

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

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PLYMOVENT CORPORATION,

Plaintiff,

Civil Action No. 05-CV-351 (JEI)  
(CONSOLIDATED)

AIR TECHNOLOGY SOLUTIONS, INC.,

Defendant.

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AIR TECHNOLOGY SOLUTIONS, INC.,

Third-Party Plaintiff,

v.

**(Document Filed Electronically)**

CLEAN AIR COMPANY,

Third-Party Defendant.

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BIOLOGICAL CONTROLS, INC., a  
corporation of the State of New  
Jersey,

Plaintiff,

v.

PLYMOVENT, A.B., et als.,

Defendants.

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**BIOLOGICAL CONTROLS, INC.'S BRIEF IN  
SUPPORT OF APPEAL OF MAGISTRATE JUDGE'S  
ORDER QUASHING *SUBPOENA DUCES TECUM***

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**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CITATIONS .....	ii
I. PRELIMINARY STATEMENT .....	1
II. STATEMENT OF FACTS .....	3
III. LEGAL ARGUMENT .....	6
The Magistrate Judge’s Order Granting PlymoVent’s Request to Quash the <i>Subpoena     Duces Tecum</i> Issued by Biological to Atlantic Environmental Is Contrary to Law .....	6
A. Discoverability of Atlantic Environmental’s records is governed by Rule 26(b)(1) and the protections afforded to privileged materials .....	6
B. PlymoVent waived its protections under Rule 26(b)(1) by voluntarily disclosing the report and select communications to opposing counsel and the Court .....	7
C. Rule 26(b)(4) does not apply to this discovery dispute .....	8
D. The Magistrate Judge based his decision on an erroneous interpretation of the law .....	10
IV. CONCLUSION .....	13

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CITATIONS .....	ii
I. PRELIMINARY STATEMENT .....	1
II. STATEMENT OF FACTS .....	3
III. LEGAL ARGUMENT .....	6
The Magistrate Judge’s Order Granting PlymoVent’s Request to Quash the <i>Subpoena     Duces Tecum</i> Issued by Biological to Atlantic Environmental Is Contrary to Law .....	6
A. Discoverability of Atlantic Environmental’s records is governed by Rule 26(b)(1) and the protections afforded to privileged materials .....	6
B. PlymoVent waived its protections under Rule 26(b)(1) by voluntarily disclosing the report and select communications to opposing counsel and the Court .....	7
C. Rule 26(b)(4) does not apply to this discovery dispute .....	8
D. The Magistrate Judge based his decision on an erroneous interpretation of the law .....	10
IV. CONCLUSION .....	13

**TABLE OF CITATIONS**

<b><u>Cases</u></b>	<b><u>Page</u></b>
<u>Behnia v. Shapiro</u> , 176 F.R.D. 277 (N.D. Ill. 1997) .....	7
<u>Callaway Golf Co. v. Dunlop Slazenger Group Americas, Inc.</u> , 2002 U.S. Dist. LEXIS 15429 (D. Del. Aug. 14, 2002) .....	9, 10
<u>Coleco Industries, Inc. v. Universal City Studios, Inc.</u> , 110 F.R.D. 688 (S.D.N.Y. 1986) .....	7
<u>Dayton-Phoenix Group, Inc. v. Gen. Motors Corp.</u> , 2000 U.S. Dist. LEXIS 8261 (S.D. Ohio Feb. 19, 2000) .....	11
<u>FMC Corp. v. Vendo Co.</u> , 196 F. Supp. 2d 1023 (E.D. Cal. 2002) .....	11
<u>Hickman v. Taylor</u> , 329 U.S. 495 (1947) .....	7
<u>House v. Combined Ins. Co. of Amer.</u> , 168 F.R.D. 236 (N.D. Iowa 1996) .....	8, 10
<u>In re Shell Oil Refinery</u> , 132 F.R.D. 437 (E.D. La. 1990) .....	11
<u>In re PolyMedica Corp. Sec. Litig.</u> , 235 F.R.D. 28 (D. Mass. 2006) .....	8
<u>Mantolete v. Bolger</u> , 96 F.R.D. 179 (D. Ariz. 1982) .....	11
<u>NetJumper Software, L.L.C. v. Google, Inc.</u> , 2005 U.S. Dist. LEXIS 27813 (S.D.N.Y. Nov. 10, 2005) .....	9
<u>Oppenheimer Fund v. Sanders</u> , 437 U.S. 340 (1978) .....	6
<u>Ross v. Burlington No. RR Co.</u> , 136 F.R.D. 638 (N.D. Ill. 1991) .....	10
<u>Spearman Industries, Inc. v. St. Paul Fire &amp; Marine Ins. Co.</u> , 128 F. Supp. 2d 1148 (N.D. Ill. 2001) .....	8
<u>United States v. Nobles</u> , 422 U.S. 225 (1975) .....	7
<u>Women's InterArt Ctr. v N.Y.C. Econ. Dev.</u> , 223 F.R.D. 156 (S.D.N.Y. 2004) .....	6

<b><u>Federal Rules of Civil Procedure</u></b>	<b><u>Page</u></b>
<u>Fed. R. Civ. P. 26(b)(1)</u> .....	2, 6, 7
<u>Fed. R. Civ. P. 26(b)(3)</u> .....	2, 9
<u>Fed. R. Civ. P. 26(b)(4)</u> .....	1, 2, 5, 6, 8, 9
<u>Fed. R. Civ. P. 26(b)(4)(A)</u> .....	2, 8, 9
<u>Fed. R. Civ. P. 26(b)(4)(B)</u> .....	2, 9

## **I. PRELIMINARY STATEMENT**

The subject of this appeal is an issue concerning the discoverability of records of an expert who was retained by an adverse party for litigation to conduct a test and to serve as an expert at a preliminary injunction hearing where the adverse party voluntarily disclosed the expert's work by using it in its submissions to the court and by providing as part of its discovery the expert's report, the videotape of the test performed, the cost estimate and invoices issued by the expert, and communications amongst the adverse party's key employees discussing the test and the hearing. There is no case law that addresses this precise issue; however, an analysis and careful application of Rule 26, as well as the rationale underlying it, show that under these specific circumstances, the expert's records are discoverable.

In a nutshell, based on Rule 26 and the corresponding case law, the applicable discovery rules can be expressed as follows: In general, anything that is relevant or may lead to potentially relevant information is discoverable unless it is protected by the attorney-client privilege or the work product doctrine. However, these protections are not absolute and will be lost if there has been waiver. That is precisely what happened in this case and waiver affords the proper basis for the discoverability of the expert's records.

The fact that the witness in question is an expert should not make a difference here. Subsection 26(b)(4) of the rule does not consider experts to be a special breed of witness.<sup>1/</sup> Rather, it is designed to provide an exception to the work product doctrine under certain circumstances—namely, when the expert is intended to be used as an expert-witness at trial. Recognizing that cross-examination of expert witnesses is often complex and requires additional

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<sup>1</sup> Compare a non-testifying expert with a party's employees communicating with counsel or among themselves in preparation for trial – information from neither would be discoverable under the work product doctrine and/or attorney-client privilege.

preparation by opposing counsel, the courts have carved out a special exception for testifying experts that was codified in Rule 26(b)(4)(A), and provides the opposing counsel with an opportunity to adequately prepare for trial through the use of interrogatories or depositions.<sup>2/</sup> However, non-testifying experts are still protected by the work product doctrine and the attorney-client privilege, as distinctly emphasized in subsection 26(b)(4)(B) of the Rule.<sup>3/</sup>

Considering the facts of this case in light of the applicable legal framework, it becomes clear that, since Atlantic Environmental was specifically retained for this litigation, its records constitute work product and, as such, would not ordinarily be subject to discovery.<sup>4/</sup> That would have been the case here, absent an applicable exception. However, in this case, PlymoVent waived its protections with respect to the Atlantic Environmental records when it used the expert's report and videorecording of the test in its submissions to the Court and when it provided to Biological the items, as well as other documents, such as the cost estimate and invoices issued by the expert, and the email communications amongst PlymoVent's key employees wherein they discussed the test and the injunction hearing. As a consequence, the materials became fully discoverable.

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<sup>2</sup> The rule specifically provides that "through interrogatories or by deposition" discovery from testifying experts is to be as broad as possible, since mere requests to produce documents are typically incidental to depositions in any case. Fed. R. Civ. P. 26(b)(4).

<sup>3</sup> The "exceptional circumstances" exception of Rule 26(b)(4)(B) is nothing more than a mirror image of Rule 26(b)(3)'s "substantial need-undue hardship" exception to the protections afforded by the attorney-client privilege and work-product doctrine for materials that are otherwise discoverable under Rule 26(b)(1).

<sup>4</sup> Since Atlantic Environmental was retained by PlymoVent's counsel, its records may contain both work product and attorney-client privileged communications. However, this is not a material distinction for purposes of this motion since PlymoVent disclosed both types of material, effecting thereby a waiver of both protections.

## **II. STATEMENT OF FACTS**

On January 20, 2005, PlymoVent Corp. filed a lawsuit against Air Technology Solutions, Inc. (“Air Technology”), asserting several federal and state law causes of action based on five allegedly false claims contained in Air Technology’s advertisements.<sup>5/</sup> At the same time, to prevent Air Technology from further using these statements in its advertising materials, PlymoVent Corp. applied for an injunction.

To support its motion for a preliminary injunction, on January 21, 2005, Lars Fritz, PlymoVent’s president, retained Atlantic Environmental, Inc. (“Atlantic Environmental”) to conduct a comparative study of the parties’ two competing diesel exhaust removal systems. Declaration of Ekaterina Schoenefeld in Support of Biological’s Motion for Reconsideration of the Magistrate Judge’s Order Granting PlymoVent’s Request to Quash *Subpoena Duces Tecum* (“Schoenefeld Dec.”) Ex. A. According to the proposal, the cost of the study was estimated to be \$14,394.00; yet, the ultimate invoice issued to and paid by PlymoVent Corp. was in the amount of \$20,706.66. Schoenefeld Dec. Exs. A, B. Henry P. Shotwell, Ph.D., CIH, the Vice President of Atlantic Environmental, drafted the proposal, performed the study that was videotaped, and issued the written report based on that study.<sup>6/</sup> Schoenefeld Dec. Exs. A, C.

In addition to conducting the study, Shotwell was also to serve as an expert witness at the hearing on PlymoVent’s motion for a preliminary injunction. Schoenefeld Dec. Ex D. According to the invoice submitted to PlymoVent’s counsel, Shotwell was paid \$1,160.00 for his appearance at that hearing. Id. All of these documents were supplied to Biological by

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<sup>5</sup> Air Technology is the sole distributor of the AirMATION, a product of Biological Controls, Inc. (“Biological”)

<sup>6</sup> The videotape of the study is not attached to this motion; however, it was included in PlymoVent Corp.’s submissions to this Court in February 2005, and was provided to Biological in response to Biological’s discovery requests. (Bates # P0291).



PlymoVent Corp. in the ordinary course of discovery and bear PlymoVent's identifying Bates numbers. Schoenefeld Dec. Exs. A-D.

In response to Air Technology's opposition to its motion for a preliminary injunction, PlymoVent submitted to the Court its Reply Brief and Declaration of Timothy J. O'Neill, Esq., including the Shotwell report and the videotape of the test, both of which were extensively quoted and referred to in PlymoVent's brief. Schoenefeld Dec. Ex. E, pp. 5-6, 8, 11, 14-16.

On February 17, 2005, the Court conducted a hearing on PlymoVent's motion for a preliminary injunction, during which Henry Shotwell was present and ready to testify. However, before PlymoVent's counsel had a chance either to argue the Shotwell Study and Report or call him as an expert witness, he was interrupted by the Court which expressed disdain for this expert's work. Schoenefeld Dec. Ex. F, T. 10:8-12:1. PlymoVent's counsel chose not to use the Study and Report, and refrained from calling Henry Shotwell as an expert witness, as originally intended. At the end of the hearing, the Court summarized the case, reiterating once more the thoughts he had about the expert's work, and ultimately denied PlymoVent's motion for a preliminary injunction. Schoenefeld Dec. Ex. F, T. 70:12-72:22.

Biological filed its suit against PlymoVent and Clean Air Co., asserting several causes of action based on federal and state law, on the day of the preliminary injunction hearing at which Biological's counsel was present and given an opportunity to respond to PlymoVent's arguments. PlymoVent's and Biological's actions were consolidated on July 14, 2005.

As part of its initial discovery, PlymoVent produced to Biological the report by Atlantic Environmental, the videotape of the test, and two invoices issued to PlymoVent and its counsel for conducting the test and attending the hearing. Later in the litigation, PlymoVent responded to Biological's discovery requests by providing the content of its GoldMine contacts

management database that included, among other things, an email from Lars Fritz to Clean Air Company's Greg Slavin (with a carbon copy to PlymoVent's National Sales Manager, Steve Connallon), in which he discussed the impending Atlantic Environmental test and the hearing on PlymoVent's motion for a preliminary injunction. Schoenefeld Dec. Ex. G (DVD P10437).

In light of PlymoVent's production of the Atlantic Environmental test results and partial disclosure of the underlying communications, Biological sought to obtain Atlantic Environmental's records related to that test.<sup>7/</sup> By letter dated October 3, 2006, Biological's counsel inquired as to whether PlymoVent intended to continue to use Atlantic Environmental as its expert in this case. Schoenefeld Dec. Ex. H. On October 30, 2006, PlymoVent's counsel advised Biological that Atlantic Environmental was retained in anticipation of litigation and/or preparation for trial but was not expected to be called as a witness at trial and directed Atlantic Environmental by copy of that letter not to produce any documents to Biological. Schoenefeld Dec. Ex. I. By serving a *subpoena duces tecum* dated November 13, 2006, Biological's counsel sought from Atlantic Environmental documents relating to the Shotwell Study and Report that were submitted by PlymoVent to the Court in connection with its motion for a preliminary injunction. Schoenefeld Dec. Ex. J. PlymoVent filed a Request to Quash the Subpoena, which Biological opposed.

During the status conference on May 14, 2007, the Magistrate Judge heard the parties' arguments on this issue. The Magistrate found that a waiver had not occurred because the Court had not relied on the report, and Atlantic Environmental's records were protected by Rule 26(b)(4). Schoenefeld Dec. Ex. K. By Order dated May 29, 2007, the Magistrate Judge granted

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<sup>7</sup> Although the report itself appears to be of little value, the underlying data collected during the test, as well as any instructions given to the expert, may be highly relevant to issues in this litigation.

PlymoVent's Request to Quash Biological's Subpoena to Atlantic Environmental. Schoenefeld Dec. Ex. L.

### **III. LEGAL ARGUMENT**

#### **The Magistrate Judge's Order Granting PlymoVent's Request to Quash the Subpoena Duces Tecum Issued by Biological to Atlantic Environmental Is Contrary to Law.**

Opposing PlymoVent's Request to Quash the subpoena *duces tecum*, Biological argued it was entitled to enforce the subpoena because (1) Rule 26(b)(1) applied and the documents were discoverable under the waiver doctrine, and/or (2) the "exceptional circumstances"/"undue hardship" exception was applicable. Rejecting the latter argument, the Magistrate Judge granted PlymoVent's Request to Quash the subpoena *duces tecum* without considering Biological's argument that Rule 26(b)(1), rather than Rule 26(b)(4), was applicable and that Atlantic Environmental's records were discoverable under the doctrine of waiver.

#### **A. Discoverability of Atlantic Environmental's records is governed by Rule 26(b)(1) and the protections afforded to privileged materials.**

Generally, the Federal Rules of Civil Procedure favor broad discovery of any matter that is relevant to the case or that may lead to the discovery of relevant information, unless it is protected from disclosure under the attorney-client privilege or work product doctrine. Fed. R. Civ. P. 26(b)(1) (stating that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party"); Oppenheimer Fund v. Sanders, 437 U.S. 340, 351 (1978) (noting that discovery is not limited to issues raised in the pleadings or to the merits of the case). "Privileged" materials are typically defined as those protected from discovery based on the attorney-client privilege and work product doctrine. Women's InterArt Ctr., Inc. v. N.Y.C. Econ. Dev., 223 F.R.D. 156 (S.D.N.Y. 2004). The attorney-client privilege protects communications between the client and his lawyer while the work product doctrine

shields from discovery materials prepared by an attorney or his agents in anticipation of litigation or in preparation for trial. United States v. Nobles, 422 U.S. 225, 238-40 (1975) (citing Hickman v. Taylor, 329 U.S. 495 (1947)). Accordingly, the expert retained in anticipation of litigation or in preparation for trial is acting as the attorney's agent and such expert's work is ordinarily protected under the work product doctrine.

**B. PlymoVent waived its protections under Rule 26(b)(1) by voluntarily disclosing the report and select communications to opposing counsel and the Court.**

Such protections are not, however, absolute and may be waived by disclosing otherwise privileged information to third parties. Nobles, 422 U.S. at 239. The difference between the attorney-client privilege and work product doctrine is that, in the case of the former, the deliberate disclosure to a third party is a sufficient waiver, whereas in the latter case, waiver occurs only if there is a substantial probability that the adverse party will have access to the information. Behnia v. Shapiro, 176 F.R.D. 277, 279 (N.D. Ill. 1997). Furthermore, a selective or partial disclosure constitutes an implied waiver of protection for all records related to the subject disclosed. Coleco Industries, Inc. v. Universal City Studios, Inc., 110 F.R.D. 688, 691 (S.D.N.Y. 1986) (finding such a waiver in the context of the work product doctrine). In other words, by partially disclosing information pertaining to a certain subject, a party waives any protection it might have for documents pertaining to that subject matter.

In the instant case, the waiver of both protections occurred. In this case, not only did PlymoVent and its counsel submit the expert's report and videotape of the test to the Court, it also produced to Biological and Air Technology in the ordinary course of discovery the report, the videotape of the test, the cost estimate and invoices issued by Atlantic Environmental to PlymoVent and its counsel, and email communications amongst PlymoVent's key employees pertaining to the test and the hearing. By so doing, both PlymoVent and its counsel waived any

privilege or work product claim that might otherwise have attached to the subpoenaed documents.

**C. Rule 26(b)(4) does not apply to this discovery dispute.**

Rule 26(b)(4) was adopted in recognition of an opposing party's need for a fair opportunity to adequately prepare for the cross-examination of an expert witness. House v. Combined Ins. Co. of Amer., 168 F.R.D. 236, 245 (N.D. Iowa 1996) (stating that its purpose is "to prevent a litigant from unfairly benefiting from an opposing party's work and preparation") (internal citations omitted). Accordingly, the federal rules now provide for discovery from the opposing party's expert who is retained in anticipation of litigation or in preparation for trial under certain circumstances.<sup>8/</sup> Fed. R. Civ. P. 26(b)(4); In re PolyMedica Corp. Sec. Litig., 235 F.R.D. 28, 33 (D. Mass. 2006). As Rule 26(b)(4) states, a party may discover facts known or opinions held by an opposing party's expert through interrogatories or by deposition. More specifically, Rule 26(b)(4)(A) provides that "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial." Fed. R. Civ. P. 26(b)(4)(A) (emphasis added).

The fact that Rule 26(b)(4) speaks in terms of testimonial evidence is not surprising since this is often the most effective means of obtaining discovery, often accompanied by document requests that allow opposing counsel to elicit facts known or opinions held by the testifying expert through interrogatories or by a deposition. Such an interpretation is entirely consistent with case law – cases implicating Fed. R. Civ. P. 26(b)(4) typically involve attempts to depose experts retained by opposing parties to obtain their reports, and/or to find the facts known to

<sup>8</sup> Discovery is not allowed from experts who, in anticipation of litigation or in preparation for trial, were consulted informally but not retained or specially employed. Spearman Industries, Inc. v. St. Paul Fire & Marine Ins. Co., 128 F. Supp. 2d 1148, 1151 (N.D. Ill. 2001) (quoting the Advisory Committee's Note to Rule 26).

such experts.<sup>9</sup> Callaway Golf Co. v. Dunlop Slazenger Group Americas, Inc., 2002 U.S. Dist. LEXIS 15429 (D. Del. Aug. 14, 2002) (considering whether a party may proceed with the scheduled deposition of the withdrawn expert); NetJumper Software, L.L.C. v. Google, Inc., 2005 U.S. Dist. LEXIS 27813 (S.D.N.Y. Nov. 10, 2005) (deciding on a motion to compel deposition of the formerly designated testifying witness).

Requests for production of documents standing alone, and any evidence obtainable from the retained but non-testifying expert, remain covered by the work product doctrine and/or attorney-client privilege unless exceptions (such as crime-fraud or waiver) or Fed. R. Civ. P. 26(b)(3) apply. House, 168 F.R.D. at 245 (noting that “a consulted-but-never-designated expert might be properly considered to fall under the work product doctrine that protects matters prepared in anticipation of litigation”); Callaway Golf Co., 2002 U.S. Dist. LEXIS 15429 at \*4, n. 3. In other words, the non-testifying expert’s opinion and records are typically protected unless one of the exceptions applies. Here, there was a waiver.

**D. The Magistrate Judge based his decision on an erroneous interpretation of the law.**

The case law cited by PlymoVent and taken into account by the Magistrate Judge are inapposite. Relying on the Callaway Golf Co. case, the Magistrate Judge regarded it as “the best decision . . . which did a really good summary of the law in this area.” Schoenefeld Dec. Ex. K, T. 8:24-9:1. However, the Magistrate Judge failed to recognize that that case involved only the conversion of a Rule 26(b)(4)(A) testifying expert witness into a Rule 26(b)(4)(B) non-testifying expert. Callaway Golf Co., 2002 U.S. Dist. LEXIS 15429 \*11. Neither that case, nor any of the cases cited therein involved a waiver of the attorney-client privilege or work product doctrine.

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<sup>9</sup> The cases arising under Fed. R. Civ. P. 26(b)(4) often involve parties’ requests to produce experts for depositions, accompanied by documentary requests, which are—as one might reasonably conclude—incidental to depositions.

Callaway Golf Co., the case heavily relied upon by the Magistrate Judge, involved a discovery dispute arising out of plaintiff's withdrawal of an expert as its testifying expert one week prior to his scheduled deposition. 2002 U.S. Dist. LEXIS 15429 at \*1. After an extensive discussion of several cases from various courts (see below), described as containing a "common theme" of re-designating a testifying expert as a non-testifying consulting expert, the court allowed a limited deposition of the expert concerning only the knowledge the expert obtained outside of that litigation. Id. at \*12-13.

The cases discussed by the Callaway Golf Co. Court are not pertinent to the issue presented here. The House case involved "the question of whether a party [plaintiff] should have access to and be able to use at trial an expert hired by the opposing party" who was initially designated as a testifying expert by a defendant but then subsequently removed from its witness list. 168 F.R.D. at 240. In that case, the plaintiff was ultimately allowed—pursuant to the court's order—to obtain that expert's report, depose the expert and call him as a witness at trial, but was prohibited from introducing any evidence of how the expert became involved in the litigation in order to avoid prejudice to the defendant. Id. at 248.

In Ross v. Burlington No. RR Co., the defendant sought to depose plaintiff's expert who was initially identified as a testifying expert witness but subsequently named a consulting expert only. 136 F.R.D. 638, 638 (N.D. Ill. 1991). The court reasoned that "nothing more than the identity and the subject matter of the witness's testimony was revealed," and distinguished it from "a situation where facts or opinions were disclosed," holding that a waiver had not occurred. Id. at 639. In the instant case, however, PlymoVent voluntarily disclosed facts, the expert's opinion and other related documents, effectively warranting a finding of waiver.

In Dayton-Phoenix Group, Inc. v. Gen. Motors Corp., a plaintiff sought to depose defendant's previously designated, but then withdrawn, expert witness. 2000 U.S. Dist. LEXIS 8261, \*1-2 (S.D. Ohio Feb. 19, 2000). The defendant filed a motion for a protective order that the district court granted, precluding the plaintiff from discovery of the facts acquired and opinions held by the expert as a result of being retained for that litigation. Id. at \*10.

The relevant parts of the district court's decision in In re Shell Oil Refinery concerned non-testifying, in-house experts who assisted outside counsel in that litigation and it is similarly inapplicable here. 132 F.R.D. 437, 440 (E.D. La. 1990).

In Mantolite v. Bolger, a defendant identified an expert as a testifying expert witness but then withdrew that designation, refusing to produce pertinent documents and the expert for deposition. 96 F.R.D. 179, 181 (D. Ariz. 1982). The plaintiff moved "to compel production of documents, answers to interrogatories and to allow the deposition," which was denied. Id.

Likewise, the FMC Corp. v. Vendo Co. case involved a motion to quash proposed subpoenas in the context of a settlement agreement. 196 F. Supp. 2d 1023 (E.D. Cal. 2002). The experts had exchanged their reports and opinions, as required by Rule 26(a)(2). Id. at 1042-43. Discussing various standards employed by other courts in similar situations, the court found that the "exceptional circumstances" standard was the applicable standard, but found no such circumstances in that case and granted the motion. Id. at 1043-46.

It should be noted that, in all these cases, waiver was not involved. Most of them involved an expert designated as a testifying expert witness whose report either had not yet been produced or was produced involuntarily – pursuant to court order or as part of mandatory disclosures. PlymoVent, however, was not obligated to disclose the Atlantic Environmental report, the videorecording of the test, or any communication between Atlantic Environmental,



PlymoVent's counsel, or PlymoVent's employees. It could have withheld the documents which would then have retained their protection as work product and/or privileged materials. Yet, PlymoVent chose to produce these items, and did so several times – using them to support its motion for a preliminary injunction and by producing them twice in the ordinary course of discovery. By so doing, PlymoVent waived any protection it had with respect to the Atlantic Environmental records.

The Magistrate Judge's brief discussion of waiver at the status conference is not dispositive. Reasoning that the District Judge did not rely upon Atlantic Environmental's report in denying PlymoVent's motion for a preliminary injunction, the Magistrate Judge found that there had been no waiver. Schoenefeld Dec. Ex. K, T. 9:23-10:14. However, in considering whether there was a waiver, the dispositive issue was whether the party "waived" protections it might otherwise have had by disclosing privileged materials to the opposing party, not whether the court had in any way relied on the materials in rendering its decision. If the latter was the case, there would not be a waiver unless the materials in dispute were first disclosed to, and then relied upon by, the Court.

Finally, commenting on the Atlantic Environmental report, the Magistrate Judge stated that "that type of evidence would have no relevance in this case because it can't be used by anyone in support of or in opposition to a claim." Schoenefeld Dec. Ex. K, T. 11:17-19. This is not, however, the proper inquiry – the issue is whether it is relevant or may lead to the discovery of relevant evidence. Biological submits that it is likely to. For instance, depending on the test protocol and instructions, if any, the underlying test data—which was supposed to be objective, -  
-may constitute or lead to the discovery of other facts, relevant to this case.<sup>10/</sup>

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<sup>10</sup> The video of the test disclosed highly relevant information in the form of visible leakage from PlymoVent's diesel exhaust hose removal system, a fact which bears directly upon Biological's claim that PlymoVent's marketing claims of "100% source capture" of diesel exhaust are false.

In short, the Magistrate Judge's Order granting PlymoVent's request to quash the subpoena to Atlantic Environmental was not supported by the law.

#### **IV. CONCLUSION**

For the reasons stated, it is respectfully submitted, Biological's Motion to Reconsider the Magistrate Judge's Order Granting PlymoVent's Request to Quash the Subpoena Issued to Atlantic Environmental by Biological should be granted and the Magistrate Orders should be reversed .

Dated: June 12, 2007

Respectfully submitted,  
Messina Law Firm, P.C.

By: /s/ Ekaterina Schoenefeld (ES 7134)  
Ekaterina Schoenefeld  
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