

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

JD LUMBER, INC., an Idaho Corporation)
DAVID SLAUGHTER, an Individual; and)
JEFFREY D. SLAUGHTER, an Individual,)
)
Plaintiffs,)

CASE NO. CV – 2009 – 1141

**ORDER RE: PLAINTIFFS'
MOTION TO COMPEL**

v.)

RILEY CREEK LUMBER COMPANY, a)
Nevada Corporation; IDAHO FOREST)
GROUP, LLC, a Delaware Limited Liability)
Company; PRIEST RIVER LAND COMPANY,)
an Idaho Corporation; and RCJD LLC, an)
Oregon Limited Liability Company,)
)
Defendants.)

RILEY CREEK LUMBER COMPANY, a)
Nevada Corporation; IDAHO FOREST)
GROUP, LLC, a Delaware Limited Liability)
Company; PRIEST RIVER LAND COMPANY,)
an Idaho Corporation; and RCJD, LLC, an)
Oregon Limited Liability Company,)
)
Counterclaim Plaintiffs,)

v.)

JD LUMBER, INC. an Idaho Corporation;)
DAVID SLAUGHTER, an Individual; and)
JEFFREY D. SLAUGHTER, an Individual,)
)
Counterclaim Defendants.)

BLACK SWAN DEVELOPMENT, LLC, an Idaho Limited Liability Company,)
)
Third Party Plaintiff,)
v.)
)
JD LUMBER, INC., an Idaho Corporation,)
)
Third Party Defendant.)

FONDA L. JOVICK and SCOTT NASS, PAINE HAMBLEN, LLP, for
Plaintiffs/Counterclaim Defendants/Third Party Defendant.

MICHEAL J. HINES and MICHAEL G. SCHMIDT, Lukins & Annis, P.S.,
for Defendants/Counterclaim Plaintiffs/Third Party Plaintiff.

I. FACTS AND COURSE OF PROCEDURE

This is the second discovery dispute to come before this Court in this rather contentious case. The present discovery dispute surrounds the Environmental Agreement ("EA") that Plaintiff JD Lumber, Inc. ("Plaintiffs") entered into with Defendants Idaho Forest Group, LLC and Riley Creek Lumber Company ("Defendants"). The EA, which is a subject matter of this litigation, provides that the parties would use the services of Professional Engineer John Karpenko to conduct a Phase I and Phase II environmental evaluation of the disputed Priest River Mill site. The parties also agreed that the Defendants would use the services of Professional Engineer Steve Locke to review John Karpenko's environmental evaluation. Mr. Locke is, therefore, a fact witness who may testify as to facts known and opinions held as a result of his duties under the EA.

On November 30, 2010, the Plaintiffs conducted a deposition of Mr. Locke, and during questioning the Defendants' counsel disclosed that the Defendants' counsel had privately retained Mr. Locke as an "expert consultant." (11/30/10 Tr., pp.40-49; pp.76-

79; pp.88-99.) The Defendants then objected to the Plaintiffs' questioning of Mr. Locke asserting that the facts known and opinions held as a result of Mr. Locke's role as a consulting expert are "privileged work product." (Id.) The Defendants admit that they did not inform the Plaintiffs of Mr. Locke's dual status prior to the deposition. (Id.) Mr. Locke, on advice from the Defendants' counsel, refused to answer the Plaintiffs' questions regarding his role as a consulting expert, his activities as a consulting expert, or the resulting factual knowledge he gained or expert opinions he held. (Id.)

The Plaintiffs filed a motion to compel ("Plaintiffs' Motion to Compel") on December 23, 2010, and a "Memorandum in Support of Plaintiffs/Counterclaim Defendants' Motion to Compel" ("Plaintiffs' Memorandum"). The Plaintiffs also filed an "Affidavit of Fonda L. Jovick in Support of Plaintiffs/Counterclaim Defendants' Motion to Compel" ("Jovick Affidavit") and attached the following exhibits: Exhibit A, partial deposition transcript of Steve Locke; Exhibit B, partial deposition transcript of Scott Atkinson; Exhibit C, partial deposition transcript of Ryan Fobes; Exhibit D, Environmental Agreement.

The Defendants responded with "Defendants' Response to Plaintiffs' Motion to Compel" ("Defendants' Response") and supplied an "Affidavit of Michael J. Hines in Support" ("Hines Affidavit") and "Affidavit of Michael G. Schmidt in Opposition" ("Schmidt Affidavit"). This Court heard argument and requested additional briefing. The Plaintiff submitted a "Plaintiffs'/Counterclaim Defendants' Supplemental Memorandum in Support of Motion to Compel" ("Plaintiff's Supplemental Memorandum"). The Defendants submitted the "Defendants' Supplemental Memo in Opposition to Motion to Compel" ("Defendant's Supplemental Memorandum"), as well as the "Second Affidavit

of Michael G. Schmidt in Opposition to Plaintiffs' Motion to Compel" ("Second Schmidt Affidavit") and the "Affidavit of Peter Jewett" ("Jewett Affidavit").

II. LEGAL STANDARD

Idaho Rule of Civil Procedure 26(a) allows for a party to obtain discovery by "deposition upon oral examination or written questions [or] written interrogatories." Idaho Rule of Civil Procedure 30(a) provides that "any party may take the testimony of any person, including a party, by deposition upon oral examination." Idaho Rule 30(c) allows for all objections made during the deposition to be noted in the deposition record and "evidence objected to shall be taken subject to the objections." "Any objection to evidence shall be stated concisely and in a non-argumentative and non-suggestive manner. Conduct of counsel or other persons shall not impede, delay or frustrate the fair examination of the deponent." Idaho Rule of Civil Procedure 37(a) provides for a motion or an order compelling discovery if a "deponent fails to answer a question propounded or submitted under Rules 30 or 31 When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order."

III. ANALYSIS

Idaho Rule of Civil Procedure 26(b)(1) defines the scope of discovery. Rule 26(b)(4) allows for the discovery of "facts known and opinions held by experts expected to testify, otherwise discoverable under [26(b)(1)] and acquired or developed in anticipation of litigation or for trial" Rule 26(b)(4)(B) recognizes that facts and opinions held by a "an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be

called as a witness at trial,” are not discoverable, “except upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” (Emphasis added.)

The Plaintiffs request, pursuant to I.R.C.P. 37(a), “an order compelling Defendants . . . to provide . . . discovery/answers to deposition questions regarding the facts known and opinions held by Steve Locke.” The Defendants, however, argue that Mr. Locke will not testify and was hired as a consulting expert in anticipation of litigation, and therefore the information is “not discoverable” as per I.R.C.P. 26(b)(4)(B). The Plaintiffs’ Motion to Compel presents one narrow issue: whether Mr. Locke must answer the deposition questions propounded by the Plaintiffs and provide discovery, or whether the facts known and opinions held by Mr. Locke that he obtained while working as a “consulting expert” are not discoverable as per Rule 26(b)(4)(B).

A. The Facts Known and Opinions Held by Mr. Locke are Discoverable

Rule 26(b)(4)(B) “imposes a partial though not a total ban on fact- or opinion-discovery from a non-testifying expert. It eschews a policy of categorical inaccessibility to such information in favor of a carefully circumscribed opportunity for discovery.” Marine Petroleum Company v. Champlin Petroleum Company, 641 F.2d 984, 990-991, 206 U.S. App.D.C. 31, 36-38 (1980). “[F]actual information, even when acquired in expectation of litigation, is shielded only if discovery is attempted from the expert, and not at all if the effort is to obtain it from a party or another sharing it.” Marine, 641 F.2d at 994, 206 U.S. App.D.C. at 42. The party asserting an applicable protection bears the initial burden of showing that the protection applies. U.S. Inspection Services, Inc. v. NL Engineered Solutions, LLC, et al., 268 F.R.D. 614, 617 (N.D. Cal. 2010).

Idaho Rule of Civil Procedure 26 certainly recognizes a difference between testifying experts and nontestifying "expert consultants," but there is no Idaho case law regarding this rule that is helpful to this Court's determination of the issue presented. However, it appears that this issue is rather extensively litigated in federal courts. The cases of In re Shell Oil Refinery, 134 F.R.D. 148, 149-50 (E.D. La. 1990) and 132 F.R.D. 437 (E.D. La. 1990), though the address a prior codification of Federal Rule of Civil Procedure 26,¹ are instructive. In Shell, the employees of Shell were ordinary fact witnesses to an explosion at a Shell plant, but later retained in anticipation of litigation as consulting experts who conducted an investigation of the explosion. Shell, 134, F.R.D. at 149-50. The Shell court recognized that the "[r]ule does not protect facts or opinions of expert employees developed while conducting business activities related to matters in issue but before being specially employed." Shell, 134 F.R.C. at 150 (citations omitted). Essentially, as the Shell court stated, "[w]hich hat [the witness] wears depends on whether their knowledge was gained in the course of their special employment as members of the investigation team, or in the course of their regular duties." Id. The determining factors are 1) when the "consulting expert" was retained in "anticipation of litigation" and 2) the scope of the consulting expert's duties. Id.

There in lies the difficulty for trial courts in determining whether the facts known and opinions held by a consulting expert are protected from discovery pursuant to Rule 26(b)(4)(B). This Court cannot know the source and extent of the witnesses knowledge,

¹2010 Federal Rule of Civil Procedure 26 differs from Idaho Rule of Civil Procedure 26 and is somewhat more complex, but the current and past federal rule similarly recognize "separate methods of discovery for those experts expected to testify at trial and those not expected to testify." Hoover v. U.S. Dept't of Interior, 611 F.2d 1132, 1141 (5th Cir 1980). Current subpart (A) discusses the disclosure of and deposition of experts whose opinions may be presented at trial. Current subpart (B) restricts discovery of experts retained in anticipation of litigation nor preparation for trial and who are not expected to be called as witnesses at trial.

or the use to which each party will put the information during trial. Therefore it is up to the parties to clearly delineate when the consulting expert was retained, the purpose for which the consulting expert was retained, and assure the trial court that the facts known and opinions held by the consulting expert were obtained after retention as a consulting expert and in anticipation of litigation.

In some cases, federal courts have concluded that the witness's role as an ordinary fact witness cannot be delineated from the role as an expert consultant, and therefore the protection of Rule 26(b)(4)(B) does not apply. See Herman v. Marine Midland Bank, 207 F.R.D. 26 (2002) (holding that an expert report was the result of collaborative work); Hexion Specialty v. Huntsman Corp., 959 A.2d (Del.Ch. 2008) (holding that Rule 26(b)(4)(B) does not apply where Merrill Lynch acted as the defendant's sole financial advisor and expert consulting witness because "Merrill Lynch has acquired and continues to acquire information as an 'actor' or 'viewer' of the transaction at issue"); U.S. Inspection Services, Inc., 268 F.R.D. at 618-619, *citing In re Grand Jury Subpoena (Mark Torf)*, 357 F.3d 900, 905-06 (9th Cir.2004) ("[T]aking into account the facts surrounding their creation, their litigation purpose so permeated any non-litigation purpose that the two purposes [could not] be discretely separated from the factual nexus as a whole").

In other cases, the parties clearly established for the trial court the line between fact witness and expert consultant. See Shell, 134 F.R.C. at 151 (employees were clearly hired to perform the specific task of investigation after the explosion at the plant); Marine, 641 F.2d at 992-993, 206 U.S. App.D.C. at 39-40 (the expert consultant "knew nothing helpful to Marine until the special assignment, nor thereafter except in the role

for which he was specially retained”); In re PolyMedica Corp. Securities Litigation, 235 F.R.D. 28, 31-32 (D.Mass.2006) (holding the non-testifying expert was retained “in anticipation of litigation” after the court examined the engagement letter and the timing of the expert’s retention relative to the inception of the lawsuit”); Consol. Copper Co. v. Lumbermens Mut. Cas. Co., 60 F.R.C. 205 (S.D.N.Y 1973) (allowing discovery of accountant witness to first audit as a fact witness, but prohibiting discovery of accountant witness to second audit as a consulting expert).

Courts have also acknowledged the potential for abusing Rule 26(b)(4), where a fact witness is employed as a consultant expert specifically to avoid and control the parameters of discovery. Shell, 134 F.R.C. at 151; Marine, 641 F.2d at 993, fn.49, 206 U.S. App.D.C. at 40 fn.49 (“While facts are not to be hidden, nor necessary discovery improperly obstructed, neither is a party allowed to delve at will into an expert mind solely to sustain its own burden of preparing for litigation”). Thus, it is clear from case law that “protection from discovery inures when the so-called independent non-litigation purpose is ‘grounded in the same set of facts that created the anticipation of litigation,’ but is less likely when the non-litigation purpose is ‘truly separable.’ In other words, the ‘because of’ standard does not consider whether litigation was a primary or secondary motive, but looks to the ‘totality of the circumstances.’” U.S. Inspection Services, 268 F.R.D. at 618-619, *citing* In re Grand Jury Subpoena (Mark Torf), 357 F.3d at 905-06.

The Defendants have the burden to show that the facts known and expert opinions held by Mr. Locke are protected from discovery as per Rule 26(b)(4)(B). However, the Defendants have failed to meet this burden. This litigation commenced on July 1, 2009, and Mr. Locke has been employed under the EA since October 18,

2008. (Exhibit B and C to Answer/Counterclaim.) Notably, the Defendants assert that in April of 2009 the Defendants anticipated litigation in regards to the Environmental Agreement and hired Mr. Locke as a consulting expert, but the Defendants also state that Mr. Locke performed tasks as a consulting expert "while still performing his limited role under the Environmental Agreement for IFG." (Hines Aff. ¶ 3.d.) Thus, Mr. Locke has acted in two capacities for nearly two years unbeknownst to the Plaintiffs.

The Defendants do not, however, delineate for this Court the responsibilities Mr. Locke performs as a consulting expert, from the responsibilities he performs under the EA. The pleadings show that both of Mr. Locke's roles concern the same location, the same possible contamination, and the same agreement. Additionally, Mr. Locke's roles appear to cover the nearly the same period of time. Given the totality of the circumstances the purpose Mr. Locke serves as a consulting expert cannot be discretely separated from his role as a fact witness. Therefore, the Defendants are not entitled to the protection of Rule 26(b)(4)(B) and the Plaintiff may continue the deposition of Mr. Locke.²

B. Other Arguments and Considerations

The parties make numerous other arguments and assertions in support of their positions, and this Court will address each briefly.

This Court notes that during the deposition of Mr. Locke, counsel for the Defendants did not inform counsel for the Plaintiffs that Mr. Locke would not be called as an expert witness at trial. Instead, after the deposition had commenced, the

² Because the Defendants have not met their burden, this Court need not address the parties arguments regarding whether "exceptional circumstances" exist such that Rule 26(b)(4)(B) may be circumvented by the Plaintiffs.

Defendants' counsel asserted that Mr. Locke "has been retained as a consulting expert by [Defendants' counsel], which is privileged work product; and therefore, I'm going to instruct you not to answer with respect to that expert consulting engagement." (11/30/11 Tr., p.42, L.18-p.43, L.16.) The Defendants continue to argue that the information is privileged work-product, and cite many cases involving work-product privilege. However, whether the facts known and opinions held by Mr. Locke are "trial preparation materials" or "privileged work product" is not properly before this Court on a motion from the Defendant pursuant to I.R.C.P. 26(b)(3) or (5)(A), and the Defendants have not applied for a protective order pursuant to I.R.C.P. 26(c). The Defendants, like the parties in the federal cases cited, could have obtained such a determination from this Court prior to the date of the deposition, but chose to proceed without such a determination. Therefore, this Court will not address the issue of whether the information is privileged as part of the Plaintiffs' Motion to Compel.

In response to this Court's concern that the Defendants "waived" the protection of Rule 26(b)(4)(B), the Defendants' have submitted an affidavit by the Defendants' testifying expert Mr. Peter Jewett. According to the affidavit, Mr. Jewett did not review any information that Mr. Locke acquired when acting as the "consulting expert" for the Defendants. (Jewett Aff., ¶ 4.) However, Mr. Jewett did review "objection reports" generated by Mr. Locke when he was performing duties as per the EA. While this Court finds the distinction drawn in Mr. Jewett's affidavit less than persuasive, this Court will not address the issue of waiver because, as discussed above, the Defendants have not met their burden of showing that they are entitled to the protection of Rule 26(b)(4)(B) and therefore no waiver of the protection occurred.

The Defendants also argue that the Plaintiffs claimed that communications between their expert, Mr. Karpenko, and the Plaintiffs' counsel were privileged, and that the Plaintiffs are therefore estopped from challenging the Defendants' claims that the facts known and opinions held by Mr. Locke are not privileged. This argument is specious at best, but regardless, the Defendants' argument fails because, as discussed above, the Defendants have not sought a determination of privilege or a protective order regarding the facts known and opinions held by Mr. Locke. These arguments, then, do not change this Court's analysis of the Plaintiffs' Motion to Compel.

C. Fees and Costs

Both parties seek attorney fees and costs pursuant to Rule 37(a), which provides that if the moving party prevails, "the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, . . . unless the court finds that the opposition to the motion was substantially justified" This Court is persuaded that the Defendants opposition to the Plaintiffs motion to compel was justified given that the issue presented had not previously been decided by Idaho appellate courts. In addition, the facts and circumstances of the matter required additional briefing by both parties to ensure that the parties were given a full and fair opportunity to litigate the issue presented. For that reason, this Court declines to award costs to either party.

The Defendants also request an order directing the Plaintiff to pay a portion of the expert fees charged by Mr. Locke as a consultant for the Defendants' counsel. Idaho Rule of Civil Procedure 26(b)(4)(C) provides:

Unless manifest injustice will result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions . . . (b)(4)(B) of this rule . . . , and (ii) . . . with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions for the expert.

The Plaintiffs may engage in discovery of the facts known and opinions held by Mr. Locke as an expert witness. As a result, the Plaintiffs must bear a portion of the fees and expenses reasonably incurred by the Defendants in obtaining the facts and opinions of Mr. Locke and pay the expert a reasonable fee for Mr. Locke's time spent in responding to discovery. More specifically, should the Plaintiff continue the deposition of Mr. Locke and request production of other discovery from Mr. Locke, the Plaintiff must pay Mr. Locke his reasonable fee for responding to the discovery. Further, the Plaintiff must pay 25% of the reasonable fees and expenses reasonably incurred by the Defendants' counsel in obtaining the facts and opinions of Mr. Locke.

IV. CONCLUSION

The Plaintiffs' Motion to Compel is hereby GRANTED. The Plaintiffs' request for costs and the Defendants' request for costs are hereby DENIED.

DATED this 27th day of January, 2011.



John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ORDER RE: PLAINTIFF'S MOTION TO COMPEL was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the _____ day of January, 2011 to the following:

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CLIFFORD T. HAYES
Clerk of the District Court

By: _____
Deputy Clerk