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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER *Justice* PART 30

Index Number : 107211/2008
BERNARD, SHELLY
vs.
BROOKFIELD PROPERTIES CORP.
SEQUENCE NUMBER : 033
OTHER RELIEFS

INDEX NO. 107211/08

MOTION DATE

MOTION SEQ. NO. 33

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided pursuant to the memo decision dated 6.15.12.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUN 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6.15.12

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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LAWRENCE BERNARD and MARILYN BERNARD as Co-Executors of the Estate of SHELLY BERNARD,

Plaintiffs,

-against-

BROOKFIELD PROPERTIES CORP., et al.,

Defendants.

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Index No. 107211/08
Motion Seq. No. 033

LORI KONOPKA-SAUER and RICHARD KONOPKA, As Executor of the Estate of KAREN TEDRICK,

Plaintiff,

-against-

COLGATE-PALMOLIVE COMPANY

Defendant.

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Index No. 190078/08

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.:

Pursuant to Section III, paragraph B of the September 20, 1996 Case Management Order, amended as of May 26, 2011 ("CMO"), which governs all New York City Asbestos Litigation ("NYCAL"), defendant Colgate-Palmolive Company ("Colgate") objects to and seeks vacatur of the November 6, 2011 recommendation of NYCAL Special Master Pacheco ("Recommendation") in which she directed that the plaintiffs be permitted to inquire into the substance of conversations between counsel for Colgate and Dr. Richard Turse, a former Colgate employee who has been identified as a fact witness in this case. For the reasons set forth below, the Special Master's Recommendation is confirmed as herein modified.

BACKGROUND

This dispute arises from plaintiffs' claims that plaintiffs' decedent Shelly Bernard and plaintiffs' decedent Karen Tedrick ("Plaintiffs") were exposed to asbestos from Colgate's Cashmere Bouquet Talcum Powder ("Cashmere Bouquet"). Ms. Bernard and Ms. Tedrick alleged that they liberally used Cashmere Bouquet for at least twenty years beginning in the late 1950's, and that such exposure caused her to develop mesothelioma. In or about October 2011, Plaintiffs noticed the deposition of Dr. Richard Turse, whom Colgate has identified as a fact witness in these cases. Colgate employed Dr. Turse from the time he received his Ph.D in chemistry in 1960 until he retired in 1995. From 1977 to 1988, he was responsible for x-ray diffraction testing, which is purported to be one of several tests employed by Colgate to ensure that the materials used to manufacture Cashmere Bouquet were asbestos-free.

Dr. Turse was examined in connection with these matters on October 12, 2011. He was represented for such purpose by his own counsel whose services were paid for by Colgate. At his deposition Plaintiffs' counsel sought to elicit testimony from Dr. Turse regarding the substance of pre-deposition conversations between Colgate's in-house counsel and Dr. Turse concerning events which took place during the course of his employment. Asserting privilege, counsel for Colgate and Dr. Turse's own attorney instructed Dr. Turse not to answer any questions about his communications with Colgate's current attorneys, former attorneys, or in-house counsel. The deposition was then closed pending resolution of this issue.

Special Master Pacheco directed the parties to try to agree on the questions presented by Colgate's objections to her. It appears that the parties jointly agreed to brief the following two issues:

- Is there an attorney-client privilege for Colgate governing communications between Colgate's counsel and Colgate's former employees concerning matters within the scope of the former employees' employment?

- May Colgate claim work product privilege over questions that elicit which documents or topics were reviewed by Colgate's attorneys with a non-party fact witness?

On November 6, 2011, Special Master Pacheco issued her Recommendation in which she concluded that under the circumstances Colgate could not invoke the attorney-client privilege. She directed that Plaintiffs be permitted to inquire into the substance of Colgate's pre-deposition conversations with Dr. Turse. *See* Defendant's Exhibit 1.[1]

Thereafter, Colgate timely notified Special Master Pacheco of its intent to appeal from her Recommendation to this court, *see* NYCAL CMO § III(B), and this motion followed.

DISCUSSION

At the outset, Plaintiffs argue that Colgate's reliance almost exclusively on federal law in support of its position is inappropriate. In general, however, the application of the attorney-client and work product privileges are substantially similar under New York state law (Civil Practice Law and Rules "CPLR") and federal law (Federal Rules of Civil Procedure).

While the attorney-client privilege is codified in CPLR 4503, like its federal counterpart it is deeply rooted in the common law. *See, e.g.*, *Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d 371, 377 (1991); *United States v Doe*, 399 F3d 527, 531 (2d Cir. 2005). The New York Court of Appeals has traditionally likened CPLR 4503 to be a "mere re-enactment of the common-law rule."

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[1] While the Recommendation does not specifically address the issue whether Colgate's communications with Dr. Turse are protected by the work-product privilege, in response to Colgate's request for clarification, the Special Master responded by email that, "I have ruled that no privilege of any kind exists." Defendant's Exhibit 4.

Spectrum, supra, at 377; *see Hurlburt v Hurlbur*t, 128 NY 420, 424 (1891).

With respect to the work-product privilege, the similarity between state law and federal law is not as clear. The United States Supreme Court first recognized the work product privilege in *Hickman v Taylor*, 329 US 495 (1947), which holds that information obtained or produced by or for attorneys in anticipation of litigation may be protected from discovery under the Federal Rules of Civil Procedure. While "the New York lawyer may find some valuable insights in a careful reading of . . . *Hickman*", the New York State legislature rejected a proposal to precisely codify *Hickman's* language in the 1985 amendments to CPLR 3101(d)(2).[2] Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3101:27, p. 53. Unlike *Hickman, supra*, which confers a conditional immunity on both the work product of an attorney and materials prepared in anticipation of litigation, the CPLR separates these two categories and accords "work product" an absolute immunity in CPLR 3101(c), which provides in its entirety that: "The work product of an attorney shall not be obtainable."

This rule, however, has been met with unfavorable treatment by the New York Courts, the "misfortune" being that CPLR 3101(c) carves out an immunity for "items that do not require it."

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[2] CPLR 3101(d)(2) currently provides: "Materials. Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

Connors, supra, C3101:27, at 53. As Professor Connors writes, "[i]f anything that qualifies as an attorney's genuine work product contains a confidential communication from or to the client, as it often does," it is protected by the attorney-client privilege. "If it does not contain such a communication, it merits no absolute immunity" and should be considered a material prepared in anticipation of trial, which is protected by a conditional immunity. *Id* at 54.

Thus, while *Hickman* does not "pronounce a rule of constitutional law applicable in state courts", and as such is not controlling on the states, it is nevertheless highly persuasive to the extent that it is not inconsistent with the CPLR. *Id.* Therefore, basic New York law on the scope of work product immunity is guided by *Hickman*, which defines the work product of an attorney as, *inter alia*, interviews, mental impressions, and personal beliefs, the only practical difference being whether such product should be accorded absolute immunity under CPLR 3101(c), or conditional immunity under CPLR 3101(d)(2). In this regard, Plaintiffs' concerns with Colgate's reliance on federal law in support of its claims of privilege is thus not a sufficient basis on which to deny this motion.

A. Attorney-Client Privilege

The attorney-client privilege, "the oldest among common-law evidentiary privileges . . . fosters the open dialogue between lawyer and client that is deemed essential to effective representation." *Spectrum Sys. Int'l Corp., supra*, at 377 (internal citations omitted). "It exists to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment." *Matter of Priest v Hennessy*, 51 NY2d 62, 67-68 (1980). Of course, not every communication between an attorney and his client is privileged. *Id.* at 69. Indeed, "the

attorney-client privilege constitutes an obstacle to the truth-finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose." *Id.* at 68 (quoting *Matter of Jacqueline F.*, 47 NY2d 215, 219 [1979]).

The attorney-client privilege in the corporate setting is governed by the Supreme Court's decision in *Upjohn v United States*, 449 US 383 (1981). In *Upjohn*, the corporation's general counsel had solicited confidential information from various employees in connection with an internal investigation into questionable payments made to foreign government officials. The Internal Revenue Service sought to compel the production of this information from Upjohn, but the company refused, arguing that such communications were protected by the attorney-client privilege. The Court held that the attorney-client privilege did in fact extend to communications made by corporate employees to corporate counsel in connection with a pending investigation. *Id.* at 396.

Upjohn argued that the privilege should also apply to counsel's interviews with former employees. But as neither the District Court nor the Court of Appeals had "occasion to address this issue", the Court declined "to decide it without the benefit of treatment below." *Id.*, n. 3. Nevertheless, this position appears to have been adopted by the various federal courts that have considered the issue. In so doing, most courts adopted the reasoning of Chief Justice Burger, who concurred with the majority decision in *Upjohn*, as follows (*Upjohn, supra*, 449 US at 403):

> Because of the great importance of the issue, in my view the Court should make clear now that, as a general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct.

See also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 658 F2d 1355, 1361, n. 7 (9th Cir. 1981), *cert. denied* 455 US 990 (1982) ("Although Upjohn was specifically limited to current employees . . . the same rationale applies to the ex-employees [and current employees] involved in this case. Former employees, as well as current employees, may possess the relevant information needed by corporate counsel to advise the client with respect to actual or potential difficulties"); *Miramar Constr. Co. v Home Depot, Inc.*, 167 F. Supp. 2d 182, 184 (D.P.R. 2001); *Chancellor v Boeing Co.*, 678 F. Supp. 250, 253 (D. Kan. 1988); *Command Transportation, Inc. v Y.S. Line (USA) Corp.,* 116 F.R.D. 94, 95-97 (D. Mass. 1987); *Porter v Arco Metals, Div. of Atlantic Richfield*, 642 F. Supp. 1116, 1117-18 (D. Mont. 1986).

The New York Court of Appeals and the Appellate Division, First Department have demonstrated their willingness to follow federal precedent concerning the nature of the attorney-client privilege through its continued reliance upon *Uphohn*, which remains the leading case in the realm of the corporate attorney-client privilege. *See Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 139 (1996); *Spectrum Sys. Int'l Corp., supra*, 78 NY2d 371, 377 (1991); *Rossi v Blue Cross & Blue Shield*, 73 NY2d 588, 592 (1989); *Carone v Venator Group, Inc.*, 289 AD2d 185, 186 (1st Dept 2001).[3] Plaintiffs have not provided nor has this court discovered any authorities to the contrary.

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[3] This treatment of the corporate attorney-client privilege is also supported as a matter of sound policy. *See Bank of New York v Meridien Biao Bank Tanzania Limited, et al.,* 95 CV 4856, 1996 U.S. Dist. LEXIS 12377 (SDNY Aug. 27, 1996) ("If an employee has information obtained while acting as representative of the corporate entity, it would frustrate the purposes of the attorney-client privilege if counsel for the corporation were foreclosed from having confidential communications with that individual at the instant the employment relationship terminated.")

The only New York case cited by both sides on this issue is *Radovic v City of New York*, 168 Misc.2d 58 (Sup. Ct. NY Cty. 1996). In that case plaintiff sued the City for negligence after his son died in a car crash. One witness was a City employee who had left his job by the time the case came to trial. Denying the plaintiff's request to question the former City employee about his communications with defense counsel, the *Radovic* court explained that "[a]s the former employee was selected by defendant City to be its witness at its deposition, and as he was represented by an attorney for defendant City . . . the attorney-client privilege attached at that time." *Id.* at 60.

Plaintiffs assert that *Radovic* is distinguishable on the ground that Dr. Turse was deposed 10 years after he left Colgate's employ. They also argue that *Radovic* stands for the proposition that post-employment communications are privileged only if they commence before the employment relationship ends. However, Plaintiffs' reading is entirely inconsistent with *Radovic's* guiding principles. In this respect, the court opined, in relevant part, as follows (*Id.* at 60-61):

> Just like a corporation, defendant City is a legal creation which acts through its employees, at all levels. Just as do counsels for corporations and for individual clients, attorneys for the defendant City must have the same opportunity for a privileged 'open dialogue' in preparing their City employee witnesses for trial * * * * The termination of the employment relationship did not dissolve the attorney-client privilege, which forever protects the client, here defendant City, from disclosure against its will of protected communications between a former employee and defendant City's attorneys. The discussions between the former employee and the attorneys for defendant City in preparation for trial were privileged because the attorney-client privilege continued until the trial.

Notably, the *Radovic* court recognized that the privilege belonged to the City, not the witness, and that such privilege could extend to its former employees. *Id.* at 60. To this extent *Radovic* is consistent with the federal authorities cited herein which hold that a corporation's attorney-client privilege extends to communications with its former employees regarding matters that took place within the scope of their employment.

However, while the attorney-client privilege protects communications between corporate counsel and a former employee, it is, and has always been, a qualified privilege, "the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose . . . ." *Matter of Priest, supra*, at 68. For example, communications between corporate counsel and "a former employee whom counsel does not represent, which bear on or otherwise potentially affect the witness' testimony" are generally not privileged. *Nicholls v Philips Semiconductor Manufacturing*, No. 07-CV-6789, US Dist. LEXIS 64644, at *2 (SDNY July 29, 2009) (*quoting Peralta v Cendant Corp.*, 190 FRD 38, 41-2 [D. Conn. 1999]). The privilege should not be used to deny opposing counsel's "right to ask about matters that may have affected or changed the witness's testimony", *see Peralta, supra*, at 41, and this court concurs that, "any communication between counsel and [the former employee], occurring after [his] employment . . . that goes beyond [his] knowledge of the circumstances, and beyond [his] activities within the course of . . . employment . . . is not protected by the attorney-client privilege. *Gioe v AT&T Inc.*, 09-CV-4545, 2010 US Dist. LEXIS 99066, at *2 (EDNY Sept. 20, 2010).

Moreover, it is axiomatic that the attorney-client privilege is waived if the communication is not kept confidential. *See, People v Mitchell*, 58 NY2d 368 (1983) (statement made by defendant to his attorney's paralegal in the common area of a shared office where two other secretaries of other attorneys were present was not privileged); *see also People v Osorio*, 75 NY2d 80, 84 (1989) (attorney-client privilege defined in part by whether the "client had a reasonable expectation of confidentiality under the circumstances.")

With these qualifications in mind, given the facts of this case, this court should not adopt Colgate's position on this issue. Colgate took no affirmative steps to create an attorney-client

privilege with Dr. Turse. There are no facts to establish that Dr. Turse expected that any communications he had with counsel for Colgate were privileged, especially in light of the fact that Dr. Turse chose to be represented by his own attorney. *See Matter of Priest, supra*, at 68-69. That Colgate may have paid Dr. Turse's counsel's fee does not eliminate the fact of separate representation by counsel for Dr. Turse. No matter who pays her fees, such counsel is bound by the confidences of Dr. Turse and not Colgate. *See* 22 NYCRR § 1200, Rule 1.8(f), Rules of Professional Conduct. As to Colgate's involvement, it is significant that, unlike the situation with Dr. Turse, Colgate chose to have its own counsel represent two of its other former employees (also designated as fact witnesses) in this litigation. As Special Master Pacheco pointed out, "counsel for Colgate knows how to establish an attorney-client relationship with a former employee." Defendant's Exhibit E, p. 2. Finally, it is critical that Dr. Turse's attorney was present at his pre-deposition interview by Colgate and was privy to all of Colgate's interactions with her client. Thus, by definition, Colgate's communications with Dr. Turse at that meeting were not confidential. *See People v Mitchell, supra*, at 368.

Accordingly, this court declines Colgate's assertion that the attorney-client privilege protected its communications with Dr. Turse, and in that regard Special Master Pacheco's Recommendation is confirmed.

B. Work Product Doctrine

In general, "[t]he work product of an attorney shall not be obtainable" CPLR 3101(c). While this privilege is absolute, *see Spectrum Sys. Intl. Corp, supra*, at 376, it "applies only to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and

professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 190-191 (1st Dept 2005); *see Spectrum Sys. Intl. Corp, supra*, at 376. Privileged materials prepared in anticipation of trial may be obtained only if the party seeking discovery demonstrates that it has a substantial need for the materials, or that they are unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. CPLR 3101(d)(2); *see Giordano v New Rochelle Mun. Hous. Auth.*, 84 AD3d 729, 732 (2d Dept 2011). Any "data received by the attorney from others while investigating in behalf of the client" is not privileged. *Siegel*, NY Prac § 347, at 576 (5th ed 2011).

At Dr. Turse's deposition the only questions Colgate's counsel directed him not to answer were in the nature of: "What did you talk about with Colgate's lawyers." Defendant's exhibit 2, pp. 39-45. Colgate asserts that an obvious reason for this broad line of questioning is an intention to explore Colgate's mental impressions and legal strategies in this case. It is undisputed that all of Dr. Turse's notebooks and other requested documents had been produced to Plaintiffs many months prior to the deposition. Plaintiffs had ample time to examine such documents and, at the deposition, to question Dr. Turse with regard to same. It does not appear that Colgate objected to any question that was directed to a fact that he knew of based on his employment with Colgate. Thus, the responses to such broad questions, if provided, likely would have given Plaintiffs an inappropriate glimpse into the strategy of opposing counsel. Such questions plainly fall under the rubric of the work product privilege.

Plaintiffs contend that Colgate waived any such privilege because neither Dr. Turse nor his counsel are parties to this litigation. However, a claim of "work product privilege is waived upon

disclosure to a third party only when there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality." *Bluebird Partners, L.P. v. First Fid. Bank, N.A.*, 248 AD2d 219, 225 (1st Dept 1998). Such a waiver "will be found only if the party has disclosed the work-product in such a manner that it is likely to be revealed to his adversary." *Gulf Oil, et al., v Chevron U.S.A. Inc.,* No. 82 CV 5253, 1990 WL 108352, at *4 (SDNY July 20, 1990).

Plaintiffs' reliance on *Nab-Tern-Betts v City of New York*, 209 AD2d 223, 224 (1st Dept 1994) and *Scott v Beth Israel Med. Ctr. Inc.,* 17 Misc.3d 934, 943 (Sup. Ct. NY Cty. 2007) is misplaced. In *Nab-Tern-Betts*, defendant New York City sought appellate review of a trial court decision which granted the plaintiff's motion to compel discovery. In affirming the trial court's ruling, the First Department noted that the documents claimed to be privileged were created several years before the litigation had commenced. The court also noted that the documents appeared to have been generated by City employees or agents in the course of administering the parties' contract, and thus could not have been "materials prepared in anticipation of litigation." *Id.* at 223. Here, Plaintiffs seek to discover information which would likely reflect Colgate's counsel's legal strategies. In *Scott*, a doctor sued his former employer hospital for breach of contract. The hospital obtained emails between the doctor and his counsel that were exchanged using the hospital's email system. The trial court held that the use of the hospital's email system was "so careless" as to warrant waiver of the work-product privilege. *Scott, supra*, at 943. There was no such careless disclosure to an adversary in this case and no evidence that Dr. Turse is anything but a friendly fact witness.

Gulf Oil, supra, 1990 WL 108352, on the other hand, upon which Colgate relies, is

particularly instructive. In that case, the plaintiffs brought an action against a corporation after it had repudiated a tender offer. During discovery, the plaintiffs deposed Mr. E.M. Miller, a former employee and officer of the corporation. Counsel for the corporation instructed Mr. Miller not to answer questions concerning a meeting with corporate counsel at which the lawsuit was discussed, even though another third-party fact witness was present. The plaintiffs sought to compel the witness to further testify. The court declined to order such testimony, holding that it was exempt from discovery because the purpose of the meeting was likely to assist the corporation in preparing for the litigation. The court opined that the plaintiffs could not show that the presence of the third-party "posed any danger of ultimate disclosure" since he was a paid consultant to the defendant and was also a "friendly fact witness." *Id.* at 4.

Here, even though Dr. Turse's own lawyer was present at his pre-deposition interview, it cannot reasonably be inferred that Colgate's counsel's interactions with Dr. Turse posed a danger of ultimate disclosure of its mental impressions to Plaintiffs' counsel or to anyone else who might be considered Colgate's adversary. Thus, I find that counsel for Colgate properly raised the work-product privilege in this case.

But the inquiry does not end there. "Even if a communication is found privileged, 'it does not immunize the underlying factual information.'" *In re 91st Street Crane Collapse Lit.*, 2010 WL 6428504, at *1 (Sup. Ct. NY Co. 2010) (*quoting Niesig v Team 1, et al.*, 76 NY2d 363, 372 [1990]). Because the line of questions that triggered Colgate's objection were extremely broad, it is difficult to say whether Plaintiffs were exploring or seeking underlying data. Nor can one surmise what the the substance of Dr. Turse's answers would have been. Plaintiffs may indeed have been seeking factual information not otherwise obtainable through the previously produced documents, and Dr.

Turse's testimony in such regard may indeed contain such factual information.

Taking that into consideration, Plaintiffs' counsel now have a choice. *See Beller v William Penn Life Insurance Co. of New York*, 15 Misc.3d 350, 358-59 (Sup. Ct. Nassau Co. 2007). Counsel may submit written questions to Dr. Turse in respect of the previously precluded inquiry, avoiding any areas that seek reference to Colgate's mental impressions. In the alternative, counsel may reopen the deposition of Dr. Turse while particularly avoiding questioning that engenders reference to Colgate's mental impressions. Should Plaintiffs submit written questions to Dr. Turse, any objections with respect thereto shall be raised in the first instance to the Special Master in accordance with the CMO. Should Plaintiffs choose to continue the deposition, the Special Master will supervise the balance of the deposition so that it will be conducted pursuant to this decision and order. Plaintiffs therefore are directed to notify this court, the Special Master, and all parties to this action of their intention within five days of the date of entry of this decision and order.

CONCLUSION

Accordingly, and in light of the foregoing, it is hereby

ORDERED that the Special Master's November 6, 2011 Recommendation is confirmed as modified in accordance with this decision and order.

This constitutes the decision and order of the court.

DATED: 6-15-12

SHERRY KLEIN HEITLER
J.S.C.