

1 between the system and a "culvert"; and (2) an October 24, 2011 letter from URS clarifying that
2 the system itself is not "culvert."³ Capitola has asserted work-product immunity over the
3 remaining documents drafted by URS.⁴

4 After Lexington served a subpoena duces tecum on other consultants of Capitola, these
5 consultants produced two other documents created by URS: (1) a May 16, 2011 four-page report
6 on which the May 31 two-page report was based; and (2) an October 11, 2011 communication
7 between URS and Capitola in which URS indicated it believed the system was itself a culvert.⁵
8 The URS email followed an email conversation among Capitola representatives about Lexington's
9 denial of Capitola's claim and Capitola's concerns that URS's report was the grounds for that
10 denial.⁶

11 Lexington now seeks the rest of the file generated by URS because these latter two
12 documents suggest that Capitola selectively waived its work-product immunity to share only
13 reports by URS that were favorable to it. Lexington also wants to prevent Capitola from clawing
14 back the documents. Before this disclosure, Capitola maintained in correspondence with
15 Lexington that Lexington's reliance on URS's use of "culvert" in the May 31 letter was misplaced
16 because Lexington had taken URS's comment "out of context" and in any event the
17 characterization "is not a substitute for an informed coverage analysis of policy language by those
18 who understand it."⁷

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³ See Docket No. 40 Exs. 2, 10.

25 ⁴ See Docket No. 44 Ex. 1-6.

26 ⁵ See Docket No. 40 Exs 12, 22.

27 ⁶ See *id.* Ex. 8.

28 ⁷ See *id.* Ex. 15.

1 The work-product doctrine protects “from discovery documents and tangible things
2 prepared by a party or his representative in anticipation of litigation.”⁸ “[C]ourts are in accord that
3 the attorney work-product privilege is not absolute and may be waived, for example, when an
4 attorney attempts to use the work-product as testimony or evidence, or reveals it to an adversary to
5 gain an advantage in litigation.”⁹ Waiver for the benefit of the party who owns the privilege
6 precludes limiting the waiver to avoid disclosing disadvantageous information.¹⁰

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8 Although Capitola focuses on whether the consultants’ production of the May 16 and the
9 October 11 documents was a waiver of its work product privilege, the court finds a waiver was
10 effected by the voluntary disclosure of the May 31 and the October 24 documents by Capitola.
11 Even if the URS file and the four disclosed documents are indeed work product, Capitola's attempt
12 to share only documents that support its position, or at least mitigate Lexington's, while
13 withholding the remaining documents underlying that position or reflecting less advantageous
14 information is impermissible. Capitola put URS's work product at issue by offering some of the
15 URS product that is not particularly damaging. It cannot disclaim the damaging parts by
16 referencing "context" and then use the work-product doctrine to avoid telling Lexington what that
17 context is.
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23 ⁸ *In re Grand Jury Subpoena (Torf)*, 357 F.3d 900, 906 (9th Cir. 2003); *see* Fed. R. Civ. P.
24 26(b)(3).

25 ⁹ *United States v. Reyes*, 239 F.R.D. 591, 598 (N.D. Cal. 2006); *see also Hernandez v. Tanninen*,
604 F.3d 1095, 1100 (9th Cir. 2010).

26 ¹⁰ *See United States v. Nobles*, 422 U.S. 225, 239-40 (1975) (holding that a party “can no more
27 advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials
28 to resist cross-examination on matters reasonably related to those brought out in direct
examination.”).

1 Although Fed. R. Evid. 502(a) does not apply because the disclosure occurred prior to the
2 initiation of the suit, its methodology for determining the scope of waiver is instructive.¹¹ Here,
3 Capitola intentionally shared the May 31 and the October 24 letters. Those letters cover the same
4 subject matter as the files Capitola intends to withhold, namely URS's investigation. Based on
5 Capitola's attempt selectively to use URS's investigation to its benefit, in fairness Lexington ought
6 to have access to the withheld documents. As Capitola indicated in its motion for summary
7 judgment currently before Judge Koh, the parties agree that the URS investigation provides the
8 undisputed facts of the case.¹² Following Capitola's voluntary disclosure of part of that
9 investigation, Lexington now is entitled to see URS's entire investigation.
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11 Lexington's motion to compel the URS and V&A files regarding the investigation is
12 GRANTED. The files shall be produced immediately.

13 **IT IS SO ORDERED.**

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15 Dated: March 13, 2013

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17 PAUL S. GREWAL
18 United States Magistrate Judge

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¹¹ See *Wi-LAN Inc. v. Kilpatrick Townsend & Stockton LLP*, 684 F.3d 1364, 1369 (Fed. Cir. 2012)
27 (noting that the fairness principle underlying Fed. R. Evid. 502(a) should apply under Ninth Circuit
28 precedent in the prelitigation context).

¹² See Docket No. 36.