STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

VERIFIED PETITION OF SOUTHERN INDIANA GAS AND ELECTRIC COMPANY d/b/a VECTREN ENERGY DELIVERY OF INDIANA, INC. ("VECTREN SOUTH") FOR (1) ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE CONSTRUCTION OF A COMBINED CYCLE GAS TURBINE GENERATION FACILITY ("CCGT"); (2) APPROVAL OF ASSOCIATED RATEMAKING AND ACCOUNTING TREATMENT; (3) ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR COMPLIANCE PROJECTS TO MEET FEDERALLY MANDATED REQUIREMENTS ("CULLEY 3 COMPLIANCE PROJECT"); (4) AUTHORITY TO TIMELY RECOVER 80% OF THE COSTS INCURRED DURING CONSTRUCTION AND OPERATION OF THE CULLEY 3 COMPLIANCE PROJECTS THROUGH VECTREN SOUTH'S ENVIRONMENTAL COST ADJUSTMENT MECHANISM; (5) AUTHORITY TO CREATE REGULATORY ASSETS TO RECORD (A) 20% OF THE REVENUE REQUIREMENT FOR COSTS, INCLUDING CAPITAL, OPERATING, MAINTENANCE, DEPRECIATION, TAX AND FINANCING COSTS ON THE CULLEY 3 COMPLIANCE PROJECT WITH CARRYING COSTS AND (B) POST-IN-SERVICE ALLOWANCE FOR FUNDS USED DURING CONSTRUCTION, BOTH DEBT AND EQUITY, AND DEFERRED DEPRECIATION ASSOCIATED WITH THE CCGT AND CULLEY 3 COMPLIANCE PROJECT UNTIL SUCH COSTS ARE REFLECTED IN RETAIL ELECTRIC RATES; (6) ONGOING REVIEW OF THE CCGT; (7) AUTHORITY TO IMPLEMENT A PERIODIC RATE ADJUSTMENT MECHANISM FOR RECOVERY OF COSTS DEFERRED IN ACCORDANCE WITH THE ORDER IN CAUSE NO. 44446; AND (8) AUTHORITY TO ESTABLISH DEPRECIATION RATES FOR THE CCGT AND CULLEY 3 COMPLIANCE PROJECT ALL UNDER IND. CODE §§ 8-1-2-6.7, 8-1-2-23, 8-1-8.4-1 ET SEQ, 8-1-8.5-1 ET SEQ., AND 8-1-8.8 -1 ET SEQ.	)	**CAUSE NO. 45052**

VECTREN SOUTH'S RESPONSE TO JOINT INTERVENORS' MOTION TO COMPEL

For the second time in ten days, Joint Intervenors Citizens Action Coalition of Indiana, Valley Watch, and Sierra Club have filed a Motion that seeks to eviscerate the procedural schedule in this case. This attempt to delay the schedule should be rejected because the Motion to Compel is procedurally premature, factually inaccurate, and legally unsupported. Accordingly, it should be denied.

1. Joint Intervenors filed this Motion before meeting with Vectren South as the rules require.

This Commission follows the Indiana Trial Rules with respect to discovery. 170 IAC 1-1.1-16(a). Indiana T.R. 26(F) requires movants to "make a reasonable effort to reach agreement with the opposing party" before resorting to a motion to compel. T.R. 26(F)(1). The motion itself must include a statement that "shall recite, in addition, the date, time and place of the effort to reach agreement, whether in person or by phone, and the names of all parties and attorneys participating therein." T.R. 26(F)(2).

This information is absent from the Motion because there was no meeting. Joint Intervenors cannot fall back on the exception to a meeting requirement where a party "has refused or delayed meeting," because they made no attempt to schedule a meeting. The various attachments to the Motion will be searched in vain for any effort to schedule a meeting or a call. They did not even respond to Vectren South's email suggesting a meeting. Joint Intervenors do not attach to their Motion follow-up email correspondence to Mr. Stephenson's letter, where Mr. Stephenson specifically invited a telephone call in response to the follow-up. (See Attachment 1.)

Joint Intervenors attach a series of emails, but emails do not substitute for a "reasonable effort to reach agreement." T.R. 26(F)(1). The rules require a meeting because face-to-face dialogue (or at least dialogue over the telephone) is much more likely to produce a resolution of a discovery dispute without needing to involve the tribunal. As the local Federal District Court has observed,[1]

> An electronic ultimatum is not a good faith attempt to resolve a discovery dispute. Rather, the local rule contemplates an actual meeting with a date, time, and place – whether by telephone, videoconference, or (if counsel's location permits) preferably face-to-face. An old-fashioned chat over coffee might prove especially productive. Real-time interaction often

[1] As will be explained later, federal court interpretation of the discovery rules is persuasive authority in Indiana.

> provides the best forum for hashing out disputes, whereas a faceless exchange of carefully worded and often pointed emails usually solves little except perhaps providing a false moment of triumph to the person pressing the "send" button.

Loparex, LLC v. MP Release Technologies, LLC, 2011 WL 1871167, *2 (S.D. Ind. 5/16/2011) (footnote omitted); *accord Popovich v. Indiana Dept. of State Revenue*, 7 N.E.3d 419 (Ind. Tax Ct. 2014).

While, as will be explained herein, Joint Intervenors' Motion should fail on the merits, at a bare minimum, the Commission should not countenance the filing of a Motion to Compel before a movant has undertaken the effort to engage in dialogue with opposing counsel to reach resolution. The requests (CAC 2.27, 5.13b, 5.15, 8.1, and 8.5) at issue fall into three categories, which are each addressed below.

2. Vectren South has already provided a number of the answers Joint Intervenors seek to compel.

The Motion to Compel is mystifying because some of Joint Intervenors' requests drew no objection and received a full and complete response. It is thus unclear what Joint Intervenors seek to compel, other than perhaps a different answer. Particular attention is drawn to Requests 5.13b and 5.15.

5.13 states in its entirety:

> 5.13 Please refer to the Company's response to ICC Data Request 5.1.
> a. Please provide the Aurora modeling outputs.
> b. Please provide the correlations of variables modeled in Aurora (where available).
>
> Response:
>
> a. Please find attached the Aurora modeling outputs in Excel spreadsheet format.
> b. Pace Global used consensus views for the coal price, natural gas price, and carbon price variables modeled in Aurora. The consensus views, which were provided by Vectren South, consisted of multiple forecasts averaged together from a range of sources. Accordingly, Pace Global did not adjust the correlation

factors for these consensus price forecasts for coal, natural gas, and carbon.

Attachment:

CAC DR 5.13-R1.xls

When Joint Intervenors inquired about this request via email, Ms. Close responded on behalf of Vectren South on July 11, 2018: "With respect to 5.13b, perhaps I can clarify our answer. There was no correlation of variables modeled in Aurora as part of the modeling completed after completion of the 2016 IRP." JI Motion to Compel, Attachment 5, p. 4 (also submitted as Attachment 2.) The data request has thus been fully answered, so there is nothing to compel.

A similar issue arises with respect to 5.15, which states as follows:

5.15 Please refer to the Company's response to IG Data Request 4.7.
- a. Were the capital costs of the pipeline included in the NPV of revenue requirements for the CCGT being proposed in this filing?
  - i. If so, please provide these costs and locate where they are incorporated into the NPV of revenue requirements.
  - ii. If not, please explain why not.
- b. Does Vectren have an estimate of the "contract costs" that it will seek to recover at a later date for this pipeline?
  - i. If so, please provide such estimates.
  - ii. If not, please explain why not.
- c. Are there any costs of the pipeline included in revenue requirements for the Company's chosen portfolio?
  - i. If so, please provide such costs.
  - ii. If not, please explain why not.
- d. Please provide a list of which portfolios were modeled with the assumption that the pipeline would be built.

Response:

- a. Yes, pipeline costs were included in the NPV calculation as part of the Fixed O&M cost associated with the CCGT. The assumed costs were provided as part of the workpapers associated with Matthew Lind's testimony. The levelized pipeline costs can be found on the "CCGT Costs" tab of the provided workpapers as part of the Firm Gas Reservation cost.
- b. Please see Vectren South's response to CAC DR 5.15a.
- c. Please see Vectren South's response to CAC DR 5.15a.

> d. No portfolio was modeled with the assumption that the pipeline would be built. All portfolios had the option to select the construction of a combined cycle gas turbine at the Brown site (the "Brown CCGT"), the costs of which included construction of a gas pipeline. Any portfolio that selected the Brown CCGT included the cost of the pipeline necessary to deliver gas. To the extent Vectren South modeled a mix of specific resources to evaluate their cost against other portfolios and the included resources included the Brown CCGT, such portfolio would include the cost of the gas line lateral.

Again, the email from Ms. Close explains this answer: "With respect to 5.15, the request appears to be based on a mis-understanding of how the capital costs of the proposed pipeline are modeled. The capital costs of the proposed pipeline are not included in the modeling as part of the capital cost of the CCGT. Witness Hoover discloses the cost of the pipeline at p. 4 of his direct testimony. That cost was modeled as a fuel cost to the electric utility based on recovery of the cost to construct the pipeline. This approach is consistent with the pipeline costs incurred by Duke and IPL to serve their Edwardsport and Eagle Valley plants respectively." (Attachment 2.) This is reiterated in Mr. Stephenson's July 19, 2018 letter:

> There is no conflict between these two responses and therefore Vectren South will not be updating the response. A capital expense is different from an operation and maintenance ("O&M") expense. The modeled capital expense of the combined cycle gas turbine ("CCGT") did not include the gas pipeline costs (as Ms. Close explained in her email). The cost of the gas pipeline was accounted for as a fixed O&M expense as we explained in the response to CAC-VW Request 5.15(a). We have provided "consistent and transparent" explanations of how and where these costs were incorporated into the model. Our response to CAC VW Request 10.1 addresses your request for information on how the pipeline costs were incorporated into the fuel cost.

JI Motion to Compel, Attachment 5, p. 2 (also submitted as Attachment 3.)

There is nothing further to provide in response to 5.13 or 5.15. Both have been answered. Had Joint Intervenors conducted the required discovery conference, perhaps they would have realized that the requests have already been answered. Regardless, if they find

fault with the answers, they are free to file testimony and engage in cross examination at the hearing to support their view.

3. Disclosure of the names of companies pursuing economic development serves no purpose and harms Indiana's interests.

Joint Intervenors are demanding that the highly-confidential names of prospective economic development projects in Vectren South's service territory be handed over pursuant to a nondisclosure agreement so they can independently verify the accuracy of Vectren South's disclosure of the existence of these prospects, and also further assess the timing and nature of the service required by the potential customers. Joint Intervenors have shown no need for these names (Request 8.1). Of course, additional details related to the identified potential projects such as timing or the nature of the load could be the subject of additional data requests CAC has chosen not to submit. In terms of the existence of the prospects, while Vectren South does not falsify discovery responses, it is perfectly willing to submit an affidavit as to the existence of the prospects and to submit to cross examination regarding the existence. The bottom line is Vectren South is trusted by these customers in highly competitive industries with critical information, and it would be damaging to the customers, Vectren South and the State of Indiana to divulge such proprietary customer information.

Vectren South reasonably resists handing over private information that is very carefully guarded, not only by the prospective companies, but also the Indiana Economic Development Corporation. There is not public information through which these prospects can be confirmed. The only reason Joint Intervenors could have for requesting these names is to contact the prospects and interrogate them. Joint Intervenors want the names produced pursuant to the existing nondisclosure agreement ("NDA") between Vectren South and the Joint Intervenors, but that is no solace. The existing NDA permits Joint Intervenors to use confidential information for purposes of participating in this proceeding, which arguably could allow the Joint Intervenors to contact the prospective customers. Certainly to this point, Joint Intervenors have not articulated

how the NDA would prevent such activity. It would be a terrible result for economic development in Indiana if prospective development knew that its highly confidential plans could be handed over to an intervenor in a regulatory proceeding.

Joint Intervenors take umbrage at their own inference that Joint Intervenors might violate the terms of the NDA. That is not what Mr. Stephenson's July 19 letter referenced previously implies. Instead, he raises the legitimate concern that some of the Joint Intervenors have opposed economic development projects in the past and that if they do so here, companies pursuing the development may infer that disclosures made during discovery enabled opposition here:

> Should any party that receives specific information about the proposed development decide to oppose the economic development project, businesses may conclude that the State's sharing of the information (through Vectren South) has contributed to the opposition – whether or not the sharing of the information had any impact on the opposition.

Attachment 2, p. 3.

If a meeting had been convened, as the rules require, the parties may have been able to find a way (short of contacting the prospect) that would allow Joint Intervenors to verify the legitimacy of the prospect. As it is, Indiana should not compel the disclosure of these names.

4. <u>Materials available from subscriptions are not discoverable.</u>

The final set of requests in dispute relates to materials from Edison Electric Institute (Request 2.27) and from Moody's, S&P, and other rating agencies (Request 8.5). As a preliminary matter, Vectren South has not relied on information from any of these sources for purposes of its analysis or its evidence in this case. While Joint Intervenors might like to have these materials, they can readily obtain them for a nominal subscription fee of approximately $250 each (one to EEI and the other to the rating agency). Vectren South has paid that subscription and is contractually obligated not to share, publish, or retransmit the information.

Despite Joint Intervenors' contortions, the authorities cited by Vectren South in support of its objection are directly on point and persuasive. Joint Intervenors complain that Vectren South cites decisions by federal courts, but such citations are entirely proper. "In the absence of state law, we look to federal decisions for guidance in interpreting our rules of procedure which are similar to the Federal Rules of Civil Procedure." *Jackson v. Russell*, 491 N.E.2d 1017, 1018 (Ind. Ct. App. 1986). "The Indiana Trial Rules were patterned after the federal rules of civil procedure, and thus, because of the lack of Indiana case law on point, it is helpful to look at decisions in the federal system." *Brewer v. Brewer*, 403 N.E.2d 352, 354 (Ind. Ct. App. 1980); *see also Reeder v. Harper*, 788 N.E.2d 1236, 1241 (Ind. 2003) ("This Court has not spoken on the issue, but because the federal counterpart to Indiana Trial Rule 56(E) is identical, we look to the federal courts for guidance.")

This federal authority holds that a party cannot free-ride through discovery by forcing production of information that one party has paid for and which is publicly available for a similar fee. *See Securities & Exch. Comm'n v. Strauss*, 2009 WL 3459204, *11 (S.D. N.Y. 2009) ("The working paper database maintained by D&T is equally available to all parties here. Hozie can obtain the same access to the material that the SEC has by arranging with D&T's third-party service provider to have an identical database created and paying for monthly access and its own key fobs. Like the discovering party in *Sloan*, Hozie has chosen not to pay for the documents himself, opting instead to seek free access through discovery of his adversary.") (citations omitted); *see also Securities & Exch. Comm'n v. Samuel H. Sloan Co.*, 369 F.Supp. 994 (S.D. N.Y. 1973). Joint Intervenors cite no contrary authority, because there is none.

Finally, Joint Intervenors erroneously contend that the parties' NDA addresses this issue. That agreement allows a party who is in receipt of confidential information to challenge the claim of confidentiality. In the recently settled rate case for Indianapolis Power & Light Company, the Presiding Officers issued two docket entries (the second of which was ultimately affirmed on appeal to the full Commission) holding that information which is readily available

upon payment of a subscription or fee is, by definition, not confidential. Cause No. 45029 (Docket Entries of 6/7/2018 and 6/25/2018 and Entry of 7/25/2018.) Accordingly, the NDA would provide Vectren South little or no protection from a claim of breach of contract by the entities that supply the information to Vectren South.

The materials are readily available to Joint Intervenors for a nominal fee, which would be far less than the cost of the valuable attorney time disputing the issue with Vectren South.

CONCLUSION

For the reasons stated in this Response, the Motion to Compel should be denied.

Respectfully submitted,

Robert E. Heidorn (Atty No. 14264-49)
P. Jason Stephenson (Atty. No. 21839-49)
VECTREN CORPORATION
One Vectren Square
211 N.W. Riverside Drive
Evansville, Indiana 47708
Telephone: (812) 491-4203
Facsimile: (812) 491-4238
Email: rheidorn@vectren.com
jstephenson@vectren.com

Nicholas K. Kile (Atty No. 15203-53)
Hillary J. Close, (Atty No. 25104-49)
Lauren M. Box (Atty No. 32521-49)
Barnes & Thornburg LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Kile Telephone: (317) 231-7768
Close Telephone: (317) 231-7785
Box Telephone: (317) 231-7289
Facsimile: (317) 231-7433
Email: nicholas.kile@btlaw.com
hillary.close@btlaw.com
lauren.box@btlaw.com

Attorneys for Southern Indiana Gas and Electric Company d/b/a Vectren South Delivery of Indiana, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Vectren South's Response to Joint Intervenors' Motion to Compel was served via electronic transmission to:

Lorraine Hitz Bradley
Abby Gray
Randy Helmen
OFFICE OF UTILITY CONSUMER COUNSELOR
lhitzbradley@oucc.in.gov
rhelmen@oucc.in.gov
agray@oucc.in.gov
infomgt@oucc.in.gov

Robert E. Heidorn
Jason Stephenson
Vectren Corporation
rheidorn@vectren.com
jstephenson@vectren.com

Robert Hartley
Alan S. Brown
Darren A. Craig
Frost Brown Todd LLC
rhartley@fbtlaw.com
abrown@fbtlaw.com
dcraig@fbtlaw.com

Michael Kurtz
Boehm Kurtz & Lowry
mkurtz@bklawfirm.com

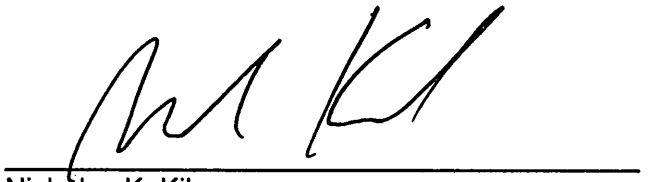
Jennifer A. Washburn
Margo Tucker
Citizens Action Coalition of Indiana, Inc.
mtucker@citact.org
jwashburn@citact.org

Nikki Shoultz
Kristina Kern Wheeler
Bose McKinney & Evans LLP
nshoultz@boselaw.com
kwheeler@boselaw.com

Todd A. Richardson
Tabitha L. Balzer
Lewis & Kappes, P.C.
trichardson@lewis-kappes.com
tbalzer@lewis-kappes.com

Jeffrey A. Earl
jeff@lewisandearl.com

this 1st day of August, 2018.



Nicholas K. Kile

DMS 12979733v1

Kile, Nicholas

From: Stephenson, Jason <jstephenson@vectren.com>
Sent: Friday, July 20, 2018 2:31 PM
To: 'Jennifer Washburn'
Cc: Close, Hillary; Box, Lauren; Brown, Alan S.; Craig, Darren A.; Heidorn, Bob; Hitz-Bradley, Lorraine; Jeffery Earl; Michael Kurtz; Kile, Nicholas; Shoultz, Nikki; Tabitha Balzer; Wheeler, Kristina; rhartley@fbtlaw.com; Cassandra McCrae; Margo Tucker; Thomas Cmar
Subject: [EXTERNAL]RE: 45052--Trial Rule 26F communication re CAC-VW 5.11, 5.15, 8.1, and 8.5

Jennifer,

1. Vectren is still working with the owner of the information responsive to 5.11 to obtain approval. We have had conversations several days this week.
2. Vectren has outlined its position on the remainder issues in the letter. If you have specific questions, please call me.

From: Jennifer Washburn [mailto:jwashburn@citact.org]
Sent: Friday, July 20, 2018 11:24 AM
To: Stephenson, Jason
Cc: Close, Hillary; Box, Lauren; Brown, Alan S.; Craig, Darren A.; Heidorn, Bob; Hitz-Bradley, Lorraine; Jeffery Earl; Michael Kurtz; Kile, Nicholas; Shoultz, Nikki; Tabitha Balzer; Wheeler, Kristina; rhartley@fbtlaw.com; Cassandra McCrae; Margo Tucker; Thomas Cmar
Subject: Re: 45052--Trial Rule 26F communication re CAC-VW 5.11, 5.15, 8.1, and 8.5

This EXTERNAL email may contain an attachment. Do not open attachments or click on links in emails unless you are certain the source AND content of the email are credible.
Jason,

We reviewed your communication. A couple follow-up matters:

1. Regarding CAC DR 5.11, we understand your response to suggest you are still coordinating access with the "owner of the information." Is that correct? If so, could you please provide us with a date certain by which Vectren will either produce responsive documents to that request or a definitive refusal?

2. Please confirm our overall understanding of your communication--Vectren does not intend to provide any additional information in response to any of the requests besides CAC 5.11.

Thank you,
Jennifer

On Thu, Jul 19, 2018 at 5:13 PM, Stephenson, Jason <jstephenson@vectren.com> wrote:

Jennifer,

We've had several discovery responses to work on this week. Attached is our response.

In addition, we wanted to newly follow up on Vectren's responses to CAC-VW 8.1 and CAC-VW 8.5. With respect to CAC-VW 8.1, we appreciate Vectren's accounting of projected new loads, but would ask that Vectren disclose the company names associated with those projected new loads. Parties to this proceeding have the right to discover specific information that would allow them to evaluate the credibility of Vectren's claims that new customers will increase its load in coming years. As we have previously explained, proprietary, confidential, and competitively sensitive business information is not per se undiscoverable. On the contrary, the parties in this proceeding have entered into non-disclosure agreements to allow for the exchange of such information for use in this proceeding while preventing its further dissemination. Under the operative non-disclosure agreements to which the parties in this case have already agreed, the names of the specific customers responsive to CAC-VW 8.1 would be adequately protected and should be identified without further delay.

With respect to CAC-VW 8.5, we would again ask Vectren to produce the requested information subject to the operative non-disclosure agreements. Vectren's response raises alleged limitations based on the subscription agreement, but again does so without specifying what those limitations actually are, let alone how they could justify Vectren not fulfilling its discovery obligations. As demonstrated by Vectren's direct testimony, the credit ratings themselves as well as the underlying methodologies are relevant to these proceedings and should be produced without further delay.

Thank you in advance for your assistance,

Jennifer

On Wed, Jul 11, 2018 at 4:32 PM, Close, Hillary <Hillary.Close@btlaw.com> wrote:

Jennifer,

We are contacting the creator to obtain permission to share the information requested in 5.11 so that we are not in violation of our contractual obligations.

With respect to 5.13b, perhaps I can clarify our answer. There was no correlation of variables modeled in Aurora as part of the modeling completed after completion of the 2016 IRP.

With respect to 5.15, the request appears to be based on a mis-understanding of how the capital costs of the proposed pipeline are modeled. The capital costs of the proposed pipeline are not included in the modeling as part of the capital cost of the CCGT. Witness Hoover discloses the cost of the pipeline at p.4 of his direct testimony. That cost was modeled as a fuel cost to the electric utility based on recovery of the cost to construct the pipeline. This approach is consistent with the pipeline costs incurred by Duke and IPL to serve their Edwardsport and Eagle Valley plants respectively.

-Hillary

BARNES & THORNBURG LLP

VCard | Bio | Dept Info

Hillary J. Close
Partner
hillary.close@btlaw.com

Phone: (317) 231-7785
Fax: (317) 231-7433
www.btlaw.com

VECTREN
Live Smart

Jason Stephenson
Vice President, General Counsel

Vectren Corporation
One Vectren Square
Evansville, IN 47708
Tel: 812 491 4231
Fax: 812 491 4238
Cell: 812 431 7994
jstephenson@vectren.com

July 19, 2018

Jennifer Washburn
Citizens Action Coalition
1915 W. 18th St., Suite C
Indianapolis, IN 46202
jsashburn@citact.org

RE: Indiana Utility Regulatory Commission Cause No. 45052

Dear Jennifer,

We received your July 16, 2018 email related to Southern Indiana Gas and Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc.'s ("Vectren South") responses to certain discovery requests issued by the Citizens Action Coalition of Indiana ("CAC") and Valley Watch ("VW") which was identified as a communications pursuant to Indiana Trial Rule 26F. This letter constitutes Vectren South's response.

CAC-VW Allegations Related To CAC-VW Request 5.11

Vectren South has been working with the owner of the information sought in response to CAC-VW 5.11 to enable us to provide that information to the CAC-VW. We disagree with your claim that Vectren South "has not provided any legitimate basis for delaying this production." Vectren South must purchase some of the information it relies upon to operate its business. The entities that create that information sometimes provide it to Vectren South (and others) subject to contractual arrangements that prohibit its disclosure to third parties. The seller likely depends on the fees paid for the information to fund the cost to develop the information (or future information that can be sold). This ensures that others desiring to utilize the information must also pay for the information, thus providing revenue to further reimburse the seller for the cost of developing the information.

Your email contends that Vectren South's "purported" 'contractual obligations' were not specified. That assertion is not accurate. Hillary Close's July 11, 2018 email explained that we needed to contact "the creator to obtain permission to share the information requested in 5.11 so that we are not in violation of our contractual obligations." This statement makes it clear that the contractual obligations prohibited us from sharing the information with third parties. Setting forth the specific contractual language is not necessary to make the obligations clear.

We also disagree with your allegation that Vectren South is "not fulfilling its discovery obligations in this proceeding." Vectren South has provided responses to hundreds of requests, including turning over numerous documents responsive to requests. We have been very inclusive of the information being provided, both in response to discovery responses and in our workpapers filed with the Commission.

Furthermore, raising legitimate objections and insisting upon compliance with our contractual obligations does not constitute failure to fulfill discovery obligations. In fact, as made clear in Ms. Close's July 17, 2018 email, Vectren South was seeking authority from the owner of the information to turn-over the information, thereby complying with our discovery obligations. CAC/VW implicitly contends that discovery obligations trump contractual obligations. No legal precedent is provided for that proposition. The Indiana Trial Rules cannot eliminate contract protections outlined in the Indiana constitution. Specifically, Article 1, Section 24 of Indiana's Constitution recognizes the sanctity of contracts by declaring that no "law impairing the obligation of contracts shall ever be passed." Therefore, even if the Trial Rules were intended to impair contract obligations (which Vectren South does not believe to be the case), they cannot invalidate protection granted to Vectren South and contractual counter-parties by the Indiana Constitution.

CAC-VW Allegations Related To CAC-VW Request 5.15(a)

Your July 16, 2018 email suggests that the response to CAC-VW Request 5.15(a) conflicts with Ms. Close's July 11, 2018 email. Ms. Close's email states in relevant part that:

> With respect to 5.15, the request appears to be based on a mis-understanding of how the capital costs of the proposed pipeline are modeled. The capital costs of the proposed pipeline are not included in the modeling as part of the capital cost of the CCGT. Witness Hoover discloses the cost of the pipeline at p.4 of his direct testimony. That cost was modeled as a fuel cost to the electric utility based on recovery of the cost to construct the pipeline.

Vectren South's response to CAC-VW Request 5.15(a) provided that:

> Yes, pipeline costs were included in the NPV calculation as part of the Fixed O&M cost associated with the CCGT. The assumed costs were provided as part of the workpapers associated with Matthew Lind's testimony. The levelized pipeline costs can be found on the "CCGT Costs" tab of the provided workpapers as part of the Firm Gas Reservation cost.

There is no conflict between these two responses and therefore Vectren South will not be updating the response. A capital expense is different from an operation and maintenance ("O&M") expense. The modeled capital expense of the combined cycle gas turbine ("CCGT") did not include the gas pipeline costs (as Ms. Close explained in her email). The cost of the gas pipeline was accounted for as a fixed O&M expense as we explained in the response to CAC-VW Request 5.15(a). We have provided "consistent and transparent" explanations of how and where these costs were incorporated into the model. Our response to CAC-VW Request 10.1 addresses your request for information on how the pipeline costs were incorporated into the fuel cost.

CAC-VW Allegations Related To CAC-VW Request 8.1

Vectren South's response to CAC-VW Request 8.1 provided details of six specific customers that, either by expanding load or constructing new facilities, would drive higher electric load on Vectren South's system. Vectren South did not disclose the specific names of the customers. CAC-VW has not identified a legitimate basis for disclosure of this information. For that reason and to ensure Indiana's ability to attract economic development is not harmed by inappropriate disclosure of information, Vectren South will not produce this information.

You assert that "Parties to this proceeding have the right to discover specific information that would allow them to evaluate the credibility of Vectren's claims that new customers will increase its load in coming years." However, identifying the potential customers would not assist the parties in assessing the credibility of Vectren South's load projections. Industrial customers closely protect the electric load of their facilities on the basis that this information is a trade secret. Consequently, the load information is not public. Knowledge of the specific customer names will not help the parties evaluate the credibility of Vectren South's load projection because the information on load usage is not in the public realm. In some cases, the customer's consideration to locate in Indiana is not publicly available. The only way this information could be utilized to verify Vectren South's load projections would be for a party to contact the potential customers directly and inquire about expansion plans. This use would directly conflict with the nondisclosure agreements.

There are also significant risks if it becomes known that Indiana is sharing information on potential economic development, even pursuant to a nondisclosure agreement, with parties to this proceeding. Some of the parties to this proceeding have, in the past, opposed some forms of economic development. *See e.g.* Sierra Club Opposes Proposed Vallejo Cement Plant, https://www.sierraclub.org/redwood/blog/2017/01/sierra-club-opposes-proposed-vallejo-cement-plant (last visited July 18, 2018) and Olivia Ingle, *Residents seek more info on coal-to-diesel plant*, The Herald (April 25, 2018), https://duboiscountyherald.com/b/residents-seek-more-info-on-coal-to-diesel-plant. Should any party that receives specific information about the proposed development decide to oppose the economic development project, businesses may conclude that the State's sharing of the information (through Vectren South) has contributed to the opposition—whether or not the sharing of the information had any impact on the opposition.

Economic prospects might also refuse to allow information about their projects to be shared with Vectren South if Vectren South cannot protect this information from disclosure. The State of Indiana would be placed at a significant disadvantage in attracting future economic development projects without the ability to coordinate with a utility on available capacity and pricing.

CAC-VW Allegations Related To CAC-VW Request 8.5

Your July 16, 2018 email implies that Vectren South has refused to make information sought in response to CAC-VW Request 8.5 by stating "we would again ask Vectren to produce the requested information subject to the operative non-disclosure agreements." This premise in your email (that Vectren South has refused access to this information) is false. Vectren South is making this information available to CAC-VW by making the attachment available for review at the offices of Barnes & Thornburg LLP in Indianapolis, Indiana or Vectren South in Evansville, Indiana at a mutual agreed and scheduled time during business hours.

You also assert that Vectren South is "not fulfilling its discovery obligations" because it is not providing you copies of the" Moody's and S&P reports. In fact, Vectren South has no discovery obligations with respect to this information. Courts construing the obligation to produce documents have held that discovery is not required of documents of public record which are equally accessible to all parties. *SEC v. Strauss*, 2009 U.S. Dist. LEXIS 101227 at * 31-32 (S.D.N.Y. 2009); *Valenzuela v. Smith*, 04 Civ. 0900, 2006 U.S. Dist. LEXIS 6078, 2006 WL 403842 at *2 (E.D. Cal. Feb. 16, 2006) ("Defendants . . . will not be compelled to produce documents that are equally available to plaintiff."); *Baum v. Village of Chittenango*, 218 F.R.D. 36, 40-41 (N.D.N.Y. 2003) ("[C]ompelling discovery from another is unnecessary when the documents sought are equally accessible to all."); *Bleecker v. Standard Fire Ins. Co.*, 130 F. Supp. 2d 726, 738 (E.D.N.C. 2000) ("Discovery is not required when documents are in the possession of or are readily obtainable by the party seeking a motion to compel."); *S.E.C. v. Samuel H. Sloan & Co.*, 369 F. Supp. 994, 995-96 (S.D.N.Y. 1973) (Ward, D.J.) ("It is well established that discovery need not be required of documents of public record which are equally accessible to all parties."); *Blair v. Travelers Ins. Co.*, 9 F.R.D. 99, 99 (W.D. Mo. 1949) (motion for production denied where "[n]early all the documents sought can be obtained by the plaintiff as easily as they can be obtained by the defendant"). This is true even when the document in question requires payment of a fee to obtain. SEC v. Strauss, 2009 U.S. Dist. LEXIS 101227 at * 31-32 (S.D.N.Y. 2009); (*Baum*, 218 F.R.D. at 40-41 ("parties are generally responsible for their own costs, and their adversaries are not obligated to finance their litigation.")

While some courts consider financial need, Vectren South does not believe that well financed parties like the CAC, VW or Sierra Club are unable to bear the cost of their own litigation. Please feel free to share financial statements with us if you believe that not to be the case.

While Vectren South has made the information available for inspection by the parties for their convenience, we will not provide copies. Parties desiring their own copies are free to enter into arrangements with Moody's and S&P to obtain and utilize the information as they see fit and in accordance with the terms of their arrangements.

Conclusions

Vectren South will continue to work to be open and transparent with the parties in this proceeding. However, Vectren South's transparency will not come at the cost of violating contractual commitments it has entered into for purposes of obtaining information or putting the State of Indiana at a potential future disadvantage from the disclosure of information about economic development projects.

Sincerely,

Jason Stephenson
Vice President, General Counsel of Vectren Utility Holdings, Inc.

2011 WL 1871167
Only the Westlaw citation is currently available.
United States District Court,
S.D. Indiana,
Indianapolis Division.

LOPAREX, LLC, Plaintiff,
v.
MPI RELEASE TECHNOLOGIES, LLC, Gerald Kerber, and Stephan Odders, Defendants.

No. 1:09-cv-1411-JMS-TAB.
|
May 16, 2011.

Attorneys and Law Firms

Charles W. Pautsch, Lisa A. Baiocchi, Jackson Lewis LLP, Milwaukee, WI, Lawrence Bryant Shulman, Jackson Lewis LLP, Southfield, MI, Melissa S. Vare, Michael W. Padgett, Jackson Lewis LLP, Indianapolis, IN, for Plaintiff.

Aaron M. Staser, Donald E. Knebel, Jennifer Lynn Schuster, Lynn C. Tyler, Richard P. Winegardner, Barnes & Thornburg LLP, Indianapolis, IN, for Defendants.

ORDER DENYING PLAINTIFF'S MOTION TO COMPEL

TIM A. BAKER, United States Magistrate Judge.

I. Introduction

*1 The word *confer* derives from the Latin *conferre*—"to bring together"—and means to compare views or take counsel. In this district, Local Rule 37.1 requires counsel to confer in good faith before submitting a discovery dispute to the Court, and encourages counsel to contact the assigned Magistrate Judge before filing a formal discovery motion. Plaintiff's counsel in this case ignored not only Local Rule 37.1, but also the Court's repeated warnings about increasing incivility and moved to compel without conferring in good faith. For these reasons, as more fully set forth below, the Court denies Plaintiff's motion to compel. [Docket No. 271.]

II. Background

This trade secrets case is before the Court on another discovery dispute despite the Court's repeated admonitions encouraging cooperation. [*E.g.*, Docket Nos. 44, 188.] As recently as March 21, 2011, the Court concluded an entry denying Plaintiff's motion for sanctions with the following observation:

> [W]hat should be a straightforward trade secrets case has resulted in an abnormally high number of discovery disputes, not to mention multiple motions for sanctions. Counsel on both sides are reminded that while they can and should zealously advocate for their clients, zealous advocacy does not equate with a total-war mentality toward litigation.

[Docket No. 270 at 8.]

This warning apparently fell on deaf ears. At 12:12 p.m. on March 23—less than fourtyfour hours after the Court's March 21 reminder—Plaintiff's counsel emailed Defendants' counsel threatening to file a motion to compel if Defendants failed to stipulate to additional discovery before 9:00 the next morning. [Docket No. 274, Ex. 2.] Defendants' counsel responded hours later with several meaningful objections and urged Plaintiff's counsel to heed the Court's recent admonition. [*Id.*]

That warning also fell on deaf ears, and Plaintiff's counsel filed this motion to compel. [Docket No. 271.] The motion did not include any statement of informal attempts to resolve the dispute, and Plaintiff's counsel have not replied to Defendants' argument that this failure precludes relief.

III. Discussion

Local Rule 37.1, amended effective January 1, 2011, sets

out this Court's expectations of counsel involved in discovery disputes:

> (a) Prior to involving the court in any discovery dispute, including disputes involving depositions, counsel must confer in a good faith attempt to resolve the dispute. If any such dispute cannot be resolved in this manner, counsel are encouraged to contact the chambers of the assigned Magistrate Judge to determine whether the Magistrate Judge is available to resolve the discovery dispute by way of a telephone conference or other proceeding prior to counsel filing a formal discovery motion. When the dispute involves an objection raised during a deposition that threatens to prevent completion of the deposition, any party may recess the deposition to contact the Magistrate Judge's chambers.
>
> *2 (b) In the event that the discovery dispute is not resolved at the conference, counsel may file a motion to compel or other motion raising the dispute. Any motion raising a discovery dispute must contain a statement setting forth the efforts taken to resolve the dispute, including the date, time, and place of any discovery conference and the names of all participating parties. The court may deny any motion raising a discovery dispute that does not contain such a statement.

An electronic ultimatum is not a good faith attempt to resolve a discovery dispute.[1] Rather, the local rule contemplates an actual meeting with a date, time, and place—whether by telephone, videoconference, or (if counsel's location permits) preferably face-to-face. An old-fashioned chat over coffee might prove especially productive. Real-time interaction often provides the best forum for hashing out disputes, whereas a faceless exchange of carefully worded and often pointed emails usually solves little except perhaps providing a false moment of triumph to the person pressing the "send" button.

If a more interactive and meaningful meeting is infeasible, Local Rule 37.1 requires, at the very least, an attempt to fully exchange views before filing discovery motions. In addition, the recent amendments to Local Rule 37.1 encourage counsel to seek the assistance of the assigned Magistrate Judge before filing a formal discovery motion. Plaintiff's counsel ignored the opportunity presented by this amended rule in the same manner that Plaintiff's counsel ignored the Court's warnings.

Plaintiff's counsel's email missive does not satisfy the local rule. Despite its tone, the March 23 email was met with level-headed objections from Defendants that merited further discussion, preferably via a verbal conversation. The parties' contentious history provides no excuse for skipping this step. Even if relations between counsel have deteriorated to the point where picking up the phone is a challenge, "[i]t is precisely when animosity runs high that playing by the rules is vital." [Docket No. 276 at 10.] Had further discussions failed, either counsel could have contacted the Magistrate Judge for prompt guidance on what appears to be a relatively simple dispute. The Court therefore denies Plaintiff's motion to compel for noncompliance with the local rule. Any successive motion will likewise be denied unless it is preceded by an actual meeting of counsel, preferably in person, and, if the meeting of counsel fails to resolve the discovery dispute, a request to involve the assigned Magistrate Judge.

IV. Conclusion

Plaintiff's motion to compel [Docket No. 271] is denied.

All Citations

Not Reported in F.Supp.2d, 2011 WL 1871167

Footnotes

1 This is not the first time these parties have heard this message. [Docket No. 44 at 1 n. 1 ("A meet-and-confer is not an empty and formulaic process that can be accomplished by simply mailing or faxing a letter to the opposing party. It requires that the parties in good faith converse, confer, compare views, consult and deliberate, or in good faith attempt to do so.") (internal quotation omitted).]

2009 WL 3459204
Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

SECURITIES and EXCHANGE COMMISSION,
Plaintiff,
v.
Michael STRAUSS, Stephen Hozie, and Robert Bernstein, Defendants.

No. 09 Civ. 4150(RMB)(HBP).
|
Oct. 28, 2009.

OPINION AND ORDER

PITMAN, United States Magistrate Judge.

I. *Introduction*

*1 I write to resolve two pending discovery disputes between the parties: (1) defendant Stephen Hozie's application to compel plaintiff Securities and Exchange Commission ("SEC") to produce notes taken by SEC staff of memoranda of witness interviews prepared by the FBI, as well as notes and memoranda of other witness interviews, and (2) Hozie's application to compel the SEC to grant him access to a database of work papers which is maintained by third party Deloitte and Touche ("D & T") and to which the SEC obtained remote access through an investigative subpoena.[1]

For reasons discussed below, (1) Hozie's application to compel production of the witness interview notes and memoranda is denied and (2) Hozie's application to compel the SEC to grant him remote access to D & T's electronic database is denied.

II. *Facts*

This is an enforcement action brought by the SEC against defendants Michael Strauss, Stephen Hozie and Robert Bernstein, senior officers of American Home Mortgage Investment Corporation ("American Home"), for accounting fraud (Complaint, dated Apr. 29, 2009 ("Compl.") ¶ 1). The complaint alleges that the defendants violated various provisions of the Securities Act and the Securities Exchange Act by setting "materially understated reserves," making misleading and incomplete public statements, misleading their auditors, and concealing information from their auditors (Compl.¶¶ 2–3, 5, 7). The Honorable Richard M. Berman, United States District Judge, entered a final consent judgment as to defendant Michael Strauss shortly after the complaint was filed (Final Judgment as to Def. Michael Strauss, entered Apr. 29, 2009; Letter from David Stoelting, Esq. to the undersigned, dated Sept. 18, 2009 ("SEC Sept. 18 Letter") at 1). As of September 11, 2009, defendant Robert Bernstein had reached a settlement in principle with the SEC, but it had not yet been finalized. Hozie appears to be the only defendant actively pursuing discovery at this time.

A. *The SEC's Notes and Memoranda of Witness Interviews*

The parties' first dispute arises out of Hozie's requests for three categories of witness interview notes and the SEC's assertion that the documents are protected by the work-product doctrine.

The SEC commenced its investigation of American Home in July 2007; the SEC issued a formal order of investigation on August 23, 2007 (Declaration of Alison T. Conn, dated Sept. 18, 2009 ("Conn.Decl."), ¶¶ 3–4). Three attorneys—Alison Conn, Vincent Sherman and Maureen Peyton King—participated in the investigation (Conn Decl. ¶ 5). They were assisted by an accountant—James Addison—and two SEC "examiners"—Debbie Chan and Kathy Murdocco (Conn Decl. ¶ 5). The individuals participating in the investigation generated three categories of notes that are in issue in the present dispute: (1) 16 sets of notes of interviews of witnesses; (2) 8 sets of notes summarizing portions of memoranda prepared by the FBI which summarize interviews with witnesses and (3) three sets of notes of proffers made by Hozie and Bernstein to the United States Attorney's Office for the Eastern District of New York (*see* Plaintiff's Amended Privilege Log at 6–7, annexed as Ex. A to the Letter of Lawrence Gerschwer,

Esq., to the undersigned, dated Sept. 18, 2009 ("Hozie Sept. 18 Letter")). Eight sets of notes in the first category were prepared by non-attorneys; none of the notes in the second category were prepared by non-attorneys, and two of the three sets of notes in the third category were prepared by non-attorneys (Plaintiff's Amended Privilege Log at 6–7, annexed as Ex. A to Hozie Sept. 18 Letter). All of the notes in issue relate to interviews or proffer sessions conducted after the SEC issued its formal order of investigation (Plaintiff's Amended Privilege Log at 6–7, annexed as Ex. A to Hozie Sept. 18 Letter). There is no contention that any of the witnesses whose statements are purportedly reflected in the notes are unavailable for interview or deposition by Hozie or his counsel (*see* Conn Decl. ¶ 10).

*2 According to the SEC,

> During the investigation [the Assistant Regional Director in the SEC's New York Regional Office, Alison T. Conn], took and directed the staff to take certain investigative steps .... The investigative steps [Conn] undertook included preparing notes of interviews of witnesses and instructing attorney, accountant and investigative staff members to prepare notes of interviews of witnesses. The staff took these notes in furtherance of the formal investigation the purpose of which was to determine whether to recommend that the Commission initiate litigation against any entities or individuals for violations of the securities laws. Thus, these notes were made in anticipation of litigation.

(Conn.Decl.¶ 6).

The SEC has refused to produce all three categories of documents, claiming that each is protected by the work-product doctrine, the deliberative process privilege and the law enforcement privilege. Hozie challenges only the assertion of the work-product privilege.

B. *The SEC's Remote Access to the Deloitte & Touche Database*

Through an investigative subpoena, the SEC obtained remote access to an electronic database containing D & T's audit work papers concerning its audits and quarterly reviews of American Home (Letter from Lawrence Gerschwer, Esq., to the undersigned, dated Sept. 10, 2009 ("Hozie Sept. 10 Letter") at 1; Conn Decl. ¶ 11; Letter from Charles F. Walker, Esq., to Alison Conn, dated Feb. 6, 2008 ("Walker Letter") at 1). D & T uses software that allows it to conduct "largely paperless audits of clients by facilitating creation and control of electronic audit working papers that reflect [its] audit methodology and procedures" (Declaration of Eric T. Streck, Esq., dated Sept. 17, 2009 ("Streck Decl.") ¶ 2). D & T uses a third-party litigation support services provider, Solutions Plus

, to provide secure, remote access to D & T's electronic audit working papers for litigants (Streck Decl. ¶ 4). Access is by way of the internet and requires the user to input a code from an "RSA SecureID fob," a small portable device that generates a new access code once per minute, as well as a separate password and user name (Streck Decl. ¶ 4; Walker Letter at 1–2). In order to access the data-base remotely, the SEC has obtained four of these "key fobs," each associated with a separate user name containing the letters "sec" and a password (Conn Decl. ¶ 12; Walker Letter at 1–2). The SEC pays Solutions Plus

$2,500.00 a month for this access, plus a $66.00 one-time charge for each fob (Streck Decl. ¶ 7).

Apparently, if a user accessing the database remotely tries to open an audit file that is already being viewed by another user, the party attempting to open the file will be denied access (*see* SEC Sept. 18 Letter at 4; Streck Decl. ¶ 14). Additionally, that party will receive a message indicating which other user is currently viewing that file (Streck Decl. ¶ 14; Letter from David Stoelting, Esq., to the undersigned, dated Sept. 22, 2009 ("SEC Sept. 22 Letter") at 2; *see* SEC Sept. 18 Letter at 4).

*3 In his discovery requests, Hozie asked the SEC to share its database access with him—either by giving him one or more of its key fobs, or by agreeing to allow him to access the same database through additional key fobs obtained from Solutions Plus

(Hozie Sept. 10 Letter at 1; Hozie Sept. 18 Letter at 2; Letter from Lawrence Gerschwer, Esq., to the undersigned, dated Sept. 22, 2009 ("Hozie Sept. 22 Letter") at 5). The SEC declined to share its remote access to the database by giving defendant Hozie a key fob, and, by letter, Hozie requested that I compel production (SEC Sept. 18 Letter at 1; Hozie Sept. 18 Letter at 2). The SEC submitted letter memoranda opposing Hozie's application on the grounds that the database is not in the SEC's "possession, custody, or

control," for purposes of Federal Rule of Civil Procedure 34(a) and, further, that shared access to the database would reveal attorney work product (SEC Sept. 18 Letter at 3–4; SEC Sept. 22 Letter at 1–2). It argues that Hozie is obligated to obtain his own access to the database by serving a Rule 45 subpoena on D & T, and that he should have Solutions Plus
"create a second, identical secure server environment" for him (SEC Sept. 18 Letter at 4; Streck Decl. ¶ 9). The SEC maintains that it has not refused production in order to prevent Hozie from having access to the database, but it contends that he is obligated to seek his own access directly from D & T and Solutions Plus
rather than obtaining free access through the SEC (SEC Sept. 18 Letter at 3; SEC Sept. 22 Letter at 2).

D & T does not typically provide more than one party with access to the same database environment hosted by Solutions Plus
(Streck Decl. ¶ 11). A letter from D & T's outside counsel to the SEC concerning the remote access arrangement stated that the database materials "remain the property of D & T and are being provided to [the SEC] in connection with the Commission's inquiry" regarding American Home (Walker Letter at 2; Conn Decl. ¶ 13).

III. *Analysis*

A. *The Interview Notes and Summaries*

The scope of the work-product doctrine is defined in Fed.R.Civ.P. 26(b)(3), which provides:

> (A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But ... those materials may be discovered if
>
> (i) they are otherwise discoverable under Rule 26(b)(1); and
>
> (ii) the party shows that it has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
>
> (B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

*4 Fed.R.Civ.P. 26(b)(3)(A), (B).[2]

The work-product doctrine arises out of the realization that

> [i]n performing his various duties ... it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.... This work is reflected, of course, in *interviews,* statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways-aptly though roughly termed ... as the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 510–11 (1947) (emphasis added); *see also United States v. Adlman,* 134 F.3d 1194, 1196 (2d Cir.1998) (stating that work-product doctrine "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries," *quoting Hickman v.. Taylor, supra,* 329 U.S. at 511).

A party asserting work-product protection must prove three elements: "[t]he material must (1) be a document or a tangible thing, (2) that was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by or for his representative." *In re Grand Jury Subpoenas dated Dec. 18, 1981 & Jan. 4, 1982,* 561 F.Supp. 1247, 1257 (E.D.N.Y.1982) (McLaughlin, D.J.); *see Adamowicz v. I.R.S.,* 552 F.Supp.2d 355, 365 (S.D.N.Y.2008) (Preska, D.J.).

If the proponent succeeds in establishing these elements,

the burden then shifts to the parties seeking discovery of work-product material to show substantial need for the material and an inability to obtain its substantial equivalent from another source without undue hardship. *Weinhold v. Witte Heavy Lift, Inc.*, 90 Civ.2096(PKL), 1994 WL 132392 at *3 (S.D.N.Y. Apr. 11, 1994) (Leisure, D .J.); *accord Kent Corp. v. N.L.R.B.*, 530 F.2d 612, 623–24 (5th Cir.1976). However, "while factual materials falling within the scope of the doctrine may generally be discovered upon this showing of 'substantial need,' attorney mental impressions are more rigorously protected from discovery [.]" *In re Leslie Fay Cos. Sec. Litig.*, 161 F.R.D 274, 279 (S.D.N.Y.1995) (Conner, D.J.).

To the extent the interview notes and memoranda were prepared by counsel, they easily fit within the protection of the work-product doctrine. In *S.E.C. v. Cavanagh*, 98 Civ. 1818(DLC), 1998 WL 132842 (S.D.N.Y. Mar. 23, 1998), the subject of an SEC investigation, like Hozie here, sought notes of interviews the staff had conducted in order to determine whether to commence an enforcement action. The Honorable Denise L. Cote, United States District Judge, sustained the assertion of work product stating

> *5 The notes at issue in this case are classic work-product under the standard re-affirmed in [*United States v. Adlman*, 134 F.3d 1194 (2d Cir.1998)]. As attested to by Doherty in her declaration in opposition to disclosure of Commission work-product ("the Doherty declaration"), the notes were taken by SEC attorneys during interviews that, although they preceded the formal initiation of this litigation, were conducted "in order to provide the Commission with information so that it could make the determination whether to proceed with litigation in this matter." This type of work, prepared in the anticipation of litigation, falls squarely within the protections of the work-product doctrine. *See Adlman*, 134 F .3d at 1197 ("[i]t is universally agreed that a document whose purpose is to assist in preparation for litigation is within the scope of the Rule and thus eligible to receive protection").

1998 WL 132842 at *2 (footnote omitted). Other cases reaching the same results on similar facts include *S.E.C. v. Stanard*, 06 Civ. 7736(GEL), 2007 WL 1834709 at *2 (S.D.N.Y. June 26, 2007) (Lynch, D.J.) (notes of interviews "conducted in order to determine whether to initiate litigation" protected as work product); *S.E.C. v. Treadway*, 229 F.R.D. 454, 455–56 (S.D.N.Y. July 26, 2005) (Marrero, D.J.) (pre-litigation witness interviews protected as work product); *S.E.C. v. Downe*, 92 Civ. 4092(PKL), 1994 WL 23141 at *2 (S.D.N.Y. Jan. 27, 1994) (Leisure, D.J.) ("The existence of an active investigation, therefore, is strong circumstantial evidence that the agency lawyer prepared the document with future 'litigation in mind.' " (citation and inner quotations omitted)).

Although Hozie accuses the SEC of "sleight of hand" with respect to its withholding of notes summarizing portions of interview memoranda prepared by the FBI (Hozie Sept. 18 Letter at 3), it is Hozie who is really engaging in *legerdemain*. Hozie argues that the interview memoranda prepared by the FBI are not privileged and, therefore, the information contained in the memoranda cannot be protected as work product "simply by having an attorney transcribe them instead of just obtaining actual copies of the 302s [3]" (Hozie Sept. 18 Letter at 3). This argument would have force if Hozie had sought the 302s themselves, and the SEC resisted production on the ground that its attorneys had summarized them. The documents at issue here, however, are not the 302s themselves.[4] Rather, Hozie is seeking the summaries of selected portions of the 302s prepared by the SEC's attorneys (Plaintiff's Amended Privilege Log at 7, annexed as Ex. A to Hozie Sept. 18 Letter). By definition, summaries are not *verbatim* copies and necessarily involve some level of judgment in deciding what to note and what not to note. Thus, by mis-characterizing the summaries as handwritten, *verbatim* copies, it is Hozie, and not the SEC, who is attempting a conjurer's trick.

*6 Finally, to the extent that Hozie is seeking notes and memoranda prepared by staff members of the SEC who are not attorneys, his arguments come closer to hitting the mark, but do not quite succeed. According to the evidence currently before me, the non-attorneys who prepared notes of interviews were supervised by and acting at the direction of an attorney (Conn Decl. ¶¶ 5–6). This evidence is sufficient to bring the work of the non-attorney staff members within the protection of the work-product doctrine. *United States v. Nobles*, 422 U.S. 225, 238–39 (1975) ("It is ... necessary that the [work-product] doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself."); *S.E.C. v. Nacchio*, 05–cv–00480–MSK–CBS, 2007 WL 219966 at *10 (D.Colo. Jan. 25, 2007) ("The work-product doctrine is no less applicable to materials prepared in anticipation of litigation by SEC accountants working under the direction or at the behest of Commission attorneys.").

In support of his position, Hozie relies primarily on the decision of the Honorable Michael H. Dolinger, United States Magistrate Judge, in *S.E.C. v. Thrasher*, 92 Civ. 6987(JFK), 1995 WL 46681 (S.D.N.Y. Feb. 7, 1995)

which denied work-product protection to interview notes similar to those at issue here. Hozie, however, overlooks the fact that the Court of Appeals subsequently rejected a limitation on the scope of the work-product doctrine on which Magistrate Dolinger relied in *Thrasher.* In describing what constitutes work product, Magistrate Judge Dolinger expressly relied on a number of cases that limited work-product protection to documents prepared principally or exclusively to assist in litigation:

> In applying Rule 26(b)(3), the courts have generally ruled that it "applies only to documents prepared principally or exclusively to assist in anticipated or ongoing litigation." *Martin v. Valley Nat'l Bank,* 140 F.R.D. 291, 304 (S.D.N.Y.1991). *See, e.g., Binks Mfg. Co. v. National Presto Indus., Inc.,* 709 F.2d 1109, 1118–19 (7th Cir.1983); *In re Grand Jury Investigation,* 599 F.2d 1224, 1229 (3d Cir.1979); *Hardy v. New York News, Inc.,* 114 F.R.D. 633, 644 (S.D.N.Y.1987). Consequently, "if a party prepares a document in the ordinary course of business, it will not be protected even if the party is aware that the document may also be useful in the event of litigation." *Bowne of New York, Inc. v.. AmBase Corp.,* 150 F.R.D. at 471. *See, e.g., Binks Mfg. Co. v. National Presto Indus., Inc.,* 709 F.2d at 1119; *Hardy v. New York News, Inc.,* 114 F.R.D. at 644; *Joyner v. Continental Ins. Cos.,* 101 F.R.D. 414, 415–16 (S.D.Ga.1983).

Three years later the Court of Appeals for the Second Circuit expressly rejected this limitation on the work-product doctrine.

> We believe that a requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and the policies of the Rule. Nowhere does Rule 26(b)(3) state that a document must have been prepared *to aid* in the conduct of litigation in order to constitute work product, much less *primarily* or *exclusively* to aid in litigation. Preparing a document "in anticipation of litigation" is sufficient.

*7 *United States v. Adlman, supra,* 134 F.3d at 1198.

Since the Court of Appeals subsequently rejected one of the limitations on the work-product doctrine that was central to the decision in *Thrasher,* I respectfully submit that *Thrasher* no longer reflects the current state of the law.

Thus, because the SEC has shown that all the interview notes and memoranda in issue were prepared in anticipation of litigation and Hozie does not even argue that "substantial need" justifies production of the documents, his application to compel production of the interview notes and memoranda is denied.

B. *Production of D & T Database*

1. *Control*

Defendant Hozie argues that the SEC's remote access arrangement puts D & T's database sufficiently within the SEC's control such that the SEC is obligated to give him access (Hozie Sept. 10 Letter; Hozie Sept. 18 Letter; Hozie Sept. 22 Letter). The SEC responds that it lacks control of the database and the ability to grant access to third parties (SEC Sept. 18 Letter; SEC Sept. 22 Letter).

Under Federal Rule of Civil Procedure 34(a), a party is entitled to documents that are in the "possession, custody, or control" of its adversary. "Control" is construed broadly and may cover materials that are not in a party's actual physical possession. *United States v. Stein,* 488 F.Supp.2d 350, 360–61 (S.D.N.Y.2007) (Kaplan, D.J.) (considering "control" as used in Federal Rule of Criminal Procedure 16, but noting that control carries the same meaning in Rule 16 as it does in Federal Rules of Civil Procedure 34 and 45); *United States v. Freidus,* 88 Civ. 6116(RWS), 1989 WL 140254 at *2 (S.D.N.Y. Nov. 13, 1989) (Sweet, D.J .); *Standard Dyeing & Finishing Co. v. Arma Textile Printers Corp.,* 85 Civ. 5399(CSH), 1987 WL 6905 at *2 (S.D.N.Y. Feb. 10, 1987) (Haight, D.J.).

There are two ways in which a party not in actual possession of material may have control over it under Federal Rule of Civil Procedure 34(a). First, a party has control over material that it has the practical ability to obtain. *In re NTL, Inc. Sec. Litig.,* 244 F.R.D. 179, 195 (S.D.N.Y.2007) (Peck, M.J.); *In re NASDAQ Market–Makers Antitrust Litig.,* 169 F.R.D. 493, 530 (S.D.N.Y.1996) (Sweet, D.J.); *Golden Trade, S.r.L. v. Lee Apparel Co.,* 143 F.R.D. 514, 525 (S.D.N.Y.1992) (Dolinger, M.J.); *United States v. Freidus, supra,* 1989 WL 140254 at *2. Second, a party has control over material that it has a legal right to obtain. *United States v. Stein, supra,* 488 F.Supp.2d at 361, 363; *In re NASDAQ Market–Makers Antitrust Litig., supra,* 169 F.R.D. at 530. The discovering party bears the burden of establishing control. *Golden Trade, S.r.L. v. Lee Apparel Co., supra,* 143 F.R.D. at 525 n. 7 ("In the face of a denial by a party

that it has possession, custody or control of documents, the discovering party must make an adequate showing to overcome this assertion."); *see also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 236 F.R.D. 177, 180 (S.D.N.Y.2006) (Conner, D.J.).

*8 Although the SEC does not have physical possession of the database, its arrangement with D & T and Solutions Plus
gives it complete and immediate access to the contents of the database via the web portal (*see* Streck Decl. ¶ 4; Walker Letter). The SEC seems to contend that mere access is not control, emphasizing that "[t]he agreement between D & T and the SEC ... does not require D & T to produce the database to the SEC, it only requires access." (SEC Sept. 22 Letter). However, an agreement with a third-party possessor granting a party access to documents, along with an actual mechanism for getting the documents, gives that party the "practical ability to obtain" the documents and so is sufficient to establish that party's control. *In re NTL, Inc. Sec. Litig., supra,* 244 F.R.D. at 195–96 (finding control based on "practical ability to obtain" where an agreement obligated a third party to make the documents available to the responding party and the responding party was routinely able to get the documents from the third party through a telephone request). Indeed, "access" is exactly what the phrase "the practical ability to obtain" seems to contemplate. The SEC gained the "practical ability to obtain" the material in the D & T database through its arrangement with D & T and Solutions Plus
: D & T has agreed to make the database material available to the SEC and, through the web portal, key fobs, user names, and passwords, has plainly given the SEC the practical means to obtain it.

The SEC also appears to have the legal right to obtain the materials in the database by virtue of its agreement with D & T. *See United States v. Stein, supra,* 488 F.Supp.2d at 363 (government had legal right to obtain documents where an agreement obligated a third party to provide it with the documents on request); *In re NTL, Inc. Sec. Litig., supra,* 244 F.R.D. at 195 (party had legal right to obtain documents where the actual possessor was under a contractual obligation to make them available to that party). Because the SEC has both the practical ability and the legal right to obtain the working papers contained in the database, it has control over them for the purposes of Rule 34(a).

The fact that the material sought is electronic and organized in a database does not, in itself, affect the extent to which it must be produced, as Rule 34 includes "electronically stored information" and "data compilations" in its definition of discoverable documents. *See* Fed.R.Civ.P. 34(a).

Nor does it matter that by giving defendant Hozie a key fob to access the database the SEC may violate the terms of its agreement with D & T. The SEC argues that it lacks the ability to grant third parties access to the database (SEC Sept. 18 Letter at 4), and the letter from D & T's counsel outlining the terms of access suggests that use of the database is to be limited to the SEC, stating that the materials "remain the property of D & T and are being provided to [the SEC] in connection with the Commission's inquiry in the above-captioned matter" (Walker Letter at 2). But any prohibition the agreement imposes on turning over a key fob to another entity is not significant here, because discovery obligations under the Federal Rules of Civil Procedure trump most other commitments. *See In re Bankers Trust Co.,* 61 F.3d 465, 469–70 (6th Cir.1995) (documents discoverable even where federal regulations would otherwise prohibit responding party from producing documents); *Nat'l Union Fire Ins. Co. v. Midland Bancor, Inc.,* 159 F.R.D. 562, 566 (D.Kan.1994) (banks had ability to obtain, and so were obligated to produce, Federal Deposit Insurance Corporation reports despite FDIC regulations requiring that the FDIC consent to their release). An agreement providing that the key fobs are for the sole use of the SEC does not overcome the SEC's discovery obligations under the Federal Rules of Civil Procedure.

2. *Attorney Work Product*

*9 The SEC argues that allowing defendant Hozie to share its remote access to the D & T database would result in the exposure of attorney work product because of the potential for one party to see what audit file its adversary has open (SEC Sept. 18 Letter at 4; SEC Sept. 22 Letter at 2), and that this information would reveal counsel's thoughts and mental impressions (SEC Sept. 18 Letter at 4). Hozie responds that the possibility of such observations is speculative and that the selection of any particular file, alone, would not reveal counsel's thought processes (Hozie Sept. 22 Letter at 6).

In *Sporck v. Peil,* 759 F.2d 312, 316–17 (3d Cir.1985), the Third Circuit extended the scope of the work-product doctrine, holding that the selection of a subgroup of documents produced in discovery and used to prepare a witness for a deposition was attorney work product protected under Fed.R.Civ.P. 26(b)(3). *See also United States v. Pepper's Steel & Alloys, Inc.,* 132 F.R.D. 695, 698 (S.D.Fla. Oct. 17, 1990) ("[O]pinion work product may be reflected in something as subtle as the act of selecting or ordering documents because this may reflect

an attorney's opinion as to the significance of those documents in the preparation for his case."). "The Second Circuit has [also] recognized that the selection and compilation of documents may fall within the protection accorded to attorney work product, despite the general availability of documents from both parties and non-parties during discovery." *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 408 (S.D.N.Y.2009) (Scheindlin, D.J.). However, the Second Circuit treats this category of protection as "a 'narrow exception' aimed at preventing requests with 'the precise goal of learning what the opposing attorney's thinking or strategy may be.' " *S.E.C. v. Collins & Aikman Corp., supra,* 256 F.R.D. at 408; *see also In re Grand Jury Subpoenas Dated Oct. 22, 1991 & Nov. 1, 1991,* 959 F.2d 1158, 1166–67 (2d Cir.1992); *Gould Inc. v. Mitsui Min. & Smelting Co., Ltd.,* 825 F.2d 676, 680 (2d Cir.1987); *S.E.C. v. Morelli,* 143 F.R.D. 42, 47 (S.D.N.Y.1992) (Leisure, D.J.). For this "narrow exception" to apply, there must be "a real, rather than speculative, concern that the thought processes of ... counsel in relation to pending or anticipated litigation would be exposed." *Gould Inc. v. Mitsui Min. & Smelting Co., Ltd., supra,* 825 F.2d at 680; *see also In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002,* 318 F.3d 379, 386 (2d Cir.2003) ("Not every selection and compilation of third-party documents by counsel transforms that material into attorney work product."); *In re Grand Jury Subpoenas Dated Oct. 22, 1991 & Nov. 1, 1991, supra,* 959 F.2d at 1167; *S.E.C. v. Collins & Aikman Corp., supra,* 256 F .R.D. at 408; *United States v. Pepper's Steel & Alloys, Inc., supra,* 132 F.R.D. at 698 (work-product protection "is not triggered unless disclosure creates a real, nonspeculative danger of revealing the lawyer's thoughts").

***10** Here, there is no "selection or compilation" of documents of the kind in *Sporck. See Sporck v. Peil, supra,* 759 F.2d at 316. Merely opening a document contained in a database is not the same as "selecting" it for any litigation-related purpose. A major aspect of reviewing any mass of documents, whether they are housed in a database or in a box, is assessing each one to determine if it has any relevance at all. The simple fact that a document has been opened does not imbue it with any special significance when one side realizes its adversary has a document open, it is as just as likely (perhaps more likely[5]) that its adversary is deciding it is irrelevant than that it is relevant. The decision to open a given file in the database, then, reveals little about the user's thought process or opinion, and identification of documents that were opened cannot be considered protected work product. As the Honorable Shira A. Scheindlin, United States District Judge, has aptly stated, the "theory ... that every document or word reviewed by an attorney is 'core' attorney work product ... leaves nothing to surround the core." *S.E.C. v. Collins & Aikman Corp., supra,* 256 F.R.D. at 410. Even the observation that one's adversary has had a document open for a long period of time does not necessarily indicate any special importance—it is entirely possible that a user would get up from her desk in the middle of systematically reviewing files and leave a completely insignificant file open for several hours. Accordingly, the concern that shared access to the database would result in transmission of information about thought processes or strategies is extremely speculative.

Relatedly, a list of the documents that one side noticed its adversary viewing would certainly not be organized by any ascertainable "legal theory or strategy," a necessary element for work-product protection. *See S.E.C. v. Collins & Aikman Corp., supra,* 256 F.R.D. at 410. Shared access to the electronic working paper database would not identify the type of coherent, consciously arranged, static set of documents found to be protected work product in *Sporck v. Peil, supra,* 759 F.2d at 316; at most, it could reveal an ad hoc smattering of files observed by chance (*see* Streck Decl. ¶ 14; SEC Sept. 18 Letter at 4; SEC Sept. 22 Letter at 2). This rather random transmission of piecemeal information is plainly not an "identification of ... documents as a group" that would "reveal defense counsel's selection process." *Sporck v. Peil, supra,* 759 F.2d at 315.

Accordingly, the proposed access to the database does not create a work-product concern that would justify barring the requested discovery.

3. *Availability from Another Source*

Even when the documents at issue are within the opposing party's possession, custody or control, it may be inappropriate to compel discovery when the discovering party could easily obtain the documents elsewhere without any of the difficulties that might result from compelled production. The Federal Rules of Civil Procedure provide that "[o]n motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought ... can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed.R.Civ .P. 26(b)(2)(C)(i); *see also Hall v. Sullivan,* 231 F.R.D. 468, 475 (D.Md.2005) ("part of the Rule 26(b)(2) analysis requires a determination as to whether the information should be discovered through the requesting party's chosen discovery method"); *Ares–Serono, Inc. v. Organon Int'l. B.V.,* 160 F.R.D. 1, 5–6 (D.Mass.1994)

(motion for a protective order granted where the discovering party could obtain the information through other means that were less intrusive and burdensome to the responding party). The addition of this provision to Rule 26 acknowledged "the existing practice of many courts in issuing protective orders under Fed.R.Civ.P. 26(c); for example, those holding that discovery need not be ordered ... if the discovering party can obtain the documents in question as readily as can the adverse party." 10A Fed. Proc., L.Ed. § 26:651 (2009).

*11 Courts have declined to compel production of documents in the hands of one party when the material is **equally available** to the other party from another source. *Valenzuela v. Smith,* 04 Civ. 0900, 2006 WL 403842 at *2 (E.D.Cal. Feb. 16, 2006) ("Defendants ... will not be compelled to **produce** documents that are **equally available** to plaintiff."); *Baum v. Village of Chittenango,* 218 F.R.D. 36, 40–41 (N.D.N.Y.2003) ("[C]ompelling **discovery** from another is unnecessary when the documents sought are **equally accessible** to all."); *Bleecker v. Standard Fire Ins. Co.,* 130 F.Supp.2d 726, 738 (E.D.N.C.2000) ("**Discovery** is not required when documents are in the possession of or are readily obtainable by the party seeking a motion to compel."); *S.E.C. v. Samuel H. Sloan & Co.,* 369 F.Supp. 994, 995–96 (S.D.N.Y.1973) (Ward, D.J.) ("It is well established that **discovery** need not be required of documents of public record which are **equally accessible** to all parties."); *Blair v. Travelers Ins. Co.,* 9 F.R.D. 99, 99 (W.D.Mo.1949) (motion for production denied where "[n]early all the documents sought can be obtained by the plaintiff as easily as they can be obtained by the defendant"). In *S.E.C. v. Samuel H. Sloan & Co., supra,* 369 F.Supp. at 995, the late Honorable Robert J. Ward, United States District Judge, denied a motion to compel production where the movant had the same opportunity to **purchase** the document (a hearing transcript) as his adversary but had chosen not to do so. He emphasized that "[t]he purpose of **discovery** is to enable a party to **discover** and inspect material **information** which by reason of an opponent's control, *would otherwise be unavailable* for judicial scrutiny." (Emphasis added.)

The protection from having to produce documents that are equally available to the other party is not limited to the public records context. *See Valenzuela v. Smith, supra,* 2006 WL 403842 at *2 (physician defendant not required to produce documents that plaintiff could instead obtain from his own medical file or the prison law library); *Bleecker v. Standard Fire Ins. Co., supra,* 130 F.Supp.2d at 738–39 (declining to compel production both of insurance manuals that were in the public record and of insurance manuals that were not in the public record but that were readily available from a third party—though the ruling with regard to the latter category was based on the court's interpretation of "control"); *Blair v. Travelers Ins. Co., supra,* 9 F.R.D. at 99 (declining to compel production of hospital records and letters that were equally accessible to the discovering party).

The working paper database maintained by D & T is equally available to all parties here. Hozie can obtain the same access to the material that the SEC has by arranging with D & T's third-party service provider to have an identical database created and paying for monthly access and its own key fobs[6] (*see* SEC Sept. 18 Letter at 3–4; Streck Decl. ¶ 9). Like the discovering party in *Sloan,* Hozie has chosen not to pay for the documents himself, opting instead to seek free access through discovery of his adversary. *S.E.C. v. Samuel H. Sloan & Co., supra,* 369 F.Supp. at 995. Admittedly, in contrast to the public records cases, access to the database at issue here is not readily available to the public, and Hozie will, presumably, be required to serve a Rule 45 subpoena on D & T in order to obtain access to the database (*see* SEC Sept. 18 Letter at 3). However, this is the normal mechanism for obtaining discovery from third parties, *see* Fed.R.Civ.P. 45, and the need for a subpoena does not diminish Hozie's obligation to obtain the materials on his own.

*12 Additionally, a shared access arrangement would create significant burdens,[7] making limitation of discovery appropriate under Rule 26(b)(2)(C)(i).[8] First, compelling the SEC to share its access with Hozie would limit its own access. The SEC paid for four key fobs, and to accede to Hozie's discovery request would mean giving up at least one. This would impede the SEC's ability to prepare for litigation because fewer SEC employees could access the database at any given time. Second, because a file may only be viewed by one user at a time (*see* SEC Sept. 18 Letter at 4; Streck Decl. ¶ 14), giving Hozie access to the same database environment would interfere with the parties' ability to view the files. This would be a significant nuisance to both parties, as they are likely to want to spend time reviewing the same files. It would also create the potential for abuse, allowing one party to prevent the other from viewing a file by leaving it open on his own computer for long periods of time.[9] To be sure, it is not unusual for compliance with a discovery request to limit the possessing or controlling party's own ability to engage with the material—this occurs, for example, when one party requests inspection of land or of a tangible thing in the other party's control or possession. *See* Fed.R.Civ.P. 34(a)(2). However, the limitation in those situations is confined to a discrete time period. In this case, the surrender of one of the SEC's key fobs to

Hozie would subject its own access to a potentially obtrusive level of interference for the remainder of the discovery period.

Third, the SEC undoubtedly has many occasions to arrange for remote access to audit working paper databases such as this one, and compelling that it turn over one or more of its key fobs in this case may have the effect of requiring it to purchase extra key fobs for its adversaries in the future. *See S.E.C. v. Samuel H. Sloan & Co., supra,* 369 F.Supp. at 996 ("To grant Sloan's motion [to compel production of a hearing transcript from his adversary] would in the future allow all respondents in administrative proceedings, regardless of how many parties may be involved, to obtain a copy of the transcript on motion, thereby requiring the Commission to purchase additional copies of the transcript and placing an undue burden on the Commission.").

Further, "[p]arties are generally responsible for their own costs, and their adversaries are not obligated to finance their litigation." *Baum v. Village of Chittenango, supra,* 218 F.R.D. at 40–41. Granting Hozie access to the database through an SEC key fob would essentially be forcing the SEC to finance his litigation. Although discovery of material also available elsewhere may be compelled when the discovering party is limited by financial hardship, *S.E.C. v. Samuel H. Sloan & Co., supra,* 369 F.Supp. at 996, Hozie does not claim any financial obstacle to his purchasing his own access to the D & T database. *See S.E.C. v. Samuel H. Sloan & Co., supra,* 369 F.Supp. at 996 ("Absent a claim and proof of Sloan's inability to pay, it must be assumed that Sloan is financially able to purchase the transcript he desires."). In the absence of a showing of financial difficulty that might suggest otherwise, discovery should be confined to its objective of providing parties with material they would not otherwise have access to. *See S.E.C. v. Samuel H. Sloan & Co., supra,* 369 F.Supp. at 995.

4. *Summary*

*13 The audit working paper database is within the SEC's control and shared access with Hozie would not reveal attorney work product. However, the SEC's discovery obligations do not include sharing access of a database it has obtained through investigative subpoena and a fee arrangement when Hozie can obtain the same access through similar means and faces no financial hardship in doing so.

IV. *Conclusion*

Accordingly, for all the foregoing reasons, (1) Hozie's application to compel production of the SEC's notes and memoranda on other witness interviews is denied, and (2) his application to compel the SEC to share its access to the D & T database is denied.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2009 WL 3459204

Footnotes

1 The discovery disputes resolved by this Order have been raised at a conference and in a series of letters. There are no docketed motions that correspond to the issues addressed herein.

2 Although the SEC asserts three different bases for withholding the interview notes and summaries, Hozie challenges only the SEC's assertion of the work-product privilege. Given the fact that courts do not ordinarily entertain serial motions addressing the same discovery response, Hozie's failure to address the other two privileges asserted by the SEC is odd; even if I find that work-product protection is not applicable, unless successfully challenged, the remaining privileges would protect the documents from production. Nevertheless, because I find that the work-product doctrine does protect the interview notes and summaries from production, I need not resolve the consequences of Hozie's failure to challenge all the grounds on which these documents are being withheld.

3 "FD–302" is the designation of the form used by special agents of the FBI to record information that was gathered in the course of an investigation and that may become evidence.

4 Curiously, it does not appear that Hozie has ever sought the 302s themselves; all he appears to be seeking are the SEC's summaries of the 302s. This tactic strongly suggests that Hozie is more interested in his adversary's analyses of the witnesses' statements than in the witnesses' statements themselves.

5 Experience teaches that the number of documents actually used in most securities actions is a small fraction of the documents produced.

6 The SEC maintains that it is not trying to prevent defendant Hozie from obtaining access, but only from free-riding on the access it purchased (SEC Sept. 22 Letter at 2).

7 Although Rule 26(b)(2)(C)(i) is the provision most directly applicable here, other subsections of Rule 26 also allow limitations of discovery to prevent an undue burden on the responding party and could apply in this context. *See* Fed.R.Civ.P. 26(b)(2)(B) ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."); Fed.R.Civ.P. 26(c) (1)(A), (C) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (A) forbidding the disclosure or discovery ... (C) prescribing a discovery method other than the one selected by the party seeking discovery.").

8 There is a general reluctance to allow a party to access its adversary's *own* database directly. The Advisory Committee Notes to the 2006 Amendments to Rule 34 explain that Rule 34(a) is not meant to "create a routine right of direct access to a party's electronic information system" and advises that courts "guard against undue intrusiveness resulting from inspecting or testing such systems." Thus, courts have declined to find an automatic entitlement to access an adversary's database. *Cummings v. Gen. Motors Corp.*, 365 F.3d 944 (10th Cir.2004) (unduly burdensome to compel access to defendant automobile manufacturer's computer databases), *abrogated on other grounds by Unitherm Food Sys., Inc. v. Swift Eckrich, Inc.* 546 U.S. 394 (2006); *In re Ford Motor Co.*, 345 F.3d 1315, 1316 (11th Cir.2003) ("Rule 34(a) does not grant unrestricted, direct access to a respondent's database compilations."); *see Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 169 (S.D.N.Y.2004) (Francis, M.J.) (granting direct access to adversary's databases not warranted where adversary had not destroyed or withheld relevant information). Although the database at issue is not the SEC's own, and must be accessed remotely by both parties, granting Hozie direct access would still impose a burden on the SEC.

9 Hozie argues that Solutions Plus
may be able to customize the database to allow multiple users to view the same audit file at the same time (Hozie Sept. 22 Letter at 6). Even if true, this would not solve the other problems shared access poses.

End of Document