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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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AMERICAN NATIONAL BANK AND	)	
TRUST COMPANY OF CHICAGO, as	)	
Trustee f/b/o EMERALD INVESTMENTS	)	
LP, an Illinois limited partnership; and	)	
EMERALD INVESTMENTS LP,	)	
	)	Appeal from the United States
Plaintiffs-Appellees,	)	District Court for the Northern
	)	District of Illinois
vs.	)	
	)	No. 00 C 6786
AXA CLIENT SOLUTIONS, LLC; THE	)	
EQUITABLE LIFE ASSURANCE	)	Judge Charles P. Kocoras
SOCIETY OF THE UNITED STATES;	)	
and AXA FINANCIAL, INC.,	)	Magistrate Judge Martin C. Ashman
	)	
Defendants-Appellants.	)	

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**OPENING BRIEF OF APPELLANT  
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES**

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**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 04-2992

Short Caption: American National Bank and Trust, et al. v. AXA Client Solutions, LLC, et al.

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The Equitable Life Assurance Society of the United States

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer, Brown, Rowe & Maw LLP; McDermott, Will & Emery

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Equitable is wholly owned by AXA Financial, Inc., which is wholly owned by AXA, S.A., a publicly traded company.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(c). Yes  No .

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## JURISDICTIONAL STATEMENT

In October 2000, American National Bank and Trust Company of Chicago (“ANB”) and Emerald Investments LP (“Emerald”) filed this lawsuit in the United States District Court for the Northern District of Illinois against The Equitable Life Assurance Society of the United States (“Equitable”), AXA Financial, Inc., and AXA Client Solutions, LLC. R. 1.<sup>1</sup> Emerald claimed that the district court had subject matter jurisdiction under 28 U.S.C. § 1332, because complete diversity existed between the parties and the amount in controversy exceeded \$75,000. *Id.* at 1. Emerald based its claim of complete diversity on the fact that it is an Illinois limited partnership, that ANB is a nationally chartered bank headquartered in Illinois, and that all of the defendants were citizens of New York or Delaware. *Id.* at 2-3. Emerald did not plead the citizenship of its limited partners in its complaint.

After more than three years of litigation, Emerald informed the district court that complete diversity had been lacking at the time the lawsuit was filed because one of its limited partners was a trust that had a trustee who was a citizen of New York. R. 442 at 3. After rejecting a number of alternatives Emerald proposed for keeping the lawsuit alive, the district court entered an order and final judgment on July 7, 2004, dismissing Emerald’s complaint without prejudice for lack of subject matter jurisdiction. A35.

Equitable filed a timely notice of appeal from that judgment on August 3, 2004, appealing from a sanctions order entered by Magistrate Judge Ashman on September 27, 2002 and the district court’s denial of Equitable’s Rule 72(a) objections thereto on October 16, 2002. R. 481. In the order appealed from, Judge Ashman struck Equitable’s privilege log and required Equitable to produce all of the documents listed on the log, even though many of those

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<sup>1</sup> This brief cites to the Record on Appeal as “R. \_\_,” to the Required Short Appendix as “A\_\_,” and to the Supplemental Appendix as “SA\_\_.”

documents were admittedly privileged. A17. On August 13, 2004, Emerald filed a timely cross-appeal (docketed as No. 04-3120). R. 485. Emerald does not appeal from the district court's dismissal of its complaint for lack of subject matter jurisdiction; instead, it appeals only the district court's decision to deny all pending motions (including a sanctions motion by Emerald that had not yet been fully briefed) when it dismissed the complaint for lack of subject matter jurisdiction. *Id.* at 1.

This Court has jurisdiction over Equitable's appeal pursuant to 28 U.S.C. § 1291 because the district court's July 7, 2004 order is a final decision. This Court's appellate jurisdiction is not affected by the absence of subject matter jurisdiction over Emerald's complaint. In *Willy v. Coastal Corp.*, 503 U.S. 131, 138-39 (1992), the Supreme Court held that a district court's order imposing sanctions remains valid even though the court later dismisses the case for lack of subject matter jurisdiction. Judge Ashman's order striking Equitable's privilege log likewise remains valid despite the district court's lack of jurisdiction because Judge Ashman's order was a sanction for Equitable's alleged misconduct. This Court thus has jurisdiction to review Judge Ashman's order. *See, e.g., Belleville Catering Co. v. Champaign Market Place, L.L.C.*, 350 F.3d 691, 694 (7th Cir. 2003) ("Although we lack jurisdiction to resolve the merits, we have ample authority to govern the practice of counsel in the litigation."); *In re BBC Int'l, Ltd.*, 99 F.3d 811, 813 (7th Cir. 1996) (holding that "[t]he request for sanctions \* \* \* is within our jurisdiction" despite the lack of jurisdiction over the merits of the appeal).

That the district court dismissed the complaint without prejudice also does not affect this Court's appellate jurisdiction. An order dismissing a complaint without prejudice is generally "not 'final' for purposes of § 1291 because the plaintiff is free to re-file the case." *Doctor's Assocs., Inc. v. Duree*, 375 F.3d 618, 622 (7th Cir. 2004). While "[d]ismissals for want of

subject-matter jurisdiction are always denominated without prejudice,” *Hill v. Potter*, 352 F.3d 1142, 1146 (7th Cir. 2003), this Court regularly hears appeals from orders dismissing complaints for lack of diversity jurisdiction. *See, e.g., Dakuras v. Edwards*, 312 F.3d 256 (7th Cir. 2002); *CCC Info. Servs., Inc. v. Am. Salvage Pool Assoc.*, 230 F.3d 342 (7th Cir. 2000).

Moreover, this Court has recognized that “a dismissal without prejudice may be final as a practical matter and thus appealable. For example, if it is clear that the plaintiff cannot amend her complaint, then the dismissal is final for purposes of appellate review.” *Doctor’s Assocs., Inc.*, 375 F.3d at 622; *see also Moore v. Mote*, 368 F.3d 754, 755 (7th Cir. 2004) (holding that the dismissal of an action without prejudice is “final” where “it is impossible for the plaintiff to amend the filing to remedy the problem that prompted the dismissal”). In this case, the district court’s July 7 order dismissing Emerald’s action without prejudice is final because “it is impossible for [Emerald] to amend the filing to remedy the problem that prompted the dismissal.” *Moore*, 368 F.3d at 755. The Supreme Court “measures all challenges to subject-matter jurisdiction premised upon diversity of citizenship against the state of facts that existed at the time of filing.” *Grupo Dataflux v. Atlas Global Group, L.P.*, 124 S. Ct. 1920, 1924 (2004). As Emerald has admitted, there was no diversity jurisdiction when it filed its complaint; accordingly, Emerald could not amend its original complaint to cure the defect. R. 442 at 3. Instead, Emerald was required to—and in fact did—file a new complaint.<sup>2</sup>

In its docketing statement in Appeal No. 04-3120, Emerald suggests that “appellate jurisdiction may not exist over” Equitable’s appeal “because defendants are not aggrieved by the district court’s July 7 Order and seek appellate review only of a sanction order previously

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<sup>2</sup> The trustee whose presence destroyed diversity resigned and Emerald refiled its case in federal court even before this case was dismissed. Emerald’s new action, *Emerald Investments LP v. Equitable Life Assurance Society*, No. 04 C 4285 (N.D. Ill.), was transferred to Judge Kocoras as a related case. R. 471.

entered by the district court which has already been fully complied with and which has no collateral estoppel effect.” That is incorrect. It is irrelevant that the dismissal of the action did not aggrieve Equitable. “When a final decision is appealed, the appeal brings up all previous rulings of the district judge adverse to the appellants.” *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 682 (7th Cir. 1990). The *Bastian* court reasoned that “[o]therwise there would be no way to obtain appellate review of those rulings, save for the exceptional few that were appealable regardless of finality.” *Id.* at 682-83. Because the district court’s July 7, 2004 order is a final decision, this appeal “brings up all previous rulings of the district judge adverse to [Equitable],” including Judge Ashman’s order striking the privilege log. *Id.* at 682.

Nor is it relevant that Equitable complied with Judge Ashman’s order by producing all of the documents listed on the privilege log to Emerald. In *Corley v. Rosewood Care Center, Inc.*, 142 F.3d 1041, 1057-58 (7th Cir. 1998), this Court rejected the defendant’s argument that the plaintiffs’ payment of a \$200 sanction assessed by the district court “mooted” the plaintiffs’ appeal of the sanction. The court noted that “[t]he propriety of the sanction may \* \* \* be challenged on appeal once there is a final decision in the case, even if that is long after the sanction was paid.” *Id.* at 1057. The court thus held that “[p]ayment of the sanction does not moot the appeal because the appellate court can fashion effective relief to the appellant by ordering that the sum paid in satisfaction of the sanction be returned.” *Id.*

Similarly, Equitable’s compliance with Judge Ashman’s order does not moot this appeal because the Court “can fashion effective relief” simply by ordering Emerald to return the documents produced pursuant to Judge Ashman’s order. That Emerald has already seen the

documents does not alter the analysis.<sup>3</sup> “[C]ourts generally hold that when production of privileged communications is judicially compelled, compliance with the order does not waive the attorney-client privilege that should have shielded the communications from disclosure.”<sup>2</sup> Paul R. Rice, *Attorney-Client Privilege in the United States* § 9:25 (2d ed.); accord, *Gov’t Guar. Fund v. Hyatt Corp.*, 182 F.R.D. 182, 187 (D.V.I. 1998); *Leonen v. Johns-Manville*, 135 F.R.D. 94, 99 (D.N.J. 1990). Indeed, proposed Federal Rule of Evidence 512 provides: “Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was \* \* \* compelled erroneously \* \* \* .” Although never enacted, “Rule 512 retains considerable utility as a guide to the federal common law.”<sup>3</sup> Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* § 512.02 (2d ed. 2004); see also *United States v. McPartlin*, 595 F.2d 1321, 1337 (7th Cir. 1979) (holding that “the recommendations of the Advisory Committee, approved by the Supreme Court, are a useful guide to the federal courts in their development of a common law of evidence”).

The final jurisdictional issue is whether the finality of the judgment below is affected by the continued pendency of a related action in the district court. In December 2001, Equitable filed a separate complaint against ANB and Emerald, alleging that Emerald had fraudulently induced it to sell the variable annuities at issue in Emerald’s complaint. See *AXA Client Solutions, LLC v. Am. Nat’l Bank & Trust Co.*, No. 01 C 9974 (N.D. Ill.). On January 24, 2002, that case was reassigned to the district judge presiding over this action. R. 112. Equitable’s

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<sup>3</sup> To the extent that Emerald has already used the documents in the course of the litigation, they have been filed under seal, pursuant to the terms of a protective order. R. 65.

action currently remains pending in the district court, although Equitable has moved to dismiss it for lack of subject matter jurisdiction.<sup>4</sup>

In *Sandwiches, Inc. v. Wendy's International, Inc.*, 822 F.2d 707 (7th Cir. 1987), this Court dismissed three appeals following the entry of what purported to be a final judgment in one of two cases that had been consolidated at the trial court level. The court noted that the district court had consolidated the cases, but had never explained “to what extent the cases are consolidated.” *Id.* at 709. The court concluded that the cases were “sufficiently closely related that they should be treated as consolidated for all purposes, even if that was imperfectly accomplished.” *Id.* Because the cases were consolidated for all purposes, the court concluded that an appeal should not be allowed until both cases were resolved, absent a proper Rule 54(b) finding. *See id.* at 710.

This case differs from *Sandwiches, Inc.* in one crucial respect: here, no one ever moved to consolidate the two cases and there was never any order entered to consolidate them for any purpose. Instead, the two cases were simply designated as “related” cases under Local Rule 40.4, which were therefore assigned to the same judge. R. 112. Under these circumstances, a final judgment in one case should be appealable even though the other case has not yet been fully resolved. Indeed, *Sandwiches, Inc.* makes precisely this point, noting that if the losing party

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<sup>4</sup> In March 2004, the district court entered summary judgment against Equitable on all of the claims made in its complaint and entered what purported to be a final judgment. Equitable appealed and Emerald cross-appealed from the apparent dismissal of its counterclaims in that action. *See Equitable Life Assurance Soc. v. Am. Nat'l Bank & Trust Co.*, Nos. 04-1711, 04-1867 (7th Cir.). This Court raised questions about the appealability of the summary judgment ruling, both because there was no order disposing of Emerald's counterclaims and because this case was still pending in the district court. Once the district court became aware of the issue, it entered an order noting that it had issued a final judgment in error because it had not yet disposed of all of the claims in the lawsuit. Equitable and Emerald then voluntarily dismissed their appeals. On remand, Equitable has moved to dismiss its own complaint, which was predicated on Emerald's faulty assertion of diversity jurisdiction. Emerald has resisted that motion, on the ground that there is an independent jurisdictional basis for its counterclaim.

there had “not moved to consolidate the cases, it could appeal notwithstanding the link between them.” 822 F.2d at 710.

### **ISSUE PRESENTED**

Whether Judge Ashman abused his discretion by striking Equitable’s privilege log and compelling it to produce all of the documents listed on that log—including numerous documents that he expressly held to be protected by the attorney-client privilege and hundreds that he never reviewed—as a discovery sanction.

### **STATEMENT OF THE CASE**

In October 2000, Emerald and ANB filed their complaint in this action against Equitable and two related defendants, seeking damages under a variety of theories for Equitable’s refusal to allow Emerald to engage in frequent trading in subaccounts created in connection with variable annuities Emerald had purchased from Equitable. R. 1. Equitable had imposed restrictions on Emerald in the summer of 2000 because it concluded that Emerald was engaged in disruptive market-timing activity. Emerald claimed that Equitable had no right under the governing documents to limit the manner in which it traded and sought damages for the losses it suffered because of its inability to continue using what Emerald describes as its proprietary trading strategy. *Id.*

The district court referred all discovery matters to Magistrate Judge Ashman. R. 48. On September 27, 2002, Judge Ashman issued an order striking Equitable’s privilege log and requiring Equitable to produce all documents listed on the log to Emerald. A17. The district court denied Equitable’s Rule 72(a) objections to Judge Ashman’s order on October 16, 2002. A27. Equitable then filed an emergency motion for a stay of Judge Ashman’s order and a petition for a writ of mandamus in this Court. *See In re Equitable Life Assurance Soc.*, No. 02-

3747 (7th Cir.). On October 28, 2002, the Court denied Equitable's motion for a stay and dismissed the petition for a writ of mandamus. R. 241.

Equitable complied with Judge Ashman's order. However, all of the documents were designated "highly confidential" pursuant to the terms of the protective order entered in this case. R. 65. As a result, to the extent that Emerald has attached any of those documents to court filings, the documents have been filed under seal. *E.g.*, R. 436.

On July 7, 2004, the district court entered an order and final judgment dismissing Emerald's complaint for lack of subject matter jurisdiction. A35. Equitable filed a timely notice of appeal on August 3, 2004. R. 481. Emerald filed a notice of cross appeal on August 13, 2004. R. 485.

### **STATEMENT OF FACTS**

The issue presented by this appeal does not involve the merits of the underlying litigation. Rather, this appeal centers around an expedited discovery process in which Equitable produced over 20,000 documents. R. 212 at 13. As part of that process, Equitable created a privilege log listing about 750 documents that it had withheld from production based on the attorney-client privilege. R. 76, Ex. A.

On December 6, 2001, Emerald filed a motion to strike Equitable's privilege log, arguing that the privilege log provided insufficient descriptions of the documents listed on the log to establish that the documents were in fact privileged. R. 76. Acknowledging that creating the privilege log was "a big job," Judge Ashman granted Emerald's motion, but gave Equitable leave to file an amended privilege log that provided additional descriptions of the documents listed on the log. SA8; R. 77. Equitable subsequently reviewed all of the documents on its privilege log,

voluntarily produced most of the documents about which Emerald had expressed concerns, and, on December 27, 2001, provided Emerald with a First Amended Privilege Log. R. 191, Ex. D.

On January 4, 2002, Emerald filed a motion to compel Equitable to produce all of the documents listed on the privilege log or, alternatively, to require Equitable to submit a privilege log with additional descriptions of the documents listed on the log. R. 89. On January 9, Judge Ashman granted Emerald's alternative request for relief—apparently without examining the Second Amended Privilege Log that Equitable had provided to Emerald earlier that day—at least in part due to his conclusion that log entries describing documents as “advice” did not sufficiently differentiate between business and legal advice. SA14-15. Judge Ashman gave Equitable leave to file an amended privilege log by January 14. R. 99.

In accordance with Judge Ashman's order, Equitable again reviewed the documents listed on its privilege log, voluntarily produced a number of documents from the log, and, on January 14, 2002, submitted a Third Amended Privilege Log. R. 223 at 3. Still not satisfied with Equitable's privilege log, Emerald requested that Judge Ashman review in camera ten of the documents that had been withheld. R. 144 at 42. Judge Ashman agreed and, in a March 20 opinion, held that the attorney-client privilege protected six of the documents in full and two of the documents in part, but could not properly be invoked with respect to the two remaining documents. SA18.

One of the documents that Judge Ashman found not to be privileged was a draft letter from Equitable to Emerald with handwritten comments by Equitable's in-house counsel. SA105. Judge Ashman held that the attorney-client privilege did not protect the letter “because the handwritten notes were not communicated by in-house counsel to anyone and disclosure of the handwritten notes would not reveal any confidential communication that was made for the

purpose of obtaining legal advice.” SA21. The second document was a handwritten cover letter from Equitable’s in-house counsel to another Equitable employee attaching “the portion of our prospectus dealing with market timing.” SA106. Judge Ashman held that the privilege did not protect the cover letter because it “merely reports in one sentence the content of the attached document.” SA24.

The documents that Judge Ashman found to be only partially privileged were both e-mails sent by or to Equitable’s in-house counsel. Judge Ashman found that one e-mail—from Equitable’s in-house counsel to several Equitable employees, including other lawyers—was privileged but that nine words handwritten by in-house counsel on a copy of the e-mail were not privileged because there was no proof that they were ever communicated to anyone else. SA26 (reviewing SA107). Finally, Judge Ashman held that the privilege protected part of a fourth document—two e-mails sent among various Equitable employees, including in-house counsel, discussing Equitable’s response to “market timers”—but did not protect the remaining portion of the document because it purportedly “reveals communications by Equitable employees for the purpose of obtaining business advice.” SA23 (reviewing SA108).

At a March 27, 2002 hearing, Emerald again argued that Judge Ashman should strike Equitable’s privilege log and order Equitable to produce all of the documents listed on the log. SA30. Judge Ashman granted the motion to strike the privilege log, but again gave Equitable leave to serve an amended privilege log. R. 132. Judge Ashman instructed Equitable to “knock out” of the privilege log any documents comparable to the documents he had previously held to be not privileged and to produce any documents that, although arguably privileged, do not “make

any difference.” SA34-35.<sup>5</sup> Pursuant to Judge Ashman’s order, Equitable produced a number of documents and provided Emerald with a Fourth Amended Privilege Log. R. 223 at 4.

At an April 22 hearing, Emerald again raised concerns about Equitable’s privilege log. Judge Ashman rejected Emerald’s concerns, stating that

I’m not going to strike the privilege log right now, and I don’t think I need samples either. \* \* \* I don’t see any need for any in camera. There’s nothing ambiguous anywhere that you’ve pointed out in the Fourth Amended Privilege Log that would require a Fifth Amended. There’s not going to be a Fifth Amended Privilege Log. \* \* \* I don’t think you’ve demonstrated any necessity to do that.

SA55-56.

In early May 2002, counsel for Emerald and Equitable engaged in extensive discussions concerning Equitable’s privilege log, with Equitable responding to Emerald’s questions about numerous documents listed on the log. R. 223 at 4. On May 9, Emerald informed the court that there were about thirty documents remaining on the privilege log that Emerald suspected were not privileged. SA60-61. After further discussions between the parties, Emerald narrowed the list of documents that it suspected were not privileged to sixteen and filed a motion to compel production of these documents. R. 154. Equitable voluntarily produced two of the documents selected by Emerald and provided Judge Ashman with the remaining fourteen documents for in camera review. R. 223 at 5. On June 5, Judge Ashman ruled in open court that the attorney-client privilege protected eight of the documents in full and two in part, but that the privilege did not protect the remaining four documents. SA65.

One of the documents that Judge Ashman found not to be privileged was an e-mail distributed among various Equitable employees, including in-house counsel, summarizing what

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<sup>5</sup> Judge Ashman also stated that “the mere revelation of stuff that is now in the privilege log that you are now disclosing will not by itself waive any other privilege on any other document.” SA35; *see also* R. 140 at 1-2.

had occurred in a meeting held with Emerald before the lawsuit was filed about its market timing activity and discussing Equitable's possible response to that activity. SA110. Judge Ashman held that the attorney-client privilege did not protect this e-mail because "[t]here's nothing in this e-mail that asks for advice, for legal advice, nor is there anything in there that gives legal advice." SA68. For the same reason, Judge Ashman rejected the privilege claim with respect to another e-mail on which in-house counsel were copied and handwritten notes of meetings among Equitable employees and in-house counsel discussing the dispute with Emerald. SA111-12; SA115. Two other sets of handwritten notes of meetings attended by Equitable employees and in-house counsel concerning the dispute with Emerald were held to be only partially privileged because some portions of the notes are "not a communication letter from an attorney." SA70 (reviewing SA113-14).

On July 25, 2002, Emerald filed a motion for sanctions under Rules 26 and 37. R. 186. Emerald again argued that Judge Ashman should strike Equitable's privilege log and order Equitable to produce all of the documents listed on the log. *Id.* at 1. Alternatively, Emerald argued that Judge Ashman should appoint a special master at Equitable's expense to review the documents listed on the privilege log. *Id.* at 2. At an August 14 hearing, Judge Ashman directed Emerald to choose any twenty documents from Equitable's privilege log for in camera review. SA80. Judge Ashman stated that if four or more of the documents were not privileged, then he would strike Equitable's privilege log and order Equitable to produce all of the documents listed on the log. SA81. Equitable subsequently filed a motion objecting to the proposed procedure, arguing that it provided insufficient protection for the attorney-client privilege and requesting the appointment of a special master to review the documents listed on the privilege log. R. 200. Judge Ashman denied the motion. R. 201.

On September 23, 2002, Judge Ashman ruled in open court on the twenty documents selected by Emerald. A1. He initially concluded that four of the documents were not privileged, but that “[a]ll of the rest appear to be privileged. So therefore, there is four within the 20 percent, the Court will not sanction the defendant. That should end the discussion.” A3. After Emerald’s counsel noted that Judge Ashman had stated on August 14 that he would strike Equitable’s privilege log if he found four or more documents not to be privileged, Judge Ashman reversed his original conclusion, found that a fifth document was not privileged, struck Equitable’s privilege log, and ordered Equitable to produce all of the 433 documents listed on the log to Emerald. A4-8. Judge Ashman stated that although he had “no direct information” that Equitable had acted in bad faith, he drew an “inference from a total of five privilege logs on which a sampling showed at least 25 percent of the privilege log being non-privileged, that the Court infers bad faith from that statistic.” A7.

On October 7, 2002, Equitable filed timely Rule 72(a) objections to Judge Ashman’s order striking the privilege log. R. 223. The district court rejected Equitable’s objections, stating that “on the chance that [Judge Ashman] gets it wrong, that is the way it goes.” A26. Equitable subsequently produced all of the 433 documents listed on the privilege log to Emerald.

### **SUMMARY OF ARGUMENT**

During an expedited discovery process in which Equitable ultimately produced more than 20,000 documents, Emerald repeatedly challenged the validity of Equitable’s privilege log. In response to Emerald’s challenges, Judge Ashman reviewed in camera forty-four of the more than 400 documents listed on the privilege log. Judge Ashman found that the attorney-client privilege protected twenty-nine of the documents in full and four in part, but that the privilege did not protect the remaining eleven documents. Based on this sampling of documents from Equitable’s

privilege log, Judge Ashman sanctioned Equitable by striking its privilege log and ordering Equitable to produce all of the documents listed on the log to Emerald.

Judge Ashman's order constitutes an abuse of discretion for a number of reasons. First, the sampling procedure he used to test the validity of Equitable's privilege assertions failed to adequately protect the attorney-client privilege. Based on a review of only forty-four documents—most of which were selected by Emerald—Judge Ashman's sampling procedure resulted in an order requiring Equitable to produce hundreds of documents that he never reviewed and numerous documents that he expressly found to be privileged. This arbitrary and unprecedented procedure for testing the validity of a privilege log should be rejected.

Second, Judge Ashman committed clear error by finding that Equitable acted in bad faith in compiling its privilege log. Even assuming for purposes of argument that all of Judge Ashman's privilege rulings were correct, Equitable's assertion of the privilege was not so unreasonable as to be indicative of bad faith. Without a finding of bad faith, there is no basis for the imposition of the draconian sanction of a wholesale waiver of Equitable's privileges.

Third, sanctioning Equitable by requiring the production of every document from its privilege log was disproportionate to Equitable's alleged misconduct because it punished Equitable for its purportedly incorrect invocation of the attorney-client privilege on *fifteen* documents by ordering Equitable to produce all of the *more than 400* documents on its privilege log. To the extent that a sanction was warranted, Judge Ashman could have required Equitable to pay the costs incurred by Emerald in challenging the privilege log and for the appointment of a special master to review the remaining documents listed on the log. These sanctions would have been proportionate to Equitable's alleged misconduct and would have provided Emerald with everything to which it was entitled.

Finally, Equitable's allegedly incorrect invocation of the attorney-client privilege on fifteen documents did not prejudice Emerald's ability to prosecute this action. Those fifteen documents did not contain any important revelations. Moreover, Emerald was able to obtain those documents (and many more) at a relatively early stage of the discovery process. Emerald thus suffered no conceivable harm from Equitable's alleged misconduct, and certainly did not suffer the type of harm that would warrant the striking of Equitable's entire privilege log.

### STANDARD OF REVIEW

This Court reviews sanctions orders entered pursuant to Rule 37 for abuse of discretion. See *In re Golant*, 239 F.3d 931, 937 (7th Cir. 2001). Although the Court will affirm a sanctions order when "the district court chose an option that was among those from which we might expect a district court reasonably to choose," the Court has made clear that "this standard is not without teeth." *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 739 (7th Cir. 1998). "[A] district court by definition abuses its discretion when it makes an error of law." *Maynard v. Nygren*, 332 F.3d 462, 467 (7th Cir. 2003).

### ARGUMENT

#### **I. Judge Ashman Abused His Discretion By Striking Equitable's Privilege Log Based On His Review Of A Small Sampling Of The Documents.**

The Supreme Court recognized long ago that the attorney-client privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). More recently, the Court noted that the attorney-client privilege serves "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of

justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Similarly, this Court has stated that “maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice.” *Harper & Rowe Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970), *aff’d by an equally divided court*, 400 U.S. 348 (1971). For this reason, documents covered by the attorney-client privilege “are ‘zealously protected.’” *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992) (quoting 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2017 (1970)).

The procedure that Judge Ashman employed in this case was an abuse of discretion because it failed to adequately protect the attorney-client privilege. Judge Ashman’s order required Equitable to produce twenty-nine documents that he had expressly found to be privileged. It also required Equitable to produce hundreds of documents that Emerald had never challenged and that Judge Ashman himself had never reviewed. As a result, Equitable was forced to produce documents containing its lawyers’ candid assessments of the merits of the litigation with Emerald—documents that are unquestionably protected by the attorney-client privilege. Emerald has repeatedly sought to take advantage of these documents, citing them in support of its motion for summary judgment as proof of Equitable’s interpretation of the agreement between the parties. R. 435-36.

Equitable is unaware of any case from any jurisdiction that has struck an entire privilege log based on a conclusion that a sampling of documents listed on the log revealed some documents that were not privileged. Indeed, Judge Ashman himself recognized that the procedure he used in striking the privilege log was “perhaps \* \* \* a novel approach.” SA99. On this point, Judge Ashman is correct. Courts have struck privilege logs only in extreme situations, where a party has consistently impeded discovery by, among other things, refusing to provide a

privilege log at all or refusing to supply basic information necessary to enable the court and its opponent to make a judgment with respect to whether the documents are likely to be privileged. Thus, for example, in *Ritacca v. Abbott Laboratories*, 203 F.R.D. 332, 336 (N.D. Ill. 2001), the court concluded that the defendant had waived its right to claim any privilege because its conduct—which included false assurances that certain documents withheld from production were mere duplicates—was “unjustified, inexcusable, and in bad faith.” Similarly, in *In re General Instrument Corp. Securities Litigation*, 190 F.R.D. 527 (N.D. Ill. 2000), the court ordered documents as to which the defendant had claimed privilege to be produced without reviewing them in camera after a three-year battle over privilege issues. The court reached that conclusion because (among other things) the defendants’ descriptions of the allegedly privileged documents were still “sketchy, cryptic, often mysterious” and, “[w]hen the plaintiff pointed out obvious flaws in the log \* \* \* the defendant stridently refused to provide required information.” *Id.* at 531-32.

There is no even remotely comparable conduct here. In this case, Equitable provided a timely log at the outset. When Emerald sought more detail about the documents being withheld, Equitable promptly provided that information. Indeed, the log describing the documents withheld spanned over 100 pages. R. 76, Ex. A.

The arbitrary result produced by Judge Ashman’s procedure for testing the validity of Equitable’s privilege log illustrates why it constituted an abuse of discretion. At the September 23, 2002 hearing, Judge Ashman initially ruled that because only four of the twenty documents reviewed were not privileged, “the Court will not sanction [Equitable]. That should end the discussion.” A3. However, after Emerald’s counsel reminded Judge Ashman that he had said he would strike the privilege log if he found four or more documents not to be privileged, Judge

Ashman reversed his initial conclusion, struck Equitable's privilege log, and ordered Equitable to produce all of the 433 documents listed on the log. A4-8. The validity of an entire privilege log containing over 400 entries should not rise or fall depending upon a court's conclusion about whether a single document is privileged. Yet that is precisely what occurred in this case.

Moreover, to the extent that a court can ever resolve the validity of a privilege log by reviewing only a sample of documents from the log, the sample should at the very least be representative of the log as a whole. In this case, however, Judge Ashman allowed Emerald to select thirty-four of the forty-four documents to be reviewed in camera, with the remaining documents selected at random. Permitting Emerald to select the documents to be reviewed was particularly inequitable because the parties' counsel had engaged in extensive discussions concerning the privilege log prior to Judge Ashman's review of the final twenty documents. R. 223 at 14. During these discussions, Equitable's counsel provided Emerald's counsel with additional descriptions of numerous documents listed on the privilege log in response to Emerald's questioning of Equitable's privilege claims. *Id.* As a result, Emerald was able to "cherry-pick" documents from the privilege log that Judge Ashman was most likely to find not privileged. Judge Ashman thus had no basis for his apparent conclusion that he could extrapolate from the fact that he found 25% of the documents he had reviewed not to be privileged that 25% of the documents on the entire log would also not be privileged.

In sum, Judge Ashman's procedure for testing the validity of a privilege log failed to adequately protect the attorney-client privilege and, if permitted, would have a chilling effect on the privilege. In *Upjohn*, the Supreme Court warned against precisely the type of chilling effect that widespread use of Judge Ashman's sampling procedure would create, holding that "if the purpose of the attorney-client privilege is to be served, the attorney and the client must be able to

predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.” 449 U.S. at 393. For this reason alone, Judge Ashman’s order striking Equitable’s privilege log should be reversed.

## **II. Judge Ashman Clearly Erred By Finding That Equitable Acted In Bad Faith.**

“Rule 37 sanctions may only be imposed where a party displays ‘wilfulness, bad faith, or fault.’” *Langley v. Union Elec. Co.*, 107 F.3d 510, 514 (7th Cir. 1997); *see also United States v. Philip Morris Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003) (“As the federal rules, case law and commentators suggest, waiver of a privilege is a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith.”). The Court reviews findings of bad faith for clear error. *See Golant*, 239 F.3d at 936.

In this case, even if Judge Ashman was right in concluding that the fifteen documents in question were not privileged in whole or in part, Equitable’s assertion of the privilege was not so far off the mark that it gives rise to a reasonable inference that Equitable was acting in bad faith.

Courts apply state law to resolve attorney-client privilege claims where, as here, jurisdiction is premised on diversity of citizenship. *See, e.g., Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1053 (8th Cir. 2000). The Illinois Supreme Court applies the following standard in examining claims of attorney-client privilege:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

*People v. Simms*, 736 N.E.2d 1092, 1117 (Ill. 2000) (internal quotation marks omitted); *accord United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) (federal common law standard).

In this case, Judge Ashman clearly erred by finding that Equitable acted in bad faith in compiling its privilege log based on his conclusion that fifteen of the more than 400 documents listed on the privilege log are not privileged. As the following ten examples illustrate, Equitable had a good faith basis for asserting its privilege claims.

EQ 7556. This draft letter from Equitable to Emerald discusses Equitable's concerns about Emerald's market timing, and contains the handwritten comments of Equitable's in-house counsel. SA105. Judge Ashman rejected Equitable's claim that the letter was privileged "because the handwritten notes were not communicated by in-house counsel to anyone and disclosure of the handwritten notes would not reveal any confidential communication that was made for the purpose of obtaining legal advice." SA21. In doing so, Judge Ashman relied on *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 6 (N.D. Ill. 1980), which holds that the attorney-client privilege does not protect "memos to file by counsel."

Equitable had a good faith basis for asserting the attorney-client privilege on this document. As an initial matter, Judge Ashman clearly erred by holding that disclosure of the notes would not reveal a confidential communication, because "[c]omments made by an attorney on a draft document are privileged when the attorney is acting in a professional legal capacity," as Equitable's counsel was clearly doing here. *Neuder v. Battelle Pac. N.W. Nat'l Lab.*, 194 F.R.D. 289, 296 (D.D.C. 2000).<sup>6</sup> Moreover, Judge Ashman had no basis for concluding that the

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<sup>6</sup> See also *SmithKline Beecham Corp. v. Pentech Pharms., Inc.*, 2001 WL 1397876, at \*4 (N.D. Ill. Nov. 6, 2001) ("The document is a draft letter and includes handwritten notes from an attorney. It may be withheld as an attorney-client communication and work product."); *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 635 (M.D. Pa. 1997) ("Drafts of required reports to state regulators circulated among the environmental consultants and attorneys for comment and review are protected under the attorney client privilege if the drafts contain comments or notations of counsel for Andritz and contain information or provisions not included in the final version.") (emphasis in original); *Burroughs Wellcome Co. v. Barr Labs., Inc.*, 143

(cont'd)

handwritten notes were not communicated to anyone. In fact, there would be no point to commenting on a draft letter unless the comments are communicated to the author. In any event, in *McCook Metals L.L.C. v. Alcoa Inc.*, 192 F.R.D. 242, 254 (N.D. Ill. 2000), the court rejected *Sneider*, which Judge Ashman relied on, and instead held that the privilege protects “an attorney’s notes memorializing his confidential discussions with his client.”<sup>7</sup>

EQ 8066. This July 17, 2000 e-mail from Equitable’s in-house counsel to members of Equitable’s control group proposes language designed to prevent market timing and suggests its inclusion in Equitable’s revised annuity contracts. SA107. The e-mail also contains nine words handwritten by an Equitable attorney, including changes to the proposed language. *Id.* Judge Ashman held that the attorney-client privilege protected the e-mail itself, but not the handwritten notes because they “were not communicated by in-house counsel to anyone and disclosure of the handwritten notes would not reveal any confidential communication that was made for the purpose of obtaining legal advice.” SA26. In fact, Equitable’s counsel was clearly providing legal advice by suggesting changes to a legal document. Therefore, for the same reasons noted above, Equitable had a good faith basis for asserting that its counsel’s notes were privileged.

EQ 7762-63. This document contains two March 2000 e-mails to members of Equitable’s control group and in-house counsel requesting “input” about Equitable’s “options to curb” market timing, and Equitable’s ability to enforce “the prospectus guidelines as well as the

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(... cont’d)

F.R.D. 611, 619 (E.D.N.C. 1992) (holding that counsel’s notes on a draft document were privileged even though the document itself was not privileged).

<sup>7</sup> See also *Trustmark Ins. Co. v. Gen. & Cologne Life Re*, 2000 WL 1898518, at \*10 (N.D. Ill. Dec. 20, 2000) (holding that the privilege protected counsel’s “handwritten notes \* \* \* concerning his communications with [the client]” that “were placed in a file”); *Hendrick v. Avis Rent A Car Sys., Inc.*, 944 F. Supp. 187, 190 (W.D.N.Y. 1996) (holding that counsel’s “memoranda to the file” were privileged).

sales agreements.” SA108-09. Judge Ashman held that this document was privileged only in part because portions of the document were solely “for the purpose of obtaining business advice.” SA23. Although the document does seek business advice, it was clearly sent to in-house counsel to obtain legal advice concerning Equitable’s ability to prevent market timing and to enforce the prospectus and other agreements. Accordingly, Equitable had a good faith basis for asserting the privilege.

EQ 7609. This document is a July 21, 2000 e-mail from an Equitable executive to members of Equitable’s control group and in-house counsel. SA110. The e-mail summarizes a meeting with Emerald about Equitable’s objections to market timing and discusses a potential letter demanding that Emerald stop market timing. *Id.* Judge Ashman held that the e-mail was not privileged because “it’s more of a report of what’s going on.” SA68. The Supreme Court has recognized, however, that because the attorney-client privilege “depends upon the lawyer’s being fully informed by the client,” the privilege protects “not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.” *Upjohn*, 449 U.S. at 389-90. Under *Upjohn*, Equitable clearly had a good faith basis for concluding that a memo to in-house lawyers recounting a meeting with a customer with whom the client was embroiled in a dispute and discussing ways to end the dispute would be protected from disclosure by the attorney-client privilege.

EQ 7945. This document is an e-mail to members of Equitable’s control group and in-house counsel seeking “to stimulate a discussion on how we want to deal with the complicated history of our relationship with Emerald.” SA112. The e-mail states that Emerald “will have to adopt a more long term investment activity, which may or may not be what they want to do. If they are not willing to do so, we will then face the issue of how to ‘let them out’ of our contract.

Will we waive surrender [sic] charges?” *Id.* Judge Ashman held that this document was not privileged because it contains “no discussion of legal advice nor obtaining of advice.” SA69. However, the very fact that the document raises the question of how the parties should end their contractual relationship and whether surrender charges should be assessed suggests that it is part of a dialogue that involves the giving of legal advice. At the very least, there is no basis for inferring that Equitable was acting in bad faith by asserting a privilege with respect to this document.

EQ 7943; EQ 9061; EQ 9062; EQ 9106; EQ 9326. These documents contain handwritten notes of meetings with members of Equitable’s control group and in-house counsel about Equitable’s approach to market timing. SA111; SA113-15; SA 120. Judge Ashman held that these documents were not privileged because they do not request or provide legal advice. SA68-70; A7. However, courts routinely hold that notes of meetings with in-house counsel are privileged when legal issues are discussed. *See, e.g., EEOC v. Int’l Profit Assocs., Inc.*, 206 F.R.D. 215, 219 (N.D. Ill. 2002); *Stopka v. Alliance of Am. Insurers*, 1996 WL 204324, at \*8 (N.D. Ill. Apr. 25, 1996); *In re Brand Name Prescription Drugs Antitrust Litig.*, 1996 WL 5180, at \*3 (N.D. Ill. Jan. 3, 1996); *Green v. IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982), *aff’d*, 734 F.2d 18 (7th Cir. 1984). The notes of these meetings reflect privileged communications about market timing—a matter that raises a host of legal issues—with in-house counsel present. Equitable therefore had a good faith basis for claiming the privilege on these documents.

In sum, even if Judge Ashman was correct in finding that the attorney-client privilege did not protect the fifteen documents that he found not to be privileged, that conclusion does not provide any basis for inferring that Equitable was trying to obstruct the discovery process or otherwise acted in bad faith. Privilege determinations are necessarily subjective and often

extremely difficult judgments to make. That is particularly true when the documents in question involve discussions between in-house counsel and senior management, when it may well be difficult to determine whether the purpose of the communication is to secure legal advice or whether the participants are making a business decision. *See* 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 7:5 (2d ed.) (“The distinctions drawn by the courts \* \* \* are especially difficult to identify in the business setting where attorneys are consulted for and expected to render both legal and business opinions.”); *see also Robinson v. Texas Auto. Dealers Assoc.*, 214 F.R.D. 432, 446 (E.D. Tex. 2003), *vacated on other grounds*, 2003 WL 21911333 (5th Cir. June 25, 2003) (holding that “in determining whether advice is predominately legal or business in nature, courts should resolve doubts in favor of the privilege” because “legal and business issues are often inextricably intertwined”). Litigants who err in making those judgments should not be tarred with accusations of bad faith.

Once the finding of bad faith falls, the sanctions order must be reversed. There is no basis for imposing the draconian sanction of a wholesale waiver of all privileges on a party who has attempted in good faith to comply with its discovery obligations. *See, e.g., Ritacca*, 203 F.R.D. at 335 (holding that “good faith attempts at compliance \* \* \* militate against finding waiver”).

### **III. Striking The Privilege Log Was Wholly Disproportionate To Equitable’s Alleged Misconduct.**

Even if Judge Ashman had properly concluded that Equitable’s conduct warranted the imposition of sanctions, the sanction he chose—indiscriminately striking all of Equitable’s privilege assertions—was disproportionate to the claimed misconduct. Although courts need not “select the ‘least drastic’ or ‘most reasonable’ sanction,” district courts “may only impose sanctions that are ‘just,’ that is, proportionate to the circumstances surrounding a party’s failure

to comply with discovery rules.” *Melendez v. Ill. Bell Tel. Co.*, 79 F.3d 661, 672 (7th Cir. 1996). Judge Ashman’s order striking Equitable’s privilege log was disproportionate to Equitable’s alleged misconduct because it punished Equitable for its purportedly incorrect invocation of the attorney-client privilege on fifteen documents by ordering Equitable to produce *all* of the documents on its privilege log—including hundreds of documents that Judge Ashman never reviewed and numerous documents that Judge Ashman expressly held to be privileged. In fact, rather than being proportionate to Equitable’s alleged misconduct, Judge Ashman’s sanction resulted in a windfall for Emerald, providing Emerald with hundreds of privileged documents to which it was clearly not entitled.

Judge Ashman had several alternative means of sanctioning Equitable that would have been proportionate to Equitable’s alleged misconduct. For example, Judge Ashman could have sanctioned Equitable by requiring it to pay for Emerald’s costs in challenging the privilege log. *See, e.g., Castillo v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776, 779 (7th Cir. 1991) (holding that the district court did not abuse its discretion by assessing fees and expenses against plaintiff for “a ‘deliberate frustration of defendants’ discovery attempts”); *Godsey v. United States*, 133 F.R.D. 111, 113 (S.D. Miss. 1990) (holding that, rather than waiving the attorney-client privilege, “the more advisable and prudent course is to sanction the plaintiff’s attorneys and to order that the U.S. Magistrate examine the discovery”).

In addition to sanctioning Equitable by requiring it to pay Emerald’s costs in challenging the privilege log, granting Emerald’s request to appoint a special master to review the remaining documents listed on the privilege log (at Equitable’s expense) would have been a more proportionate sanction for Equitable’s alleged misconduct. Courts have repeatedly encouraged the use of in camera review to resolve disputes over privilege assertions. In *Kerr v. United*

*States District Court*, 426 U.S. 394, 405-06 (1976), for example, the Supreme Court instructed the district court to examine allegedly privileged documents in camera, holding that

it would seem that an In [sic] camera review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between petitioners' claims of irrelevance and privilege and plaintiffs' asserted need for the documents is correctly struck. Indeed, this Court has long held the view that in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege.

Similarly, this Court has held that only when the district court has reviewed the allegedly privileged documents can the court "make a principled determination as to whether the attorney-client privilege in fact applies. Any attempt to make this type of determination without this factual foundation amounts to nothing more than a waste of judicial time and resources."

*Holifield v. United States*, 909 F.2d 201, 204 (7th Cir. 1990) (internal citation omitted); *see also* *2 Attorney-Client Privilege in the United States* § 11:15 (stating that "district courts should be highly reluctant to order disclosure without conducting an in camera review of allegedly privileged materials").

In this case, an in camera inspection, whether by the Magistrate or a special master, would not have been an overwhelming task. The documents identified in the privilege log were not particularly voluminous: in total, there was less than one box worth of documents.

Sanctioning Equitable by requiring it to pay for the costs incurred by Emerald in challenging the privilege log and for the appointment of a special master to review the remaining documents listed on the privilege log would have provided Emerald with everything to which it was entitled. Judge Ashman's sanction, however, provided Emerald with much more—insight into Equitable's privileged communications with its counsel. Judge Ashman's sanction is thus disproportionate to Equitable's alleged misconduct, and should be reversed.

#### **IV. Equitable’s Allegedly Incorrect Invocation Of The Attorney-Client Privilege On Fifteen Documents Did Not Prejudice Emerald.**

This Court has held that “where ‘no harm’ can be found to the non-sanctioned party, we will reverse” the sanctions order. *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756 (7th Cir. 2004); *see also Jackson v. County of Sacramento*, 175 F.R.D. 653, 655-56 (E.D. Cal. 1997) (“Imperfections unaccompanied by prejudice in defendant’s efforts to protect the confidentiality of the attorney-client relationship do not support finding waiver.”). In this case, Equitable’s allegedly incorrect invocation of the attorney-client privilege on fifteen documents did not prejudice Emerald’s ability to conduct discovery. None of those fifteen documents contained any startling revelations. And they were produced long before the close of discovery, at a point where Emerald had ample opportunity to use them for whatever they might be worth. Emerald thus suffered no conceivable harm from Equitable’s alleged misconduct, and certainly did not suffer the type of harm that would warrant the striking of Equitable’s entire privilege log.

#### **CONCLUSION**

For the foregoing reasons, the district court’s denial of Equitable’s Rule 72(a) objections to Judge Ashman’s order striking Equitable’s privilege log should be reversed, with directions that Emerald be ordered on remand to return all documents produced pursuant to Judge Ashman’s order, with the exception of those he specifically found not to be privileged.

Respectfully submitted,

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**REQUIRED SHORT APPENDIX**

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel certifies that the foregoing brief contains approximately 9,500 words and complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

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Stephen J. Kane

**CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)**

The undersigned attorney hereby certifies that all materials required by Circuit Rule 30(a) & (b) are included in the appendices.

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Stephen J. Kane

**CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 31(e)**

The undersigned attorney certifies that, pursuant to Circuit Rule 31(e), I have filed electronically on a virus-free disk, versions of the brief and all of the Circuit Rule 30(a) and 30(b) appendix items that are available in non-scanned PDF format.

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Stephen J. Kane

## **CERTIFICATE OF SERVICE**

The undersigned certifies that, on September 28, 2004, he caused a copy of the foregoing Opening Brief for Appellant The Equitable Life Assurance Society of the United States to be sent via overnight delivery to each of the following:

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