

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER**

JENLIH JOHN HSIEH,)	
Complainant,)	
)	8 U.S.C. § 1324b Proceeding
)	
v.)	OCAHO Case No. 02B00005
)	
PMC - SIERRA, INC.,)	Judge Robert L. Barton, Jr.
Respondent)	

**ORDER RULING ON COMPLAINANT'S
MOTIONS TO COMPEL DISCOVERY**

(December 24, 2002)

Complainant filed two motions to compel discovery with the Court on November 15, 2002:

1. A Motion to Compel Production of Documents Or In The Alternative A Court Order To Enforce The Subpoena And Request For Attorney's Fees; and
2. A Motion to Compel Further Production Of Documents And Request For Attorney's Fees.

The Court rules on the two motions discussed in this Order as follows:

Complainant's motion to compel production of documents responsive to the subpoena is granted because Respondent failed to establish that documents requested pursuant to a subpoena duces tecum are protected by the attorney-client privilege, and any privilege has been waived.

Complainant's motion to compel further production of documents responsive to its first set of requests for production is partially granted because Respondent has failed to establish that thirty documents withheld and reviewed in camera are fully protected by the attorney-client privilege.

I. RELEVANT BACKGROUND

Complainant alleges that Respondent violated 8 U.S.C. § 1324B by discriminating against him on

the basis of his citizenship status. Complaint, Part II ¶ 2. Complainant alleges that Respondent saved jobs for H1B visa holders and replaced United States citizen employees with H1B

visa holders. Id., Part II ¶ 7. Respondent denies these allegations and asserts that Complainant was fired because of a Company-wide layoff. Answer at 3-4.

Respondent's outside counsel for immigration matters is Ryan, Swanson & Cleveland (Ryan Swanson). Respondent's Opposition to Complainant's Motion to Compel Further Production of Documents at 1. Ryan Swanson assisted Respondent to obtain an H1B visa for an employee, Ravinder Singh. Id.

Complainant filed these two motions to compel discovery on November 15, 2002, and Respondent's briefs in opposition to the motions to compel were filed on November 25, 2002. A Prehearing Conference was held on December 11, 2002, to discuss Complainant's motions to compel. At the conference, I ruled orally on the motions to compel. For the reasons stated during the conference and in this Order, I granted Complainant's motion to compel with respect to the documents responsive to the subpoena. I deferred ruling on the motion to compel further production of documents until I reviewed a portion of them in camera, as well as on Complainant's motion for attorneys fees until further documentation is provided. This Order reiterates my rulings made at the Prehearing Conference.

II. COMPLAINANT'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS OR IN THE ALTERNATIVE A COURT ORDER TO ENFORCE THE SUBPOENA

Complainant is moving to compel production of documents requested pursuant to a subpoena duces tecum properly served upon the law firm of Ryan Swanson on October 2, 2002. The subpoena duces tecum requested: "(1) [a]ny documents prepared for either SwitchOn Networks, Inc., or PMC-Sierra, Inc., for submission to any public agency pertaining to Ravinder Singh; (2) [a]ny correspondence, including e-mail, between the firm and either SwitchOn Networks, Inc., or PMC-Sierra, Inc.; (3) [a]ny notes or memoranda pertaining to either of the above categories." Specifications Attached to Subpoena to Ryan Swanson. These documents were to be produced on or before October 24, 2002. Subpoena to Ryan Swanson. Ryan Swanson has not complied with or responded to the subpoena. However, Ryan Swanson performed work and continues to perform work for Respondent. In response to the motion to compel, Respondent attempts to assert attorney-client privilege with respect to documents responsive to the subpoena which were either withheld in their entirety or redacted. Respondent's Opposition to Complainant's Motion to Compel Further Documents or in the Alternative a Court Order to Enforce the Subpoena (R's Opposition to Motion to Compel) at 2-5.

A. FACTUAL FINDINGS

Pursuant to the subpoena, the requested documents were to be produced at the office of Complainant's counsel. Subpoena to Ryan Swanson. Instead of producing the documents responsive to the subpoena at the office of Complainant's counsel, Ryan Swanson turned over the responsive documents to Respondent's current litigation counsel, Wilson, Sonsini, Goodrich & Rosati (Wilson Sonsini). Notice of Motion to Compel Further Production of Documents or Enforce Subpoena at 2; testimony of Respondent's counsel at prehearing conference, transcript (PHC Tr.) at 22, lines 3-7. Respondent's counsel withheld documents and redacted portions of other documents that, in its opinion, were protected by the attorney-client privilege. Id. Respondent's counsel sent the redacted documents and documents not withheld to the office of Complainant's counsel. Memorandum of Points and Authorities Supporting Complainant's Motion to Compel Further Production of Documents or in the Alternative a Court Order to Enforce the Subpoena, Exhibit 2. By doing so, Respondent took possession, custody, and control of the documents.

Ryan Swanson has performed work for Respondent in the past and continues to be Respondent's outside counsel. PHC Tr. at 20. Thus, an attorney-client relationship exists between Ryan Swanson and Respondent. However, asserting the attorney-client privilege requires proper procedural steps. Neither Respondent, Wilson Sonsini, nor Ryan Swanson produced a privilege log to Complainant with respect to the withheld documents requested pursuant to the subpoena. Neither Respondent, Wilson Sonsini, nor Ryan Swanson filed a motion for a protective order with respect to the documents requested in the subpoena. Although expressly authorized by the OCAHO Rules of Practice, 28 C.F.R. § 68.25(c) (2002), Ryan Swanson did not file a petition to revoke or modify the subpoena.

On October 8, 2002, Respondent did file a motion to revoke the subpoena served on Ryan Swanson. However, in its motion regarding the subpoena duces tecum, Respondent asserted a blanket privilege claiming that "each and every requested document" was protected by the attorney-client privilege. Respondent's Memorandum of Points and Authorities in Support of its Motion to Revoke the Subpoena to Ryan, Swanson & Cleveland at 3. Respondent completely failed to identify the responsive documents which it claimed were protected by attorney client privilege. I denied the motion because Respondent failed to show that there were any privileged documents. Prehearing Conference Report, Oct. 21, 2002, at 7. Subsequently, Respondent produced some documents and withheld or redacted other documents, despite the fact that Respondent's motion had been denied. Respondent also failed to produce a privilege log for the documents responsive to the subpoena that were being withheld and failed move for a protective order.

B. LEGAL CONCLUSIONS

A party is in control of documents if it has the legal right to obtain them upon demand. Int'l Union of Petroleum & Indus. Workers, 870 F.2d 1450, 1452 (9th Cir. 1989). Courts have found that documents in a party's counsel's possession are within the party's control. Asset Value Fund Ltd. P'ship

v. Care Group, Inc., 1997 WL 706320, at *9 (S.D.N.Y.), Moyers v. Mythology, Ltd., 1991 WL 73978, at *1 (S.D.N.Y.).

At the outset, I would observe that both Wilson Sonsini, Respondent's litigation counsel in this case, and Ryan Swanson, are agents of Respondent and act at the direction of Respondent. Thus, the subpoena, which sought documents prepared by Ryan Swanson on behalf of Respondent PMC, was not directed to an independent third party, but rather to a law firm which has acted in the past, and continues to act as counsel for Respondent.

Because Respondent is claiming that these documents are protected by the attorney-client privilege, Respondent must show that the documents requested in the subpoena contain confidential communications by Respondent to Ryan Swanson made for the primary purpose of securing legal advice, the privilege was properly asserted, and the privilege has not been waived. Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 327 (N.D. Cal. 1985); see also United States v. Plache, 913 F.2d 1375, 1379 n.1 (9th Cir. 1990). Neither Ryan Swanson nor Respondent have established that the three document specifications sought by the subpoena to Ryan Swanson are protected by the attorney-client privilege.

1. FAILURE TO ESTABLISH PROTECTION UNDER THE ATTORNEY-CLIENT PRIVILEGE

The first document specification requested by Complainant is “[a]ny documents prepared for SwitchOnNetworks, Inc., or PMC-Sierra, Inc., for submission to any public agency pertaining to Ravinder Singh.” Attachment to Subpoena to Ryan Swanson. These documents are clearly not protected by the attorney-client privilege as they are certainly not confidential communications because they were given to a public agency. Indeed, Respondent concedes the point and, at the prehearing conference, it asserted that it did not withhold any documents responsive to the first specification of the subpoena. PHC Tr. at 25, lines 2-5.

As for the second and third specifications: “[a]ny correspondence, including e-mail, between the firm and either SwitchOn Networks, Inc., or PMC-Sierra, Inc.” and “[a]ny notes and memoranda pertaining to either of the above categories,” Respondent has failed to establish that these documents are protected by the attorney-client privilege.

From the information provided by the parties, it appears that the visa application process completed by Ryan Swanson was a routine business matter and not the rendering of legal advice. Respondent completely turned over the visa application process of Ravinder Singh to Ryan Swanson. Because Respondent anticipated that the information provided to Ryan Swanson about Ravinder Singh's visa would be used for communications with the Immigration and Naturalization Service (INS), Respondent had no reasonable expectation of confidentiality with respect to Singh's visa application.

Additionally, aside from the lack of confidentiality, the communications between Respondent and Ryan Swanson do not appear to be legal advice from an attorney in his/her capacity as such, as is required for attorney-client privilege protection. Indeed, it appears that, in completing the visa application, Ryan Swanson was soliciting information and advice from Respondent, rather than Ryan Swanson providing advice to Respondent. Ryan Swanson was performing a business service for Respondent, not rendering legal advice.

Respondent has not met its burden of demonstrating that the documents requested pursuant to the subpoena are protected by the attorney-client privilege because it has not shown that these documents contain communications intended to remain confidential or that they involve the request or rendering of legal advice.

2. ATTORNEY-CLIENT PRIVILEGE HAS BEEN WAIVED

Notwithstanding the fact that neither Respondent nor Ryan Swanson have established that any confidential legal advice was provided with respect to Singh's visa application, to the extent any of the documents responsive to the subpoena do contain legal advice, the privilege has been waived. Respondent has not met its burden of demonstrating non-waiver, an element necessary to establish attorney-client privilege protection.

a. FAILURE TO PRODUCE PRIVILEGE LOG

Neither Respondent nor Ryan Swanson produced a privilege log in response to the subpoena. In its opposition to Complainant's Motion to Compel, Respondent asserts that Ryan Swanson had no duty to produce a privilege log. Further, Respondent argues that Wilson Sonsini, who was merely preparing the documents on behalf of Ryan Swanson, was also not required to produce a privilege log because it was not withholding its own documents. Respondent's Opposition to Motion to Compel at 1. Respondent is mistaken in both of its arguments.

Indeed, the Federal Rules of Civil Procedure debunk these notions. When information subject to a subpoena is withheld based on privilege, "the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." Fed. R. Civ. P. 45(d)(2); see also Christman v. Brauvin Realty, 185 F.R.D. 251, 254 (N.D. Ill. 1999) (demonstrating that non-party recipients of subpoenas duces tecum file privilege logs). Thus, Ryan Swanson had the duty to produce a privilege log that expressly claimed privilege and to give a description of the documents withheld under a claim of privilege. A non-party cannot shirk its responsibility to prepare a privilege log by giving documents responsive to a subpoena to another entity.

Further, because Respondent, through its counsel Wilson Sonsini, undertook the task of unilaterally

deciding which documents are privileged, which documents are not privileged, and serving the “non-privileged” documents upon Complainant, the responsibility of preparing a privilege log fell upon them. Once Ryan Swanson provided the documents to Wilson Sonsini, it is clear that Respondent had possession, custody, and control of these documents.

b. FAILURE TO MAKE TIMELY OBJECTION TO THE SUBPOENA

In a recent case involving a subpoena issued to a non-party pursuant to Federal Rule of Civil Procedure 45, which governs subpoenas duces tecum for the production of documents, the Central District of California first observed that only the nonparty to whom the subpoena was directed could prevent disclosure by objecting to the subpoena. McCoy v. Southwest Airlines, Co., 2002 WL 31681521, at *2 (C.D. Cal. Nov. 7, 2002). The party to whom the subpoenaed documents pertain must file a motion for a protective order or a motion to quash the subpoena. Id. The “nonparty’s failure to make timely objections to a subpoena duces tecum generally requires the court to find that any objection, including attorney-client privilege, has been waived.” Id. at *3.

The OCAHO Rules of Practice provide that either the entity served with the subpoena or a party may file a petition to revoke or modify. 28 C.F.R. § 68.25(c-d) (2002). Moreover, a motion for a protective order may be filed either by the person from whom discovery is sought or by a party. 28 C.F.R. § 68.18(c) (2002).

In this case, neither the nonparty, Ryan Swanson, nor the party, Respondent, have raised timely objections to the subpoena duces tecum. Respondent and Ryan Swanson have failed to comply with the OCAHO Rules of Practice in three ways. First, both have failed to file a procedurally proper petition to revoke/modify the subpoena, even though the rules of practice clearly provide for that procedure. 28 C.F.R. § 68.25(c-d). Second, both have failed to file a motion for protective order and the Rules of Practice clearly provide for that procedure. 28 C.F.R. § 68.18(c). Third, as discussed above, both failed to prepare and present a privilege log, or to identify responsive documents being withheld pursuant to a claim of privilege, as required by my procedural orders in the case and by Federal Rule of Civil Procedure 45(d)(2). The Order Governing Prehearing Procedures, Jan. 24, 2002, at 4-5, specifically provides that a party withholding information based on a privilege must make the claim expressly and specify the document request to which the privileged document is pertinent, the date of the document, the title of the document (if any), the type of document or communications being withheld, the number of pages of each document being withheld, the author(s), addressee(s), subject matter, and how and why the document or information, in whole or in part, is protected by the privilege.

Instead of following the procedure set forth in the OCAHO Rules of Practice, the Federal Rules of Civil Procedure, and my orders in this case, Respondent, through its litigation counsel Wilson Sonsini, interceded, had Ryan Swanson submit the documents to Respondent, and then proceeded unilaterally,

without seeking court intervention, to decide which documents would be produced and which would be withheld. Respondent did not file a procedurally proper petition to revoke or modify the subpoena, nor a motion for protective order, nor a privilege log or other similar document expressly describing the nature of the documents or communications not produced. Apparently Respondent's counsel has the quaint notion that, without seeking judicial relief, it may unilaterally decide which documents to withhold pursuant to a claim of privilege. This notion is contrary to the rules of practice, the case law, and my orders in this case.

Because Ryan Swanson submitted the documents to Wilson Sonsini, and Wilson Sonsini is Respondent's current counsel, Respondent has possession, custody, and control of the documents responsive to the subpoena provided to Wilson Sonsini by Ryan Swanson. Frankly, Wilson Sonsini has no legal standing to refuse turning the documents over to Respondent. There is no question that Respondent has control of all of the documents responsive to the subpoena.

Because Respondent failed to establish that the documents requested pursuant to a valid subpoena are protected by the attorney-client privilege, during the December 11 prehearing conference, I ordered Respondent and its counsel, Wilson Sonsini, to immediately produce and serve Complainant with all documents provided by Ryan Swanson to Wilson Sonsini that are responsive to the subpoena served upon Ryan Swanson. I ordered Respondent to bear the cost of copying and shipping all such documents to Complainant.

III. COMPLAINANT'S MOTION TO COMPEL FURTHER PRODUCTION OF DOCUMENTS AND REQUEST FOR ATTORNEY'S FEES

A. FACTUAL FINDINGS

Complainant served upon Respondent three sets of requests for production of documents. Only the first set of requests is the subject of this motion. The first set consisted of twenty-four requests for production of documents and was served on Respondent on February 13, 2002. Within the first set of requests for production, three specific requests are the subject of this motion: Request Nos. 12, 22, and 28.

Request No. 12 asks Respondent to "produce all documents relating to the employment information regarding the: (a) hiring and firing of H1-B workers at Respondent's Milpitas facility, (b) the hiring and firing of H-1B workers at Respondent's IT department, (c) hiring and firing of professional consultants at Respondent's Milpitas facility, (d) hiring and firing of professional consultants at Respondent's IT department. List their names, title, race, DOB, national origin, citizenship, work status, and workplace location."

Request No. 22 asks Respondent to "produce copies of all documents relating to Respondent's

ten H-1B applicants filed ETA Form 9035 for Labor Condition Application (ETA Case No. 30249424).”

Request No. 28 asks Respondent to produce a “list of all documents which are being withheld from production by virtue of privilege or for any other reason. (This list should identify each document by its name, date, author, and recipient and specify the reason for withholding it from production).”

On March 18, 2002, Respondent responded to the First Request for Production. Declaration of Phillip J. Griego Supporting Complainant’s Motion to Compel Further Production of Documents, Exhibit 1. With respect to Request No. 12, Respondent objected to all parts of the question because the information requested was overbroad and unduly burdensome, protected by attorney-client and/or work product privileges, irrelevant, compound, and violative of the privacy of third parties. Respondent objected to Request No. 22, because the information requested was overbroad and unduly burdensome, violative of the privacy of third parties, and vague and ambiguous. With respect to Request No. 28, Respondent objected because the requested information was protected by the attorney-client and/or the attorney work product privilege.

In response to Complainant’s request for a discovery conference, Respondent sent an amended response to the first request for production on July 25, 2002. Declaration of Griego Supporting Complainant’s Motion to Compel, Exhibit 4. With respect to Request Nos. 12 and 22, Respondent stated that it has “produced all relevant H-1-B documents.” Id. In response to Request No. 28, Respondent stated that “no documents were withheld from production based on the attorney-client privilege.” Id.

Thus, on July 25, 2002, five months after the first request for production was propounded, Respondent unequivocally represented to Complainant that no documents responsive to the first request for production had been withheld, and specifically that no documents were withheld on the basis of attorney-client privilege.

Complainant served two more sets of requests for production, with specific requests for privilege logs. Respondent responded to each of the requests for production, but did not include a privilege log with either response. During the deposition of Chris Smith (an employee of Respondent) on August 22, 2002, Respondent asserted the attorney-client privilege with respect to a document that had been turned over to Complainant through the course of discovery and was the subject of questioning at the deposition. Declaration of Griego Supporting Complainant’s Motion to Compel at 4. The next day, August 23, 2002, Respondent’s counsel sent a letter to Complainant’s counsel requesting that the document be returned and mentioned that a privilege log would be produced. Id. at Exhibit 19.

On September 20, 2002, Respondent produced a privilege log claiming attorney-client privilege protection for fifty-nine documents. Id. at Exhibit 22. This privilege log was provided to Complainant almost seven months after the initial request for production of a privilege log. After a meet and confer attempt by Complainant’s counsel, an amended privilege log was produced on October 30, 2002, and

claimed fifty-one documents as privileged. Id. at Exhibit 27.

In a letter from Respondent's counsel to Complainant's counsel dated October 22, 2002, Respondent justified its failure to produce a privilege log by stating, among other things, that it was not aware of privileged documents until mid-August, and thus Respondent could not have produced a privilege log. Id. at Exhibit 25.

The amended privilege log contains communications between paralegals and non-attorneys who work for Respondent. Additionally, the privilege log contains communications to and from Ravinder Singh, a non-party. At a prehearing conference held on December 11, 2002, I ordered Respondent to submit the documents that fall within the above categories to me for an in camera review. This totaled thirty documents, referred to by privilege log number: 4, 6, 11, 14, 15, 16, 17, 18, 19, 20, 23, 28, 32, 33, 35, 36, 37, 39, 40, 41, 45, 47, 49, 50, 51, 52, 54, 55, 56, 60. All documents were submitted to the court on December 13, 2002, except for document 32, which was submitted on December 18, 2002.

B. LEGAL CONCLUSIONS

The attorney-client privilege protects information when it is "confidential communications by a client...to a lawyer acting in the capacity of a lawyer (or a lawyer's subordinate), made for the primary purpose of securing legal advice or legal services...provided that the privilege is properly asserted, and has not been waived." Hartford Fire Ins., 109 F.R.D. at 327; see also Plache, 913 F.2d at 1379 n.1.

The attorney-client privilege is narrowly construed because federal policy favors broad discovery and the attorney-client privilege has the effect of withholding relevant information. Weil v. Inv./Indicators, Research & Mgmt., 647 F.2d 18, 24 (9th Cir. 1981), Hartford Fire Ins., 109 F.R.D. at 327. The party asserting the attorney-client privilege has the burden of demonstrating all of the elements, including non-waiver. Hartford Fire Ins., 109 F.R.D. at 327.

Generally, ordinary business matters handled by attorneys are not protected by the attorney-client privilege. Tri-State Equip. v. United States, 1996 WL 376340, at *2 (E.D. Cal.), United States v. Bell, 1994 WL 665295, at *8 (N.D. Cal. 1971); see also Sedco Int'l v. Cory, 683 F.2d 1201, 1205 (8th Cir. 1982).

Ordinarily, information gleaned by attorneys assisting clients with applications to government agencies is not protected by the attorney-client privilege. United States v. Oloyede, 982 F.2d 133, 141 (4th Cir. 1992) (holding that the attorney-client privilege did not apply to information given from a client to his attorney in order to file a citizenship application with the INS), United States v. Cooper, 1997 WL 129306, at *3 (D. Colo.) (holding that much of the information communicated between an attorney and client for purposes of filing a visa application is not protected by the attorney-client privilege), United States v. Rivera, 837 F. Supp. 565, 569-70 (S.D.N.Y. 1993) (holding that all information pertaining to a client's

application for amnesty was discoverable and not subject to the attorney-client privilege). This information is not privileged because the client did not have the expectation that it would remain confidential. Oloyede, 982 F.2d at 141, Cooper, 1997 WL 129306, at *3, Rivera, 837 F. Supp. at 569.

The attorney-client privilege only extends to agents of the attorney (e.g. paralegals) when communications are made for the purpose of obtaining legal advice from the lawyer. United States v. Gurtner, 474 F.2d 297, 299-300 (9th Cir. 1973) (stating that an accountant's advice was not privileged because it was not for the purpose of obtaining legal advice from an attorney); see also United States v. Zegzula, 42 F.3d 1404, 1994 WL 667065, at *3 (9th Cir.) (unpublished); accord HPD Laboratories v. Clorox Co., 202 F.R.D. 410, 415 (D.N.J. 2001) (holding that a paralegal rendering her own legal views, not in an effort to assist the attorney in formulating and rendering legal advice to a client, is not protected by the attorney-client privilege).

In his Motion to Compel, Complainant has made several arguments in the alternative. Complainant argues that the privilege log fails to adequately describe the nature of the communications; that the communications between non-attorney employees are not privileged; that communications pertaining to ordinary business are not privileged; that any privilege was waived by disclosure; and that any privilege was waived because it was not asserted in a timely manner.

1. PRIVILEGE LOG IS INADEQUATE

The privilege log, which is undated, does not comply with the requirements of the Order Governing Prehearing Procedure which requires that the party identify the specific document request to which the withheld documents are applicable, and that the party shall describe "how and why the document or information, in whole or in part, is protected by the privilege." Prehearing Conference Report and Order Governing Prehearing Procedure, Jan. 24, 2002, at 5. Given the tardiness of and the defects in the privilege log, as with the documents responsive to the subpoena, I could have found that Respondent had failed adequately to assert the privilege, and I could have ordered Respondent to produce all documents to Complainant, without performing an in camera review. However, unlike the subpoena, here Respondent did produce a privilege log, albeit in an untimely fashion. Although the log did not fully comply with my orders, I decided to review the documents in camera to determine if they were confidential privileged communications.

2. DOCUMENTS REVIEWED IN CAMERA

After reviewing in camera thirty of the documents withheld on the basis of privilege, I find that only a small portion of the documents, namely nineteen sentences in three documents, are potentially privileged communications. Reviewing these thirty documents in camera elucidates the fact that Ryan Swanson was facilitating the routine business function of obtaining a visa on behalf of Respondent. Almost all of the

documents were void of communications rendering or seeking legal advice. A number of documents were communications from paralegals offering their own opinion and business advice about how to obtain an H1B visa, which is not protected by the attorney-client privilege. Attached to this Order is an addendum that expansively explains my ruling as to each document withheld under claim of privilege that I reviewed in camera. In several instances in the addendum I have noted that the privilege claim with respect to certain documents is frivolous, such as the privilege assertion as to a request for Ravinder Singh to call an attorney at Ryan Swanson on his cellular telephone (document 23), and an e-mail discussing the contents of the H1B visa application with the new H1B/LCA regulations, a merger agreement, and various papers from the Secretary of State's office in Delaware attached (document 52).

I am extremely troubled by the behavior of Respondent's counsel with respect to the assertion of the attorney-client privilege in this case. First, I am disturbed by the fact that Respondent waited almost seven months to produce a privilege log, produced the privilege log only after noticing in a deposition that a document given in discovery contained communications from a paralegal, and then mysteriously found fifty-nine "privileged" documents in the course of twenty-nine days. Second, I am baffled and appalled at the assertion of privilege for twenty-seven documents that are not even remotely privileged.

I am sending back the documents reviewed in camera to Respondent. Respondent is ordered to immediately serve the following documents, referred to by privilege log number, upon Complainant with no redactions: 4, 6, 11, 14, 15, 16, 17, 18, 19, 20, 23, 28, 32, 33, 35, 36, 37, 39, 40, 41, 45, 47, 50, 51, 52, 56, and 60. Respondent is ordered immediately to serve the following documents upon Complainant with only the redactions I have marked with yellow highlighter and brackets at the beginning and end of the redacted portion: 49 (one sentence), 54 (nine sentences), and 55 (nine sentences). The redacted portions are communications from Ryan Swanson paralegal Elizabeth Krueger to Ravinder Singh and Paula Stevens, but refer to advice from attorney Joel Paget. They are borderline attorney-client communications. Respondent shall bear the expense of copying and shipping the documents to Complainant. Shipping the documents shall be accomplished by courier or overnight delivery and they shall be delivered not later than January 3, 2003.

3. REMAINDER OF DOCUMENTS ON PRIVILEGE LOG

Respondent is ordered to turn over the remainder of the documents listed on the privilege log to the Court for in camera review. The documents to be turned over, referred to by privilege log number, are as follows: 1, 2, 3, 5, 7, 12, 21, 22, 24, 26, 27, 29, 30, 31, 34, 44, 46, 48, 53, 59, 61. These documents are to be filed with the Court no later than January 3, 2003.

IV. COMPLAINANT'S MOTIONS FOR ATTORNEY'S FEES

Complainant has requested attorney's fees for the time expended making these two motions. At this time, I am deferring a ruling on Complainant's motion for attorneys fees until Complainant provides an

itemized statement and briefing supporting the award of such fees. Complainant must provide time records or receipts for all fees, specifically showing the time expended on each activity for which he seeks reimbursement. This supplemental documentation shall be filed with and served upon the court no later than Friday, January 10, 2003.

V. CONCLUSION

Complainant's Motion to Compel Production of Documents or in the Alternative Enforce the Subpoena is granted.

Complainant's Motion to Compel Further Production of Documents is granted in part.

I defer ruling on Complainant's Requests for Attorney's Fees at this time. Complainant must submit documentation to the court supporting its request for attorney's fees for bringing these two motions to compel discovery.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE