

IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI

WILLIAM KEMPER, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 PRIME TANNING CORP., et al.,)
)
 Defendants.)

FILED
OCT 14 2009
MOLLY LIVINGSTON
Clerk of Clinton Co. Circuit Court

Case No. 09CN-CV00333

DEFENDANT PRIME TANNING CORP.'S SUGGESTIONS IN SUPPORT OF ITS MOTION TO COMPEL DISCOVERY RESPECTING VENUE ISSUES

Prime Tanning Corp. (sometimes referred to as "this defendant"), by and through its counsel, moves this Court pursuant to Mo. R. Civ. P. 61.01(d), to compel Plaintiffs to provide documents responsive to Request Nos. 6-9 of Prime Tanning Corp.'s First Request for Production of Documents.

1. On April 22, 2009, Plaintiffs' counsel, together with well-known celebrity activist Erin Brokovich and "investigator" Robert W. Bowcock, held a "town hall meeting" in Cameron, Missouri, purportedly to release the findings of Ms. Brokovich and Mr. Bowcock's investigation into the purported cause of cancer in and around Cameron, Missouri. Several hundred people packed a school auditorium to attend the meeting. Various media outlets, including the major television stations and newspapers in Kansas City, Jackson County, Missouri covered the event with great interest.

2. Those attendees with questions about the lawsuit or who had particular questions about whether their cancer or a family member's cancer was caused by defendants were directed to meet with Plaintiffs' counsel after the meeting.

3. In this way, the town hall meeting appeared at least in part to constitute a marketing effort to obtain additional plaintiffs, rather than simply to disclose the fruits of Brokovich and Bowcock's investigation as some type of public service to the residents of Cameron, Missouri. More importantly perhaps to Prime Tanning Corp.'s motion for change of venue, the town hall meeting either intentionally or unwittingly also served the purpose of trying Plaintiffs' case in public and spawned the wave of adverse press reports, some of which are attached to Prime Tanning Corp.'s motion for change of venue, (Exhibit A-1, thereto). Numerous copy-cat suits were also filed against defendants herein within days of the Brokovich/Bowcock town hall meeting.¹

4. On information and belief, the Brokovich/Bowcock town hall meeting and the related adverse press has affected the potential jury pool in certain counties or and Prime Tanning Corp. submits it is entitled to discovery on this issue.

5. On June 12, 2009, this defendant served its First Request for Production of Documents to Plaintiffs related to venue issues.

6. Plaintiffs served their responses thereto on July 13, 2009, objecting to Request Nos. 6-9 on the grounds that the documents sought are protected from discovery by the work product doctrine. A true and accurate copy of Plaintiffs' Response to Defendant Prime Tanning Corp.'s First Request for Production of Documents to Plaintiffs is attached hereto as **Exhibit 1** and incorporated herein by reference.

7. The parties have been unable to resolve their dispute over Plaintiffs' objections to Request Nos. 6-9, despite this Defendant's good faith efforts. See attached "golden rule" letter,

¹ The town hall meeting and attendant adverse press also prompted an EPA investigation, which is ongoing. Notably, on July 1, 2009, the EPA stated that the test results conducted on certain farm fields where Prime fertilizer had been spread "do not appear to indicate any health risks." (Exhibit 4C).

dated September 17, 2009 (attached as “**Exhibit 2**”); and Plaintiffs’ September 24, 2009, response (attached as “**Exhibit 3**”). The undersigned and counsel for Plaintiffs also discussed the subject in person on September 25, 2009, without success in resolving the issue. Notwithstanding Plaintiffs’ objections are based on the work-product doctrine, Plaintiffs are even refusing to produce a privilege log or the materials sought, much less the documents themselves.

Requests regarding Robert W. Bowcock

8. In Request Nos. 6 and 8, this Defendant sought communications and agreements between Plaintiffs, their attorneys and Robert W. Bowcock regarding Plaintiffs’ claims that Prime Tanning’s sludge contained hexavalent chromium.

9. Plaintiffs objected to both requests on the grounds that each “calls for items that are privileged under the work product doctrine.” However, Plaintiffs did not describe the nature of their relationship with Mr. Bowcock or provide any other information sufficient for this Defendant to assess Plaintiffs’ claim of privilege.

10. Although this Defendant requested Plaintiffs to provide a privilege log to substantiate their claim of privilege (**Exhibit 2**), Plaintiffs refused to do so. See **Exhibit 3**.

11. Separately from their discovery responses, Plaintiffs have alternatively described Robert W. Bowcock as their “consultant” (**Exhibit 3**); their “environmental investigator” (**Exhibit 4 and 4A**, Transcript Part 1, p. 8); and as their “expert” (**Exhibit 4 and 4A**, Transcript Part 3, p. 12).

12. Blanket assertions of work product do not suffice. *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. banc 2005). The Missouri Supreme Court has held that a party is entitled to a privilege log upon request with sufficient information to enable it to assess whether the claimed privilege applies. See *id.* at 368 (While “a party may initially claim work product protection in response to a discovery request,” “[t]he party seeking discovery . . . is

entitled, at least, to a privilege log if requested.”); *id.* at 367 (a privilege log must provide sufficient information for opposing counsel to determine whether the claimed privilege is applicable).

13. By refusing to provide a privilege log upon request and resting solely on their blanket assertions of privilege which are wholly insufficient under Supreme Court precedent, Plaintiffs should be deemed to have waived any such privilege and should be compelled to provide the documents requested.

14. Further, any claim of work product privilege does not apply to the *facts* discovered by the expert, as opposed to his conclusions and opinion. *See State ex rel. Missouri Public Serv. Co. v. Elliott*, 434 S.W.2d 532 (Mo. banc 1968). As the Court stated: “[I]f the information sought is a factual matter within the knowledge of the party interrogated or his attorney, it is not protected from discovery because the information was developed as the result of the party’s investigation.” *Id.* at 537 (citation omitted). In that case, an expert who investigated the scene of an explosion was required to disclose “what [he] saw] at the scene, whether [he] took anything away, and whether [he] disturbed anything.” *Id.* at 537. Further, the Court held, “as to what [the expert] did, [he] should also be required to testify to the extent that any ordinary individual would, so long as that testimony does not necessarily involve [his] conclusions.” *Id.* In short, the Court held that “the observations and activities of an expert, consisting of such things as an ordinary person might see and do, must be disclosed. Witnesses and counsel should, if they sincerely try, be able to separate such testimony from conclusions and opinions.” *Id.* at 538-39.

15. Thus, to the extent Mr. Bowcock conveyed factual information from his investigation of Prime Tanning's sludge to Plaintiffs or their counsel, at the very least those facts are not shielded from discovery by the work product doctrine and must be disclosed.

16. Additionally, all facts discovered by Mr. Bowcock, as well as his opinions and conclusions, should be disclosed because any work product privilege has been waived. "[W]ork product immunity, as any other, may be relinquished by voluntary disclosure of the protected information." *State ex rel. Mueller v. Dixon*, 456 S.W.2d 594, 597 (Mo. App. W.D. 1970). "A party waives any work product immunity for a consultant by giving the work product to the other side, or by authorizing the consultant to talk to the other side." *Brown v. Hamid*, 856 S.W.2d 51, 54 (Mo. banc 1993).

17. Further, any work product immunity, including opinion work product, is waived by disclosure to third parties that substantially increases the chances that adversaries will obtain the information. *Monarch Fire Protection Dist. of St. Louis Co. v. Freedom Consulting & Auditing Serv., Inc.*, 2009 WL 2155158, *2 (E.D. Mo. July 16, 2009) (citations omitted); 8 Wright & Miller, *Federal Practice and Procedure*, Section 2024 (1970 ed.). And such privilege is waived where the disclosure is "inconsistent with maintaining secrecy from possible adversaries." *Monarch Fire Protection Dist.*, 2009 WL 2155158 at *2 (citation omitted). Of particular note is that a majority of courts hold that work product immunity is waived by disclosure to government entities. *See In re Natural Gas Commodity Litigation*, 2005 WL 1457666, *7 (S.D.N.Y. June 21, 2005) (unreported) (collecting cases).

18. In this case, Mr. Bowcock publicly disclosed information concerning his investigation of Prime Tanning Corp.'s sludge not once, but twice, thereby waiving any work product protection. First, Mr. Bowcock disclosed information concerning his investigation to the

United States Environmental Protection Agency, substantially increasing the probability that it would be disclosed to Plaintiffs' adversaries. See United States Environmental Protection Agency response to FOIA request at p. 15 of 17 (disclosing samples provided to the EPA by Mr. Bowcock) (Exhibit 5 and 5B). Indeed, as one author stated, "anything produced to the government should be expected to end up in the hands of plaintiffs in subsequent civil actions via . . . requests to the government agency through the Freedom of Information Act." *In re Natural Gas Commodity Litigation*, 2005 WL 1457666, *7 (S.D.N.Y. June 21, 2005) (unreported) (quoting Mark Robeck, et al., *Corporate Governance in the Face of Government Investigations*, 17 No. 2 Health Law. 20, 26 (2005)).

19. Disclosure of some privileged communications waives the privilege as to similar information in documents withheld from production. See *State ex rel. Mitchell Humphrey & Co.*, 854 S.W.2d 810, 813 (Mo. App. E.D. 1993) (holding that plaintiff did not waive work product immunity by producing some communications between Plaintiff's counsel and consultant where the documents withheld were *not* similar to the documents produced). Prime Tanning is entitled to discovery of all communications with Plaintiffs and their counsel that relate to the same facts and opinions Mr. Bowcock disclosed to the EPA, as the same have been waived.

20. Second, Mr. Bowcock waived any work product immunity as to his investigation of Prime Tanning's sludge, and his opinions and conclusions therefrom, by disclosing such information in an April 22, 2009, public meeting in Cameron, Missouri. There, Mr. Bowcock reported both the facts of his investigation and his conclusions from that investigation:

We looked at, as Brian [Madden] said, numerous documents surrounding the investigation, and it kept point to this activity of the waste material being deposited in and around the farms of the area of Cameron. And it has been going on for decades, and *the same chemical amounts to, you know, hundreds of thousands and millions of pounds of chromium(VI)*.

We came out; we wanted to be respectful of their business activities, so we were very quiet about our investigation and *we physically obtained samples of the sludge material and of the windrows that have been deposited on the farms and confirmed that the chromium that they had represented to the State Department of Agriculture [as] an agricultural soil enhancement product with only chromium levels in it had indeed chrome(VI) levels.*

Exhibit 4 and 4A, Part 1, at 9 (emphasis added).

In addition, Mr. Bowcock opined, *inter alia*:

- that the alleged contamination was “physically” “in the environment, but “some of my evidence indicates that it is likely not” in the drinking water supply;
- that the sludge has “harmful hazardous waste chemicals in them,”
- that “it’s likely that over 25 years, this community has been loaded with millions and millions of pounds of chromium(VI);”
- that “we know where it’s kind of coming from;”
- that “everyone is doing to be affected differently. Everyone is going to have different problems at different times;”
- that the sludge “is hazardous waste material and it needs to go to a hazardous waste landfill and it needs to be properly managed;”
- that “what’s in that is this hazardous chemical;”
- that “the majority of this stuff, though it’s got hair in it, is protein and nitrogen and a lot of chromium(VI);”
- that chrome(VI), once it gets in water, will stay for “a very, very long time;”
- as to the manner in which the sludge was taken from the tannery to the farmer’s field;

- that the Missouri Department of Natural Resources should have regulated the sludge “because it’s a hazardous waste material;”
- that “millions of pounds of [hazardous waste] ended up in the four-county area.”

Id. at Part I, pp. 11-15; Part II, p. 10, 23-25, 31-33.

21. The April 22, 2009, Cameron meeting was open to the general public and was conducted with the knowledge and participation of Plaintiffs’ Counsel, Brian Madden, who moderated the meeting. Moreover, the meeting was videotaped by KMBC television station, and made available to the general public. *See* Affidavit of W.C. Blanton, ¶ 5 (**Exhibit 4**).

22. By making these extensive disclosures of Mr. Bowcock’s investigation, conclusions and opinions in a public forum, Plaintiffs substantially increased the chances that their purported work product would be discovered by their adversaries.

23. Accordingly, any work product immunity is waived not only as to the particular facts and opinions actually disclosed during the meeting, but also as to any similar or related facts and opinions, such as those that may be contained in communications between Mr. Bowcock and Plaintiffs and their Counsel, which Plaintiffs have withheld from production. As a result, Plaintiffs should be compelled to disclose all communications between them and/or their Counsel and Mr. Bowcock that relate to the facts, conclusions and opinions disclosed during the Cameron public meeting.

Requests regarding Erin Brockovich

24. In Request Nos. 7 and 9, this Defendant sought communications and agreements between Plaintiffs, their attorneys and Erin Brockovich regarding Plaintiffs’ claims that Prime Tanning’s sludge contained hexavalent chromium.

25. Plaintiffs objected to both requests on the grounds that each “calls for items that are privileged under the work product doctrine.” However, Plaintiffs did not describe the nature of their relationship with Ms. Brockovich or provide any other information sufficient for this Defendant to assess Plaintiffs’ claim of privilege.

26. Although this Defendant requested Plaintiffs to provide a privilege log to substantiate their claim of privilege (**Exhibit 2**), Plaintiffs refused to do so. *See Exhibit 3*.

27. Separately from their discovery responses, Plaintiffs have alternatively described Erin Brockovich as their “consultant” (**Exhibit 3**); and as their “expert” (**Exhibit 4 and 4A**, Transcript Part 3, p. 12).

28. As stated above, blanket assertions of work product, such as those Plaintiffs asserted in their response to this Defendant’s document requests, are not sufficient to preserve any claim of privilege. *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. banc 2005). Further, a party is entitled to a privilege log upon request that provides sufficient information to enable it to assess whether the claimed privilege applies. *See id.* at 368.

29. Plaintiffs’ refusal to provide a privilege log leaves only a blanket assertion of privilege which is insufficient, under Supreme Court precedent, to preserve any claim of privilege. Accordingly, Plaintiffs should be deemed to have waived any such privilege and should be compelled to provide the documents requested.

30. Further, the work product doctrine does not shield from discovery the facts which Ms. Brockovich has learned during her investigation of the claims in this litigation. *See State ex rel. Missouri Public Serv. Co. v. Elliott*, 434 S.W.2d 532 (Mo. banc 1968). The work product doctrine protects only conclusions or opinions.

31. Thus, to the extent Ms. Brockovich conveyed factual information from her investigation of Prime Tanning's sludge to Plaintiffs or their Counsel, at the very least those facts are not shielded from discovery by the work product doctrine and must be disclosed.

32. Additionally, both the facts discovered by Ms. Brockovich, as well as her opinions and conclusions, should be disclosed because any work product privilege has been waived by her voluntary disclosure of such information at the April 22, 2009, Cameron public meetings.

33. Ms. Brockovich publicly disclosed information concerning her investigation of Prime Tanning Corp.'s sludge, which substantially increased the chances that Plaintiffs' adversaries would obtain the information, and which is "inconsistent with maintaining secrecy from possible adversaries." *See Monarch Fire Protection Dist. of St. Louis Co. v. Freedom Consulting & Auditing Serv., Inc.*, 2009 WL 2155158 (E.D. Mo. July 16, 2009) (citations omitted); 8 Wright & Miller, *Federal Practice and Procedure*, Section 2024 (1970 ed.).

34. At the April 22, 2009, Cameron public meeting, Ms. Brockovich opined, *inter alia*:

- that the sludge contained hexavalent chromium, a "bad chemical;"
- that as the sludge "dries, in the wind and becomes airborne, it can be an exposure pathway for the community;"
- that the sludge is "jeopardizing public health and safety;"
- that "we've looked in the community, we have found a problem; we have found a chemical; we have found something that is concerning us that there could be an exposure pathway;"

- that “in [her] experience in the field, hexavalent chromium, depending on its concentration and it’s level, takes on different colors in soil, and that’s already been reported to us;”
- that she has taken water samples where the water turns different colors depending on the concentration of hexavalent chromium;
- that hexavalent chromium “has been a known carcinogen for a hundred years by inhalation,” and causes “various forms of cancer, including lung, throat and kidney cancers.
- that “to date we haven’t anything conclusive reports that it’s in water, in your drinking water, in ponds, and we are clearly dealing with a sludge waste material that has been spread onto the farms and are looking at an airborne exposure pathway to the community.”
- that “damage has been done.”

Exhibit D, Part II, pp. 6-7, 12, 19-20, 30, 35.

35. By making these extensive disclosures of Ms. Brockovich’s investigation, conclusions and opinions in a public forum, Plaintiffs substantially increased the chances that their purported work product would be discovered by their adversaries. Indeed, these disclosures were videotaped by KMBC television station, and made available to the general public. *See* Affidavit of W.C. Blanton, ¶ 5 (**Exhibit 4**).

36. Accordingly, any work product immunity is waived not only as to the particular facts and opinions actually disclosed during the meeting, but also as to any similar or related facts and opinions, such as those that may be contained in communications between Ms. Brockovich and Plaintiffs and their Counsel, which Plaintiffs have withheld from production. As

a result, Plaintiffs should be compelled to disclose all communications between them and/or their Counsel and Ms. Brockovich that relate to the facts, conclusions and opinions disclosed during the Cameron public meeting.

WHEREFORE, defendant Prime Tanning Corp. respectfully requests this Court overrule Plaintiffs' objections to Request Nos. 6-9 of Prime Tanning Corp.'s First Request for Production of Documents; that Plaintiffs be directed to provide full and complete responses thereto by a date certain to be determined by the Court, and for such other relief the Court deems just and appropriate.

Dated: October 13, 2009

Respectfully submitted,

POLSINELLI SHUGHART PC



R. Dan Boulware MO #24289

DBoulware@polsinelli.com

Todd H. Bartels MO #45677

TBartels@polsinelli.com

Seth C. Wright MO #51830

SCWright@polsinelli.com

3101 Frederick Avenue

St. Joseph, MO 64506

Phone: (816) 364-2117

Fax: (816) 279-3977

Dennis J. Dobbels MO #32378

DDobbels@polsinelli.com

Twelve Wyandotte Plaza

120 West 12th Street

Kansas City, MO 64105

Phone: (816) 421-3355

Fax: (816) 374-0509

Melissa A. Hewey
DRUMMONDWOODSUM
84 Marginal Way, Suite 600
Portland, ME 04101
Phone: (207) 772-1941
Fax: (207) 772-3627
mhewey@dwmlaw.com

**ATTORNEYS FOR DEFENDANT
PRIME TANNING CORP.**

CERTIFICATE OF SERVICE

I certify that on this 13th day of October, 2009, copies of the foregoing were transmitted via first class U.S. mail, postage prepaid, to:

Thomas P. Cartmell
Brian J. Madden
Thomas L. Wagstaff
WAGSTAFF & CARTMELL LLP
4740 Grand Avenue, Suite 300
Kansas City, MO 64112

Thomas V. Girardi
GIRARDI KEESE
1126 Wilshire Boulevard
Los Angeles, CA 90017-1904

Stephen Griffin
W. Mitchell Elliott
Troy Dietrich
GRIFFIN DIETRICH ELLIOTT
416 N. Walnut
Cameron, MO 64429

ATTORNEYS FOR PLAINTIFFS

WC Blanton
Stephen J. Torline
HUSCH BLACKWELL SANDERS LLP
4801 Main Street, Suite 1000
Kansas City, MO 64112

**ATTORNEYS FOR DEFENDANT
NATIONAL BEEF LEATHERS CO. LLC**

Scott R. Ast
Todd A. Scharnhorst
SCHARNHORST AST & KENNARD, P.C.
1000 Walnut, Suite 1550
Kansas City, MO 64106

**ATTORNEYS FOR DEFENDANT
RICK REAM**



Attorneys for Defendant Prime Tanning Corp.