

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA,)	
)	
<i>Plaintiff</i>)	
)	
v.)	No. 2:11-cv-455-NT
)	
CONAGRA GROCERY PRODUCTS)	
COMPANY, LLC,)	
)	
<i>Defendant</i>)	

ORDER ON ORAL MOTIONS FOR PROTECTIVE ORDER

Following a telephonic hearing on November 27, 2012, on matters in dispute concerning discovery in this case, I ordered the parties to submit letter briefs no longer than seven pages by December 4, 2012, Report of Hearing and Order re: Discovery Dispute (ECF 72) at 2, addressing two of those disputes: whether the defendant should be allowed to take the depositions of James Israel, an investigator for the Environmental Protection Agency (EPA), and Tina Hennessy, an EPA enforcement coordinator. Subsequent to the telephonic conference, the parties developed an additional dispute over the defendant’s desire to take the deposition of Sarah Meeks, Enforcement Counsel for EPA Region I.

After the telephonic hearing, the parties reached agreement concerning Israel, and that matter is no longer before me. As to Hennessy, the plaintiff contends that she “perform[ed] EPA’s P[otentially] R[esponsible] P[arties] search relating to the Site” at issue in this CERCLA proceeding “in conjunction with EPA attorneys[.]” Plaintiff’s Letter Brief at 4, 1. It contends that this search was “conducted in anticipation of litigation” as are all investigations into

contaminated sites “by their very nature.” *Id.* at 5. Conducting such a search would have been futile, it posits, if the possibility of litigation did not exist. *Id.* The plaintiff concludes, therefore, that all of Hennessy’s work with respect to the site at issue in this proceeding is protected by the work product doctrine.

Most of the case law upon which the government relies deals with documents for which work product protection was claimed. *E.g.*, *United States v. Axel Johnson Inc., et al.*, United States District Court for the Eastern District of North Carolina, Southern Division, No. 7:00-CV-252-F(1), Order dated April 29, 2002 (Attachment 2 to Plaintiff’s Letter Brief); *Cozinco, Inc. v. United States Env. Prot. Agency*, Civil Action Number 98-K-1724, United States District Court for the District of Colorado, Order Regarding Motions Addressed to the United States’ Claims of Privilege dated April 5, 2001 (Attachment 1 to Plaintiff’s Letter Brief); *United States v. Textron Inc.*, 577 F.3d 21 (1st Cir. 2009); *State of Maine v. United States Dep’t of Interior*, 298 F.3d 60 (1st Cir. 2002); *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991); *Appleton Papers Inc. v. EPA*, No. 11-C-318, 2012 WL 1079884 (E.D. Wis. Mar. 30, 2012); *Feshbach v. SEC*, 5 Supp.2d 774 (N.D. Cal. 1997).

The government attempts to avoid the distinction between documents and the testimony at issue here by referring repeatedly to Hennessy’s “investigatory work, including the PRP search,” Plaintiff’s Letter Brief at 1, 4, 5, and asserts that “[t]he tasks performed by Ms. Hennessy are protected by the work product doctrine[.]” *Id.* at 6. That terminology takes the work product doctrine well beyond its recognized scope. In this court,

it is black-letter law that, even when applicable, the work-product doctrine protects only documents and not the underlying facts and, therefore, may not be used as a shield in response to questions posed during a deposition.

LaBrecque v. SAD No. 57, 463 F.Supp.2d 88, 96 (D. Me. 2006).

As the government's own parenthetical descriptions demonstrate, none of the cases cited by the government for the proposition that "courts have determined that a PRP search conducted by EPA is entitled to protection under the work product doctrine," Plaintiff's Letter Brief at 4, stands for that proposition, if "a PRP search" is defined to include anything other than the documents generated by such a search. *See generally Axel Johnson; Cozinco; Raytheon Aircraft Co. v. United States Army Corps of Engineers*, 183 F.Supp.2d 1280, 1282 (D. Kan. 2001). Contrary to the government's presentation, *id.*, it is not "[t]he investigation" itself that is opinion work product; it is the documents and tangible things that are generated by the investigation.

Because this dispute concerns only whether a particular deposition may be held, I need not reach the parties' arguments concerning the legal standards for anticipation of litigation or the degree of protection provided to documents generated by government agencies. I accept the proposition that any work product protection that might be applicable in this case extends to Hennessy, as an agent of the EPA's attorneys, for purposes of the instant motion. That fact has no bearing on the outcome of the motion, however.

The government argues that the defendant has not demonstrated a "substantial need" for Hennessy's testimony. Plaintiff's Letter Brief at 6-7. However, this test applies only if that testimony is protected by the work product doctrine. Fed. R. Civ. P. 26(b)(3)(A). I have concluded that it is not.

The same reasoning applies, from all that appears, to the parties' dispute about the defendant's desire to depose Sarah Meeks, Enforcement Counsel for EPA Region I. Letter dated December 4, 2012, from Jeffrey D. Talbert to Magistrate Judge Rich Re: Discovery Dispute Regarding Deposition of Sarah Meeks. There is an additional caveat with respect to this dispute, however. As the matter is presented, an EPA employee who certified its responses to the

defendant's interrogatories testified at deposition that, if "his knowledge of the completeness and accuracy of the response may have been deficient[,]” then someone who wanted to ask about specific factual responses “would inquire of Attorney Meeks[,]” and that is why the defendant wishes to take her deposition. *Id.* at 1-2. It is highly likely that an attorney who participated in the preparation of responses to interrogatories is not in fact the source of the factual information presented therein, and, on the showing made, she is not, as the defendant would have it, “the individual identified as having knowledge about the factual responses in the interrogatories[,]” *id.* at 2, or “the only witness with any factual knowledge of the government’s Interrogatory responses.” *Id.*

It is conceivable, although unlikely, that Meeks has some factual information that may lead to the discovery of admissible evidence in this case and that is not subject to the attorney-client privilege. If the defendant insists on deposing Meeks for this purpose, it may do so, although it may be precluded from later seeking expansion of any limit on the number of depositions it is allowed, if it is unsatisfied with her responses.

I emphasize that the fact that the defendant may take the depositions of Hennessy and Meeks does not deprive those witnesses of any privileges or other protections that may be available to them with respect to any particular questions that may be put to them.

For the foregoing reasons, the oral motions for protective orders are **DENIED.**¹

NOTICE

In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.

¹ I have not found it necessary to address the request of the defendant to strike the affidavit of Tina Hennessy that was filed by the government along with its letter brief, because I do not refer to that affidavit in this order. I, therefore, take no action on the letters from counsel dated December 8, 2012, and December 9, 2012, on this issue.

Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.

Dated this 21st day of December, 2012.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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