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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

**Russell B. Toomey,**  
  
Plaintiff,  
  
v.  
**State of Arizona; Arizona Board of Regents,  
D/B/A University of Arizona,** a governmental  
body of the State of Arizona; et al.,  
  
Defendants.

Case No.19-cv-00035-TUC-RM (LAB)

**PLAINTIFF’S REPLY IN SUPPORT  
OF MOTION FOR ENTRY OF AN  
ORDER COMPELLING THE  
PRODUCTION OF DOCUMENTS**

Plaintiff, Dr. Russell B. Toomey, on behalf of himself and the certified classes (“Plaintiff”), hereby submits through the undersigned counsel the following Memorandum of Law in support of his Motion For Entry Of An Order Compelling The Production Of Documents (the “Motion”) from the Office of the Governor of the State of Arizona (the “Governor”) in response to Plaintiff’s Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action, dated February 17, 2021 (the “Subpoena”). This Motion and exhibits hereto are accompanied by the Transmittal Declaration of Christine K. Wee (“Wee Decl.”).

**THE COURT SHOULD GRANT PLAINTIFF’S MOTION TO COMPEL**

The Governor protests that Plaintiff seeks a sea of documents, entirely unrelated to this case. This is false. Plaintiff’s Motion seeks production of just 17 documents, all of which are responsive to the Subpoena carefully tailored to speak directly to the intent of the decision-makers at issue in this case. This Court has reiterated that the intent of these decision-makers remains a critical issue in the case. And the Governor has failed to credibly defend that any privilege protects these 17 documents from disclosure under either federal

1 common law or Arizona state law. Given the broad scope of discovery, these documents  
2 cannot and should not be withheld.

3 **ARGUMENT**

4 **I. ALL POTENTIAL EVIDENCE OF DISCRIMINATORY INTENT IS RELEVANT,  
5 REGARDLESS OF ITS SOURCE**

6 **A. The Governor Cannot Exploit the Executive Branch’s Organizational  
7 Structure to Impose a Heightened Standard of Relevance.**

8 As the Governor acknowledges, the scope of discovery under the federal rules is  
9 broad. (Opp. 5) *E.g.*, Fed. R. Civ. P. 26(b); *Tex. Dep’t of Cmty. Affs. v. Burdine*, 450 U.S.  
10 248, 258 (1981) (holding that there are “liberal discovery rules applicable to any civil suit  
11 in federal court”); *Sullivan v. Bank of Am. NA*, No. CV-13-01166, 2016 WL 2940013, at  
12 \*3 (D. Ariz. May 20, 2016). Discovery should be permitted “unless the information sought  
13 has no conceivable bearing on the case.” *Sullivan*, 2016 WL 294013, at \*3.

14 The Governor nevertheless seeks to unilaterally gatekeep discovery based on its  
15 current status as a third party, arguing that Plaintiff fails to meet some heightened standard  
16 of relevancy and/or are privileged. (Opp. 3-7) This is plainly incorrect and improper. The  
17 Governor is not a stranger to these proceedings<sup>1</sup> or the underlying dispute, having admitted  
18 it was involved in the decision-making surrounding the Exclusion (Opp. 2, n. 1 (“the  
19 testimony indicates that the Governor was among several participants involved in the  
20 decision concerning the Exclusion”)). That the Governor remains a third party owes less  
21 to its lack of involvement, as it does the strictures of sovereign immunity.<sup>2</sup> As Plaintiff

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22 <sup>1</sup> State Defendants previously represented to this Court positions/requests from the  
23 Governor’s Office regarding then-pending motions in this matter. (Doc. 176 at 2, n. 1  
24 (“If the Court is inclined to order production of these documents, [State Defendants]  
25 understand that the Governor’s Office requests the opportunity to address its  
independent assertion of the privilege with the Court, if the Court so desires.”))

26 <sup>2</sup> Plaintiff neither concedes, nor waives any right or opportunity to challenge at a later  
27 date, the Governor’s Office immunity from suit. Plaintiff merely raises the complexities  
28 of sovereign immunity to provide context to the Governor’s Office’s current third-party  
status. *See Tohono O’odham Nation v. Ducey*, 130 F. Supp. 3d 1301, 1311 (D. Ariz.  
2015) (dismissing Governor Ducey as named defendant under *Ex Parte Young* doctrine

1 previously raised however, neither State Defendants nor the Governor should be permitted  
 2 to abuse the latter’s current third-party status, especially where they have sought to use such  
 3 separateness as both sword and shield. (Doc. 180 at 9)

4 **B. The Governor Seeks To Improperly Gatekeep Discovery By Substituting**  
 5 **The Sufficiency Of Evidence For Relevance**

6 The Governor argues that Plaintiff is not entitled to discovery because he either lack  
 7 the evidence to establish, presumably preliminarily, that the 17 sought documents are  
 8 relevant (Opp. 4-5), or the 17 documents would be insufficient to establish Plaintiff’s  
 9 claims. (Opp. 6)<sup>3</sup> The Governor is wrong. Plaintiff is entitled to discovery so long as his  
 10 “requests are narrowly tailored to seek evidence that is directly relevant to central issues in  
 11 the litigation and is not available with due diligence elsewhere.” *Karnoski v. Trump*, 926  
 12 F.3d 1180, 1205 (9<sup>th</sup> Cir. 2019). Plaintiff has done so. Plaintiff tailored his requests to the  
 13 Governor to those records relevant to whether decision-makers in the Governor’s Office  
 14 directed ADOA to maintain its exclusion of coverage for gender-affirming surgery because  
 15 those decision-makers are ideologically opposed to having the government pay for such  
 16 procedures. (Mot. 8-9) And Plaintiff now seeks to compel documents, almost exclusively  
 17 in the Governor’s possession, in light of consistent testimony from State Defendants  
 18 witnesses pointing to the Governor as the key decision-maker about the Exclusion. (Mot.  
 19  
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21 as “general supervisory power over the persons responsible for enforcing the challenged  
 22 provision will not subject an official to suit”).

23 <sup>3</sup> The Governor most succinctly makes these arguments in attempting to distinguish  
 24 Magistrate Bowman’s November 30, 2020 Report & Recommendation, which  
 25 acknowledges the need for discovery regarding intent. (Opp. 7, n. 5 (arguing (1)  
 26 “Plaintiff has *no evidence* ‘the Plan exclusion exists because the Plan authors do not like  
 27 gender transition’” (emphasis original) and (2) “as Plaintiff demands documents that do  
 28 not address the Exclusion, they are not evidence the Exclusion was created specifically  
 to burden transgender individuals.”)) Although Plaintiff argues the Exclusion is facially  
 discriminatory, the Governor cannot avoid that discovery regarding the Governor’s  
 intent as one of the decision-makers on the Exclusion is plainly relevant. (Doc. 134 at  
 6, 9; Doc. 187 at 5)

1 3)<sup>4</sup> The Governor’s complaints about the overbreadth of Plaintiff’s requests—*i.e.*, their  
2 “virtually limitless” scope (Opp. 17)—ring hollow given that the Motion pursues just 17  
3 documents (Mot. 3, n.1).

4 Relevant evidence is not limited to documents specifically discussing the ADOA  
5 exclusion. If the evidence shows that the Governor had a policy of opposing all forms of  
6 state-subsidized coverage for transition-related surgery—whether through private  
7 insurance, through Medicaid, or through health care for prisoners—that evidence would  
8 help demonstrate that the ADOA exclusion was maintained based on ideological  
9 opposition, and not based on factors traditionally considered in making insurance coverage  
10 decisions. Such evidence could also undermine the Governor’s credibility, to the extent he  
11 relies on alternative explanations for the Exclusion. *See Burdine*, 450 U.S. at 256 (Title VII  
12 gender discrimination case “may succeed . . . by showing that the employer’s proffered  
13 explanation is unworthy of credence.”); *Heyne v. Caruso*, 69 F.3d 1475, 1479–80 (9th Cir.  
14 1995) (“evidence of the employer’s discriminatory attitude *in general* is relevant and  
15 admissible to prove . . . discrimination.”) (emphasis in original).

16 The Governor, through Ms. Corieri’s supporting declaration, singles out as non-  
17 relevant four categories of documents within the 17 documents Plaintiff seeks—documents  
18 relating to (1) the “state Affordable Care Act benchmark plan”; (2) the “healthcare available  
19 through the Arizona Health Care Cost Containment System (AHCCCS)”; (3) “healthcare  
20 available through the Arizona Department of Corrections (ADC)”; and (4) “proposed  
21 legislation relating to healthcare.” (Opp., Ex. 1 at No. 6) (internal quotations omitted) Ms.  
22 Corieri claims these documents “do not relate to the Exclusion decision at issue in this  
23 action.” (*Id.*) But they are relevant, and potentially dispositive. Starting with the fourth  
24 category, Ms. Corieri presumably refers here to documents listed on the Governor’s  
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26 <sup>4</sup> Additionally, one of the documents Plaintiff successfully moved to compel State  
27 Defendants to produce indicates that the Governor’s Office, speaking through Ms.  
28 Corieri, had final, or near final, authorization on the scope and language of the  
Exclusion. (Wee Decl., Ex. 1, AZSTATE246062.)

1 privilege log regarding “proposed legislation,” “House Bill” or “Administrative Code.”  
 2 (Mot., Ex. 7 at 4-5, emails dated January 18, 23, 24 and 25, 2017) At the time these  
 3 documents were apparently created in 2017, the Arizona Legislature was considering  
 4 legislation to exclude funding for gender affirming surgery for Medicaid recipients and  
 5 incarcerated people.<sup>5</sup> The Governor’s discussions about these bills is entirely relevant to  
 6 determining if discriminatory intent informs his decision-making on the topic of  
 7 transgender individuals and their healthcare.

8 The other categories are relevant too. The first category regarding the Affordable  
 9 Care Act is directly relevant, as it was the Plan’s compliance with Section 1557 of the  
 10 Affordable Care Act that prompted its reconsideration of the Exclusion in 2015. (Doc. 195  
 11 & 205) The second and third categories are directly relevant as both the current language  
 12 of the Exclusion is apparently based on R9-22-205(B)(4) of the Arizona Administrative  
 13 Code that excludes “gender reassignment surgeries” from coverage for AHCCCS members.  
 14 Similarly, the Arizona Department of Corrections Medical Services Technical Manual also  
 15 excludes “gender-reassignment surgery.”<sup>6</sup> It is disingenuous to argue as the Governor does  
 16 that its discussions about AHCCCS’s and ADC’s exclusions on the exact topic of this  
 17 dispute (and language of the Exclusion) could not provide evidence of discriminatory intent.

18 In arguing that Corieri’s prior statements on Twitter are irrelevant to Dr. Toomey’s  
 19 claims (Doc. 208, at 7, n.6), the Governor improperly confuses the relevance of potential  
 20 evidence with the sufficiency of such evidence. Fed. R. Evid. 401. *Vita Zahnfabrik H.*

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22 <sup>5</sup> Maria Polletta, “Arizona bills would ban coverage for gender-reassignment surgeries  
 23 already denied by state,” THE REPUBLIC (Jan. 24, 2017 2:04 P.M.),  
 24 [https://www.azcentral.com/story/news/politics/legislature/2017/01/24/arizona-bills-  
 ban-state-coverage-gender-reassignment-surgeries-medicaid-prison-  
 inmates/96966272/](https://www.azcentral.com/story/news/politics/legislature/2017/01/24/arizona-bills-ban-state-coverage-gender-reassignment-surgeries-medicaid-prison-inmates/96966272/)

25 <sup>6</sup> Arizona Department of Corrections, Rehabilitation & Reentry, *Medical Services*  
 26 *Technical Manual*, 115 ¶ 6.2 (June 3, 2021),  
 27 [https://corrections.az.gov/sites/default/files/documents/PDFs/tech\\_manuals/adcr-  
 healthservicetechnicalmanual\\_060321.pdf](https://corrections.az.gov/sites/default/files/documents/PDFs/tech_manuals/adcr-healthservicetechnicalmanual_060321.pdf)

28 (“Due to limitations inherent in being incarcerated, gender-reassignment surgery is not  
 possible for inmates who reside within a correctional facility.”)

1 *Rauter GmbH & Co. KG v. Dentsply Int'l, Inc.*, No. SACV 04-0729, 2006 WL 8437644, at  
 2 \*2 (C.D. Cal. June 21, 2006), *aff'd*, 278 F. App'x 1013 (Fed. Cir. 2008) (“Evidence does  
 3 not need to be correct, however, to be relevant or admissible. Relevance does not measure  
 4 the sufficiency of the evidence, but merely whether the evidence tends to make the existence  
 5 of a fact more or less probable.”) *Majors v. Warden*, No. 2:99-CV-00493 MCEKJN, 2010  
 6 WL 3341593, at \*3 (E.D. Cal. Aug. 23, 2010) (“Petitioner need not show  
 7 this discovery alone will prove his claims. Rather petitioner shows good cause for  
 8 the discovery when he shows the information sought is relevant to the subject matter of his  
 9 claims and that if the facts are fully developed he “may” be entitled to relief.”) Whether  
 10 the evidence sought will be sufficient by itself to conclusively prove the Governor’s  
 11 discriminatory intent, remains an issue for the ultimate trier of fact. Not the Governor,  
 12 playing goalie over which discovery Plaintiff is entitled.<sup>7</sup>

13 **C. Ms. Corieri’s Prior Remarks Regarding Transition-Related Surgery Are**  
 14 **Relevant and Important.**

15 Documents discussing Ms. Corieri’s decisions and opinions regarding gender  
 16 reassignment, even if they do not discuss the Exclusion itself, are plainly relevant here.  
 17 Plaintiff has uncovered a public statement from Ms. Christina Corieri, one of the  
 18 Governor’s Senior Policy Advisors, and one of the direct liaisons between the Governor  
 19 and State Defendants in discussions about transgender benefits under the Plan, expressing  
 20 discontent with the expenditure of government funds for gender-affirming surgery. (Doc.  
 21 202, Ex. 11) (“advocates now demanding taxpayer dollars for gender reassignment surgery

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22  
 23 <sup>7</sup> Plaintiff asks that the Court reject the Governor’s requests that the Court conduct an *in*  
 24 *camera* review of the 17 documents for relevance, as it appears intended merely to delay  
 25 Plaintiff’s receipt of the documents if successful on the motion, rather than preserve or  
 26 protect highly confidential/sensitive information, as normally required for *in camera*  
 27 review. (Opp. 7) If the Court indulges this request, then Plaintiff requests that the Court  
 28 identify as relevant those documents that speak to discriminatory intent *in general*  
 (*Heyne*, 69 F.3d at 1479–80) regardless of whether or not a document mentions the  
 Exclusion at issue, as well as documents that speak to intent *in maintaining* the  
 Exclusion (*Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) or similar  
 exclusion, and not just the intent in creating it.

1 under Medicare – bet Medicaid is next.”) Far from “a years-old stray remark” as the  
 2 Governor contends (Opp. 7, n.6), Ms. Corieri demonstrated a particular interest in the topic  
 3 at the heart of this dispute, and then years later was herself a key decision-maker on the  
 4 very topic. (Opp. 7, n.6). *See Trump v. Hawaii*, 138 S. Ct. 2392, 2439 (2018)  
 5 (“discriminatory intent does tend to persist through time” (quotations and citations  
 6 omitted)); *Fordice*, 505 U.S. at 747 (holding that where “a policy remains in force, without  
 7 adequate justification . . . the State has failed to disprove discriminatory intent.”).<sup>8</sup>

## 8 **II. THE EXECUTIVE COMMUNICATIONS PRIVILEGE TO STATE** 9 **GOVERNORS UNDER BOTH FEDERAL AND ARIZONA STATE LAW**

10 Because the only claims at issue in this case are federal claims, the Governor’s  
 11 applicable privileges are determined by federal common law. The Governor grasps at cases  
 12 from New Mexico, New York, Pennsylvania, and Puerto Rico, to support its demand that  
 13 this Court create new federal law extending the “executive communications privilege” here  
 14 in Arizona.<sup>9</sup> The Governor confuses the issue by referring interchangeably between  
 15 “executive privilege” and the more specific “executive communications privilege” which  
 16  
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18 <sup>8</sup> Discovery has revealed that Ms. Corieri received at her governmental email address  
 19 newsletters regularly providing her with inflammatory content regarding gender-  
 20 affirming surgery. (Wee Decl., Ex. 2, AZ\_GOV\_00003120 (“Daily Signal” newsletter  
 21 sent to Corieri, including article titled, “This Man Received 167 Sex-Change Surgeries.  
 22 He Lives in a World of Regret”); Ex. 3, AZ\_GOV\_00003123 (“Daily Signal” newsletter  
 sent to Corieri with an article titled “My ‘Sex Change’ Was a Myth. Why Trying to  
 Change One’s Sex Will Always Fail”)).

23 <sup>9</sup> The Governor admits that the executive (or presidential) communications privilege is  
 24 based upon separation of powers concerns between two coordinate branches of  
 25 government. (Opp. 3, 7-10) However, there are no separation of powers concerns when  
 26 a federal court enforces federal law against a state official. *United States v. Gillock*, 445  
 27 U.S. 360, 370 (1980) (finding that “under our federal structure, we do not have the  
 28 struggles for power between the federal and state systems such as inspired the need for  
 the Speech or Debate Clause as a restraint on the Federal Executive to protect federal  
 legislators” and that “federal interference in the state legislative process is not on the  
 same constitutional footing with the interference of one branch of the Federal  
 Government in the affairs of a coequal branch.”)

1 he seeks to extend in Arizona.<sup>10</sup> But none of the cases cited by the Governor clearly  
2 recognize and extend this specific privilege to state governors.

3 In *JM through Foley*, the Governor invoked “executive privilege” to prevent  
4 disclosure of certain documents in an investigation he requested and testimony of certain  
5 state officials who had been involved in such investigation. *JM through Foley v. N.M. Dep’t*  
6 *of Health*, No. CV 07-604 RB/ACT, 2009 WL 10698414, at \*2 (D.N.M. Aug. 20, 2009).  
7 The case is distinguishable not only because the context and the documents are substantially  
8 different—Plaintiff here seeks governmental communications to prove discriminatory  
9 intent by the government, rather than the government’s shielding certain records in its own  
10 internal investigation—but most importantly because the Court there relied on the state law  
11 of New Mexico supporting a general “executive privilege,” rather than federal common  
12 law.<sup>11</sup> *JM through Foley*, 2009 WL 10698414, at \*3. Likewise in *In re Fin. Oversight &*  
13 *Mgmt. Bd. for Puerto Rico*, the “executive privilege” was based on state law, rather than  
14 federal law. 385 F. Supp. 3d 130, 134 (D.P.R.), *objections overruled*, 390 F. Supp. 3d 311  
15 (D.P.R. 2019) (citing to *Bhatia Gautier v. Gobernador*, 199 D.P.R. 59, 89 (2017), a  
16 decision issued by the *Tribunal Supremo de Puerto Rico*).

17 The Governor’s other cases are also distinguishable. In both *Haber v. Evans* and  
18 *Marisol ex rel. Forbes v. Giuliani*, the court did not discuss the executive communications  
19 privilege, but rather other forms of executive privilege or related concerns (such as burden  
20 on elected officials). *Haber v. Evans*, No. 03-CV-3376, 2004 WL 963995 (E.D. Pa. May  
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22 <sup>10</sup> Opp. 9 (citing *JM through Foley*, *Hayes*, *Haber*, and *Giuliani* as recognizing an  
23 “executive privilege,” but citing *Merritt* and *In re Fin. Oversight & Mgmt. Bd. for P.R.*  
24 as explicitly recognizing “executive communications privilege” or “executive privilege  
25 protecting communications”. As noted in the Motion, *Merritt* does not support the  
26 Governor’s contention. (Mot. 10-11) *In re Fin. Oversight & Mgmt. Bd. for P.R.*,  
27 Plaintiff addresses further below.

28 <sup>11</sup> Also important to note that unlike here, plaintiffs in *JM through Foley* did not dispute  
whether the presidential communications privilege was applicable to State Governors  
under federal common law. *JM through Foley*, WL 4993481 (D.N.M. 2009) Therefore,  
the Court was never prompted to review such argument.

1 4, 2004); *Marisol ex rel. Forbes v. Giuliani*, No. 95 CIV. 10533, 1998 WL 158948  
2 (S.D.N.Y. Apr. 1, 1998). In *Hayes v. Reed*, the court reasoned, hypothetically in a footnote,  
3 that the presidential communications privilege (as a form of executive privilege) could  
4 possibly apply to state governors, but did not apply the privilege. No. CIV.A. 96-4941,  
5 1997 WL 125742, at \*9, \*9 n.8 (E.D. Pa. Mar. 13, 1997). In short, none of the Governor’s  
6 cases support recognition of an “executive communications privilege” as a matter of federal  
7 common law.

8 In any event, even if Arizona state law were relevant, Arizona does not recognize  
9 an executive communications privilege either. The Governor largely avoids citing  
10 Arizona cases for this reason, and the one he does, *Mathews v. Pyle*, again recognizes the  
11 general concept of “executive privilege” but interprets it narrowly. 75 Ariz. 76, 80–81  
12 (1952) (holding that “[i]t rests within the jurisdiction of the courts of the state to  
13 determine” questions of privilege (citations omitted)). *Mathews* is old however, and  
14 Arizona courts have historically refrained from recognizing privileges that have not been  
15 specifically adopted by the legislature. *Rigel Corp. v. State*, 225 Ariz. 65, 73, 234 P.3d  
16 633, 641 (Ct. App. 2010) (finding that “government agencies do not ordinarily have a  
17 privilege to refuse to produce evidence unless a statute has specifically created an  
18 exemption.”)

19 Even assuming, *arguendo*, an executive communications privilege applies to the  
20 Governor of Arizona, the privilege would still not protect the 17 documents sought because  
21 (i) Plaintiff has shown that the need for disclosure outweighs the government’s (lack of)  
22 reasons for withholding; and (ii) there is no evidence that the Governor has actually viewed  
23 any of these documents, nor solicited or received them. *See Karnoski*, 926 F.3d at 1203  
24 (finding that the privilege protects “communications directly involving and documents  
25 actually viewed by the President, as well as documents solicited and received by the  
26 President or his immediate White House advisers.”)

27  
28 **III. THE GOVERNOR HAS NOT CARRIED ITS BURDEN ON ITS**

1           **DELIBERATIVE PROCESS PRIVILEGE CLAIMS, WHICH WOULD BE**  
 2           **OVERCOME IN ALL EVENTS**

3           As the Governor admits (Opp. 15), it bears the burden of establishing that the  
 4 withheld 17 documents are both (1) “predecisional,” i.e., “generated before the adoption of  
 5 an agency's policy or decision”; and (2) “deliberative,” i.e., reflecting “opinions,  
 6 recommendations, or advice about agency policies.” *F.T.C. v. Warner Commc’ns Inc.*, 742  
 7 F.2d 1156, 1161 (9th Cir. 1984); *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118,  
 8 1121 (N.D. Cal. 2003).

9           The Governor has failed to “assert with precision the reason why each document is  
 10 subject to the asserted [deliberative process] privilege.” *E.E.O.C. v. Swissport Fueling,*  
 11 *Inc.*, No. CV-10-2101-PHX-GMS, 2012 WL 1648416, at \*15 (D. Ariz. May 10, 2012)  
 12 (emphasis added). Ms. Corieri’s declaration provides rote, high-level summaries of the  
 13 documents explaining how they are deliberative,<sup>12</sup> which is insufficient. *Cal. Native Plant*  
 14 *Soc’y v. U.S. E.P.A.*, 251 F.R.D 408, 413 (N.D. Cal. 2008) (“an index of documents,  
 15 providing just basic information and a brief description, is inadequate even when  
 16 accompanied by conclusory affidavits”) (emphasis added); Fed. R. Civ. P. 26(b)(5)(A)(ii).  
 17 Ms. Corieri provides similarly sparse details as to the “predecisional” nature of the  
 18 documents, relying more on theories and hypotheticals than the facts of each supposed  
 19 deliberation.<sup>13</sup>

20           Even if the Governor had asserted its deliberative process privilege claim with the  
 21 requisite specificity, the privilege would be overcome in all events under the *Warner*

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22 <sup>12</sup> For example, “These documents were deliberative as they were made to assist a senior  
 23 policy advisor in the Governor’s Office’s formulation of healthcare policy and decision-  
 24 making concerning the proposed legislation.” (Corieri Decl. 6). Ms. Corieri repeats  
 this description almost verbatim for each of the documents she discusses.

25 <sup>13</sup> For example, “The information was predecisional, as it preceded the selection of an  
 26 Affordable Care Act benchmark plan” with no details as to when a decision was made.  
 27 (Corieri Decl. 1) Or, that the documents are predecisional on the theory that “the  
 28 Governor would ultimately be responsible for signing or vetoing the legislation if passed  
 by the Legislature” rather than the actual facts of the Government’s discussions and  
 when it actual deliberated or made a decision in each instance. (*Id.* 2-7)

1 factors. (Mot. 12-14) The Governor has argued nothing to reasonably rebut the relevance  
2 of the 17 documents sought (factor one), that there is any other source of the particular  
3 evidence of discriminatory intent of the Governor's Office these documents might contain  
4 (factor two), that the Governor is not intimately tied to the decision-making around the  
5 Exclusion (factor three), and that disclosure of these years old documents would somehow  
6 chill discussion in the Governor's Office (factor four).<sup>14</sup>

7 Finally, the Governor mischaracterizes Plaintiff's reliance on this Court's grant of  
8 its prior motion to compel State Defendants to produce documents withheld on the basis of  
9 deliberative process privilege. Plaintiff was not arguing estoppel, as the Governor seems  
10 to think, but rather the reasoning and logic of the Court remained sound in the instant  
11 context. The Governor's response to that reasoning is effectively that the 17 documents  
12 sought do not directly focus on the Exclusion. (Opp. 16-18). These 17 documents might  
13 directly evidence discriminatory intent of the Governor's Office, and could be the most  
14 reliable evidence thereof. If, as the Governor claims, its decision-making on the Exclusion,  
15 and indeed on all issues involving transgender individuals and their healthcare, has been  
16 made "for entirely prosaic reasons, such as cost containment, there is little reason to fear  
17 that future health insurance decision would be adversely affected if predecisional opinions  
18 were disclosed to the public." (Doc. 187 at 7). The Governor offers no response to this  
19 simple logic.<sup>15</sup>

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22 <sup>14</sup> Out of the 17 sought documents, two are emails between Corieri and Jami Snyder,  
23 Director of AHCCCS, dated August 2020, and concern healthcare coverage likely  
24 related to transgender (because responsive to the Subpoena). Even if the fact of being  
25 more recent communications could be considered a factor weighing against disclosure  
26 for these two specific documents, the outcome would remain the same as the other  
27 three factors still weigh in favor of disclosure.

28 <sup>15</sup> For these same reasons, the Governor's requests that the Court conduct an *in camera*  
review of the 17 documents should be rejected. (Opp. 7) If the Court indulges this  
request, then Plaintiff requests that the Court identify as relevant those documents that  
speak to discriminatory intent *in general* (*Heyne*, 69 F.3d at 1479–80) regardless of  
whether or not a document mentions the Exclusion at issue, as well as documents that  
speak to intent *in maintaining* the Exclusion (*Pers. Adm'r of Mass.*, 442 U.S. at 279) or  
similar exclusion, and not just the intent in creating it.

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**CONCLUSION**

For all the reasons discussed above, Plaintiff's Motion should be granted.

Dated: June 25, 2021

ACLU FOUNDATION OF ARIZONA

By /s/ Christine Wee

Victoria Lopez - 330042  
Christine K. Wee - 028535  
3707 North 7th Street, Suite 235  
Phoenix, Arizona 85014

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UNION FOUNDATION

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Justin Garbacz\*  
787 Seventh Avenue  
New York, New York 10019

*\*admitted pro hac vice*

*Attorneys for Plaintiff Russell B. Toomey*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 25, 2021, I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court’s electronic filing system.

I, further hereby certify that on June 25, 2021, I emailed the attached document to:

Betsy Lamm  
Daniel Dowd  
Kaysey L. Fung  
Cohen Dowd Quigley  
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*Attorneys for Office of Governor Douglas A. Ducey*

/s/ Christine K. Wee  
Christine K. Wee

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\*Admitted pro hac vice

Attorneys for Plaintiff Russell B. Toomey

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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

**Russell B. Toomey,**  
Plaintiff,

Case No.19-cv-00035-TUC-RM (LAB)

v.

**DECLARATION OF CHRISTINE K  
WEE IN SUPPORT OF  
PLAINTIFF’S REPLY MOTION TO  
COMPEL PRODUCTION OF  
DOCUMENTS**

**State of Arizona; Arizona Board of  
Regents, D/B/A University of Arizona,** a  
governmental body of the State of Arizona;  
et al.,

Defendants.

I, Christine K. Wee, submit this declaration under penalty of perjury pursuant to 28 U.S.C. § 1746 and declare as follows:

1. I am a Senior Staff Attorney at ACLU Foundation of Arizona, licensed to practice law in the State of Arizona, and represent Plaintiff Russell B. Toomey (“Dr. Toomey” or “Plaintiff”).

2. I submit this declaration in support of Plaintiff’s Reply Motion for Entry of an Order Compelling the Production of Documents.

3. I base this declaration on my personal knowledge and on information obtained in the course of the above-captioned matter.

4. Exhibit 1 (**filed under seal**) to Plaintiff’s Motion is a true and correct copy of State Defendants’ produced document, bates AZSTATE246062.

1           5. Exhibit 2 as attached to Plaintiff's Motion is a true and correct copy of  
2 Governor's Office's produced document, bates AZ\_GOV\_00003120.

3           6. Exhibit 3 as attached to Plaintiff's Motion is a true and correct copy of  
4 Governor's Office's produced document, bates AZ\_GOV\_00003123.

5           7. Exhibit 4-A as attached to Plaintiff's Motion is a true and correct copy of the  
6 Slip Copy of *Sullivan v. Bank of Am. NA*, No. CV1301166TUCJGZBGM, 2016 WL  
7 2940013 (D. Ariz. May 20, 2016).

8           8. Exhibit 4-B as attached to Plaintiff's Motion is a true and correct copy of the  
9 Slip Copy of *Vita Zahnfabrik H. Rauter GmbH & Co. KG v. Dentsply Int'l, Inc.*, No. SACV  
10 04-0729, 2006 WL 8437644 (C.D. Cal. June 21, 2006), *aff'd*, 278 F. App'x 1013 (Fed. Cir.  
11 2008).

12           9. Exhibit 4-C as attached to Plaintiff's Motion is a true and correct copy of the  
13 unreported decision in *Majors v. Warden*, No. 2:99-CV-00493 MCEKJN, 2010 WL  
14 3341593 (E.D. Cal. Aug. 23, 2010).

15           10. Exhibit 4-D as attached to Plaintiff's Motion is a true and correct copy of the  
16 unreported decision in *JM through Foley v. New Mexico Dep't of Health*, No. CV 07-604  
17 RB/ACT, 2009 WL 10698414 (D.N.M. Aug. 20, 2009).

18           11. Exhibit 4-E as attached to Plaintiff's Motion is a true and correct copy of the  
19 unreported decision in *Haber v. Evans*, No. 03-CV-3376, 2004 WL 963995 (E.D. Pa. May  
20 4, 2004).

21           12. Exhibit 4-F as attached to Plaintiff's Motion is a true and correct copy of the  
22 unreported decision in *Marisol A., By her Next Friend, Forbes v. Giuliani*, No. 95 CIV.  
23 10533 (RJW), 1998 WL 158948 (S.D.N.Y. Apr. 1, 1998).

24           13. Exhibit 4-G as attached to Plaintiff's Motion is a true and correct copy of the  
25 unreported decision in *Hayes v. Reed*, No. CIV.A. 96-4941, 1997 WL 125742 (E.D. Pa.  
26 Mar. 13, 1997).

27           14. Exhibit 4-H as attached to Plaintiff's Motion is a true and correct copy of the  
28 unreported decision in *E.E.O.C. v. Swissport Fueling, Inc.*, No. CV-10-2101-PHX-GMS,

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2012 WL 1648416 (D. Ariz. May 10, 2012).

I declare under penalty of perjury that the foregoing is true is and correct.

Executed this 25th day of June 2021.

/s/ Christine K. Wee  
Christine K. Wee

# **EXHIBIT 1**

**FILED UNDER  
SEAL  
AZSTATE246062**

# **EXHIBIT 2**

**Date:** Saturday, January 20 2018 11:10 AM  
**Subject:** WHY WE ARE A REPUBLIC, NOT A DEMOCRACY | Germany Becomes the New Poster Child for Climate Change Hypocrisy | This Man Received 167 Sex-Change Surgeries. He Lives in a World of Regret.  
**From:** The Daily Signal <morningbell@heritage.org> <morningbell@heritage.org>  
**To:** ccorieri@az.gov;

Jan. 20, 2018



## Why We Are a Republic, Not a Democracy

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## This Man Received 167 Sex-Change Surgeries. He Lives in a World of Regret.

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# President and the 'S—hole Countries'

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## MUST READ



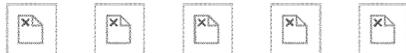
### When Harry Became Sally: Responding to the Transgender Moment

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# **EXHIBIT 3**

Date: Saturday, September 2 2017 11:03 AM

Subject: MY 'SEX CHANGE' WAS A MYTH. WHY TRYING TO CHANGE ONE'S SEX WILL ALWAYS FAIL | I Was Covered By The Mainstream Media. Here's How They Got My Story Wrong | Hurricane Harvey Brings Out the Best in Americans

From: The Daily Signal <morningbell@heritage.org> <morningbell@heritage.org>

To: ccorieri@az.gov;

Sept. 2, 2017



## **I Was Covered by the Mainstream Media. Here's How They Got My Story Wrong.**

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## **My 'Sex Change' Was a Myth. Why Trying to Change One's Sex Will Always Fail.**

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# **EXHIBIT 4-A**

2016 WL 2940013

Only the Westlaw citation is currently available.  
United States District Court, D. Arizona.

Pamela C. SULLIVAN, Plaintiff,

v.

BANK OF AMERICA NA, Defendant.

No. CV-13-01166-TUC-JGZ (BGM)

|  
Signed 05/19/2016

|  
Filed 05/20/2016

**Attorneys and Law Firms**

Jerry Stephen Smith, Jerry S. Smith PLLC, Tucson, AZ, for Plaintiff.

Andrea G. Lisenbee, John Michael Fry, Ryley Carlock & Applewhite PA, Phoenix, AZ, Teri L. Danish, McGuireWoods LLP, Houston, TX, for Defendant.

**ORDER**

Honorable Bruce G. Macdonald, United States Magistrate Judge

\*1 Currently pending before the Court is Plaintiff's Motion to Compel Discovery (Doc. 72). Defendant Bank of America ("BOA") has responded (Doc. 73) and Plaintiff filed her Reply (Doc. 74). Plaintiff seeks documents responsive to several interrogatory requests, as well as requests for production. See Pl.'s Mot. to Compel (Doc. 72). The Court will address each of these in turn.

**A. Discovery—Generally**

Rule 26, Federal Rules of Civil Procedure, governs discovery in a civil matter. Fed. R. Civ. P. 26. Rule 26 provides in relevant part that:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the

discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1).<sup>1</sup> It is well-established law "that the deposition-discovery rules are to be accorded a broad and liberal treatment." *Hickman v. Taylor*, 529 U.S. 495, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947). The United States Supreme Court has long recognized that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Id.* "Furthermore, relevant means germane and should not be read as meaning 'competent' or admissible." *Jackson v. Montgomery Ward & Co., Inc.*, 173 F.R.D. 524 (D. Nev. 1997) (citing 8 Wright, Miller & Marcus, *Federal Practice and Procedure* Civil 2d § 2008); see also Fed. R. Evid. 401 (Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). A litigant's right to discovery is not unlimited, however. "District courts need not condone the use of discovery to engage in 'fishing expedition[s].'" *Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004). Toward this end, the Court has the inherent power to control discovery as it deems necessary. See *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975).

<sup>1</sup> Rule 26(b), Federal Rules of Civil Procedure changed as of December 1, 2015. The rule prior to that date provided as follows:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1).

**B. Requests**

**1. Interrogatory No. 16**

\*2 Plaintiff's Interrogatory No. 16 provides as follows:

List the following information for each and every charge or complaint alleging age discrimination or retaliation in connection with age discrimination filed against the BOA with either the United States Equal Employment Opportunity Commission or the Arizona Civil Rights Division or the New Mexico state agency which receives and investigates charges of unlawful employment discrimination which were filed or received during the years of 2008 through 2013. With respect to each charge or complaint provide (a) the name and last known address and contact information of the complaining party, (b) the agency with which the charge was filed and its case number, (c) the date of the charge filing, (d) the final disposition of such charge, and (e) whether or not such person is presently employed by BOA.

Pl.'s Mot. to Compel (Doc. 72) at 8. Defendant BOA objects arguing that (1) the information is not relevant; (2) it lacks authority to provide the information; and (3) the information requested is overbroad. Def.'s Response (Doc. 73) at 3–4.

**a. Authority to disclose.**

In support of its contention that it lacks authority to disclose the information sought, Defendant relies 42 U.S.C. §§ 2000e-5(b) and 2000e-8(e). *Id.* at 3. Section 2000e-5(b), 42 U.S.C., relates to Enforcement Provisions of Title VII and provides in relevant part:

Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action.

42 U.S.C. § 2000e-5(b). Regarding charges filed with the Equal Employment Opportunity Commission (“EEOC”), Section 2000e-8(e), 42 U.S.C., provides:

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than \$ 1,000, or imprisoned not more than one year.

42 U.S.C. § 2000e-8(e). Contrary to Defendant's contention, the prohibition against the Commission from disclosing information related to filed charges does not direct Defendant from disclosing the same information. Reasonably construed, these sections protect the identities of parties who have filed charges with the EEOC, or who have had charges filed against them, from exposure by the EEOC during the pendency of its investigation. This is very different from disclosing the existence of such charges in the context of ongoing civil litigation. *See, e.g., Moss v. Blue Cross and Blue Shield of Kansas, Inc.*, 241 F.R.D. 683, 691–92 (allowing discovery “regarding the identity of persons who have filed lawsuits, complaints, administrative charges or claims of violation of the FMLA since January 1, 1996”). As such, the Court finds that Defendant BOA is not precluded by law from disclosing the information sought in Plaintiff's Interrogatory No. 16.

**b. Relevance**

\*3 Defendant asserts that to the extent that Plaintiff is “asking for ‘every charge or complaint alleging age discrimination’ ” without limitation, such information is irrelevant. Def.'s Response (Doc. 73) at 3 (emphasis in original). “[D]iscovery of prior complaints of discrimination is permitted in order to prove that the reasons articulated for an adverse employment action are a pretext for discrimination.” *Jackson v. Montgomery Ward & Co., Inc.*, 173 F.R.D. 524, 527 (D. Nev. 1997) (and citing references therein). Moreover, “[u]nder the Federal Rules the scope of discovery is broad and discovery should be allowed unless the information sought has no conceivable bearing on the case.” *Id.* at 528 (citations omitted). Additionally, courts have also recognized that such “comparative information concerning an employer's treatment of individuals is relevant evidence in an individual discrimination claim...[and] may be used to construct a *prima facie* case of discrimination.” *Nuskey v. Lambright*, 251 F.R.D. 3, 10 (D. D.C. 2008). In the broad sense, the information Plaintiff seeks is relevant; however, the Court will address Defendant's concerns regarding overbreadth in the following section.

**c. Overbreadth**

As mentioned in the previous section, Defendant asserts that seeking “every charge or complaint alleging age discrimination” without limitation will result in the production of irrelevant documents. Def.'s Response (Doc.

73) at 3. As an initial matter, Plaintiff seeks “information for each and every charge or complaint alleging age discrimination or retaliation in connection with age discrimination filed against the BOA[.]” Pl.’s Mot. to Compel (Doc. 72) at 8. Plaintiff’s Complaint (Doc. 1) alleges a claim of age discrimination; however, there is no claim for retaliation. “[A]s a general rule, ‘[o]ther claims of discrimination against a defendant are discoverable only if limited to the same *form* of discrimination[.]” *Moss v. Blue Cross and Blue Shield of Kansas, Inc.*, 241 F.R.D. 683, 692 (D. Kan. 2007) (and citing references therein) (2d alteration in original). Accordingly, the Court finds it appropriate to limit this request to claims of “age discrimination” only. *See id.*; *see also Gheesling v. Chater*, 162 F.R.D. 649, 651 (D. Kan. 1995) (“[t]he only possible relevant inquiry in this case would be an inquiry into complaints of age discrimination”).

Defendant further asserts that Plaintiff’s request requires limitation to “age discrimination charges filed by others in Plaintiff’s same position, same line of business with Defendant, same supervisor, or same location.” Def.’s Response (Doc. 73) at 3–4. Plaintiff asserts that “[i]t is undisputed that PCS was a middle management executive who reported to a regional manager whose region included all of Arizona and New Mexico, and PCS’[s] interrogatory is limited to those two states since they had common regional supervision.” Pl.’s Mot. to Compel (Doc. 74). Defendant does not object to the time frame of Plaintiff’s request, 2008 through 2013. The Court finds it appropriate to restrict discovery to age discrimination charges filed by management employees who reported to Plaintiff’s direct supervisor, Dwain Moss – the BOA Regional Executive for the BOA Southwest Region or to Walter Elcock – the BOA Executive Vice President of the West Division.<sup>2</sup> *See, e.g., Mitchell v. Nat’l R.R. Passenger Corp.*, 208 F.R.D. 455 (D. D.C. 2002) (permitting discovery of complaints of discrimination to the Human Resources Department alleging discrimination on the same basis as the plaintiff); *Hill v. Motel 6*, 205 F.R.D. 490 (S.D. Ohio 2001) (permitting discovery of plaintiff’s supervisor’s personnel file). It is unclear to the Court whether Mr. Moss and Mr. Elcock held their positions during the pendency of the relevant period. As such, the Court will also direct disclosure of charges of age discrimination during the relevant time period of any management employees who reported to the BOA Regional Executive for the BOA Southwest Region and/or the BOA Executive Vice President of the West Division, regardless of who held the position during that time. Additionally, Defendant need not disclose unlisted addresses or telephone numbers. *See Hill v. Motel*

*6*, 205 F.R.D. 490 (S.D. Ohio 2001). Accordingly, Defendant is directed to respond to Plaintiff’s Interrogatory No. 16 as limited by this Order.

2 This includes management employees who report directly or indirectly to Mr. Elcock.

**2. Interrogatory No. 17**

\*4 Plaintiff’s Interrogatory No. 17 provides as follows:

In response to PCS’ Interrogatory # 3, BOA listed six CMEs who were employed by the BOA as a CME under Dwain Moss on September 30, 2010: Priscilla Gutierrez, Eric Gonzales, John Calo, Denise Farmer, Pamela Sullivan, and Dean Bird. With respect to each of these six, excluding PCS: (a) Are they currently employed by BOA? If yes, what is their current position and at what location? If not currently employed by BOA, when did their employment by the BOA end, did the employee resign or retire voluntarily or was the employee terminated by the BOA, and when did such employment by the BOA end? (b) What is their current address or last known address and contact information?

Pl.’s Mot. to Compel (Doc. 72) at 9. Defendant asserts that it has previously identified these individuals as well as their dates of birth; however, “[t]he privacy interest that these non-party former employees have in their contact information prevents Defendant from providing such information.” Def.’s Response (Doc. 73) at 4. Plaintiff does not acknowledge that Defendant produced the individual’s dates of birth.

“While the Federal Rules of Civil Procedure do permit parties to be excused from certain discovery on the basis of ‘annoyance, embarrassment, oppression, or undue burden or expense,’ there is no generic ‘privacy’ privilege.” *Ivy v. Outback Steakhouse, Inc.*, 2006 WL 381355, \*2 (W.D. Wash. 2006) (quoting Fed. R. Civ. P. 26(c)). To the extent that the individuals’ contact information is not otherwise unlisted, Defendant shall disclose the same. *See Hill v. Motel 6*, 205 F.R.D. 490 (S.D. Ohio 2001). If the contact information is unlisted, the parties shall stipulate to a confidentiality agreement or protective order prior to disclosure.<sup>3</sup>

3 Any such disclosure excludes Mr. Bird as he is a current employee of Defendant. *See* Def.’s Response (Doc. 73) at 5.

### **3. Interrogatory No. 20**

Plaintiff's Interrogatory No. 20 provides:

Please answer PCS' Interrogatory # 9 with respect to all BOA CMEs ("CME" was PCS' job title when she was fired) in the area, division, or region overseen by Walter Elcock (who was PCS' regional supervisor) as of the date of the end of his employment by BOA, stating the month and year of birth of each CME, whether they are still employed by BOA, and if not, the date their employment terminated and whether or not they voluntarily resigned or retired.

Pl.'s Mot. to Compel (Doc. 72) at 9–10. Defendant indicated that it had supplemented its response to this interrogatory; however, Plaintiff does not acknowledge that such disclosure took place. *See* Def.'s Response (Doc. 73) at 5; Pl.'s Reply (Doc. 74) at 6. To the extent that Defendant has not done so already, it shall provide Plaintiff with the information regarding other CMEs "who did not directly report to Mr. Elcock, but may have been under his supervision." Def.'s Response (Doc. 73) at 5. Defendant need not provide any individual's birth month, but shall provide a birth year.

### **4. Interrogatory No. 23**

Plaintiff's Interrogatory No. 23 provides:

\*5 With respect to BOA employees or former employees Michelle Lulloff (employee #10486643) and Kristen De La Riviere (employee #27974291): (a) What is the month and year of birth of such employee? and (b) Is such person still employed by the BOA? If not still employed by the BOA, when did their employment cease and why? (c) Please provide their current or last known addresses and contact information.

Pl.'s Mot. to Compel (Doc. 72) at 10. Defendant asserts that because neither of these two individuals were employed in the same position as Plaintiff, the information is not relevant. Def.'s Response (Doc. 73) at 6. Defendant further asserts that it had previously provided the women's ages showing that the women are over forty and that Ms. Lulloff is a current employee who should be contacted through defense counsel, if necessary. *Id.* at 7. Regarding Ms. De La Riviere, Defendant urges that her contact information is private and therefore not discoverable. *Id.*

Unlike the information sought in Interrogatory No. 16, *supra*, there is no evidence before this Court to suggest that either Ms. Lulloff or Ms. De La Riviere witnessed the discrimination of Plaintiff in this case or otherwise. *See Baptiste v. Lids*, 2013 WL 5708848, \*5 (N.D. Cal. 2013). Nor is there any evidence that either of these individuals made accusations of age discrimination or would have knowledge regarding age discrimination at BOA. *Cf. Ivy v. Outback Steakhouse, Inc.*, 2006 WL 3813555, \*3 (N.D. Wash. 2006) (discovery of personnel files appropriate for discovery regarding accusations of harassment and management's response). As such, the Court finds that the information sought is not relevant. *See Baptiste*, 2013 WL 5708848 at \*5.

### **5. Renewed of Request for Production No. 1**

Plaintiff's Renewed Request No. 1 seeks discovery of:

Copies of all charges of age discrimination in employment or retaliation for having complained of or opposed age discrimination in employment or retaliation in connection with age discrimination filed by any person employed or formerly employed or who sought employment against BOA by persons with the BOA Southwest Region, including but not limited to Arizona, New Mexico, and Texas, filed or presented to either the U.S. Equal Employment Opportunity Commission or the Arizona Attorney General Civil Rights Division or the comparable employment discrimination enforcement agencies for the states of New Mexico or Texas or other states within the BOA Southwest Region since January 1, 2008, and any and all responses to such charges made or given by or on behalf of BOA.

Pl.'s Mot. to Compel (Doc. 72) at 11. Defendant asserts the same relevance, lack of authority to produce, and limitation issues that it relied on regarding Interrogatory No. 16. *See* Section B.1., *supra*.

As with Interrogatory No. 16, the Court finds that the information Plaintiff seeks is broadly relevant and Defendant is not precluded from disclosing the same. *See* Sections B.1.a & b, *supra*. The Court will, in its discretion, limit the scope of Plaintiff's request.

Plaintiff seeks "[c]opies of all charges of age discrimination in employment or retaliation in connection with age discrimination filed by any person employed or formerly employed or who sought employment against BOA[.]" Pl.'s

Mot. to Compel (Doc. 72) at 11. As noted previously, Plaintiff's Complaint (Doc. 1) alleges a claim of age discrimination, but there is no claim for retaliation. The Court finds it appropriate to limit this request to claims of "age discrimination" only. See *Moss v. Blue Cross and Blue Shield of Kansas, Inc.*, 241 F.R.D. 683, 692 (D. Kan. 2007) (and citing references therein) ("[A]s a general rule, '[o]ther claims of discrimination against a defendant are discoverable only if limited to the same form of discrimination[.]'"); see also *Ghesling v. Chater*, 162 F.R.D. 649, 651 (D. Kan. 1995) ("[t]he only possible relevant inquiry in this case would be an inquiry into complaints of age discrimination").

\*6 Defendant again asserts that Plaintiff's request requires limitation to "age discrimination charges filed by others in Plaintiff's same position, same line of business with Defendant, same supervisor, or same location." Def.'s Response (Doc. 73) at 8. Defendant does not object to the time frame of Plaintiff's request, from January 1, 2008 forward. The Court finds it appropriate to restrict discovery to age discrimination charges filed by management employees who reported to Plaintiff's direct supervisor, Dwain Moss – the BOA Regional Executive for the BOA Southwest Region or to Walter Elcock – the BOA Executive Vice President of the West Division.<sup>4</sup> See, e.g., *Mitchell v. Nat'l R.R. Passenger Corp.*, 208 F.R.D. 455 (D. D.C. 2002) (permitting discovery of complaints of discrimination to the Human Resources Department alleging discrimination on the same basis as the plaintiff); *Hill v. Motel 6*, 205 F.R.D. 490 (S.D. Ohio 2001) (permitting discovery of plaintiff's supervisor's personnel file). The Court will also direct disclosure of charges of age discrimination during the relevant time period of any management employees who reported to the BOA Regional Executive for the BOA Southwest Region and/or the BOA Executive Vice President of the West Division, regardless of who held the position during that time. Additionally, Defendant need not disclose unlisted addresses or telephone numbers. See *Hill v. Motel 6*, 205 F.R.D. 490 (S.D. Ohio 2001). Accordingly, Defendant is directed to respond to Plaintiff's Renewed Request for Production No. 1 as limited by this Order.

<sup>4</sup> This includes management employees who report directly or indirectly to Mr. Elcock.

**6. Renewed Request for Production No. 5**

Plaintiff's Renewed Request No. 5 seeks discovery of:

Any job description or statement of job duties for BOA consumer marketing executives (CMEs) (the last job held by PCS for BOA) during the years of 2008, 2009, 2010, or 2011, with a notation as to when such job description was written and implemented.

Pl.'s Mot. to Compel (Doc. 72) at 12. Defendant has previously disclosed documents Bates stamped BOA 00651–00986 responsive to this request. Def.'s Response (Doc. 73) at 8–9. Moreover, Defendant's Supplemental Response stated:

Defendant maintains its objections set forth in its initial response to Plaintiff's RFP No. 5. Subject to and without waiving these objections, Defendant directs Plaintiff to previously produced documents, BOA00651– 986, which contain job descriptions for the CME position that were posted between 2008 and 2011. Answering further, Defendant specifically directs Plaintiff to BOA00717–19, which contains the CME job description from 2008 for the Phoenix location where Mr. Elcock was the hiring manager. Def.'s Response to Pl.'s Pre-Conference Memo. (Doc. 67), Def.'s First Suppl. Response to Pl.'s Second Requests for Production (Exh. "C") at 1–2. The Court finds that Defendant has properly responded to Plaintiff's Request for Production No. 5 and no further action by it is required.

**7. Renewed Request for Production No. 8**

Plaintiff's Renewed Request for Production No. 8 seeks:

All correspondence, either written or electronic, by Dwain Moss, Walter Elcock, Mary Kanaga, Michael Rogers and/or Brad Kimball (all current or former employees of the BOA who knew PCS mentioning or concerning PCS) during the years of 2009 and 2010.

Pl.'s Mot. to Compel (Doc. 72) at 13. Defendant states that it "was not required to journal the emails for any of the individuals identified in this request...[and] [a]s a result, all information responsive to this request has been produced." Def.'s Response (Doc. 73) at 9. It appears that Defendant has produced the relevant documents responsive to this request, although Plaintiff's Reply (Doc. 74) suggests that it has not produced any such documents. To the extent that Defendant has complied, no further action will be required. Moreover, the Court finds that this request is overbroad as it is not limited to issues regarding Plaintiff's age or performance, and as such will not compel further disclosure by Defendant. See *Moss v. Blue Cross and Blue Shield of Kansas*, 241 F.R.D. 683, 692–93 (D. Kan. 2007) (request for production of any and

all correspondence and/or documents bearing Plaintiff's name overbroad).

### **8. Request for Production No. 13**

Plaintiff's Request for Production No. 13 seeks:

Copies of all EEO-1 Reports filed or created by the BOA which pertained in whole or in part to its operations and/or branches in the States of Arizona and/or New Mexico during or for the years of 2008 through and including 2012. EEO-1 reports are defined as those required to be made, created, or produced by employers pursuant to 29 C.F.R. 1602.7.

\*7 Pl.'s Mot. to Compel (Doc. 72) at 13. Defendant asserts that EEO-1 reports provide statistical information on several other demographic factors which are irrelevant to a claim of age discrimination. Def.'s Response (Doc. 73) at 10. A review of the Standard Form 100, required by section 709(c) of Title VII, shows that it does not contain any information relating to age, only race and gender. *See* Standard Form 100 Instruction Booklet,

available at [https://www.eeoc.gov/employers/eeo1survey/upload/instructions\\_form.pdf](https://www.eeoc.gov/employers/eeo1survey/upload/instructions_form.pdf) (last visited May 19, 2016). As such, the information contained in the EEO-1 is not relevant to Plaintiff's claim of age discrimination, and Defendant shall not be compelled to produce such documents.

### ***C. Conclusion***

Accordingly, IT IS HEREBY ORDERED that Plaintiff's Motion to Compel Discovery (Doc. 72) is GRANTED IN PART and DENIED IN PART. Defendant shall supplement its disclosures consistent with this Order. IT IS FURTHER ORDERED pursuant to stipulation by the Parties, that Plaintiff shall file her response to Defendant's Motion for Summary Judgment (Doc. 75) within thirty (30) days of this Order.

Dated this 19th day of May, 2016.

### **All Citations**

Not Reported in Fed. Supp., 2016 WL 2940013

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# **EXHIBIT 4-B**

2006 WL 8437644

Only the Westlaw citation is currently available.  
United States District Court, C.D. California.

**VITA ZAHNFABRIK H.  
RAUTER GMBH & CO. KG, et al.**  
v.  
**DENTSPLY INTERNATIONAL, INC.**

Case No. SACV 04-0729 JVS (RNBx)

|  
Filed 06/21/2006

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PROCEEDINGS: (IN CHAMBERS): Order re Plaintiffs’  
Motions for Summary Adjudication of Infringement and  
Non-Invalidity/Defendant’s Motion for Summary Judgment  
of Non-Infringement and Invalidity

JAMES V. SELNA, DISTRICT JUDGE

\*1 Plaintiffs Vita Zahnfabrik H. Rauter GMBH and  
Company KG, Vident, and Neil R. Hall (collectively “Vita”) and  
Defendant Dentsply International, Inc. (“Dentsply”) have  
brought several motions for summary judgment with respect  
to claims arising out of U.S. Patent Number 5,498,157 (“the  
‘157 Patent”). Specifically, Vita seeks summary adjudication  
that the ‘157 Patent is not invalid for inadequate written  
description or lack of enablement, that the asserted claims  
of the ‘157 Patent were not anticipated, and that Dentsply  
has infringed claim 17 of the ‘157 Patent. Dentsply moves  
this Court for summary judgment of non-infringement and  
invalidity.

Vita has filed a request for judicial notice of the fourteen  
documents it has filed in support of its motion for summary  
adjudication. Under Federal Rule of Evidence 201(b) (“Rule

201”), “a judicially noticed fact must be one not subject to  
reasonable dispute in that it is either (1) generally known  
within the territorial jurisdiction of the trial court or (2)  
capable of accurate and ready determination by resort to  
sources whose accuracy cannot reasonably be questioned.”  
A court may take judicial notice of the contents of public  
records. [Lee v. City of Los Angeles](#), 250 F.3d 668, 688 (9th  
Cir. 2001). Furthermore, the content of court files is a proper  
subject for judicial notice under Rule 201(d). [Mullis v. United  
States Bankr Ct.](#), 828 F.2d 1385, 1388 n.9 (9th Cir. 1987).  
The Court therefore takes judicial notice of these documents  
pursuant to Rule 201(d).

**I. BACKGROUND**

Vita brought suit against Dentsply for claims of  
infringement of the ‘157 Patent, copyright infringement,  
false representations of fact, false advertising, and unfair  
competition. The Court already has conducted a [Markman](#)  
hearing and construed relevant terms contained in the patent  
at issue. Based on those constructions, the parties now move  
for summary judgment on the issues listed above.

**II. PRELIMINARY ISSUES**

Both Vita and Dentsply object to various pieces of evidence  
presented to the Court. The Court will address each one in  
turn.<sup>1</sup>

<sup>1</sup> On February 22, 2006, Vita submitted objections to the  
Declaration of Dr. Joel White. The Court considered the  
objections and informs the parties that it only considers  
admissible evidence in deciding motions.

**A. Glidden Declaration**

Vita objects to the declaration of Shawn Glidden and  
the attached exhibits as irrelevant, conclusory, speculative,  
lacking foundation as to personal knowledge, and improper  
expert testimony. Specifically, Vita contends that Mr. Glidden  
provides no basis for the configuration and orientation of the  
chosen grids, that the ‘157 Patent does not in fact prescribe  
such grids, and that Mr. Glidden provided no foundation that  
he is an expert to select the particular configurations that he  
chose.

For evidence to be admissible, it must be relevant. [Fed.  
R. Evid. 402](#). Pursuant to [Federal Rule of Evidence 401](#),  
relevant evidence is “evidence having any tendency to make

the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” Because the evidence provided by Mr. Glidden tends to show where Dentsply's product's data lie on a grid and its potential alignment or non-alignment with a longitudinal axis, the Court finds the evidence relevant.

\*2 Vita fails to argue why the evidence is conclusory or speculative. These objections are therefore overruled.

Vita also contends that Mr. Glidden failed to lay the foundation that he had personal knowledge of the grids provided as required by [Federal Rule of Evidence 602](#). However, because Mr. Glidden declares that the “data used to generate the plots of Exhibits A-H ... were entered personally by me,” the Court finds that Mr. Glidden did have personal knowledge and has laid the foundation to testify as to the grids he created.

Finally, Vita claims that Mr. Glidden has not laid a foundation as to his status as an expert to plot the data. Pursuant to [Federal Rule of Evidence 702](#), for a witness to testify as to technical, scientific, or other specialized knowledge, the witness must first be qualified as an expert. Because the use of Excel for the creation of grids is not a skill or a matter requiring technical, scientific, or specialized knowledge, the Court finds that Mr. Glidden need not be qualified as an expert.

Because the evidence is relevant and with a proper foundation, Mr. Glidden's declaration and attached exhibits are admissible.

#### B. Gray Declaration

Vita also objects to the admissibility of the declaration of Andrew Gray filed in support of Dentsply's motion on the issue of invalidity. Specifically, Vita objects to paragraphs 3, 4, 5<sup>2</sup> and 7 in the declaration.

<sup>2</sup> Vita incorrectly labels paragraph 5 as paragraph 4.

In paragraph 3, Mr. Gray declares that “[t]he specification for the patent application as it was originally filed neither discloses, nor claims, any steps for a process by which a set of dental color materials might be created.” (Gray Decl., ¶ 3.) Vita objects on the grounds of relevance, speculation, and that the statement is conclusory. Specifically, Vita argues

that this testimony is incorrect and therefore not relevant. Evidence does not need to be correct, however, to be relevant or admissible. Relevance does not measure the sufficiency of the evidence, but merely whether the evidence tends to make the existence of a fact more or less probable. [Fed. R. Evid. 401](#). Because the evidence is relevant in as much as it relates to what information was provided in the original application, the evidence is admissible. As above, Vita fails to argue why the evidence is conclusory or speculative. These objections are therefore overruled.

The same analysis applies to paragraph 4. In paragraph 4, Mr. Gray declares that “[d]uring the course of prosecuting this patent application before the U.S. Patent Office, claims 17-22 were amended to claim a *process* by which a set of dental color materials could be prepared.” (Gray Decl., ¶ 4 (emphasis in original).) Vita objects to this evidence as irrelevant because it is incorrect. As above, this evidence is admissible because it tends to show the amendments made during the prosecution of the patent.

Vita also objects to paragraph 5, in which Mr. Gray attaches a “true and correct copy of correspondence between Hall and Henry Rauter evidencing Hall's efforts to develop a process for creating a set of dental color materials. (Gray Decl., ¶ 5.) As above, Vita makes the standard objections that the statement is conclusory, speculative, lacking foundation as to personal knowledge, that the document is unauthenticated, and hearsay.

\*3 Vita contends that the statement lacks foundation as to personal knowledge. Pursuant to [Federal Rule of Evidence 602](#), a witness may not testify unless he or she has personal knowledge. Because Mr. Gray has declared that has personal knowledge of the facts contained within his declaration (Gray Decl., ¶ 1), Mr. Gray may testify as to the letters.

Next, Vita argues a failure to authenticate the attached documents. Pursuant to [Federal Rule of Evidence 901](#), the requirement of authentication can be satisfied through the testimony of a witness with knowledge that the matter is what it is claimed to be. Because Mr. Gray declares that the attached letters are true and correct copies (Gray Decl., ¶ 5), the letters have been authenticated.

Finally, Vita argues that the documents constitute hearsay. Hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to provide the truth of the matter asserted.” [Fed. R. Evid. 801](#).

Statements that are not hearsay include admissions by a party-opponent, so long as the statement is offered against a party and it is the party's own statement. *Id.* 801(d)(2). Because all of the letters attached to paragraph 5 are letters by Mr. Hall, a plaintiff in this action, the letters are admissible as statements of a party-opponent.

Vita also objects to Mr. Gray's statement in paragraph 7 that “[f]ollowing Neil Hall's stroke, Vita continued the development of this process, and was finally able to sell product based on this process in 1998.” (Gray Decl., ¶ 7.) As above, Vita objects that the statement is conclusory, speculative, and lacking foundation as to personal knowledge. And, as above, Mr. Gray has testified to his personal knowledge (Gray Decl., ¶ 1). Furthermore, Vita fails to argue why the evidence is conclusory or speculative. These objections are therefore overruled.

For the forgoing reasons, the statements objected to in the Gray Declaration are admissible.<sup>3</sup>

<sup>3</sup> Vita also makes similar objections to Mr. Gray's declaration in support of Dentsply's opposition to Vita's motion for summary judgment regarding written description and enablement. First, the evidence in Exhibit B is admissible because Mr. Gray has authenticated it by testifying to his personal knowledge and because the documents are non-hearsay as statements of a party-opponent. Second, Vita's objections to paragraphs 6-13, 18-22, 25, 30, and 32 are not well taken. The depositions and declarations are all admissible and Mr. Gray's statements relating to them merely explain why they are relevant. To be sure, it is the depositions that the Court has considered in deciding the motions. Third, the Exhibit attached to paragraph 24 has been authenticated and is a non-hearsay party-opponent statement. Fourth, paragraphs 28-29 are not expert testimony and have proper foundation. Mr. Gray need not be an expert to read the patent application and describe it. Finally, paragraph 33 is admissible because it has been authenticated and is non-expert testimony.

C. Sundar Declaration

Again, Vita makes a laundry list of objections to Veeraghavan Sundar's declaration. Mr. Sundar has testified from his personal knowledge (Sundar Decl., ¶ 1), and therefore any objections based on [Federal Rule of Evidence 602](#) are overruled. Furthermore, as the Manager of New Product Commercialization, Mr. Sundar has personal

knowledge and is competent to establish the foundations of the documents attached to his declaration in exhibits B and C as records of regularly conducted activity in compliance with [Federal Rule of Evidence 802\(6\)](#). Finally, the Court has considered Vita's other objections and will only consider admissible evidence in deciding this motion.

D. Johnston Declaration

\*4 Vita objects to William Johnston's declaration largely on the issue of his qualification as a expert. Under [Federal Rule of Evidence 702](#), a witness must be qualified as an expert by knowledge, skill, training, experience, or education if the witness is to testify as to scientific technical, or other specialized knowledge. Mr. Johnston has a Ph.D. in Dental Materials and Engineering Materials and has been working in the field for over twenty years. He has done significant research on color and translucency of dental porcelain mixtures. He is also a member of several professional organizations and has published over 200 articles, chapters, and abstracts related to color formulation of dental materials, construction of dental materials, and color matching. The Court therefore finds that Mr. Johnston is qualified to testify on these issues. Furthermore, the Court has considered Vita's other objections and will only consider admissible evidence in deciding this motion.<sup>4</sup>

<sup>4</sup> Vita objects to Dr. Johnston's declaration submitted in support of Dentsply's Reply. The grids submitted are admissible as described above because one need not be an expert to plot data on Excel. Nonetheless, the Court notes Vita's objections and has only considered admissible evidence in deciding the motions.

E. Albarski Declaration

Dentsply objects to and moves to strike the opinion testimony in paragraph 11 of the Declaration of Dr. Olivia Albarski as improper opinion testimony in violation of Rule 701. In paragraph 11, Dr. Albarski states

The result was that the C3 crowns were remarkably similar in visual appearance to the 3D Master Shade Guide. The shades of the vast majority of the C3 crowns were extremely close, if not identical to the 3D Master shades. This was also my visual observation.

Dentsply contends that this statement is based on scientific, technical, and specialized knowledge and is thus expert

testimony. Dentsply argues that this statement should be stricken because Dr. Albarski has not been qualified as an expert and because Vita has not made the required Rule 26 disclosures. However, pursuant to [Federal Rule of Evidence 701\(a\)](#), a lay witness may give opinion testimony that is “rationally based on the perception of the witness.” Because the statement is based on a visual comparison of colors, this statement falls within the bounds of opinion testimony of a lay witness. The evidence is therefore admissible.

#### F. Rauter Declaration

Dentsply objects and moves to strike paragraphs 7 and 8 in the Rauter Declaration on the basis that the evidence is speculative and beyond the scope of Mr. Rauter's expertise.

Looking first at paragraph 7, Mr. Rauter declares that the “specific arrangement of colors, including the number of luminance levels (five) and the arrangement of colors at each luminance level, were conceived by Dr. Hall.” Dentsply argues that Mr. Rauter is not qualified to testify as such because he is not an expert pursuant to [Federal Rules of Evidence 701](#) and [702](#). [Federal Rules of Evidence 701](#) and [702](#), however, only address admissibility of opinion testimony, whether lay or expert. This statement is not an opinion, but is a statement of fact - namely, that Mr. Hall conceived of the arrangement. The objection is therefore overruled. Furthermore, the testimony is not speculative as it is made from Mr. Rauter's personal knowledge. (Rauter Decl., ¶ 7.) The statement is therefore admissible.

Next, Dentsply objects to the “myriad of technical aspects recited in paragraph 8.” (Objections to the Declaration of Mr. Rauter, p. 2.) Again, Dentsply argues that Mr. Rauter is not qualified to testify regarding technical aspects because he is not an expert pursuant to [Federal Rules of Evidence 701](#) and [702](#) and that the admission of this evidence is also in violation of [Federal Rule of Civil Procedure 56\(e\)](#). Specifically, Dentsply points out that Mr. Rauter's only formal training includes one and a half years of physics education and a graduate degree in German law. (Rauter Dep.11:5-12:22; Cast Decl., Ex. U.) Furthermore, Dentsply notes that Vita has not made any of the required disclosures pursuant to [Federal Rule of Civil Procedure 26](#). The Court agrees with Dentsply. Mr. Rauter has not been qualified as an expert and the testimony in paragraph 8 qualifies as scientific or technical opinion. For similar reasons, the Court finds that this portion of the declaration fails to satisfy the requirement of [Federal](#)

[Rule of Civil Procedure 56](#) that the affiant be competent to testify to the matters stated in the declaration. [Fed. R. Civ. P. 56\(e\)](#). Therefore, paragraph 8 of the Rauter declaration is inadmissible and is stricken.

#### G. Kelly Declaration

\*5 Dentsply moves to strike various portions of the Kelly Declaration for various reasons, most notably that Dr. Kelly has not been qualified as an expert on the issue of color theory of dentistry. (Objections to the Declaration of Mr. Kelly, p. 2-3.)<sup>5</sup> The Court has already ruled that Dr. Kelly is not an expert in color theory. [Order Denying Defendant Dentsply's Motion for Summary Judgment of Invalidity](#), Aug. 5, 2005, p. 2 (“August 5, 2005 Order”). As Dr. Kelly has not attached a new version of his resume, there is no reason for this Court to believe that Dr. Kelly has developed an expertise in color theory since the August 5, 2005 Order. Accordingly, the Court strikes those portions of the Kelly Declaration relating to the technical analysis of color space.

5 Dentsply also objects to the Kelly Declaration in support of Vita's Opposition for the same reasons.

With regard to the remainder of the Declaration, the Court has considered Dentsply's objections and disregard those portions which are inadmissible. In deciding this motion, the Court has relied only on admissible evidence.

### III. LEGAL STANDARD

#### A. Summary Judgment Standard

Summary judgment is as appropriate in a patent case as in any other, [Avia Group Int'l v. L.A. Gear California, Inc.](#), 853 F.2d 1557, 1561 (Fed. Cir. 1988), and will be granted if there is no genuine issue of material fact. [Fed. R. Civ. P. 56\(c\)](#). The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323 (1986); [MEMC Electronic Materials Inc. v. Mitsubishi Materials Silicon Corp.](#), 420 F.3d 1369, 1373 (Fed. Cir. 2005). If, and only if, the moving party meets its burden, then the non-moving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. [MEMC](#), 420 F.3d at 1373. If the non-moving party meets this burden, then the motion will be denied. [Bose Corp. v. JBL Inc.](#), 274 F.3d 1354, 1360 (Fed.

Cir. 2001). The Court will view the evidence in the light most favorable to the non-moving party. [MEMC](#), 420 F.3d at 1373.

#### B. Patent Invalidity

To obtain summary judgment of invalidity, a moving party must overcome the statutory presumption of 35 U.S.C. Section 282 (“Section 282”) that issued patent claims are valid. Section 282 mandates that “[a] patent shall be presumed valid” and that “[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.” 35 U.S.C. § 282. A party seeking to overcome the statutory presumption and establish the invalidity of an issued patent claim must prove the invalidity by clear and convincing evidence. [Apple Computer, Inc. v. Articulate Sys., Inc.](#), 234 F.3d 14, 26 (Fed. Cir. 2000).

#### C. Infringement Analysis

Determination of patent infringement is a two-step process. [Cybor Corp. v. FAS Techs., Inc.](#), 138 F.3d 1448, 1454 (Fed. Cir. 1998) (en banc). The first step is for the Court to determine the scope and meaning of the patent claims asserted. *Id.* As noted above, the Court already has held a [Markman](#) hearing and completed this step. The Court's focus therefore is on the second step, which involves a comparison of the properly construed claims to the allegedly infringing device. *Id.*

To prove infringement, the patentee must show that the accused device meets each claim limitation, either literally or under the doctrine of equivalents (“DOE”). [Playtex Prods., Inc. v. Proctor & Gamble Co.](#), 400 F.3d 901, 906 (Fed. Cir. 2005). To prove literal infringement, the “patentee must show that the accused device contains every limitation in the asserted claims.” [Mas-Hamilton Group v. LaGard, Inc.](#), 156 F.3d 1206, 1211 (Fed. Cir. 1998). “If even one limitation is missing or not met as claimed, there is no literal infringement.” *Id.* Infringement under the Doctrine of Equivalents, however, is found where “only ‘insubstantial differences’ distinguish the missing claim element from the corresponding aspects of the accused device.” [Leggett & Platt, Inc. v. Hickory Springs Mfg. Co.](#), 285 F.3d 1353, 1359 (Fed. Cir. 2002).

#### IV. DISCUSSION

##### A. Invalidity Regarding Written Description or Enablement

\*6 Vita moves this Court for summary adjudication that the ‘157 Patent is not invalid for inadequate written description or lack of enablement. Dentsply has also moved this Court for summary judgment that the ‘157 Patent is invalid because its specification lacks a written description. In its opposition, Dentsply has argued that the ‘157 Patent is in fact invalid for a lack of enablement, as well as an inadequate written description. The Court will address the written description requirement and enablement requirement in turn.

##### 1. Written Description

Pursuant to 35 U.S.C. Section 112 (“Section 112”), the specification must include a written description of the invention. The written description requirement does not require the applicant to “describe exactly the subject matter claimed, [instead] the description must clearly allow persons of ordinary skill in the art to recognize that [he or she] invented what is claimed.” [Union Oil Co. v. Atlantic Richfield Co.](#), 208 F.3d 989, 997 (Fed. Cir. 2000) (quoting [In re Gosteli](#), 872 F.2d 1008, 1012 (Fed. Cir. 1989) ). This is to ensure that, as of the filing date, the inventor conveyed to those skilled in the art that he possessed the subject matter of the patent. [Union Oil](#), 208 F.3d at 997. An inventor shows he is in possession of the invention by describing the invention with all its claimed limitations. [Lockwood v. Am. Airlines, Inc.](#), 107F.3d 1565, 1572 (Fed. Cir. 1997). The inventor need not use the exact terms used in the claims, but the specification must contain an equivalent description of the claimed subject matter. *Id.*

Vita contends that a simple comparison of claims 17 and 20 with the originally filed application reveals that the inventor, Dr. Hall, was in possession of the invention at the time of application. (Vita's Mot'n, p. 5.) Vita also argues that because layering is not required by the patent and because it is well known in the field, there is no requirement that it be described in the patent. (*Id.*, pp. 6-7.) Specifically, while Vita concedes that layering makes the prosthesis look more natural because it creates translucency, the patent is not concerned with translucency but rather with color. Thus, although layering may be used, it is not required by the patent. (White Dep. 168:6-8, Jan. 16, 2006.) Therefore, a person skilled in the art would not need to know about layering in making or using the invention.

Dentsply, on the other hand, argues that a comparison of the language in the original application as compared to the patent that issued reveals an amendment to claim 17 to claim a process for creating a set of dental materials. (Dentsply's Opp'n, p. 1.) Dentsply further contends that this amendment was material, evidenced by the fact that the PTO refused to issue the patent until this amendment was made. (*Id.*, p. 16.) According to Dentsply, because the wording is not exactly identical, the patent fails to provide an adequate written description. However, because an inventor is not required to use the exact same terms in the specification and must only use an equivalent description, Lockwood, 107 F.3d at 1572, Dentsply's argument fails as a matter of law.

Dentsply further argues that the '157 Patent should be declared invalid for lack of written description because layering is in fact necessary to create the product protected by the '157 Patent and therefore should be included in the written description. (Dentsply's Opp'n, p. 10.) To support its argument, Dentsply presents a report by Vita's expert, Robert Kelly, in which he describes tooth prostheses having more than one layer of artificial material. (Gray Decl., ¶ 14, Ex. L.) Dentsply also presents Mr. Kelly's deposition testimony, in which Mr. Kelly testifies that the materials are meant to be used clinically as a layered structure (Kelly Dep. 170:16-21, Jan. 18, 2006, attached to Gray Decl., Ex. N) and that he believed it is better to use the layered structure (*Id.* 171:3-10, attached to Gray Decl., Ex. O). Furthermore, Dentsply presents the testimony of Vita's initial technical expert, William O'Brien, where Mr. O'Brien explains the layering process to get a desired color. (O'Brien Dep. 71:25-73:11, Feb. 22, 2005, attached to Gray Decl., Ex. Q.) Finally, Dentsply presents the testimony of Dr. Norbert Thiel who testified about the complexity of developing dental porcelains because of the different layers that go onto the crown. (Thiel Dep. 28:1-3, Nov. 30, 2005, attached to Gray Decl., Ex. AH).

\*7 The Court finds that the evidence put forward by Dentsply establishes two material issues of fact. First, a fact issue remains as to whether layering is not required as proffered by Vita or is required for the creation of dental porcelains as argued by Dentsply. Second, a genuine issue of material fact remains as to whether layering should have been described in the '157 Patent or whether one skilled in the art would know layering is required without the need for Dr. Hall to disclose it. For these reasons Vita's motion for summary judgment on the issue of written description is denied.

Dentsply has also moved for summary judgment on the issue of written description. In its motion, however, Dentsply contends that the '157 Patent is invalid for lack of written description because none of the claims of the '157 Patent as originally filed claimed a process for creating a set of dental color materials, the patent was amended during its prosecution to claim a process, and the specification does not otherwise describe such a process. (Dentsply's Mot'n, p. 2.) Dentsply explains that the reason for the absence of a claimed process is twofold: first, Dr. Hall intended only to claim the products, the set of dental color materials and the artificial tooth, and second, Dr. Hall could not disclose a process for creating dental color materials because he not yet invented such materials at the time he filed the application. (*Id.*, p. 8.) To support this contention, Dentsply presents evidence that it took several more years to develop a set of dental color materials that technicians could use to create dental restorations that would match the shade guides. (Gray Decl., ¶ 5, Ex. C.) Furthermore, Vita continued to develop the process after Dr. Hall suffered a stroke and it was only in 1998 that Vita was able to sell the product. (*Id.*, Ex. D, p. 230-31.) According to Dentsply, this evidence shows that Dr. Hall did not have a process for developing the materials at the time of application and, therefore, the patent application contained no such process. Accordingly, Dentsply avers that the '157 Patent is invalid for a lack of written expression.

Vita, on the other hand, contends that claims 17-22 as issued describe the invention in a nearly identical way as the original application and that one skilled in the art would understand that Dr. Hall was in possession of the invention. (Vita's Opp'n, p. 3.) Furthermore, Vita argues that pursuant to this Court's Claim Construction Order, the claims are product-by-process claims, and are not limited to product made by the identical process but also products made by a different process that possess the same characteristics as products made by the process claimed. (*Id.* (citing Court Order re Claim Construction, May 4, 2005, p. 42).) As such, it was the product that was claimed and it was claimed in the original application. (Vita's Opp'n, p. 3.) Finally, Vita explains that the amendment was made to positively recite the limitations as steps of a process by which the materials are made, rather than the steps by which the color materials were selected. (*Id.*, pp. 5-6.)

The Court finds that Vita has met its Celotex burden and has established a material issue of fact. While Vita contends that Dr. Hall merely amended the '157 Patent to recite the limitations more positively, Dentsply presents evidence that

Dr. Hall made the amendment late in prosecution of the '157 Patent because he did not create the process until that time. Therefore, a material issue of fact exists as to whether Dr. Hall was indeed in possession of the product-by-process patent at the time of the initial application. For this reason, Dentsply's motion for summary judgment on the issue of written description is denied.

## 2. Enablement

\*8 Section 112 also requires that the specification enable one skilled in the art to make and use the invention. The specification must be enabled when it is filed. [Ajinmoto Co. v. Archer-Daniels-Midland Co.](#), 228 F.3d 1338, 1345 (Fed. Cir. 2000). The Federal Circuit has determined that the specification must teach those skilled in the art how to make and use the invention as broadly as it is claimed. [In re Goodman](#), 11 F.3d 1046, 1050 (Fed. Cir. 1993). One skilled in the art must be able to use the invention without undue experimentation. *Id.*

Vita moves this Court for summary adjudication that the '157 Patent is not invalid for lack of enablement. To support its motion, Vita makes two arguments: first, that because the patent does not require layering, the patent need not describe layering, and second, because claims at issue are not directed toward the actual manufacture of dental porcelains, the patent need not disclose a method for manufacture. (Vita's Mot'n, pp. 5-8.) The Court has already determined that the question of whether layering is required remains an issue of fact. (See *supra*, pp. 10-11). The Court will therefore limit its discussion of the lack of enablement to the method for producing dental color materials.

Vita argues that the claims are not directed toward the manufacture of dental porcelains, and therefore, the process for the manufacture need not be described in the patent. (Vita's Mot'n, p. 7.) Specifically, Vita asserts that the materials and techniques for making artificial teeth were well known to persons skilled in the art, and therefore, need not be disclosed. (*Id.*, p. 8.) Rather, according to Vita, the patent protects a process for selecting the colors of the dental materials and that this is sufficiently disclosed in the patent. (*Id.*)

Dentsply on the other hand argues that the '157 Patent does not enable because it requires undue experimentation. The Federal Circuit has held that a reasonable amount of experimentation will not result in a finding of invalidity

based on enablement. [Enzo Biochem v. Calgene](#), 188 F.3d 1362, 1371 (Fed. Cir. 1999). To determine reasonableness, a court may consider the following factors: (1) the quantity of experimentation necessary, (2) the amount of direction or guidance presented, (3) the presence or absence of working examples, (4) the nature of the invention, (5) the state of the prior art, (6) the relative skill of those in the art, (7) the predictability or unpredictability of the art, and (8) the breadth of the claims. *Id.* at 1371-72. The Court need not consider all these factors in making its determination. *Id.*

First, Dentsply argues that making and using the patent took years of experimenting by research teams with far greater skill than one ordinary skilled in the art, including both Dr. Hall and Vita experts, as well as Dentsply's own research team. (Dentsply's Opp'n, p. 17.) Although the test to determine whether experimentation is undue is not merely quantitative, the Federal Circuit has given guidelines as to unreasonableness. See [Genentech, Inc. v. Novo Nordisk, A/S](#), 108 F.3d 1361, 1367 (Fed. Cir. 1997) (finding that the fact that it took more than one year for a person to use the patent to make a human protein shows that the patent could not be used without undue experimentation); [White Consolidated Indus., Inc. v. Vega Servo-Control, Inc.](#), 713 F.2d 788, 791 (Fed. Cir. 1983) (holding that one and a half to two years of experimentation is unreasonable). In the instant case, it took at least four years for the inventor and a team of experts to perform the process described in the patent and create a set of dental color materials. (Gray Decl., ¶¶ 4-5.) Furthermore, it took Dentsply's experts two years to shade porcelain dental color materials because of the complex effects of layering on color. (Sundar Decl., ¶¶ 3-4.) Although it is an issue of fact as to whether layering is required to make dental porcelains, assuming one skilled in the art knew that layering is required, the fact that it took so long to develop porcelain dental color materials raises a question of fact as to whether one skilled in the art is truly enabled by the specification in the '157 Patent to make and practice the invention.

\*9 Furthermore, Dentsply avers that the fact that Dr. Hall required specific computer programming to manipulate and process the data collected from extensive tooth color surveys is further evidence that the claims in the '157 Patent require undue experimentation. (*Id.*, p. 19.) The Federal Circuit has noted that significant mathematical manipulation and a need to write a computer program to practice the invention may be factors that support a finding of undue experimentation if not disclosed in the patent. [Union Pacific Res. Co. v. Chesapeake Energy Corp.](#), 236 F.3d 684, 691 (Fed. Cir. 2001); [White](#), 713

F.2d at 791-92. The Court therefore finds that a material issue of fact exists as to whether Dr. Hall should have disclosed the software and the mathematical manipulation he conducted through the software in the ‘157 Patent remains a material issue of fact.

Finally, Dentsply contends that because the specification does not locate the longitudinal access, the disclosure in the patent is broader than that in the specification, and therefore requires experimentation by one skilled in the art to find the longitudinal access. (*Id.*, p. 22.) The Federal Circuit has noted that where an inventor himself engages in significant experimentation to commercialize the invention, this is an indication of undue experimentation. *Enzo Biochem*, 188 F.3d at 1372. Based on this, the Court agrees with Dentsply that the fact that Dr. Hall conducted significant experimentation, combined with the fact that the ‘157 Patent does not locate the longitudinal axis, leaves open a material issue of fact as to whether the ‘157 Patent does enable one skilled in the art to locate the offset of the longitudinal axis of the tooth color space.

For the foregoing reasons, Vita's motion for summary adjudication that the ‘157 Patent is not invalid for a lack of enablement is denied.

At oral argument, Dentsply invited the Court to grant summary judgment *sua sponte* in Dentsply's favor. *Mora v. Construction Laborers Pension Trust for Southern California*, 435 F.3d 1211, 1124 (9th Cir. 2006.) The Court is not satisfied that the issue has been adequately ventilated, and therefore declines to do so.

## B. Anticipation

Vita moves for summary adjudication that the ‘157 Patent is not invalid due to anticipation. (Vita's Mot'n, p. 1.) To establish anticipation under 35 U.S.C. Section 102, “every limitation of a claim must identically appear in a single prior art reference.” *Gechter v. Davidson*, 116 F.3d 1454, 1457 (Fed. Cir. 1997). “A reference anticipates a claim if it discloses the claimed invention such that a skilled artisan could take each teaching in combination with his own knowledge of a particular art and be in possession of the invention.” *In re Graves*, 69 F.3d 1147, 1152 (Fed. Cir. 1995) (internal citations and emphasis omitted). A prior art reference may anticipate a later patent without expressly disclosing a feature of the claimed invention if that missing

feature is necessarily present, *i.e.*, inherent, in the single anticipating reference. *Schering v. Geneva Pharms.*, 339 F.3d 1373, 1377 (Fed. Cir. 2003).

Vita asks the Court to find that, as a matter of law, U.S. Patent Number 4,657,399 (“the ‘399 Patent”), the predecessor to the ‘157 Patent, does not anticipate claims 17 to 22 of the ‘157 Patent. Furthermore, Vita seeks a finding that other prior art references written by Dr. Hall do not anticipate claims 17 through 22 of the ‘157 Patent, including the Australian application PG 3002 to which the ‘399 Patent claims priority and two articles from 1991 written by Dr. Hall. (*Id.*)

### 1. The ‘399 Patent

The Court has already addressed whether the ‘399 Patent anticipates the ‘157 Patent. In the *Order Denying Defendant Dentsply's Motion for Summary Judgment of Invalidity*, the Court found that the ‘399 did anticipate a set of dental color materials, an *artificial tooth* fabricated from at least one of the dental color materials, and cuts that are not perpendicular to the longitudinal axis. August 5, 2005 Order, pp. 6-8. The Court also determined that the color variations observed over the length of an offset axis is a purely natural phenomenon. (*Id.*, p. 9.) The Court ultimately denied the motion because genuine issues of material fact existed as to whether the “offset” limitation is inherent. (*Id.*, p. 11.) The Court will therefore limit its discussion to whether the “offset” limitation is in fact anticipated or whether it is inherent.

\*10 Vita claims that the ‘399 Patent does not anticipate the “offset” limitation. Rather, Vita argues that the ‘399 Patent discloses a longitudinal axis that is parallel to the vertical luminance axis and the only orientation provided in the ‘399 Patent is that the cuts are substantially parallel to the a-b plane. This arrangement, according to Vita, results in central colors located on a vertical axis that is perpendicular to the planes of the horizontal cuts. (Vita's Mot'n, pp. 6-7.)

Dentsply, however, contests this reading of the ‘399 Patent. First, Dentsply notes that the ‘399 Patent describes the longitudinal axis as “substantially parallel” to the vertical luminance, and not exactly parallel as described by Vita. (Dentsply's Opp'n, p. 6.) Furthermore, Dentsply points out that dependant claim 18 of the ‘157 Patent describes the offset limitation as “approximately 3 degrees in hue towards red for each adjacent cut in a direction of decreasing luminance.” (Brookey Decl., Ex. A, col. 11, lns. 37-38.)

Noting that the Court has construed “approximately 3 degrees in hue” to mean “2-4 degrees in hue towards red” (Claim Construction, p. 22-23), and noting that claim 17 is broader than claim 18 and would therefore cover offsets greater than zero but less than two, Dentsply contends that a longitudinal axis that is “substantially parallel” may in fact include an offset of some number between zero and two.

The Court notes that Dentsply is correct in its reading of the ‘399 Patent and that the ‘399 Patent does claim a longitudinal axis “substantially parallel to the vertical luminance axis.” The Court also agrees with Dentsply that whether a “substantially parallel” longitudinal axis includes the “offset” in claim 17 remains a material issue of fact. Summary judgment on this motion is therefore denied.

## 2. Australian PG 3002 Application

Next, Vita argues the Australian PG 3002 Application (“App. PG 3002”) does not anticipate the claims in the ‘157 Patent. Specifically, Vita contends that the App. PG 3002 identifies a longitudinal weak-strong axis and makes cuts on bright-dull planes perpendicular to the longitudinal axis. (Vita's Mot'n, p. 7; Brookey Decl., Ex. C, p. 5.) According to Vita, this means that the longitudinal axis is not offset and that therefore there is no disclosure of the selection of colors on the conceptual cuts of the tooth colorspace. (Vita's Mot'n, p.7.)

Dentsply disputes Vita's explanation of the App. PG 3002 on two grounds. First Dentsply objects the Vita's reliance on the analysis of Dr. Kelly who is not an expert on color theory. The Court sustains this objection as described above. (*Supra*, Section II.E.) The Court therefore cannot consider Dr. Kelly's testimony as it relates to the theoretical discussion of tooth color space. Accordingly, the Court finds that Vita has not met its burden under *Celotex* and summary judgment as to whether the App. PG 3002 anticipates must be denied.

Dentsply further argues Vita was inaccurate in explaining that the App. PG 3002 describes perpendicular cuts. (Dentsply's Opp'n, p. 11.) Rather, Dentsply notes that the App. PG 3002 provides that “the sausage like body 10 can be regarded as having a longitudinal axis (the WEAK-STRONG axis of Fig 2) and can be **transversally** cut (in the DULL-BRIGHT plane of Fig 2) as indicated in Fig 3.” (Dentsply's Opp'n, p. 11 quoting App. PG 3002, p. 5, Ins. 6-12 (emphasis in Opposition).) Noting that “transversally” does not equate with “perpendicular,” Dentsply contends that Vita's argument is

untenable. (Dentsply's Opp'n, p. 11.) Furthermore, according to Dentsply, the ‘399 Patent incorporates the App. PG 3002, and therefore, the Court should find that the ‘157 is anticipated.

\*11 The Court agrees with Dentsply insofar as Vita's untenable reading of the App. PG 3002. The language of the App. PG 3002 does describe transversal cut and not perpendicular cuts. According to Dentsply, transverse is defined as “situated or lying across; crosswise.” (Dentsply's Opp'n, p. 11 (citing *The American Heritage Desk Dictionary*)). However, according to the *Oxford English Dictionary*, one definition of “transverse” is “situated or extending across the length of something, *spec.* at right angles.” (*Oxford English Dictionary*, available at <http://www.oed.com/>.) Because the Court has not been asked to construe this term, its definition remains a material issue of fact.<sup>6</sup>

6 “Material not explicitly contained in the single, prior art document may still be considered for purposes of anticipation if that material is incorporated by reference into the document.” *Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272, 1282 (Fed. Cir. 2002). The specification in the ‘399 Patent states that “the No. PG 3002, the disclosure of which is hereby incorporated by reference.” (Brookey Decl., Ex. B, Col. 2, Ins. 33-34.) Vita, however, argues that the App. PG 3002 was incorporated for the specific purpose of describing the Munsell system. The Court therefore finds that an issue of fact exists as to the extent of incorporation.

## 3. The 1991 Hall Articles

Vita contends that the 1991 Hall articles describe a tooth color guide that has twenty-seven color samples arranged in three levels of luminance, with nine samples on each of three levels. (Vita's Mot'n, p. 8.) According to Vita, there is no disclosure of the central colors lying on a longitudinal axis that is offset from an axis perpendicular to the luminance planes. (*Id.*) Rather, the longitudinal axis is a vertical axis perpendicular to the planes. (*Id.*) As above, Vita relies solely on the testimony of Dr. Kelly. Again, because this testimony relates to color theory, the Court cannot consider the testimony in evaluating this motion. Accordingly, Vita has failed to meet its *Celotex* burden and summary judgment is therefore denied.

#### 4. Is an Offset Longitudinal Axis Inherent?

Vita's final argument in this motion is that the offset is not inherent. (Vita's Mot'n, pp. 8-9.) Specifically, Vita contends that the offset being a natural phenomenon does not mean that it is inherent in the patent. (*Id.*, p. 9.) Vita presents the testimony of Dr. Johnston as evidence that there is no accepted way of identifying the longitudinal axis, and that therefore, it cannot be considered inherent.<sup>7</sup> Dentsply, however, argues that although there may be more than one accepted way to identify the axis does not mean that a person of ordinary skill can identify the axis or that there is no way to identify the longitudinal axis. (Dentsply's Opp'n, p. 14.) The Court agrees with Dentsply that Dr. Johnston's testimony raises issues of fact as to the ways to identify the longitudinal axis. Furthermore, the Court does not find the testimony to be sufficient to meet Vita's Celotex burden. The question of inherency therefore remains a material issue of fact.

<sup>7</sup> “Q. Is there an accepted way of identifying the longitudinal axis of the tooth color space? A. Not to my knowledge.” (Johnston Dep. 56:24-57:1, Jan. 24, 2006.)

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For the foregoing reasons, Vita's motion regarding anticipation is denied.

### C. Infringement

#### 1. Vita's Motion for Summary Adjudication of Infringement of Claim 17

Vita moves this Court for summary adjudication that Dentsply's Ceramco3 C3 dentin and opaque dentin materials violate claim 17 of the '157 Patent. In so arguing, Vita explains that its own 3D Master shade guide meets the limitations of claims 17 and that a visual comparison of Dentsply's C3 materials with the 3D Master shade guide reveals infringement. Vita further contends that by engaging in research whose goal was to copy the 3D Master shades and by marketing the C3 materials as matching, Dentsply infringed on the '157 Patent. Finally, Vita contends that spectrophotometry is an inaccurate means to assess the data and that a visual analysis is a better means to compare and in fact establishes that the C3 materials copy the 3D Master shade guide.

\*12 In opposing this motion, Dentsply argues that infringement cannot be determined by a comparison of the C3 materials with the 3D Master shade guide for the following reasons: (1) the law does not permit the comparison of an accused product with a commercial embodiment; (2) Vita improperly compares dental materials to a shade guide; (3) Dentsply did not copy but rather followed its own philosophy in creating its product; (4) Vita's 3D Master shade guide itself does not meet the limitations of claim 17; and (5) visual analysis is a subjective and inaccurate means to determine infringement.

Dentsply's first argument in opposition to Vita's motion is that Vita improperly compares the C3 materials to the 3D Master shades because the 3D Master shades are commercial embodiments of claim 17. The Federal Circuit has clearly noted that it is claims that are infringed and not commercial embodiments. Spectrum Int'l, Inc. v. Sterilite Corp., 164 F.3d 1372, 1381 (Fed. Cir. 1998); Datascope Corp. v. SMEC, Inc., 879 F.2d 820, 824 (Fed. Cir. 1989). Therefore, it is well-settled law that the appropriate analysis to determine infringement is a comparison of the alleged infringing product and the claims in the patent. Datascope, 879 F.2d at 824. Rather than compare the C3 materials to the limitations in claim 17, Vita bases its infringement argument on a visual comparison to the 3D Master shade guide, Vita's claimed commercial embodiment of the '157 Patent. Comparison to the commercial embodiment is simply not sufficient to establish infringement. Vita has therefore failed to meet its Celotex burden.

At oral argument, Vita sought to justify its reliance on product comparisons by citing to Glaxo, Inc. v. TorPharm, Inc., 153 F.3d 1366, 1372-73 (Fed. Cir. 1998). However, as Dentsply points out, the opinion rejects direct product comparisons. *Id.* at 1373. In fact, the analysis in Glaxo was far more complicated. The issue there was whether a particular compound was present in the infringing product. An infrared profile was developed using the patent holder's compound, and that profile was compared to the profile for the infringing product. A sample was needed to create the reference profile. The infrared profile was a product of the constituents in the sample. With twenty-nine peaks matching, Glaxo's expert opined that the defendant's product infringed. Here there is no certainty that Vita's commercial embodiment produces a unique bench mark in the same sense that an infrared profile of a given element will produce a unique profile. At bottom, Vita's approach is still an impermissible product comparison.

Even if the Court were to accept Vita's approach here, it would still be necessary to deny summary judgment because of the material dispute over the accuracy of Vita's methodology. See *id.*

Vita argues that a visual comparison of the C3 materials to the 3D Master shade guide is a more accurate method to determine infringement and that such a comparison in fact reveals infringement. (Vita's Mot'n, pp. 18-19.) To support this argument, Vita presents the testimony of Dentsply's expert, Dr. White, who testified that visual matching is a better method to use when comparing the colors of "teeth works." (White Dep. 95:8-12, Jan. 19, 2006.)

Dentsply, on the other hand, opposes the sole use of visual analysis. Dentsply puts forward the testimony of Dr. Kelly, Vita's expert, in which he admits that visual analysis is subjective. (Kelly Dep. 135:3-20, Feb. 8, 2006.) Dentsply also presents the expert report and an article by Vita's expert, Dr. Brewer, indicating the inherent unpredictability of visual shade matching in the manufacture of dental crowns. (Castro Decl., Exs. P, Q.) Additionally, Dr. White testified that visual assessment is not "a sound assessment of position in the tooth color space." (White Dep. 64:21-23, Jan. 19, 2006.) In so offering this evidence, Dentsply successfully raises a material issue of fact as to the reliability and value of visual analysis.

**\*13** For the foregoing reasons, Vita's motion for summary adjudication on the issue of infringement is denied.

2. Dentsply's Motion for Summary Judgment of Non-Infringement

Dentsply has also moved for summary judgment on the issue of infringement. In the Claim Construction Order, the Court construed the limitations of claims 17 and 20 as a product-by-process patent such that a product made by a different process may infringe the product so long as it displays specific characteristics that a product made by the process in claims 17 and 20 would possess. Order re Claim Construction, May 5, 2005, pp. 38-39. For a product to infringe the '157 Patent, the following must occur: (1) there must be substantially parallel cuts on an elongated body of possible dental colors onto which regular grid lines are conceptually located; (2) each color must be positioned at an intersection of the regular grid lines; and (3) the central colors, i.e. the color lying at the central location of the grid, must lie on the longitudinal

axis of the elongated tooth body, which is offset from an axis that is perpendicular to the planes of the parallel cuts. Order Granting Defendant Dentsply's Motion for Reconsideration of the Court's May 5, 2005 Claim Construction Ruling, June 10, 2005, p. 2.

Dentsply argues that in the C3 materials (1) the colors do not lie on substantially parallel conceptual divisions; (2) the colors are not located at crossing points of regular grids; and (3) the central color are not located on a longitudinal axis. In making this assessment, Dentsply's attorney has plotted data derived from spectrophotometric analyses conducted by Vita. (Dentsply's Opp'n, p. 16.) In plotting the data on both a L\*a grid and a L\*b grid, Dentsply shows that the coordinates of its colors do not in fact lie on parallel planes, but in fact, deviate from those parallel lines, even when the lines are drawn with thick dark lines. (*Id.*, p. 16-17; Glidden Decl., Ex. E.) Furthermore, Dentsply avers that each color of the C3 material is not positioned at an intersection on a regular grid line. (Dentsply's Opp'n, p. 18; Glidden Decl., Ex. D.) Finally, Dentsply shows that when the central colors are plotted, they do not form a straight line. (Dentsply's Opp'n, p. 20; Glidden Decl., Ex. F.) This was apparent in both the L\*a grid and the L\*b grid. In fact, Dentsply presents the testimony of Dr. Albarski who could not draw a straight line when the central colors were plotted but rather noted that the lined was curved. (Albarski Dep. 128:14-130:7, Dec. 1, 2005 attached to Kohler Decl., Ex. C.) Accordingly, Dentsply argues that the C3 materials do not literally infringe the claims.<sup>8</sup>

<sup>8</sup> Dentsply contends that pursuant to Local Patent Rule 3-1(d), Vita is estopped from arguing doctrine of equivalents because it did not make the assertion in any preliminary infringement contentions. Vita, on the other hand, seeks leave to amend the contentions to assert a doctrine of equivalents claim. The Court denies this relief. In doing so, the Court notes the '157 Patent requires the colors to lie at the intersections of the grids, to allow otherwise, i.e. that the colors lie close to the intersection, would read this element out of the '157 Patent. The doctrine of equivalents cannot be used to read an element out of a claim. Seachange Int'l., Inc. v. C-COR, Inc., 413 F.3d 1361, 1378 (Fed. Cir. 2006). Significantly, claim 17 asserts that the color is "at" the intersection, not "substantially" or "generally."

**\*14** Vita, opposes Dentsply's motion by making the following three arguments: (1) the grids are inadmissible as improper expert testimony; (2) the evidence shows that Dentsply's goal was to match the 3D Master shade guide

and in fact accomplished that goal; (3) [spectrophotometry](#) is imprecise and visual analysis is in fact more accurate. The Court will consider each of these arguments in turn.

Vita first contends that the grids made by Mr. Glidden are inadmissible expert testimony.<sup>9</sup> As discussed above, one need not be an expert to use Excel.

<sup>9</sup> The construction of the grid is irrelevant. So long as the data are plotted properly, a set of data reproducing a straight line will produce a straight line on any grid system. To be sure, if the grid is laid out as 1:1 (vertical to horizontal) as opposed to 2:1 (vertical to horizontal), the line will have a different angle. For example, assume the data satisfy the equation  $X=Y$ . The line will have a 45° angle on a 1:1 grid and a steeper angle in a 2:1 grid. But it will still form a line. Here, Vita takes no issue with the data or how they are plotted.

Second, Vita contends that comparing the C3 materials to the 3D Master shade guide reveals infringement, and Dentsply's stated goals of matching only confirms this. However, as discussed above, comparison to a commercial embodiment is an improper means to establish infringement. Moreover, even intentional copying will not create infringement if the resulting product does not satisfy the claimed elements.

Finally, Vita opposes the reliance on [spectrophotometric measurements](#). To support its argument, Vita presents a chart in which measurements attained by Dentsply are compared to measurements attained by Vita. (Dillard Decl., ¶ 2.) The Court finds this chart inadmissible for the following reasons. Although the documents from which data was collected found in Exhibits C and D are properly authenticated and admissible,<sup>10</sup> the Court notes that the data attributed to Dentsply is different from the data found in the Dentsply documents in Exhibit D. Although Mr. Dillard explains that the hue and chroma measurements were converted to  $a^*$  and  $b^*$  coordinates (Dillard Decl., ¶ 4), Mr. Dillard does not explain how the conversions were made and who made the conversions. Furthermore, the document citing the conversions is not properly authenticated. Additionally, the chart contains a value described as the change in

color and measured by the equation  $\sqrt{\frac{E(a^2+b^2+L^2)}{1/2}}$ . However, Mr. Dillard does not explain from where this equation came and who conducted the calculations. This information therefore is not properly authenticated and must be disregarded by the Court.<sup>11</sup>

<sup>10</sup> The Court believes that Mr. Dillard made an error in labeling the document in Exhibit C a Dentsply document when it is clearly a Vita document.

<sup>11</sup> In its reply, Dentsply also objects to the representation of this evidence on the basis that Mr. Dillard is not an expert. The Court finds that Mr. Dillard need not be qualified as an expert to provide the information in such a matter. Dentsply also contends that the evidence is irrelevant. However, the Court finds the evidence relevant because it tends to show possible differences in results in spectrophotometric analyses. Nonetheless the evidence is inadmissible for the reasons stated above.

Vita's only other evidence relating to the accuracy of spectrophotometric analysis is a statement by Dr. White that spectrophotometric analysis is almost as good as visual matching. (White Dep. 95:8-12, Jan. 19, 2006.) The Court, however, does not find that stating that spectrophotometric analysis is almost as good as visual matching establishes a material issue of fact as to the accuracy of spectrophotometric analysis. Furthermore, Vita's own reliance on spectrophotometric analysis to establish that its product meets the specifications in claim 17 belies its argument on inaccuracy. Because Vita does not raise a material issue of fact, Dentsply's motion on the issue of infringement is granted.

V. CONCLUSION

\*15 For the foregoing reasons, all of Vita's motions are denied. Dentsply's motion on written description is also denied. Dentsply's motion on infringement, however, is granted.

**All Citations**

Not Reported in Fed. Supp., 2006 WL 8437644

# **EXHIBIT 4-C**

2010 WL 3341593

 KeyCite Yellow Flag - Negative Treatment  
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2010 WL 3341593

Only the Westlaw citation is currently available.

**This decision was reviewed by West editorial staff and not assigned editorial enhancements.**

United States District Court,  
E.D. California.

James David MAJORS, Petitioner,

v.

WARDEN, San Quentin  
State Prison, Respondent.

No. 2:99-cv-00493 MCE KJN.

|  
Aug. 23, 2010.

**Attorneys and Law Firms**

[Allison Claire](#), Tivon Schardl, Federal Defender, Sacramento, CA, [Richard C. Neuhoff](#), [Richard C. Neuhoff](#), Attorney, New Britain, CT, for Petitioner.

**ORDER**

[KENDALL J. NEWMAN](#), United States Magistrate Judge.

\*1 After the July 8, 2010 hearing on petitioner's motion for discovery, the court issued an order permitting further briefing regarding three issues: (1) whether petitioner's subpoenas seeking prosecution witness Bonnie Hogue's mental health records and those seeking records regarding Ms. Hogue and petitioner's co-defendant Mr. Reese could be more narrowly tailored; (2) whether respondent will assert procedural default bars to any claims upon which petitioner seeks discovery; and (3) if the court finds good cause for the discovery of Ms. Hogue's mental health records, whether Ms. Hogue is entitled to notice, and if so how that notice will be given. (Dkt. No. 170 at 1–2.) Respondent filed a statement regarding the first two issues and petitioner filed a response. In addition, petitioner filed a statement regarding the third issue of notice to Ms. Hogue. After considering the parties' original briefs on petitioner's May 25, 2010 motion for discovery (dkt.nos.159, 166, 167), the parties' briefs in the

prior discovery proceedings before Judge Nowinski (dkt. nos.76, 77, 78, 115, 116, 117), the parties' briefs in response to the court's July 12, 2010 order (dkt.nos.172, 173, 176), the argument of counsel at the hearing, and good cause appearing, the court finds and orders as follows.

Petitioner seeks leave to conduct discovery in three areas. First, he seeks leave to issue subpoenas to a number of mental health treatment centers, hospitals, and jail facilities in California and Nevada to discover information about prosecution witness Bonnie Hogue's mental health problems. Second, he seeks leave to issue subpoenas to law enforcement agencies seeking information that Ms. Hogue and petitioner's co-defendant Richard Reese had a preexisting relationship. Third, he seeks information to determine whether further benefits were provided to Ms. Hogue in exchange for testifying.

Rule 6(a) of the Rules Governing § 2254 Cases states that “[a] party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.” Good cause exists “where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief...” *Bracy v. Gramley*, 520 U.S. 899, 908–09, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 300, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969)). Where good cause exists, “it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.” *Harris*, 394 U.S. at 300.

In addition to arguing good cause under Rule 6, petitioner argues that the discovery sought was essentially pre-approved by Magistrate Judge Nowinski in 2006. While petitioner's third state habeas petition was pending before the California Supreme Court, Judge Nowinski considered several discovery requests by petitioner. In 2005, he ordered disclosure of various law enforcement records, including the Sacramento County Sheriff's Department case file, to petitioner's counsel. Apr. 19, 2005 Order (Dkt. No. 73.) Later, based on the declaration of Ms. Hogue's sister Susan Riley asserting that Hogue admitted lying at petitioner's trial, Judge Nowinski ordered in-court depositions of Hogue and Riley. Nov. 23, 2005 Order (Dkt. No. 83) at 2. Among other things, Ms. Hogue testified at her deposition that she had a history of mental health problems, which included hallucinations, suicide attempts and hospitalizations, starting

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when she was a teenager and continuing after petitioner's trial in 1990. (Dkt. Nos. 104 at 61–89; 118 at 34–48, 53–58.) After the depositions, petitioner renewed prior requests for discovery of information regarding Ms. Hogue's relationship to Mr. Reese, and information regarding the benefits Ms. Hogue received as a result of testifying. In addition, petitioner requested discovery of Ms. Hogue's mental health records. (Dkt.Nos.115, 117.) Respondent opposed those requests. (Dkt. No. 116.)

\*2 Judge Nowinski denied all requests. However, he stated that he would grant the first two requests if the California Supreme Court denied petitioner further factual development without a reasoned basis for doing so:

Comity counsels this court involve itself no further in developing the factual record at this point. However, if relief is denied in the California Supreme Court without a convincing reasoned decision explaining why further factual development is not required, this court will authorize the subpoenas for medical records and for law enforcement records implicating both Reese and Starr, to look for any clue how to resolve what respondent recognizes are irreconcilable accounts and also to assess, if Starr's testimony about her mental health is true, whether a decision to impose the death penalty should be based upon the testimony of such a person.

Feb. 8, 2006 Order (Dkt. No. 120) at 6–7. In an April 28, 2010 order, the California Supreme Court denied petitioner's third state habeas petition without explaining why further factual development was unnecessary. *In re James D. Majors*, No. S117112 (Dkt. No. 159–1).

While this court respects Judge Nowinski's prior analysis, it is not necessarily bound by Judge Nowinski's prior ruling. Below, the court reviews each of petitioner's requests to determine whether petitioner has established good cause for the discovery sought.

#### I. Subpoenas Regarding Ms. Hogue's<sup>1</sup> Mental Health History

<sup>1</sup> According to the parties, Ms. Hogue also goes by the name Bonnie Starr.

According to petitioner, Ms. Hogue was a key prosecution witness at trial. Petitioner describes her testimony as follows:

Bonnie Hogue (aka Starr) was a local prostitute who told police, and testified at trial, that she met petitioner and Robert Reese for the first time at a motel in south

Sacramento shortly after the homicides, spent the night with them, witnessed their division of cash and jewelry, and spent the next day with petitioner, helping him to ship contraband back to Phoenix before seeing him off at the airport. Ms. Hogue was the sole source of evidence that Reese and Majors were together after the homicides, and was the sole witness regarding petitioner's conduct in the day or so following the crimes.

(Dkt. No. 159 at 4.) Petitioner seeks to issue twelve subpoenas to obtain information about Ms. Hogue's mental health problems. (Dkt. No. 159–2, items 1–12.) Petitioner argues Ms. Hogue's mental problems are relevant to her credibility, which is central to several claims in the amended petition: (1) claim 23 that the prosecutor committed misconduct by relying on testimony he should have known was false and that he failed to disclose impeaching material; (2) claim 2 that counsel was ineffective for failing to adequately impeach Hogue; (3) claim 20 that petitioner's conviction and sentence are unreliable because, among other things, they are based on Hogue's false testimony; and (4) claim 21 that trial errors cumulatively prejudiced petitioner. (Dkt. No. 140.)

\*3 Respondent makes numerous arguments that petitioner is not entitled to the discovery sought. Each is addressed below.

#### A. *Privilege*

Respondent first claims the information petitioner seeks is protected from discovery by the psychotherapist/patient privilege. As petitioner points out, respondent does not have standing to raise this issue. See *United States v. Schlette*, 842 F.2d 1574, 1583 n. 5 (9th Cir.), *as amended*, 854 F.2d 359 (9th Cir.1988). The question for this court is whether or not petitioner has shown good cause for the discovery. Once petitioner propounds the subpoenas, parties with standing to raise the privilege may do so and the court will consider any privilege issues at that time.

#### B. *Relevance*

Respondent next argues the mental health records are not relevant to petitioner's claims 23 and 2. Until petitioner knows what sort of mental problems Ms. Hogue may have suffered before and/or during trial, it is not possible for petitioner to know whether the prosecutor or petitioner's trial counsel knew or should have known of these problems. Petitioner need not show this discovery alone will prove his claims. Rather petitioner shows good cause for the discovery when he shows the information sought is relevant to the subject matter of his claims and that if the facts are fully developed

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he “may” be entitled to relief. *Fed.R.Civ.P. 26(b) (1); Bracy*, 520 U.S. at 908–09. Further, respondent ignores the relevance of this discovery to claim 20, in which petitioner alleges that a number of factors, including Ms. Hogue's false testimony, resulted in an unreliable conviction and sentence.<sup>2</sup> (Dkt. No. 140 at 525–28.)

<sup>2</sup> The information sought may also be relevant to petitioner's claim of cumulative prejudice, claim 21. However, the court is not convinced that a petitioner should be entitled to discovery on a claim of cumulative prejudice alone. If he was so entitled, any trial error, regardless of its significance or basis for relief, could be raised to establish good cause for discovery.

Respondent asks that if the court finds good cause for this discovery, it should be limited to the first seven subpoenas. According to respondent, the remaining five subpoenas would contain little, if any, information relevant to Ms. Hogue's mental health. The court disagrees. Subpoenas eight through ten are directed to substance abuse treatment programs which Ms. Hogue attended in the course of probation.<sup>3</sup> (Dkt. No. 115 at 2.) Given the obvious potential relationship between mental health issues and substance abuse issues, it seems likely Ms. Hogue's mental health would have been a subject of records maintained by these facilities. Subpoenas eleven and twelve are directed to the Yolo County Juvenile Court and the county's Child Protective Services Agency. Petitioner based these requests on Ms. Hogue's statements in her deposition that she spent time in group homes as a teenager. (Dkt. No. 115 at 2–3.) Again, if the court and protective services agency have records regarding Ms. Hogue, it is reasonable to think they may include information about her mental health. The court finds petitioner has shown the information sought by subpoenas eight through twelve may be relevant to the subject matter of claims 23, 2, and 20.

<sup>3</sup> These subpoenas are directed to the John H. Jones Community Clinic, the Cache Creek Lodge, and Beamer Street, all in Woodland, California.

#### C. Limitation on Time Covered by Subpoenas

\*4 Respondent next attempts to limit the information sought to agencies Ms. Hogue stated she had contact with before petitioner's trial. As the court stated during the hearing, agencies Ms. Hogue had contact with after trial would likely have information regarding Ms. Hogue's mental health history prior to trial. Respondent alternatively argues that each subpoena should specifically state that it seeks “only

records that make explicit reference to, or incorporate, information regarding mental health diagnoses or treatment before October 1990.” Petitioner argues this would put an unreasonable burden on the custodian of records because specific dates may often not be mentioned in the recitation of Ms. Hogue's mental health history. This court agrees. Further, it is certainly possible records of treatment post October 1990 could lead to the discovery of information pre-dating trial.

#### D. Overbreadth

Respondent next argues the subpoenas are overbroad because they seek “any and all information” that each entity may have about Ms. Hogue. The subpoenas specifically include any information the recipient may have about Ms. Hogue's “medical history and/or treatment, including communicable diseases, HIV/AIDS status, and rehabilitation (including alcohol and drug rehabilitation.” They also seek any communications between the agency and “lawyers, law enforcement officers, witnesses, prosecutors, judges, probation officers, correctional officers, counselors or any other individuals .” (Dkt. No. 159–2, pp. 4–5.) Petitioner argues generally that medical problems may shed light on a mental health diagnosis and notes that he only seeks that information from agencies and providers who addressed issues related to Ms. Hogue's mental health care. With respect to the broad scope of communications sought, petitioner repeats the argument that since he is only seeking information from those who provided mental health care, it is reasonable to think those communications may be relevant.

With respect to those subpoenas directed to mental health agencies, the court agrees with petitioner that all records those facilities found important may be relevant to petitioner's mental health. However, petitioner seeks the same information from the University of California Medical Center, the Yolo County Juvenile Court, and Yolo County Child Protective Services. The court finds the subpoenas overbroad with respect to these facilities. Petitioner will be permitted to propose amended subpoenas for those facilities.

#### II. Subpoenas Regarding Ms. Hogue's Relationship with Mr. Reese

Petitioner submitted declarations with the petition from a number of people who indicate Ms. Hogue may have had a relationship with Mr. Reese prior to the crimes, contrary to her testimony at trial. (Dkt. No. 167 at 14–15.) Petitioner seeks to subpoena all law enforcement records of both Ms. Hogue and Mr. Reese to examine further any possible relationship

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between them. Respondent points out that petitioner has presented no credible evidence that Ms. Hogue and Mr. Reese were involved in any past criminal activity together. In his July 1 reply brief and July 27 responsive statement, petitioner does not show any reason to believe Ms. Hogue and Mr. Reese engaged in criminal activity together. While the court understands that law enforcement agencies should have records on both Ms. Hogue and Mr. Reese, petitioner has made a weak showing that those records will show any relationship between them. Accordingly, the court grants petitioner's request to subpoena the agencies identified in item 15 for any records which reference both Ms. Hogue, including any of her aliases, and Mr. Reese. (Dkt. No 159–2, item 15; Dkt. No. 115, ¶ 15.)

### III. Victim/Witness Program Records

\*5 Petitioner seeks to obtain records from the Sacramento County District Attorney's Victim/Witness Assistance Program regarding benefits that may have been conferred upon Ms. Hogue, and from the District Attorney for policies for dealing with witnesses and for records of investigations into or charges filed against Ms. Hogue. Respondent argues that petitioner already had access to the District Attorney's files and that the District Attorney explained in a declaration the provision of Victim/Witness program funds for Ms. Hogue. This court agrees that the Victim/Witness program may maintain separate records regarding benefits to Ms. Hogue that are different than those contained in the District Attorney's file on petitioner's case. As stated during the hearing, the court finds good cause for petitioner to subpoena the Victim/Witness Assistance Program for records. However, petitioner has not made a sufficient showing that the benefits provided to Ms. Hogue may have violated any policies. Accordingly, the court finds petitioner has not shown good cause for issuance of the subpoena on the District Attorney's Office. If petitioner's discovery reveals additional information in support of that subpoena, he may renew his motion to serve it.

### IV. Procedural Bar

Respondent's July 19 statement includes an argument that issuance of the discovery sought is premature because respondent intends to argue that claims 23 and 2 are procedurally barred. He asks the court to defer ruling on the discovery requests until any procedural bar issues are decided. Respondent is scheduled to raise any procedural bar arguments along with his answer by December 27, 2010. (Dkt. No. 170 at 2.) With respect to all these arguments,

respondent ignores the fact that petitioner also claims the evidence is relevant to claim 20, that petitioner's conviction and sentence are unreliable. Respondent does not assert claim 20 is subject to a procedural bar. Further, as petitioner points out, the procedural rules respondent alleges have infrequently been held to bar federal review. (Dkt. No. 176 at 7.) Accordingly, this court will not defer a ruling on petitioner's discovery requests pending any decision on procedural bar issues.

### V. Notice for Discovery of Mental Health Records

Petitioner provided the court with an overview of both federal, California, and Nevada notice provisions for the release of confidential health records. Petitioner has established to this court's satisfaction that neither petitioner nor this court are required to provide Ms. Hogue with notice that her records are being sought. The federal Health Insurance Portability and Accountability Act does not require notice if the records are ordered disclosed for use in a judicial proceeding. 45 C.F.R. § 164.512(e)(1). California's provisions on the confidentiality of medical information require the custodian of the records, not the court or party seeking them, to provide notice. Cal. Civ.Code § 1798.24. Nevada law regarding the disclosure of medical information similarly contains no requirement of notice by this court or the party serving the subpoena. *Humana Inc. v. District Court*, 110 Nev. 121, 123, 867 P.2d 1147 (1994). However, this court's holding that notice is not required at this stage does not preclude either the custodians of those records from providing notice or the custodians or Ms. Hogue from objecting to the release of her health records.

\*6 This court recognizes that Ms. Hogue's health records are, at least in some part, confidential. Petitioner proposes issuance of a protective order for those records. Respondent does not object. By separate order, this court will adopt the protective order proposed by petitioner.

For the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED that petitioner's May 25, 2010 Motion for Discovery is granted in part and denied in part as follows:

1. Petitioner may issue the subpoenas identified as items 1, 2, 4, 5, 6, 7, 8, 9, 10, and 13 in attachment 2 to petitioner's May 25 Motion for Discovery.
2. Petitioner may amend the subpoenas identified as items 3, 11, and 12 to address the overbreadth problems described above and file a renewed request to issue them.

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3. Petitioner may amend the subpoenas identified in item 15 to seek law enforcement records which refer to both Ms. Hogue and Mr. Reese and file a renewed request to issue them.

**All Citations**

Not Reported in F.Supp.2d, 2010 WL 3341593

4. Petitioner's request to issue the subpoena identified in item 14 is denied without prejudice.

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# **EXHIBIT 4-D**

2009 WL 10698414

Only the Westlaw citation is currently available.  
United States District Court, D. New Mexico.

JM, THROUGH her next friend John  
FOLEY, and J.E., through her next  
friend Maria Fellin, on their own behalf  
and on behalf of a class of all other  
similarly-situated persons, Plaintiffs,

v.

NEW MEXICO DEPARTMENT  
OF HEALTH, et al., Defendants.

CIV NO. 07-604 RB/ACT

|  
Filed 08/20/2009

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#### **MEMORANDUM OPINION AND ORDER**

ALAN C. TORGERSON, UNITED STATES MAGISTRATE  
JUDGE

\*1 **THIS MATTER** comes before the Court on five motions filed in this case. The first is Plaintiffs' Motion for Leave to File Sur-Reply filed May 20, 2009 [Doc. No. 264] for which no response was filed. The second is Intervenor's Office of the Governor of the State of New Mexico's ("Governor's Office") Motion for Protective Order filed April 10, 2009 [Doc. No. 238], Plaintiffs' Response filed April 27, 2009 [Doc. No. 250], Governor's Office Reply filed May 14, 2009 [Doc. No. 259], Plaintiffs' Sur-Reply filed May 20, 2009 [Doc. No. 264-2], Intervenor's Supplemental Brief filed June 26, 2009 [Doc. No. 281], Plaintiffs' Supplemental Brief filed

June 26, 2009 [Doc. No. 280], Defendants' Supplemental Brief filed August 7, 2009, with Errata filed August 12, 2009 [Doc. Nos. 296, 297], and Plaintiffs' Supplemental Brief filed August 7, 2009 [Doc. No. 295]. The third is the Governor's Office Second Motion for Protective Order filed April 27, 2009 [Doc. No. 249], Plaintiff's Response filed May 14, 2009 [Doc. No. 260], Governor's Office Reply filed June 4, 2009 [Doc. No. 268], Intervenor's Supplemental Brief filed June 26, 2009 [Doc. No. 281], Plaintiffs' Supplemental Brief filed June 26, 2009 [Doc. No. 280], Defendants' Supplemental Brief filed August 7, 2009, with Errata filed August 12, 2009 [Doc. Nos. 296, 297], and Plaintiffs' Supplemental Brief filed August 7, 2009 [Doc. No. 295]. The fourth is Defendants' Motion for Protective Order filed April 26, 2009 [Doc. No. 247], Plaintiffs' Response filed May 13, 2009 [Doc. No. 257], Defendants' Reply filed June 8, 2009 [Doc. No. 269], Defendants' Supplemental Brief filed August 7, 2009, with Errata filed August 12, 2009 [Doc. Nos. 296, 297], and Plaintiffs' Supplemental Brief filed August 7, 2009 [Doc. No. 295]. The fifth is Plaintiffs' Motion to Compel filed May 11, 2009 [Doc. No. 256], Defendants' Response filed June 8, 2009 [Doc. No. 270], Plaintiffs' Reply filed July 7, 2009 [Doc. No. 288], Defendants' Supplemental Brief filed August 7, 2009, with Errata filed August 12, 2009 [Doc. Nos. 296, 297], and Plaintiffs' Supplemental Brief filed August 7, 2009 [Doc. No. 295]. Having reviewed Plaintiffs' Motion for Leave to File Sur-Reply, the Court finds that it is well taken and it will be granted. Having reviewed the Governor's Office Motion for Protective Order, the Response, the Reply, the Sur-Reply, the supplemental briefs, and the applicable law, the Court finds that the Governor's Office Motion for Protective Order will be granted in part and denied in part. Having reviewed the Governor's Office Second Motion for Protective Order, the Response, the Reply, the supplemental briefs, and the applicable law, the Court finds that the Governor's Office Motion for Protective Order will be granted in part and denied in part. Having reviewed the Defendants' Motion for Protective Order, the Response, the Reply, the supplemental briefs, and the applicable law, the Court finds that the Defendants' Motion for Protective Order will be granted in part and denied in part. Having reviewed the Plaintiffs' Motion to Compel, the Response, the Reply, the supplemental briefs, and the applicable law, the Court finds that Plaintiffs' Motion to Compel will be granted in part and denied in part.

#### **I. BACKGROUND**

\*2 The general factual background of this case is set forth in this Court's Memorandum Opinion and Order entered

March 13, 2009 [Doc. No. 230]. The Governor's Office is presently seeking a protective order requesting that the depositions of Judge Robert Schwartz, Nancy Long, and Francisco Nogales be precluded in their entirety because such depositions would violate protections afforded by the executive privilege and the deliberative process privilege, and the depositions of Nancy Long and Judge Schwartz would also violate the attorney-client privilege. In its Motion, the Governor's Office further seeks protection from having to produce any documents or information requested in Plaintiffs' New Mexico Inspection of Public Records Act request, claiming the same privileges as for the depositions and further claiming that the patient information is confidential. Plaintiffs respond that the privileges asserted by the Governor's Office either do not apply or were waived and that all confidentiality concerns are adequately protected by the Confidentiality Order [Doc. No. 44] previously entered by this Court.

In the Governor's Office Second Motion for Protective Order, the Governor's Office moves for a protective order regarding materials referenced in the *duces tecum* portion of the deposition notices of Gerald McBride, Robert Casey, and Leroy Lucero, arguing that such information is protected from disclosure by the executive privilege, the deliberative process privilege, the attorney-client privilege, the work product doctrine, and confidentiality. Plaintiffs respond as they did to the Governor's Office's first motion regarding the asserted privileges and the confidentiality issues. Regarding work-product, Plaintiffs contend that the work-product doctrine does not apply because the requested documents were not prepared in anticipation of litigation, but even if the doctrine applies, Plaintiffs have demonstrated a substantial need for the requested documents and an inability to obtain them by other means.

The Defendants' Motion for Protective Order also moves for a protective order regarding materials referenced in the *duces tecum* portion of the deposition notices of Gerald McBride, Robert Casey, and Leroy Lucero, advancing the same arguments as those presented in the Governor's Office Motion and further arguing that information in the possession of Gerald McBride is protected by the attorney-client privilege, the work-product doctrine, and executive privilege. Defendants additionally argue that certain information in the possession of Robert Casey and Leroy Lucero is protected under the attorney-client privilege and the work-product doctrine. Plaintiffs contend that all factual information is discoverable from Mr. McBride and

that the asserted privileges regarding Mr. Casey and Mr. Lucero are inapplicable.

In Plaintiffs' Motion to Compel, Plaintiffs ask this Court to compel production of various documents, many of which appear to be addressed in the Governor's Office's and the Defendants' Motions for Protective Order. Defendants again assert all of the privileges they claim under their Motion for Protective Order.

## II. LEGAL STANDARD FOR ISSUANCE OF PROTECTIVE ORDER

Generally, discovery is allowed of any matter that is relevant to the claim or defense of a party, provided the requested information is not protected by a privilege. *Fed.R.Civ.P. 26(b) (1)*. Information need not be admissible at trial in order to be considered "relevant" under *Rule 26*. *Id.* The requested discovery, however, must appear "reasonably calculated to lead to the discovery of admissible evidence." *Id.* The decision to issue a protective order rests within the sound discretion of the trial court. *Wang v. Hsu*, 919 F.2d 130 (10th Cir. 1990). The moving party must set forth specific facts showing good cause for the issuance of the protective order, not simply conclusory statements. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n. 16 (1981). *See also Skellerup Ind. Ltd.v. City of Los Angeles*, 163 F.R.D. 598, 600-01 (C.D. Cal. 1995) (The moving party must demonstrate a particular and specific need for a protective order as opposed to the presentation of a conclusory argument.) (citations omitted). When a party contends that information or testimony is protected because of a privilege, the party asserting the privilege bears the burden of proof with respect to showing its entitlement to the privilege. *See Foster v. Hill*, 188 F.3d 1259, 1264 (10th Cir. 1999) ("A party claiming the attorney-client privilege must prove its applicability, which is narrowly construed.").

## III. APPLICABLE LAW FOR GOVERNOR'S OFFICE'S FIRST AND SECOND MOTIONS FOR PROTECTIVE ORDER, DEFENDANTS' MOTION FOR PROTECTIVE ORDER, AND PLAINTIFFS' MOTION TO COMPEL

### Privileges in General

\*3 The parties raise the issue of whether federal or state law should be applied to the various privileges asserted by Defendants. This case involves both federal and state-law claims. Generally when this situation arises, federal courts may apply federal privilege law to the federal claims and

state privilege law to the state-law claims. *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1551 (10th Cir. 1995), cert. denied, 517 U.S. 1190 (1996). However, where the privilege asserted goes to evidence that is relevant to both the federal and state law claims, federal privilege law should apply. *Vondrak v. City of Las Cruces, et al.*, 2009 WL 1255451 (D.N.M.). This Court finds that privileges asserted in this case go to evidence that is relevant to both the federal and state law claims, and, accordingly, the Court will apply federal law. However, it is still appropriate to consider the existence of state precedent in recognizing a particular privilege. See *Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996).

Executive Privilege

In *State of New Mexico ex rel. Attorney General v. First Judicial District Court of New Mexico*, 96 N.M. 254, 257, 629 P.2d 330, 333 (1981), the New Mexico Supreme Court held that executive privilege is recognized in New Mexico. The court found that the purpose of the executive privilege is to “safeguard the decision-making process of the government by fostering candid expression of recommendations and advice and to protect this process from disclosure.” *Id.* at 258, 629 P.2d at 334. The privilege is not, however, absolute; therefore, even if the executive privilege applies, a court “must balance the public's interest in preserving confidentiality to promote intra-governmental candor with the individual's need for disclosure of the particular information sought.” *Id.* If the party seeking discovery shows good cause, privileged information should be released. *Id.*

New Mexico law regarding executive privilege generally parallels that of federal law. In *Cheney v. U.S. District Court*, 542 U.S. 367, 382-389 (2004), the United States Supreme Court recognized that a civil litigant's need for discovery may be constrained where discovery requests impinge on the constitutional prerogative of officials in the executive branch to give advice and recommendations to the executive. This executive privilege shields confidential, executive branch communications from disclosure. *United States v. Nixon*, 418 U.S. 683, 705 (1974). It is based upon the principle that “those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decision making process.” *Id.* The question, then, is whether disclosure of information or collected material would expose the decision making process in such a way as to discourage discussion and thereby undermine the agency's ability to perform its functions.

The executive privilege is a “qualified privilege and can be overcome if the party seeking discovery shows sufficient need for the otherwise privileged material, with the court required to balance the litigant's need for the disclosure against the government's need for secrecy.” *Hinsdale v. City of Liberal*, 1997 WL 557314 (D. Kan.).

Primarily factual material and communications with or among agencies are not protected by executive privilege. *EPA v. Mink*, 410 U.S. 73, 87-88 (1973). See also *Bristol-Myers Co. v. Federal Trade Commission*, 424 F.2d 935, 939 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970); *Boeing Airplane Co. v. Cogheshall*, 280 F.2d 654, 660-61 (D.C. Cir. 1960).

Deliberative Process Privilege

The deliberative process privilege is a subset of the more general executive privilege. *In re U.S.*, 2009 WL 577794 (Fed. Cir.). It is designed to prevent injury to the quality of agency decisions by insuring that frank discussions within the agency are not inhibited by public disclosure. See *Kinoy v. Mitchell*, 67 F.R.D. 1, 11 (S.D.N.Y. 1975) (“The deliberate and decision-making processes of Government officials are held confidential to preserve the free expression, integrity and independence of those responsible for making the determinations that enable government to operate.”) The privilege “ ‘rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.’ ” *Casad v. U.S. Department of Health and Human Services*, 301 F.3d 1247, 1251 (10th Cir. 2002) (quoting *Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1, 8-9 (2001) ).

\*4 To fall within the deliberative-process privilege, information must be pre-decisional in nature and must form part of the agency's deliberative process. See *NLRB v. Sears Roebuck and Co.*, 421 U.S. 132, 151-152 (1975). Information is pre-decisional if it is prepared “to assist an agency decisionmaker in arriving at his decision” and may include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Formaldehyde Institute v. Department of Health and Human Services*, 889 F.2d 1118, 1122 (D.C. Cir. 1989) (internal quotations and citations omitted). See also *Pueblo of Zuni v. United States*, No. 01-1046 WJ/WPL, Memorandum Opinion and Order at 13, filed February 13, 2006 (Doc.

No. 205) (D.N.M. 2006) (where the court found that a pre-decisional document may include recommendations, proposals, suggestions, and other subjective evaluations which reflect the personal opinions of the writer and which discuss the wisdom or merits of a particular agency policy or recommend new agency policy.)

A pre-decisional document is part of the deliberative process if it relates to government decision making and its disclosure to the public “would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.” *Formaldehyde Institute v. Department of Health and Human Services*, 889 F.2d at 1122 (internal quotations omitted). The government has the burden of demonstrating “precise and certain reasons for preserving confidentiality of the materials at issue.” *Center for Biological Diversity v. Norton*, 336 F.Supp.2d 1155, 1159 (D.N.M. 2004) (citation omitted).

As with the executive privilege, the deliberative process privilege is a “qualified privilege and can be overcome if the party seeking discovery shows sufficient need for the otherwise privileged material, with the court required to balance the litigant's need for the disclosure against the government's need for secrecy.” *Hinsdale v. City of Liberal*, 1997 WL 557314 (D. Kan.).

The deliberative process privilege protects internal communications of a governmental agency when they are deliberative in nature, but not when they are purely factual. See *Daily Gazette Company, Inc. v. West Virginia Development Office*, 482 S.E.2d 180, 190 (W. Va. 1996) (“It is generally accepted that the deliberative process privilege does not extend to materials which are factual in nature, even if such materials may have been used by government decision makers in their deliberations.”); See also *Petroleum Information Corporation v. U.S. Department of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992).

#### Attorney-Client Privilege

The attorney-client privilege “protects confidential communications by a client to an attorney made in order to obtain legal assistance from the attorney in his or her capacity as a legal advisor.” *United States v. Phelan*, 3 Fed. Appx. 716, 718 (10th Cir. 2001)(quoting *In re Grand Jury Subpoena Duces Tecum*, 697 F.2d 277, 278 (10th Cir. 1983) )(internal quotation omitted). It is not intended to be a catch-all exception to the need for broad discovery. See *Sanchez*

*v. Matta*, 229 F.R.D. 649, 655-56 (D.N.M. 2004) (internal citations omitted). “[I]f all activities of a lawyer are classified as warranting the bar of discovery proceedings because of the attorney-client privilege, then it would be appropriate for clients to retain lawyers as investigators, custodians of records and the like, thereby turning the shield of the privilege into the sword of injustice.” *Id.* Indeed, privileges typically are narrowly construed. See *Trujillo v. Board of Educ. of the Albuquerque Public Schools*, 2007 WL 1306593 at \*4 (D.N.M. Mar. 12, 2007). Privileges are to be strictly construed because they contravene “the normally predominant principle of utilizing all rational means for ascertaining truth.” *In re Qwest Communications, Inc.*, 450 F.3d 1179, 1185 (10th Cir.), cert. denied, 549 U.S. 1031 (2006).

\*5 The purpose of the attorney-client privilege is to “encourage clients to make full disclosure to their attorneys.” *Fisher v. United States*, 425 U.S. 391, 403 (1976). The attorney-client privilege protects from discovery communications made in confidence between a client and the attorney, but it does not protect the underlying facts contained within those communications. *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981); *In re Qwest Communications*, 450 F.3d at 1185. To warrant the privilege's protection, “a communication between a lawyer and client must relate to legal advice or strategy sought by the client.” *United States v. Johnston*, 146 F.3d 785, 794 (10th Cir. 1998), cert. denied, 525 U.S. 1088 (1999). See also 24 Wright & Graham, *Federal Practice and Procedure: Evidence* § 5478 at 229 n. 179 (“[C]onversations the attorney has with his investigator are not privileged unless they would reveal a communication of the client because the investigation of facts is not ‘professional legal services.’ ”)

#### Work Product Privilege

The attorney work-product doctrine “shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.” *In re Qwest Communications*, 450 F.3d at 1186 (quoting *United States v. Nobles*, 422 U.S. 225, 238 (1975) ). The protection applies to “attorneys' or legal representatives' mental impressions, conclusions, opinions, or legal theories authored in anticipation of litigation.” *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 668 (10th Cir. 2006)(citing *Fed. R. Civ. P. 26(b)(3)* ). See *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (“[A]n attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties ... falls outside

the arena of discovery.”). The Tenth Circuit Court of Appeals notes that the work-product doctrine “protects only that which was prepared in preparation for litigation.” *Vargas v. United States (In re Grand Jury Proceedings)*, 727 F.2d 941, 945 (10th Cir.), *cert denied*, 469 U.S. 819 (1984).

Similar to the attorney-client privilege, “[t]he party asserting a work product privilege as a bar to discovery must prove the doctrine is applicable.” *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995) (citation omitted). Moreover, the Tenth Circuit has held that “production of work-product material during discovery waives a work-product objection.” *In re Qwest Communications.*, 450 F.3d at 1186.

If the party asserting the work-product protection establishes entitlement to the protection, [Rule 26\(b\)\(3\)](#) allows production of attorney work-product materials only upon a showing that the party seeking discovery has substantial need for the materials to prepare its case and that the party is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. [Fed. R. Civ. P. 26\(b\)\(3\)](#). A party has a substantial need for work product materials if those materials contain information that is “essential” to that party’s case, “crucial” to the determination of liability, or “carries great probative value on contested issues.” *National Congress for Puerto Rican Rights v. The City of New York*, 194 F.R.D. 105, 110 (S.D.N.Y. 2000); *see also McCoo v. Denny’s Inc.*, 192 F.R.D. 675, 684 (D. Kan. 2000) (the party requesting the production of work product must show that the information requested is important to the preparation of its case). In order to show “undue hardship,” a party need not prove that it is absolutely impossible to obtain the information elsewhere, but rather that it is likely to be significantly more difficult, time-consuming or expensive to obtain information from another source.” *SEC v. Thrasher*, 1995 WL 46681 (S.D.N.Y. February 7, 2005). A court may order the production of work-product material when one party does not have access to the same information as the other. *See Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 237 (E.D.N.Y. 2007); *Lawrence E. Jaffe Pension Plan v. Household International, Inc.*, 244 F.R.D. 412 (N.D. Ill. 2006); *Wainwright v. Kraftco Corporation*, 54 F.R.D. 532 (N.D. Ga. 1972). Courts have held that requiring a party to duplicate an extensive investigation creates an undue hardship. *See, e.g., EEOC v. CRST Van Expedited, Inc.*, 2009 WL 136025 (N.D. Iowa January 20, 2009) (defendant was entitled to copies of materials gathered through solicitation letters issued by the EEOC where it would need to depose more than 150 class members to obtain the same information); *In re Intel Corporation Microprocessor Antitrust Litigation*,

2008 U.S. Dist. LEXIS 98898 at \*52 (D. Del. May 9, 2008) (requiring production of materials gathered during defendant’s investigation into its failure to maintain electronic records, when plaintiff would need to conduct more than 1000 interviews to obtain the same information); *see also Jarvis, Inc. v. American Tel. & Tel. Co.*, 84 F.R.D. 286, 293 (D. Colo. 1979). Furthermore, where one party has created a database containing information that is relevant to the issues in a case, courts have not required the other party to cull through source material to obtain the same information, *see Fisher v. United States*, 502 F.Supp.2d 1033, 1050 (D. Ariz. 2006), and courts have not required one party to go to great lengths to obtain information the other party already has. *See SEC v. Thrasher*, 1995 WL 46681 (S.D.N.Y. February 7, 2005). If a court finds substantial need and undue hardship for work-product materials and thereby orders discovery of these materials, “it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.” [Fed. R. Civ. P. 26 \(b\)\(3\)\(B\)](#).

Relevancy

\*6 [Rule 26\(b\)\(1\) of the Federal Rules of Civil Procedure](#) provides in pertinent part:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. [Fed. R. Civ. P. 26\(b\)\(1\)](#). Courts should liberally construe the scope of discovery under [rule 26](#) as “the rule contemplates discovery into any matter that bears on or that reasonably could lead to other matter[s] that could bear on any issue that is or may be raised in a case.” *Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 237 F.R.D. 618, 621 (N.D. Cal. 2006) (citing *Oakes v. Halvorsen Mar. Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998) ). This principle of broad discovery is intended to allow the parties to learn as much as they can about each other’s claims and defenses before trial. *See Herbert v. Lando*, 441 U.S. 153, 177 (1979).

#### IV. ANALYSIS

##### **1. The Office of the Governor of the State of New Mexico's Motion for Protective Order [Doc. No. 238]**

###### Depositions of Judge Robert Schwartz, Francisco Nogales and Nancy Long

This Court finds that the executive privilege applies to the Governor's Office in this case.<sup>1</sup> Governor Richardson tasked Robert Schwartz and Francisco Nogales with investigating and providing recommendations to the Governor's office regarding the former residents of various state institutions for the developmentally disabled. Nancy Long replaced Mr. Schwartz. New Mexico public policy is served when, under appropriate circumstances, the Governor can task a special investigation without concern that a future litigant will be able to discover recommendations and advice given during the investigation. Protecting this process can help avoid curtailing the executive's use of these types of procedures. This Court further finds that Plaintiffs have not presented the Court with sufficient specific factual information to establish waiver regarding recommendations and advice concerning the investigation.<sup>2</sup> "Since executive privilege exists to aid the governmental decision-making process, a waiver should not be lightly inferred." *SCM Corporation v. United States*, 473 F.Supp. 791, 796 (Cust. Ct. 1979). As discussed *supra*, the executive privilege can be overcome if Plaintiffs show sufficient need for the material that outweighs the public interests. The Court finds that Plaintiffs have not established sufficient need for information regarding opinions, conclusions, recommendations, advice, and similar "non-factual" communications between Mr. Schwartz, Mr. Nogales, Ms. Long and members of the executive branch that would outweigh the public interests to be served by the executive privilege.<sup>3</sup>

\*7 Regarding the deliberative process privilege, the Governor's Office has not demonstrated with "precise and certain reasons" that the information requested is predecisional and relates to a deliberative process. The Governor's Office has presented no facts to show that Mr. Schwartz, Mr. Nogales and Ms. Long were engaged in deliberations or discussions with the Governor to determine what policy the Governor should adopt. Accordingly this Court finds that the deliberative process privilege does not apply; however, even if the privilege did apply, as discussed *supra*, it would not extend to information that is factual in nature.

Finally, this Court finds that the attorney-client privilege applies to Mr. Schwartz and Nancy Long. However, as discussed *supra*, the underlying facts contained within attorney-client communications are not shielded, and conversations the attorney has with his or her investigator are not privileged unless they would reveal a communication of the client because the investigation of facts is not professional legal services. *Id.* at 9.

Although the Court finds that the executive and attorney-client privileges apply, neither of these privileges protects underlying facts within any protected communications. Therefore, the Governor's Office request that this Court preclude the depositions of Judge Schwartz, Mr. Nogales, and Ms. Long in their entirety is denied; however, the depositions will be limited in scope to protect the applicable privileges. Accordingly, the depositions may proceed as follows:

The depositions of Mr. Schwartz, Mr. Nogales, and Ms. Long will be limited to factual matters regarding their investigation. Counsel may not inquire into the opinions, recommendations, conclusions, advice, or other "non-factual" matters Mr. Schwartz, Mr. Nogales, or Ms. Long provided to the Governor or to other members of the executive branch with whom these individuals discussed the investigation.

For purposes of this ruling, members of the executive branch are defined as individuals on the Governor's staff as well as legal counsel and policy making level individuals at other executive branch agencies, specifically including Children, Youth, and Families Department, New Mexico Department of Health, and New Mexico Department of Human Services. Cabinet secretaries and division directors are the "policy making" executive branch employees. Individuals who, at the time of the investigation, were former, not then current, executive branch employees are not members of the executive branch whose communications with Mr. Schwartz, Mr. Nogales, or Ms. Long are protected by privilege. Counsel for the Office of the Governor may object and instruct the witnesses not to answer questions which are believed to be prohibited under this Order. If the parties are unable to resolve the dispute, counsel should promptly file a motion for protective order.<sup>4</sup>

###### Documents

In its Motion for Protective Order, the Governor's Office further seeks protection from having to produce any

documents or information requested in Plaintiffs' New Mexico Inspection of Public Records Act, claiming the same privileges as for the depositions and further claiming that the requested patient information is confidential. For all of the reasons discussed *supra*, this Court finds that the executive privilege applies to the documents requested, and Plaintiffs have not established sufficient need for information regarding opinions, conclusions, advice, recommendations, and similar “non-factual” information that would outweigh the public interests to be served by the executive privilege. However, factual information is not protected under the executive privilege. Again, for the reasons stated *supra*, the Court finds that the deliberative process privilege does not apply. To the extent attorney-client privilege might apply, it does not apply to factual information.<sup>5</sup>

\*8 In addition to claiming various privileges, the Governor's Office contends that information requested by Plaintiffs implicates the confidentiality provisions of the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 45 CFR 164.500 *et. seq.* The Governor's Office also claims that New Mexico public policy protects confidential patient information as reflected in the New Mexico Inspection of Public Records Act. NMSA 1978, § 14-2-1(a). Plaintiffs respond, *inter alia*, that this Court's Case Management Order already includes a Confidentiality Order [Doc. No. 44] which fully addresses all relevant confidentiality interests. In the July 21, 2009 hearing in this case, this Court gave counsel the opportunity to explain why the Confidentiality Order entered on March 20, 2008 does not adequately address all relevant confidentiality issues that have been raised. Counsel failed to do so. This Court finds that the March 20, 2008 Confidentiality Order adequately protects all relevant confidentiality interests addressed in the Governor's Office Motions.

Accordingly, the Governor's Office must produce all factual information in unredacted form in the documents requested by Plaintiffs that are relevant to this Motion. If a document contains both factual and non-factual information, the non-factual information may be redacted. If the Governor's Office believes that any privilege or confidentiality concern applies to a particular document that is not addressed in this Memorandum Opinion and Order, a privilege log must be prepared.

**2. Governor's Office's Second Motion for Protective Order [Doc. No. 249]**

Executive Privilege, Deliberative Process Privilege, Attorney-Client Privilege, and Confidentiality

In the Governor's Office Second Motion for Protective Order, the Governor's Office moves for a protective order regarding materials referenced in the *duces tecum* portion of the deposition notices of Gerald McBride, Robert Casey and Leroy Lucero (“Notices”),<sup>6</sup> arguing that such information is protected from disclosure by the executive privilege, the deliberative process privilege, the attorney-client privilege, confidentiality, and the work-product doctrine.

For all the reasons stated *supra* regarding the Governor's Office's Motion for Protective Order, the Court finds that the executive privilege applies to the materials referenced in the Notices regarding Request No. 1. The executive privilege also applies to the materials referenced in the Notices regarding Request Nos. 2 and 3 to the extent that any of these documents were generated or provided by or for the Office of the Governor in connection with the investigation. This Court also finds that Plaintiffs have not established sufficient need for information regarding opinions, conclusions, advice, and similar “non-factual” information that would outweigh the public interests to be served by the executive privilege. However, factual information is not protected under the executive privilege. Additionally, for the reasons stated *supra*, the Court finds that the deliberative process privilege does not apply. To the extent that the attorney-client privilege applies, the privilege does not protect the underlying facts contained in the communication.<sup>7</sup> Finally, as discussed *supra*, all relevant confidentiality concerns are adequately protected by the Confidentiality Order entered in this case on March 20, 2008.

\*9 In addition to the various privileges and confidentiality concerns asserted, the Governor's Office also contends that the documents Plaintiffs request must be protected from discovery because they fall under the work-product doctrine. As discussed *supra*, in order for the work-product doctrine to apply to the documents which Plaintiffs seek, this Court must find that these documents were prepared in anticipation of litigation. In support of its contention that these documents were prepared in anticipation of litigation, the Governor's Office states: “Here, the Governor ordered Mr. Schwartz and later Ms. Long to conduct an investigation after certain details became apparent in the *La Familia* litigation. Accordingly, the anticipation of further litigation was clearly a factor in tasking these attorneys with the investigation.” [Doc. No. 249 at 10]. This is the sole argument that the Governor's

Office presents to the Court. The Court finds this argument wholly insufficient to meet the Governor's Office burden to establish that the work-product doctrine applies to the documents Plaintiffs seek. Furthermore, as Plaintiffs point out to the Court, the Governor's statements regarding the investigation support Plaintiffs' contention that the documents were not prepared in anticipation of litigation. When the Governor first announced the investigation, he stated that the state "should do the right thing here." [Doc. No. 260 at 12 (citation omitted)]. When the Governor appointed Judge Schwartz to head the investigation, he "made it very clear that this investigation is about lives, not litigation." *Id.* And when the Governor replaced Judge Schwartz with Nancy Long, he pledged to produce a "public report ... [that would] be used to fix the system." *Id.* The Court finds that the work-product doctrine does not apply to the documents generated by or for the Governor's Office requested in the Notices.

Finally the Governor's Office and the State Defendants argue that New Mexico law specifically prohibits the release of documents created and/or maintained by Adult Protective Services ("APS"), and release of such information is cause for imposition of criminal penalties. *See NMSA 1978, § 27-2-29 et. seq.* By its terms, however, this statute has no application to "any other person or entity, by order of the court, having a legitimate interest in the case." § 27-7-29(B) (11). This Court finds that Plaintiffs have a legitimate interest and, furthermore, the Confidentiality Order [Doc. No. 44] entered in this case protects any confidentiality concerns.

Accordingly, all factual information must be produced in unredacted form in the documents generated by or for the Governor's Office requested by Plaintiffs in the Notices. If a document contains both factual and non-factual information, the non-factual information may be redacted. If the Governor's Office believes that any privilege or confidentiality concern applies to a particular document that is not addressed in this Memorandum Opinion and Order, a privilege log must be prepared.

**3. Defendants' Motion for Protective Order [Doc. No. 247]**

Defendants' Motion for Protective Order concerns the same document requests as the Governor's Office Second Motion for Protective Order, *i.e.*, the Defendants are seeking protection from having to produce documents in response to the *duces tecum* portion of the deposition notices to Gerald McBride, Robert Casey and Leroy Lucero. *See fn. 7 supra* for language of the Notices.

Defendants present two additional arguments to those made in the Governor's Office's Second Motion for Protective Order. The first argument is that information in the possession of Attorney Gerald McBride is protected by attorney-client privilege, work-product doctrine, and executive privilege.

Regarding attorney-client privilege, Defendants argue the Mr. McBride is an Assistant General Counsel for New Mexico Aging and Long-Term Services Department ("ALTSD") that oversees Adult Protective Services ("APS"), and as such, he oversaw, reviewed or impacted APS investigations and provided necessary legal advice so that the Department could assist certain individuals. Plaintiffs respond, and the Court agrees, that attorney-client privilege does not protect the underlying facts contained within attorney-client privileged communications.

\*10 Regarding the work-product doctrine, Defendants allege that the files and information were developed in Mr. McBride's capacity as an attorney for ALTSD. As discussed *supra*, the work-product doctrine protects only that which was prepared in anticipation of litigation, and the party asserting the work-product doctrine as a bar to discovery has the burden of establishing its applicability. Defendants have failed to present any facts to establish that these documents were prepared in anticipation of litigation, and, accordingly, the work-product doctrine is not applicable.

Regarding executive privilege, this Court finds that Defendants have not presented sufficient facts to establish that they are entitled to invoke the executive privilege. However, even if sufficient facts were presented, as discussed *supra*, factual information is not protected.

Defendants' second argument concerns Robert Casey and Leroy Lucero. Defendants argue that Mr. Casey and Mr. Lucero were part of the "investigation team" retained to assist defense counsel regarding the present lawsuit, and, therefore, the requested information that was provided to them, any notes taken by them, and any investigations they conducted as to these individuals are protected by attorney-client privilege and work product. Plaintiffs contend that they were in fact working for DOH to update their developmental disabilities data base and to locate certain former residents of the State's facilities.

Based on information provided to the Court both in the briefs and the hearing of July 21, 2009, this Court finds that defense counsel retained Robert Casey and Leroy

Lucero after the present lawsuit was filed in order to assist them with the lawsuit. Accordingly, to the extent that Robert Casey and Leroy Lucero had communications with defense counsel that revealed any communication of the client, those communications are protected by the attorney-client privilege. However, as discussed *supra*, this privilege does not protect the underlying facts contained within those communications, and those facts must be provided to Plaintiffs.

This Court further finds that the work-product doctrine applies to documents generated by Mr. Casey and Mr. Lucero under the direction of Mr. Walz. However, as discussed *supra*, Rule 26(b)(3) allows production of factual attorney work-product materials if Plaintiffs show that they have substantial need for the materials to prepare its case and that they are unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. *Fed. R. Civ. P. 26(b)(3)*.

Plaintiffs assert that they have demonstrated a “substantial need” for these documents and an inability to obtain them by other means [Doc. No. 260, p. 11] and refer the Court to their Motion to Compel. [Doc. No. 256, pp. 20-21]. At the July 21, 2009 hearing, this Court requested additional briefing on the work-product issue, which the parties submitted and the Court has considered in connection with this Motion. [Doc. Nos. 295, 296, 297].

This Court finds that factual information requested in the Notices meets the legal standard for “substantial need.”<sup>8</sup> See *National Congress for Puerto Rican Rights v. The City of New York*, 194 F.R.D. at 110. In the Complaint, Plaintiffs allege that Defendants violated Plaintiffs' constitutional right to due process by discharging them from state facilities and placing them into a setting where they have been neglected, abused, and/or exploited. Complaint ¶ 26, 102. Plaintiffs further allege that Defendants failed to provide Plaintiffs with needed services and protections after their release and failed to ensure that Plaintiffs were appointed guardians. *Id.* at ¶¶ 27-32, 110. Plaintiffs' claims under the Rehabilitation Act of 1973, the Medicaid Act, the Social Security Act, and the New Mexico Mental Health and Developmental Disability Code are based on the same factual allegations. Plaintiffs further seek to certify a class.

\*11 The factual information in the requested documents is necessary for Plaintiffs to attempt to establish, *inter alia*, that Defendants failed to provide essential services to Plaintiffs

and is the best evidence of what services were or were not provided and whether an on-going custom and practice of failure to assist Plaintiffs and proposed class members exists.<sup>9</sup> Moreover, this information may be necessary in Plaintiffs' attempt to obtain class certification, particularly as it relates to the requirement of numerosity. See *Fed. R. Civ. P. 23 (a)*.

This Court further finds that Plaintiffs have established the requisite undue hardship. Because of the massiveness of the investigation and Plaintiffs' lack of access to certain information, Plaintiffs could not duplicate the investigation undertaken by the Defendants. Plaintiffs represent to the Court that they do not have access to the Department of Health files that were used to locate former residents, that they do not have access to the OmniCaid database, and that it likely that some individuals interviewed by the Defendants' investigators are no longer available. [Doc. No. 295, p. 14].

Even if Plaintiffs' could duplicate the investigation, it simply makes no sense for this Court to require them to do so. The work has been done. The database has been created. It would take years for the Plaintiffs to replicate the work, and it would cost Plaintiffs hundreds of thousands of dollars—by Plaintiffs' estimate, two million dollars—to do so. *Id.* This Court agrees with the findings and rulings of previous courts discussed *supra* that under this type of circumstance, ordering production of factual work-product information is warranted.

Accordingly, to the extent that any work-product material has been produced, Defendants have waived the work-product privilege. For all other work-product materials, all factual information must be produced in unredacted form for the documents requested by Plaintiffs in the Notices.<sup>10</sup> In order to “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories,” *Fed. R. Civ. P. 26(b)(3)*, if a document contains both factual and non-factual information, the non-factual information may be redacted. If the Defendants believe that any privilege or confidentiality concern applies to a particular document that is not addressed in this Memorandum Opinion and Order, a privilege log must be prepared.

#### **4. Plaintiffs' Motion to Compel [Doc. No. 256]**

For the reasons set forth above, this Court will grant Plaintiffs' Motion to Compel in part to the extent it can determine what documents Plaintiffs are requesting. Defendants will produce the following documents:

a. the “discharged individuals spreadsheet,” the “matrix” and the “interview forms/tools” used by interviewers in phase two to assist them in their interviews described by Bert Dennis or the Rule 30(b)(6) designee at their depositions.

\*12 b. the “CSI Monthly Reports” and “contact notes” referred to by Bert Dennis in her deposition.

c. Statements from Irene Chavez, Pat Chavez, Brother Fabian, and the videotaped statement of Jewel Goforth.<sup>11</sup>

d. The e-mails exchanged between the New Mexico Department of Health officials and their staff, consultants and agents since November 2007 with the exception of e-mails between in-house counsel and defense counsel which may be protected by the attorney-client privilege. If there are any such e-mails in this category, Defendants must provide a privilege log.

With respect to the SCAR minutes, the “Bible,” and “Index cards” which have been made available for review at the office of defense counsel, Norman Weiss, Defendants will provide Plaintiffs with their own copies of these documents. Copies may be produced in digital form on the same computer referred to in footnote 10. Defendants have waived any privileges in connection with these documents by previously making these documents available to Plaintiffs, and any confidentiality concerns are covered under this Court's Confidentiality Order. [Doc. No. 44].

Accordingly, all factual information outlined above must be produced in unredacted form. If a document contains

both factual and non-factual information, the non-factual information may be redacted. If the Defendants believe that any privilege or confidentiality concern applies to a particular document that is not addressed in this Memorandum Opinion and Order, a privilege log must be prepared.

**IT IS THEREFORE ORDERED** that Plaintiffs' Motion for Leave to File Sur-Reply is hereby granted; Governor's Office's Motion for Protective Order is hereby granted in part and denied in part; the Governor's Office's Second Motion for Protective Order is hereby granted in part and denied in part; Defendants' Motion for Protective Order is hereby granted in part and denied in part, and Plaintiffs' Motion to Compel is hereby granted in part and denied in part as discussed more fully in this Memorandum Opinion and Order.

**IT IS FURTHER ORDERED** that the Court's Confidentiality Order [Doc. No. 44] is applicable to any documents produced pursuant to this Order and to which Defendants have raised a concern or objection on the basis of confidentiality.

**IT IS FURTHER ORDERED** that taking into account the findings in this Memorandum Opinion and Order, the parties are to confer and advise the Court within twenty days of the entry of this Order what issues, if any, are remaining for this Court's consideration regarding Plaintiffs' Motion to Compel. [Doc. No. 256].

#### All Citations

Not Reported in Fed. Supp., 2009 WL 10698414

#### Footnotes

- 1 This Court's ruling regarding executive privilege is in keeping with Judge Conway's December 15, 2005 Recommendation Regarding Scope of Depositions in the *La Familia* case. [Doc. No. 77-4, Exh. H].
- 2 This Court's ruling regarding waiver is also in keeping with Judge Conway's December 15, 2005 Recommendation Regarding Scope of Depositions in the *La Familia* case. [Doc. No. 77-4, Exh. H]. This Court agrees with Judge Conway that the privilege has not been waived by public disclosure of the investigation or by the fact that Mr. Schwartz allowed Plaintiffs' counsel to participate in the investigation. *See id.*
- 3 In fact, throughout their briefs, Plaintiffs make no specific argument that they have a need for such “non-factual” information.
- 4 As counsel know, the Court also routinely makes itself available for telephonic conferences during depositions to resolve disputes over questions or areas of inquiry that come up during depositions.
- 5 Without counsel identifying with particularity all of the documents at issue, this Court cannot determine which documents or which parts of documents may or may not be subject to attorney-client privilege.
- 6 Specifically, Plaintiffs' Notice to all deponents requests the following documents:

1. Every document in your possession or control that was provided since January 1, 2003 by Robert Schwartz, Francisco Nogales, Forrest Putnam, Nancy Long, or any person working for any of them, that discusses or describes in any way people released from the State's training schools for people with developmental disabilities.

2. Any document in your possession or control that discusses or describes in any way efforts by State Protective Services officials since January 1, 2003 to locate or assist people released from the State's training schools for people with developmental disabilities.

3. Any document in your possession or control that discusses or describes in any way the above captioned lawsuit.

The following is added for deponents Casey and Lucero:

4. Any forms used by you to identify, locate, assess or obtain assistance for any member of the proposed Plaintiff class.

7 Again, without counsel identifying with particularity all of the documents at issue, this Court cannot determine which or what parts of documents may or may not be subject to attorney-client privilege.

8 For the same reasons this Court finds "substantial need," it also finds relevancy of the requested factual information in the Notices under Fed. R. Civ. P. 26(b)(1) discussed *supra*.

9 For example, the Court agrees with Plaintiffs that the forms and contact notes from the interviews with former residents, various e-mails, microfiche, and so forth are essential to attempting to prove their case and crucial in determining liability. [Doc. 295 p. 10].

10 Documents stored on microfiche may be produced in digital form on a computer that Defendants will provide to Plaintiffs that will not produce a "shadow file." If Plaintiffs want to use any information contained in these documents for discovery purposes or at trial, a hard copy of any document from which this information is extracted will be made at Plaintiffs' expense and a copy must be provided to Defendants before the information can be used by Plaintiffs' counsel during discovery or at trial.

11 In the hearing of July 21, 2009, counsel for Defendants stated that the Defendants would produce these statements.

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# **EXHIBIT 4-E**

2004 WL 963995

Only the Westlaw citation is currently available.

United States District Court,

**E.D. Pennsylvania.**

Ashley **HABER**

v.

Michael K. **EVANS** et al.

No. 03-CV-3376.

May **4, 2004.**

#### Attorneys and Law Firms

Thomas W. Sheridan, Sheridan & Murray, Philadelphia, PA, for Plaintiff.

Sue Ann Unger, Office of Attorney General, Gene M. Linkmeyer, James P. Golden, Hamburg & Golden PC, Philadelphia, PA, for Defendants.

#### MEMORANDUM OPINION AND ORDER

RUFE, J.

\*1 Before the Court is the Motion to Quash Subpoena of Pennsylvania Inspector General Donald L. Patterson pursuant to Fed.R.Civ.P. 45(c)(3). In the subpoena, Plaintiff Ashley **Haber** seeks any and all documents related to or relied upon in preparing the September 8, 2003 General Investigation Report on Sexual Harassment and Sexual Misconduct at the Pennsylvania State Police. For the following reasons, the Motion is granted, and the Subpoena is quashed.

#### FACTUAL BACKGROUND

On June 30, 2003, after the disclosure of detailed allegations of sexual harassment and sexual misconduct by Pennsylvania State Police (“PSP”) members, the Office of the Inspector General (“OIG”) of the Commonwealth of Pennsylvania initiated an investigation to establish the groundwork for making operational changes and improvements and to deter and prevent future sexual harassment and misconduct by the PSP.<sup>1</sup> The OIG reviewed Commonwealth executive orders and management directives, PSP Bureau of Professional

Responsibility (“BPR”) complaints of sexual harassment and sexual misconduct from 1995 to 2003, administrative regulations, and pleadings and discovery in *Maslow v. Evans*, No. 00-CV-3636, a consolidated Section 1983 action involving supervisory liability claims against various PSP officials as a result of the criminal misconduct of former PSP Trooper Michael **Evans**.<sup>2</sup> The OIG interviewed PSP personnel, a representative from the Governor’s Office, and subjects, complainants and witnesses in cases where the PSP investigated allegations of sexual harassment or misconduct.<sup>3</sup> During the investigation, the OIG generated various reports, flow charts, and memoranda analyzing the information it gathered.<sup>4</sup>

On September 8, 2003, the OIG issued a report criticizing the PSP policies and acknowledging that there was a “voluminous record of unsavory behavior” by some PSP members.<sup>5</sup> The OIG recommended creating a commission to investigate sexual misconduct in law enforcement as well as numerous policy changes, including but not limited to: (1) requiring all PSP members to report sexual misconduct directly to the BPR; (2) prohibiting supervisors from investigating allegations of direct subordinate misconduct; (3) requiring complete documentation of all BPR investigative interviews; (4) providing information on all prior misconduct cases (regardless of disposition) to new supervisors when members are transferred; and (5) providing improved training to background investigators.

On December 22, 2003, Plaintiff served a Subpoena upon Inspector General Patterson, directing that he produce numerous documents relied upon to prepare the Report.<sup>6</sup> Inspector General Patterson thereafter timely filed objections to the Subpoena, asserting that the entire investigative file is protected by various privileges, including: (1) the deliberative process privilege; (2) the self-critical analysis privilege; (3) the executive privilege; and (4) the law enforcement-investigative privilege. Inspector General Patterson seeks to protect the OIG’s investigative materials, including its flow charts, work plans, methodologies, proposed questions and other analytical documents. Inspector General Patterson notes that the entire Report with findings and recommendations was made public and argues that the Court should not permit Plaintiff to review the mostly subjective evaluative materials and investigative documents. Inspector General Patterson further notes that Plaintiff can obtain all of the information contained in the subpoenaed documents through interviews

or depositions of the various PSP employees and sexual harassment victims.

\*2 Plaintiff, who alleges in her Complaint that the PSP engaged in a widespread pattern of tolerating sexual misconduct, counters that the investigative documents relied upon in preparing the report are not absolutely privileged and that she can overcome the qualified privileges asserted by Inspector General Patterson.<sup>7</sup> Plaintiff asserts that discovery is particularly important in this case because it concerns the conduct of public officials. She submits that the OIG investigative file is clearly relevant, cites cases where courts have required the production of similar documents despite the assertion of identical privileges,<sup>8</sup> and argues that without the file, it will be extremely difficult for her to prove that the PSP policymaking Defendants had knowledge of instances of sexual misconduct, leading to a practice of condoning said misconduct. Plaintiff asserts that Judge Stewart Dalzell rejected a similar privilege asserted by the defendants in *Maslow*.<sup>9</sup> Finally, Plaintiff suggests that because the OIG investigation was conducted at the taxpayers' expense, all of the investigative files should be disclosed.

## DISCUSSION

The Federal Rules of Civil Procedure allow parties to obtain discovery regarding any matter, not privileged, that is relevant to any claim or defense.<sup>10</sup> A subpoena is a method that a party may use to obtain discovery.<sup>11</sup> However, on a timely motion, a court may quash or modify subpoenas requiring disclosure of privileged or other protected matter when no exception or waiver applies.<sup>12</sup>

The executive privilege serves an important government policy by preventing the disclosure of certain information that would be “contrary to the public's interest.”<sup>13</sup> The privilege protects “internal communications offering opinions and recommendations” in order to “safeguard free expression in giving intragovernmental advice by eliminating the possibility of outside examination as an inhibiting factor.”<sup>14</sup> However, the privilege is not absolute, and should be upheld only if damage to the executive department or the public interest outweighs the harm to the plaintiff from non-disclosure.<sup>15</sup>

On behalf of the chief executive of the state, the Inspector General conducts investigations for and recommends policy changes to the executive branch. Confidentiality is crucial to the OIG because it serves to protect government sources and “enhances the effectiveness of investigative techniques and procedures.”<sup>16</sup> To claim executive privilege at least three requirements must be fulfilled: (1) the head of the agency claiming privilege must personally review the material; (2) there must be a specific designation of the documents claimed to be privileged; and (3) there must be precise and certain reasons for preserving the claims of privilege.<sup>17</sup> In the case at bar, Inspector General Patterson attached a declaration in which he describes the contents of the investigative materials. He attests that the documents requested include pre-decisional, executive deliberative and evaluative information and opinions, analyses, and interview summaries that should not be disclosed.<sup>18</sup> Because the executive privilege has been properly asserted by Inspector General Patterson, the burden shifts to Plaintiff to demonstrate the need for the requested information. The Court must balance the public interest in the confidentiality of governmental information against the needs of the litigant to obtain data.<sup>19</sup> Specifically, the Court must consider:

\*3 (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information;

(2) the impact upon persons who have given information of having their identities disclosed;

(3) the degree to which government self-evaluation and consequent program improvement will be chilled by disclosure;

(4) whether the information sought is factual data or evaluative summary;

(5) whether the party seeking the discovery is an actual or potential defendant to any criminal proceeding either pending or reasonably likely to follow from the incident in question;

(6) whether the investigation has been completed;

(7) whether the intra-departmental disciplinary proceedings have arisen or may arise from the investigation;

(8) whether plaintiff's suit is non-frivolous and brought in good faith;

(9) whether the information sought is available through other discovery or from other sources; and

(10) the importance of the information sought to plaintiff's case.<sup>20</sup>

The Court concludes that the first three *Frankenhauser* factors weigh in favor of non-disclosure. The OIG collected and analyzed data from numerous outside sources. The witnesses included victims of the sexual harassment and sexual misconduct who voluntarily provided their subjective opinions concerning perceived deficiencies in PSP policies and practices. During interviews, these witnesses provided candid analyses and opinions for improving the system. Disclosure of these statements would discourage future cooperation and would stifle the OIG's internal deliberative process.

The fourth *Frankenhauser* factor also weighs in favor of non-disclosure because the information sought by the Subpoena is primarily evaluative summaries. Moreover, the 84-page Report with detailed factual findings and numerous recommendations is a public document. The fifth *Frankenhauser* factor also weighs in favor of non-disclosure because Plaintiff is not an actual or potential defendant in any criminal proceeding either pending or likely to follow from the matter investigated.

The sixth and seventh *Frankenhauser* factors are neutral. While many of the BPR records involve closed cases, others involve cases that remain open. The release of documents from open cases could prejudice intra-departmental proceedings.

The eighth *Frankenhauser* factor weighs in favor of disclosure because, without commenting significantly on the merits of the claims in the above-captioned matter, it appears from the related *Maslow* litigation that this case is non-frivolous and brought in good faith.

The ninth *Frankenhauser* factor focuses on whether the subpoenaed information is available through other means. There is no indication that any of the OIG's witnesses are deceased or unavailable or that any of the information contained in the investigative files and evaluative summaries is not otherwise available to Plaintiff. Moreover, requiring Plaintiff to obtain PSP records, including personnel files,

directly from the PSP gives the PSP records custodian the opportunity to object to the release of files containing confidential information.

\*4 Finally, the tenth *Frankenhauser* factor relates to the importance of the subpoenaed information. While the investigative materials in the OIG file may assist Plaintiff in proving her case, the Subpoena is essentially an attempt to use the Inspector General as her own liability expert. Although the investigation was funded with taxpayer dollars, the OIG undertook the investigation to improve PSP policies and programs that serve the general public, even though individual lawsuits are pending. Moreover, Plaintiff seeks monetary damages only in this case. She has not requested any injunctive relief against the PSP, and she should not be permitted to prosecute this civil action at the taxpayers' expense.

In balancing all of the *Frankenhauser* factors, the Court concludes that the executive privilege protects the OIG investigative files and evaluative materials in this case. Confidentiality is vital to OIG investigations because it protects government sources, encourages candor, and enhances the effectiveness of investigative techniques and procedures.<sup>21</sup> The executive privilege protects and insulates the sensitive decisional and consultative responsibilities of the Governor, which are discharged most effectively with privacy and security.<sup>22</sup>

Due to the voluminous records already in Plaintiff's possession as well as her ability to question each of the high-ranking PSP officials under oath through the discovery process, the Court quashes the Subpoena on the basis of executive privilege.<sup>23</sup> In light of this ruling, it is unnecessary to address Inspector General Patterson's remaining arguments.

## CONCLUSION

For the foregoing reasons, Inspector General Patterson's Motion to Quash Subpoena is granted. An appropriate Order follows.

## ORDER

AND NOW, this 4th day of May, 2004, upon consideration of the Motion to Quash Subpoena of Inspector General David L. Patterson [Doc. No. 64] and Plaintiff Ashley Haber's response thereto, it is hereby ORDERED and DECREED that the Motion is GRANTED. The Subpoena is hereby QUASHED.

All Citations

Not Reported in F.Supp.2d, 2004 WL 963995

Footnotes

- 1 Executive Order 1987–7 created the OIG to:
  - (a) To deter, detect, prevent, and eradicate fraud, waste, misconduct, and abuse in the programs, operations, and contracting of executive agencies; (b) To keep the heads of executive agencies and the Governor fully informed about problems and deficiencies relating to the administration of programs, operations, and contracting in executive agencies; (c) To provide leadership, coordination, and control over satellite Inspector General Offices in designated executive agencies to insure a coordinated and efficient administration of duties and use of staff....Executive Order, Patterson Mot. to Quash, Ex. C.
- 2 See Investigative Report on Sexual Harassment and Sexual Misconduct at the Pennsylvania State Police (“Report”) at 6–7 (Sept. 8, 2003).
- 3 *Id.* at 7.
- 4 Decl. of Donald L. Patterson at 4–5.
- 5 Report at 8.
- 6 The Subpoena demands production of:

Any and all interviews, reports, notes, summaries, etc. for all persons interviewed by the Inspector General's Office including but not limited to victims, complainants, PSP officers, administrators, citizens, etc. who were interviewed for the investigative report on sexual harassment and sexual misconduct within the Pennsylvania State Police dated September 8, 2003, as well as any and all documents provided to you by the Pennsylvania State Police relating to your investigation of sexual harassment and sexual misconduct within the Pennsylvania State Police as set forth in the ‘Investigative Report on Sexual Harassments and Sexual Misconduct at the Pennsylvania State Police’ dated September 8, 2003.

Any and all documents reviewed by, relied upon, referred to, referenced by, cited to, or otherwise, utilized by the Pennsylvania Office of Inspector General in connection with the preparation of the September 8, 2003 Pennsylvania Inspector General's Investigative Report on Sexual Harassment and Sexual Misconduct at the Pennsylvania State Police including but not limited to: interviews of all persons, documents obtained from, and provided by the Pennsylvania State Police, documents prepared by the office of Inspector General but not included in the official report.

Inspector General Patterson's Mot. to Quash, Ex. A.
- 7 The Complaint in the above-captioned case alleges that on April 16, 1998, Defendant Evans, while on duty, made improper sexual advances upon Plaintiff, a minor, as his hands were at his crotch and he was touching himself. Pl.'s Compl. ¶¶ 73–76
- 8 See, e.g., *Cameron v. City of Philadelphia*, No. 90–CV–2928, 1990 U.S. Dist. LEXIS 13245, 1990 WL 151770 (E.D.Pa. Oct.4, 1990) (requiring production of Philadelphia Police Board of Inquiry investigation documents).
- 9 See *Maslow v. Evans*, No. 01–CV–3636, Order (July 18, 2001) at 7, n. 5 [Doc. No. 16] (“even assuming either the work product doctrine or deliberative process privilege applied, we believe that Plaintiffs have demonstrated need sufficient to overcome the privileges in this instance.... These files are highly relevant to the issue of supervisory liability, and Plaintiffs do not have equal access to the same information. Although Evanko claims that Plaintiffs have the names of every witness and could readily interview and/or depose them all, we believe that requiring Plaintiffs to do so would be unduly burdensome (especially in light of the discrepancy in the economic resources of the parties.”).
- 10 Fed.R.Civ.P. 26(b)(1).
- 11 Fed.R.Civ.P. 45.
- 12 See *id.* (c)(3)(A)(iii).
- 13 *Clark v. Township of Falls*, 124 F.R.D. 91, 92 (E.D.Pa.1988); *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 342 (E.D.Pa.1973).
- 14 *United States v. O'Neill*, 619 F.2d 222, 230 (3d Cir.1980).

- 15 *Clark*, 124 F.R.D. at 93.
- 16 *Hayes v. Reed*, No. 96–CV–4941, 1997 U.S. Dist. LEXIS 2992, at \*30 (E.D.Pa. Mar. 13, 1997).
- 17 *O'Neill*, 619 F.2d at 226.
- 18 Inspector General Patterson Decl. at 5–6.
- 19 *Frankenhauser*, 59 F.R.D. at 344.
- 20 *Id.*
- 21 See *Hayes*, 1997 U.S. Dist. LEXIS 2992 at \*31–32.
- 22 Plaintiff's reliance upon *Chladek v. Commonwealth of Pennsylvania*, No. 97–CV–355, 1998 U.S. Dist. LEXIS 2992 (E.D.Pa. Mar. 18, 1998) and *Clark v. Township of Falls*, 124 F.R.D. 91 (E.D.Pa. 1988) is misplaced because each of those cases involved an attempt to subpoena an OIG report that had not been made public, not the investigative files generated in conjunction with producing the reports. While the *Chladek* and *Clark* courts required production of the reports (in the *Chladek* case a redacted report), they did not require the production of the files generated in creating the reports.
- 23 The ruling today is consistent with Judge Dalzell's order requiring production of the BPR General Investigation Reports. First, the OIG, not the PSP (**Evans**' employer), compiled the data at issue in the Motion to Quash. Second, as a result of Judge Dalzell's ruling, Plaintiff's counsel obtained the identities of the names of the various victims and wrongdoers. Thus, Plaintiff can conduct her own investigation regarding the knowledge of various PSP officials.

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# **EXHIBIT 4-F**

1998 WL 158948

Only the Westlaw citation is currently available.  
United States District Court, S.D. New York.

Marisol A., by her next friend,  
Rev. Dr. James Alexander  
Forbes, Jr., et al., Plaintiffs,

v.

Rudolph W. GIULIANI, Mayor of the  
City of New York, et al., Defendants.

No. 95 CIV. 10533(RJW).

|  
April 1, 1998.

MEMORANDUM AND ORDER

WARD, D.J.

\*1 State defendants having moved this Court for an order quashing the notice of deposition of George E. Pataki, Governor of the State of New York (“Governor Pataki”), and for a protective order precluding the deposition of Governor Pataki pursuant to [Rule 26\(c\)\(1\), \(3\), \(4\) of the Federal Rules of Civil Procedure](#), and the Court having considered the submissions of the parties and the oral arguments of counsel finds that the following issues are properly subject to discovery except in the limited instances where they involve executive privilege:

(1) information of which Governor Pataki was made aware around the time of Elisa Izquierdo's death regarding child welfare in New York City which potentially influenced his decision in December 1995 to direct the New York State Department of Social Services (“DSS”) to undertake an extensive review of the Child Welfare Administration, now the Administration for Children's Services, that resulted in

the April 1996 Report titled “A Review of Investigations, Assessment and Decision Making in Child Abuse and Maltreatment Reports Received by the Child Welfare Administration of New York City”; and

(2) information of which Governor Pataki was made aware which served to influence his decision to disband DSS and place its child welfare responsibilities in a new agency with a new Commissioner as of 1998–99.

[Rule 30 of the Federal Rules of Civil Procedure](#) provides for broad access to persons during the discovery process. [Fed.R.Civ.P. 30\(a\)](#). Parties, however, may be limited in their pursuit of depositions under [Rule 26\(c\)](#), which provides that courts can issue a protective order to prevent “undue burden” in the discovery process. [Fed.R.Civ.P. 26\(c\)](#). While granting a protective order and quashing a deposition is the exception rather than the rule, the burden a deposition would place on a high ranking government official is given special scrutiny.

To prevent Governor Pataki, a high ranking government official, from being unduly burdened, it is

ORDERED that State defendants designate witnesses with knowledge of the factual information furnished to Governor Pataki on which his decisions were based within five [5] business days of the date of this Memorandum and Order and that the depositions of these witnesses be conducted within ten [10] business days thereafter, and it is further

ORDERED that in the event State defendants are unwilling or unable to comply with the foregoing direction that Governor Pataki either furnish an affidavit concerning the issues identified above by April 15, 1998 or appear for an oral deposition at a time and place convenient to his schedule but in no event later than April 30, 1998.

**All Citations**

Not Reported in F.Supp., 1998 WL 158948

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# **EXHIBIT 4-G**

1997 WL 125742

Only the Westlaw citation is currently available.

United States District Court,

**E.D. Pennsylvania.**

Timothy **HAYES**, M.D., et al., Plaintiffs,

v.

John **REED**, et al., Defendants.

Civil Action No. 96–4941.

March **13, 1997.**

#### Attorneys and Law Firms

Daniel M. Gray, Swick & Shapiro, Washington, DC, for Plaintiffs.

Guy A. Donatelli, William H. Lamb, Lamb, Windle & Mc Erlane, P.C., West Chester, PA, for Tom. Ridge, Nicolette Parisi, John H. **Reed**, Linda Kaiser.

William H. Lamb, Lamb, Windle & Mc Erlane, P.C., West Chester, PA, for Yvette Kane, Cynthia Warner, Nathaniel Alston, P.A., Charles J. Bannon, M.D., Kathleen Galop, Oliver Morris Johnson, Daniel B. Kimball, Jr., M.D., Solomon C. Luo, M.D., Sant Ram, M.D., Richard E. Wright, M.D., Jack D. Albert, Daniel D. Dowd, Jr., D.O., Silvia M. Ferretti, D.O., Morris A. Fishman, D.O., Kathleen Galop, Dennis M. Guest, D.O., William R. Henwood, D.O., John L. Johnston, D.O., George M. Kern, Quentin C. Weaver, Dorothy Childress, Stanley Bock, D.P.M., Judy Carrhart, M.D., Michael Cibik, Barbara Davis-Kenyon, D.P.M., Jack Rubinlicht, D.P.M., Maria Wyner, D.P.M.

#### MEMORANDUM AND ORDER

YOHN, District Judge.

\*1 Plaintiffs are sixty-six physicians licensed to practice medicine in Pennsylvania. Defendants are the Governor of Pennsylvania, the Director of the Medical Professional Liability Catastrophe Loss Fund (“the CAT Fund”), the Inspector General, the Insurance Commissioner, the Secretary of State of Pennsylvania, and Administrators and members of the State Boards of Medicine, Osteopathic Medicine, and Podiatry.

Plaintiffs filed a complaint alleging that defendants' certification procedures, initiated against certain plaintiffs for failure to pay 1995 emergency surcharges for medical malpractice insurance in excess of basic coverage under the Health Care Services Malpractice Act, 40 Pa.C.S.A. § 1301.701 (“the Act” or “Act 111”), violate plaintiffs' constitutional and statutory rights. Defendants filed a motion to dismiss contending that plaintiffs' complaint failed to state any claims upon which relief could be granted. For the reasons stated below, defendants' motion is granted in part and denied in part.

#### I. Background

Because the court is considering a motion to dismiss, plaintiffs' version of the underlying facts as set forth in their complaint will be accepted as true.<sup>1</sup>

On July 3, 1995, defendant Governor Tom Ridge appointed defendant, John H. **Reed**, director of the CAT Fund, an executive agency of the Commonwealth of Pennsylvania which “provid[es] excess professional liability insurance to plaintiffs and to other health care providers ‘entitled to participate’ within the Commonwealth of Pennsylvania.” (Comp.¶ 13). At that time, the CAT Fund had an \$8 million deficit for its fiscal year 1995. (Comp.¶ 38). In the sixty days between his July 3, 1995 start and the August 31, 1995 end of the fiscal year, **Reed** accelerated the settlement of malpractice claims paid out to claimants by the CAT Fund. (Comp.¶ 42.) As a result of the “marked increase in payments to claimants,” the CAT Fund deficit rose by \$99 million, creating a \$107 million deficit for the fiscal year which ended August 31, 1995. (Comp. ¶ 45). To ameliorate this deficit, Director **Reed** and defendant Insurance Commissioner, Linda Kaiser, “levied a 107% emergency surcharge” upon all health care providers, including plaintiffs, payable on December 1, 1995. (Comp.¶ 52).

In early 1996, **Reed** began to “certify” health care providers for failure to pay the emergency surcharges. (Comp.¶ 86). In February, 1996, **Reed** certified nineteen of the plaintiffs for alleged failure to “comply with the insurance requirements of Act 111 [“the Act”] to the Defendants Commonwealth Department of State, Bureau of Occupational and Health Affairs, and to the Defendants State Licensing Boards to suspend or revoke their professional licenses, and/or to force cancellation of their basic coverage insurance for 1995, for which they already ha[d] paid premium.” (Comp.¶ 82).

As a result of the certifications, “defendant State Boards have already suspended plaintiff **Hayes**’ license<sup>2</sup> and have scheduled license suspension or revocation proceedings [in front of state hearing examiners] to begin against nineteen (19) of the plaintiffs....” (Comp.¶ 88).

\*2 Whether any other plaintiff besides **Hayes** has yet appeared before a state hearing examiner and whether any other plaintiff has been suspended by a state hearing examiner or the appropriate licensing board is not disclosed in the complaint. None of the sixty-six plaintiffs has yet received a hearing before the full state licensing boards or a decision from the full state licensing boards.

## II. Procedural History

In December, 1995, plaintiffs filed suit in Commonwealth Court and requested that the court issue a preliminary injunction restraining the state’s medical boards from continuing to take any steps to suspend plaintiffs’ licenses because of plaintiffs’ non-payment of their emergency surcharges. The Commonwealth Court denied plaintiffs’ application because plaintiffs had failed to add as parties some of the government officials and boards essential to their requested relief. The court also determined that plaintiffs had not proven all four required elements of a preliminary injunction. *See Gueson v. Reed*, 679 A.2d 284, 285 (Pa.Comm.1996).

On May 8, 1996, plaintiffs filed in Commonwealth Court a “Third Amended Complaint in the Form of Third Amended Petition for Review Seeking Injunctive, Declaratory, and Other Relief” which included the following counts: Count I claimed “Participation in the CAT Fund is Voluntary, Not Mandatory.” Count II claimed “Breach of Fiduciary and Statutory Duties/Abuse of Agency Discretion/Negligence, Request for Injunctive, Declaratory, and Mandamus Relief.” Count III alleged “Violations of Due Process Under Administrative Agency Law and the Pennsylvania Constitution.” Count IV alleged “Section 1983 Claims Against respondents in Their Official Capacities.” *Gueson v. Reed*, 679 A.2d 284 (Pa.Comm.1996).

Subsequent to the filing of that amended complaint, plaintiffs requested that the Commonwealth Court issue a preliminary injunction. Specifically, plaintiffs sought to:

1. Preliminarily enjoin Director of the CAT Fund and the Insurance Commissioner from certifying those Petitioners not yet certified for alleged failure to comply with the

Health Care Services Malpractice Act (“the Act”) to the respective State Boards for suspension or revocation of their license to practice medicine, osteopathy or podiatry; and,

2. Preliminarily enjoin the respective State Boards and the Department of State’s Bureau of Professional and Occupational Affairs from taking any steps to suspend, revoke or otherwise impair Petitioners’ licenses until such time as [court] makes a final determination on the merits.

*Gueson v. Reed*, 679 A.2d at 287.

The Commonwealth Court denied plaintiffs’ second request for a preliminary injunction finding that plaintiffs had again failed to satisfy the criteria necessary for the grant of a preliminary injunction.

On July 12, 1996, immediately after the Commonwealth Court denied plaintiffs’ second request for a preliminary injunction, plaintiffs filed a wide-ranging complaint in this court alleging multiple violations by the CAT Fund of due process and equal protection under the Fourteenth Amendment to the U.S Constitution. The complaint included the following counts:

- \*3 Count One— Section 1983 Claims Against Respondents In Their Official Capacities: (A) License Suspension Without Procedural Due Process; (B) Violations of Substantive Due Process; (C) Violation of Fourteenth Amendment Equal Protection; (D) Enforcement of the Constitutional Guarantee of Republican Government U.S. Const. Art. 4, Sec. 4; (E) No Legal Authority Exists Warranting Creation of the Office of Inspector General Within the Executive Office of the Governor; (F) Conspiracy Under 42 U.S.C. § 1985(3).

Count Two— Participation in the CAT Fund is Voluntary, Not Mandatory.

Count Three— Breach of Fiduciary and Statutory Duties/ Abuse of Agency Discretion/ Negligence/Request for Injunctive, Declaratory and Mandamus Relief.

Count Four— Violations of Due Process Under Administrative Agency Law and Pennsylvania Constitution.

As relief under Count I, plaintiffs request “that this Court enter an Order declaring the rights and responsibilities of the parties, invalidating any certifications for suspension of any health care providers to the State Licensing Boards for

alleged failure to pay CAT Fund surcharges as violative of constitutional due process, and enjoin Defendant CAT Fund Director and Insurance Commissioner's certifications of Plaintiffs and other health care providers to the State Licensing Boards for failure to pay the 1995 emergency surcharges, and the 1996 annual surcharge, declaring the Act unconstitutional on its face and as applied, and enjoining enforcement of the Act as against Plaintiffs, for a reasonable attorney's fee and costs pursuant to 42 U.S.C. section 1988, and for such other and general relief as this Court deems just and equitable.” (Comp. p. 53).

As relief under Count II, plaintiffs “pray that this Court declare that the Act does not require participation in the CAT Fund, but makes such participation voluntary, that persons who do not participate in the CAT Fund are not entitled to insurance coverage by the CAT Fund, and that failure to pay CAT Fund surcharges is not a violation of the Act, and enjoin further proceedings against them, and for such other and general relief as this Court deems just and equitable....” (Comp. p. 55).

As relief under Count III, plaintiffs request an order requiring general compliance with the Act, an order requiring the defendants to clarify and define legal standards, a mandamus requiring defendants to recover and return misspent CAT Fund money, and an accounting. (Comp. p. 59).

As relief under Count IV, plaintiffs “pray that this Court declare the CAT Fund component of Act 111 void as violative of due process under the Pennsylvania Constitution, and the actions of the CAT Fund and of the Defendant State Licensing Boards ‘not valid’, and enjoin further disciplinary actions against the Plaintiffs.” (Comp. p. 61).

Immediately after filing their complaint in federal court, plaintiffs requested injunctive relief to prevent further certifications and further suspension hearings because of plaintiffs' failure to pay the emergency surcharges. As provisional relief, plaintiffs asked for a preliminary injunction

\*4 (1) prohibiting Defendant John H. **Reed**, Director of the Medical Professional Liability Catastrophe Loss Fund of the Commonwealth of Pennsylvania (“the CAT Fund”) from certifying Plaintiff health care providers to the Defendant State Licensing Boards for license suspension or revocation proceedings on grounds of alleged or actual non-payment of CAT Fund surcharges until this Court can decide this case on the merits; and

(2) prohibiting Defendant State Licensing Boards from proceeding with license suspension or revocation hearings against nineteen (19) of the Plaintiffs on grounds of alleged non-payment of CAT Fund surcharges....

Pls' Application for Prel. Inj. p. 1.

After holding a hearing on plaintiffs' preliminary injunction request, the court denied the request. While the court was considering the motion for a preliminary injunction, defendants filed their motion to dismiss. Plaintiffs filed their response soon thereafter.

### III. DISCUSSION

#### COUNT I— § 1983 CLAIMS AGAINST DEFENDANTS<sup>3</sup>

##### (A) *Procedural Due Process*

In Count I(A), plaintiffs allege that defendants' certification and subsequent license suspension procedures violate procedural due process because once CAT Fund Director **Reed** certifies a physician for failing to pay their emergency surcharge, an act which occurs without notice or hearing, (Comp. ¶ 68), that physician is subject to automatic suspension by the hearing examiners or state boards. (Comp. ¶ 83 & ¶ 84). Plaintiffs' complaint states:

The CAT Fund and Insurance Department provided no reasonable notice and opportunity to Plaintiffs or other health care providers for a hearing *before* such certification, and the State Licensing Boards lack any discretion, and as a matter of Pennsylvania law, *must* suspend or revoke professional licenses once certification has occurred regardless of the sham notice and hearing with which they provide Plaintiffs.

Accordingly, any notices given by the State Licensing Boards, or “hearings” or proceedings held by the State Licensing Boards, are a sham because the *outcome of such hearings is preordained by statute, custom and practice* before such notice or hearings are provided, and do not provide notice and a reasonable opportunity for a hearing which complies with due process *before* Plaintiffs are condemned.

Because those “after the fact” notice and hearings are a sham with a predetermined outcome, and because Defendants have failed to define the offense warranting license suspension or revocation adequately through vague

administrative rules, they violate the due process rights of all Plaintiffs who have suffered certification. (Comp.¶ 83–¶ 85).

In support of this claim, plaintiffs point to the wording of the Health Care Services Malpractice Act (“the Act”) which states:

The failure of any health care provider to comply with any of the provisions of this section or any of the rules and regulations issued by the director *shall* result in the suspension or revocation of the health care provider's license by the licensure board.

\*5 40 Pa.C.S.A. § 1301.701(f) (emphasis added).

Plaintiffs also find support in *Slawek v. State Bd. of Medical Education and Licensure*, 526 Pa. 316, 586 A.2d 362 (Pa.1991), where the court appeared to conclude that any violation of the Act (e.g., failure to pay emergency surcharges), required suspension. Under *Slawek*, plaintiffs argue state licensing boards cannot abuse their discretion when they suspend health care providers' licenses because 40 Pa.C.S.A. § 1301.701(f) “gives them no discretion to abuse.” *Slawek*, 586 A.2d at 366; (Comp.¶ 97).

In response, defendants argue that the procedures do not violate procedural due process because “Director **Reed** has no authority to suspend or revoke Petitioners' licenses. That authority rests with the State Board[s].... Accordingly, the certification by Director **Reed** does not result in the suspension or revocation of their licenses; it is not final, results in no consequences to Plaintiffs and acts to trigger Plaintiffs' rights to a hearing before the appropriate licensing board in which Plaintiffs receive a full hearing prior to any license suspension or revocation.” Defs' Brief in Opposition to Pls' Motion for Prel. Inj. p. 9.<sup>4</sup>

Plaintiffs' Count I(A) claim is sufficient to survive a motion to dismiss. Under both the United States and Pennsylvania Constitutions,<sup>5</sup> procedural due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest. See *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Pennsylvania Coal Mining Ass'n v. Insurance Dept.*, 471 Pa. 437, 370 A.2d 685 (Pa.1977); *Pennsylvania Bar Association v. Commonwealth*

*of Pennsylvania*, 147 Pa.Cmwlth. 351, 607 A.2d 850 (Pa.Comm.1992). The fundamental requirements of due process are notice and a meaningful opportunity to be heard, but the “concept is flexible, calling for procedural protection as dictated by the particular circumstance.” *Harris v. City of Philadelphia*, 47 F.3d 1333, 1338 (3d Cir.1995); *Kahn v. United States*, 753 F.2d 1208, 1218 (3d Cir.1985); *Hahalyak v. A. Frost, Inc.*, 444 Pa.Super. 494, 664 A.2d 545 (Pa.Super.1995).

In *Logan v. Zimmerman*, 455 U.S. 422, 432–33, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982), the United States Supreme Court discussed the constitutional requirements of due process in situations where a statutory scheme made liability an important factor in the ultimate license suspension decision but did not allow a consideration of liability in presuspension hearings:

\*6 As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that ‘some form of hearing’ is required before the owner is finally deprived of a protected property interest. And that is why the Court has stressed that, when a ‘statutory scheme makes liability an important factor in the State's determination ..., the State may not, consistent with due process, eliminate consideration of that factor in its prior hearing.’ To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.

*Logan v. Zimmerman*, 455 U.S. at 432–33 (citing *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971)).

Under *Mathews* and *Logan*, plaintiffs' allegations that the hearings by state hearing examiners or state licensing boards are or will be “shams” because liability is “predetermined” after the CAT Fund's “in absentia,” secretive certifications are sufficient to withstand defendants' motion to dismiss. (Comp.¶¶ 83–85, 117).

Nonetheless, it remains unclear whether hearing examiners or state boards have actually interpreted or will interpret the word “shall” to mean that hearing examiners or boards “must” suspend plaintiffs after CAT Fund certification. More importantly, besides plaintiff **Hayes**, it remains unclear at this time whether any other plaintiffs have been or ever will be suspended by state hearing examiners or state licensing boards. Thus, allegations that CAT Fund certifications violate procedural due process are premature and plaintiffs may well

have a difficult time submitting sufficient evidence to survive a motion for summary judgment on this issue.

Because plaintiffs have stated a legally sufficient procedural due process claim, the court must reach the justiciability issues raised by defendants in their motion to dismiss. Defendants claim that “[d]efendants are state officials or state agencies acting within the scope of their official capacities,” who have not consented to suit in federal court under § 1983, and therefore, any § 1983 claim for monetary or injunctive relief against defendants in their official capacities violates the Eleventh Amendment and must be dismissed at this time. Defs’ Motion to Dismiss p. 3–4.

Plaintiffs respond that “Eleventh Amendment immunity does not protect state officials acting in their official capacities from civil rights actions seeking declaratory and injunctive relief under 42 U.S.C. sections 1983 and 1985, but only precludes actions for damages.” Pls’ Brief in Opposition to Defs’ Motion to Dismiss p. 7. Because “[t]he complaint in this case names state officials as defendants, and seeks only injunctive and declaratory relief against them under 42 U.S.C. section 1983 and 1985(3) ..., [t]he Eleventh Amendment does not bar such relief.” Pls’ Brief in Opposition to Defs’ Motion to Dismiss p. 10.

\*7 Plaintiffs’ requests for injunctive and declaratory relief in Count I(A) are not barred by the Eleventh Amendment. Absent a state’s consent, the Eleventh Amendment bars a civil rights suit in federal court that names the state as a defendant. See *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978); *Laskaris v. Thornburgh*, 661 F.2d 23, 26 (3d Cir.1981), cert. denied, 469 U.S. 886, 105 S.Ct. 260, 83 L.Ed.2d 196 (1984). This bar extends to suits against departments having no existence apart from the state. See *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Similarly, an action in federal court for damages or back pay against a state official acting in his official capacity is barred because such retrospective relief would be paid from state funds, thereby making the state the real party in interest and invoking an Eleventh Amendment bar. See *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Laskaris v. Thornburgh*, 661 F.2d at 26. However, the Eleventh Amendment does not bar suits seeking prospective declaratory or injunctive relief against state officials. See *Laskaris v. Thornburgh*, 661 F.2d at 26 (citing *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)); *Martinez v. Shapp*, 859 F.Supp. 170, 172 (E.D.Pa.1994).

Because plaintiffs’ Count I(A) procedural due process claim seeks prospective declaratory and injunctive relief against state officials, the claim does not conflict with the Eleventh Amendment and this court has the power to grant such relief.

In sum, defendants’ request that plaintiffs’ Count I(A) claim be dismissed for failure to state sufficiently a claim that defendants’ certification procedures violate constitutional guarantees of procedural due process will be denied at this time.

(B) *Substantive Due Process & Equal Protection*

In Count I(B) & (C), plaintiffs allege that the Act is irrational and unrelated to a legitimate state interest and therefore in violation of plaintiffs’ substantive due process and equal protection rights. Specifically, plaintiffs claim that the following procedures violate substantive due process: a) the discretion of the CAT Fund to adjust and settle cases (Comp.¶ 123); b) the requirement that participation in the CAT Fund is mandatory (Comp.¶ 124); c) the requirement that all physicians’ licenses be revoked if they fail to pay the surcharges (Comp.¶ 126); and, d) the provision for excess coverage currently provided by the CAT Fund. (Comp.¶ 127). As for equal protection, plaintiffs claim that “by failing to compel self-insured hospitals to pay their fair share of CAT Fund surcharges, which results in Plaintiffs and other health care providers being forced to pay more than their fair share, [defendants] have violated Plaintiffs’ equal protection rights under the Fourteenth Amendment.” (Comp.¶ 138).

\*8 In reviewing a state statute under both the due process and the equal protection clause, a court must determine if the provision rationally furthers any legitimate state objective. “For these purposes, it is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision....” *Flemming v. Nestor*, 363 U.S. 603, 612, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960); *Malmed v. Thornburgh*, 621 F.2d 565, 569 (3d Cir.1980). The court may even hypothesize the motivations of the state legislature to find a legitimate objective promoted by the provision under attack. See *Weinberger v. Salfi*, 422 U.S. 749, 780, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975). The legitimate purpose justifying the provision need not be the primary purpose of the provision. See *McGinnis v. Royster*, 410 U.S. 263, 276, 93 S.Ct. 1055, 35 L.Ed.2d 282 (1973).

The objectives of the CAT Fund legislation, expressly stated in 40 Pa. Cons.Stat. Ann. § 1301.102, are as follows:

[T]o make available professional liability insurance at a reasonable cost, and to establish a system through which a person who has sustained injury or death as a result of tort or breach of contract by a health care provider can obtain a prompt determination and adjudication of his claim and the determination of fair and reasonable compensation.

40 Pa. Cons.Stat. Ann. § 1301.102;

In this instance, the CAT Fund legislation clearly passes the rational relationship test:

The CAT Fund was formulated as “the legislative quid pro quo to insurance companies continuing to provide malpractice insurance coverage in Pennsylvania.” The penultimate goal of the Act, ensuring the availability of medical malpractice insurance in Pennsylvania, was achieved by placing a cap on each carrier's liability for any one occurrence and by absolving carriers from liability for any act of malpractice committed by one of its insureds in prior years. The Commonwealth legislature could reasonably have believed that these limitations on the liability of insurance carriers would foster the continuing availability of medical malpractice insurance in Pennsylvania.

The ultimate goal of the Act, assurance of a full recovery by malpractice victims, is achieved by the establishment of the CAT Fund from which victims may draw the proceeds of a verdict which exceeds the carriers' liability. The Commonwealth legislature could have reasonably believed that the CAT Fund would directly promote full recovery by medical malpractice victims. Therefore, ... it bears a reasonable relation to the [Commonwealth's] legitimate purpose in controlling the medical malpractice insurance market in Pennsylvania.

*Meier v. Anderson*, 692 F.Supp. 546 (E.D.Pa.1988) (citing *McCoy v. Commonwealth Bd. of Medical Education & Licensure*, 37 Pa.Cmwlth. 530, 391 A.2d 723 (Pa.Comm.1978)).

\*9 Plaintiffs have offered no set of facts showing that pursuant to these legitimate legislative objectives it was irrational or arbitrary a) to give discretion to the CAT Fund to settle cases; b) to require that participation in the CAT Fund is mandatory; c) to require that all physicians' licenses be revoked if they fail to pay the surcharges; or, d) to provide excess coverage as is currently provided by the CAT Fund. Nor have plaintiffs offered any set of facts showing that the distinction between plaintiffs and self-insured hospitals

was irrational or without any justification. Plaintiffs have thus failed to bear their burden of proving unconstitutionality under the rational relationship test, see *Heller v. Doe by Doe*, 509 U.S. 312, 113 S.Ct. 2637, 2643, 125 L.Ed.2d 257 (1993) (due process)<sup>6</sup>; *Parham v. Hughes*, 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979) (equal protection), and therefore Count I(B) & (C) will be dismissed against all defendants.

#### (C) Republican Form of Government

Plaintiffs' Count I(D) cause of action alleges a violation of Article IV, § 4 of the United States Constitution<sup>7</sup> and hinges upon an unresolved discovery dispute which occurred during the Commonwealth Court litigation. In the Commonwealth Court action, plaintiffs sought to subpoena certain files of the Inspector General's Office. The Inspector General resisted the subpoena and filed a motion to quash asserting, inter alia, that the information requested was privileged and confidential. Because plaintiffs left the Commonwealth Court to bring their claims in federal court, defendants' motion to quash was never ruled upon by the Commonwealth Court and plaintiffs never obtained the disputed files. See Defs' Motion to Dismiss p. 6–7.

As a result, plaintiffs now claim that: “The Governor's Inspector General has invoked the doctrine of ‘absolute executive privilege’ to strip the Commonwealth Court of jurisdiction to enforce its subpoena against the Inspector General.” (Comp.¶ 141). Because the Commonwealth Court cannot enforce its subpoena, it “lack[s] the separate stature independent of the executive branch necessary for the true Republican form of government guaranteed Plaintiffs under U.S. Const. Art. 4, sec.4.” *Id.*

The problem with plaintiffs' argument is that it attempts to transform a mere discovery dispute, which was never resolved, into a constitutional claim that the executive branch is using its “privilege” to threaten the judiciary. Plaintiffs make “no specific allegation indicating how the state's republican form of government is threatened or compromised” by defendants' use of the executive privilege. See *State of New Jersey v. United States*, 91 F.3d 463 (3d Cir.1996); *Bauers v. Heisel*, 361 F.2d 581 (3d Cir.1966). And, plaintiffs offer no facts which could support a claim that defendants' use of the “absolute executive privilege” presents a “realistic risk of altering the form or the method of functioning of [the state's] government.” See *State of New Jersey v. United States*, 91 F.3d at 466. Thus, plaintiffs fail to

sufficiently state a republican form of government claim and Count I(D) will be dismissed against all defendants.<sup>8</sup>

(D). *Unlawful Creation of the Inspector General's Office*

\*10 In Count I(E), plaintiffs contend that:

The Executive Office of the Governor lacks constitutional and statutory authority to create an Inspector General to bypass the heads of executive agencies to investigate allegations of 'fraud, waste, misconduct, and abuse' at those agencies, or to take necessary legal action against them, without the participation of the Attorney General, the Auditor General, the State Treasurer, or other elected officials of appropriate jurisdiction....

(Comp.¶ 156).

Former Pennsylvania Governor Casey created the Office of the State Inspector General within the Executive Office of the Governor to investigate and report directly to the Governor allegations of fraud, waste and misconduct in the executive branch.<sup>9</sup> The Inspector General's purpose was not to "bypass," supplant or replace the jurisdiction of the Attorney General, the Auditor General, the State Treasurer or other constitutional officers or otherwise usurp their powers. Instead, the Inspector General's purpose was to supplement the constitutional officers' powers by assisting the Governor in rooting out waste and mismanagement within the executive branch. Former Governor Casey clearly was empowered to create and appoint an Inspector General for that legitimate purpose, *see* Pa. Const. art. IV, Section 2 ("The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed."); 71 Pa. Stat. Ann. § 71 ("The Governor shall appoint, to serve at his pleasure a Secretary to the Governor, a Budget Secretary, and such consultants, experts, accountants, investigators, clerks ... and other employes, as may be required for the proper conduct of the work of his office, and of the Executive Board."); *see also* 71 Pa. Stat. Ann. § 241(i), and therefore plaintiffs' claim that the Inspector General "has no legal authority to exist" borders on the frivolous and will be dismissed against all defendants.

(E). *Conspiracy Under 42 USC § 1985(3)*

In Count I(F), plaintiffs claim that "one or more of the Defendants, acting in concert with one or more of the other Defendants, has conspired, colluded, or acted in concert to deprive Plaintiffs of their federal constitutional rights" by virtue of defendants' shared use of the law firm of

Lamb, Windle & McErlane. (Comp.¶ 168). Underlying plaintiffs' conspiracy claim is the belief that the law firm's advice that the defendants assert their "absolute executive privilege" amounted to a conspiracy to deny plaintiffs their constitutional rights and to cover up CAT Fund mismanagement. (Comp.¶ 75).

In order to recover under § 1985(3), plaintiffs must allege and prove: (1) a conspiracy (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws and (3) an act in furtherance of the conspiracy (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *See United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 829–30, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983); *Griffen v. Breckenridge*, 403 U.S. 88, 102–103, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). The conspiracy not only must have as its purpose the deprivation of "equal protection of the laws," but also must be motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus...." *Scott*, 463 U.S. at 829 (questioning whether § 1985(3) can be construed to reach a conspiracy formed to further a discriminatory motivation other than race and limiting its decision to holding that § 1985(3) does not reach "conspiracies motivated by bias towards others on account of their economic views, status or activities").

\*11 Plaintiffs have not alleged sufficient facts to show that defendants' shared use of the law firm amounted to a violation of § 1985(3). First, plaintiffs have not alleged facts sufficient to show any "purposeful conspiracy" under § 1985(3). Plaintiffs merely have shown that the law firm advised its clients to assert their executive privileges. (Comp.¶ 71–76). Second, even if there were some sort of "purposeful conspiracy" to use the executive privilege to shield documents from discovery, the conspiracy would not have denied plaintiffs any constitutional right or privilege. Finally, plaintiffs are not a proper class under § 1985(3) because § 1985(3) does not reach "conspiracies motivated by bias towards others on account of their economic views, status, or activities." *Scott*, 463 U.S. at 837.

Plaintiffs' Count I(F) conspiracy claim therefore will be dismissed against all defendants.

COUNT II. *Participation in the CAT Fund is Voluntary/Mandatory*

In Count II, plaintiffs state that under 40 Pa. Cons.Stat. Ann. § 1301.701(a)(1)(I) participation “in the CAT Fund is voluntary and not mandatory, and persons who choose not to participate in the CAT Fund are not covered by it.” (Comp.¶ 172) Further, plaintiffs argue that if participation in the fund is voluntary, they cannot be prosecuted for their failure to pay the surcharge. (Comp.¶ 173–175). Plaintiffs focus on the words “entitled to participate” found in Section 701 of the Act and argue that “[t]he phrase ‘entitled to participate’ in Act 111 does not mean ‘required to participate.’ ” (Comp.¶ 171).

The Act reads as follows:

(a)(1)(i) A health care provider, other than hospitals, who conducts more than 50% of his health care business or practice within ... Pennsylvania shall insure or self-insure his professional liability in the amount of \$100,000 per occurrence and \$300,000 per annual aggregate ..., hereinafter known as “basic coverage insurance” and they shall be entitled to participate in the fund ....

(d) There is hereby created a contingency fund for the purpose of paying all awards, judgments and settlements for loss or damages against a health care provider entitled to participate in the fund as a consequence of any claim for professional liability brought against such health care provider as a defendant ... to the extent such health care provider's share exceeds his basic coverage insurance.... The limit of liability of the fund shall be \$1,000,000 for each occurrence for each health care provider and \$3,000,000 per annual aggregate for each health care provider.

(e)(1) The fund shall be funded by the levying of an annual surcharge on or after January 1 of every year on all health care providers entitled to participate in the fund. The surcharge shall be determined by the director ... and subject to prior approval by the commissioner.

(e)(3) Notwithstanding the above provisions relating to an annual surcharge, the commissioner shall have the authority, during ... September of each year thereafter, if the fund would be exhausted by the payment in full of all claims which have become final and the expenses of the office of the director, to determine and levy an emergency surcharge on all health care providers then entitled to participate in the fund. Such emergency surcharge shall be the appropriate percentage of the cost to each health care provider for maintenance of professional liability insurance....

\*12 40 Pa. Cons.Stat. Ann. § 1301.701 (emphasis added).

Despite plaintiffs' claims, the court believes that the dispute as to whether the CAT Fund is voluntary or mandatory is largely one of semantics. As the statute reads, all healthcare providers must participate in the basic coverage provision; those who participate in the basic coverage are automatically deemed “entitled to participate” in the CAT Fund; those who are “entitled to participate” in the CAT Fund are required to pay the annual and emergency surcharges. Thus, strictly speaking, the healthcare providers may not be required to become members of the CAT Fund (they are simply entitled) but they are required to pay the surcharge. Thus, one might argue that participation is voluntary, but payment of the emergency surcharge, the crux of this case, is not.

In addition, without expressly ruling on the issue, Pennsylvania courts have implied time and again that participation in the CAT Fund is mandatory. See *Meier v. Maleski*, 670 A.2d 755, 756 (Pa.Comm.1996) (“Pursuant to the Act, Pennsylvania health care providers *must* remit an annual surcharge to the CAT Fund in order to retain their health care provider's license.”) (emphasis added); *American Casualty Co. v. PHICO*, 537 Pa. 295, 643 A.2d 91 (Pa.Comm.1994); *Finkbiner v. Medical Professional Liability Catastrophe Loss Fund*, 119 Pa.Cmwlth. 243, 546 A.2d 1327 (Pa.Comm.1988), *aff'd* 523 Pa. 101, 565 A.2d 157 (Pa.1989); *McCoy v. Com. Bd. of Med. Ed. & Lic.*, 37 Pa.Cmwlth. 530, 391 A.2d 723 (Pa.Comm.1978).

For these reasons, plaintiffs' Count II claim will be dismissed against all defendants.

### COUNT III. *Fiduciary Duties/Abuse of Discretion/Negligence*

In Count III of the complaint, plaintiffs attempt to assert claims for breach of fiduciary and statutory duties, abuse of discretion and negligence. However, Count III's mixture of factual allegations and legal claims is so inarticulately framed that the court is unable to decipher the statutory, common-law or constitutional bases for these claims. Because plaintiffs' motion papers do not address Count III's deficiencies (they fail to discuss the Count III claims altogether), the court will grant defendants' motion to dismiss Count III of plaintiffs' complaint. However, plaintiffs may file a renewed statement of their Count III claims, if they so desire, within twenty days of the date hereof so long as that statement clearly sets forth the specific Count III claims against each defendant, the specific statute, common-law or constitutional provision on

which each Count III claim is based, and a short summary of the specific facts underlying each Count III claim as they relate to each defendant.

COUNT IV.—*Pennsylvania Constitution & Administrative Agency Law*

Count IV of plaintiffs' complaint reads as follows:

\*13 Articles 1, 9, and 11 of the Pennsylvania Constitution, and the Administrative Agency Law, require that Defendants afford Plaintiffs prior notice that failure to pay CAT Fund surcharges is an offense punishable by license suspension or revocation through appropriate prior rule-making, and notice and opportunity for a fair hearing in adjudicatory hearings involving substantial property rights, including license suspension or revocation hearings such as those confronting Plaintiffs....

[Under the Act, and the regulations promulgated thereunder], none of the Defendants afforded Plaintiffs prior notice that failure to pay CAT Fund surcharges is an offense punishable by license suspension or revocation, or reasonable opportunity for a prior fair hearing ... in violation of the Administrative Agency Law and the Pennsylvania Constitution.

(Comp.¶ 189–90).

Count IV alleges that plaintiffs' procedural due process rights under Pennsylvania's Constitution have been violated because plaintiffs have not been afforded proper notice and opportunity to be heard before **Reed's** certification. That allegation has been adequately covered in the discussion of Count I(A). *See supra* (discussion of Count I(A)); Pa. Const. art. I, § 1; *Pennsylvania Coal Mining v. Insurance Dept.*, 471 Pa. 437, 370 A.2d 685 (Pa.1977); *Pennsylvania Bar Assoc. v. Commonwealth of Pennsylvania*, 147 Pa.Cmwlth. 351, 607 A.2d 850 (Pa.Cmmw.1992). For the same reasons as stated in the previous procedural due process discussion of Count I(A), defendants' motion will be denied.

Count IV also alleges that defendants' procedures violate Pennsylvania's Administrative Agency law. That issue is sufficiently different from the previous procedural due process discussion to warrant its own discussion here.

Under Pennsylvania's Administrative Agency Law, an “adjudication” cannot take place unless proper notice and opportunity to be heard have occurred. An “adjudication”

is defined under the Administrative Agency Law, 2 Pa. Cons.Stat. Ann. § 101, as:

Any final order, decree, decision, determination or ruling by an agency affecting personal property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.

2 Pa. Cons.Stat. Ann. § 101.

Plaintiffs argue that because the hearing examiners and state boards have no discretion as to whether to suspend plaintiffs for failure to pay the surcharge, those procedures cannot be “adjudications.” Therefore, “the essential adjudicative act must have occurred *earlier* in the process,” notably either during the initial CAT Fund determination to certify or during the BPOA prosecutors' decision to prosecute. *See* Pls' Brief In Opposition to Defs' Motion to Dismiss p. 6. Because both the CAT Fund certification and the prosecutors' decision to prosecute occur without any notice and hearing, plaintiffs claim they have been or will be subjected to an adjudicative suspension without the proper administrative protections. *See id.*

\*14 These facts are sufficient to state a claim that defendants' certification procedures violate Pennsylvania's Administrative Agency law. *See Cook v. Pa. Dept. of Agriculture*, 139 Pa.Cmwlth. 616, 591 A.2d 331 (Pa.Commw.1994); *Elliot v. City of Pittsburgh*, 162 Pa.Cmwlth. 180, 638 A.2d 413 (Pa.Commw.1991); *Insurance Co. of North America v. Com. Ins. Dept.*, 15 Pa.Cmwlth. 462, 327 A.2d 411 (Pa.Commw.1974). Moreover, to the extent that the BPOA prosecutors are given “adjudicative” decision-making power by virtue of their discretion, such power might arguably also constitute an unconstitutional commingling of prosecutorial and adjudicative functions in violation of *Lyness v. Commonwealth of Pennsylvania State Board of Medicine*, 529 Pa. 535, 605 A.2d 1204 (Pa.1992) (concluding that a violation of due process occurs under the Pennsylvania Constitution when an administrative board both determines that a professional licensing prosecution should be initiated, and then acts as the ultimate fact-finder in determining whether a violation has occurred).

Thus, based solely on the allegations in the complaint, plaintiffs have sufficiently stated a claim that defendants' procedures violate Pennsylvania's Constitution and Pennsylvania's Administrative Agency law. Defendants' motion to dismiss Count IV therefore will be denied.

An order consistent with this memorandum follows.

ORDER

AND NOW, this 13th day of March, 1997, in consideration of defendants' motion to dismiss, and plaintiffs' response thereto, it is hereby ORDERED that the motion is GRANTED as follows:

(1) Count I(B) which alleges that defendants' procedures violate plaintiffs' substantive due process rights is dismissed against all defendants.

(2) Count I(C) which alleges that defendants' procedures violate plaintiffs' rights to equal protection under the law is dismissed against all defendants.

(3) Count I(D) which alleges that defendants' assertion of their "absolute executive privilege" violates the constitutional guarantee of a "republican form of government" is dismissed against all defendants.

(4) Count I(E) which alleges that the Office of Inspector General has no legal authority to exist is dismissed against all defendants.

(5) Count I(F) which alleges that defendants engaged in a conspiracy in violation of 42 U.S.C. § 1985(3) is dismissed against all defendants.

(6) Count II which alleges that participation in the CAT Fund is voluntary not mandatory is dismissed against all defendants.

(7) Count III which alleges that defendants have breached their fiduciary and statutory duties, abused their agency discretion and committed negligence is dismissed without prejudice against all defendants. Plaintiffs may re-file a statement of their Count III claims within twenty days of the date hereof setting forth the specific claims against each defendant, the specific statute, common-law or constitutional provision on which each Count III claim is based, and a short summary of the specific facts underlying each claim as they relate to each defendant.

\*15 (8) The motion is denied as to Counts I(A) and IV.

All Citations

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Footnotes

- 1 The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. *Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir.1987). In deciding a motion to dismiss under Rule 12(b)(6)—failure to state a claim—the court must “accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant.” *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir.1994) (citing *Rocks v. Philadelphia*, 868 F.2d 644, 645 (3d Cir.1989)). Dismissal is not appropriate unless it “is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *Jordan*, 20 F.3d at 1261; *Robb v. Philadelphia*, 733 F.2d 286, 290 (3d Cir.1984). A complaint may be dismissed when the facts pled and the reasonable inferences therefrom are legally insufficient to support the relief sought. *Pennsylvania ex. rel. Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 179 (3d Cir.1988).
- 2 “Plaintiff Timothy Hayes did not pay his 1995 emergency surcharge payment until he appeared at his May, 1996 hearing with a certified check for the amount due. Despite his payment, the Defendant State Board of Medicine found him in non-compliance, suspended his medical license for two weeks, and ordered him to pay a fine of \$1,600.” (Comp.¶ 99). Hayes has appealed his suspension seeking review from the full Board of Medicine.
- 3 Section 1983 empowers plaintiffs to sue in federal court for a violation of their constitutional rights. The initial inquiry in a § 1983 action is two-fold: “1) whether the conduct complained of was committed by a person acting under color of state law; and 2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States.” *Parrat v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Here, plaintiffs are suing defendants for alleged constitutional violations committed in their official capacities only. Pls' Brief in Opposition to Defs' Motion to Dismiss p. 9 (“Plaintiffs have not yet sued Defendants in their personal capacities. If it appears that Plaintiffs have suffered money damages as discovery proceeds, they will amend the complaint to name various of the Defendants ... personally.”).

- 4 Defendants incorporate their “Brief in Opposition to Plaintiffs’ Motion for Preliminary Injunction” into their Motion to Dismiss.
- 5 Section 1 of Amendment XIV to the United States Constitution provides in relevant part:  
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.  
Article I of the Pennsylvania Constitution provides in relevant part:  
§ 1. All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.  
§ 11. All courts shall be open; and every man for an injury done to him in his lands, goods, person or reputation shall have a remedy by due course of law, and right and justice administered without sale, denial or delay....  
Federal and Pennsylvania procedural due process rights have been interpreted by the courts as “substantially coextensive.” *Stone & Edwards Ins. Agency, Inc. v. Dept. of Ins.*, 161 Pa.Cmwlth. 177, 636 A.2d 293, *aff’d*, 538 Pa. 276, 648 A.2d 304 (Pa.Cmwlth.1994); *Coades v. Com., Pennsylvania Bd. of Probation and Parole*, 84 Pa.Cmwlth. 484, 480 A.2d 1298 (Pa.Cmwlth.1984).
- 6 “A State ... has no obligation to produce evidence to sustain the rationality of a statutory classification. ‘[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.... A statute is presumed constitutional’. .and ‘[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.’ ” *Heller v. Doe by Doe*, 509 U.S. 312, 113 S.Ct. 2637, 2643, 125 L.Ed.2d 257 (1993) (citing *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 113 S.Ct. 2096, 2098, 124 L.Ed.2d 211 (1993) and *Lenhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973)).
- 7 “[T]he United States shall guarantee to every State in this Union a Republican Form of Government.” U.S. Const. art. IV, § 4.
- 8 Plaintiffs also overlook the fact that the executive privilege serves an important public function. The Governor, as chief executive, must be accorded a qualified power to protect the confidentiality of communications pertaining to the function of the executive branch. This power is analogous to the qualified constitutionally-based privilege of the President, which is “fundamental to the operation of government and inextricably rooted in the separation of powers....” *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Confidentiality is vital not only because it serves to protect government sources of information but also because it enhances the effectiveness of investigative techniques and procedures. See *infra* Count I(E) (discussion of responsibilities of the Inspector General). More importantly, this executive privilege protects and insulates the sensitive decisional and consultative responsibilities of the Governor which can be discharged most effectively with privacy and security. See *id.*
- 9 Officially, the Office of the State Inspector General was created:  
(a) To deter, detect, prevent, and eradicate fraud, waste, misconduct, and abuse in the programs, operations, and contracting of executive agencies; (b) To keep the heads of executive agencies and the Governor fully informed about problems and deficiencies relating to the administration of programs, operations, and contracting in executive agencies; (c) To provide leadership, coordination, and control over satellite Inspector General Offices in designated executive agencies to insure a coordinated and efficient administration of duties and use of staff....  
(Executive Order, Comp. Exh. 3 p. 1).

# **EXHIBIT 4-H**

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Only the Westlaw citation is currently available.  
United States District Court, D. Arizona.

EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION, Plaintiff,

v.

SWISSPORT FUELING, INC., Defendant.

No. CV-10-2101-PHX-GMS.

|  
May 10, 2012.

**Attorneys and Law Firms**

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Richard Seth Cohen, Victoria R. Torrilhon, Jackson Lewis LLP, Amy Jo Gittler, Phoenix, Az, for Defendant.

**ORDER**

G. MURRAY SNOW, District Judge.

\*1 Pending before the Court is Plaintiff EEOC's Expedited Motion For Extension of Time to Identify Claimants and Memorandum in Support (Second Request) (Corrected), Doc. 184.<sup>1</sup> To the extent that the EEOC requests that the deadline be retroactively extended for all potential claimants that motion is denied. To the extent that the motion is one to modify the deadlines on behalf of those claimants for whom the EEOC has shown good cause to modify the deadlines, the motion is granted in part and denied in part as further explained in this order.<sup>2</sup>

<sup>1</sup> Doc. 184 supercedes and corrects Doc. 160 which was EEOC's earlier motion to extend. The Court considered Defendant's Response to Doc. 160 as its Response to Doc. 184.

<sup>2</sup> Defendant's Motion to Strike Reply, or in the alternative Motion for Leave to File Sure-Reply, Doc. 198, is denied to the extent it seeks to have the EEOC's Reply stricken.

It is granted to the extent that the Court permits the filing and consideration of Swissport's Sur-reply.

Also pending before this Court is Plaintiff EEOC's Motion For Protective Order Regarding the Deposition of EEOC investigator Jae Richardson, Doc. 165, Defendant Swissport's Motion to Compel, Doc. 216, and Defendant Swissport's Second Motion to Compel, Doc. 217. For the reasons stated below Plaintiff EEOC's Motion for Protective Order is denied, and Investigator Richardson may be deposed by Defendant. Plaintiff will pay the court-reporter cost incurred in taking the deposition. Further, Defendant Swissport's Motions To Compel, Docs. 216 and 217, are denied in part and granted in part as further explained in this Order. Pursuant to Fed.R.Civ.P.37 (5)(A), the EEOC will file with the Court within five days a memorandum, not to exceed five pages, indicating why Swissport should not be awarded its attorney's fees in connection with bringing Doc. 217.

The Court will confer with the parties concerning the necessary re-opening of discovery at the status conference scheduled for May 11, 2012.

**A. Motion For Extension**

In May 2007, two Swissport fuelers filed discrimination charges with the EEOC. At approximately the same time, the EEOC received a petition signed by approximately twenty current and former employees of Swissport complaining of discrimination. During the course of the EEOC's ensuing administrative investigation, and at it's request, Defendant provided Plaintiff with a list of fueler employees who were potential claimants for the period back to 2005, along with the employees' contact information and dates of employment.

For the next three years the EEOC conducted its investigation and, Defendant provided, at Plaintiff's request, more than 3000 documents concerning Defendant's employment practices. On June 11, 2010 the EEOC issued 18 separate letters of determination finding reasonable cause against Swissport. Those determination letters lead to an unsuccessful conciliation process. When conciliation was unsuccessful, Plaintiff filed its complaint at the end of September 2010.

According to that complaint, since at least May 2005 Defendant Swissport has been unlawfully harassing "the charging parties"—unspecified African fuelers—because of their race, national origin and/or color and created a hostile working environment. The Complaint also alleges that since at least May 2007, Swissport has "retaliated against the

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Claimants for opposing the hostile work environment based on race, national origin and/or color.” And, it alleges that since at least June 2008, the Defendant “constructively discharged claimants because the discriminatory treatment had made the workplace intolerable.” The complaint requests injunctive relief, damages and equitable relief such as back pay, reinstatement and/or front pay as well as punitive damages.

\*2 The scheduling conference was held in April seven months after Plaintiff filed its complaint. At the scheduling conference, Plaintiff indicated that it had currently identified seventeen charging parties, apparently made up of the same persons whose rights it had asserted in the administrative conciliation process. It had not, however, provided a single document or any of the information as required by [Fed.R.Civ.P. 26](#) with respect to the damages and equitable relief it was claiming on behalf of these identified claimants. Plaintiff also asserted that in addition to the seventeen identified claimants, there were the 20 additional potential claimants that had signed and submitted the petition against the Defendant back in 2007. Plaintiff stated with respect to those twenty additional potential claimants that “We’ve looked for many of them. We’ve looked for all of them, and many of their addresses have changed. There’s a few that we’re—we’re still trying to track down.” Plaintiff thought it could reasonably locate and identify ten of them.<sup>3</sup>

<sup>3</sup> To the extent that the EEOC seeks to assert that it stated that there would be up to thirty additional potential Claimants at the pretrial conference it either misapprehends or misstates the record.

At the scheduling conference Defendant asserted that one of two key witnesses in the defense case, Jim Vescio, had terminal cancer and Defendant needed to preserve his testimony with respect to the claims asserted by the Plaintiff. Defendant had provided the EEOC with notice of Mr. Vescio’s condition prior to the scheduling conference.

In light of the years that the EEOC had to identify claimants, and the limited time in which Mr. Vescio could be deposed regarding the claimants’ assertions, Defendant requested a cutoff for adding additional claimants. The Court granted an additional sixty days to amend the complaint or add additional claimants. It did not preclude the EEOC from adding additional claimants after that time if it could establish its own diligence in seeking to identify such claimants. The Court noted: “Well, I’m actually going to—I’m not going to allow amendment past 60 days. So to add class members,

to me, is an amendment. You’ve got 60 days to find class members, unless you can tell my why, in light of the extensive period that you’ve already had to do that, I should give you more time.”

Apparently sometime after the scheduling conference, despite the Court’s order, the EEOC determined it would cast a much wider net in seeking to discover potential claimants. On May 24, 2011, approximately one month after the scheduling conference, the EEOC sent out letters with information packets to 188 Swissport employees for whom Swissport had provided contact information more than three years earlier. Further, on May 25, it sent an interrogatory to Swissport asking it to identify all of its employees who worked for the company as early as January 1, 2001 and further requesting disclosure of their race and job title.

By the deadline for amending the pleadings and identifying claimants that was set by the Court, Plaintiff had not filed an amended complaint seeking to recover for discrimination or harassment prior to May 2005, nor had it specifically identified additional claimants on whose behalf it sought relief. On that date, Plaintiff served Defendant with additional disclosures in which it identified persons who were claimants, and persons who were “Potential Claimants.” Plaintiff had, by this time, identified nine additional claimants and an additional 75 potential claimants in their supplemental disclosure statements. Thus, the scope of the potential claimants that Plaintiff was seeking to identify now vastly exceeded those identified at the scheduling conference.

\*3 On that same date Plaintiff also filed its Motion For Extension of Time. Doc. 32. The motion stated that since the setting of the schedule, the EEOC had decided to send out letters to the 188 fuelers for which Swissport had provided it with contact information, and 103 of those letters were returned as undeliverable. Plaintiff asserted that many of the addressees had changed addresses—not surprising if the Plaintiff had taken three years from receiving their contact information to actually attempt to contact them—and that many traveled for extensive periods out of the country. Plaintiff stated that it was continuing to use public databases to attempt to find current contact information.

In that motion Plaintiff also identified that it had expanded the scope of its discovery requests to the Defendant to identify additional potential charging parties. Plaintiff had not, however, sought to amend the complaint to assert a right to relief earlier than May 2005. Because of the expansion of

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its efforts to identify potential claimants, Plaintiff requested that the Court grant it until December 16, 2011 to continue to identify potential claimants.

When requesting a modification to a scheduling order, the requesting party must establish good cause for doing so. The existence of such good cause is, as the EEOC had been advised at the scheduling conference, dependent upon its diligence. Amendment to the scheduling order is allowed only if the good cause standard is satisfied. See *Johnson v. Mammoth Recreation Centers, Inc.*, 975 F.2d 604 (9th Cir.1992). “A court’s evaluation of good cause is not coextensive with an inquiry into the propriety of the amendment under ... Rule 15.” *Id.* at 609. “Unlike Rule 15(a)’s liberal amendment policy which focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)’s ‘good cause’ standard primarily considers the diligence of the party seeking the amendment.” *Id.* “[C]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief.” *Id.*, citing *Engleson v. Burlington, Northern R.R. Co.*, 972 F.2d 1038, 1043 (9th Cir.1992). If the party seeking amendment “was not diligent, the inquiry should end.” *Id.*

Not only does the EEOC offer no reason consistent with diligence why it did not earlier seek to identify such claimants since it had earlier received their contact information, it offers no reason, consistent with diligence, as to why it did not decide until after the scheduling conference that it was going to seek to identify 188 additional Claimants as opposed to the twenty that it disclosed at the scheduling conference.

In declining to rule on the motion to extend, the Court ordered:

To the extent that the identification of claimants would require the EEOC to seek to amend its pleadings, the Court will determine at the time of the proposed amendment whether such a modification in the Scheduling Order is both justified by “good cause,” see Fed.R.Civ.P. 16, and by the moving party’s diligence in the matter. See *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir.1992). In the absence of any proposed motion to amend, the Court cannot determine whether the EEOC has been sufficiently diligent to justify the proposed extension. Therefore, the Court declines to rule on the EEOC’s motion as unripe. To the extent that the EEOC takes the position that no amendment is necessary, the Scheduling order has a discovery deadline that will continue to govern this action. The parties are advised to cooperate to insure that all

parties are timely aware of all potential claimants to ensure successful discovery within the parameters of that deadline.

\*4 The EEOC treated this order as authorization to continue to seek to add class members throughout the course of the litigation on a rolling basis by so informing the Defendant in disclosure statements, and without seeking leave of the Court to do so.

Those notices resulted in the Defendant filing its motion to limit class on October 31, 2011. In its Response, Plaintiff again made no effort to demonstrate diligence with respect to its attempts to identify individual claimants. As a result, the Court granted Defendant’s motion in part, while indicating it would still allow the Plaintiff the opportunity to demonstrate such diligence and good cause:

The Court has never deviated from its view that after that date, June 28, 2011, it would require Plaintiff to establish good cause, and thus previous diligent efforts to identify members of the class, prior to permitting Plaintiff to seek individual relief on behalf of additional members of the charging class. Frankly, the Court acknowledges that the wording of its order refusing to act on the Plaintiff’s motion to amend was not as clear as it should have been. In seeking to recognize that, as a technical matter, Plaintiff might not need to amend the complaint to seek to add members of the charging class on whose behalf the Plaintiff sought individual relief, the Court did not make it precisely clear that Plaintiff nevertheless would have to establish good cause before seeking to add additional persons on whose behalf it sought relief.

While recognizing that there still might be unidentified members of the class, the Court entered its previous scheduling order in light of the extensive time that Plaintiff has had to identify individuals on whose behalf it seeks relief, and the need for Defendant to adequate time to conduct adequate discovery from those persons. In any of the motions or responses filed, Plaintiff has yet to identify or establish to this Court, individuals on whose behalf it seeks to assert relief that it had not identified prior to June 28, 2011, and any reasons approaching good cause, why those persons were not previously identified. To the extent that Plaintiff has set forth generic reasons why it should still be able to seek to identify class members, those reasons are rejected in light of the years that the Plaintiff has had to identify such class members and the failure of Plaintiff to set forth any good faith reason why such steps were not earlier taken.

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Therefore, absent demonstrating “good cause” why this Court should allow Plaintiff to seek individual relief for aggrieved employees who were identified to Defendant after June 28, 2011, Plaintiff is precluded from doing so.

By the status conference held on January 20, 2012, Plaintiff asserted that it had identified an additional seven of the remaining 75 class members on whose behalf it desired to seek relief. The Court directed the Plaintiff to file a pleading by early February establishing such good cause on an individual basis.

## ANALYSIS

\*5 Despite the Court's order, in its motion for extension the EEOC nevertheless sets forth generic arguments similar, if not identical, to those that the EEOC had earlier asserted unsuccessfully. The EEOC first seems to argue that because the Court only made an oral order setting a deadline for the EEOC to disclose the claimants on whose behalf it seeks relief, it was not obliged to comply with the order. This argument plainly lacks merit. In the Ninth Circuit “oral orders are entitled to the same force and effect as an order reduced to writing.” *Lorenz v. Beltio, Ltd.*, 76 F.3d 387 (9th Cir.1996) (citing *Noli v. CIR*, 860 F.2d 1521, 1525 (9th Cir.1988)). The EEOC did not overlook the order but was aware of at all times of the need to identify charging parties by the 28th of June as its first Motion for Extension demonstrates. See, e.g., Doc.32. (“The [case management] Order does not explicitly set forth a deadline for identification of Claimants ... but the Court advised the parties at the April 29, 2011 Case Management Conference that it expected all Claimants to be identified by the June 28 deadline.”) To the extent that Plaintiff EEOC suggests that this Court cannot set a deadline for the disclosure of claimants governed by Fed.R.Civ.P. 16, such a suggestion also lacks merit.

To the extent that the EEOC asserts that this Court abused its discretion in setting the disclosure deadline sixty days after the discovery conference it is also unpersuasive. At the scheduling conference the EEOC asserted that it knew of only approximately twenty additional potential claimants—those who had signed the 2007 employee petition—and that it had “looked for all of them,” and that “[t]here's a few that we're-we're still trying to track down.” Sixty days is not an unreasonable period to track down the remaining few claimants in such circumstances especially when a key

defense witness as to such potential claims is suffering from a terminal illness and has testimony that must be preserved, and the EEOC had been given the contact information for virtually all such persons at the start of the investigation three years earlier. The EEOC could and should have determined by the point of the scheduling conference which of Swissport's previous employees it wished to solicit to be charging parties and been prepared to request that sufficient time be scheduled and balanced into the other exigencies raised by the parties. At that time, however, they only desired to identify the twenty employee signers of the petition for whom it represented it had already been looking.

The EEOC also asserts that it is routinely given significant time in discovery to ascertain the identity of potential class members. Yet, it fails to establish that it is awarded such lengthy discovery even in cases when it has, during the administrative proceedings, compelled the Defendant to disclose to it the identities and contact information of all such potential class members, and has otherwise done nothing to ascertain actual claimants since the time that it received that information or filed its complaint.

\*6 The EEOC asserts that it need not identify all persons on whose behalf it seeks damages relief during its administrative investigation or conciliation procedures. *EEOC v. United Parcel Service*, 94 F.3d 314, 318 (7th Cir.1996), *EEOC v. United Parcel Service*, 860 F.2d 372, 376 (10th Cir.1988), *EEOC v. American National Bank*, 652 F.2d 1176, 1185 (4th Cir.1980). The Court assumes the accuracy of this legal assertion. Even so, it is hardly dispositive of whether, under *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir.1992), the EEOC has demonstrated diligence in identifying charging parties on whose behalf it seeks actual and equitable damages and injunctive relief in a judicial proceeding.

In assessing a reasonable deadline for such disclosures, and whether the EEOC has been diligent in attempting to meet such a deadline, a court may take into account that Plaintiff EEOC twice mandated Defendant to provide the identities and contact information of all potential judicial claimants years earlier in its administrative processes. A court may further consider the nine months between the Plaintiff's filing of the complaint and the deadline set for the identification of claimants on whose behalf the EEOC seeks damages and injunctive relief. It may further consider the far more limited number of potential Claimants that the Plaintiff identified that

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it might add at the Scheduling Conference. None of the cases cited by Plaintiff suggest otherwise.

Prior to the deadline set by the Court for identifying claimants, the Plaintiff identified nine additional claimants on whose behalf it is seeking relief in this lawsuit. It may seek relief on behalf of such claimants. It now seeks to add twenty-two more. Pursuant to Fed.R.Civ.P. 16(b)(4). It must demonstrate good cause as to each of these twenty-two.

The facts as to many of the twenty-two additional persons on whose behalf the EEOC seeks to assert claims bear certain similarities. It is undisputed that during the EEOC's administrative investigation of Swissport first in January and then again in April 2008, Swissport provided the EEOC with the then current contact information for twenty-one of the twenty-two additional claimants, and that the contact information for the remaining potential claimant was given to the EEOC in 2007.

Approximately two weeks prior to the scheduling conference, on April 13, 2011, the EEOC supplied Swissport with a preliminary list of the twenty persons who signed the petition that it believed it would eventually identify as claimants in addition to the seventeen claimants it had already identified. That list includes five of the twenty-two additional names on whose behalf Plaintiff now desires to seek relief apparently including Amos Tarley, Angelo Ajawin, Kweku Essien, Wellington Pyne and Charles Talati. In that letter the EEOC also requested Swissport to voluntarily provide a list of names, addresses and phone numbers and dates of employment of fuelers employed from 2005 to 2007.

\*7 Swissport did not voluntarily supply such a list to the Plaintiff. Compliance with such a request would have constituted the third time that Defendant would have done so. However, given the passage of time, such a list would have contained some updated contact information for eight of the twenty-two claimants on whose behalf the EEOC now seeks to assert claims.<sup>4</sup> These include: Amos Tarley, Angelo Ajawin, Jacob Kual, Angelo Ring, Salah Ahmed, Abdirahman Mumin, Koami Kromega, and Charles R. Talati. Because Swissport desired to quickly identify the claimants so that Mr. Vescio's testimony could be preserved with respect to them, it would have been reasonable for Swissport to assist in identifying such potential claimants on request. Swissport was served by the EEOC with a formal request for the information in May. After it received a mutual extension from the EEOC it apparently disclosed this updated contact

information in July 2011. While, under the circumstances, Swissport's determination not to voluntarily provide updated contact information does not demonstrate bad faith, the Court is unwilling to find that to the extent the EEOC was making diligent efforts to locate such persons without such direct and efficient assistance, it should not result in a windfall to Swissport. This reasoning has particular force when, as was the case here, Swissport sought an accelerated date for identifying claimants in part, due to the precarious health of a key witness.

4 Fourteen of the twenty-two additional charging parties left Swissport's employ prior to their previous disclosure of the list to the EEOC in April 2008. These employees include Wellington Pyne, David Mensah, Kweku Essien, Sualiman Kargbo, Sumene Daborloomene, John Dan-Kane, John Ruai, Friday Ikue, Peter Adjei, Anthony Nwiyaara, Ebenezer Sitam, Muritala Usuf, Yasir Hamid, Doctor Clemente Joule Dador.

The EEOC was ordered on April 29, 2011 to identify all parties on whose behalf it would seek relief by June, 28, 2011. The EEOC arrived at the decision sometime after the scheduling conference to attempt to identify all of the past qualified employees identified by Swissport in the EEOC administrative proceedings as claimants in this lawsuit as opposed to merely the signers of the 2007 employee petition. Beginning approximately four weeks later, between May 24, and June 11, 2011, the EEOC mailed out a notice of litigation letter, questionnaire and participation agreements to 188 potential claimants. These letters were apparently sent to the last known address of the potential claimants that the EEOC had earlier received from Swissport in connection with its administrative investigation in 2008 and included twenty-one of the twenty-two people on whose behalf the EEOC now wishes to assert claims.<sup>5</sup>

5 No such packet of materials was sent to Angelo Ajawin during this period although a packet was later sent to him.

There is no reason that the EEOC could not have earlier made the determination as to the number of potential claimants it sought to represent and proceeded to identify those claimants either during the administrative process or after it filed its complaint. This Court is aware as the EEOC points out, that to the extent that the EEOC was not diligent in pursuing the identity of the claimants, it is the claimants themselves and not the EEOC who lose their opportunity to assert their claims. Nevertheless, the EEOC's lack of diligence cannot always be excused just because it harms others who might

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have had a claim for relief, but did not independently assert it. Such deprivation must be balanced against the fairness and expediency that is due to the parties against whom the EEOC asserts such claims. The EEOC can reasonably be expected to consider the scope of its claims by the time of the scheduling conference. It is, after all, the diligence of the party, in this case the EEOC, that is at issue when deciding whether to adjust deadlines previously set under [Fed.R.Civ.P. 16](#), and not the diligence of those who rely on the party to assert their claims for relief.

\*8 In balancing these two interests, the Court has determined that the most important facts to consider is whether the EEOC was diligent and consistent in seeking to identify charging parties once this Court set a deadline to identify charging parties. While it did not begin sending out information letters to such potential charging parties until May 24, the Court does not consider this alone sufficient to establish a lack of diligence and deny the extension of a deadline to all potential claimants. Nevertheless, to the extent the EEOC failed to demonstrate continued diligence in seeking to identify charging parties in this suit after the deadline had expired, given their past opportunity to identify the claimants over a three year period, the Court will not modify its schedule to permit the claim of the proposed charging party.

### **1. Amos Tarley**

Mr. Tarley had been earlier disclosed on April 13, by the EEOC as a potential claimant, and, at the time, Mr. Tarley remained in the employ of Swissport. Thus, Swissport was aware of his whereabouts, but, apparently, did not disclose them to the EEOC. After sending the packet of materials to Amos Tarley on May 24 to the address previously provided by Swissport, the EEOC continued to search for him by using public databases and attempting to telephone him. The EEOC thus listed Mr. Tarley as a potential claimant in its June 28 disclosure statement. On June 30, 2011 the EEOC was able to contact Mr. Tarley by telephone and confirmed with him that he wished to be a claimant. They notified Swissport that he was a claimant on that same date. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to allow it to assert the claims of Amos Tarley.

### **2. Angelo Ajawin**

Mr. Ajawin had been earlier disclosed on April 13, 2011 by the EEOC as a potential claimant, and, had remained in the employ of Swissport until 2009. Swissport thus, presumably,

had updated contact information concerning Mr. Ajawin that it did not provide to the EEOC until after the deadline. The EEOC first sent the packet of materials to Mr. Ajawin on June 17. Mr. Ajawin replied by mail. The EEOC conferred with Mr. Ajawin on or before July 5 and identified Mr. Ajawin to Swissport as a claimant on the next day. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit it to assert the claims of Angelo Ajawin.

### **3. Wellington Pyne**

After sending the packet of materials to Wellington Pyne on May 25, the EEOC listed him as a potential claimant in its June 28 disclosure statement and continued to search for him by using public databases. With information obtained on such databases it sent a follow-up letter on July 5 and was successful in contacting Mr. Pyne by phone on July 7. Mr. Pyne had been earlier disclosed on April 13, by the EEOC as a potential claimant. On July 8, the EEOC was able to confirm with him that he wished to be a claimant. They so notified Swissport on that same date. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Wellington Pyne.

### **4. Jacob Kual.**

\*9 Mr. Kual remained in the employ of Swissport, and thus Swissport had updated information about his whereabouts, but, apparently, did not disclose it to the EEOC, prior to the deadline. When Mr. Kual did not respond to the informational letter, the EEOC conducted a public records search to locate the address of Mr. Kual on July 5. On that date it sent him an information packet. The EEOC unsuccessfully attempted to reach Mr. Kual by phone on July 6. The EEOC reached Mr. Kual by phone on July 11 and he indicated he wished to have the EEOC assert claims on his behalf. The EEOC so notified Swissport on that same date. It has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Jacob Kual.

### **5. David Mensah**

After sending the packet of materials to David Mensah on May 24, the EEOC continued to conduct public record searches for him and sent two letters to potential addresses on June 17, 2011. The EEOC also attempted to reach Mr. Mensah by phone and was able to reach him on July 7. He thereafter came in and spoke with the EEOC in person. The EEOC notified Swissport on July 14 that Mensah would be

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a claimant. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of David Mensah.

#### **6. Kweku Essien**

Mr. Essien had been earlier disclosed on April 13, 2011 by the EEOC as a potential claimant. After sending the packet of materials to Kweku Essien on May 24, to the address previously provided by Swissport, the EEOC continued to search for him by using public databases and sent him another letter on July 5. The EEOC received a written response from Mr. Essien on July 11, and spoke to him on July 14. The EEOC notified Swissport of Essien's claimant status on that same date. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Kweku Essien.

#### **7. Sulaiman Kargbo**

After sending the packet of materials to Sulaiman Kargbo on May 24, the EEOC continued to conduct public record searches for him and sent another letter to a potential address on July 5, 2011. The EEOC received Mr. Kargbo's response on July 11, 2011 indicating that he wished to be a claimant. The EEOC notified Swissport on July 18 that Kargbo would be a claimant. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Sulaiman Kargbo.

#### **8. Sumene Kaborloomene John Dan–Kane Friday Ikue Anthony Nwiyaara Muritala Yusuf**

There appears to be no dispute that five of the claims are asserted for periods outside of the time parameters of the complaint. The EEOC makes no argument that it has ever amended its original complaint in this action pursuant to the deadline for amendments set forth by the Court. The complaint seeks relief as far back as May 2005. The EEOC asserts that because the complaint states “since at least May 2005” as its earliest date, the complaint covers an unlimited period prior to that date. This argument is unpersuasive and would not permit the parties to define claims or marshal defenses for such claims based on the limitations period set by the statute itself. 42 U.S.C. § 2000e–5(e)(1).

\*10 The EEOC was able, had it wished to do so, to amend the complaint to specify for what earlier periods it was seeking relief. It was aware of its obligation to do so. It offers no explanation how its failure to do so was consistent with its

diligence. Plaintiff's failure to otherwise amend the complaint pursuant to the deadline demonstrates that it did not act with diligence sufficient to now seek relief on behalf of the five potential claimants above named. It will, therefore, not be able to seek relief on behalf of Friday Ikue, Anthony Nwiyaara, Sumene Kaborloomene, Muritala Yusuf and John Dan–Kane.

#### **9. John Ruai**

After sending the packet of materials to John Ruai on May 24, the EEOC continued to search for him and sent two letters to potential addresses on July 6, 2011. Using a phone number from a public records search, the EEOC successfully contacted Mr. Ruai on July 18, 2011 and confirmed that he wished to assert claims. The EEOC notified Swissport on July 20 that Ruai would be a claimant. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of John Ruai.

#### **10. Angelo Ring**

Mr. Ring had been earlier disclosed on April 13, by the EEOC as a potential claimant, and, at the time, Mr. Ring remained in the employ of Swissport. Thus, Swissport was aware of his whereabouts, but, apparently, did not disclose them to the EEOC. After sending the packet of materials to Mr. Ring on June 6 to the address previously provided by Swissport, which was apparently the correct address, the EEOC continued to search for him by using public databases and attempting to telephone him. The EEOC thus listed Mr. Ring as a potential claimant in its June 28 disclosure statement. On July 7, 2011, the EEOC called Mr. Ring at a telephone number found in a public records search and left a message. On July 14, 2011, Mr. Ring returned the call. On a return call from the EEOC on that date the EEOC confirmed with him that he wished to be a claimant. They notified Swissport of that status on July 20, 2011. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Angelo Ring.

#### **11. Salah Ahmed**

Mr. Ahmed had been earlier disclosed on April 13, by the EEOC as a potential claimant. After sending the packet of materials to Salah Ahmed on May 24, the EEOC continued to search for him and sent Mr. Ahmed a second letter to a potential address on June 28, 2011. Using a phone number from a public records search, the EEOC successfully contacted Mr. Ahmed on July 20, 2011. The EEOC notified Swissport on July 27 that Mr. Ahmed would be a claimant.

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Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Salah Ahmed.

### **12. Peter Adje**

After sending the packet of materials to Peter Adje on May 24, the EEOC continued to search for him and sent a second letter to him at a different address on June 28, 2011. Using a phone number from a public records search, the EEOC successfully contacted Mr. Adje on July 20, 2011. The EEOC notified Swissport on July 27 that Mr. Adje would be a claimant. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Peter Adje.

### **13. Abdirahman Mumin**

\*11 Mr. Mumin had been earlier disclosed on April 13, by the EEOC as a potential claimant. After sending the packet of materials to Abdirahman Mumin on May 24, the EEOC continued to search for him and sent a second letter to him at a different address on July 5, 2011. Mr. Mumin responded on July 25, 2011 and the EEOC interviewed him on July 27, 2011. The EEOC notified Swissport on July 28 that Mr. Muhmin would be a claimant. Plaintiff has established sufficient diligence to permit the modification of the scheduling order to permit the claims of Abdirahman Mumin.

### **14. Ebenezer Sitam**

The EEOC provides no facts concerning its attempts to contact Mr. Sitam in the affidavit of Rosanne T. Wood. It merely repeats, through what appears to be a copy and paste error, the averments pertaining to Anthony Nwiyaara. The Court will grant five judicial days after the filing of this order to permit the EEOC to assert facts that it believes establish its diligence in trying to contact Mr. Sitam. In the absence of such a filing, the EEOC will have failed to establish its diligence in contacting Mr. Sitam and the EEOC will not be allowed to pursue relief on his behalf. Should the EEOC provide such information in a timely fashion, the Court will evaluate it to determine whether it constitutes good faith.

### **15. Koami Kromega**

Mr. Kromega had been earlier disclosed on April 13, 2011 by the EEOC as a potential claimant. After the EEOC sent an information packet on May 24, 2011, it sent Mr. Kromega

an addition letter on July 6, 2011 to a different address in Glendale. The next effort made by the EEOC with respect to Mr. Kromega was October 31 when it was able to contact him by telephone. The EEOC did not identify Mr. Kromega as a claimant to Swissport until November 23, 2011. The EEOC offers no evidence of any attempt to locate or contact Mr. Kromega from July 6, (already after the deadline), until October 31. This almost four months delay after the deadline had passed and while available discovery time was being exhausted does not, in the Court's assessment, constitute diligent effort to identify Mr. Kromega after the deadline had passed. Having failed to establish its diligence in attempting to contact Mr. Kromega after July 6, 2011, the EEOC will not be able to seek relief on his behalf.

### **16. Yasir Hamid**

After the EEOC sent an information packet on May 24, 2011, it sent Mr. Hamid an addition letter on July 6, 2011 to a different address in Phoenix. The next effort made by the EEOC with respect to Mr. Hamid was October 31 when it was able to contact him by telephone after determining his number through a public database. The EEOC did not identify Mr. Hamid as a claimant until November 23, 2011. The EEOC offers no attempt to locate or contact Mr. Hamid from July 6, (already after the deadline), until October 31. For the reasons set forth above, this almost four-month delay does not constitute diligent effort to identify Mr. Hamid. Having failed to establish its diligence in attempting to contact Mr. Hamid after July 6, 2011, the EEOC will not be able to seek relief on his behalf.

### **17. Doctor Clemente Joule Dado**

\*12 After the EEOC sent an information packet on May 24, 2011, it sent Mr. Dado an additional letter on July 5, 2011. The EEOC lists no additional efforts that it made to contact Mr. Dado. Although the EEOC offers hearsay testimony that Mr. Dado traveled between New York and Phoenix in this period and had communications barriers with the brother who received his mail, the relevant inquiry is not whether there is an excuse for Mr. Dado's tardiness, but rather whether the EEOC acted with diligence. The EEOC indicates no effort to locate or contact Mr. Dado from July 5, (already after the deadline) until it received his written correspondence on October 25. This almost four months delay after the deadline had passed does not constitute diligent effort by the EEOC to identify Mr. Dado after the deadline had passed. Having failed to establish its diligence in attempting to contact Mr.

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Dado after July 5, 2011, the EEOC will not be able to seek relief on his behalf.

### 18. Charles Talati

Mr. Talati had been earlier disclosed on April 13, by the EEOC as a potential claimant, and, at the time, Mr. Talati remained in the employ of Swissport. Thus, Swissport was aware of his whereabouts, but, apparently, did not disclose them to the EEOC until July 25 when it responded to the EEOC's interrogatory. After sending the packet of materials to Charles Talati on May 24, the EEOC indicates it sent him another letter on July 6 at an address in Phoenix. Thereafter, it states without indicating when, that "it attempted to reach Mr. Talati by telephone." The EEOC finally sent Mr. Talati a third letter on November 15, 2011 which was also returned as undeliverable. The EEOC then called Mr. Talati on January 11 and received a return call from Mr. Talati on January 12. The EEOC subsequently identified Mr. Talati as a claimant on February 2, 2012. The EEOC offers no specific attempts to locate or contact Mr. Hamid from July 6, (already after the deadline), until November 15. This delay after the EEOC would have presumably been made aware of Mr. Talati's contact information, followed by an additional two month delay between November and January while available discovery time was being exhausted does not, in the Court's assessment, constitute diligent effort to identify Mr. Talati after the deadline had passed. Mr. Talati was not identified by the EEOC as a claimant until well after even the retroactive identification deadline that the EEOC would have this court impose. Having failed to establish its diligence in attempting to contact Mr. Talati after July 6, 2011, the EEOC will not be able to seek relief on his behalf.

### B. Motion For Protective Order and For Sanctions

After Defendant took its 30(b)(6) deposition, on December 14, 2011 both parties simultaneously moved for relief. Defendant moved for sanctions, Doc. 164, and an order to compel Plaintiff to provide a knowledgeable and prepared deponent. To that end Defendant noticed the deposition of Jae Richardson, who was apparently the principal investigator with the EEOC on the administrative charges. Plaintiff immediately thereafter moved for a protective order to prevent the deposition. Doc. 165. The Court opted to treat Defendant's Motion for Sanctions as a Response to the Motion for Protective Order, and to allow Defendant's to supplement that Response. See Doc. 180. After review the Court now rules as follows:

\*13 It is clear to the Court after a review of the 30(b)(6) notice and the deposition testimony provided that Berta Echeveste was not an adequately knowledgeable or prepared witness for the areas of testimony designated in the 30(b)(6) deposition notice. Although she was able to provide some answers, she did not have adequate knowledge, familiarity or preparation in many of the areas of inquiry to adequately respond. Therefore, contrary to the position taken by the Plaintiff, Ms. Richardson's deposition would be neither cumulative, nor has Swissport had a reasonable opportunity to otherwise obtain the evidence.

To assert that the adequacy of an EEOC investigation is not an appropriate subject on which testimony can be introduced at trial, the EEOC cites to cases from different circuits which, for the most part, do not allow consider relevant matters concerning the adequacy of an EEOC investigation. Nevertheless, the Ninth Circuit explicitly provides for inquiry into the adequacy of EEOC investigations. See, *Plummer v. Western Int'l Hotels, Co., Inc.*, 656 F.2d 502, 505 (9th Cir.1981) (observing that because the EEOC findings are admissible at trial the Defendant is "free to present evidence refuting the findings of the EEOC and may point out deficiencies in the EEOC determination"); See also, *Ex Rel. Goddard v. Frito Lay, Inc.*, 273 F.R.D. 545, 552 (D.Ariz.2011) (same). Thus, the EEOC's argument that the law is otherwise lacks merit in this circuit at least.

The Court is further unpersuaded by the EEOC's argument that it would be unduly burdensome to permit the investigation of Jae Richardson. Therefore, the EEOC's Motion for Protective Order is denied, and the Defendant's Motion for Sanctions is granted to the extent that Ms. Richardson may be deposed and the EEOC will be obliged to pay the court reporting expenses incurred in the deposition of Ms. Richardson.

### C. Defendant's First Motion To Compel, Doc. 216

Defendant also moves to compel:

1. All May 24, 2011 "Notice of Class Litigation" letters that the EEOC sent to non-claimants, and a list of individuals to whom these letters were sent.
2. All Participation Agreements that were returned to the EEOC from any individuals who are not current claimants in this litigation.

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3. All Questionnaires that were returned to the EEOC from any individuals who are not current claimants in this litigation.

4. Tax returns for any claimants for whom the EEOC seeks lost wage recovery, or, if unavailable, documentation showing all efforts to seek such tax returns from the IRS

5. Information regarding claimants' travel out of the country from January 1, 2003 to present.

### 1. Identities of Potential Claimants Provided With Notice

At the time the May 24, 2011 letters were sent, this matter had been in litigation for nine months. And, as related above, the EEOC counsel apparently decided to pursue a broader class of claimants than it had earlier identified in the scheduling conference. The notice letter was signed by EEOC counsel and was sent with a packet containing a Questionnaire and a Participation Agreement. Although the contents of the Notice, Participation Agreement and Questionnaire as drafted by the Plaintiff's attorneys are not subject to the attorney-client privilege to the extent that the material was sent to those who were not clients and did not qualify as clients, any privilege or immunity in the text of the document has been waived to the extent that the documents has already been disclosed by the EEOC. However, Plaintiff is entitled to work-product immunity to the extent that Defendant requests that it identify to whom its attorneys sent the information. *EEOC v. Collegeville/Imagineering Ent.*, no. CV-05-3033-PHX-DGC, 2007 WL 1089712, at \*1 (D.Ariz. Apr.10, 2007) (holding that "where a party ... seeks to learn who has been contacted by opposing counsel, work product concerns arise. Such discovery requests seek to track the steps of opposing counsel ... [and thus focuses] on the actions of lawyers rather than the knowledge of witnesses."); see also *Commonwealth of Mass. v. First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149, 152 (D.Mass.1986). The decision to contact additional possible claimants, and the further decision of who among the possible candidates to contact, involves, at this stage of the litigation, the mental impression of Plaintiff's attorneys. To the extent that Defendants attempt to trace the work of Plaintiff's counsel in impeaching the claims asserted by Plaintiff as a result of the number of people contacted by Plaintiff's counsel who did not become claimants, Defendant is attempting to profit from work undertaken by Plaintiff's counsel. Such information is subject to the work-product immunity. As a result, Plaintiff need not identify the persons to whom it sent class notification letters.

### 2. Participation Agreements and Questionnaires

\*14 Further, those who signed the Participation Agreement and returned it to the Plaintiff, had, by the terms of the Participation Agreement itself, an expectation of privacy in a communication with an attorney representing their interests and evaluating their potential claims. Such communications are thus subject to the attorney-client privilege. *Yurick ex rel. Yurick v. Liberty Mut. Ins. Co.*, 201 F.R.D. 465, 468 (D.Ariz.2001). Those who returned the questionnaire along with the Participation Agreement sufficiently indicated that they wished to have their interests represented by the EEOC and thus would have had an objectively reasonable belief that they were speaking to counsel. In such cases, the communication is protected by the attorney-client privilege.

*EEOC v. ABM Industries*, 261 F.R.D. 503 (E.D.Ca.2009) is distinguishable because in that case, the Court noted "the EEOC has not demonstrated that the persons who filled out and returned the questionnaires were seeking to become EEOC clients at the time they completed the document ..." While this observation also remains true in this case for those who returned the questionnaire without returning a signed Participation Agreement, for those who did fill out and return the Participation Agreement with the questionnaire, the EEOC has adequately demonstrated that such persons were seeking to become EEOC clients.

In sum, then, the EEOC must disclose the contents of the questionnaires that were returned without Participation Agreements or that were returned with Participation Agreements if the respondent indicated that he/she did not wish to assert a claim. It need not return Participation Agreements or questionnaires returned with Participation Agreements, when the respondent indicated that he or she wished the EEOC to assert a claim on his or her behalf. Further, the EEOC need not disclose the persons to whom it sent out the notice, participation agreement and/or questionnaire.

### 3. Tax returns and Other Documents

The EEOC shall provide tax returns, and W-2s for years in which tax returns have not yet been filed, for all claimants on whose behalf the EEOC seeks back wage recovery. To the extent that the Court has permitted the EEOC to assert additional claims on behalf of new claimants in this order, or previous claimants had not yet received complete tax returns from the IRS, discovery shall be reopened to allow the

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Defendants to obtain such tax returns. To the extent that the EEOC has such tax returns for claimants in its possession, it shall immediately provide them to the Defendants.

#### 4. Out-of-Country Travel Information

The EEOC shall provide the requested information regarding claimants' travel out of the country from January 1, 2003 to present. To the extent that the Court has permitted the EEOC to assert additional claims on behalf of new claimants in this order, discovery shall be reopened to allow the Defendants to obtain such tax information concerning the claimants. To the extent that the EEOC has such information for claimants in its possession, it shall immediately provide such information to the Defendants.

#### D. Defendant's Second Motion to Compel, Doc. No. 217

\*15 Defendant's second motion to compel relates to documents withheld by the EEOC pursuant to the deliberative process privilege. Swissport's motion lays out a detailed history as to its concern that the EEOC has over-asserted the privilege. The motion further sets out the extent of the deliberative process privilege, and requests that the Court review EEOC's privilege log to determine compliance.

It is the agency's "burden to submit specific information identifying each document and its contents, so that the court, in looking at the list of documents, can understand the basis on which the privilege is asserted. The [agency] will not be allowed to shift its burden onto the court by submitting all the documents for inspection *in camera* without more. Such a procedure would 'force [ ] courts to become mindreaders—to discern without guidance what privilege claims an agency is asserting, the reasons for those claims, and then using those assumption to determine whether the documents may be justifiably withheld.'" *Resolution Trust Corp. v. Diamond*, 137 F.R.D. 634, 642 (S.D.N.Y.1991) quoting *Mobil Oil Corp. V. Department of Energy*, 102 F.R.D. 1, 6 (N.D.N.Y.1983).

Further, the claim of deliberative due process privilege must be raised by a formal claim made by the head of the agency after she has personally considered the material in question prior to the invocation of the privilege. "[S]he does so by submitting a declaration stating the precise reasons for reserving the confidentiality of the investigative report and identifying and describing the documents to which the privilege is asserted." *EEOC v. Peoplemark, Inc.*, 2010 U.S. Dist. LEXIS 17526 at \*3 (W.D.Mich. Feb 26, 2010). In this case, the proffered declaration is deficient. It is, as Defendant

notes, conclusory. Further, it fails to assert with precision the reason why each document is subject to the asserted privilege. As a result, in evaluating the applicability of the privilege the Court is left without the benefit of context necessary with respect to many documents, to determine whether they are in fact, deliberative.

In this case the EEOC does, however, divide the withheld documents into five general categories that it asserts demonstrate the existence of the privilege. The first of these categories is investigator notes and communications reflecting mental impressions, analysis and/ or investigative method.

#### 1. Investigation Notes, Mental Impressions and Analysis

The EEOC broadly asserts that, as a general matter, notes of meetings are subject to the deliberative process privilege. *Nulankeyutmonen Nkihtaqmikon v. Bureau of Indian Affairs*, 493 F.Supp.2d 91, 107 (D.Maine 2007), quoting *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 321 (D.C.Cir.2006). Nevertheless, merely because an investigator's notes are at issue does not justify the assertion of privilege, unless there is a sufficient connection between the notes and the agency's deliberative process. The privilege is not categorically applicable to all investigative notes in this Circuit.

\*16 To qualify for the privilege, "a document must be *both* (1) 'predecisional' or antecedent to the adoption of agency policy, and (2) 'deliberative,' meaning 'it must actually be related to the process by which policies are formulated.'" *Nat'l Wildlife Fed'n v. United States Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir.1988) quoting *Jordan v. United States Department of Justice*, 591 F.2d 753, 774 (D.C.Cir.1978). "Factual material that does not reveal the deliberative process is not protected by this exemption." *Nat'l Wildlife* at 1117, quoting *Paisley v. CIA*, 712 F.2d 686, 698 (D.C.Cir.1983). However, "even if the content of a document is factual, if disclosure of the document would expose 'the decision-making process itself' to public scrutiny by revealing the agency's "evaluation and analysis of the multitudinous facts," the document would nonetheless be exempt from disclosure." *Id.*

"Under such a 'process-oriented' inquiry, 'a report does not become part of the deliberative process simply because it contains only those facts which the person making the report thinks material.'" *Id.* quoting *Playboy Enterprises, Inc. v.*

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*Department of Justice*, 677 F.2d 931, 935 (D.C.Cir.1982). Nevertheless, “[w]here either the disclosure of the manner of selecting or presenting facts would expose the deliberative process, or where facts are ‘inextricably intertwined’ with ‘policy making processes,’ the material is [subject to the privilege].” *Id.* quoting *Ryan*, 617 F.2d at 790.

The EEOC asserts a privilege in all notes of investigators because they either reflect the investigators' mental impressions, analysis or investigative method. Many of the authors of such notes are unknown as are the dates on which the notes are written, and the topic, otherwise unclear, is unidentified. Where the EEOC fails to specify the note's author, the date on which it was written, its subject, and the date and identity of the “decision” or policy that it preceded and pursuant to which it was prepared, the EEOC has not met its burden of establishing that the communication was either pre-decisional or deliberative. Thus with respect to such documents the EEOC has failed to establish the applicability of the privilege and the documents must be disclosed.

Further, as the Ninth Circuit set forth in *National Wildlife*, ‘a report does not become part of the deliberative process simply because it contains only those facts which the person making the report thinks material.’ *Id.* quoting *Playboy Enterprises*, 677 F.2d at 935. To the extent that the investigator notes, whether otherwise identified or not, only set forth facts which the person making the note thinks material, and they do not expose the deliberative process by which policy or decisions are made, or are not otherwise “inextricably-intertwined” with it, the privilege is not appropriately invoked.

“The exercise of judgment in the formulation of a factual statement is not sufficient to lift it to the level of deliberation.” *Resolution Trust*, 137 F.R.D. at 641, quoting *Playboy Enterprises*, 677 F.2d at 935. Thus, while an investigator may have mental impressions about which facts are important to discern, or about how to approach a particular witness, or what questions to ask a particular witness, such concerns are more related to the discovery of facts than they are to the deliberative process leading to a policy or ultimate agency decision. While hopefully administrative policies or decisions ultimately rely on factual determinations, factual investigations, without more, are not as a generic matter “inextricably-intertwined” with the deliberative process that results in an agency decision or policy in a way that protects factual investigations in general pursuant to the privilege. Apart from generally noting that the document relates to an investigator's mental process, analysis or methods, Plaintiff

does not specify how any particular document meets the necessary requirements to be sufficiently related to the deliberative process that ultimately results in the agency decision. This Court declines to parse the documents on its own to determine, based on its limited scope of knowledge of the facts of this case, which documents might have some text that arguably qualifies and which do not. To construe the privilege as broadly as Plaintiff does here would be to permit the limited privilege to swallow the general objection to produce the evidence.

\*17 Upon its review of the documents, however, the Court concludes that with respect to the investigation notes that the EEOC has identified as “analyzing information that had been obtained,” (Exhibit 1 to EEOC's Response, Privilege Log Exhibit A Lines 374–79, 381, 382–88, 405), it has appropriately invoked the deliberative process privilege. Those documents to a greater or lesser degree do actually expose agency deliberations that lead to a charging decision. Therefore, of those documents designated by the EEOC as privileged because they were Investigator Notes and Communications, the documents at line numbers 374–79, 381–88 and 405 are protected by the privilege. All other documents must be disclosed.

## 2. Draft Documents

Plaintiff identifies seven privilege log line number documents that it asserts are “draft documents” that fall under the protection of the privilege. The Ninth Circuit has noted that “the deliberative process privilege has been held to cover all ‘recommendations, draft documents, proposals, suggestions and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency’ as well as documents which would ‘inaccurately reflect or prematurely disclose the views of the agency.’” *Nat'l Wildlife*, 861 F.2d at 1119, quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C.Cir.1980). Nevertheless, merely because the document is a draft does not make it one that is actually sufficiently “related to the process by which policies are formulated” to be subject to the privilege. *Nat'l Wildlife*, 861 F.2d at 1117, quoting *Jordan v. United States Department of Justice*, 591 F.2d 753, 774 (D.C.Cir.1978).

Upon its review the Court finds that the EEOC has appropriately invoked the privilege with respect to three of the documents—those listed at line numbers 290, 293, 294. Those documents are draft conciliation proposal letters by the Commission. The text of a conciliation proposal letter

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sufficiently constitutes an agency decision so that a draft of the letter is subject to the protection of the privilege.

However, the EEOC also seeks to withhold four other documents that are not, subject to the privilege. Two of the documents, lines 366 and 373, though also draft letters, are draft requests to Swissport's counsel for additional information. Mere requests for information from the party under investigation do not constitute documents that are sufficiently related to a deliberative process resulting in a "decision or policy" of the agency. They are, as is discussed above, informational requests.

Documents 279 and 283 are also drafts. Nevertheless, they are drafts of charges of discrimination for persons who may or may not have filed such charges with the EEOC. While the EEOC or its investigators may have drafted such documents for the consideration of the putative charging party, the decision regarding whether to revise, file, accept or reject the draft belongs to the charging party and not the agency. Thus the draft document is not protected by the deliberative process privilege belonging to the agency because it is not the draft of a document that represents a decision or policy that the agency has the authority to make.

\*18 Therefore with respect to those documents designated by the EEOC as privileged because they were drafts, the documents at line numbers 290, 293 and 294 are protected by the privilege. All other documents must be disclosed.

### 3. Data Searches

Plaintiff identifies four privilege log line number documents, documents 174, 228, 229 and 230, that it asserts are "data searches" that, fall under the protection of the privilege. The Court has reviewed these documents. While they are the documents that Plaintiff describes, the data searches themselves are not sufficiently related to a deliberative process or decision to be made by the EEOC to merit protection under the privilege. Privilege Log Line Number Documents 174, 228, 229 and 230 will, therefore be disclosed by Plaintiff.

### 4. Internal Instructional Document

Plaintiff identifies one privilege log line number, document 298, that it asserts is "an internal instructional document" used by the EEOC to determine what type of relief to seek in conciliation, and thus subject to the protection of the privilege. To the extent that the document is a tool used

by the EEOC to guide its conciliation offers it relates to the explanation, interpretation or application of an existing policy within the EEOC. Such materials are not protected by the deliberative process privilege. See *Resolution Trust*, 137 F.R.D. at 641, *Mobil Oil*, 102 F.R.D. at 5. Document line number 298 will, therefore, be disclosed.

### 5. Internal Charge Inventory Document

Plaintiff identifies one privilege log line number, document 348, that it asserts is "an internal charge inventory document" kept by individual investigators and their superiors to "evaluate and categorize their charge inventory in order to efficiently and effectively process their charges." Although it has withheld this document on the basis of the deliberative process privilege, the EEOC offers no explanation as to how this document relates to a deliberative process used by it. Its argument, essentially, is that this particular list also has information relating to other charges and claimants that are not at issue in this case. While that may be true, such an argument does not justify the invocation of the deliberative process privilege. The EEOC, therefore, has not met its burden of establishing the applicability of the deliberative process privilege. The document will, therefore, be disclosed.

### 6. The Benjamin Documents

Defendant asserts that Plaintiff is out of compliance with the Court's Order in which the EEOC agreed to, and was ordered to provide, certain access to the Benjamin documents. Nevertheless, after the parties comply with the above orders of the Court regarding the scope of the privilege, all Benjamin documents contained in the in camera submission will have been disclosed to the Defendants.

### IT IS THEREFORE ORDERED THAT:

1. Plaintiff's Motion for Protective Order (Doc. 165) is denied.

\*19 2. Plaintiff's Expedited Motion for Extension of Time to Identify Claimants (Doc. 184) is granted in part and denied in part.

3. Defendant's Motion to Strike or, in the Alternative, Motion for Leave to File Sur-Reply (Doc. 198) is denied.

4. Defendant's Motion to Compel Production (Doc. 216) is granted in part and denied in part.

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5. Defendant's Motion to Compel in Camera Inspection (Doc. 217) is granted in part and denied in part.

6. Plaintiff's Motion for Extension of Time to File Response to Motion to Compel (Doc. 224) is denied as moot.

7. Plaintiff's Motion for Leave to File Document Under Seal (Doc. 227) is granted. The Clerk of Court is directed to file Exhibit 1 to EEOC's Response (Doc. 228) under seal.

**All Citations**

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