SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
TELEPHONE (302) 856-5264

Craig A. Karsnitz, Esquire
Timothy Jay Houseal, Esquire
William E. Gamgort, Esquire
Young Conaway Stargatt & Taylor, LLP
Rodney Square
1000 North King Street
Wilmington, Delaware 19801

John Anthony Wolf, Esquire
John F. Morkan III, Esquire
Anthony F. Vittoria, Esquire
Ian I. Friedman, Esquire
Ober, Kaler, Grime & Shriver
A Professional Corporation
100 Light Street
Baltimore, Maryland

James F. Lee, Jr., Esquire
Michael F. Germano, Esquire
Lee & McShane
1211 Connecticut Ave., N.W.
Suite 425
Washington D.C. 20036

Frederick H. Schranck, Esquire
Deputy Attorney General
Department of Transportation
P.O. Box 778
Dover, DE 19903

Mary Page Bailey, Esquire
Deputy Attorney General
820 N. French Street, 6th Floor
Wilmington, DE 19801

Re: ***State of Delaware Department of Transportation v. Figg Bridge Engineers, Inc. and AMEC Environmental & Infrastructure, Inc., f/k/a MACTEC Engineering and Consulting, Inc.***
C.A. No. S11C-01-031 (RFS)

Date Submitted: August 2, 2013
Date Decided: September 19, 2013

Dear Counsel:

After consideration of the arguments and materials pertaining to Defendant AMEC Environmental and Infrastructure, Inc.'s ("AMEC") Motion to Compel Discovery, the Motion is **GRANTED**.

Facts

In this case, several opinions have been published,[1] and the information about this litigation will not be repeated. The present question concerns whether AMEC may depose Mark McNeilly, P.E., D.GE. ("McNeilly") of Golder Associates, Inc. ("Golder") in Newark, New Jersey, where McNeilly is principally employed.

Under the Pretrial Scheduling Order, dated June 15, 2012,[2] Plaintiff State of Delaware Department of Transportation ("DelDOT") identified four trial experts, including two Golder individuals, William F. Brumund, Ph.D., P.E., D.GE.

---

[1] *See generally AMEC E & I, Inc. v. State Dep't of Transp.*, 44 A.3d 921 (Table) (Del. 2012) (denying interlocutory appeal regarding AMEC's Motion to Dismiss); *State Dep't of Transp. v. Figg Bridge Eng'rs, Inc.*, 2013 WL 4522955 (Del. Super. Aug. 13, 2013) (granting AMEC's Motion to Compel); *State Dep't of Transp. v. AMEC Envtl. & Infrastructure, Inc.*, 2013 WL 4521073 (Del. Super. Aug. 13, 2013) (granting in part AMEC's Motion to Compel); *Del. Dep't of Transp. v. MACTEC Eng'g & Consulting, Inc.*, 2011 WL 6400285 (Del. Super. Dec. 14, 2011) (granting MACTEC's Motion to Amend Caption); *State Dep't of Transp. v. Figg Bridge Eng'rs, Inc.*, 2011 WL 6208701 (Del. Super. Dec. 7, 2011) (denying MACTEC's Motion for Consideration and Reargument); *State Dep't of Transp. v. Figg Bridge Eng'rs, Inc.*, 2011 WL 5593163 (Del. Super. Nov. 9, 2011) (granting in part, denying in part MACTEC's Motion to Dismiss).

[2] Amended November 14, 2012.

("Brumund") and Graham Elliott, Ph.D., C.Eng. ("Elliot"). Brumund and Elliott base their expert trial testimony on two Golder reports, prepared in 2011 and 2013. Brumund, Elliott, McNeilly, and Kerem H. Esin, P.E. ("Esin") signed these reports. The signature portions of these documents designated Elliott and Esin as senior consultants, McNeilly and Brumund as principals. McNeilly also affixed his seal as a Delaware registered professional engineer.

Brumund and Elliot have been deposed. In July 2013, AMEC notified DelDOT that it sought to depose McNeilly. DelDOT opposed this, claiming McNeilly to be immune from discovery because, as opposed to Brumund and Elliot, McNeilly served only as DelDOT's "consultant" (*i.e.,* non-testifying expert).

AMEC points out that the 2013 Report identifies Brumund, Elliott, Esin, and McNeilly as "the four key Golder Associates' individuals."[3] Also, AMEC has received "thousands" of McNeilly's documents.[4] Additionally, the reports were the work of a "team" that included McNeilly.[5] AMEC argues that even as a non-testifying expert, McNeilly's role in the formation of the testifying experts' opinions, plus the fact that DelDOT and Golder did not screen McNeilly from the testifying

[3] 2013 Report at 2.

[4] Mot. to Compel at 2.

[5] *Id.* (citing Brumund dep. at 71–76; email correspondence from McNeilly).

experts, renders McNeilly vulnerable to AMEC's discovery request. Regardless of the label DelDOT attached to McNeilly, AMEC contends that exceptional circumstances under Delaware Superior Court Civil Rule 26(b)(4)(B) exist.

DelDOT notes that "McNeilly is an out-of-state, non-testifying consultant, who is neither an employee nor an agent of DelDOT."[6] DelDOT first argues that AMEC's Motion is procedurally flawed because in order to depose McNeilly, AMEC should have subpoenaed him.[7] Next, DelDOT argues that no exceptional circumstances under Rule 26(b)(4)(B) exist because all information that McNeilly could provide AMEC can be acquired from Brumund and Elliott. DelDOT asserts that AMEC's reliance on case law recognizing the discoverability of a non-testifying expert is misplaced because those cases did not discuss the issue presented in this Motion: the taking of a non-testifying expert's deposition, rather than production of documents. Also, DelDOT argues that if AMEC's Motion is granted, the scope of McNeilly's deposition should be limited to his role in preparing the 2011 and 2013 Reports. Furthermore, DelDOT contends that the costs of this discovery should be AMEC's responsibility. AMEC conceded this latter point at oral argument.

[6] Opp'n to Mot. to Compel at 2.

[7] If a subpoena was served through the commission process for an out-of-state deposition under Civil Rules 28 and 45, an objection could be made that it should be quashed. The argument would be that the Court should have first passed on the question whether McNeilly is subject to examination for the reasons asserted by AMEC. The issue will be addressed on the merits now in the interest of judicial economy.

Discussion

As Rule 26(b)(4)(B) states, discovery generally is not permitted from non-testifying experts:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) *or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means*.[8]

Defining "exceptional circumstances" is a case-specific and sometimes challenging pursuit.[9] This Court has stated before that "[p]arties ought to be able to consult with experts and obtain their views. They should be shielded, within reason, from having to expose these consultation experts to the full panoply of pretrial discovery."[10]

---

[8] Super. Ct. Civ. R. 26(b)(4)(B) (emphasis added). Rule 35(b) pertains to disclosure of written reports for mental or physical examinations that are not in play here.

[9] *Winchester v. Hertrich*, 658 A.2d 1016, 1020 (Del. Super. 1995) ("Discovery of a consultation expert is permitted only under 'exceptional circumstances'. The plaintiff has not shown or argued that exceptional circumstances exist. There is no indication he lacks an expert, that the defendants have cornered readily available experts, or any other recognized exceptional circumstances. As that issue is not before this Court at this time, what constitutes an exceptional circumstance is to be decided another day."); *but see Apple Inc. v. Amazon.com*, 2013 WL 1320760, at *3 n.2 (N.D. Cal. Apr. 1, 2013) ("Exceptional circumstances exist where the condition observed by the expert is no longer observable, where the costs of an independent examination would be judicially prohibitive, or where there are no other available experts in the same field or subject area.").

[10] *Winchester v. Hertrich, supra*. The limitation on discovery also limits one party from riding the coattails of the other party's pre-trial work. *Id.*

On the other hand, a party cannot claim that a consultant is immune from discovery where the work of a consultative non-testifying expert and a testifying expert co-mingle. The closer a testifying expert relies upon a non-testifying expert, the more the non-testifying expert becomes subject to discovery .[11]

The issue of the discoverability of non-testifying experts has been grappled with by courts in and out of Delaware. From the case law, two separate scenarios have emerged: the "two-hat" scenario and the "hand-in-glove" scenario.[12] The former, which is not implicated in this Motion, involves one person functioning as both a consultative non-testifying expert and a testifying expert.[13]

---

[11] *Id.* ("Rule 26(b)(4)(B) . . . draws the distinction based not on degree of involvement between counsel and expert but between testifying and consultation experts.").

[12] *See, e.g.*, *Council of Unit Owners of Sea Colony East, Phase III Condo. v. Carl M. Freeman Assocs., Inc.*, 1989 WL 25839, at *2 (Del. Super. 1989) ("The effect of . . . Rule [26(b)(4)(B)] is less clear when an expert wears two hats, i.e. when the testifying expert also acts as non-testifying consultant to counsel on other subjects *or* where a non-testifying expert acts as a consultant to a testifying expert witness." (emphasis added) (citation omitted)).

[13] *See Tampa Bay Water v. HDR Eng'g, Inc.*, 2010 WL 3394729, at *2 (M.D. Fla. Aug. 26, 2010) ("A majority of courts take the view that once a litigation consultant also becomes a testifying expert, all materials considered by the expert in the formation of his testimony are discoverable regardless of whether these same materials were also considered by the expert in his role as litigation consultant.") (citing, *inter alia*, *Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 257 F.R.D. 607, 614 (E.D. Cal. 2009)).

In *LC v. AC*, the Family Court laid out a useful framework of how to proceed if confronted with the following circumstances:

> [T]he question of whether Rule 26 . . . is applicable to this case turns on whether the appraiser retained by Husband was hired as a consultation expert or as an expert witness for trial. If the Court finds that Husband's appraiser was retained as a consultative expert, Rule 26 . . . applies to this case. Under the Rule, Wife must make a showing of exceptional circumstances in order to compel the appraiser's testimony. If, however, the Court finds that Husband's appraiser was retained as an expert witness for trial the Rule does not apply. Instead, the Court

Under the latter, "a non-testifying expert's report is used by a testifying expert as the basis for an expert opinion, or . . . there is evidence of substantial collaborative work between a testifying expert and a non-testifying expert."[14] Evidence of this scenario can be when the work performed by or fees paid to the non-testifying expert exceed that of the testifying expert.[15] When this occurs, "[a] deposition limited in scope to the extent of participation of [the non-testifying expert's] in the preparation and drafting of the expert reports and the extent of any meetings and contacts between the" non-testifying expert will be permitted, so long as "the depositions [do] not extend into the underlying substantive analysis completed by" the non-testifying expert.[16]

> may exercise its discretion and make the determination as to whether the expert can be compelled to testify based on the "interests of fairness."

LC v. AC, 2004 WL 3245793, at *5 (Dec. 14, 2004) (footnotes omitted) (quoting and citing this Court's decision in *Winchester,* 658 A.2d at 1021). Here, McNeilly was not designated as a trial expert and the "interests of fairness" criteria would not be applicable, that is, expert trial testimony could not be compelled.

[14] *See Long Term Capital Holdings v. United States,* 2003 WL 21269586, at *2-3 (D. Conn. May 6, 2003) (citing, *inter alia*, *Derrickson v. Circuit City Stores, Inc.*, 1999 U.S. Dist. LEXIS 2100, at *18 (D. Md. Mar. 19, 1999). The term "hand-in glove" comes from the *Derrickson* case. *Derrickson*, U.S. Dist. LEXIS 2100, at *18.

This scenario differs from when a non-testifying party "ghost writes," or composes a report which the expert claims to be his own in its entirety. *See id.* at *4 (quoting and citing *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277, 291 (E.D. Va. 2001)).

[15] *See id.* at *3 (citing *Herman v. Marine Midland Bank*, 207 F.R.D. 26, 30–32 (W.D.N.Y Apr. 25, 2002)).

[16] *See id.* at *4 (citing *Bank Brussels Lambert v. Chase Manhattan Bank*, 175 F.R.D. 34, 45 (S.D.N.Y. 1997)).

Within the "hand-in glove" scenario, another dichotomy emerges: discovery of a non-testifying expert's documents versus attaining a non-testifying expert's deposition. This Court discussed the former in the *Sea Colony* case, to which both AMEC and DelDOT cite:

> Where a non-testifying consultant assists a testifying expert, such *reports* are discoverable as an aid for cross-examination of the testifying expert. [W]here a party employs testifying experts and consultants from the same firm, discovery will not be compelled unless the testifying expert has seen, commissioned, or relied upon the desired materials in preparing opinions and conclusions.[17]

The latter scenario, which is relevant to this case, has not been clearly settled by Delaware courts. Federal jurisprudence, however, provides helpful instruction. In *Herman v. Marine Midland Bank*, the federal district court denied the plaintiff's motion for a protective order in response to the defendant's notice to take the deposition of the co-author of the plaintiff's expert's report, stating that "the evidence

[17] *Sea Colony*, 1989 WL 25839, at *2–3 (citations omitted). *Sea Colony* has aspects of a "wearing-of-two-hats" case and a "hand-in glove" case. In *Sea Colony*, the Court granted the plaintiff's motion in part, ruling that the plaintiff could attain a witness's notes and certain reports because the question of whether that witness was a testifying versus non-testifying expert witness was "blurred." *Id.* at *4. Additionally, the Court ordered that communications and reports submitted between a consultant and a testifying witness (who was also considered only a "consultant" on some issues) be turned over to the plaintiff because the consultant "did provide [the testifying witness] with information which served as the basis for observations and conclusions about which [the testifying witness] will be testifying." *Id.* at *5. Interestingly, plaintiff asked for a particular set of notes from the testifying witness, which apparently did not exist. *Id.* The defendants, however, "agreed to make [the testifying witness] available during the continuation of his *deposition* to respond to questions concerning his comments on the . . . report" and summarize such comments via affidavit. *Id.* (emphasis added). Thus, the *Sea Colony* case did not analyze the difference between the movant's attempt to reach the witness's report, rather than attain his deposition.

clearly demonstrates that the expert report submitted by [the plaintiff's expert] was the result of *substantial collaborative work* by he and [his co-author]."[18] Considering the amount of the co-author's work performed and fees rendered (each more than 50% higher than the expert's), the court found the work between the co-author and the expert "indivisible."[19] Although the court did not actually rule that the collaboration between the two constituted an exceptional circumstance, this Court finds that extensive collaboration can be an exceptional circumstance for purposes of Rule 26(b)(4)(B).[20]

There is one last piece to this puzzle: limiting the scope of the non-testifying expert's deposition. In *Apple Inc. v. Amazon.com, Inc.*, another federal case, the magistrate judge granted Amazon's request for a deposition of Apple's expert's assistants, but tailored the scope of that deposition only to the assistants' involvement

---

[18] *Herman v. Marine Midland Bank*, 207 F.R.D. at 31 (emphasis added).

[19] *Id.*

[20] Another avenue has been recognized that is consistent with the Court's ultimate ruling. In *In re Chaparral*, a case from the Delaware Court of Chancery, to which both parties cite, the plaintiffs retained a firm that provided both expert witness and consulting services; and the strict lines that should have been drawn between the two functions became fuzzy. Rather than finding exceptional circumstances under Rule 26(b)(4)(B), which the defendants did not argue, the Vice Chancellor ruled that the consultants had, in effect, transformed themselves into testifying experts. *In re Chapparal, Inc. S'holders Litig.*, 2007 WL 2998967, at *1–3 (Del. Ch. Oct. 11, 2007) ("[I]t is reasonable to conclude that the opinion [the trial expert] eventually formed was based, at least indirectly, on the work product of the consultants. In light of this conclusion, it is appropriate for this court to consider the consulting team as testifying experts for purposes of discovery, making the production of the documents sought by the defendants appropriate." (footnote omitted)).

in the creation of the expert's report. Amazon could question the assistants as to *whether* they performed consulting work for Apple independent of the expert, but could not question the assistants as to *what* they discovered in their independent work because Amazon had shown neither that the expert relied on the assistants' independent work nor that the expert substantially collaborated with the assistants regarding that work.[21]

With the aforementioned principles discussed, this Court finds that exceptional circumstances under Rule 26(b)(4)(B) have been shown, warranting AMEC's taking McNeilly's deposition. By signing the Reports, it appears that McNeilly is one of the authors whose work contributed to the ultimate trial opinions. At argument, DelDOT indicated that McNeilly was cast only as a consultant, rather than a testifying expert, because Brumund and Elliott have superior communication skills. This is a legitimate position.[22]

On the other hand, McNeilly substantially collaborated with his colleagues in the formulation of several findings and opinions, as Brumund described in his May 2013 deposition:

---

[21] *Apple Inc. v. Amazon.com, Inc.*, 2013 WL 1320760, at *2–4 (N.D. Cal. Apr. 1, 2013).

[22] *See Winchester v. Hertrich*, 658 A.2d at 1019–20 (explaining how the hiring party has the prerogative as to whether the person retained will be labeled a "consultant" or a "testifying expert").

> Different folks did different pieces. [S]ince a lot of the original documents were in our Newark office, I [Brumund] would go to Newark and meet with Mark McNeilly and some of the other people in that office, David Lee, Paskal Masal, they were doing settlement calculations and time rate calculations, and a lot of the early work on the mechanisms at play would have been done by me and by folks in our Newark office. The first portion of the work was done largely by McNeilly and myself, and putting the report together, I brought in two other really good young engineers that I work with quite a lot, and that's Kerem Esin and Graham Elliott. And – so the four of us – I would meet with them; okay, your task is do this . . . let's get it together, give me a draft, let's see how it looks, let me see what you're doing, make sure the calculations are checked. And so I was the orchestra leader, and I had different people doing different parcels of work.[23]

While McNeilly was involved in drafting Chapter 8 of the 2011 Report, "conclusions and opinions largely [were Brumund's]."[24] Brumund was the "team leader;" and while he "had different guys preparing drafts," he had overall responsibility.[25]

But the email record McNeilly sent dated April 29, 2013 shows McNeilly making technical forecasts. On October 24, 2012, in a series of emails sent to Brumund and Elliott, McNeilly attempted to develop a timeline concerning the decision to use mechanically stabilized earth ("MSE") walls. McNeilly also sent the link of Figg's Expression of Interest, DelDOT's original Request for a Quote ("RFQ") and Figg's updated Scope of Services ("SOS"), dated May 1, 2003 and

[23] Brumund Dep. 71:15–16, 19–72:16, May 21, 2013.

[24] *Id.* at 76: 14–15.

[25] *Id.* at 76: 20–21.

October 20, 2003.

Further, McNeilly states that the SOS dated May 1, 2003 was incorporated into Figg's original agreement with DelDOT dated June 17, 2003. After he reviewed the two SOS documents which Figg prepared and issued to DelDOT, McNeilly concluded that the configuration of roadway embankments with MSE walls was not a precondition in Figg's original agreement with DelDOT. According to McNeilly, Figg was responsible for the design of the approach embankments. Also, McNeilly concluded that the decision to design/construct the MSE approach embankments was made between May 1, 2003 and October 20, 2003, about four months after Figg's original agreement. McNeilly notes that Figg started working at risk on the project as early as February 2003 and AMEC's subsurface phase and investigation was conducted between February and July 2003. Three emails on April 18th, 19th, and 29th of 2013 show McNeilly participating in eleven revisions to Golder's 2013 Report. The record shows that McNeilly recommended the removal or revision of a table concerning first cost construction estimates and assumptions as to drain elevations.

Considering the forgoing, notwithstanding DelDOT's designation of McNeilly as merely a consultant, McNeilly had a substantial role in the procurement of the

experts' reports, upon which DelDOT's designated trial experts relied. As in *Herman*, "extensive collaborative work" existed between McNeilly and the trial experts, which this Court considers to be an exceptional circumstance under Rule 26(b)(4)(B).[26] Therefore, discovery relating to McNeilly will be permitted.

Additionally, this discovery will be broader than the mere production of documents. AMEC will be permitted to take McNeilly's deposition. As in *Apple*, however, this deposition will be limited, although it need not be as limited as the deposition in *Apple* because the trial experts in this case, unlike in that case, did rely on McNeilly. Thus, McNeilly's deposition will be limited to his interactions with the testifying experts, identifying what he said to them and what information and documents were provided. He may not be questioned about any matter upon which the testifying experts did not rely in forming their expert opinions.

For the reasons set forth above, AMEC's Motion is **GRANTED**. This ruling serves Rule 26(b)(4)(B)'s protective purposes relating to work product while allowing for the exploration of the bases of testifying experts' opinions. Costs shall be borne by AMEC.

[26] *See Herman*, 207 F.R.D. at 31.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Prothonotary
Judicial Case Manager