EXHIBIT A

BINGHAM

Donn P. Pickett
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July 2, 2009

Via Email and U.S. Mail

David L. Herron, Esq.
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071

Re: *AMD v. Intel* – Meet and Confer re Further Depositions

Dear David:

This letter (1) responds to your letters of June 30, 2009 and July 2, 2009, (2) summarizes our positions regarding the location, dates and duration of Intel's further depositions, and (3) addresses the parties' apparent dispute about one line of questioning.

Location. The need for additional deposition time was created by AMD's decision to block legitimate lines of questioning. As such, and as stated in our motion papers, we believe the depositions should take place in San Francisco. Alternatively, we would be willing to travel to Los Angeles, but strongly prefer San Francisco.

Dates. Intel continues to believe that the depositions should take place after Judge Poppiti returns from his vacation (*i.e.*, after July 15), so that he can resolve disputes during the depositions should they arise, as Judge Poppiti offered during the hearing. Of course, it is most efficient to schedule the depositions on the same day, or on consecutive days, to the extent possible. Here is an updated list of possible deposition dates for your consideration: July 22, July 30-31, August 3, and/or August 10-14.

Duration. We believe your two hour estimate is unrealistic and instead propose six hours of additional deposition time. First, we intend to ask the witnesses what they did to prepare for the further depositions and, with four witnesses, that will require additional time. Second, Intel was foreclosed from entire lines of questioning, and from exploring certain documents with the witnesses, and thus we will need sufficient time to conduct reasonable follow-up. As addressed next, it appears from your letter earlier today that the parties have a different view of what constitutes reasonable follow-up, and a different understanding of the Court's June 22 Order.

AMD's Knowledge of Facts Underlying Its Claims. AMD's antitrust claims are based on allegations of fact. The dates on which AMD learned those "facts" are relevant to the reasonable anticipation issue, and we will soon be presenting this matter to Judge Poppiti.

As noted in your letter, Judge Poppiti ruled that Question 93 was an appropriate question that seeks "factual information" that "is not protected by the attorney-client privilege." As

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such, AMD's objection and instruction to this line of questioning was improper. We look forward to your interrogatory response to that question.

Your suggestion that Intel has "waived" further questions on this topic is unsupported by the record. As you know, Judge Poppiti also ordered AMD to answer the following question (#41) during deposition: "When did AMD become aware of Intel contracts that AMD disputed as anticompetitive?" Had AMD answered the question, as Judge Poppiti ruled it should have, the logical and reasonable follow-up would have involved the various contracts AMD disputes as anticompetitive. *See, e.g.,* Complaint re HP (¶¶ 64, 80); Dell (¶ 38, 39); IBM/Lenovo (¶¶ 52, 76, 81, 84); Acer (¶¶ 79, 86); and Gateway/eMachines (¶ 50). As noted in my prior letter to Mark, Intel intends to ask whether AMD knew the information referenced in those portions of the Complaint as of certain dates – specifically, November 2004, January 2005, February 2005, and/or March 2005. It appears from your letter that AMD will designate Mr. McCoy on this topic, and we expect that he will be prepared to address these issues during the deposition.[1]

* * *

We should continue this discussion next week and reach agreement where possible. To the extent the parties' cannot agree, I suggest that the parties simultaneously submit letters (two pages max) to Judge Poppiti on July 15, 2009 at 5:00 p.m. EDT (the date he requested). I look forward to your response on these issues.

Sincerely yours,

Donn Pickett

Donn P. Pickett

cc: Mr. Eric Friedberg, Esq. (by email)
Ms. Jennifer Martin, Esq. (by email)
Mr. Jeffrey Fowler, Esq. (by email)

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[1] Intel made a clear record during the deposition that AMD was going to foreclose the entire line of questioning similar to the Sony question, which the Court has now ruled must be answered. *See* Question 94 ("Have you learned anything about AMD contracts with OEMs outside privileged communications?").

EXHIBIT B

BINGHAM

Donn P. Pickett
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June 18, 2009

Via Email and U.S. Mail

Mark A. Samuels
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071-2899

Re: *AMD v. Intel*: Follow-up to June 15, 2009 Hearing

Dear Mark:

This letter addresses certain issues raised during the June 15, 2009 hearing before Judge Poppiti on Intel's motion for further deposition testimony.

Deposition Schedule

During the hearing we agreed to meet and confer regarding the length and location of Intel's further depositions regarding AMD retention issues. To facilitate that discussion, we ask that you provide us with the names of the Rule 30(b)(6) witnesses that AMD intends to produce, and the subject matter(s) on which each will be designated. Once you provide that information, we will provide you with a proposal regarding the appropriate length and location of the depositions.

For scheduling purposes, please note that Intel would prefer to have Judge Poppiti available by telephone should any issues arise during the depositions. As such, we propose that the depositions be scheduled on the following days: June 29, 30 (before his vacation) and/or July 16, 17, 20, 23 (after his vacation).

Chart Item #45

Judge Poppiti asked the parties to meet and confer regarding the parameters of this issue, which concerns REDACTED

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Chart Item #93 (And Related Questioning)

Judge Poppiti granted Intel's request for further depositions on several questions related to the date on which AMD first reasonably anticipated litigation. *See* Court Chart dated 6/15/09 ("Anticipation of Litigation"; Items 40, 41, 67, 81, 82, 84, 85, 93, 96-99, 102, 110-111). Intel intends to ask these questions, as well as reasonable follow-up, and make use of any of the exhibits referenced in those questions.

Judge Poppiti suggested that Intel, in advance of further depositions, may want to provide AMD with more information relating to the type of question included as Item #93. Here is some information that may help you prepare a witness:

- Intel is interested in learning the date AMD first learned certain facts alleged in its Complaint. If it is not possible to identify a specific date, we expect AMD to provide a reasonable estimate, or at least to confirm or deny whether AMD knew the information as of certain date(s) preceding the filing of the Complaint that Intel may reference during the deposition – specifically, November 2004, January 2005, February 2005, and/or March 2005.

- Intel will be asking about the following OEMs and allegations referred to in AMD's Complaint: Sony (¶ 40); HP (¶¶ 64, 80); Dell (¶ 38, 39); IBM/Lenovo (¶¶ 52, 76, 81, 84); Acer (¶¶ 79, 86); and Gateway/eMachines (¶ 50).

- We expect AMD to discuss these issues in advance of the deposition with: (1) the AMD employees responsible for the OEMs listed above, (2) relevant members of AMD's management team who are ultimately responsible for these types of business relationships; and (3) the sources of information AMD used as a factual basis for making the allegations noted above. We are confident that AMD has also identified during the course of this case (*e.g.*, during deposition preparation) certain documents that help identify the timing of AMD's knowledge of these issues.

* * *

We look forward to your responses on these issues.

Sincerely yours,

Donn Pickett

Donn P. Pickett

cc: Mr. Eric Friedberg (by email)
Ms. Jennifer Martin (by email)
Mr. David Herron (by email)
Mr. Jeffrey Fowler (by email)

EXHIBIT C

United States District Court,
W.D. Washington.

CELLPRO, a Delaware Corporation, Plaintiff,
v.
BAXTER INTERNATIONAL, INC. an Baxter Healthcare Corporation, its Wholly-owned Subsidiary; and Becton Dickinson and Company, Defendant.
No. C92-715D.

Dec. 28, 1992.

David Jon Maki, Seed & Berry, Seattle, Wash., Coe A. Bloomberg, Roy L. Anderson, Lyon & Lyon, Los Angeles, Cal., for Cellpro.

Thomas W. Burt, Stephen Elliott DeForest, Riddell, Williams, Bullitt & Walkinshaw, Seattle, Wash., Michael Sennett, Bell Boyd & Lloyd, Chicago, Ill., for Baxter Intern., Inc., Baxter Healthcare Corporation.

David Everett Wagoner, Perkins Coie, Seattle, Wash., Donald R. Ware, Foley, Hoag & Eliot, Boston, Mass., Kenneth E. Madsen, Stephen J. Lee, Kenyon & Kenyon, New York City, for Becton and Dickson Co.

ORDER

DIMMICK, District Judge.

***1** THIS MATTER comes before the Court on plaintiff CellPro's motions to compel deposition testimony and for sanctions and to compel responses to requests for documents nos. 3 and 79. The Court having considered the memoranda and affidavits submitted by the parties hereby partially grants the motion.[FN1]

BACKGROUND

The dispute between plaintiff CellPro, and defendants Baxter International and Baxter Healthcare (Baxter), and Becton Dickinson (Becton) concerns patents held in part by defendants that relate to stem cell technology. CellPro filed this declaratory judgment action seeking a ruling that defendants' patents are invalid. Defendants responded with six motions to dismiss the action. The parties then stipulated to continue these motions so that the parties could conduct discovery, which they limited to the issues raised in the motions to dismiss.

The current motions to compel concern discovery that CellPro is attempting to conduct, which relates to the defendants' motion to dismiss for lack of subject matter jurisdiction. In that motion defendants argue that CellPro was not reasonably apprehensive of a patent infringement suit from defendants when CellPro filed its declaratory judgment action. To respond to this CellPro is seeking discovery from defendants that could show that defendants planned to sue CellPro for patent infringement, and that this intention was communicated to CellPro.

More specifically, the first motion to compel concerns the deposition of Russell D. Hays, who served as a vice president of defendant Baxter at the time this dispute arose. CellPro claims that in a series of meetings Hays informed CellPro that the defendants might sue CellPro for patent infringement. Hays no longer works for defendant Baxter, but when deposed he was represented by defendant Baxter's attorney. When CellPro tried to ask certain questions about Hays communications with CellPro, Baxter's attorney instructed Hays not to answer. In its motion to compel CellPro asks the Court to compel Hays to answer those questions.

The second motion to compel concerns requests for production of documents made by CellPro to defendants. CellPro is seeking in one request all communications made by defendants to CellPro, and all documents that refer to potential or actual communications to CellPro. In the other request in dispute CellPro is seeking all documents held by defendants which discuss CellPro, CellPro technology, patent applications or product, and potential or actual litigation between CellPro and defendants.

DISCUSSION

A. *CellPro's Motion to Compel Responses to CellPro's Document Requests Nos. 3 and 79.*

CellPro claims that its document requests nos. 3 and 79 are relevant, and thus that responses to the requests must be compelled. It claims the requests go to the question of whether CellPro had a reasonable apprehension of being sued by defendants for patent infringement, which is key to CellPro's defense of defendants motion to dismiss for lack of subject matter jurisdiction.

***2** The key to resolving this motion is determining what kind of discovery is relevant to the question of whether the Court has subject matter jurisdiction over this declaratory judgment action. Declaratory judgment actions are allowed so long as there is an actual controversy. 28 U.S.C. § 2201. Courts have developed a specific test for determining whether an actual controversy exists in patent infringement cases.

> First, the defendant's conduct must have created on the part of plaintiff a reasonable apprehension that the defendant will initiate suit if the plaintiff continues the allegedly infringing activity. Second, the plaintiff must actually have either produced the device or have prepared to produce the device.

Goodyear Tire & Rubber Co. v. Releasomers, Inc., 824 F.2d 953, 955 (Fed. Cir.1987). In the present action the question is whether defendant's conduct caused plaintiff to have a reasonable apprehension that defendants would sue plaintiff for infringement. The test is objective and is applied to the facts as they existed when the complaint was filed. *Arrowhead Industrial Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 736 (Fed. Cir.1988). Courts must look at the totality of circumstances to determine if a defendants' conduct could create a reasonable apprehension on the part of plaintiffs that they would be sued. *Id.* Because it is an objective test, it focuses on plaintiffs' knowledge of defendants acts, and whether their knowledge of defendants intentions could create a reasonable apprehension. Thus defendants subjective intent, which was not communicated to plaintiffs is not relevant to the determination.

One twist on the test allows a plaintiff to have reasonable apprehension if plaintiff or its customers face an infringement suit or threat of one. *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783-84 (7th Cir.1979). In that case the Court found evidence that plaintiffs in a declaratory judgment action learned that the defendant had contacted the plaintiffs' customers, and informed the customers that plaintiffs were infringing defendants' patents, and that the customers could be subject to patent infringement litigation. *Id.* Again, the focus is on what plaintiffs knew, and so the subjective intent of a defendant, or communications made to customers that plaintiff did not know about, are not relevant to the question of whether plaintiffs had a reasonable apprehension of suit.

Turning to the present action, the question is whether the material specified in plaintiffs requests for production nos. 3 and 79 is relevant to whether plaintiffs had a reasonable apprehension of suit. The court is mindful that discovery relevance is much broader than trial relevance, and thus includes any material that “appears reasonably calcu-

lated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1).

No. 3

Request for documents No. 3 asks for:

> All documents that constitute, mention, discuss or refer to potential or actual communications between CellPro, or anyone employed or retained by CellPro, and [defendants or their employees].[FN2]

***3** CellPro claims these documents are relevant because they can be used to impeach the affidavit and deposition statements of defendants former Vice President, Hays, who says he never threatened to sue CellPro, to discover if any threats were made to CellPro clients, and to show that defendants were trying to gain a competitive edge against CellPro by threatening a patent infringement suit.

Defendants argue that none of this information is relevant, because it all goes to their subjective intent. The only relevant evidence they argue, is evidence that should be in the hands of CellPro already, which would show objective proof that CellPro learned of defendants alleged intent to sue.

CellPro does have documentation, however, indicating that Hays implied that CellPro might be sued. In response Hays has testified he didn't make such a threat. The best way to verify which side is true is to get all contemporaneous documents produced by defendants that in any way speak about communications with CellPro about the patent. Thus defendants must fully respond to request no. 3.[FN3]

Request No. 79

Request No. 79 asks for:

> All documents, including agendas, minutes, memoranda and notes, that mention, discuss, describe or refer to meetings of (defendants] ... at which the subject of (a) CellPro, (b) CellPro technology, patent applications or product, and/or (c) potential or actual litigation between CellPro and (defendants] ... was mentioned or discussed.[FN4]

CellPro justifies this request on the same grounds as request No. 3. CellPro states that the information requested goes to documents that could impeach Hays, that could show defendants threatened or told CellPro clients of potential litigation, or that could show defendants were trying to gain a competitive edge against CellPro by threatening litigation. CellPro claims the requested information will also show what defendants actual posture was during the time in question. More specifically, CellPro offers an affidavit in a supplemental brief indicating that defendants told a potential CellPro client that defendants planned patent litigation against CellPro.

Defendants respond saying once again that any internal documents about CellPro are irrelevant, because they go to defendants subjective intent, rather than objective manifestations of their intent. Defendant concedes, however, that information given to a client, about which CellPro learned, is relevant, and defendants agreed to produce all documents relating to communications to that client that mentioned CellPro. However, defendants claim they are not required to respond to the general request about communications to clients, absent identification of specific CellPro clients who were told about potential litigation.

The Court agrees. Information about defendants' internal communications goes to defendants' subjective state of mind which is not relevant, and is not likely to lead to admissible evidence. Also, it could not be used to impeach Hays because it asks about info that was not communicated to CellPro.[FN5] The only way the information in request No. 79 would be relevant, is if it relates to communications with CellPro clients, but it will not become relevant unless CellPro can first identify that client. Thus the motion to compel a response to request no. 79 is

granted only to the extent that CellPro can identify a client that was contacted by defendants. Then defendants must, as they agree to, supply all the requested info regarding communications with that client.[FN6]

B. *CellPro's Motion to compel Deposition Testi mony and for Sanctions.*

***4** By this motion CellPro is seeking to compel Russel D. Hays to answer certain questions that he refused, at the advice of defendant Baxter's counsel, to answer during his deposition. As previously stated Hays is a key figure because it is he who CellPro claims communicated defendant Baxter's warning that they might sue CellPro for patent infringement. Hays is a nonparty now, because he stopped working for defendant Baxter in April 1992. However, he is represented by defendant Baxter's counsel, and the briefs that were submitted on his behalf opposing CellPro's motion were written by defendant Baxter's counsel.

Defendants claim this Court does not have jurisdiction to compel non-party Hays to answer any questions, or to sanction defendants or their attorneys for Hays failure to answer any questions, because "[a]n application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken." Fed.R.Civ.P. 37(a)(1). The Hays deposition was conducted in Massachusetts.

CellPro correctly points out, however, that it is not challenging Hays conduct, but instead is seeking an order against defendant Baxter and its counsel, who instructed Hays not to answer. "An application for an order to a party may be made to the court in which the action is pending." Fed.R.Civ.P. 37(a)(1). Because the motion does go to the conduct of Baxter's attorney, and accordingly against Baxter, the motion has been properly submitted to this Court.

Further, it appears that Hays can and should be treated as a party because at the time of dispute he was an officer of Baxter. Courts have held that a deponent can be termed a "managing agent" of a corporation when the deponent was acting as a managing agent at the time of the transactions, even if he is not in that role at the time of the deposition.[FN7] *Boston Diagnostics Development Corp., Inc. v. Kollsman Mfg. Co.,* 123 F.R.D. 415, 416 (D. Mass.1988). The chief concern is whether the deponent can be expected to identify himself with his employer or the other party. *Id.* While the classification of a managing agent and the assertion of jurisdiction over a deponent to compel answers to depositions are not exactly the same, they are sufficiently analogous to allow the Court to assert jurisdiction over Hays in this instance.

Defendant Baxter also objects to the filing of the motion because no Local Rule CR 37(g) conference was held prior to the filing of the motion. The Court will not deny the motion on these grounds. However, CellPro is warned that any future discovery motions will be summarily denied if it has not first participated in a 37(g) conference.

Substantively, CellPro argues that Baxter's attorney should not have instructed Hays not to answer, because the modern rules of discovery require an attorney to make his objection in deposition, allow the answer, and then challenge admissibility at trial. Fed.R.Civ.P. 30(c) states that "[e]vidence objected to shall be taken subject to the objections." Courts have held that "[c]ounsel for party had no right to impose silence or instruct witnesses not to answer and if he believed questions to be without scope of orders he should have done nothing more than state his objections." *Ralston Purina Co. v. McFarland,* 550 F.2d 967, 974 (4th Cir.1977)(quoting *Shapiro v. Freeman,* 38 F.R.D. 308 (D.C.N.Y.1965)).

***5** This is not an absolute rule. This is demonstrated by the existence of Rule 37, which is designed to allow parties to move to compel answers

to deposition questions. However, there is a presumption in favor of answering subject to objections, which shapes the Court's consideration of defendants objections during the Hays deposition. There are four main areas where defendant Baxter's counsel instructed Hays not to answer deposition questions.

First, Hays was instructed not to answer questions about whether any of CellPro's competitors accepted defendants terms for a license of the patents at issue. CellPro claims this is relevant to determine the reasonableness of its apprehension of suit, because it could lead to evidence that other entities also felt defendants were threatening litigation. This could lead to the discovery of admissible evidence, and Baxter's counsel should have allowed Hays to answer.

Second, Hays was instructed not to answer questions about the criteria Baxter used internally to decide to reject CellPro's offer in regards to a license for the patent at issue. This question is not calculated to lead to the discovery of admissible evidence on the jurisdictional issue, because it involves only Baxter's subjective views. This discovery should not be compelled.

Third, CellPro complains about defendant Baxter's attorney's statements during the deposition, in which he attempted to clear up whether Hays had attended three or four meetings with CellPro. CellPro claims the attorney testified for the witness, but does not indicate what remedy it is seeking for this. Further, it appears that on the following pages Hays clears up the confusion by saying there were four meetings. CellPro's criticism of these actions is without merit.

Fourth, CellPro claims that Baxter's attorney improperly stopped inquiry into the circumstances of meetings between Hays and CellPro. More specifically, CellPro has an internal memo, which was marked deposition exhibit 7, which implies that Hays told CellPro that defendants might sue over the patent. CellPro tried to question Hays about the material discussed in this memo, but was stopped by defendants counsel on two occasions. The contents of the memo were discussed by defense counsel during cross examination of Hays during the deposition, and CellPro should have been able to discuss with Hays his memory of the meetings described in the memo during re-direct. This memo and Hays meetings with CellPro go to the heart of whether CellPro had a reasonable apprehension of being sued.

In summary, the motion to compel deposition testimony is granted to the extent that defendant Baxter and Baxter's counsel are ordered to allow Hays to answer questions about whether any of CellPro's competitors accepted the terms of Baxter's license offer, and reasonable follow up questions that go to whether the offer included a threat of litigation, and to the extent that CellPro should be allowed to question Hays about the memo written about his meetings with CellPro. No other answers should be compelled. Further, defendant Baxter must pay the reasonable expenses of reconvening this deposition. However, the deposition should take place by phone, so no unreasonable expenses are incurred, and CellPro may not pursue any questioning beyond that allowed by this Order. Finally, neither side will be required to pay the other's expenses for bringing or opposing these motions as both were substantially justified in their arguments.

***6** THEREFORE, CellPro's motion to compel deposition testimony and for sanctions is PARTIALLY GRANTED pursuant to the terms of this order, and CellPro's motion to compel responses to document requests nos. 3 and 79 is PARTIALLY GRANTED pursuant to the terms of this Order.

The Clerk of the Court is directed to send copies of this Order to all counsel of record.

FN1. Defendants object to many of

CellPro's requests for discovery on the grounds that confidential business information is involved, and no protective order is in place. Since the filing of"this motion, the parties have agreed to a protective order, so all such objections will be disregarded.

FN2. The plaintiff sent this request to each of the three defendants, and used the individual name of each defendant in each separate request.

FN3. Defendants also object to the request for potential communications. The Court agrees that potential communications are not relevant because they go only to defendants subjective state of mind, and could not impeach Hays statement that no threat of a lawsuit was communicated to CellPro. Thus the motion to compel a response to request no. 3 is denied to the extent it relates to potential communications be denied.

FN4. Again, separate requests were sent to each of the three defendants, with the specific defendants name used rather than the generic term defendants.

FN5. Any internal communications that mention communications made by Hays or defendants to CellPro would have to be produced through request no. 3.

FN6. Defendant Becton filed a separate opposition to CellPro's motion to compel responses to request nos. 3 and 79. It claims to have complied with CellPro's requests, and claims that it could provide no information that could relate to Hays communications with CellPro because Hays was not an employee. However, Becton might have some info concerning Hays, communications to CellPro, or about any communications made by any of defendants to CellPro clients. Thus to the extent Becton has not replied to the requests, it is Ordered to comply according to the terms of this order.

FN7. Under Fed.R.Civ.P. 32(a)(1) a "managing agent" is someone who works for a party in a management role, and because of that role his deposition testimony can be used by a party adverse to his employer against his employer. Hays is similar to a managing agent because he was an officer, and thus his testimony can be used against defendants.

W.D.Wash.,1992.
Cellpro v. Baxter Intern., Inc.
Not Reported in F.Supp., 1992 WL 454839 (W.D.Wash.)

END OF DOCUMENT

Only the Westlaw citation is currently available.

United States District Court, C.D. Illinois.
Marie CIMAGLIA, Special Administrator of the Estates of Jane Ann McGrath, deceased, and Molly Morgan, deceased, et al, Plaintiffs,
v.
UNION PACIFIC RAILROAD COMPANY, Defendant.
No. 06-CV-3084.

Dec. 18, 2008.

West KeySummary
Federal Civil Procedure 170A 1271

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1271 k. Proceedings to Obtain. Most Cited Cases
A motion to compel discovery by the administrator of the estate of car passengers who had been killed in a train collision was denied. The administrator argued that a key witness had information about a potential eyewitness to the collision. The court, to ensure a fair process, had allowed the administrator to conduct limited supplemental discovery on the issue of the "witness." The Court was satisfied that the discovery that had been provided was sufficient to prevent any prejudice to the administrator. Furthermore, the discovery deadlines had long since passed.

Joseph B. Ori, Mark Peter Sutter, Alex D. Abate, Sutter & Ori LLC, Chicago, IL, Byron J. Sims, Phelps Kasten Ruyle Burns & Sims PC, Carlinville, IL, Robert L. Pottroff, Pottroff Law Office, Manhattan, KS, for Plaintiffs.

Thomas E. Jones, Harlan Harla, Thompson Coburn, Belleville, IL, for Defendant.

OPINION

BYRON G. CUDMORE, U.S. Magistrate Judge:

***1** This matter is before the Court on Plaintiffs' Motion to Compel Discovery and Motion for Sanctions (d/e 425). This case arises out of a collision between a Union Pacific freight train and a passenger vehicle that occurred on July 22, 2004, some time between 6:03 p.m. and 6:08 p.m. at the Cisco Road railroad crossing in Macoupin County, Illinois. The instant motion is brought pursuant to Fed.R.Civ.P. 37. Plaintiffs ask the Court to compel Defendant Union Pacific Railroad Company to produce Michael Rodriguez for a third deposition to answer questions regarding catastrophic grade crossing collision investigation materials and to produce the most recent (2004) version of Defendant's claim procedure manual. Plaintiffs also seek an order requiring Tracy Andrews to sit for a supplemental deposition regarding the "witness" and the note discussed in this Court's Opinion (d/e 397), dated July 25, 2008. The matter has been fully briefed and is ripe for determination. For the reasons set forth below, the Motion to Compel Discovery and Motion for Sanctions is denied.

The background of this litigation has been set out by this Court in prior orders and will not be restated here. Additionally, the Court will only briefly address the circumstances surrounding the "witness" and the handwritten note which are set forth in detail in this Court's Opinion (d/e 439), dated December 16, 2008. During the April 2008 deposition of Defendant's expert Roy Reynolds, Plaintiffs became aware of a handwritten note which indicated that an unnamed witness contradicted the train conductor's statement that the lights at the subject crossing were working at the time of the accident. After Plaintiffs filed a Motion to Compel (d/e 364) regarding the unnamed witness, asserting that Defendant erroneously failed to disclose this witness

during discovery, the Court determined that Reynolds, Scott Gunter, Steve Jackson, and Michael Rodriguez had knowledge relating to the handwritten note. In order to ensure a fair discovery process, the Court granted Plaintiffs the opportunity to take the deposition of Steve Jackson on the limited issue concerning the handwritten note, as well as the opportunity to take supplemental depositions of Mike Rodriguez and Scott Gunter, not to exceed four hours each, on the issue of the "witness" in the note. *Opinion (d/e 397), dated July 25, 2008.*

Plaintiffs filed notices of deposition for Jackson, Rodriguez and Gunter (d/e 399-404). Defendant moved to quash and asked this Court to reconsider its July 25, 2008 Opinion. *Motion to Quash (d/e 406); Motion for Reconsideration (d/e 408).* In a Text Order, dated August 8, 2008, District Judge Scott canceled the three depositions pending the resolution of the outstanding motions. In an Order (d/e 411), dated August 11, 2008, this Court denied Defendant's request for reconsideration and granted Plaintiffs leave to conduct "limited follow-up depositions" of Jackson, Rodriguez, and Gunter. *Id.*, p. 1-2. The Court noted that Defendant's assertion that, due to research required by Opinion (d/e 397), Defendant had identified "certain information to support its belief that the 'missing witness' was in fact Kimberly McGuire."*Id.*, p. 1. The Court, however, declined to take Defendant's assertion as negating Plaintiffs' need for limited follow-up depositions of Jackson, Gunter, and Rodriguez on the issue. The Court expressly stated that the depositions must be limited to four hours in length and "pertain to the issue of the 'witness' and the note discussed in Court's Opinion (d/e 397)."*Id.*, p. 2. The Court further directed as follows: "All of the three witnesses should be directed to bring to the deposition their entire file concerning the matter. However, the scope of any questioning of the three witnesses is limited to the 'witness' and any records/notes/documents relating thereto discussed at length in the Court's Opinion (d/e 397)."*Id.*

***2** The instant Motion incorporates by reference arguments raised in Plaintiffs' Motion for Sanctions (d/e 420). The Court has denied the Motion for Sanctions (d/e 420) and again rejects the arguments raised therein for the reasons stated in the prior opinion. *See Opinion (d/e 439), dated December 16, 2008.*The instant Motion further asserts that Defense Counsel Harla improperly directed Rodriguez not to answer a question at his supplement deposition inquiring whether "any investigation that would be performed should be performed to the standards outlined in the catastrophic grade crossing collision investigation materials?"*Motion to Compel and Motion for Sanctions*, Ex. A, *Deposition of Michael Rodriguez held August 21, 2008 (Rodriguez Dep.)*, p. 44-45. Plaintiffs ask the Court to compel Defendant to produce Rodriguez for a third deposition to answer questions regarding catastrophic grade crossing collision investigation materials and to produce the most recent (2004) version of Defendant's claim procedure manual.

Under Fed.R.Civ.P. 30(c)(2), a person may instruct a deponent not to answer when necessary "to enforce a limitation ordered by the court."This Court limited the scope of questioning at the supplemental deposition to the "witness" and the note discussed in the Court's Opinion (d/e 397). Plaintiffs' inquiry regarding the applicability of the standards outlined in the catastrophic grade crossing collision investigation materials is outside the scope of the limited follow-up allowed by the Court. Harla's instruction for Rodriguez not to answer the question did not violate Fed.R.Civ.P. 30, and Plaintiffs' request to compel a third Rodriguez deposition is denied. Plaintiffs' request for an order directing Defendant to produce the 2004 version of Defendant's claim procedure manual is also denied. The discovery deadlines have passed, and Plaintiffs fail to establish that the claim procedure manual falls within the scope of the limited follow-up allowed by the Court relating to the "witness" and the note.

Plaintiffs also ask the Court to order Defendant to

produce Tracy Andrews for a supplemental deposition regarding the "witness" and the note. Plaintiffs, however, fail to establish the necessity of a supplemental Andrews deposition, especially given the advanced stage of the proceedings. The record evidence relating to the "witness" and the note is as follows. Rodriguez testified that, at some point on the morning of July 23, 2004, he learned that Karen Willis had information about a potential eyewitness to the collision. *Rodriguez Dep.,* p. 48-49. Rodriguez could not recall where he got the information about Willis. *Id.,* p. 40, 49-52, 85. Rodriguez does not believe that he had information about the potential existence of an eyewitness before 8:00 a.m. on July 23, 2004. *Id.,* p. 40. He recalls telling Scott Gunter about Karen Willis between approximately 10:30 a.m. and noon on July 23, 2004. *Id.,* p. 79-81. The record reveals that Gunter called Steve Jackson at 12:35 p.m. on July 23, 2004. Gunter testified that he passed along information he received from Rodriguez that a witness said that the crossing lights were not flashing at the time of the accident. *Gunter Dep.,* p. 14-15. As set out in this Court's Opinion (d/e 397), the handwritten note at issue, created by Jackson, indicates as follows: "7/23/04 Scott Gunter ... Union Pacific RR 12:35 p.m.... Crossing has flashing lights. Conductor says they were working; A witness says they were not."*Opinion (d/e 397),* p. 2. Rodriguez called Willis at 3:37 p.m. on July 23, 2004. She told him that she knew of a person, Kim Maguire, who had preceded the Plaintiffs' vehicle through the crossing and that this person said that the flashers were not working. *Rodriguez Dep.,* p. 108. Willis told Rodriguez that Maguire worked at McDonald's. According to Rodriguez, immediately after the phone call, he and Andrews went to McDonald's to follow up on Maguire. Rodriguez called Kim Maguire at 3:59 p.m. after obtaining her phone number from someone at McDonald's and left a message. *Id.* Maguire was out of town at the time. Rodriguez eventually interviewed Maguire in person on July 27, 2004 and made handwritten notes which were produced at the deposition. *Id.* at 62. Rodriguez also produced a copy of a sticky note that was attached to his day planner on the page for July 23, 2004. *Defendant's Response to Plaintiffs' Motion to Compel Discovery and Motion for Sanctions,* Attachment 1, p. 14. The sticky note had Maguire's name and telephone number on it. According to Rodriguez, he wrote Maguire's name on the note and Andrews wrote Maguire's number on the note. *Rodriguez Dep.* at 57.

***3** According to Plaintiffs, Rodriguez's testimony regarding the time at which he became aware of an eyewitness conflicts with Andrews deposition testimony. An analysis of Andrews' deposition reveals no conflict. Rodriguez was Andrews' supervisor, and she was working with him on July 23, 2004, investigating the collision. Andrews testified that, on July 23, 2004, they did not find or contact anyone that had seen the incident. *Motion to Compel and Motion for Sanctions,* Ex. B, *Deposition of Tracy Andrews held August 21, 2008 (Andrews Dep.),* p. 120-21. When asked whether she came into contact with Kimberly Maguire at some point, Andrews testified that she did not, but stated that she was familiar with Maguire's name as a potential witness. *Id.,* p. 121. This testimony is not on its face inconsistent with Rodriguez's account that Maguire was out of town on July 23, 2004, and thus, he did not interview her until July 27, 2004. As the Court has previously noted, the discovery deadlines have long since passed in the instant case. Because the handwritten note regarding the witness did not surface until April 2008, the Court, to ensure a fair process, allowed Plaintiffs to conduct limited supplemental discovery on the issue of the "witness" and the note. The Court is satisfied that the discovery that has been provided in response to this Court's Opinions (d/e 397 & 411) is sufficient to prevent any prejudice to the Plaintiffs. The Court finds no reason to extend or expand discovery on this issue.

THEREFORE, for the reasons set forth above, Plaintiffs' Motion to Compel and Motion for Sanc-

tions (d/e 425) is DENIED.

IT IS THEREFORE SO ORDERED.

C.D.Ill.,2008.
Cimaglia v. Union Pacific R. Co.
Not Reported in F.Supp.2d, 2008 WL 5388330 (C.D.Ill.)

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Only the Westlaw citation is currently available.

United States District Court,
N.D. California.
GENENTECH, INC., et al., Plaintiffs,
v.
INSMED INCORPORATION, et al., Defendants.
No. C-04-5429 CW (EMC).

April 13, 2006.

M. Patricia Thayer, Ethan Glass, Heller Ehrman LLP, San Francisco, CA, William G. Gaede, III, McDermott Will & Emery LLP, Palo Alto, CA, for Plaintiffs.

Heidi Strain, George C. Best, Larry L. Shatzer, Liane M. Peterson, Foley & Lardner LLP, Washington, DC, David B. Moyer, E. Patrick Ellisen, Foley & Lardner LLP, Palo Alto, CA, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO COMPEL REOPENING THE DEPOSITION OF WILLIAM WOOD

EDWARD M. CHEN, States Magistrate Judge.

***1** The Defendants' motion to compel the further or reopening of the deposition of Dr. William Wood came on for hearing on April 12, 2006. Having considered the papers filed in support of and in opposition to the motion and the argument of counsel, and good cause appearing therefor, the Court hereby **GRANTS** the motion in part.

Plaintiff does not seriously contend that the deposition question posed to Dr. Wood-"Do you know why you're an inventor on the patent?"-directly implicates the attorney-client privilege. As established in the foundational voir dire conducted by counsel for Defendants, Dr. Wood had not discussed this issue in this case with any attorney. At most, Dr. Wood intimated that he has a "general" understanding as to why people are named as inventors on patents as a result of previous conversations involving attorneys, but those conversations were not in connection with this case. The relationship between his understanding as it pertain to his inventorship on the '287 patent and any prior conversations with attorneys about inventorship generally is extremely attenuated. His testimony regarding the '287 patent will not necessarily reveal the content of any specific attorney-client communication. In fact, Plaintiff has stated it is willing to allow Dr. Wood to answer the question and provide factual information in regard thereto if Defendants agree not to use any such testimony to claim a waiver of a privilege.

Rather than asserting a direct privilege, Plaintiff argues that by answering the question (and reasonable follow up) Dr. Wood would be testifying as to his state of mind and that this would open the door for a future waiver claim, citing the previous dispute over Dr. Clark's deposition testimony on the '151 patent and this Court's order of February 23, 2006 requiring *in camera* review and subsequent order of March 9, 2006 ordering production of one redacted document. Plaintiff seeks to prevent any such prospective waiver by stopping Dr. Wood from even opening the door via his testimony, at least until Judge Wilken has ruled on Plaintiff's objections to this Court's order.

The Court declines to do so. First, there is no dispute that the question seeks relevant information relating to the identity of the '287 patent's correct inventors. Nor is there any dispute that the information sought in the first instance is not privileged since it would not reveal any privileged attorney-client communication. Thus, the information sought is relevant, non-privileged, and discoverable under Rule 26(b). Plaintiff's counsel forthrightly conceded

at the hearing that he has not been able to find any case supporting the position that a party may block otherwise discoverable matters simply because it might eventually lead to a claim of waiver. There is no legal basis for Plaintiff's position.

Second, the risk of waiver is attenuated here. Neither side can point to any communication between Dr. Wood and counsel that is being sought and which might be subject to a waiver agreement. This stands in contrast to Dr. Clark's situation where there were communications with counsel clearly falling within the attorney-client privilege and subject to a waiver argument.

***2** Third, Plaintiff overstates the risk of waiver. Even if there were a specific communication put at risk of a waiver argument as a result of Dr. Wood's testimony, waiver would not follow automatically from such testimony. The legal issue implicated here is not fraud or inequitable conduct, but proper identification of inventorship. The former directly implicates concerns of fairness in permitting an opposing party an opportunity to refute exculpatory assertions as to state of mind otherwise irrefutable. *General Electric Company v. Hoechst Celanses Corp.*,1990 U.S. Dist. Lexis 14106 (D.Del.1990) at *25 ("fairness requires that defendants be allowed to uncover foundations for GE's assertions"); *Starsight Telecast, Inc. v. Gemstar Development Corp.*, 158 F.R.D. 653, 655 (N. D.Cal.1994) ("applying the rule of fairness").*Cf. Laser Industries, Ltd. v. Reliant Technologies, Inc.*, 167 F.R.D. 417, 447 (N.D.Cal.1996) (although rejecting waiver argument, holds it would be "unfair" for attorneys to testify at trial without giving opponent opportunity to examine confidential communications to confirm or refute). Such fairness concerns are less obvious in the context of inventorship determination. It may be that a different, more rigorous standard for waiver applies in this context.

Plaintiff's concerns are further exaggerated because even in the context of waiver where fraud or inequitable conduct is asserted, affirmative testimony about state of mind (beyond mere denial of inequitable conduct) that leads to *in camera* review (as this Court held it its February 23, 2006 order), does not necessarily result in disclosure. The waiver exception still must be narrowly construed and applied in determining whether documents should actually be disclosed. *Starsight Telecast, Inc.*, 158 F.R.D. at 655. The court still must determine "if facts relevant to a particular, narrow subject matter have been disclosed in circumstances in which it would be unfair to deny the other party an opportunity to discover other relevant facts with respect to that subject matter."*Id., quoting Hercules, Inc. v. Exxon Corp.*, 424 F.Supp. 136 (D.Del.1977). The court must consider "the subject matter of the documents disclosed, balanced by the need to protect the frankness of client disclosure and to preclude unfair partial disclosures."*Id., quoting American Standard, Inc. v. Pfizer Inc.*, 229 U.S.P.Q. 897 (D.Del.1986). Indiscriminate disclosure, even in the face of a waiver sufficient to permit *in camera* review, is not permitted. The courts, upon completing *in camera* review, have been selective in deciding which documents, if any, warrant disclosure. *See e.g. Starsight*, 158 F.R.D. at 655-56;*United States v. Oettinger*,1992 U.S. Dist. LEXIS 21087 (N.D.Cal.1992) at *2. In the case at bar, this Court ordered disclosure of only three paragraphs of one document.

In sum, the information sought does not infringe directly upon any attorney-client privileged communication. There is no legal basis for preventing deposition questions that seek relevant and non-privileged information on the ground that the answer could open the door to a future claim of waiver of the attorney-client privilege. Such an argument, moreover, is based on speculative concerns for the reasons stated above.

***3** Accordingly, the motion to compel the reopening of Dr. Woods deposition is granted. Defendants may ask Dr. Woods about his understanding as to

why he is listed as an inventor on the patent and reasonable follow up questions (such as the factual basis for his understanding) so long as no questions are asked which would elicit answers that would clearly reveal the protected content of any attorney-client communication. Dr. Woods may also be asked about his understanding as to why Dr. Baxter is listed as an inventor and the factual basis of such understanding.

As to the deposition questions regarding who devised certain experimental conditions, those questions, despite the assertion of an objection, were asked and answered. Therefore, the motion to compel as to those question is denied as moot.

This order disposes of Docket No. 330.

IT IS SO ORDERED.

N.D.Cal.,2006.
Genentech, Inc. v. Insmed Incorporation
Not Reported in F.Supp.2d, 2006 WL 988877 (N.D.Cal.)

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Only the Westlaw citation is currently available.

United States District Court, S.D. New York.
Theodore SMALLS, et al., Plaintiffs,
v.
Patrick FALLON, et al., Defendants.
No. 92 Civ 8191 (DLC) (BAL).

Jan. 5, 1995.

Robert Herbst, New York City.

Barbara W. Peabody, Asst. Corp. Counsel, New York City.

MEMORANDUM OPINION AND ORDER

LEE, United States Magistrate Judge.

***1** This is a federal civil rights action against the City of New York and one of its police officers, Patrick Fallon, arising out of an unlawful arrest.[FN1] It was referred to me for pre-trial supervision by the Hon. Kimba M. Wood, U.S.D.J., by Order of Reference entered May 17, 1994.[FN2] Presently before me is defendants' motion for a protective order pursuant to Rule 26(c), Fed.R.Civ.P., providing, with respect to plaintiffs' discovery requests served pursuant to Rules 33 and 34, Fed.R.Civ.P., that defendant Fallon's alcohol treatment records not be produced; or that, if production is required, it be made under carefully limited conditions, including *in camera* inspection.[FN3] Plaintiffs' opposing papers, although not cast in the form of a cross-motion, seek, in addition to the documents, an order that "Officer Fallon be directed to answer all questions about his alcoholism, treatment, and related matters at his deposition." [FN4] For the reasons discussed below, defendants' motion is granted; plaintiffs' motion is granted in part and denied in part; and all parties are to bear their own costs.

FACTS

The incident out of which this action arises occurred in the late evening of November 23, 1991. The complaint alleges that plaintiff Smalls was driving plaintiff Jacobs to work when their van was pulled over by a New York City Police patrol car. Defendant Fallon "verbally abused" the plaintiffs and, when they complained, "defendants"-*i.e.*, Fallon and "two John Does"-"arrested plaintiff Smalls on the false charges of attempted assault, resisting arrest, obstructing governmental administration, and failure to obey a police officer." [FN5] Plaintiffs further allege that excessive force was used in the arrest of Smalls, and that plaintiff Jacobs was threatened with arrest and was "physically bumped" by a "John Doe" who removed his badge.[FN6] After plaintiff Smalls spent approximately 24 hours in jail, all criminal charges against him were dropped.

Plaintiffs allege that the facts stated violated their rights under "the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §§ 1981, 1983 and 1985" [FN7] and also give rise to pendent State tort claims.[FN8] The City of New York ("City") is joined as a defendant on the basis of allegations that defendant Fallon and the other police officers acted pursuant to

a de facto policy or custom ... to punish summarily persons, especially those who may be members of minority racial or ethnic groups, who question or refuse to obey police orders or who appear to challenge police authority, whether lawfully exercised or not, by means of unlawful arrest, unlawful detention, and the excessive use of force[;] [FN9]

and that "supervisory and policy-making officers" with knowledge of the policy or custom "failed to

discipline or properly train" the officers involved. [FN10]

Defendants City and Fallon have denied the substantive allegations of the complaint and have pleaded affirmative defenses including, qualified immunity and probable cause to believe that "plaintiffs were committing or had committed or were attempting to commit a crime." [FN11]

***2** Plaintiffs served a First Set of Interrogatories and Request for Production of Documents, which included the following paragraph:

10. With respect to any medical, psychiatric or psychological treatment, including but not limited to consultation, examination or treatment relating to any illness or physical, mental or emotional condition, and including but not limited to alcohol, drug, psychological or emotional counseling, of the defendants, (a) state the dates when such treatment was received, (b) identify the provider of the treatment and the place where the treatment was provided, and (c) specifically describe the treatment provided, including but not limited to (1) the patient's history and symptoms then present, (2) a description of the medical, psychiatric, psychological or other tests which were employed and their results, (3) diagnosis and prognosis, if any, (4) a specific description of the course of treatment provided; and (5) the results obtained and any other pertinent details. Identify all documents relating to the treatment described above.[FN12]

In a joint letter submitted pursuant to my "Procedures for Informal Resolution of Discovery Disputes," defendants objected to the quoted request to the extent that it calls for "information and documents relating to defendant Officer Patrick Fallon's treatment for alcoholism." [FN13] The joint letter recites that "[p]laintiff was ... advised by defense counsel that Officer Fallon's name appeared in the Police Department's files for alcoholism and counseling, but that no documents or information relating to this would be forthcoming." [FN14] The objections were based on relevance; prejudice; and privilege pursuant to N.Y.Civil Rights L. § 50-a and 42 U.S.C. § 290dd-2.[FN15] By order entered June 23, 1992, I overruled defendants' objections without prejudice to renewal by motion on specified conditions. As to the objections based on § 290dd-2, the June 23 Order required that the motion be

supported by an affidavit on personal knowledge showing that the records in issue are "maintained in connection with the performance of any program or activity ... which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States" within the meaning of 42 U.S.C. § 290dd-2(a). In the event that such a motion is made, the parties are directed to file memoranda of law (and affidavit(s) if necessary) addressing the issue whether the criteria set out in 42 U.S.C. § 290dd-2(b)(2)(C) are satisfied.[FN16]

Despite these extraordinarily specific instructions, neither party has filed a memorandum of law or an affidavit on personal knowledge. In the conclusory attorney affidavits filed by both sides, only defendants discuss the statutory criteria and then only in the most general terms.

Defendants argue in substance that federal law creates a privilege against disclosure of records of treatment for alcohol abuse which is virtually absolute, arguing that "even the question of whether Officer Fallon has ever received treatment for alcoholism is included within the broad parameters of the federal statute and is not subject to disclosure," except by subpoena to the "custodian of the records" under the limited circumstances prescribed by the statute and the regulations adopted thereunder by the Secretary of the Department of Health and Human Services ("HHS").[FN17]

***3** Plaintiffs challenge the applicability of the federal confidentiality statute and argue that it should

in any event yield to the overriding policies of the federal civil rights laws because the information and documents sought are relevant to a number of issues raised by their Constitutional claims, including defendant Fallon's credibility.[FN18] In addition, plaintiffs argue that the records are relevant to certain issues of fact raised by their claim against the defendant City.[FN19]

Thus, despite the absence of briefs on the law, the motions raise three principal issues, all of which appear to be questions of first impression in this Circuit:

Defendants' motion raises (1) the preliminary question whether a party to a civil action seeking information protected by § 290dd-2 may proceed by a discovery request addressed to the adverse party under Rule 33 or 34, Fed.R.Civ.P., instead of a subpoena to the custodian of the records; and (2) the substantive issue whether plaintiffs have established that this case meets the statutory and administrative criteria under which a court may order defendant Fallon to produce the confidential documents or supply the information they contain. I conclude (Part I below, pp. 13-31) that defendants' objection based on statutory privilege is well founded; and that, although there is no prohibition against the procedure followed by plaintiffs here, they have failed to establish that this case comes within any of the very limited exceptions to the broad privilege created by § 290dd-2.

Plaintiffs' application, which I have treated as a cross-motion, raises the question whether, independent of the foregoing, any privilege or public policy permits Officer Fallon to refuse to answer deposition questions about whether, at times relevant to this lawsuit, he has suffered from or been treated for alcohol abuse or related problems. I conclude (Part II below, pp. 31-34) that the answer to this question is no, but that the scope of his deposition must be clearly limited to avoid encroachment on privileged matters. Directions for this purpose are given in the ordering paragraph, p. 35, below.

APPLICABLE LAW

To determine whether information about any alcohol treatment defendant Fallon may have received is protected from disclosure in a federal civil rights action against him, it is necessary to analyze the statute on which he relies in the context of the complex statutory and administrative scheme of which it is a part.

Confidentiality.

The provision here in issue, 42 U.S.C. § 290dd-2(a), as presently in effect, provides:

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e), be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b).

***4** Disclosure of patient records by a federally assisted alcohol treatment program, even when the patient consents to the disclosure, is strictly limited in accordance with regulations prescribed by HHS pursuant to delegated authority, 42 U.S.C. § 290dd-2(g), discussed below.

The original legislation protecting the confidentiality of treatment records was the Drug Abuse Office and Treatment Act of 1972, Pub.L. No. 92-255, § 408, initially codified as 21 U.S.C. § 1175 and thereafter as 42 U.S.C. § 290ee-1.[FN20] It was reenacted with slight modifications not here relevant in its present form as part of § 131 of the

ADAMHA Reorganization Act of 1992.[FN21] As now in effect, it consolidates in a renumbered single section former miscellaneous provisions relating to alcohol and drug abuse.[FN22]

From this extremely tangled web of legislative history (only part of which is summarized here), one thing is abundantly clear, namely that the Congressional purpose was to encourage government employees with substance or alcohol abuse problems to seek help without fear that they would be criminally prosecuted or fired. *See generally Ohta v. Muraski*, No. 3:93 CV 00554 (JAC), 1993 WL 366525 at *14-15, 1993 U.S.Dist. LEXIS 12693 (D.Conn. Aug. 19, 1993) (Cabranes, J.).

Permitted Disclosures.

Subsection (b) of § 290dd-2 permits disclosure of the content of patient records in connection with civil litigation, among other extremely limited circumstances,

[i]f authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.[FN23]

In addition, the 1992 legislation gave HHS a broad mandate to "prescribe regulations to carry out the purposes of this section," [FN24] including the explicit provision that the regulations
... may contain such definitions, and may provide for such safeguards and procedures, *including pro cedures and criteria for the issuance and scope of orders under subsection (b)(2)(C)* of this section, as in the judgment of the Secretary are necessary or proper to effectuate the purposes of this section, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.[FN25]

HHS regulations pursuant to § 290dd 2.

HHS has defined "good cause," within the meaning of § 290dd-2(g), as requiring the court to find that

(1) Other ways of obtaining the information are not available or would not be effective; and

(2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.[FN26]

***5** In addition, the Regulations provide that a "general authorization for the release of medical or other information is NOT sufficient to constitute consent of the patient"; [FN27] prescribe the specific content of an order authorizing disclosure in the absence of consent; [FN28] and provide that a court order need not be obeyed unless accompanied by a subpoena "or a similar legal mandate." [FN29] Section 2.63(a) prescribes the "only" conditions under which "[a] court order under these regulations may authorize disclosure" of communications between the patient and the facility, *i.e.*, where
(1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;

(2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or

(3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

The validity of the Secretary's authority to prescribe the scope of a judicial order under the predecessor of § 290dd-2 was upheld by the First Circuit in *Whyte v. Connecticut Mut. Life Ins. Co.,* 818 F.2d 1005, 1010 (1st Cir.1987). As originally promulgated, § 2.63 permitted disclosure of certain "objective data" but excluded confidential communications, 40 Fed.Reg. 27,802 (1975), quoted in *Whyte,* 818 F.2d at 1009, n. 4. The present version was adopted in 1987, 52 Fed.Reg. 21,803 (1987). The few district courts that have considered the question have interpreted the 1987 amendment as narrowing the scope of permitted disclosure, so that the specific findings of fact required for a court order disclosing confidential communications are also required for "objective data." *See Mahoney v. Village of Fox Lake,* No. 90 C 1415, 1990 WL 251808 at *2, 1990 U.S.Dist. LEXIS 12112 (N.D.Ill. Sept. 12, 1990); *see also Cybok v. Niagara Mach. & Tool Works,* No. 90-2721, 1990 WL 182126 at *2, 1990 U.S.Dist. LEXIS 15792 (E.D.Pa. Nov. 26, 1990).

In addition, construing the words "directly or indirectly assisted by any department or agency of the United States" as used in § 290dd-2(a), HHS has adopted a broad definition of eligible programs:

An alcohol abuse or drug abuse program is considered to be federally assisted if:

(3) It is supported by funds provided by any department or agency of the United States by being:

(i) A recipient of Federal financial assistance in any form, including financial assistance which does not directly pay for the alcohol or drug abuse diagnosis, treatment, or referral activities; or

***6** (ii) Conducted by a State or local government unit which, through general or special revenue sharing or other forms of assistance, receives Federal funds which could be (but are not necessarily) spent for the alcohol or drug abuse program.[FN30]

DISCUSSION

I. *DEFENDANTS' MOTION FOR A PROTECTIVE ORDER.*

A. *Preliminary Procedural Issues.*

1. *Use of Rules 33 and 34, Fed.R.Civ.P.*

Defendants oppose production in part on the basis that plaintiffs have failed to follow "procedures outlined by the regulations." [FN31] Although their argument is difficult to follow, they seem to interpret § 2.64 as requiring the court (1) to give the "patient" an "opportunity to respond in writing or appear at a hearing (in chambers)" and (2) to conduct "any proceedings for disclosure ... on notice to the custodian of the records, so that they may provide evidence on the statutory criteria for issuance of the order." [FN32]

Section 2.64 provides in pertinent part:

§ 2.64 Procedures and criteria for orders authorizing disclosures for noncriminal purposes.

(a) Application. An order authorizing the disclosure of patient records for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure which is sought. The application may be filed separately or as part of a pending civil action in which it appears that the patient records are needed to provide evidence. An application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the

patient is the applicant or has given a written consent (meeting the requirements of these regulations) to disclosure or the court has ordered the record of the proceeding sealed from public scrutiny.

(b) Notice. The patient and the person holding the records from whom disclosure is sought must be given:

(1) Adequate notice in a manner which will not disclose patient identifying information to other persons: and

(2) An opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order.

Since in this case the "custodian" of the records is the defendant City itself,[FN33] the argument is technical, if not frivolous. In any event, I do not construe § 2.64 as overriding Rules 33, 34 and 45 of the Federal Rules of Civil Procedure-a result which, even if framed in the most explicit terms, is not within the jurisdiction of HHS. Section 290dd-2(g) did not repeal or amend 28 U.S.C. § 2072.

What § 2.64 does accomplish is to provide additional protection to patients whose records are subpoenaed in cases to which they are not parties. In criminal cases, for example, where the patient is often a key prosecution witness, he or she would not, in the absence of the regulation, have knowledge of the request or standing to object. *See, e.g., United States v. Cresta,* 825 F.2d 538, 552 (1st Cir.1987), *cert. denied sub nom. Impemba v. United States,* 486 U.S. 1042 (1988); *United States v. Smith,* 789 F.2d 196, 205 (3d Cir.), *cert. denied,* 479 U.S. 1017 (1986); *United States v. Graham,* 548 F.2d 1302, 1314-15 (8th Cir.1977).

***7** In this case both the "patient" (defendant Fallon) and the "custodian" (the defendant City) have had an opportunity to be heard by making this motion, which is being decided in accordance with the criteria specified in the statute and regulations. Rule 26(c), Fed.R.Civ.P., gives the court broad discretion to fashion any conditions, including conditions of confidentiality, that may be appropriate "where justice requires, to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." It is difficult to see what, other than expense and delay to both parties, would be gained by requiring plaintiffs to seek a separate court order directing production by the Alcohol Treatment Program of the New York City Police Department.[FN34]

Since, as discussed below, I sustain the defendants' objections on grounds of privilege, there is no need to reach the question whether, if "good cause" had been established, *in camera* inspection of the documents prior to disclosure or other safeguards under Rule 26(c) would be appropriate.

2. *Federally funded program.*

Plaintiffs' opposing papers raise the issue whether the New York City Police Department Alcohol Treatment Program is federally funded, and therefore within the scope of § 290dd-2. Although both parties have vigorously argued this issue, the plain language of the statute makes clear that it applies to any program "directly or indirectly assisted by any department or agency of the United States." [FN35] HHS regulations provide even more explicitly that a State or local government unit is covered if it, among other alternatives, "receives Federal funds which could be but are not necessarily spent for the alcohol or drug abuse program." [FN36]

Defendants allege that "the City receives federal financial assistance for various purposes which are deposited in the general fund, and money from this fund is available for various Police Department expenditures." [FN37] These facts are uncontroverted. Plaintiff argues only that the quoted allegation is

"broad [and] conclusory." [FN38] But it is the statute and regulations which are broad in their coverage, and the affidavit of the City's attorney, stating the obvious, is sufficient to establish that any alcohol treatment program operated by the New York City Police Department is covered by the statute.[FN39]

B. *Applicability of § 290dd 2 in Federal Civil Rights Cases.*

It is hornbook law that

In ascertaining what the words in a statute mean, we start with the familiar maxim that one must look first to the words Congress used because "a court should presume that the statute says what it means." ...When the words selected by Congress to be included in a statute are clear and unambiguous, judicial inquiry ends.... At that point, a court's sole function is to give effect to the statute according to its terms.

Wetzler v. F.D.I.C., 38 F.3d 69, 73 (2d Cir.1994) (quoting *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir.1993)); *see also Connecti cut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).

***8** Applying these familiar maxims, I conclude that § 290dd-2 is applicable here; and that plaintiffs have not made the requisite showing of "good cause" for disclosure.

Cases such as *King v. Conde*, 121 F.R.D. 180, 195 (E.D.N.Y.1988), relied on by plaintiffs for the proposition that the policies underlying the federal civil rights laws override the interests protected by state evidentiary privileges, are not applicable here.[FN40] Here the protected interests arise under *federal* law, and neither the statute nor the regulations includes any express exception for federal civil rights cases. Nor has our research discovered any reported decisions construing the statute or regulations to create any exception not explicitly mentioned.

In criminal cases in which defendants have sought production of records protected by § 290dd-2 or predecessor statutes to impeach the credibility of key prosecution witnesses, the confidentiality of the records has repeatedly been upheld. *E.g.*, *Cresta*, 825 F.2d at 552; *Smith*, 789 F.2d at 205; *Graham*, 548 F.2d at 1314-15.

Although plaintiffs cite criminal cases in which defendants were allowed access to records otherwise confidential under State law,[FN41] the opposite result has more often been reached in determining whether confidential alcohol and substance abuse records protected by federal statute should be released in similar circumstances. The rationale is explained in *Graham*, where the Eighth Circuit held that "the public interest in the confidentiality of these patient records ... far outweighed the defendants' need for this information" in a criminal case. In support of its reasoning, the court quoted from the Conference Report on former 21 U.S.C. § 1175, now incorporated in 42 U.S.C. § 290dd-2:

[T]he strictest adherence to the provisions of § 1175 is absolutely essential to the success of all drug abuse prevention programs. Every patient and former patient must be assured that this right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have is this tragic national problem is to be overcome.[FN42]

The same reasoning has been applied in civil cases, *e.g.*, *Whyte*, 818 F.2d at 1010 (defendant insurance company denied access to alcohol treatment records bearing on issue whether insured died accidentally or committed suicide); *Conway v. Icahn & Co., Inc.*, No. 89 Civ. 3995(RJW), 1993 WL 205136, 1991 U.S. Dist. LEXIS 21026 (S.D.N.Y. May 10, 1991) (Ward, J.) (*in camera* examination, pursuant

to former § 290dd-3, of hospital records bearing on issue of plaintiff's competence at time of alleged securities fraud; any records produced in violation of statute would be inadmissible at trial); *Cybok,* 1990 WL 182126 at *2.

In *Whyte,* which appears to be the leading civil case construing the statute, the First Circuit applied essentially the same reasoning as in *Graham,* finding the purpose of the statute "clear":

***9** Congress recognized that absolute confidentiality is an indispensable prerequisite to successful alcoholism research. Moreover, confidentiality is necessary to ensure successful alcoholism treatment. Without guarantees of confidentiality, many individuals with alcohol problems would be reluctant to participate fully in alcoholism programs.[FN43]

The court held that this policy was so strong it should survive the death of the patient because, among other reasons,
the fear of post mortem disclosure may dissuade others who need treatment from seeking help or may prevent them from communicating with program personnel with the candor necessary for effective treatment.[FN44]

Finally, the court expressly rejected a balancing argument similar to the one advanced by plaintiffs here. Citing *Graham,* the Eighth Circuit held that
Notwithstanding [defendant's] assertion that [decedent's] statements during treatment provided needed evidence on a key issue, the regulations place the confidentiality necessary to ensure the success of alcoholism treatment programs above that need.[FN45]

The parties cite no federal civil action involving discovery of records protected by § 290dd-2, and our own research has discovered only two. In *Mahoney,* 1990 WL 251808, 1990 U.S. Dist. LEXIS 12112, plaintiffs sued for the death of their decedent while in police custody, alleging use of excessive force. Defendants subpoenaed medical records which they contended were relevant to the decedent's mental state. Citing *Whyte,* the court quashed the subpoena, reasoning that

Without the guarantee of confidentiality, many persons dependent upon alcohol or drugs would be reluctant to participate in alcohol or drug rehabilitation programs. The *Whyte* court further noted that even if the patient is dead, the fear of post mortem disclosure and harm to the patient's family and reputation could dissuade individuals who need treatment from seeking help or prevent them from communicating with program personnel with the candor necessary for effective treatment.

1990 WL 251808 at *2.

O'Boyle v. Jensen, 150 F.R.D. 519, 521 (M.D.Pa.1993), reached the opposite result on similar facts. The court held that there was "good cause" for disclosure of the decedent's alcohol treatment records within the meaning of § 290dd-2(a) because the plaintiff, by bringing the action, had placed in controversy the cause of her decedent's death, and "[t]he possibility cannot be ruled out at this stage that O'Boyle's death may have resulted from a pre-existing condition related to alcoholism or drug abuse." [FN46]

In sum, the decisions applying § 290dd-2 and its predecessors provide no support for plaintiffs' argument that the statute and regulations should not be applied in federal civil rights cases. Since there is no express exception in the statute itself, I conclude that it is applicable and proceed to the question whether plaintiffs have shown "good cause" for discovery of the confidential information they seek, within the meaning of § 290dd-2(b)(2)(C) and 42 C.F.R. §§ 2.63 and 2.64(d).

C. *Insufficiency of Plaintiffs' Showing of "Good Cause."*

***10** In contrast to the general rule that the party invoking a privilege has the burden of establishing it, *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir.1989), *cert. denied*, 112 S.Ct. 55 (1991); *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987), the party seeking disclosure of records protected by § 290dd-2 bears the burden of establishing "good cause." *Cresta*, 825 F.2d at 552; *In re August, 1993 Regular Grand Jury (Hospital Subpoena)*, 854 F.Supp. 1380, 1383 (S.D.Ind.1994).

Plaintiffs make three arguments for disclosure of confidential information relating to any alcohol treatment of defendant Fallon: (1) the possibility that it "might" explain his behavior and condition at the time of the incident; (2) its possible usefulness for impeachment purposes; and (3) its relevance to their claims against the City for negligent supervision and discipline.[FN47]

At the outset it must be noted that plaintiffs have made no showing that any of their arguments for discovery of the confidential records comes within the very narrow requirements for issuance of a court order pursuant to 42 C.F.R. § 2.63(a) as presently in effect, quoted above, p. 11: no prospective harm to the plaintiffs is in issue that might bring subsection (a)(1) into play; plaintiffs are not law enforcement agencies entitled to invoke subsection (a)(2); and defendant Fallon has not, in this action, "offer[ed] testimony or other evidence pertaining to the content of the confidential communications" so as to effect a waiver pursuant to subparagraph (a)(3).

If § 2.63(a) were the only applicable regulation, the matter would end there. Section 2.64(d)(2), however, quoted above, p. 10, would appear to permit a somewhat broader definition of "good cause," raising the issue of how the two regulations are to be read together.[FN48] In light of both the literal language of § 2.63(a) and the 1987 amendment which narrowed its scope, the more rational reading is that § 2.63(a) is a limitation on the definition of "good cause" found in § 2.64(d)(2). In other words, to read the two regulations consistently, the stricter requirements of § 2.63(a) must be read as limitations on the more general language of § 2.64(d)(2).

If the reverse were true-*i.e.*, if § 2.64(d)(2) were construed to prevail over § 2.63(a)-the three arguments advanced by plaintiff would nevertheless not amount to "good cause." Although not necessary to this decision in light of the preceding paragraph, we nevertheless discuss the reasons why each of plaintiffs' arguments is insufficient.

1. *Explanation of defendant's contemporaneous behavior.*

a. *Federal civil rights claims.*

Plaintiffs argue that the confidential information "might explain [Fallon's] otherwise bizarre, unprofessional and unjustified behavior during the incident" and whether his "emotional problems or conditions ... led him to lash out so irrationally in this case." [FN49] Defendant's state of mind or "condition" is however irrelevant in a § 1983 action against a police officer, where liability depends upon the objective reasonableness of the defendant's actions, without regard to their underlying motives or attitude toward the suspect, *Graham v. Connor*, 490 U.S. 386, 394 (1989); *Miller v. Lovett*, 879 F.2d 1066, 1070 (2d Cir.1989). Whatever the evidence may ultimately show defendant Fallon to have done on the night in question, nothing in the confidential records will bear on the dispositive issue whether his conduct was objectively reasonable in the circumstances.[FN50]

b. *Pendent tort claims.*

***11** To the extent that plaintiffs' claims arising un-

der State law may involve elements of subjective intent-an issue not briefed by the parties and not determined here-the situation is the reverse of *King v. Conde,* 121 F.R.D. 180: the strong policy of confidentiality reflected in § 290dd-2, as repeatedly reemphasized in the legislative history and appellate decisions discussed above, overrides plaintiffs' interests in vindicating their State-law rights. Although this too would be a question of first impression if it were necessary to the decision in this case, the pre-eminence of the confidentiality statute even in criminal cases would certainly militate against subordinating it to pendent tort claims arising under State law. *Cf. Whyte,* 818 F.2d at 1010 and authorities cited (regulations place confidentiality of alcohol treatment programs "above" adverse party's assertions that decedent's statements during treatment provided "needed evidence on a key issue").

c. *Defenses.*

Finally, none of the defenses raised by Fallon in his Answer raise issues of his subjective intent to which his confidential communications with treating personnel would be relevant.

Qualified Immunity. Defendants' Second Defense asserts that "Patrick Fallon acted with a good faith belief that their [sic] actions were lawful, proper and constitutional and therefore, defendants are entitled to immunity from liability for damages." [FN51] This defense too depends on objective criter- ia:

The qualified immunity doctrine shields government officials performing discretionary functions from liability for civil damages insofar as their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."

Piesco v. City of New York, 933 F.2d 1149, 1160 (2d Cir.), *cert. denied,* 112 S.Ct. 331 (1991) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). Moreover,

Even where the rights were clearly established, officials are immune if it was *objectively reasonable* for them to believe that their acts did not violate those rights.... An official does not have immunity, however, where the contours of the right were sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Id. (emphasis added); *see generally Anderson v. Creighton,* 483 U.S. 635, 639-40 (1987). The test then is not what defendant Fallon, drunk or sober, may have believed; but what a reasonable officer would believe in this circumstances. The documents sought by plaintiffs would cast no light on that issue.

Probable Cause. Defendants' Sixth Defense, based on probable cause for arrest of the plaintiffs,[FN52] is likewise governed by objective criteria. *See gen erally Whitely v. Warden,* 401 U.S. 560 (1971) (test of probable cause as stringent for warrantless arrests as for issuance of arrest or search warrant); *Illinois v. Gates,* 462 U.S. 213 (1983) ("totality of circumstances" test); *United States v. Towne,* 870 F.2d 880, 885 (2d Cir.) ("objectively reasonable"), *cert. denied,* 490 U.S. 1101 (1989).[FN53]

***12** *Credibility.* Plaintiffs also argue that Fallon's treatment records are relevant to his credibility, contending that

Fallon is the critical defense witness in his case, and his testimonial capacity-his ability to accurately perceive, remember and recount events at issue-is very relevant, and would be affected by alcohol abuse or by the underlying conditions causing it.[FN54]

Plaintiffs, however, have proffered no factual predicate for a finding that the defendant suffers from a mental condition or disability severe enough to meet the stringent federal test, summarized in *United States v. Butt,* 955 F.2d 77, 82-83 (1st Cir.1992):

[F]ederal courts appear to have found mental instability relevant to credibility only where, during the time-frame of the events testified to, the witness exhibited a pronounced disposition to lie or hallucinate, or suffered from a severe illness, such as schizophrenia, that dramatically impaired her ability to perceive and tell the truth.

The *Butt* test was applied by the Second Circuit in *United States v. Friedman*, 854 F.2d 535, 571 (2d Cir.1988), *cert. denied*, 490 U.S. 1004 (1989). In that case, the Court of Appeals upheld an order quashing a subpoena calling for a co-defendant's psychiatric records where the trial court, after *in camera* inspection, had found that "nothing in the psychotherapist's notes casts any doubt upon [co-defendant's] ability to understand and relate the truth." *See also Cresta*, 825 F.2d at 551-52 (trial court's denial of access to records protected by the predecessor of § 290dd-2 for purposes of cross-examination affirmed despite evidence that the prosecution witness "had used cocaine during the crime itself"); *Smith*, 789 F.2d at 205-06 ("public interest requiring confidentiality" held to outweigh defendant's interest in impeaching credibility of prosecution witness). The rationale of *Smith* is of particular interest here because, if prejudice to "a public interest requiring confidentiality" outweighs the interests of a defendant in a criminal case, the same result should apply *a fortiori* in a civil case, where no liberty interest of the party seeking disclosure is at stake.

Whether defendant Fallon was drunk at the time of the incident out of which this case arises is a different question, which may well bear on his ability to remember what occurred. There is, however, no basis for supposing that any treatment records will contain any information that would be admissible on the issue whether he was impaired, within the meaning of *Butt* and *Friedman*, during the late evening hours of November 23, 1991. Plaintiffs' argument to the contrary is sheer speculation.

2. *Relevance to Plaintiffs' Claims Against the City.*

Finally, plaintiffs argue that defendant Fallon's treatment records are relevant to their claims against the defendant City for negligent supervision and discipline to the extent that they relate to

***13** 1) Fallon's fitness as a police officer, 2) the Police Department's awareness or lack of awareness of Fallon's drinking problem or the emotional and psychological problems underlying it, and 3) the effectiveness of the Police Department's processes or procedures for monitoring its employees for substance abuse and other health, psychological or emotional problems bearing on their fitness as police officers.[FN55]

In addition, plaintiffs seek to explore "whether or not [Fallon] was being monitored for his alcohol abuse and emotional problems," as well as any possible "correlation" with prior civilian complaints against him.[FN56]

It is difficult to follow the reasoning that an individual defendant's treatment records bear on whether he was adequately supervised by the Police Department. The relevant inquiry is not what treatment the officer received, but whether his supervisors knew or should have known that he had a problem that interfered with the performance of his duties. Treatment records, even if otherwise discoverable in accordance with the criteria of § 290dd-2(b)(2)(C), are unlikely to lead to any admissible evidence of what the patient's supervisors knew or should have known. The proper means of pursuing that inquiry is through the defendant officer's personnel records, disclosure of which has already been ordered [FN57] or deposition questions to his immediate superiors. Careful preparation of questions to elicit information about the supervisors' knowledge may require more work than a fishing expedition through medical records, but it is also more likely to lead to the discovery of admissible evidence.

In summary, defendant Fallon's alcohol treatment records are privileged from disclosure under 42 U.S.C. § 290dd-2(a), because, although discoverable in a civil action if the requisite showing of "good cause" is made pursuant to § 290dd-2(g) or the regulations adopted by HHS thereunder, plaintiffs have not made that showing on this record. Accordingly, defendants' motion for a protective order is granted.

D. *State Statute Regarding Disclosure of Police Files.*

Since the documents sought are protected by federal statute, it is unnecessary to reach defendants' alternative argument that they are protected against disclosure by New York Civil Rights Law § 50-a.[FN58] It is well settled that that section creates no independent evidentiary privilege, but merely establishes a procedure for a preliminary judicial determination of the relevance of police files subject to disclosure in a civil action, *Unger,* 125 F.R.D. at 69; *Martin v. Lamb,* 122 F.R.D. 143, 146-47 (W.D.N.Y.1988); *King,* 121 F.R.D. at 191-92, a procedure that in any event is not directly applicable in a federal civil rights action, *Unger,* 125 F.R.D. at 69; *King,* 121 F.R.D. at 187; *Boyd v. City of New York,* No. 86 Civ 4501(CSH), 1987 WL 6915, 1987 U.S.Dist. LEXIS 104 (S.D.N.Y. Feb. 11, 1987); *Burke v. New York City Police Dep't,* 115 F.R.D. 220, 224 (S.D.N.Y.1987). While it is doubtful that § 50-a applies in any event to documents maintained by a third party, defendants have in any event made no effort to make the record required for invocation of that section, relying instead on the more generalized showing sufficient for the broader protection of the federal statute.[FN59]

II. *PLAINTIFFS' CROSS MOTION FOR AN ORDER AS TO THE SCOPE OF DEFENDANT FALLON'S DEPOSITION.*

***14** While defendant Fallon's treatment records are privileged for the reasons discussed above, the scope of his deposition is an entirely different issue. There is nothing in the federal confidentiality statute to indicate that a defendant by entering a treatment program casts a cloak of secrecy over everything he may have done while impaired.

The parties cite no reported decisions on this issue and our own research has discovered none. Both the language and the history of § 290dd-2, discussed above, pp. 8-9, support the interpretation that it is the confidential communications that are protected from disclosure, not the underlying facts. So too, by way of analogy, does the reasoning underlying decisions limiting other privileges in similar circumstances.

If defendant Fallon had discussed the matter with his attorney, he could be questioned about it on deposition, because the attorney-client privilege, founded on a similar policy of encouraging the client to speak freely to counsel without fear of disclosure, protects only the communication, not the underlying facts. *Upjohn Co. v. United States,* 449 U.S. 383, 395 (1981); *In re Six Grand Jury Witnesses,* 979 F.2d 939, 944 (2d Cir.1992), *cert. denied sub nom., XYZ Corp. v. United States,* 113 S.Ct. 2997 (1993); *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983,* 731 F.2d 1032, 1037 (2d Cir.1984); *Solomon v. Scientific Am., Inc.,* 125 F.R.D. 34 (S.D.N.Y.1988). The Second Circuit has also applied this principle to a claim of privilege based on attorney work product. *In re Six Grand Jury Witnesses,* 979 F.2d at 944 ("merely by asking witnesses to conduct an analysis defense counsel may not thereby silence all the key witnesses on the cost aspects [of the contracts in issue] under either claim of privilege").

The same reasoning is applicable here.

Just as a client " 'cannot conceal a fact merely by revealing it to his lawyer,' " *Upjohn,* 449 U.S. at

396 (quoting *State ex rel. Dudek v. Circuit Court,* 34 Wis.2d 559, 580, 150 N.W.2d 387, 399 (1967)), so a defendant in a civil rights action cannot conceal facts pertinent to the plaintiffs' claims by discussing them with treating professionals. The discussions are protected; the conduct of the defendant is not. Any other result would transform a statute designed to encourage police officers to seek treatment for substance abuse into a shield against liability for civil wrongs committed while impaired. Both the plain language of the statute and its legislative history, pp. 8-9, above, make clear that Congress never intended such a result.

In summary, plaintiffs are entitled to inquire whether defendant Fallon was drunk on the night in question; he cannot unilaterally deprive them of that evidence by discussing the facts in a privileged communication.

While the privilege created by § 290dd-2 does not extend to the underlying facts, the converse is also true: plaintiffs may not, in the guise of inquiring about the underlying facts, use the deposition of defendant Fallon to obtain the content of privileged communications and related treatment information that is otherwise privileged under the statute. Defendants' argument that "plaintiffs should be limited to questions relating to Officer Fallon's use of alcohol on the night in question," [FN60] while essentially correct, may, however, be susceptible to too narrow an interpretation. For example, a denial by the deponent that he had anything to drink on the night in question should not foreclose reasonable follow-up questions designed to test the credibility of the answer or the accuracy of the recollection on which it is based. There is an obvious tension between the two rules, that requires careful definition of the scope of the deposition and careful preparation on the part of the questioner to stay within that scope.

***15** As to the scope of defendant Fallon's deposition, my ruling may be summarized as follows: plaintiffs may inquire as to Fallon's drinking on the night in question and may ask reasonably related questions bearing on the credibility of whatever answers he gives. They may not, however, inquire about "what emotional problems or conditions led to Officer Fallon's drinking" or the "underlying conditions" they conjecture may have caused his alleged alcohol abuse.[FN61] A police officer's mental health is not placed in issue solely by virtue of allegations of excessive force. *Unger,* 125 F.R.D. at 71.

Counsel are cautioned to frame questions carefully to avoid disputes if possible. If disputes arise, they are to be submitted by telephone conference, on the record, in accordance with my "Procedures for Informal Resolution of Discovery Disputes." If the parties anticipate a lengthy deposition and the possibility of numerous disputes, they may wish to notice it for the new United States Courthouse at 500 Pearl Street, at 9 a.m. on any business day; the Clerk of Court will assign a room on a space-available basis. In that event, counsel should check with my courtroom deputy concerning my schedule on the date selected, to minimize the likelihood of delays if rulings are needed.

III. *EXPENSES*

Rule 37(a)(4), Fed.R.Civ.P., provides in pertinent part that, upon the grant of a motion to compel discovery, the moving party is entitled to reimbursement of the reasonable expenses (including attorneys' fees) incurred in bringing the motion unless the court finds "that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust." From the preceding discussion it is abundantly clear that difficult questions of first impression were presented by both defendants' motion for a protective order and plaintiffs' application for an order regarding the scope of defendant Fallon's deposition. In these cir-

cumstances, I cannot say that either party's position was not "substantially justified"-even though a more complete briefing of the issues by both parties would certainly have been preferable to the bare-bones conclusory affidavits filed by both sides. In the circumstances, all parties shall bear their own expenses.

In light of the foregoing it is hereby

ORDERED:

1. Defendants' motion for a protective order is granted. The documents called for by ¶ 10 of Plaintiffs' First Set of Interrogatories and for Production of Documents are not required to be produced.

2. Plaintiffs' application (deemed a cross-motion) for an order regarding the scope of defendant Fallon's deposition is granted in part and denied in part, as follows: plaintiffs may question defendant Fallon about his sobriety or drunkenness (specifically including what he had had to drink) at or about the time of the events giving rise to this lawsuit, including reasonable follow-up questions going to his credibility and the accuracy of his recollection, but such follow-up questions may not be so framed as to call for information privileged pursuant to 42 U.S.C. § 290dd-2 relating to the dates or places of any treatment for alcoholism or any communications in connection with such treatment.

***16** 3. The deposition of defendant Fallon is to be completed by February 3, 1995, or ten days after the entry of an order by the district judge determining any objections to this Order that may be filed pursuant to 28 U.S.C. § 636(b)(1)(A), whichever is later.

4. Discovery is otherwise closed.

5. Counsel are directed to inform the undersigned by letter no later than February 1, 1995, of any date between February 15 and March 31, 1995, on which any attorney of record or client is unable to attend a settlement conference due to previously scheduled actual trial engagement (in which event the information specified in 22 NYCRR § 125.1(e)(1) shall be furnished) or similarly grave reason such as scheduled major medical procedures, previously pre-paid non-refundable travel arrangements, and the like. As used in this paragraph, "previously" means prior to receipt of a copy of this Order. The press of other business (except actual trial engagements) is not good cause for inability of counsel to attend, and engagements in the ordinary course of business are not good cause for the inability of clients to attend. Conclusory statements that an attorney or party is "unavailable" will be disregarded; facts constituting specific, grave reasons for inability to attend must be stated with particularity. In the case of a party which is not a natural person, the client representative who must attend is the person giving instructions to the attorney of record about the conduct of the case. A settlement conference will be scheduled promptly upon receipt of letters from both counsel in compliance with this paragraph.

6. Communications with chambers may be sent by facsimile transmission to (212) 791-0088, provided that the original communication, manually signed by the attorney (or in the case of joint letters, by both attorneys) is thereafter mailed.

The foregoing is a determination pursuant to 28 U.S.C. § 636(b)(1)(A).

FN1. The caption lists as additional defendants other police officers identified as "John Does," but the Clerk's docket sheet does not reflect service of process on any of them.

FN2. The case was subsequently reassigned to the Hon. Denise L. Cote, U.S.D.J.

FN3. The relief requested is described in

the Affidavit of Barbara Peabody, Esq., sworn to August 22, 1994, submitted in support of the motion ("Peabody Aff.") ¶ 16. The notice of motion seeks only a "protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure," without specifying the nature of the protection sought.

FN4. "Affirmation in Opposition to Motion for Protective Order" of Adrian Eisman, dated October 5, 1994 ("Eisman Aff."), at 8. Since the "Affirmation" includes the phrase "under the penalties of perjury," I have treated it as a Declaration pursuant to 28 U.S.C. § 1746.

FN5. Complaint filed November 12, 1992 ("Cplt.") ¶ 12.

FN6. *Id.* ¶ 15.

FN7. *Id.* ¶ 19 at 5.

FN8. *Id.* ¶¶ 26-27.

FN9. *Id.* ¶ 20.

FN10. *Id.* ¶ 21.

FN11. Amended Answer filed January 5, 1993 ("Ans."), "Second Defense," p. 4; "Sixth Defense," p. 5.

FN12. The original interrogatory is attached to the parties' joint letter dated June 21, 1994 ("joint letter"), which is in turn attached to the Memorandum (endorsed) filed June 23, 1994 ("June 23 Order"). The paragraph in dispute is erroneously referred to in Peabody Aff. ¶ 2 as Interrogatory No. 9, but it is clear from the context that No. 10 is referred to.

FN13. Joint letter at 1.

FN14. *Id.*

FN15. *Id.* at 2-3.

FN16. June 23 Order ¶ 2.

FN17. Peabody Aff. ¶¶ 10, 13.

FN18. Eisman Aff. ¶¶ 12-15.

FN19. *Id.* ¶ 13.

FN20. *See* "Historical and Statutory Notes" to former 21 U.S.C.A. §§ 1174, 1175 (now 42 U.S.C. § 290dd*et seq.*) (West Supp.1994).

FN21. Pub.L. No. 102-321, § 131, 1992 U.S.C.C.A.N. (106 Stat. 323, 368-69), amending (and renumbering in U.S. Code) Public Health Service Act §§ 541-543 (codified at 42 U.S.C. §§ 290dd through 290dd-2). The principal purpose of the legislation was the reorganization of the Alcohol, Drug Abuse and Mental Health Administration ("ADAMHA") in order to transform a "patchwork of authorities" created at different times for different purposes "into an agency with an unambiguous charter to support treatment and prevention services for the mentally ill and for substance abusers." S.Rep. No. 102-131, 102d Cong., 2d Sess., *reprinted in* 1992 U.S.C.C.A.N. 277, 278-80. Section 131, entitled "Miscellaneous Provisions Relating to Substance Abuse and Mental Health," included many new provisions relating to, *e.g.*, creation of model programs and the dissemination of information by HHS for "fostering substance abuse prevention and treatment programs and services in State and local governments and in private industry"; and prohibitions against certain kinds of discrimination against substance abusers. 42 U.S.C. § 290dd(a)(1)

(amending Public Health Service Act § 541, 1992 U.S.C.C.A.N. (106 Stat. at 367)); *id.* §§ 290dd(b)(1) through 290dd-1(a) (1992 U.S.C.C.A.N. (106 Stat. at 367-68)).

FN22. *See*S.Rep. No. 102-131, 102d Cong., 2d Sess., *reprinted in* 1992 U.S.C.C.A.N. 277, 306. These include former §§ 290dd-3 and 290ee-1, sections omitted from the current Code which are nevertheless referred to in pre-1992 case law and, more confusingly, in some of the HHS regulations still in effect.

FN23. 42 U.S.C. § 290dd-2(b)(2)(C). Subparagraphs (A) and (B), not here relevant, permit disclosure in connection with medical emergencies and scientific research, under specified conditions.

FN24. 42 U.S.C. § 290dd-2(g).

FN25. *Id.* (emphasis added).

FN26. 42 C.F.R. § 2.64(d).

FN27. *Id.* § 2.32 (emphasis in original).

FN28. *Id.* § 2.64(a) and (b), quoted and discussed below, pp. 13-14.

FN29. *Id.* §§ 2.64(e), 2.61(a); *see also id.* § 2.61(b)(2), second sentence. The meaning of the provision requiring a subpoena in addition to a court order is not immediately clear; since regulations, like statutes, should be given a rational interpretation whenever possible, it may be intended to protect against the possibility of production pursuant to an order issued by a court which lacks *in personam* jurisdiction of the treating agency.

FN30. 42 C.F.R. § 2.12(b) (1993).

FN31. Peabody Aff. ¶ 10.

FN32. *Id.*

FN33. *See* Peabody Aff. ¶ 7.

FN34. *Susan W. v. Ronald A.*, 558 N.Y.S.2d 813 (Sup.Ct.Queens Co.1990), relied on by defendants, Peabody Aff. ¶ 10, is distinguishable in that, unlike the defendant City here, the "custodian" was a stranger to the proceedings. To the extent, however, that the case stands for the proposition that a party must proceed by subpoena to the custodian of the records instead of by discovery requests to the party pursuant to Art. 31, N.Y.Civ.Prac.L. & R., it is in any event not controlling and I respectfully decline to adopt its reasoning.

FN35. § 290dd-2(a), quoted above p. 8.

FN36. 42 C.F.R. § 2.12(b)(3)(ii), quoted and discussed above pp. 12-13.

FN37. Peabody Aff. ¶ 5.

FN38. Eisman Aff. ¶ 8.

FN39. Plaintiffs' reliance on Judge Sand's unpublished letter to counsel in *Brennan v. Lang*, No. 90 Civ. 7533(LBS) (Exhibit 3 to Eisman Aff.) is unpersuasive. The letter indicates only that certain records of Gracie Square Hospital were reviewed *in camera* and that "extracts from that record of possible relevance" were produced to counsel. The issues that were argued before Judge Sand, formally or informally, are not identified and his short letter to counsel cannot be rationally construed as a holding that § 290dd-2 does not apply to alcohol treatment programs maintained by the City of New York or its Police Department. Indeed, the very fact that he inspected the re-

cords *in camera* may suggest the contrary. *See*42 C.F.R. § 2.64, pp. 13-14 above. In the absence of a written decision and the record on which it is based, however, it is impossible to read into *Brennan* the broad ruling for which plaintiffs argue.

FN40. *See* Eisman Aff. ¶¶ 10-11.

FN41. *Pennsylvania v. Ritchie,* 480 U.S. 39, 44 (1987) (records of State child welfare agency); *Davis v. Alaska,* 415 U.S. 308, 310, 319-20 (1974) (juvenile records), cited in Eisman Aff. ¶ 10.

FN42. *Graham,* 548 F.2d at 1314 (quoting H.R.Conf.Rep. No. 920, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2062, 2072).

FN43. 818 F.2d at 1010 (footnotes omitted) (construing former § 290dd-3, now § 290dd-2).

FN44. *Id.* at n. 13.

FN45. *Id.* at 1010.

FN46. *O'Boyle* is difficult to reconcile with the very narrowly drawn waiver provision of 42 C.F.R. § 263(a)(3), which comes into play only if the *content* of the patient's communications with the treating agency is placed in issue by the patient or his representative, an issue which does not appear to have been argued in the *O'Boyle* case. In any event, it is unnecessary to consider whether *O'Boyle* was correctly decided, since the fact pattern in both *Mahoney* and *O'Boyle* is the precise opposite of that presented here, where plaintiffs seek defendant Fallon's confidential treatment records as a sword, rather than a shield.

FN47. Eisman Aff. ¶¶ 12-13.

FN48. The court in *O'Boyle,* discussed above, p. 21, appears to have defined "good cause" broadly, without discussing the interplay between the two regulations, and therefore is of no help on how they are to be reconciled.

FN49. Eisman Aff. ¶ 14.

FN50. Plaintiffs' complaint also recites that their claims arise under 42 U.S.C. §§ 1981 and 1985, which deal respectively with the right to make and enforce contracts and conspiracy to violate certain civil rights. The complaint includes no allegations relating the making or enforcement of contracts and does not on its face appear to allege any facts amounting to conspiracy. If it were so construed, there is in any event nothing in the record to suggest how any confidential communications between defendant Fallon and treatment personnel might have even the remotest bearing on claims under either of those sections.

FN51. Ans. at 4.

FN52. Ans. at 5.

FN53. Defendants' remaining defenses allege legal insufficiency of the complaint, contributory negligence on the part of plaintiffs, inapplicability of the doctrine of respondeat superior, and a general denial of unlawful or unconstitutional conduct. No rational connection between the records sought and any issue pertinent to these defenses can be discerned.

FN54. Eisman Aff. ¶ 12.

FN55. Eisman Aff. ¶ 13.

FN56. *Id.*

FN57. June 23 Order, ¶ 1. No motion of the type contemplated by the first sentence of that ordering paragraph was ever made.

FN58. Joint letter at 3.

FN59. To discourage "pro forma" invocation of privilege as to documents that should be disclosed, it is insufficient to cite "generalized policies" supporting confidentiality; rather, defendants resisting disclosure must make a "substantial threshold showing" of "specific harms likely to accrue from the disclosure of specific materials" before the court even reaches the question of balancing the interests involved. *King*, 121 F.R.D. at 189-90; *Unger*, 125 F.R.D. at 70. That showing should be made in the form of an affidavit by the head of the department who is neither a defendant nor an attorney for a defendant after an independent review of the documents. *Kerr v. United States Dist. Court*, 426 U.S. 394, 399-400 (1976); *United States v. Reynolds*, 345 U.S. 1 (1953); *Unger*, 125 F.R.D. at 70; *King*, 121 F.R.D. at 189.

FN60. Joint letter at 2-3.

FN61. *See* Eisman Aff. ¶ 12.

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