Weather Underground, Incorporated v. Navigation Catalyst Systems, Incorporated et al Doc. 125

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

THE WEATHER UNDERGROUND, INC.,
a Michigan corporation,

Plaintiff,

vs.

Case No. 2:09-CV-10756
Hon. Marianne O. Battani

NAVIGATION CATALYST SYSTEMS, INC.,
a Delaware corporation; BASIC FUSION, INC.,
a Delaware corporation; CONNEXUS CORP.,
a Delaware corporation; and FIRSTLOOK, INC.,
a Delaware corporation,

Defendants.

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NAVIGATION CATALYST SYSTEMS, INC.'S MOTION FOR PROTECTIVE ORDER

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TO THIS HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, pursuant to Fed. R. Civ. P. 26(c), Defendant Navigation Catalyst Systems, Inc. ("NCS") hereby moves this Court for a protective order forbidding Plaintiff The Weather Underground, Inc. from taking the deposition of Christopher Pirrone, Defendant's former General Counsel, and inquiring into matters protected against disclosure by the attorney-client privilege and attorney work product doctrine. NCS also moves for sanctions against Plaintiff, its counsel, or both, as the Court deems fit, in the amount of $5,250 pursuant to Fed. R. Civ. P. 26(c)(3) and 37(a)(5) for forcing NCS to file this Motion when it has no legal basis for inquiring into privileged information.

This Motion is based on the facts and arguments set forth in the accompanying Memorandum of Points and Authorities; to wit, that Plaintiff cannot meet the elements of the *Shelton* test, that the matters about which Plaintiff seeks to inquire are protected against disclosure by the attorney-client privilege and attorney work product doctrine, and neither privilege has been waived by NCS.

This Motion is supported by the attached Memorandum of Points and Authorities, the Declaration of William A. Delgado, the case file, and the arguments of counsel that the Court would entertain at a hearing on this Motion.

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Between October 21, 2010 and November 8, 2010, William A. Delgado, counsel for NCS, and Enrico Schaefer, counsel for Plaintiff, met and conferred and NCS explained the nature of this Motion and its legal basis and requested, but did not obtain, concurrence in the relief sought.

RESPECTFULLY SUBMITTED this 8th day of November, 2010.

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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE ISSUE PRESENTED

The issue presented in this motion is to what extent, if any, a party to litigation waives the attorney-client privilege and/or the attorney work product doctrine even though it is ***not*** relying on any attorney-client communication or attorney work product as part of its defense. NCS respectfully submits that the attorney-client privilege and/or attorney work product doctrine are not waived unless a party explicitly and unequivocally pleads advice of counsel or otherwise relies on the substance of an attorney-client communication to prove a claim or defense.

CONTROLLING AUTHORITY

Fed. R. Civ. P. 26(b) permits discovery into relevant, non-privileged matters. Fed. R. Civ. P. 26(c) permits the Court to issue a protective order forbidding certain discovery in order to prevent annoyance, embarrassment, oppression, undue burden or expense.

INTRODUCTION

Plaintiff seeks to take the deposition of Defendant's in-house counsel and ask questions about information which is indisputably protected from disclosure by the attorney-client privilege and attorney work product doctrine. Plaintiff should be forbidden from doing so for at least two reasons.

First, Plaintiff cannot meet the strict requirements of *Shelton* for deposing opposing counsel. That is to say, Plaintiff cannot show that counsel's information cannot be obtained another way, that counsel's information is non-privileged, or that counsel's information is crucial to the preparation of its case. In fact, as demonstrated below, Plaintiff cannot meet a single one of these elements.

Second, Plaintiff cannot show that the attorney-client privilege or attorney work product doctrine has been waived. It is true that an implicit waiver of such privileges may be found when a defendant specifically and unequivocally pleads "advice of counsel" as an affirmative defense or otherwise relies on the substance of an attorney-client communication to prove a claim or defense. Here, however, NCS has not pleaded reliance on the advice of counsel nor has it sought to defend itself by referring to a specific conversation involving counsel. In fact, the undisputed fact is this: no employee of NCS had ever heard of Plaintiff prior to the initiation of litigation by Plaintiff. As a result, it would have been ***impossible*** for NCS to obtain pre-litigation "advice of counsel" regarding Plaintiff's marks upon which NCS could now rely. As a result, Plaintiff is unable to establish any implicit waiver of the privileges.

For these reasons, Defendant's motion should be granted in its entirety.

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STATEMENT OF FACTS

Plaintiff has filed this trademark infringement lawsuit alleging that Defendant NCS (and other companies[1]) purposefully registered and monetized domain names that were similar to Plaintiff's trademarks with a "bad faith" intent to profit from those domain names, in violation of the Lanham Act and, particularly, the Anti-Cybersquatting Protection Act ("ACPA") (15 U.S.C. § 1125(d)).

Plaintiff has never been shy about the intent behind this lawsuit: it seeks to end the business model of domain name monetization and that desire has resulted in scorched earth discovery tactics. As a result, what should have been a relatively straightforward trademark infringement case has (unnecessarily) transmogrified into something more. To satisfy Plaintiff's never ending discovery requests (which, without exaggeration, originally requested nearly every document in the company's possession from 2004 to the present), NCS has produced nearly 100,000 pages of documents and a hard drive containing Firstlook's[2] entire database, with third party data, measuring 448 GB in size.[3] Declaration of William A. Delgado, dated November 8, 2010, at ¶ 2. Presently, Defendant's counsel is in the process of reviewing thousands of e-mails that were generated as a result of searches requested by Plaintiff. *Id*. at ¶ 4. And, of course, NCS has made its witnesses available for deposition including Firstlook President Seth Jacoby,

[1] These other companies—FirstLook, Basic Fusion, and Connexus Corporation—have all been dismissed from this case because there is no personal jurisdiction over them in this judicial district.

[2] Firstlook is the parent company of NCS.

[3] 448 GB represents approximately **29 million pages** of a document in Microsoft Word format. Delgado Decl. at ¶ 3.

software engineer Donnie Misino, and employees involved in domain name registration over time, Mavi Llamas and Lily Stevenson. Other depositions are currently scheduled. *Id*. at ¶ 5.

Now, Plaintiff seeks to depose Chris Pirrone, the former General Counsel for Connexus Corporation, the parent company of Firstlook. *See* Notice of Deposition of Chris Pirrone (Delgado Decl. Ex. A). Plaintiff intends to ask Mr. Pirrone about privileged communications and information. *See* Letter from E. Schaefer, dated October 21, 2010 to W. Delgado (Delgado Decl. Ex. B). For the reasons set forth below, which were explained to Plaintiff during the meet and confer process[4], the Court should grant this motion for protective order forbidding Plaintiff from taking the deposition of Chris Pirrone and inquiring into privileged information.

ARGUMENT

I. PLAINTIFF CANNOT MEET THE STRICT REQUIREMENTS OF THE *SHELTON* TEST AS A GENERAL MATTER.

In 1986, the Eighth Circuit issued its ruling in *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986), and it thereafter became the seminal case on when an opposing attorney can be deposed as a general matter. In 2002, the Sixth Circuit adopted the principles in *Shelton* in *Nationwide Mutual Ins. Co. v. Home Insurance Co.*, 278 F.3d 621 (6th Cir. 2002), holding that "[d]iscovery from an opposing counsel is limited to where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information…; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Nationwide*, 278 F.3d at 628; *see also Iron Workers Local No. 25*

[4] See October 25, 2010 Letter from W. Delgado to E. Schaefer (Delgado Decl. Ex. C).

Pension Fund v. Watson Wyatt & Co., 2006 WL 1156723 *1 (E.D. Mich. May 1, 2006) ("The Sixth Circuit adopted the *Shelton* test in [*Nationwide*].")

Here, Plaintiff seeks to take the deposition of Chris Pirrone, Defendant's former General Counsel, ostensibly because "[w]hether NCS is a bad faith cybersquatter or a willful infringer of trademarks is necessarily dependent upon Chris Pirrone's determinations made concerning both the process and the handling of individual domain registrations and disputes while employed with NCS and the competency of advice relied on by others in the company." Letter from E. Schaefer, dated October 21, 2010 to W. Delgado (Delgado Decl. Ex. B).

As this statement makes clear, however, Plaintiff cannot meet ***any*** of the elements of the *Shelton* test. First, Plaintiff has already deposed Firstlook employees (including Jacoby, Misino, Llamas, and Stevenson), all of whom were able to explain the company's efforts—and their own specific roles—in avoiding domain name registrations that are arguably similar to others' trademarks. *See, e.g.*, Deposition Transcript of Mavi Llamas at 14:1-15:25 (Delgado Decl. D); Deposition Transcript of Lily Stevenson at 24:20-26:11 and 30:2-19 (Delgado Decl. Ex. E). In addition, Plaintiff has in its possession the Expert Report of Richard Korf, an MIT-educated computer science professor at UCLA, which explains the method by which NCS registers domain names and the automated processes (e.g., a black list, an internal tool of rejected domain names) and manual processes (e.g., human screeners) which NCS utilizes to avoid problematic registrations. Delgado Decl. Ex. F. As a result, it is impossible for Plaintiff to argue that "there is no other way" for it to determine whether NCS's domain name registrations were in bad faith.

Second, it is clear that the information sought by Plaintiff ***is*** privileged and protected. Otherwise, Plaintiff would not be arguing—as it does in its October 21, 2010 letter—that the

attorney-client privilege and attorney work product doctrine have been waived. *See* Letter from E. Schaefer, dated October 21, 2010 to W. Delgado (Delgado Decl. Ex. B). Lastly, Plaintiff cannot show that the "information is crucial to the preparation of the case." Plaintiff is not seeking any information that relates to this particular case or Plaintiff's particular trademarks. Rather, it is seeking information about Mr. Pirrone's advice to his business clients generally which is not necessary for purposes of its prosecution of this case. That Plaintiff does not need an unbridled fishing expedition into NCS's general business practices is particularly true in this context where, time and again, courts have made clear that the determination of "bad faith" for purposes of the ACPA is a very specific inquiry related to the trademark(s) ***at issue*** in the case. *Solid Host NL v. NameCheap, Inc.*, 652 F. Supp. 2d 1092, 1109 (C.D. Cal. 2009) ("The bad faith required to support a cybersquatting claim is not general bad faith, but 'a bad faith intent to profit *from the mark,'* 15 U.S.C. § 1125(d)(1)(A)(I) (emphasis added).") (collecting cases); H.R. Conf. Rep. No. 106-464 (1999) ("[T]he bill does not extend to innocent domain name registrations by those who are unaware of another's use of the name…").

In light of the foregoing, it is clear that Plaintiff cannot meet the strict requirements of *Shelton* and, therefore, cannot depose Chris Pirrone as a general matter. Undoubtedly aware of this fatal hurdle, Plaintiff instead argues that it is permitted to depose Mr. Pirrone because his advice is "at issue," and, correspondingly, any privilege attached to that advice has been waived. In this regard, Plaintiff is wrong.

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II. NCS HAS NOT WAIVED THE ATTORNEY-CLIENT PRIVILEGE OR THE ATTORNEY WORK PRODUCT DOCTRINE.

Discovery is limited to information that is relevant to a claim or defense and is ***non-privileged***. Fed. R. Civ. P. 26(b)(1). To argue that NCS has waived the attorney-client privilege and/or attorney work product doctrine as to Chris Pirrone's advice, Plaintiff relies on cases in which the Defendant pleads an "advice of counsel" defense, and, as a result, the Plaintiff is permitted to inquire into the pre-litigation advice Defendant received vis-à-vis the Plaintiff's intellectual property rights. The fact pattern in such cases is typically the same:

1. A potential defendant finds out about the existence of an intellectual property right of a potential plaintiff (e.g., patent, trademark, etc.) in advance of litigation.
2. The defendant seeks the advice of an attorney, typically in the form of a non-infringement opinion, regarding defendant's activities vis-à-vis plaintiff's intellectual property right. *See, e.g., Minnesota Specialty Crops, Inc., v. Minnesota Wild Hockey Club, L.P.*, 210 F.R.D. 673 (D. Minn. 2002) ("[P]rior to January 22, 1998, [Defendants] received an opinion from counsel that their adoption, and use, of the name 'Minnesota Wild' would be 'entirely lawful.'").
3. The defendant is subsequently sued by the plaintiff.
4. To defend against a finding of willful infringement (since defendant was aware of plaintiff's intellectual property rights prior to litigation), defendant asserts "advice of counsel" as a defense. *See, e.g., Michlin v. Canon, Inc.*, 208 F.R.D. 172 (E.D. Mich. 2002) ("Defendants have denied infringement, and have alleged reliance on the advice of counsel in defense of plaintiff's claim of willful infringement.").

5. Plaintiff inquires into defendant's pre-suit investigation into Plaintiff's trademarks. *Minnesota Specialty*, 210 F.R.D. 678 ("The Plaintiff contends that the Defendant should be required to produce 'all documents discussing [the Plaintiff's] trademark rights in 'MINNESOTA WILD' or related design or how such rights might be affected by [D]efendant's actions or contemplated actions.").
6. The Court permits the plaintiff to inquire into the "advice of counsel" so that, for example, plaintiff can determine whether the advice was competent. *See, e.g.*, *Adidas-Am, Inc. v. Payless Shoesource, Inc.*, 546 F. Supp. 2d 1029, 1047-48 (D. Or. 2008) ("If the opinion is not competent, then it is of little value in showing the good faith belief of the infringer.").

As a general matter, NCS has no quarrel with the proposition for which those cases stand; to wit, if you affirmatively plead "advice of counsel" as a defense, you waive privilege with respect to the specific advice obtained vis-à-vis the Plaintiff's rights (but only that advice). However, these cases do ***not*** stand for the proposition advanced by Plaintiff: that a party waives the attorney-client privilege and attorney-work product doctrine as to its general business practices simply because a business person asks in-house counsel for legal advice in the operation of the business. Presumably, that is the whole point of having in-house counsel in the first place.

The question, then, is whether this case falls into the fact pattern described above. It does not. In fact, the differences between such cases and this case could not be more obvious, and these distinctions are crucial.

For example, in the cases upon which Plaintiff relies, the defendant knew of plaintiff ahead of litigation and was able to obtain advice of counsel specific to Plaintiff's patents/marks in advance of litigation. Here, the evidence is clear that NCS did ***not*** know of Plaintiff prior to Plaintiff filing a UDRP against NCS. Llamas Tr. at 243:1-245:22; Stevenson Tr. at 214:8-15; Deposition Transcript of Seth Jacoby at 129:21-23 and 133:15-23 (Delgado Decl. Ex. G). As a result, NCS ***could not*** have obtained a pre-litigation advice of counsel regarding Plaintiff's marks. And, it necessarily follows that if NCS did not know of Plaintiff prior to the filing of a UDRP, it did not receive any pre-litigation advice from Chris Pirrone regarding Plaintiff or its marks.

As another example, in the cases upon which Plaintiff relies, Plaintiff sought ***very specific*** discovery: the pre-litigation advice given to Defendant vis-à-vis Plaintiff's specific intellectual property (e.g., the MINNESOTA WILD mark). But, that is not what Plaintiff seeks here (because, as just noted, it does not exist). Rather, Plaintiff seeks to inquire about Chris Pirrone's advice as to NCS's business practices ***in general***. That is to say, Plaintiff wants to inquire about what advice Mr. Pirrone may have provided regarding whether to register/transfer/delete/etc. domain names that relate to the trademark of ***others***. Nothing in these cases stands for the proposition that the attorney-client privilege or attorney work product is waived in that respect. *Henry v. Quicken Loans, Inc.*, 263 F.R.D. 458 (E.D. Mich. 2008) ("[The Sixth Circuit] also noted that, as a matter of policy, implied waivers are to be construed narrowly, and the court 'must impose a waiver no broader than needed to ensure the fairness of the proceedings before it.'") *citing In re Lott*, 424 F.3d 446 (6th Cir. 2005).

But, perhaps the most important difference is this: in the cases cited by Plaintiff (and other cases of this ilk), the defendant put the "advice of counsel" at issue by pleading it as a defense, and it was defendant's choice to do so that triggered the waiver. *Michlin*, 208 F.R.D. at 173 ("***When such reliance is pleaded***, there is a waiver of the attorney-client privilege and work product protection, at least to the extent of all information respecting communications between the client and attorney up until the time the opinion is rendered.") (emphasis added); 1 McCormick on Evidence § 93 (6th Ed. 2006) ("[S]pecific reliance upon the advice either in pleading or testimony will generally be seen as waiving the privilege."). The rationale behind this is simple: "Fairness dictates that a party may not use the attorney-client privilege as both a sword and a shield, and therefore, parties asserting the advice-of-counsel defense may not selectively disclose privileged communications that it considers helpful while claiming privilege on damaging communications relating to the same subject." *Minnesota Specialty*, 210 F.R.D. at 675 (internal quotations omitted).

But, here, NCS has ***not*** pleaded "advice of counsel" as an affirmative defense and is ***not*** intending to rely on such advice. *See* Answer (Delgado Decl. Ex. H). That should not be surprising: since NCS was not aware of Plaintiff prior to litigation, it has no "advice of counsel" on which it *can* rely, even if it wanted. Put simply, if NCS does not affirmatively place an attorney-client communication at issue, there is no waiver.

To rebut this last point, Plaintiff may argue that the ACPA specifically examines "bad faith" or that NCS has alleged "good faith" in its Answer and that, by virtue of the elements of

Plaintiff's claims, Chris Pirrone's advice is necessarily at issue.[5] This argument has also been soundly rejected.

The attorney-client privilege is not implicitly waived simply because intent is relevant to these proceedings. "An implicit waiver of the attorney-client privilege is not triggered by whether or not the communications are relevant to the issue asserted, for the implicit waiver rule to become applicable, a party must affirmatively use privileged communications to defend itself or attack its opponent in the action." *Hodak v. Madison Capital Mgt., LLC*, 2008 WL 2355798 *3 (E.D. Ken. June 5, 2008). Indeed, *Hodak* contains a good summary of the holding from a seminal case from the Third Circuit, *Rhone-Poulenc v. Home Indem Co.*, 32 F.3d 851 (3d Cir. 1994):

> In *Rhone-Poulenc* [], the court discussed "advice of counsel" and stated "advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorneys' advice might affect the client's state of mind in a relevant manner… As the court in *Rhone* goes on to explain, "the advice of counsel is placed 'in issue' where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication.

Hodak, 2008 WL 2355798 at *3; *Henry*, 263 F.R.D. at 468 ("The *Rhone-Poulenc*] court found that such a standard encourages predictability in the privilege by providing certainty 'that the client's confidential communications will not be disclosed unless the client takes the affirmative

[5] This argument implicitly requires the Court to also accept the legally-rejected corollary that Plaintiff can rely on some showing of "general bad faith" as opposed to a bad faith intent to profit ***from the mark at issue*** in the lawsuit as the words of the statute plainly state.

step to waive the privilege.'"); *U.S. v. Ohio Edison Co.*, 2002 WL 1585597 (adopting *Rhone-Poulenc* and finding that "merely pleading the defense of equitable estoppel in patent case without affirmatively relying upon advice of counsel is not sufficient to imply waiver.").

Here, NCS has denied it had the requisite "bad faith intent" and has pleaded that, instead, it was acting in "good faith." But, as *Ohio Edison* makes clearly, *more* is required before a waiver will be implied. But, that *more* is missing here. NCS has not used the substance of any attorney-client communication to rebut Plaintiff's charge of "bad faith intent" or, put another way, to show its "good faith." For example, when Mavi Llamas and Lily Stevenson testified as to how they screened potential domain name candidates for trademarks, they testified that they did so based on their own personal knowledge or a USPTO search, ***not*** on Chris Pirrone's advice. Llamas Tr. at 14:1-15:25 (Delgado Decl. D); Stevenson Tr. at 24:20-26:11 and 30:2-19 (Delgado Decl. Ex. E). And, as the Expert Report of Rich Korf makes clear, the process for avoiding domain names that are arguably similar to trademarks consists of (1) an automated portion and (2) human screeners, but Chris Pirrone is ***not*** one of the human screeners. Delgado Decl. Ex. F.

Put simply, as the *Hodak* Court succinctly noted, it is true that the attorney-client privilege cannot at once be used as both a sword and a shield but "[w]hile the sword stays sheathed, the privilege stands." *Hodak*, 2008 WL 2355798 at *4 *citing In Re Lott*, 139 Fed. Appx. 658, 661 (6th Cir. 2005).

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III. PLAINTIFF SHOULD BE SANCTIONED FOR FORCING NCS TO INCUR THE EXPENSE OF FILING A MOTION FOR PROTECTIVE ORDER WHEN PLAINTIFF HAS NO LEGAL BASIS TO TAKE CHRIS PIRRONE'S DEPOSITION.

Under Federal Rules of Civil Procedure 26 and 37, where a motion for a protective order is granted, an award of attorneys' fees and expenses is mandatory, subject to limited exceptions inapplicable here. Fed. R. Civ. P. 26(c)(3), 37(a)(5)(A). Indeed, "[i]f the motion is granted . . . the court *must*, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. Fed. R. Civ. P. 37(a)(5)(A) (emphasis added). Exceptions to this rule exist only where the moving party failed to attempt to resolve the dispute in good faith in advance of filing the motion, if the opposing party's conduct was "substantially justified," or if "other circumstances" make an award of expenses "unjust." Fed. R. Civ. P. 37(a)(5)(A) (i-iii). In other words, subject to these limited exceptions, Rule 37 "*presumptively* requires every loser to make good the victor's costs . . . ." *Rickels v. City of South Bend, Ind*., 33 F.3d 785, 786 (7th Cir. 1994) (emphasis added).

None of Rule 37's exceptions apply here. Counsel for Defendant attempted to resolve this discovery dispute in advance of filing this Motion. Indeed, on October 25th, Defendant's counsel explained to Plaintiff's counsel the reasons Plaintiff has no waiver argument and encouraged Plaintiff to conduct further research – and, in fact, specifically cautioned Plaintiff's counsel that, to the extent Plaintiff sought Mr. Pirrone's deposition, sanctions would be sought in

connection with the filing of this Motion. Nevertheless, Plaintiff proceeded to notice the deposition of Mr. Pirrone on November 2, 2010. Plaintiff's conduct in this regard cannot be "substantially justified," where no legal basis exists to depose Mr. Pirrone, and Plaintiff was so informed in advance of its service of Mr. Pirrone' deposition notice. No "other circumstances" exist that would make an award of fees and expenses "unjust" here.

Accordingly, in light of Plaintiff's conduct and the lack of any legal justification for attempting to proceed with the deposition of Mr. Pirrone (much less substantial justification), sanctions are warranted. *Rodriguez v. Parsons Infrastructure & Technology Group, Inc*., 2010 WL 3883436 at *3 (Slip Copy) (S.D.Ind.) (Rule 37 sanctions imposed where opposition to protective order was not "substantially justified" where deposition subpoena to attorney was improper); *U&I Corp. v. Advanced Medical Design, Inc*., 251 F.R.D. 667 (M.D.Fla. 2008) (Rule 37 sanctions imposed where opposition to motion for protective order was not "substantially justified" where deposition subpoenas were improper). For the foregoing reasons, NCS requests a sanctions award in $5,250 (well below the ***actual*** attorneys' fees it incurred in bringing this motion) against Plaintiff, Plaintiff's counsel, or both, as determined by the Court. Delgado. Dec. at ¶ 15.

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CONCLUSION

The attorney-client privilege and the attorney work product are fundamental to a lawyer's ability to effectively represent his or her clients. An implicit waiver of such privileges is found only in the most limited of circumstances which are not present here. For the foregoing reasons, NCS respectfully requests that the Court grant its motion for protective order.

RESPECTFULLY SUBMITTED this 8th day of November, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2010, I electronically filed the foregoing paper with the Court using the ECF system which will send notification of such filing to the following:

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