IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY
IN SUPPORT OF MOTION FOR
PROTECTIVE ORDER REGARDING PRIVILEGED DOCUMENTS
REFERENCED IN SEVENTH REPORT OF THE COURT MONITOR

The Secretary of the Interior and the Assistant Secretary - Indian Affairs ("Interior Defendants" or "Interior") state the following as their reply to Plaintiffs' Opposition (the "Opposition" or "Opp.") to Interior Defendants' Motion for Protective Order Regarding Privileged Documents Referenced in the Seventh Report of the Court Monitor (the "Motion").

Introduction

Interior Defendants' Memorandum of Points and Authorities In Support ("Memorandum in Support") of the Motion established that the Privileged Documents are indeed privileged, Interior has not waived its privileges, and the Court Monitor's inappropriate disclosure of the Privileged Documents did not waive Interior's privileges. Nor has the privilege been destroyed by the fact that, as a result of the Court Monitor's wrongful disclosure, the documents found their way into the court file or even onto the Internet.

Plaintiffs' Opposition studiously avoids disputing or even citing the weighty body of case

law that directly contradicts Plaintiffs' arguments regarding the scope of applicable privileges. Interior Defendants cited these cases in a brief already on file when Plaintiffs filed their Opposition. Moreover, Plaintiffs' Opposition provides yet another instance in which they substitute hyperbole and *ad hominem* attacks on government officials and lawyers, in place of legal authorities and arguments.

Plaintiffs stray again from the issues at hand and discuss other allegations having nothing to do with the Motion. To avoid burdening the Court, we will respond only to the issues relevant to the Motion.[1]

Argument

I. The Attorney-Client and Work Product Privileges Are Not as Limited as Plaintiffs Suggest

A. The Attorney-Client and Work Product Privileges Apply to a Trustee in Litigation

Plaintiffs' Opposition (at page 6-9) incorrectly describes the scope of the attorney-client and work product privileges. Plaintiffs erroneously imply that any services provided by Interior

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[1] But we offer just one example of Plaintiffs' misstatements. Plaintiffs' Opposition at page 5 n.10, trumpets the allegation that Interior Defendants' counsel used the word "contemnor" during the recent contempt trial. Plaintiffs argue that this shows that the Court Monitor was justified in using that word too. Their argument is deceptive. They cite the contempt trial Transcript, page 2566, lines 19-22. But in that excerpt, Defendants' counsel merely referred, in the abstract, to "the party named as the contemnor." (Emphasis added.)

Defendants' attorney was merely describing an element of proof regarding persons "named as" contemnors in general, and was not referring to any person in particular. Moreover, his use of the modifier "named as" makes all the difference in the world, and is vastly different from the Court Monitor's use of the word "contemnors" to refer to individuals who have not been found to be in contempt or otherwise to have committed wrongdoing. Plaintiffs' effort to equate such different usages of the term is highly misleading. As far as we have been able to determine, in the other instances in which defense counsel used the term "contemnor," they also included modifiers such as "putative" or "alleged."

Defendants' attorneys in this case must relate to trust "administration," so no privileges could apply vis-a-vis the trust beneficiaries. See Opp. at 6-7. Plaintiffs also incorrectly argue that, merely because some Interior lawyers (e.g., in the Solicitor's office) or officials have responsibilities regarding both trust administration and the handling of this litigation, they are afforded no privileges with regard to this case. See Opp. at 3 n.6 and at 7 n.13.

Plaintiffs ignore relevant parts of the Special Master's opinion and pertinent contrary case law. Interior Defendants discussed the applicable principles and authorities at length in Defendants' Reply in Support of Motion to File Under Seal ("Reply Regarding Motion to Seal"), filed June 11, 2002, at pages 2-10.[2] Plaintiffs, who were served with that brief on June 11, 2002, were thus informed of this case law but chose not to respond in their June 14th Opposition.

First, even if the Special Master's May 11, 1999 opinion ("5/11/99 Special Master's Opinion" or "5/11/99 SM Opp.") controls,[3] it supports Interior's position. Plaintiff's Opposition (at page 3 n.6) erroneously cites the 5/11/99 Special Master's Opinion (at 10-11) for the proposition that no privilege applies to "litigation information communicated by defendants to counsel who advise the defendant trustee-delegates on both trust reform and litigation." The

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[2] For the convenience of the Court, we will repeat some of the arguments stated in Defendants' Reply Regarding Motion to Seal, but a fuller discussion of the privilege issues appears in that brief at pages 2-10.

[3] Plaintiffs argue (Opp. at 9) that the Special Master's opinion of May 11, 1999 must control on the question of privilege. But, first, as shown below, the Court has not yet adopted the Special Master's opinion, so the scope of these privileges has not been finally decided by the Court. Second, Plaintiffs' citation to the doctrine of "law of the case" is incorrect. "Interlocutory orders are not subject to the law of the case doctrine and may always be reconsidered prior to final judgment." Langevine v. District of Columbia, 106 F.3d 1018, 1023 (D.C. Cir. 1997).

5/11/99 Special Master's Opinion says no such thing.[4]

On the contrary, the Special Master recognized that whether a particular communication is privileged depends upon its subject matter, and communications are not necessarily non-privileged because they merely relate to the trust. The Special Master noted that the cases he relied upon, which arose in the context of employee benefit plans, "uniformly hold that certain 'plan design' decisions concerning the formation, amendment or termination of the trust are non-fiduciary functions reserved to the 'Employer' or 'Settlor,' which are outside the fiduciary functions of the trustee and therefore, legal advice pertaining to these non-fiduciary functions is protected by the Employer's attorney-client privilege." 5/11/99 SM Op. at 10 (emphasis added). Thus, the Special Master's opinion is directly contrary to Plaintiffs' argument that a fiduciary can have no confidential communications with its counsel. It is only communications pertaining to "fiduciary activity of trust administration" that are for the benefit of trust beneficiaries and thus cannot be shielded from them. However, the Privileged Documents do not fall in that category. Consequently, the privilege exists.

Further, the Special Master expressly opined that "work product protection . . . will be afforded" to documents that "were prepared and created solely for use by counsel in anticipation or in the course of this litigation." 5/11/99 SM Op. at 13. That statement also is contrary to Plaintiffs' argument.

As indicated in the Defendants' Reply Regarding Motion to Seal, statements by the Court at the recent contempt trial indicated that, at that time, the Court had not decided whether to

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[4] Indeed, even Plaintiffs' attorney conceded on the record that a trustee in litigation still enjoys an attorney-client privilege. See note 5, below.

adopt the Special Master's opinion, although the Court appeared to recognize that the privileges apply with regard to materials prepared to assist Interior in the defense of this case, as distinct from administration of the trust, and even Plaintiffs' attorney seemed to concede as much.[5]

Second, Plaintiffs ignore the weighty body of case law that runs counter to their argument. Plaintiffs once again tout Washington Baltimore Newspaper Guild, Local 35 v. Washington Star Co., 543 F. Supp. 906 (D.D.C. 1982), as though it does away with all privileges whenever a fiduciary and beneficiary have a dispute. Plaintiffs vastly overstate the impact of the case. The case, which, as a district court opinion, is not binding on this Court, is largely distinguishable on the crucial point that it did not involve allegedly privileged communications that took place during ongoing litigation between a trustee and beneficiaries.

Most cases hold that the fiduciary-beneficiary exception to the attorney-client privilege does not apply to work product materials and does not apply to attorney-client communications involved in the fiduciary's defense of itself in a lawsuit. See Defendants' Reply Regarding Motion to Seal (at pages 5-8), and cases cited therein, such as Koenig v. International Systems and Controls Corp. Securities Litigation (In re International Systems and Controls Corp. Securities Litigation), 693 F.2d 1235, 1239 (5th Cir. 1982) (the fiduciary-beneficiary exception to the attorney-client privilege was not intended to apply to the work product doctrine, nor is it reasonable to apply the exception where the fiduciary and beneficiary anticipate litigation against each other); Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386, 1423 (the fiduciary-beneficiary exception to the attorney-client privilege "does not apply to attorney work

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[5] See Defendants' Reply Regarding Motion to Seal at 4-5 nn. 1 & 2, quoting Transcript of proceedings, January 4, 2002, at 1609:9-16; February 11, 2002 at 4256:18-25; 4257:1-20.

product"), modified in part, on other grounds, 30 F.3d 1347 (11th Cir. 1994); Strougo v. Bea Assocs., 199 F.R.D. 515, 524 (S.D.N.Y. 2001) (the fiduciary-beneficiary exception to the attorney-client privilege "does not permit disclosure of communications regarding the defense of a lawsuit").[6]

As stated in United States v. Mett, 178 F.3d 1058, 1063 (9th Cir. 1999), "it is clear that the fiduciary exception has its limits – by agreeing to serve as a fiduciary, [a trustee] is not completely debilitated from enjoying a confidential attorney-client relationship." Further, the court observed:

> where a fiduciary seeks legal advice for her own protection, the core purposes of the attorney-client privilege are seriously implicated and should trump the beneficiaries' general right to inspect documents relating to plan administration. . . . [W]here attorney-client privilege is concerned, hard cases should be resolved in favor of the privilege, not in favor of disclosure. As the Supreme Court has repeatedly cautioned, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."

Id. at 1065 (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)). Thus, the court held that the fiduciary exception did not overcome the attorney-client privilege as to communications to employee-benefit plan trustees regarding their exposure to liability. 178 F.3d at 1064.

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[6] As discussed in Defendants' Reply Regarding Motion to Seal (at page 6 n.3), the few cases that state that the fiduciary exception applies to work product materials are distinguishable and unpersuasive. For example, Wessel v. Albuquerque, No. Misc. 00-00543 ESH/AK, 2000 WL 1803818, at *5 (D.D.C. Nov. 30, 2000), did not mention or analyze the many cases holding that the fiduciary exception does not apply to work product, and the documents involved in that case do not appear to have been actual work product materials because they did not pertain to litigation. Moreover, Wessel still declined to apply the fiduciary exception where the fiduciary "retains counsel in order to defend herself against the [plan] beneficiaries." 2000 WL 1803818 at *7.

The fact that some lawyers (e.g., in the Solicitor's office) sometimes assist the Interior Defendants with matters involving trust administration, and in other instances assist with litigation matters, does not defeat the attorney-client privilege. Well-reasoned case law holds that the attorney-client privilege is not undone simply because the same lawyers represent an organization in its role as a fiduciary and in its role as a non-fiduciary. See Becher v. Long Island Lighting Co. (In re Long Island Lighting Co.), 129 F.3d 268, 272 (2d Cir. 1997), cited by Plaintiffs; In re Int'l Sys. and Controls Corp. Sec. Litig., 693 F.2d at 1239 ("It is not reasonable to indulge in the fiction that counsel, hired by management, is also constructively hired by the same party counsel is expected to defend against").

B. The Privileges Apply to the Entirety of the Privileged Documents

Plaintiffs (Opp. at 7 & 8 n.14) offer their unsupported and fanciful speculations that it is "highly unlikely" that all of the contents of the Privileged Documents really are privileged and it is "more likely" that only a few lines should be redacted. First, common sense and experience teach just the opposite: Clients and their litigation attorneys frequently have discussions or send letters only about the litigation.[7] Second, case law recognizes that confidential client communications often are so inseparably a part of the communications between the client and the attorney that disclosure of any part of those communications may inadvertently disclose, "either directly or by implication, . . . information which the client previously provided to the attorney's trust." Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980)

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[7] Plaintiffs argument could result in unintended consequences for them that they may not like. If their rule were accepted, then Plaintiffs' communications with their counsel also would be subject to being produced generally, with only "a few lines" of privileged information redacted.

(discussing why the attorney-client privilege is extended to communications from the attorney to the client); see also RTC v. Diamond, 773 F. Supp. 597, 601-02 (S.D.N.Y. 1991) (privilege afforded to "attorney-client communications that appear to be so inextricably intertwined with the rest of the text that they cannot be separated"), which Plaintiffs cite.

Third, if the Court chooses to examine the Privileged Documents (which are attached to the Court Monitor's Seventh Report) on this point, their text reveals that they pertain to the litigation and not trust administration.

Plaintiffs' Opposition (at 7 n.13, 8) cites a number cases for the proposition that privileged information should be redacted and the remainder of the documents produced. Those cases are inapposite. First, some of Plaintiffs' cited cases did not even involve the attorney-client privilege. See Merchants Bank v. Vescio, 205 B.R. 37, 42 (D. Vt. 1997) (redaction of personal, "sensitive" information from bank documents that were not covered by a "bank examination" privilege); Hopkins v. Dep't of HUD, 929 F.2d 81, 89 (2d Cir. 1991) (involved the deliberative process privilege; only deliberative material should be redacted and the factual information produced). Neither case involved the attorney-client privilege nor that privilege's principle that disclosure of any of the communications between attorney and client may inadvertently reveal confidential client information. Moreover, in RTC v. Diamond, 773 F. Supp. 597, 601 (S.D.N.Y. 1991), the court recognized that many documents cannot simply be produced with confidential information redacted because the confidential parts are so intertwined with the rest of the document.

Other of Plaintiffs' cited cases (Opp. at 8) involved reports or memoranda by and between personnel involved in business transactions, not letters or memoranda between attorney and

client. See RTC v. Diamond, 773 F. Supp. at 601-02 (documents to be redacted were, e.g., documents addressed to RTC attorneys in their roles as policymakers for the agency, not as attorneys); RTC v. Bright, 157 F.R.D. 397, 401 (N.D. Tex. 1994) (court ordered redaction of privileged information from officers' reports or memoranda regarding RTC's sale of assets, that merely mentioned attorney-client privileged information in some sections).

Finally, Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984), involved the question of whether documents provided by an attorney to his expert witness had to be produced in discovery. The court ruled that the facts within those documents must be disclosed, but the privileged information could be redacted, under the familiar principle that an opposing litigant is entitled to find out the facts upon which the other side's expert based his opinion. That principle is not involved here.

Plaintiffs have cited no case in which a court ordered production of any part of the types of documents involved here (i.e., letters from litigation attorneys to the client regarding document production in the litigation, or memoranda from the client's officials to agency counsel regarding document production).

III. The Privileges Have Not Been Waived

A. Disclosure to the Court Monitor Did Not Waive Privileges

Plaintiffs fail to overcome Interior's showing (Memorandum in Support at 7-12) that disclosure of the Privileged Documents to the Court Monitor did not waive the attorney-client privilege or the work product protection. Plaintiffs (Opp. at 9) struggle over who might have given the documents to the Court Monitor. But it does not matter. As shown in Interior Defendants' Memorandum in Support (at 7-10), for purposes of analyzing privileges, the

production by Interior (regardless of which official within Interior) to the Court Monitor should be deemed the sort of "court-compelled disclosure" that does not waive privileges.

Plaintiffs Opposition (at 10) refers to a number of cases discussed in section VIII of their December 17, 2001 brief (filed in the recent contempt trial).[8] Those cases, however, are inapposite. Virtually all of those cases involved a party's disclosure of documents to the SEC or other investigative agency of the Executive Branch, not a judicial officer. See, e.g., Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (disclosure to SEC); In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (disclosure to Defense Contract Audit Agency auditor); In re Worlds of Wonder Sec. Lit., 147 F.R.D. 208, 211 (N.D. Cal. 1992) (disclosure to SEC); In re Subpoean Duces Tecum to Fulbright & Jaworski, 99 F.R.D. 582, 585 (D.D.C. 1983) (disclosure to SEC); see also Bartholdi Cable Co. v. FCC, 114 F.3d 274, 279 (D.C. Cir. 1997) (party did not timely assert privileges in FCC proceeding).

The fundamental basis for those decisions was that the agency in those instances functioned as an opposing party, and disclosure to an opposing party waives certain privileges. But, as discussed in Defendants' Memorandum in Support (at 12), the Court Monitor does not hold the status of an opposing litigant. On the contrary, he is a court-appointed official who is not supposed to be the opponent of either side to this case. Therefore, production to him should

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[8] Plaintiffs observe (Opp. at 10 n.17) that, during the recent contempt trial, they argued that disclosure to the Court Monitor waived privileges. But Plaintiffs' argument of an invalid legal point does not transform it into the law nor does it require that the parties treat it as such. Defendants opposed Plaintiffs' argument (see Defendants' "Response to Plaintiffs' 'Brief on Why the Court Monitor Reports as a Whole and Virtually All Evidence Contained Therein Are Admissible [etc.],'" filed December 19, 2001, at 11-12). Regardless of what Plaintiffs hoped or argued, the Court Monitor was obliged to treat confidential materials as such unless and until the Court overruled privilege claims.

be treated, for privilege purposes, as production to the Court *in camera*.

Plaintiffs observe that, in Fulbright & Jaworski, 99 F.R.D. at 585, the party voluntarily disclosed information to the SEC, not because it was compelled to do so, but rather, in order to persuade the agency that there was no need for further investigation. But that point misses the mark here, for the key issue remains whether the recipient of the information is an opponent, not whether the submitter of the information hopes to prove a point in its favor. See In re Perrigo Co., 128 F.3d 430, 441 (6th Cir. 1997) (submission to court of counsel's investigative report did not waive privileges, where the report was submitted to demonstrate compliance with state statute allowing dismissal of shareholders' derivative actions if disinterested directors perform an investigation and determine that a derivative suit is not in the corporation's interest).

Plaintiffs argue that Defendants consented to the order appointing the Court Monitor. Even if that were so,[9] that is a far cry from consenting to his public disclosure of privileged documents.

Plaintiffs erroneously argue that, because the Secretary instructed Interior staff to cooperate and provide the Court Monitor with access to documents, production of documents to him cannot be considered "court-compelled." Plaintiffs overlook the fact that the Court ordered that the Court Monitor be provided "access . . . to gather information." See Order dated April 16, 2001. If Interior chose to interpret that direction "broadly" (see memorandum dated April 24, 2001, from the Secretary), and thus allow the Court Monitor to see even some privileged documents, that does not change the fact that Interior did so in order to comply with what it

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[9] In fact, Interior Defendants did not consent to the recent reappointment of the Court Monitor under the conditions that the Court adopted. See Order dated April 15, 2002.

interpreted to be the Court's direction. That the Court did not enter an order specifically referring to the Privileged Documents does not change that analysis.

Indeed, Plaintiffs' cited case law demonstrates that the concept of "court-compelled" disclosure is to be construed liberally. Plaintiffs' Opposition (at 11 n.20) cites In re Sealed Case, 877 F.2d at 980, for the proposition that "short of court-compelled disclosure, [citation omitted], or other equally extraordinary circumstances, we will not distinguish between various degrees of 'voluntariness' in waivers of the attorney-client privilege." But the court made that comment in response to the argument that the party's accidental disclosure should not be deemed "voluntary." Id. at 980. That issue is not present. Moreover, the case citation that Plaintiffs omitted from their quotation of In re Sealed Case is Transamerica Computer Co. v. Int'l Bus. Machines Corp., 573 F.2d 646, 650-51 (9th Cir. 1978), in which the court held that, where a court ordered expedited production of documents, a party's inadvertent production of privileged materials (resulting from the expedited pace) to an opponent was effectively "compelled" by the court, so no waiver occurred. Thus, the courts construe the notion of "court-compelled" disclosure in a flexible and liberal fashion.

The unusual circumstances of this case should fit comfortably within the doctrine of "court-compelled" disclosure or the "equally extraordinary circumstances" to which the In re Sealed Case and Transamerica opinions referred. The production of the Privileged Documents to the Court Monitor was at least as "court-compelled" as was the production to an opposing litigant in Transamerica. This Court ordered that the Court Monitor be provided "with access to any Interior offices or employees to gather information necessary or proper to fulfill his duties." See Order dated April 16, 2001 at 2. That order was the genesis for Interior's giving access and

production of documents to the Court Monitor. The circumstances are unique and sufficiently extraordinary to justify the quite reasonable request that production of documents to the Court Monitor not waive privileges. Interior Defendants should not be penalized for their efforts to satisfy the direction to provide "access." Mere recognition of basic privileges is not too much to ask.

Moreover, even if Interior's production to the Court Monitor waived the attorney-client privilege, Plaintiffs fail to overcome Interior Defendants' showing that this did not waive the work product doctrine, which is held by the Department of Justice attorneys.[10] Even Plaintiffs' cited case of Permian Corp., 665 F.2d at 1222, held that, although disclosure to the SEC waived the attorney-client privilege, it did not waive work product protection. The same result would obtain here, even if the attorney-client privilege were found to be waived.

Plaintiffs (Opp. at 10 n.16) try unsuccessfully to distinguish Securities and Exchange Comm'n v. Lavin, 111 F.3d 921 (D.C. Cir. 1997). First, contrary to Plaintiffs' characterization of the case, Lavin involved assertion of privilege claims after the documents were produced.[11] 111 F.3d at 924. Second, Plaintiffs fail to distinguish or overcome the central point of Lavin:

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[10] Plaintiffs cite Wichita Land & Cattle Co. v. American Federal Bank, 148 F.R.D. 456 (D.D.C. 1992), but that case involved waiver of work product protection by producing documents to opposing counsel. As indicated above, production to the Court Monitor is quite different from production to an opposing litigant. In Fulbright & Jaworski, 738 F.2d at 1371, the court held that disclosures that are "not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the [work product] privilege." (quoting United States v. American Tel. & Telegraph, 642 F.2d 1285 (D.C. Cir. 1980)).

[11] In Lavin, the employer produced the tapes containing privileged materials "to the Federal Reserve Bank of New York in response to a request made pursuant to the Federal Reserve [Bank]'s examination powers." 111 F.3d at 924. After that production, Lavin's attorney asserted the privilege. The court held that the production to the Federal Reserve Bank did not waive that later-asserted privilege. Id. at 932.

Production of privileged materials to a non-party with authority to examine or monitor should not be deemed a waiver of the privileges. Id. at 932. In Lavin, the non-party was the Federal Reserve Bank (Id. at 924); in the present case, it is the Court Monitor. But the outcome of the privilege determination should be the same.[12]

B. Disclosure by the Court Monitor and Resulting Disclosures (on the Internet or Otherwise) Do Not Waive the Privileges

Plaintiffs make much of the fact that, as a result of the Court Monitor's inappropriate filing of the Privileged Documents, they now appear in the court file and on Internet sites (one of which is Plaintiffs' site, www.indiantrust.com). Interior's Supporting Memorandum (at 13) disposed of Plaintiffs' argument that unauthorized publication by third parties waives privileges, and Plaintiffs have failed to refute that showing or to distinguish Nat'l Wildlife Fed'n v. EPA, 286 F.3d 554, 575-76 (D.C. Cir. 2002) (EPA's disclosure of confidential industry data without permission did not waive the industry's privilege).

Further, in United States v. Hubbard, 650 F.2d 293, 424 n.99 (D.C. Cir. 1980), the circuit court held that the district court's erroneous unsealing of confidential documents – and thus their public availability while the case was on appeal – should not even be considered in deciding whether to reverse the district court's decision to unseal them. The court stated, "[t]o permit this mode of access to factor into a subsequent evaluation of the interest at stake would only compound the errors we perceive in the court's original orders." Id.

Thus, the fact that the Court Monitor wrongfully made the Privileged Documents

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[12] The fact that Lavin involved the marital communications privilege makes no difference, for the attorney-client privilege is at least as important a privilege. See Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d at 862 (discussing importance of the attorney-client privilege).

viewable by the public by filing them with the court does not waive or destroy applicable privileges. Nor does any resulting further disclosure overcome the privileges. The court in Lavin recognized that, "[i]n light of the modern regulatory age and technological advances . . . involuntary disclosures by third parties" should not destroy privileges "as long as the holder has acted reasonably in attempting to protect [the privileges]." Lavin, 111 F.3d at 930.

Thus, Plaintiffs prove nothing by pointing to the fact that the court file is available to the public (on paper or on the Internet) or that Plaintiffs have sought to take advantage of the situation by placing the Court Monitor's Seventh Report (which includes the Privileged Documents) on their website. Interior Defendants have acted reasonably to protect the privileges they assert. They promptly filed objections once the Court Monitor publicly disclosed the Privileged Documents, they sought to file under seal the portion of their objections that discussed the contents of those documents, and they moved for a protective order for the return of the documents. While Plaintiffs chastise Interior Defendants for "alacrity and urgency" (Opp. at 1 n.1) in filing those papers, they no doubt would have complained more if Interior had not moved quickly and forcefully to protect the privileges.

III. The Rules of Evidence Regarding Hearsay and Authentication Do Not Apply to Determinations of Privilege

Plaintiffs (Opp. at 11-15) complain that the Declaration of Larry Jensen contains hearsay or lacks foundation. But Plaintiffs overlook the black-letter principle of law that the rules of evidence regarding hearsay and foundation do not apply to the Court's determination of the existence of a privilege. Fed. R. Evid. 104(a) provides that, "[i]n making its determination of the existence of a privilege, [the court] is not bound by the rules of evidence except those with

respect to privileges." Case law consistently interprets this rule to mean that "the judge can rely on inadmissible evidence in making his determination" as to the applicability of the attorney-client privilege. 24 Wright and Graham, Federal Practice and Procedure § 5507 at 569 (1986); see also Burton v. R.J. Reynolds Tobacco Co., 167 F.R.D. 134, 142 (D. Kan. 1996) ("the court rejects the hearsay and authenticity arguments [objections] because under Federal Rule of Evidence 104(a), it is not bound by the rules of evidence on those subjects in determining the existence of a privilege . . . ."); United States v. Campbell, 73 F.3d 44, 48 (5th Cir. 1996) (under Rule 104(a), the court allowed admission of a letter to prove whether a privilege applied, even though the letter was hearsay).[13]

Therefore, even if some statements within the Jensen Declaration are hearsay or do not have the foundation that would be required to prove facts in other contexts, those statements still are properly considered in determining whether the privileges apply. The Jensen Declaration contains sufficient information to establish applicability of the attorney-client and work product privileges. The declaration establishes that Jensen conducted the appropriate inquiry and learned that the Privileged Documents were treated as just that – privileged documents. Plaintiffs have pointed to no legally cognizable defect in the Jensen Declaration or in Interior's showing that the attorney-client and work product privileges apply.

IV. Plaintiffs Fail to Meet Their Burden of Showing Any Exception to the Privileges

Plaintiffs casually suggest that "evidence of misconduct" is not privileged. Opp. at 3 n.6.

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[13] The cases cited by Plaintiffs (Opp. at 11-12), involved hearsay objections to admissibility of evidence at trial or otherwise on the merits of the case, and had nothing to do with admissibility of statements to prove the existence of a privilege.

But, as discussed at length in Defendants' Reply Regarding Motion to Seal (at 10-13), if Plaintiffs seek to overcome privileges based upon alleged misconduct, they face a heavy burden which they utterly fail to meet. Mere conclusory allegations are not enough. Id.

Conclusion

For the foregoing reasons, Interior Defendants request that the Court grant the Motion and enter the protective order requested.

Respectfully submitted,

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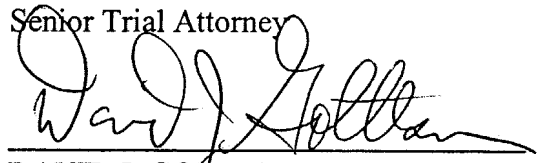

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Dated: June 26, 2002

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on June 26, 2002 I served the foregoing *Defendants' Reply in Support of Motion for Protective Order Regarding Privileged Documents Referenced in Seventh Report of the Court Monitor*, by facsimile in accordance with their written request of October 31, 2001 upon:

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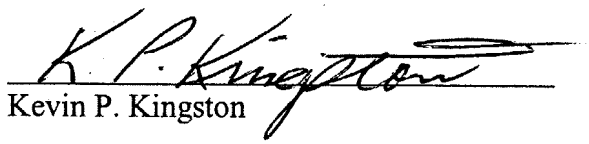

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