UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 13-23671-CIV-COOKE/TORRES

UNITED STATES OF AMERICA
and THE STATE OF FLORIDA, EX REL.
THOMAS BINGHAM,

Plaintiffs,

v.

HCA, INC.,

Defendant.
_____/

OMNIBUS DISCOVERY ORDER

This matter is before the Court on three pending discovery motions that are ripe for adjudication. Upon review of the motions, responses, replies and the record as a whole, the Court's rulings follow.

A. Motion to Compel Disclosure Statement

Defendant's Motion to Compel [D.E. 92 (Redacted) and D.E. 91 (Sealed/Un-redacted)] seeks production of the written disclosure statement that Relator Bingham submitted to the United States Department of Justice pursuant to the False Claims Act. Defendant argues that the statement is not protected by any privilege and is relevant under Rule 26. Defendant also maintains that, even if it was protected work product at one point, that privilege was waived when Relator Bingham (1) failed to provide an appropriate "privilege log" so HCA could properly evaluate the basis for the

privilege; and (2) when prior to his deposition the Relator reviewed the disclosure statement to refresh his recollection in preparation for his testimony.

The Relator objected to production because the disclosure statement contains work-product privileged information, and Defendant has not made the appropriate required showing of substantial need to overcome this privilege. In addition, the Relator claims that no waiver of the privilege occurred despite the provisions of Rule 612, Fed. R. Evid. ("an adverse party is entitled to have the writing [used to refresh recollection while or prior testifying] produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.").

We will assume for purposes of this Order that the disclosure statement retains its work product privilege status, notwithstanding the reasons why it was created and why it was turned over to the government as provided in the False Claims Act. The parties' briefing disputes the validity of a claim of privilege to the document, but we need not address that issue. That is because we find, based on settled principles applied in our District, that the use of the Relator of that same document to prepare for his deposition answers effectively waived any work product protection in the document, except for pure opinion work product that, if disclosed, would substantially prejudice the Relator in the litigation.

This conclusion flows from well established principles applied in this District for some time. As Judge Hoeveler explained in 1998:

> "Where a party uses attorney work product to refresh his memory, the potential for conflict exists between Rule 612, which favors disclosure of materials used to refresh a witness['s] recollection, and the work-product

> privilege." *In re Joint Eastern and Southern District Asbestos Litigation,* 119 F.R.D. 4 (E.D. & S.D.N.Y.1988). Most courts, however, have ordered the production of privileged material used to refresh a witness['s] recollection before testifying. *See, e.g., Parry v. Highlight Industries, Inc.,* 125 F.R.D. 449, 452 (W.D.Mich.1989) ("A number of courts have resolved this apparent conflict by allowing disclosure of privileged materials where necessary in the interests of justice."); *Barrer v. Women's National Bank,* 96 F.R.D. 202, 204 (D.D.C.1982) ("[F]urther research has disclosed a judicial trend towards requiring disclosure under Rule 612 of materials used to refresh recollection preliminary to the taking of a deposition, notwithstanding claims of attorney-client privilege or work product privilege."); *James Julian Inc. v. Raytheon Co.,* 93 F.R.D. 138, 145 (D. Del.1982) ("Those courts which have considered the issue have generally agreed that the use of protected documents to refresh a witness['s] memory prior to testifying constitutes a waiver of the protection."). In deciding whether to order production of such privileged materials, courts have relied on a balancing test, considering three relevant factors: (1) whether witness "coaching" may have occurred; (2) whether the documents reviewed constitute "factual" or "opinion/core" work product"; or (3) whether the request constitutes a fishing expedition. *See, e.g., Parry,* 125 F.R.D. at 452-53 (discussing three-factor test); *In re Joint Eastern and Southern District Asbestos Litigation,* 119 F.R.D. at 5-6 (listing three factors as relevant).

Hoglund v. Limbach Constructors, Inc., 1998 WL 307457, at *5-6 (S.D. Fla. Mar. 30, 1998).

These long-established principles have not been undermined in the intervening years from any contrary Eleventh Circuit authority. We thus find no reason not to apply them here.

In doing so, it is clear that factual work product contained in the document is discoverable because any work product protection was lost when the witness specifically relied on the document in preparation for his deposition. The decision to review the document is also purposeful and understandable. But it has consequences

under Rule 612, based upon the unfairness to the adverse litigant in not being able to cross-examine the witness on this document.

On the other hand, the balancing approach that Judge Hoeveler approved requires that the Court make a more deliberate determination before compelling production of the entire document if it includes core opinion work product. Work product (consisting of an attorney's opinions, mental impressions, and legal theories) enjoys must stronger protection, for good reason. *See, e.g., Cox v. Admin'r United States Steel & Carnegie,* 17 F.3rd 1386, 1441-42 (11th Cir.), *modified on other grounds,* 30 F.3d 1347 (11th Cir. 1994). That protection requires that the Court determine whether opinion work product should be excised, if any, if the Relator can show that disclosure of such work product, notwithstanding the Rule 612 waiver, would create a non-speculative danger of revealing counsel's mental thoughts and impressions that would unduly prejudice or damage the Relator's case. *See In re Trasylol Products Liab. Litig.,* 2009 WL 936597, at *3-4 (S.D.Fla. April 7, 2009) (Middlebrooks, J.); *Calderon v. Reederei Claus-Peter Offen Gmbh & Co.,* 2009 WL 1748089, at *3 (S.D. Fla. June 19, 2009) (Seltzer, J.).

Accordingly, we agree with the Relator that the document should not be turned over until the Court conducts an in camera examination with respect to any core opinion work product that the Relator points us to. The Relator shall, therefore, file under seal by April 22, 2016, a complete copy of the document at issue with appropriate annotations for those specific portions alleged to fall within the work product protection (and where necessary with argument that explains why disclosure

of such materials would substantially prejudice the Relator in the litigation). The Court will then make its rulings on the entire document before it is turned over to Defendant.

For now, the motions are Granted in part and deferred in part.

B. Motions to Compel Interrogatories

Defendant's Motion to Compel [D.E. 98] seeks better answers to the Relator's responses to Interrogatories 1 through 4. Our review of the arguments on the motion shows that the issues raised appear to be moot in light of the District Judge's ruling granting partial summary judgment on the Centerpoint-related claims. [D.E. 183]. To the extent that is not the case, Defendant has leave to file a renewed and amended motion to show why the requested interrogatory answers have some material bearing on the remaining claims in the case, *and* why these particular interrogatories are the most appropriate way to discover that information (as opposed to deposition testimony already taken from the most knowledgeable witnesses). For now, we deem these interrogatories to be immaterial given the state of the case and Deny the motion as moot.

Defendant's Motion to Compel [D.E. 100] seeks better answers to the Relator's responses to the Third Set of Interrogatories that primarily seek sworn answers on how the Relator searched for documents in the case for production purposes. The Relator objects to the number of interrogatories that it has had to answer in the case. Putting aside that objection, the Court still denies the motion because these types of questions are far more appropriate for a custodian or representative deposition. And apparently

Defendant conducted that very type of examination in this case. Thus, the Court finds that the discovery should not be compelled under Rule 26(c)(1)(C).

Moreover, the substantive questions at issue from the third set of interrogatories (Nos. 11 & 12) address the Centerpoint-related claims that are now moot. Therefore the motion is also Denied as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 18th day of April, 2016.

/s/ Edwin G. Torres
EDWIN G. TORRES
United States Magistrate Judge