

Exhibit F

LEXSEE



Caution

As of: Jun 21, 2011

**A.I.A. HOLDINGS, S.A., et al., Plaintiffs, -against-LEHMAN BROTHERS, INC.
and BEAR STEARNS & CO., INC., Defendants.**

97 Civ. 4978 (LMM)(HBP)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK**

2002 U.S. Dist. LEXIS 20107

October 18, 2002, Decided

October 21, 2002, Filed

DISPOSITION: [*1] Plaintiff's and defendant's motions to compel denied in all respects.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs sought to compel production of numerous documents that were withheld on the basis of privilege and work product. Defendant sought to compel non-party witnesses to produce certain documents withheld on the ground of work product.

OVERVIEW: Plaintiffs argued that defendant one's index of withheld documents did not set forth sufficient facts to support its assertions of privilege and work product. The court disagreed because defendant one has submitted affidavits that filled in the gaps asserted by plaintiffs, and so had sustained its burden of proof. Plaintiffs then argued that a substantial number of documents withheld on the basis of work product should have been produced because plaintiffs had a substantial need for the information, and were unable to obtain that information from any alternative source. However, the court denied the motion to compel because plaintiffs failed to offer any evidence that they were unable to obtain the information from other sources. Defendant two

also sought to compel production of documents from non-party witnesses, but the court denied the motion because defendant two was able to depose the witnesses, and so did not have a substantial need for production of documents.

OUTCOME: Plaintiffs' motion to compel production and defendant's motion to compel production were both denied.

CORE TERMS: withheld, work product, discovery, non-party, tape, work-product, impeachment, log, privileged, interview, compel production, applicability, proponent, claim of privilege, specific facts, withholding, tape recording, disclosure, deposition, facts establishing, burden of proof, evidentiary, recipient, facially, pierce, Federal Rules, information required, subject matter, deposition testimony, attorney-client

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN1]See [Fed. R. Civ. P. 26\(b\)\(5\)](#).

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN2]See U.S. Dist. Ct., S.D. N.Y., R. 26.2.

Civil Procedure > Discovery > Methods > Requests for Production & Inspection

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN3][Fed. R. Civ. P. 26\(b\)\(5\)](#) was not intended to establish rigid requirements concerning the information disclosed in an index of a withheld documents: The withholding party must provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents. The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN4]The index of withheld documents need not establish all the elements of a privilege by itself. Typically privilege logs will identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure. Other required information, such as the relationship between the individuals listed in the log and the litigating parties, the maintenance of confidentiality and the reasons for any disclosures of the document to individuals not normally within the privileged relationship, is then typically supplied by affidavit or deposition testimony.

Evidence > Privileges > Attorney-Client Privilege > Elements

Evidence > Privileges > Attorney-Client Privilege > Scope

Legal Ethics > Practice Qualifications

[HN5]One element of the attorney-client privilege is that the attorney must actually be admitted to the bar of a state or federal court. Although, the privilege has been extended to cover communications with an attorney's subordinate, the privilege requires that there be a communication intended to reach, either directly or indirectly, an attorney admitted to practice. Thus, in the absence of an excusable mistake of fact, even if all the other requirements of the privilege are met, communications between a client and an unadmitted law school graduate are not privileged even where the putative attorney has passed the bar examination.

Civil Procedure > Counsel > General Overview

Civil Procedure > Discovery > Methods > General Overview

Legal Ethics > Practice Qualifications

[HN6]Neither [Fed. R. Civ. P. 26\(b\)\(5\)](#) nor U.S. Dist. Ct., S.D. N.Y., R. 26.2 require an allegation of specific facts establishing an attorney's admission to the bar at the time of an allegedly privileged communication.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN7]The ultimate determination of the availability of a privilege was based on an adequately detailed privilege log, in conjunction with evidentiary submissions to fill in any factual gaps.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

Evidence > Privileges > General Overview

Evidence > Procedural Considerations > Burdens of Proof > Ultimate Burden of Persuasion

[HN8]Although it is clear that the proponent of the privilege ultimately bears the burden of proving all essential facts necessary to sustain a claim of privilege, the law is not entirely clear as to how this burden may be discharged where the proponent has served a detailed index of documents withheld, and the challenger has submitted specific challenges. Where the defendant does not generally challenge the adequacy of plaintiff's index, it appears that the proponent of the privilege may satisfy its burden by submitting evidentiary material as to the challenged elements only. Requiring the proponent to submit evidentiary material to prove all elements of the privilege in response to a specific challenge unduly

burdens and wastes the time of both the court and the parties. A party asserting a claim of privilege is obligated to prepare an index of withheld documents, which must provide sufficient information to assess the applicability of the privilege or protection. [Fed. R. Civ. P. 26\(b\)\(5\)](#). Thus, a party challenging an assertion of privilege is given the information necessary to state the grounds of its challenge and is not left to guess at the nature of what's being withheld and why. Since the challenger is given this information, there is no logic or efficiency in requiring the proponent of a privilege or the court to address matters which are not contested by the challenger.

***Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview
Evidence > Privileges > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Ultimate Burden of Persuasion***

[HN9]The withholding party's initial obligation is to prepare an index of withheld documents providing the specific information required by [Fed. R. Civ. P. 26\(b\)\(5\)](#) and U.S. Dist. Ct., S.D. N.Y., R. 26.2. If the assertions of privilege are not challenged, the withholding party has no further obligation with respect to its assertions of privilege. If the assertions of privilege are challenged and the dispute cannot be resolved informally, the withholding party then has to submit evidence, by way of affidavit, deposition testimony or otherwise, establishing only the challenged elements of the applicable privilege or protection, with the ultimate burden of proof resting with the party asserting the privilege or protection.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN10]Where the information in the log of withheld documents is insufficient to establish a factual basis for the privilege, the proponent of the privilege bears the burden of showing its applicability, a gap which often is filled through an affidavit or deposition testimony.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN11]Where the applicability of the work product doctrine has been established, factual material may, nevertheless, be ordered produced upon a showing of substantial need and inability to obtain the equivalent without undue hardship. The substantial need

requirement is as follows: Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN12]A substantial need for work product materials exists where the information sought is essential to the party's defense, is crucial to the determination of whether the defendant could be held liable for the acts alleged, or carries great probative value on contested issues.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN13]The failure to list privileged documents on the required log of withheld documents in a timely and proper manner operates as a waiver of any applicable privilege.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN14]A witness's availability for a deposition defeats a claim of substantial need for work product material because the party seeking discovery can ask the witness himself about the events in issue, and, if the witness recalls the events in issue, the need for notes or other materials prepared by opposing counsel is, thereby, eliminated. It is always the case that a witness may lie at a deposition or may not have an accurate recollection. However, if those facts, without more, were sufficient to pierce a claim of work product, work-product protection, at least with respect to witness statements, would quickly become meaningless.

Civil Procedure > Discovery > Privileged Matters > Work Product > General Overview

[HN15]The crime-fraud exception applies and pierces work product protection where the attorney-client communications in issue were in furtherance of a crime or fraud.

COUNSEL: For AIA Holding SA, PLAINTIFF: Peter N Wang, Todd C Norbitz, Friedman, Wang & Bleiberg, PC, New York, NY USA.

For Lehman Brothers Inc, DEFENDANT: Robert W Gaffey, Layton Brooks & Hecht, Robert W Gaffey, Jones, Day, Reavis & Pogue, New York, NY USA.

For Bear Stearns & Co Inc, DEFENDANT: Howard M Sendrovitz, Rosenman & Colin LLP, Stephen L Ratner, Katten, Muchin, Zavis, Rosenman, Stephen L Ratner, Howard Wilson, Proskauer Rose, LLP, New York, NY USA.

JUDGES: HENRY PITMAN, United States Magistrate Judge.

OPINION BY: HENRY PITMAN

OPINION

OPINION AND ORDER

PITMAN, United States Magistrate Judge:

I. Introduction

Two discovery applications are currently pending before me. First, plaintiffs seek to compel production of numerous documents listed on Bear Stearns & Co., Inc.'s ("Bear Stearns") index of documents withheld on the basis of privilege and work product on the ground that [*2] Bear Stearns' index of withheld documents is facially inadequate. In addition, plaintiffs seek to compel production of numerous documents withheld by Bear Stearns on the basis of work product, claiming that the information in those documents is not available from any other source and that plaintiffs have substantial need for those documents.

Second, defendant Lehman Brothers, Inc. ("Lehman") seeks to compel non-party witnesses (a) Pricewaterhouse Coopers United Kingdom, (b) the law firm of Stillman & Friedman, P.C. and (c) the law firm of Lovells P.C. to produce certain documents withheld on the ground of work product.

For the reasons set forth below, both motions are denied in all respects.

II. Facts

A. Background

The facts underlying this action have been set forth in detail in several opinions by the Honorable Lawrence M. McKenna, United States District Judge, addressing various dispositive motions made by the parties. See [A.I.A. Holdings, S.A. v. Lehman Bros., Inc., 2002 U.S. Dist. LEXIS 10848, 97 Civ. 4978 \(LMM\), 2002 WL 1334809 \(S.D.N.Y. June 17, 2002\)](#); [A.I.A. Holdings, S.A. v. Lehman Bros., Inc., 2002 U.S. Dist. LEXIS 980, 97 Civ. 4978 \(LMM\), 2002 WL 88226 \(S.D.N.Y. Jan. 23, 2002\)](#); [*3] [A.I.A. Holdings, S.A. v. Lehman Bros., Inc., 1998 U.S. Dist. LEXIS 4175, 97 Civ. 4978 \(LMM\), 1998 WL 159059 \(S.D.N.Y. Apr. 1, 1998\)](#). Familiarity with these opinions is assumed.

For present purposes, it is sufficient to note that this action arises out of a massive alleged fraud perpetrated in Lebanon by an individual named Ahmad Al-Daouk. According to the complaint now before the Court, plaintiffs are approximately 270 individuals and entities, mostly from the Middle East, who gave money to Daouk and entities controlled by him to invest in securities and other investment vehicles. Daouk allegedly informed his customers that their funds had been invested with the defendant brokerage companies. Through various types of chicanery, betrayal and deceit, Daouk allegedly dissipated his victims' funds, misappropriated money for himself and either misapplied or misappropriated any profits that his investments were fortunate enough to earn. Among other things, Daouk allegedly intercepted account statements sent by defendants to the plaintiffs, destroyed the originals and fabricated false statements to show that plaintiffs' investments were doing far better than they actually were. Plaintiffs have asserted [*4] various theories of liability against defendants and have offered some evidence that some of the defendants' employees were active participants in the scheme and shared in its alleged proceeds. The aggregate damages claimed are in excess of \$ 100 million.

B. Plaintiffs' Motion

Plaintiffs' motion arises out of an index of withheld documents produced by Bear Stearns. The index lists 160 documents and provides for each (to the extent the information is available) the date of the document, the type of document, the author, the recipient, who received copies, a description of the document and the nature of the privilege being asserted.

Plaintiffs' motion consists of two parts. In the first part of their motion, plaintiffs argue that Bear Stearns' index does not set forth sufficient facts to support its assertions of privilege and work product. Specifically, plaintiffs divide almost all the documents on Bear Stearns' index into three categories. As to the first category ("Category A"), plaintiffs claim that Bear Stearns has not provided sufficient facts to show that the documents were prepared in anticipation of litigation and has not, therefore, established the applicability of work [*5] product protection.¹ As to the second category ("Category B"), plaintiffs claim that Bear Stearns has failed to provide specific facts establishing that the documents, which were prepared by non-lawyers, were prepared at or under the direction of attorneys.² According to plaintiffs, this hole in the proof defeats the assertion of work product protection as to these documents. As to the third category ("Category C"), plaintiffs claim that Bear Stearns has failed (1) to set forth specific facts as to each document establishing that it was prepared for the purpose of providing legal and not business advice and (2) to set forth specific facts establishing that the documents reflect confidential client communications.³

1 Since plaintiffs made their motion, Bear Stearns has voluntarily produced some of the documents challenged by plaintiffs. The documents in Category A that remain in issue are numbers 1, 2, 12, 24A, 33, 35, 37 42, 43, 70, 105, 123 and 124.

2 The documents in Category B that remain in issue are documents 3, 11, 13, 16, 17, 18, 19, 24B, 25, 28, 30, 38, 39, 41, 44, 46, 47, 51, 54, 55, 56, 58, 61, 93, 94, 101, 102, 103, 110, 125, 126, 127 and 129.

[*6]

3 The documents in Category C that remain in issue are documents 10, 14, 27, 95, 117, 132, 136, 138 and 151.

The second aspect of plaintiffs' motion seeks production of numerous documents that are being withheld on the basis of work product on the theory that plaintiffs have demonstrated a substantial need for the documents and that the information contained in those documents is not available from any other source.⁴ Plaintiffs argue that these documents are the only alternative source for the information that was contained in documents that were destroyed in a fire at Bear

Stearns' document storage facility.

4 The documents plaintiffs seek in this aspect of their motion that remain in issue are documents 1, 2, 3, 10, 11, 12, 13, 16, 17, 18, 19, 24, 25, 28, 29, 30, 32, 33, 35, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 51, 52, 53, 54, 55, 56, 57, 58, 60, 61, 62, 66, 69, 70, 93, 94, 100, 101, 102, 103, 104, 105, 110, 115, 123, 124, 125, 126, 127, 129, 130, 137 and 161.

[*7] *C. Lehman's Motion*

Lehman has also made an unrelated motion in which it seeks to compel production from the non-party witnesses of a transcript and tape recording of an interview with Daouk conducted by the United Kingdom liquidator of Mid East Trading Ltd., one of the entities through which Daouk perpetrated his fraud. Defendants had previously attempted to obtain the transcript of the interview from plaintiff Marwan Hakim. However, in May 2000, I sustained plaintiffs' work product objection to producing the transcript, concluding that the transcript was work product and that since Daouk was scheduled to be deposed in July 2000, defendants could not, at that time, show substantial need sufficient to justify piercing the work-product protection.

III. Analysis

A. Plaintiffs' Motion

1. *The Sufficiency of Bear Stearns' Index*⁵

5 Plaintiffs have expressly disclaimed any contention that their motion is addressed to the merits of Bear Stearns' assertions of the attorney-client or work-product privileges (Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion to Compel Production of Documents, dated July 18, 2001 ("Plaintiffs' Reply Mem."), at 2). Thus, the only issue to be resolved concerning this aspect of plaintiffs' motion is the facial sufficiency of Bear Stearns' index.

[*8] The obligation to produce an index of withheld documents in response to a Rule 34 request has two sources in this District. First, [HN1][Fed.R.Civ.P. 26\(b\)\(5\)](#) provides:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

the document, the addressees of the document, and any other recipients shown in the document, and, where not apparent, the relationship of the author, addressees, and recipients to each other

Second, [HN2]Local Civil Rule 26.2 provides:

(a) Where a claim of privilege is asserted in objecting to any means of discovery or disclosure ... and an answer is not provided on the basis of such assertion,

(1) the attorney asserting the privilege shall identify the nature of the privilege (including work product) which is being claimed and, if the privilege is governed by state law, indicate the state's privilege rule being invoked; and

(2) the following information shall be provided in the objection, unless divulgence of such information would [*9] cause disclosure of the allegedly privileged information:

(A) for documents: (i) the type of document, e.g., letter or memorandum; (ii) the general subject matter of the document; (iii) the date of the document; and (iv) such other information as is sufficient to identify the document for a subpoena *duces tecum*, including, where appropriate, the author of

Plaintiff's motion seems to be predicated on a fundamental misapprehension of the role played by an index of withheld documents. Plaintiffs seem to be claiming that, in response to a Rule 34 request and prior to any motion to compel production, a party withholding documents on the ground of privilege or work product must produce an index, affidavits or other evidence which, in the aggregate, for each document withheld, establish every element of each privilege or protection asserted and that the failure to do so results in a waiver of the privilege or protection. The law is otherwise.

Unless and until a motion to compel is made [*10] or an assertion of privilege is otherwise challenged before the Court, the only obligation the Federal Rules and the Local Rules impose on the withholding party is to produce an index of documents that complies with the requirements set forth above. The Advisory Committee Notes to the 1993 Amendments to [HN3]the Federal Rules of Civil Procedure explain that the [Rule 26\(b\)\(5\)](#) was not intended to establish rigid requirements concerning the information disclosed in an index of a withheld documents:

The [withholding] party must ... provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom the discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of the documents.

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, [*11] persons, general subject matter etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected

Similarly, this Court has noted that [HN4]the index of withheld documents need not establish all the elements of a privilege by itself.

Typically [privilege] logs will identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure. Other required information, such as the relationship between the individuals listed in the log and the litigating parties, the maintenance of confidentiality and the reasons for any disclosures of the document to individuals not normally within the privileged relationship, is then typically supplied by affidavit or deposition testimony.

[Bowne of New York City, Inc. v. AmBase Corp.](#), 150 F.R.D. 465, 474 (S.D.N.Y. 1993); accord [United States v. Construction Prods. Research, Inc.](#), 73 F.3d 464, 473 (2d Cir. 1996).

The central issue raised by plaintiffs' motion is what does the [*12] proponent of a privilege have to prove and at what stage does it need to prove it.

Plaintiffs base their argument on a quote from [Golden Trade S.r.L. v. Lee Apparel Co.](#), 1992 U.S. Dist. LEXIS 17739, 90 Civ. 6291 (JMC), 90 Civ. 6292 (JMC) and 92 Civ. 1667 (JMC), 1992 WL 3676070 at *5 (S.D.N.Y. Nov. 20, 1992) , which states: "The standard for testing the adequacy of the privilege log is whether, as to each document, it sets forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed" (Plaintiffs'

Memorandum of Law in Support of Plaintiffs' Motion to Compel Production of Documents, dated May 7, 2001 ("Plaintiffs' Mem.") at 1). Plaintiffs claim that Bear Stearns' failure to set forth specific facts as to each element of each privilege as to each document prior to plaintiffs' motion operates as a waiver of the privilege. If plaintiffs are correct, virtually no index of withheld documents served in this District would pass muster.

For example, [HN5]one element of the attorney-client privilege is that the "attorney" must actually be admitted to the bar of a state or federal court. [Bank Brussels Lambert v. Credit Lyonnais \(Suisse\) S.A.](#), 160 F.R.D. 437, 441 (S.D.N.Y. 1995), [*13] *quoting* [United States v. United Shoe Mach. Corp.](#), 89 F. Supp. 357, 358-59 (D. Mass. 1950). Although, the privilege has been extended to cover communications with an attorney's subordinate, *see* [United States Postal Serv. v. Phelps Dodge Refining Co.](#), 852 F. Supp. 156, 161 (E.D.N.Y. 1994), the privilege requires that there be a communication intended to reach, either directly or indirectly, an attorney admitted to practice. Thus, in the absence of an excusable mistake of fact, even if all the other requirements of the privilege are met, communications between a "client" and an unadmitted law school graduate are not privileged even where the putative "attorney" has passed the bar examination. [Financial Technologies, Int'l. Inc. v. Smith](#), 2000 U.S. Dist. LEXIS 18220, 99 Civ. 9351 (GEL)(RLE), 2000 WL 1855131 (S.D.N.Y. Dec. 19, 2000). [HN6]Nevertheless, neither [Fed.R.Civ.P. 26\(b\)\(5\)](#) nor Local Civil Rule 26.2 require an allegation of specific facts establishing an attorney's admission to the bar at the time of an allegedly privileged communication. Thus, if plaintiffs are correct, an index of withheld documents that was in full compliance with both the Federal Rules of Civil [*14] Procedure and the Local Civil Rules would invariably result in a waiver of the privilege. Such a result cannot be correct.

Moreover, the author of the "test" set forth in [Golden Trade S.r.L. v. Lee Apparel Co.](#), supra, 1992 U.S. Dist. LEXIS 17739, 1992 WL 3676070, has not applied it in the manner suggested by plaintiffs. In [Golden Trade](#), the Honorable Michael H. Dolinger, United States Magistrate Judge, expressly made his rulings concerning privilege on the basis of plaintiff's privilege log, plaintiff's evidentiary submission in response to the motion to compel and an *in camera* review of the documents in issue. [1992 U.S. Dist. LEXIS 17739, 1992 WL 3676070](#) at *1. Similarly, in

Bowne of New York City, Inc. v. AmBase Corp., supra, 150 F.R.D. 465, upon which plaintiffs also rely, Magistrate Judge Dolinger noted that the ultimate determination of the availability of a privilege was ordinarily based on [HN7]"an adequately detailed privilege log in conjunction with evidentiary submissions to fill in any factual gaps." 150 F.R.D. at 474.⁶

6 In addition, plaintiffs themselves have not produced an index of withheld documents that comports with the standards plaintiffs now seek to posit. For example, plaintiffs claim here that, with respect to documents prepared by non-legal personnel, work-product protection is available only if the documents were prepared "at or under the direction of counsel" (Plaintiffs' Mem. at 14 (inner quotations omitted)), and that Bear Stearns' failure to set forth specific facts as to each document, prior to the present motion, establishing such facts operates as a waiver of work-product protection. Plaintiffs' index of withheld documents asserts work-product protection as to 61 of 62 withheld documents. Although all of plaintiffs' withheld documents are authored by plaintiffs themselves, plaintiffs' index nowhere sets forth specific facts that the documents were prepared at or under counsel's direction. Admittedly, a failure by one party to a litigation does not excuse an identical failure by the other. However, where as here, a party seeks to impose a discovery obligation that goes beyond the plain text of the applicable rules, and the party seeking to impose the obligation has not itself complied with the standard it seeks to impose, I cannot help but question the validity of the argument.

[*15] Although the law on the subject is not well developed, I continue to believe that the appropriate manner to adjudicate claims of privilege is the mechanism I suggested in *ECDC Environmental L.C. v. New York Marine & Gen. Ins. Co.*, 1998 U.S. Dist. LEXIS 8808, 96 Civ. 6033 (BSJ)(HBP), 1998 WL 614478 at *3-*4 (S.D.N.Y. June 4, 1998):

[HN8]Although it is clear that the proponent of the privilege ultimately bears the burden of proving all essential facts necessary to sustain a claim of privilege, the law is not entirely clear as to how this

burden may be discharged where, as here, the proponent has served a detailed index of documents withheld, and the challenger has submitted specific challenges. Apart from the specific challenges made in its motion, defendant does not generally challenge the adequacy of plaintiff's index.

Under these circumstances, it appears that the proponent of the privilege may satisfy its burden by submitting evidentiary material as to the challenged elements only. Requiring the proponent to submit evidentiary material to prove *all* elements of the privilege in response to a specific challenge unduly burdens and wastes the time of both the Court and the parties. A party [*16] asserting a claim of privilege is obligated to prepare an index of withheld documents, which must provide sufficient information "to assess the applicability of the privilege or protection." Fed.R.Civ.P. 26(b)(5). Thus, a party challenging an assertion of privilege is given the information necessary to state the grounds of its challenge and is not left to guess at the nature of what's being withheld and why. Since the challenger is given this information, there is no logic or efficiency in requiring the proponent of a privilege or the Court to address matters which are not contested by the challenger. See generally *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir.1992); *Bowne of New York City, Inc. v. AmBase Corp.*, supra, 150 F.R.D. at 474; *Golden Trade, S.r.L. v. Lee Apparel Co.*, 1992 U.S. Dist. LEXIS 17739, 90 Civ. 6291 (JMC), 1992 WL 367070 at *5 (S.D.N.Y. Nov. 20, 1992).

Stated with slightly more detail, [HN9]the withholding party's initial obligation is to prepare an index of withheld documents providing the specific information required by Fed.R.Civ.P. 26(b)(5) and Local Civil Rule 26.2. If the assertions of privilege are not challenged, the withholding [*17] party has no further obligation with respect to its assertions of privilege. If the assertions of privilege are challenged and the dispute

cannot be resolved informally, the withholding party then has to submit evidence, by way of affidavit, deposition testimony or otherwise, establishing only the challenged elements of the applicable privilege or protection, with the ultimate burden of proof resting with the party asserting the privilege or protection. *See von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987), citing *In re Grand Jury Subpoena Dated Jan. 4, 1984*, 750 F.2d 223, 224 (2d Cir. 1984); *Bowne of New York City, Inc. v. AmBase Corp.*, *supra*, 150 F.R.D. at 470 (S.D.N.Y. 1993) (collecting cases).

The foregoing procedure properly allocates the burden of proof and saves the Court and the parties from having to address any elements of a privilege or protection that are not in dispute. In addition, the foregoing accurately reflects the manner in which disputes concerning documents withheld on the ground of privilege are currently resolved in this District. *See, e.g., Johnson Matthey, Inc. v. Research Corp.*, 01 Civ. 8115 (MBM)(FM), 2002 U.S. Dist. LEXIS 18802, 2002 WL 31235717 at *3 (S.D.N.Y. Oct. 3, 2002) [*18] [HN10] ("Where the information in the log [of withheld documents] is insufficient to establish a factual basis for the privilege, the proponent of the privilege bears the burden of showing its applicability, a gap which often is filled through an affidavit or deposition testimony."); *CSC Recovery Corp. v. Daido Steel Co.*, 1997 U.S. Dist. LEXIS 16346, 94 Civ. 9214 (LAP)(THK), 1997 WL 661122 at *2 (S.D.N.Y. Oct. 22, 1997) ("Daido's privilege log, combined with Ms. Newton's affidavit, providing greater detail about the authors and recipients of the documents and the context in which they were generated, and the documents themselves, which have been submitted for review, are more than sufficient to support the asserted claims of privilege."). *See generally U.S. Info. Sys. v. IBEW Local Union No. 3*, 2002 U.S. Dist. LEXIS 17532, 00 Civ. 4763 (MBM)(JCF), 2002 WL 31093619 at *1 (S.D.N.Y. Sept. 17, 2002) (Privilege log that provides information required by Local Civil Rule 26.2(a) is facially sufficient.).

Since Bear Stearns has submitted affidavits in opposition to the current motion that fill in the "gaps" asserted by plaintiffs, [*19] it has sustained its burden of proof with respect to the documents challenged by plaintiffs.

Finally, although I have previously quoted and relied upon the passage from *Golden Trade, S.r.L. v. Lee*

Apparel Co., *supra*, 1992 U.S. Dist. LEXIS 17739, 1992 WL 367070, on which plaintiffs rely, in resolving a prior discovery dispute in this matter, *A.I.A. Holdings, S.A. v. Lehman Bros., Inc.*, 2000 U.S. Dist. LEXIS 15141, 97 Civ. 4978 (LMM)(HBP), 2000 WL 1538003 at *2 (S.D.N.Y. Oct. 17, 2000) ("October 2000 Decision"), I do not believe there is any inconsistency between the result here and the result in my October 2000 Decision. My October 2000 Decision arose out of Bear Stearns' attempt to withhold a tape recording of a conversation; Bear Stearns' index entry for the conversation did not identify the parties to the conversation, did not identify the subject matter and justified the assertion of work-product protection by merely parroting the definition of the work-product doctrine. *See 2000 U.S. Dist. LEXIS 15141, 2000 WL 1538003* at *3. Thus, I concluded that Bear Stearns' failure to describe the tape recording in conformity with Fed.R.Civ.P. 26(b)(5) and Local Civil Rule 26.2(a) operated as a waiver of any claim of work product [*20] protection. Although I did cite and quote *Golden Trade* in my October 2000 Decision for the proposition that an index of withheld documents "must 'as to each document, ... set [] forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed,'" 2000 U.S. Dist. LEXIS 15141, 2000 WL 1538003 at *2, there was no claim in that dispute that Bear Stearns had waived work-product protection by failing to set forth specific facts establishing each element of each privilege asserted. Rather the issue in my October 2000 Decision was Bear Stearns' gross failure to comply with Fed.R.Civ.P. 26(b)(5) and Local Civil Rule 26.2(a), and it was that gross failure that lead to the finding of waiver.

Accordingly, plaintiffs' motion to compel the production of documents withheld by Bear Stearns on the ground that Bear Stearns' index of withheld documents is facially deficient is denied.⁷

⁷ In addition to challenging plaintiffs' motion on the merits, Bear Stearns also contends that the motion is untimely. Since I conclude that plaintiffs' motion should be denied on the merits, I do not address Bear Stearns' arguments concerning the timeliness of the plaintiffs' motion.

[*21] 2. *Plaintiffs' "Substantial Need" for Documents Withheld on the Basis of Work Product*

Plaintiffs next contend that, even if Bear Stearns' assertions of work product are facially valid, a substantial

number of the documents withheld on the basis of work product should be produced because plaintiffs have a substantial need for the information in those documents and are unable to obtain that information through any alternative source. Specifically, plaintiffs claim that the withheld documents disclose trading activity in plaintiffs' accounts and that all other records disclosing that information were destroyed in a fire at Bear Stearns' document storage facility.

[HN11]Where the applicability of the work product doctrine has been established, factual material may, nevertheless, be ordered produced "upon a showing of substantial need and inability to obtain the equivalent without undue hardship." Upjohn Co. v. United States, 449 U.S. 383, 400, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981). The Supreme Court has described the "substantial need" requirement as follows:

Where relevant and non-privileged facts remain hidden in an attorney's file and where production of [*22] those facts is *essential* to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration."

Hickman v. Taylor, 329 U.S. 495, 511, 91 L. Ed. 451, 67 S. Ct. 385, 34 Ohio Op. 395 (1947) (emphasis added); accord In re Grand Jury Proceedings, 2001 U.S. Dist. LEXIS 15646, No. M-11-189, 2001 WL 1167497 at *21 (S.D.N.Y. Oct. 3, 2001). See also Madanes v. Madanes, 199 F.R.D. 135, 150 (S.D.N.Y. 2001) ("Substantial need is shown where the work product material at issue is central to the substantive claims in litigation."); National Congress for Puerto Rican Rights v. City of New York, 194 F.R.D. 105, 110 (S.D.N.Y. 2000) [HN12] ("A substantial need for work product materials exists where the information sought is 'essential' to the party's defense, is 'crucial' to the determination of whether the defendant could be held liable for the acts alleged, or carries great probative value on contested issues." (citations and footnotes omitted)).

[*23] The principal problem with plaintiffs' argument here is that they have offered no evidence

whatsoever establishing that the information is not available to them from other sources. In contrast, Bear Stearns has offered the affidavit of Thomas S. Cohen which states that all the factual information in the withheld documents is either contained in other documents produced to plaintiffs or was produced by plaintiffs themselves. Given this uncontradicted evidence, it is impossible to conclude that plaintiffs have met their burden of demonstrating a substantial need for the withheld documents.⁸

8 Indeed, in connection with Lehman's motion to compel, discussed in Section III(B), plaintiffs note that "It is hornbook law that a party seeking to obtain discovery of work product material bears a *heavy burden* of proof to justify disclosure" (Letter of Todd C. Norbitz, Esq., dated September 25, 2002 at 6 (emphasis added)).

Accordingly, plaintiffs' application to compel the production of documents withheld by Bear [*24] Stearns on the basis of work product on the ground that plaintiffs have demonstrated a substantial need for the documents is also denied.

B. *Lehman's Motion to Compel*

Lehman makes two arguments in support of its application to compel production of the Daouk interview tape and transcript. First, it claims that any privilege with respect to the tape has been waived by the failure of the non-party witnesses to identify the tape on their schedule of documents withheld on the ground of privilege. Second, Lehman claims that it has a substantial need for the tape and transcript because it believes them to contain impeachment material that is not available elsewhere.

Although I have repeatedly held, and continue to believe, that [HN13]the failure to list privileged documents on the required log of withheld documents in a timely and proper manner operates as a waiver of any applicable privilege, *see, e.g., Bruker v. City of New York*, 2002 U.S. Dist. LEXIS 5334, 93 Civ. 3848 (MGC)(HBP), 2002 WL 484843 at *5 (S.D.N.Y. Mar. 29, 2002); A.I.A. Holdings, S.A. v. Lehman Bros., Inc., 2000 U.S. Dist. LEXIS 15141, 97 Civ. 4978 (LMM)(HBP), 2000 WL 1538003 at *3 (S.D.N.Y. Oct. 17, 2000); PKFinans Int'l Corp. v. IBJ Schroder Leasing Corp. Leasing Corp., 1996 U.S. Dist. LEXIS 13505, 93 Civ. 5375 (SAS)(HBP), 1996 WL 525862 at *3-*4 (S.D.N.Y. Sept. 17, 1996), [*25] the present case is

distinguishable from situations in which a party fails to list a document entirely or fails to provide, in sufficient detail, the information required by [Fed.R.Civ.P. 26\(b\)\(5\)](#) or Local Civil Rule 26.2(a). In this case, there is no dispute that the non-party witnesses timely and adequately indexed the transcript of the interview; it is only the tape recording that was not timely listed. Although the analogy is, admittedly, imperfect, the situation here approaches a party's failure to index a non-identical copy of an indexed document that contains only immaterial variations. The magnitude of the non-party witnesses' default here is not equivalent to either a complete failure to list a document or a failure to provide all the information required by the applicable rules. Under the circumstances of this case, I conclude that a finding of waiver is disproportionate to the default and, therefore, reject Lehman's first argument.

The non-party witnesses' principal argument in opposition to Lehman's "substantial need" argument is that Lehman had the opportunity to depose [*26] Daouk and to ask him about the interview memorialized in the tape and transcript in issue. Since Lehman had the opportunity to interrogate Daouk about the interview in issue, the non-party witnesses claim that Lehman cannot establish a substantial need for the documents. *See Tribune Co. v. Purciogliotti*, 1998 U.S. Dist. LEXIS 5155, 93 Civ. 7222 (LAP), 1998 WL 175933 at *4 (S.D.N.Y. Apr. 14, 1998) ("Substantial need' cannot be shown where persons with equivalent information are available for deposition."), *citing Horn & Hardart Co. v. Pillsbury Co.*, 888 F.2d 8, 12 (2d Cir. 1989). *See also Gay v. P.K. Lindsay Co.*, 666 F.2d 710, 713 (1st Cir. 1981) ("It seems well-settled that there is in general no justification for discovery of the statement of a person contained in work product materials when the person is available to be deposed."); *Taylor v. Costa Cruises, Inc.*, 1992 U.S. Dist. LEXIS 11435, 90 Civ. 2630 (KC), 1992 WL 196793 at *1 (S.D.N.Y. Aug. 13, 1992); 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* § 2025 at 375 (2d ed. 1994) ("Discovery of work product material will be denied if the party seeking discovery can obtain [*27] the desired information by taking the deposition of witnesses."). The non-party witnesses also argue that a substantial need for work product material can never be established where the material in issue is relevant for impeachment purposes only.

There can be no dispute here that Daouk did appear

for a proceeding in the nature of a deposition in July 2000 in Casablanca during which he made himself available for questioning for five days. During the proceeding, Lehman never asked Daouk about the interview conducted by Mid East's liquidator. Nevertheless, without citing any authority, Lehman claims that Daouk's availability for questioning is "not ... pertinent" to the claim of work product and that the only pertinent issue is the fact that the non-party witnesses are in possession of unique impeachment material (Letter of Robert W. Gaffey, Esq., dated Sept. 27, 2002, at 3).

Lehman's argument is not convincing. [HN14]A witness's availability for a deposition defeats a claim of substantial need for work product material because the party seeking discovery can ask the witness himself about the events in issue, and, if the witness recalls the events in issue, the need for notes or other materials [*28] prepared by opposing counsel is, thereby, eliminated. It is always the case that a witness may lie at a deposition or may not have an accurate recollection. However, if those facts, without more, were sufficient to pierce a claim of work product, work-product protection, at least with respect to witness statements, would quickly become meaningless.

Lehman's claimed inability to obtain the substantial equivalent of the tape and transcript through other means is also unconvincing. Assuming, without deciding that impeachment material can, in some circumstances, support a claim of substantial need sufficient to pierce a claim of work product,⁹ the wealth of impeachment material already in this case with respect to Daouk attenuates any need for the tape and transcript in issue. Put bluntly, when he was questioned, Daouk freely admitted that he ran a con game for several years for his personal aggrandizement at the expense of his friends and business associates. He admitted to repeatedly and systematically forging documents to perpetrate his scheme. Daouk admitted to carrying on his business through an ongoing pattern of lies and deception in order to secure a comfortable life for himself. [*29] Although he now claims that certain individuals employed by defendants either knew of or participated in his scheme, Daouk authenticated documents in which he denied virtually all the material allegations in plaintiffs' complaint and claimed that they were fabrications, including plaintiff's claim that defendants were aware of his frauds. After his scheme to light, Daouk admitted to participating in a second scheme in which he offered to

perjure himself in whatever fashion was most useful to the highest bidder. Finally, there is also some evidence suggesting that Daouk fabricated documents to "corroborate" his claim of alleged payoffs to some of defendants' employees. Given this evidence and array of admissions by Daouk of his willingness to do virtually anything for money, it is impossible to conclude that the tape and transcript in issue, even if they contradicted Daouk's testimony, would have substantial incremental effect on the jury's assessment of Daouk's credibility.

9 The Supreme Court has indicated in *dicta* that impeachment material may, in some circumstances, be sufficient to support a claim of substantial need. [Hickman v. Taylor, supra, 329 U.S. at 511.](#)

[*30] Accordingly, I also conclude that even if Lehman had established a substantial need for the tape and transcript in issue, the impeachment material to which Daouk has already admitted is the substantial equivalent of any impeachment information that could be contained in the tape and transcript and that there is, therefore, no basis to pierce the non-party witnesses' claim of work product.¹⁰

10 Lehman also claims that [HN15]the

crime-fraud exception applies here and pierces work product protection. However, Lehman offers no evidence that the communications in issue were in furtherance of a crime or fraud, and, therefore, has not established a requisite element of the exception. See [United States v. Jacobs, 117 F.3d 82, 87 \(2d Cir. 1997\).](#)

IV. Conclusion

Accordingly, for all the foregoing reasons, plaintiff's motion to compel defendants to produce certain documents withheld on the ground of the attorney-client privilege and work product protection and Lehman's motion to compel certain non-party [*31] witnesses to produce a tape recording and transcript of an interview with Daouk are denied in all respects.

Dated: New York, New York

October 18, 2002

SO ORDERED

HENRY PITMAN

United States Magistrate Judge