

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

## ORDER

1

1 and Mr. Green. Plaintiffs ask for an *in camera* review of the EUO to ensure that the assertions made  
2 in their response and supporting declarations are accurate, and to aid the Court in making its decision  
3 in the pending motion for sanctions. Plaintiffs also argue that their use of the EUO in support of  
4 their response does not waive their work product privilege, so they do not have to disclose the EUO  
5 to Defendants. Resp. at 7-9 (ECF No. 166).

6       However, when Plaintiffs refer to the EUO in their response to the motion for sanctions and  
7 their supporting declarations, they put the contents of that document at issue. As both parties note in  
8 their briefing, "a litigant cannot use the work product doctrine as both a sword and shield by  
9 selectively using the privileged documents to prove a point but then invoking the privilege to prevent  
10 an opponent from challenging the assertion." *Frontier Ref., Inc. v. Gorman-Rupp Co.*, 136 F.3d 695,  
11 704 (10th Cir. 1998). It would be inconsistent with the adversarial system to allow Plaintiffs to  
12 make arguments that explicitly rely on the EUO without also allowing Defendants access to that  
13 material for rebuttal. In order to meaningfully reply to Plaintiffs' response to the motion for  
14 sanctions, Defendants must be able to challenge the truth of the assertions made about the EUO and  
15 the validity of the conclusions drawn from those assertions. Plaintiffs argue that by merely  
16 submitting the EUO to the Court for *in camera* review, without disclosing the document to  
17 Defendants, they do not waive any privilege. The Court does not disagree. However, Plaintiffs also  
18 refer to the EUO extensively in their response to the motion for sanctions, in direct support of their  
19 arguments against the motion. They then invoke privilege to prevent any challenge to Plaintiff's  
20 characterization of the EUO in Defendants' reply. The Court finds this selective use of the EUO is a  
21 form of the "sword and shield" strategy described by the *Frontier* court. The Court will therefore  
22 order Plaintiffs to produce the EUO to Defendants.

23       As to the e-mails Plaintiffs provided to the Court for *in camera* review, Defendants argue  
24 they should be disclosed. Plaintiffs do not claim any privilege to them, and take no position on  
25 whether they should be disclosed to Defendants. Resp. at 4 (ECF No. 166). Defendants' request is  
26 unopposed, and the Court will therefore order Plaintiffs to produce the e-mails to Defendants.

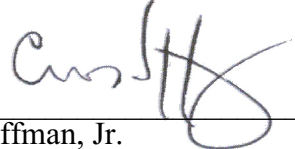
27       A hearing is currently scheduled on Defendants' motion for a status conference regarding  
28

1 these documents (ECF No. 156). In light of the Court's order above, it appears that the motion is  
2 moot. Unless the parties notify the Court of a continued need to hold the hearing by the June 5,  
3 2017, the hearing will be terminated.

4 IT IS THEREFORE ORDERED that Plaintiffs shall produce to Defendants the documents  
5 provided to the Court for *in camera* review no later than June 7, 2017.

6 IT IS FURTHER ORDERED that if either party believes the hearing currently scheduled for  
7 June 8, 2017 is still necessary, they shall notify the Court by June 5, 2017.

8 DATED: June 1, 2017.

9  
10  
11   
C.W. Hoffman, Jr.  
United States Magistrate Judge  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28