

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

STATE FARM MUTUAL AUTOMOBILE :
INSURANCE COMPANY and STATE :
FARM FIRE AND CASUALTY :
COMPANY, :

Plaintiffs, :

v. :

METROPOLITAN FAMILY PRACTICE, :
HERSH DEUTSCH, EDWARD KANNER :
D.C., POLINA SHIKHVARG, EFIM ITIN, :
M.D., :

Defendants. :

CIVIL ACTION NO. 03-969

MEMORANDUM

BUCKWALTER, S.J.

December 12, 2005

Presently before the Court are Motion of Defendant, Dr. Edward Kanner, to Compel the Production of Documents Identified in Plaintiffs' More Specific Privilege Log (Docket No. 407) and Plaintiffs' Response thereto (Docket No. 410). For the reasons stated below, Defendant Kanner's Motion to Compel is granted in part and denied in part. An appropriate order follows.

I. BACKGROUND

Defendant Kanner seeks to discover numerous documents from Plaintiffs, State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company.¹ By Order

¹ Defendant Kanner seeks to discovery the following bates-stamped documents: 005455, 005456, 005457, 005458, 005478-005479, 005484, 005485, 005486, 005487-005488, 005489-005492, 005510-005514, 005534 -005536, 005537-005538, 016553-016556, 016567-016568, 016576-016579, 016604-016606, **016621-016622**, 016625-016627, 016635-016636,

dated October 26, 2005 (Docket No. 412), the Court deferred resolution of a portion of Defendant Kanner's Motion pending an *in camera* review of the documents over which Plaintiffs claim privilege. Plaintiffs submitted copies of the documents for an *in camera* review on November 7, 2005.

II. DISCUSSION

Defendant Kanner argues that the documents he seeks to discover are relevant to his "affirmative defense at trial that the statute of limitations on State Farm's claim expired prior to the filing of its complaint in this case." (Def.'s Mot. at 8.) Defendant Kanner asserts that State Farm was placed on notice of "potential fraud at Metropolitan Family Practice long before February 22, 2001, specifically by the Le Ngan Thi claim, number 38-1624-723, and the Vanna Som claim, number 38-J17-321." *Id.* at 5.

Plaintiffs make several arguments in response. As a threshold issue, Plaintiffs argue that Defendant Kanner never requested these documents during formal discovery and therefore, is not entitled to them at this stage in the litigation. (Pl.'s Mem. of Law at 4, 7.) Should the Court find that Defendant Kanner is entitled to these documents despite not requesting them during the discovery period, Plaintiffs argue that many of the documents Defendant Kanner seeks to discover are protected by the attorney-client privilege. *Id.* at 8. Alternatively, Plaintiffs argue that all of the documents that Defendant Kanner seeks to discover are protected by the work product privilege. *Id.* at 8.

A. Expiration of Discovery Deadline

016702-016706, 016708-016709, 016723-016729, 016861-016864, 016870-016887, and 016915-016921.

Plaintiffs argue that because Defendant Kanner did not seek to discover the contested documents prior to the Court's deadline for filing discovery related motions, he is not entitled to them at this stage in the litigation. (Pl.'s Mem. of Law at 4, 7.)² The present motion, like Defendant Kanner's Motion to Compel a More Specific Privilege Log (Docket No. 377), originated with Defendant Kanner filing a Motion to Compel a Privilege Log on May 25, 2005 (Docket No. 327). This current motion is a motion to enforce this Court's Orders of June 9, 2005 (Docket No. 350) and August 29, 2005 (Docket No. 406). Accordingly, the Court rejects Plaintiff's first argument.

B. Attorney-Client and Work Product Privileges

1. *Attorney-Client Privilege*

Plaintiffs argue that the documents Defendant Kanner seeks to discover are protected by the attorney-client privilege. A federal court sitting in diversity must apply the law of the state in which it sits in order to determine the applicability of the attorney-client privilege. Fed. R. Evid. 501. In Pennsylvania, the attorney-client privilege is codified in 42 Pa. Cons. Stat. Ann. § 5928, which states "in a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client."

Nonetheless, the Third Circuit and the state of Pennsylvania apply the same test in evaluating attorney-client privilege. Rhone-Poulenc Rorer v. Home Indem. Co., 32 F.3d 851, 861 (3d Cir. 1994) ("No one has argued, however, that there are any principles or rules of law as

² The Court's deadline for filing discovery related motions was May 31, 2005. (Docket No. 328.)

to the attorney client privilege unique to Pennsylvania that should control the resolution of our decision on these matters.”). Thus, communications between an attorney and client are protected if:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.³

Id. at 862. In other words, the attorney-client privilege “protects the confidences exchanged between an attorney and a client” during the course of representation. United States v. Inigo, 925 F.2d 641, 656 (3d Cir. 1991). This includes client communications with both in-house and outside counsel. Robertson v. Allstate Ins. Co., No. 98-4909, 1999 U.S. Dist. LEXIS 2991, at *17 (E.D. Pa. Mar. 10, 1999). However, “for a communication to be privileged, it must have been made for the purpose of securing legal advice.” Kelly v. Ford Motor Co., 110 F.3d 954, 965 (3d Cir. 1997); see also Rhone-Poulenc Rorer, 32 F.3d at 862.

The attorney-client privilege does not apply to the “disclosure of the underlying facts by those who communicated with the attorney.” Upjohn Co. v. United States, 449 U.S. 383, 396. See also Rhone-Poulenc Rorer, 32 F.3d at 862. The attorney-client privilege also does not apply if the communication is “in furtherance of a crime or fraud.” Inigo, 925 F.2d at 656-67.

Defendant Kanner requested that this Court review *in camera* several documents that

³ The Court finds that there is no evidence that Plaintiffs waive the attorney-client privilege and therefore, will not discuss this portion of the attorney-client privilege analysis.

Plaintiffs labeled “privileged” in its initial disclosure to determine “if they merely contain ‘facts acquired from persons or sources other than the client.’” (Def.’s Mot. at 1.) Plaintiffs respond that many of the documents “fall within the confines of attorney-client privilege and, therefore, are not discoverable unless substantially redacted.” (Pl.’s Mem. of Law at 8.) Plaintiff also argues that “[a]fter redaction by Plaintiffs, the factual statements would provide no more information to Defendant [Kanner] than that available through a review of claim file materials inclusive of medical records, police reports, and transcripts of the parties and witnesses.” Id.

2. *Work Product Privilege*

Alternatively, Plaintiffs argue that all of the documents that Defendant Kanner requests are protected by the work product privilege. Unlike the attorney-client privilege, the work product privilege is governed solely by the standard embodied in Federal Rule of Civil Procedure 26(b)(3). The standard set forth in Rule 26(b)(3) applies even in diversity cases. United Coal Co. v. Powell Constr. Co., 839 F.2d 958, 966 (3d Cir. 1988).

Under Rule 26(b)(3), the party claiming privilege must show that the materials in question “were prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).”⁴ Fed. R. Civ. P. 26(b)(3). See also Haines v. Liggett Group, Inc., 975 F.2d 81, 94 (3d Cir. 1992) (quoting Hickman v. Taylor, 329 U.S. 495 (1947)). Thus, work product prepared in the ordinary course of business is not immune from discovery. Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124, 138 (3d Cir. 2000). Additionally, it is

⁴ The Court will refer to this portion of Rule 26(b)(3) as the “in anticipation” prong.

insufficient for the party claiming work product privilege to merely assert that the materials were prepared “in connection with” the subject matter of the dispute. Id. at 139.

Upon a showing by the party claiming the work product privilege that the documents were created in anticipation of litigation, the burden then shifts to the party seeking to discover the documents. The party disputing the work product privilege must satisfy two elements. First, the party seeking discovery must show they have “substantial need of the materials in the preparation of [their] case.” Fed. R. Civ. P. 26(b)(3). Second, the party seeking discovery must show they are “unable without undue hardship to obtain the substantial equivalent of the material by other means.” Id. If the party seeking discovery shows both elements, the court will still withhold documents that would disclose “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the lawsuit.” Id.

Again, Defendant Kanner argues substantial need for the documents he seeks to discover because they are relevant to his “affirmative defense at trial that the statute of limitations on State Farm’s claim expired prior to the filing of its complaint in this case.” (Def.’s Mot. at 8.) Although Defendant Kanner does not specifically argue that he is unable without undue hardship to obtain the substantial equivalent of the material by other means, Defendant Kanner states that he “will [sic] severely prejudiced if the non-privileged correspondence to State Farm from attorneys representing State Farm insureds is not disclosed.” Id. at 3.

Plaintiffs note that claim files 38-1624-723, the Le Ngan Thi claim, and 38-J17-321, the Vanna Som claim, as well as deposition transcripts, were made available to Defendant Kanner. (Pl.’s Mem. of Law at 9.) Plaintiffs argue that any information contained in the claim files and deposition transcripts is substantially equivalent to the information contained in the documents

presently before the Court for an *in camera* review. Id. (“Dr. Kanner has placed no evidence on the record that the type of information that would be contained in the correspondence and internal documents or its substantial equivalent could not have been obtained elsewhere.”). Plaintiffs further note that because the claims files and deposition transcripts were made available⁵ and Defendant Kanner “performed absolutely no discovery with respect to these claims,” Defendant Kanner cannot show “that he was unable to obtain this information without being subject to an undue hardship.” Id.

3. *Application of Privileges to Documents Requested by Defendant Kanner*

The Court has carefully reviewed the submitted documents and arrived at the following conclusions:

- **005455**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege.⁶ This document is an e-mail to Lynita Marshall⁷ from Cathy Maloney⁸ dated November 14, 1999. The e-mail contains information regarding the

⁵ Plaintiffs state that in Defendant Kanner’s formal discovery request, he sought “the complete claim files identified by the following State Farm claim numbers: 38-7183817, 38-8232-086, 38-8257338, 38-1670571, 38-J040882, 084405210, 38-1624723.” (Pl.’s Mem. of Law at 6.) Plaintiffs argue that “[Defendant] Kanner, at that time, was in possession of all of the claim file numbers of Plaintiffs. He had, at his fingertips, the claim file identification numbers now presently at issue. He chose not to seek the same type of discovery with respect to the claim files at issue.” Id.

⁶ For documents which the Court finds are protected by the work product privilege, the Court declines to discuss whether the document is also protected by the attorney-client privilege.

⁷ Lynita Marshall is a Claim Representative of State Farm Insurance Company.

⁸ Cathy Maloney is an attorney in the Corporate Law Department of State Farm Mutual Automobile Insurance Company.

settlement of claim, 38-1624-723, the Le Ngan Thi claim. The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Specifically, Defendant Kanner fails to demonstrate how he would have substantial need for information about the settlement of claim 38-1624-723 in the preparation of his statute of limitations defense in the present case.

- **005456:** The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document contains an e-mail to Cathy Maloney⁹ from Susan Graham¹⁰ dated November 7, 1999. The e-mail directs Cathy Maloney to submit a pre-trial report prior to a conference call regarding claim 38-1624-723, the Le Ngan Thi claim. This document also contains an e-mail to Susan Graham¹¹ and Lynita Marshall¹² from Cathy Maloney¹³ dated November 11, 1999 concerning the scheduling of the settlement conference and due date for the pre-trial report in the Le Ngan Thi claim. The Court finds that although Plaintiffs prepared the documents in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Specifically, Defendant Kanner fails to demonstrate how he would have substantial need for

⁹ Cathy Maloney is an attorney in the Corporate Law Department of State Farm Mutual Automobile Insurance Company.

¹⁰ Susan Graham is a Team Manager for State Farm Insurance Company.

¹¹ Susan Graham is a Team Manager for State Farm Insurance Company.

¹² Lynita Marshall is a Claim Representative for State Farm.

¹³ Cathy Maloney is an attorney in the Corporate Law Department of State Farm Mutual Automobile Insurance Company

information relating to the scheduling of conference calls and pre-trial reports regarding claim 38-1624-723 in the preparation of his statute of limitations defense in the present case.

- **005457:** The Court finds that this document is subject to discovery because it is not protected by the work product or the attorney-client privilege. This document contains two e-mails to Doug Babin¹⁴ from Cathy Maloney¹⁵ dated November 5, 1999 and November 7, 1999. In her e-mails, Cathy Maloney indicates that claim 38-1624-723, the Le Ngan Thi claim, is on appeal from arbitration and scheduled to go into the trial pool. Regarding the work product privilege, Plaintiffs have not demonstrated that this document was created in anticipation of litigation. Cathy Maloney simply forwarded information about claim 38-1624-723 to Doug Babin. Regarding the attorney-client privilege, Doug Babin is not the claim specialist responsible for the resolution of claim 38-1624-723. Nonetheless, Cathy Maloney and Doug Babin's relationship can be construed as an attorney-client relationship, as Doug Babin is an employee of State Farm. The contents of the e-mail however, are not made for the purpose of securing legal advice but only to supply Doug Babin with facts about the procedural scheduling of claim. Doug Babin was not the claim specialist involved in the resolution of claim 38-1624-723 but, interested in the claim due to its possible involvement in a "ring investigation." See Doc. 005458.

Accordingly, the Court orders Plaintiffs to provide Defendant Kanner a copy of document 005457.

¹⁴ Doug Babin is a Claim Specialist for State Farm.

¹⁵ Cathy Maloney is an attorney in the Corporate Law Department of State Farm Mutual Automobile Insurance Company.

- **005458:** The Court finds that this document is subject to discovery because it is not protected by the work product or attorney-client privilege. This document is an e-mail to Cathy Maloney¹⁶ from Doug Babin¹⁷ dated November 5, 1999 expressing interest in claim 38-1624-723, the Le Ngan Thi claim, because it may be part of a “ring investigation.” Regarding the work product privilege, Plaintiffs have not demonstrated that this document was created in anticipation of litigation. Doug Babin simply requested that Cathy Maloney forward him information from the file for his review. Regarding the attorney-client privilege, Doug Babin is not the claim specialist responsible for the resolution of claim 38-1624-723. Nonetheless, Cathy Maloney and Doug Babin’s relationship can be construed as an attorney-client relationship, as Doug Babin is an employee of State Farm. The contents of the e-mail however, are not made for the purpose of securing legal advice, but only to request documents from Cathy Maloney that she had in her possession.

Accordingly, the Court orders Plaintiffs to provide Defendant Kanner a copy of document 005458.

- **005478-005479:** The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a letter to Susan Graham¹⁸ from Cathy Maloney¹⁹ dated June 4, 1999. The document contains a summary of a conference call

¹⁶ Cathy Maloney is an attorney in the Corporate Law Department of State Farm Mutual Automobile Insurance Company.

¹⁷ Doug Babin is a Claim Specialist for State Farm.

¹⁸ Susan Graham is a Team Manager for State Farm Insurance Company.

¹⁹ Cathy Maloney is an attorney in the Corporate Law Department of State Farm Mutual Automobile Insurance Company.

with Susan Graham regarding an arbitration appeal taken by the Plaintiffs in claim 38-1624-723, the Le Ngan Thi claim. The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Specifically, Defendant Kanner fails to demonstrate how he would have substantial need for basic information regarding the arbitration appeal of claim 38-1624-723 in the preparation of his statute of limitations defense **in the present case.**

- **005484**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is an e-mail to Susan Graham²⁰ and Lynita Marshall²¹ from Cathy Maloney²² dated June 3, 1999 and contains information regarding the process in which Cathy Maloney was informed of arbitration appeal in claim 38-1624-723, the Le Ngan Thi claim. The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Specifically, Defendant Kanner fails to demonstrate how he would have substantial need for information regarding the means in which Cathy Maloney was informed of the arbitration appeal of claim 38-1624-723 in the preparation of his statute of limitations defense **in the present case.**

- **005485**: The Court finds that this document is not subject to discovery because it is

²⁰ Susan Graham is a Team Manager for State Farm Insurance Company.

²¹ Lynita Marshall is a Claim Representative for State Farm.

²² Cathy Maloney is an attorney in the Corporate Law Department of State Farm Mutual Automobile Insurance Company.

protected by the work product privilege. This document is identical to document 005484 except that it indicates it was printed from the e-mail of Susan Graham,²³ not Lynita Marshall.²⁴ See Doc. 005484.

- **005486**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is identical to document 005484. See Doc. 005484.

- **005487**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is an e-mail to Lynita Marshall²⁵ from Cathy Maloney²⁶ dated June 3, 1999 informing her that the plaintiff in claim 38-1624-723, the Le Ngan Thi claim, appealed the case after an arbitration decision and that a settlement conference scheduled. The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Specifically, Defendant Kanner fails to demonstrate how he would have substantial need for information about the settlement of claim 38-1624-723 in the preparation of his statute of limitations defense in the present case.

- **005488**: The Court finds that this document is subject to discovery because it is not protected by the work product or attorney-client privilege. This document is an e-mail to Cathy

²³ Susan Graham is a Team Manager for State Farm Insurance Company.

²⁴ Lynita Marshall is a Claim Representative for State Farm.

²⁵ Lynita Marshall is a Claim Representative for State Farm.

²⁶ Cathy Maloney is an attorney in the Corporate Law Department of State Farm Mutual Automobile Insurance Company.

Maloney²⁷ from Lynita Marshall²⁸ dated May 24, 1999, requesting closed paperwork regarding claim 38-1624-723, the Le Ngan Thi claim. The Court finds that this document is not immune from discovery because it was prepared in the ordinary course of business, i.e. updating a file to indicate its status as closed. Regarding the attorney-client privilege, although the e-mail is a communication between a client and her attorney, it is not for the purpose of securing legal advice, in this instance.

Accordingly, the Court orders Plaintiffs to provide Defendant Kanner a copy of document 005488.

- **005489-005492**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a letter to Lynita Marshall²⁹ from Cathy Maloney³⁰ dated March 18, 1999. The document is a pre-arbitration report in claim 38-1624-723, the Le Ngan Thi claim. The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Defendant Kanner demonstrates substantial need for the material in the preparation of his case by indicating that any information of fraud contained in the document would be relevant to his statute of limitations defense in the present case. The Court finds however, that Defendant Kanner would have been able without

²⁷ Cathy Maloney is an attorney in the Corporate Law Department of State Farm Mutual Automobile Insurance Company.

²⁸ Lynita Marshall is a Claim Representative for State Farm.

²⁹ Lynita Marshall is a Claim Representative for State Farm.

³⁰ Cathy Maloney is an attorney in the Corporate Law Department of State Farm Mutual Automobile Insurance Company.

undue hardship to obtain substantially equivalent material through the discovery of claim file 38-J17-321 and the deposition transcripts of Ciu-Thi Nguyen, Myanh Nguyen and Le Ngan Thi Nguyen.

- **005510:** The Court finds that this document is subject to discovery because it is not protected by the work product or attorney-client privilege. This document contains a Fax Cover Sheet to Lynita Marshall³¹ from Cathy Maloney³² dated March 23, 1999. The Court finds that this document is not immune from discovery because it was prepared in the ordinary course of business, i.e. sending a fax. Regarding the attorney-client privilege, although the fax sheet can be construed as a communication between an attorney and her client, it was not sent for the purpose of securing legal advice.

Accordingly, the Court orders Plaintiffs to provide Defendant Kanner a copy of document 005510.

- **005511-005514:** The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a duplicate copy of document 005489-005492. See Doc. 005489-005492.

- **005534:** The Court finds that this document is subject to discovery because it is not protected by the work product or attorney-client privilege. This document is a Fax Cover Sheet

³¹ Lynita Marshall is a Claim Representative for State Farm.

³² Cathy Maloney is an attorney in the Corporate Law Department of State Farm Mutual Automobile Insurance Company.

to Lynita Marshall³³ from David Bush³⁴ dated February 23, 1999. The Court finds that this document is not immune from discovery because it was prepared in the ordinary course of business, i.e. sending a fax. Regarding the attorney-client privilege, although the fax sheet can be construed as a communication between an attorney and his client, it is not for the purpose of securing legal advice.

Accordingly, the Court orders Plaintiffs to provide Defendant Kanner a copy of document 005534.

- **005535-005536**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a letter to Lynita Marshall³⁵ from David Bush³⁶ dated February 5, 1999 and contains a summary of the deposition of Stephen Sylvester, co-defendant with State Farm's insured, in claim 38-1624-723, the Le Ngan Thi claim. The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Defendant Kanner demonstrates substantial need for the material in the preparation of his case by indicating that any information of fraud contained in the document would be relevant to his statute of limitations defense in the present case. The Court finds however, that Defendant Kanner would have been able without undue hardship to obtain

³³ Lynita Marshall is a Claim Representative for State Farm.

³⁴ Attorney, Corporate Law Department, State Farm Mutual Automobile Insurance Company

³⁵ Lynita Marshall is a Claim Representative for State Farm.

³⁶ Attorney, Corporate Law Department, State Farm Mutual Automobile Insurance Company

substantially equivalent material through the discovery of the deposition transcript of Stephen Sylvester.

- **005537-005538**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a duplicate copy of document 005535-005436. See Doc. 005535-005436.

- **016553-016556**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a letter to Doug Babin³⁷ from Lee Rosenau³⁸ dated March 15, 2001 and describes the trial of claim 38-J17-321, the Vanna Som claim, and Rosenau's evaluation of the testimony of Dr. Efem Itin³⁹ and Vanna Som. The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Defendant Kanner demonstrates substantial need for the material in the preparation of his case by indicating that any information of fraud contained in the document would be relevant to his statute of limitations defense in the present case. The Court finds however, that after redaction of Lee Rosenau's mental impressions, Defendant Kanner would have been able without undue hardship to obtain substantially equivalent material through acquisition of the trial transcript for claim 38-J17-321.

³⁷ Doug Babin is a Claim Specialist for State Farm.

³⁸ Lee Rosenau is an attorney appointed by State Farm to represent George Wong, an insured of State Farm and defendant in claim 38-J17-321.

³⁹ Dr. Efem Itin testified on behalf of Vanna Som in the trial for claim 38-J17-321. Dr. Itin is also a defendant in the present case.

- **016567-016568**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a letter to Doug Babin⁴⁰ from Lee Rosenau⁴¹ dated February 28, 2001. The document contains a summary of the deposition of Dr. Efem Itin.⁴² The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Defendant Kanner demonstrates the substantial need for the material in the preparation of his case by indicating that any information of fraud contained in the document would be relevant to his statute of limitations defense in the present case. The Court finds however, that Defendant Kanner would have been able without undue hardship to obtain substantially equivalent material through the discovery of the transcript of the deposition of Dr. Itin.

- **016576-016579**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a letter to Austin Bowles⁴³ from Lee Rosenau⁴⁴ dated December 19, 2000 and contains a pre-trial report for claim 38-J17-321, the Vanna Som claim. The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the

⁴⁰ Doug Babin is a Claim Specialist for State Farm.

⁴¹ Lee Rosenau is an attorney appointed by State Farm to represent George Wong, an insured of State Farm and defendant in claim 38-J17-321.

⁴² Dr. Efem Itin testified on behalf of Vanna Som in the trial for claim 38-J17-321. Dr. Itin is also a defendant in the present case.

⁴³ Austin Bowles is a Team Manager for State Farm.

⁴⁴ Lee Rosenau is an attorney appointed by State Farm to represent George Wong, an insured of State Farm and defendant in claim 38-J17-321.

work product protection afforded by Rule 26(b)(3). Defendant Kanner demonstrates substantial need for the material in the preparation of his case by indicating that any information of fraud contained in the document would be relevant to his statute of limitations defense in the present case. The Court finds however, that after redaction of Lee Rosenau's mental impressions, Defendant Kanner would have been able without undue hardship to obtain substantially equivalent material through discovery of claim file 38-J17-321.

- **016604-016606**: The Court finds that this document is subject to discovery because it is not protected by the work product or the attorney-client privilege. This document is a letter to Doug Babin⁴⁵ from Lee Rosenau⁴⁶ dated July 17, 2000 summarizing the arbitration proceedings and questioning whether to appeal the arbitration award. Regarding the work product privilege, the Court finds that Defendant Kanner satisfies both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Defendant Kanner demonstrates the substantial need for the material in the preparation of his case by indicating that any information of fraud contained in the document would be relevant to his statute of limitations defense in the present case. The Court also finds that Defendant Kanner would not have been able without undue hardship to obtain the substantial equivalent of information concerning what went on at the arbitration proceedings. Thus, the portions of this document which do not contain the mental impressions, conclusions, opinions, or legal theories of Lee Rosenau are discoverable.

Regarding the attorney-client privilege, the Court finds that the document is a

⁴⁵ Doug Babin is a Claim Specialist for State Farm.

⁴⁶ Lee Rosenau is an attorney appointed by State Farm to represent George Wong, an insured of State Farm and defendant in claim 38-J17-321.

communication between an attorney and his client. The Court also finds that the contents of the e-mail are made for the purpose of securing legal advice because the document conveys information to Doug Babin in order to determine the necessity of an arbitration appeal.

However, the attorney-client privilege does not apply to the “disclosure of the underlying facts by those who communicated with the attorney,” specifically, Vanna Som’s testimony during the arbitration. Thus, the portions of the document which disclose underlying facts are discoverable.

Accordingly, the Court orders Plaintiffs to provide Defendant Kanner with a redacted version of document 016604-016606.

- **016621-016622**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a letter to Doug Babin⁴⁷ from Lee Rosenau⁴⁸ dated June 23, 2000. The document contains a summary of the deposition of George Wong.⁴⁹ The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Defendant Kanner demonstrates the substantial need for the material in the preparation of his case by indicating that any information of fraud contained in the document would be relevant to his statute of limitations defense in the present case. The Court finds however, that Defendant Kanner would have been able without undue hardship to obtain substantially equivalent material through the discovery of the transcript of the deposition

⁴⁷ Doug Babin is a Claim Specialist for State Farm.

⁴⁸ Lee Rosenau is an attorney appointed by State Farm to represent George Wong, an insured of State Farm and defendant in claim 38-J17-321.

⁴⁹ George Wong is an insured of State Farm and defendant in claim 38-J17-321.

of George Wong.

- **016625-016627**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a letter to Austin Bowles⁵⁰ from Lee Rosenau⁵¹ dated June 8, 2000. The documents is a pre-trial report created in preparation for a pending arbitration hearing for claim 38-J17-321, the Vanna Som claim. The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Defendant Kanner demonstrates substantial need for the material in the preparation of his case by indicating that any information of fraud contained in the document would be relevant to his statute of limitations defense in the present case. The Court finds however, that after redaction of Lee Rosenau's mental impressions, Defendant Kanner would have been able without undue hardship to obtain substantially equivalent material through the discovery of claim file 38-J17-321.

- **016635-016636**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a letter to Doug Babin⁵² from Lee Rosenau⁵³ dated May 17, 2000. The documents contain a summary of the deposition of Vanna Som. The Court finds that although Plaintiffs prepared this document in anticipation of

⁵⁰ Austin Bowles is a Team Manager for State Farm.

⁵¹ Lee Rosenau is an attorney appointed by State Farm to represent George Wong, an insured of State Farm and defendant in claim 38-J17-321.

⁵² Doug Babin is a Claim Specialist for State Farm.

⁵³ Lee Rosenau is an attorney appointed by State Farm to represent George Wong, an insured of State Farm and defendant in claim 38-J17-321.

litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Defendant Kanner demonstrates the substantial need for the material in the preparation of his case by indicating that any information of fraud contained in the document would be relevant to his statute of limitations defense in the present case. The Court finds however, that Defendant Kanner would have been able without undue hardship to obtain substantially equivalent material through the discovery of the transcript of the deposition of Vanna Som.

- **016702-016706**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a letter to George Wong⁵⁴ from Lee Rosenau⁵⁵ dated January 20, 2000 indicating that he will defend Wong. This document also contains a letter to Austin Bowles⁵⁶ from Lee Rosenau dated February 21, 2000 confirming the strategy meeting between Lee Rosenau and Doug Babin.⁵⁷ The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Specifically, Defendant Kanner fails to demonstrate how he would have substantial need for such information in the preparation of his statute of limitations defense in the present case.

⁵⁴ George Wong is an insured of State Farm and defendant in claim 38-J17-321.

⁵⁵ Lee Rosenau is an attorney appointed by State Farm to represent George Wong, an insured of State Farm and defendant in claim 38-J17-321.

⁵⁶ Austin Bowles is a Team Manager for State Farm.

⁵⁷ Doug Babin is a Claim Specialist for State Farm.

- **016708-016709**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a letter to George Wong⁵⁸ from Lee Rosenau⁵⁹ dated February 9, 2000. The letter informs George Wong of the procedures he must follow to answer interrogatories and directing him to do so. The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Specifically, Defendant Kanner fails to demonstrate how he would have substantial need for such information in the preparation of his statute of limitations defense in the present case.

- **016723-016729**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a letter to Lee Rosenau⁶⁰ from Austin Bowles⁶¹ dated January 19, 2000. The document contains a summary of claim file 38-J17-321, the Vanna Som claim, and Bowles suggestions for defending the insured, George Wong,⁶² against this claim. The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Defendant Kanner demonstrates substantial need for the material in the preparation of his case by indicating that any information of fraud

⁵⁸ George Wong is an insured of State Farm and defendant in claim 38-J17-321.

⁵⁹ Lee Rosenau is an attorney appointed by State Farm to represent George Wong, an insured of State Farm and defendant in claim 38-J17-321.

⁶⁰ Lee Rosenau is an attorney appointed by State Farm to represent George Wong, an insured of State Farm and defendant in claim 38-J17-321.

⁶¹ Austin Bowles is a Team Manager for State Farm.

⁶² George Wong is an insured of State Farm and defendant in claim 38-J17-321.

contained in the document would be relevant to his statute of limitations defense in the present case. The Court finds however, that Defendant Kanner would have been able without undue hardship to obtain substantially equivalent material through the discovery of claim file 38-J17-321.

- **016861-016864**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a duplicate copy of document 016576-016579. See Doc. 016576-016579.

- **016870-016879**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a duplicate copy of document 016576-016579, see Doc. 016576-016579, however, document 016871 and document 016874 are blank pages with handwritten notations on them. The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3).

Specifically, Defendant Kanner fails to demonstrate how he would have substantial need for the handwritten notations on documents 016871 and 016874 in the preparation of his statute of limitations defense in the present case.

- **016880-016884**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a duplicate copy of document 016703-016706, see Doc. 016703-016706, however, 016884 is a blank page containing a handwritten notation. The Court finds that although Plaintiffs prepared this document in anticipation of litigation, Defendant Kanner fails to satisfy both elements necessary to defeat the work product protection afforded by Rule 26(b)(3). Specifically, Defendant Kanner fails to

demonstrate how he would have substantial need for the handwritten notation in the preparation of his statute of limitations defense in the present case.

- **016885-016887**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a duplicate copy of document 016625-016627. See Doc. 016625-016627.

- **016915-016921**: The Court finds that this document is not subject to discovery because it is protected by the work product privilege. This document is a duplicate copy of document 016723-016729. See Doc. 016723-016729.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

STATE FARM MUTUAL AUTOMOBILE :
INSURANCE COMPANY and STATE :
FARM FIRE AND CASUALTY :
COMPANY, :

Plaintiffs, :

v. :

METROPOLITAN FAMILY PRACTICE, :
HERSH DEUTSCH, EDWARD KANNER :
D.C., POLINA SHIKHVARG, EFIM ITIN, :
M.D., :

Defendants. :

CIVIL ACTION NO. 03-969

ORDER

AND NOW, this 12th day of December, 2005, upon consideration of Motion of Defendant, Dr. Edward Kanner, to Compel the Production of Documents Identified in Plaintiffs' More Specific Privilege Log (Docket No. 407) and Plaintiffs' response thereto (Docket No. 410), it is hereby **ORDERED** that Defendant Kanner's Motion is **GRANTED IN PART** and **DENIED IN PART** as explained below.

With respect to documents 005457, 005458, 005488, 005510 and 005534, Defendant Kanner's Motion to Compel is **GRANTED**. After conducting an *in camera* review, the Court finds that such documents are not protected by the work product or attorney-client privilege. Accordingly, within (10) ten days of the date of this **ORDER**, Plaintiffs shall produce documents 005457, 005458, 005488, 005510 and 005534 to Defendant Kanner in their entirety.

With respect to documents 016604-016606, Defendant Kanner's Motion to Compel is

GRANTED. After conducting an *in camera* review, the Court finds that portions of such documents are not protected by the work product or attorney-client privilege. Accordingly, within (10) ten days of the **ORDER**, Plaintiffs shall produce redacted versions of documents 016604-016606 to Defendant Kanner.

With respect to the remaining documents: 005455, 005456, 005478-005479, 005484, 005485, 005486, 005487, 005489-005492, 005511-005514, 005535-005536, 005537-005538, 016553-016556, 016567-016568, 016576-016579, 016621-016622, 016625-016627, 016635-016636, 016702-016706, 016708-016709, 016723-016729, 016861-016864, 016870-016879, 016880-016884, 016885-016887, 016915-016921, Defendant Kanner's Motion to Compel is **DENIED.**

BY THE COURT:

RONALD L. BUCKWALTER, S.J.