ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
	)	
TELEBRANDS CORP.,	)	
a corporation,	)	
	)	
TV SAVINGS, LLC,	)	
A limited liability company, and	)	**Docket No. 9313**
	)	
AJIT KHUBANI,	)	
Individually and as president of	)	
Telebrands Corp. and sole member	)	
of TV Savings, LLC.	)	
	)	

RESPONDENTS' MOTION TO COMPEL
THE PRODUCTION OF CONSUMER SURVEY INFORMATION

Pursuant to Rule 3.22 of the Federal Trade Commission's Rules of Practice, Respondents Telebrands Corporation, TV Savings, LLC, and Ajit Khubani hereby move to compel Complaint Counsel to produce for inspection and copying documents related to consumer perception data in Complaint Counsel's declaration, and described as items 15a through 15e of Complaint Counsel's Supplemental Privilege Log.

A memorandum in support and proposed Order accompany this motion.

Dated: December 11, 2003

Edward F. Glynn
Theodore W. Atkinson
VENABLE LLP
575 7th Street, N.W.
Washington, DC 20004-1601
(202) 344-8000

Attorneys for Respondents
Telebrands Corp., TV Savings, LLC,
and Ajit Khubani

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
TELEBRANDS CORP.,	)	
TV SAVINGS, LLC, and	)	**Docket No. 9313**
AJIT KHUBANI,	)	
Respondents	)	

ORDER GRANTING MOTION TO COMPEL

On December 11, 2003, Respondents Telebrands Corporation, TV Savings, LLC, and Ajit Khubani filed a motion to compel complaint counsel to produce for inspection and copying documents related to consumer perception data in Complaint Counsel's declaration, as described as items 15a through 15e of Complaint Counsel's Supplemental Privilege Log. Respondents also filed a memorandum in support. In consideration of the motion and the response filed by complaint counsel,

IT IS HEREBY ORDERED that the motion to compel is **GRANTED**. Complaint counsel shall produce for inspection and copying within ten days the items 15a through 15e of Complaint Counsel's Supplemental Privilege Log, with the exception of drafts and e-mails or faxes not containing factual information.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

December __, 2003

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
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Individually and as president of	)	
Telebrands Corp. and sole member	)	
of TV Savings, LLC.	)	
	)	

MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO COMPEL THE PRODUCTION OF CONSUMER SURVEY INFORMATION

Respondents Telebrands Corporation, TV Savings, LLC and Ajit Khubani move for an Order compelling Complaint Counsel to produce questionnaires, data, and other factual information related to a consumer survey conducted by Complaint Counsel's non-testifying marketing expert in connection with this proceeding.

As Complaint Counsel stated at the pre-hearing conference, "the main issue in this case is whether consumers got it, whether consumers thought, when they saw the Ab Force commercials, that they were being promised the same benefits" claimed by other advertisers of similar devices. Complaint Counsel further asserted that "we can prove that consumers got it..." (Exhibit A, Prehearing Conference Transcript Selection, p. 15, ll.16 – 25).

In mounting their defense to the charges of false and misleading advertising, Respondents have requested the so-called evidence that "consumers got it." Specifically, Respondents requested the production of consumer survey data or other evidence of consumers' perception of Respondents' advertising. Despite admitting that it had such evidence in their possession,

Complaint Counsel flatly refused the request, objecting that the consumer survey data is protected from disclosure by the attorney work product and/or that the request is premature.

Complaint Counsel are incorrect. As Judge Parker held in *In re Kraft, Inc.*, Order Ruling on Respondents' Motion for Documents in the Possession of Complaint Counsel, (Docket 9208, July 10, 1987), consumer survey evidence of the type withheld by Complaint Counsel must be produced because it goes to the central issue of the case and otherwise cannot be obtained by those in Respondents' position. Moreover, Judge Parker held that such evidence should be produced upon request, regardless of whether it was prepared by a consulting expert, and regardless of whether it would be introduced at the hearing. For the reasons discussed by Judge Parker and echoed by federal courts, Complaint Counsel should be compelled to immediately produce the consumer survey evidence it now has in its possession.

FACTUAL BACKGROUND

Respondents have been charged with false advertising in violation of the FTC Act in connection with the marketing and sale of an electronic muscle stimulation (or "EMS") device called the Ab Force.

This case is unusual because Complaint Counsel admit that none of the allegedly false claims at issue are found in Respondents' advertising. Instead, Complaint Counsel advance the theory that the Ab Force infomercial had the effect of "reminding viewers" of other EMS devices and therefore "consumers thought, when they saw the Ab Force commercials, that they were being promised the same benefits" claimed in advertisements for other EMS devices (specifically, three EMS devices selected by Complaint Counsel out of dozens of commercially available EMS devices similarly advertised). (Exh. A, p. 15, ll. 3 – 18). Consequently,

Complaint Counsel indicated at the pre-hearing conference that they would produce evidence of "consumers' impressions" of the Ab Force advertising. (Exh. A, p. 15, ll.16 – 25).

On October 23, 2003, Respondents propounded their first set of written discovery to Complaint Counsel. In the interrogatories, Respondents asked Complaint Counsel to

> [i]dentify every evaluation, survey, or study conducted by you or on your behalf to assess consumer reaction to or consumer perception, comprehension, understanding, "take-away," or recall of statements or representations made in the Ab Force advertisements or in any EMS device advertisement.

(Exhibit B, Complaint Counsel's Response to Respondents' First Set of Interrogatories, Interrogatory No. 20 (renumbered from "Interrogatory No. 7" as propounded)).

Complaint Counsel objected on the grounds that the request sought information relating to non-testifying expert witnesses and was protected by the attorney work product doctrine. Complaint Counsel also objected that the Interrogatory prematurely sought information involving expert witnesses in advance of the timing set forth in the Scheduling Order. (*Id.*).

At the same time they served the interrogatories, Respondents also served requests for the production of documents. Among other things, Respondents requested

> All documents supporting or relating to every evaluation, survey, or study conducted by you or on your behalf to assess consumer reaction to or consumer perception, comprehension, understanding, "take-away," or recall of statements or representations made in any EMS device advertisement.

(Exhibit C, Complaint Counsel's Response to Respondents' First Set of Document Requests, Request No. 8). Complaint Counsel again objected, citing the work product doctrine and the untimeliness of the request for expert information.

The parties thereafter held a meeting during which counsel for Respondents asked whether Complaint Counsel were withholding any information responsive to the requests at issue. Complaint Counsel admitted that there were materials related to consumer perceptions

that had been withheld because a non-testifying consulting expert had prepared them. Because these materials had been vaguely described as "other material received from non-testifying experts" in Complaint Counsel's privilege log, counsel for Respondents asked Complaint Counsel to provide a more detailed description.

Respondents also asked Complaint Counsel to reconsider their objection in light of the discovery Order issued in *In re Kraft, supra*. Counsel for Respondents explained that the *Kraft* Order—which Complaint Counsel had cited in and attached to their objections (Exh. B, p. 2; Exh. C, p. 1)—contemplated facts similar if not identical to those in this case, and explicitly compelled the production of consumer survey evidence prepared by a non-testifying expert and before the timing for expert disclosures.

Counsel for Respondents memorialized the discussion and outlined the issues in a December 1, 2003 letter to Complaint Counsel. (Exhibit D, Letter). In response, Complaint Counsel stated that they were not going to produce the "consumer evidence," which counsel characterized as "pre-test data" prepared by a non-testifying expert. Complaint Counsel also indicated that, absent unforseen circumstances, the expert would remain a non-testifying expert and the consumer survey data would not be introduced at hearing. However, on December 4, 2003, Complaint Counsel did produce a supplemental privilege log describing the "pre-test data" and "consumer evidence" in its possession. (Exhibit E, Complaint Counsel's Supplemental Privilege Log).[1] This motion followed.

[1] At present, it appears that other issues raised at the November 20, 2003 conference have been resolved between the parties. However, Respondents note that only in the last day has it received the documents copied and produced by Complaint Counsel. Consequently, Respondents have not had the opportunity to determine if Complaint Counsel has fully responded to Respondents' written discovery.

ARGUMENT

Rule 3.31 (b)(4)(ii) of the Federal Trade Commission's Rules of Practice controls discovery of facts known and opinions held by non-testifying experts who are retained in anticipation of litigation:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing and who is not expected to be called as a witness at hearing, only upon a showing of exceptional circumstances under which it is impracticable for the party seeking the discovery to obtain facts or opinions on the same subject by other means.

(*Id.*).

Respondents' request for information is narrow and limited only to factual information—not opinions—and meets the standard set forth by the Rule for the production of such information.

As indicated in their letter to Complaint Counsel, Respondents have clarified their requests as limited to *factual* information related to the consumer perception evidence in Complaint Counsel's possession. Of the twelve categories of documents described by Complaint Counsel in their supplemental privilege log, Respondents request is narrowly tailored and seeks disclosure of the following documents only:

- 15a - Screening questionnaire for copy test (excluding drafts of questionnaire);
- 15b - Questionnaire for copy test (excluding drafts thereof);
- 15c - Completed questionnaires from copy test;
- 15d - Tabulations of data (excluding e-mails regarding the copy test to the extent they do not include factual data);
- 15e - Tapes for use in copy data.

(Exh. E).[2] Respondents do not seek any analyses, opinion, notes, annotations or other documents that do not contain factual information describing final test methodology or procedure, raw data, or survey results.

The *Kraft* decision cited by Complaint Counsel in their objections involved circumstances remarkably similar to those at issue. In that Order, Judge Parker recognized the distinction between analyses, opinion and thought processes of non-testifying experts, on the one hand, and consumer survey data, on the other, in the context of the work product doctrine.

In *Kraft*, Judge Parker considered a request that he issue a subpoena requiring complaint counsel to turn over certain documents, among which were "documents relating to consumer perceptions conveyed by advertisements which are referred to in the complaint." *In re Kraft*, Order Ruling on Respondents' Motion for Documents in the Possession of Complaint Counsel, (Docket 9208, July 10, 1987)(attached hereto as Exhibit F). Judge Parker summarily rejected part of the request, stating that

> [o]ther documents which Kraft seeks—interview reports, written analyses of evidence, memoranda recommending action, communications between the Commission and the Attorney General of California—are work product or relate to the deliberative process and are generally immune from disclosure.

Id., p. 2 (citations omitted). However, with regard to *factual* consumer perception data—the same type of data at issue in this motion—he expressed a different view:

> While withholding the work product and internal memoranda which Kraft seeks will not prejudice its ability to prepare its defense, one category of documents causes me concern—those relating to copy test research performed at the direction of complaint counsel in anticipation of litigation. Those documents are work product but they contain significant evidence relating to the issues raised in the complaint.

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[2] Complaint Counsel's supplemental privilege log indicates that these categories of documents have been withheld on the basis of "non testifying-expert; work product doctrine privilege." Although Complaint Counsel invoked the deliberative process privilege in its initial objections to the discovery at issue, they have not asserted that privilege with regard to the documents presently sought by Respondents.

Id. Judge Parker explained that Respondents were unable to obtain the same information without disclosure, and that such inability met the standard contemplated by the Rule:

> Kraft can develop and offer its own evidence of consumer perceptions, but it cannot exactly duplicate complaint counsel's research. Therefore, since Kraft has a need for the surveys conducted by or for complaint counsel, and since the precise information contained in the surveys cannot be obtained through any other means, I will approve a subpoena directing complaint counsel to turn them over to counsel for Kraft.

Id. (citations omitted).

Moreover, Judge Parker stated that the information was immediately discoverable, regardless of whether the evidence was going to be offered at hearing or not:

> If complaint counsel intend to offer the surveys in evidence, *they should be revealed now* so that Kraft's attorneys can begin analyzing them. If they are not offered in evidence, they may lend some support to Kraft's claim that its advertisements do not imply what the Commission believes they do.

Id. (emphasis added).[3]

Respondents face the same hardship as respondents in *Kraft*. Complaint Counsel's case will rise or fall on surveys of consumer perceptions, and the consumer perception data in the possession of Complaint Counsel goes to the heart of the central issue in this case. Complaint Counsel has indicated that it will not seek to introduce the consumer survey data at a hearing in

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[3] Federal Courts have had no difficulty in separating out discoverable *factual data* obtained from third parties by a consulting expert, and protected analyses, opinion and evaluation of the factual data by that same expert. *See, e.g., Milwaukee Concrete Studios, Ltd. v. Greeley Ornamental Concrete,* 140 F.R.D. 373 (E.D.Wis.,1991)(Finding that the consumer survey data fell outside the scope of the work product doctrine: "The materials sought by Greeley Ornamental Concrete Products are predominantly factual in nature--and their production poses little, if any, risk of revealing Milwaukee Concrete Studios' trial strategy"); *Southern Scrap Material Co. v. Fleming,* Slip Copy (June 18, 2003 E.D.La.)("Insofar as documents sought recount factual information relevant to the claims against Southern Scrap in the underlying litigation, whether it is simply unannotated raw data, test results, maps indicating where samples were taken from, or a graphic display of test sample results, these factual matters are fully discoverable. This type of underlying factual information does not fall within the work-product doctrine.")(attached hereto as Exhibit G).

this case. This position obviously raises the question whether the consumer survey evidence supported or weakened the Commission's belief as to consumers' perceptions. If the consumer survey data supports Respondents' case, then, as Judge Parker reasoned, that factual information is discoverable because it "may lend some support to [Respondents'] claim that its advertisements do not imply what the Commission believes they do." *Id.* Because Respondents cannot obtain that information absent disclosure by Complaint Counsel, the special circumstances called for by Rule 3.31 (b)(4)(ii) exist and the information should be disclosed.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that an Order be issued directing Complaint Counsel to produce all surveys or consumer perception information, identified in Complaint Counsel's supplemental privilege log, relating to consumer perceptions or impressions received from or conveyed by any of the advertisements described in the complaint.

Dated: December 11, 2003

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(202) 344-8000

Attorneys for Respondents
Telebrands Corp., TV Savings, LLC,
and Ajit Khubani

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2003, pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), I caused the foregoing Respondents' Preliminary Witness List to be filed and served as follows:

(1) an original and one (1) paper copy filed by hand delivery and an electronic copy in Microsoft Word format filed by e-mail to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Rm. H-159
Washington, D.C. 20580
E-mail: secretary@ftc.gov

(2) one (1) paper copy served by hand delivery to:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Pennsylvania Avenue, N.W.
Rm. H-112
Washington, D.C. 20580

(3) one (1) paper copy by first-class mail and electronically by e-mail to:

Constance M. Vecellio, Esq.
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Assistant Director
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Washington, DC 20001

(4) and one (1) electronic copy each by e-mail to:

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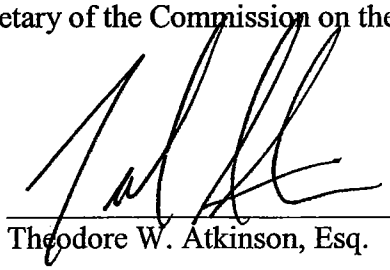
I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission on the same day by other means.



Theodore W. Atkinson, Esq.

In The Matter Of:

TELEBRANDS CORP., ET AL.
MATTER NO. D09313

PREHEARING CONFERENCE
November 4, 2003

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FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION

In the Matter of:)
TELEBRANDS CORP.,)
a corporation,)
TV SAVINGS, LLC,)
a limited liability company, and) Docket No. 9313
AJIT KHUBANI,)
individually and as president of)
Telebrands Corp. and sole member)
of TV Savings, LLC.)

TUESDAY
NOVEMBER 4, 2003

Room 532
Federal Trade Commission
6th Street & Pennsylvania Ave.,
N.W.
Washington, D.C. 20580

The above-entitled matter came on for prehearing conference, pursuant to notice, at 10:05 a.m., before THE HONORABLE STEPHEN J. MCGUIRE.

APPEARANCES:

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ALSO PRESENT:

VICTORIA C. ARTHAUD, In-House Counsel, FTC

PROCEEDINGS

ADMINISTRATIVE LAW JUDGE MCGUIRE: This hearing is now in order in the case in re: Telebrands Corporation, TV Savings, LLC, and Ajit Khubani, Proceeding Number 9313, and this prehearing conference is being held pursuant to Part 3121 of the FTC Practice Rules.

Let me say hi to everyone this morning. Before we get started, I think it's proper that counsel at this time enter their own appearances, and for the record we'll start first with the counsel for the government.

MS. VECELLIO: Good morning, Your Honor. I'm Connie Vecellio. I'm counsel supporting the complaint.

MR. GROSS: Good morning, Your Honor. Walter Gross, counsel supporting the complaint.

JUDGE: Mr. Gross.

MS. LLOYD: Good morning, Your Honor. I'm Amy Lloyd, counsel supporting the complaint.

JUDGE: Good morning. Now counsel I think for respondent.

MR. GLYNN: Good morning, Your Honor. I'm Edward Glynn, counsel for respondents in this matter.

JUDGE: Good morning.

MR. ATKINSON: Good morning, Your Honor. Theodore Atkinson, counsel for the respondents in this

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changes to any of the additional information within that order, if you want to just type up or Email me the information that should be filled in for respondent's and complaint's counsel contact information, then I can put that in.

MR. GLYNN: Right.

JUDGE: Okay. Are we clear on that?

If there are no other items to take up, I will also encourage both sides if they want to make a short statement on their case that they would be free to do so.

We'll start first with the statement from complaint counsel.

MS. VECELLIO: Thank you, Your Honor. This case is about the Ab Force, an electronic abdominal belt. Respondents advertised the Ab Force on television, radio and print and on the Internet starting in December 2001.

At the same time, other more expensive ab belts were saturating the airwaves with program length commercials, or otherwise known as infomercials for their products.

As an early radio ad for the Ab Force said in December 2001: "Have you seen those fantastic electronic ab belt infomercials on T.V.? They're

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amazing, promising to get our abs into great shape fast, without exercise. But they're expensive, some selling for $120 each. But what if you could get a high quality electronic ab belt for just $10? Ab Force is just as powerful and effective as those expensive ab belts on TV designed to send just the right amount of electronic stimulation to your abdominal area. Get the amazing Ab Force belt, the latest fitness craze, for just $10."

Respondents introduced TV ads for the Ab Force in January 2002 while this so called fitness craze was at its peak. Again the ad reminded viewers of the infomercials for other ab belts saying: "I'm sure you've seen those fantastic electronic ab belt infomercials on T.V.," and the ad stressed that the Ab Force used the same powerful technology as those other ab belts.

The ads were correct in saying, I'm sure you've seen those other electronic belt infomercials on T.V. Infomericals for three other products, the Ab Energizer, the AbTronic and Fast Abs, were saturating the airwaves showing daily on television at the same time as the Ab Force ads.

These products, as the early Ab Force radio ads said, were promising to get your abs into great shape fast, without exercise, and as the Ab Force ad said, the

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Ab Force used the same powerful technology as those expensive ab belts, but it was cheaper.

The Ab Force ad did everything they could to remind viewers of the infomercials for those expensive ab belts. The ads are very similar in appearance to the AbTronic, Ab Energizer and Fast Abs commercials. Like them, they used images of well muscled, bare chested men and lean, shapely women wearing ab belts and appearing to experience abdominal contractions.

All of these images reinforced the impression that the Ab Force was just a lower priced version of those belts, and in 2002, the Commission sued all three of the marketers of those belts for falsely promising that those belts would produce slim waist lines and rock hard abs without exercise.

The respondents, however, apparently believed they could avoid Commission action by not explicitly repeating the verbal claims in the infomercials to which they refer, and the main issue in this case is whether consumers got it, whether consumers thought, when they saw the Ab Force commercials, that they were being promised the same benefits as were being touted in the infomercials they were seeing daily, the trim wastes, well defined abs and slim bodies in the Ab Force ads.

Quite simply we can prove that consumers got it,

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and we can also prove that this product does not cause loss of inches, loss of weight or well defined abs.

Respondents contend they were offering their product for completely different purposes, for relaxing massage of the abdominal muscles. They do not appear to contend that the Ab Force causes loss of weight, loss of inches or well defined abs. The only real issue in this case is whether consumers got those claims from the ads.

And as an aside, I hope that respondents will agree to simplify the issues in this case and save everyone time and effort by admitting that their product does not cause loss of weight, loss of inches or produce well defined abs. That is something that's under discussion with us now.

In sum, this case is about the effect the ads for the Ab Force had on the consumers who saw them and who spent $19 million of their hard earned money on them in the hope of losing weight and inches so they could look more like the fit, trim models in the ads and take advantage of the so-called fitness craze that was sweeping the country.

JUDGE: All right. Thank you, Ms. Vecellio. Mr. Glynn, would you like to make a statement on behalf of the respondent?

MR. GLYNN: Just briefly, Your Honor. The

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essence of this case is found in paragraph 19 of the complaint. Paragraph 19 lays out some claims that complaint counsel says we made: The Ab Force causes loss of weight, inches, or fat, well defined abdominal muscles, et cetera.

You will search in vain in respondent's advertising to find that. Telebrands, the principal respondent, has been in business about 20 years. It's got a well defined product niche, if you will. They essentially take a look at products that are out there in the market and say, We can bring you the same thing but at a lot less money, and that's exactly what they did in this case.

The essence of this is not claims for the Ab Force for particular results, but that Telebrands will sell you the same technology that you've seen elsewhere but for $10 a piece instead of $120 or $79 or whatever those other things are.

Now, complaint counsel says, well, that they're going to prove that respondents got different claims, and we welcome that proof because frankly we don't think they're going to be able to prove it.

I argue to Your Honor that such proof would appropriately take the form of consumer surveys, that after they conduct defensible consumer surveys, then

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they won't have an expert witness to opine on any of those surveys.

We don't know at this point how they're going to prove it, but at this point, our position is that this is very much in the tradition in the American commerce of, You've seen X, compare and save, and that's what this case is about.

JUDGE: Okay. Thank you, Mr. Glynn. Counsel, that's all the items that I had today. Is there anything else you want to take up while we're still here in session?

MS. VECELLIO: Not at this time, Your Honor.

MR. GLYNN: No, Your Honor.

JUDGE: If not, then we'll be back for our prehearing conference sometime between April 29 and the 17th of May prior to the hearing, so other than that, have a good afternoon, and this hearing is adjourned.

MS. VECELLIO: Thank you.

MR. GLYNN: Thank you.

(Time noted: 10:21 a.m.)

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CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: 9313
CASE TITLE: TELEBRANDS, et al.
HEARING DATE: NOVEMBER 4, 2003

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the tapes transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: NOVEMBER 17, 2003

DEBRA L. MAHEUX

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

DIANE QUADE

B

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of TELEBRANDS CORP., a corporation, TV SAVINGS, LLC, a limited liability company, and AJIT KHUBANI, individually and as president of Telebrands Corp. and sole member of TV Savings, LLC.	DOCKET NO. 9313 PUBLIC DOCUMENT

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENTS' FIRST SET OF INTERROGATORIES

Pursuant to Rule 3.37 of the Commission's Rules of Practice, and item 6 of Chief Administrative Law Judge McGuire's Additional Provisions to his Scheduling Order, Complaint Counsel serve the following answers to the Respondents' First Set of Interrogatories ("Respondents' Interrogatories").

GENERAL OBJECTIONS - INTERROGATORIES

1. Complaint Counsel object to respondents' interrogatories to the extent they seek information which may be derived or ascertained by respondents from documents or information already in respondents' possession. Interrogatories are properly used to obtain information not otherwise available for the requesting party to analyze, not to "require a party in such discovery proceeding to do his adversary's work for him by compiling lists or other information . . . for him." Berg v. Hoppe, 352 F.2d 776, 779 (9th Cir. 1965).

2. Complaint Counsel object to respondents' interrogatories seeking information prepared in anticipation of litigation or which seek disclosure of the theories and opinions of Complaint Counsel, on the grounds that such information is protected from disclosure by the attorney work product privilege and the provisions of Rule 3.31(c)(3), and because respondents have not made the proper showing that they are entitled to such information pursuant to Rule 3.31(c)(3) or (4)(B)(ii). Stouffer Foods Corp., Docket No. 9250, Order Ruling on Stouffer Foods' Application for an Order Requiring the Production of Documents (Parker, A.L.J. Feb. 11, 1992); Kraft, Inc., Docket No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (Parker, A.L.J. July 10, 1987).

3. Complaint Counsel object to respondents' interrogatories seeking information protected from disclosure by the deliberative process privilege. Stouffer Foods Corp., Docket No. 9250, Order Ruling on Stouffer Foods' Application for an Order Requiring the Production of Documents (Parker, A.L.J. February 11, 1992); Kraft, Inc., Docket No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (Parker, A.L.J. July 10, 1987); see also Rule 4.10(a)(3).

4. Complaint Counsel object to respondents' interrogatories to the extent they seek information relating to the expert witnesses that Complaint Counsel intend to use at the hearing on the ground that the timing for identification of such witnesses and discovery relating to their opinions and testimony is established in the Scheduling Order Pursuant to Rule 3.21(c). Schering Corp., Docket No. 9232, Order re Interrogatories and Request for Production of Documents (Timony, A.L.J. Feb. 6, 1990); Kraft, Inc., Docket No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (Parker, A.L.J. July 10, 1987).

5. Complaint Counsel object to respondents' interrogatories to the extent that they seek information relating to non-testifying expert witnesses because respondents have not made the proper showing that they are entitled to such information pursuant to Rule 3.31(c)(4)(ii). Schering Corp., Docket No. 9232, Order Denying Discovery and Testimony by Expert Witness (Timony, A.L.J. March 23, 1990);

6. Complaint Counsel object to respondents' interrogatories to the extent that they seek information obtained from or provided to other law enforcement agencies, and to the extent that they seek information obtained in the course of investigating marketers of other EMS devices, on the grounds that such documents are protected from disclosure by the law enforcement evidentiary files privilege and disclosure of such documents would be contrary to the public interest.

7. Complaint Counsel object to each of respondents' interrogatories to the extent that they seek information ascertained or derived from documents provided to the Commission by defendants in Federal Trade Commission v. Electronic Products Distribution, L.L.C., et

al., Civil No. 02-CV-888H (AJB), (S. D. Cal.), Federal Trade Commission v. United Fitness of America, LLC, et al., CV-S-02-0648-KJD-LRL (D. Nev.) and Federal Trade Commission v. Hudson Berkley Corporation, et al., CV-S-020649-PMP-RJJ (D. Nev.) in the course of settlement negotiations. Such documents are not part of the Commission's investigative files or the cases against the marketers of Ab Energizer, Ab Tronic, and Fast Abs. They were provided for settlement purposes only, and their production would not be reasonably calculated to lead to discovery of admissible evidence and should be afforded the protections of F.R.E. 408, and containcommercial and financial information of a third party to this litigation.

8. Complaint Counsel object to respondents' interrogatories that, when read with the definitions and instructions, are so vague, broad, general, and all inclusive that they do not permit a proper or reasonable response and are, therefore, unduly burdensome and oppressive.

9. Complaint Counsel object to the preamble, Instructions and Definitions to the extent that they impose an obligation greater than that imposed by the Commission's Rules of Practice and the provisions of the Court's Pretrial Scheduling Order. In addition, Complaint Counsel object to each of Respondents' document requests that seek information that is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent, in violations of the limits of discovery set by Rule 3.31(c)(1).

10. Complaint Counsel object to respondents' interrogatories to the extent that they seek information ascertained from or the identity of confidential informants as disclosure of such information would be contrary to the public interest.

GENERAL RESPONSES

1. Complaint Counsel's responses are made subject to all objections as to competence, relevance, privilege, materiality, propriety, admissibility, and any and all other objections and grounds that would require the exclusion of any statement contained herein if any requests were asked of, or if any statements contained herein were made by, or if any documents referenced here were offered by a witness present and testifying in court, all of which objections are reserved and may be interposed at the time of the hearing.

2. The fact that Complaint Counsel have answered or objected to any interrogatory or part thereof should not be taken as an admission that Complaint Counsel accept or admit the existence of any facts or documents set forth in or assumed by such interrogatory or that such answer or objection constitutes admissible evidence. The fact that Complaint Counsel have responded to any interrogatory in whole or in part is not intended and shall not be construed as a waiver by Complaint Counsel of all or any part of any objection to any interrogatory.

3. Complaint Counsel have not completed their investigation in this case, and additional facts may be discovered that are responsive to respondents' interrogatories. Complaint Counsel reserve the right to supplement the responses provided herein as appropriate during the course of discovery.

4. Complaint Counsel note that to the extent that Respondents have included as many as four separate interrogatories under only one numbered interrogatory, the total number of discrete and separate interrogatories is understated. Instruction 7 of Respondents' First Request for Interrogatories, in addition to instructing about the content of the contention (Instruction 7(a), also instructs Complaint Counsel to identify all parties with knowledge of relevant facts (Instruction 7(b)), identify all relative communications (Instruction 7(c)), and identify all relative documents (Instruction 7(d)). In fact, each contention Interrogatory is four separate interrogatories, and Complaint Counsel's responses are numbered according to the actual number of individual interrogatories posed that require separate answers. Accordingly, Complaint Counsel have renumbered the Interrogatories with the Respondents' original number in brackets.

5. As used herein, "respondents" shall mean Telebrands Corp., TV Savings L.L.P., and Ajit Khubani.

6. As used herein, "respondents' interrogatories" shall mean the interrogatories and all applicable instructions and definitions as set forth in the preamble to the interrogatories.

Interrogatories and Responses

INTERROGATORY NO. 1 [Respondents' Interrogatory No. 1, Instruction 7(a)]

Identify every representation that you contend is false or misleading that the respondents expressly made in the Ab Force advertisements and state the basis for your contention.

Response:

Complaint Counsel object to this interrogatory based upon the objections set forth in General Objections 1 - 10 of Complaint Counsel's Objections to Respondents' First Set Of Interrogatories. Complaint Counsel object to disclosing communications with Complaint Counsel's non-testifying experts because respondents have not made the proper showing that they are entitled to such information pursuant to Rule 3.31(c)(4)(ii) (General Objection 5). Furthermore, Complaint Counsel object to providing communications involving expert witnesses that Complaint Counsel intend to use at the hearing on the ground that the timing for identification of such witnesses and discovery relating to their opinions and testimony is established in the Scheduling Order Pursuant to Rule 3.21©) (General Objection 4). Subject to and without waiving these objections, Complaint Counsel provide the following response:

enforcement officials as well as conversations with consumers and experts. To the best of Complaint Counsel's knowledge and belief, we are not aware of any other responsive communications.

INTERROGATORY NO. 19 [Respondents' Interrogatory 6, Instruction 7(d)]

Identify every document relating to the allegation, contention, assertion or claim by providing a specific and individual identification of each document or thing, including the type of document or thing and a brief description consisting at least of (i) the type of document or thing; (ii) its general subject matter; (iii) its date; (iv) its author(s), addressee(s) and recipient(s); (v) the present location of each document or thing and each copy thereof; (vi) the name, job title, employer, and address of the custodian of the document or thing; and (vii) if a copy of the document or thing has been previously produced to any party, so state and specifically and individually describe the previously supplied copy by production numbers or otherwise.

Response

Complaint Counsel object to this interrogatory based upon the objections set forth in General Objections 1 - 10 of Complaint Counsel's Objections to Respondents' First Set Of Interrogatories. Specifically, Complaint Counsel Subject to and without waiving these objections, Complaint Counsel respond as follows:

Complaint Counsel has provided a response to this request in their response to Request 6 of Respondents' First Set of requests for Production of Documents and Things. To repeat it here would be duplicative and unduly burdensome.

INTERROGATORY NO. 20 [Respondents' Interrogatory No. 7]

Identify every evaluation, survey, or study conducted by you or on your behalf to assess consumer reaction to or consumer perception, comprehension, understanding, "take-away," or recall of statements or representations made in the Ab Force advertisements or in any EMS device advertisement.

Response:

Complaint Counsel object to this interrogatory to the extent that it seeks information relating to non-testifying expert witnesses because respondents have not made the proper showing that they are entitled to such information pursuant to Rule 3.31(c)(4)(ii). Schering Corp., Docket No. 9232, Order Denying Discovery and Testimony by Expert Witness (Timony, A.L.J. March 23, 1990). Furthermore, Complaint Counsel object to to the extent that it seeks information involving expert witnesses that Complaint Counsel intend to use at the hearing on the ground that the timing for identification of such witnesses and discovery relating to their opinions and testimony is established in the Scheduling Order Pursuant to Rule 3.21(c)) (General Objection 4).

Constance Vecellio

Constance Vecellio
Walter Gross
Amy Lloyd
Complaint Counsel

Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
601 Pennsylvania Ave., N.W, Room 4302.
Washington, D.C. 20580
For Deliveries Use Zip Code 20004

Dated

Declaration Pursuant to Rule 3.35(a)(2)

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

Executed: November 12, 2003

Walter C. Gross III

Walter Gross

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November 2003, I caused a true copy of Complaint Counsel's Response Respondents' First Set of Interrogatories to be served by electronic mail and facsimile upon:

Edward F Glynn, Jr.

Venable, Baetjer, Howard & Civiletti, LLP
575 7th Street, N.W.
Washington, D.C. 20004-1601
(202) 344-8300 fax
Attorneys for Respondents
efgynn@venable.com

Amy M. Lloyd
Complaint Counsel

Complaint Counsel Privilege Log in Response to Respondents' First Set of Requests for Production

	AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE(S)
1	BCP Staff and BCP Management	Commission and its staff, BE and its staff; Office of the General Counsel (OGC)	Memos and attachments (and earlier drafts thereof), analyzing facts in relation to legal issues and strategies, and making recommendations to the Commission regarding the determination to issue a complaint in this case and in the three cases referred to in paragraphs 16-18 of the complaint in this case (hereinafter "the three prior abs cases")	Deliberative process privilege; work-product privilege; attorney-client
2	BCP Staff	BCP Management, BE and its staff	Memos and attachments (and earlier drafts thereof) analyzing facts in relation to legal issues, and making recommendations regarding potential consent negotiations and potential litigation in this case and in the three prior abs cases	Deliberative process privilege; work-product privilege
3	BCP Staff and Management	Commission and its staff, BE and its staff	Memos and attachments (and earlier drafts thereof) analyzing facts in relation to legal issues and strategies, and recommending that the Commission issue Civil Investigative Demands in this case and in the three prior abs cases	Deliberative process privilege; work-product privilege; attorney-client

	AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE(S)
4	BE Staff and Management	Commission and its staff, BCP Management and Staff; OGC	Memos (and earlier drafts of memos) analyzing facts in relation to legal and economic issues, and making recommendations to the Commission regarding the determination to issue the complaint in this case	Deliberative process privilege; work-product privilege;
6	BCP Management and Staff	N/A	Attorney notes (and drafts thereof) for Commission presentation analyzing facts in relation to legal issues and making recommendations regarding the determination to issue the complaint in this case and in the three prior abs cases	Deliberative process privilege; work-product privilege
7	BCP Staff; FDA	FDA; BCP Staff	Emails and letters (some with attachments) containing opinions, attorney mental impressions and analysis with respect to factual and legal issues involving EMS and the possibility of litigation in this case and in the three prior abs cases	Deliberative process privilege; work-product privilege; law enforcement privilege

	AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE(S)
8	BCP Staff Attorneys	BCP Staff Attorneys	Emails (some with attachments) between various BCP Attorneys analyzing facts in relation to legal issues, reviewing marketing claims, discussing issues raised in investigating these claims and/or in anticipated litigation involving these claims, and/or making recommendations regarding case strategy in this case and in the three prior abs cases	Deliberative process privilege; work-product privilege
9	BCP Staff Attorneys; Bureau of Economics Staff members	BCP Staff Attorneys; Bureau of Economics Staff members	Emails (some with attachments) between BCP Attorneys and Bureau of Economics Staff Members referring or relating to Staff Attorneys' requests and directions for analysis and recommendations in preparation for recommendations to the Commission and for use in anticipation of litigation in this case and in the three prior abs cases	Deliberative process privilege; work-product privilege;
10	BCP Staff Attorneys; Commission Attorney Advisors	BCP Staff Attorneys; Commission Attorney Advisors	Emails (some with attachments) between BCP Attorneys and Commission Attorney Advisors relating to and analyzing Staff Attorney's recommendations regarding strategy in this case and in the three prior abs cases, and for use in recommendations to the Commission and in anticipation of litigation	Deliberative process privilege; work-product privilege; attorney-client

	AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE(S)
11	BCP Staff	N/A	Database prepared by Staff Attorneys and paralegals acting upon the instructions of Staff Attorneys, analyzing documents produced by respondents in this case and third parties, and setting forth attorney mental impressions regarding documents in preparation for recommendations to the Commission and for use in anticipation of litigation	Deliberative process privilege; work-product privilege
12	BCP Staff Attorneys	N/A	Handwritten notes (or summaries thereof) concerning attorney mental impressions of meetings or other discussions with experts or non-testifying experts regarding this case and in the three prior abs cases, for use in anticipation of litigation	Work-product privilege; non-testifying expert privilege
13	Bureau of Economics Staff	N/A	Handwritten notes (or summaries thereof) concerning mental impressions of meetings or other discussions with experts or non-testifying experts regarding this case prepared at the direction of Staff Attorneys, in preparation for recommendations to the Commission and for use in anticipation of litigation in this case and in the three prior abs cases	Work-product privilege; non-testifying expert privilege; deliberative process

	AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE(S)
14	BCP Staff Attorneys; Bureau of Economics Staff	N/A	Handwritten notes (or summaries thereof) concerning mental impressions of meetings or other discussions with respondents in this action and their representatives in this case and in the three prior abs cases	Work-product privilege; deliberative process
15	Non-testifying experts	BCP Staff Attorneys	Resumes, correspondence and other materials received from non-testifying experts and relied upon by Staff Attorneys in the 3 prior abs cases and in this case in preparation for recommendations to the Commission and for use in anticipation of litigation	Non-testifying expert; work product privilege
16	BCP Attorneys	Non-testifying experts	Correspondence, communications and other materials used to solicit expert analysis and opinion in preparation for recommendations to the Commission and for use in anticipation of litigation in the 3 prior abs cases and in this case	Non-testifying expert; work product privilege
17	Foreign law enforcement agencies	BCP Staff	Letters and emails referring to abs devices in connection with foreign law enforcement agencies' investigations	Law enforcement privilege
18	BCP Staff Attorney	Foreign law enforcement agency; BCP Staff	Emails regarding foreign law enforcement agency's investigation into claims made for the Ab Force	Law enforcement privilege

	AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE(S)
19	BCP Staff; State Law Enforcement Agencies	State Law Enforcement Agencies; BCP Staff	Letters exchanging information and materials regarding abs devices	Law enforcement privilege
20	Counsel for third party and/or third party; BCP Staff	BCP Staff; Counsel for third party and/or third party;	Emails/letters regarding abs devices; responses to civil investigative demands or access letters	Material and/or identity protected from disclosure pursuant to Section 21 of the FTC Act, 15 USC Section 57-b2; informant privilege; Section 6 of FTC Act
21	BCP Staff Attorneys	BCP Staff and Management	Chart analyzing responses to civil investigative demands or access letters or other materials relating to abs devices	Work product; law enforcement evidentiary privilege; deliberative process
22	Consumers	BCP Staff	Complaints about abs devices submitted to FTC's Consumer Information System or Staff Attorneys (other than complaints about the Ab Force)	Law enforcement evidentiary; informant privilege
23	BCP Staff and Management	Commission	Memos (including prior drafts thereof) recommending that the Commission issue a complaint against Khubani in actions that preceded this case and other internal documents concerning the recommendations to issue complaints	Work product; deliberate process; attorney-client

	AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE(S)
24	BCP Staff and Management	Dept. of Justice	Memos (including prior drafts thereof) recommending that DOJ issue a complaint against Khubani in actions that preceded this case and other internal documents concerning the recommendations to issue complaints	Work product; deliberative process; law enforcement privilege; attorney-client

Dated: November 12, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November 2003, I caused a true copy of Complaint Counsel's Privilege Log in Response to Respondents' First Set of Requests for Production to be served by electronic mail and facsimile upon:

Edward F Glynn, Jr.
Venable, Baetjer, Howard & Civiletti, LLP
575 7th Street, N.W.
Washington, D.C. 20004-1601
(202) 344-8300 fax
Attorneys for Respondents
efgynn@venable.com

Amy M. Lloyd
Complaint Counsel

C

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	
TELEBRANDS CORP., a corporation,	)	DOCKET NO. D 9316
TV SAVINGS, LLC, a limited liability company, and	)	PUBLIC DOCUMENT
AJIT KHUBANI, individually and as president of Telebrands Corp. and sole member of TV Savings, LLC.	)	

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENTS' FIRST SET OF DOCUMENT REQUESTS

Pursuant to Rule 3.37 of the Commission's Rules of Practice, complaint counsel serve the following responses and objections to the respondents' first request for production of documents.

GENERAL OBJECTIONS - DOCUMENT REQUESTS

1. Complaint counsel object to respondents' requests for documents in the possession of the Commissioners, the General Counsel, or the Secretary in his capacity as custodian or recorder of any information.

2. Complaint counsel object to respondents' requests for documents prepared in anticipation of litigation or which seek disclosure of the theories and opinions of complaint counsel, on the grounds that such information is protected from disclosure by the attorney work product privilege and the provisions of Rule 3.31(c)(3), and because respondents have not made the proper showing that they are entitled to such information pursuant to Rule 3.31(c)(3) or (4)(B)(ii). Stouffer Foods Corp., Docket No. 9250, Order Ruling on Stouffer Foods' Application for an Order Requiring the Production of Documents (Parker, A.L.J. Feb. 11, 1992); Kraft, Inc., Docket No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (Parker, A.L.J. July 10, 1987).

3. Complaint counsel object to respondents' requests for document protected from disclosure by the deliberative process privilege. Stouffer Foods Corp., Docket No. 9250,

Order Ruling on Stouffer Foods' Application for an Order Requiring the Production of Documents (Parker, A.L.J. February 11, 1992); Kraft, Inc., Docket No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (Parker, A.L.J. July 10, 1987); see also Rule 4.10(a)(3).

4. Complaint counsel object to respondents' requests for documents relating to the expert witnesses that complaint counsel intend to use at the hearing on the ground that the timing for identification of such witnesses and discovery relating to their opinions and testimony is established in the Pretrial Scheduling Order Pursuant to Rule 3.21(c), dated November 5, 2003 ("Scheduling Order"). Schering Corp., Docket No. 9232, Order re Interrogatories and Request for Production of Documents (Timony, A.L.J. Feb. 6, 1990); Kraft, Inc., Docket No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (Parker, A.L.J. July 10, 1987).

5. Complaint counsel object to respondents' requests for documents relating to non-testifying expert witnesses because respondents have not made the proper showing that they are entitled to such information pursuant to Rule 3.31(c)(4)(ii). Schering Corp., Docket No. 9232, Order Denying Discovery and testimony by Expert Witness (Timony, A.L.J. March 23, 1990).

6. Complaint counsel object to respondents' requests for documents received by FTC staff from respondents during this investigation or this proceeding, or documents already possessed by respondents, their representatives, attorneys, officers, employees, or agents, on the ground that production of such documents would be unduly burdensome, unnecessary and duplicative.

7. Complaint counsel object to respondents' requests for documents relating to the extent that they seek documents obtained in the course of investigating marketers of other EMS devices on the grounds that such documents are protected from disclosure by the law enforcement evidentiary files privilege and disclosure of such documents would be contrary to the public interest. Hoechst Marion Rousell, Inc., Docket No. 9293, Order on Motions to Compel Discovery From Compliant Counsel Filed By Andrix and Aventis (Chappell, A.L.J. Aug. 18, 2000).

8. Complaint Counsel object to each of Respondents' Document Request to the extent that they seek documents subject to protection from public release under either section 6(f), 21(b), 21(c), or 21(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), 57b-2(b), 57b-2(c), or 57b-2(f) until such time as a protective order covering their release is in effect. See also Rule 4.10(g).

9. Complaint Counsel object to each of Respondents' Document Request to the extent that they seek documents that are covered by protective orders in actions in federal court until such time as respondents have complied with the provisions of the relevant protective

orders, copies of which are provided herewith.

10. Complaint Counsel object to each of respondents' document requests to the extent that they seek documents provided to the Commission by defendants in Federal Trade Commission v. Electronic Products Distribution, L.L.C., et al., Civil No. 02-CV-888H (AJB), (S. D. Cal.), Federal Trade Commission v. United Fitness of America, LLC, et al., CV-S-02-0648-KJD-LRL (D. Nev.) and Federal Trade Commission v. Hudson Berkley Corporation, et al., CV-S-020649-PMP-RJJ (D. Nev.) in the course of settlement negotiations. Such documents are not part of the Commission's investigative files or the cases against the marketers of Ab Energizer, Fast Abs, and AbTronic. They were provided for settlement purposes only, and their production would not be reasonably calculated to lead to discovery of admissible evidence and should be afforded the protections of F.R.E. 408, and contain commercial and financial information of a third party to this litigation.

11. Complaint Counsel object to each of Respondents' document requests that, when read with the definitions and instructions, are so vague, broad, general, and all inclusive that they do not permit a proper or reasonable response and are, therefore, unduly burdensome and oppressive.

12. Complaint Counsel object to the preamble and General Instructions to the extent that they impose an obligation greater than that imposed by the Commission's Rules of Practice and the provisions of the Court's Pretrial Scheduling Order. In addition, Complaint Counsel object to each of Respondents' document requests that seek information that is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent, in violations of the limits of discovery set by Rule 3.31(c)(1) of the Commission's Rules of Practice.

13. Complaint Counsel object to each of Respondents' document requests to the extent that they seek information ascertained from or the identity of confidential informants as disclosure of such information would be contrary to the public interest.

GENERAL RESPONSES

1. Complaint counsel's responses are made subject to all objections as to competence, relevance, privilege, materiality, propriety, admissibility and any and all other objections and grounds that would require the exclusion of any statement contained herein if any requests were asked of, or if any statements contained herein were made by, or if any documents referenced here were offered by a witness present and testifying in court, all of which objections are reserved and may be interposed at the time of the hearing.

2. The fact that complaint counsel have answered or objected to any document request or part thereof should not be taken as an admission that complaint counsel accept or admit the

existence of any facts or documents set forth in or assumed by such request or that such answer or objection constitutes admissible evidence. The fact that complaint counsel have responded to any request is not intended and shall not be construed as a waiver by complaint counsel of all or any part of any objection to any request.

3. Complaint counsel have not completed their investigation in this case, and additional documents may be discovered that are responsive to respondents' request for documents. Complaint counsel reserve the right to supplement the responses provided herein as appropriate during the course of discovery.

Document Requests and Responses

Request 1.

All documents relating to your contention that representations expressly made in the Ab Force advertisements are false or misleading.

Response:

Complaint counsel object to this request based upon General Objections 2 - 8. Subject to these objections, complaint counsel will make available for inspection at a mutually agreeable date and time documents that are located at Federal Trade Commission, 601 New Jersey Avenue, Washington, DC 20580.

Request 2.

All documents relating to your contention that representations made by implication in the Ab Force advertisements are false or misleading.

Response:

Complaint counsel object to this request based upon General Objections 2 - 8. Subject to these objections, complaint counsel will make available for inspection at a mutually agreeable date and time documents that are located at Federal Trade Commission, 601 New Jersey Avenue, Washington, DC 20580.

Request 3.

Documents sufficient to identify every EMS device other than Ab Tronic, AB Energizer, and Fast Abs that was offered for sale, sold or distributed in the United States during or in the three-year period before the time period in which the Ab Force advertisements appeared.

Washington, DC 20580.

Request 7.

All documents supporting or relating to every evaluation, survey, or study conducted by you or on your behalf to assess consumer reaction to or consumer perception, comprehension, understanding, "take-away," or recall of statements or representations made in the Ab Force advertisements.

Response:

Complaint counsel object to this request based upon the objections set forth in General Objections 2-5. In particular, complaint counsel object to respondents' requests for documents relating to documents relating to the expert witnesses that complaint counsel intend to use at the hearing on the ground that the timing for identification of such witnesses and discovery relating to their opinions and testimony is established in the Pretrial Scheduling Order Pursuant to Rule 3.21(c), dated November 5, 2003 ("Scheduling Order"). Complaint counsel also reiterate the objection Complaint counsel to respondents' requests for documents relating to non-testifying expert witnesses because respondents have not made the proper showing that they are entitled to such information pursuant to Rule 3.31(c)(4)(ii).

Request 8.

All documents supporting or relating to every evaluation, survey, or study conducted by you or on your behalf to assess consumer reaction to or consumer perception, comprehension, understanding, "take-away," or recall of statements or representations made in any EMS device advertisement.

Response:

Complaint counsel interprets this request as applying to all EMS devices other than the Ab Force. Complaint counsel object to this request based upon the objections set forth in General Objections 2-5.

Request 9.

All documents that you intend to rely on as evidence including, without limitation, surveys, letters, telephone records, reports and memoranda, that consumers perceive, understand or comprehend the Ab Force advertisements as making the representations identified in paragraphs 16 through 19.

Complaint counsel object to this request based upon the objections set forth in General Objections 2-7 and 11-12. In particular, complaint counsel object to respondents' request for documents relating to past law enforcement actions against respondents because it seeks information that is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent, in violations of the limits of discovery set by Rule 3.31(c)(1) of the Commission's Rules of Practice and because most such documents are already possessed by respondents, their representatives, attorneys, officers, employees, or agents, and production of such documents would be unduly burdensome, unnecessary and duplicative.

Request 16.

All documents identified in any answer to any Interrogatory or which you relied on in answering any Interrogatory.

Response:

Complaint counsel object to this request based upon the objections set forth in General Objections 2 - 13. In particular, complaint counsel object to this request because it seeks information that is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent, in violations of the limits of discovery set by Rule 3.31(c)(1) of the Commission's Rules of Practice and because most such documents are already possessed by respondents, their representatives, attorneys, officers, employees, or agents, and production of such documents would be unduly burdensome, unnecessary and duplicative.

Respectfully submitted,

Connie Vecellio

Connie Vecellio (202) 326-2966
Walter Gross (202) 326-3319
Amy M. Lloyd (202) 326-2394

Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dated: November 12, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November 2003, I caused a true copy of Complaint Counsel's Response to Respondents' First Set of Requests for Documents and Things to be served by electronic mail and facsimile upon:

Edward F Glynn, Jr.
Venable, Baetjer, Howard & Civiletti, LLP
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Amy M. Lloyd
Complaint Counsel

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202-344-8008 twatkinson@venable.com

December 1, 2003

BY FAX

Walter Gross, III, Esquire
Federal Trade Commission
Bureau of Consumer Protection
Enforcement Division
601 New Jersey Ave., N.W., Room 2115
Washington, D.C. 20580

Re: *FTC v. Telebrands* - Docket No. 9313
Discovery Responses

Dear Walter:

I am writing to follow up on our meeting on November 20, 2003 during which we raised several issues concerning complaint counsel's responses and objections to Respondents' First Set of Interrogatories and First Requests for Production of Documents.

As you recall, we expressed our concern that counsel had not produced certain responsive documents and information in answering our discovery. The documents and information covered three areas, each of which we discussed in detail:

- *Evidence of Consumer Perceptions*

You indicated in the meeting that you were in possession of certain "consumer evidence" that had been prepared by a consulting expert in anticipation of litigation. The existence of this "evidence" raised two issues.

First, we expressed our concern that the privilege log produced by complaint counsel failed to provide any description of this "evidence" sufficient to allow Respondents to understand what was being withheld. Specifically, item number 15 of the privilege log describes resumes, correspondence and "other materials" as having been produced by a non-testifying expert on behalf of the Commission "for use in anticipation of litigation." At the meeting we requested that you amend the privilege log to describe the "consumer evidence" and "other materials" in your possession. You agreed. As you know, I will be in your office tomorrow to review documents. Please provide us with the amended privilege log at that time.

Second, based on the decision in *Kraft, Inc.*, Docket No. 9208, Order Ruling on Respondents' Motion for Documents in the Possession of Complaint Counsel (Parker, A.L.J. March 23, 1990)—which you were kind enough to attach to your objections—any such "consumer evidence" must be produced to Respondents in this case.

The decision in *Kraft* instructs that such "evidence," although work product, is discoverable. Indeed, the Judge in *Kraft* reasoned that although it is true that the respondent in that case "can develop and offer its own evidence of consumer perceptions, it cannot exactly duplicate complaint counsel's research." *Id.* The same is true of complaint counsel's "consumer evidence" in this case. Although the impressions, thoughts and analyses of the expert are not discoverable, the factual information—whether survey or study data, methodology, results, etc.—is discoverable. Moreover, whether the "consumer evidence" in your possession will be offered at the hearing or otherwise is irrelevant. The decision in *Kraft* makes it clear that the evidence is discoverable now, regardless of whether complaint counsel intend to offer it up at the hearing: "If complaint counsel intend to offer the surveys in evidence, they should be revealed now so that Kraft's attorneys can begin analyzing them. If they are not offered in evidence, they may lend some support to Kraft's claim that its advertisements do not imply what the Commission believes they do." *Id.*

You told us at the meeting that you would consider Respondents' position on this issue and let us know whether complaint counsel will produce the "consumer evidence" in its possession. Per our request, which was renewed by Ed Glynn in his conversation with you this afternoon, please let us know by noon tomorrow if you will produce such information.

- *Consumer Complaints*

We understand that complaint counsel will produce for inspection and copying communications between the Commission and consumers regarding to the advertising or performance of the Ab Force or of any other EMS device at issue. We also understand that the Commission may have conducted interviews with consumers of the Ab Force or other EMS devices at issue. You informed us that you would determine whether any such statements exist, and whether any of those interview statements contain factual information concerning the advertising or performance of the devices at issue. To the extent that such communications do contain factual information, please produce that information.

- *Evidence of Prior Bad Acts*

Connie Vecellio informed us at the meeting that she would seek to introduce the existence of prior consent orders against Mr. Khubani, even though the consent orders were entered into without any finding of wrongdoing. As an initial matter, we believe that these consent orders are wholly irrelevant to the issues raised in the current proceeding, and that any attempt to introduce the orders at the hearing in this case would be made for the sole, improper purpose of citing to alleged prior bad acts. This type of evidence is routinely stricken as irrelevant and unduly prejudicial even where—unlike this case—there is some evidence of a prior "bad act."

We requested that we be permitted to assemble a defense to any improper and outrageous citation of consent orders by complaint counsel by examining the information in the Commission's possession concerning the previous consent orders. You informed us that you would consider our request. Please let us know by noon tomorrow whether you will produce that information.

With regard to Respondents' document requests, we understand that of the universe of responsive documents, complaint counsel have withheld from production the following:

- Documents identified on the privilege log;
- Documents that Respondents already produced to the Commission; and
- Documents in the Abtronic and Fast Abs that are not directly or indirectly related to advertising or marketing.

I note that on November 21, 2003, Ed Glynn informed Amy Lloyd that we had reached an agreement for the production of documents with counsel in the Ab Energizer case and therefore complaint counsel need not produce any documents that were produced to the Commission Staff by AbEnergizer. Please inform us tomorrow if there are any documents complaint counsel are withholding in addition to those described above.

Finally, you asked us to provide you with (1) a more complete identification of persons with knowledge as part of the initial disclosures and (2) broadcast quality copies of the television advertisements at issue. With regard to the identification of persons with knowledge, Ed Glynn sent a letter after our meeting citing the interrogatory responses that identified persons with knowledge. As to the broadcast quality tapes, we expect to be able to inform you tomorrow as to the status of those tapes.

Please inform us immediately if Respondents' understanding of any of these issues is incorrect. Barring such a response, I will see you tomorrow for the inspection of the documents being produced by complaint counsel, and I look forward to receiving responses to the requests outlined above.

Regards,

Ted Atkinson

cc: Edward F. Glynn, Esquire
Constance M. Vecellio, Esquire
Amy Lloyd, Esquire

E

Complaint Counsel's Revised Privilege Log in Response to Respondents' First Set of Requests for Production
Revised for Items 15 and 16 as Pertains to Copy Test of Ab Force by Non-testifying Expert

	AUTHOR	RECIPIENT	DESCRIPTION	DATE	PRIVILEGE(S)
	EXPANDED				
15a	Non-testifying marketing expert	BCP Attorneys, FTC economists, contractor for copy test	Screening questionnaire for copy test and drafts thereof	undated	Non-testifying expert; work product privilege
15b	Non-testifying marketing expert	BCP Attorneys, FTC economists, contractor for copy test	Questionnaire for copy test and drafts thereof	undated	Non-testifying expert; work product privilege
15c	Contractor for copy test	BCP Attorneys, non-testifying marketing expert	Completed questionnaires from copy test	various	Non-testifying expert; work product privilege
15d	Non-testifying marketing expert and FTC paralegal	BCP Attorneys, FTC economists	Tabulations of data, emails re copy test	9/29/03 forward	Non-testifying expert; work product privilege
15e	video contractor	BCP Attorneys, FTC economists, non-testifying expert	Tapes for use in copy test	undated	Non-testifying expert; work product privilege
15f	Contractor for copy test	BCP Attorneys, non-testifying expert	emails and faxes re copy test	8/15/03-9/15/03	Non-testifying expert; work product privilege

	AUTHOR	RECIPIENT	DESCRIPTION	DATE	PRIVILEGE(S)
	EXPANDED				
16a	BCP Attorneys and economists	BCP Attorneys and economists, non-testifying expert, contractor	emails re copy test	9/15/03 forward	Non-testifying expert; work product privilege
16b	BCP Attorneys	none	notes from phone calls, notes from observation of pretest for copy test, notes from meetings	8/27/03 forward	Work product privilege
16c	BCP attorneys	BCP Attorneys and Director of BCP, FTC economists	memo re proposed copy test and drafts thereof	undated	Work product privilege, deliberative process privilege
16c	BCP attorney	BCP Attorneys and Director of BCP, FTC economists	bullets describing preliminary results of copy test and drafts thereof	10/21/03	Work product privilege, deliberative process privilege
16d	BCP attorney	BCP Attorneys and FTC procurement	Memo re contract for copy test and drafts thereof and purchase order	8/15/03	Non-testifying expert; work product privilege
16e	FTC procurement	BCP Attorneys	Contract for copy test	9/3/03	Non-testifying expert; work product privilege

Dated: December 4, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December 2003, I caused a true copy of Complaint Counsel's Revised Privilege Log in Response to Respondents' First Set of Requests for Production Revised for Items 15 and 16 as Pertains to Copy Test of Ab Force by Non-testifying Expert to be served by electronic mail and facsimile upon:

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Attorneys for Respondents
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Complaint Counsel

F

UNITED STATE OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

KRAFT, INC.
a corporation.

DOCKET NO. 9208

ORDER RULING ON RESPONDENT'S MOTION FOR DOCUMENTS IN THE POSSESSION OF COMPLAINT COUNSEL

Pursuant to §§ 3.31(b)(1), 3.34(b) and 3.36 of the Commission's Rules of Practice, respondent Kraft, Inc. has asked me to issue a subpoena duces tecum requiring complaint counsel to turn over certain documents in their possession to Kraft. The requested subpoena contains eleven specifications, the first seven of which seek all documents relating to the allegations in paragraphs 6, 7, 8, 9, 10, 11, and 12 of the complaint. Specificiation eight seeks documents relating to consumer perceptions conveyed by advertisements which are referred to in the complaint; nine, all documents relating to the nutritional content or quality of Kraft singles, imitation cheese products, and five ounces of milk; ten, communications between the Commission or its staff and the Attorney General of California or his staff relating to Kraft or its advertising; and, eleven, all documents identified in complaint counsel's responses to Kraft's first set of interrogatories.

The requested specification seek several categories of documents in complaint counsel's possession:

(1) Those received from Kraft during the investigation which led to the complaint.

(2) Communications with third parties.

(3) Those prepared by or for complaint counsel, such as interview reports, analyses of evidence, surveys, letters to and from potential witnesses, and recommendations to their superiors and to the Commission.

Kraft knows which of its documents it gave the Commission during the investigation, but it seeks disclosure of the relevance of each document to particular complaint allegations. While Kraft is entitled to this information, a subpoena is the wrong vehicle for obtaining such knowledge. At the prehearing conference which will be held shortly, I will establish, inter alia, deadlines for the production of documents which the parties intend to offer in evidence and, if after analyzing the documents, Kraft cannot determine the relevance of some it may challenge the admissibility of those documents.

Other documents which Kraft seeks -- interview reports, written analyses of evidence, memoranda recommending action, communications between the Commission and the Attorney General of California -- are work product or relate to the deliberative process and are generally immune from disclosure. Safeway Stores, Inc., Docket No. 9053 (June 30, 1976); Bell & Howell Co., Docket No. 9099 (April 11, 1970); FTC v. Warner Communications, Inc., 742 F.2d 1156, 1161 (9th Cir. 1984).

While withholding the work product and internal memoranda which Kraft seeks will not prejudice its ability to prepare its defense, one category of documents causes me concern -- those relating to copy test research performed at the direction of complaint counsel in anticipation of litigation. These documents are work product but they contain significant evidence relating to the issues raised in the complaint. If complaint counsel intend to offer the surveys in evidence, they should be revealed now so that Kraft's attorney's can begin analyzing them. If they are not offered in evidence, they may lend some support to Kraft's claim that its advertisements do not imply what the Commission believes they do.

Kraft can develop and offer its own evidence of consumer perceptions but it cannot exactly duplicate complaint counsel's research. Therefore, since Kraft has a need for the surveys conducted by or for complaint counsel, and since the precise information contained in the surveys cannot be obtained through any other means (Section 3.36(b) of the Rules of Practice), I will approve a subpoena directing complaint counsel to turn them over to counsel for Kraft. Therefore,

IT IS ORDERED that Kraft's request for a subpoena duces tecum containing proposed specifications 1-7 and 9-11 be, and it hereby is, denied.

IT IS FURTHER ORDERED that Kraft shall prepare for my signature a subpoena duces tecum directing complaint counsel to produce all surveys relating to consumer perceptions or impressions received from or conveyed by any of the Kraft advertisements attached to or otherwise described in and subject to the complaint. If

complaint counsel intend to move to quash this subpoena, they shall do so within five (5) business days of its receipt.

Lewis F. Parker
Administrative Law Judge

DATED: July 10, 1987

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H
Only the Westlaw citation is currently available.

United States District Court,
E.D. Louisiana.

SOUTHERN SCRAP MATERIAL CO., et al,
v.
George M. FLEMING; Fleming & Associates L.L.P., Fleming, Hovenkamp & Grayson, P.C.; John L. Grayson; Mark A. Hovenkamp; Bruce B. Kemp; L. Stephen Rastanis; The Law Offices of L. Stephen Rastanis; John B. Lambremont, Sr.; The Law Offices of John B. Lambremont, Sr.; Ken J. Stewart; Frederick A. Stolzle, Jr.; Frederick A. Stolzle, Jr. & Associates

No. Civ.A. 01-2554.

June 18, 2003.

MEMORANDUM OPINION AND ORDER

KNOWLES, Magistrate J.

***1** This action, which invokes the civil RICO jurisdiction of the Court under 18 U.S.C. § 1964, [FN1] involves claims by plaintiffs, Southern Scrap Material Co., LLC, SSX, L.C., and Southern Recycling, LLC, against the defendant attorneys listed above. This matter is before the undersigned magistrate judge pursuant to the mandate of the Fifth Court of Appeals [Rec. Doc. 107] and the reference of district judge to consider arguments of the parties that certain documents for which discovery is sought are protected by the work-product doctrine or the attorney-client privilege. More particularly, presently before the Court are the following contested discovery motions:

> FN1. On August 20, 2001, plaintiffs filed their Complaint [Rec. Doc. 1] pursuant to the 28 U.S.C. § § 1331 and 1337, and 18 U.S.C. § § 1964(a) and 1964(c), Title IX of the Organized Crime Crime Control Act of 1970, also known as the Racketeer Influenced and Corrupt Organization Act (RICO).

(1) Plaintiffs Southern Scrap Material Co., LLC, SSX, L.C., and Southern Recycling Co. LLC's (hereinafter collectively referred to as "Southern Scrap") Motion and Memorandum in Support of Maintenance of Privilege over various documents submitted for *in camera* review [Rec. Doc. # 188];
(2) Defendants Frederick A. Stolzle, Jr. and Frederick A. Stolzle, Jr. & Associates' ("Stolzle defendants") Motion to Sustain Attorney-Client and Work Product Privileges [Rec. Doc. # 187];
(3) Defendants Fleming & Associates, L.L.P., and George Fleming's ("Fleming defendants") Joint Motion and Memorandum to Sustain Work Product and Attorney/Client Privileges [Rec. Doc. # 189];
(4) Defendant Ken J. Stewart's Motion and Memorandum to Sustain the Privilege on Documents Produced for *In Camera* Inspection [Rec. Doc. # 198]; and
(5) Defendant John B. Lambremont, Sr. and Law Offices' Memorandum in Support of Sustaining Work Product and Attorney-Client Privileges. [Rec. Doc. # 186].

I. BACKGROUND

Necessarily predicate to any ruling on the privileges claimed is some understanding of the climate in which the instant case arose and the tenor and substance of the allegations which presaged the instant motions to compel. On August 20, 2001, the plaintiff, Southern Scrap, filed a complaint naming the following trial attorneys as defendants, to wit: George M. Fleming, Fleming & Associates, L.L.P., Fleming, Hovenkamp & Grayson, P.C., John L. Grayson, Mark A. Hovenkamp, Bruce B. Kemp, L. Stephen Rastanis, The Law Offices of L. Stephen Rastanis, John B. Lambremont, Sr., The Law Offices of John B. Lambremont, Sr., Ken J. Stewart, Frederick A. Stolzle, Jr. and Frederick A. Stolzle, Jr. and Associates. *See* Southern Scrap's Complaint [Rec. Doc. # 1]. Southern Scrap seeks-relief pursuant to § § 1961-68, § 901(a) of Title IX of the Organized Crime Control Act of 1970, as amended, otherwise known as the Racketeering Influenced and Corrupt Organizations Act of 1970 ("RICO"), and in particular, under 18 U.S.C. § 1964. Following the filing of the Southern Scrap's RICO case statement [Rec. Doc. # 3], defendants filed their motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). [Rec. Doc. # 11]. Finding that the alleged "improprieties and calculated manipulations set out in the RICO case statement" were sufficient to defeat the defendants' motion to dismiss the Court denied same, as well as the defendants' Motion for More Definite Statement. [Rec. Doc. 's 23 and 27]. The parties were ordered to exchange initial disclosures by March 12, 2002. The claims against the defendant Mark A. Hovenkamp were dismissed with prejudice. [Rec. Doc. # 41]. On

May 6, 2002, Southern Scrap filed an amended complaint with respect to its damages. [FN2] [Rec. Doc # 65].

FN2. Plaintiff amended their original RICO complaint alleging "severe financial and business losses, and damage to reputation, negative publicity, decreased company productivity, decreased employee morale, and fear of frivolous lawsuits," to state: "As a proximate cause of the Attorneys' violation of 18 U.S.C. § 1962(c) and (d), Plaintiffs have been injured in their business or property for the reasons described above and because they were forced to expend a significant amount of time and money in the maintenance of defenses to these numerous, yet meritless lawsuits. The Attorneys have caused Plaintiffs damages consisting of the attorneys fees, expenses, costs, and time associated with the defense of these frivolous lawsuits." *See* Amended Complaint at ¶ 152 [Rec. Doc. # 65].

*2 In its application presently before the Court in the nature of a Motion to Compel Production of Documents, Southern Scrap characterizes the defendant attorneys as "a group of plaintiffs' attorneys that encircled Southern Scrap like jackals in an attempt to extort settlement funds," [FN3] from plaintiff scrap metal companies, which are along, with the judicial system and others, victims of the defendant attorneys' RICO conspiracy. [FN4] Plaintiffs' RICO complaint casts the defendant attorneys into two groups of actors, the Baton Rouge area plaintiffs' attorneys and the Texas plaintiffs' attorneys, who allegedly came together in 1995, formed an association-in-fact, and, working together, "unleashed a torrent of eleven (11) frivolous and baseless lawsuits against [Southern Scrap], alleging everything from mass exposure to toxic torts to discriminatory hiring practices." [FN5] Southern Scrap contends that "all of the resolved underlying cases were either dismissed on summary judgment, by the Court of Appeals, or in exchange for not seeking sanctions against the defendants," and "not a single one of these cases had any merit." [FN6]

FN3. *See* Plaintiffs' Motion and Incorporated Memorandum in Support of Maintenance of Privilege over Various Documents Submitted for In Camera Review, at p. 2.

FN4. *See* Complaint at ¶ IV [Rec. Doc. 1].

FN5. Southern Scraps' Motion and Incorporated Memorandum in Support of Maintenance of Privilege over Various Documents Submitted for In Camera Review, at p. 3.

FN6. *Id.* at 4.

Southern Scrap specifically alleges that the defendant attorneys (*i.e.*, plaintiffs' attorneys in the underlying state court litigation), exceeded any legitimate role they may have had as diligent adversaries by filing baseless claims and, in so doing, committed mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343) in furtherance of their scheme to bring extortionate pressure to settle cases, inflicting heavy costs in terms of legal expenses for defense against the false and fraudulent claims. Additionally, Southern Scrap claims violations of the Hobbs Act, 18 U.S.C. § 1951, referring to attempts by defendant attorneys to induce the scrap metal companies to pay funds to settle the fraudulent state court suits by threats of filing more of the same and thus inflicting even heavier financial losses.

The defendant attorneys have denied the allegations against them and submit that the allegations in the RICO case statement are unsupported allegations. Defendants response to the plaintiffs' characterization of the underlying state court litigation and their roles, in that Southern Scrap's statement erroneously suggests that all of the attorney defendants assisted in the prosecution of all eleven (11) underlying lawsuits. Moreover, Defendants contend that the Court should give little or no credence to Southern Scrap's argument that the underlying lawsuits were frivolous and baseless, in light of the fact that three of the underlying state court cases remain pending, one having survived a La.Code Civ. Proc. Art. 863 motion to dismiss hearing.

II. CONTENTIONS OF THE PARTIES

1. SOUTHERN SCRAP'S CHALLENGES TO DEFENDANTS' PRIVILEGE LOGS

Southern Scrap challenges the documents listed in the various defendant attorneys' privilege logs on various grounds, including the following, to wit: (1)

regarding documents which relate to the business aspects of the defendants' legal practices, including fee agreements and agreements between counsel entered prior to the commencement of the litigation, Southern Scrap contends that they are discoverable and do not constitute the rendition of legal advice, nor are they protected work product; (2) articles, including maps, photographs, videos, and the like, all without attorney commentary, are discoverable; (3) documents which discuss purely factual matters without the addition of mental impressions or strategy of counsel are discoverable and do not constitute protected work product; (4) vintage documents dating back one to six years prior to the institution of the first lawsuit are discoverable; (5) the attorney-client privilege was waived with respect to the publication of "Scrap Notes"; (6) any claim of privilege was waived with respect to "the Becnel communications;" (7) "ALR Customer" and "CLR Customer" documents are not privileged; and (8) certain miscellaneous items, including the "Letters to Reverends," are also discoverable. Plaintiffs argue that, in any event, they have demonstrated their substantial need for the challenged documents. Southern Scrap highlights that the attorney defendants have denied the RICO claim and alleged the affirmative defense of good faith, and contends that the documents are necessary impeachment and cannot be obtained from an alternative source.

***3** The Stolzle defendants submit that they currently represent individuals in toxic exposure/personal injury litigation against the Southern Scrap plaintiffs. Defendants further advise that three of the "eleven (11) underlying cases" were filed in Louisiana's Nineteenth Judicial District and are still pending, to wit: *Harmason v. Southern Scrap Material Co., Inc.,* Docket No. 415,360 "C"; *Curry v. Southern Scrap Material Co.,* Docket No. 421,244 "C"; and *Banks v. Southern Scrap Material Co.,* 421,023 "H." Essentially, the Stolzle defendants argue that Southern Scrap's discovery requests demand the production of nearly every document maintained in client and attorney work files of the aforesaid underlying toxic tort litigation, and Stolzle submits that certain documents are protected by the work product and/or attorney-client privileges. Per the Court's October 16, 2002 order, Stolzle submitted a tabular log identified as Exhibit "B" which identifies each of eighty-five (85) documents withheld, along with the corresponding documents in tabbed binders for *in camera* review. Stolzle notes that the list of eighty-five documents was narrowed down from an October 11, 2002 privilege log, which previously identified tens of thousands of pages of privileged documents.

Regarding the documents listed on Exhibit "B," the Stolzle defendants argue that the fact that defendants have denied the allegations asserted against them in Southern Scrap's RICO complaint does not "place-at-issue" any "factual information," resulting in a waiver of the privileges claimed. Defendants further hearken back to the strictures of Rules 9(b) and 11, and more particularly, remind Southern Scrap plaintiffs that, prior to filing the instant lawsuit, they should have had knowledge of the specific "facts" and "law," which support their allegations, and thus may not, consistently with their Rule 11 obligation, now claim they do not have access to the facts and/or that they have substantial need within the meaning of Rule 26(b)(3). [FN7] Defendants admit that the work product doctrine protects documents and not underlying facts, but highlight federal law which stands for the proposition that a document does not lose its privilege status merely because its contains factual information. [FN8]

FN7. *See* Stolzle Defendants' Motion to Sustain Attorney Client Privilege, at p. 5 n. 3 (*citing Williams v. WMX Technologies, Inc.,* 112 F.3d 175, 177 (5th Cir.1997)).

FN8. *Id.* at 6 (*citing High Tech Communications, Inc. v. Panasonic Co.,* 1995 WL 45847 at *6 (E.D.La., Feb. 2, 1995), *inter alia*).

The Stolzle defendants, along with the other defendants in this case, accuse Southern Scrap of attempting to use this RICO action to circumvent Louisiana's scope of discovery regarding experts in the pending state court litigation, *i.e.,* "experts" identified in an article 863 hearing in the underlying state court litigations. [FN9] Finally, the Stolzle defendants submit that surveillance videos, photographs, and all communications with prospective clients are clearly subject to the work product doctrine and the attorney- client privilege. [FN10]

FN9. *See id.,* at p. 8 (*noting* La. Civ.Code of Proc. Art. 1424, *inter alia,* recognizing that under Louisiana law there is an absolute privilege against the discovery of writing, mental impressions, conclusions or opinions of an expert or any attorney).

FN10. *Id.* at 11-12.

The Fleming defendants have submitted their own privilege log and corresponding tabbed binder of documents for *in camera* review. In addition to the arguments made by the Stolzle defendants, the Fleming defendants contend that Southern Scrap has failed to demonstrate either substantial need or the inability to discover the same evidence by other means as required by Fed.R.Civ.P. 26(b)(3). Moreover, the Fleming defendants submit that the following categories of documents are protected work product, to wit: (1) correspondence among co-counsel relating to legal strategy, legal issues, and division of labor; (2) counsel/co-counsel communications; (3) attorney notes regarding depositions, subpoenas, and testimony; (4) compilations of documents; (5) documents that set out a case plan of action and discuss legal issues; (6) documents that relate or refer to investigations and/or factual information; (7) sworn statements; and (8) defendants' communications with experts.

***4** Ken Stewart submitted his privilege log and corresponding tabbed binder of eighty (80) documents withheld under claims of privilege. To prevent repetition of legal arguments, Stewart adopted the arguments set forth in the Fleming Defendants' memorandum in support of sustaining work product and attorney-client privileges. Like the Stolzle Defendants, Stewart similarly points out that three of the eleven underlying cases identified in Southern Scrap's RICO complaint remain pending in state court. Although he contends that certain documents are protected from disclosure under the federal case law as well, Stewart urges the Court to carefully consider that law, in conjunction with Louisiana law strictly prohibiting disclosure of expert documents to opposing parties.

Defendant John B. Lambremont, Sr. submitted a privilege log, alleging both work product protection and/or attorney-client privilege with respect to the documents tabbed 1-4, 6, 7, 12, and 14. Defendant Lambremont filed a memorandum in support of his objections, arguing more specifically that: (1) Southern Scrap has not demonstrated substantial need or inability to discover the same evidence by other means; (2) the mere denial of an association-in-fact does not effect a waiver of the applicable privileges; (3) correspondence and communications among co-counsel relating to legal strategy, legal issues, and division of labor are protected work product; (4) attorney notes regarding depositions, subpoenas, and testimony are protected work product; (5) documents that set out a case plan of action and discuss legal issues among co-counsel are protected work product; (6) case expense reports, invoices, and billing for experts and attorneys are privileged because they reveal legal strategies and attorney client communications; (7) communications with experts are protected; (8) discussions of expert testing results are protected work product because they reveal attorney thoughts and impressions; (9) communications between attorney and client are covered by the attorney client privilege; and (10) discussions with and information received from clients are privileged. [FN11]

FN11. *See* John B. Lambremont, Sr.'s Memorandum to Sustain Work Product and Attorney/Client Privileges [Rec. Doc. No. 186].

2. DEFENDANTS' CHALLENGES TO SOUTHERN SCRAP'S PRIVILEGE LOG

Southern Scrap has withheld a total of twenty-two (22) documents, which it contends are shielded from discovery by either the work product or attorney-client privileges, or both. The defendant attorneys challenge the plaintiffs' claims of privilege on the basis that the plaintiffs waived any privilege they may have possessed over their files by filing the instant RICO complaint. The defendants contend that the "the Audit Letters" and "the Becnel Correspondence" are the core of plaintiff's RICO claims. Additionally, defendants contend that the audit letters were not prepared exclusively in anticipation of litigation. As for the Becnel correspondence, Ken Stewart notes that Southern Scrap has labeled Daniel Becnel as a fact witness, knowledgeable of some of the alleged RICO violations in the underlying cases.

***5** The Court will first address the applicable law generally, and then, the parties' privilege logs/documents serially.

III. THE LAW

1. WORK-PRODUCT DOCTRINE

The attorney work-product privilege first established in *Hickman v. Taylor*, 329 U.S. 495 (1947), and codified in Fed.R.Civ.P. Rule 26(b)(3) for civil discovery, protects from disclosure materials prepared by or for an attorney in anticipation of

litigation. *Varel v. Banc One Capital Partners, Inc.*, 1997 WL 86457 (N. D.Tex.) (*citing Blockbuster Entertainment Corp. v. McComb Video, Inc.*, 145 F.R.D. 402, 403 (M.D.La.1992)). Since *Hickman, supra,* courts have reaffirmed the "strong public policy" on which the work-product privilege is grounded. The Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383 (1981) found that "it is essential that a lawyer work with a certain degree of privacy" and further observed that if discovery of work product were permitted "much of what is not put down in writing would remain unwritten" and that "the interests of clients and the cause of justice would be poorly served. *Upjohn,* 449 U.S. at 397-998; *see also In re Grand Jury Proceedings*, 219 F.3d 175, 190 (2nd Cir.2000); *United States v. Aldman*, 134 F.3d 1194, 11967(2nd Cir.1998)

Fed.R.Civ.P. 26(b)(3) provides that

> a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and *prepared in anticipation of litigation* or for trial *by or for that other party's representative* (including the other party's attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's 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) (emphasis added). Federal law governs the parties' assertions that certain information is protected from disclosure by the work product doctrine. *See Naquin v. Unocal Corp .*, 2002 WL 1837838 *2 (E.D.La.2002) (Wilkinson, M.J.) (*citing Dunn v. State Farm*, 927 F.2d 869, 875 (5th Cir.1991)).

The Fifth Circuit describes the standard for determining whether a document has been prepared in anticipation of litigation as the "primary purpose" test. *See In Re Kaiser Aluminum and Chemical Co.*, 214 F.3d 586, 593 n. 19 (5th Cir.2000) (*citing* precedents in *United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir.1982) and *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir.1981)). The primary purpose test, coined by the Fifth Circuit in *Davis,* states:

> It is admittedly difficult to reduce to a neat formula the relationship between the preparation of a document and possible litigation necessary to trigger the protection of the work product doctrine. We conclude that litigation need not necessarily be imminent, as some courts have suggested, as long as the *primary motivating purpose behind the creation of the document* was to aid in possible future litigation.

***6** *Davis*, 636 F.2d at 1039. The determination that one or more of the documents were not prepared by counsel is not necessarily dispositive of the inquiry, as Rule 26(b)(3) protects documents prepared by a party's agent from discovery, as long as they were prepared in anticipation of litigation. In *United States v. Nobles*, 422 U.S. 225 (1975), [FN12] the Supreme Court explained:

> FN12. In *Nobles,* the Supreme Court applied the work-product doctrine to criminal proceedings. The Court observed that, although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case. 422 U.S. at 238.

> At its core, the 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. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversarial system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation of trial. It is therefore necessary that the doctrine protect material *prepared by agents for the attorney* as well as those prepared by the attorney himself.

Nobles, 422 U.S. at 238-39 (emphasis added). In both *Hickman* and *Nobles, supra,* the Supreme Court recognized that the "the work-product doctrine is distinct from and broader than the attorney-client privilege." *Hickman*, 329 U.S. at 508; *Nobles*, 422 U.S. at 238 n. 11. The doctrine protects not only materials prepared by a party, but also materials prepared by a co-party [FN13] or a representative of a party, including attorneys, consultants, agents, or investigators. *Nobles*, 422 U.S. at 228. [FN14]

> FN13. *See United States v. Medica-Rents, Co.*, 2002 WL 1483085 *1 n. 6 (N. D.Tex.) (noting that disclosure of documents by relators to co- party the United States and its representatives does not result in waiver and

that the joint defense privilege, an extension of the attorney-client privilege, also applies in the context of work-product immunity).

FN14. *Upjohn Co.*, 449 U.S. at 400; *United States v. El Paso Co .*, 682 F.2d 530, 543 (5th Cir.1982, *cert. denied,* 466 U.S. 944 (1984).

Work product immunity extends to documents prepared in anticipation of prior, terminated litigation, regardless of the interconnectedness of the issues and facts. The work product privilege recognized in *Hickman, supra,* does not evaporate when the litigation for which the document was prepared has ended. [FN15] In *In re Grand Jury Proceedings,* 43 F.3d 966 (5th Cir.1994), the Fifth Circuit observed:

FN15. *See In re Grand Jury Proceedings,* 43 F.3d 966, 971 (5th Cir.1994) (noting that neither Rule 26 nor its well-spring *(Hickman)* place any temporal constraints on the privilege).

The emerging majority view among the circuits which have struggled with the issue thus far seems to be that the work product privilege does not extend to subsequent litigation. One circuit, the Third Circuit, appears to extend the work product privilege only to "closely related" subsequent litigation. *In re Grand Jury Proceedings,* 604 F.2d 798, 803-04 (3rd Cir.1979). A broader view, exemplified by the Fourth and Eighth Circuits, is that the privilege extends to all subsequent litigation, related or not.

Id. at 971 (agreeing that the privilege extends to subsequent litigation but finding no need to choose between the two views since the subsequent litigation was "closely related" to the first).

The law is settled that "excluded from work product doctrine are materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation." *United States v. El Paso Co.,* 682 F.3d 530, 542 (5th Cir.1982) (citing Rule 26(b)(3) advisory committee notes)).

Factors that courts rely on to determine the primary motivation for the creation of a document include the retention of counsel, his involvement in the generation of the document and whether it was routine practice to prepare that type of document or whether the document was instead prepared in response to a particular circumstance. If the document would have been created regardless of whether the litigation was also expected to ensue, the document is deemed to be created in the ordinary course of business and not in anticipation of litigation.

*7 *Piatkowski v. Abdon Callais Offshore, LLC,* 2000 WL 1145825, at *2 (E.D.La. Aug. 11, 2000). "If a party or its attorney prepares a document in the ordinary course of business, it will not be protected from discovery even if the party is aware that the document may also be useful in the event of litigation." *Naquin v.. Unocal Corp.,* 2002 WL 1837838 *7 (E.D.La. Aug. 12, 2002) (internal quotation marks omitted). The party seeking protection from discovery bears the burden of showing that the disputed documents are work-product. [FN16]

FN16. *Id.* at *6 (*citing Guzzino v. Felterman,* 174 F.R.D. 59, 63 (W.D.La.1997) (Tynes, M. J.); *Hodges, Grant & Kaufmann v. United States,* 768 F.2d 719, 721 (5th Cir.1985)).

The work product doctrine protects two categories of materials prepared in anticipation of litigation, fact and opinion work product. To obtain fact or ordinary work-product, a party seeking discovery of such material must make a showing of "substantial need ." Fed R Civ P 26(b)(3). However, absent a showing of *compelling* need and the inability to discover the substantial equivalent by other means, work product evidencing mental impressions of counsel, conclusions, opinions and legal theories of an attorney are not discoverable. [FN17] Indeed, opposing counsel may rarely, if ever, use discovery mechanisms to obtain the research, analysis of legal theories, mental impressions, and notes of an attorney acting on behalf of his client in anticipation of litigation. [FN18] The burden of establishing that materials determined to be attorney-work product should be disclosed is on the party seeking production. [FN19]

FN17. *See Conkling v. Turner,* 883 F.2d 431, 434-35 (5th Cir.1989); *In Re Grand Jury Proceedings,* 219 F.3d 175, 190 (2nd Cir.2000); *Varel v. Banc One Capitol Partners, Inc.,* 1997 WL 86457 (N. D.Tex.) (Boyle M. J.).

FN18. *See* *Dunn v. State Farm Fire & Casualty Co.*, 927 F.2d 869, 875 (5th Cir.1991); *Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 721 (5th Cir.1985).

FN19. *Hodges*, 768 F.2d at 721.

2. ATTORNEY CLIENT PRIVILEGE

Federal courts look to various sources, including time-honored Wigmore formulation setting forth the various elements of the privilege, to wit: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless waived." [FN20] Relying on the Wigmore standard, Judge Alvin B Rubin observed:

FN20. *Naquin v. Unocal*, 2002 WL 1837838, *2 (E.D.La.) (Wilkinson, M.J.) (*quoting*, 8 J. Wigmore, *Evidence* § 2292m at 554 (McNaughton rev.1961)).

> The oldest of the privileges for confidential communications, the attorney- client privilege protects communications made in confidence by a client to his lawyer for the purpose of obtaining legal advice. The privilege also protects communications from the lawyer to his client, at least if they would tend to disclose the confidential communications. [FN21]

FN21. *Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 720-21 (5th Cir.1985).

The burden of establishing the existence of an attorney-client privilege, in all of its elements, rests with the party asserting it. Although this oldest and most venerated of the common law privileges of confidential communications serves important interests in the federal judicial system, [FN22] it is not absolute and is subject to several exceptions. [FN23] These exceptions also apply in the context of work-product immunity, and thus, waiver is discussed under that separate heading below.

FN22. *United States v. Edwin Edwards*, 303 F.3d 606, 618 (5th Cir.2002) (*citing Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

FN23. *Id.*

3. WAIVER OF PRIVILEGE

Federal law applicable to waiver of attorney client privilege provides that disclosure of any significant portion of a confidential communication waives the privilege as to the whole. [FN24] Waiver of the privilege in an attorney-client communication extends to all other communications relating to the same subject matter. *In re Pabst Licensing, GmbH Patent Litigation*, 2001 WL 1135465, at *4 (E.D.La. Sept. 24, 2001).

FN24. *See also* *Nguyen v. Excel Corp.*, 197 F.3d 200, 207 (5th Cir.1999); *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir.1993)("Patently, a voluntary disclosure of information which is inconsistent with the confidential nature of the attorney-client relationship waives the privilege.").

***8** Applying federal law, the Fifth Circuit in *Conkling v. Turner*, 883 F.3d 431 (5th Cir.1989) held that the plaintiff waived the attorney-client privilege and work product protection as to the issue of his own knowledge where the plaintiff had "injected [the issue] into [the] litigation. *Id.* at 435. The Fifth Circuit in *Conkling* further observed:

> The attorney-client privilege was intended as a shield, not a sword. When confidential communications are made a material issue in a judicial proceeding, fairness demands treating the defense as a waiver of privilege. The great weight of authority holds that the attorney-client privilege is waived when a litigant places information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party.

Conkling, 883 F.2d at 434 (citations and inner quotation marks omitted). [FN25]

FN25. The Second Circuit in *United States v. Blizerian*, 926 F.2d 1285 (2nd Cir.1991)

> similarly recognized that implied waiver may be found where the privilege holder "asserts a claim that in fairness requires examination of protected communications. *Id.* at 1292. Fairness considerations arise where the party attempts to use the privilege both as a sword and a shield, the quintessential example being the defendant, who asserts an advice-of-counsel defense and is thereby deemed to have waived the privilege as to the advice he received. *Id.; see also In re Grand Jury Proceedings,* 219 F.3d at 182.

However, in light of the distinctive purpose underlying the work product doctrine, a general subject-matter waiver of work-product immunity is warranted only when the facts relevant to a narrow issue are in dispute and have been disclosed in such a way that it would be unfair to deny the other party access to facts relevant to the same subject matter. "[C]ourts have recognized subject-matter waiver of work-product in instances where a party deliberately disclosed work product in order to gain a tactical advantage and in instances where a party made testimonial use of work-product and then attempted to invoke the work-product doctrine to avoid cross-examination." [FN26]

> FN26. *See Varel v. Banc One Capital Partners, Inc.,* 1997 WL 86457 *3 (N. D.Tex.) (*citing United States v. Nobles,* 422 U.S. 225, 228 (1975) and *In re United Mine Workers,* 159 F.R.D. 307, 310-12 (D.C.Cir.1994)).

Another exception to both the attorney-client privilege and work product immunity is the crime-fraud exception. [FN27] Essentially, communications made by a client to his attorney during or before the commission of a crime or fraud for the purpose of being guided or assisted in its commission are not privileged. [FN28] The privilege may be overcome "where the communication or work product is intended to further criminal or fraudulent activity." [FN29] The proponent of the otherwise privileged evidence has the burden of establishing a *prima facie* case that the attorney-client relationship was intended to further criminal or fraudulent activity and the focus is on the client's purpose in seeking legal advice. [FN30] Although the pleadings in a case may be unusually detailed, as they are in the instant case, the pleadings are not evidence. Bare *allegations* will not supply the *prima facie* predicate necessary to invoke the crime-fraud exception to the attorney client and work- product privileges. *See In re International Systems and Control Corporations Securities Litigation,* 693 F.2d 1235, 1242 (5th Cir.1982). [FN31] The courts have evolved a two element test for the requisite *prima facie* predicate, to wit:

> FN27. "The crime/fraud exception recognizes that because the client has no legitimate interest in seeking legal advice in planning future criminal activities, ... society had no interest in facilitating such communications," and thus "demonstrates the policy: persons should be free to consult their attorney for legitimate purposes." *In re Burlington Northern,* 822 F.2d 518, 524 (5th Cir.1987) (*citing In re International Systems & Control Corporation Securities Litigation,* 693 F.2d 1235, 1242 (5th Cir.1982)) (inner quotation marks omitted).
>
> FN28. *Garner v. Wolfinbarger,* 430 F.2d 1093, 1102 (5th Cir.1970).
>
> FN29. *Edwards,* 303 F.3d at 618 (*quoting United States v. Dyer,* 722 F.2d 174, 177 (5th Cir.1983)) (internal quotation marks omitted). In the *Edwards* case, the government was the proponent of information sought that was otherwise covered by the attorney-client privilege. The government carried its burden by establishing a prima facie case that Cecil Brown was using his lawyer's services to cover up crimes related to his extortion of LRGC/NORC which involved payments made to Brown in exchange for his guarantee of obtaining river boat gambling licenses for the aforesaid organization *Id.*
>
> FN30. *Edwards,* 303 F.3d at 618.
>
> FN31. *See also* Minute Entry Order dated May 30, 2002 (*citing In re International Sys. & Controls Corp. Sec. Litigation, supra,* observing that Southern Scrap presents only allegations in support of its effort to breach the walls of the subject privileges, and holding that its position has been

> specifically rejected by Fifth Circuit precedent) [Rec. Doc. # 90].
>
> First, there must be a *prima facie* showing of a violation sufficiently serious to defeat the work product privilege. Second, the court must find some valid relationship between the work product under subpoena and the *prima facie* violation.
> *9 *Id.*

Bearing all these basic principles in mind, the Court will examine the challenged documents submitted for *in camera* inspection.

IV. ANALYSIS

1. SOUTHERN SCRAP'S DOCUMENTS

A. Audit Letters

The plaintiff corporations have carried their burden of proof of demonstrating their privilege claim. In this case, the work product doctrine clearly applies to the audit letters (tabs 1-4) prepared and sent by Michael Meyer, counsel for Southern Scrap, to Deloitte & Touche and Price Waterhouse ("Deloitte & Touche"). [FN32] The documents were generated at the request of general counsel for Southern Scrap and set forth a summary of all ongoing litigation, as well as counsel's mental impressions, opinions, and litigation strategy. The comments of the court in *Tronitech, Inc. v. NCR Corporation*, 108 F.R.D. 655, 656 (S.D.Ind.1985) are on point, to wit:

> FN32. Because the work-product doctrine applies in the case of documents submitted for *in camera* review by Southern Scrap, the Court will not address the issue of whether the attorney-client privilege or some other privilege is applicable.

> An audit letter is not prepared in the ordinary course of business but rather arises only in the event of litigation. It is prepared because of the litigation, and it is comprised of the sum total of the attorney's conclusions and legal theories concerning that litigation. Consequently, it should be protected by the work product privilege.
> *Id.*

The audit letters were not prepared by or at the direction of Deloitte & Touche. Instead, the letters were prepared by outside counsel at the request of Southern Scrap's general counsel with an eye toward litigation then ongoing. Clearly, the audit letters in this case are not accountant work-product. Instead, they are attorney work product of the opinion/mental impression/litigation strategy genre. Moreover, Southern Scrap is a closely- held corporation, and thus any report was to be made to its Board and not to the public.

More than once, the Fifth Circuit has held that the mere voluntary disclosure of work-product to a third person is insufficient in itself to waive the work product privilege. [FN33] This is not one of those cases where a party deliberately disclosed work-product in order to obtain a tactical advantage or where a party made testimonial use of work-product and then attempted to invoke the work-product doctrine to avoid cross-examination. [FN34]

> FN33. *See In re Grand Jury Proceedings*, 43 F.3d 966, 970 (5th Cir.1994); *Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir.1989); *see also Varel v. Banc One Capital Partners, Inc.*, 1997 WL 86457 *2 (N. D.Tex.).

> FN34. *Cf. United States v. Nobles*, 422 U.S. 225, 228 (1975); *In re Mine Workers of American Employee Benefit Plans Litigation*, 159 F.R.D.307, 310-12 (D.C.Cir.1994).

Considering that the plaintiffs have amended their complaint in pertinent part, deleting its allegations blaming the attorney defendants for the destruction of their business, defendants cannot now argue placing-at-issue waiver. Concomitantly, the defendants have failed to make the requisite showing of compelling need Absent that showing, the audit letters are not discoverable because the letters consist almost entirely of opinion work product, mental impressions and litigation strategies of the plaintiffs' counsel. Moreover, Michael Meyer is listed as a witness and available for deposition, and thus, the substantial equivalent is available through other methods of discovery. [FN35] The Fifth Circuit has held that the cost of one or even a few depositions is not sufficient to justify discovery of work product. Moreover, with the exception of the *Edwards* litigation, the lawsuits addressed by the audit letters are totally irrelevant to the underlying litigation or claims and defenses made in the RICO complaint, are similarly unlikely to lead to the discovery of relevant and are admissible evidence.

FN35. *United States v. Medica-Rents Co.*, 2002 WL 1483085 (N. D.Tex.) (Means, J) (noting disclosure to a co-party does not result in waiver of the work-product doctrine and, that in any event, the information contained in the documents could have been readily obtainable through other means).

B. The Becnel Letters

***10** The Becnel letters are located at tabs 5 through 22 of Southern Scrap's binder submitted for *in camera* inspection. These letters consist of communications by and between various Southern Scrap attorney's, one of them is Daniel Becnel. Southern Scrap notes that Becnel argued a *Dauber* t motion on its behalf in the underlying *Houston* litigation. Plaintiffs correctly note the fallacy in the defendants' argument that materials sent or disclosed to Becnel (a non-party) are not privileged. The Becnel letters listed below are aptly characterized as attorney work-product in that they set forth opinions, strategies, legal theories, and mental impressions of counsel, and thus are not subject to disclosure absent a showing of compelling need and the inability to obtain the information elsewhere.

As in the case of the audit letters, Southern Scrap has not waived the privilege by disclosure to a third party or by "placing at issue" the information. Becnel is one of many attorneys, who represent the plaintiff scrap metal companies in the underlying litigation. Daniel Becnel is listed as a witness and will be made available for deposition to speak to the issue of the *Houston* litigation, *inter alia*. Moreover, the defendants have failed to show either compelling [FN36] or even substantial need. [FN37]

FN36. Although opinion work product, that which conveys the mental impressions, conclusions, opinions, strategies, or legal theories of an attorney has been accorded almost absolute protection by some courts, it may nevertheless become discoverable when mental impressions are at issue in a case. However, the requisite showing is one of compelling need. *Conoco, Inc. v. Boh Bros. Construction Co.*, 191 F.R.D. 107, 118 (W.D.La.1998) (*citing In re International Systems*, 693 F.2d at 1242).

FN37. The party seeking production of documents otherwise protected by the work product doctrine bears the burden of establishing that the materials should be disclosed. *Id.* (*citing Hodges*, 768 F .2d at 721).

Becnel Letters [FN38]

FN38. Unless previously produced, fax cover sheets which bear no confidential communications, mental impressions or opinions must be produced as they contain no protected data. *See American Medical Systems. Inc.*, 1999 WL 970341 *4 (E.D.La.); *Dixie Mill Supply Co., Inc.*, 168 F.R.D. at 559 (E.D.La.1996).

Tab 5 Fax Cover Letter from Jack Alltmont (counsel/partner Sessions) to Brandt Lorio (in house counsel Southern Scrap), Daniel E. Becnel, Jr. (counsel/Southern Scrap), Rick Sarver (counsel/partner Stone Pigman), and Michael Meyer (counsel/Southern Scrap) regarding the *Houston* case and containing counsel's mental impressions and litigation strategy.

Tab 6 Fax Letter from Matthew A. Ehrlicher (General Counsel) to Daniel Becnel (Counsel/Southern Scrap), Rick Sarver, Michael Meyer and Jack Alltmont (Counsel/Southern Scrap) regarding *Houston* case strategy and mental impressions about upcoming work to be done

Tab 7 Fax Letter from Jack Alltmont to Matthew Ehrlicher (General Counsel), Daniel E. Becnel, Jr., Rick Sarver, and Michael Meyer (Counsel/Southern Scrap), regarding *Houston* case and enclosing draft motion, and discussing legal strategy, legal theory, and mental impressions of counsel.

Tab 8. Fax Letter from Michael Meyer to Daniel Becnel, copied to counsel for Southern Scrap, Ned Diefenthal, Matthew Ehrlicher, Jack Alltmont, and Richard Sarver regarding upcoming hearing in the *Houston* case, stating mental impressions and strategy.

Tab 9 Fax Letter from Jack Alltmont to Southern Scrap counsel, Matthew EHRLICHER, Daniel Becnel, Rick Sarver and Michael Meyer regarding *Houston* case, discussing correspondence from Jack Kemp, strategy and mental impressions.

Tab 10 Fax Letter from Jack Alltmont to Southern Scrap counsel, Matthew EHRLICHER, Daniel Becnel, Rick Sarver and Michael Meyer regarding *Houston* case, discussing conversation with from Jack Kemp, strategy and mental impressions.

***11** Tab 11 Fax Letter from Rick Sarver to Southern Scrap counsel, Matthew EHRLICHER, Daniel Becnel, and Jack Alltmont regarding *Houston* case, discussing strategy and giving mental impressions.

Tab 12 Fax Correspondence from Jack Alltmont to Southern Scrap counsel Brandt Lorio, Daniel Becnel, Rick Sarver, and Michael Meyer enclosing the judgment from Judge Ramsey dismissing the *Houston* case and May 16, 2001 letter from John Lambremont to Judge Ramsey and contains mental impression and strategy of counsel regarding that case.

Tab 13 A duplicate of the fax correspondence contained in the binder at Tab 5.

Tab 14 Fax Letter from Jack Alltmont to Southern Scrap counsel, Matthew Ehrlicher, Daniel Becnel, Rick Sarver and Michael Meyer regarding the *Houston* case enclosing a draft motion for summary judgment, and discussing legal theory, strategy and mental impressions of counsel.

Tab 15 Duplicate of the document discussed at Tab 7 but includes 4 fax transmittal sheets.

Tab 16 Duplicate of the document discussed at Tab 10 but includes 2 fax transmittal sheets and I transmission report.

Tab 17 Duplicate of the document discussed at Tab 11 but includes fax transmittal sheet.

Tab 18 Fax Letter from Jack Alltmont to Southern Scrap Counsel, Matthew Ehrlicher, Daniel Becnel, Rick Sarver and Michael Meyer regarding the *Houston* case, enclosing draft letter showing mental impressions of counsel and includes fax cover sheets and confirmation.

Tab 19 Duplicate of the document discussed at Tab 9, with letter from Bruce Kemp attached, and letter from Alltmont to Kemp also attached.

Tab 20 Duplicate of documents discussed at Tabs 10 and 16, but also contains handwritten attorneys' notes, and thus, not discoverable.

Tab 21 Fax transmission from Rick Sarver to Daniel Becnel regarding Houston case and outlining oral argument in that case and containing mental impressions of counsel and strategy for the hearing.

Tab 22 Duplicate of the document discussed at Tabs 7 and 15 but with the draft motion attached, with attorney's notes on the face of the document.

2. DEFENDANTS' PRIVILEGE LOG ENTRIES

Prior to addressing the individual categories of documents challenged by Southern Scrap, the Court will resolve the plaintiffs' claim of "placing-at- issue" waiver in the context of this particular case, to wit: whether by denying the allegation of the existence of an "association-in-fact" (RICO) enterprise, the defendant attorneys have placed-at-issue ordinary and opinion attorney work-product in the underlying state litigation. For reasons set forth below, the Court answers this question in the negative.

This precise issue was addressed by the Fifth Circuit in *In re Burlington Northern Inc.*, 822 F.2d 518 (5th Cir.1987). The *In re Burlington* case, involved the plaintiffs antitrust claim against defendant railroads which allegedly conspired to prevent the construction of a coal slurry pipeline, and did so by filing and defending various lawsuits. [FN39] The plaintiff ETSI sought discovery of documents relating to those underlying lawsuits and the railroads resisted discovery on the grounds of attorney-client and work product privileges. The Fifth Circuit observed:

> FN39. ETSI claimed that the defendant railroads unlawfully conspired to prevent, delay or make more expensive the pipeline's construction, because they were afraid of losing business to the pipeline ETSI was attempting to build from Wyoming to Arkansas. The railroads allegedly engaged in sham administrative and judicial challenges to ETSI in its attempts to secure crossing rights, water rights, inter alia, until ETSI abandoned the pipeline project in 1984. *In re Burlington*, 822 F.2d 518, 520 (5th Cir.1987).

***12** It (ETSI) argues that an antitrust defendant who relies on *Noerr- Pennington* bears the burden of proving the genuineness of his petitioning activities, and, having thus injected his good faith into the case, waives any privilege to documents bearing on that issue. We disagree.
We cannot accept the proposition that a defendant in an antitrust suit who relies on the protection

> afforded by *Noerr-Pennington* necessarily gives up the right to keep his communications with his attorney confidential. Such a rule certainly cannot be justified on the basis of waiver. This is not a case where a party has asserted a claim or defense that explicitly relies on the existence or absence of the very communications for which he claims a privilege. *See, e.g.* United States v. Woodall, 438 F.2d 1317, 1324-26 (5th Cir.1970), *cert. denied,* 403 U.S. 933 (1971). A defendant who relies on *Noerr- Pennington* merely denies the existence of an anti-trust violation. *Cf. Areeda,* at 4 (The "doctrine is in part an 'exception' or 'immunity' from normal antitrust principles ... but it principally reflects the absence of any antitrust violation to start with."). Accordingly, a plaintiff attempting to make an antitrust case based on conduct that involves lobbying or litigation bears the burden to show that such activity is not protected petitioning but a sham. *Coastal States,* 694 F.2d at 1372 n. 46; *Mohammad,* 586 F.2d 543. We do not see how it can be said that the railroads waived their privilege when it is ETSI who filed this lawsuit and who seeks to rely on attorney/client communications and work product to prove its claim.

In re Burlington, 822 F.2d at 533. The Fifth Circuit explained:

> *Noerr-Pennington* is based on principles that individuals have a right to petition the government and that government has a need for the information provided by such petitioning. As we noted earlier in this opinion, the protection afforded by the attorney/client privilege furthers these principles. Under the rule ETSI suggests, whenever a competitor files a lawsuit alleging that some earlier petitioning was a sham and the defendant denies the allegation, the defendant would lose his privilege. This result would be inconsistent with both *Noerr-Pennington* and the attorney/client privilege. Attorney/client documents may be quite helpful in making out a claim of sham, but this is not a sufficient basis for abrogating the privilege.

Id. The Fifth Circuit concluded that *Noerr-Pennington* requires a *prima facie* finding that the particular litigation was a sham to warrant discovery of documents initially protected by the attorney/client privilege or work product immunity. *Id.* In *In re Burlington, supra,* the Fifth Circuit determined that the district court acted improperly in granting ETSI's motion to compel discovery without making the proper predicate factual determination that the individual petitioning activities in which the defendant railroads were engaged were sham lawsuits. *Id.* at 534. However, once a *prima facie* showing is made demonstrating that the underlying litigation is a sham, "then at that moment the attorney/client and work product privileges evaporate" and will not serve "to shield such dramatic evidence form the finder of fact." *Id.* at 534.

***13** Notwithstanding the foregoing, Southern Scrap contends that the documents withheld by the various defendant attorneys do not constitute work product. Additionally, and in the event that the Court disagrees with their position, Southern Scrap argues that it has made the requisite showing necessary to obtain discovery of ordinary work-product, *i.e.,* substantial need and the inability to obtain the substantial equivalent elsewhere. The Court hereinafter addresses the challenged documents categorically as did Southern Scrap in its Memorandum challenging the defendant attorneys various privilege log entries. *See* Plaintiffs' Challenges to the Defendants' Various Privilege Log Entries [Rec. Doc. # 194].

A. Documents Evidencing Business Relations, Including Fee Splitting Agreements Joint Representation Agreement, Business Development Plans

Information relating to billing, contingency fee contracts, fee-splitting arrangements, hourly rates, hours spent by attorneys working on litigation, and payment of attorney's fees does not fall within the attorney-client or the work product privilege. [FN40] Moreover, the work product doctrine does not protect documents and materials assembled in the ordinary course of business. These documents do not concern the client's litigation, but rather concern a business agreement to split fees by and between the defendant attorneys and their respective law firms regarding extant business and other business which may be developed.

> FN40. *See In re Central Gulf Lines,* 2001 WL 30675 * 2 (E.D.La.) (Livaudais, J.) (noting that transmittal letters, letters sent for review by both legal and non-legal staff, investigation documents containing factual information regarding the result of the investigation and business recommendations, but not as a legal service or to render a legal opinion, or client fee arrangements are *not protected by privilege); Tonti Properties v. The Sherwin-Williams Company,* 2000 WL 506015 (E.D.La.); *C.J. Calamia Construction Co., Inc. v. Ardco/Traverse Lift Co., LLC,* 1998 WL 395130 *2 (E.D.La.) (Clement, J.) (noting that billing statements and records

which simply reveal the amount of time spent, the amount billed, and the type of fee arrangement are fully subject to discovery and, similarly, the purpose for which an attorney was retained and the steps taken by the attorney in discharging his obligations are not privileged).

(1) Frederick Stolzle Privilege Log

Number 11:	Confidentiality Agreement dated July 14, 1995	Not Privileged
Number 12:	Joint Representation Arrangement dated July 24, 1995	Not Privileged
Number 13:	Fee Arrangement dated July 24, 1995	Not Privileged
Number 39:	Business Offer dated January 25, 2001	Not Privileged
Number 40:	Discussing Litigation Management dated 1-25-01 sets forth mental impressions regarding various suits against Southern Scrap. There is no showing of compelling need. The information is otherwise available via deposition of Frank Dudenhefer	Work Product
Number 41:	Discussing Fee Potential dated 4-4-97	Not Privileged
Number 42:	Fee Contracts by and between Counsel Various Fee Splitting Arrangements dated October 4, 1995 and October 5, 1999	Not Privileged
Number 48:	Fee Sharing Agreement dated 2-20-96	Not Privileged
Number 49:	Confirmation of Fee Sharing Agreement dated October 11, 1995	Not Privileged
Number 50:	Joint Representation Agreement dated 3-27-95	Not Privileged
Number 69:	Fee Agreement and Confidentiality Agreement dated July 14, 1995 and July 24, 1995	Not Privileged
Number 70:	Fee Sharing Agreement Clarification dated July 20, 1995 and signed	Not Privileged

	August 16, 1995	
Number 71:	Letter dated July 24 enclosing Clarification (same as Number 70)	Not Privileged
Number 75:	8-5-95 Handwritten Draft Addendum to Joint Representation Agreement	Not Privileged

(2) John B. Lambremont Sr.'s Privilege Log

Bates 88316-88317:	Letter from Bruce Kemp dated July 15, 1999 No. 7 in Lambremont Binder	Not Privileged
Bates 27657-27658:	Correspondence between co-counsel No. 18 not in Lambremont binder	Not Produced in camera
Bates: 27659-27661:	Correspondence between co-counsel No. 19 not in Lambremont binder	Not Produced in camera

(3) Ken Stewart Privilege Log

Number 1:	7-24-96 Memorandum between counsel Plaintiff's strategy regarding tests for Edwards case [previously Item Number 78].	Work Product
Number 10:	Case investigation and analysis of of the levels of elements [previously Item Number 11]	Underlying Factual Data Not Privileged
Number 14:	7-18-99 Article--Oulfport Explosion plaintiff strategy [previously Item Number 31]	Underlying Factual Data Not Privileged 41
Number 76	1995 Memorandum Discussing Case Strategy and information regarding Banks and Curry clients [previously Item Number 261]	Work Product
Number 252:	10-30-95 unidentified handwritten notes not included for in camera review in new privilege log listing 80 documents for in camera review	Not Produced in camera
Number 260	11-16-95 Letter Discussing Case Strategy enclosing lists to correct	Not Produced in camera

errors and discrepancies

FN41. Privilege log item number 14 consists of a copy of a newspaper article which appeared in the Baton Rouge Advocate regarding the toxic tort suit against Southern Scrap. The article consists of non-protected factual information, and thus, must be produced. The mere fact that an attorney is copied with an newspaper article or document does not mean that the underlying data or that the document itself is privileged. See United States v. Davis, 636 F.2d 1028, 1040-41 (5th Cir.1981) (unprivileged documents are not rendered privileged by depositing them with an attorney); Robinson v. Automobile Dealers Association, 2003 WL 1787352 *2 (E.D.Tex).

(4) Fleming Group Privilege Log

Bates 8018	7/24/95 Clarification regarding Joint Representation	Not Privileged
Bates 7847-48	10/11/95 Fee Splitting Agreement	Not Privileged
Bates 6513-14	8/11/99 Revised Fee Arrangement instructions regarding litigations handling mental impressions of counsel	Work Product
Bates 5704	same as Lambremont 88316-88317	Not Privileged
Bates 5690-91	9/13/99 Letter Regarding Case Expenditures, Division of Work	Not Privileged
Bates 5688-89	9/14/99 Letter Invoice and Notice of Breach of Agreement	Not Privileged
Bates 3688	9/3/99 Fax re Case Handling	Work Product
Bates 3677-78	10-10-99 Fax re redoing fee arrangement payment of case expenses	Not Privileged
Bates 3273-74	8-11-99 Letter same as Bates 6513-14	Work Product
Bates 3264-67	10-11-99 Letter Requesting Execution of New Fee Arrangement	Not Privileged
Bates 900-02	12-8-97 Fee Arrangement	Not Privileged
Bates 625-31	8-15-96 Letter regarding legal strategy mental impressions of counsel	Work Product
Bates 583-85	1-9-96 Proposed Fee Arrangement regarding unrelated case not involving Southern Scrap	Not Privileged

Bates 294	undated statement of wages and withholding regarding unidentified individual with matching	Not Privileged
Bates 273-75	August 16, 1995 Clarification July 20, 1995 Letter Fee Agreement same as Stolze No. 70	Not Privileged

B. Articles, Photographs, Maps and Videos

***14** As previously noted the work-product doctrine shields materials prepared by or for an attorney in preparation for litigation. *Blockbuster Entertainment Corp. v. McComb Video, Inc.*, 145 F.R.D. 402, 403 (M.D.La.1992). It protects two categories of materials: ordinary work-product and opinion work product. *See Upjohn Co. v. U.S.*, 449 U.S. 383, 400-02 (1981). The doctrine is not an umbrella affording protection to all materials prepared by a lawyer or an agent of the client. The law of the Fifth Circuit is that "as long as the primary motivating purpose behind the creation of the document was to aid in potential future litigation," the work-product privilege is implicated. *See In re Kaiser Aluminum and Chemical Co.*, 214 F.3d 586, 593 (5th Cir.2000). However, if the materials were assembled or came into being in the ordinary course of business, work-product protection does not reach that far. *See United States v. El Paso Company*, 682 F.2d 530 (5th Cir.1982), *cert. denied*, 466 U.S. 944 (1984); *Beal v. Treasure Chest Casino*, 1999 WL 461970, *3 (E.D.La. July 1, 1999). Moreover, it does not extend to underlying facts relevant to the litigation. *See Upjohn*, 449 U.S. at 395-96. The burden of showing that documents were prepared in anticipation of litigation, and therefore, constitute work-product, falls on the party seeking to protect the documents from discovery. *St. James Stevedoring Co., Inc. v. Femco Machine Co.*, 173 F.R.D. 431, 432 (E.D.La.1997). The Court now turns to the documents and items listed on defendants' privilege logs to determine whether they are shielded from discovery pursuant to either the work-product or the attorney- client privilege.

(1) Frederick Stolzle Privilege Log No. 23-- Photographs and Exhibit Video:

Defendant Stolzle argues that the surveillance video and photographs are privileged under the work product doctrine and can only be produced upon a showing of "substantial need" and "undue hardship." The video tape and photographs at issue are clearly work product, having been gathered in anticipation of litigation, *i.e., Banks, et al, inter alia.*

Courts have expressed a diversity of views as to how to resolve the issue presented. [FN42] However, there is a common thread running through all of the jurisprudence, *i.e.,* surveillance can be a very important aspect of the party's case. The issue surfaces most often in the plaintiff-personal injury scenario; usually, it involves the defendant's surveillance of the plaintiff which tends to discredit the plaintiff's description of his or her injuries. Obviously, such surveillance evidence gathered in anticipation of litigation is generally protected as work product.

FN42. *See, e.g., Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, *reh'g denied & opinion clarified*, 3 F.3d 123 (5th Cir.1993); *Menges v. Cliffs Drilling Company*, 2000 W.L. 765083 (Vance, J.) (noting the seminal case in the Fifth Circuit is Chaisson, supra); *Fortier v. State Farm Mutual Automobile Insurance Co.*, 2000 WL 1059772 (E.D.La.) (Vance, J.); *Innovative Therapy Products, Inc. v. Roe*, 1998 WL 293995 (E.D.La.) (Wilkinson, J.); *Martino v. Baker*, 179 F.R.D. 588, 590 (D.Colo.1998) (balancing conflicting interests of parties best achieved by requiring the production of surveillance tapes); *Ward v. CSX Trnasportation, Inc.*, 161 F.R.D. 38, 41 (E.D. N.C.1995) (noting that allowing discovery of surveillance materials prior to trial is consistent with the discovery rules in avoiding unfair surprise at trial); *Wegener v. Cliff Viessman, Inc.*, 153 F.R.D. 154, 159 (N. D.Iowa 1994) (disclosure of surveillance materials is consistent with broad discovery and the notion of trial as a "fair contest"); *Boyle v. CSX Transportation, Inc.*, 142 F.R.D. 435, 437 (S.D.W.Va.1992).

In *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 517 (5th Cir.1993), the Fifth Circuit addressed the discoverability of videotape surveillance. The

court held that, regardless of whether the surveillance video has impeachment value, it must be disclosed prior to trial if it is at all substantive evidence [FN43] as opposed to solely "impeachment evidence." *Id.* at 517-18. [FN44]

> FN43. The *Chaisson* court defined substantive evidence as "that which is offered to establish the truth of the matter to be determined by the trier of fact." *Chaisson*, 988 F.2d at 517.

> FN44. In addition to *Chaisson, supra,* numerous other courts have considered the discoverability of surveillance tapes, which are intended for use at trial, and, almost uniformly, these courts have held that evidentiary films or videotapes must be provided to the opposing party prior to trial. *E.g., Forbes v. Hawaiian Tug & Barge Corp.*, 125 F.R.D. 505, 507-08 (D. Hawaii 1989); *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 150-51 (E.D.Pa.1973).

***15** Having reviewed the video tape and photographic surveillance (*i .e.,* the defendants' trial exhibits in the underlying litigation), the Court finds that the films, whether photograph or video, are of a substantive nature. More specifically, they may be used to either prove or disprove the plaintiffs' allegations in the underlying state court toxic tort litigation regarding the condition of Southern Scrap's facilities and the various operations conducted and materials stored upon or moved about the premises. Likewise, they may aid in either proving Southern Scrap's allegations or the defendants' affirmative defenses in the captioned RICO litigation. The thrust of Southern Scrap's claims herein is that the defendants made a concerted effort to prosecute baseless and frivolous claims against Southern Scrap for the purpose of extorting settlement funds in the underlying state court litigation. Because the subject video tapes and photographic materials are substantive in nature, and the same are not otherwise available to Southern Scrap, [FN45] under *Chaisson,* these items are discoverable.

> FN45. Surveillance evidence, available only from the ones who obtained it, fixes information available at a particular time and place under particular circumstances, and therefore, cannot be duplicated. The underlying facts which may be derived from the requested discovery are not freely discoverable. Southern Scrap has propounded interrogatories for the purpose of discovering the very facts which are the subject of the video/photographs to no avail.

(2) John B. Lambremont, Sr.'s Privilege Log

Lambremont's Bates Numbers 0026979-80: Defendant Lambremont withdrew his objection to production of this document.

Lambremont's Bates Numbers 0026982 and 0026984: For the same reasons discussed above with respect to videotape discovery withheld by the defendant Stolzle, the defendant John Lambremont Sr. must produce this withheld video surveillance.

Lambremont's Bates Numbers 0088517-0088520: Defendant Lambremont agreed to provide a copy of this article which is Bates Stamped No. 0088516.

Lambremont's Bates Numbers 0027198-0027201: Defendant Lambremont notes that he will produce this article *in camera* ordered by the Court and that these are his notes. The Court orders the defendant to produce Bates Numbers 0027198-0027201 to the undersigned Magistrate Judge for *in camera* review, as was done in the case of all other contested documentation withheld by the defendants.

(3) Ken Stewart's Privilege Log

Stewart Number 159 on Stewart's previous privilege log (*i.e.,* a letter dated 10-26-95 enclosing an invoice representing all outstanding invoices, etc.), is not included in Stewart's 80 item submission tendered to the undersigned Magistrate Judge for *in camera* review.

(4) The Fleming Group's Privilege Log

Fleming Bates Numbers FSS 007883-84, as defense counsel submits, consists of a copy of a newspaper article which appeared in the Baton Rouge Advocate regarding the toxic tort suit against Southern Scrap. The article consists of non-protected factual information, and thus, must be produced. As previously noted, the mere fact that an attorney is copied with a newspaper article or document does not mean that the underlying data or that the document itself is privileged. [FN46] Only confidential communications made with a legal objective are

privileged.

FN46. *See* *Davis*, 636 F.2d at 1040-41 (5th Cir.1981); *Robinson*, 2003 WL 1787352 *2 (E.D.Tex).

Fleming Bates Numbers FSS 006792-95 is a fax communication between plaintiff's counsel commenting on faxed newspaper article regarding the settlement of a lawsuit. Mere transmittal or confirmation letters, which do not contain any confidential communications or attorney advice, opinion or mental impressions, are not protected. [FN47] Whereas, here, the transmittal coversheets contain the opinion and/or mental impressions of counsel, the document is privileged. However, the newspaper article (*i.e.*, non-protected factual information) must be produced.

FN47. *See* *American Medical Systems, Inc.*, 1999 WL 970341 *4 (E.D.La.); *Dixie Mill Supply Co., Inc.*, 168 F.R.D. at 559 (E.D.La.1996).

***16** Flemings Bates Numbers FSS 001779, FSS 00937-938, FSS 000067-68 and 000046-48 must be produced for the same reasons set forth immediately above in subparagraphs a and b. These newspaper articles (*i.e.*, otherwise unprotected factual documents/data with comments removed, if any, per agreement of counsel) are NOT PRIVILEGED.

C. Purely Factual Matters are Discoverable

These documents are comprised of investigative materials, reports and opinions of experts who have been retained (possibly not *testifying experts*), along with raw data, factual data displays on charts and maps, and other factual records, including but not limited to results of tests conducted on all air, water, soil and attic dust samples taken from various sites in and around Southern Scrap facilities in Baton Rouge and elsewhere in the state of Louisiana. Southern Scrap contends that these factual records, data and/or documentation is fully discoverable.

Defendant Stolzle contends that these documents are protected as attorney work product and that he should not be required to produce copies or disclose the contents. Moreover, the defendant urges the Court to find that unless and until the defendants disclose the names of their *testifying* experts, which disclosure is not due until July 9, 2003, these individuals should not be treated as "experts" in this RICO case at all. Stolzle notes generally that some of these experts may have or eventually will render opinions on issues pertinent to the underlying state court litigation; however, in this proceeding these individuals are presently only potential fact witnesses. Finally, defendant argues that *via* discovery in the instant federal RICO lawsuit, Southern Scrap is attempting to circumvent Louisiana's scope of discovery regarding experts as set forth in article 1424 of the Louisiana Code of Civil Procedure, which proscribes ordering the production or inspection of any part of a writing that reflects the mental impressions, conclusions, opinions, or theories of an attorney or an expert. *See* La.Code Civ. P. art. 1424. Stolzle contends that Southern Scrap is using this Court as a tool in its quest for production of documents and material otherwise unobtainable in the underlying *pending* state court litigation.

Southern Scrap counters that this third category of challenged documents are but recitations of purely factual matters learned from third parties. The plaintiff contends that this information is either discoverable as documents given to testifying experts or that any privilege that may be applicable has been waived because the Fleming Group produced such "work product" protected documents. [FN48] Moreover, defendants point out that Stolzle and the other defendants challenge production on the basis of Louisiana procedural law, noting that the federal court must evaluate the claim of work product protection under the rubric of federal law. [FN49]

FN48. The Court has not been informed which documents were produced by the Fleming Group to counsel for Southern Scrap. Absent a record as to the specific "work product" disclosed, the Court cannot properly determine either the fact or the extent of waiver of any privilege.

FN49. *See* 6 Moore's Federal Practice, S 26.70[7] (Matthew Bender 3d ed.)(work product doctrine is governed by the federal standard, even in diversity cases).

As previously discussed, the work-product doctrine [FN50] is a judicially created immunity to prevent a party to a lawsuit from receiving the benefits of an opposing counsel's preparations for trial. [FN51] The doctrine is designed to protect the adversary process

"by safeguarding the fruits of an attorney's trial preparations from discovery attempts of an opponent." [FN52] The party who is seeking the protection of the work-product doctrine has the burden of proving that the documents were prepared in anticipation of litigation. [FN53] Notwithstanding the foregoing, work product protection does not extend to the underlying facts relevant to the litigation. [FN54]

FN50. The work-product doctrine is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. *See Dunn,* 927 F.2d at 875; *Nance v. Thompson Medical Co.,* 173 F.R.D. 178, 181 (E.D.Tex.1997); *Schwegmann Westside Expressway v. Kmart Corporation,* 1995 WL 510071, *5 (E.D.La.1995).

FN51. *See generally Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 393-94 (1947); *see also In Re Leslie Fay Companies Securities Litigation,* 161 F.R.D. 274, 279 (S.D. N. Y.1995).

FN52. *Shields v. Sturm, Ruger. & Co.,* 864 F.2d 379, 382 (5th Cir . 1989); *Guzzino,* 174 F.R.D. at 62.

FN53. *Conoco, Inc. v. Boh Bros. Const. Co.,* 191 F.R.D. 107, 117 (W.D.La.1998); *In re Leslie Fay Companies Securities Litigation,* 161 F.R.D. 274, 280 (S.D. N. Y.1995).

FN54. *See generally Upjohn Co. v. United States,* 499 U.S. 383, 395-96(1981).

***17** The Court here specifically distinguishes between the types of information sought by Southern Scrap. Insofar as documents sought recount factual information relevant to the claims against Southern Scrap in the underlying litigation, whether it is simply unannotated raw data, test results, maps indicating where samples were taken from, or a graphic display of test sample results, these factual matters are fully discoverable. This type of underlying factual information does not fall within the work-product doctrine. Moreover, this factual information goes to the very heart of the defendants' affirmative defenses in the captioned federal RICO case (*i.e.,* the existence of a basis in fact for the underlying state court cases filed against Southern Scrap).

(1) Frederick Stolzle Privilege Log

Stolzle Number 1: Correspondence between plaintiffs' counsel, authored by Bruce Kemp and mailed to co-counsel Lambremont and Stolzle, is protected WORK PRODUCT, rife with mental impressions and opinions of counsel.

Stolzle Numbers 3, 4: These documents are merely transmittal cover letters, without the appended test results and do not contain any confidential communications, mental impressions or other protected matters. Accordingly, the documents are NOT PRIVILEGED and should be produced.

Stolzle Number 5: The Fax Cover Sheet and Cover Letter dated 7-12-99, along with case narrative and Chain of Custody Form with instructions are PRIVILEGED and need not be produced. However, the remainder of the document consisting of 35 pages relevant factual data, including a map of sample locations, results of attic dust sampling, TAL metal lab results, and radiation survey records are NOT PRIVILEGED and shall be produced.

Stolzle Number 6: The Cover Letters dated 7-8-99 and 7-9-99 along with Expert Report and Analysis dates July 8, 1999 are protected WORK PRODUCT.

Stolzle Number 7: The Fax Cover Sheet dated 5-13-99 is PRIVILEGED and need not be produced. The one-page enclosure consisting of a recitation of lab results on a soil sample is NOT PRIVILEGED and shall be produced.

Stolzle Number 8: The Cover Letter dated April 23, 1999 and Report and Findings dated April 19, 1999 is protected WORK PRODUCT.

Stolzle Number 9: Histologic analysis and opinion of Dr. Daniel Perl regarding lung tissue taken from the autopsy of Mr. Eddie Edwards are protected WORK PRODUCT.

Stolzle Number 10: Correspondence to Mr. Kemp dated March 24, 1999 detailing the scope of the work is protected WORK PRODUCT.

Stolzle Number 14: Cover letter dated July 11, 1996, hand-sketched map, Report on Microscopic Analysis dated July 2, 1996 are protected WORK PRODUCT. However, Southern Scrap Materials Sampling Data

Sheet (2 page chart) landscape mode and Southern Scrap Metals Sampling Results dated 6-23-96 (1 page chart) are NOT PRIVILEGED and shall be produced.

Stolzle Number 15: Cover letter dated October 22, 1996, Fax Cover Sheet dated 10-29-96 and Report of Results dated October 17, 1996 are protected WORK PRODUCT. However, the Southern Scrap Materials Sampling Data Sheet, Baton Rouge, La. (2 pages) is NOT PRIVILEGED and shall be produced.

***18** Stolzle Number 16: Correspondence between plaintiffs' counsel discussing households with lead poisoning is protected WORK PRODUCT.

Stolzle Number 17: Handwritten pages and comments noted are protected WORK PRODUCT. However, Maps of Zip Code 70805, Soil Sample Test Results dated 9-20- 95, LSU Graphic Depicting Baton Rouge Wind Rose (Annual 1965-1974) are NOT PRIVILEGED and shall be produced.

Stolzle Number 18: Cover Letters dated January 20, 1996 and January 19, 1996, the narrative entitled "Map Interpretations of Data" and Fax Cover Sheet dated December 12, 1995 with enclosures including handwritten notes are protected WORK PRODUCT. However the 8 charts graphing attic dust test results and the attic dust sampling results dated December 1995 are NOT PRIVILEGED and shall be produced.

Stolzle Number 19: Fax cover sheets are protected WORK PRODUCT, but test results dated 1-31-96 are NOT PRIVILEGED and shall be produced.

Stolzle Number 20: Fax cover sheet with notations and Report dated March 20, 1996 are protected WORK PRODUCT.

Stolzle Number 21: Non-Fasting Blood test results for lead (2 pages) are NOT PRIVILEGED and shall be produced.

Stolzle Number 22: Un-executed Contractor Service Agreement is protected WORK PRODUCT.

Stolzle Number 24: Fax message regarding house testing dated 12-1-95 is later addressed under the section captioned "ALR Customer" and "CLR Customer" below.

Stolzle Number 25: Cover letter and Report dated July 8, 1999 are protected WORK PRODUCT

Stolzle Number 26: Same Document as Item Number 5 above (*i.e.*, fax cover sheet and cover letter dated 7-12-99, plus same test results). Test results need not be produced again.

Stolzle Number 27: Cover letter dated June 26, 2000 and Narrative Report dated 6-26-00 are protected WORK PRODUCT. However, Radiation Survey dated 6-19-00 (1 page) and the Draft TAL metal test results (14 pages) dated 6-26-00 are NOT PRIVILEGED and shall be produced.

Stolzle Number 28: Cover letter and report dated 3-20-96 are protected WORK PRODUCT.

Stolzle Number 29: Cover letter dated 4-8-96 and report dated 4-5-96 are protected WORK PRODUCT.

Stolzle Number 30: Cover letter and report dated 7-2-96 are protected WORK PRODUCT.

Stolzle Number 31: Same Documents included in Item Number 14 above.

Stolzle Number 32: Same Documents included in Item Number 14 above.

Stolzle Number 33: Same Documents included in Item Number 15 above.

Stolzle Number 34: Same Documents included in Item Number 26 above.

Stolzle Number 35, 36, 37, and 38: Data charts, portions of which were included as part of Items 14 and 15 above, are NOT PRIVILEGED and shall be produced.

Stolzle Number 55: Letter dated April 15, 1997 is protected WORK PRODUCT.

Stolzle Number 56: Letter dated September 29, 1995 is protected WORK PRODUCT.

Stolzle Number 57: Letter dated September 22, 1995 is protected WORK PRODUCT.

Stolzle Number 60: Letter dated September 12, 1995 is protected WORK PRODUCT.

***19** Stolzle Number 61: Letter dated September 6, 1995 is protected WORK PRODUCT.

Stolzle Number 62: Letter dated August 31, 1995 addressed to all "Residents" of a North Baton Rouge Neighborhood is NOT PRIVILEGED and shall be produced.

Stolzle Number 72: Correspondence to Mr. Grayson dated July 10, 1997 detailing the scope of the work is protected WORK PRODUCT.

Stolzle Number 73: Correspondence to Mr. Grayson dated August 5, 1998 discussing strategies is protected WORK PRODUCT.

Stolzle Number 74: Correspondence of Mr. Rastanis to Dr. George dated November 3, 1995 discussing the report of Dr. Ronald Gots is protected WORK PRODUCT.

Stolzle Number 79: Memorandum from Ken Stewart dated June 14, 1995 discussing the DEQ notification regarding the St. Thomas yard is protected WORK PRODUCT.

(2) John Lambremont, Sr.'s Privilege Log

Bates Numbers 0089024-31 is protected WORK PRODUCT. However, Fax Transmittal Cover Sheets are discoverable.

Bates Numbers 087481-515 consisting of client lists with annotations regarding each is protected WORK PRODUCT.

Bates Number 0088190 consists of correspondence between counsel for plaintiffs in the underlying state court litigation, discussing trial strategy and mental impressions. It is protected WORK PRODUCT.

Bates Numbers 0012561-656 and 0013095-96: Defendant withdrew his objections to these items.

(3) Ken Stewart's Privilege Log

Stewart No. 20 [previously # 89]: Memorandum dated March 10, 1999 discussing case strategy is protected WORK PRODUCT.

Stewart No. 32 [previously # 76]: Fax cover letter dated 7-11-96 sent by Keith Partin without remarks but enclosing 10 pages of air sample test results is NOT PRIVILEGED and shall be produced.

Stewart No. 36 [previously # 45]: Unexecuted document which purports to be a Report of Patricia Williams, Ph.D., an expert consulted in a wholly unrelated matter number 89-23976 on the docket of the Civil District Court is protected WORK PRODUCT.

Stewart No. 39 [previously # 50]: Attic Dust Sample Test Results dated December, 1995 is NOT PRIVILEGED and shall be produced.

Stewart No. 42, 43, 44 [previously # 's 57, 58, 59]: Annotated client lists are protected WORK PRODUCT and plaintiffs have already been advised of the names of the clients.

Stewart Nos. 41 and 45 [previously # 's 60 and 61]: Southern Scrap Materials Sampling Data Sheet is NOT PRIVILEGED and shall be produced.

Stewart No. 50 [previously # 65]: Sample testing result data sheet dated January 31, 1996 is NOT PRIVILEGED and shall be produced.

Stewart No. 54 [previously # 84]: Letter dated March 7, 1997 is protected WORK PRODUCT.

Stewart No. 55 [previously # 88]: Letter dated August 31, 1998 along with enclosures are protected WORK PRODUCT.

Stewart No. 56 [previously # 90]: Test Results of Soil Samples dated May 11, 1999 is NOT PRIVILEGED and shall be produced.

Stewart No. 57 [previously # 91]: This Document consists of a Narrative Report by ETI and a Narrative Report of Results dated November 7, 1996 and both reports are protected WORK PRODUCT.

***20** Stewart No. 58 [previously # 92]: Information and sample **surveys** are protected **WORK PRODUCT**.

Stewart No. 70 [previously # 115]: Defendant has failed to show how this list of individuals identified by Caller Identification is protected work product, and thus, it is NOT PRIVILEGED and shall be produced.

Stewart Items Previously Numbered 83, 85-87, 93-114, 116-119, 124. 126 and 128 are not included in Stewart's 80 item submission tendered to the undersigned Magistrate Judge for *in camera* review.

The Court here notes that if and/or when any one or more of the defendants' or the plaintiffs' experts are designated as trial (*i.e.,* testifying) witnesses, their reports and all of the material furnished to them by counsel or utilized by them in producing their reports shall be produced to opposing counsel forthwith and without any further delay. This ruling obtains whether the designation of such an expert be as either a fact or an expert witness. This is so because any

factual testimony elicited from such an expert will necessarily relate to their participation in the underlying case or cases as an expert witness. In other words, their trial testimony will inevitably touch upon matters which the parties, both plaintiffs and defendants, now claim are protected by privilege. Testimony of such experts at trial, even as to factual matters, would necessarily waive both the attorney-client privilege, to the extent such matters were disclosed, and any work product protection that is presently claimed.

Rule 26(a)(2) of the Federal Rules of Civil Procedure governs the disclosure of expert testimony and the Advisory Committee Notes to the 1993 Amendments clarify the intent of the disclosure requirement: "The [expert] report is to disclose the data and *other information considered* by the expert.... Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are *privileged or otherwise protected* from disclosure when such persons are testifying or being deposed." (emphasis added). In other words, the plain language of Rule 26(a)(2)(B) and the accompanying Advisory Committee Note mandates the disclosure of any material, factual or otherwise, that is shared with a testifying expert, even if such material would otherwise be protected by the work product privilege. [FN55]

FN55. See *Karn v. Ingersoll-Rand,* 168 F.R.D. 633, 635 (N. D.Ind.1996) (holding Rule 26(a)(2)(B) trumps the work product doctrine and establishing a "bright line" rule by which parties know in advance what is discoverable and courts are relieved from having to determine what documents or portions of documents are discoverable); *Musselman v. Phillips,* 176 F.R.D. 194, 202 (D.Md.1997) ("[W]hen an attorney furnishes work product--either factual or containing the attorney's impressions--to [a testifying expert], an opposing party is entitled to discovery of such communication."); *B.C.F. Oil Refining v. Consolidated Edison Co. of N.Y.,* 171 F.R.D. 57 (S.D. N. Y.1997) (following *Karn, supra*).

In *TV-3, Inc. v. Royal Insurance Company of America,* the Court noted that:

> When an attorney hires an expert both the expert's compensation and his "marching orders" can be discovered and the expert cross-examined thereon. If the lawyer's "marching orders" are reasonable and fair, the lawyer and his client have little to fear. If the orders are in the nature of telling the expert what he is being paid to conclude, appropriate discovery and cross- examination thereon should be the consequence. Such a ruling is most consistent with an effort to keep expert opinion testimony fair, reliable and within the bounds of reason. [FN56]

FN56. *TV-3, Inc.,* 194 F.R.D. 585, 588 (S.D.Miss.2000).

***21** Given the plain language of Rule 26(a)(2), *inter alia,* the district judge affirmed the Magistrate Judge's ruling denying the defendants' motion for a protective order and ordering full disclosure. [FN57] In *In re Hi-Bred International, Inc.,* 238 F.3d 1370 (D.C.Cir.2001), the Federal Circuit cited the *TV-3* decision with approval and observed that:

FN57. *See id.* at 589 (holding that the Magistrate Judge's ruling was neither clearly erroneous nor contrary to law).

> The revised rule proceeds on the assumption that fundamental fairness requires disclosure of all information supplied to a testifying expert in connection with his testimony. Indeed, we are quite unable to perceive what interest would be served by permitting counsel to provide core work product to a testifying expert and then to deny discovery of such material to the opposing party. [FN58]

FN58. *In re Hi-Bred International, Inc.,* 238 F.3d 1370, 1375 (D.C.Cir.2001)

The Federal Circuit further specifically held that the attorney client privilege, to the extent such communications were disclosed, and any work product protection are waived by disclosure of confidential communications to a testifying expert. [FN59]

FN59. *Id.*

It is not clear on this record which of the defendants' experts have already testified or will in fact testify in the underlying proceedings. Additionally, the parties in this proceedings have not yet designated the

witnesses who will testify on their behalf at the trial in the captioned matter. Moreover, considering that these proceedings only recently advanced to the brink of the commencement of discovery depositions, the record does not yet demonstrate the full extent of the disclosures made to any testifying experts. Absent a proper record, disclosure to a testifying expert cannot be the basis of ordering production.

D. Lambremont's Vintage Documents

Southern Scrap refers to items listed on John B. Lambremont, Sr.'s Privilege Log which comprise Tab 6 of his *in camera* submission, to wit: Bates Nos. 0075835, 007586, 0075871, 0075944, 0075955, 0075978, 0075982, 0076003, 0076081, 0076242, 0076456, 0076463, 0076614, 0076674, 0076738, and 0076146. Southern Scrap argues that the above enumerated documents bear dates between one and six years prior to the institution of the first lawsuit. Essentially, Southern Scrap contends that because these documents were not created during a time frame within which "a real and substantial possibility of litigation" existed, they cannot properly be categorized as work product. A review of these documents, which appear to be the attorney's handwritten research notes, belies plaintiffs' contentions. Most of the documents bear dates in 1994, and quite a few refer specifically to underlying lawsuits filed. against Southern Scrap by plaintiff/client name. The documents are protected WORK PRODUCT.

E. "Scrap Notes"

The publication "Scrap Notes" was the vehicle utilized by the defendants to advise clients of the progress of their cases against Southern Scrap in the underlying proceedings. Southern Scrap suggests that simply because it somehow came into possession of a copy of this informational pamphlet bulk mailed to clients, that the attorney-client privilege has been waived as to all of the topics discussed therein. Southern Scrap urges the Court to order the production of all documents related to the topics discussed in "Scrap News."

***22** Defendants Fleming & Associates, LLC and George Fleming filed formal reply on this issue. Fleming denies that "Scrap Notes," which on its face purports to be a confidential attorney-client communication, [FN60] was mailed to anyone other than clients. Essentially, the Fleming defendants contend that the simple fact that a third party somehow became possessed of a copy of an issue of its client newsletter, does not, in and of itself, effect a waiver of the attorney-client privilege in this matter. Moreover, the Fleming defendants highlight the facts that the newsletter was not circulated to potential clients and that the copy obtained by Southern Scrap was mailed to a plaintiff in the underlying proceedings. [FN61]

FN60. The newsletter sets forth the following, to wit: "NOTE: This newsletter is considered privileged communication between clients and attorneys in connection with ongoing work in your case. Keeping this in mind, please use this newletter for your information and refrain from sharing it with anyone not a plaintiff in this case. This newsletter is published as a courtesy and contains confidential information that would normally only be revealed in attorney-client conferences." *See* Reply Brief [Rec. Doc. No. 197 at Exhibit "B"].

FN61. *See* Reply Brief [Rec. Doc. No. 197 at Exhibit "B"].

The attorney-client privilege exists to protect confidential communications and the attorney-client relationship and may be waived by disclosure of the communication to a third party. [FN62] However, inadvertent disclosure to third party may or may not constitute a waiver of the attorney-client privilege; that determination depends on the facts of the disclosure. [FN63]

FN62. *Alldread v. City of Grenada*, 988 F.2d 1425 (5th Cir.1993).

FN63. *Id.* at 1433-1434; *see also* Myers v. City of Highland Village, Texas, 212 F.R.D. 324, 327 (E.D.Tex.2003).

While it is not clear how counsel for Southern Scrap came into possession of the client newsletter, the submissions to date do not militate in favor of finding waiver. The memorandum is very clearly and obviously an attorney-client communication. Based upon the facts known at this time and considering the criteria set forth in the Fifth Circuit's decision in *Alldread v. City of Grenada*, 988 F.2d 1425 (5th Cir.1993), [FN64] the undersigned Magistrate Judge finds that the client newsletter is protected by the

attorney-client privilege.

FN64. The five-part test adopted by the Fifth Circuit, under which consideration is given to all of the circumstances surrounding the disclosure, includes the following factors, to wit: (1) the reasonableness of precautions taken to prevent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness." *Alldread,* 988 F.2d at 1433 (five-part test adopted from *Hartford Fire Ins. Co. v. Garvey,* 109 F.R.D. 323, 332 (N.D.Cal.1985)).

F. Becnel Communications

Southern Scrap disputes that Document No. 2 on the Stolzle Privilege Log can possibly be considered work product. Southern Scrap highlights the fact that the letter dated September 13, 1999 (*i.e.,* after the underlying litigation was filed) and is addressed to Daniel E. Becnel, Jr., one of Southern Scrap's attorneys. The Court agrees that no matter how the argument is pared, defendants' objection must be OVERRULED. The document is NOT PRIVILEGED, contains no privileged information [FN65] and shall be produced.

FN65. *See* Note 40 and accompanying text.

G. "ALR Customer" and "CLR Customer"

Southern Scrap disputes the privilege claimed by defendants with respect to writings to and/or from either ALR Customer or CLR Customer, which items appear on the Stolzle Privilege Log at Tab 24 and on the Lambremont Privilege Log at Tab 5 (Bates No. 0029761-62). [FN66] As Southern Scrap aptly points out, the defendants have not identified these parties, designated only by the title "ALR Customer" and "CLR Customer." The burden of demonstrating that the information contained in the document constitutes "work product" is the defendants, who are claiming the privilege. Only after the court is convinced that the subject document is protected "work product," does the burden shift to Southern Scrap to show that the materials that constitute work-product should nonetheless be disclosed. [FN67] Accordingly, Stolzle No. 24 and Lambremont (0029761-62) are fully discoverable and shall be produced.

FN66. Lambremont did not actually submit the document for in camera review, noting that he was unable to find the document, but would supplement.

FN67. *See Hodges. Grant & Kaufmann,* 768 F.2d at 721.

H. Miscellaneous Stolzle Log Items

***23** Stolzle Numbers 43, 44, 45 and 46 are documents which simply refer to the division of work in a case. These documents are NOT PRIVILEGED, fully discoverable and shall be produced. [FN68]

FN68. *See* citations of authority set forth at Note 40 and accompanying text.

I. Letters to Reverends

Stolzle Numbers 80, 81, 82, and 83, letters to various reverends in the community, regarding utilizing local church facilities for client meetings, constitute neither attorney-client communications nor protected work product; they are fully discoverable and shall be produced.

Accordingly and for all of the above and foregoing reasons, the Court issues the following orders.

IT IS ORDERED that:

(1) Southern Scrap Material Co., LLC, SSX, L.C., and Southern Recycling Co. LLC's Motion for Maintenance of Privilege over various documents submitted for *in camera* review [Rec. Doc. # 188] is hereby GRANTED;

(2) The Stolzle Defendants' Motion to Sustain Attorney-Client and Work Product Privileges [Rec. Doc. # 187] is hereby GRANTED IN PART and DENIED IN PART, all as more specifically set forth herein above;

(3) The Fleming Defendants' Joint Motion to Sustain Work Product and Attorney/Client Privileges [Rec. Doc. # 189] is hereby GRANTED IN PART and DENIED IN PART, all as more specifically set forth herein above;

(4) Ken J. Stewart's Motion to Sustain the Privilege on Documents Produced for *In Camera* Inspection [Rec. Doc. # 198] is hereby GRANTED IN PART and DENIED IN PART, all as more specifically set

forth herein above; and
(5) Defendant John B. Lambremont, Sr. et al's Motion to Sustain Work Product and Attorney-Client Privileges. [Rec. Doc. # 186] is hereby GRANTED IN PART and DENIED IN PART, all as more specifically set forth herein above.

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