews is at the very least fact work product, if not opinion work product. See, e.g., United States v. Urban Health Network Inc., Civ. No. 91-5976, 1993 WL 12811, at *3 (E.D. Pa. Jan. 19, 1993). Thus, at a minimum, the law requires that Dean demonstrate a substantial need for the information it is seeking and that it is unable to obtain this information without undue hardship. Id. Dean cannot make this showing.

Dean's extensive third-party discovery -- undertaken since Plaintiffs filed their Response to Dean's Motion to Compel -- belies any suggestion that it needs Plaintiffs' work product. On the business day after Plaintiffs filed their response to this motion, Dean began issuing subpoenas to third-parties, including 227 requests for documents with a return date of September 20, 2010. Dean served this discovery in spite of the statement in its Motion to Compel that, if its motion were granted, it would "narrow the number of third-parties subject to unwanted discovery." Dean Mot. to Compel at 2.

Second, in its reply, Dean for the first time cites several out-of-circuit cases in support of the primary argument made in its initial Motion to Compel. For example, Dean contends that Protective Nat'l Ins. Co. of Omaha v. Commonwealth Ins. Co., 137 F.R.D. 267 (D. Neb. 1989) supports its argument that there is no work product protection for factual information. Contrary to Dean's argument, Protective Nat'l Ins., held that, in a Rule 30(b)(6) deposition, a company's designated representative could not automatically claim work product protection to withhold

factual information merely because it was conveyed to the representative by an attorney. Id. at 280-81. The Court expressly left open the possibility that, "depending upon how questions are phrased to the witness," it was possible that "such questions may tend to elicit the impressions of counsel about the relative significance of the facts." Id. at 280. Moreover, a district court in this Circuit has expressly held that Protective Natl'l Ins. has no applicability to an attempt to obtain factual information learned from an attorney-led law enforcement investigation. See S.E.C. v. Buntrock, 217 F.R.D. 441, 444-45 (N.D. Ill. 2003) (holding that a Rule 30(b)(6) deposition seeking facts learned in investigation was merely "intended to ascertain how the SEC intends to marshal its facts, documents and testimonial evidence").

Dean also repeatedly cites Oklahoma v. Tyson Foods, Inc., 262 F.R.D. 617 (N.D. Okla. 2009). However, that opinion held that documents reflecting information learned through third-party interviews were attorney work product. Id. at 633 (citing Lamer v. Williams Comm'ns, LLC, No. 04-CV-847-TCK-PJC, 2007 WL 445511, at *2 (N.D. Okla. Feb. 6, 2007) (holding even purely factual witness statements are protected work product)). Moreover, neither Tyson nor Protective Nat'l Ins., involved interrogatories that sought *all* factual information learned from third-party interviews.

Finally, Dean also cites United States v. AMR Corp., No. 99-1180-JTM (D. Kan. Feb. 7, 2000) (order granting motion to compel), in support of its argument. This opinion is no different in its reasoning than United States v. Dentsply, 187 F.R.D. 152 (D. Del.1999), and is similarly wrongly decided. Both Dentsply and AMR suffer from the same infirmity -- they ignore the Supreme Court's holding in Upjohn Co. v. United States, 449 U.S. 383 (1981). Upjohn clarifies that the language from Hickman, on which both Dentsply and AMR rely, stating that either party

may compel the other to disgorge whatever facts he has in his possession. Upjohn holds that statement simply "d[oes] not apply to oral statements made by witnesses." Upjohn, 449 U.S. at 399. Upjohn, then, makes clear that factual information learned from third-party interviews is attorney work product, and an opposing party is not entitled to discover the information conveyed absent a compelling showing of need. Defendant makes no effort in its reply to explain why this Supreme Court precedent -- specifically Upjohn's clarification of Hickman -- should not control the present dispute.

Respectfully submitted,

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Only the Westlaw citation is currently available.

United States District Court,
D. South Dakota,
Western Division.
LAMAR ADVERTISING OF SOUTH DAKOTA, INC., a South Dakota corporation, and Cody P. Burton, Plaintiffs,
v.
Richard W. KAY, Defendant.
No. CIV. 07-5091-KES.

March 1, 2010.

John K. Nooney, Aaron T. Galloway, Nooney Solay & Van Norman, LLP, Rapid City, SD, for Plaintiffs.

Heather Lammers Bogard, Costello Porter Hill Heisterkamp Bushnell & Carpenter, Rapid City, SD, for Plaintiffs and Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO COMPEL

VERONICA L. DUFFY, United States Magistrate Judge.

INTRODUCTION

***1** The original plaintiffs in this action, Richard and Deana Kay, brought the original lawsuit in December, 2007, alleging negligence against original defendants Lamar Advertising of South Dakota, Inc. ("Lamar") and Cody Burton, and seeking damages for injuries arising from a motor vehicle collision. Docket No. 1. Jurisdiction was founded on diversity of citizenship among the parties and an amount in controversy of at least $75,000. *See* 28 U.S.C. § 1332. The Kays settled their claim against Lamar and Mr. Burton in October, 2009. Throughout the proceedings and settlement, Lamar indicated its belief that Mr. Kay was contributorily negligent, as well as its intent to seek contribution from Mr. Kay as to the settlement paid to Mrs. Kay.

On December 15, 2009, Mr. Kay filed a motion requesting a determination by the district court that the settlement allocation paid by Lamar to Mrs. Kay was unreasonable. Docket No. 143. On or about December 10, 2009, Mr. Kay served plaintiffs with various discovery requests regarding the settlement and allocation. Docket No. 181. In January, 2010, plaintiffs served responses to Kay's requests. *Id.* Plaintiffs' responses denied knowing what "settlement negotiations" meant, asserted that the information sought was available through Kay's former counsel, and objected based on the attorney-client and work product privileges. Thereafter defendant Kay filed this motion to compel production, pursuant to Federal Rule of Civil Procedure 37 and Local Rule 37.1. The district court, the Honorable Karen E. Schreier, Chief Judge, referred the motion to this magistrate judge for resolution pursuant to 28 U.S.C. § 636(b)(1)(A).

FACTS

The facts, insofar as they are pertinent to the present motion, are as follows. Mr. and Mrs. Kay were injured on July 19, 2006, when a boom truck driven by Cody Burton, an employee acting within the scope of his employment with Lamar, collided with the Kays' motorcycle. The Kays filed suit against Lamar and Mr. Burton in December, 2007. Docket No. 1. Lamar and Burton filed a counterclaim against Mr. Kay in March, 2008. Docket No. 29. The Kays settled their claim against Lamar and Burton in October, 2009, but Lamar and Burton advised their intent to seek contribution from Mr. Kay for payment made to Mrs. Kay for her injuries. The Kays did not inform counsel representing Mr. Kay on Lamar's counterclaim against him, Attorney Heather Lammers Bogard, as to the details of the

settlement allocation between Mr. and Mrs. Kay. Attorney Eric Neiman, who represented the Kays through the date of settlement, withdrew from representation on December 2, 2009. Docket No. 142. The district court realigned the parties when Lamar and Mr. Burton sought contribution from Mr. Kay for payment made to Mrs. Kay in settlement for her injuries. Accordingly, the original plaintiff Mr. Kay is now the defendant in the action, and the original defendants are now the named plaintiffs. *See* Docket No. 146.

***2** Following the settlement, Mr. Kay's counsel on the contribution claim filed a motion for a determination that the settlement allocation was unreasonable. Docket No. 143. In support of that motion, Mr. Kay asserted that the total settlement among the original parties was $1.5 million, and that Mrs. Kay received an allocation of $525,000, despite evidence showing that her actual medical bills totaled approximately $126,500.[FN1] *Id.* Mr. Kay's medical bills, however, totaled $512,000, and his claimed loss of income and lost stock options were in excess of $6 million. *Id* . Mrs. Kay asserted no claim for lost earning capacity. *Id.* The plaintiffs resisted Mr. Kay's motion for a determination that the settlement allocation was unreasonable. Docket No. 148.

> FN1. Since the date of the district court's referral to this magistrate, plaintiffs have stipulated to the amount of medical bills incurred by Mrs. Kay as a result of the accident, but have not stipulated that the treatment Mrs. Kay received was reasonable or necessary, or that such costs were incurred as a proximate result of the accident. *See* Docket No. 208. Plaintiffs have continued to deny liability for the accident itself and have denied responsibility for payment of Mrs. Kay's medical bills. *Id.*

Mr. Kay served various discovery requests on the plaintiffs in December, 2009. The plaintiffs objected to the requests and supplied only limited responses on January 19, 2010. Docket No. 198. Mr. Kay thereafter requested that plaintiffs' counsel revisit the discovery requests to see whether any of plaintiffs' answers could be supplemented. Plaintiffs continued to object on grounds that the information sought was privileged and otherwise readily discoverable through former counsel, but nonetheless provided supplemental discovery responses on or near February 1, 2010. Docket No. 196. Despite admitting that they have provided additional discovery beyond the district court's discovery deadline of December 5, 2008, plaintiffs now assert an objection to Mr. Kay's motion to compel on grounds that the district court's deadline for discovery has passed. *Id.*

Mr. Kay asserts that plaintiffs' initial answers to his requests, as well as their supplemental responses, are inadequate. Mr. Kay also notes that although the plaintiffs objected on grounds of privilege, they failed to provide an appropriate privilege log pursuant to *Vaughn v. Rosen*[FN2], and did not describe the nature of any of the withheld information pursuant to Federal Rule 26(b)(5)(A)(ii) so that he could assess the plaintiffs' claims. Mr. Kay argues that discovery as to the approximation of the Kays' total recovery, Lamar's proportionate liability, and other factors as to the reasonableness of the settlement goes to the heart of plaintiffs' claim that they are entitled to contribution from Mr. Kay, and that any information relating to the settlement allocation and settlement negotiations is discoverable. Docket No. 180, at 5.

> FN2. *See Vaughn v. Rosen,* 484 F.2d 820 (D.C.Cir.1973), *cert denied,* 415 U.S. 977 (1974) (requiring parties whom object to discovery on grounds of privilege to itemize and index the documents allegedly exempt from discovery, so the court may determine whether any protection or privilege actually applies).

Plaintiffs resist Mr. Kay's motion to compel on various grounds, including that the information sought is either subject to privilege, is readily obtainable through former counsel, or does not exist.

Docket No. 201.

DISCUSSION

A. Whether the Information Sought is Discoverable

1. Scope of Discovery Under Rule 26

Federal Rule of Civil Procedure 26(b)(1) sets forth the standard governing the scope of discovery in civil cases:

> (1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense-including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

***3** *See* Fed.R.Civ.P. 26(b)(1).

The advisory committee's note to the 2000 amendments to Rule 26(b)(1) provide guidance on how courts should define the scope of discovery in a particular case:

> Under the amended provisions, if there is an objection that discovery goes beyond material relevant to the parties' claims or defenses, the court would become involved to determine whether the discovery is relevant to the claims or defenses and, if not, whether good cause exists for authorizing it so long as it is relevant to the subject matter of the action. The good-cause standard warranting broader discovery is meant to be flexible.
>
> The Committee intends that the parties and the court focus on the actual claims and defenses involved in the action. The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision. A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard.... In each case, the determination whether such information is discoverable because it is relevant to the claims or defenses depends on the circumstances of the pending action.
>
> The rule change signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.... When judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. The court may permit broader discovery in a particular case depending on the circumstances of the case, the nature of the claims and defenses, and the scope of the discovery requested.

See Fed.R.Civ.P. 26(b)(1) advisory committee's note.

The same advisory committee's note further clarifies that information is discoverable only if it is relevant to the claims or defenses of the case or, upon a showing of good cause, to the subject matter of the case. *Id.* "Relevancy is to be broadly construed for discovery issues and is not limited to the precise issues set out in the pleadings. Relevancy ... encompass[es] 'any matter that could bear on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.' "

E.E.O.C. v. Woodmen of the World Life Ins. Society, 2007 WL 1217919 at *1 (D.Neb. March 15, 2007) (quoting *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351 (1978)). The party seeking discovery must make a "threshold showing of relevance before production of information, which does not reasonably bear on the issues in the case, is required." *Id.* (citing *Hofer v. Mack Trucks,* Inc., 981 F.2d 377, 380 (8th Cir.1993)). "Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery must describe with a reasonable degree of specificity, the information they hope to obtain and its importance to their case." *Id.* (citing *Cervantes v. Time, Inc.,* 464 F.2d 986, 994 (8th Cir.1972)).

***4** Discoverable information itself need not be admissible at trial; rather, "discovery of such material is permitted if reasonably calculated to lead to the discovery of admissible evidence." *See* Fed.R.Civ.P. 26(b)(1) advisory committee's note. Additionally, Rule 26(b)(2) requires the court to limit discovery if it determines, for example, that the discovery sought is unreasonably cumulative or duplicative or that "the burden or expense of the proposed discovery outweighs its likely benefit ..." *See* Fed.R.Civ.P. 26(b)(2)(C); *see also Roberts v. Shawnee Mission Ford, Inc.,* 352 F.3d 358, 361 (8th Cir.2003) ("The rule vests the district court with discretion to limit discovery if it determines, inter alia, the burden or expense of the proposed discovery outweighs its likely benefit."); *Continental Illinois Nat'l Bank & Trust Co. of Chicago v. Caton,* 136 F.R.D. 682, 684-85 (D.Kan.1991) ("All discovery requests are a burden on the party who must respond thereto. Unless the task of producing or answering is unusual, undue or extraordinary, the general rule requires the entity answering or producing the documents to bear that burden.").

2. The Right of Contribution and Reasonableness of Settlement

In this case, plaintiffs seek contribution from the defendant, Mr. Kay, following settlement with him and his wife. South Dakota state substantive law governs the underlying diversity action. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938). Under South Dakota law, contribution is available to a settling tortfeasor. SDCL § 15-8-12. South Dakota statutory law does not specifically provide that in order to recover contribution from a joint tortfeasor with whom the defendant has settled, a defendant must prove that the settlement reached was reasonable, but the South Dakota Supreme Court has acknowledged that "[i]n contribution actions, 'a compromiser must sustain the burden of proof, not only as to the compromiser's own liability to the original plaintiff, but also as tot he amount of damages and the reasonableness of the settlement.' " *Plato v. State Bank of Alcester,* 555 N.W.2d 365, 368 n. 3 (S.D.1996) (dictum) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 50 at 339 (5th ed.1984) (footnote omitted)).

Neither party cites any South Dakota case that is directly on point to demonstrate the plaintiffs' duty to demonstrate the reasonableness of the settlement before they may recover contribution from Mr. Kay. Instead, both parties cite *Cook v. State,* 746 N.W.2d 617, 622 (Iowa 2001), for the proposition that the right to contribution by a joint tortfeasor may be defeated if the settlement was not reasonable. *See* Docket Nos. 148, 180. The Eighth Circuit has acknowledged that "[c]ontribution is available to a settling tortfeasor if the amount paid in settlement is reasonable." *Transport Ins. Co. v. Chrysler Corp.,* 71 F.3d 720, 722 (8th Cir.1995) (citing *Automobile Underwriters Corp. v. Harrelson,* 409 N.W.2d 688, 690 (Iowa 1987)). The general rule is that "[t]he reasonableness of the settlement is always open to inquiry in [a] suit for contribution, and the tortfeasor making [the settlement payment] has the burden of establishing the reasonableness of the payment he has made." RESTATEMENT (SECOND) OF TORTS 886A cmt. (2):(d).

***5** Given the foregoing, the right to *recover* contribution does not automatically follow the right to

simply *seek* contribution. *See Perrella v. Shorewood RV Center*, No. Civ.03-424, 2004 WL 741567, at *3 (D.Minn. March 31, 2004) (citing *Neussmeier Electric, Inc. v. Weiss Mfg Co.*, 632 N.W.2d 248, 253 (Minn.Ct.App.2001)). "Where a defendant seeks contribution from a third-party defendant for settlement payments, it is the defendant's burden to demonstrate that the settlement was reasonable." *Samuelson v. Chicago, Rock Island and Pacific R.R. Co.*, 178 N.W.2d 620, 622 (Minn.1970). The defendant must also demonstrate "that [the settling tortfeasor] paid more than its 'fair share' of the liability burden." *Nuessmeier Electric*, 632 N.W.2d at 253. " 'Fair share' is measured by the extent to which each tortfeasor could be liable to the injured parties." *Id.*

Here, the plaintiffs seek contribution from Mr. Kay as to the settlement paid by plaintiffs to Mrs. Kay. In order for plaintiffs to actually recover contribution for the settlement payments they made to Mrs. Kay, they must make a prerequisite showing that the underlying settlement was reasonable. Clearly, details about the settlement qualify as a matter that bears on, or that reasonably could lead to other matter that could bear on, whether the settlement was reasonable. Therefore, details of the settlement and settlement negotiations are relevant to plaintiffs' claim for contribution against Mr. Kay. Therefore, the documents sought by Mr. Kay relating to settlement negotiations and the settlement allocation are discoverable unless some exemption based on privilege or other exception applies. The court now turns to the specific discovery requests made by Mr. Kay, and the plaintiffs' respective responses and objections, to determine whether any of the requested information is exempt from discovery.

B. Interrogatory No. 1 and Request for Production No. 3

Mr. Kay's first interrogatory and third request for production seek copies of detailed information about the settlement negotiations that took place between plaintiffs and defendant's former counsel, to include (1) the date of all discussions/negotiations; (2) the manner or mode of each communication; and (3) the content of each communication. Docket No. 196, at 4. Plaintiffs initially responded by objecting on grounds that they did not know what was meant by "settlement negotiations," and that any such information was available to Mr. Kay through his former counsel of record, Eric Neiman. *Id.* Plaintiffs later supplemented their answer by noting that there were "on and off negotiations" among counsel and clients for "more than an eighteen month period of time." *Id.* Plaintiffs attached bates-stamped "copies of the documents which generally chronicle those communications" and again noted that all of the information was available through Mr. Kay's former counsel. *Id.* There is no indication that the plaintiffs disclosed the content of each of the communications at issue, and Mr. Kay's reply brief does not indicate whether the bates-stamped documents he received from plaintiffs are responsive to his request. *See* Docket No. 201.

1. The Appropriate Scope of Discovery Where Documents Were Previously Produced to Former Counsel

***6** Mr. Kay argues that this court should construe Rule 26(b)(2)(C)(i) as requiring plaintiffs to provide copies of documents or information apparently obtainable through Mr. Kay's former counsel. Mr. Kay argues that Rule 26 permits a court to "limit discovery if it is shown that the information can be obtained from another source that is 'more convenient, less burdensome, or less expensive.' " Docket No. 180 (quoting Fed.R.Civ.P. 26(b)(2)(C)(I)). Mr. Kay's former counsel, Attorney Eric Neiman, who represented the Kays throughout settlement negotiations, resides in Oregon state and withdrew from representation in December, 2009.

The plaintiffs have not demonstrated that obtaining discovery from Kay's former counsel is more convenient, less burdensome, or less expensive than obtaining the documents from plaintiffs, who are located in Rapid City, South Dakota. Rule 26 is in-

tended to "guard against redundant or disproportionate discovery," but neither party has presented evidence that the discovery from plaintiffs with respect to Interrogatory 1 and Request for Production 3 is unreasonably cumulative, redundant or disproportionate. *Benson v. Giordano*, No. 05-Civ-4088, 2007 WL 2355783, at * 2 (D.S.D. Aug. 17, 2007); Fed.R.Civ.P. 26 advisory committee's notes to 1983 amendments. Rather than weigh the respective convenience to or burdens incurred by Mr. Kay or plaintiffs, the court is of the opinion that efficiency and prudence weigh in favor of compelling plaintiffs to produce the documents rather than requiring Mr. Kay to obtain the documents from former counsel who is no longer a participant in this litigation.

Implicit in plaintiffs' objection and refusal to produce documents is that Mr. Kay should instead pursue legal remedies against his former counsel in order to obtain documents which plaintiffs admit they possess. Federal Rule 26(b)(1) permits the court to order "discovery of any matter relevant to the subject matter involved in the action" upon a showing of good cause. Fed.R.Civ.P. 26(b)(1). The court believes Mr. Kay has shown sufficient good cause to justify an order compelling disclosure from plaintiffs of any documents previously provided to Mr. Kay's former counsel. *See* Fed.R.Civ.P. 26(b)(1).

The Federal Rules permit the court to order a party seeking discovery to pay the expenses incurred by production of the requested documents. Accordingly, this court orders plaintiffs to produce the documents sought by Mr. Kay which it claims are otherwise obtainable through former counsel, provided that Mr. Kay pays the reasonable expenses incurred by plaintiffs in producing the documents. *See* Fed.R.Civ.P. 37(a)(5)(C).

2. Plaintiffs' Representation that "It is Unknown What is Meant By Settlement Negotiations"

The court notes that plaintiffs initially objected to Mr. Kay's request on grounds that they did not know what "settlement negotiations" meant. The court believes this objection borders on the frivolous, was not made in good faith, and directs plaintiffs to refrain from raising further similar objections. In the event either party raises a frivolous objection to any further interrogatories, the court recommends that the district court entertain a motion pursuant to Federal Rule 37 for costs and sanctions or other appropriate relief. *See* Fed.R.Civ.P. 37(b)(2).

C. Interrogatory No. 2 and Request for Production No. 4

***7** Mr. Kay's second interrogatory and fourth request for production seek information about all discussions regarding settlement allocation between plaintiff's counsel or his clients and Mr. Kay's former counsel, Eric Neiman, to include (1) the date of all discussions; (2) the manner of communication; and (3) the content of each communication. Docket No. 196, at 4-5. Plaintiffs responded by stating that settlement communications were "ongoing throughout the litigation" and that the information was otherwise available to Mr. Kay's former counsel. *Id.* at 4. Plaintiffs said the communications occurred via telephone, email, and correspondence, and referred Mr. Kay to the bates-stamped documents accompanying the supplemental response to Interrogatory 1. *Id.* Plaintiffs' counsel asserts that he "personally conducted a review of all correspondence and documents" in his possession with respect to conversations with plaintiffs, and that no correspondence or documentation exists regarding allocation of settlement monies. *Id.* at 5.

1. Objection on Grounds that Information is Otherwise Available Through Former Counsel.

As this court has already set forth *supra*, plaintiffs are directed to produce any and all information in their possession that they claim is "otherwise available" through Mr. Kay's former counsel of record

but that is responsive to Mr. Kay's discovery requests. Mr. Kay shall pay the reasonable cost of plaintiffs' production of the information. *See* Fed.R.Civ.P. 37(a)(5)(C).

2. Whether Plaintiffs' Answers are Satisfactory

Mr. Kay's Interrogatory 2 and Request for Production 4 request the specific date of any settlement discussions had between plaintiffs or their counsel, and Mr. Kay or his counsel, as well as the manner of each communication. Plaintiffs' response states only that communication was "ongoing throughout the litigation," which lasted for approximately eighteen months, and that telephone, email, and written correspondence took place during that time. Docket No. 196, at 4. The court finds plaintiffs' answers to be incomplete and generally nonresponsive. A response of "ongoing" to a request for dates certain over the course of a period of eighteen months is not sufficient. Certainly plaintiffs' counsel kept records of communications had with Mr. Kay and his counsel for billing purposes as well as to inform his client of what was taking place in the case, and it is unlikely that any such records kept would be undated or unspecific as to the type of communication that was exchanged. Plaintiffs' answer suggests to this court that plaintiffs did not undertake to answer Mr. Kay's request in good faith.

Accordingly, the court directs plaintiffs's counsel to examine his files and determine dates certain upon which discussions took place as to settlement allocation, as well as the type of communication that was had on each of those respective dates. Plaintiffs' answer should disclose those dates to Mr. Kay, as well as the specific manner of each communication, as requested in Interrogatory 1.

D. Interrogatory No. 3 and Request for Production No. 5

***8** Mr. Kay's third interrogatory and fifth request for production seek detailed descriptions of all discussions about the settlement allocation between plaintiffs' counsel and Lamar (including discussions had between either party's representatives or clients), to include (1) the date of all discussions; (2) the manner of communication; and (3) the content of each communication. Docket No. 196, at 5-6. Request for Production 5 seeks copies of all documents referred to in plaintiffs' answer to Interrogatory 3. Plaintiffs initially responded by stating that the information sought was subject to the attorney-client privilege, and later supplemented its answer by asserting that, subject to the privilege objection, there were no documents responsive to the request. *Id.* at 6.

Mr. Kay argues that Rule 26(b)(5)(A)(ii) requires that plaintiffs invoking either the attorney-client or work product privilege describe the nature of any privileged documents or communications, so that the opposing party may assess the claims, and that plaintiffs have failed to so describe the documents or communications. Docket No. 180, at 5. Mr. Kay also argues that any privledge has been waived because plaintiffs paid the Kays in settlement despite denying liability for the motor vehicle accident that caused the Kays' injuries and maintaining that Mr. Kay was solely liable for the accident. *Id.* Plaintiffs assert that Mr. Kay's request seeks mental impressions by counsel that are privileged and exempt from discovery.

1. The Attorney-Client Privilege

The attorney-client privilege protects the confidentiality of communications between attorney and client made for the purpose of obtaining legal advice. In a diversity action, state law determines both the existence and scope of the attorney-client privilege. Fed.R.Evid. 501; *Gray v. Bicknell*, 86 F.3d 1472, 1482 (8th Cir.1996); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

Four elements must be present to invoke the attor-

ney-client privilege: (1) a client; (2) a confidential communication; (3) the communication was made for the purpose of facilitating the rendition of professional legal services to the client; and (4) the communication was made in one of the five relationships enumerated in SDCL § 19-13-3. *State v. Rickabaugh,* 361 N.W.2d 623, 624-25 (S.D.1985) (quoting *State v. Catch The Bear,* 352 N.W.2d 640, 645 (S.D.1984)); SDCL § 19-13-3. The party claiming the privilege carries the burden of establishing all of the essential elements. *Id.*

With respect to Interrogatory 3 and Request for Production 4, which seek detailed descriptions of all discussions regarding settlement allocation between plaintiffs and their counsel, the court agrees that plaintiffs are required to describe the nature of any withheld documents or communications, pursuant to Fed.R.Civ.P. 26(b)(5)(A)(ii), so that Mr. Kay can assess the claim of privilege. Rule 26(b)(5)(A)(ii) states that a party who "withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material," the party must expressly make the claim and "describe the nature of the documents, communications, or tangible things not produced or disclosed-and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed.R.Civ.P. 26(b)(5)(A)(ii). Plaintiffs have asserted that the information sought by Mr. Kay is privileged, but plaintiffs have not complied with Rule 26(b)(5)(A)(ii). To that end, the court directs plaintiffs to comply with Rule 26(b)(5)(A)(ii) by describing the nature of the communications withheld, so that Mr. Kay and counsel can assess the claim of privilege.

2. *Vaughn* Index

***9** Here, the court is unable to definitively determine whether the documents or information sought by Mr. Kay is covered by the attorney-client privilege based on the plaintiffs' mere assertion that the protection applies. The party asserting the protection of a privilege bears the burden of proving each element of the privilege. *Rickabaugh,* 361 N.W.2d at 624-25 (quoting *Catch The Bear,* 352 N.W.2d at 645). "In cases involving large numbers of documents or where the nature of the document will not likely be readily apparent on its face to the uninitiated observer, the proponent of work product protection must present *in camera* matter to the Court in a reviewable form such as in a 'Vaughn Index' which itemizes each document, provides a factual summary of its content and justification for withholding it." *Delaney, Migdail & Young, Chartered v. I.R.S.,* 826 F.2d 124, 128 (D.C.Cir.1987); *Vaughn v. Rosen,* 484 F.2d 820 (D.C.Cir.1973), *cert denied,* 415 U.S. 977, 94 S.Ct. 1564 (1974). A court can order a party to produce a *Vaughn* Index where a party asserts the protection of the attorney-client privilege as well. *See* Fed.R.Civ.P. 26(b)(5).

In the instant case, plaintiffs did not assert that the requisite elements are present to invoke the attorney-client privilege, and did not produce a privilege log for any documents or communications that it claims are privileged. Therefore, the court has no factual basis for concluding that any of the documents requested by Mr. Kay would be subject to the attorney-client or work product privileges. The plaintiffs are directed to compile a *Vaughn* index as to any documents in existence for *in camera* review that itemizes each withheld document, provides a factual rather than conclusory summary of its content and plaintiffs' justification for withholding it. *See Delaney, Migdail & Young, Chartered,* 826 F.2d at128; *Vaughn,* 484 F.2d 820, *cert denied,* 415 U.S. 977 (1974). The index shall be produced to the court by no later than March 14, 2010.

3. Whether Plaintiffs have Waived the Privilege

A protected privilege may be waived either expressly or by implication. *Sedco Internat'l, S.A. v. Cory,* 683 F.2d 1209, 1206 (8th Cir.), *cert. denied,* 459 U.S. 1017 (1982). Here, there has been no express waiver of either the attorney-client or work product privileges.

Mr. Kay cites *In Re Consolidated Litigation Concerning Int'l Harvester's Disposition of Wis. Steel*, 666 F.Supp. 1148 (N.D.Ill.1987), for the proposition that the court should order disclosure of documents where the information contained therein was inconsistent with the claimed confidentiality of the documents. *See* Docket No. 180, at 4-5. Mr. Kay asserts that "the attorney-client privilege is waived when discovery sought is inconsistent with a party's claims." Docket No. 180, at 4. However, this is a misstatement of the rule regarding voluntary disclosures of information and waiver of the attorney-client privilege.

***10** The case of *In Re Consolidated Litigation* involved a corporation's waiver of attorney-client privilege where the corporation failed to prevent disclosure of privileged information in various documents prior to turning over the documents to the opposing party for examination and review. *Id.* at 1150-58. The documents, which the corporation later claimed were subject to the attorney-client privilege, had been actually disclosed to third parties and were not redacted or screened to prevent disclosure of confidential information. *Id.* Therefore, that case stands for the proposition that where a party's *treatment* of documents is inconsistent with their claimed confidentiality, the attorney-client privilege is waived. *Id.* at 1157-58. The court does not read the case as holding that the privilege is waived where the information itself is inconsistent with the documents' claimed confidentiality, as Mr. Kay argues.

Here, there is no indication that communications between plaintiffs and their counsel have already been disclosed to Mr. Kay by plaintiffs in a manner that is inconsistent with plaintiffs' present claims that the communications are subject to privilege. Plaintiffs have maintained that any discussions between them and counsel are privileged and not subject to discovery. Likewise, plaintiffs themselves have not placed the settlement at issue, which circumstance has been held to waive the protection of a privilege. *See St. Louis Convention and Visitors' Commission v. Nat'l Football League et al.*, No. 4:95CV2443 JCH, 1997 WL 1419394, at *2 (E.D.Mo. Sept. 10, 1997); *Sedco*, 683 F.2d at 1206 (holding that a party may waive a claim of privilege by putting at issue the underlying subject matter of the privilege). Instead, it was Mr. Kay, rather than the plaintiffs, who placed the settlement at issue by filing the motion for a determination that the settlement allocation was unreasonable (Docket No. 143), and by utilizing the settlement agreement itself and other related documents to show that the settlement was unreasonable. *See* Docket No. 145; *St. Louis Convention*, 1997 WL 1419394, at *2-3.

Mr. Kay also argues that the fact that plaintiffs paid the Kays in settlement operates as a waiver of any attorney-client privilege as to settlement discussions and allocation of settlement monies, because payment to the Kays is inconsistent with plaintiffs' assertion that the Kays were not entitled to damages. Docket No. 180, at 4-5. The court disagrees with Mr. Kay's argument that the settlement constitutes an admission by plaintiffs that they were liable for the Kays' damages. Public policy has long favored the resolution of disputes through settlement rather than through litigation, and statements made during settlement discussions are generally not admissible to prove liability. *See* Fed.R.Evid. 408(a)(2), 408(b) advisory committee's note. Furthermore, the precise language of the parties' settlement agreement advises that payment made to Mr. and Mrs. Kay was "not to be construed as an admission by Lamar, Burton, or Zurich, that either Lamar or Burton has any liability, or obligation of any type or kind to" the Kays. Docket No. 145-2, at 3, 8. The settlement release forms also state that the settlement paid by plaintiffs was a compromise of a disputed claim and was not an admission of liability by Lamar and Burton. *Id.*

***11** Based on the foregoing, the court finds that plaintiffs have not waived the attorney-client privilege as to discussions they had with counsel regarding settlement or the settlement allocation.

However, the court finds it appropriate that the plaintiffs submit a *Vaughn* index in accordance with the court's direction above.

E. Interrogatory No. 4 and Request for Production No. 6

Mr. Kay's fourth interrogatory and sixth request for production seek a detailed description of "all factors considered with regard to settlement allocation" by plaintiffs' counsel and his representatives or clients, along with copies of any documentation of the same. Plaintiffs objected on grounds that the requested information seeks discovery of counsel's mental impressions, and is covered by the work product or attorney-client privilege. Docket No. 196, at 6. Plaintiffs later supplemented their response with a continued objection based on attorney-client privilege and a reference to the bates-stamped documents produced alongside Interrogatory 1. *Id.*

1. The Work Product Privilege

The work product privilege is "distinct from and broader than the attorney-client privilege." *In re Green Grand Jury Proceedings*, 492 F.3d 976, 980(8 th Cir.2007) (quoting *In re Murphy*, 560 F.2d 326, 337 (8th Cir.1977)). While the purpose of the attorney-client privilege "is to encourage clients to make a full disclosure of all favorable and unfavorable facts to their legal counsel," *Murphy*, 560 F.2d at 337, the work product privilege "functions not merely and (perhaps) not mainly to assist the client in obtaining complete legal advice but in addition to establish a protected area in which the lawyer can prepare his case free from adversarial scrutiny." *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 62 (7th Cir.1980). Because the work product privilege protects the attorney's thought processes and legal recommendations, both the attorney and the client hold the privilege. *United States v. Under Seal (In re Grand Jury Proceedings # 5)*, 401 F.3d 247, 250 (4th Cir.2005) (citation omitted); *Genentech, Inc. v. U.S. Intern. Trade Com'n*, 122 F.3d 1409, 1415 (Fed.Cir.1997) (internal quotation marks and citation omitted).

The work product privilege encompasses both "ordinary" work product and "opinion" work product. *Baker v. General Motors Corp.*, 209 F.3d 1051, 1054(8 th Cir.2000). Ordinary work product includes raw factual information. *See Gundacker v. Unisys Corp.*, 151 F.3d 842, 848 n. 4 (8th Cir.1998) . Ordinary work product is not discoverable unless the party seeking discovery has a substantial need for the materials and the party cannot obtain the substantial equivalent of the materials by other means. *See* Fed.R.Civ.P. 26(b)(3). Opinion work product includes counsel's mental impressions, conclusions, opinions or legal theories. *See Gundacker*, 151 F.3d at 848, n. 5. "Opinion work product enjoys almost absolute immunity and can be discovered only in very rare and extraordinary circumstances, such as when the material demonstrates that an attorney engaged in illegal conduct or fraud." *Baker*, 209 F.3d at 1054 (citing *In re Murphy*, 560 F.2d 326, 336 (8th Cir.1977)).

***12** In a diversity case, such as this one, courts must "apply federal law to resolve work product claims." *McElgunn v. Cuna Mut. Group*, No. 06-Civ-5061-KES, 2008 WL 5105453, at *1 (D.S.D. Dec. 2, 2008) (quoting *Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1053 (8th Cir.2000)). Rule 26(b) of the Federal Rules of Civil Procedure permits discovery of any matter "not privileged." Rule 26(b)(3) provides that documents "prepared in anticipation of litigation or for trial by or for another party or by its representative" are discoverable only if the requesting party demonstrates a "substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." The rule further states that the court will "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed.R.Civ.P. 26(b)(3). To assess the presence

of either the attorney-client privilege or the work product privilege, the court may order documents to be submitted for *in camera* review. Fed.R.Civ.P. 26(b)(5).

With the applicable Federal Rules in mind, the court now turns to the test adopted by the Eighth Circuit for determining whether documents were prepared in anticipation of litigation, and thus are subject to the work product privilege. The test is "a factual determination" which asks

> whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.

Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir.1987). The Advisory Committee notes following Rule 26 indicate that "[m]aterials assembled in the ordinary course of business ... or for other non-litigation purposes" are not subject to qualified immunity under the Rule. Fed.R.Civ.P. 26(b)(3) advisory committee's note.

Mr. Kay's fourth interrogatory and sixth request for production seek "all *factors considered* with regard to settlement allocation...." Docket No. 196, at 6 (emphasis added). To the extent Mr. Kay seeks to discover any raw factual information considered by plaintiffs and counsel as to the settlement allocation, the request seeks ordinary work product. Although the court cannot discern whether the information is ordinary or opinion work product, the court finds that in either case, the information is not discoverable. If the information were to be classified ordinary work product, the information is not discoverable because Mr. Kay has not demonstrated that he has a substantial need for the information and cannot obtain the substantial equivalent of the same by any other means. Fed. R.Civ.P. 26(b)(3). Similarly, if the information is classified as opinion work product which has been reduced to a written format, an even greater measure of protection applies, and the information is only discoverable in "rare and extraordinary circumstances." *In re Murphy*, 560 F.2d at 336. Mr. Kay has not met his burden of showing why the information he seeks-specifically, "all factors considered with regard to settlement allocation," is either not protected by the work product doctrine or is otherwise discoverable.

***13** The court also notes that to the extent Mr. Kay's Interrogatory 4 and Request for Production 6 seek information that has not been previously reduced to a written or other documented, discoverable format, parties cannot be ordered to produce documents which are not already in existence. *Cone v. Rainbow Play Systems, Inc.*, No. CIV 06-4128, 2009 WL 4891753, at *1 (D.S.D. Dec. 16, 2009); *Healthcare Management Solutions, Inc. v. Hartle*, No. 8:07CV05, 2007 WL 1726585, at *3 (D. Neb. June 13, 2007). An attorney's bare thought processes and legal recommendations are entitled to "almost absolute immunity." *Baker*, 209 F.3d at 1054 (citing *In re Murphy*, 560 F.2d at 336). Moreover, the court cannot order parties to create or produce new documents in order to respond to an opposing party's discovery request.

To that end, Lamar shall produce to the court the documents which it claims are subject to the attorney-client or work product privileges for *in camera* review. Lamar shall summarize, in factual and not conclusory terms, the nature of the material withheld and shall link each specific claim of privilege to specific material. *See Vaughn*, 484 F.2d at 826-28. The court can then assess whether statutory attorney-client or work product privileges apply to the documents and whether they are subject to discovery. Lamar shall produce all documents described above, whether directly to Mr. Kay's counsel, or to the court for *in camera* review, within 14 days from the date of this order. Plaintiffs are not required to compile data or documents relating to counsel's thought processes, mental impressions,

and the like. To the extent that Mr. Kay's request seeks protected opinion work product, his motion to compel is denied.

2. Whether discovery should be limited where former counsel was provided documents at issue

As the court noted above, plaintiffs are ordered to review their records and produce the requested information and documents which it does not claim are subject to privilege, and Mr. Kay is directed to pay the reasonable expenses incurred as a result of providing the discovery. *See* Fed.R.Civ.P. 37(a)(5)(C). Plaintiffs shall file an appropriate *Vaughn* index as to any and all documents in existence that it has withheld on grounds of attorney-client or work product privilege.

F. Whether Kay's Motion Should be Denied as Untimely

Finally, the court will address plaintiffs' assertion that the court should deny Mr. Kay's motion to compel discovery because the district court's original scheduling order set the deadline for discovery to December 5, 2008. Docket No. 198, at 2. Plaintiffs' objection is moot. Following a pretrial conference with the parties on February 5, 2010, the district court amended its scheduling order and extended the deadline for completion of discovery to February 26, 2010. *See* Docket No. 205.

The court finds significant to point out that on December 12, 2008, this court issued an order directing plaintiffs (then defendants) to issue amended answers to Mr. and Mrs. Kay's request to admit the fact of their respective medical expenses (Docket No. 78), plaintiffs only recently stipulated to the amount of medical bills incurred by Mrs. Kay as a result of the accident. Docket No. 208. Specifically, plaintiffs' stipulation was filed on February 10, 2010. *Id.* Plaintiffs waited more than an entire calendar year to admit to the amount, which could not reasonably be disputed, despite being ordered to issue amended answers regarding the issue fourteen months earlier. Plaintiffs cannot in fairness object to Mr. Kay's request for information regarding a settlement allocation that occurred in December, 2009, while disregarding their own obligation to comply with court orders for more than a year.

***14** Furthermore, although plaintiffs fashion their compliance with Mr. Kay's recent request for discovery as "informal," plaintiffs in fact produced additional discovery beyond the district court's deadline. Mr. Kay's requests seek information only as to the settlement among the parties which was effectuated in December, 2009. Mr. Kay could not have requested discovery prior to December, 2008, regarding a settlement that had not taken place.

CONCLUSION

The court grants in part and denies in part defendant's motion to compel in accordance with the above opinion. Plaintiffs shall serve amended responses to plaintiffs' interrogatories and requests for production within 14 days of this order. As to any documents withheld on any claim of privilege, the plaintiffs shall produce those documents to the court for *in camera* review with the appropriate index or other documentation in support of its claim of privilege.

NOTICE TO PARTIES

Pursuant to 28 U.S.C. § 636(b)(1)(A), any party may seek reconsideration of this order before the district court upon a showing that the order is clearly erroneous or contrary to law. The parties have fourteen (14) days after service of this order to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. *See* Fed.R.Civ.P. 72(a). Failure to file timely objections will result in the waiver of the right to appeal matters not raised in the objections. *Id.* Objections must be timely and specific in order to require review by the district court.

D.S.D.,2010.

Lamar Advertising of South Dakota, Inc. v. Kay
Slip Copy, 2010 WL 758786 (D.S.D.)

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Not Reported in F.Supp., 1993 WL 12811 (E.D.Pa.), Med & Med GD (CCH) P 41,054
(Cite as: 1993 WL 12811 (E.D.Pa.))

H

United States District Court, E.D. Pennsylvania.
UNITED STATES of America
v.
URBAN HEALTH NETWORK, INC., et al.
Civ. No. 91-5976.

Jan. 19, 1993.

MEMORANDUM

LOUIS H. POLLAK, District Judge.

***1** Before me are (1) defendants' motion to compel discovery responses (doc. # 17), (2) plaintiff's response to defendants' motion to compel, and (3) defendants' reply memorandum in support of their motion to compel. For the reasons that follow, defendants' motion will be denied in part and granted in part.

I

The Tortuous History of Discovery

In 1989, two doctors who were providing medical services on a contractual basis to patients at the Philadelphia Nursing Home were advised that a federal investigation of their Medicare billing practices was underway. On September 23, 1991, the government filed a civil complaint against the two doctors and three related corporations alleging that, between 1986 and 1989, defendants had submitted false claims to the Medicare Trust Fund for services provided at the Philadelphia Nursing Home. The complaint described two types of allegedly false billing practices: (1) billing routine physical checkups, which are noncompensable, as reimbursable "comprehensive consultations," and (2) billing for physical therapy, which is reimbursable only when provided by a licensed physical therapist, although it had been administered by an unlicensed therapist. 3,646 comprehensive consultation claims were alleged to have been submitted during the relevant years, some of which were claimed to be false, and 10,614 physical therapy claims were said to have been submitted, all of which were allegedly unreimbursable.

On November 15, 1991, the government served its first request for production of documents upon defendants. A number of documents were turned over to the government on February 9, 1992, but defendants' document production continued through the fall of 1992.[FN1]

In February, 1992, defendants requested a broad range of documents-including all documents reviewed by the government during its investigation of defendants and all documents containing statements made to the government during its investigation. The government refused to provide much of the requested material. On September 18, 1992, defendants served a set of interrogatories, seeking, among other things, the identification of each and every Medicare claim that the government contends is improper and an explanation of why each claim was said to be improper. The government refused to comply with this request, and defendants filed the instant motion to compel addressed to its unrequited requests for documents and interrogatories.

Because the government had issued subpoenas for the depositions of various current and former employees of defendants, and because defendants felt it necessary to obtain the requested discovery before those depositions occurred, defendants also sought a protective order that no depositions would take place until the resolution of its motion to compel. Defendants' motion for a protective order was granted in a November 16, 1992 order, which also extended the discovery deadline to March 1, 1993.

In light of progress made by the parties toward resolving the discovery dispute since the filing of

defendants' motion to compel, there is not much distance separating the parties even on some of the discovery issues remaining for judicial resolution.

II

The Remaining Discovery Issues

A. *Identification of False Claims and the Government's Good Faith Basis for Asserted Falsity of Those Claims*

***2** Defendants request that the government immediately identify each of the physical therapy and comprehensive consultation claims alleged to be fraudulent and-as requested in its first set of interrogatories-detail the grounds on which the government contends that each claim was fraudulent and the factual basis for its allegations of fraud.[FN2] Since the filing of the instant motion to compel, the government has provided defendants with a list of all comprehensive consultation and physical therapy claims submitted by defendants during the years 1986-89, listed by patient identification number. The government contends that each of the more than 10,000 physical therapy claims was false due to the therapist's lack of license, and that some of these claims may have been fraudulent for other reasons. As for the 3,624 comprehensive consultation claims mentioned in the pleadings, the government has already identified 600 of those claims as false, and contends that, in the course of discovery, more false comprehensive claims may be identified. Importantly, the government has agreed, by the close of discovery (March 1, 1993), to inform defendants of (1) any physical therapy claims believed to be false for reasons other than the status of the therapist's license, *together with the reason each is believed to be false*, and (2) any additional comprehensive consultation claims believed to be false, *together with the reason that each of these claims, and each of the original 600, is believed to be false.*

Therefore, the disagreement between the parties is solely one of timing: whether the government should have to identify all claims believed to be false and why each claim is believed to be false immediately, or whether the government should be allowed until the close of discovery to make the requested identification and explanation. The government contends that it is not now able fully to comply with defendants' request for false claim identification because it has not yet been able to depose defendants' former and current employees and hence learn relevant details of defendants' billing practices and specifics about what defendants knew when they submitted the claims in question to Medicare.[FN3] I am satisfied that the government needs the additional months to comply with defendants' request for false claim identification and explanation of asserted false grounds, and that defendants are not unduly prejudiced by allowing depositions to take place without defendants' first having received all false claim information.

Therefore, based on the government's representation that it will identify each claim believed to be false and the good-faith basis for such beliefs no later than March 1, 1993, I decline to compel immediate compliance with defendants' request.

2. *Document Requests*

Defendants seek production of documents reflecting any reviews by Medicare or Pennsylvania Blue Shield (“PBS”) of defendants' claim submissions for work performed at the Philadelphia Nursing Home.[FN4] The parties apparently reached an agreement that defendants would subpoena prelitigation claim reviews and other documents directly from PBS, and that the government would facilitate this process. To that end, the government has provided defendants with the name of a PBS employee, Linda Hicks, whom the government indicates is the proper person to receive a subpoena. Defendants were initially concerned, in light of information they received from Ms. Hicks, that she was not the appropriate subpoena recipient, *see* De-

fendants' Reply Brief, Exhibit G; however, the government has continued to maintain that she is the appropriate recipient, and defendants apparently have served a subpoena on PBS (although they have not yet received the requested documents). Therefore, it seems to me that judicial intervention is not necessary at this stage.[FN5]

C. *Investigatory Statements of Interviewees*

***3** Defendants seek all notes of witness interviews taken during the investigation of defendants' claim submissions, or, alternatively, the names and dates of all persons interviewed by the government.[FN6] Defendants are particularly interested in such information so that they can determine when the government knew or should have known that defendants had submitted erroneous claim submissions, which is relevant to a possible statute of limitations defense. Recognizing this concern as valid, the government has agreed to provide defendants with the name and date of any individual interviewed by the government in connection with this case prior to September 23, 1988 (which, on the government's calculus, marks the first date on which the government could have learned of the alleged fraud and still have timely filed all counts of the complaint). *See* Plaintiff's Letter of December 28, 1992, to my law clerk, Timothy Macht.

There can be no doubt that notes prepared by an attorney or his agent[FN7] of oral interviews with witnesses are core work product requiring a very strong showing of necessity and unavailability by other means.[FN8] *E.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 397-402 (1981). Defendants argue that they have substantial need for the interview notes and an inability to obtain the information by other means because "the memories of the witnesses interviewed years ago when events were fresh in their minds about specific practices and procedures of defendants regarding billing during the relevant 1986-89 time period, have obviously faded."[FN9] Defendants' Mem. in Sup. at 29. However, as the government points out, assertions of possibly faded memories-as distinct from a witness's statement during the course of a deposition that she does not remember relevant facts-cannot suffice to overcome the work product privilege.[FN10] *See, e.g.*, *Lewandowski v. National R.R. Passenger Corp.*, Civ.A. No. 85-2036, 1985 WL 106 (Nov. 22, 1985 E.D.Pa.1985).

The names and dates of persons interviewed by the government during its investigation are also covered by the work product rule. *See, e.g.*, *Massachusetts v. First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149, 152-53 (D.Mass.1986). Defendants might have substantial need of some of this information in order to assert a statute of limitations defense;[FN11] however, the government has already agreed to provide defendants with a list of names and dates of all persons interviewed during the critical period before September 23, 1988.[FN12]

Therefore, the government will not now be ordered to turn over any interview notes or provide a list of any persons interviewed after September 23, 1988.

D. *Claim for Costs*

Defendants' claim for costs associated with filing this motion will be denied.

ORDER

For the reasons given in the accompanying memorandum, it is hereby ORDERED and DIRECTED that defendants' motion to compel (doc. # 17) is GRANTED in part and DENIED in part as follows:

***4** 1. Plaintiff shall be required to identify every physical therapy and comprehensive consultation claim believed to be fraudulent, and the reason(s) that each claim is believed to be false, by the close of discovery on March 1, 1993;

2. Plaintiff shall verify that the list of persons already provided to defendants contains all those reasonably likely to have information concerning

the claims or defenses at issue, or provide an additional list including government representatives with such relevant information; and

3. Defendants' motion is DENIED in all other respects, including their claim for costs.

FN1. Based on this discovery, the government moved for, and was given, leave to file an amended complaint alleging that the individual defendants used the corporate defendants as their alter egos.

FN2. For instance, in defendants' first set of interrogatories, defendants requested that the government identify all facts and information upon which it based its charge that defendants acted with "reckless disregard" in billing for physical therapy, and, similarly, that the government identify the bases for its charge that defendants knowingly misrepresented or recklessly disregarded the truth of both physical therapy and comprehensive consultation claims. *See* Plaintiff's Mem. in Opp., Exhibit 6, Interrogs. 25-27.

FN3. Defendants may have contributed to this state of affairs when, in response to plaintiff's interrogatories about defendants' billing practices, defendants stated that the information requested called for "a narrative response more properly the subject of deposition testimony." *See* Plaintiff's Mem. in Opp., Exhibit 8, Defendants' Resp. to Plaintiff's Interrogs. 29-30.

FN4. Defendants also seek documents reflecting communications and correspondence between the parties concerning those claim submissions (including notes of meetings and records of phone conversations). Such a request seems to me overly burdensome-especially because much of this information should be, or should have been, available to defendants from their own records.

FN5. If, however, Ms. Hicks indicates again that she is not the appropriate recipient, the government may be required to provide defendants with the name of another subpoena recipient at PBS.

FN6. Defendants also request a list of former or current Medicare, PBS, or Department of Health and Human Services representatives with knowledge of the claims contained in the amended complaint. Pursuant to § 4:01(a)(1)(A) of the Civil Justice Expense and Delay Reduction Plan, the government has already provided names and addresses of persons with relevant information concerning the claims or defenses at issue. Defendants object that the government has failed to list any PBS or other government representatives as having knowledge of the claims against defendants. Therefore, the prudent course, it seems to me, is that the government should verify that the list already provided to defendants contains all persons reasonably likely to have information concerning the claims and defenses at issue, or provide an additional list including government representatives with such information.

FN7. Fed.R.Civ.P. 26(b)(3) protects against disclosure of work product of an attorney or any other "representative" of a party. Therefore, defendants' attempt to distinguish those interview notes that may have been produced by a "non-attorney," *see* Defendants' Reply Brief at 15, falls flat. *See generally* 8 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2026, at 231 (1970).

FN8. Defendants suggest that I review the interview notes *in camera* with an eye toward identifying and/or redacting attorney opinion work product contained in the

notes. *See* Defendants' Mem. in Sup. at 30; Defendants' Reply Brief at 16. However, "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes" by the simple fact of " 'what he saw fit to write down regarding witnesses' remarks.' " *Upjohn,* 449 U.S. at 399 (citation omitted); *see also Hickman v. Taylor,* 329 U.S. 495, 512 (1947) (where the Court-noting the dangers of inaccuracy and untrustworthiness in forcing an attorney to turn over his notes of oral statements-"[did] not believe that any showing of necessity can be made under the circumstances of this case so as to justify production [of oral statements made by witnesses to lawyers])." Therefore, it may be impossible to excise offending instances of attorney mental impression from notes of oral statements. Besides, even if the interview notes could be found to contain no mental impressions of an attorney or other party representative, the notes would still be discoverable only upon a showing of substantial need and undue hardship, which I do not believe defendants have made. *See infra.*

FN9. Defendants also note that at least two witnesses have left the jurisdiction since the interviews occurred; however, mere absence from the state typically does not itself make a substantial showing of substantial need. *See* 8 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2025, at 217 (1970).

FN10. In their reply brief, defendants state that several witnesses have indicated to defense counsel that they do not recall the events listed in the complaint. *See* Defendants' Reply Brief at 16. If, at their depositions, these witnesses continue to insist that they cannot recollect important events, and it appears from the list provided by the government or by the witnesses' own deposition testimony that they were indeed interviewed by the government, defendants will have the opportunity at that time to file a new motion to compel, directed to production of the interview notes of those specific witnesses.

FN11. Additionally, defendants might claim a need to interview those with knowledge of relevant facts about the claims and defenses at issue; however, the government has already provided a list of all such persons-which it must now verify. *See supra* note 6.

FN12. Defendants claim that the government's calculus is incorrect because the two-year *state* statute of limitations should apply rather than the three-year *federal* statute of limitations used by the government and gleaned from 28 U.S.C. § 2415 ("Time for commencing actions brought by the United States"). *See* Defendants' Letter of December 31, 1992 to my law clerk, Timothy Macht. However, it is a well settled rule that "the United States is not subject to local statutes of limitations." *United States v. John Hancock Mut. Life Ins. Co.,* 364 U.S. 301, 308 (1960).

E.D.Pa.,1993.
U.S. v. Urban Health Network, Inc.
Not Reported in F.Supp., 1993 WL 12811 (E.D.Pa.), Med & Med GD (CCH) P 41,054

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United States District Court,
N.D. Oklahoma.
MaryAnn LAMER, an individual, Plaintiff,
v.
WILLIAMS COMMUNICATIONS, LLC, Defendant.
No. 04-CV-847-TCK-PJC.

Feb. 6, 2007.

N. Kay Bridger-Riley, Bridger-Riley & Associates PC, Jenks, OK, for Plaintiff.

OPINION AND ORDER

PAUL J. CLEARY, United States Magistrate Judge.

***1** This matter came before the Court for hearing on Defendant's Motion to Compel [Dkt. # 48]. Defendant's motion raised two issues for consideration by the Court: First, production of certain financial information, including Plaintiff's W-2s for 2002 and 2003. Plaintiff is to produce these documents by February 2, 2007. The Court considers Defendant's motion as to this matter to be moot. The second issue concerned whether Plaintiff must produce a privilege log listing affidavits she has obtained from non-party witnesses after the filing of this lawsuit. The Court addresses this issue below.

Plaintiff's counsel has represented that the only documents that she has not produced to Defendant are her notes from interviews with potential witnesses and affidavits based on these notes. Counsel further represented that all of her notes and the affidavits were prepared after the filing of this lawsuit on November 3, 2004 [Dkt. # 1]. Relying on *Schipp v. General Motors Corp.*, 457 F.Supp.2d 917 (E.D.Ark.2006), Defendant argues that the affidavits must be listed on a privilege log since they may be "verbatim non-party witness statements." *Id.* at 924.

Legal Standard

The Work Product doctrine protects from discovery those materials prepared by an attorney in anticipation of litigation. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."). With respect to civil litigation, the principles announced in *Hickman* have been codified in Fed.R.Civ.P. 26(b)(3), and one must look to this rule and its interpretations for guidance in applying work-product protection. *See*, Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, p. 481 (ABA 4th ed.). The work-product doctrine strikes a balance between the benefits of an adversary system and liberal discovery rules. *Anderson v. Hale*, 202 F.R.D. 548 (N.D.Ill.2001). "On the one hand, liberal discovery rules provide parties with the fullest possible knowledge of the operative facts of the case before trial to reduce surprise and ensure that cases are decided on the merits. On the other hand, to arrive at the truth, the adversary system pits attorneys against each other and charges them with gathering information, sifting through it, and developing strategy." *Id.* at 553-54 (citations omitted).

In federal court, the proponent of a privilege has the burden of proving its applicability. *E.g.*, *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976 (7th Cir.1996). Once the proponent has met this burden, the burden shifts to the party seeking production to show both a substantial need and an inability to get the information from some other source. Epstein, *supra*, at 492.

Discussion

At the hearing held February 1, 2007, Plaintiff's counsel represented that the only documents she has not produced to Defendant are her notes of interviews with certain witnesses and affidavits based on those notes, all prepared after this action was commenced. Defendant concedes that counsel's notes of her post-lawsuit interviews are protected work product, but contends that the affidavits are fact statements that, at the least, must be listed on a privilege log. Defendant requests the Court to order Plaintiff's counsel to list these interviews on a privilege log. This would disclose to Defendant which witnesses Plaintiff's counsel felt were important to interview and get affidavits from. Plaintiff argues that even listing these witnesses' names on a privilege log compromises her work-product protection.

***2** Defendant relies on *Schipp* in which the court noted that while an attorney's notes taken during an interview are work product, "any verbatim non-party witness statements are neither privileged nor work product and must be produced." *Schipp,* 457 F.Supp.2d at 924.

Other courts disagree with the view expressed in *Schipp.* The work-product doctrine creates a certain "degree of privacy" protected from the broad scope of discovery to maintain balance and fairness in adversarial competition. *See Hickman,* 329 U.S. at 510-11. This protection includes such documents as a "lawyer's research, analysis of legal theories, mental impressions, and notes." Courts have held that it also protects "memoranda of witness statements." *See, S.E.C. v. Brady,* 238 F.R.D. 429, 441 (N.D.Tex.2006) (citations omitted); *Anderson v. Hale,* 202 F.R.D. 548, 554 (N.D.Ill.2001) (Tapes of witness interviews done after lawsuit filed were protected work product).

LCvR26.4 of the Local Rules of this Court describes the required contents of a privilege log. The rules provides in pertinent part:

> This rule requires preparation of a privilege log with respect to all documents withheld on the basis of a claim of privilege or work product protection except the following: written communications between a party and its trial counsel after commencement of the action and the work product material created after commencement of the action.

The affidavits at issue are work product and were prepared after commencement of the action; thus, under LCvR26.4 they are protected from production absent special circumstances. There is no record evidence before the Court of any special circumstances that would render the affidavits producible in this instance. Furthermore, the undersigned believes that even mere disclosure of the names of non-party witnesses Plaintiff's counsel has interviewed would represent an invasion of counsel's mental impressions and strategies. "[A]n interrogatory asking a party to identify all persons interviewed would contravene work product. Yet automatic disclosure of witness statements would require revelation of the identities of all witnesses from whom the attorney decided to take a statement, thereby intruding into the heart of attorney trial preparation." 8 Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2028, p. 415 (1994).

Apart from the privilege log issue, Plaintiff has other obligations regarding the disclosure of names of potential witnesses. Fed.R.Civ.P. 26(a)(1) imposes obligations regarding the names of individuals "likely to have discoverable information." The Scheduling Order [Dkt. # 34] entered by the Court on August 29, 2006, required an exchange of initial witness lists by September 29, 2006. The Order [Dkt. # 57] entered on January 3, 2007, requires final witness lists to be filed on April 27, 2007. To the extent the individuals Plaintiff's counsel has interviewed are potential witnesses, they must be disclosed to Defendant on these lists.

***3** The Court concludes that under these circumstances Plaintiff need not produce a privilege log listing the witness statements at issue. However, if any person from whom Plaintiff has a witness statement has (1) not been listed on Plaintiff's witness

list(s) and (2) has not been identified as required by Fed.R.Civ.P. 26(a)(1), Plaintiff shall identify that person for Defendant within three (3) business days of this Order. Defendant's Motion to Compel a privilege log is **DENIED** subject to the condition outlined above.

IT IS SO ORDERED.

N.D.Okla.,2007.
Lamer v. Williams Communications, LLC
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