

## **Exhibit A**



**AT&T CORP., Plaintiffs, v. MICROSOFT CORP., Defendants.**

**No. 02-0164 MHP (JL)**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**2003 U.S. Dist. LEXIS 8710**

**April 18, 2003, Decided**

**DISPOSITION:** [\*1] AT&T's motion to compel third party DSP's production of documents DENIED; AT&T's motion for in camera review of documents DENIED.

**COUNSEL:** For Richard Ringgold, Plaintiff: David R. Donadio, Brayton & Purcell, Novato, CA.

For General Motors Corporation, DaimlerChrysler Corporation, Defendants: Philip R. Cosgrove, Grace Genson Cosgrove & Schirm, Los Angeles, CA.

For Ford Motor Company, Defendant: Eugene Brown, Jr., Filice Brown Eassa & Mcleod, Oakland, CA.

**JUDGES:** James Larson, United States Magistrate Judge.

**OPINION BY:** JamesLarson

**OPINION**

**ORDER DENYING AT&T'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS 82, 83, 92, AND 95 FROM THIRD PARTY DSP**

**Introduction**

Plaintiff AT&T Corporation's motion to compel production of documents from third party DSP Group, Inc., came on for hearing on March 26, 2003. Appearing for AT&T was Scott Devereaux Appearing for third party

DSP were Daphne Butler and Richard Kim.

**Factual Background**

AT&T Corp. ("AT&T") filed suit against Microsoft Corp. ("Microsoft") for infringement of U.S. Patent No. 32,580 ("the '580 patent"). The '580 patent relates to speech coding technology. Essentially, the invention is [\*2] a method that significantly reduces the size of a sound file containing a speech recording. Smaller file size allows for faster transfer times across a network, as well as occupying less space on a storage device. The current applications utilizing the smaller sound files are digital cellular phones, computer software, audio video conferencing, voice messaging, and Internet voice communications.

Microsoft is accused of implementing an infringing speech coding technology known as TrueSpeech(R)CODEC (TrueSpeech) into Microsoft products, such as Windows 95. TrueSpeech was developed by DSP Group, Inc. ("DSP") and licensed to Microsoft. DSP is a California corporation with offices in Santa Clara, California. Under a 1993 licensing agreement with Microsoft, DSP is obligated to indemnify Microsoft in the case of an infringement suit. AT&T claims that TrueSpeech infringes upon AT&T's own speech compression technology. AT&T asserts that Microsoft has infringed the '580 patent through sales of the software containing TrueSpeech.

**Procedural Background**

On June 4, 2001, AT&T filed suit against Microsoft in U.S. District Court for the Southern District of New York. An amended complaint [\*3] was filed on or about February 19, 2002. AT&T served DSP with a subpoena for production of documents and deposition testimony on February 12, 2002. In a letter dated September 18, 2002, plaintiff's counsel requested that DSP produce certain documents originally designated as privileged. DSP complied but did not produce all the requested documents. Instead, DSP asserted privilege and work product for the four documents not produced (82, 83, 92 and 95).

Two of the four documents in question (82 and 83) are e-mails and two are technical memoranda (92 and 95) that initially were only between employees of DSP. These were later forwarded to in-house counsel. The e-mails contain discussions between DSP employees relating to the litigation between AT&T and Microsoft. DSP was aware of the litigation and analyzed AT&T's patent to determine the extent of plaintiff's rights under the '580 patent.

On December 30, 2002, AT&T filed a motion to compel production of the four "privileged" documents. This case was assigned to Chief Judge Marilyn Hall Patel and was referred to Judge Larson on January 2, 2003 for disposition of this motion to compel.

### Analysis

Plaintiff AT&T raises these questions: [\*4] 1) Are documents that do not contain confidential attorney-client communications subject to the attorney-client privilege? 2) Do non-privileged documents become privileged when they are sent to in-house counsel? 3) May DSP, a nonparty to the underlying patent infringement litigation, assert the work product doctrine in contravention of Ninth Circuit Authority?

#### I. DSP's Burden to Prove Privilege and the Prima Facie Case

Once the privilege is invoked, the party asserting it must make a prima facie showing that the privilege protects the documents in question. *In re Grand Jury Investigation*, 974 F.2d 1068, 1070-71 (9th Cir.1992); see also Federal Rule 26(b)(5) (requiring an express claim of privilege, the grounds upon which it is based, and disclosure of sufficient information to determine the applicability of the privilege). A privilege log is "one

means by which a party can establish the [applicability of a] privilege." *In re Community Psychiatric Centers*, 1993 WL 497253 at \*4 (C.D. Cal.); see also, *In re Grand Jury*, 974 F.2d at 1071. The log itself must contain "at least the following: (a) the attorney and client [\*5] involved, (b) the nature of the document, (c) all persons or entities shown on the document to have received or sent the document, (d) all persons or entities known to have been furnished the document or informed of its substance, and (e) the date the document was generated, prepared, or dated." *Community Psychiatric Centers*, 1993 WL 497253 at \*4 (C.D.Cal.). Additionally, specific information is necessary to determine the sufficiency of the log. Alexander Black, Annotation, *What Corporate Communications are Entitled to Attorney-Client Privilege-Modern Cases*, 27 A.L.R.5th 76 (1995).

Under Federal Rule 26(b)(5) the burden of proving the attachment of privilege to each document is on DSP. See *Clarke v. Am. Commercial Nat'l Bank*, 974 F.2d 127, 129 (9th Cir.1992). Considering DSP's log, it lists: (a) sender: A. Bernstein and recipients: Y. Cohen and attorney A. Macpherson; (b) the type of document: e-mails; (c) and (d) the identities of all parties who have received or reviewed the documents; and (e) that the e-mails are dated August 16 and 22, 1995. Additionally, DSP's log has gone beyond the requirements of *Dole* and also identifies [\*6] the subject matter of the documents. Therefore, DSP satisfies the prima facie showing required under *Dole* and *In re Grand Jury*. See *In re Grand Jury Investigation*, 974 F.2d 1068 (9th Cir.1992).

In addition to a privilege log, the party claiming privilege should produce affidavits describing the confidential nature of the documents. *In re Grand Jury*, 974 F.2d 1068 at 1071. DSP produced affidavits along with its motion to compel. In their affidavits, Alberto Bernstein (Research Engineer) and Ze'ev Roth (Digital Signal Processing Manager), attest to their review of AT&T's patents and consultations with legal counsel. These affidavits and the specificity of the descriptions in the privilege log, at least with respect to documents 82, 83, and 92, answer any questions AT&T may have concerning the content of the documents. See 974 F.2d at 1071. Therefore, DSP makes its prima facie case but still must show that privilege applies to each document. See Federal Rule 26(b)(5); see also, *Clarke v. Am. Commercial Nat'l Bank*, 974 F.2d at 129.

#### II. Attorney-Client Privilege

The Ninth Circuit privilege test involves the nature, [\*7] the content, and the context in which documents were prepared. See *Bio-Rad Lab., Inc. v. Pharmacia, Inc.*, 130 F.R.D. 116, 126 (N.D.Cal. 1990). Whether an attorney-client privilege protects the documents in question is a mixed question of law and fact and subject to de novo review. See *In re Grand Jury Investigation*, 974 F.2d at 1070. The attorney-client privilege has eight essential elements: "1) where legal advice of any kind is sought; 2) from a legal adviser in his capacity as such; 3) the communications relating to that purpose; 4) made in confidence; 5) by the client; 6) are at his instance permanently protected; 7) from disclosure by himself or by the legal adviser; 8) unless the protection be waived." *In re Grand Jury*, 974 F.2d at 1071 fn. 2; see also *United States v. Chevron Corp.*, 1996 U.S. Dist. LEXIS 4154, 1996 WL 264769 at \*5 (N.D.Cal. 1996).

#### **A. Application of Attorney-Client Privilege to DSP's Documents**

Communications between non-lawyer employees about matters which the parties intend to seek legal advice are likewise cloaked by attorney-client privilege. *U.S. v. Chevron Texaco Corp.*; 241 F. Supp. 2d 1065, 2002 U.S. Dist. LEXIS 24970, \*27-28 (N.D. Cal. Mar. 25, 2002). [\*8] The only question to consider is whether DSP intended to seek legal advice of any kind over the subject matter contained in the memoranda? See *Upjohn v. United States*, 449 U.S. 383, 396, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981); *In re Grand Jury*, 974 F.2d at 1071 fn. 2; see also *United States v. Chevron Corp.*, 1996 U.S. Dist. LEXIS 4154, 1996 WL 264769 at \*5 (N.D.Cal. 1996). Consequently, DSP must show an intention to seek legal advice on the matters which Mr. Berstein was asked to investigate.

Communications containing information compiled by corporate employees for the purpose of seeking legal advice and later communicated to counsel are protected by attorney-client privilege. *Upjohn* at 394-95. As long as the legal implications were understood at the beginning at the inquiry and the communications were covered by a veil of confidentiality, then the privilege attaches. See *Upjohn*, at 394-95. In the instant case, documents 82 and 83 contain analysis and discussions of AT&T's patents: matters upon which DSP intended to seek legal advice. The documents were never produced to anyone outside of DSP, except for outside counsel. Therefore, [\*9] although Mr. Berstein was acting at the direction of

corporate executives to investigate AT&T's patents, documents 82 and 83 are still privileged because they address matters upon which DSP intended to seek legal advice. They were not produced merely for business purposes.

Next, document 92 is a memorandum that was created after Ze'ev Roth had met with corporate counsel concerning AT&T's infringement allegations. Roth's memorandum was written after a meeting with DSP's corporate counsel to discuss AT&T's infringement claims in January 2000. The memorandum compared the '580 patent to DSP's technology. The fact that Roth's memo came after a meeting with corporate counsel strongly suggests that it was prepared at the behest of corporate counsel. Attorney-client privilege protection is available to the same extent as it was in *Larson v. Harrington*. See *Larson v. Harrington*, 11 F. Supp. 2d 1198, 1203 (E.D. Cal.1998) [holding that attorney-client privilege protects notes or memoranda created at the behest of counsel]. Moreover, Roth's memo contains technical analysis or comparison of AT&T's patents to DSP's technology that was later reviewed and likely relied upon by [\*10] counsel.

Consequently, document 92 is privileged.

"Communication between a client and its outside counsel are presumed to be made for the purposes of obtaining legal advice." *U.S. v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1073 (N.D. Cal. 2002) [citing *U.S. v. Chen*, 99 F.3d 1495 (9th Cir. 1996)]. Arguably, DSP's employees (Berstein and Cohen) were seeking the advice of counsel after investigating the technical aspects of AT&T's patents. Berstein had contacted Mr. MacPherson, DSP's patent counsel, shortly after Berstein and Cohen completed their analysis. At this point, there was some attempt by Berstein on behalf of DSP to obtain legal advice from Mr. MacPherson. Mr. MacPherson is described in DSP's papers as its outside counsel and likely provides regular advice to DSP regarding intellectual property issues. The communications between Berstein and MacPherson were made in relation to DSP's seeking a legal analysis of AT&T's patents.

Document 95 is a drawing or technical document that was prepared by Mr. Roth to explain or supplement document 92. In his declaration Mr. Roth's description of Document 95 at best depicts it as an attachment to document [\*11] 92. See Roth's Declaration at 13. An attachment must qualify on its own for attorney-client

privilege and "must be listed as a separate document on the privilege log." *O'Connor v. Boeing North American, Inc.* 185 F.R.D. 272, 280 (C.D.Cal. 1999). Therefore, document 95 must qualify on its own to be protected by attorney-client privilege.

Technical information "primarily concerned with giving legal guidance" remains privileged. *Jack Winter, Inc. v. Koratron Co.*, 54 F.R.D. 44, 46 (N.D. Cal. 1971). Where the technical documents meet the normal requirements of attorney-client privilege, they are protected. See *Space Systems/Loral, Inc. v. Lockheed Martin Corp.*, 1999 U.S. Dist. LEXIS 10602, 1999 WL 33268060 \*2 (N.D. Cal. 1999) [citing with approval *Knogo Corp. v. U.S.*, 213 U.S.P.Q. 936, 1980 U.S. Ct. Cl. LEXIS 1262, 1980 WL 39083, (Ct.Cl. Trial Div., 1980)]. In addition to the normal requirements that the communication are between an attorney and client, the court in *Knogo* also considered the following factors: 1) the communication relates to a fact of which the attorney was informed: (a) by his client; (b) without the presence of strangers; (c) [\*12] for the purposes of securing primarily: (1) an opinion of law; or (ii) legal services; or (iii) assistance is some legal proceeding; and (d) not for the purposes of committing a crime or tort; and (2) the privilege has been claimed and not waived by the client. See *Space Systems/Loral, Inc. v. Lockheed Martin Corp.*, 1999 WL 33268060 \*2 (N.D. Cal. 1999) [citing *Knogo*, 213 U.S.P.Q. at 938].

In the instant case, document 95 is described as relating to the facts that were discussed by Roth and DSP's corporate counsel and were later incorporated into document 92. Roth was seeking the legal opinion or advice of attorneys Brun and Barkai and created documents 92 and 95 at the behest of those attorneys. Though document 95 is technical in nature, this does not mean that Roth could not have sought legal advice about its content. The drawing's connection to the subject matter of document 92 implies that document 95 contained matters upon which DSP intended to seek legal advice. Neither document 95 nor 92 was ever shown to anyone outside of DSP except DSP's outside patent counsel; thus, maintaining a veil of confidentiality. Despite the conclusory nature of [\*13] Roth's affidavit, there is enough evidence suggesting that Roth intended to seek legal advice upon the matters contained in document 95. Therefore, it too is privileged.

### **B. Confidentiality**

Attachment of the attorney-client privilege also depends on whether confidentiality was properly maintained by the company and corporate counsel. *U.S. v. Chevron Texaco Corp.*, 241 F. Supp. at 1074. In the case at bar, there is no evidence suggesting that DSP made its analysis of AT&T's patents available to anyone outside of the company or to Microsoft. Therefore, there is no reason to believe the privilege has been waived or compromised and documents 82, 83, 92, and 95 are protected by attorney-client privilege.

### **III. DSP'S Work Product Assertion**

Federal Rule 26(b)(1) allows discovery "regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . ." However, Rule 26(b)(3) has three requirements that must be met before work product protection applies, "the material in question must be: 1) a document or tangible thing, 2) which was prepared in anticipation, and 3) was prepared by or for a party, or by or for its representative." *In re Community Psychiatric Centers*, 1993 WL 497253 \*5 C.D.Cal. (Sept. 15, 1993). [\*14] Upon satisfaction of all three requirements, the burden then shifts to the party seeking production to show necessity of the documents under Rule 26(b)(3). See *U.S. v. Chevron Texaco, Corp.*, 241 F. Supp. 2d 1065, 2002 U.S. Dist. LEXIS 24970, \*38 N.D.CA. (March 25, 2002).

#### **A. Document or Tangible Thing**

The materials in dispute are documents, and there is no issue as to whether this element is satisfied.

#### **B. Prepared in Anticipation of Litigation**

This element is satisfied "if in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Chevron Texaco*, 241 F. Supp. 2d 1065, 2002 U.S. Dist. LEXIS 24970 at \*41 [internal quotations omitted]. Additionally, "except where a document would have been generated in the normal course of business even if no litigation was anticipated, the work product doctrine can reach documents prepared because of litigation even if they were prepared in connection with a business transaction or also served a business purpose." 241 F. Supp. 2d 1065, Id. at \*43 [internal [\*15] quotations omitted]. Therefore, this standard implies at least three things, 1) that there must have been a

reasonable belief that litigation would arise; 2) that the document was born out of or connected to the belief or expectation that litigation would arise, as well as a reasonable connection in time to the litigation or threat thereof; and 3) documented legal or business analysis connected to the litigation or expectation of litigation. *See* 241 F. Supp. 2d 1065, *id.* at \*42-4.

In the instant case, DSP claims documents 92 and 95 are related to AT&T's patent suit against Microsoft. According to the declaration of Ze'ev Roth, documents 92 and 95, the technical memoranda and drawing respectively, were created in January 2000 after Roth had met with corporate attorneys Brun and Barkai to discuss AT&T's claims of infringement on the '580 patent. The memorandum (document 92) comparing AT&T's speech recognition program to DSP's was written by Roth and is dated January 17, 2000.

AT&T's original complaint was filed sometime between January 1999 and January 2000. The memo is titled "AT&T vs. TrueSpeech 8.5 Patent Technical Analysis." The title alone implies that the document contains some formal analysis [\*16] reasonably connected to the litigation or imminent threat of litigation based on the '580 patent. Therefore, this element is satisfied.

At oral argument DSP's counsel, Ms. Butler, explained with respect to document 95, that this technical document was created to clarify Roth's memoranda. Document 95 was created during the same time period as document 92, or sometime after DSP was aware of AT&T's infringement claims. There is no evidence that document 95 was prepared for a reason other than anticipation of the litigation. Consequently, document 95 also satisfies this element.

### C. Party or Party Representative

Rule 26(b)(3) provides that material prepared "in anticipation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)" may be protected by work-product privilege. Where a non-party "is in substance equally concerned with the outcome" of litigation and documents are created with an "eye toward litigation," then the attorney-work product privilege applies. *See Stanley Works v. Haeger Potteries, Inc.*, 35 F.R.D. 551, 554 (N.D. Ill. 1964) (holding [\*17] that a non-party was entitled to the

protection of the attorney-work product doctrine by virtue of a licensing agreement giving a non-party an interest in the litigation equal to a party defendant). DSP is as equally concerned as Microsoft with the outcome of this litigation because the suit involves DSP's technology.

Other federal courts have held that "it is necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself." *Taylor v. Temple & Cutler*, 192 F.R.D. 552, 556 (E.D. Mich. 1999). Where an attorney "must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial," the privilege most assuredly lies. *See* 192 F.R.D. at 556. In the case at bar, document 92 was created by a DSP engineer after DSP learned of AT&T's allegations of infringement. Mr. Roth in his memo (document 92) analyzed DSP's technology against AT&T's patent and was later reviewed by DSP's Israeli corporate counsel. A strong inference exists that Roth's memo was relied upon by DSP's counsel to formulate a legal position with respect to AT&T's complaint. Therefore, [\*18] under Federal Rule 26(b)(3) and the case law cited above, the work product doctrine applies to documents 92 and 95.

### D. The Burden Shifts Back to AT&T to Demonstrate Substantial Need for Documents 92 and 95.

Under Federal Rule 26(b)(3), once a party meets the three requirements for work product protection, the burden then shifts back to the party seeking discovery to present a substantial need for the documents. There are two requirements for the substantial needs test: 1) the party has substantial need of the materials to prepare the party's case, and 2) the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. *See* Federal Rule 26(b)(3); *see also, Taylor*, 192 F.R.D. at 557. The analysis employed by the *Taylor* case is instructive in this regard. *Taylor* states that if the party seeking production could elicit the same information through deposition, then the need for the documents is diminished, unless there is undue hardship. *See* 192 F.R.D. at 557-58 (citing *In re International Systems and Controls Corp.*, 693 F.2d 1235 (5th Cir. 1982). Undue hardship is demonstrable [\*19] if witnesses are unavailable or cannot recall the events in question. *See* 192 F.R.D. at 558. Therefore, AT&T has the burden of proving that the information sought is undiscoverable other than by production of documents 92 and 95. AT&T has not met this burden.

The test is not only relevancy, but that there are no other available means by which to secure the same information. *See* 192 F.R.D. at 557-58. Therefore, failing a showing by AT&T of a substantial need for documents 92 and 95 or that the same information is not obtainable through some other means of discovery such as depositions, the documents are privileged.

#### **IV. Waiver of Attorney Client and Work Product Privileges**

AT&T asserts that DSP waived the attorney-client privilege and work product immunity by acting on "behalf" of Microsoft. AT&T's argument relies on the contention that DSP is acting as Microsoft's attorney in this litigation. However, this argument falls far short of defeating any of DSP's attorney-client and work product claims.

AT&T cites numerous published and unpublished opinions holding that reliance upon the advice of counsel defense results in the waiver of attorney-client and attorney work products [\*20] privileges. In each instance, the party asserting the defense was the actual party in the litigation. *See generally, Electro Scientific Idus. v. General Scanning, Inc.*, 175 F.R.D. 539 (N.D. Cal. 1997); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926 (D.C. Cal. 1976); *Dunhall Pharm., Inc. v. Discus Dental, Inc.*, 994 F. Supp. 1202 (C.D. Cal. 1998). Further, the waiver of the privilege only applied to the party putting the advice of counsel defense into issue. *Handgards*, 413 F. Supp. at 929; *Dunhall*, 994 F. Supp. at 1204-06. AT&T does not cite and this court could not locate any precedent that allows a party in the litigation to waive the privilege claims of a third party through the assertion of an advice of counsel defense.

Further, waiver only occurs when the party asserting advice of counsel has made the defense an issue in the case. *Handgards*, 413 F. Supp. at 929 (holding that the "deliberate injection of the advice of counsel into a case waives" the privileges relating to documents that are the subject of the advice). DSP has not asserted the advice of counsel defense. Microsoft [\*21] may not unilaterally waive DSP's privileges because it is not the holder of the privilege. *See In Re Auclair*, 961 F.2d 65, 70-71 (5th Cir. 1992) (holding that a joint party's waiver of privilege could not effect a waiver of the other joint party's privilege).

Only the alleged infringer's actual reliance on advice

of counsel generates the defense and the accompanying waiver of privilege. An assertion of the defense means the alleged infringer intends to rely on attorney-client communications to support the advice of counsel defense and put it at issue. *See Beneficial Franchise Co., Inc. v. Bank One*, 205 F.R.D. 212, 215 (N.D. Ill. 2001) [citing with approval *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.*, 32 F.3d 851 (3d Cir. 1994)]. There was no waiver because Microsoft did not know about DSP's investigations or opinions formulated by DSP's counsel. Microsoft did not rely upon the opinions of DSP's legal counsel. Therefore, Microsoft could not have relied upon documents and advice about which it had no knowledge.

Even if DSP had made the documents available to Microsoft, this does not vitiate DSP's attorney-client or work product [\*22] privilege claims. Where parties have a common interest or joint defense, the privilege is not waived by the mere sharing of information. *Transmirra Products Corp., v. Monsanto Chemical Co.*, 26 F.R.D. 572, 577 (S.D.N.Y. 1960); *see also, Beneficial*, 205 F.R.D. at 215-16 (N.D. Ill. 2001). Consequently, AT&T's arguments regarding waiver are untenable.

#### **V. DSP'S Rule 45(c)(3)(B) Claim**

Rule 45(c)(3)(B) states that "trade secrets or other confidential research, development, or commercial information . . ." are protected from disclosure. A party asserting a Rule 45 privilege must show that the information is a trade secret or confidential and demonstrate that its disclosure might be harmful. *See R & D Business Systems v. Xerox Corp.*, 152 F.R.D. 195, 196-97 (D.Colo., 1993). Once this has been established, then the burden shifts to the party requesting production to show the relevance and necessity of the documents to the case. *See Id.* at 197.

AT&T shows neither that the information sought is unobtainable through other means nor that DSP's documents will yield information relevant or necessary to its claims against [\*23] Microsoft. For these reasons DSP asserted attorney client and work product privilege. Since DSP has established both attorney-client and work product privilege, there is no need to further analyze the merits of DSP's assertion under Rule 45(c)(3)(B).

#### **VI. In Camera Review**

Whether *in camera* review is appropriate is a mixed question of law and fact and is reviewed de novo. *See In*

*re Grand Jury Investigation*, 974 F.2d at 1071. The threshold requirement is that a party demonstrate "a factual basis adequate to support a good faith belief by a reasonable person, that *in camera* review of the materials may reveal evidence to establish the claim. . ." 974 F.2d at 1072. This threshold is purposely low to "prevent abuse of privilege and to ensure that mere assertions of the attorney-client privilege will not become sacrosanct." 974 F.2d at 1072 (citing *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo. 1982)). Even though the claim of privilege is not compromised by *in camera* review this does not mean that *in camera* review is automatic. 974 F.2d at 1072.

This court has discretion whether or not to order *in camera* review. See *Royal Surplus Lines Ins. Co. v. Sofamor Danek Group, Inc.*, 190 F.R.D. 463, 486-87 (W.D. Tenn. 1998). [\*24] The court is satisfied that DSP's privilege log and affidavits sufficiently

demonstrate the basis for an assertion of privilege. Therefore, there is no need to conduct *in camera* review.

### **Conclusion**

For the above reasons, AT&T's motion to compel third party DSP's production of documents 82, 83, 92 and 95 is DENIED. In addition, AT&T's motion for *in camera* review of documents 82, 83, 92 and 95 is DENIED.

IT IS SO ORDERED.

DATED: April 18, 2003

//s//

James Larson

United States Magistrate Judge