

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

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IN RE: NEW YORK CITY
ASBESTOS LITIGATION
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NYCAL
Index M 40000/88

THIS DOCUMENT RELATES TO:

ALL WEITZ & LUXENBERG CASES IN WHICH
GEORGIA-PACIFIC IS A DEFENDANT

**RECOMMENDATION
OF THE SPECIAL MASTER**

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Plaintiffs represented by Weitz & Luxenberg, P.C. (“W&L”) seek to discover materials and documents constituting, underlying or relating to both published and unpublished product and/or “reformulated” product studies undertaken and/or sponsored by defendant Georgia-Pacific (“GP”) in 2005 and thereafter. GP has agreed that it will produce, for the Special Master’s *in camera* review, any and all communications and materials listed in its privilege log that were shared with or disclosed to any persons, entities or consultants outside of GP. GP refuses to produce for my *in camera* review any additional communications or materials internal to GP, claiming these are absolutely privileged as attorney-client communications and concern its defense of litigation, including communications involving GP’s in-house counsel and involving GP employee(s) involved in the research process.

GP undertook and/or sponsored research relating to asbestos fiber release from asbestos “re-formulated” asbestos joint compound and/or asbestos joint compound, as well as animal inhalation studies, commissioning such studies in connection with the defense of litigation. GP published certain of these studies. This dispute now concerns the discovery of internal GP communications related to the studies GP published, as well as those it may have elected not to publish, share with or disclose to the outside world.

W&L plaintiffs believe that some of the materials GP now refuses to produce for *in camera* review might reveal GP’s deliberate suppression of unfavorable test results and that this effort at suppression could constitute a fraud on public. W&L claims that, assuming *arguendo* that the attorney-client privilege attaches to the materials, any such privilege might be vitiated by virtue of the crime-fraud exception to the privilege. *See, e.g., SEC v. Lum’s, Inc.*, 365 F. Supp. 1046, 1059 (S.D.N.Y. 1973) (“It is the selective disclosure of information which acts as a fraud or deceit upon the public.”).

New York recognizes the crime-fraud exception to the attorney-client privilege. *See Nowlin v. People (In re Grand Jury Subpoena)*, 1 A.D.3d 172, 173 (1st Dep’t 2003); *Sieger v. Zak*, M 19978/2005, 2008 WL 598344, at *8 (Sup. Ct., Nassau County 2008); *In re Grand Jury Subpoenas Served upon John Doe*, 142 Misc. 2d 229, 231-32 (Sup. Ct., NY County 1988) (“extending the crime-fraud exception to attorney work product is . . . consistent with the

rationale expressed by the [New York] Court of Appeals”).

A leading federal case setting forth the showing that should be made both for obtaining in camera review, and for piercing the attorney-client privilege, is *In re Grand Jury Subpoena*, 419 F.3d 329 (5th Cir. 2005). The court said that *in camera* viewing is warranted upon “a showing of a factual basis adequate to support a good faith belief by a reasonable person” concerning the misconduct. *Id.* at 335-36. The privileges are then pierced or vitiated upon a *prima facie* showing of some evidence that “will support a finding [of fraud] if evidence to the contrary is disregarded.” *Id.* at 336. The *prima facie* showing should be of some fraudulent misconduct, and of “some valid relationship between the work product under subpoena and the *prima facie* violation.” *Id.*

In support for claim for possibility of fraud, W&L points to the following facts:

- Documents thus far disclosed show that “Exponent,” an engineering and scientific consulting firm, had been hired by GP to undertake a number of projects on behalf of GP, other than the ones known to have been published to date;
- GP admits the litigation-driven reason for the project, and the consultants chosen allegedly have a history of publishing favorable results, thereby leading W&L to the argument that additional studies, *if any*, would not likewise have been published only if the results did not support GP’s litigation position;
- The published studies concern only “reformulated” joint compound, whereas invoices thus far disclosed indicate that Exponent’s initial task was to locate and presumably study old, original GP asbestos joint compound;
- The authors of the published studies, presumably on GP’s behalf, have failed to disclose that the studies that were the subject of the publications were funded specifically and in large amounts by GP “for the ongoing defense of litigation,” or that any partial disclosures were misleading and inadequate;
- For each of five studies co-authored by a GP in-house employee-researcher, the authors failed to mention that any of them had been retained for, and testified in, asbestos litigation and that the GP employee was “specially employed” by GP to “perform expert consulting services” for GP “in connection with” the litigation; and
- The authors of a 2010 writing appearing in the *International Journal of Occupational and Environmental Health* and criticizing a writing previously published in that journal which was a critique of the animal inhalation methods used here, affirmatively represent that they were not “allied to” nor “in receipt of funds from” any asbestos manufacturing company, notwithstanding the fact that one such author was a paid GP expert consulting on this particular project and, himself, a co-author of a number of the published studies at issue here.

Before reaching the crime-fraud issue, however, and as a threshold issue, there is a question

whether any privilege attaches to these materials in the first place. It is well settled that not every communication, even with an attorney, particularly an in-house attorney, is protected by the attorney-client privilege. See *United States Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 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. . . . 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”); *In re Grand Jury Subpoena*, 599 F.2d 504, 511 (2d Cir. 1979) (“Participation of the general counsel does not automatically cloak the investigation with legal garb”). Nor does GP establish a valid reason for distinguishing internal from external communications with respect to the present issue.

Similarly, no privilege attaches, in the first instance, to communications or materials intended to be available for publication. “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.” *In re New York Renu with Moistureloc Prod. Liability Litig.*, 2:06-MN-77777-DCN, 2008 U.S. Dist. LEXIS 88515, at *5, 14 (D.S.C. May 8, 2008) (applying New York law) (relying on MICHAEL M. MARTIN, *ET AL.*, NEW YORK EVIDENCE HANDBOOK 318 (2d ed. 2002)).

Finally, W&L alleges that, in any event, GP may have waived its claim of privilege for this category of documents, by virtue of having producing some materials falling within this category when it believed such production would inure to its benefit. For instance, GP has produced an internal August 2005 letter from GP’s Chief Litigation Counsel to their in-house employee-researcher confirming that employee’s “special employment” as an expert litigation consultant whose work “will be directed solely by GP’s in-house counsel” and establishing the scope of the project. That document is quintessential “privileged.” See *Deutsche Bank Trust Co. v. Tri-Links Inv. Trust*, 43 A.D.3d 56 (1st Dep’t 2007) (“selective disclosure is not permitted as a party may not rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications”).

Accordingly, GP shall produce to the Special Master for *in camera* review all documents listed in its privilege log, in the order in which they appear in the privilege log, and which it has thus far refused to produce for inspection, as described herein and such production shall occur by or on June 30, 2011.

Dated: June 15, 2011

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Laraine Pacheco, Special Master