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DATE: 2-24-93

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FROM: Paul Merrell, Esq.

CLIENT/MATTER: Nevada Power/Monsanto

CLIENT/MATTER NO.: 11927.2

DOCUMENT(S) DESCRIPTION: Draft of 02-24-93 Upc Motion
For entry of default against WEC.

NUMBER OF PAGES (including cover page): 20 (Twenty-one)

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MESSAGE FROM XEROX 7024: (702) 385-1655

DATE: 2-24-93

TO: David McCrea, Esq.

FAX #: (812) 336-5307

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FROM: Paul Merrell, Esq.

CLIENT/MATTER: Nevada Power/Monsanto

CLIENT/MATTER NO.: 11927.2

DOCUMENT(S) DESCRIPTION: *Draft of 02-24-93 npe motion for entry of Default against WEC*

NUMBER OF PAGES (including cover page): 20

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NO. D-3385

IN THE
SUPREME COURT OF TEXAS

WESTINGHOUSE ELECTRIC CORPORATION

Relator,

V.

THE HONORABLE PAUL DAVIS, JR.,
200th DISTRICT COURT
TRAVIS COUNTY, TEXAS

Respondent.

REPLY TO PETITION FOR WRIT OF MANDAMUS

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NO. D-3385

IN THE
SUPREME COURT OF TEXAS

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Relator.

V.

THE HONORABLE PAUL DAVIS, JR.,
200th DISTRICT COURT
TRAVIS COUNTY, TEXAS

Respondent.

REPLY TO PETITION FOR WRIT OF MANDAMUS

TO THE SUPREME COURT OF TEXAS:

COMES NOW PETER M. DASHKO, plaintiff in the case of *Dashko v. Fibreboard Corp., Westinghouse Corp., et al.*, No. 91-14798, in the 331st Judicial District Court of Dallas County, Texas, real party in interest to this proceeding, and on behalf of the Honorable Paul R. Davis, Jr., respondent, files this reply to the petition for writ of mandamus as directed by the Honorable Thomas R. Phillips in his order of February 10, 1993.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Real party in interest Peter M. Dashko (hereinafter referred to "plaintiff") is the plaintiff in a wrongful death case in which he claims that the death of his decedent, Steven Douglas, was caused by his exposure to the asbestos-containing products of relator Westinghouse Electric Corporation ("Westinghouse") and others. Plaintiff alleges that Westinghouse is liable for the death of his decedent under various product liability theories, including strict liability, negligence, and gross negligence. Westinghouse is apparently a defendant in thousands of similar cases across the country, and has been a defendant in asbestos litigation since at least 1987. SOF 69.

Prior to trial, Westinghouse invited plaintiff to participate in a document production hosted at Westinghouse's headquarters in Pittsburgh, Pennsylvania. The production was scheduled to satisfy the discovery requests of plaintiffs in Mississippi and North Carolina cases; Westinghouse sought to bind Texas plaintiffs represented by Baron & Budd to the results of the document production as well. Plaintiff's counsel agreed to participate in the document production on behalf of his Texas clients. SOF, Plaintiff's Exhibit 8. The document production was arranged by the firm of McGuire, Woods, Battle & Boothe of Richmond, Virginia, Westinghouse's national counsel. The day before the production, Maureen Matsen, a lawyer with McGuire, Woods sent by telecopier a copy of a letter that she had previously sent to Ms. Susan Nial of the firm of Ness, Motley, Loadholt, Richardson, and Poole of Barnwell, South Carolina, counsel for the Mississippi plaintiffs. SOF 120-123. The letter to Ms. Nial stated that "Inadvertant product of documents protected by the attorney-client privilege or work-product doctrine is not intended as a waiver of the privilege." SOF Plaintiff's Exhibit 9. However, by

the time his office received the fax from Ms. Matson, plaintiff's counsel had already left his office to participate in the document production in Pittsburgh. SOF 124. He did not see the letter from Ms. Matson to Ms. Nial until after he returned from the document production. SOF 138. More importantly, plaintiff's counsel never agreed in any fashion to the proviso contained in Ms. Matson's letter to Ms. Nial, and certainly did not do so in writing as required by Rule 11 of the Texas Rules of Civil Procedure. SOF 128.

Prior to producing the documents for inspection by plaintiff's counsel, Westinghouse had reviewed the documents to determine if any legal privilege would attach to shield them from discovery. Westinghouse determined that roughly a thousand of the documents were in fact privileged, and removed them from production, replacing them with sheets of paper bearing the notation "privileged claimed" along with a brief description of the document. SOF 24. The Memoranda involved in this proceeding, plaintiff's Exhibits 1 and 5 attached to the Statement of Facts, were not removed from production; on the contrary, they were made available for inspection by plaintiff's counsel, along with thousands of other documents. Following inspection of all the documents produced by Westinghouse, plaintiff's counsel identified plaintiff's Exhibit 1 (the "smoking gun memorandum," referred to by Westinghouse in its petition benignly as the "draft memorandum") and plaintiff's Exhibit 5 as documents to be copied and provided to plaintiff's counsel. Westinghouse accepted this request, photocopied the documents, and sent them to their national counsel, McGuire, Woods, in Richmond. McGuire, Woods then "bates-stamped" the documents, stamped them with the notation "In re Abrams," and forwarded them to plaintiff's counsel.

About a week after producing the copies to plaintiffs' counsel, Westinghouse began efforts to retrieve the documents that it now asserts it inadvertently produced, including the "smoking gun memorandum." Westinghouse asserted that the documents were protected from discovery by the attorney-client privilege. Plaintiff's counsel opposed these efforts, believing (1) that the documents were not attorney-client communications within the meaning of Tex.R.Civ.Evid. 503(b), because they contained not legitimate professional counsel but unethical advice promoting the perpetration of a fraud; (2) that even if the documents did contain attorney-client communications within the meaning of Tex.R.Civ.Evid. 503(b), the communications were made in order "to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud," Tex.R.Civ.Evid. 503(b)(1), and thus were not protected from disclosure by the attorney-client privilege; and (3) that any privilege attaching to the documents had been waived by voluntary disclosure of the documents by Westinghouse. Plaintiffs agreed, though, not to disseminate the documents until the Honorable David Brooks, Judge of the 191st Judicial District in and for Dallas County, Texas, determined the "privilege issue." SOF, Defendant's Exhibit 1. Judge Brooks, however, recused himself from ruling on matters involving Westinghouse. Since Judge Brooks did not rule on the issue, plaintiff's counsel consented to extend the agreement until after a ruling by Judge Davis. Plaintiff's counsel expressly *declined* to agree not to disseminate the documents until the disposition of any appeals of writs of mandamus occasioned by an order on the issue of privilege. SOF, Defendant's Exhibit 1.

On February 8, 1993, Judge Davis conducted a five-hour evidentiary hearing on the "privilege issue." Westinghouse introduced the testimony of four live witnesses, attempting to

show that the documents that it had inadvertently produced were protected from discovery and inadmissible at trial. After carefully considering the evidence and the legal standard announced by this Court for deciding claims of privilege and waiver, Judge Davis ruled that the documents were discoverable for two reasons: (1) the documents fell within the "crime-fraud exception" to the attorney-client privilege; and (2) Westinghouse had voluntarily waived any privilege attaching to the documents by voluntarily producing them to plaintiff's counsel. SOF 155-57. Judge Davis thus denied Westinghouse's Motion for Protective Order and Motion for Order Preventing Dissemination of Confidential Information. He also denied Westinghouse's request that his order be stayed pending Westinghouse's application for writ of mandamus.

The Austin Court of Appeals denied Westinghouse's motion for leave to file a petition for writ of mandamus from Judge Davis' order. Westinghouse then sought relief in this Court.

ARGUMENT

I. JUDGE DAVIS DID NOT COMMIT A CLEAR ABUSE OF DISCRETION IN ALLOWING PLAINTIFF TO RETAIN THE DOCUMENTS AND USE THEM AT TRIAL.

A. Judge Davis Did Not Abuse His Discretion in Finding That By Voluntarily Disclosing the Documents to Plaintiffs, Westinghouse Waived Its Claim That the Documents Are Privileged.

After the five-hour evidentiary hearing on the issue of whether the documents were covered by the attorney/client privilege and therefore immune from discovery and inadmissible at trial, Judge Davis found "that Westinghouse has in fact waived this privilege." SOF 156. Judge Davis based his ruling on the standards for determining waiver announced in this Court's recent opinion in *Granada Corp. v. Honorable First Court of Appeals*, 36 Tex.Sup.Ct.J. 350

(Dec. 16, 1992), and on his review of the evidence on the issue of waiver presented at the hearing. Judge Davis concluded,

. . . I cannot find and do not believe that the evidence sustains a finding that the disclosure was compelled erroneously, and I do not find that the evidence supports—that the disclosure was made without an opportunity to claim the privilege.

There is certainly not any claim that the plaintiffs made the defendant or that any court made the defendant disclose this document, so to that extent it was voluntary.

It does seem to the Court as if it were an accident that this document was included, but I cannot find that the disclosure was an involuntary one, and accordingly I have made my ruling.

SOF 157.

Unquestionably, Judge Davis did not abuse his discretion in interpreting the evidence of waiver presented at the hearing and in applying the standards of the *Granada* opinion in finding that Westinghouse had waived any privilege attached to the documents.

1. The Disclosure of the Documents, Though Perhaps Inadvertant, Was Not Involuntary.

Under Rule 511 of the Texas Rules of Civil Evidence, a party waives a privilege against disclosure of evidence if the party "voluntarily discloses or consents to disclosure of any significant part of the privileged matter." Tex.R.Civ.Evid. 511. Rule 512 provides an exception to this rule of waiver; disclosure of privileged evidence does not waive a privilege if the disclosure was "(1) compelled erroneously or (2) made without opportunity to claim the privilege." Tex.R.Civ.Evid. 512. Under *Granada*, though, "a party seeking to preserve a privilege after disclosure must do more than show inadvertence; rather, the producing party has the burden of justifying preservation of the privilege by showing that the circumstances

demonstrate the involuntariness of the disclosure." *Granada*, 36 Tex.Sup.Ct.J. at 352. Judge Davis did not abuse his discretion in finding that Westinghouse had failed to carry its burden.

Granada, like the instant case, involved a huge document production. The defendant in *Granada* made 150,000 pages of documents available for inspection by plaintiffs' counsel. 36 Tex.Sup.Ct.J. at 350. As in the instant case, the plaintiffs in *Granada* designated a large number¹ of documents for photocopying and production, including the four contested documents that the defendant would later claim were privileged. The defendant refused to produce 104 documents, including the four contested documents, but, for unknown reasons, inadvertently included the four contested documents with the unprivileged documents provided to plaintiffs' counsel. Defendant's counsel did not learn of the inadvertent production until plaintiffs' counsel attempted to use the contested documents at a deposition. *Id.* at 351. The defendant moved for a protective order three weeks after the deposition and some eleven months after the inadvertent disclosure, seeking return of the documents. *Id.* The trial court granted the protective order, but the court of appeals reversed on a writ of mandamus. *Id.*

The Texas Supreme Court affirmed the order of the court of appeals holding that the defendant had waived any privilege attaching to the documents. The court noted,

Inadvertent production is distinguishable from involuntary production. A party who permits access to unscreened documents may, do to inattention, unwittingly--but none the less voluntarily--disclose a privilege document.

¹The plaintiffs in *Granada* designated 18,000 documents for photocopying and production, compared with 38,000 pages of documents in the instant case. It must be recalled, however, that the Westinghouse production was intended to satisfy discovery requests in multiple jurisdictions, not just one jurisdiction as in *Granada*. The large number of documents that Westinghouse was required to photocopy could not possibly have come as any surprise to Westinghouse or its counsel.

Id. at 352. Focusing on the defendant's opportunities to withhold the document *before* disclosure, and not on the defendant's delay in discovering the disclosure as suggested by Westinghouse in its petition, the court set forth the basis for its holding in terms strikingly applicable in the case at bar.

Here, it is relevant that *Granada* did not avail itself of opportunities to prevent disclosure of memoranda, although it had many. The memoranda were not segregated out in *Granada*'s initial review of the documents opened to Freeman, nor were they detected when Freeman notified *Granada* of its designations for photocopying or when the copies were sent to *Granada* before distribution to Freeman. *Granada* had the opportunity to inventory the documents at many points *before* production. . . . *Granada*'s conclusory assertion that the disclosure was inadvertent and therefore involuntary offers no circumstantial justification for the disclosure.

Id. at 352 (emphasis added). Similarly, in the instant case, Westinghouse failed to avail itself of multiple opportunities to prevent disclosure. As in *Granada*, the memoranda in question were not segregated from the documents made available for inspection to plaintiffs' counsel. As in *Granada*, the defendant had an opportunity to ascertain the privileged nature of the documents when plaintiff's counsel requested that the documents be photocopied. Unlike *Granada*, the documents were actually transferred from the party itself to the party's national counsel for a final privilege review before the documents were actually transmitted to plaintiffs.²

²Ms. Matsen, an attorney for Westinghouse, testified that McGuire, Woods was able to review only about half of the requested documents for privilege; it could not complete a review of all the documents, Ms. Matsen and her counsel suggested, because of the Thanksgiving Holiday. SOF 130-133; 35. Whether or not Ms. Matsen's self-interested testimony is credited, however, the failure of McGuire, Woods to review all documents for privilege is certainly no fault of plaintiffs.

Westinghouse has gone to great lengths in its petition, as it did at the hearing, to suggest that it was under some type of unreasonable time constraint in making the documents available for inspection and in copying the documents, and that this constraint rendered disclosure of the documents involuntary. Westinghouse's suggestion is unsupported by the record, was implicitly rejected by Judge Davis, and should be rejected here. Although Westinghouse suggests that it was forced to assemble "several hundred thousand pages of documents" in a "short time span" in order to accommodate a "looming trial date in Mississippi and a December 1, 1992 Motion to Compel Deadline,"³ Westinghouse's petition at 14, the record contains no court order compelling Westinghouse to adhere to its self-imposed discovery schedule. More obviously, the record contains absolutely no evidence that Westinghouse had inadequate opportunity to screen its documents for privilege *prior* to disclosure. Westinghouse's cries of duress are all the more ironic when one considers that Westinghouse gave plaintiff's counsel a total of *two days* in which to review the many hundreds of thousands of documents that Westinghouse made available for inspection. SOF, Plaintiff's Exhibit 9. Westinghouse certainly believed that the limited time given to plaintiffs for review of the Westinghouse documents provided plaintiffs with an adequate opportunity to analyze the documents and make reasoned judgments about their significance to the litigation--and plaintiffs, unlike Westinghouse, had no second or third chances. Westinghouse had an exponentially greater opportunity to screen its documents than had plaintiffs, and Westinghouse's suggestion to the contrary is simply ludicrous.

³Westinghouse does not explain what a "motion to compel deadline" is. A party's motion, without an order granting it, does not *compel* the opponent to do anything.

As in *Granada*, Westinghouse "has failed to sustain its burden of establishing that its disclosure of the documents was involuntary." *Granada*, 36 Tex.Sup.Ct.J. at 352-53. Clearly, Judge Davis did not abuse his discretion in construing the facts to indicate that the disclosure was not involuntary. Therefore, any privilege that might have existed as to these documents was waived upon the voluntary disclosure.

B. Plaintiff's Counsel Did Not Agree That Westinghouse Would Be Allowed To Assert Discovery Privileges After Disclosure.

Westinghouse suggests that it did not waive the attorney-client privilege allegedly attaching to plaintiff's Exhibits 1 and 5 because Westinghouse had unilaterally declared that inadvertent disclosure of privileged documents would not waive any privileges. See Plaintiff's Exhibit 9. Unfortunately for Westinghouse, this declaration was not made part of any discovery agreement with counsel for plaintiff. Counsel for plaintiff did not even see this "condition" on production until after he had returned from the document inspection in Pittsburgh;⁴ even then, he did not agree to this condition. SOF at 124. Most importantly, plaintiff's counsel did not agree to Westinghouse's sweeping attempt to sidestep the law of waiver in writing, as required by Rule 11 of the Texas Rules of Civil Procedure.

In *Freeman v. Bianchi*, 820 S.W.2d 853 (Tex.App.--Houston [1st Dist.] 1991), the defendant, like Westinghouse here, attempted to revive a claim of privilege after disclosure, based on an alleged agreement among counsel to reserve objections based on privilege even with

⁴Westinghouse disingenuously notes that plaintiff's counsel, Andy Waters, testified that "he read the October 26 letter [containing the non-waiver proviso] when he received the October 28 letter." Westinghouse's Petition at 5. Westinghouse omits the crucial fact that Mr. Waters did not read the October 28 letter until *after* he returned from the document inspection. SOF 138.

respect to documents that had been disclosed. 820 S.W.2d at 859. The court rebuffed the defendant's attempt, because the alleged agreement had not been signed and filed with the court in accordance with Tex.R.Civ.P. 11. Thus, the court concluded, "any agreements reached by the parties are unable to support the defendants' claims of privilege and cannot be utilized to demonstrate that disclosure of the documents to plaintiffs did not constitute waiver." 820 S.W.2d at 860.

A similar situation obtains here. Neither plaintiff's counsel in the instant case, nor any other plaintiffs' counsel, agreed in writing to the conditions set forth in Ms. Matsen's letter. Nor was the letter filed with the court as required by Tex.R.Civ.P. 11. Ms. Matsen's letter was simply ineffective to preserve Westinghouse's claim of privilege on documents that it voluntarily disclosed in discovery.

B. Judge Davis Did Not Abuse His Discretion in Ruling That the Documents Fall Within the "Crime-Fraud Exception" to the Attorney-Client Privilege.

Rule 503 of the Texas Rules of Civil Evidence provides that neither attorney work product nor attorney-client communications are privileged "... [i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud." Tex.R.Civ.Evid. 503(d)(1). The crime fraud exception applies "if a prima facie case is made of contemplated fraud." See *Granada*, 36 Tex.Sup.Ct. J. at 353 (emphasis added). The documents themselves may provide the necessary evidence that fraud was being contemplated. *Freeman v. Bianchi*, 820 S.W.2d 853, 862 (Tex.App.—Houston [1st Dist.] 1992). Upon reviewing the documents in question and evaluating the testimony of the witnesses at the hearing, Judge Davis found "that the document

was prepared and the document describes a plan to commit fraud on the courts of this nation by Westinghouse." SOF at 156.

Judge Davis clearly did not abuse his discretion in making this finding.

The Westinghouse Memorandum (Plaintiff's Exhibit 1 to the SOF), can fairly be described as shocking. It advises the adoption of a program to destroy Westinghouse records, files, and documents based on criteria not relating to applicable law relating to document retention, but based on whether the evidence would be potentially harmful to Westinghouse in toxic tort litigation. Among the factors that the author recommended be considered in determining whether a document should be retained or destroyed were "the chances of litigation," "which party would have the burden of proof," and when the statute of limitations would run. Plaintiff's Exhibit 1 at 12. In considering whether plant correspondence files concerning safety during the early 1970's, the author of the document noted:

These files show corporate knowledge of hazards but no actual implementation of corrective measures. Consequently, the documentation is potentially harmful.

Plaintiff's Exhibit 1 at 15. Elsewhere in the memorandum, the author is more direct. He observes,

From a review of the files, it appears that the Department commented and editorialized on just about everything which might have been found in the workplace. This "self analysis" and "editorializing" type of information can be dangerous. This is just the type of documentation which should be discarded from the files.

Plaintiff's Exhibit 1 at 13-14. The Memorandum is replete with references to "smoking gun" documents, with the unavoidable implication that these documents should be discarded. On the

other hand, the Memorandum also makes references to "favorable" data which the author recommends that Westinghouse "continue to maintain." Plaintiff's Exhibit 1 at 17.

Westinghouse stresses that it presented evidence that the document destruction policies advised in the "smoking gun memorandum" were never implemented. Of course, all this evidence came from Westinghouse employees, whose credibility is tainted by their obvious incentive to assure the court that no improper document destruction took place. Moreover, even if Judge Davis accepted their testimony at face value (which Judge Davis was by no means obligated to do), the fact that the fraudulent plan was not implemented may affect the relevance or admissibility of the memo, but is utterly irrelevant to the issue of whether the document deserves protection under the attorney-client privilege. Tex.R.Civ.Evid. 503(d)(1) does not withdraw the attorney-client privilege only if the communications facilitated the *actual* commission of a crime or fraud; it removes the privilege if the communications "aid anyone to . . . plan to commit" criminal or fraudulent activity.

As in *Granada*, the Memorandum itself "suggest[s] a possibility of fraud sufficient to bring the documents within the crime-fraud exception." 36 Tex.Sup.Ct.J. at 353. All witnesses called by Westinghouse recognized the duty to preserve evidence potentially relevant to pending litigation. SOF 69-70 (testing of Ronald Lawrence, assistant general counsel at Westinghouse); SOF 99 (testing of Jeff Bair, also assistant general counsel at Westinghouse); SOF 111 (Testimony of Clarence Wayne Bickerstaff, manager of industrial hygiene at Westinghouse). To shield disclosure of a document essentially advocating the breach of this duty would dishonor the attorney-client privilege. Judge Davis' properly ruled that the crime-fraud exception to the

attorney-client privilege allows disclosure of the documents in question, and his ruling should not be disturbed.

II. RELIEF BY MANDAMUS IS UNAVAILABLE.

A writ of mandamus is an extraordinary remedy and will issue only 1) when the trial court has committed a clear abuse of discretion and 2) when there is no adequate remedy by relator on appeal. *Walker v. Pecker*, 827 S.W.2d 833, 839 (Tex. 1992). As to this first prong, a trial court abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Id.* (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985)). In reviewing a trial court's resolution of factual issues, the reviewing court may not substitute its judgment for that of the trial court, and significantly, the relator must establish that the trial court could reasonably have reached only one decision. *Id.* at 840. This Westinghouse has not done. Further, in reviewing a trial court's determination of controlling legal issues, the reviewing court must find a failure to analyze or apply the law properly in order to find an abuse of discretion in the trial court's ruling. *Id.*

In the present case, as plaintiffs have demonstrated, Judge Davis properly applied the law to the facts at hand and did not abuse his discretion in finding the Westinghouse documents admissible under the crime-fraud exception to the attorney-client privilege or in finding that Westinghouse waived any privilege that may have existed through its voluntary disclosure of the documents.

Additionally, in order for mandamus to be available, the relator must show that it has no adequate remedy on appeal. Mandamus would be adequate, for example, in the rare situation in which the trial court compels production of previously undisclosed documents since such

disclosure could not be retracted on appeal. *Walker*, 827 S.W.2d at 843. This scenario, however, is clearly not the situation before this court. Westinghouse voluntarily supplied the documents in question to plaintiffs; no court compelled Westinghouse to make such a disclosure. Thus, even were this court to grant leave to file mandamus, the fact that the documents have been disclosed would remain unchanged.⁵ Mandamus would thus not prevent the harm feared by Westinghouse; the harm has already occurred, through Westinghouse's voluntary disclosure. See, e.g., *Walker v. Packer*, 827 S.W.2d at 843 quoting *Crane v. Tunks*, 160 Tex. 182, 190, 328 S.W.2d 434, 439 ("[a]fter the [privileged documents] had been inspected, examined, and reproduced. . . a holding that the court had erroneously issued the order would be of small comfort to relators in protecting their papers.").

Westinghouse's only possible concern at this point, then, must be for the alleged prejudicial effect the documents would have at trial. However, it is well settled that evidentiary matters such as this are adequately reviewed on appeal and not by the extraordinary remedy of mandamus. *Walker v. Packer*, 827 S.W.2d at 843-44. This Court would not consider on mandamus a contention that the trial court was about to erroneously admit hearsay or irrelevant evidence. The Court should deny Westinghouse's motion for leave to file the mandamus petition for the same reason.

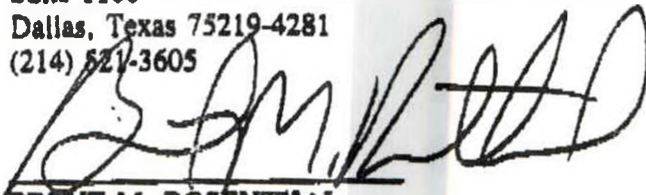
⁵Plaintiff would point out that he initially agreed with counsel for Westinghouse not to disseminate the information until a ruling was obtained by Judge Brooks on February 5, 1993. This agreement was subsequently extended by both parties until Judge Davis could rule on the privilege issue, Judge Brooks having had to recuse himself from the matter. After Judge Davis signed the order denying privilege, plaintiff was then free to disseminate the information.

CONCLUSION

For the foregoing reasons, plaintiff respectfully pray that Westinghouse's motion for leave to file petition for writ of mandamus be denied. Because this Court's stay order affects the trial currently proceeding in Judge Davis's court, plaintiff urges the court to lift the stay immediately.

Respectfully submitted,

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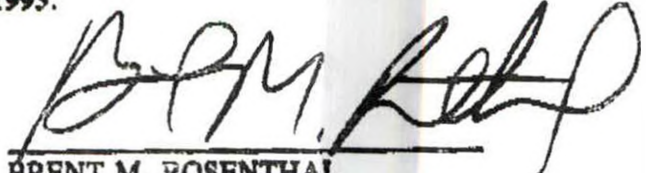

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing reply was served by telecopier and U.S. Mail on Bruce W. Bowman, Jr., Vial, Hamilton, Kock & Knox, 1717 Main Street, Suite 4400, Dallas, Texas 75201, this 12th day of February, 1993.


BRENT M. ROSENTHAL



THE SUPREME COURT OF TEXAS

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THOMAS R. PHILLIPS

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Hon. Paul R. Davis, Jr.
Judge, 200th Judicial District Court
Travis County Courthouse
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RE: Case No. D-3385

Style: WESTINGHOUSE ELECTRIC CORPORATION
v. THE HONORABLE PAUL R. DAVIS, JR., JUDGE

Page 2, D-3385
02-16-93

RE: Case No. D-3385

Style: WESTINGHOUSE ELECTRIC CORPORATION
v. THE HONORABLE PAUL R. DAVIS, JR., JUDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for leave to file petition for writ of mandamus in the above styled case. The Stay Order issued February 10, 1993, is vacated.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: Tencha Damian
Tencha Damian, Deputy

NO. 91-14798

PETER M. DASHKO, INDIVIDUALLY	§	IN THE DISTRICT COURT OF
AND AS PERSONAL	§	
REPRESENTATIVE OF THE HEIRS	§	
AND ESTATE OF STEVEN	§	
DOUGLAS, DECEASED	§	TRAVIS COUNTY, T E X A S
	§	
VS.	§	
	§	
FIBREBOARD CORP., ET AL.	§	331ST JUDICIAL DISTRICT

**ORDER DENYING WESTINGHOUSE ELECTRIC CORPORATION'S
CLAIM OF PRIVILEGE**

On the 8th day of February, 1993, came on to be heard Plaintiff's Motion to Deny Application of Privilege and Westinghouse Electric Corporation's Motion for Protective Order, Request for In Camera Inspection, and Motion for Order Preventing Dissemination of Privileged Information in the above styled and numbered cause.

The Court, after considering the evidence, ~~and~~ authorities, and arguments of counsel finds that Westinghouse Electric Corporation's Exhibits 1 and 5 (Bates Numbers 0032997-0033018 and 0032671), tendered to and considered by the Court in camera, are privileged documents under the attorney-client privilege; and

Further finds that Exhibits 1 and 5 fall within the crime/fraud exception to privileged documents of Rule 503(d)(1) of the Tex. R. Civ. Evid. as such documents were prepared, and describe a plan, to commit fraud on the courts of this nation; and

Further finds that Westinghouse Electric Corporation has waived its claim of privilege to Exhibits 1 and 5.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Westinghouse Electric Corporation's Request for In Camera

Inspection is GRANTED as to Exhibits 1 and 5.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Exhibits 1 and 5 were made for the purpose of facilitating the rendition of professional legal services to Westinghouse Electric Corporation; that Exhibits 1 and 5 fall within the crime-fraud exception to privileged documents of Tex. R. Civ. Evid. 503(d)(1); and that Westinghouse Electric Corporation has waived its claim of privilege to Exhibits 1 and 5.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Westinghouse Electric Corporation's Motion for Protective Order and Motion for Order Preventing Dissemination of Confidential Information is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Westinghouse Electric Corporation's request that this order be stayed pending its Application for Writ of Mandamus is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Deny Application of Privilege is GRANTED.

All relief requested by the above Motions and not expressly granted herein is DENIED.

SIGNED this 9th day of February, 1993.


PAUL R. DAVIS, JR.
Judge Presiding

1 describe, and I cannot find and do not believe
2 that the evidence sustains a finding that the
3 disclosure was compelled erroneously, and I do not
4 find that the evidence supports -- that the
5 disclosure was made without an opportunity to
6 claim the privilege.

7 There's certainly not any claim that the
8 plaintiffs made the defendant or that any court
9 made the defendant disclose this document, so to
10 that extent it was voluntary.

11 It does seem to the Court as if it were
12 an accident that this document was included, but I
13 cannot find that the disclosure was an involuntary
14 one, and accordingly I have made my ruling.

15 We have one additional Westinghouse
16 matter, and it's late. We've been doing this all
17 day long, and this is hard, so I want to take that
18 up first thing in the morning, which will be at
19 8:30.

20 So we'll reconvene for that purpose
21 tomorrow.

22 MR. BOWMAN: Judge, based on your
23 ruling, we of course need to present an order, I
24 suppose, first thing tomorrow, when we can.

25 We would request that you either stay

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1 consideration the testimony as well as the
2 document itself, it was for the purpose of legal
3 services to Westinghouse by the legal department.

4 Second, with respect to the exception to
5 the lawyer/client privilege contained in Rule 503,
6 the Court finds that the document was prepared and
7 the document describes a plan to commit fraud on
8 the courts of this nation by Westinghouse.

9 Third, with respect to the issue of
10 waiver, the Court finds that Westinghouse has in
11 fact waived this privilege and accordingly orders .
12 the -- denies Westinghouse's motion to exclude
13 this document and grants the plaintiff's motion
14 with respect to the privilege.

15 The Supreme Court in the Granada case
16 talks about a difference between an inadvertent
17 production which can be voluntary, which they
18 describe as voluntary, and involuntary production.

19 And apparently in the Supreme Court's
20 idea there's a sliding scale that somewhere
21 inadvertence turns into involuntary.

22 Well, I have read that decision very
23 closely on several occasions while you-all have
24 been arguing today, and I have also read Rule 512,
25 which I think is what the courts are trying to

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1 The only point of distinction that
2 they're able to bring up, Judge, is "Well, we
3 found out about it quicker." And I don't think
4 Granada even suggests that that in and of itself
5 could possibly be a reason for setting it aside.

6 Thank you, Judge.

7 THE COURT: Thanks, Mr. Waters.

8 MR. BOWMAN: Judge, I would only
9 point out that the rest of the paragraph that Mr.
10 Waters didn't read indicates, "Moreover, Granada
11 only sought production after 11 months had
12 passed."

13 I mean, we can talk about -- we both
14 pointed out, I think, all the factors.

15 THE COURT: Yes.

16 I'm going to find several things here.
17 First of all, that this particular document,
18 Plaintiff's Exhibit 1 in this proceeding, was in
19 fact made with respect to the rendition of
20 professional legal services to Westinghouse.

21 Secondly -- and that to me is a fairly
22 close call, by the way. I certainly do understand
23 the plaintiff's argument that the document was in
24 fact a business policy decision within
25 Westinghouse, but I think taking into

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