

1 Christopher R. Kaup, Esq.
State Bar No. 014820
2 Jeffrey A. Sandell, Esq.
State Bar No. 020658

TIFFANY & BOSCO
P.A.

3 third floor camelback esplanade ii
2525 east camelback road
4 PHOENIX, ARIZONA 85016-4237
TELEPHONE: (602) 255-6000
5 FACSIMILE: (602) 255-0103

6 *Attorneys for Global Financial Investments, L.L.C., Plaintiff*

7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **DISTRICT OF ARIZONA**

10 GLOBAL FINANCIAL INVESTMENTS,
11 LLC, an Arizona limited liability company,

12 Plaintiff,

13 vs.

14 THOMAS E. SEWELL and JANE DOE
SEWELL, et al.,

15 Defendants.

No. CIV 04-01465 PHX JWS

**PLAINTIFF'S RESPONSE TO
DEFENDANT SCHNEIDER'S OBJECTION
TO SUBPOENA AND MOTION TO QUASH**

16 Plaintiff, Global Financial Investments, L.L.C., hereby preliminarily responds to
17 the "Objection to Subpoena and Motion to Quash" ("Objection and Motion to Quash") filed by
18 Defendant James Schneider. This Response is supported by the following Memorandum of
19 Points and Authorities, which is incorporated herein by this reference.

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RESPECTFULLY SUBMITTED this 18th day of June, 2007.

TIFFANY & BOSCO, P.A.

By: /s/ Jeffrey A. Sandell, #020658
Christopher R. Kaup
Jeffrey A. Sandell
Camelback Esplanade II, 3rd Floor
2525 E. Camelback Road
Phoenix, Arizona 85016-4237
Counsel for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I. AS A MATTER OF LAW, SCHNEIDER'S BOILERPLATE OBJECTIONS ARE COMPLETELY INSUFFICIENT TO SATISFY HIS BURDEN.

First, it is only fair that Plaintiff concede that Defendant Schneider and his lawyers had only a short period of time to prepare Schneider's objection to the Subpoena that was served by Plaintiff in Florida. This was because the Subpoena included a quick return date. Nevertheless, the necessity that Schneider prepare an objection and motion to quash in a quick or hurried manner cannot and does not excuse him from satisfying the very same burden that is required of every other litigant attempting to prohibit the production of documents based upon the assertion of a privilege.

Indeed -- as a matter of black letter law -- parties, such as Schneider, who are seeking to invoke the attorney-client privilege have the significant burden of showing the privilege's applicability, establishing all its essential elements, and explaining why the party serving the subpoena should be deprived of the documents it needs to prepare its case. *U.S. v. Landof*, 591 F.2d 36 (9th Cir. 1978); *In re Grand Jury Subpoenas*, 803 F.2d 493 (9th Cir. 1986), opinion corrected on other grounds, 817 F.2d 64 (9th Cir. 1987); *U.S. v. Tedder*, 801 F.2d 1437 (4th Cir. 1986); *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447 (6th Cir. 1983); *In re Grand Jury Proceedings (Doe)*, 575 F. Supp. 197 (N.D. Ohio 1983), order aff'd, 754 F.2d 154

1 (6th Cir. 1985); *U.S. v. Lawless*, 709 F.2d 485 (7th Cir. 1983); *Hollins v. Powell*, 773 F.2d 191 (8th
2 Cir. 1985). Specifically, a party invoking the attorney-privilege has the burden of establishing
3 the existence of the attorney-client relationship and the confidential nature of the
4 communication, *In re Grand Jury Proceedings in Matter of Freeman*, 708 F.2d 1571 (11th Cir.
5 1983); *In re Witness Before Grand Jury No. 82-5*, 558 F. Supp. 1089 (S.D. Fla. 1983), and the
6 fact that the privilege has not been waived. *U.S. v. Willis*, 565 F. Supp. 1186 (S.D. Iowa 1983).
7 Lacking this type of specific information, boilerplate objections are considered invalid. *See, e.g.*,
8 *U.S. v. Wells*, 929 F. Supp. 423, 425 (S.D. Ga. 1996) (“When information subject to a subpoena
9 is withheld on a claim that it is privileged or subject to protection as trial preparation materials,
10 the claim shall be made expressly and shall be supported by a description of the nature of the
11 documents, communications, or things not produced that is sufficient for the demanding party to
12 contest the claim.”). Put another way, a simple declaration that a privilege exists not only fails to
13 sustain the required burden, but such a bald assertion is considered virtually meaningless.
14 *Research Institute for Medicine and Chemistry, Inc. v. Wisconsin Alumni Research Foundation*,
15 114 F.R.D. 672 (W.D. Wis. 1987).

16 Yet, in this case, through his Objection and Motion to Quash, Schneider has done
17 nothing more than make the same type of boilerplate objection that is consistently rejected by
18 courts. Schneider certainly has not explained why the specific documents requested by Plaintiff
19 would ever be considered attorney-client privileged or work product. For example, item #5 in
20 the Subpoena seeks:

21 Any and all documents, including, but not limited to,
22 accounting records, which evidence the services, costs,
23 and/or expenses to which the \$2,500 payment was applied.
24 For example, if the \$2,500 Payment was applied to legal
25 research costs, you are to produce any and all documents
26 which evidence the same. By way of further example, if
 the \$2,500 Payment was applied to certain attorney’s fees
 charged by James Schneider (or James Schneider on behalf

of Atlas Pearlman, P.A.), you are to produce any and all documents which evidence the same.

As explained in the Subpoena, the \$2,500.00 Payment refers to a check that was paid by Plaintiff to Schneider for services Schneider provided to Plaintiff. Schneider does not explain why a payment made by Plaintiff would be subject to a purported attorney-client privilege arising from Schneider's alleged representation of a different client, Whitehall Enterprises, Inc. Similarly, items #3 and #4 contained within the Subpoena request, among other things, documents that relate to work performed by Schneider on behalf of Plaintiff or Plaintiff's representative, Alfred Bowen. Again, Schneider does not explain why documents evidencing work performed by him on behalf of Plaintiff could give rise to an attorney-client privilege that related to Schneider's representation of Whitehall Enterprises, Inc.

It is beyond all credible dispute that the Objection and Motion to Quash filed by Schneider is wholly inadequate on its face and therefore can never be granted. Thus, the non-party witness upon who the Subpoena was served must be allowed to produce the documents that have been requested by Plaintiff.

B. EVEN TO THE EXTENT SCHNEIDER CAN BELATEDLY EXPLAIN THE BASIS FOR HIS BLANKET ASSERTION OF A PRIVILEGE, ANY PRIVILEGE THAT DID EXIST HAS BEEN WAIVED BY SCHNEIDER.

To be sure, it is well settled that a party cannot simultaneously use the attorney-client privilege as both a shield and a sword. *See, e.g., Clark v. United States*, 289 U.S. 1, 15 (1933). "Where a litigant asserts a claim that in fairness requires examination of a privileged communication, courts have held the protections of the attorney/client privilege and the work product doctrine implicitly waived." *Worthington v. Endee*, 177 F.R.D. 113, 116 (N.D.N.Y. 1998), *citing United States v. Bilzerian*, 925 F.2d 1285, 1292 (2nd Cir. 1991) (*citing United States v. Exxon Corp.*, 94 F.R.D. 246, 249 (D.D.C. 1981) and *Tribune Co. v. Purcigliotti*, 1997 U.S. Dist. LEXIS 228, No. 93 Civ. 7222, 1997 WL 10924, at *5 (S.D.N.Y. Jan. 10, 1997). "Implicit

1 waiver, also referred to as ‘at issue’ waiver, exhibits several common characteristics,” including
2 “(1) a litigant asserting a privilege; (2) placing ‘at issue’ the protected communication through an
3 affirmative act such as a claim of an affirmative defense; and (3) making the protected
4 communication relevant information and necessary to the original claim of the adversary.” *Id.*
5 *citing Kidder, Peabody & Co. v. IAG International Acceptance Group, N.V.*, 1997 U.S. Dist.
6 LEXIS 7108, No. 94 Civ. 4725 at *4 (S.D.N.Y. May 21, 1997) and *Tribune Co.*, 1997 U.S. Dist.
7 LEXIS 228 at *5.

8 Here, Schneider has put the documents requested by Plaintiff “at issue” in this
9 litigation. In fact, Schneider has put the relevancy and importance of these document front and
10 center.

11 On or about August 22, 2006, Plaintiff served written interrogatories on
12 Schneider. Interrogatory #20 read as follows:

13 **INTERROGATORY #20:** Have you (personally or on
14 behalf of any law firm by which you were employed) ever
15 received or accepted any monies from Plaintiff for any
16 reason? In responding to Interrogatory number twenty,
17 please state the following:

18 (a) All facts supporting your allegation, including the
19 reason why you received such monies.

20 (b) Identity of each person known to you to have
21 knowledge of any facts pertaining to or in any way relating
22 to your answer to this interrogatory;

23 (c) Identity of each document that supports or relates to
24 the facts stated in your answer to this interrogatory.

25 (See Exhibit A). Importantly, Schneider did not assert any objection to this Interrogatory.
26 Instead, he provided a lengthy response wherein he tries to explain away the fact that he received
at least a \$2,500 payment from Global for work performed by him. Specifically, Schneider
provides a far-fetched explanation of how the \$2,500 was not paid to him for services that he

1 rendered, but that the money was actually for services he rendered months later to Whitehall
2 Enterprises, Inc. (See Exhibit A). The documents requested by Plaintiff simply seek to assess
3 Schneider's credibility in this regard. Quite frankly, Plaintiff is more than confident that the
4 billing records held by Schneider's former law firm will make clear that Schneider is not telling
5 the truth.

6 Indeed, it is Schneider himself that has made an issue of how and when the
7 \$2,500 payment received by him was applied. Plaintiff is entitled to the information necessary to
8 test Schneider's credibility and rebut any assertions he may make both at trial and throughout the
9 course of this litigation. Quite simply, this case involves Schneider's alleged legal malpractice in
10 connection with the work he performed for Plaintiff. All of the information requested in the
11 Subpoena, which is needed to establish that Schneider was in fact serving as counsel for Plaintiff
12 is, at the very least, discoverable. Plaintiff has no other means to acquire this information.

13
14 **C. THE OTHER CLIENT UPON WHICH SCHNIEDER IS APPARENTLY BASING**
15 **HIS ASSERTION OF AN ATTORNEY-CLIENT RELATIONSHIP IS EXPECTED TO**
16 **SOON WAIVE ANY SUCH PRIVILEGE AND THIS ISSUE WILL BECOME**
17 **ENTIRELY MOOT.**

18 Additionally, to the extent the Subpoena would require the production of
19 privileged documents of Whitehall Enterprises, LLC ("Whitehall"), the person with the ability to
20 waive Whitehall's privilege would be the *Chapter 7 bankruptcy trustee* in Whitehall Enterprises,
21 LLC's ("Whitehall") Chapter 7 Bankruptcy Case. In *Commodity Futures Trading Commission*
22 *v. Weintraub*, 471 U.S. 343 (1985), the United States Supreme Court held that the trustee of a
23 corporation in Chapter 7 bankruptcy may waive that corporation's attorney-client privilege with
24 regards to pre-bankruptcy communications. Because there is no specific provision on this matter
25 in the Bankruptcy Code, the Court looked to the roles of different actors involved in the
26 bankruptcy action to determine with whom the attorney-client privilege rested. The court

1 ultimately determined that the actor whose duties most closely parallel that of the corporate
2 management should have the authority to waive the attorney-client privilege. *Id.* at 351-352. The
3 Court found that in light of the extensive powers, duties, and management authority of the
4 bankruptcy trustee over the debtor, “it is clear that the trustee plays the role most closely
5 analogous to that of a solvent corporation’s management.” *Id.* at 353. Thus, the trustee of a
6 corporation in Chapter 7 bankruptcy may waive the attorney-client privilege for that corporation.

7 As applied to the present circumstances, Whitehall was Schneider’s other client
8 during the same time period subject to Plaintiff’s Subpoena request. Whitehall is a debtor in a
9 Chapter 7 Bankruptcy Case in the District of Arizona. A trustee has been appointed in
10 Whitehall’s bankruptcy case. Accordingly, that trustee holds Whitehall’s attorney-client
11 privilege and the power to waive that attorney-client privilege. Plaintiff’s counsel is the process
12 of attempting to procure from the trustee in Whitehall’s bankruptcy case a waiver of any
13 attorney-client privilege that may be relevant to the documents sought by Plaintiff through the
14 Subpoena that is the subject of Schneider’s Motion to Quash.

15 WHEREFORE, Plaintiff, Global Financial Investments, LLC, respectfully
16 requests that the Objection and Motion to Quash be overruled and denied.

17 **TIFFANY & BOSCO, P.A.**

18 By: /s/ Jeffrey A. Sandell, #020658
19 Christopher R. Kaup, Esq.
20 Jeffrey A. Sandell, Esq.
21 Camelback Esplanade II, 3rd Floor
22 2525 E. Camelback Road
23 Phoenix, Arizona 85016-4237
24 *Counsel for Plaintiff*
25
26

1 ORIGINAL electronically filed this 18th day
2 of June, 2007 with the United States District
3 Court, District of Arizona, and COPIES delivered
4 through the Court's CM/ECF system to the following
5 parties:

6 Curtis D Ensign
7 Law Offices of Curtis Ensign
8 3225 N Central Ave
9 Ste 1609
10 Phoenix, AZ 85012-2413
11 Email: curtisensign@cox.net

12 C Andrew Campbell
13 Martin Hart & Fullerton PC
14 1839 S Alma School Road
15 Ste 354
16 Mesa, AZ 85210-3050
17 480-838-9000
18 Fax: 480-838-9302
19 Email: campbell@mhf.cc

20 LeslieAnn Haacke
21 Jennings Strouss & Salmon PLC
22 The Collier Center
23 201 E Washington St
24 11th Floor
25 Phoenix, AZ 85004-2385
26 602-262-5890
Fax: 602-495-2640
Email: lhaacke@jsslaw.com

William W Drury, Jr.
Renaud Cook Drury Mesaros PA
Phelps Dodge Tower
1 N Central Ave
Ste 900
Phoenix, AZ 85004-4418
602-256-3012
Fax: 602-307-5853
Email: wdrury@rcdmlaw.com

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COPY of the foregoing
mailed the 18th day of June, 2007 to:

Thomas E Sewell
1600 SW 131st Terr.
Davie, FL 33325

/s/ Jeffrey A. Sandell

EXHIBIT A

1 LeslieAnn Haacke - 012734
2 Paul G. Johnson - 010309
3 **JENNINGS, STROUSS & SALMON, P.L.C.**
4 A Professional Limited Liability Company
5 The Collier Center, 11th Floor
6 201 East Washington Street
7 Phoenix, Arizona 85004-2385
8 Telephone: (602) 262-5911
9 Minute Entries@jsslaw.com

10 Attorneys for *Defendant James Schneider*

11 **IN THE UNITED STATES DISTRICT COURT**
12 **DISTRICT OF ARIZONA**

13 GLOBAL FINANCIAL
14 INVESTMENTS,
15 L.L.C., an Arizona limited liability
16 company,

17 Plaintiff,

18 vs.

19 THOMAS E. SEWELL et ux., et al.,

20 Defendants.

No. CIV 04-01465 PHX JWS

10/13

**DEFENDANT JAMES
SCHNEIDER'S RESPONSES AND
OBJECTIONS TO PLAINTIFF'S
FIRST SET OF
INTERROGATORIES TO
DEFENDANT JAMES SCHNEIDER**

21 **TO: JAMES SCHNEIDER**

22 YOU ARE HEREBY NOTIFIED that, pursuant to Rule 33, Federal Rules of
23 Civil Procedure, Plaintiff, Global Financial Investments, L.L.C., demands that you
24 answer under oath and in writing, within thirty (30) days from the receipt hereof, the
25 following Interrogatories:
26

1 **INTERROGATORY #20:** Have you (personally or on behalf of any law firm by
2 which you were employed) ever received or accepted any monies from Plaintiff for
3 any reason? In responding to Interrogatory number twenty, please state the
4 following:

- 5 (a) All facts supporting your allegation, including the reason why
6 you received such monies;
- 7 (b) Identity of each person known to you to have knowledge of any
8 facts pertaining to or in any way relating to your answer to this
9 interrogatory;
- 10 (c) Identity of each document that supports or relates to the facts
11 stated in your answer to this interrogatory.

12

13 *(a) James Schneider responds as follows: In February of 2000, Atlas,*
14 *Pearlman, P.A. received a check in the amount of \$138,845, which was deposited*
15 *into the Atlas, Pearlman, P.A. Trust Account, relating to the acquisition of C&M*
16 *Oil Company. To the best of Schneider's knowledge, Atlas, Pearlman, P.A. was*
17 *not involved in closing that transaction, but it simply allowed its trust account to be*
18 *used as a depository to complete the transaction. The initial check bounced due to*
19 *insufficient funds. Replacement funds in the amount of \$138,845 were provided*
20 *under the same conditions, but were later returned to Al Bowen. Also, on or about*
21 *June 14, 2000, Atlas, Pearlman, P.A. received a check from Global Financial*
22 *Investments in the amount of \$2,500 to offset the costs to Whitehall associated with*
23 *the Rule 144 letters, which are described in response to Interrogatory No. 11. This*
24 *is common practice when it comes to Rule 144 letters, whereby the requesting*
25 *stockholders themselves reimburse the company (Whitehall) for the cost of the*
26 *letter. Atlas, Pearlman, P.A., represented Whitehall and not the stockholder. The*

1 *stockholder simply defrayed the cost to Whitehall. This does not indicate that there*
2 *is any relationship between Atlas, Pearlman, P.A. (or Mr. Schneider) and the*
3 *requesting stockholder.*

4 *(b) Robin Russo, Carlos Trueba, Al Bowen.*

5 *(c) Documents showing the receipt and handling of such funds, and the Rule*
6 *144 letters.*

7
8 **INTERROGATORY #21:** List each and every meeting (regular, special or
9 otherwise) that was ever conducted by the board of directors of Whitehall
10 Enterprises, Inc., or a committee of the board of directors of Whitehall Enterprises,
11 Inc., at which you were present or about which you have any knowledge. In
12 responding to Interrogatory number twenty-one, also state the following:

13 (a) All facts supporting your explanation, including, but not limited
14 to, the date, time and location of any meetings;

15 (b) All events, topics, matter, votes or issues discussed at those
16 meetings;

17 (c) Identity of each person known to you to have knowledge of any
18 facts pertaining to or in any way relating to your answer to this
19 interrogatory;

20 (d) Identity of each document that supports or relates to the facts
21 stated in your answer to this interrogatory.

22
23 *On or about December 2, 1997, and on or about October 27, 1999.*

24 *(a) At Whitehall's former offices, 3200 North Military Trail, Boca Raton,*
25 *Florida 33431. He does not recall the time.*

26 *(b) As shown by the minutes.*

1 and location of any such conversation or meeting;

2 (b) The exact content of the conversation or the subject matter of
3 the meeting;

4 (c) Identity of each person known to you to have knowledge of any
5 facts pertaining to or in any way relating to your answer to this
6 interrogatory, including, but not limited to, the persons who were
7 present at any such meetings;

8 (d) Identity of each document that supports or relates to the facts
9 stated in your answer to this interrogatory.

10
11 *None, to the best of James Schneider's knowledge.*

12 Dated this 13th day of October, 2006.

13
14 JENNINGS, STROUSS & SALMON, P.L.C.

15
16 By 

17 LeslieAnn Haacke

18 Paul G. Johnson

19 The Collier Center, 11th Floor

20 201 East Washington Street

21 Phoenix, Arizona 85004-2385

22 *Attorneys for Defendant James Schneider*

23 ORIGINAL of the foregoing
24 mailed this 13th day of
25 October, 2006, to:

26 Christopher R. Kaup, Esq.
TIFFANY & BOSCO P.A.
Third Floor, Camelback Esplanade II
2525 East Camelback Road
Phoenix, AZ 85016-4237
Attorneys for Plaintiff

1 COPIES mailed this 17th day of
2 October, 2006, to:

3 Clifton Andrew Campbell, Esq.
4 Martin, Hart & Fullerton, P.C.
5 1839 South Alma School Road, Suite 354
6 Mesa, Arizona 85210
Attorneys for Defendant Luis Alvarez

7 Curtis D. Ensign, Esq.
8 3225 N. Central, Suite 1609
9 Phoenix, AZ 85012-2413
Attorneys for Defendants Foy and Miller

10
11
12 Brian Holohan, Esq.
13 HINSHAW & CULBERTSON
14 3800 N. Central Avenue, Suite 1600
15 Phoenix, AZ 85012-1946
*Attorneys for Defendants Trueba and
Rodriguez, Trueba & Company, CPA*

16 Thomas E. Sewell
17 Inmate Register No. 56917-004
18 EDGFIELD FCI
19 501 Gary Hill Road
20 P.O. Box 725
21 Edgefield, SC 29824
Defendant Pro Se

22 By 
23
24
25
26

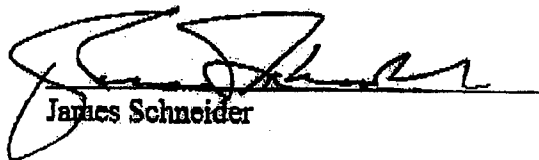
VERIFICATION

I, James Schneider, a Defendant herein, declares as follows:

I have reviewed the information contained in the response to "Plaintiff's First Set of Interrogatories to Defendant James Schneider", and the information contained therein is true and correct except for those matters stated to be true upon information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this date: October 13, 2006


James Schneider

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