UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. EDCV 06-55-GW Date July 30, 2012

Title *United States of America et al v. J-M Manufacturing Company, Inc.*

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	Laura Elias	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
IN PERSON: Jonathan I. Handler / Elizabeth J. Sher	Thomas A. Zaccaro Kai Bartomoleo
BY TELEPHONE: R. Clayton Welch / Joan C. Arneson Susan K. Stewart	

PROCEEDINGS: **DEFENDANT J-M MANUFACTURING, INC.'S MOTION FOR THE RETURN OR DESTRUCTION OF PRIVILEGED AND CONFIDENTIAL INFORMATION (filed 09/01/11)**

The Court's Tentative Ruling is circulated and attached hereto. Court hears oral argument. For reasons stated on the record, the motion is **TAKEN UNDER SUBMISSION.** Defendants' response to Plaintiff's Notice of Supplemental Authority, filed on July 27, 2012, will be filed within 10 days from the date of this order. A nonappearance status conference is set for August 20, 2012. Court to issue ruling.

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Initials of Preparer JG

United States ex rel. Hendrix v. J-M Mfg. Co., Inc., et al., Case No. CV-06-0055

Further Consideration of Motion for the Return or Destruction of Privileged Documents and for Other Appropriate Relief

Having reviewed the Court's earlier tentative ruling on this motion (Docket No. 605), the transcript of the February 27, 2012 hearing in this matter (Docket No. 608) and the parties' supplemental briefing (Docket Nos. 615, 616, 677 and 679), the proper course for resolving this significant motion is fairly clear. Three points will form the correct outcome, as follows.

First, the prevailing party on this motion will be determined by way of resolution of the meaning of the term "holder" as used in Federal Rule of Evidence 502(b)(2). There does not appear to be any reported federal appellate decision construing Rule 502(b)(2) (or even Rule 502(b) in general). The parties agree that J-M is the "holder" of both the attorney-client privilege and protection afforded by the work produce doctrine for purposes of this motion and this case. As the Court explained in its earlier tentative ruling, a plain reading of Rule 502(b)(2) would support the conclusion that only the reasonableness of J-M's conduct should therefore be at issue.

However, as the Relator points out in his supplemental briefing,[1] at least historically,[2] actions of a "holder's" agent may effect a waiver of the privilege or work product protection. Moreover, there is an obvious appeal to the argument that the Court may not credit J-M by way of the efforts its agents made in *setting up* a reasonable system for reviewing the necessary documents while at the same time ignoring the apparent significant errors in applying that system (or flaws in its design). At the same

[1] J-M takes issue with the Relator's argument on this point in the supplemental briefing, asserting (perhaps correctly) that the Relator overstepped the bounds of the subjects upon which the Court invited further submissions. However, the Court's earlier tentative ruling was just that – *tentative*. Whether or not the Relator had continued to argue the correct understanding of Rule 502(b)(2)'s construction, the Court would have continued to assess its initial position. J-M has had the opportunity to respond to the Relator's further argument on this point.

[2] The Explanatory Note to the enactment of Rule 502 observes, in part, that, "while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally." Fed. R. Evid. 502 Explanatory Note.

time, the Relator does not appear to have directly confronted the actual language of Rule 502(b)(2) and its explicit limitation to "holder."[3]

If the Relator is correct about the proper interpretation of "holder," a client's decision to hire a law firm (and attendant vendors) experienced in document productions of this sort means *nothing* in the context of Rule 502(b). A client could hire the Clarence Darrow of document productions with *no* effect on whether the client has taken "reasonable steps to prevent disclosure" *unless* that experienced attorney's conduct in the client's actual case was up to snuff. Moreover, even if "Clarence Darrow" informs the client that he *has corrected* earlier mistakes and now *properly* applied the filter he had in place, when in fact he has not, the "holder" would have acted unreasonably because, without the client's knowledge, "Clarence Darrow" had not done what he indicated he had (or at least had not done it properly).

Second, the reason that the proper interpretation/construction of Rule 502(b)(2) is critical is because the parties agree that J-M itself was not aware of the privilege/protection-revealing problems with its production until May 2010. Before that date, the Court believes that J-M reasonably relied upon its attorneys' assurances that the designed process was being faithfully applied.[4] Any productions *after* May 2010 are subject to the parties' clawback agreement.

Yet, whether or not the Court concludes J-M has provided sufficient evidence of any "on the ground" efforts, it is clear to the Court that one or more of J-M's agents (whether attorneys, discovery-related vendors, or both) was or were not taking "reasonable steps to prevent disclosure." A complex system for reviewing documents – software-based or not – in a complicated and extensive discovery process is, by itself, a reasonable step to take in preventing disclosure of documents protected by the privilege and/or work-product protection. *See* Rule 502 Explanatory Note ("Depending on the circumstances, a party that uses advanced analytical software applications and linguistic

[3] Obviously, it would have been easy to add the language "or its attorneys or other agents" to the rule. At the same time, as noted *supra*, Footnote 2, the rule "does not purport to supplant applicable waiver doctrine generally."

[4] To the extent that the Relator argues it was up to J-M – the *client* – to perform spot-checks on its attorneys' work in order to render any reliance reasonable, the Court rejects that argument.

tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure."). In addition, as the Court has already observed, mistakes are to be expected, especially in connection with the scope of production at issue in this case. However, *repeated* mistakes concerning the *same* documents can illustrate only that there is something so flawed in the process and/or its application that whatever "steps" are being taken are not "reasonable."

If "holder" within the meaning of Rule 502(b)(2) includes J-M's agents, the Court need not identify whether the *unreasonable* steps were being taken by J-M's attorneys or the discovery-related vendors. Even if the continued productions of the same documents after May 2010 were themselves subject to clawback agreements, the fact that there were continued productions with the same flaws is still further evidence that there was something glaringly unreasonable about the review and production process, its application, or both.

At a minimum, therefore, if the Court concludes that "holder" in Rule 502(b)(2) includes a client's attorneys and other agents, those documents that were produced after May 2010 that had already been produced in the first and second productions to the federal government would have lost whatever protection they once had. The clawback agreement would provide no protection as to those documents if the Court reaches that conclusion as to how Rule 502(b)(2) operates.[5] Even as to those documents that were produced only as part of the first and/or second productions to the federal government – and not again thereafter – the Court might conclude that J-M has not satisfied its burden of explaining why its agents' actual actions (as opposed to their plans) were reasonable in connection with those productions.

Third, the Relator has not explained why documents produced subsequent to May 2010 would *not* be subject to the parties' clawback agreement. Therefore, any documents that were *only* produced to the Relator after that time would not be waived, pursuant to the terms of the clawback agreement (and subject to the Relator's ability to challenge

[5] If the Court concludes that "holder" means just that – *only* the holder – it would conclude that J-M had taken reasonable steps prior to May 2010 and, as to the post-May 2010 time period, the clawback agreement would control.

whether the documents in question actually are protected by any privilege or protection), irrespective of the Court's ultimate conclusion on the Rule 502(b)(2) question.

The legal question of the construction/interpretation of Rule 502(b)(2) will require further assessment before a final ruling may be issued. No further briefing will be necessary in deciding that issue.