

No.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re: TERRA INTERNATIONAL, INC.,

Petitioner.

TERRA INTERNATIONAL, INC.,

Defendant-Petitioner,

v.

MISSISSIPPI CHEMICAL CORPORATION,

Plaintiff-Real Party In Interest.

On Petition for Writ of Mandamus to the
United States District Court for the Southern District
of Mississippi, Western Division, Case No. 5:95CV127BrN
The Honorable David C. Bramlette, Judge Presiding

PETITION FOR WRIT OF MANDAMUS

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

A. Parties

1. Mississippi Chemical Corporation is the plaintiff below, and the real party in interest for purposes of this mandamus petition.

Mississippi Chemical Corporation has no parent company.

Mississippi Chemical Corporation has the following subsidiaries (other than wholly-owned subsidiaries): Farmland MissChem Limited; FMCL Limited Liability Company; and Houston Ammonia Terminal, L.P.

2. Terra International, Inc. is the defendant below, and petitioner here.

Terra International, Inc. is a wholly owned subsidiary of Terra Industries Inc.

Terra International, Inc. has the following subsidiaries (other than wholly-owned subsidiaries): Royster-Clark, Inc.; and Omnium, LLC.

B. Other Interested Persons

The following entities are subrogees of Terra International, Inc.:

1. National Union Fire Insurance Company of Pittsburgh, PA

National Union Fire Insurance Company of Pittsburgh, PA is a subsidiary of American International Group, Inc.

2. Zurich Insurance Company

Zurich Insurance Company's sole subsidiary (other than wholly-owned subsidiaries) is Zurich Life Insurance Company.

3. Commonwealth Insurance Company

Commonwealth Insurance Company is a subsidiary of Fairfax Financial Holdings Limited.

4. Fireman's Fund Insurance Company

Fireman's Fund Insurance Company is a subsidiary of Allianz Aktiengesellschaft.

5. Industrial Risk Insurers

6. The Insurance Company of North America

The Insurance Company of North America is a subsidiary of CIGNA Corporation, and has the following subsidiaries (other than wholly-owned subsidiaries): AIFA; and INA Financial Corporation.

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Defendant-Petitioner Terra International, Inc. (“Terra”), pursuant to the All Writs Act, 28 U.S.C. § 1651, and Fed. R. App. P. 21, respectfully submits the following Petition For Writ of Mandamus to compel the district court to vacate Orders entered on October 30, 1997 (1) compelling the production of various categories of documents that are protected by the attorney-client privilege, the attorney work-product doctrine of Fed. R. Civ. P. 26(b)(3), and Fed. R. Civ. P. 26(b)(4)(B), and (2) sequestering all party and non-party fact witnesses throughout the discovery process.

STATEMENT OF ISSUES PRESENTED AND RELIEF SOUGHT

This is a petition for a writ of mandamus to compel the United States District Court for the Southern District of Mississippi to vacate two extraordinary and unprecedented orders. The first Order (Exh. E hereto) compels Terra to produce within 10 days (subject to a stay pending appeal) to plaintiff Mississippi Chemical Corporation (“MCC”) volumes of documents prepared by Terra’s outside counsel and its non-testifying consultants in connection with their investigation into the cause of the massive explosion that is the subject of this litigation. The second Order (Exh. H hereto) sequesters all fact witnesses throughout discovery, forbidding Terra’s counsel from discussing with any prospective deponent the testimony of any other fact witness. As demonstrated below, the district court clearly exceeded its authority, and disregarded controlling Supreme Court and Fifth Circuit precedents, in entering these orders. These patently erroneous orders threaten Terra with the immediate loss of fundamental rights whose deprivation cannot effectively be reviewed or remedied after final judgment. As a result, the Orders are properly subject to this Court’s mandamus jurisdiction under 28 U.S.C. § 1651.^{1/}

^{1/} On November 27, 1997, Terra filed a timely notice of appeal as to each of these Orders, invoking the collateral order doctrine. On December 5, 1997, MCC filed a motion to dismiss Terra’s appeal, arguing that neither order is immediately appealable. Concurrently with the filing of this petition, Terra has submitted its response to the motion to dismiss. As explained in Terra’s response, this Court has appellate jurisdiction to review both Orders pursuant to the collateral order doctrine of 28 U.S.C. § 1291.

1. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court held that attorney notes of employee interviews conducted pursuant to an internal corporate investigation are absolutely protected from discovery by the attorney-client privilege and the attorney work product doctrine. This case involves a straightforward application of *Upjohn*. Terra's general counsel appointed a Committee, led by Terra's outside counsel, to conduct an investigation into the cause and origin of a massive explosion that leveled Terra's Port Neal, Iowa ammonium nitrate facility. During the course of that investigation, Terra's counsel interviewed dozens of Terra employees and prepared notes of those interviews, all of which were scrupulously maintained in confidence. Without applying any of the principles established in *Upjohn*, the district court ordered the production of all of Terra's attorney's notes on the ground that they were not protected by the attorney-client privilege. Ignoring the uncontradicted affidavits of Terra's counsel, the district court reached the astounding conclusion that the notes in question were neither confidential nor prepared for the purpose of seeking or giving legal advice. The district court also held, without explanation, that Terra's employees were not "clients" within the meaning of the attorney-client privilege. Exh. E, at 1-2. In light of the Supreme Court's explicit holding in *Upjohn*, and the undisputed factual record below, the district court's order represents an unmistakable abuse of discretion.

The district court also patently erred in treating Terra's attorney interview notes as if they were "ordinary" work product whose protection could be overcome by a showing of "substantial need" and "undue hardship." Exh. D, at 2 (adopted in Exh. E, at 3). *Upjohn* squarely held that such interview notes constitute "opinion" work product, which enjoys near-absolute protection. Without even mentioning *Upjohn*, the district court ordered the production of counsel's notes based solely on its speculation that

it would be “impossible for MCC to discover via depositions” the recollections of Terra’s employees of the events in question. Exh. D, at 2. As Terra argued to the district court (*e.g.*, App. Tab 16, at 21), however, this Court squarely held in *In re International Sys. and Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1240 (5th Cir. 1982), that work product materials cannot be sought on the basis of “broad unsubstantiated assertions of . . . faulty memory” unless other methods of seeking the information in question are exhausted first — something that MCC clearly has not done.

The district court similarly abused its discretion in ordering Terra to produce the written work product of its non-testifying consultants. The plain language of Rule 26(b)(4)(B) absolutely bars discovery of documents generated by non-testifying consultants in anticipation of litigation, allowing discovery *only* of “facts known and opinions held” by such consultants *only* by “interrogatory or deposition.” Yet, the district court refused to apply the Rule on the ground that its does not mean what it says. Exh. E, at 4. The district court had no authority to rewrite the rule.

The district court also clearly abused its discretion in holding that MCC had satisfied its “heavy burden” of demonstrating the “exceptional circumstances” required to obtain the work product of Terra’s non-testifying consultants. *Hoover v. U.S. Dept. of the Interior*, 611 F.2d 1132, 1142 n.13 (5th Cir. 1980). MCC conceded that its experts are fully capable of conducting their own investigation into the cause of the Port Neal explosion, and that it seeks access to Terra’s investigative documents solely to prove scienter in support of its defamation claim against Terra. In *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989), however, this Court squarely held that a litigant cannot unilaterally abrogate an opponent’s discovery privileges simply because it bears the burden of

proving scienter. Once again, the district court's decision makes no mention of *Ward*, and is flatly contrary to its holding. Exh. D, at 3-5 (adopted in Exh. E, at 3).

Moreover, as this Court held in *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988), a district court cannot order the production of privileged documents to support a claim that may be barred by immunity defenses without first deciding the immunity issue (at least on a prima facie basis). In this case, MCC's defamation claim is likely barred by absolute and qualified immunity. The district court nonetheless refused to follow this Court's holding in *Burlington Northern*, noting, without explanation, that it simply was "not dispositive..." Exh. E, at 4-5.

2. Finally, the district court unmistakably exceeded its statutory authority in ordering the sequestration of scores (if not hundreds) of fact witnesses throughout discovery based on nothing more than MCC's wholly unsubstantiated assertion that Terra witnesses might be subject to "substantial influence" and "subtle pressures." Exh. H (adopting Exh. F, at 1). The federal discovery rules were specifically amended in 1993 to make clear that sequestration under Fed. R. Evid. 615 does *not* apply to depositions, and that sequestration may only be ordered upon a particularized showing of good cause. In this case, MCC offered no evidence *whatsoever* to support its request for sequestration, and instead merely pointed to the fact that many witnesses in this case are employed by Terra and are outside the subpoena power of the Mississippi court. These, however, are circumstances that exist in virtually *every* piece of commercial litigation involving corporate parties from different states. Given the plain language of Fed. R. Civ. P. 26(c)(5), the district court lacked authority to order the sequestration of all fact witnesses without requiring a particularized showing of good cause to justify an order of such breathtaking magnitude.

STATEMENT OF FACTS

On December 13, 1994, a catastrophic explosion occurred at Terra's ammonium nitrate facility in Port Neal, Iowa, killing four people, injuring 18 others, destroying the plant, and causing hundreds of millions of dollars in property damage. Terra immediately formed an Incident Investigation Committee ("Committee") to conduct an investigation into the cause and origin of the explosion. The Committee was appointed by Terra's General Counsel, George Valentine, and operated under the direction of Robert A. Gombar, a partner in the law firm of McDermott, Will & Emery, and Larry Chapman, Terra's Production Superintendent. The Committee consisted of Terra employees, inside and outside counsel, and several outside consultants retained for their scientific and technical expertise. The Committee's primary function was to assist Terra in preparing its defense of anticipated litigation with federal, state and local regulators, and also for potential civil litigation with third parties for personal injuries and property damage caused by the explosion.

During the course of the Committee's investigation, Terra's counsel interviewed scores of fact witnesses, including Terra employees. In addition, the outside scientific consultants conducted forensic tests concerning the possible causes of the explosion. The Committee uncovered conclusive evidence that the explosion originated inside a "sparger" — an apparatus used to feed nitric acid into the vessel where the liquid ammonium nitrate was processed. The technology in question was designed by MCC and licensed to Terra. The Committee concluded that the explosion was principally caused by a defect in the sparger's design, and summarized its findings in a comprehensive 153-page Incident Investigation Report ("Report"). In accordance with OSHA regulations, Terra distributed the Report to interested parties (including MCC) on July 17, 1995. See 29 C.F.R. § 1910.119(m)(3)-(4) & App. C, ¶ 12.

On August 31, 1995, Terra filed a product liability action against MCC in the U.S. District Court for the Northern District of Iowa, alleging that MCC's technology was defectively designed and unreasonably dangerous, and proximately caused the explosion. Terra's Complaint neither mentioned nor relied upon the Committee's investigation or Report. Hours later, MCC filed suit in the U.S. District Court for the Southern District of Mississippi, seeking a declaration that the MCC-designed equipment did not cause the Port Neal explosion, and alleging that Terra's Report and certain other Terra statements concerning the cause of the Port Neal explosion were defamatory.^{2/}

The Production Order. On August 10, 1996, MCC filed a motion to compel the production of all documents generated by the Committee, including all of Terra's attorney's notes of Terra employee interviews, and all data and test results generated by the non-testifying consultants retained to assist in the investigation. App. Tabs 1-2. Terra sought a protective order to bar the production of those documents on the ground that they were categorically protected by the attorney-client privilege, Rule 26(b)(3) (the attorney work product doctrine), and Rule 26(b)(4)(B) (which restricts discovery of documents generated by non-testifying consultants). App. Tabs 3-4. In support of its motion, Terra offered several uncontradicted affidavits, which established that all of the documents in question (1) were generated for the purpose of assisting Terra's counsel to provide Terra with legal advice concerning anticipated regulatory and civil litigation, and (2) were created and maintained in confidence. App. Tab 4 (Exhs. A-D thereto). Terra also submitted a lengthy and detailed privilege log.

^{2/} Terra's Iowa product liability action against MCC has been transferred to the Mississippi district court pursuant to 28 U.S.C. § 1404(a). See *Terra Int'l., Inc. v. Mississippi Chemical Corp.*, 119 F.3d 688 (8th Cir.), *cert. denied*, 118 S.Ct. ____ (1997).

On December 4, 1996, Magistrate Judge Alfred G. Nicols issued an Order (the “12/4/96 Order”) (Exh. A hereto) granting MCC’s motion to compel in part, and granting Terra’s motion for protective order in part. The Magistrate Judge agreed with Terra that all of the documents sought by MCC were protected by the attorney-client privilege, Rule 26(b)(3) and/or Rule 26(b)(4)(B). In particular, the Magistrate Judge found that “[t]hese documents, including correspondence, were generated in confidence for the purpose of obtaining and giving legal advice” (Exh. A, at 13-14), and were generated primarily in anticipation of litigation:

Mr. Gombar was retained, and the Committee composed, primarily for the purpose of defending or prosecuting future litigation. . . . Terra most obviously anticipated litigation when the explosion occurred, and it legitimately put together a team of experts to deal with *whatever* consequences resulted. Terra certainly had that right, and its actions were prudent under the circumstances. . . . [M]ost of the documents sought were generated by Mr. Gombar and his firm, the investigation team, including experts and consultants, in anticipation of litigation and are work product. The court rejects the arguments of MCC that work product and the attorney client privilege are inapplicable.

Id., at 9-10 (emphasis in original). The Magistrate Judge also recognized that “Terra certainly had every right to hire outside consultants and investigators as soon as the accident occurred, as well as an attorney whose specialty included OSHA matters, and to vigorously pursue and defend any litigation which resulted from the accident.” *Id.* at 6.

Notwithstanding these findings, the Magistrate Judge ordered the production of four specific categories of documents: “Notes of confidential employee interviews” (Category 1); “Documents prepared by Terra employees at the request and for the use of counsel (or counsel’s experts)” (Category 4); “Documents prepared by counsel’s experts containing test results and analyses” (Category 5); and “Certain scientific and engineering literature used by counsel’s experts” (Category 6). *Id.* at 14. The court did so on the basis that “(1) MCC has a *substantial need* of the materials in defending the suit and prosecuting its defamation claim and that the equivalent of these documents cannot be obtained,” and that (2) Terra has

“waived the protection of the work product doctrine [and attorney-client privilege] in regard to the documents underlying the Committee’s [Report] by publishing the results and filing suit against MCC.” *Id.* at 10-11 (emphasis in original).

With respect to the forensic test results and data generated by Terra’s non-testifying consultants, the Magistrate Judge held that “MCC has shown *exceptional circumstances* in this case [under Rule 26(b)(4)(B)], wherein it is impracticable for it to obtain the equivalent facts or opinions on the same subject by other means.” *Id.* at 11 (emphasis in original). The Magistrate Judge based this finding upon MCC’s claimed need “to challenge and analyze the experts who deemed it liable for the explosion,” and upon his view that Terra’s publication of the Report “provides exceptional circumstances to discover the underlying basis for their report.” *Id.* at 12.

Terra objected to the Magistrate Judge’s 12/4/96 Order, and on July 18, 1997, the district court issued an Order (“7/18/97 Order”) (Exh. C hereto) remanding the cause to the Magistrate Judge for further factual findings. In doing so, the district court held that Iowa law governed the application of the attorney-client privilege, and strongly suggested that the Magistrate judge had erred in concluding that Terra had “waived” its rights under the attorney-client privilege and Rule 26(b)(3). Exh. C, at 15-24, 40-41, 46-50. The court remanded the cause to the Magistrate Judge for additional findings on five issues, only three of which are relevant here: (1) whether the attorney-client privilege, as construed under Iowa law, applied to Terra’s documents in the first place; (2) whether the Magistrate Judge intended to find, in addition to “substantial need” and “undue hardship,” that Terra had waived its work product protections; and (3) what facts supported the Magistrate Judge’s finding of “exceptional circumstances” under Rule 26(b)(4)(B).

Only one week after the remand, and without additional submissions from the parties, the Magistrate Judge issued a six-page Order (“7/25/97 Order”) (Exh. D hereto) which held, contrary to his original ruling, that the attorney-client privilege “never applied” to Terra’s attorney notes of interviews of

Terra employees, or to documents prepared by Terra employees at the request of Terra's counsel or consultants. Exh. D, at 1-2. The Magistrate Judge also held that while Terra did not waive any attorney work-product protections, those protections were overcome by MCC's "substantial need" for the documents because MCC would be unable, without "undue hardship," to obtain the equivalent of such documents by other means. *Id.* at 2.

As for the forensic data and analyses prepared by Terra's non-testifying consultants (Category 5), and scientific and engineering literature collected by these consultants (Category 6), the Magistrate Judge held that MCC had demonstrated the "exceptional circumstances" required by Rule 26(b)(4)(B) to obtain such documents — both to defend against Terra's product liability claims *and* to pursue its defamation claim. *Id.* at 3-5. Based on these findings, the Magistrate Judge reaffirmed his 12/4/96 Order compelling the production of the same four categories of documents. *Id.* at 6.

On October 30, 1997, the District Court issued an Order (Exh. E hereto) summarily affirming the Magistrate Judge's 12/4/96 and 7/25/97 Orders. In doing so, the district court rejected Terra's contention that the plain language of Rule 26(b)(4)(B) expressly limits discovery of non-testifying consultants only to discovery of "facts known and opinions held" by those consultants, and only then through "interrogatories or deposition," and thus prohibits document discovery of consultant work product. The Court explained as follows:

It is true that the rule mentions only interrogatories and depositions, and does not speak to requests for the production of documents under Fed.R.Civ.P. 45. 'However, it is by now a truism that the various discovery devices function as an integrated system, and that in deciding the limits of privilege, we should treat the various devices similarly.'

Exh. E, at 4 (citation omitted). The court also rejected Terra's argument that *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), required the court to stay production of Terra's incident investigation

documents pending a determination of whether MCC's defamation claim was barred by Terra's immunity defenses. Although MCC conceded that its need for these documents was limited to its defamation claim, the district court inexplicably stated that "MCC's defamation claim is not the only basis on which [the Magistrate Judge] ordered the production of documents." *Id.* at 5. The court also noted, without elaboration, that *Burlington Northern* "is not dispositive under the facts of this case." *Ibid.*

The Sequestration Order. On February 19, 1997, MCC moved for a protective order under Rule 26(c)(5), seeking to prohibit all fact witnesses from attending the deposition of any other witness and to prevent counsel from disclosing any prior deposition testimony to any prospective fact witness. App. Tabs 20-21. MCC's motion was not supported by any affidavit or other evidence. Instead, MCC merely speculated that Terra employees might share a sense of "camaraderie," and that many witnesses were outside of the subpoena power of the Mississippi court and thus could not be compelled to attend a trial. MCC claimed that it was seeking the "raw reactions" of Terra's employees. Terra opposed MCC's Motion on the ground that the federal discovery rules were amended in 1993 to make clear that witnesses could not be sequestered during discovery absent a particularized showing of exceptional circumstances, and that MCC had not even attempted to make such a showing. App. Tab 22. Terra also pointed out that a blanket sequestration order would deprive Terra of its right to counsel during discovery by impairing the ability of its counsel to fully investigate and pursue Terra's claims and defenses, and to represent Terra witnesses at their deposition.

On April 14, 1997, the Magistrate Judge issued an Order (Exh. F hereto) granting MCC's motion, and directed that (1) when preparing witnesses for their depositions, attorneys may not refer "directly or indirectly by innuendo, to what other witnesses say about the facts"; (2) attorneys and officers of any party may not "reveal[]" prior deposition testimony to any witness prior to that witness' deposition; and (3) a

party may not designate more than two corporate representatives to attend depositions before the representatives themselves have been deposed, and may have only six corporate designees overall, two of whom will not be deposed. Exh. F, at 2. As its justification for these measures, the Magistrate Judge broadly accepted MCC's unsupported assertions that Terra witnesses would be subject to substantial influence and subtle pressures by Terra:

[T]he court finds validity in the contentions of MCC that most fact witnesses are subject to substantial influence and even perhaps subtle pressures from their relationships with Terra. The court further finds that MCC has made a substantial showing of exceptional circumstances that make it appropriate for the court to fashion a reasonable protective order.

Id. at 1. The Magistrate Judge cited no evidence to support his “findings” concerning the “substantial influence” or “subtle pressures” that Terra supposedly would impose on its employees — nor was any ever offered.^{3/} On October 30, 1997, the district court issued an Order (Exh. H hereto) summarily affirming the Magistrate Judge's Sequestration Order, relying exclusively upon *Dunlap v. Reading Co.*, 30 F.R.D. 129 (E.D. Pa. 1962), a case decided more than 30 years prior to the 1993 amendments to the Federal Rules. The depositions of fact witnesses have been stayed by agreement of the parties pending appeal of the sequestration order.

REASONS WHY THE WRIT SHOULD ISSUE

I. THIS COURT HAS AUTHORITY TO ISSUE THE REQUESTED WRIT.

Mandamus is an appropriate remedy “when the trial court has exceeded its jurisdiction or has declined to exercise it, or when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court.” *In re Dresser Industries, Inc.*, 972 F.2d 540, 543

^{3/} On April 22, 1997, the Magistrate Judge issued an order (Exh. G hereto) staying the depositions of all “fact witnesses” pending the appeal of the Sequestration Order.

(5th Cir. 1992) (quoting *In re Chesson*, 897 F.2d 156, 159 (5th Cir. 1990)). As demonstrated below, the district court's orders of October 30, 1997 were not merely erroneous, but well beyond the scope of its authority under the Federal Rules. It is well-established that mandamus is appropriate to correct and vacate actions that are not authorized by law. See *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997); *In re Excel Corp.*, 106 F.3d 1197, 1200-01 (5th Cir.), *cert. denied*, 118 S.Ct. 159 (1997); *Hebert v. Exxon Corp.*, 953 F.2d 936 (5th Cir. 1992). In this case, the district court not only disregarded the plain language of the Federal Rules, but declined to follow controlling decisions of the Supreme Court and this Court. Mandamus thus is plainly an appropriate remedy. See *In re Burlington Northern*, 822 F.2d 518 (5th Cir. 1987); *Dresser Industries*, *supra*; *In re M.P.W. Stone*, 986 F.2d 898 (5th Cir. 1993).

A petitioner seeking mandamus also “‘must show that [it] lack[s] adequate alternative means to obtain the relief [it] seek[s].’” *Hebert*, 953 F.2d at 938 (quoting *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, (1989)). In this case, if Terra is compelled to produce documents protected by the attorney-client privilege and by Rules 26(b)(3) and 26(b)(4)(B), those privileges will have been lost, and the district court's order will then effectively be unreviewable after final judgment. See, e.g., *Burlington Northern*, 822 F.2d at 522-23; *In re Bieter Co.*, 16 F.3d 929, 931-32 (8th Cir. 1994); *In re Regents of the University of California*, 101 F.3d 1386, 1387-88 (Fed. Cir. 1996), *cert. denied*, 117 S.Ct. 1484 (1997). Likewise, if all fact witnesses in this case are sequestered prior to their depositions, and Terra's counsel is prohibited from properly preparing Terra's witnesses for their depositions, the harm to Terra will be both irreparable and incurable after final judgment since discovery already will have been completed, and could not realistically be redone. In short, this case

presents precisely the sort of exceptional circumstances that warrant the exercise of this Court's mandamus jurisdiction.

II. THE WRIT SHOULD ISSUE BECAUSE THE DISTRICT COURT EXCEEDED ITS AUTHORITY IN COMPELLING TERRA TO PRODUCE PRIVILEGED DOCUMENTS PREPARED BY ITS ATTORNEYS AND CONSULTANTS.

In its order of October 30, 1997 (Exh. E), the district court ordered the production of all notes and memoranda of Terra's attorneys of confidential interviews of Terra employees concerning the Port Neal explosion. The court also ordered the production of documents prepared by Terra's employees at the request of Terra's counsel to assist in providing legal advice to Terra. The district court ordered Terra to produce these documents on the grounds that they are not covered by the attorney-client privilege, and, treating the notes as if they were ordinary work product, found that MCC had demonstrated the "substantial need" and "undue hardship" necessary to overcome the protections of Rule 26(b)(3). Exh. E, at 1-2 (adopting Exh. D, at 2). As demonstrated below, the district court lacked the authority to issue this Order given the undisputed factual record and the controlling legal standards established by the Supreme Court and this Court.

A. The Court's Privilege Ruling Is Patently Contrary To The Supreme Court's Decision In *Upjohn*, The Law Of This Circuit, And Controlling Iowa Law.

In support of its Motion for Protective Order, Terra offered uncontradicted affidavits which established that, during Terra's incident investigation, Terra's counsel conducted numerous confidential interviews of Terra employees concerning the events leading up to the Port Neal explosion. Terra's attorneys conducted the interviews "in [their] capacity as defense counsel for Terra," and treated the interviews "as confidential discussions with Terra employees concerning matters within the scope of their employment." Gombar Aff., ¶ 21 (App. Tab 4 (Exh. B thereto)). During the course of these interviews, Terra's attorneys

prepared interview notes which “contain counsel’s impressions and thoughts either about the witness or the subject matter.” *Ibid.* Terra’s counsel also requested that Terra employees create various documents “to either explain or illustrate some process or issue being addressed.” *Id.*, ¶ 24. As Terra’s counsel explained, “[a]t times the documents were created for counsel’s use directly, and at other times the documents were created to assist the experts who, in turn, provided information to counsel.” *Ibid.*

Under controlling Iowa law,^{4/} documents protected by the attorney-client privilege are absolutely immune from discovery — even in the face of substantial need. *Shook v. City of Davenport*, 497 N.W.2d 883, 886 (Iowa 1993). The district court, however, held that Terra’s counsel’s interview notes and memoranda are not covered by the attorney-client privilege because (1) the documents were “not confidential”; (2) the information provided in those interviews was “not given or acquired for the purpose of seeking or giving legal advice”; and (3) Terra’s employees were not “clients” so as to invoke the privilege.” Exh. E, at 1-2. Each of these findings is patently wrong as a matter of fact and law.

First, there is not a shred of evidence to support the court’s finding of non-confidentiality. Mr. Gombar testified, without contradiction, that counsel’s interviews of Terra employees “were held without third parties present, the employees were told that the interviews would be maintained as confidential and, to this date, such has been the case.” Gombar Aff., ¶ 21 (App. Tab 4, Exh. B thereto). Likewise, the employee-prepared documents in question were requested by counsel and by counsel’s consultants solely for the purpose of providing analysis to counsel. *Id.*, ¶ 24. At the outset of the investigation, Terra’s General

^{4/} The district court held that, under Fed. R. Evid. 501, Iowa law governs Terra’s assertion of attorney-client privilege. Exh. C, at 24. Neither party has disputed this holding.

Counsel “made it clear that . . . the communications from Terra employees to Terra’s counsel [were] intended to be confidential, would be confidential, and would remain as such.” *Id.*, ¶ 11.

Second, the uncontradicted record evidence establishes that Terra’s counsel conducted their employee interviews for the purpose of giving legal advice to Terra in anticipation of regulatory and civil litigation arising from the Port Neal explosion. Both Mr. Valentine and Mr. Gombar testified that Terra retained MWE, Mr. Gombar’s law firm, to advise Terra with respect to pending regulatory investigations and future litigation regarding the explosion. Valentine Aff., ¶ 5 (App. Tab 4 (Exh. A thereto)); Gombar Aff., ¶ 11 (App. Tab 4 (Exh. B thereto)). Mr. Gombar also specifically stated that part of MWE’s preparation of Terra’s defense of anticipated litigation included “determining the facts of the matter” through an intensive factual investigation, and that “communications made by Terra employees to Terra’s counsel were for the purpose of providing legal advice, which had been requested by Terra’s officers and directors....” Gombar Aff., ¶ 11. Mr. Gombar’s objective in initiating the factual investigation into the explosion was “to obtain the facts so that I would be in a position to counsel Terra regarding anticipated litigation” with regulatory agencies and third parties. *Id.*, ¶ 15.

The Supreme Court and this Court have both held that attorney-initiated factual investigations are protected by the attorney-client privilege because they are critically necessary to rendering legal advice. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 390-91 (1981) (“[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant”); *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 600-01 (N.D. Tex. 1981) (Higginbotham, J.).

In his 12/4/96 Order, the Magistrate Judge properly found that the Committee undertook its work “primarily for the purpose of defending or prosecuting future litigation,” and that “the primary motivating purpose behind the creation of the documents . . . was . . . to aid in possible future litigation.” Exh. A, at 9. On remand, however, the Magistrate Judge inexplicably switched course, finding — without any new evidence or arguments from the parties — that the information relayed during counsels’ interviews with Terra employees “was not given or acquired for the purpose of seeking or giving legal advice.” Exh. D, at 1-2. The Magistrate Judge cited no evidence to support this new “finding.”^{5/} In truth, there is no factual or legal basis for the district court’s ruling the documents were not created for the purpose of seeking or giving legal advice.

Finally, the district court’s holding that Terra’s employees were not “‘clients’ so as to invoke the [attorney-client] privilege” (Exh. E, at 2) is directly contrary to the Supreme Court’s holding in *Upjohn* as well as controlling principles of Iowa law.^{6/} The issue in *Upjohn* was whether the attorney-client privilege applied to interviews and other communications between corporate counsel and corporate employees during the course of an internal investigation into employee conduct for which Upjohn could potentially be liable. The Supreme Court rejected the narrow “control group” test adopted by some courts, holding that the interviews and interview notes were protected by the attorney-client privilege. The Court explained that

^{5/} The district court’s finding also is contradicted by its separate finding that the interview notes were attorney work product documents. Exh. D, at 2. A finding that counsel’s interview notes and memoranda were “prepared in anticipation of litigation or for trial” *necessarily* means that the interviews were conducted for the purpose of seeking and giving legal advice to Terra. See Fed. R. Civ. P. 26(b)(3).

^{6/} Although Iowa law governs application of the attorney-client privilege, it was undisputed below that Iowa courts would look to analogous federal precedents in determining whether a corporate employee is a “client” for purposes of the privilege. See *Shook v. City of Davenport*, 497 N.W.2d 883, 886 (Iowa 1993).

“[m]iddle-level — and indeed lower-level — employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.” *Id.* at 391. The Court also went on to reject the notion (adopted by the district court here) that corporate employees are not “clients” within the meaning of the attorney-client privilege:

Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications *concerned matters within the scope of the employees’ corporate duties*, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. *Id.* at 394.

Upjohn compels the conclusion that Terra’s attorney interviews of Terra employees were “client” communications protected by the attorney-client privilege. The purpose of Terra’s investigation was “to prepare Terra’s defense against the entire range of anticipated litigation” arising out of the Port Neal explosion. Gombar Aff., ¶ 11 (App. Tab 4 (Exh. B thereto)); Valentine Aff., ¶ 5 (App. Tab 4, (Exh. A thereto)). Moreover, “the communications made by Terra employees to Terra’s counsel were for the purpose of providing legal advice,” and “the information sought by Terra’s counsel [was] information within the scope of each employee’s duties.” Gombar Aff., ¶ 11. Indeed, as the Iowa district court found with respect to twelve mid- to lower-level Terra employees (all of whom were interviewed by Terra’s counsel and/or prepared documents at the request of counsel), such employees “could impute liability directly to Terra for their own wrongful acts, because it is their own conduct . . . that has the potential for being the central focus of MCC’s defense of inappropriate operations and maintenance.” *Terra Int’l, Inc. v.*

Mississippi Chemical Corp., 913 F. Supp. 1306, 1322 (N.D. Iowa 1996). Under *Upjohn*, communications between Terra’s counsel and Terra’s employees are plainly protected by the attorney-client privilege.⁷¹ The district court was without authority to ignore *Upjohn*’s holding in this case.

B. The District Court Clearly Abused Its Discretion In Treating Terra’s Attorney Notes And Documents As “Ordinary” Attorney Work Product.

Because Terra’s attorney interview notes and employee-generated documents are privileged, no amount of need can overcome their protected status. See *supra* at 14. However, even assuming, *arguendo*, that the attorney-client privilege does not apply, *Upjohn* also makes clear that Terra’s attorney interview notes qualify as core “opinion” work product, which cannot be discovered even upon a showing of substantial need. The district court, however, held that the protections accorded Terra’s attorney notes and documents could be overcome simply by a showing of substantial need and undue hardship. Exh. E, at 3 (adopting Exh. D, at 2). In doing so, and in disregarding this Circuit’s well-established precedents as well, the district court clearly exceeded the bounds of its authority.

There are two types of work product under Rule 26(b)(3): “opinion” (or “core”) work product and “ordinary” work product. “Opinion” work product includes documents that reflect “the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.” Fed. R. Civ. P. 26(b)(3). The Supreme Court and this Court have both held that an attorney’s

⁷¹ See also, *e.g.*, *Samaritan Foundation v. Goodfarb*, 862 P.2d 870, 878 (Ariz. 1993) (in banc) (to be privileged, “employee’s communication [must] relate to the employee’s own activities that are within the scope of his or her employment and are being attributed to the corporation”); *In re Allen*, 106 F.3d 582, 603 n.11 (4th Cir. 1997) (“the attorney-client privilege protected communications between Upjohn’s counsel and its employees, regardless of rank, because the communications were made in order to formulate and render legal advice to the corporation itself”); 2 *Weinstein’s Evidence*, ¶ 503(b)[04] (1992) (to be privileged, subject matter of communication must be “the performance by the employee of the duties of his employment”).

notes of witness interviews qualify as “opinion” work product. *Upjohn*, 449 U.S. at 399-401; *In re Grand Jury Proceedings*, 43 F.3d 966, 970-71 (5th Cir. 1994).

It also is well-established that the protections afforded “opinion” work product under Rule 26(b)(3) are far more stringent than those afforded “ordinary” work product. As the Supreme Court has noted, some courts have held that “no showing of necessity can overcome protection of work product which is based on oral statements from witnesses.” *Upjohn*, 449 U.S. at 401. This Court likewise has held that disclosure of “documents based upon oral communications with third parties” will be ordered only in a “rare situation” because the protection afforded such documents is “‘far stronger’ than for other work product documents.” *In re Grand Jury Proceedings*, 43 F.3d at 970-71 (quoting *Upjohn*, 449 U.S. at 402). See also *Upjohn*, 449 U.S. at 400 (“memoranda based on oral statements of witnesses . . . [are] the sort of material the draftsmen of the Rule [26(b)(3)] had in mind as deserving special protection”).

In this case, however, the district court inexplicably treated counsel’s interview notes as “ordinary” work product whose production could be overcome by the less stringent showing of “substantial need/undue hardship.” Exh. D, at 2 (adopted by Exh. E, at 3). In doing so, the district court committed a clear error of law given *Upjohn*’s unequivocal holding that attorney notes and memoranda reflecting the oral statements of third parties “cannot be disclosed simply upon a showing of substantial need and inability to obtain the equivalent without undue hardship.” 449 U.S. at 401.

The justification offered by the district court for overcoming Terra’s work product protections also has been flatly rejected by this Court. The district court held that MCC had shown substantial need and undue hardship because “Terra had access to the immediate testimony of eyewitnesses, and the notes reflect these witnesses’ portrayal of the events surrounding the explosion at a time when their memories

were fresh,” and because “[a]t this late date, it is impossible for MCC to discover via depositions this more accurate testimony of the witnesses, as recollections will certainly have diminished.” Exh. D, at 2 (adopted by Exh. E, at 3). As *Upjohn* itself reflects, however, in virtually *every* case a party’s counsel conducts witness interviews before opposing counsel is able to depose those witnesses. Accordingly, it is settled law in this Circuit that parties seeking discovery of work product materials must *first* attempt to obtain the desired information from other sources.

In re International Sys. and Controls Corp. Sec. Litig., 693 F.2d 1235 (5th Cir. 1982), controls on this point. Plaintiffs in that case sought discovery of work product generated by the defendant corporation’s audit committee, which was established to investigate SEC allegations that corporate personnel had made illegal payments abroad, to prove the corporation’s scienter in a fraud case. This Court held that the district court erred in ordering production of the work product documents, and explained that before ordering such production, “the district court should determine if [the information sought] can be discovered without the work product — *i.e.*, by deposition testimony.” *Id.* at 1241. While this Court noted that plaintiffs might at some point be able to “demonstrate undue hardship if the witness cannot recall the events in question, or is unavailable,” it warned that “broad unsubstantiated assertions of unavailability or faulty memory are not sufficient.” *Id.* at 1240. Accord *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1467 (11th Cir. 1984) (district court abused its discretion in ordering production of witness interviews, as “[t]here has been no showing . . . that appellee could not obtain that information by deposing the very same witnesses”).

Given that depositions in this case have yet to begin, the district court’s speculation that it would be “impossible for MCC to discover via depositions” the witnesses’ recollection of relevant events, and

that the “recollections” of Terra employees “will certainly have diminished” (Exh. D, at 2), is *precisely* the sort of “unsubstantiated assertion” that this Court rejected as insufficient in *International Systems*.^{8/} And since *International Systems* was an “ordinary” work product case, its holding applies with even greater force to the type of “opinion” work product that the district court ordered to be produced. See *McKenzie v. McCormick*, 27 F.3d 1415, 1420 (9th Cir. 1994), *cert. denied*, 513 U.S. 1118 (1994). Once again, the district court clearly exceeded the boundaries of its discretion in refusing to follow this well-established rule.

C. The District Court Exceeded its Authority in Ordering Terra to Produce Documents Prepared by its Non-Testifying Consultants.

In addition to compelling the production of Terra’s attorney-client documents and work product, the district court also ordered Terra to produce documents reflecting the extensive testing and analytical work conducted by Terra’s non-testifying consultants regarding the cause and origin of the Port Neal explosion. See *Valentine Aff.*, ¶ 11 (App. Tab 4 (Exh. A thereto)); *Gombar Aff.*, ¶¶ 8-13, 16-17, 25-26 (App. Tab 4 (Exh. B thereto)); *Baker Aff.*, ¶¶ 2-10 (App. Tab 4 (Exh. D thereto)). The district court’s Order cannot be squared with the plain language of the Federal Rules.

^{8/} The district court’s error cannot be cured by redacting “opinion” work product from the interview notes, so that only “factual” information remained, since the facts that counsel chose to record in the interview notes *necessarily* reveal what counsel believed to be sufficiently important to record, and hence would expose counsel’s mental impressions. See, e.g., *Upjohn*, 449 U.S. at 399 (“[f]orcing an attorney to disclose notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal the attorney’s mental processes”); *In re Grand Jury Proceedings*, 43 F.3d at 970 (recognizing the “likelihood” that “work product which results from oral communications with third parties . . . will reveal the attorney’s mental processes or litigation strategy”); *In re Allen*, 106 F.3d at 608 (“the information [the attorney] memorialized in her interview summary[] tends to indicate the focus of her investigation, and hence, her theories and opinions regarding this litigation”); *Hickman v. Taylor*, 329 U.S. 495, 513 (1947) (interview notes reflect “what [the attorney] saw fit to write down regarding the witnesses’ remarks”).

Rule 26(b)(4)(B) provides that “a party may, *through interrogatories or by deposition*, discover *facts known or opinions held* by [a non-testifying] expert . . . only . . . upon a showing of *exceptional circumstances* that it would be impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means” (emphasis added). The district court acknowledged the language of this Rule, but rejected Terra’s contention that the plain text of the Rule prohibits discovery of documents prepared by an opponent’s non-testifying consultants, and further found that MCC had met its burden of demonstrating the “exceptional circumstances” necessary to overcome the protections of the Rule. Exh. E, at 4 (adopting Exh. D, at 3-5). As demonstrated below, the district court clearly abused its discretion in disregarding the plain language of Rule 26(b)(4)(B) and in holding that MCC had shown “exceptional circumstances” under the Rule.

1. The Court’s Order Violates The Plain Language of Rule 26(b)(4)(B).

Rule 26(b)(4)(B) permits discovery of “facts known or opinions held” by an opposing party’s non-testifying consultant “through interrogatories or by deposition.” The Rule contains no provision authorizing discovery of *documents* generated by a non-testifying consultant. It follows, therefore, under settled principles of statutory construction (*inclusio unius, exclusio alterius*), that such document discovery is not authorized by the Federal Rules. See *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 86-87 (1994); *Landry v. All American Assurance Co.*, 688 F.2d 381, 389 & n.29 (5th Cir. 1982).^{2/}

^{2/} Prior to the 1993 amendments, Rule 26(b)(4)(B) contained no limitation on the methods of discovery that could be used vis-a-vis a non-testifying consultant, providing that “[a] party may discover facts known or opinions held by” a non-testifying expert upon a showing of exceptional circumstances. The 1993 amendments inserted the limiting term “through interrogatories or by deposition” between the words “may” and “discover,” thus limiting the methods of discovery to interrogatories and depositions. This amendment must be taken as an intentional restriction on the available methods of discovery under the Rule. *Cf. Eastus* (continued...)

While acknowledging that Rule 26(b)(4)(B) “mentions only interrogatories and depositions, and does not speak to requests for the production of documents,” the district court held that Rule 26(b)(4)(B) does not mean what it plainly says, and actually permits document discovery because ““the various discovery devices function as an integrated system, and that in deciding the limits of privilege, we should treat the various devices similarly.”” Exh. E, at 4 (citation omitted). Whatever its rationale, the district court had no authority to disregard the plain language of the rule. See *Burns v. Lawther*, 53 F.3d 1237, 1241 (11th Cir. 1995) (applying *inclusio unius* maxim to interpret Federal Rules). Indeed, the district court’s decision illegitimately arrogated to itself the power of deciding which types of discovery should be allowed under Rule 26(b)(4)(B). Congress, which of course has the last word on the matter, clearly resolved to limit discovery of non-testifying consultants to discovery of “facts known” and “opinions held” through “interrogatories or by deposition” alone. There is no other way that Rule 26(b)(4)(B) can plausibly be read. The district court was obliged to follow that Rule, not to rewrite it. Its patent disregard of the Rule plainly calls for an application of this Court’s mandamus jurisdiction. See *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (appellate court has power to grant mandamus relief where relevant federal rule does not empower district court to issue challenged order); *In re Excel Corp.*, 106 F.3d 1197, 1200 (5th Cir. 1997) (mandamus appropriate where district court remanded case on grounds not authorized by applicable removal statutes).

²(...continued)

v. Blue Bell Creameries, 97 F.3d 100, 106 (5th Cir. 1996) (1990 amendment to 28 U.S.C. § 1441(c) demonstrates “Congress’s intent to restrict, rather than to expand, removal jurisdiction”).

2. The Court Clearly Abused its Discretion in Finding That MCC Demonstrated “Exceptional Circumstances” Under Rule 26(b)(4)(B).

Even if Rule 26(b)(4)(B) permitted discovery of documents prepared by non-testifying consultants in anticipation of litigation, the district court clearly abused its discretion in holding that MCC demonstrated the sort of “exceptional circumstances” the Rule requires to justify such discovery. This Court has cautioned that a party seeking to demonstrate “exceptional circumstances” under Rule 26(b)(4)(B) “carries a heavy burden.” *Hoover v. U.S. Dep’t of the Interior*, 611 F.2d 1132, 1142 n.13 (5th Cir. 1980). Accord 8 Wright, Miller & Marcus, *Federal Practice and Procedure* § 2032, at 451 (2d ed. 1994) (“it will rarely be possible to make the required showing”) (emphasis added).

In this case, the district court suggested that MCC demonstrated “exceptional circumstances” justifying production of Terra’s consultant work-product because of MCC’s need to defend against Terra’s product liability claims. Exh. D, at 3-4 (adopted by Exh. E, at 3). The court did so even though MCC expressly disclaimed any need for Terra’s consultant work product to pursue any product liability issues in this case. Rather, MCC openly stated that it seeks this work product *only* to prove scienter as part of its defamation claim:

MCC can and has retained its own experts and has no interest in the Terra consultants’ documents as evidence in chief or as sources of information on the explosion *per se*. Rather, MCC seeks discovery of those documents as sources of information on the due diligence that Terra undertook before blaming MCC for four deaths and on what was actually done and known prior to the issuance of Terra’s report. [MCC needs] [t]o determine what basis, if any, Terra[] had for its public statements This is a defamation case.

App. Tab 5, at 12. The district court clearly was without authority to order Terra to produce documents for a purpose that MCC not only did not pursue, but expressly disclaimed.^{10/}

^{10/} Courts have consistently held that exceptional circumstances under Rule 26(b)(4)(B) (or “substantial need” and “undue burden” under Rule 26(b)(3)) cannot be shown where, as here, the party
(continued...)

The district court also found “exceptional circumstances” based on its holding that the “defamation claim pending against Terra (based in part upon its assertions that Terra was aware that its publication of the final report was false) renders these non-testifying expert reports impossible to duplicate by other means.” Exh. D, at 4 (adopted by Exh. E, at 3). Thus, according to the district court, MCC could overcome the restrictions of Rule 26(b)(4)(B) simply because of its burden to prove scienter as part of its defamation claim. Yet, this Court *consistently* has held that litigants cannot unilaterally abrogate their opponents’ discovery protections simply by asserting claims that require proof of the opponent’s scienter. For instance, in *Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir. 1988), plaintiffs in a securities fraud suit sought discovery of certain communications between the defendant corporation and its attorneys concerning the tender offer at issue in the litigation. Plaintiffs acknowledged that the communications were privileged, but maintained that “good cause” existed for overcoming the privilege (per *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971)) because of “their need to have information proving scienter on the part of the defendants.” *Id.* at 786. This Court flatly rejected this argument:

Plaintiffs are mistaken in assuming that having a scienter element as part of one’s burden of proof is a sufficient showing of ‘apparent necessity . . . [for] having the information’ under *Garner*. *Scienter must be proved in every securities case, but that fact alone*

¹⁰(...continued)

seeking the discovery can (by its own admission) conduct its own tests, analyses or investigation. See, e.g., *In re Shell Oil Refinery*, 132 F.R.D. 437, 443 (E.D. La. 1990) (rejecting plaintiffs’ attempt to obtain discovery of the test results and reports developed by Shell’s experts, explaining that plaintiffs could “obtain the substantial equivalent” of what they sought “by having their own experts conduct tests” on the artifacts); *Martin v. Bally’s Park Place Hotel & Casino*, 983 F.2d 1252, 1263 (3d Cir. 1993) (denying discovery because OSHA was not precluded “from conducting its own tests” on allegedly defective dishwasher); *Santos v. Rando Machine Corp.*, 151 F.R.D. 19, 22 (D.R.I. 1993) (denying discovery in product liability action because “plaintiff has adequate ‘other means’ to obtain facts and opinions on the design, manufacture, appearance and operation of the machine at the time of” the accident); *Hartford Fire Ins. Co. v. Pure Air on the Lake, Ltd.*, 154 F.R.D. 202 (N.D. Ind. 1993).

is not sufficient for showing 'good cause.' Otherwise, all fraud claims would pry open the privilege. . . .

Ibid. (emphasis added).^{11/} Accord, *e.g.*, *In re Burlington Northern, Inc.*, 822 F.2d at 533 (an antitrust plaintiff's burden to establish scienter in order to prove the existence of a "sham" under the *Noerr-Pennington* doctrine does not justify discovery of privileged information, for were the rule otherwise, "whenever a competitor files a lawsuit alleging that some earlier petitioning was a sham . . . the defendant would lose his privilege"); *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.*, 32 F.3d 851, 863 (3d Cir. 1994) (an attorney's advice "is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner").

Once again, the district court's decision contains no reference at all to any of the foregoing Fifth Circuit precedents, all of which were prominently cited by Terra. The district court had no discretion to ignore them.

D. The District Court Clearly Abused its Discretion in Refusing to Stay Discovery of Terra's Investigation Documents Pending Resolution of Terra's Entitlement to Defamation Immunity.

As explained above, MCC seeks access to Terra's incident investigation documents solely to support MCC's defamation claim. Terra, however, has asserted that MCC's defamation claim is barred by defenses of absolute and qualified immunity. Accordingly, this Court's ruling in *In re Burlington Northern, Inc.*, 822 F.2d 518 (1987), clearly requires that the discovery sought — to the extent it is not otherwise barred for the reasons specified above — be stayed until the district court first decides whether

^{11/} Because the "exceptional circumstances" standard of Rule 26(b)(4)(B) is at least as stringent as the *Garner* "good cause" standard, *In re International Systems*, 693 F.2d at 1239-40 & n.5, *Ward* applies with equal, if not greater, force to MCC's claim that it needs documents generated by Terra's non-testifying consultants to prove scienter for its defamation claim.

MCC's defamation claim is barred by absolute or qualified immunity. The district court wrongly refused to apply *Burlington Northern's* holding here. Exh. E, at 4-5.

Burlington Northern was an antitrust case in which the plaintiff alleged that the defendants, a group of railroads, conspired to prevent the construction of a coal slurry pipeline by improperly filing and defending lawsuits related to the pipeline. Plaintiff sought discovery of documents prepared by the railroads and their attorneys in connection with those prior lawsuits. The railroads resisted discovery under the attorney-client privilege and Rule 26(b)(3), and also on the ground that their litigation activities were immune from antitrust liability under the *Noerr-Pennington* doctrine. Specifically, the railroads argued that to obtain discovery, plaintiff first "had to show that [the railroads' prior] litigation activities were . . . not protected by the *Noerr-Pennington* doctrine." *Id.* at 522. The district court rejected these arguments and ordered the railroads to produce the requested documents. This Court then granted the railroad's petition for a writ of mandamus on the ground that "[t]o permit discovery of the documents . . . would undermine the effectiveness of the very type of petitioning" protected by *Noerr-Pennington* immunity. *Id.* at 525. This Court then went on to hold that:

to the extent [plaintiff] seeks material directly connected with the railroad's litigation activities, *the district court cannot order discovery without first determining that the litigation activity was itself in violation of the antitrust laws.* In the context of this case, that determination will require resolution of the question whether the litigation [is protected by *Noerr-Pennington*].

Ibid. (emphasis added). This Court also directed the district court, on remand, to make "a proper factual determination" as to whether plaintiff has established "a prima facie case showing that the [railroads' prior] litigation" fell outside the *Noerr-Pennington* doctrine. *Id.* at 534.

Burlington Northern's holding applies with equal force in this case. Just as *Burlington Northern's* litigation activities were arguably immune from antitrust liability under the *Noerr-Pennington* doctrine,

Terra’s allegedly defamatory statements also are likely protected by the doctrines of absolute and qualified immunity.

MCC’s defamation claim centers upon Terra’s publication of the Committee Report. The district court did not dispute that OSHA regulations *required* Terra to establish an “incident investigation team” to “thoroughly investigate and analyze” the explosion at the Port Neal facility, and to prepare a report summarizing the team’s conclusions and findings. 29 C.F.R. § 1910.119(m)(3)-(4). Moreover, the regulations state that “[t]he report, its findings and recommendations are to be shared with those who can benefit from the information.” 29 C.F.R. § 1910.119, App. C, ¶ 12 (emphasis added).^{12/} It is therefore likely that Terra will be able to prove that Terra’s publication of the Report is immune from defamation liability. At the very least, there is a substantial question as to whether Terra is entitled to such immunity. Under these circumstances, *Burlington Northern* compels the district court first to consider and decide these immunity questions *before* permitting discovery of the documents in question.

The district court acknowledged *Burlington Northern*, but refused to apply it on the ground that “MCC’s defamation claim is not the only basis on which [the court] ordered the production of documents.” Exh. E, at 5. In fact, as explained above (p. 24, *supra*), MCC disclaimed any purpose for seeking Terra’s incident investigation documents other than to pursue its defamation claim. The district court also asserted — without elaboration — that *Burlington Northern* “is not dispositive under the facts of this case.” Exh. E, at 5. In fact, *Burlington Northern* is controlling because the protected documents in question are being

^{12/} Even putting the OSHA regulations aside, it also is well settled that publication of a document is absolutely privileged when it is made “in connection with judicial proceedings.” *Ladner v. Arrington*, 374 So.2d 831, 833 (Miss. 1979). See, e.g., *Netterville v. Lear Siegler, Inc.*, 397 So.2d 1109, 1112-13 (Miss. 1981) (letter and complaint sent to the chairman of an attorney disciplinary committee are absolutely privileged because “disciplinary proceedings against an attorney are judicial in nature”).

sought by MCC only to support a claim that may ultimately be barred by defenses of immunity. For the very reasons articulated by this Court in *Burlington Northern*, a writ of mandamus is plainly warranted.

III. THE DISTRICT COURT EXCEEDED ITS AUTHORITY IN SEQUESTERING ALL FACT WITNESSES THROUGHOUT DISCOVERY WITHOUT REQUIRING A PARTICULARIZED SHOWING OF GOOD CAUSE UNDER RULE 26(c)(5).

Fed. R. Civ. P. 26(c)(5) provides that “for good cause shown,” a court may issue a protective order requiring a deposition to proceed “with no one present except persons designated by the court.” It is settled law in this Circuit that “[t]he burden is upon the movant to show the necessity” for a protective order, and that the movant must make “a *particular and specific demonstration of fact* as distinguished from *stereotyped and conclusory statements*” to support the issuance of a protective order. *United States v. Garrett*, 571 F.2d 1323, 1326 (5th Cir. 1978) (emphasis added). Accord, e.g., *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986). In this case, contrary to the plain language of Rule 26(c), the district court ordered the sequestration of all fact witnesses throughout discovery, party and non-party alike, without a shred evidence to demonstrate that there is any need for such a breathtaking order. Exh. H (adopting Exh. F). Given the fundamental impact that the sequestration order will have on the ability of Terra’s counsel to represent its client in discovery, and the restrictions that it places on legitimate attorney-client communications, the district court’s order represents an unmistakable abuse of discretion.

A. The District Court’s Sequestration Order is Contrary to the Plain Language of Fed. R. Civ. P. 26(c)(5).

In 1993, Congress amended the Federal Rules to make clear that the sequestration of witnesses at the deposition stage is permissible only in exceptional cases, and only upon a particularized showing of good cause. Prior to 1993, several courts assumed that Rule 615 of the Federal Rules of Evidence —

which grants parties the absolute *right*, with or without “good cause,” to sequester witnesses *at trial* — applied to pre-trial depositions as well. See, *e.g.*, *In re Shell Oil Refinery*, 136 F.R.D. 615 (E.D. La. 1991) (cited by Magistrate Judge below). Accordingly, those courts viewed the sequestration of witnesses at the deposition stage as the rule, not the exception. In 1993, however, Fed. R. Civ. P. 30(c) was specifically amended to make clear that Rule 615 does *not* apply to depositions. See Fed. R. Civ. P. 30(c) (“Examination and cross-examination of witnesses [at deposition] may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence *except Rules 103 and 615*”) (emphasis added).

Since 1993, then, it has been clear that sequestration orders at the discovery stage — unlike trial — are to be granted only in exceptional cases and upon a particularized showing of “good cause,” not on the basis of innuendo. In affirming the Sequestration Order, however, the district court relied exclusively on a 1962 decision that obviously took no account of the 1993 amendments to the Federal Rules. Exh. H, at 3. Whatever its rationale, the district court clearly had no authority to issue its sequestration order without requiring *any* “particular and specific demonstration of fact” to explain why such an order is necessary. *Garrett*, 571 F.2d at 1326 n.3.

Rule 26(c)(5) provides that “for good cause shown,” the court may order “that discovery be conducted with no one present except persons designated by the court.” The “good cause” required by Rule 26(c)(5) will not, however, be present in “ordinary garden variety” cases, and instead must be justified by a showing of “compelling or exceptional circumstances.” *BCI Communications, Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154, 160 (N.D. Ala. 1986). Accordingly, Rule 26(c)(5) and “the Court’s discretion under it[] should be *invoked sparingly*, else the openness on which our legal system

properly prides itself would be impaired.” *Kerschbaumer v. Bell*, 112 F.R.D. 426, 426 (D.D.C. 1986) (emphasis added). Accord, e.g., *Hamon Contractors, Inc. v. District Court of the First Judicial District*, 877 P.2d 884, 887 (Colo. 1994) (en banc) (sequestration should be “permitted only rarely and only under extraordinary circumstances”) (applying Colorado analog to Rule 26(c)(5)).

In this case, MCC made no attempt to offer any “particular and specific demonstration of fact” to support its request for sequestration. Likewise, the district court could point to nothing “compelling” or “exceptional” about this case that would even arguably justify the sequestration of all party and non-party fact witnesses. The court’s sequestration order instead was based *exclusively* upon the conjecture “that most fact witnesses are subject to substantial influence and even perhaps subtle pressures from their relationship with Terra.” Exh. F, at 1 (adopted by Exh. H).

MCC has not offered even a shred of evidence to support this disturbing accusation. To date, MCC has taken four depositions of current or former Terra employees, and has not *once* pointed to any evidence of “substantial influence” or “subtle pressures” by Terra or its counsel. In fact, MCC made no attempt to offer any evidence that Terra or its attorneys have ever exerted “substantial influence” or imposed “subtle pressures” upon actual or potential Terra witnesses. There is nothing in the record that even arguably calls into question Terra’s integrity in conducting this litigation, or the professionalism of Terra’s counsel. The district court’s “findings” simply have no basis in the record, and are instead merely the product of “stereotyped and conclusory statements” (*United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978)), which district judges have no discretion to rely upon under Rule 26(c).^{13/}

^{13/} It is true, as MCC argued (App. Tab 21, at 1), that many of the witnesses whom MCC seeks to depose are present or former employees of Terra. It is also true that Terra’s current employees draw salaries from Terra. But those circumstances are present in the thousands upon thousands of cases that
(continued...)

MCC based its request for sequestration on the bald assertions of its counsel that (1) most present and former Terra employees are outside of the subpoena power of the Mississippi court, (2) the attendance of these witnesses at trial could not be compelled in Mississippi, (3) present and former Terra employees may feel a sense of “camaraderie” toward one another, and (4) MCC desires to obtain the “raw reactions” of Terra’s witnesses in their deposition. App. Tab 21. These assertions, however, in no way justify a sequestration order at the discovery stage. As the district court recently explained in *Visor v. Sprint/United Mgmt. Co.*, 1997 WL 567923, at *2 (D. Colo. 1997), “an order for exclusion grounded in opposing counsel’s need ‘to assure independent recollection’ of events * * * has been deemed an abuse of discretion.” Indeed, if MCC’s speculative assertions were alone sufficient to establish “good cause,” sequestration would automatically be appropriate in *all* cases involving corporate parties whose employees may be called to testify.

In light of the 1993 amendments, recent decisions have consistently and categorically rejected requests for sequestration in cases presenting circumstances similar to those asserted by MCC. In *Tuszkiewicz v. Allen Bradley Co., Inc.*, 170 F.R.D. 15 (E.D. Wis. 1996), for example, plaintiff sought a Rule 26(c)(5) order preventing three of the defendant’s corporate employees from attending one another’s depositions. Like MCC, the movant argued that the three employees “continue to work together,” and that allowing them to “listen in on the testimony” of the others “would only serve to prejudice

¹³(...continued)

involve a business with two or more employees who are witnesses to the events in question. There is nothing “exceptional” or “compelling” about such circumstances. If the fact that an employer pays salaries to its employees, or that many of those employees like and respect each other, were to qualify as “good cause” under Rule 26(c)(5), then nearly every case would be “exceptional,” and deposition sequestration orders would be the rule, not the exception, in litigation under the Federal Rules.

the plaintiff.” *Id.* at 17. The district court denied the motion, explaining that plaintiff offered “no distinct facts that would lead the court to conclude that the witnesses cannot be trusted to tell the truth or that their attending each other’s depositions will otherwise affect their testimony.” *Ibid.* The court also added that a finding of “good cause” in the case “would surely mandate the same result in all cases in which there was more than one fact witness on an issue and where the movant alleges that prejudice could result.” *Ibid.* Accord *Visor v. Sprint/United Mgmt. Co.*, 1997 WL 567923, at *2 (D. Colo. 1997) (same).^{14/}

The lesson of *Tuszkiewicz* and other recent cases is clear: the employment relationship between a party employer and its employees, and the “camaraderie” that may exist among those employees, cannot provide the sort of compelling and extraordinary circumstances necessary to establish “good cause” under Rule 26(c)(5). As these cases make clear, any speculation that employees will engage in collusion or fabricate testimony to ensure consistency is just that — speculation. Such speculation will arise whenever two or more employees (or two or more relatives, or friends, or neighbors, or fellow club members) are deposed regarding their respective recollections of the same events. Because MCC offered no record evidence of its own, all the district court had to rely on is precisely the sort of speculation that is legally

^{14/} See also, *e.g.*, *BCI Communication Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154, 160 (N.D. Ala. 1986) (movant’s allegations of need to preclude plaintiff’s witnesses, some of them co-employees, “from hearing or being exposed to deponents’ testimony, [and] thereby preventing collusion or fabrication of testimony by the prospective future witnesses” “do not impress the Court as being anything more than ordinary garden variety or boilerplate ‘good cause’ facts which will exist in most civil litigation”); *Hamon Contractors, Inc. v. District Court*, 877 P.2d 884 (Colo. 1994) (en banc) (reversing trial court order prohibiting employees of either party from attending their fellow employees’ depositions or discussing their testimony with one another, finding that employees’ relationships with themselves and employer did not constitute the sort of “exceptional circumstances” necessary to justify a sequestration order, and reasoning that sequestration order “cannot be justified simply on the basis that it provides some protection against a possibility that the party will tailor his own testimony to assure consistency with that of the witness”).

insufficient under Rule 26(c). See *Garrett*, 571 F.2d 1323, 1326 n.3 (movant must make “a particular and specific demonstration of fact[,] as distinguished from stereotyped and conclusory statements,” to support issuance of protective order).

In sum, there are no exceptional or compelling circumstances in this case that even remotely support the district court’s finding of “good cause” for a Rule 26(c)(5) sequestration order. Moreover, the district court clearly was without authority to issue its sequestration order without requiring a particularized showing of good cause.

B. The Sequestration Order Will Deny Terra the Effective Assistance of its Counsel and Impair Its Ability to Meaningfully Participate in Discovery.

In addition to plainly failing the requirements of Rule 26(c)(5), the court’s sequestration order also will immediately and irreparably deprive Terra of its right to assistance of counsel, and will seriously impair Terra’s ability to participate effectively in the discovery process.

The sequestration order prohibits all persons, including Terra’s counsel, from discussing with any “fact witness” not yet deposed the testimony given in any earlier deposition. Such an intrusive and overly-broad restriction, if upheld, not only would substantially limit the ability of Terra’s counsel to fully prepare its witnesses for their depositions, but also would deny Terra the full assistance and zealous representation of its counsel during discovery and prevent Terra from vigorously investigating and developing Terra’s claims and defenses. The order also grants opposing counsel the right to invade attorney-client communications by inquiring as to whether the attorney representing the witness discussed the testimony of any other witnesses.

It is well-settled that in civil litigation “the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement.” *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1118 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). See also *Mosley v. St. Louis Southwestern*

Railway, 634 F.2d 942, 946 (5th Cir.) (same), *cert. denied*, 452 U.S. 906 (1981). Accordingly, this Court has prohibited *any* impingement on the attorney-client relationship absent “compelling reasons.” *Texas Catastrophe Property Ins. Ass’n v. Morales*, 975 F.2d 1178, 1180 (5th Cir. 1992), *cert. denied*, 507 U.S. 1018 (1993).

The right to counsel arises from the needs of clients who often are unfamiliar with the litigation process. The average litigant “lacks the skill and knowledge to adequately prepare his case and [the litigant] requires the guiding hand of counsel at every step in the proceeding against him.” *Ibid.* One such step, of course, is deposition discovery. Courts of appeals have cautioned “[d]istrict courts [to] be . . . chary of issuing protective orders that restrict the ability of counsel and client to consult with one another during trial or during the preparation therefor.” *Doe v. Dist. of Columbia*, 697 F.2d 1115, 1119 (D.C. Cir. 1983).

The restrictions imposed by the sequestration order in this case on Terra’s attorney-client communications would be severe and far-reaching, and would impinge upon the truth-seeking function that discovery is meant to serve. For instance, if a Terra employee were to provide new information during a deposition, or were to recall events or circumstances that (to the knowledge of Terra’s counsel) other prospective deponents had not yet recalled, Terra’s counsel would be prohibited from discussing that testimony with prospective deponents — or from verifying its accuracy. Likewise, if a question were to be asked on a subject that Terra’s counsel had not anticipated or investigated, Terra’s counsel would be barred from sharing the contents of that deposition with other witnesses who might be able to provide Terra’s counsel with valuable information and insights into that subject. The sequestration order also is not limited to communications between a party’s own witnesses. For instance, if an MCC witness were to testify about a conversation with a Terra employee, Terra’s counsel would be barred from discussing that

testimony with the Terra employee unless he or she had already been deposed — even though the witnesses obviously would not share any sense of “camaraderie.”

In short, the sequestration order would prevent Terra’s counsel from doing precisely that which any competent attorney would seek to do during discovery in representing a client. Indeed, the restrictions imposed by the sequestration order are even more intrusive than those that would even be imposed by Fed. R. Evid. 615 at trial. Under Rule 615, trial witnesses still would be permitted to review the prior deposition testimony of other witnesses in preparation for trial. See, e.g., *Naismith v. Professional Golfers Ass’n*, 85 F.R.D. 552, 567 (N.D. Ga. 1979); *Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451, 452 (M.D. Ga. 1987). Trial witnesses simply would not be permitted to attend the trial itself or to review the *trial* testimony of other witnesses. Here, on the other hand, the district court has barred counsel from discussing the testimony of *any* witness with *any* prospective deponent at *any* time prior to their deposition.

Terra has a substantial interest in the accurate reconstruction of the events occurring at the Port Neal facility prior to the explosion. As the district court recognized, the recollection and memories of fact witnesses already have faded, and are likely to fade further with time. See Exh. A, at 7, 8, 10 n.3. It is therefore only natural and proper to seek to refresh the recollection of a witness — something the Federal Rules openly encourage (see Fed. R. Evid. 612) — by allowing witnesses to speak with fellow witnesses, or by sharing with witnesses what others have recalled about the same events. Doing so best ensures that the testimony the witness will give reliably reflects the witness’ actual recollection of events. See *Kerschbaumer*, 112 F.R.D. at 427 (listening to other witnesses’ testimony may allow a prospective witness “to offer a fresher and more complete account of their own”).

Limiting Terra's counsel's ability to prepare witnesses for depositions also impinges upon the ethical duties of Terra's counsel. It is beyond dispute that "[a]n attorney has an ethical duty to prepare a witness" for a deposition. *Odone v. Croda Int'l PLC*, 170 F.R.D. 66, 69 (D.D.C. 1997); *Christy v. Pennsylvania Turnpike Comm'n*, 160 F.R.D. 51, 53 (E.D. Pa. 1995). Proper preparation necessarily includes discussing with the witness his or her recollections, the witness's expected testimony, and the areas in which the witness is likely to be questioned. This duty of preparation arises from a lawyer's duty to provide "competent representation to a client." Miss. Rules of Prof. Conduct 1.1. It therefore goes without saying that "[r]estrictions on speech between attorneys and their clients directly undermine the ability of attorneys to offer sound legal advice," and to provide the required level of competent representation. *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982). See also, e.g., *Christy*, 160 F.R.D. at 53 (declining to grant plaintiff's request for protective order limiting "the otherwise proper preparation of a witness for a deposition").

By denying Terra the ability to have its witnesses' recollections refreshed in this commonly-accepted fashion, and thus placing Terra in jeopardy that its witnesses will be forced to testify only from their own dim recollections, the sequestration order will severely prejudice Terra's presentation and investigation of its case, and threaten the integrity of the fact-finding process — all without a *shred* of evidentiary justification.^{15/}

It should come as no surprise, then, that courts have invalidated analogous restrictions placed upon attorney-client consultation. For example, courts have invalidated restrictions that prevent a client from

^{15/} Although the sequestration order applies to Terra and MCC witnesses and counsel alike, the great majority of fact witnesses to the events in dispute will be present and former Terra employees. Accordingly, counsel's inability to prepare witnesses for deposition, and to refresh witness recollections about events long since past, will prejudice Terra to a far greater extent than MCC.

conferring with counsel during extended breaks in his testimony at trial (see *Potashnick*, 609 F.2d at 1118); that prevent plaintiffs from consulting with their attorney during settlement proceedings facilitated by the EEOC (see *Mosley*, 634 F.2d at 945-46); or that prohibit a defendant from consulting with his lawyer during an overnight recess (see *United States v. Romano*, 736 F.2d 1432 (11th Cir. 1984), *vacated on other grounds*, 755 F.2d 1401 (11th Cir. 1985)). If anything, the sequestration order here is even more intrusive of the attorney-client relationship than the orders struck down by these courts since it restricts attorney-client communications not just for a few days, but throughout the *entire* discovery process. Without requiring a particularized showing of good cause, the district court had no authority to issue such an unprecedented order.

CONCLUSION

For the foregoing reasons, this Court should issue a writ a mandamus requiring the district court to vacate its Orders of October 30, 1997 affirming the Magistrate Judge's order compelling the production of documents and its sequestration order.

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