

REDACTED PUBLIC VERSION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
JOHN DOE I, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civ. No. 01-1357 (LFO)
)	
EXXON MOBIL CORPORATION, et al.,)	
)	
Defendants.)	
_____)	

**PLAINTIFFS’ MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS’ MOTION FOR RECONSIDERATION OF
MAGISTRATE JUDGE KAY’S JUNE 20, 2008 ORDER**

Magistrate Judge Kay undertook a careful, *in camera* review of documents withheld by Defendants and, in an opinion that discussed the law of privilege and work product, ordered certain of those documents produced, holding that they [REDACTED] [REDACTED] See June 20, 2008 Mem. Order at 12. Defendants now seek reconsideration pursuant to Federal Rule of Civil Procedure 72(a) as to nineteen of those documents, but they have not shown that Magistrate Judge Kay’s ruling is clearly erroneous or contrary to law.

Because the nineteen documents at issue were submitted *in camera*, Plaintiffs have not seen the allegedly privileged information and thus have a limited ability to comment on Defendants’ assertions. But Magistrate Judge Kay did review the documents, and issued an opinion siding with Defendants as to some documents and with Plaintiffs as to others. Reconsideration of that ruling is not warranted.

Moreover, what Plaintiffs do know about the nineteen documents suggests that Defendants' continued claims of privilege may be overbroad. For example, contrary to Defendants' representation, not all of these documents were identified on the privilege log disclosed to Plaintiffs. In addition, questions are raised by Defendants' shifting claims regarding [REDACTED]

[REDACTED]. Finally, the Court should view Defendants' current privilege arguments with skepticism – if it considers them at all – in light of their earlier position before Magistrate Judge Kay that cases discussing attorney-client privilege and work product were “irrelevant” to the motion and did not need to be briefed. Accordingly, the Court should deny Defendants' motion for reconsideration.

I. The Standard for Rule 72(a) Motions Is Deferential

Defendants' motion fails even to mention the standard governing Rule 72(a) motions for reconsideration of a magistrate judge's discovery ruling. That standard is one of deference. “Upon review, ‘the magistrate judge’s decision is entitled to great deference’ and will not be disturbed ‘unless found to be clearly erroneous or contrary to law.’” *Beale v. District of Columbia*, 545 F. Supp. 2d 8, 13 (D.D.C. 2008) (quoting *Boca Investering's P'ship v. United States*, 31 F. Supp. 2d 9, 11 (D.D.C. 1998)). Thus, courts “affirm the magistrate judge’s determination unless ‘on the entire evidence’ the court ‘is left with the definite and firm conviction that a mistake has been committed.’” *Id.* (quoting *Neuder v. Battele Pac. Northwest Nat'l Lab.*, 194 F.R.D. 289 (D.D.C. 2000)).

Significantly, Defendants do not question Magistrate Judge Kay's legal analysis, only his application of the law to these nineteen documents. Courts have some discretion, however, in deciding claims of attorney-client privilege and attorney work

product. *See, e.g., In re Papst Licensing GmbH & Co. KG Litig.*, MDL Docket No. 1880, 2008 U.S. Dist. LEXIS 44394, at *14-15 (D.D.C. June 9, 2008). Moreover, there is no reason to believe – much less to have a “definite and firm conviction” – that Magistrate Judge Kay made a mistake. Given the amount of time that Magistrate Judge Kay devoted to reviewing the documents, the Court should credit the balance he struck in his opinion.

II. Defendants Failed to Identify Certain of the Documents on the Privilege Log They Provided to Plaintiffs

Defendants argue that “the privilege was claimed and not waived” because “each of these documents was disclosed on a privilege log produced to Plaintiffs in this case and to this Court in connection with Plaintiffs’ motion to compel.” Defs.’ Mem. at 9. A review of the privilege log provided to Plaintiffs, however, reveals that five of the documents (Documents [REDACTED]) were never identified as containing privileged information.¹ Unless Defendants can offer a legitimate explanation for these omissions, a finding of waiver may be appropriate. *See United States v. Philip Morris Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003).

III. Defendants’ Claims Suggest That Their Privilege Assertions Are Overbroad

Defendants have withheld a staggering number of documents in this case on the basis of privilege. While they produced approximately 21,200 documents to Plaintiffs, their privilege log runs over 300 pages and contains nearly 5,000 entries. Thus, approximately *one out of every five relevant documents* is alleged to be protected by

^{1/} Attached as Exhibit A are the relevant pages from Defendants’ November 1, 2007 privilege log, which was produced in Bates-number-order, showing that the documents at issue do not appear.

attorney-client privilege or work product.² Under the circumstances, careful scrutiny of Defendants' privilege claims is warranted, and careful scrutiny is exactly what Magistrate Judge Kay did.

One example helps to illustrate the point. Document [REDACTED], which Defendants claim to be [REDACTED], is described in Appendix A to their motion as [REDACTED] [REDACTED] Defs.' Mot., Appx. A at 1. But this is not always how Defendants described this document in the privilege log they provided to Plaintiffs.³ While Defendants now say that [REDACTED] they previously claimed that [REDACTED] [REDACTED] Defendants have offered no explanation for why their description of the document changed, and it raises serious questions: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Even more puzzling is the redacted version of the document (omitting the [REDACTED] pages at issue) that was produced to Plaintiffs.⁴ [REDACTED]

[REDACTED]

^{2/} The parties continue to meet and confer regarding certain of the entries on Defendants' voluminous privilege log.

^{3/} Attached as Exhibit B is the relevant page from Defendants' November 1, 2007 privilege log. In the privilege log they provided to Plaintiffs, Defendants asserted [REDACTED] [REDACTED] but have apparently abandoned their [REDACTED] claim, without any explanation.

^{4/} The redacted document is attached as Exhibit C.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵ Given these facts, it is not surprising that Magistrate Judge Kay would reject Defendants’ privilege claims and require the nineteen documents to be produced.

IV. Defendants Previously Called Cases About Attorney-Client Privilege and Work Product “Irrelevant” and Failed to Brief The Issue

Defendants’ current position is particularly surprising because of their comment, in opposition to Plaintiffs’ original motion to compel, that the case law cited by Plaintiffs regarding attorney-client privilege and work product was “irrelevant.” Defs.’ Opp. to Mot. to Compel at 15 n.5. In addition, Defendants concede that they “did not describe the bases for the attorney-client privilege and work-product protection in their Opposition to Plaintiffs’ motion to compel” Defs.’ Mem. at 2. Having failed to brief the issue, and having gone so far as to deride Plaintiffs for citing pertinent cases, it is too late for Defendants to criticize Magistrate Judge Kay – who did analyze the privilege issues despite Defendants’ disavowals – for coming to a different conclusion about whether the

^{5/} Defendants state in their brief that [REDACTED] Defs.’ Mem. at 12. Of course, markings placed on a document are “not dispositive in determining whether a document is privileged.” *Neuder*, 194 F.R.D. at 295.

documents must be produced. *See Students Against Genocide v. Dep't of State*, 257 F.3d 828, 834 & n.10 (D.C. Cir. 2001).

V. Conclusion

For the foregoing reasons, the Court should uphold Magistrate Judge Kay's ruling and deny Defendants' motion for reconsideration.

Dated: July 10, 2008

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EXHIBIT A

(FILED UNDER SEAL)

EXHIBIT B

(FILED UNDER SEAL)

EXHIBIT C

(FILED UNDER SEAL)

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of July, 2008, a redacted copy of the foregoing Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Reconsideration of Magistrate Judge Kay's Order of June 20, 2008 was served via the Court's electronic filing system and an unredacted copy was hand delivered to the following counsel:

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