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' REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL FURTHER RESPONSES AND PRODUCTION OF DOCUMENTS

REPLY MEMORANDUM

I. THE RULE 26 THAT EXISTED AS OF NOVEMBER 30, 2010 APPLIES.

NCS propounded its Third Document Requests and Plaintiff served its responses thereto *before* the amendment to Rule 26 became effective. At the time of its response, Plaintiff was obligated under Rule 26 and *Regional Airport Authority* to produce all documents considered by Mr. Schwerzler, its testifying expert, including privileged documents and attorney work product. Nonetheless, Plaintiff withheld documents on the basis of privilege, and now claims that production of such documents is not required under the *amended* Rule 26. Whether or not that is true is irrelevant because the version of Rule 26 that existed when Plaintiff's discovery responses were due applies and mandates production of the withheld documents.

A. Application of the Amended Rule 26 Would Be Unjust.

As conceded by Plaintiff, application of the amended Rule 26 to pending actions is not required where doing so would be unjust or impracticable. (Resp. at 7-8 (citing Supreme Court Order).)[1] Indeed, 28 U.S.C. § 2074 provides the following guidance in determining whether retroactive application should be given to a new procedural rule:

> [T]he Supreme Court shall *not* require the application of such rule to further proceedings then pending to the extent that, *in the opinion of the court in which such proceedings are pending*, the application of such rule . . . would not be feasible or would *work injustice*, in which event the former rule applies.

28 U.S.C.A. § 2074(a) (emphasis added).[2] Thus, application of the amended Rule 26 to pending

[1] Contrary to Plaintiff's suggestion otherwise, NCS cited this Supreme Court Order in its Motion and explained that nearly every amendment of the Rules of Civil Procedure is accompanied by a Supreme Court order with nearly identical language. (Resp. at 11; Mot. at 11 n.4.)

[2] Section 2074 "merely recognizes the endless variations met from one case to another and gives the judge closest to the scene the final say in determining whether it is fair to give retroactive effect to a new rule." 28 U.S.C.A. § 2074 commentary on 1988 revision.

actions would not be required where, as here, application of such rule would work injustice.[3]

As NCS argued in its Motion, "the administration of *justice* is dependent on the parties following the rules as they exist, not as they *might* exist at some future time." (Mot. at 11 (first emphasis added).)[4] Here, NCS propounded its Third Document Requests on October 26, 2010, seeking documents related to Mr. Schwerzler's designation as Plaintiff's expert. After obtaining an extension to respond from NCS, Plaintiff served its responses on November 30, 2010 and withheld documents on the basis of privilege. The day *after* Plaintiff served its responses, Rule 26 was amended to restrict the automatic discovery of privileged material considered by testifying experts. Allowing Plaintiff to rely on the amended Rule 26 to excuse its failure to abide by Rule 26 as it existed when its discovery responses were due would not be just.[5] *See Security Ins. Co. v. Trustmark Ins. Co.*, 2003 WL 22326574, at *2 (D. Conn. Sept. 20, 2003) (holding that motions to compel would be considered under earlier version of Rule 26(b)(1) because "application of the current, more restrictive standard would not be just," where "present case proceeded for five months under the earlier version" and "[t]here [was] evidence in the present motions that the parties conducted significant discovery under this standard").

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[3] Plaintiff presents contradictory arguments in its Response. First, Plaintiff argues that it would not be unjust to apply the former Rule 26 because "under either version of Rule 26," Plaintiff's position is that "it has fully complied with the discovery requests." (Resp. at 8.) But, Plaintiff later argues that "injustice would lie" in the application of former Rule 26 "to resolve the pending discovery dispute." (*Id.* at 9.) Plaintiff cannot have it both ways. If, as Plaintiff maintains, it has fully complied with its discovery obligations under former Rule 26, then Plaintiff should have no problem with applying former Rule 26 to this discovery dispute.

[4] Contrary to Plaintiff's repeated assertions in its Response that NCS has not argued that application of the amended Rule 26 would be unjust nor identified an injustice, this is, in fact, the argument NCS made in its Motion. (Resp. at 7-9.)

[5] Plaintiff's contention that application of amended Rule 26 would not be unjust because this action has not been set for trial is a nonstarter. (Resp. at 9.) The relevant inquiry here is whether Plaintiff's responses to the Third Document Requests were due before or after the amended Rule 26 became effective. For this same reason, that an amended complaint was recently filed and at least one deposition and several motions remain pending is also irrelevant. (*Id.* at 11.)

Applying the amended Rule 26 would be particularly unjust here because NCS disputes that Mr. Schwerzler is, in fact, an expert in the areas in which he seeks to testify. As made clear during his most recent deposition, Mr. Schwerzler has never testified as an expert before and has no meaningful experience in the field of computer science. (See Ex. A, Dep. of Christopher Schwerzler, taken on Dec. 6, 2010 ("Schwerzler Dep.") at 12:2-19:22, 20:19-23, 21:22-23:12.) Given these circumstances, it is particularly important that *all* documents considered by Mr. Schwerzler be produced to NCS to enable NCS to effectively cross-examine Mr. Schwerzler. *See, e.g.*, *Rochow v. Life Ins. Co. of N. Am.*, 2010 WL 100633, at *4 (E.D. Mich. Jan. 5, 2010) ("'The disclosure of [all communications to expert witnesses by attorneys] enables the opposing party to test the expert's opinion through more effective cross-examination.'") (citation omitted).

B. Application Of The Former Rule 26 Is Supported By Case Law.

Although Plaintiff argues that application of the former Rule 26 is not warranted by the numerous cases cited in NCS's Motion, Plaintiff fails to cite even a *single* case in which a court applied a new procedural rule to resolve a discovery dispute regarding discovery propounded and responded to under the former rule. Indeed, should this Court agree with Plaintiff and apply the amended Rule to this dispute, this Court's decision would be contrary to other district court decisions in the Sixth Circuit and elsewhere. *See, e.g.*, *Lattuga v. United States Postal Serv.*, 2010 WL 4918769, at *3 (S.D. Ohio Nov. 29, 2010) (refusing to apply amended Rule 26(a)(2)(C), which would become effective two days after the court's decision, to discovery dispute "[b]ecause the amendment was not in place at the time expert disclosure was required"); *see also* Mot. at 10-11 (citing *Stanphill*, 2008 WL 2359730, at *1 n.5, and *Pace*, 2007 WL1385385, at *1 n.1.)[6]

[6] Although Plaintiff contends that the Court in *Pace* applied the former version of an amended rule "without analysis or commentary," (Resp. at 11), the Court specifically stated that it was

Plaintiff's attempt to distinguish and discredit the cases cited by NCS is unavailing. In *Toth v. Grand Trunk Railroad*, 306 F.3d 335 (6th Cir. 2002), the Sixth Circuit determined that the "pre-[amendment] federal rules. . . should apply" to sanctions motions because "all portions of the suit relating to [plaintiff's] motions . . . were completed prior to the effective date of the amendments." *Id.* at 343 n.2. That *Toth* also noted the "general rule" that "'[g]enerally a new procedural rule applies to the *uncompleted* portions of suits pending when the rule became effective'" is of no consequence. *Id.* (emphasis added) (citations omitted); Resp. at 10. Here, Plaintiff's responses to NCS's Third Document Requests were due and served – that is, "completed" – *prior* to the effective date of amended Rule 26. The amended Rule 26 would therefore *not* apply to this "completed" portion of this action, even under the "general rule." Plaintiff's sole criticism of *Stanphill* is its reliance on *Toth* and thus can also be disregarded.

II. PLAINTIFF SHOULD BE COMPELLED TO PROVIDE FURTHER RESPONSES TO THE THIRD DOCUMENT REQUESTS AND PRODUCE DOCUMENTS PROVIDED TO MR. SCHWERZLER AND CONSIDERED BY HIM IN THE COURSE OF PREPARING HIS OPINION.

A. The Sixth Circuit Established A Bright Line Rule Requiring Disclosure Of All Documents Reviewed By A Testifying Expert, Regardless Of Privilege.

Both the language of Rule 26 and the Advisory Committee Notes accompanying the 1993 amendments confirm that Rule 26 was intended to provide a bright-line rule requiring disclosure of all materials considered by a testifying expert. (Mot. at 12-13.) The Sixth Circuit definitively enunciated this bright-line rule in *Regional Airport Authority v. LFG, LLC*, 460 F.3d 697 (6th Cir. 2006), holding that "Rule 26 creates a bright-line rule mandating disclosure of all documents, including attorney opinion work product, given to testifying experts." *Id.* at 717.[7]

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applying the former version of Rule 34 because "the conduct at issue in [plaintiff's] motion occurred *prior* to this amendment." *Pace*, 2007 WL1385385, at *1 n.1 (emphasis added).

[7] The bright-line rule in *Regional Airport Authority* was not limited to "retained expert[s]," as suggested by Plaintiff, but to "testifying experts." (Resp. at 12.)

Moreover, "[i]n interpreting Rule 26(a)(2)(B) and giving definition to the term 'considered' used therein, . . . the courts have embraced an objective test that defines 'considered' as anything received, reviewed, read, or authored by the expert, before or in connection with the forming of his opinion, if the subject matter relates to the facts or opinions expressed." *Euclid Chem. Co. v. Vector Corrosion Techs,, Inc.*, 2007 WL 1560277, at **3-4 (N.D. Ohio May 29, 2007).

B. <u>The Bright-Line Rule Is Applicable To Employees Designated As Experts.</u>

In its Response, Plaintiff argues that the bright-line rule of *Regional Airport Authority* does not apply to Mr. Schwerzler because "that case was factually different and did not concern issues related to a non retained employee expert[]." (Resp. at 14.) But this district rejected this precise argument in *Rochow* and ordered the disclosure of privileged documents, including communications between defendant's expert witness, who was also a corporate officer, and in-house counsel.[8] (Mot. at 14-15, discussing *Rochow*.) Although Plaintiff labels *Rochow* as "wrongly decided," it remains persuasive law and any decision supporting Plaintiff's position would create a split in this district.

Plaintiff's attempt to distinguish *Euclid*, 2007 WL 1560277, on the basis that the expert in that case was not an employee or officer of the company also fails.[9] (Resp. at 12-13.) For purposes of the disclosure requirements of Rule 26, a consultant is treated as the functional equivalent of an employee: "But for the [employee or consultant's] designation as a testifying expert, privileges might apply." *Euclid*, 2007 WL 1560277, at *4. The expert in *Euclid* had

[8] That "communications with trial counsel were not at issue" in *Rochow* is irrelevant. (Resp. at 13-14.) The relevant inquiry is whether the court ordered – and it did – the disclosure of otherwise privileged communications between defendant's corporate officer who was designated as a testifying expert and its counsel.

[9] Plaintiff does not even acknowledge or attempt to distinguish ***two additional cases*** cited by NCS which confirm that the bright-line rule of Rule 26 applies equally to corporate officers, employees, or consultants later designated as testifying experts. (Mot. at 15, citing *American Elec. Power*, 2006 WL 3827509, at *1, and *Western Resources*, 2002 WL 181494, at *10.)

served as a consultant for defendant for six years prior to being designated as a testifying expert and had received privileged documents during that time period. *Id.* at *6. The Court noted that "a testifying expert cannot fall back upon his status as an employee or consultant to defeat appropriate Rule 26(a)(2)(B) discovery" and concluded that defendant "[could not] avoid discovery because data or information 'considered' would otherwise be privileged." *Id.* at **4, 6. The Court in *Euclid* ordered disclosure of ***all documents*** that were related to the subject matter of his expert report and considered by the expert from the date defendant received plaintiff's cease and desist letter, which was roughly two years before consultant's designation as a testifying expert. *Id.* at *6.

Similarly, here, Plaintiff cannot avoid discovery because documents considered by Mr. Schwerzler would otherwise be privileged. Moreover, NCS is not conducting a fishing expedition seeking all documents considered by Mr. Schwerzler during his entire career with Plaintiff. Rather, NCS is seeking the privileged documents and communications considered by Mr. Schwerzler only *after* he was designated as a testifying expert on August 16, 2010.

C. Plaintiff Should Be Compelled To Provide Further Responses And Documents.

In its Response, Plaintiff argues that counsel for Plaintiff corresponded with Mr. Schwerzler in his capacity as a Weather Underground employee and also "*exclusively* in his capacity as an expert witness" and that Plaintiff has produced all items responsive to NCS's discovery requests "that relate to the formation of [Mr. Schwerzler's] opinions as an expert." (Resp. at 3-4, 14.) Plaintiff's argument is fatally flawed.[10]

[10] The bright-line rule established in *Regional Airport Authori*ty "obviates the need to examine nuanced arguments and factual distinctions," such as those offered by Plaintiff regarding the different capacities in which Mr. Schwerzler received certain documents. *Rochow*, 2010 WL 100633, at *5; *see also supra* Part II.A.

Although Plaintiff maintains that it has provided all documents related to Mr. Schwerzler's role as an expert in this case, Plaintiff's counsel cannot *know* which documents he did or did not consider in forming his expert opinion. They are not mind readers. "Once an expert sees information . . . that information becomes part of the expert's mental database, and the opposing party is entitled to test how, if at all, knowing that information may have influenced the expert's opinion." *MVB Mortgage Corp. v. Federal Deposit Ins. Corp.*, 2010 WL 582641, at *4 (S.D. Ohio Feb. 11, 2010).

As Plaintiff concedes, after his designation as testifying expert, Mr. Schwerzler was privy to communications with Plaintiff's counsel "concerning a number of issues in the case, including counsel's impressions concerning the status of the case and other privileged communications which bear on issues such as trial strategy or settlement." (Resp. at 3-4.) Because Mr. Schwerzler is a corporate officer who is exposed to privileged communications, including opinions and impressions of counsel, (*Id*.. at 13), NCS is entitled to cross-examine him on the extent to which counsel's impressions may have influenced his expert report. *See, e.g., Western Resources*, 2002 WL 181494, at *15 ("'[I]f the attorney hiring the expert sets forth the desired theory of the case on the front end, then the opposing side should have the right to be made aware of the fact that the expert's viewpoint was initially couched by the attorney's desired theory.'") (citations omitted).

Indeed, Mr. Schwerzler admitted during his deposition that he made changes to his expert report in response to suggestions from Plaintiff's counsel, including at least one substantive addition to his report. (Schwerzler Dep. at 34:16-35:5, 37:2-21, 38:3-23). Deposition Exhibit 220, which Plaintiff has attempted to designate as privileged, specifically demonstrates how Plaintiff's counsel's "impressions of the case" influenced Mr. Schwerzler in his role as a

testifying expert and cannot be neatly compartmentalized into the category of communications with Mr. Schwerzler in his role as a corporate officer. *See* Dep. Ex. 220 (e-mail chain in which Mr. Schwerzler discusses research performed in connection with his expert opinion ***and*** Plaintiff's counsel's impressions of case ***within same e-mail chain***).

Moreover, it is impossible for NCS to determine whether the documents withheld are in fact unrelated to the subject of Mr. Schwerzler's expert report because Plaintiff has failed to provide a privilege log of the withheld documents. Should the Court decline to grant NCS's Motion in full, Plaintiff should be compelled to produce a privilege log that conforms with the requirements of Rule 26(b)(5) and to submit the withheld documents to the discovery referee to determine whether they should be disclosed. *See Hastings v. Asset Acceptance, LLC*, 2007 WL 461477, at *2 (S.D. Ohio Feb. 7, 2007) (ordering production of privilege log).

CONCLUSION

For the foregoing reasons, NCS respectfully requests that its Motion to Compel be granted in full. (Mot. at 16, requesting relief.)

RESPECTFULLY SUBMITTED this 16th day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2011, 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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