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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER PART 30

Justice

Index Number : 400000/1988

NYC ASBESTOS LITIGATION

VS.

ALL WEITZ & LUXEMBERG CASES

SEQUENCE NUMBER : 003

VACATE

INDEX NO. 400000/88

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided as per the memo decision dtd 12-7-11.

FILED

DEC 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12-7-11

HON. SHERRY KLEIN HEITLER J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

IN RE: NEW YORK CITY ASBESTOS LITIGATION

Index No. 40000/88
Motion Seq. 002, 003

This Document Relates to:

ALL WEITZ AND LUXENBURG CASES IN WHICH GEORGIA-PACIFIC IS A DEFENDANT

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.:

Motion sequence Nos. 002 and 003 are consolidated for disposition

Pursuant to Section III, paragraph B of the September 20, 1996 Case Management Order, as amended May 26, 2011 ("CMO"), which governs all New York City Asbestos Litigation ("NYCAL"), defendant Georgia-Pacific objects to and seeks vacatur of two June 15, 2011 recommendations of the Special Master (the "Recommendations"). In Recommendation #1, addressed in Motion Sequence 002, the Special Master directed an *in camera* review of all internal attorney-client and work-product documents identified on Georgia-Pacific's privilege log. In Recommendation #2, addressed in Motion Sequence 003, the Special Master directed the production of all materials and raw data underlying several published studies funded by Georgia-Pacific relating to the health effects of its joint compound.

BACKGROUND

NYCAL cases typically involve large numbers of defendants who are alleged to have in one way or another caused personal injuries to others who to have been exposed to asbestos. The need for a case management plan to fairly and efficiently manage this mass tort litigation gave rise to the CMO, which was crafted by representatives of both the plaintiffs' and defendants'

NYCAL personal injury bar.[1] Pursuant to the CMO, discovery is supervised by a Special Master, who is tasked with ensuring compliance therewith. In the first instance, it is the Special Master who issues recommended rulings on all discovery disputes. At times, her recommendations apply not just to a single case, but on a broad level to large clusters of cases.[2] *See Ames v A.O. Smith Water Products, et al.*, 66 AD3d 600 (1st Dept 2009). The Special Master's recommendations are appealable to this court pursuant to section III(B) of the CMO.

The Recommendations and Georgia-Pacific's corresponding motions to vacate same apply to all NYCAL cases in which Georgia-Pacific is a defendant, and relate to research studies funded by Georgia-Pacific which resulted in the publication of several scientific articles.[3] The published articles highlight the studies performed by Georgia Pacific's consulting experts for the purpose of, among other things, recreating Georgia-Pacific's historical joint compound product and testing the biopersistence and pathogenicity of that product. This work was performed by approximately twenty experts from various organizations, most if not all of whom served as authors and contributors to the scientific articles. Mr. Stewart Holm, who is Georgia-Pacific's Director of Toxicology and Chemical Management, participated as an author in respect of most of these articles.

On or about April 19, 2011, plaintiffs noticed the deposition of Mr. Holm on the topic of

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1 The opponents of these consolidated motions consist of representatives of plaintiffs' NYCAL bar ("plaintiffs").

2 Recent recommendations of the Special Master may be accessed at http://nycal.net/Recommendations.htm

3 According to Georgia-Pacific, several additional articles have been drafted which will be published in the near future.

several of the published articles, and requested that Georgia-Pacific produce all documents from the company's files that relate to such studies, including any and all correspondence among Georgia-Pacific and its consulting experts, and any internal communications relating to same. On or about May 31, 2011, Georgia-Pacific produced some of the requested documents together with a corresponding privilege log, wherein Georgia-Pacific asserted that all communications with its consulting experts were protected by the attorney's work-product privilege and that its internal communications concerning the studies were protected by the attorney-client privilege. In response, plaintiffs asserted that the publication of the studies rendered all underlying communications with regard thereto discoverable. Plaintiffs also argued that they had presented factual circumstances which triggered the crime-fraud exception to the attorney-client privilege and requested an *in camera* review by the Special Master of all documents listed in the privilege log to determine if Georgia-Pacific was using such privilege to perpetrate a fraud.

On June 15, 2011, the Special Master issued her Recommendations. Recommendation # 1 directed Georgia-Pacific to produce all documents listed in its privilege log for *in camera* review. While the Special Master did not explicitly determine whether plaintiffs had met their burden[4] under the crime-fraud exception to the attorney-client privilege, she questioned whether the communications at issue were even privileged to begin with. In this regard, she opined that no privilege attaches to communications or materials intended to be available for publication.[5] In Recommendation # 2, the Special Master found that the data underlying the published studies

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[4] *See* pp. 7-8, *infra*.

[5] *See In re New York Renu with Moistureloc Prod. Liab. Litig.*, 2:06-MN-77777, 2008 U.S. Dist. LEXIS 88515 (D.S.C. May 6, 2008, n.o.r.)

was not protected by the attorney work-product privilege and was therefore discoverable. In so doing,

the Special Master opined that the dispute at its core involved a research scientist's interest in his or her data and study-related materials, not attorney work-product. The Special Master noted that New York does not recognize the "research scholar's privilege."[6]

On June 22, 2011, Georgia-Pacific filed the two motions at issue to vacate the Special Master's respective Recommendations. Thereafter, Georgia-Pacific complied with Recommendation # 1 to the extent that it submitted for *in camera* review all communications to and from its consulting experts. The Special Master completed her review of those communications and on July 11, 2011 emailed to the parties the following ruling, in relevant part:

> I am satisfied with these responses.[7] I have found no other documents whose privilege status I would question. I do not believe any of the documents is discoverable other than those that GP has agreed to supply. At this point I do not believe the drafts must be produced, especially because I see no evidence in any of the correspondence that there was any attempt to "pervert" or in any way change the result. The edits I saw were "ministerial."

In this regard, the Special Master concluded that the documents she reviewed are indeed privileged. Her ruling was limited to Georgia-Pacific's communications to and from its

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6 The "research scholar's privilege" protects against the production of research data. The Seventh Circuit has recognized such a qualified privilege, principally to protect scholars from the premature disclosure of their research. *See, e.g., Deitchman v E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 560-61 (7th Cir. 1984); *Dow Chemical Co. v Allen*, 672 F.2d 1262, 1274-76 (7th Cir. 1982).

7 In a separate email to Georgia-Pacific on July 9, 2011, the Special Master set forth several questions which arose from her *in camera* review of the communications to and from Georgia-Pacific's consulting experts.

consulting experts which Georgia-Pacific had produced and did not otherwise modify or vacate her Recommendations in respect of Georgia-Pacific's claim of attorney client privilege (internal communications) and the attorney work-product privilege regarding the underlying data, which remained in full force and effect.

DISCUSSION

I. Recommendation #1 for an *In Camera* Review of Internal Communications

In Motion Sequence 002, Georgia-Pacific seeks to vacate Recommendation # 1 which directs Georgia-Pacific to submit for *in camera* review all of the documents listed on its privilege log. In light of Georgia-Pacific's partial compliance with such direction and the Special Master's July 11, 2011 ruling thereon, *supra*, the only issue concerning Recommendation # 1 is whether an *in camera* review of Georgia-Pacific's internal communications is appropriate.

The threshold issue is whether the attorney-client privilege should attach to such communications in the first place. In general, the attorney-client privilege applies to communications between a client and its lawyer. It enables one seeking legal advice to communicate with counsel, secure in the knowledge that the contents of the exchange will not be revealed against the client's wishes. *People v Osorio*, 75 NY2d 80, 84 (1989); CPLR 4503. The party invoking the privilege must establish that the materials in question reflect communications between the attorney or his or her agents and the client or its agents, that the communications were made and kept in confidence, and that they were made principally to assist in obtaining or providing legal advice or services for the client. *See People v Mitchell*, 58 NY2d 368, 373 (1983); *see also Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 378-380 (1991). The "fact that business advice is sought or even given does not automatically waive the privilege,

where the advice given is predominantly legal, as opposed to business, in nature." *Stenovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc 2d 99, 106 (Sup Ct NY Cty. 2003) (internal quotation marks omitted).

However, not all communications with an attorney, or as in this case, in-house counsel, are protected by the attorney client privilege. As set forth in *United States Postal Serv. v Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 160 (EDNY May, 18 1994):

> Defining the scope of the privilege for in-house counsel is complicated by the fact that these attorneys frequently have multi-faceted duties that go beyond traditional tasks performed by lawyers. House counsel have increased participation in the day-to-day operations of large corporations . . . . Needless to say, the attorney-client privilege attaches only to legal, as opposed to business, services. The communication must be made to the attorney acting in her capacity as counsel. If the communication is made to the attorney in her capacity as a business adviser, for example, it ought not be privileged.

Similarly, materials and/or communications are not privileged when they are intended to be made available for publication. *See In re New York Renu with Moistureloc Prod. Liab. Litig.*, 2:06-MN-77777, 2008 U.S. Dist. LEXIS 88515 (D.S.C. May 6, 2008, n.o.r.) (relying on MICHAEL M. MARTIN, *ET AL.*, NEW YORK EVIDENCE HANDBOOK at 318 [2d ed. 2002]; "New York of course accepts the unremarkable proposition that if a client communicates to the lawyer with the intent that the communication is to be released to the public, that communication is not privileged.") The critical inquiry, therefore, is "whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client." *Spectrum Sys. Intl. Corp.*, *supra*, 79 NY2d at 379.

Plaintiffs argue that no privilege attaches to Georgia-Pacific's internal communications because the studies at issue serve Georgia-Pacific's business and public relations interests.

However, such contention is not supported in the record. Indeed, the initial publication resulting from the studies explicitly provides that they were funded in connection with Georgia-Pacific's ongoing litigation relating to its joint compound products. Moreover, that the studies may have positively altered the public's view of the company is immaterial given that public opinion generally is not implicated in privilege issues.

In any event, the attorney-client privilege "may give way to strong public policy considerations," (*Spectrum Sys. Intl. Corp*, *supra*, 78 NY2d at 380), and "may not be invoked where it involves client communications that may have been in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct." *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224 (1st Dept 2003); *see also Nowlin v People,* 1 AD3d 372 (1st Dept 2003). In *United States v Zolin*, 491 U.S. 554, 571-74 (1989), the United States Supreme Court held that an in camera review may be used to determine whether privileged communications fall within the "crime-fraud" exception (citations omitted):

> There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents . . . . In fashioning a standard for determining when in camera review is appropriate, we begin with the observation that in camera inspection . . . is a smaller intrusion upon the confidentiality of the attorney-client relationship than is public disclosure. We therefore conclude that a lesser evidentiary showing is needed to trigger in camera review than is required ultimately to overcome the privilege. The threshold we set, in other words, need not be a stringent one. We think that the following standard strikes the correct balance. Before engaging in in camera review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies. Once that showing is made, the decision whether to engage in in camera review rests in the sound discretion of the district court. The court should make that decision in light

> of the facts and circumstances of the particular case, including, among other things, the volume of materials the district court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through in camera review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply.

In *United States v Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997), the Second Circuit instructed on a proponent's burden in this respect (citations omitted):

> A party wishing to invoke the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime. This is a two-step process. First, the proposed factual basis must strike a prudent person as constituting a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof. Once there is a showing of a factual basis, the decision whether to engage in an in camera review of the evidence lies in the discretion of the district court. Second, if and when there has been an in camera review, the district court exercises its discretion again to determine whether the facts are such that the exception applies. These factual determinations are governed by the clearly erroneous standard.

Under both *Zolin*, *supra*, and *Jacobs, supra*, the law requires the discovering party to make a good faith evidentiary showing that the privileged communications are in furtherance of or intended to conceal an alleged fraud, without which an *in camera* review is inappropriate. *See Galvin v Hoblock*, No. 00-CV-6058, 2003 U.S. Dist. LEXIS 16704, at *13-14 (SDNY Sept. 23, 2003).

Plaintiffs make several arguments in support of their contention that the crime-fraud exception applies herein. As an example, plaintiffs submit that Georgia-Pacific has selectively disclosed only favorable research outcomes, and that it is "unfathomable" that the results of Georgia-Pacific's unpublished studies would not likewise have been published unless the results did not support Georgia-Pacific's litigation position. Also of particular importance to plaintiffs

is their claim that Georgia-Pacific failed to test an original joint compound sample, instead relying on a "reformulated" compound. Both contentions are simply unfounded. Plaintiffs further allege that Georgia-Pacific did not adequately disclose that it funded the research which led to the publication of these studies.[8] In this regard, plaintiffs point out that these disclosures fail to mention that Georgia-Pacific is involved in *asbestos*-based litigation, fail to disclose significant conflicts of interest, and fail to reveal that Georgia-Pacific paid considerable sums to the authors for their services. While this contention has merit insofar as it suggests that Georgia-Pacific may have been improvident in drafting such disclosures, it does not establish a sufficient

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[8] The published studies at issue and their respective disclosure statements are as follows:

1. Simmons, et al., *Factors Influencing Dust Exposure: Finishing Activities in Drywall Construction*, (2011): "The underlying research was funded by Georgia-Pacific (Atlanta, Ga). Georgia-Pacific did not participate in the design of the study, analysis of the data, or preparation of the manuscript";
2. Brorby, Holm, et al., *Potential Artifacts Associated with Historical Preparation of Joint Compound Samples and Reported Airborne Asbestos Concentrations* (2011): "This research was primarily funded by Georgia-Pacific, LLC, which has been in litigation related to joint compound."
3. Jones, et al., *Development and Evaluation of a Semi-Empirical Two-Zone Dust Exposure Model for Dusty Construction Trade* (2011): "The underlying research was funded by Georgia-Pacific (Atlanta, Ga). Georgia-Pacific did not participate in the design of the study, analysis of the data, or preparation of the manuscript";
4. Bernstein, Holm, et al., *A Biopersistence Study Following Exposure to Chrysotile Asbestos Alone or in Combination with Fine Particles* (2008): "This research was sponsored by a grant from Georgia-Pacific, LLC";
5. Bernstein, Holm, et al., *The pathological Response and Fate in the Lung and Pleura of Chrysotile in Combination with Fine Particles Compared to Amosite Asbestos Following Short-term Inhalation Exposure: Interim Results* (2010): "This work was supported by a grant from Georgia-Pacific, LLC";
6. Bernstein, Holm, et al., *Quantification of the Pathological Response and Fate in the Lung and Pleura of Chrysotile in Combination with Fine Particles Compared to Amosite Asbestos Following Short-term Inhalation Exposure* (2011): "This work was supported by a grant from Georgia-Pacific, LLC";
7. Bogen, et al., *Measuring Mixed Cellulose Ester (MCE) Filter Mass Under Variable Humidity Conditions* (2011): "This research was primarily funded by Georgia-Pacific"; and
8. Brorby, Holm, et al., *Re-Creation of Historical Chrysotile-Containing Joint Compounds* (2008): "This research was primarily funded by Georgia-Pacific, LLC, who has been in litigation related to joint compound"

basis to inquire into whether Georgia-Pacific committed a fraud in respect of its studies herein and that privileged communications are likely used in furtherance thereof. *See Jacobs*, *supra*, 117 F.3d at 87. To this end, a careful review of the articles would have revealed Georgia-Pacific's substantial involvement therein.

On the other hand, the facts also show that Georgia-Pacific's in-house counsel may have had an integral role in determining the content of the manuscripts of two of the now published studies. At his deposition, Mr. Stewart Holm, who authored several of the research studies at issue and who serves as Georgia-Pacific's Director of Toxicology and Chemical Management, testified as follows (plaintiff exhibit 3, p. 121-25):

Q: I was asking who was in the loop in terms of reviewing the manuscripts before they were submitted for publication for all of these studies.

A: The authors --

A. Okay. The authors in general.

Q: Anyone else.

A: Yes.

Q: Who was that?

A: There was one attorney at GP that was part of that review team.

Q: And who was that attorney?

A: Mary McLemore.

Q: Were there meetings of the authors where you could face-to-face deal with drafts of the manuscripts for any of the studies?

A: I don't remember any face-to-face meetings to talk about the manuscripts.

Q: Okay. How about video conferencing or Skyping or some other communications, phone conferencing?

Q: There are four -- two of the manuscripts there was -- I don't know -- it wasn't Skyping but WebEx and -- but for the other ones it was mainly just in terms of writing and talking on the phone.

Q: And where and when were those WebEx conferences? Tell me the studies first, if you would.

A: Yeah. It was the articles that I wasn't an author on and it was the 2011 Simmons and it was the 2011 Jones.

Q: Okay. So the two studies that were done on non-asbestos joint compound that Environ wrote –

A: Right.

Q: -- there were discussions of the drafts of those manuscripts by phone or that was the WebEx discussions?

A: That was the WebEx discussions.

* * * *

Q: And you were weighing in in terms of suggestions or wordings or -- obviously you were on for a reason.

A: Yeah. I mean for clarity, basically.

Q: So you were reviewing those manuscripts, giving comments on this WebEx conference and . . .

A: Yes.

* * * *

Q: And how long were those conferences? It seems like it would take a while if you're going through --

A: Yeah.

Q: -- the manuscript --

A: Well, you're right. It took, you know, several hours, two to three hours.

Q: Was Ms. McLemore present?

A: No.

Q: Was she involved at all?

A: She reviewed them in the same way that I did.

* * * *

Q: Independent of that, were there WebEx conferences where the GP lawyer Mary McLemore was on a WebEx conference with the Environ authors?

A: That's my understanding.

The court is concerned that Georgia-Pacific's attorney would be involved in any discussions concerning the content of these purportedly objective scientific studies by Georgia-Pacific's

consulting experts, especially in light of the disclosure statements for the Simmons and Jones articles (*see* Fn 8, *supra*, items 1 and 3), which provide that Georgia-Pacific did not participate in the preparation of the manuscripts. These statements are called into serious question by Mr. Holm's testimony. Further, although the Special Master's July 11, 2011 ruling provides that "the drafts" need not be produced insofar as any changes to the manuscripts were "ministerial", it is not clear to which articles she was referring or whether the Simmons and Jones articles were included in her review.

Therefore, and in light of the fact that Georgia-Pacific's counsel at the very least commented on the manuscripts for the Simmons and Jones articles, there is a reasonable basis to believe that she did the same for the other articles in question. Accordingly, the court finds that an *in camera* review of Georgia-Pacific's internal communications with regard to all of the articles (*see* Fn 8, *supra*) is warranted under these circumstances, and as such Recommendation #1 is confirmed. *See Jacobs*, *supra*, 117 F.3d at 87.

II. Recommendation #2 on Data Underlying the Biopersistence Studies

In motion sequence 003, Georgia-Pacific seeks the reversal of recommendation #2, which requires the company to produce the materials and raw data underlying the published studies at issue. These materials and data include microscopy images, the data generated in the chambers where the reformulated compounds were created, numerical calculations, and other like materials. Georgia-Pacific argued before the Special Master that the studies were commissioned in connection with the defense of litigation and that such materials are protected from discovery by the attorney work-product privilege. The Special Master disagreed, finding as an initial matter that the dispute was not a question of work-product, but rather the existence or lack

thereof of a "research scholar's privilege," and ultimately that such materials are discoverable because the research scholar's privilege is not recognized in New York.

However, Georgia-Pacific never asserted a research scholar's privilege, nor is such privilege applicable herein. In this regard, plaintiffs reliance on *In re American Tobacco Co.*, 880 F.2d 1520 (2d Cir. 1989) is misplaced. In that case, defendants sought production of data underlying certain studies conducted by non-parties Mount Sinai School of Medicine and the American Cancer Society, the results of which the plaintiffs' experts had relied upon to support their own opinions. Significantly, none of the authors of those studies served as consultants to any party involved in that matter. Ultimately, the Second Circuit ruled, among other things, that the research scholar's privilege is not recognized in New York. *Id.* at 1529-1539. While *American Tobacco, supra*, is indeed persuasive, it is nonetheless distinguishable from the case at bar insofar as plaintiffs do not seek discovery from non-parties, but from defendant's own consulting experts whose work was commissioned in anticipation of litigation.[9] Nor does it appear that *American Tobacco* involved a claim of attorney work-product privilege. Moreover, the *American Tobacco* defendants showed a need to defend themselves against the studies at trial. Georgia-Pacific, on the other hand, has not designated any of its consulting authors as expert witnesses in NYCAL cases or otherwise used these studies at trial.[10]

Accordingly, rather than a research scholars's privilege, Georgia-Pacific has invoked the

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[9] The other cases relied on by plaintiffs are, for the same reasons, distinguishable from the case at bar. *See Murphy v Phillip Morris*, 99-CV-7155, 2000 U.S. Dist. LEXIS 21128 (CD Cal. Mar. 17 2000); *United States Postal Serv. v Phelps Dodge Ref. Corp., supra*, 852 F. Supp. 156 (EDNY May, 18 1994).

[10] Georgia-Pacific is a defendant in a significant number of NYCAL cases.

attorney work-product privilege, which is codified in CPLR 3101(d)(2), and which provides in relevant part:

> Materials. Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

Here, Georgia-Pacific argues that the underlying data sought by plaintiffs was generated and prepared in connection with projects commissioned by Georgia-Pacific in anticipation of litigation. In this regard, New York courts have consistently found that an opposing party is generally not entitled to such materials. *See Santariga v McCann*, 161 AD2d 320, 321 (1st Dept 1990) ("We find that it was an improvident exercise of discretion for the Supreme Court to have directed discovery of the nontestifying expert's report . . . . Accordingly, an expert who is retained as a consultant to assist in analyzing or preparing the case is beyond the scope of this provision; in fact, such experts are generally seen as an adjunct to a lawyer's strategic thought processes, thus qualifying for complete exemption from disclosure . . ."); *see also Hudson Ins. Co. v Oppenheim*, 72 AD3d 489, 490 (1st Dept 2010) (work-product privilege "extends to experts retained as consultants to assist in analyzing or preparing the case."); *Barrowman v Niagara Mohawk Power Corp.*, 252 AD2d 946, 946 (4th Dept 1998), *app. den.* 92 NY2d 817 (1998) (expert report "constitutes material prepared for litigation and is not subject to disclosure unless the party seeking disclosure has a substantial need for the report and is unable without

undue hardship to obtain its substantial equivalent by other means").

Plaintiffs argue that *In re New York Renu* (*supra*, p. 6) should guide this court's decision. In that case, the US District Court for the District of South Carolina, Charleston Division, held that an expert report was not protected from discovery under New York's attorney work-product privilege. However, the report at issue in that case was not designed exclusively to aid the client in litigation, but to suggest measures for future compliance with FDA standards. As such, the court found that the report was not protected by CPLR 3101(d)(2). *See United States v Adlman*, 134 F3d 1194, 1202 (2d Cir. 1998) ("documents should be deemed prepared in anticipation of litigation," if in "light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.") (internal quotation marks omitted). Here, Georgia-Pacific admits that it commissioned these studies to aid the company in asbestos-related lawsuits.[11]

However, the work-product privilege may be waived by the conduct of the parties. As an example, if a party selectively discloses certain privileged material but, as in this case, withholds underlying raw data that might be prone to scrutiny by the opposing party, principles of fairness may require a more complete disclosure. *See United States v Nobles*, 422 U.S. 225, 239 (1975); *see also Niagara Mohawk Power Corp. v Stone & Webster Eng. Corp.*, 125 F.R.D. 578, 587 (NDNY May 25, 1989) ("Generally, the work product protection is waived when documents are

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[11] The court is aware that materials otherwise protected by the attorney work-product privilege may nevertheless be required to be produced where the party seeking discovery demonstrates they are unable to obtain the substantial equivalent of such materials or that they require such materials for trial. CPLR 3101(d)(2). Should defendants designate any of the authors of the published reports as testifying experts, the provisions of CPLR 3101(d)(1) will apply.

voluntarily shared with an adversary or when a party possessing the documents seeks to selectively present the materials to prove a point, but then attempts to invoke the privilege to prevent an opponent from challenging the assertion.") Waiver of the privilege may also result from a party's "injection of an issue into the litigation that, in fairness, requires the party to disclose otherwise protected materials." *Bovis Lend Lease, Lmb v Seasons Contr. Corp.*, No. 00-CV-9212, 2002 U.S. Dist. LEXIS 23322, at *16 (SDNY Dec. 4, 2002, n.o.r.).

This is not to say that the publication of the actual studies necessarily means that Georgia-Pacific forfeited the privilege for all other documents relevant to this litigation. Rather, "any waiver of work product by disclosing that work product to one's opponent waives the privilege only as to matter covered in the waived documents." *Fullerton v Prudential Ins. Co.*, 194 F.R.D. 100, 104 (SDNY May 5, 2000). While the Second Circuit has stressed the "incompatibility of using the assertions of the privilege as a 'sword' while attaching the privilege to a related matter as a 'shield,'" it has also "cautioned against broad generalizations." *In re Grand Jury Proceedings John Doe Co. v United States*, 350 F.3d 299, 302 (2d Cir. 2003). In this regard, "whether fairness requires disclosure" should be decided on a "case by case basis, and depends primarily on the specific context in which the privilege is asserted." *Id.*, quoting *United States v Doe* (*In re Grand Jury Proceedings*), 219 F.3d 175, 183 (2d Cir. 2000).

Applying these rules, and notwithstanding whether or not the underlying data was at some point protected by CPLR 3101(d)(2) in the first place, I find that Georgia-Pacific waived any privilege with respect to such materials in the circumstances of this case, and accordingly it must produce the data underlying the published studies. Georgia-Pacific vigorously asserted throughout these proceedings that it commissioned these studies in anticipation of litigation.

Indeed it has admitted that "at an appropriate time and after their publication is complete, GP plans to introduce the results of these studies in litigation." (Moving Affirmation, p. 8). Moreover, Georgia-Pacific concedes that plaintiffs may seek disclosure of the underlying data pursuant to CPLR 3101(d) when it identifies the authors of these studies it will call to testify with respect to the published articles. (*Id.* p. 13). Insofar as the underlying data and published data clearly relate to the same matter, there is no reason why plaintiffs should be prejudiced by being made to wait to analyze the assertions made therein until Georgia-Pacific deems it appropriate to designate experts for trial, which will no doubt require a lengthy and careful examination of the underlying data. Disclosure is particularly warranted at this time given the complexity of these studies and the difficulties plaintiffs will face should Georgia-Pacific produce the materials on the eve of trial.

Not the least important is that disclosure of the underlying data complies with the letter and the spirit of the CMO, which "confirms that the coordination and standardization of discovery so that the parties can prepare their cases for trial at minimum expense is the rule for all pretrial procedures . . . ." *Ames v A.O. Smith Water Products, et al.,* Index No. 107574/08 (Sup. Ct. NY. Co. Mar. 23, 2009, n.o.r), *aff'd* 66 AD3d 600 (1st Dept 2009); *see also* CMO Section II. In fact, a guiding principle of the CMO is to "allow the parties to obtain reasonably necessary documents and information without imposing undue burdens in order to permit the parties to evaluate the case, reach early settlements, and prepare unsettled cases for trial." CMO, § II. With these general considerations in mind, I find that article 31 of the CPLR and the CMO authorize disclosure of the data underlying such studies. Georgia-Pacific cannot use its experts' conclusions as a sword while at the same time attempting to shield the public from information

which affects the veracity of its experts' conclusions. *See In re Grand Jury Proceedings John Doe Co. v United States*, 350 F.3d 299, 302 (2d Cir. 2003); *see also Farrow v Allen*, 194 AD2d 40, 45 (1st Dept 1993) ("[I]t is unfair for the opposing party in a litigated controversy to . . . use this privilege both as a sword and a shield, to waive when it enures to her advantage, and wield when it does not.") (internal quotation marks omitted); *Flynn v Canadian Imperial Bank of Commerce*, 2008 NY Slip Op 30605U, 8 (Sup. Ct. NY Cty. 2008, n.o.r.) ("Based on principles of fairness, courts most often impose the subject matter waiver when the privilege-holder attempts to use the privilege as both a sword and a shield or when the party attacking the privilege will be prejudiced at trial." (internal citations omitted)).

My ruling herein (regarding Recommendation # 2) is limited to the data, samples, and materials which relate to those studies whose results have been published or will be published. Georgia-Pacific is not required at this juncture to produce to plaintiffs any internal communications which portray its attorneys' or consultants' notes, comments or opinions.

To the extent Georgia-Pacific claims that its consulting experts, and not the company itself, have possession, custody, or control of the materials and documents underlying the published articles, Georgia-Pacific is directed to act in good faith to secure their consulting experts' compliance with such production.

Accordingly, and in light of all of the foregoing, it is hereby

ORDERED that Georgia-Pacific's Motion Sequence 002 to vacate Recommendation #1 is denied in its entirety; and it is further

ORDERED that Recommendation #1 is confirmed; and it is further

ORDERED that Georgia-Pacific's Motion Sequence 003 to vacate Recommendation #2

is denied in its entirety; and it is further

ORDERED that Recommendation #2 is modified insofar as Georgia-Pacific is directed to produce all documents and materials relating to the published studies discussed herein over which it has possession, custody, or control, including, but not limited to, microscopy images, the data generated in the chambers where the reformulated compounds were created, and numerical calculations, no later than Friday, February 10, 2012, at 5:00PM, and it is further

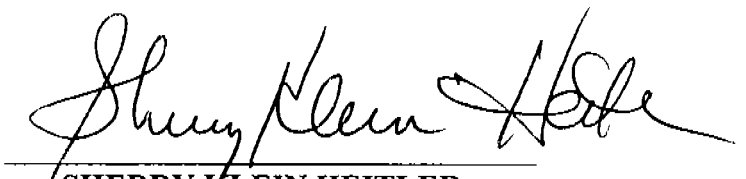
ORDERED that Georgia-Pacific shall provide to plaintiffs in whose possession, custody, or control such documents are reposed which are outside of its possession, custody, or control, so that plaintiffs may serve third-party subpoenas in accordance herewith; and it is further

ORDERED that in all other respects Recommendation # 2 is confirmed; and it is further

ORDERED that any dispute between the parties over the method of production (e.g. whether plaintiffs should be required to physically inspect the materials on site) shall first be raised before the Special Master in accordance with the provisions of the CMO.

This constitutes the decision and order of the court.

DATED: December 7, 2011



SHERRY KLEIN HEITLER
J.S.C.