IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DONALD F. HALL and MARY ANN HALL,	)	
	)	
Plaintiffs,	)	No. 3:07 CV MC279 (AVC)
v.	)	(Civil Action No. 94-951 in the U.S.
	)	District of Pennsylvania)
BABCOCK & WILCOX COMPANY	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS' MEMORANDUM
IN SUPPORT OF MOTION TO COMPEL AND IN
OPPOSITION TO NON-PARTY ANI'S MOTION TO QUASH

This subpoena enforcement action requires the Court to decide whether Plaintiffs—who seek compensation for cancers caused by releases from two nuclear fuel processing facilities in Pennsylvania—can obtain discovery from an insurance company about the insurer's role in sponsoring published scientific research about cancer rates in Plaintiffs' community. To avoid Plaintiffs' subpoenas, American Nuclear Insurers (ANI) falsely asserts that Dr. John D. Boice, Jr., of the International Epidemiology Institute, is a "designated expert" in the underlying action, denies that Dr. Boice is "employed by, associated with, or acting on behalf of ANI, which is not the case,"[1] and therefore contends discovery concerning Dr. Boice is "expert discovery" best obtained through the Defendants in the underlying case. In 2004, however, ANI represented to the United States Bankruptcy Court for the Eastern District of Louisiana that ANI had retained Dr. Boice to conduct scientific studies on its behalf, at a time when ANI was actively engaged in coverage litigation adverse to the Defendants. And contrary to the affidavit testimony submitted by ANI, though Dr.

[1] *See, e.g.,* Exhibit B to Plaintiffs' Motion to Compel, filed Oct. 3, 2007 [Docket No. 1], at 5.

 Oral Argument Requested

Boice may have been hired at some unknown later date by Defendants themselves, Dr. Boice has never been designated as an expert in the underlying litigation. ANI's position here directly contradicts what ANI said about Dr. Boice when it was to its advantage to "associate" with him, and ANI offers no reliable evidence to support its objection that the discovery concerning Dr. Boice's relationship with ANI is "expert" discovery best obtained from the Defendants in the underlying case. Because ANI's asserts only meritless objections to Plaintiffs' subpoenas for (a) documents concerning ANI's relationship with Dr. Boice; and (b) the testimony of the ANI employee believed to have knowledge of that relationship, and because ANI and its claims handler, Edward Boehner, are the most direct sources of information about ANI's relationship with Dr. Boice, the Court should therefore grant Plaintiffs' motion to compel and deny ANI's motion to quash.[2]

I. STATEMENT OF THE CASE

A. Plaintiffs seek new discovery pertinent to a Price Anderson action pending in the U.S. District Court for the Western District of Pennsylvania.

In the underlying case—*Hall, et al. v. Babcock & Wilcox, Co., et al.*, No. 94-0951 in the United States District Court for the Western District of Pennsylvania—several hundred individual plaintiffs assert personal injury, wrongful death, and property damage claims under the Price Anderson Act against ANI's insureds, Atlantic Richfield Corporation (ARCO) and Babcock & Wilcox Co. (as well as a related entity, B&W Nuclear Environmental Service, Inc.), due to releases

[2]Plaintiffs' Motion to Compel, filed Oct. 3, 2007 [Docket No. 1] and ANI's Motion to Quash, filed Oct. 5, 2007 [Docket No. 9; *see also* Docket No. 21], address the same subpoenas and present the same issues for the Court's determination. Accordingly, for purposes of efficiency, Plaintiffs address both motions in this Memorandum. ANI has submitted a memorandum in support of its motion to quash, but has not filed a response to Plaintiffs' motion to compel. Plaintiffs suggest that the Court treat ANI's Motion to Quash and supporting memorandum and evidence as a response to Plaintiffs' Motion to Compel (unless, of course, ANI cares to file further briefing) and hear both motions at the same time.

of radiation from two nuclear fuel processing facilities in Apollo and Parks Township, Pennsylvania from the 1950s through the early 1990s[3]. The case was filed in mid-1994; in 1996, during pre-trial discovery, Plaintiffs served a subpoena duces tecum on American Nuclear Insurers for documents relating to the coverage ANI provided to Defendants.[4] ANI initially objected but eventually produced approximately 900 pages consisting of its insurance policies, amendments to those policies, and notices relating to the policies, along with just 94 pages of "safety evaluations" purportedly covering more than forty years during in which ANI and its predecessors insured the facilities.[5] ANI's 1996 document production did not include any materials relating to Dr. John D. Boice, Jr.—indeed, as far as Plaintiffs know, Dr. Boice did not begin his studies of cancer incidence and mortality in the vicinity of Defendants' Apollo and Parks Township, Pennsylvania, until sometime during or after the year 2000.[6]

The *Hall* action proceeded to an initial trial of eight test cases in August 1998, resulting in a $36.5 million jury verdict in favor of Plaintiffs[7]. In mid-1999, however, the district court vacated the verdict and granted a new trial based on its finding that two exhibits discussed by Plaintiffs'

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[3] *See generally* Plaintiffs' Sixteenth Amended Complaint, attached as Exhibit B to the Affidavit of Timothy J. Cornell, Esq., in Support of American Nuclear Insurers' Non-Party Motion to Quash, filed Oct. 5, 2007 [Docket No. 9-1] (hereafter "Cornell Affid.").

[4] *See* Plaintiffs' Notice of Intent to Take Deposition By Written Questions and Intent to Issue Subpoena Duces Tecum, directed to American Nuclear Insurers, dated Sept. 19, 1996 (Ex. C to Cornell Affid.).

[5] *See* Letter from Stephen Simoni to Kay Gunderson Reeves dated June 13, 1997 (Ex. F to Cornell Affid.), at 1-2 (identifying pages 1-918 of ANI's production as "insurance policies," pages 919-1013 as "safety evaluations," pages 1014-1017 as "notices of occurrence," and pages 1018-1022 as "policy termination.").

[6] Affid. of Alicia D. Butler, Esq., in Support of Motion to Compel and in Opposition to Non-Party Motion to Quash, at ¶5 (hereafter "Butler Affid.").

[7] *See* Ex. G to Cornell Affid.

causation experts, P-37 and P-38, which contained cancer incidence data for the communities surrounding Defendants' plants, had not been properly disclosed prior to trial.[8]

Shortly after the 1998 test trial, ANI instigated litigation against B&W and ARCO due to conflicts that had developed over Defendants' desire to enter into a settlement with Plaintiffs. On November, 19, 1998, ANI sued ARCO and B&W in New York state court, seeking a declaration of rights under its policies and arguing that the coverage for Plaintiffs' claims had been exhausted.[9] This prompted B&W and ARCO to seek leave to file a third party complaint against ANI in the *Hall* action, a motion that was granted in December, 1999.[10] Though the third party complaint was later dismissed, the litigation between ANI and its insureds ultimately continued in Pennsylvania state court, beginning in 1999. That case did not conclude until December, 2003.[11]

ANI's adversity to B&W and ARCO continued beyond December, 2003. Before the underlying *Hall* case was re-tried, in early 2000, Defendant Babcock & Wilcox filed a Chapter 11 bankruptcy petition in the Eastern District of Louisiana.[12] During the pendency of B&W's bankruptcy, the parties reached a settlement which they proposed to include in B&W's Chapter 11 plan of reorganization. ANI appeared as a party in the B&W bankruptcy to object to the proposed settlement, asserting, among other things, that Defendants B&W and ARCO had acted in "bad faith"

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[8] *See Hall v. Babcock & Wilcox Co.*, 69 F. Supp. 2d 716, 722 (D. Pa. 1999)(denying motion for judgment as a matter of law and granting new trial) (Ex. B to Butler Affid.).

[9] *Hall v. Babcock & Wilcox, et al.*, 1999 WL 956311 (D. Pa. 1999) at *1.

[10] *Id.*

[11] *See, e.g.*, *Babcock & Wilcox Co. v. American Nuclear Insurers*, 2001 WL 1202358 (Pa. Com. Pl. 2001), Cause No. GD99-11498, GD99-15227; *American Nuclear Ins. v. Babcock & Wilcox, Co.*, 823 A.2d 1020 (Pa. Super. Co. 2002); *Babcock & Wilcox, Co. v. American Nuclear Ins.*, 2002 WL 31749119 (Pa. Super. 2002); *Babcock & Wilcox, Co. v. American Nuclear Ins.*, 839 A.2d 350 (Pa. 2003)(Table).

[12] *In re Babcock & Wilcox, Co.*, No. 00-10992 in the U.S. Bankr. Ct., E. D. La.

by attempting to settle with Plaintiffs, in part because two studies published by John D. Boice, Jr., in December 2003, concerning cancer incidence and mortality in the vicinity of the Defendants' facilities, demonstrated the scientific weakness of Plaintiffs' claims. Specifically, in October 2004, ANI represented to the bankruptcy court that it had retained Dr. Boice to evaluate the cancer incidence data presented in exhibits P-37 and P-38 and discussed in the district court's June 29, 1999 order granting a new trial:

> Based on the importance attached by Judge Ambrose in her new trial order to the fact that P-37 and P-38 consisted of raw, unverified data, **ANI considered it important to verify that data** to determine whether such data could be used to support an expert opinion in a re-trial similar to the opinion offered by Dr. Melius in the test case. **ANI retained for that purpose Dr. John Boice....** Dr. Boice completed his evaluation of the data and published two reports in the December 2003 edition of *Health Physics Journal* relating to cancer incidence and cancer mortality rates in the communities surrounding Apollo and Parks Township....**ANI also retained Dr. Boice** to act as an expert in epidemiology on behalf of B&W and ARCO in the new trial.[13]

Dr. Boice's articles—which were submitted to *Health Physics* in June, 2002, accepted in July 2003, and published in December 2003—state that his studies were "funded, in part, by an agreement with American Nuclear Insurers."[14] ANI did not, however, designate Dr. Boice as a testifying expert in the bankruptcy proceeding.[15] And notwithstanding the representation in paragraph 8 of the Affidavit of Timothy J. Cornell, Esq, in support of ANI's motion to quash, Dr. Boice has never been

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[13] Objections of American Nuclear Insurers and Mutual Atomic Energy Underwriters to Proposed Findings of Fact and Conclusions of Law Recommending Confirmation of the Third Amended Joint Plan of Reorganization, dated Oct. 18, 2004 (Ex. C to Butler Affid.), at 34-35.

[14] *See, e.g.,* John D. Boice, Jr., et al., "Cancer Incidence in Municipalities Near Two Former Nuclear Materials Processing Facilities in Pennsylvania," 85 *Health Physics* 678 (December 2003) (Ex. D to Butler Affid.) at 678, 689.

[15] Butler Affid. at ¶ 4.

designated as an expert in the *Hall* litigation.[16]

In the B&W bankruptcy proceeding, ANI's objections to the parties' settlement were the subject of discovery and a week-long bench trial in January 2004. Specifically, Plaintiffs served document requests on ANI for materials relevant to the bankruptcy trial concerning the validity of the proposed settlement—which did *not* including materials relating to ANI's relationship with Dr. Boice.[17] After ANI moved for a protective order and Plaintiffs moved to compel production, the bankruptcy judge ruled that ANI was not entitled to assert the attorney-client privilege for materials that its insureds wished to disclose, and therefore granted Plaintiffs' motion to compel.[18] Because ANI's insureds voluntarily waived their attorney-client and work product privileges for large portions of ANI's files,[19] ANI ultimately produced various materials relating to the matters at issue in the bankruptcy hearing—namely, materials relating to Defendants' requests for ANI to participate in settling the case and ANI's positions with respect to coverage for Plaintiffs' claims.[20] ANI did *not* produce any materials concerning Dr. Boice's studies or ANI's relationship with Dr. Boice, other

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[16] *Id.* Defendants actually cited Dr. Boice's published work in briefing directed to the Western District of Pennsylvania, *without* identifying Dr. Boice as their paid expert. *Id.* Defendants have more recently stated that they *intend* designate Dr. Boice as an expert in the future, *id.*, a representation that is not binding and that does not clarify when he became *Defendants'* retained expert (not ANI's).

[17] *See* Obj. & Resp. of American Nuclear Insurers and Mutual Atomic Energy Liability Underwriters to Apollo/Parks Township Releasors' First Set of Requests for Production of Documents Directed to Apollo/Parks Township Insurers, dated Aug. 19, 2003 (Ex. E to Butler Affid.).

[18] Order dated Nov. 25, 2003, *In re Babcock & Wilcox*, No. 00-10992 in the U.S. Bankr. Ct., E.D. La. (Ex. F to Butler Affid.).

[19] *See* Declaration of Richard D. Milone, Esq., at ¶¶3-4 and exhibits referenced therein (Exhibit G to Butler Affid.).

[20] *See* Exs. J(1) and J(2) to Cornell Affid.

than the two published articles ANI mentioned in its briefing[21]—nor did ANI designate Dr. Boice as an expert in that proceeding. ANI produced for deposition its employee Edward Boehner, who testified that in his capacity as vice president of claims, he was "exclusively responsible" for ANI's administration of the claims relating to this litigation from the time they were tendered to ANI.[22] Mr. Boehner did not testify about ANI's relationship with Dr. Boice. Ultimately, though the bankruptcy court approved the proposed settlement, B&W emerged from bankruptcy while ANI's appeal from the bankruptcy judge's decision remained pending, and the parties' settlement collapsed. In February 2007, the parties therefore returned once more to litigate the underlying case before Judge Donetta Ambrose in the Western District of Pennsylvania.

Earlier this year, Judge Ambrose ordered two common issue trials on the limited issue of general causation, i.e., whether the enriched uranium and plutonium can cause the various cancers and injuries alleged by Plaintiffs (as opposed to whether releases of these substances from Defendants' facilities caused the injuries alleged by the individual plaintiffs here).[23] On August 29, 2007, Judge Ambrose granted Plaintiffs' request for time to conduct additional fact discovery relating to the general causation trials, setting a discovery cutoff of October 15, 2007.[24] One of the subjects Plaintiffs had asked for time to explore was "the financial relationship between [Dr. Boice

[21] *See* Ex. I(2) to Cornell Affid.

[22] Deposition of Edward H. Boehner dated Nov. 24, 2003, *In re The Babcock & Wilcox Companies*, No. 00-10992, U.S. Bankr. Ct., E. D. La. (Ex. L to Cornell Affid.), at 9, 12-13.

[23] *See* Ex. N to Cornell Affid.

[24] *See* Order dated Aug. 29, 2007, in *Hall et al. v. Babcock & Wilcox, et al.,* No. 94-0952 in the U.S.D.C., W.D. Pa. (Ex. H to Butler Affid.).

and his co-authors] and Defendants' insurance company [American Nuclear Insurers]."[25] After Judge Ambrose modified the pre-trial schedule to allow time for such discovery, Plaintiffs immediately served discovery requests on both Defendants, as well as subpoenas on various third parties (including American Nuclear Insurers), seeking documents about the relationship between American Nuclear Insurers and Dr. John Boice and his employer, International Epidemiology Institute. Plaintiffs also served a subpoena and deposition notice (hereafter, the "Boehner Subpoena") on Edward Boehner, the ANI employee who was "exclusively responsible" for handling Plaintiffs' claims through at least 2003.[26]

B. This Court is now faced with two motions concerning enforcement of Plaintiffs' subpoenas to ANI and Mr. Boehner, and one motion suggesting that these matters be referred to the Western District of Pennsylvania for resolution.

On September 11, 2007, pursuant to Federal Rule of Civil Procedure 45, Plaintiffs served an amended *subpoena duces tecum* on ANI, issued by this Court (hereafter, the "Document Subpoena"), seeking documents relating to ANI's involvement in the published Boice studies and certain other communications between ANI and the Defendants that relate to the general causation trial, together with the written deposition of a custodian of records to authenticate any documents produced.[27] ANI

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[25] *See* Plaintiffs' Reply in Supp. of Motion to Modified Case Management Order, filed Aug. 23, 2007, in *Hall et al. v. Babcock & Wilcox, et al.,* No. 94-0952 in the U.S.D.C., W.D. Pa. (Ex. I to Butler Affid.), at 3.

[26] Ex. O(2) to Cornell Affid.

[27] Exhibit A to Plaintiffs' Motion to Compel, filed October 3, 2007 [Docket No. 1]. Plaintiffs initially served a subpoena on ANI on September 5, 2007; however, it appears that materials intended for International Epidemiology Institute (in Maryland) were switched with materials intended for American Nuclear Insurers prior to service of the subpoenas, with the result that the subpoena originally served on ANI named the wrong party (IEI) and was issued by the wrong court (the U.S. District Court for the District of Maryland).

served its response (consisting solely of objections) on September 25, 2007,[28] contending, among other things, that the Document Subpoena incorrectly "implies that [Dr. Boice is] employed by, associated with, or acting on behalf of ANI, which is not the case,"[29] and asserting that the Document Subpoena did not include the list of documents to be produced. Plaintiffs therefore filed with this Court a Motion to Compel on October 3, 2007, together with an affidavit of the process server demonstrating service of the complete Document Subpoena on ANI. On October 5, 2007, ANI filed with this Court its "Memorandum of Law in Support of Non-Party ANI's Motion to Quash," seeking to quash both the Document Subpoena and the Boehner Subpoena. The same day, ANI agreed to accept service of a second complete copy of the Document Subpoena that Plaintiffs counsel had mailed to ANI's counsel as a courtesy; ANI also served additional responses and objections to that subpoena.[30]

Along with their October 2, 2007, Motion to Compel, Plaintiffs filed a Motion to Transfer (and a motion to expedite the hearing on the motion to transfer), suggesting that this Court remit jurisdiction over this dispute to Judge Donetta Ambrose of the District Court for the Western District of Pennsylvania, who has presided over the underlying case since 1994. Judge Ambrose is presently considering motions for protective order filed by both Defendants that address the two subpoenas at issue here (among other things) and overlap significantly with the issues presented here.[31] Defendants, like ANI, have argued to Judge Ambrose that the discovery sought concerning Dr.

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[28] Exhibit B to Plaintiffs' Motion to Compel, filed October 3, 2007 [Docket No. 1].

[29] *See, e.g.,* Exhibit B to Plaintiffs' Motion to Compel, filed Oct. 3, 2007 [Docket No. 1], at 5.

[30] *See* Letter of Timothy Cornell to Alicia D. Butler, dated October 5, 2007 (Ex. J to Butler Affid.).

[31] *See, e.g.,* Ex. T to Cornell Affid.

Boice's studies is premature expert discovery, that the communications between ANI and Defendants are privileged, and that the requested discovery is irrelevant to the upcoming trial. On October 11, 2007, Judge Ambrose referred Defendants' motions for protective order to a special master and established a shortened briefing schedule to expedite the resolution of any further discovery disputes.[32]

II. ARGUMENT

A. ANI fails to demonstrate that its records concerning Dr. Boice are subject only to "expert" discovery in the *Hall* matter.

Without any reliable evidence, ANI asks this Court to accept at face value that all of Dr. Boice's work has been performed as a "retained expert" of Defendants—even though the record here demonstrates that ANI (not Defendants) retained Dr. Boice to protect ANI's own interests, at a time when ANI was actively litigating *against* the Defendants. The sole evidence in support of ANI's position consists of the Affidavit of Timothy J. Cornell, Esq, which states in Paragraph 8 that "Defendants designated Dr. Boice as a testifying expert in epidemiology."[33] But this is simply not true. Dr. Boice has never been designated as an expert in the *Hall* case, though Defendants have stated that they *intend* to designate him at some point in the future.[34]

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[32] Order dated Oct. 11, 2007, in *Hall, et al. v. Babcock & Wilcox Co., et al.,* No. 94-0951 in the U.S. Dist. Ct., W. D. Pa. (Ex. K to Butler Affid.).

[33] ANI's Memorandum states at page 4 that "Defendants engaged Dr. John D. Boice as a testifying expert in epidemiology," citing to paragraph 8 of the Cornell Affidavit. Paragraph 8 of the Cornell affidavit, however, states that "the Defendants designated Dr. Boice as a testifying expert in epidemiology" (emph. added). ANI has come forward with no evidence of Dr. Boice's "engagement" by Defendants; Plaintiffs object to the Cornell Affidavit as evidence of such engagement because (a) the affidavit does not state that Defendants "engaged" Dr. Boice; (b) the affidavit does not demonstrate that Mr. Cornell has personal knowledge of the purported "engagement" of Dr. Boice by Defendants; and (c) pursuant to the Rule 1002 of the Federal Rules of Evidence, Mr. Cornell's testimony is inadmissible to prove the contents of any written retainer agreement between Defendants and Dr. Boice.

[34] Butler Affid. at ¶3-4.

ANI, meanwhile, has come forward with no evidence to show when (if ever) Dr. Boice was "retained or specially employed" by the Defendants, *see* FED. R. CIV. PROC. 26(b), or what (if anything) such employment had to do with the 2003 published studies that are the subject of Plaintiffs' subpoenas to ANI. ANI's representation to the bankruptcy court reveals that ANI (and not Defendants) retained Dr. Boice to "verify" the data in exhibits P-37 and P-38,[35] at a time when ANI was busy litigating *against* Defendants in the Pennsylvania state court coverage action. Dr. Boice's publications disclose only that the studies were funded "under an agreement with American Nuclear Insurers,"[36] with no mention of any funding from Defendants. Based on the record before it, the Court should find that Dr. Boice is *not* an expert subject to the limited discovery procedures of Federal Rule of Civil Procedure 26(b)(4), and that the most straightforward method for obtaining ANI's correspondence with Dr. Boice and its files relating to Dr. Boice is by discovery directly to ANI, rather than through the Defendants (who would have to obtain the materials from ANI in any event).

Even if Defendants have retained Dr. Boice to testify in the underlying case (a fact that is not in evidence here), that should not alone prevent Plaintiffs from obtaining discovery from ANI about Dr. Boice's financial relationship with ANI and the research he published in 2003. Dr. Boice may be an expert as to some matters and a fact witness as to others. "[T]he mere designation by a party of a trial witness as an 'expert' does not thereby transmute the experience that the expert witness acquired as an actor into experience that he acquired in anticipation of litigation for trial." *Nelco Corp. v. Slater Elec. Inc.*, 80 F.R.D. 411, 414 (D. N.Y.1978). Rule 26(b)(4), which specifies the

[35]Ex. C to Butler Affid. at 34-35. Mr. Cornell and his firm, Simpson, Thatcher & Bartlett, LLP, appeared as counsel of record for ANI on that filing, *see id*. at 88.

[36] Ex. D to Butler Affid. at 689.

procedure for expert discovery, does not immunize from fact discovery a witness whose litigation work overlaps with his other work. *See Quarantillo v. Consolidated Rail Corp.*, 106 F.R.D. 435, 437 (D. N.Y. 1985) (denying protective order to limit questioning of treating physician named as an expert witness); *Nelco Corp.*, 80 F.R.D. at 414 (explaining that a witness "may be an 'expert' as to some matters and an 'actor' [subject to fact discovery] as to others").[37] Moreover, the type of information Plaintiffs' seek is not "expert" discovery: information about Dr. Boice's financial relationship with Defendants' insurer, and other help ANI provided to Dr. Boice for his published 2003 studies, does not threaten to reveal previously undisclosed *opinions* held by Dr. Boice that he may one day disclose in an expert report or offer at trial. That information about Dr. Boice's potential biases is *relevant* should be beyond dispute: Defendants have already cited Dr. Boice's published work in their briefing in the underlying case (*without* mentioning that Dr. Boice was their paid expert),[38] and whether or not Defendants actually designate Dr. Boice as a testifying expert, they will undoubtedly attempt to offer his published work into evidence or elicit information about it through the testimony of other experts. Accordingly, the Court should grant Plaintiffs' motion to compel ANI to respond to the Document Subpoena,[39] and deny ANI's motion to quash.

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[37] *See also, e.g., Sullivan v. Glock, Inc.*, 175 F.R.D. 497, 500 (D. Md. 1997) ("[A] witness can be a hybrid witness as to some opinions, but a retained expert as to others"); *Harasimowicz v. McAllister*, 78 F.R.D. 319, 320 (D. Pa. 1978) (denying protective order that would have prevented wrongful death plaintiff from deposing medical examiner who examined decedent in the ordinary course of his duties); *Eliasen v. Hamilton*, 111 F.R.D. 396, 403 (D. Ill. 1986)("[W]e think the purpose of the rule is to protect from discovery only those facts and opinions the expert has acquired and developed for the client who hired him in anticipation of litigation or for trial."); *Grinnell Corp. v. Hackett*, 70 F.R.D. 326, 333 (D.R.I. 1976) ("Where, as in the case at bar, the facts or opinions sought were not prepared for litigation or trial, there is little support for a finding that freely permitting discovery would result in any unfairness to the opposing party.").

[38] *See* Ex. A to Butler Affid., at 8.

[39] Specifically, such an order would require ANI to produce the following documents requested in Exhibit A to the Document Subpoena (Ex. A to Pls' Mot. to Compel filed Oct. 5, 2007), all of which are calculated to uncover evidence of Dr. Boice's potential financial bias, the extent of ANI's role in his work,

and the underlying information he obtained from ANI and/or Defendants for purposes of the 2003 studies:

1. All documents (written or electronic) relating to any study of cancer incidence or mortality in the vicinity of the Nuclear Materials & Equipment Corporation (NUMEC) plants located in Apollo, Pennsylvania, and Parks Township, Pennsylvania, and operated at various times under the ownership of Atlantic Richfield Corporation and Babcock & Wilcox, Co.

2. All documents (written or electronic) pertaining to any agreement to fund the following studies (hereafter referred to as "the Boice studies"): (a) John D. Boice, William L. Bigbee, Michael T. Mumma, and William J. Blot, "Cancer Incidence in Municipalities Near Two Nuclear Materials Processing Facilities in Pennsylvania"; and (b) John D. Boice, John D. Boice, William L. Bigbee, Michael T. Mumma, and William J. Blot, "Cancer Mortality in Counties Near Two Nuclear Materials Processing Facilities in Pennsylvania, 1950-1995."

3. All records (whether written or electronic) of payments made pursuant to any agreement to fund the Boice studies.

4. All documentation of any other agreement(s) between American Nuclear Insurers and any other person or entity concerning funding for work by any of the following persons and entities:

a. John D. Boice;
b. William L. Bigbee
c. Michael T. Mumma
d. William J. Blot;
e. International Epidemiology Institute;
f. Graduate School of Public Health, University of Pittsburgh;
g. University of Pittsburgh Cancer Institute;
h. Department of Medicine, Vanderbilt University Medical Center
I. Vanderbilt Ingram Cancer Center

5. All records (whether written or electronic) of all payments made by or on behalf of American Nuclear Insurers to any of the following persons or entities:

a. John D. Boice;
b. William L. Bigbee
c. Michael T. Mumma
d. William J. Blot;
e. International Epidemiology Institute;
f. Graduate School of Public Health, University of Pittsburgh;
g. University of Pittsburgh Cancer Institute;
h. Department of Medicine, Vanderbilt University Medical Center
I. Vanderbilt Ingram Cancer Center

6. All documents and materials provided by you, or at your direction, to the authors of the

B. ANI's insureds voluntarily waived the privileges ANI asserts in response to the Document Subpoena and the Boehner Subpoena.

The Court should also disregard ANI's global assertions of the attorney-client privilege for the documents responsive to Plaintiffs' subpoena *duces tecum*, and the deposition testimony of its vice president of claims, Edward Boehner.[40] In November 2003, the Bankruptcy Judge presiding over the B&W bankruptcy ruled that "ANI is not entitled to assert the attorney-client privilege or work product doctrine to preclude its insureds, ARCO and B&W, from producing Apollo/Parks joint defense documents and information. . . as the privileges reside exclusively with the insureds."[41] Defendants B&W and ARCO chose in the B&W bankruptcy to voluntarily waive any privilege claims they might otherwise assert with respect to substantial portions of the ANI file.[42] ANI's insureds also questioned Mr. Boehner at length in his deposition in the B&W bankruptcy

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> Boice studies, and/or persons working under their direction, for use in conducting the Boice studies.
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> 7. Please produce all documents exchanged between you and Babcock & Wilcox, Co. ("B&W"), B&W Nuclear Environmental Services, Inc.,and/or Atlantic Richfield Company ("ARCO"), or any person on their behalf, relating to the Apollo and Parks Township facilities, including, but not limited to:
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> . . .
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> d. any communications concerning studies of cancer incidence and mortality in the vicinity of the Apollo and Parks Township facilities; and
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> e. any communications relating to the Boice studies.

[40] *See, e.g.,* Memorandum in Support of Non-Party ANI's Motion to Quash, filed October 5, 2007, (hereafter "ANI's Mem.") at 11.

[41] Ex. F to Butler Affid., at 1.

[42] *See* Exhibit F to Butler Affid., at ¶¶3-4 and exhibits referenced therein; *see also* Exhibits J(1) & J(2) to Cornell Affid. (transmitting documents as a result of Defendants' waiver).

proceeding,[43] further undermining ANI's argument here that a deposition of Mr. Boehner is "only" likely to address matters covered by privilege. "It is well settled that when a client voluntarily discloses privileged communications to a third party, the privilege is waived." *Westinghouse Elec. Corp. v. Republic of the Phillippines*, 951 F.2d 1414, 1424 (3d. Cir. 1991); *see Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. 465, 478-79 (D. N.Y. 1993). "'The client cannot be permitted . . . to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit.'" *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993) (cit. omitted). Once a party begins to disclose confidential information, the privilege is lost for all communications relating to the same matter. *See Marshall v. U.S. Postal Service*, 88 F.R.D. 348 (D. D.C. 1980). In short, based on the record here, ANI's global objection based on privileges owned (and waived) by its insureds has no merit, and any assertions of privilege for such materials must be disregarded unless ANI identifies the withheld materials with sufficient specificity to allow the parties to assess the applicability of the privilege claims in view of Defendants' voluntary waiver in the B&W bankruptcy. The Court should therefore grant Plaintiffs' motion to compel ANI to comply with the Document Subpoena, and deny ANI's motion to quash the Document Subpoena and the Boehner Subpoena on privilege grounds.[44]

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[43] *See* Ex. L to Cornell Affid. Of the 299 pages of deposition testimony Mr. Boehner gave, 185 pages of testimony (62%) were elicited by counsel for ANI's insureds, B&W and ARCO (pp. 7-161 and 276-06).

[44] This would require ANI to respond to the requests identified in footnote 39, above, as well as to the remainder of item No. 7, which are reasonably calculated to lead to the discovery of statements by Defendants evidencing their knowledge of the health hazards caused by enriched uranium and plutonium:

> 7. Please produce all documents exchanged between you and Babcock & Wilcox, Co. ("B&W"), B&W Nuclear Environmental Services, Inc.,and/or Atlantic Richfield Company ("ARCO"), or any person on their behalf, relating to the Apollo and Parks Township facilities, including, but not limited to:

C. Plaintiffs' subpoenas do not impose an undue burden on ANI.

In weighing the burdens to ANI against the benefits to be obtained from Plaintiffs' subpoenas, the Court should give great weight to the fact that ANI is an "interested party"[45] in the defense of the underlying case, as ANI alleged when it intervened in the B&W bankruptcy proceeding to prevent that case from settling. While ANI correctly cites the decision in *Cusumano v. Microsoft Corp.*, 162 F.3d 708(1st Cir. 1998), for the proposition that "courts are sensitive to thrusting the unwanted burden on upon non-parties, thus forcing them to subsidize the costs of the litigation," ANI's Mem. at 7, the non-party in *Cusumano* was a "stranger[] to the...litigation" with "no dog in that fight." 162 F.3d at 717. ANI, by contrast, has already assumed responsibility for the costs of the defense in the underlying action[46] and will not be forced to "subsidize" those costs by virtue of Plaintiffs' subpoenas. The Court should therefore conclude that the subpoenas impose no undue burden on ANI.

ANI's briefing leaves the false impression that the subpoenas here are burdensome because ANI has been subjected to "continual" discovery requests for the same materials over the last 14 years. While the Document Subpoena focuses primarily on Dr. Boice and his relationship with ANI,

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a. any and all inspections, workplace evaluations, or other evaluations at the Apollo/Parks Township facilities;

b. any communications concerning workplace hazards, premiums, and sufficiency of coverage;

c. any communications concerning this lawsuit or the settlement or prosecution of this lawsuit;

[45] *See, e.g.,* ANI's Mem. at 4.

[46] *See, e.g.,* Cornell Affid. at ¶21 ("ANI...does have the duty and right to defend its insureds in [the Hall] lawsuit.").

these matters were never the subject of any previous discovery request or subpoena. Indeed, in that regard, Plaintiffs' current Document Subpoena can hardly be cumulative of Plaintiffs 1996 subpoena in the *Hall* action, because (as far as Plaintiffs can determine) Dr. Boice's work only began four years later, in the year 2000. ANI claims that its prior document production in the B&W bankruptcy included "documents related to experts in the Hall Action," ANI's Mem. at 12, but ANI refers only to two pre-publication copies of the articles Dr. Boice published in 2003, and ANI's production of materials for Dr. Ann Kennedy—ANI's testifying expert in the bankruptcy proceeding, who has never been designated as an expert for Defendants in the *Hall* action.[47] To the extent that there *is* any overlap between Plaintiffs' Document Subpoena and the 94-page production of "safety evaluations" in 1996, or the production of coverage-related materials during the B&W bankruptcy proceeding, any undue burden may be avoided simply by Plaintiffs' agreement that ANI need not produce duplicate copies of responsive materials that it previously produced.

ANI has offered no actual evidence of the burden it contends it would suffer by complying with the Document Subpoena, or the reasons why it would make more sense for Plaintiffs to obtain ANI's documents *through* Defendants (who would have to obtain them, in turn, from ANI), rather than directly from ANI. In *Travelers Indem. Co. v. Metropolitan Life Ins. Co.*, 228 F.R.D. 111 (D. Conn. 2005), for example, this Court quashed a non-party subpoena based on affidavit evidence that showed that compliance would "call for the review of all the documents associated with over 1,000 insurance policies, which are kept in hundreds of boxes stored in numerous branch offices, sub-offices and warehouses in several states" and the record demonstrated that the information sought could be obtained either in the public record or directly from the insured, who was a party to the

[47]Butler Affid. at ¶4.

proceeding. 228 F.R.D. at 114. In *Braxton v. Farmer's Ins. Group*, 209 F.R.D. 651 (D. Ala. 2002), the court refused to enforce a subpoena where a party to the underlying case had asserted it could supply all the requested information. Here, by contrast, ANI's affidavit and documentary evidence does not reveal how or what ANI must do to comply with the subpoena, nor does it demonstrate that all (or even some) of the information requested can be obtained directly from Defendants.

Lastly, ANI cannot demonstrate any undue burden resulting from the deposition of Edward Boehner, the employee "exclusively responsible" for handling Plaintiffs' claims for many years, based merely on the fact that Mr. Boehner testified previously in the B&W bankruptcy proceeding. Mr. Boehner gave no testimony whatsoever about ANI's relationship with Dr. Boice. The Court should give no weight to the Mr. Cornell's affidavit testimony that "nearly all of what Mr. Boehner knows with regard to the Hall Action – especially with regard to experts – he has learned through his communications with the Defendants' counsel," Cornell Affid. at ¶21. Mr. Cornell's affidavit demonstrates no proper foundation for Mr. Cornell's testimony about what Mr. Boehner knows about ANI's relationship with Dr. Boice. The Court should find Mr. Cornell's affidavit testimony particularly unpersuasive given the fact that Mr. Boehner, as an ANI employee, was readily available to give affidavit testimony directly demonstrating his own purported lack of knowledge.

III. CONCLUSION

To avoid Plaintiffs' subpoenas, American Nuclear Insurers falsely asserts that Dr. John D. Boice, Jr., is a "designated expert" in the underlying action, claims the benefit of privileges that ANI's own insureds already waived, and suggests the Plaintiffs' subpoenas would unfairly force it to "subsidize the costs" of litigation ANI is already paying to defend. ANI has come forward with no convincing evidence to demonstrate that the subpoenas at issue here impose any undue burden

on ANI or invade any applicable privilege. The Court should therefore grant Plaintiffs' motion to compel ANI's responses to the September 11, 2007 subpoena directed to ANI and its records custodian, and should deny ANI's motion to quash that subpoena and the subpoena for the testimony of Edward Boehner.

Dated: October 23, 2007.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DONALD F. HALL and MARY ANN HALL,	:	
	:	No. 3:07-mc00279 (AVC)
Plaintiffs,	:	(Case No. 94-951 in the United States
	:	District Court for the Western
-against-	:	District of Pennsylvania)
	:	
BABCOCK & WILCOX COMPANY, et al.	:	
	:	OCTOBER 23, 2007
	:	
Defendants.	:	
	:	

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2007, a copy of the foregoing Plaintiffs' Memorandum in Support of Motion to Compel and in Opposition to Non-Party ANI'S Motion to Quash was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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