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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

U.S. INSPECTION SERVICES, INC.,  
Plaintiff,  
v.  
NL ENGINEERED SOLUTIONS, LLC, et  
al.,  
Defendants.

No. C-10-mc-80083-CRB (DMR)

**ORDER RE MOTION TO QUASH  
THIRD PARTY SUBPOENA**

\_\_\_\_\_  
GREAT DANE LIMITED PARTNERSHIP,  
Plaintiff,  
v.  
FULKS-GRAHAM HOLDING CO. f/k/a  
U.S. INSPECTION SVCS., INC., et al.,  
Defendants.  
\_\_\_\_\_

This matter arises out of the issuance of a subpoena *duces tecum* under Rule 45 of the Federal Rules of Civil Procedure upon a non-testifying expert consultant, Exponent Failure Analysis Associates (“Exponent”). Intervening Plaintiff Great Dane Limited Partnership (“Great Dane”) has moved to quash the subpoena. Defendant Fulks-Graham Holding Co. (“Fulks-Graham”) opposes the motion to quash.

1            Having considered the parties’ briefs and accompanying submissions, as well as the oral  
2 argument of counsel presented during the June 24, 2010 hearing, the Court hereby GRANTS  
3 Great Dane’s Motion to Quash Third Party Subpoena.  
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5    **I. BACKGROUND**

6            In November 2006, Fulks-Graham (formerly known as U.S. Inspection  
7 Services, Inc.), initiated an action in the Southern District of Ohio seeking declaratory judgment  
8 against NL Engineered Solutions, LLC (“NLES”) and Indiana Metal Treating, Inc. (“Indiana  
9 Metal Treating”).

10           On June 24, 2009, Great Dane intervened in the action by filing claims for, *inter alia*,  
11 breach of contract, breach of warranty, and negligence against NLES, Indiana Metal Treating,  
12 and Fulks-Graham. *See* Docket No. 7 (Affidavit of Christine Huntoon, Exh. A, Complaint). In  
13 its suit, Great Dane alleged that NLES sold defective kingpins – metallic devices which provide  
14 a coupling point between an over-the-road tractor and a semi-trailer – to Great Dane. *See id.*  
15 (Huntoon Aff., Exh. A, Complaint ¶ 7). NLES, in turn, had entered into service contracts with  
16 Indiana Metal Treating and Fulks-Graham for heat treating and inspection of the kingpins it had  
17 sold to Great Dane. *See id.* (Huntoon Aff., Exh. A, Complaint ¶¶ 8-9). According to Great  
18 Dane, the defective kingpins, which failed to meet Great Dane’s hardness specifications, had  
19 been improperly heat-treated by Indiana Metal Treating and improperly inspected by Fulks-  
20 Graham. *See id.* (Huntoon Aff., Exh. A, Complaint ¶¶ 13-21). Pursuant to its obligations under  
21 the National Highway & Traffic Safety Act (“NHTSA”) and the regulations of the National  
22 Highway & Traffic Safety Administration (“Agency”), Great Dane informed the Agency of the  
23 kingpins’ safety-related defects and initiated a recall of all semi-trailers that contained the  
24 defective kingpins. *See id.* (Huntoon Aff., Exh. A, Complaint ¶¶ 22-26). Consequently, Great  
25 Dane claims it has incurred and will continue to incur considerable expenses in order to conduct  
26 the recall, and alleges that NLES, Indiana Metal Treating, and Fulks-Graham are jointly and  
27 severally liable to Great Dane for damages. *See id.* (Huntoon Aff., Exh. A, Complaint ¶¶ 29-34,  
28 42, 47, 53, 60, 67).

1 On July 7, 2009, Great Dane’s counsel engaged the technical services of Exponent,  
2 located in Menlo Park, California. Specifically, Exponent was retained to provide Great Dane’s  
3 counsel with a technical analysis of whether the “Brinell hardness range set by the American  
4 Association of Railroads...is appropriate for a tractor-trailer kingpin, or if higher values of  
5 hardness may be suitable.” See Docket No. 13-1 (Affidavit of John Hewson, Exh. 1, Letter from  
6 Exponent to Hewson (hereinafter “Engagement Letter”) at 1). Although Fulks-Graham and  
7 Great Dane agree that Exponent was hired at least in part to assist counsel in advising Great  
8 Dane on the recall, they dispute whether Exponent was also retained in connection with the  
9 pending litigation in Ohio. Great Dane has not designated Exponent as a testifying expert. See  
10 Docket No. 13 (Hewson Aff. ¶ 13).

11 On March 23, 2010, Fulks-Graham issued a subpoena *duces tecum* in this district,  
12 demanding that Exponent produce various documents by April 16, 2010, including testing  
13 records, analyses, reports, photographs, samples, and raw data related to Exponent’s analysis of  
14 kingpins for Great Dane. See Docket No. 7 (Huntoon Aff., Exh. F). On April 14, 2010, Great  
15 Dane moved to quash the subpoena.

## 16 17 **II. DISCUSSION**

18 Great Dane has moved this court for an order quashing the third party subpoena issued  
19 upon Exponent under Rule 45, on two grounds: (1) the subpoena seeks information from a non-  
20 testifying expert retained in anticipation of litigation and thus protected from discovery by Rule  
21 26(b)(4)(B); and (2) the subpoena seeks trial preparation material protected by the work product  
22 doctrine under Rule 26(b)(3).

23 Fulks-Graham opposes the motion to quash based on the following arguments: (1)  
24 Exponent was not hired “in anticipation of litigation” so the protections under either Rule  
25 26(b)(4)(B) or Rule 26(b)(3) are not triggered; (2) exceptional circumstances exist to justify  
26 production of the documents, due to the purported destruction of evidence and Fulks-Graham’s  
27 putative inability to access information which Fulks-Graham asserts has increased its exposure to  
28 damages; and (3) Great Dane has waived any such protections by voluntarily disclosing certain

1 documents related to Exponent’s work and by failing to object when Fulks-Graham questioned a  
2 Great Dane witness about Exponent.<sup>1</sup>

3 As set forth fully below, the Court orders that the third party subpoena be quashed. With  
4 respect to the documents for which Great Dane asserts protection under Rule 26(b)(4)(B) as  
5 information known to a non-testifying expert, the Court finds that Exponent was retained “in  
6 anticipation of litigation,” as this phrase has been defined by controlling Ninth Circuit precedent,  
7 that exceptional circumstances do not exist to justify their production, and that Great Dane has  
8 not waived protection under Rule 26(b)(4)(B) for the documents that have not yet been  
9 disclosed. With respect to the one document for which Great Dane claims work product  
10 protection, the Court finds that this document was created “in anticipation of litigation,” that  
11 Fulks-Graham has not demonstrated any substantial need for its production, and that Great Dane  
12 has not waived work product protection.

13 **A. Fed.R.Civ.P. 26(b)(4)(B) and Non-Testifying Experts.**

14 Under Rule 45(c)(3)(A)(iii), a court must quash a subpoena that “requires disclosure of  
15 privileged or other protected matter, if no exception or waiver applies.”<sup>2</sup> Fed.R.Civ.P.  
16 45(c)(3)(A)(iii). In turn, Great Dane points to Rule 26(b)(4)(B) as the basis for denying  
17 discovery of all but one of the documents sought through the subpoena.

18 Rule 26(b)(4)(B) provides:

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21 <sup>1</sup> As part of its reply brief, Great Dane submitted a privilege log listing 40 documents.  
22 *See* Docket No. 13-2 (Hewson Aff. ¶ 15, Exh. 2). Of those documents, Great Dane asserts that  
23 39 are protected as “information known to [a] non-testifying expert,” and identifies only one  
24 document as sheltered by work product. *See id.* Based on the submission of the privilege log,  
25 Fulks-Graham dropped its claim at oral argument that a waiver should be found due to Great  
26 Dane’s previous failure to provide a log.

27 <sup>2</sup> As a preliminary matter, this Court applies federal law in resolving the claims asserted  
28 by Great Dane. Because the work product doctrine and protection accorded to non-testifying  
experts are not evidentiary privileges but rather, procedural limitations on discovery, the scope  
of these asserted protections is determined by federal law, even when the federal court sits in  
diversity. *See Mitchell Engineering v. City & County of San Francisco*, No. C 08-04022 SI,  
2010 WL 1853493, at \*2 (N.D. Cal. May 6, 2010); *Great American Assurance Co. v. Liberty  
Surplus Ins. Corp.*, 669 F. Supp. 2d 1084, 1090 (N.D. Cal. 2009).

1 Ordinarily, a party may not, by interrogatories or deposition,<sup>3</sup> discover facts known or  
2 opinions held by an expert who has been retained or specially employed by another party  
3 in anticipation of litigation or to prepare for trial and who is not expected to be called as a  
4 witness at trial. But a party may do so only:

- 5 (I) as provided in Rule 35(b);<sup>4</sup> or
- 6 (ii) on showing exceptional circumstances under which it is impracticable for the  
7 party to obtain facts or opinions on the same subject by other means.

8 Thus, Rule 26(b)(4)(B) “creates a safe harbor whereby facts and opinions of non[-]  
9 testifying, consulting experts are shielded from discovery, except upon a showing of exceptional  
10 circumstances.” *PlymoVent Corp. v. Air Tech. Solutions, Inc.*, 243 F.R.D. 139, 143 (D. N.J.  
11 2007). The party asserting an applicable protection bears the initial burden of showing that the  
12 protection applies. *See United States v. 22.80 Acres of Land*, 107 F.R.D. 20, 21 (N.D. Cal.  
13 1985). Once that initial burden is met, the party seeking discovery from a non-testifying expert  
14 carries a heavy burden of proving the existence of exceptional circumstances. *See Oki America,*  
15 *Inc. v. Advanced Micro Devices, Inc.*, No. C 04-3171 CRB (JL), 2006 WL 2987022, at \*2 (N.D.  
16 Cal. Sept. 27, 2006); *Vanguard Savings & Loan Ass’n v. Banks*, No. CIV. A. 93-4627, 1995 WL  
17 71293, at \*3 (E.D. Pa. Feb. 17, 1995). The burden of proving any claimed waiver of protection  
18 also rests on the party seeking discovery. *Johnson v. Gmeinder*, 191 F.R.D. 638, 643 (D. Kan.  
19 2000) (where claim of protection arises under Rule 26(b)(4)(B), burden of proof is on party  
20 asserting waiver).

21 Counsel for Great Dane has attested that it has not designated Exponent as a testifying  
22 expert in this case. *See* Docket No. 13 (Hewson Aff. ¶ 13). Fulks-Graham does not dispute this  
23 point, nor that the documents are protected under Rule 26(b)(4)(B) because they are “facts

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24 <sup>3</sup> Rule 26(b)(4)(B) does not explicitly mention document requests. Fulks-Graham does  
25 not contest the point that Rule 26(b)(4)(B) applies with equal force to protect *documents* sought  
26 from non-testifying experts. *See, e.g., PlymoVent Corp. v. Air Tech. Solutions, Inc.*, 243 F.R.D.  
27 139, 143-44 (D.N.J. 2007); *Hollinger Int’l, Inc. v. Hollinger, Inc.*, 230 F.R.D. 508, 519 (N.D. Ill.  
28 2005); *Ludwig v. Pilkington N. America, Inc.*, No. 03 C 1086, 2003 WL 22242224, at \* 1 (N.D.  
Ill. Sept. 29, 2003) (explaining that Rule 45 cannot be utilized for obtaining an expert’s files  
where Rule 26(b)(4)(B) remains the limitation on discoverability) (citation omitted)).

<sup>4</sup> Rule 35(b) pertains to examiner’s reports of physical and mental examinations and is  
not applicable here.

1 known or opinions held” by Exponent. Fulks-Graham’s sole argument against the applicability  
2 of Rule 26(b)(4)(B) is that Exponent was not in fact retained in anticipation of litigation. *See*  
3 Docket No. 6 (Opp’n at 4-7). Therefore, to prevail on its claim that the documents sought are  
4 protected from discovery under Rule 26(b)(4)(B), Great Dane must first establish it retained  
5 Exponent in anticipation of litigation. The burden then falls on Fulks-Graham to demonstrate  
6 that either exceptional circumstances compel discovery or that waiver is appropriate in these  
7 circumstances.

8 1. “In anticipation of litigation.”

9 The pivotal question before this Court, to which the parties devoted most of their written  
10 and oral argument, is whether Exponent was retained “in anticipation of litigation.” *See*  
11 Fed.R.Civ.P. 26(b)(4)(B). Both parties cite to *In re Grand Jury Subpoena (Mark Torf)*, 357 F.3d  
12 900 (9th Cir. 2003), in support of their respective positions.

13 In *In re Grand Jury Subpoena (Mark Torf)*, the Ninth Circuit examined the applicability  
14 of the work product doctrine under Rule 26(b)(3)<sup>5</sup> to documents prepared by an environmental  
15 consultant hired by an attorney who had been retained by a party (“Ponderosa”) to advise and  
16 defend it in anticipated litigation with the government. *See In re Grand Jury Subpoena (Mark*  
17 *Torf)*, 357 F.3d at 905-06. After the EPA notified Ponderosa that it was under investigation for  
18 unlawful transportation and disposal of hazardous substances, the consultant conducted  
19 interviews and an investigation to assist the attorney in mounting a legal defense. *Id.*  
20 Information collected by the consultant was used to respond to an EPA Information Request, a  
21 reporting requirement independent of the anticipated litigation. *Id.* Two years later, a grand jury  
22 investigating Ponderosa issued a subpoena to the consultant for the production of all records  
23 relating to the disposal of waste by Ponderosa. *Id.* at 906. Arguing that the documents were

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25 <sup>5</sup> Although *In re Grand Jury Subpoena* dealt with work product protection under Rule  
26 26(b)(3), the same analysis should apply to the phrase “in anticipation of litigation” under Rule  
27 26(b)(4)(B). *See, e.g., Klee v. Whirlpool Corp.*, 251 F.R.D. 507, 511-12 & n.3 (S.D. Cal. 2006);  
28 *Hollinger*, 230 F.R.D. at 520-21. *See also In re PolyMedica Corp. Securities Litigation*, 235  
F.R.D. 28, 30-31 (D. Mass. 2006) (importing analysis of the phrase “in anticipation of litigation”  
under Rule 26(b)(3) to Rule 26(b)(4)(B), “[g]iven the similar language” in both Rules).

1 protected under the work product doctrine, Ponderosa intervened and moved to quash the  
2 subpoena. *Id.*

3         Given this backdrop, the Ninth Circuit found that certain documents sought under the  
4 subpoena served a “dual purpose” in that they were prepared under the direction of an attorney in  
5 anticipation of litigation with the government *and* in compliance with the EPA Information  
6 Request. *See id.* at 907-08. Adopting the “because of” standard articulated in the Wright &  
7 Miller Federal Practice treatise, the Ninth Circuit reasoned: “[The attorney] hired [the  
8 consultant] because of Ponderosa’s impending litigation and [the consultant] conducted his  
9 investigations because of that threat. The threat animated every document [the consultant]  
10 prepared, including the documents prepared to comply with the Information Request....” *Id.* at  
11 908. Indeed, it was the anticipation of litigation that “prompted” the consultant’s work “in the  
12 first place.” *Id.* at 909.

13         Thus, the documents were entitled to work product protection under Rule 26(b)(3)  
14 because “taking into account the facts surrounding their creation, their litigation purpose so  
15 permeate[d] any non-litigation purpose that the two purposes [could not] be discretely separated  
16 from the factual nexus as a whole.” *Id.* at 910. Consequently, protection from discovery inures  
17 when the so-called independent non-litigation purpose is “grounded in the same set of facts that  
18 created the anticipation of litigation,” but is less likely when the non-litigation purpose is “truly  
19 separable.” *See id.* at 908-09. In other words, the “because of” standard “does not consider  
20 whether litigation was a primary or secondary motive” but looks to the “totality of the  
21 circumstances.” *Id.* at 908.

22         Accordingly, district courts have employed the “because of” standard to interpret the  
23 phrase “in anticipation of litigation” in the context of the protection afforded non-testifying  
24 experts under Rule 26(b)(4)(B). In so doing, courts have weighed factors such as the timing of  
25 retention of the non-testifying expert in relation to the litigation at issue and the existence of  
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1 evidence including supporting affidavits and engagement letters.<sup>6</sup>

2           In *Hollinger Int'l, Inc. v. Hollinger, Inc.*, a case cited by Great Dane, the court applied  
3 the reasoning of *In re Grand Jury Subpoena (Mark Torf)* in holding that undisclosed portions of  
4 a non-testifying expert's report were protected by Rule 26(b)(4)(B). 230 F.R.D. 508, 520-22  
5 (N.D. Ill. 2005). This was so even though the report arguably served a dual purpose because it  
6 was relied on as part of a special committee report mandated by a consent decree. *Id.* at 521.  
7 The court noted that the special committee report incorporating the expert report "arose out of  
8 the same set of circumstances that created the anticipation of litigation." *Id.* at 521. In finding  
9 that the expert was retained and the report was therefore prepared in anticipation of litigation, the  
10 court considered a supporting declaration filed by counsel and examined when the non-testifying  
11 expert was retained. *Id.* at 520. As part of its analysis, the court commented that two pieces of  
12 litigation were "ongoing" when the expert was contacted by counsel and that a third piece of  
13 litigation had been filed by the time the expert was formally retained. *Id.* The court also found  
14 that status as a non-testifying expert was not altered by the fact that the engagement letter did not  
15 explicitly state the expert was retained in anticipation of litigation but rather to provide technical  
16 services and analysis. *Id.* at 521 & n.15.

17           Similarly, in *In re PolyMedica Corp. Securities Litigation*, the court found that a non-  
18 testifying expert was retained "in anticipation of litigation" after examining the engagement  
19 letter and the timing of the expert's retention relative to the inception of the lawsuit.<sup>7</sup> 235 F.R.D.

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21           <sup>6</sup> Analogously, courts interpreting work product protection under Rule 26(b)(3) have  
22 found that "a party may satisfy its burden of showing anticipation of litigation in any of the  
23 traditional ways in which proof is produced in pretrial proceedings such as affidavits made on  
24 personal knowledge...." *United States v. Roxworthy*, 457 F.3d 590, 597 (6th Cir. 2006) (internal  
25 quotation omitted); *see also United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1082-  
26 83 (N.D. Cal. 2002) (adopting "because of" test and accepting party's "general assertion,  
supported by competent declarations, that the proffered anticipation of litigation was real").  
However, a party fails to meet this burden where the "only basis" for the claim of protection is  
an affidavit containing conclusory statements. *Roxworthy*, 457 F.3d at 597 (citation omitted).

27           <sup>7</sup> In making this determination, the district court applied in part the First Circuit's  
28 "because of" test. The court indicated that the First Circuit has also adopted the "because of"  
standard set forth in the Wright & Miller Federal Practice treatise. *See In re PolyMedica Corp.*,



1 28, 31-32 (D. Mass. 2006). The court emphasized that when counsel retained the non-testifying  
2 expert, “litigation was not merely possible, it had already begun.” *Id.* at 31-32. Moreover, as  
3 evidence in support of the assertion that the expert was hired “in anticipation of litigation,” the  
4 court pointed to the engagement letter submitted as an exhibit to counsel’s affidavit – even  
5 though the language of the letter “may [have been] self-serving” because it indicated the expert  
6 was retained “to assist in...giving legal advice” to the defendants. *Id.* at 31.

7 Here, to address the question of whether Exponent was hired “in anticipation of  
8 litigation” under Rule 26(b)(4)(B), this Court is guided by the “because of” standard set forth by  
9 the Ninth Circuit in *In re Grand Jury Subpoena (Mark Torf)*, and finds instructive district court  
10 cases including *Hollinger* and *In re PolyMedica Corp.* that have applied the “because of”  
11 standard to Rule 26(b)(4)(B). Accordingly, this Court has considered the totality of the factual  
12 circumstances in this case, based on sworn affidavits from Great Dane’s counsel and Exponent’s  
13 engagement letter, proffers made on the record by counsel at oral argument, and the intervening  
14 complaint itself – all of which establish that Exponent was retained “in anticipation of litigation”  
15 even though its retention served a dual purpose of assisting with the recall.

16 First, the Court finds operative the timing of Exponent’s retention by counsel for Great  
17 Dane. Fulks-Graham does not dispute that when Exponent was hired by Great Dane, the instant  
18 litigation was not merely anticipated, it had already begun. *See, e.g., Hollinger*, 230 F.R.D. at  
19 520; *In re PolyMedica Corp.*, 235 F.R.D. at 31. As Fulks-Graham itself points out, Great Dane  
20 initiated the recall of defective kingpins in or around December 2008. *See* Docket No. 6 (Opp’n  
21 at 2). Exponent was not a consultant for Great Dane at that time. On June 24, 2009, Great Dane  
22 intervened in the action originating in the Southern District of Ohio by filing an intervening suit  
23 for damages against Fulks-Graham and the other parties to the underlying action. *See* Docket  
24 No. 7 (Huntoon Aff., Exh. A, Complaint). According to the privilege log provided by Great  
25 Dane, the first email exchange with Exponent, which concerned “the scope of work to be done  
26 by Exponent,” occurred on June 29, 2009, five days *after* the intervening suit was filed. *See*  
27 Docket No. 13-2 (Hewson Aff., Exh. 2). Subsequently, on July 7, 2009, Exponent confirmed the

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28 235 F.R.D. at 30-31.

1 scope of technical services to be provided in an engagement letter to Great Dane. *See* Docket  
2 No. 13-1 (Hewson Aff., Exh. 1). The undisputed sequence of events indicates that Exponent’s  
3 work for Great Dane was prompted in the first instance by the intervening suit for damages.

4         Second, the affidavit by Great Dane’s counsel and the engagement letter both  
5 demonstrate that Exponent was hired in anticipation of litigation. In a sworn affidavit, counsel  
6 for Great Dane attests that in July 2009, he retained Exponent on behalf of his firm to provide  
7 “technical services and expert advice related to this matter”; that “[b]ased on....three interrelated  
8 and inseparable concerns (i.e., compliance with the NHTSA and the Agency regulations,  
9 damages arising from the recall with respect to this litigation, and the potential for future  
10 personal injury litigation resulting from a fractured kingpin while in service on the national  
11 highways), [he] hired Exponent to assist... in formulating [his] opinion so that [he] might provide  
12 legal advice to Great Dane about how to best balance these three concerns in the context of the  
13 out of specification kingpins which are the subject of this litigation”; and that Exponent was  
14 hired “to assist [him]... in representing Great Dane in this case pending in the Southern District  
15 of Ohio.” *See* Docket No. 13 (Hewson Aff. ¶¶ 5, 9, 10). In turn, the engagement letter between  
16 Exponent and counsel for Great Dane, dated July 7, 2009, confirms that Exponent was retained  
17 to provide counsel with a technical analysis of whether the “Brinell hardness range set by the  
18 American Association of Railroads...is appropriate for a tractor-trailer kingpin, or if higher  
19 values of hardness may be suitable.” *See* Docket No. 13-1 (Hewson Aff., Exh. 1, Engagement  
20 Letter at 1). The appropriate hardness value of the kingpins appears central to Great Dane’s  
21 claims in its intervening suit, a fact which Fulks-Graham does not dispute.<sup>8</sup>

22         Third, Great Dane’s intervening complaint sets forth how the recall and ensuing litigation  
23 are factually and legally intertwined. Indeed, counsel for Great Dane repeated on the record that  
24 Exponent was retained to assist counsel with the instant litigation, in addition to the recall and  
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28         <sup>8</sup> In its intervening complaint, Great Dane contends that certain kingpins inspected by  
Fulks-Graham failed to meet Great Dane’s hardness specifications and fractured because they  
were too hard. *See* Docket No. 7 (Huntoon Aff., Exh. A, Complaint ¶¶ 12-17, 19-21).

1 anticipated private products liability litigation arising from the allegedly defective kingpins.<sup>9</sup>  
2 Exponent’s assistance with the recall is “grounded in the same set of facts that created the...  
3 litigation.” See *In re Grand Jury Subpoena (Mark Torf)*, 357 F.3d at 909 (emphasis added). In  
4 its intervening suit, Great Dane alleges that after defective kingpins were discovered, Great Dane  
5 had a legal obligation to inform the National Highway & Traffic Safety Administration and to  
6 initiate a recall involving the defective kingpins, consequently giving rise to Great Dane’s  
7 damages which the company continues to incur as the recall progresses.<sup>10</sup> See Docket No. 7  
8 (Huntoon Aff., Exh. A, Complaint ¶¶ 22-34). As identified by Great Dane, the litigation purpose  
9 of retaining Exponent “so permeate[d]” the concomitant purpose of assisting with the recall that  
10 “the two purposes cannot be discretely separated from the factual nexus as a whole.” See *In re*  
11 *Grand Jury Subpoena (Mark Torf)*, 357 F.3d at 910.

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14 <sup>9</sup> The Court need not reach the question of whether Exponent was hired in anticipation of  
15 prospective products liability litigation since the Court finds for the reasons set forth herein that  
16 Exponent was retained in anticipation of the instant litigation pending in the Southern District of  
17 Ohio.

18 <sup>10</sup> Specifically, Great Dane’s complaint alleges, *inter alia*:

- 19 • “Under the National Highway & Traffic Safety Act (‘NHTSA’) and the regulations  
20 promulgated pursuant to the NHTSA by the National Highway & Traffic Safety  
21 Administration (the ‘Agency’), Great Dane has an obligation to inform the Agency  
22 within five days of gaining knowledge of a safety-related defect.”
- 23 • “Pursuant to this obligation, Great Dane informed the Agency of the defect in heat lot NS  
24 919 based on the Second Failure in November, 2008.”
- 25 • “Pursuant to this obligation, Great Dane informed the Agency of the defect in heat lot PH  
26 958 based on the Third Failure in December, 2008.”
- 27 • “Pursuant to the applicable Agency regulations, Great Dane was required to commence a  
28 recall of all semi-trailers that contained kingpins from heat lots NS 919 and PH 958.”
- “Great Dane has incurred and will continue to incur considerable expense to conduct this  
recall, including, but not limited to the cost of locating and inspecting semi-trailers with  
kingpins from the suspect heat lots...other expenses of administration of the recall, the  
cost of testing kingpins in the suspect lots, and the cost of replacing the upper coupler  
assembly of the trailers with defective kingpins.”
- “At the time of filing this complaint, Great Dane has replaced approximately 117 main  
beam assemblies in semi-trailers containing...defective kingpins.... This number will  
continue to increase as the recall progresses.”

See Docket No. 7 (Huntoon Aff., Exh. A, Complaint ¶¶ 22-24, 26, 29, 34).

1           Nevertheless, Fulks-Graham contends that Exponent was hired by Great Dane *solely* to  
2 assist with the recall effort pursuant to Great Dane’s independent legal obligations under the  
3 NHTSA. Fulks-Graham asserts (without evidentiary support – *see* footnotes 11 and 13, *infra*),  
4 that Exponent’s work resulted in expanding the scope of the recall and therefore damages,<sup>11</sup> but  
5 that its work was at the same time wholly disconnected from any litigation purpose. The hard  
6 line between the recall and litigation that Fulks-Graham attempts to draw in this case is illusory,  
7 precisely because Fulks-Graham concedes that Exponent was hired to assist with the recall, and  
8 that the recall, in turn, *is* the basis of Great Dane’s damages in the intervening complaint. This  
9 concession by itself demonstrates the link between the recall and ensuing litigation, which are  
10 inextricably interrelated concerns. Thus, the undisputed fact that Exponent was retained after  
11 Great Dane filed its complaint to assist both with the recall *and* the litigation brings Exponent’s  
12 retention within the ambit of the “dual purpose” doctrine of *In re Grand Jury Subpoena (Mark*  
13 *Torf)*.

14           Next, Fulks-Graham argues that Exponent was not retained for a litigation purpose  
15 because its analysis would have been “created in substantially similar form” for the recall, even  
16 if the litigation had never occurred. *See* Docket No. 6 (Opp’n at 6). The same argument was  
17 rejected by the Ninth Circuit in *In re Grand Jury Subpoena (Mark Torf)*, where the government  
18 asserted that the documents at issue were not prepared in anticipation of litigation because they  
19 would have been “created in substantially similar form” in order to comply with the EPA  
20 Information Request. 375 F.3d at 908. The Ninth Circuit found that this factor, quoted from a  
21 Second Circuit case, did not by itself “eviscerat[e] work product protection” because the  
22 protection “cannot be decided simply by looking at one motive that contributed to a document’s  
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24           <sup>11</sup> The Court notes that there is no evidence in the record to support Fulks-Graham’s  
25 contention that Exponent’s analysis was actually a *basis* for the recall or resulted in *broadening*  
26 the scope of the recall. At oral argument, Fulks-Graham’s counsel conceded that he did not have  
27 any evidentiary support for this contention, did not know what tests Exponent performed for  
28 Great Dane, did not know what the recall decision was in fact based upon, and did not offer any  
deposition testimony, documents, or interrogatory responses indicating that Fulks-Graham had  
ever propounded discovery aimed at determining what, if any, role Exponent played in any recall  
decision.

1 preparation.” *Id.* Instead, the Ninth Circuit examined the totality of circumstances and whether  
2 the litigation and non-litigation purposes were “profoundly interconnected,” *id.*, as they are here.

3 Ancillary to its contention that Exponent was engaged by Great Dane for a truly  
4 independent business purpose, Fulks-Graham asserts that Exponent could not have been hired  
5 for litigation assistance because the terms of the engagement letter preclude that possibility.  
6 Fulks-Graham points to two sections of the engagement letter: the subject line and the section  
7 regarding conflicts of interest. *See* Docket No. 6 (Opp’n at 5); Docket No. 13-1 (Hewson Aff.,  
8 Exh. 1, Engagement Letter). The letter’s subject line, which reads “Great Dane Kingpin Recall  
9 Support,” is of no real import. As articulated above, Exponent’s retention served a dual purpose.  
10 The engagement letter need not have stated explicitly that Exponent was retained for litigation  
11 purposes. *See, e.g., Hollinger*, 230 F.R.D. at 521 & n.15.

12 Of more consequence is the language in the letter regarding Exponent’s potential conflict  
13 of interest with Indiana Metal Treating, one of the parties sued by Great Dane. The relevant  
14 section of the letter states: “Consistent with our policy of full disclosure, we must inform [Great  
15 Dane] that, Exponent has been engaged by Indiana Metal Treating on an investigation related to  
16 the litigation aspect of the above subject. Because of this existing relationship with Indiana  
17 Metal Treating, we would have a conflict with any efforts adverse to Indiana Metal Treating and  
18 would not assist [Great Dane] in such efforts. In the event this occurs, Exponent reserves the  
19 right to withdraw from participating in this matter....[¶] Exponent staff working on the above  
20 noted litigation on behalf of Indiana Metal Treating will not have access to any documents, data,  
21 analysis, and reports generated or used as a part of the current investigation.” Neither party  
22 disputes that Exponent proceeded in its consultant relationship with Great Dane for a period of  
23 time after the engagement letter, and no evidence has been presented that Exponent subsequently  
24 withdrew from such a relationship due to any ethical conflict that later arose.

25 According to Fulks-Graham, the fact that Exponent continued in its relationship with  
26 Great Dane, combined with Exponent’s analysis of the Brinell hardness range, a “neutral fact,”  
27 establish that Exponent viewed its own involvement as litigation-neutral, in support of the recall  
28 only. Otherwise, it would have been necessary for Exponent to withdraw its services due to a

1 conflict of interest. *See* Docket No. 6 (Opp’n at 6-7). Great Dane counters by arguing that if its  
2 only intention had been to consult with Exponent for purposes of the recall, it would have been  
3 superfluous to provide the names of the parties to the litigation as part of a conflicts check. *See*  
4 Docket No. 10 (Reply at 3). Great Dane further contends that Exponent’s indication that it could  
5 not engage in efforts adverse to Indiana Metal Treating “merely explains...that this expert will  
6 not be called to testify at trial.” *See id.* At oral argument, Great Dane’s counsel repeatedly  
7 represented that no ethical conflict existed because Exponent merely advised Great Dane on a  
8 “neutral fact” – the Brinell hardness range – which did not require Exponent to take a position  
9 that was adverse to another entity. That Exponent continued with its services for Great Dane  
10 only underscores the absence of an ethical conflict, according to Great Dane.

11 Neither party cites to any case law in support of its position.<sup>12</sup> On this issue, the Court  
12 finds determinative both parties’ characterizations on the record that Exponent’s analysis of the  
13 Brinell hardness range constituted advice on a “neutral fact” in this case, coupled with the  
14 absence of evidence before this Court that Exponent’s “neutral” analysis was actually utilized by  
15 Great Dane in any manner adverse to Indiana Metal Treating or for that matter, the other parties  
16 to the litigation.<sup>13</sup> Thus, given the lack of proof to the contrary, the terms of the engagement

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18 <sup>12</sup> The Court does not express an opinion on whether Great Dane is correct in its  
19 representation that its retention of Exponent was ethically proper.

20 <sup>13</sup> Fulks-Graham had asserted in its opposition that Exponent’s work for Great Dane  
21 determined the “necessity and scope” of the recall, including the decision to expand the recall to  
22 cover kingpins from “heat lot 955.” But Fulks-Graham’s own argument is internally  
23 contradictory and undermined by Great Dane’s complaint. For example, Fulks-Graham admitted  
24 in its opposition that “Great Dane’s engineering group determined in *May 2009* whether to  
25 expand [the] recall” – which thus pre-dates Exponent’s retention by two months. Additionally,  
26 Fulks-Graham’s averment that it only “recently” discovered in April 2010 that the recall would  
27 include heat lot 955 is belied by Great Dane’s complaint. In the intervening suit filed in June  
28 2009 *before Exponent was hired*, Great Dane alleged that it had already “tested two pins that  
were ultimately determined to be from...heat lot PH 955 that proved to be harder than Great  
Dane’s specifications” and that “[a]s a result, kingpins in...heat lot PH 955 will also be subject to  
a recall.” *See* Docket No. 7 (Huntoon Aff., Exh. A, Complaint ¶¶ 27-29). Finally, the deposition  
testimony cited by Fulks-Graham does not reveal any role played by Exponent in the decision to  
include lot 955 in the recall. *See* Docket No. 7 (Huntoon Aff., Exh. B-1, Deposition of Barry  
Mitchell, 137:21-138:4) (indicating only that this lot had not yet been formally recalled because  
Great Dane had “asked the *other parties* in the case for information related to the [955] lot

1 letter are not inconsistent with the sworn statements of Great Dane’s counsel that Exponent was  
2 hired to provide technical expertise on both the recall and litigation.

3 In sum, taking into account the totality of circumstances, including the timing of  
4 Exponent’s retention, the inextricably intertwined nature of the recall and Great Dane’s  
5 complaint in intervention, counsel’s sworn statements, the engagement letter, and the dual  
6 purpose role served by Exponent that is permissible under *In re Grand Jury Subpoena (Mark*  
7 *Torf)*, the Court finds that Great Dane has demonstrated Exponent was hired “because of” the  
8 litigation it had already initiated against Fulks-Graham and other parties.

9 2. Exceptional circumstances.

10 Because Great Dane has established that Exponent was retained “in anticipation of  
11 litigation,” Fulks-Graham must prove the existence of exceptional circumstances to justify  
12 production of documents otherwise protected from discovery under Rule 26(b)(4)(B). *See Oki*  
13 *America, Inc.*, 2006 WL 2987022, at \*2. Courts may find exceptional circumstances to order the  
14 production of non-testifying expert records when it is impracticable for the party seeking  
15 discovery to obtain facts or opinions on the same subject by any other means, or the object or  
16 condition at issue is destroyed or has deteriorated after the non-testifying expert observes it but  
17 before the moving party’s expert has an opportunity to observe it. *See Oki America, Inc.*, 2006  
18 WL 2987022, at \*2-3 (noting that “court after court has refused to permit discovery of non-  
19 testifying experts” where other means to obtain the information exist); *FMC Corp. v. Vendo Co.*,  
20 196 F. Supp. 2d 1023, 1046 (E.D. Cal. 2002); *Vanguard Savings & Loan Ass’n*, 1995 WL 71293,  
21 at \*3 (finding exceptional circumstances did not exist where defendants were capable of  
22 discovering equivalent information through interrogatories to expert witnesses who would  
23 address substantially the same issues as those discussed in non-testifying expert report).

24 Fulks-Graham offers two arguments in support of exceptional circumstances: (1)  
25 Exponent conducted “destructive charpy tests on key pieces of evidence” so the only possible  
26 way for Fulks-Graham to obtain this information is to review Exponent’s test results; and (2)  
27 Exponent’s work determined the “necessity and scope” of the recall so Fulks-Graham is

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and...that’s still in process...” (emphasis added).

1 “without means to obtain complete discovery regarding the factors upon which Great Dane based  
2 its decision to report a purported ‘safety defect’...to NHTSA and initiate a recall campaign.”  
3 *See* Docket No. 6 (Opp’n at 7-8). The Court is not persuaded by either contention.

4 First, the evidence indicates that Exponent did not conduct any destructive tests on the  
5 kingpins, let alone *any* tests. Eric Guyer, the Senior Managing Engineer for Exponent,  
6 submitted a sworn affidavit attesting that Exponent did not conduct any tests on the kingpin  
7 remnants. *See* Docket No. 12 (Affidavit of Eric Guyer ¶ 4). Charles Fetz, Vice President of  
8 Research and Development for a division of Great Dane, attested that Exponent returned all  
9 kingpin remnants, which were received by Great Dane “in the exact condition in which they  
10 were sent,” and that “based on the visual appearance of the returned kingpin remnants, Exponent  
11 conducted no tests on the kingpin remnants, including Charpy testing or other destructive  
12 testing.” *See* Docket No. 11 (Affidavit of Charles Fetz ¶¶ 5-6). This evidence is  
13 uncontroverted.<sup>14</sup>

14 Second, other discovery means of obtaining equivalent information exist. As an initial  
15 matter, Fulks-Graham has not submitted any evidentiary support for its claim that Exponent’s  
16 analysis actually defined the “necessity and scope” of the recall.<sup>15</sup> Moreover, it is undisputed  
17 that Fulks-Graham’s own expert has been provided with the opportunity to review the kingpin  
18 specimens that were sent to Exponent. *See* Docket No. 11 (Fetz Aff. ¶ 7) (attesting that all  
19 kingpin remnants that had been sent to Exponent were subsequently made available to Fulks-  
20 Graham’s expert for examination in North Carolina and that Fetz personally traveled with the  
21 remnants to meet with Fulks-Graham’s expert). Given this fact, Fulks-Graham has failed to  
22 explain why its own expert cannot conduct an analysis of the kingpins. Nor has Fulks-Graham  
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25 <sup>14</sup> Fulks-Graham points to an email chain that merely includes the word “Charpy” but  
26 nowhere indicates Exponent engaged in “destructive charpy testing.” *See* Docket No. 7  
27 (Huntoon Aff., Exh. E). Similarly, the cited deposition testimony of James Nelson, a witness for  
28 Great Dane, reveals that he did not think Exponent “did anything” to the kingpins and only that  
Great Dane was “interested in...the Charpy impact test.” *See* Docket No. 7 (Huntoon Aff., Exh.  
B-2, Deposition of James Nelson, 107:7-25; 125:17-25).

<sup>15</sup> *See* footnotes 11 and 13, *supra*.



1 explained why other discovery methods, including interrogatories or depositions, could not have  
2 been utilized to obtain information *from Great Dane* about the basis for and scope of the recall.  
3 Finally, Fulks-Graham will have the opportunity to conduct discovery against any expert  
4 designated by Great Dane to testify about damages from the recall.

5 3. Waiver under Rule 26(b)(4)(B).

6 Fulks-Graham asserts Great Dane has waived protection under Rule 26(b)(4)(B) because  
7 Great Dane previously disclosed “numerous documents detailing Exponent’s work” and  
8 permitted one of its witnesses to answer questions about Exponent without objection. *See*  
9 Docket No. 6 (Opp’n. at 9). The Court finds this basis insufficient for Fulks-Graham to meet its  
10 burden to prove waiver. *See Johnson*, 191 F.R.D. at 643.

11 First, the previously disclosed documents are not even at issue. Great Dane conceded at  
12 oral argument that it *voluntarily* produced several documents to Fulks-Graham; Great Dane’s  
13 counsel represented on the record that these documents were disclosed because they were part of  
14 Great Dane’s files and comprised “underlying factual documents” or “separate analyses done by  
15 one or more of the other parties in the action” – *not* the opinions or analysis of Exponent – which  
16 Great Dane is not now seeking to protect or “claw back” from discovery.<sup>16</sup>

17 Second, Fulks-Graham does not cite to a single case to support its contention that  
18 *subject-matter* waiver is appropriate here, such that Great Dane should be required to turn over  
19 all documents relating in subject matter to those already disclosed.<sup>17</sup> In this regard, Great Dane  
20 asserts that waiver may not even be viable under Rule 26(b)(4)(B), which was “designed to  
21 promote fairness by preventing access to an opposing party’s trial preparation.”<sup>18</sup> *See* Docket

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23 <sup>16</sup> The disclosed documents are marked by an asterisk on Great Dane’s privilege log.

24 <sup>17</sup> In its opposition, Fulks-Graham relies on two inapposite cases, *United States v.*  
25 *Bergonzi*, 216 F.R.D. 487 (N.D. Cal. 2003), and *Central Green Co. v. United States*, CV F 96-  
26 5541 REC SMS, 2003 U.S. Dist. LEXIS 26526 (E.D. Cal. February 25, 2003), merely to state  
the general proposition that the “work product doctrine is not absolute.”

27 <sup>18</sup> The Advisory Committee Notes to Rule 26(b)(4) underscore that the drafters of the  
28 Rule “reject[ed] as ill-considered [court] decisions which have sought to bring expert  
information within the work-product doctrine” and instead “adopt[ed] a form of the more  
recently developed doctrine of unfairness.” Fed.R.Civ.P. 26 Advisory Committee’s Note to

1 No. 1 (Mot. at 3); Docket No. 10 (Reply at 9). Indeed, some courts have reasoned that waiver  
2 does not apply to Rule 26(b)(4)(B) because it is rooted in the fairness doctrine and is not a  
3 species of work product. *See, e.g., Vanguard Savings & Loan Ass’n*, 1995 WL 71293, at \*2  
4 (finding that because Rule 26(b)(4)(B) is not an extension of the work product “privilege” but  
5 instead is grounded in the fairness doctrine, waiver argument was therefore “wholly irrelevant”  
6 to documents protected under the Rule); *Ludwig v. Pilkington N. America, Inc.*, No. 03 C 1086,  
7 2003 WL 22242224, at \*3 (N.D. Ill. Sept. 29, 2003) (emphasizing that information protected  
8 under Rule 26(b)(4)(B) is not subject to waiver because “non-testifying expert information is  
9 entirely exempt from discovery not on the basis of privilege, but rather, on the basis of  
10 unfairness”).

11 Even when courts have not squarely ruled on whether protection under Rule 26(b)(4)(B)  
12 may be waived, courts have been unwilling to find *subject-matter* waiver of a non-testifying  
13 expert’s undisclosed documents where there has been partial disclosure of the expert’s materials  
14 – based ultimately on principles of fairness. *See, e.g., Hollinger*, 230 F.R.D. at 521-22  
15 (commenting that “waiver argument rests on principles of fairness”; noting that Rule 26(b)(4)(B)  
16 does not itself address waiver; and declining to extend waiver to the undisclosed portions of a  
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18 Subdivision (b)(4), 1970 Amendments (citation omitted). *See also U.S. v. Meyer*, 398 F.2d 66,  
19 73-74 (9th Cir. 1968) (commenting that “the reasons [for rejecting as ill-considered the decisions  
20 which have sought to bring expert information within the work product doctrine] seem clear”);  
21 *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 116 F.R.D. 533, 539 (N.D. Cal. 1987) (stating that  
22 “[t]he work that retained experts do in anticipation of litigation is not work product and its  
23 discoverability is governed by a separate rule [26(b)(4)]”), *abrogated on other grounds by*  
24 *Advanced Cardiovascular Systems, Inc. v. C.R. Bard, Inc.*, 144 F.R.D. 372, 374 (N.D. Cal.  
25 1992); *Klee v. Whirlpool Corp.*, 251 F.R.D. 507, 511 (S.D. Cal. 2006) (stating that one purpose  
26 of Rule 26(b)(4)(B) is to “promote fairness by precluding unreasonable access to an opposing  
27 party’s diligent trial preparation”) (citations omitted); *FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d  
28 1023, 1048 (E.D. Cal. 2002) (same) (citations omitted). *See generally*, 8A Charles A. Wright,  
Arthur R. Miller, Mary K. Kane & Richard L. Marcus, *Federal Practice and Procedure* § 2029  
(3d ed. 2010) (stating that “[t]he knowledge of an expert is not privileged, [and] it is not part of  
the work product...”); Jack H. Friedenthal, *Discovery and Use of an Adverse Party’s Expert*  
*Information*, 14 Stan. L. Rev. 455, 488 (1962) (concluding that “the work product doctrine  
should [not] be extended to cover expert information which [it] normally would not protect” and  
that “[i]f such discovery is to be denied, it should be done on the ground that disclosure would be  
unfair under the particular facts of the case”).

1 non-testifying expert’s report and to all other documents involving the same subject matter, even  
2 where portions of expert’s findings had already been disclosed); *In re PolyMedica Corp.*, 235  
3 F.R.D. at 32-33 (commenting that “[w]hether the protection of Rule 26(b)(4)(B) can be waived  
4 at all is a difficult question”; stating that “[t]he... concern for fairness underlies the treatment of  
5 discovery of experts under [Rule] 26(b)(4)”; and denying waiver of underlying documents on  
6 same subject matter where non-testifying expert report had been disclosed because there was no  
7 evidence that defendants sought to use disclosed report as both “sword and shield” in any  
8 judicial proceeding) (internal citation omitted). *See also, Ludwig*, 2003 WL 22242224, at \*3  
9 (finding that even if doctrine of waiver applied to Rule 26(b)(4)(B), any waiver is limited to  
10 material disclosed and does not apply to undisclosed material).

11 Here, the Court need not resolve the question of whether waiver is even possible under  
12 Rule 26(b)(4)(B). Even assuming *arguendo* that the doctrine of waiver applies to Rule  
13 26(b)(4)(B), the facts of this case do not support subject-matter waiver. This Court is ultimately  
14 guided by the same fairness analysis utilized by other courts that have specifically examined the  
15 issue of subject-matter waiver under Rule 26(b)(4)(B). Accordingly, the Court finds that Fulks-  
16 Graham has not demonstrated why it would be unfair to limit disclosure to the documents  
17 already produced by Great Dane. Great Dane represented at the hearing that the documents it  
18 previously disclosed are underlying factual documents in this case, and not the opinions or  
19 reports of Exponent; none of the evidence presented by Fulks-Graham contradicts this  
20 representation. The deposition excerpts, the engagement letter, the email chain with Exponent  
21 regarding shipping logistics, and the other disclosed documents listed on Great Dane’s privilege  
22 log do not indicate that the substance of Exponent’s work has been partially revealed.<sup>19</sup> Thus,  
23 there is no indication in the record that Great Dane has attempted to use Exponent’s work as both  
24 a “sword and a shield” by making use of some documents setting forth Exponent’s analysis yet  
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26 <sup>19</sup> For example, Fulks-Graham points to the deposition of James Nelson, a Great Dane  
27 witness. *See* Docket No. 6 (Opp’n at 3, 9). However, the deposition excerpts merely indicate  
28 that Nelson identified Exponent as a third-party consultant for Great Dane and that he did not  
have personal knowledge of the work performed by Exponent. *See* Docket No. 7 (Huntoon Aff.,  
Exh. B-2, Nelson Depo., 105:19 -109:3).

1 withholding the rest to shelter unfavorable evidence. Because Fulks-Graham has not established  
2 any basis for subject-matter waiver, the Court finds that Great Dane has not waived protection  
3 under Rule 26(b)(4)(B) of the documents it has not previously disclosed.

4 **B. Fed.R.Civ.P. 26(b)(3) and Work Product Protection.**

5 In order to qualify for work product protection under Rule 26(b)(3), documents must  
6 possess two characteristics: (1) they must be “prepared in anticipation of litigation or for trial”  
7 and (2) they must be prepared “by or for another party or by or for that other party’s  
8 representative.” *In re Grand Jury Subpoena (Mark Torf)*, 357 F.3d at 907 (quoting Fed.R.Civ.P.  
9 26(b)(3)) (citation omitted). The burden is on the party seeking to withhold documents under the  
10 work product doctrine to show that it applies. *Baxter Healthcare Corp. v. Fresenius Med. Care*  
11  *Holding, Inc.*, No. C 07-1359 PJH (JL), 2008 WL 5214330, at \*3 (N.D. Cal. Dec. 12, 2008);  
12 *Visa U.S.A., Inc. v. First Data Corp.*, No. C-02-1786 JSW (EMC), 2004 WL 1878209, at \*5  
13 (N.D. Cal. Aug. 23, 2004). A party may satisfy this burden by submitting affidavits showing  
14 that certain facts exist to support the work product protection or by providing a privilege log  
15 describing the documents for which a protection is claimed. *Baxter Healthcare Corp.*, 2008 WL  
16 5214330, at \*3.

17 1. “In anticipation of litigation.”

18 As under Rule 26(b)(4)(B), Fulks-Graham’s sole argument against work product  
19 protection is that the document at issue was not prepared in anticipation of litigation. The single  
20 document for which Great Dane seeks work product protection is described in the privilege log  
21 as an “[e]mail [dated April 1, 2010] from John Hewson [counsel for Great Dane] to Eric Guyer  
22 [Senior Managing Engineer of Exponent] regarding [Great Dane’s] request to [Fulks-Graham] to  
23 withdraw subpoena.” *See* Docket No. 13-2 (Hewson Aff., Exh. 2). Based on the description of  
24 the email, its date of creation, and the identity of its author, the Court finds this email is a “single  
25 purpose” document that was clearly created because of the pending litigation. *See In re Grand*  
26 *Jury Subpoena (Mark Torf)*, 357 F.3d at 907; *Visa U.S.A.*, 2004 WL 1878209, at \*6 (stating that  
27 “[t]he ‘because of’ standard is not difficult to apply when a document has been prepared  
28 exclusively in anticipation of litigation”).

1           2.     Substantial need.

2           Because Great Dane has established that the email was created “in anticipation of  
3 litigation” to trigger work product protection, Fulks-Graham must show it has a substantial need  
4 for the document and that it cannot without undue hardship obtain its substantial equivalent by  
5 other means. *See In re Grand Jury Subpoena (Mark Torf)*, 357 F.3d at 906; *Visa U.S.A.*, 2004  
6 WL 1878209, at \*5. Fulks-Graham did not specifically argue the existence of substantial need.  
7 Given the nature of this document, Fulks-Graham’s arguments under exceptional circumstances  
8 (relating to destructive testing and the inability to obtain information underlying the recall  
9 decision) do not make sense to import here. Thus, Fulks-Graham has not contended and cannot  
10 demonstrate that a substantial need exists for this document.

11           3.     Waiver of work product protection under Rule 26(b)(3).

12           As the party asserting waiver of work product, Fulks-Graham must prove facts necessary  
13 to support a finding of waiver. *See In re Convergent Techs. Second Half 1984 Securities Litig.*,  
14 122 F.R.D. 555, 565 (N.D. Cal. 1988). The parties do not dispute that the single work product  
15 document has *not* been disclosed. At oral argument, Fulks-Graham generally argued that due to  
16 Great Dane’s partial disclosure of other documents, all documents related in subject-matter  
17 should be disclosed. However, Fulks-Graham did not argue that waiver should apply to this  
18 email, and the Court does not find any basis for waiver demonstrated here.

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**III. CONCLUSION**

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For the foregoing reasons, Great Dane’s Motion to Quash is GRANTED, and Fulks-  
Graham’s request for an *in camera* inspection of documents is DENIED.

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IT IS SO ORDERED.

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DATED: July 12, 2010

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