

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALINA BOYDEN and
SHANNON ANDREWS,

Plaintiffs,

v.

Case No. 17-CV-0264

STATE OF WISCONSIN DEPARTMENT
OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

**STATE DEFENDANTS' BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION TO COMPEL**

INTRODUCTION

Plaintiffs' motion to compel should be denied because it improperly seeks to lift the veil on privileged and confidential attorney-client communications between the Wisconsin Group Insurance Board (GIB) and its attorneys. During the closed session of an otherwise public meeting on December 30, 2016, GIB sought confidential legal advice from attorneys at the Wisconsin Department of Employee Trust Funds (ETF) and the Wisconsin Department of Justice (DOJ). At the time, GIB was considering whether to reinstate a provision in the Wisconsin Group Health Insurance Program (the source of state employees' health insurance coverage) that

excluded coverage for medical services associated with gender reassignment surgery (the “Exclusion”). Foreseeing litigation over its decision to reinstate the Exclusion—a reasonable prediction, given this lawsuit—GIB sought advice from its attorneys about how it could act in compliance with various federal and state laws. GIB received that advice in the form of oral communications to and from its attorneys during the closed session meeting and in a confidential memorandum authored later by DOJ attorneys.

Although these communications were made in confidence with GIB’s lawyers, Plaintiffs argue that they are discoverable simply because they have a tangential relationship to GIB’s decision. Plaintiffs are wrong. Although this case will turn partly on GIB’s reasons for reinstating the Exclusion, GIB has never asserted “advice of counsel” as a defense or otherwise relied (at least in this litigation) on the confidential legal advice that Plaintiffs seek to discover. Instead, GIB has identified two state interests that justify the Exclusion, neither of which has anything to do with the attorney-client communications at issue here: (1) the potential cost of covering gender reassignment surgery, and (2) concerns about the medical efficacy of those procedures. Plaintiffs have always been free to conduct discovery into these state interests, including by asking witnesses at GIB’s closed session meeting about the non-legal policy reasons GIB considered. But legal advice GIB

received on other compliance topics has never been part of its defense and thus remains protected from disclosure.

Put simply, GIB is not unfairly using its privilege assertion as both a sword and a shield. Since GIB is not using the attorney-client communications to defend against Plaintiffs' claims, there is no reason to lift the veil of privilege. Plaintiffs' motion should be denied.

FACTUAL BACKGROUND

On July 12, 2016, GIB voted to remove the Exclusion from the Wisconsin Group Health Insurance Program, in response to regulations issued by the federal Department of Health and Human Services (HHS). (Dkt. 53:15 at 55:18–25.) On December 30, 2016, GIB met to reconsider its July 12 decision. The public meeting notice described the main agenda item as “Consultation with Department of Justice Legal Counsel concerning advice about strategy to be adopted with respect to litigation in which the Board is or is likely to become involved regarding the HHS Nondiscrimination Rule and Benefits and Services related to Gender Reassignment or Sexual Transformation.” (Roth Decl. ISO Mot. to Compel Opp. Ex. A.)

The minutes of the open session part of this meeting also reflect that GIB planned to meet with counsel to discuss the HHS regulations and ongoing litigation challenging those regulations:

Mr. Potter from the Department of Justice (DOJ) attended the meeting in order to discuss the July 12, 2016, Board action to approve changes to the Guidelines Contract and Uniform Benefits for 2017 These changes are in compliance with the federal Department of Health and Human Services (HHS) final regulations pertaining to Section 1557 of the Affordable Care Act (ACA) issued on May 18, 2016.

The state of Wisconsin has joined a federal lawsuit in Texas challenging the legality of the HHS regulations. The lawsuit requested a preliminary injunction be issued to preclude the enforcement of the HHS regulations, and a decision was expected soon. The request was heard on December 20, 2016, but no decision was issued by the time of the December 30 Board meeting.

(Dkt. 57-1:3.) The minutes further explain that GIB would convene in closed session to discuss confidential legal advice:

The Chair announced the Board would convene in closed session pursuant to the exemptions contained in Wis. Stat § 19.85 (1) (g) to confer with legal counsel concerning advice about strategy to be adopted with respect to litigation in which the Board is or is likely to become involved. [ETF General Counsel] Mr. Nispel [and] Mr. Potter, . . . were invited to remain during the closed session.

(Dkt. 57-1:3.) After these preliminaries, GIB members voted to go into closed session. (Dkt. 57-1:3–4.)¹ When the closed session ended, GIB reconvened in open session and “announced [that] the Board met in closed session to consult with DOJ and ETF Legal Counsel regarding the final HHS rule.”

(Dkt. 57-1:4.)

¹ Contrary to Plaintiffs’ suggestion (Pls.’ Br. 4), minutes of the closed session portion of the December 30, 2016, meeting were *not* publicly disclosed on GIB’s website. Only minutes of the open session portion of that meeting were posted online. See Group Insurance Board Open Meeting Minutes (Dec. 30, 2016), Wis. Dep’t of Emp. Tr. Funds, <http://etf.wi.gov/boards/agenda-items-2017/gib0208/item1b.pdf>.

During open session, GIB voted to reinstate the Exclusion, dependent on four contingencies being met: (1) a court decision that “enjoin[ed], rescind[ed] or invalidate[d] the HHS Rule”; (2) confirmation that the decision would “maintain or reduce premium costs” in compliance with Wis. Stat. § 40.03(6)(c); (3) a DOJ opinion that the decision would not breach GIB members’ fiduciary duties; and (4) renegotiation of contracts to reinstate the Exclusion. (Dkt. 57-1:4.) In other words, these contingencies were *not* policy reasons that explained why GIB reinstated the Exclusion; rather, they were prerequisites that had to be satisfied before GIB’s decision to reinstate the Exclusion could take effect. These prerequisites were crafted during the preceding closed session discussion with GIB’s legal counsel. (Dkt. 51:23 at 85:2–86:21.)

On January 30, 2017, ETF authored a memorandum concluding that each of the four contingencies had been met. (Dkt. 57-3:2.) Nothing in that memorandum addressed the policy reasons why GIB decided to reinstate the Exclusion. Instead, the memorandum explained why each prerequisite to GIB’s decision had occurred. One such prerequisite was the January 13, 2017, delivery to GIB of a confidential DOJ memorandum opining that reinstating the Exclusion would not breach GIB members’ fiduciary duties. (Dkt. 57-3:2.)

DISCOVERY DISPUTE

This discovery dispute revolves around two kinds of evidence: first, deposition testimony and meeting minutes regarding the closed session portion of GIB's December 30, 2016, meeting; and second, DOJ's confidential January 13, 2017, memorandum to GIB. GIB has asserted that the attorney-client privilege shields the closed meeting minutes and DOJ's memorandum. Likewise, Plaintiffs have deposed three people who attended the closed session meeting: ETF General Counsel David Nispel and GIB members Michael Farrell and Herschel Day. Those witnesses were instructed not to disclose confidential attorney-client communications that occurred during the closed session, but they were permitted to answer questions about the reasons for GIB's decision on the Exclusion.

Plaintiffs asked Nispel whether "it was only legal advice discussed during" the closed session, and he answered "that's the reason the Board went into closed session. That's my recollection as I sit here today." (Dkt. 52:20 at 73:6–12.) He further testified that "[t]he Board went into closed session as it states for the purpose to confer with legal counsel. It's my response . . . that the three and a half hours were conferring with legal counsel concerning the advice that's cited in that statute [i.e. Wis. Stat. § 19.85(1)(g)]." (Dkt. 52:20 at 73:13–20.) Nispel was also asked whether there was discussion of "other reasons why GIB might decide to provide coverage

other than concern about liability” such as whether “it’s wise from a policy determination to . . . provide that coverage,” to which he responded that “[m]y recollection . . . is there were not other reasons.” (Dkt. 52:20 at 73:21–74:10.)

GIB member Herschel Day also was questioned about the closed session meeting. First, he was generally asked “[w]hat do you recall with respect to discussion relating to the exclusion that we’ve been discussing here today at the December 30th, 2016, meeting?” (Dkt. 51:21 at 80:22–25.) His counsel objected that the closed session “contain[ed] attorney/client-privileged communication” and thus instructed Day “not to answer to the extent the answer is based on the discussion during that closed discussion.” (Dkt. 51:21 at 81:1–7.) Later, Day was asked where the four contingencies came from, and his counsel objected “to the extent it calls for attorney/client-privileged communication during the closed session.” (Dkt. 51:22 at 84:20–25.) Finally, Day was asked whether he “recall[ed] any concerns that were raised [by GIB members] that were not directed to legal counsel in closed session.” (Dkt. 51:24 at 89:10–12.) Day was allowed to answer that question—he answered “yes . . . I don’t recall the specific comments. I seem to recall concerns about the communication that I had mentioned previously” and “I can’t recall other comments made by board members.” (Dkt. 51:24 at 89:13–20.) And Day was allowed to discuss his own reasons for voting against reinstating the Exclusion. (Dkt. 51:23 at 87:17–88:15.)

As for GIB member Michael Farrell, he was permitted to testify that he personally voted to reinstate the exclusion because of litigation regarding the relevant HHS regulations: “Q: [W]hy did you vote to reinstate the exclusion[?] . . . A: My only response to that is because of the injunction.” (Dkt. 53:16 at 58:12–16.) He was instructed not to disclose attorney-client communications regarding the meaning and import of that injunction. (Dkt. 53:15–16 at 56:17–58:11.) But Farrell further testified that, in his view, the historical basis of the Exclusion was that “the desired surgery would have been . . . a preference of the covered member, just as cosmetic surgery.” (Dkt. 53:14 at 52:15–17.) Farrell was never asked whether, during the closed session, other GIB members expressed policy reasons for reinstating the Exclusion.

Plaintiffs also seek to discover the written minutes of the December 30, 2016, closed session meeting. Since those minutes reflect only attorney-client communications between GIB and its counsel during the closed session, those minutes were withheld as privileged. (*See* Dkt. 57-4 (sealed document).)²

² Copies of the closed meeting minutes were inadvertently produced to Plaintiffs during discovery, which under Fed. R. Civ. P. 26(b)(5)(B) does not constitute a waiver, since Plaintiffs were notified of the inadvertent production. (Dkt. 51:22 at 82:4–21.) Plaintiffs do not argue that this inadvertent production caused a waiver.

Next, Plaintiffs seek to discover DOJ's privileged January 13, 2017, memorandum to GIB. Again, that memorandum contained DOJ's advice about whether reinstating the Exclusion would comport with GIB members' fiduciary duties. (See Dkt. 57-5 (sealed document).) ETF's January 30 publicly-disclosed memorandum about the contingencies said only that "[o]n January 13, 2017, the Wisconsin Department of Justice provided an opinion to the Board confirming that the action taken does not constitute a breach of the Board's fiduciary duties." (Dkt. 57-3:2.) DOJ's memorandum itself was not publicly disclosed.³ Witnesses were not permitted to answer questions about the memorandum's contents. (Dkt. 52:24 at 92:8–16; Dkt. 54:44 at 170:23–171:3.)

ARGUMENT

I. The attorney-client privilege protects confidential communications and can be expressly or implied waived, depending on the circumstances.

"The attorney-client privilege protects communications made in confidence by a client to his attorney in the attorney's professional capacity for the purpose of obtaining legal advice." *Jenkins v. Bartlett*, 487 F.3d 482, 490 (7th Cir. 2007).

³ Copies of the memorandum were inadvertently produced to Plaintiffs during discovery. Again, under Fed. R. Civ. P. 26(b)(5)(B), this does not constitute a waiver since Plaintiffs were notified of the inadvertent production. (Dkt. 57-6:3.) Plaintiffs do not argue otherwise.

A client may waive its attorney-client privilege, either explicitly or implicitly. *Denius v. Dunlap*, 209 F.3d 944, 952 (7th Cir. 2000). “Express waiver of the privilege occurs primarily when information that would otherwise be privileged is not kept confidential.” *Patrick v. City of Chi.*, 154 F. Supp. 3d 705, 711 (N.D. Ill. 2015). By contrast, implicit waiver can occur “when a party takes a position in litigation that makes it unfair to protect that party’s privileged communications.” *Id.* This narrow doctrine prevents parties in litigation from “abus[ing] the privilege by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials.” *Id.* In an implied waiver situation, “[o]nly those documents or portions of documents relating to the claim asserted by the client should be disclosed.” *Id.* at 711–12.

II. GIB has not waived its privilege regarding closed session attorney-client communications since it has not relied on that advice to defend against Plaintiffs’ claims.

No dispute exists that GIB made the closed session communications at issue in confidence with its attorneys for the purpose of seeking legal advice. These communications thus meet the baseline requirements for the attorney-client privilege. *See Jenkins*, 487 F.3d at 490. Plaintiffs must show that the communications are nevertheless discoverable, but they cannot do so.

Plaintiffs first argue that GIB’s closed session discussion is relevant to their equal protection claims because, under heightened scrutiny, the state

interests asserted as a justification for GIB's challenged action must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996).⁴ (Pls.' Br. 9–11.) Plaintiffs further contend that the closed session discussion is relevant to whether, under their statutory claims, GIB's asserted non-discriminatory reasons for acting were pretextual. (Pls.' Br. 9–11.) Plaintiffs thus argue that they must be able to depose witnesses about these issues, even if the answers would reflect communications with GIB's attorneys.

Plaintiffs' relevance argument misses the mark, since the mere relevance of attorney-client communications does not destroy the attorney-client privilege. *See In re Consol. Litig. Concerning Int'l Harvester's Disposition of Wis. Steel*, 666 F. Supp. 1148, 1151 (N.D. Ill. 1987) ("The attorney-client communications are unquestionably relevant to [the plaintiffs'] allegations, but that alone does not defeat [the defendant's] claim of privilege."). In every privilege dispute the information sought is relevant to the claims at issue, yet that is not enough to destroy the privilege. Here, GIB discussed with its attorneys in closed session whether it could reinstate the Exclusion in compliance with certain federal and state laws.

⁴ Defendants disagree that heightened scrutiny applies to Plaintiffs' equal protection claims but will assume that it does solely for purposes of opposing this motion to compel.

While those confidential discussions may satisfy the broad meaning of relevancy in Fed. R. Civ. P. 401, that alone is insufficient to breach the attorney client privilege.

Plaintiffs next argue that GIB waived any attorney-client privilege by “selectively divulging helpful parts of [its] legal advice...while cloaking potentially harmful aspects of the privileged communications.” (Pls.’ Br. 12.) To support this theory, Plaintiffs point to only two pieces of publicly-disclosed evidence: GIB’s disclosure of the contingencies in its open meeting minutes and ETF’s disclosure that the contingencies had been met in its January 30, 2017, memorandum. (Pls.’ Br. 14 (citing Dkt. 57-1, 57-3).) Plaintiffs necessarily rely on an implied waiver argument, since these two documents do not disclose the actual content of the closed session attorney-client communications Plaintiffs now seek to discover.

These two narrow disclosures do not impliedly waive privilege over all attorney-client communications on the same subject matter, as Plaintiffs wrongly assert. The reason why can be found in a line of cases beginning with *In re von Bulow*, 828 F.2d 94 (2d Cir. 1987). In *von Bulow*, a book disclosed certain attorney-client communications that had taken place during a criminal trial. *Id.* at 96. In a subsequent civil action related to the same conduct, the plaintiffs sought disclosure of all attorney-client communications related to the specific communications disclosed in the book. *Id.* The plaintiffs

argued, just like Plaintiffs here, that the book's selective disclosures waived privilege over all related attorney-client communications. *Id.*

But the Second Circuit declined to find an implied waiver, reasoning that “the extrajudicial disclosure of an attorney-client communication—one not subsequently used by the client in a judicial proceeding to his adversary’s prejudice—does not waive the privilege as to the undisclosed portions of the communication.” *Id.* at 102. Similarly, it declined to find a broad subject-matter waiver, explaining that “where, as here, disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed.” *Id.* at 103. Any waiver only extended to the “particular matters *actually disclosed* in the book.” *Id.* at 102.

Other cases agree that no implied subject-matter waiver occurs through limited extrajudicial disclosures, if the privilege-holder does not put the confidential communications at issue in later litigation. *See In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 24–25 (1st Cir. 2003) (“[T]he extrajudicial disclosure of attorney-client communications, not thereafter used by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter.”); *Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP*, 684 F.3d 1364, 1373 (Fed. Cir. 2012)

("[W]e conclude that the district court erred by rejecting considerations of fairness—i.e., whether [the defendant] would be unfairly prejudiced by [the plaintiffs'] assertion of privilege against discovery into attorney-client communications beyond the four corners of the Townsend letter—when assessing the scope of waiver here."); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) ("Pennzoil's waiver with respect to information disclosed to the auditor did not constitute waiver as to all communications concerning the hoped for tax deferral."). All these cases rejected broad subject-matter waiver arguments similar to the one Plaintiffs now advance.

Here, like the limited book disclosures in *von Bulow*, GIB publicly disclosed only the contingencies that had to be met before reinstating the Exclusion. Just as in *von Bulow*, GIB did not disclose the attorney-client communications related to those contingencies. And, most importantly, GIB has not tried to use the contingencies—or the underlying attorney-client advice—"in a judicial proceeding to [its] adversary's prejudice," again as in *von Bulow*, 828 F.2d at 102. This is why Plaintiffs' implied waiver argument fails. GIB disclosed the contingencies long before this case began and has not relied on them in this case to rebut any of Plaintiffs' discrimination claims.

To the contrary, when Plaintiffs asked in an interrogatory for "all reasons why the State of Wisconsin has the . . . Exclusion," GIB responded that "the [Exclusion] . . . furthers the state interests in (1) avoiding potential

costs associated with the coverage at issue; and (2) declining to provide coverage for treatments that are experimental and have not been demonstrated to be safe and effective for treating gender dysphoria.” (Dkt. 57-2:17–18.) GIB did not also identify the contingencies or any confidential attorney-client communications from the December 30 closed session. Therefore, GIB has not put the contingencies—or any underlying attorney-client communications—at issue in this litigation and Plaintiffs would suffer no prejudice by leaving the privilege intact.

Where Plaintiffs go wrong is in their misunderstanding of the contingencies that GIB disclosed. They seem to think GIB is using the contingencies as a sword against their discrimination claims, and thus that it would be unfair to shield the underlying attorney-client communications from discovery. But the contingencies do not represent the policy reasons *why* GIB decided to reinstate the Exclusion—they address whether GIB *could* reinstate the Exclusion at all. Again, the first contingency required a court to enjoin the HHS regulations that had compelled GIB to remove the Exclusion in the first place. (Dkt. 57-1:4.) The second contingency required GIB to comply with Wis. Stat. § 40.03(6)(c), which forbids benefit changes unless they “would maintain or reduce premium costs for the state.” *Id.* The third required a DOJ opinion that GIB could reinstate the Exclusion consistent with its fiduciary duties. (Dkt. 57-1:4.) And the fourth required GIB’s contracts with third-party

insurers to actually reflect the Exclusion. (*Id.*) These contingencies were not the policy bases for why the Exclusion was reinstated, but, rather, compliance-related *prerequisites* to GIB's decision having any effect at all. The state interests disclosed in response to Plaintiffs' interrogatory—not the contingencies—explain why GIB ultimately decided to reinstate the Exclusion. (*See* Dkt. 57-2:18.) More to the point, GIB is relying on those policy reasons to defend against Plaintiffs' claims, not the contingencies. Since GIB has not offered the contingencies as a defense, it has not waived the privilege for attorney-client communications related to them.

This explains why the case on which Plaintiffs primarily rely, *Milwaukee Elec. Tool Corp. v. Chevron N. Am. Inc.*, No. 14-CV-1289-JPS, 2017 WL 2929522 (E.D. Wis. July 10, 2017), is inapposite. There, the plaintiffs sought to establish a key fact in their patent infringement litigation—the date of invention—using an attorney's declaration. *Id.* at *2–3. The court found that no privilege attached to facts and analysis underlying that declaration, since the attorney could not “draw the legal conclusion that his conversations with his client and his other work constituted conception of the invention and reduction to practice and yet withhold the substance of those communications—that is, the facts that underlay his legal opinion.” *Id.* at *3. The plaintiffs thus had impliedly waived privilege by trying to use an attorney-client communication to establish a material, disputed fact.

Nothing of the sort has happened here, since, as explained, GIB is not relying on the contingencies or any underlying attorney-client communication to establish a fact material to its defense.

Moreover, Plaintiffs were permitted to ask each closed session witness about the material fact here: the policy reasons why GIB made its decision. Day responded that there were such reasons discussed, but that he could not recall the specific discussion. (Dkt. 51:24 at 89:13–20.) Day disclosed his personal reasons for voting the way he did. (Dkt. 51:23 at 87:17–88:15.) As for Farrell, he did testify that the “injunction” was his reason for voting to reinstate the exclusion (Dkt. 53:16 at 58:12–16.), but that testimony by a board member in his personal capacity does not determine GIB’s defenses as an entity. Farrell also testified later that his “understanding of the injunction is that it allowed for reconsideration,” that “[i]f you wanted to include the exclusion, you could continue to do so,” and that “GIB did have that choice.” (Dkt. 53:34 at 129:24–130:22.) So, Farrell understood that the “injunction” contingency was just that—an event that allowed GIB to make a choice, one way or the other. That he did not go on to further explain his personal choice does not mean that GIB as an entity defendant is relying on the injunction (or any other contingency) as a state interest justifying its decision. And Nispel responded that he could not recall discussion of GIB’s policy reasons for acting. (Dkt. 52:20 at 73:21–74:10.)

Since the only other testimony Plaintiffs might obtain from these witnesses (or any others) would involve confidential attorney-client communications that GIB has not put at issue, Plaintiffs' motion to compel and request to reopen depositions should be denied.

III. GIB has not waived its privilege regarding DOJ's January 13, 2017, memorandum since it has not relied on that advice to defend against Plaintiffs' claims.

Like with GIB's closed session discussion, no dispute exists here that DOJ's January 13, 2017, memorandum was given to GIB in confidence by its attorneys for the purpose of providing legal advice. This communication thus meets the baseline attorney-client privilege requirements and Plaintiffs must show why the privilege has been destroyed. *See Jenkins*, 487 F.3d at 490. Again, they cannot do so.

Plaintiffs' argument that GIB waived its privilege fails here for the same reasons as above. GIB has not relied on this DOJ memorandum as a reason for reinstating the Exclusion or as any other part of its defense to Plaintiffs' claims. (*See* Dkt. 57-2:18.) Instead, DOJ's memorandum, like the rest of the contingencies addressed above, opened the door for GIB to make a decision—but the memorandum did not provide a substantive policy basis for the decision itself, and GIB has never argued that it did. Under *von Bulow* and its progeny, GIB would only waive the privilege by using the memorandum as a sword against Plaintiffs' claims while trying to shield it

from their view. Since GIB has not done so, the memorandum remains privileged.

Likewise, the limited disclosure of DOJ's conclusion does not effect a broad subject-matter of all DOJ's advice on the topic. ETF's January 30, 2017, memorandum disclosed only that "[o]n January 13, 2017, the Wisconsin Department of Justice provided an opinion to the Board confirming that the action taken does not constitute a breach of the Board's fiduciary duties." (Dkt. 57-3:2.) This is just like *von Bulow*, in which the book disclosed excerpts of attorney-client conversations and the plaintiffs sought to discover undisclosed parts of the conversations. *Von Bulow*, 828 F.2d at 101. *Von Bulow* declined to find waiver for that reason alone, explaining that "subject matter waiver', which allows the attacking party to reach all privileged conversations regarding a particular subject once one privileged conversation on that topic has been disclosed, is simply another form of the waiver by implication rule." *Id.* at 102–03. The court went on, "where, as here, disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed." *Id.* at 103.

Von Bulow's holding applies squarely here. Only DOJ's ultimate conclusion was disclosed, not the legal analysis underlying it. And since GIB

has not relied on DOJ's conclusion to defend against Plaintiffs' claims in this litigation, no implied subject matter waiver has occurred and Plaintiffs' motion should be denied.

CONCLUSION

For all the foregoing reasons, Plaintiffs' motion to compel and reopen depositions should be denied.

Dated this 7th day of May, 2018.

Respectfully submitted,

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