

entities, by doing so Fish & Richardson allegedly waived privilege over *all* documents listed on its privilege log. That is not, and cannot be, the law. At the outset of this litigation, Fish & Richardson included entry nos. 45, 48, 49, and 67 on a privilege log created during expedited discovery. Fish & Richardson was prepared to meet and confer about items on its privilege log with counsel for Mr. Harris. However, Mr. Harris's counsel refused to meet and confer, and instead filed a premature motion to compel. In response, Fish & Richardson reviewed its privilege log very carefully and concluded that four documents (privilege log entries nos. 45, 48, 49 and 67) were not privileged. Therefore, Fish & Richardson removed those documents from its privilege log, and produced them to Mr. Harris and the shell entities. Such conduct is routine during litigation, and Mr. Harris and the shell entities cannot cite any authority that by re-examining a privilege log and reconsidering certain entries a party waives privilege over all documents that remain listed on the party's privilege log. Production of non-privileged documents cannot create subject matter waiver over all privileged documents.

Second, Mr. Harris's suggestion that the Court sever the shell entities from this litigation plainly will not solve the Niro firm's conflict issues, and will be inefficient and a waste of judicial resources. As discussed at length during the parties' May 23, 2008 hearing, the fundamental issue here is that Mr. Harris's counsel should not be able to use privileged documents (that Fish & Richardson is willing to produce to Mr. Harris only), in litigation that is now being waged by that same counsel (the Niro firm) on behalf of its other clients (the shell entities) against Fish & Richardson and *its* clients, both in this Court and in other jurisdictions. Mr. Harris's and the shell entities' ill-conceived "solution" solves nothing—it just creates more litigation while permitting the shell entities to use Fish & Richardson's privileged information against Fish & Richardson and its clients.

Instead, the logical first step is to assess whether the documents submitted *in camera* are privileged, and whether any of those documents should be produced to Mr. Harris only. If some of the documents should be produced to Mr. Harris only, then they should be produced consistent with the directives set forth in Fish & Richardson's response to Mr. Harris's and ICR's motion to compel: (i) a judicial determination that the production is not a waiver of any applicable privilege, and (ii) a ruling that the documents may be produced to Mr. Harris only, and are privileged with respect to other parties and their counsel. (See Dkt. 160 at 5, 8-10.) The only solution is for Mr. Harris to stipulate that the shell entities are his alter ego, or for the shell entities and Mr. Harris to retain separate, independent counsel.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed with the Court by means of the Court's CM/ECF system, which will send notification of such filing to the following counsel at their email address on file with the Court:

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