EXHIBIT A

LEXSEE 265 F. SUPP. 2D 321

IN RE: GRAND JURY SUBPOENAS DATED MARCH 24, 2003 DIRECTED TO (A) GRAND JURY WITNESS FIRM and (B) GRAND JURY WITNESS

M11-189

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

265 F. Supp. 2d 321*; *2003 U.S. Dist. LEXIS 9022*; *61 Fed. R. Evid. Serv. (Callaghan) 1076

June 2, 2003, Decided
June 3, 2003, Filed

SUBSEQUENT HISTORY: Motion granted by *In re Grand Jury Subpoena, 2003 U.S. Dist. LEXIS 9814 (S.D.N.Y., June 10, 2003)*

DISPOSITION: Government's motion to compel granted in part.

COUNSEL: [1]** Appearances:

JAMES B. COMEY UNITED STATES ATTORNEY

[Redacted]

Attorneys for Grand Jury Witness Firm and Grand Jury Witness

[Redacted]

Attorneys for Intervenor Target.

JUDGES: Lewis A. Kaplan, United States District Judge.

OPINION BY: Lewis A. Kaplan

OPINION

[*322] MEMORANDUM OPINION

LEWIS A. KAPLAN, *District Judge.*

This motion poses the troublesome question whether and to what extent the attorney-client privilege and the protection afforded to work product [1] extend to communications between and among a prospective defendant in a criminal case, her lawyers, and a public relations firm hired by the lawyers to aid in avoiding an indictment. The Court's original opinion in this matter was filed under seal in order to protect the secrecy of the grand jury. In view of the importance of these issues, this redacted version of the opinion, [2] which substitutes pseudonyms for names and omits other identifying information, is being filed in the public records of the Court. [3]

1 Except where otherwise indicated, "work product" refers to material prepared in anticipation of litigation or for trial, including material that reflects the mental impressions, conclusions, opinions or legal theories of an attorney.

[2]**

2 The Court took into account the views of the parties with respect to the redactions that were required.

3 No inferences should be drawn from the gender of pronouns used to refer to Target and Witness in this redacted version of the opinion.

I. Facts

A. The Procedural Context

The United States Attorney's office began a grand jury investigation of Target, a former employee of the Company, in or before March 2003. On March 24, 2003, it served a grand jury subpoena *ad testificandum* on Witness and another *duces tecum* on Witness's firm ("Firm"), a public relations concern. Counsel for Witness and Firm informed the United States Attorney's **[*323]** office that Witness would decline to testify and that Firm declined to produce the subpoenaed documents on the ground that

the information sought by the grand jury had been generated in the course of Firm's engagement by Target's lawyers, as a part of their defense of Target, and that it therefore was protected by the attorney-client privilege and constituted work product.

The government moved by order to show cause to compel compliance **[**3]** with the subpoenas, and Target intervened with the government's consent. The Court concluded that the government almost undoubtedly could ask Witness questions as to which there would be no proper objection, even assuming that Target's position were correct, and therefore required Witness to testify before the grand jury while allowing her to assert any objections in response to specific questions and thus to frame the issues more narrowly.

The Court initially required submission of the documents withheld by Firm on grounds of privilege for *in camera* inspection. On May 1, 2003, in an order that remains under seal, it held that certain portions of the documents constituted attorney opinion work product, [4] that the government had not made a showing sufficient to require production of those portions, assuming *arguendo* that such work product ever is discoverable, and directed Target and Firm to indicate whether the privilege objections would be pressed with respect to the remaining portions of those documents. They subsequently informed the Court that they continue to press those objections.

4 That is, it reflected the mental impressions, conclusions, opinions or legal theories of counsel.

[4]** Witness testified before the grand jury. She answered some questions but asserted Target's alleged privilege [5] in response to others.

5 Although the protection afforded to work product is not, technically speaking, an evidentiary privilege, the Court uses "privilege" to refer both to attorney-client privilege and to work product protection for ease of expression.

B. The Hiring of Firm

This is a high profile matter. The investigation of Target has been a matter of intense press interest and extensive coverage for months. Witness claims that Target's attorneys hired Firm out of a concern that "unbalanced and often inaccurate press reports about Target created a clear risk that the prosecutors and regulators conducting the various investigations would feel public pressure to bring some kind of charge against" her. [6] Firm's "primary responsibility was defensive - to communicate with the media in a way that would help restore balance and accuracy to the press coverage. [The] objective . . . was to reduce **[**5]** the risk that prosecutors and regulators would feel pressure from the constant anti-Target drumbeat in the media to bring charges . . . [and thus] to neutralize the environment in a way that would enable prosecutors and regulators to make their decisions and exercise their discretion without undue influence from the negative press coverage." [7] Witness claims that "a significant aspect" of Firm's "assignment that distinguished it from standard public relations work was that [its] target audience was not the public at large. Rather, Firm was focused on affecting the media-conveyed message that reached the prosecutors and regulators responsible **[*324]** for charging decisions in the investigations concerning . . . Target." [8]

6 Witness Aff. P 8.
7 *Id.* P 9.
8 *Id.* P 12.

C. Firm's Activities

In carrying out her responsibilities, Witness had at least two conversations directly with and sent at least one e-mail directly to Target. [9] On other occasions, Firm interacted with Target's attorneys. **[**6]** [10] On still others, communications involved Firm, Target and the attorneys and, in a few cases, Target's spouse. [11] Some of the documents produced for *in camera* inspection included discussions about defense strategies, and there is no reason to doubt that this was true of many oral communications. [12] And while Target and Witness perhaps do not so admit in these precise terms, the conversations and e-mails exchanged among this group inevitably included discussion of at least some of the facts pertaining to the matters in controversy.

9 Grand Jury Tr., May 5, 2003, at 18-19, 29-30; Target Priv. 0011.
10 Grand Jury Tr. at 29.
11 *Id.* at 18-21, 29.
12 *See, e.g.,* Witness Aff. P 13.

Firm's activities were not limited to advising Target and her lawyers. Firm spoke extensively to members of the media, in some instances to find out what they knew and, where possible, where the information came from. [13] And it conveyed to members of the media information that the Target defense team **[**7]** wished to have disseminated. [14]

13 *See id.* P 17.
14 Grand Jury Tr., May 5, 2003, at 21-22, 45-47.

II. Discussion

A. Attorney-Client Privilege

As this matter is entirely federal in nature, the scope of the attorney-client privilege is governed by *FED. R. EVID. 501*, which provides in relevant part that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." In consequence, the Court looks principally to decisions applying the federal common law of attorney-client privilege.

As the government argues, the broad outlines of the attorney-client privilege are clear:

> "(1) where legal advice of any kind is sought (2) from a professional legal advisor 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 **[**8]** legal advisor, (8) except the protection be waived." [15]

But two qualifications must be made.

> 15 *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983, 731 F.2d 1032, 1036 (2d Cir. 1984)* (internal citations omitted).

First, the privilege protects not only communications by the client to the lawyer. In many circumstances, it protects also communications by the lawyer to the client. [16]

> 16 *E.g., United States v. Neal, 27 F.3d 1035, 1048 (5th Cir. 1994)* (privilege "'shields communications from the lawyer to the client only to the extent that these are based on, or may disclose, confidential information provided by the client or contain advice or opinions of the attorney.'") (citing *Wells v. Rushing, 755 F.2d 376, 379 n.2 (5th Cir. 1985)*; *In re Six Grand Jury Witnesses, 979 F.2d 939, 944 (2d Cir. 1992)* (where the client is a corporation, the attorney-client privilege protects "both information provided to the lawyer by the client and professional advice given by an attorney that discloses such [confidential] information."); *Thurmond v. Compaq Computer Corp., 198 F.R.D. 475, 480-82 (E.D. Tex. 2000)* (cataloging cases applying privilege to communications from lawyer to client and noting divergence among federal courts concerning scope of such privilege); *Fed. Election Comm'n v. Christian Coalition, 178 F.R.D. 61, 66 (E.D. Va. 1998)* ("The attorney-client privilege . . . extends 'to protect communications by the lawyer to his client . . . if those communications reveal confidential client communications.'") (citing *United States v. Under Seal), 748 F.2d 871, 874 (4th Cir. 1984))*; *Harmony Gold U.S.A., Inc. v. FASA Corp., 169 F.R.D. 113, 115 (N.D. Ill. 1996)* (stating that privilege applies to communications from a lawyer to a client provided "the legal advice given to the client, or sought by the client, [is] the predominant element in the communication"); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 441-42 (S.D.N.Y. 1995)* ("It is now well established that the privilege attaches . . . to advice rendered by the attorney to the client, at least to the extent that such advice may reflect confidential information conveyed by the client.");*1 United States v. Int'l Bus. Mach. Corp., 66 F.R.D. 206, 212 (S.D.N.Y. 1974)* (privilege applies to communications by a lawyer to a client provided legal advice is the predominant feature of the communication). *Cf. Upjohn Co. v. United States, 449 U.S. 383, 390, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)* (attorneyclient privilege protects "giving of professional advice to those who can act on it"). *See generally* 24 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5491 at 450-54 (1986 & Supp. 2003) (noting variation among federal courts in breadth of application of privilege to communications by attorney to client).

[9]** **[*325]** Second, the privilege in appropriate circumstances extends to otherwise privileged communications that involve persons assisting the lawyer in the rendition of legal services. [17] This principle has been applied universally to cover office personnel, such as secretaries and law clerks, who assist lawyers in performing their tasks. [18] But it has been applied more broadly as well. For example, in *United States v. Kovel,* [19] the Second Circuit held that a client's communications with an accountant employed by his attorney were privileged where made for the purpose of enabling the attorney to understand the client's situation in order to provide legal advice. [20] In language pertinent here, Judge Friendly wrote:

> "What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists. We recognize this draws what may seem to some a rather arbitrary line be-

> tween a case where the client comm unicates first to his own accountant (no privilege as to su ch **[**10]** c ommunications, even though he l ater cons ults hi s l awyer on the same matter . . .) and others, where the clien t in th e first in stance co nsults a lawyer who ret ains an acc ountant as a listening post, o r c onsults t he l awyer with his own accountant present. But that is the inevitable consequence of having to re concile the abs ence of a pri vilege for accountants a nd t he effect ive ope ration of the privilege of a clien t and lawyer und er conditions **[*326]** wh ere th e la wyer needs outside help." [21]

17 *See* S UP. C T. STD . 503(a)(3), 503(b), *reprinted in* 3 JOSEP H M . MCLAUGHLIN, WEINSTEIN'S EVI DENCE § 503.01 (2d ed. 2003) (hereinafter WEI NSTEIN) (p rivilege extends t o a ppropriate com munications between and among t he cl ient, t he l awyer, a nd a "r epresentative of the lawyer," which is defined as "one employed to assist th e lawyer in th e rendition of professional legal services.")

18 3 WEINSTEIN § 503.12[3][b].

19 *296 F.2d 918 (2d Cir. 1961)*.

20 *Id. at 922*.

21 *Id.* (footnotes and citations omitted).

[11]** *Kovel* helps frame the analysis here. No one suggests that comm unications between Ta rget and Firm would ha ve be en privileged i f s he si mply h ad gone o ut and hired Firm as p ublic relations counsel. On t he other hand, t here is no reason t o question the sta ted rationale for her l awyers' hiring of Fi rm - t hat the lawyers viewed altering the mix of public information as serving Target's interests b y creatin g a clim ate in wh ich prosecutors an d regulators might feel freer t o act in ways le ss antagonistic to Target than otherwise might have been the case. Finally, the C ourt acce pts t hat this was a situation in which th e lawyers, in th e words of *Kovel,* "needed outside help," as they pres umably were not s killed at public relations. The question therefore is whether the problem with wh ich t hey "n eeded outsid e h elp" related to th eir provision of what *Kovel* spoke of as "legal advice."

We begin with the obvious. Certainly Firm was not retained to help Targ et's lawyers underst and technical matters to enable th e lawyers to ad vise th eir clien t as to the requ irements o f th e law, as was th e case in *Kovel.* But it is co mmon g round t hat th e privilege ex tends to communications i nvolving c onsultants **[**12]** use d by lawyers to assist in perfor ming task s that go b eyond advising a client as to the law. For example, a client's confidential com munications t o a n ontestifying e xpert re tained by the lawyer to assist th e lawyer in preparing the client's case - essentially the situation in *Kovel* - probably are priv ileged. [22] The government in any case conc edes that con sultants enga ged by lawyers t o a dvise t hem on matters such a s whether t he state of public opi nion in a community makes a ch ange of venue desirable, w hether jurors f rom pa rticular backgrounds a re l ikely t o be di sposed favorably to the client, how a client should behave while testifying in order to impress jurors favorably and other matters routinely t he st uff of j ury and personal communication con sultants co me with in t he atto rney-client privilege, as t hey ha ve a cl ose nexus to t he attorney's ro le in ad vocating th e client's cau se b efore a cou rt or other deci sion-making b ody. [23] Th e ultimate issu e therefore resolves to whether attorney efforts to influence public opinion in order to advance the client's legal position - in this case by neutralizing what the attorneys perceived as a climate of opi nion pr essing prosecutors and regulators **[**13]** to act in ways adverse to Target' s interests - are services, t he rendition of w hich also should be facilitated by ap plying th e privilege to relev ant co mmunications which have this as their object.

22 3 WEINSTEIN § 503.12[5][b].

23 Tr., Apr. 30, 2003, at 4-7, 13-15.

Traditionally, th e p roper ro le o f lawyers vis-a-vis public opinion has been viewed rather narrowly, perhaps primarily out of c oncern t hat extra-judicial state ments might prej udice jury p ools. C odes of p rofessional co nduct, for example, traditionally have limited the extent to which lawyers p roperly m ay seek t o influen ce public opinion by p roscribing m any t ypes of extra-judicial statements co ncerning pending litig ation. [24] M ore re cently, h owever, th ere has b een a str ong ten dency to view the **[*327]** lawyer's role more broadly. [25] Nowhere is this trend more clearly recognized than in the plurality opinion by Mr. Justice Kennedy in *Gentile v. S tate Ba r of Nevada,* [26] where he wrote for four justices:

> "An at torney's dut ies do not begin **[**14]** in side the cou rtroom door. He or she ca nnot ignore the practical im plications o f a l egal proceeding for t he cl ient. Just as an attorney may recommend a plea bargain or ci vil settle ment t o avo id t he adverse c onsequences of a possible l oss after trial, so too an atto rney may take reasonable steps to de fend a client's reputation an d r educe th e a dverse co nsequences of i ndictment, espe cially in t he face of a prosecution deemed unjust or commenced with improper motives. A de-

> fense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the court of public opinion that the client does not deserve to be tried." [27]

And this statement does not stand alone. Indeed, many courts have compensated lawyers, in making fee awards under civil rights and other statutes, for public relations efforts in recognition of the importance of such work in the clients' interests. [28] But to say that lawyers in fact try **[*328]** to influence public opinion in the interests of their clients - indeed, to say that they properly may do so and, on occasion, are compensated by courts for such services - does not alone answer the question **[**15]** before the Court.

> 24 *See generally* Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion, 95 COLUM. L. REV. 1811, 1816-25 (1995)* (hereinafter *Spin Control*); Beth A. Wilkinson & Steven H. Schulman, *When Talk Is Not Cheap: Communications With the Media, The Government and Other Parties in High Profile White Collar Criminal Cases, 39 AM. CRIM. L. REV. 203, 205-06 (2001)* (hereinafter *When Talk Is Not Cheap*).
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> 25 *E.g.,* MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (1999) (allowing lawyers to comment publicly to the extent necessary to neutralize publicity if the lawyer did not initiate the media attention); *Spin Control, 95 COLUM. L. REV. at 1828-44*; Julie R. O'Sullivan, *The* Bakaly *Debacle: The Role of the Press in High-Profile Criminal Investigations* in *Symposium, Bidding Adieu to the Clinton Administration: Assessing the Ramifications of the Clinton "Scandals" on the Office of the President and on Executive Branch Investigations, 60 MD. L. REV. 149, 169-82 (2001)*; S. Bennett, *Press Advocacy and the High-Profile Client,* 30 LOY. L.A. L. REV. 13, 13-20 (1996); *see When Talk Is Not Cheap, 39 AM. CRIM. L. REV. at 223*.

[16]**

> 26 *501 U.S. 1030, 115 L. Ed. 2d 888, 111 S. Ct. 2720 (1991)*.
>
> 27 *Id. at 1043*.
>
> 28 *See, e.g., Davis v. City and County of San Francisco, 976 F.2d 1536, 1545 (9th Cir. 1992), reh'g denied, vacated in part on other grounds, and remanded, 984 F.2d 345 (9th Cir. 1993)* (affirming district court's award of compensation to prevailing party in civil rights action for attorneys' time spent giving press conferences and performing other public relations work where such work was "directly and intimately related to the successful representation of [the] client."); *Gilbrook v. City of Westminster, 177 F.3d 839, 877 (9th Cir. 1999)* (affirming award to prevailing party in civil rights action for media and public relations activities and noting with approval the district court's finding that public relations work contributed directly and substantially to plaintiffs' litigation goals because "'local politics had a potentially determinative influence on the outcome of settlement negotiations and the availability of certain remedies such as reinstatement'"); *Child v. Spillane, 866 F.2d 691, 698 (4th Cir. 1989)* (Murnaghan, J., dissenting) (stating that public relations work should be compensated as attorney's fees in exceptional cases "involving issues of such vital public concern that lawyers will find it necessary to spend time responding to reporters' questions"); *United States v. Aisenberg, 247 F. Supp. 2d 1272, 1316 (M.D. Fla. 2003)* (awarding fees for public relations services and noting that it was appropriate for counsel for suspects in missing child investigation, "consistent with the rules governing professional conduct, not only to procure the assistance of the public in locating the child but to present a public response, to nurture the clients' diminished public image, and *thereby to reduce public pressure on the prosecution to indict*") (emphasis added). *But see, e.g., Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 176 (4th Cir. 1994)* (affirming disallowance of attorneys' fees under *42 U.S.C. § 1988* for prevailing party for public relations efforts aimed "not at achieving litigation goals, but at minimizing the inevitable public relations damage to the company for suing the governor and the state police to alter the pro-labor police enforcement policies."); *New York State Ass'n of Career Sch. v. State Educ. Dep't, 762 F. Supp. 1124, 1127 (S.D.N.Y. 1991)* ("Plaintiffs' direct effect on the legislative process . . . appears to have been the result of lobbying pressure, and thus an award of attorney's fees is clearly not warranted on that basis.")

[17]** The Court's attention has been drawn to two cases that deal in some respect with the issue of public relations services in the privilege context, *Calvin Klein Trademark Trust v. Wachner* [29] and *In re Copper Market Antitrust Litigation.* [30] Both merit study.

> 29 *198 F.R.D. 53 (S.D.N.Y. 2000)*.
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> 30 *200 F.R.D. 213 (S.D.N.Y. 2001)*.

In *Calvin Klein,* the plaintiffs' attorneys hired a public relations firm in anticipation of filing what promised to be a high profile civil suit against a licensee and its well known chief executive. They contended that the purpose was defensive, viz. to assist the lawyers in understanding the possible reaction of the plaintiffs' various constituencies to the litigation, rendering legal advice, and ensuring that media interest in the action would be dealt with responsibly. [31] And they subsequently invoked the attorney-client privilege and work product in an effort to block document production by the public relations firm and one of its employees. **[**18]**

31 *198 F.R.D. at 54.*

Judge Rakoff rejected the attorney-client privilege claim on three grounds. First, after reviewing the documents, he concluded that few if any of them "contain or reveal confidential communications from the underlying client . . . made for the purpose of obtaining legal advice." [32] Second, the evidence showed that the public relations firm - which had a preexisting relationship with the plaintiffs - was "simply providing ordinary public relations advice so far as the documents . . . in question [were] concerned." [33] Finally, he found no justification for broadening the privilege to cover functions not "materially different from those that any ordinary public relations firm would have performed if they had been hired directly by [the plaintiffs] (as they also were), instead of by [their] counsel." [34]

32 *Id.*
33 *Id.*
34 *Id. at 55.*

[19]** In *Copper Antitrust,* a foreign company, Sumitomo, that found itself in the midst of a high profile scandal involving both regulatory and civil litigation aspects hired a public relations firm because it lacked experience in dealing with Western media. [35] The public relations firm acted as Sumitomo's spokesperson when dealing with the Western press and conferred frequently with the company's U.S. litigation counsel, preparing drafts of press releases and other materials which incorporated the lawyers' advice. [36] When an adversary served a subpoena calling upon the public relations firm to produce all documents relating to its work for Sumitomo, Sumitomo resisted on attorney-client privilege and work product grounds. [37] Judge Swain upheld the attorney-client privilege claim, reasoning that the public relations firm, in the circumstances of this case, was the functional equivalent of an in-house department of Sumitomo and thus part of the **[*329]** "client." [38] The communications between the firm and the lawyers, she held, therefore were confidential attorney-client interactions.

35 *200 F.R.D. at 215.*
[20]**
36 *Id. at 215-16.*
37 *Id. at 216.*
38 *Id. at 219.*

Although *Calvin Klein* and *Copper Antitrust* both involved situations somewhat analogous to this case, neither resolves the attorney-client privilege problem here. *Copper Antitrust* disposed of the privilege issue by concluding that the public relations firm in substance was part of the client where as Target makes no similar assertion. *Calvin Klein* was somewhat different from this case because the public relations firm there had a relationship with the client that antedated the litigation, the client was a corporation addressing an array of constituencies including customers and shareholders, and the public relations firm, in Judge Rakoff's words, was "simply providing ordinary public relations advice." [39] Perhaps even more significant, *Calvin Klein,* no doubt in consequence of the arguments made in that case, assumed an answer to the issue now before this Court - whether a lawyer's public advocacy on behalf of the client is a professional legal service that warrants **[**21]** extension of the privilege to confidential communications between and among the client, the lawyer, and any public relations consultant the lawyer may engage to advise on the performance of that function. Answering that question requires consideration of the policies that inform the attorney-client privilege.

39 *198 F.R.D. at 54.*

> The distinction should not be exaggerated. While Witness describes the nature of Firm's engagement as attempting to influence opinion purely for the impact of a more favorable environment on prosecutors and regulators, and the Court does not question her good faith, it would be ndive to suppose that the effect of Firm's services or, for that matter, Target's motive in agreeing to pay for them, is so unidimensional. Target is a prominent and, according to press reports, relatively young business person. Whatever the outcome of her present legal exposures, she will have a social and, in all likelihood, business life in the future, both of which stand to be affected by public perceptions of her and her conduct while at the Company. Hence, while the Court assumes that Target's chief concern at the time of these communications was to avoid or limit the scope of any indictment and other legal attacks upon her, Firm's engagement, to the extent it succeeds, is likely to have benefits for Target outside the litigation sphere.

[22]** As the Supreme Court said in *Upjohn Co. v. United States*, [40] the purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." [41] In this case, construing the privilege to cover the communications involving the public relations consultants would not materially serve the purpose of promoting observance of law for the simple reason that the current controversy concerns the consequences of Target's past conduct, not an effort to conform her present and future **[*330]** actions to the law's requirements. If justification is to be found for such a construction, it must lie in the proposition that encouraging frank communication among client, lawyers, and public relations consultants enhances the administration of justice.

40 *449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)*.

41 *Id. at 389*.

This reflects a change in the generally accepted view of the privilege's purpose. The privilege, at its inception, belonged to the attorney and was grounded in humanistic considerations, e.g., that it enabled the attorney "to comply with his code of honor and professional ethics." EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 2.3, at 108 (2002); 8 JOHN HENRY WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961); *see also In re Colton, 201 F. Supp. 13, 15 (S.D.N.Y. 1961), aff'd, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951, 9 L. Ed. 2d 499, 83 S. Ct. 505 (1963)*. Some have advocated a heavier reliance on such considerations in determining the scope of the privilege today. *See, e.g.,* IMWINKELRIED § 5.3.

[23]** Target, like any investigatory target or criminal defendant, is confronted with the broad power of the government. Without suggesting any impropriety, the Court is well aware that the media, prosecutors, and law enforcement personnel in cases like this often engage in activities that color public opinion, certainly to the detriment of the subject's general reputation but also, in the most extreme cases, to the detriment of his or her ability to obtain a fair trial. Moreover, it would be unreasonable to suppose that no prosecutor ever is influenced by an assessment of public opinion in deciding whether to bring criminal charges, as opposed to declining prosecution or leaving matters to civil enforcement proceedings, or in deciding what particular offenses to charge, decisions often of great consequence in this Sentencing Guidelines era. Thus, in some circumstances, the advocacy of a client's case in the public forum will be important to the client's ability to achieve a fair and just result in pending or threatened litigation.

Nor may such advocacy prudently be conducted in disregard of its potential legal ramifications. Questions such as whether the client should speak to the media **[**24]** at all, whether to do so directly or through representatives, whether and to what extent to comment on specific allegations, and a host of others can be decided without careful legal input only at the client's extreme peril. [42] Indeed, in at least one case, the Securities and Exchange Commission ("SEC") charged that a company that was the subject of an investigation violated the securities laws because its public statements concerning the pending investigation were misleading. [43]

42 *See, e.g.*, *Spin Control*, *95 COLUM. L. REV. at 18 28-42*; Bennett, *Press Advocacy and the High-Profile Client*, 30 LOY. L.A. L. REV. at 18-20; *When Talk Is Not Cheap*, *39 AM. CRIM. L. REV. at 203-14*.

43 *In re Incomnet, Inc.*, Exchange Act of 1934 Release No. 40281, 1998 SEC LEXIS 1614, at *12, *17 (July 30, 1998) (allegedly misleading press statements "essentially denied the Commission's investigation").

Finally, dealing with the media in a high profile case **[**25]** probably is not a matter for amateurs. Target and her lawyers cannot be faulted for concluding that professional public relations advice was needed.

This Court is persuaded that the ability of lawyers to perform some of their most fundamental client functions - such as (a) advising the client of the legal risks of speaking publicly and of the likely legal impact of possible alternative expressions, (b) seeking to avoid or narrow charges brought against the client, and (c) zealously seeking acquittal or vindication - would be undermined seriously if lawyers were not able to engage in frank discussions of facts and strategies with the lawyers' public relations consultants. For example, lawyers may need skilled advice as to whether and how possible statements to the press - ranging from "no comment" to detailed factual presentations - likely would be reported in order to advise a client as to whether the making of particular statements would be in the client's legal interest. And there simply is no practical way for such discussions to occur with the public relations consultants if the lawyers were not able to inform the consultants of at least some non-public facts, as well as the lawyers' **[**26]** defense strategies and tactics, free of the fear that the consultants **[*331]** could be forced to disclose those discussions. In consequence, this Court holds that (1) confidential communications (2) between lawyers and public relations consultants (3) hired by the lawyers to assist them in dealing with the media in cases such as this (4) that are

made for the purpose of giving or receiving advice (5) directed at handling the client's legal problems are protected by the attorney-client privilege. Two points remain however.

As previously noted, Target would not have enjoyed any privilege for her own communications with Firm if she had hired Firm directly, even if her object in doing so had been purely to affect her legal situation. There is a certain artificiality, therefore, in saying that the privilege applies where the lawyers do the hiring and the other requirements alluded to above are satisfied. The justification, however, is found in Judge Friendly's opinion in *Kovel:* "That is the inevitable consequence of having to reconcile the absence of a privilege for accountants and the effective operation of the privilege of a client and lawyer under conditions where the lawyer needs outside **[**27]** help." [44] Precisely the same rationale applies here.

44 *Kovel, 296 F.2d at 922*.

The second remaining issue is the question of Target's communications with the consultants, some of which took place in the presence of the lawyers while others were strictly between Target and Firm. The Court is of the view that both types of communications are covered by the privilege provided the communications were directed at giving or obtaining legal advice. Indeed, in *Kovel*, the Second Circuit recognized that it would be mere formalism to extend the privilege in the former scenario but not the latter, provided the purpose of the confidential communication was to obtain legal advice:

> "If the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within **[**28]** the privilege; there can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the accountant than in insisting on the lawyer's physical presence while the client dictates a statement to the lawyer's secretary or is interviewed by a clerk not yet admitted to practice. What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer." [45]

45 *Kovel, 296 F.2d at 922*.

Witness testified before the grand jury that she recalled only two conversations with Target alone and described their general subject matter. [46] One conversation took place on a day on which there had been substantial media coverage, and Target asked Witness for her view of the coverage. [47] The other concerned a problem with a wire service story. [48] Furthermore, one of the documents the Court reviewed *in camera* is an e-mail from Witness to Target alone concerning a *Wall* **[**29]** *Street Journal* posting. [49]

46 Grand Jury Tr., May 5, 2003, at 30-31.
47 *Id.* at 31.
48 *Id.*
49 Target Priv. 0011.

Neither of the conversations satisfies the standard set forth above - that the communication be made for the purpose of **[*332]** obtaining legal services. Target has not shown that either conversation was at the behest of her lawyers or directed at helping the lawyers formulate their strategy.

This Court previously held that a portion of the Target-Witness e-mail is opinion work product. [50] The balance, however, is not covered by the attorney-client privilege because there has been no showing that it has a nexus sufficiently close to the provision or receipt of legal advice. Thus, neither these two conversations nor the non-highlighted portion of the e-mail is protected by the attorney-client privilege. On the other hand, Target's communications with Firm personnel alone, or with both the lawyers and Firm personnel, are privileged to the extent the conversations were related to **[**30]** the provision of legal services. [51]

50 Order, *In re Grand Jury Subpoenas Dated March 24, 2003*, May 1, 2003.
51 That Target's spouse was present during some of these conversations does not destroy any applicable privilege. *See, e.g., Murray v. Board of Educ., 199 F.R.D. 154, 155 (S.D.N.Y. 2001)* ("disclosure of communications protected by the attorney-client privilege within the context of another privilege does not constitute waiver of the attorney-client privilege"); *Solomon v. Scientific American, Inc., 125 F.R.D. 34, 36 (S.D.N.Y. 1988)* (no waiver of the attorney-client privilege when privileged information was disclosed to client's wife); *see also* 3 WEINSTEIN § 511.07 ("There is no waiver when the disclosure is made in another communication that is itself privileged.")

In sum, then, the Court sustains the attorney-client privilege objections to questions seeking the content of oral communications among Firm, Target and her lawyers, or any combination thereof, **[**31]** which satisfy the standard enumerated above. It overrules the claim of privilege as to the two conversations described in the preceding paragraph.

As all of the documents withheld from production by Firm are communications among Target, her lawyers and Firm, or some combination thereof, for the purpose of giving or receiving legal advice, except for the previously mentioned e-mail from Witness to Target, the Court sustains the attorney-client privilege objections to production of those documents.

B. Work Product

The Court recognizes the possibility that a reviewing court may come to a different conclusion with respect to the attorney-client privilege issue. Accordingly, it deals with the work product objections to the extent they have not been sustained in the May 1, 2003 order.

"The work product doctrine, now codified in part in *Rule 26 (b)(3) of the Federal Rules of Civil Procedure* and *Rule 16(b)(2) of the Federal Rules of Criminal Procedure*, provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial." [52] Both "distinct from and broader than the attorney-client privilege," [53] the work product doctrine **[**32]** "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." [54]

52 *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002,318 F.3d 379, 383 (2d Cir. 2003)*.
53 *United States v. Nobels, 422 U.S. 225, 238 n.11, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975)*.
54 *United States v. Adlman, 134 F.3d 1194, 1196 (2d Cir. 1998)* (quoting *Hickman v. Taylor, 329 U.S. 495, 511, 91 L. Ed. 451, 67 S. Ct. 385 (1947))*.

Work product falls generally in to two categories, which are afforded different **[*333]** levels of protection. Work product consisting merely of materials prepared in anticipation of litigation or for trial is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials . . . and that the party is unable without undue hardship to obtain the substantial equivalent **[**33]** of the materials by other means." [55] Opinion work product - materials that would reveal the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation" [56] - is discoverable, if at all, only upon a significantly stronger showing. [57]

55 *FED. R. CIV. P. 26(b)(3)*.

In criminal cases, the doctrine is even stricter, precluding discovery of documents made by a defendant's attorney or the attorney's agents except with respect to "scientific or medical reports." *FED. R. CRIM. P. 16(b)(2)*.
56 56 *FED. R. CIV. P. 26(b)(3)*.
57 *See, e.g., Upjohn Co., 449 U.S. at 400-02*; *In re Grand Jury Proceedings, 219 F.3d 175, 190-91 (2d Cir. 2000)*; *Adlman, 134 F.3d at 1204*.

In this case, Firm withheld nineteen documents from production based in whole or in part on the contention that they are protected work product. The government's initial response was to claim that the documents are **[**34]** not work product because the government seeks no "materials that reveal Target's attorneys' mental impressions" and, should the Court conclude otherwise, that it is prepared to make an *ex parte* showing of substantial need. [58] At oral argument, moreover, the government disavowed any effort to obtain production of documents containing attorney opinion work product, stating that its interest is limited to obtaining facts. [59] Accordingly, the Court sustained the work product objection to such portions of the documents in its May 1, 2003 order. There remains for consideration the question whether the remaining portions of the documents are protected and, if so, whether the government has made or should be permitted to seek to make an *ex parte* showing of substantial need. [60]

58 Letter, Assistant United States Attorneys, Apr. 24, 2003, at 11-12; *see also* Letter, Assistant United States Attorneys, Apr. 29, 2003, at 6-7.
59 Tr., Apr. 30, 2003, at 33.
60 The Court for convenience uses "substantial need" to refer to the entire requisite showing of substantial need and undue hardship.

[35]** There is no serious question that the remaining portions of the documents withheld are work product, as the government does not dispute that they were prepared in anticipation of litigation. If doubt there were, it would have been eliminated both by the Court's *in camera* review, which confirms that all of the nineteen documents in fact were prepared in anticipation of litigation, and by *Calvin Klein* and *Copper Antitrust,* both of which held that work product protection covers similar materials in circumstances which, for this purpose, were analogous. [61]

61 *Calvin Klein, 198 F.R.D. at 55-56*; *Copper Antitrust, 200 F.R.D. at 220-21*.

The government implicitly concedes that it has not shown substantial need for the non-opinion work product portions of the documents, requesting instead that it be permitted to attempt such a showing *ex parte*. [62] While *ex parte* proceedings in most circumstances are strongly disfavored by our system, the public interest in grand **[**36]** jury secrecy in some cases may trump that important principle. "Where an *in camera* submission is the only way **[*334]** to resolve an issue without compromising a legitimate need to preserve the secrecy of the grand jury, it is an appropriate procedure." [63]

62 Letter, Assistant United States Attorneys, Apr. 24, 2003, at 12.

63 *In re John Doe, Inc., 13 F.3d 633, 636 (2d Cir. 1994)*; *accord In re Marc Rich & Co., 707 F.2d 663, 670 (2d Cir.)*, *cert. denied, 463 U.S. 1215, 77 L. Ed. 2d 1400, 103 S. Ct. 3555 (1983)*; *In re Grand Jury Subpoena Dated August 9, 2000, 218 F. Supp. 2d 544, 551 (S.D.N.Y. 2002)*, *aff'd, 318 F.3d 379 (2d Cir. 2003)*.

This proposition creates something of a chicken-and-egg problem. When the Court pressed the government to explain how making a showing of substantial need in the presence of its adversary would prejudice grand jury secrecy, the government indicated that it feared that it could not do so "in **[**37]** open court without letting the cat out of the bag, so to speak" and acknowledged that this is "somewhat of a Catch 22." [64]

64 Tr., Apr. 30, 2003, at 35.

In the absence of any non-conclusory showing that an explanation of the need for an *ex parte* submission itself would compromise grand jury secrecy, there are two obvious alternatives. One is simply to take the government at its word and unconditionally permit an *ex parte* showing. The other is to deny this aspect of the government's motion. But the choice before the Court need not be so stark. The middle ground is to allow the government to make an *ex parte* showing both of substantial need and of the necessity of preserving the confidentiality of its submission in order to protect grand jury secrecy. If the Court concludes that disclosure of the submission would not compromise grand jury secrecy, the government's submission will be disclosed to Target's counsel, who will be permitted to respond before the Court decides whether the government has **[**38]** shown substantial need for the non-opinion work product. If it does not so conclude, it will proceed directly to rule on the sufficiency of the government's showing of need.

III. Conclusion

For the foregoing reasons, the government's motion is granted to the following extent:

1. Witness shall testify further pursuant to the subpoena served upon her and answer all questions relating to the two conversations she recalls having had with Target alone and such other questions as may be put to her in respect of which there is no claim of privilege consistent with this opinion.

2. The government, on or before May 21, 2003, may make an *ex parte* submission as to both its claimed need for the non-attorney opinion work product portions of the withheld Firm documents and the necessity of preserving the confidentiality of its submission in order to protect grand jury secrecy. Any such submission shall be accompanied by a memorandum of law, served on Target's counsel, addressing the question whether the Court should apply Civil *Rule 26(b)(3)*, Criminal *Rule 16(b)(2)*, or some other standard in ruling on the government's motion. [65]

65 No such submission was made.

[39]** SO ORDERED.

Dated: June 2, 2003

(unredacted version dated May 16, 2003)

Lewis A. Kaplan

United States District Judge

LEXSEE 200 F.R.D. 213

IN RE: COPPER MARKET ANTITRUST LITIGATION; VIACOM, INC., as successor by merger to CBS Corp. (f/k/a Westinghouse Electric Corp.) and EMERSON ELECTRIC CO., Plaintiffs, -against- SUMITOMO CORPORATION, SUMITOMO CORPORATION OF AMERICA, GLOBAL MINERALS AND METALS CORPORATION, R. DAVID CAMPBELL, and CREDIT LYONNAIS ROUSE, LTD., Defendants.

Index No. M8-85 (LTS), MDL Docket No. 1303 (W.D. Wisc.)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

200 F.R.D. 213*; *2001 U.S. Dist. LEXIS 5269

April 30, 2001, Decided
April 30, 2001, Filed

SUBSEQUENT HISTORY: Summary judgment denied by, Summary judgment granted by, Motion denied by *In re Copper Antitrust Litig., 153 F. Supp. 2d 996, 2001 U.S. Dist. LEXIS 15431 (W.D. Wis., 2001)*

PRIOR HISTORY: *Metallgesellschaft AG v. Sumitomo Corp. (In re Copper Antitrust Litig.), 117 F. Supp. 2d 875, 2000 U.S. Dist. LEXIS 20283 (W.D. Wis., 2000)*

DISPOSITION: **[**1]** Plaintiffs' motion to compel production of documents listed on privilege log denied.

COUNSEL: For Robinson Lerer & Montgomery, Third-Party Respondent: Roberta Kaplan, Esq., PAUL, WEISS, RIFKIND, WHARTON & GARRISON, New York, New York.

For Sumitomo Corporation, Sumitomo Corporation of America, Defendants: Roberta Kaplan, Esq., PAUL, WEISS, RIFKIND, WHARTON & GARRISON, New York, New York.

For Viacom Inc., Emerson Electric Co., Plaintiffs: Patricia A. Griffin, Esq., KING & SPALDING, New York, New York.

JUDGES: LAURA TAYLOR SWAIN, United States District Judge.

OPINION BY: LAURA TAYLOR SWAIN

OPINION

[*215] LAURA TAYLOR SWAIN, United States District Judge

Plaintiffs Viacom Inc. and Emerson Electric Co. ("Plaintiffs") move to compel the production of documents listed on the privilege log (the "Privilege Log") produced by non-party Robinson Lerer & Montgomery ("RLM") in response to a subpoena issued from this Court on March 9, 2000. For the reasons set forth below, Plaintiffs' motion is denied.

FACTUAL BACKGROUND

This motion arises out of multi-district litigation pending in the Western District of Wisconsin. On or about September 27, 1999, Plaintiffs brought an action against Sumitomo Corporation **[**2]** ("Sumitomo"), Sumitomo Corporation of America, Global Minerals and Metals Corporation and Credit Lyonnais Rouse, Ltd., alleging that the defendants conspired to manipulate global copper prices. By the subpoena dated March 9, 2000, Plaintiffs requested that RLM produce documents relating to RLM's public relations consulting work for Sumitomo. Because the March 9, 2000 subpoena issued from this Court, the Court has jurisdiction to determine Plaintiffs' motion. *Fed. R. Civ. P. 45(c)(2)(B)*. Although the parties differ as to the legal significance of their respective factual proffers, none of the facts proffered is disputed in any material respect. The relevant factual background is as follows.

The signal event giving rise to the underlying antitrust litigation occurred during a deposition conducted in April 1996 by the Commodities Futures Trading Commission ("CFTC"), when Yasuo Hamanaka ("Hamanaka"), then head of Sumitomo's Non-Ferrous Metals Division, disclosed that he had executed an unauthorized power of attorney relating to hundreds of millions of dollars in copper trading. Anticipating a CFTC investigation and other litigation, Sumitomo retained RLM, a "crisis management" public **[**3]** relations firm, on or about May 23, 1996, to handle public relations matters arising from the copper trading scandal. Declaration of Yasutomo Katsuno, dated August 30, 2000, P 2 (hereinafter "Katsuno Decl."); Affidavit of Elizabeth Sigler Mather, sworn to August 31, 2000, P 7 (hereinafter "Mather Aff."). Both the investigation and civil litigation ensued promptly.

Sumitomo hired RLM because it had no prior experience in dealing with issues relating to publicity arising from high profile litigation, and because Sumitomo lacked experience in dealing with the Western media. Only two of the three executives in Sumitomo's Corporate Communications Department had English language facility and those individuals' English language skills were not sufficiently sophisticated for media relations. Katsuno Decl., PP 4-5; Mather Aff., PP 11-15. Working largely out of Sumitomo's Tokyo headquarters with Sumitomo's Corporate Communications Department, RLM acted as Sumitomo's agent and its spokesperson when dealing with the Western press on issues relating to the copper trading scandal. Katsuno Decl., PP 8-9. The chief object of RLM's engagement was damage control, *i.e.*, the management of press statements **[**4]** in the **[*216]** context of anticipated litigation "to ensure that they do not themselves further damage the client." Mather Aff., P 2. "RLM's primary goal in representing Sumitomo was to help the Company make the statements it needed to make, but to do so within the necessary legal framework -- all with the realization, in deed the expectation, that each such statement might subsequently be used by Sumitomo's adversaries in litigation." Mather Aff., P 23. In the course of providing its services to Sumitomo, RLM conferred frequently with Sumitomo's outside counsel, Paul, Weiss, Rifkind, Wharton & Garrison ("Paul Weiss") (Mather Aff., P 24) and Sumitomo's in-house counsel. Katsuno Decl., P 10.

RLM dealt with the western press on Sumitomo's behalf, while Sumitomo's internal Corporate Communications Department dealt with the Japanese press. Katsuno Decl., P 8. RLM's public relations duties included preparing statements for public release and internal documents designed to inform Sumitomo employees about what could and could not be said about the scandal. Affidavit of Roberta Kaplan, sworn to August 30, 2000, PP 6-8 (hereinafter the "Kaplan Aff."). RLM's duties also included drafting, in collaboration **[**5]** with Sumitomo's counsel, public relations documents, press releases, talking points, and Questions and Answers ("Q and As") to be used as a framework for press inquiries. The press releases were intended for different audiences, including regulators and other parties with whom Sumitomo anticipated litigation. Mather Aff., P 30. RLM prepared many drafts of the documents, incorporating legal advice from Paul Weiss and Sumitomo in-house counsel. Mather Aff., P 28. All documents prepared by RLM relating to legal issues arising from the CFTC investigation or the Hamanaka scandal were vetted with Sumitomo's in-house counsel and/or outside counsel. Mather Aff., P 26. RLM had the authority to make decisions on behalf of Sumitomo concerning its public relations strategy. Katsuno Decl., PP 3-6, 8-10; Mather Aff., PP 11-21.

RLM was the functional equivalent of an in-house public relations department with respect to Western media relations, having authority to make decisions and statements on Sumitomo's behalf, and seeking and receiving legal advice from Sumitomo's counsel with respect to the performance of its duties. Mather Aff., P 21; Katsuno Aff., PP 9-10.

On March 9, 2000, Plaintiffs served **[**6]** a subpoena requesting that RLM produce all documents relating to RLM's public relations consulting work for Sumitomo in connection with the copper trading scandal. Kaplan Aff., P 10. RLM produced approximately 15,000 pages of documents in response. Kaplan Aff., P 12. Most of the documents were produced in April 2000, approximately six weeks after the subpoena was issued. Kaplan Aff., P 12. In preparing for the production, the attorney in charge at Paul Weiss gave instructions to the persons reviewing the documents as to what documents should be produced, what documents should be withheld, and what material should be redacted. Kaplan Aff., P 18. On June 27, 2000, RLM delivered the Privilege Log along with the final portion of its production. Kaplan Aff., P 23. On June 23-24 2000, prior to the final production, Paul Weiss undertook a re-review of the documents. Kaplan Aff., P 20. As a result of that review, Paul Weiss discovered that 17 documents it contends are privileged and/or work-product had been produced in error. [1] The attorney in charge of the production reviewed the 17 documents the next business day and, the following day, simultaneously with RLM's final production, Paul Weiss **[**7]** informed Plaintiffs' counsel that in preparing the Privilege Log it had discovered that certain documents (hereinafter the "Disputed Documents") had been inadvertently produced. Kaplan Aff., PP 20-22.

1 Plaintiffs contend that approximately 30 documents were produced in error. RLM sets the

number at 17, contending that certain pages identified by Plaintiffs as separate documents are in fact portions of a single documents. In any event, there appears to be no dispute as to the universe of "Disputed Documents." As explained below, RLM's counsel has provided a reconciliation of the parties' respective document schedules.

RLM has asserted both attorney-client privilege and work-product immunity with respect to the 583 communications listed on the Privilege Log. Plaintiffs argue that the **[*217]** documents listed in the Privilege Log are not protected by the attorney-client privilege or work-product immunity. Plaintiffs contend that the attorney-client privilege is inapplicable because RLM, a third party, was involved **[**8]** in the communications as to which the privilege is asserted. Similarly, Plaintiffs argue that the work-product doctrine is inapplicable because of RLM's third-party status, because its public relations work for Sumitomo was not exclusively litigation-related, and because the work was not done at the request of Sumitomo's attorneys. They further assert that any privilege that may be applicable to the documents listed on the Privilege Log has been waived by disclosure of the information to RLM, a third party, and/or by the production of the Disputed Documents.

DISCUSSION

ATTORNEY- CLIENT PRIVILEGE

Where, as here, subject matter jurisdiction is based on a federal question, privilege issues are governed by federal common law. *See von Bulow v. von Bulow, 811 F.2d 136, 141 (2d Cir. 1987), cert. denied, 481 U.S. 1015, 95 L. Ed. 2d 498, 107 S. Ct. 1891 (1987)*. Proposed Rule of Evidence 503, also known as Supreme Court Standard 503, establishes a benchmark for determining the scope of the attorney-client privilege under federal common law:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing **[**9]** confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and his lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Supreme Court Standard 503(b). [2] Under Supreme Court Standard 503, confidential communications made for the purpose of obtaining legal advice between a client's representative and the client's attorney, between representatives of a client, or between attorneys for a client should be protected from disclosure under the attorney-client privilege.

> 2 "Supreme Court Standard 503 restates, rather than modifies, the common-law lawyer-client privilege. Thus, it has considerable utility as a guide to the federal common law . . . ." 3 Jack B. Weinstein & Margaret Berger, *Weinstein's Federal Evidence*, (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1997) § 503[02], at 510-11. "*See also United States v. Spector, 793 F.2d 932, 938 (8th Cir. 1986)* ("courts have relied upon it as an accurate definition of the federal common law of attorney-client privilege. . . . 'Consequently, despite the failure of Congress to enact a detailed article on privileges, Standard 503 should be referred to by the Courts.") (citation omitted), *cert. denied, 479 U.S. 1031, 93 L. Ed. 2d 830, 107 S. Ct. 876 (1987)*; *United States v. (Under Seal), 748 F.2d 871, 874 n. 5 (4th Cir. 1984)* (Supreme Court Standard 503 "provides a comprehensive guide to the federal common law of attorney-client privilege").

[10]**

Consistent with Supreme Court Standard 503, courts have held that the attorney-client privilege protects communications between lawyers and agents of a client where such communications are for the purpose of rendering legal advice. *Upjohn Co. v. United States, 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)*; *United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989), cert. denied, 502 U.S. 810, 116 L. Ed. 2d 31, 112 S. Ct. 55 (1991)* (attorney-client privilege protects communications made to agents assisting client); *CSC Recovery Corp. v. Daido Steel Co., Ltd., 1997 U.S. Dist. LEXIS 16346*, No. 94 Civ. 9214, 1997 WL 661122 at *3 (S.D.N.Y. Oct. 22, 1997) (attorney-client privilege protects communications between clients and attorneys and agents of both); *H.W. Carter & Sons, Inc. v. William Carter Co., 1995 U.S. Dist. LEXIS 6578*, No. 95 Civ. 1274, 1995 WL 301351 at *3 (S.D.N.Y. May 16, 1995) (communications by public relations consultants who assisted attorneys in rendering legal advice protected by the attorney-client privilege).

In *Upjohn Co. v. United States*, the Supreme Court reviewed the principles underlying the scope of the attorney-client **[**11]** privilege in the corporate context with respect to communications between a client's representative or agent and a client's attorney. The Court focused on the purpose of the attorney-client privilege: "The privilege recognizes that sound legal advice or advocacy **[*218]** serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. . . . 'The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.'" *Upjohn, 449 U.S. at 389* (quoting *Trammel v. United States, 445 U.S. 40, 51, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980))*. The Supreme Court's analysis in *Upjohn* looked to which of the corporate client's agents possess the relevant information the attorney needs to render sound legal advice. *See Upjohn, 449 U.S. at 391-392* (restricting relevant communications to those made by the control group of a corporation frustrates the purpose of the privilege because it discourages communication by the corporation's noncontrol group agents who possess the information **[**12]** needed by the attorney). *See also United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961)* ("what is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.").

The *Upjohn* Court based its holding that the communications at issue were privileged on determinations that the communications had been made to Upjohn's counsel by its employees acting at the direction of their corporate superiors; that the information was needed to supply a basis for legal advice concerning potential litigation relating to the subject matter of the communications; that the communications concerned matters within the scope of the employees' corporate duties; and that the employees were aware that the communications were for the purpose of rendering legal advice for the corporation. *See Upjohn, 449 U.S. at 394*. The Supreme Court held that, "consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure." *Upjohn, 449 U.S. at 395*. The Supreme Court's functional approach in Upjohn thus looked to whether the **[**13]** communications at issue were by the *Upjohn* agents who possessed relevant information that would enable Upjohn's attorney to render sound legal advice.

In *In re Bieter Co., 16 F.3d 929 (8th Cir. 1994)*, the Eighth Circuit applied these principles to a claim of attorney-client privilege with respect to communications with a consultant who had been retained by a real estate development company, finding that the consultant's confidential communications to the company's attorneys were protected by the attorney-client privilege. The court held that in determining whether a corporation's communications were protected by the attorney-client privilege, there was no reason to distinguish between persons on the corporation's payroll and the consultant. *In re Bieter, 16 F.3d at 937*.

In *Bieter*, a real estate partnership had hired a consultant to assist in a real estate development. The venture failed and the real estate partnership commenced litigation. Because the consultant was involved in the subject matter of the litigation arising from the failed real estate venture, the court in *Bieter* determined that the consultant was "precisely the sort of **[**14]** person with whom a lawyer would wish to confer confidentially in order to understand [the real estate firm's] reasons for seeking representation." *Id., at 938*. In sum, the Eighth Circuit asked whether the consultant's relationship to the company was of the kind that justified application of the attorney-client privilege and found that, because the consultant was involved in the activities which were the subject matter of the ensuing litigation and because the consultant possessed the information required by the attorney for informed advice, the consultant's confidential communications to counsel were protected. *Id.*

The Court finds persuasive the reasoning of the *Bieter* court. *Upjohn* teaches that the attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn, 449 U.S. at 390*. The Supreme Court in *Upjohn* looked to whether the corporation's agents possessed the information needed by the corporation's attorneys in order to render informed legal advice. **[*219]** *See Upjohn, 449 U.S. at 391*. **[**15]** In applying the principles set forth by the Supreme Court in *Upjohn*, there is no reason to distinguish between a person on the corporation's payroll and a consultant hired by the corporation if each acts for the corporation and possesses the information needed by attorneys in rendering legal advice. *See In re Grand Jury Subpoenas Dated January 20, 1998, 995 F. Supp. 332, 340 (E.D.N.Y. 1998)* (citing *Bieter* for the principle that the court's concern is with "identifying those representatives who can fairly be equated with the 'client' for purposes of the privilege"). These principles, although articulated in the context of corporate employee relationships, inform this Court's analysis of RLM's ability to assert the attorney-client privilege with respect to its communications with Sumitomo's inside and outside counsel, and Sumitomo's disclosure of privileged information to RLM. Moreover, although the immediate context of the *Bieter* court's decision was factual communications with a consultant who had in effect functioned as a principal with respect

to the events underlying the litigation, the principles to be gleaned from the decision are not so limited.

[16]** RLM was, essentially, incorporated into Sumitomo's staff to perform a corporate function that was necessary in the context of the government investigation, actual and anticipated private litigation, and heavy press scrutiny obtaining at the time. Sumitomo retained RLM to deal with public relations problems following the exposure of the copper trading scandal. Sumitomo's internal resources were insufficient to cover the task. RLM's public relations duties included preparing statements for public release and internal documents designed to inform Sumitomo employees about what could and could not be said about the scandal. Kaplan Aff., PP 6-8. RLM possessed authority to make decisions on behalf of Sumitomo concerning its public relations strategy. Katsuno Decl., PP 3-6, 8-10; Mather Aff., PP 11-21. The legal ramifications and potential adverse use of such communications were material factors in the development of the communications. In formulating communications on Sumitomo's behalf, RLM sought advice from Sumitomo's counsel and was privy to advice concerning the scandal and attendant litigation.

In addition, RLM's communications concerned matters within the scope of RLM's duties for **[**17]** Sumitomo, and RLM employees were aware that the communications were for the purpose of obtaining legal advice from Paul Weiss and/or Sumitomo's in house attorneys. Under the principles set out in *Upjohn*, RLM's independent contractor status provides no basis for excluding RLM's communications with Sumitomo's counsel from the protection of the attorney-client privilege. *Cf. McCaugherty v. Siffermann, 132 F.R.D. 234, 239 (N.D. Cal. 1990)* (under *Upjohn*, there is no principled basis for distinguishing consultant's communications with attorneys and corporate employee's communications with attorneys when each acted in the scope of their employment).

The Court therefore finds that, for purposes of the attorney-client privilege, RLM can fairly be equated with the Sumitomo for purposes of analyzing the availability of the attorney-client privilege to protect communications to which RLM was a party concerning its scandal-related duties. Accordingly, confidential communications between RLM and Sumitomo's counsel, or between RLM and Sumitomo, or among RLM, Sumitomo's in-house counsel and Paul Weiss that were made for the purpose of facilitating the rendition of legal services **[**18]** to Sumitomo can be protected from disclosure by the attorney-client privilege. [3]

> 3 RLM asserts that communications prepared in collaboration with Paul Weiss which reflected legal advice from Sumitomo's in-house and outside counsel and which were prepared in anticipation of litigation in connection with the copper trading scandal are protected from disclosure under the attorney-client privilege.

The Court finds unpersuasive Plaintiffs' argument that third-party consultants come within the scope of the privilege only when acting as conduits or facilitators of attorney-client communications. The case law cited by Plaintiffs arises in a factual context that is readily distinguishable from this case. *See, e. g., United States v. Kovel, 296 F.2d 918* (privilege applies to communications of a third-party made at the request of an attorney **[*220]** or the client where the purpose of the communication was to put in usable form information obtained from the client); *cf. Occidental Chemical Corp. v. OHM Remediation Services, Corp., 175 F.R.D. 431, 436-37 (W.D.N.Y. 1997)* **[**19]** (no privilege attaching to communications from consultant who was not hired to assist in the rendition of legal services). For example, in *United States v. Ackert, 169 F. 3d 136 (2d Cir. 1999)*, a recent case following the reasoning in *Kovel* and relied upon by Plaintiffs, the court determined that communications between an investment banker and an attorney made for the purpose of providing information to the attorney so that he could better advise his client were not privileged. In so finding, the court held that the communications with the third-party investment banker did not serve to facilitate or translate communications with the attorney's client. Moreover, in *Ackert*, the investment banker was neither the attorney's client nor an agent of the client.

By contrast, in this case, RLM is the functional equivalent of a Sumitomo employee. Accordingly, the analysis set forth in *Kovel* and its progeny concerning whether the privilege applies to communications made to third parties for the purpose of facilitating attorney-client communications is inapposite. [4]

> 4 By letter dated January 10, 2001, Plaintiffs asserted that *Calvin Klein Trademark Trust v. Wachner, et al., 198 F.R.D. 53, 2000 WL 178 1621 (S.D.N.Y. 2000)* further supports their position. That case has superficial similarities to the instant matter in that it concerns whether documents and testimony from a public relations company (RLM in that case also) were entitled to protection. *Calvin Klein* differs, however, from this case in that in *Calvin Klein*, RLM was hired by the client's attorneys to assist them in their representation of the plaintiff and there was no suggestion that RLM performed business functions for the client or entered into communications with counsel for that purpose. Thus, the court's analysis focussed on whether RLM served the "translator" function discussed in *Kovel*. As explained herein, RLM

was retained by Sumitomo and was the functional equivalent of a Sumitomo employee.

[20]** *WORK-PRODUCT IMMUNITY*

Plaintiffs contend that communications to and from RLM are not protected by work-product immunity because RLM was hired by Sumitomo as a public relations consultant and was not hired to assist Paul Weiss in providing legal advice. Plaintiffs argue that the materials that RLM claims are protected by work-product immunity were generated in the ordinary course of RLM's public relations services provided in connection with the copper trading scandal. In addition, Plaintiffs argue that communications between Paul Weiss and Sumitomo which were disclosed to RLM are not protected by work-product immunity because any such immunity was waived upon disclosure to RLM. Under the circumstances of this case, Plaintiffs' contentions concerning the applicability of work-product immunity to the items listed on the Privilege Log are misplaced.

Analysis of work-product immunity begins with *Federal Rule of Civil Procedure 26(b)(3)*. *Rule 26(b)(3)* provides in relevant part:

> a party may obtain discovery of documents . . . otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative **[**21]** (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. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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

A document is prepared "in anticipation of litigation" within the meaning of the Rule if, "in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." *United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998)* (rejecting the formulation that work-product immunity protects only documents primarily to assist in litigation and adopting the broader **[*221]** test set forth in 8 Charles Alan Wright, et al., *Federal* **[**22]** *Practice & Procedure* § 2024, at 343 (2d ed. 1994)). Documents prepared in the ordinary course of business, or that would have been created whether or not litigation was anticipated, are not protected by work-product immunity. *Id.* It is firmly established, however, that a document that assists in a business decision is protected by work-product immunity if the document was created because of the prospect of litigation. *Id.* In addition, contrary to Plaintiffs' assertions, documents prepared in anticipation of litigation need not be created at the request of an attorney. *Bank of New York v. Meridien BIAO Bank Tanzania, 1996 U.S. Dist. LEXIS 12377*, No. 95 Civ. 4856, 1996 WL 490710, at *2 (S.D.N.Y. Aug. 27, 1996). Once it is established that a document was prepared in anticipation of litigation, work-product immunity protects "documents prepared by or for a representative of a party, including his or her agent." *Occidental Chemical Corp. v. OHM Remediation Services Corp., 175 F.R.D. at 434*.

RLM asserts, and Plaintiffs do not dispute, that RLM has not withheld purely business-related documents and other types of non-privileged communications with Sumitomo's attorneys. The **[**23]** Privilege Log, together with the affidavits submitted by RLM and the supplements thereto, make clear that the materials listed on the Privilege Log were prepared in collaboration with Sumitomo's counsel, including Paul Weiss, in the context of the litigation ensuing from the copper trading scandal. Kaplan Aff., at PP 7-8; Mather Aff., P P 24-30. [5] The uncontroverted affidavits submitted by RLM in opposition to the instant motion make clear that RLM's services were provided initially because of the prospect of the CFTC's investigation and then because of the actual litigation which ensued thereafter.

> 5 The Privilege Log indicates the number of pages of each document and the date of the document, describes the document, names the author or authors, the addressees, person copied and identifies the privileges asserted with respect to the document.

RLM specializes in litigation-related crisis management. Mather Aff., P 3. The firm was hired shortly after Hamanaka's confession, when it was apparent that the CFTC **[**24]** might commence an enforcement action against Sumitomo. Mather Aff., P 7. Elizabeth Mather, RLM's principal representative for the Sumitomo engagement, states that "from the outset, RLM knew its representation was litigation-related." Mather Aff., P 8. Further, it is clear that Sumitomo retained RLM to make sure that its public statements would not result in further

exposure in the litigation which grew out of the copper trading scandal. Mather Aff., PP 23-24, 29-30; Katsuno Decl., P 10. In light of these uncontroverted facts, the Court finds that the materials listed on the Privilege Log were prepared by RLM or delivered to RLM in anticipation of litigation and that such documents are protected by work-product immunity. For the same reasons, listed documents prepared by Sumitomo or its counsel also are protected by work-product immunity. [6]

> 6 Plaintiffs contend that any claim to work-product immunity was waived upon the documents disclosure to RLM. Even if RLM were not the functional equivalent of a Sumitomo employee, disclosure of the documents to RLM does not constitute waiver of the work-product immunity. The work product privilege is not automatically waived by disclosure to third parties. *In re Pfizer Inc. Securities Litigation, 1993 U.S. Dist. LEXIS 18215*, No. 90 Civ. 1260, 1993 WL 561125 at *6 (S.D.N.Y. Dec. 23, 1993) (citations omitted). Courts find a waiver of work-product immunity only if the disclosure "substantially increases the opportunity for potential adversaries to obtain the information." *In re Grand Jury, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982)*. Disclosure of work product to a party sharing common interests is not inconsistent with the policy of privacy protection underlying the doctrine. *See Stix Products v. United Merchants & Manufacturers, 47 F.R.D. 334, 338 (S.D.N.Y. 1969)* ("The work product privilege should not be deemed waived unless the disclosure is inconsistent with maintaining secrecy from possible adversaries."). Here, RLM and Sumitomo clearly shared a common interest.

[25]** *INADVERTENT PRODUCTION/WAIVER*

Plaintiffs contend that the Disputed Documents should be produced because RLM waived any claim to privilege by producing them. However, "inadvertent production will not waive the privilege unless the conduct of the producing party or its counsel evinced such extreme carelessness as to suggest **[*222]** that it was not concerned with the protection of the asserted privilege." *Lloyds Bank PLC v. Republic of Ecuador, 1997 U.S. Dist. LEXIS 2416*, *10, No. 96 Civ. 1789, 1997 WL 96591 at *3 (S.D.N.Y. Mar. 5, 1997), *quoting Desai v. American International Underwriters, 1992 U.S. Dist. LEXIS 6894*, No. 91 Civ. 7735, 1992 WL 110731 at *1 (S.D.N.Y. May 12, 1992).

Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985), aff'd, 799 F.2d 867 (2d Cir. 1986), identifies the following factors for consideration in determining whether inadvertent production constitutes waiver of a claim of privilege: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the time taken to rectify the error, (3) the scope of the production, (4) the extent of the disclosure, and (5) overriding issues of fairness.

The **[**26]** *Reasonableness of Precautions*

The mere fact of disclosure does not establish that a party's precautions undertaken to protect the privileged evidence were unreasonable. *See Prescient Partners, L.P. v. Fieldcrest Cannon, Inc., 1997 U.S. Dist. LEXIS 18818*, No. 96 Civ. 7590, 1997 WL 736726, at *5 (S.D.N.Y. Nov. 26, 1997); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 443 (S.D.N.Y. 1995)*. Rather, a court must examine whether "the procedure[s] followed in maintaining the confidentiality of the document[s] [were] . . . so lax, careless, inadequate or indifferent to consequences as to constitute a waiver." *Martin v. Valley National Bank of Arizona, 1992 U.S. Dist. LEXIS 11571*, No. 89 Civ. 8361, 1992 WL 196798, at *3 (S.D.N.Y. Aug. 6, 1992) (citations omitted). Inadvertent production will not waive the privilege unless the conduct of the producing party or its counsel evinced such extreme carelessness as to suggest that they were not concerned with the protection of the privilege. *See Lloyds Bank PLC*, 1997 WL 96591, at *3 (citations omitted).

Here, the Paul Weiss attorney overseeing the production gave specific instructions to the document production **[**27]** team concerning which documents were to be produced, which documents were to be withheld and which documents were to be redacted. Kaplan Aff., P 18; Supplemental Affidavit of Roberta Kaplan, sworn to October 16, 2000, P 5. In addition, the production team performed an additional, final, review of the documents prior to completion of the production. Kaplan Aff., P 20. The Court finds that Paul Weiss took reasonable precautions to prevent inadvertent disclosure. These procedures were not so lax, careless, inadequate or indifferent to consequences as to render inadvertent production of the Disputed Documents a waiver.

Time Taken to Rectify the Error

The relevant correction period begins when the party realizes that an error has been made. *Lloyds Bank PLC*, 1997 WL 96591 at *5. Here, Paul Weiss discovered the error while checking the production on June 23, 2000 and June 24, 2000. Kaplan Aff., P 20. The attorney in charge reviewed the 17 documents at issue on June 26, 2000 and notified opposing counsel of the inadvertent production on June 27, 2000. Kaplan Aff., P 22. The Court finds that there was no material delay by Paul

Weiss in asserting the privilege once the **[**28]** error was realized.

The Scope of the Production and the Extent of the Inadvertent Disclosure

Approximately 15,000 pages of documents were produced by RLM. Of this amount, RLM claimed privilege with respect to 583 documents; of that number 17 documents were produced inadvertently. The Court finds that the number of documents inadvertently produced in RLM's production was relatively small in comparison with the total production and is well within margin of error that courts have found acceptable. *See, e.g., Baker's Aid v. Hussmann Foodservice Co., 1988 U.S. Dist. LEXIS 14528*, No. 87 Civ. 0937, 1988 WL 138254, at *5 (E.D.N.Y. Dec. 19, 1988) (noting that "courts have routinely found that where a large number of documents are involved, there is more likely to be an inadvertent disclosure than a knowing waiver"); *Lois Sportswear, 104 F.R.D. at 105* (where twenty-two documents out of 16,000 pages reviewed, and out of 3,000 pages requested, were claimed to be privileged, the Court held that disclosure did not constitute a waiver); *Data Systems of New Jersey, Inc. v. Philips Business Data Systems, Inc., 1981 U.S. Dist. LEXIS 10290*, No. 78 Civ. 6015, slip op. (S.D.N.Y. Jan. 8, 1981) (where **[*223]** one document was **[**29]** privileged among the several thousand produced, the Court held that the privilege was not waived); *Desai*, 1992 WL 110731 (where seventeen documents were privileged out of a "large production", the court held that privilege was not waived).

Fairness

Overall issues of fairness weigh in favor of RLM. Plaintiffs have not demonstrated that they would be prejudiced by maintaining the privilege of the Disputed Documents. Depriving a party of information in an otherwise privileged document is not prejudicial. *See Prescient Partners*, 1997 WL 736726, at *7. However, finding waiver would be prejudicial to RLM because the documents involve attorney-client communications about case strategy. *Id.*

Based on the foregoing, the Court finds that production of the Disputed Documents was inadvertent and that it did not result in waiver of the privilege and work-product protection claimed by RLM in the Privilege Log with respect to the Disputed Documents or other documents identified in the Privilege Log.

RLM'S PRIVILEGE LOG

Plaintiffs contend RLM has not set forth sufficient information in the Privilege Log to support work-product immunity. "The standard **[**30]** for testing the adequacy of the privilege log is whether, as to each document, it sets forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity claimed. The focus is on the specific descriptive portion of the log, and not on the conclusory invocations of the privilege or work-product rule . . . ." *Golden Trade v. Lee Apparel Company, et al., 1992 U.S. Dist. LEXIS 17739*, *12, Nos. 90 Civ. 6291, 90 Civ. 6292, 1992 WL 367070 at *5 (S.D.N.Y. Nov. 20, 1992). *Rule 45(d)(2) of the Federal Rules of Civil Procedure* provides that:

> When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced that is sufficient to enable the demanding party to contest the claim.

Fed. R. Civ. P. 45(d)(2). Local Civil Rule 26.2(a)(2)(A) of this Court requires provision of certain specified types of information with regard to documents withheld upon claim of privilege including, where not apparent, the relationship of the author, addressees and **[**31]** recipients to each other.

It is the proponent's burden to establish the factual basis for a claim that the attorney-client privilege or work-product immunity protects a document from disclosure. *CSC Recovery Corp.*, 1997 WL 661122, at *2. Courts have discretion in determining whether a claim of privilege has been sufficiently supported. *Id.* (courts may rely upon privilege logs and supporting affidavits in assessing whether a claim of privilege has been adequately supported).

The Privilege Log contains information concerning the date, type of document, author, addressees, a short description of each document and the privilege or immunity asserted with respect to each. Submissions by the parties in connection with this motion have made clear the relationship of authors and addressees to each other with respect to documents for which work-product immunity is claimed. Affidavits submitted in opposition to Plaintiffs' motion to compel make clear the context in which the documents identified on the Privilege Log were generated. As explained above, the affidavits establish that RLM was the functional equivalent of Sumitomo's employee for purposes of confidential communications **[**32]** made to Sumitomo's attorneys seeking legal advice.

Moreover, the affidavits submitted by RLM establish that work-product of RLM and Sumitomo's attorneys

was created in anticipation of litigation. Accordingly, the Court finds that the Privilege Log facially meets the requirements set forth in the Local Rules.

OBJECTIONS CONCERNING PARTICULAR DOCUMENTS

Plaintiffs contend that RLM's privilege and work-product claims fail as to the Disputed Documents because RLM's participation in communications and/or preparation **[*224]** of certain of the documents precludes the work-product and attorney-client privilege claims. Plaintiffs also argue that RLM has failed to establish the basis of privilege claims with respect to documents heavily redacted or produced in blank and should therefore be required to produce those documents. Plaintiffs' argument concerning the significance of RLM's participation in communications is, as explained above, ineffective to defeat the work-product and attorney-client privilege claims.

With respect to their arguments concerning specific Disputed Documents, Plaintiffs submitted the Affidavit of Reginald R. Smith, sworn to July 28, 2000, (the "Smith Affidavit"), **[**33]** which contains Exhibit R, a chart identifying by letter designation the specific items in the Disputed Documents that Plaintiffs contend should be not be protected. Because the document designations in Exhibit R and the document designations in the Privilege Log differ, the Court, by order dated March 9, 2001, directed RLM to provide an affidavit correlating the entries listed in Exhibit R to the Smith Affidavit to corresponding entries in the Privilege Log in order to assist the Court's determination of Plaintiffs' motion. RLM provided such correlation in the Supplemental Affidavit of Roberta Kaplan, sworn to March 21, 2001 (the "Supplemental Kaplan Affidavit"). In addition to providing the correlation table, the Supplemental Kaplan Affidavit includes redacted copies of the Disputed Documents as they were kept in RLM's files, indicating portions of the documents that would have been withheld had they not inadvertently been produced. Plaintiffs submitted a letter response to the Supplemental Kaplan Affidavit dated April 2, 2001, asking the Court to conduct an *in camera* review of the documents listed on the Privilege Log. RLM further responded by letter dated April 10, 2001, arguing **[**34]** that the Court should deny Plaintiffs' request.

The Court has reviewed thoroughly the Privilege Log, the Smith Affidavit, the Supplemental Kaplan Affidavit and the correspondence related thereto. If the Privilege Log was insufficient, the additional information provided to the Court clearly establishes the sufficiency of RLM's claims for purposes of *Rule 45(d)*. Accordingly, for the reasons set forth below, the Court finds that the information provided by RLM in the Privilege Log and its factual submissions in response to this motion is sufficient to warrant denial of Plaintiffs' motion to compel. In light of the foregoing, no *in camera* review of the documents listed in the Privilege Log is necessary.

Rule 45(d)(1) of the Federal Rules of Civil Procedure provides that: "[a] person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand." *Fed. R. Civ. P. 45(d)(1)*. In the Supplemental Kaplan Affidavit, RLM explains that it produced documents to Plaintiffs as they were maintained in the usual course of business. Thus, for example, memoranda **[**35]** with attachments and cover sheets were produced together and logged as one document for purposes of the Privilege Log. The descriptions contained in the Privilege Log pertain to the portions of the documents that were redacted or not produced pursuant RLM's privilege claims. Supplemental Kaplan Affidavit, P 3. The Court finds that such procedures comply with *Rule 45(d)(1) of the Federal Rules of Civil Procedure*.

The Court will refer to Plaintiffs' designations in Exhibit R to the Smith Affidavit in its discussion of Plaintiffs' arguments concerning specific documents.

Documents D, M, W, GG, are blank pages that were apparently redacted completely. Plaintiffs contend that RLM has shown no valid basis for the claim of protection for these documents. Document D corresponds to Privilege Log No. 516 and is identified in the Privilege Log as a two-page document consisting of a memorandum from a Paul Weiss attorney to Masato shi Inada (subsequently identified by RLM as a member of Sumitomo's legal department). The Court finds that RLM has identified sufficiently the basis of the privilege claim pertaining to Document D. Document M, together with Documents L, N, O, and P, corresponds to Privilege **[**36]** Log No. 569, which is described as **[*225]** an eight page memorandum. RLM represents that portions of the memorandum contain summaries of legal advice from Sumitomo counsel. Supplemental Kaplan Affidavit, PP 21-22. Document M also is identified sufficiently to support RLM's claim of privilege. *See National Education Training Group, Inc. v. Skillsoft Corp., 1999 U.S. Dist. LEXIS 8680*, No. M8-85, 1999 WL 378337, at *3 (S.D.N.Y. June 10, 1999) (distribution of legal advice within corporation is privileged). Document W, together with Documents V and X, corresponds to Privilege Log No. 571, which describes the privileged material in the document as pertaining to summaries of legal advice. Supplemental Kaplan Affidavit, PP 25-26. Document W is described sufficiently for purposes of RLM's privilege claims. Document GG, together with documents EE, FF, and HH, corresponds to Privilege Log No. 583, which describes the entry as a thirteen-page document. The

Supplemental Kaplan Affidavit further describes the document as consisting of a cover memo containing legal advice and including translations selected by Sumitomo counsel. Supplemental Kaplan Affidavit, PP 35-36. RLM has identified sufficiently the basis of the **[**37]** privilege claim pertaining to this document. *Cf. Plant Genetic Systems, N.V. v. Northrup King Co., 174 F.R.D. 330, 331 (D. Del. 1997)* (selection of documents in anticipation of litigation is protected as work-product).

Document R is a fax cover sheet. According to the Supplemental Kaplan Affidavit, it is part of a nine-page document consisting of a cover memorandum with two attachments. Supplemental Kaplan Affidavit, P 23. The Privilege Log lists the document as number 570. Document R is the fax cover sheet to the first attachment. The Privilege Log indicates that the document is a memorandum concerning advice of Sumitomo counsel. The Supplemental Kaplan Affidavit further identifies the first attachment (containing document R) as a six-page client memorandum. *Id.* Accordingly, RLM has identified sufficiently Document R for purposes of its privilege claim. *Cf. IBJ Whitehall Bank & Trust Co. v. Cory & Associates, Inc., 1999 U.S. Dist. LEXIS 12440*, No. 97 Civ. 5827, 1999 WL 617842, at *7 (N.D. Ill. Aug. 12, 1999) (fax cover sheet indicating that the attached document is drafted by attorneys is privileged). Document AA is also a fax cover sheet which is a constituent of a nineteen-page **[**38]** document identified as number 576 on the Privilege Log. The Privilege Log identifies the privileged material in the document as translations and the Supplemental Kaplan Affidavit describes the fax cover sheet as containing work product because it describes and identifies Paul Weiss' selection of articles to be translated. Supplemental Kaplan Affidavit, P 32. Accordingly, Document AA is identified sufficiently for purposes of RLM's privilege claims.

As indicated above, Documents EE, FF and HH correspond to Privilege Log No. 583. Supplemental Kaplan Affidavit, PP 35-36. As explained above and in light of the proffers set forth in the affidavits submitted by RLM in support of its privilege claims, representing that RLM's work-product was prepared in connection with the litigation arising from the copper trading scandal, the Court finds sufficient basis for RLM's privilege claims with respect to these documents.

Documents A (corresponding to Privilege Log No. 481), B (corresponding to Privilege Log No. 484), C (corresponding to Privilege Log No. 515), G (corresponding to Privilege Log No. 545), H, I and J (corresponding to Privilege Log No. 547), K (corresponding to Privilege Log No. **[**39]** 554), L (corresponding to Privilege Log No. 569), Q (corresponding to Privilege Log No. 570), V and X (corresponding to Privilege Log No. 571) and, BB (corresponding to Privilege Log No. 577) are described in the Privilege Log as internal RLM memoranda or memoranda between RLM and Sumitomo dealing with or summarizing advice from Sumitomo's counsel. The Privilege Log, together with RLM's supporting affidavits, identifies these documents sufficiently to identify the basis of RLM's privilege and/or work-product claims. *See National Education Training Group, Inc. v. Skillsoft Corp.*, 1999 WL 378337, at * 3; *Abbott Laboratories v. Airco, Inc., et al., 1985 U.S. Dist. LEXIS 14140*, No. 82 C 3292, 1985 WL 3596, at *4 (N.D. Ill. Nov. 4, 1985) (memoranda of information or advice directed to or received from an attorney, prepared by an agent of the client or attorney, as a record of that advice or request, are protected by the attorney-client privilege).

[*226] Document F corresponds to Privilege Log No. 528 and is an RLM internal memorandum copied to Sumitomo counsel. The Supplemental Kaplan Affidavit describes the document as containing summaries of legal advice. Supplemental Kaplan Affidavit, **[**40]** P 15. Document F is described sufficiently for purposes of RLM's privilege claims.

Document N corresponds to Privilege Log No. 569 and is one page of an eight-page document which is described in the Privilege Log as summarizing advice from Sumitomo counsel. According to the Supplemental Kaplan Affidavit, the entire document was produced, but three lines of the memorandum denominated Document N should have been redacted for privilege as summaries of legal advice. Supplemental Kaplan Affidavit, P 22. The Court finds that RLM has sufficiently described the privilege claim pertaining to Privilege Log No. 569. Document P is also part of Privilege Log No. 569. According to the Supplemental Kaplan Affidavit, Document P is a memorandum for which no privilege is claimed except for three lines which summarize legal advice. *Id.* Document P thus is identified sufficiently for purposes of RLM's privilege claims. Document O is also part of Privilege Log No. 569 and consists of draft Q and As which the Supplemental Kaplan Affidavit describes as containing legal advice. *Id.*

Documents U and S correspond to Privilege Log No. 570, which is an eight-page memorandum with attachments. Privilege **[**41]** Log No. 570 identifies the basis for the privilege claim as advice from counsel. According to the Supplemental Kaplan Affidavit, portions of the document should have been redacted or withheld as privileged. Supplemental Kaplan Affidavit, P 24. Document T also corresponds to Privilege Log No. 570. RLM's description of the documents constituting Privilege Log No. 570, including the description contained in the Supplemental Kaplan Affidavit, identifies sufficiently the basis of the claim of protection for Documents U, S and T.

Document Y corresponds to Privilege Log No. 572 which is described in the Privilege Log as a memorandum to Sumitomo counsel. The Supplemental Kaplan Affidavit describes most of the document as containing non-privileged material except for certain portions which should have been redacted because the portions contain legal advice from counsel. Supplemental Kaplan Affidavit, P 28. The Court finds that Document Y is identified sufficiently for purposes of RLM's privilege claims.

Documents CC and DD correspond to Privilege Log No. 577, which identifies the privileged material in the document as pertaining to a legal advice. Supplemental Kaplan Affidavit, P 34. Documents **[**42]** CC and DD are identified sufficiently for purposes of RLM's privilege claims.

Document Z corresponds to Privilege Log No. 574, which describes the privileged material in the document as a draft letter from Paul Weiss concerning the resignation of Akiyama (Sumitomo's former president). Supplemental Kaplan Affidavit, PP 29-30. The Court finds that Document Z is identified sufficiently for purposes of RLM's privilege claims.

Document E corresponds to Privilege Log No. 527, which describes the document as memoranda summarizing advice from Sumitomo counsel. The Supplemental Kaplan Affidavit describes Privilege Log No. 527 as a six-page document consisting of five memoranda and an undated time line. Supplemental Kaplan Affidavit, P 12. The Supplemental Kaplan Affidavit indicates that the memoranda, which were produced to Plaintiffs, are not privileged, but that one paragraph of the time line contains privileged information concerning legal advice which should have been redacted. Supplemental Kaplan Affidavit, P 13. Plaintiffs contend that the time line contains no date, author or recipient. The information provided by the Supplement Kaplan Affidavit satisfies that Court, however, that **[**43]** the time line was produced together with the four preceding memoranda. The Privilege Log entry for Document E is sufficient for purposes of the preserving a claim of privilege.

CONCLUSION

For the reasons set forth herein Plaintiffs' motion is denied. RLM shall submit to the **[*227]** Court, on ten days' notice to Plaintiffs' counsel, a proposed order consistent with this opinion.

Dated: New York, New York

April 30, 2001

LAURA TAYLOR SWAIN

United States District Judge