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Issue Date: 16 October 2009

Case No. 2009-SOX-43

In the Matter of

LUIS FERNANDEZ,

Complainant,

v.

NAVISTAR INTERNATIONAL CORP.,
Y. MARC BELTON,
WILLIAM CATON,
JOHN D. CORRENTI,
DAVID D. HARRISON,
ABBIE J. GRIFFIN,
JAMES H. KEYES, and
DANIEL USTIAN,

Respondents.

ORDER GRANTING COMPLAINANT'S MOTION TO COMPEL

This action arises under the employee protection provisions of § 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 ("SOX"), l8 U.S.C. § 1514A. Actions brought under this statute are governed by the rules set forth in 29 C.F.R. Part 1980, as well as the general procedural rules set forth in 29 C.F.R. Part 18. A formal hearing in this matter is scheduled to commence on March 9, 2010, in the Chicago, Illinois area.

Background

Complainant's Motion:

On July 20, 2009, Complainant filed a Motion to Compel Respondent Navistar to Produce Certain Documents ("Motion"). Specifically, Complainant seeks "documents and information concerning a fact-finding investigation conducted by the law firm Sidley Austin, LLP in 2007 concerning Navistar's accounting

practices ('Sidley Report' or 'Report')." (Motion at 1). According to Complainant, Sidley Austin was retained by the Audit Committee of Navistar International Corp. ("Navistar") to conduct an independent fact-finding investigation of various accounting issues related to Navistar's financial restatements for 2003, 2004, and the first three quarters of 2005. *Id.* at 3-4. Complainant participated in the investigation and attended meetings during which Sidley Austin updated Navistar on the progress of the investigation and preliminary findings. *Id.* at 4.

Complainant stated that Navistar has refused to produce the report during discovery, claiming that it was protected by several privileges including the attorney-client privilege and the work product doctrine. (Motion at 1-2). Complainant argues that the report is relevant to his claims and Respondents' defenses and that it is not privileged material. Complainant further argues that if any privilege applies, it was waived by Navistar when it disseminated the report to third parties, including the Securities and Exchange Commission ("SEC"), Navistar's accountants, and employees of the company who were not members of the Audit Committee. *Id.* at 14-19. Complainant also argues that Respondents waived any privileges by relying on the subject matter of the investigation in its defenses. *Id.* at 20-22.

Accordingly, Complainant requests that the Court "grant [his] motion to compel responses to all discovery requests pertaining to Sidley Austin's fact finding investigation into Navistar's financial reporting and to produce the [Sidley Report] *in camera* to give this Tribunal an opportunity to determine whether the Report is privileged." (Motion at 22).

Respondents' Opposition:

On August 3, 2009, Respondents filed an Opposition to Complainant's Motion to Compel ("Opposition").[1] Respondents argue that the Sidley Report is "absolutely irrelevant" to Complainant's case. (Opposition at 6-11).[2] Respondents also argue that the Sidley Report was prepared in anticipation of litigation and is protected by the attorney-client privilege and

[1] Portions of Respondents' Opposition contain confidential business information. Good cause having been shown by Respondents, these portions have been redacted; a complete copy of the Opposition has been filed under seal.

[2] Respondents state that Complainant stole a draft of the Sidley Report prior to leaving Navistar, and contend that he and his attorneys seek discovery of the Sidley Report for inappropriate reasons. (Opposition at 1-2).

the work product doctrine. *Id.* at 7, 11-19. Respondents maintain that these privileges were not waived by Navistar, when it disclosed the report to certain third parties. Specifically, Respondents argue that disclosure to the SEC did not constitute waiver, as Navistar had a confidentiality agreement with the SEC; further, they argue that disclosure within the company did not constitute wavier and disclosure to Navistar's accountants did not result in a privilege waiver under the common interest doctrine. *Id.* at 7. Finally, Respondents argue that subject matter waiver is unwarranted because Navistar never placed the Sidley Report at issue in this litigation. *Id.* For these reasons, Respondents request that Complainant's motion to compel be denied. *Id.* at 29.

Complainant's Reply:

On August 20, 2009, Complainant filed a reply in support of his motion to compel. ("Reply").[3] Complainant first addressed several factual contentions made by Respondent, with which he disagreed. (Reply at 2-7). Complainant then argued that Navistar had waived any privilege that attached to the Sidley Report, by its disclosure of the report to the SEC and its auditors. *Id.* at 7-14. Complainant further explained why the report is relevant to his claims and requested that his motion to compel be granted. *Id.* at 15.

Respondents' Surreply:

On September 14, 2009, Respondents filed a surreply to Complainant's motion ("Surreply.")[4] Respondents maintain that the Sidley Report is irrelevant to this litigation, and note that the report contains information regarding accounting topics that Complainant admitted are irrelevant to his case. (Surreply

[3] Complainant's Reply is titled Reply in Support of Complainant's Motion to Compel Respondent Navistar to Produce Certain Documents. Pursuant to 29 C.F.R. § 18.6(b), Complainant requested leave to file a reply, which I granted by Order issued August 31, 2009. Portions of Complainant's Reply contain confidential business information. Good cause having been shown by Respondents, these portions have been redacted; a complete copy of the Reply has been filed under seal.

[4] Respondents' Surreply is titled Respondents' Surreply to Complainant Luis Fernandez's Motion to Compel Respondent Navistar to Produce Certain Documents. Pursuant to 29 C.F.R. § 18.6(b), Respondent requested leave to file a surreply, which I granted by Order issued August 31, 2009. Portions of Respondents' Surreply contain confidential business information. Good cause having been shown by Respondents, these portions have been redacted; a complete copy of the Surreply has been filed under seal.

at 2-7). Respondents maintain that no privilege was waived. *Id.* at 9-17). Accordingly, they request that Complainant's motion to compel be denied. *Id.* at 17.

Discussion

Scope of Discovery & Motions to Compel:

The procedural rules at 29 C.F.R. Part 18 provide for a broad scope of discovery and require that the parties provide detailed answers to the discovery requested. 29 C.F.R. §§ 18.14, 18.17-18.20. Parties may "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." 29 C.F.R. § 18.14(a). Further, "[i]t is not ground for objection that information sought will not be admissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 29 C.F.R. § 18.14(b).

The pertinent inquiries, therefore, are 1) whether the Sidley Report is relevant to the subject matter of this case, and 2) whether the report and the related documents are privileged.

Relevance:

"At the pretrial discovery stage of a litigation, relevancy, as it relates to information sought to be disclosed, is broadly construed and incorporates information which is not admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Sokol v. Wyeth, Inc.*, No. 07-cv-08442 (S.D.N.Y. Aug. 4, 2008)(case below ALJ No. 2006-SOX-95); *See* 29 C.F.R. § 18.14(b); Fed. R. Civ. P. 26(b)(1); *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 392 (1947)("discovery rules are to be accorded a broad and liberal treatment").

Complainant argues that the Sidley Report and related documents are relevant to his claims and defenses, because the documents will: 1) confirm the objective reasonableness of Complainant's disclosures to the Audit Committee and to Navistar officers regarding the material weakness in Navistar's internal controls, namely the "tone at the top," and the need to publicly

disclose the material weakness;[5] 2) help prove that Complainant provided information and participated in an investigation concerning violations of SEC rules governing internal auditing controls, conduct that Complainant argues is protected; 3) provide further evidence of Respondents' motives to terminate Complainant's employment;[6] and, 4) "shed light on Navistar's motive for bringing retaliatory claims against Fernandez in state court." (Motion at 9-10; Reply at 14-16). In his Reply, Complainant also argues that the report is relevant to this proceeding, as Complainant's participation in the investigation is one of his alleged protected activities. (Reply at 4).

Respondents contend that the Sidley Report is entirely unrelated to Complainant's claims or Navistar's defenses. (Opposition at 7-11). Respondents state that:

> Sidley Austin's report relates to the accounting discrepancies underlying Navistar's financial restatement. Sidley Austin was retained to conduct the investigation in August 2006, nine months before Navistar hired Mr. Fernandez. Every single event that is the subject of the report took place long before Mr. Fernandez was hired. . . . The report does not once reference Mr. Fernandez. Obtaining a copy of the report can only serve to cause undue embarrassment to the individuals investigated therein.

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[5] In order for an internal or external complaint to be protected under SOX, the complainant must have an objectively reasonable basis for the complaint. *See* 18 U.S.C. § 1514A(a)(1); *Leak v. Dominion Resources Services, Inc.*, 2006-SOX-12 (ALJ May 12, 2006); *Harp v. Charter Communications, Inc.*, No. 07-1445 (7th Cir. Mar. 16, 2009).

[6] In Complainant's Reply, Complainant's counsel stated that

> the Report is relevant to Respondents' motive in that Fernandez contends that the Audit Committee of the Board of Navistar and Navistar senior management sought to cloak certain findings in the Report about the culpability of senior officers of Navistar for Navistar having to restate more than one billion dollars of earnings.

(Reply at 14). Complainant's counsel maintains that he is unaware of the specifics, but has a duty to act on his client's request to obtain documents and information that Complainant believes will enable him to prove causation and motive. *Id.* at 14-15.

Id. at 8. Respondents further argue that "Nowhere does Mr. Fernandez's complaint allege that he was retaliated against for aiding Sidley Austin with its internal investigation." *Id.* at 11.

Regarding Complainant's specific assertions of relevance, Respondents argue that the Sidley Report is not relevant to any of those issues. (Opposition at 8-10). First, Respondents argue that the Sidley Report is unnecessary to show the objective reasonableness of Complainant's disclosures to the Audit Committee. *Id.* at 8-9. Second, Respondents argue that Complainant does not need to prove that he provided information and participated in an investigation concerning violations of SEC rules. (Opposition at 9). Respondents note that they have admitted to Complainant's participation in the investigation. *Id.* Third, Respondents argue that the Sidley Report is not needed to provide "further evidence of Respondent's motive to terminate Complainant's employment." (Opposition at 9-10). Respondents note that Navistar self-reported its accounting discrepancies to the SEC. Respondents further maintain that Navistar's communications with attorneys at Sidley Austin had nothing to do with the public disclosures, as other law firms represent it in preparing its public filings. *Id.* at 10. Finally, Respondents argue that the State court lawsuit brought by Respondents was not for retaliatory purposes. (Surreply at 6-7). Therefore, Respondents argue that the report is entirely irrelevant to this proceeding. (Opposition at 11).

Complainant referenced the Sidley Austin investigation on several occasions in his complaint. In his Third Amended Complaint, Complainant alleged that Respondents retaliated against him because he "disclosed information and participated in investigations about conduct that he reasonably believed violated, *inter alia*, rules of the [SEC]." (Third Amended Complaint ¶ 2). Complainant stated that he actively participated in the independent investigation by Sidley Austin, raising concerns about Navistar's internal controls. *Id.* ¶¶ 32-33. Complainant also contended that Sidley Austin's investigation corroborated his concerns about Navistar's internal control deficiencies. *Id.* ¶¶ 67-70.

I interpret the regulatory provisions on discovery to require the full disclosure of all relevant information and documents prior to the hearing. Here, Complainant has shown that the report is relevant to the subject matter of his case. Accordingly, unless the report is privileged, it must be produced.

Privilege:

Only non-privileged information and materials may be obtained through discovery. 29 C.F.R. § 18.14(a). Respondents argue that the Sidley Report is protected by both the attorney-client and work product privileges. (Opposition at 11-19). Complainant argues that neither privilege is applicable to the Sidley Report and related documents. (Motion at 10-14).

Attorney-Client Privilege

Respondents argue that the Sidley Report and related communication are protected by the attorney-client privilege. (Opposition at 11-14). Respondents contend that this privilege protects not only traditional legal advice, but also overall legal assistance. *Id.* Respondents cite to several cases for the proposition that attorneys may be hired to conduct internal investigations in their professional legal capacity. *Id.* at 12. Respondents contend that the Sidley Austin "investigation involved recreating the legally relevant facts, determining legal compliance and providing legal advice to the company." *Id.* at 13. Respondents state that the attorneys at Sidley Austin were not retained solely, or largely, for business advice, but instead were retained to review "the conduct of individuals with an 'eye to the legally relevant,' including legal duties of care and other standards used to assess the events underlying the restatement." *Id.* at 13. Respondents note that the report was created by an attorney, not simply sent to an attorney in an attempt to create a privilege shield, as was the situation in cases cited by Complainant. *Id.* at 14 n.2.

Complainant argues that the attorney-client privilege does not apply to the Sidley Report. (Motion at 10-12). Complainant states that Sidley "was conducting 'a fact-finding investigation' with the intention of disclosing the results of the investigation to the SEC (rather than providing legal advice to Navistar or its Board in confidence)," and thus argues that the report is not privileged. *Id.* at 11. Complainant argues that "conducting a fact-finding investigation that would be publicly disclosed is fundamentally inconsistent with the role of an attorney who is hired to provide legal advice that is intended to be kept confidential." *Id.* at 12. Further, Complainant states that simply because the person preparing the report was an attorney does not deem the work privileged where no legal advice was sought or given. *Id.* Finally, Complainant argues that if a portion of the report is considered legal advice, the proper inquiry is whether an element of legal advice predominates the

communication, or whether it is incidental to business advice. Complainant states that "As the primary purpose of the Sidley Report was to summarize the results of a fact-finding investigation, rather than to provide legal advice, the Report is not privileged." *Id.*

The attorney-client privilege is governed by the principles of common law and exists "to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981). The Court of Appeals for the Seventh Circuit, under whose jurisdiction this case arises, has adopted the following general principles of the attorney-client privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

U.S. v. White, 950 F.2d 426, 430 (7th Cir. 1991)(quoting *United States v. Lawless,* 709 F.2d 485, 487 (7th Cir. 1983)(*citing* 8 Wigmore § 2292)). The party seeking to invoke the privilege carries the burden of establishing all essential elements. *Id.*

Courts have held that the attorney-client privilege can apply to investigations performed by attorneys, in addition to more traditional legal services. *Upjohn*, 449 U.S. at 390-92 ("The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant."); *In re Allen*, 106 F.3d 582, 602 (4th Cir. 1997)("Courts have consistently recognized that investigation may be an important part of an attorney's legal services to a client."); *Penesso v. LCC Int'l, Inc.*, ALJ No. 2005-SOX-16, Order Granting in Part and Denying in Part Complainant's Motion to Compel Discovery (ALJ March 18, 2005)(finding that an investigation prepared on behalf of a company's general counsel was protected by attorney-client privilege). The attorney must, however, perform the investigation in his or her legal capacity, not simply as a businessperson.

The attorney-client privilege does not extend to all communications with an attorney. Merely sending a copy of a letter to one's attorney does not make the document confidential or trigger the attorney-client privilege. *Bell Microproducts,*

Inc. v. Relational Funding Corp., 2002 WL 31133195 (N.D.Ill. 2002). Further, "[i]nformation imparted to counsel without any expectation of confidentiality is not privileged." *In re Feldberg*, 862 F.2d 622, 628 (7th Cir. 1988). If, therefore, a client transmits information to an attorney with the intent that it be sent to a third party, such information is not confidential. *White*, 950 F.2d at 430 (information disclosed for the purpose of assembly into a bankruptcy petition and supporting schedules was not confidential); *U.S. v. Lawless*, 709 F.2d 485, 487-88 (7th Cir. 1983).

Here, the attorneys at Sidley Austin performed an investigation into Navistar's financial restatements of 2003, 2004, and 2005. (Motion at 3-4). Respondents argue that the investigation involved determinations of legal compliance, including legal duties of care of the individuals investigated. (Opposition at 13). Complainant maintains, however, that the investigation report communicated business advice, not legal advice. (Motion at 11-12). I find that the investigation into Navistar's financial restatements required the attorneys at Sidley Austin to act in their capacity as attorneys. Moreover, although some results of the investigation were disclosed to the public, I find that the Sidley Report and related documents were intended to be kept confidential. Accordingly, I find that Respondents have established that the attorney-client privilege protects the Sidley Report and related correspondence from disclosure during discovery, unless the privilege has been waived.

Work Product Protection

Respondents contend that Sidley Austin's internal investigation materials are protected by the attorney work product doctrine, and that Complainant has not demonstrated a substantial need for those documents. (Opposition at 14). Respondents contend that the Sidley Report was prepared in anticipation of litigation. "As soon as Navistar determined that a restatement of its financials was necessary, it knew that there was a reasonable expectation that litigation could follow because an event giving rise to articulable claims had arisen." *Id.* at 15. Respondents also note that Navistar has been named in at least three suits relating to its restatement. *Id.* at 15-16. Respondents contend that Sidley Austin was hired to conduct a full-scale inquiry, precisely because of the threat of litigation. *Id.* at 16.

> The Sidley Austin investigation and resulting report was not an undertaking in the ordinary course. The report

> was instigated by an unusual multi-year restatement. The company had never engaged in this type of large-scale, sixteen month-long investigation, particularly by outside counsel. Further, the securities lawsuits against Navistar (irrespective of the lack of merit) were reasonably anticipated for a large, public company engaging in a multi-year restatement.

Id. at 17. Respondents deny that the report was prepared for the SEC and state that another law firm represented Navistar for that purpose. *Id.* at 17-18.[7]

Complainant argues that the Sidley Report is unrelated to litigation and is not protected under the work product doctrine. (Motion at 12-14). Complainant states that:

> Performing a fact-finding investigation for the purpose of reporting the cause of an earnings restatement to the SEC is wholly inconsistent with the purpose of the work product doctrine, *i.e.*, Sidley Austin was not developing a confidential strategy for defending against claims, but instead was gathering information for the purpose of a public disclosure, and indeed the results of the investigation were disclosed to shareholders. . . . The fact that Navistar disclosed the Sidley Report to the SEC calls into doubt whether the Report really qualifies for work product protection.
>
> Even if Navistar can demonstrate that the Sidley Report is work product prepared in anticipation of litigation concerning securities law violations, the Report should be discoverable under Rule 26(b)(3) in that the Report would not reveal Navistar's strategy in the instant litigation. Fernandez is not pursuing a shareholder fraud action, but instead is pursuing a retaliation claim and therefore the Report would not reveal any legal strategy that could give Fernandez an advantage in pursuing his retaliation claim. As Navistar can designate the Report confidential under

[7] Finally, Respondents contend that much of the information contained in the Sidley Report involves attorney assessments of intentional misconduct at Navistar; therefore, they argue that these mental impressions are non-discoverable "opinion" work product. (Opposition at 18-19). To the extent that the Sidley Report contains facts, Respondents argue that Complainant has not shown a substantial need for the documents, or that the facts could not be obtained elsewhere. *Id.*

> the protective order to which the parties have stipulated in this case, there is no risk that any material in the report would be shared by Fernandez with a plaintiff in a shareholder fraud action.

Id. at 13-14.

The work product doctrine protects otherwise discoverable documents prepared in anticipation of litigation or for trial. *Hickman v. Taylor*, 329 U.S. 495 (1947). The doctrine was codified in the Federal Rules of Civil Procedure, and has been included in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, as follows:

> (c) A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (a) of this section and prepared in anticipation of or for the hearing by or for another party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the administrative law judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

29 C.F.R. § 18.14(c); *see also* Fed. R. Civ. P. 26(b)(3).

The threshold determination is whether the documents sought during discovery were prepared in anticipation of litigation or for a hearing. The Seventh Circuit has held that "the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983)(quoting 8 Wright & Miller, Federal Practice & Procedure, Civil, Section 2024). The court stated that "the party seeking to assert the work product privilege has the burden of proving that 'at the very least some articulable claim, likely to lead to litigation, has arisen.'" *Id.* at 1119 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980)). However, "the mere fact that litigation does eventually ensue does not,

by itself, cloak materials prepared by an attorney with the protection of the work product privilege." *Id.* at 1118.

In *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971 (7th Cir. 1996), the Seventh Circuit maintained that "[w]hile much of the paperwork generated by insurance companies is prepared with an eye toward a possible legal dispute over a claim, it is important to distinguish between 'an investigative report developed in the ordinary course of business' as a precaution for the 'remote prospect of litigation' and materials prepared because 'some articulable claim, likely to lead to litigation . . . has arisen.'" *Logan*, 96 F.3d at 977 (quoting *Binks*, 709 F.2d at 1120).

Courts have held that investigative reports are protected by the work product doctrine if they are prepared in anticipation of litigation. *U.S. v. Nobles*, 442 U.S. 225 (1975); *Logan*, 96 F.3d at 977; *In re Vecco Instruments*, 2007 WL 210110 (S.D.N.Y. Jan. 25, 2007); *In re Allen*, 106 F.3d 582 (4th Cir. 1997); *Hollinger Int'l Inc. v. Hollinger Inc.* (N.D.Ill. 2005); *Penesso v. LCC Int'l, Inc.*, ALJ No. 2005-SOX-16, Order Granting in Part and Denying in Part Complainant's Motion to Compel Discovery (ALJ March 18, 2005). In 2007, the federal district court for the Southern District of New York encountered a factually similar case, in which a corporation's outside counsel conducted an internal investigation regarding the possible need for a financial restatement. *In re Vecco Instruments*, 2007 WL 210110 (S.D.N.Y. Jan. 25, 2007). In an unpublished decision, the court found that the documents were eligible for work product protection. *Id.*

If the investigation is not related to future litigation, however, it does not receive work product protection. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977)(*en banc* 1978). In *Diversified Industries*, the Eighth Circuit held that the work product doctrine did not cover an investigation into business practices prompted by the disclosure of certain information during the course of earlier litigation. *Id.* at 600. The court found that the law firm was not employed to give legal advice to the company or to represent it in any pending or potential litigation. *Id.* On hearing *en banc*, however, the court held that the attorney-client privilege was applicable. *Id.* at 611.

Here, Respondents restated their finances for the years 2003, 2004, and the first three quarters of 2005. Respondents contend that Navistar had a reasonable expectation that shareholder derivative litigation would follow as a result of these restatements, based on examples of other large companies that

restated their financials with the SEC. (Opposition at 15). Indeed, Navistar has been sued in at least three cases relating to its financial restatement. *Id.* at 15-16. I find that an articulable claim had arisen, and that the report was prepared in anticipation of litigation that would likely ensue. Accordingly, I find that the work product doctrine applies to the Sidley Report and related documents, and that the doctrine protects these documents from disclosure, unless it has been waived.

Waiver of Privileges:

Courts have generally held that a voluntary disclosure of attorney-client privileged material to a third party waives the privilege as to all. Disclosure of information protected by the work product privilege, however, only results in a waiver if it is disclosed or made available to an adversary. "While the attorney-client privilege is often treated as waived by any voluntary disclosure, only disclosures that are 'inconsistent with the adversary system' are deemed to waive work-product protection." Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 610 (American Bar Association 4th ed. 2001).

Complainant argues that even if a privilege is applicable, Navistar waived any privilege by providing the report to several third parties. (Motion at 14-19). Complainant contends that in the Seventh Circuit, "[k]nowing disclosure to a third party almost invariably surrenders the privilege with respect to the world at large; selective disclosure is not an option." (Motion at 15)(quoting *Burden-Meeks v. Welch*, 319 F.3d 897 (7th Cir. 2003)). Complainant argues that Navistar's Audit Committee waived its privilege regarding the Sidley Report when it disclosed the report to the SEC, Navistar's Board Members, Officers, and Employees not on the Audit Committee, and to its independent auditors and consultants at KPMG and Calloway Partners. *Id.*

Respondents argue that neither the attorney-client privilege, nor work product protection was waived. (Opposition at 19-27). Regarding work product protection, Respondents contend that "[b]ecause the concerns underlying this privilege are systemic and not related solely to confidentiality concerns, only those disclosures that are 'inconsistent with the adversary system' are deemed to waive work product protection." (Opposition at 19) (citing *Eagle Compressors Inc. v. HEC Liquidating Corp.*, 206 F.R.D. 474, 479 (N.D.Ill. 2002)). Further, Respondents argue that "[w]aiver only occurs where disclosure to a third party occurs 'in a manner which substantially increases the opportunity for potential adversaries to obtain the information.'" *Id.* (citing *Lawrence E. Jaffe Pension Plan v. Household Int'l*, 237

F.R.D. 176, 186 (N.D.Ill. 2006)). Respondents contend that the Sidley Report was not made available to any adversaries. (Opposition at 19-27). Respondents note that they entered into a confidentiality agreement with the SEC under which they agreed that the report would remain confidential. *Id.* at 23. Respondents further argue that Navistar shared a common interest of SEC compliance with its auditors, who should not be considered adversaries. *Id.* at 23-27.

Disclosure to the SEC

The U.S. Circuit Courts of Appeal have taken divergent approaches as to whether disclosures of documents to third parties such as the SEC results in a complete waiver of the attorney-client and work product privileges.

The Eighth Circuit, in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978), adopted the concept of selective waiver. In that case, the petitioner turned over privileged information during an SEC investigation and the respondent argued that the company had waived its attorney-client privilege as to the disclosed materials. *Diversified*, 572 F.2d at 599. The court disagreed, and instead found that a limited waiver had occurred:

> As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred. . . . To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.

Id. at 611.

Many other circuit courts have rejected the concept of selective waiver, including the First, Third, Fourth, Sixth, and D.C. Circuits. *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 686-87 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991); *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 307 (6th Cir. 2002); *Permian Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981); *In re Subpoenas Duces Tecum*, 738 F.3d 1367 (D.C. Cir. 1984). These courts have essentially held that disclosure of privileged information to one individual is a waiver as to all.

In *Westinghouse*, the Third Circuit held that disclosure of investigation findings to the SEC and Department of Justice ("DOJ") caused Westinghouse to waive both the attorney-client and work product privileges as to those documents. 951 F.2d at 1423-31. The court had "no difficulty concluding that the SEC and DOJ were Westinghouse's adversaries," and held that disclosure of its work product to these government agencies "waived the work-product doctrine as against all other adversaries." *Id.* at 1428-29.

The Sixth Circuit, in *Columbia/HCA Healthcare*, engaged in a thorough review of the circuit law regarding selective waiver, and "after due consideration," rejected the concept of selective waiver, "in any of its various forms." 293 F.3d at 295-302. In that case, Columbia/HCA performed internal audits which it eventually produced to the DOJ after entering into a stringent confidentiality agreement. *Id.* at 291-92. In subsequent litigation, private insurance companies and individuals sought to obtain the audit documents, which Columbia/HCA argued were privileged. *Id.* After reviewing the law in other circuits, the Sixth Circuit determined that both the attorney-client privilege and the work product privilege were waived when the company disclosed the documents to the government. *Id.* at 302.

The First Circuit, in *United States v. Massachusetts Institute of Technology* ("MIT"), held that the attorney-client privilege was waived when MIT disclosed confidential information to a government audit committee. 129 F.3d at 684-86. Further, the court held that any work product protection was waived when the information was disclosed to the audit agency, "a potential adversary." *Id.* at 687. The Court of Appeals for the District of Columbia has held that the attorney-client and work product privileges are waived when a document is provided to the SEC. *Permian Corp. v. U.S.*, 665 F.2d 1214, 1222 (D.C. Cir. 1981)(holding that the attorney-client privilege was waived when a company disclosed confidential communications to the SEC staff); *In re Subpoenas Duces Tecum*, 738 F.3d 1367 (D.C. Cir. 1984)(finding that the work product privilege was waived when documents were provided to the SEC under no expectation of confidentiality).

The Seventh Circuit has not directly addressed the issue of whether disclosure of documents to the SEC, pursuant to a confidentiality agreement, results in a waiver of privileges. The court has, however, addressed the waiver of privilege by disclosure of documents to a third party.

In *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997), the Seventh Circuit encountered a case in which

the government had disclosed to attorneys for a company under investigation audio and video tapes, which were protected by the "law enforcement investigatory privilege." *Dellwood Farms*, 128 F.3d at 1124. Placing significance on the lack of a confidentiality agreement between the government and the attorneys, the Seventh Circuit stated that "courts feel, reasonably enough, that the possessor of the privileged information should have been more careful, as by obtaining an agreement by the person to whom they made the disclosure not to spread it further." *Id.* at 1127.

In 2003, the Seventh Circuit again addressed the issue of selective waiver. *Burden-Meeks v. Welch*, 319 F.3d 897 (7th Cir. 2003). In *Burden-Meeks*, the plaintiffs were former city employees who had been fired by the city's mayor. *Id.* at 898-99. The plaintiffs sought to obtain a copy of an investigation report, which discussed the city's litigation exposure. The report had been prepared by a third party, who then shared it with the mayor. *Id.* at 899. The court in *Burden-Meeks* expressed doubt that the report was protected by the attorney-client privilege, but held that any privilege was waived when the report was shown to the mayor. Citing its previous decision in *Dellwood Farms*, the court stated that "Knowing disclosure to a third party almost invariably surrenders the privilege with respect to the world at large; selective disclosure is not an option." *Id.*

Although the Court of Appeals for the Seventh Circuit has not decided a case with facts similar to those here, district courts within this circuit have addressed analogous issues. In a recent case in the Northern District of Illinois, a magistrate judge held that a company did not waive its attorney-client or work product privileges by disclosing investigation documents to the SEC pursuant to a confidentiality agreement. *Lawrence E. Jaffe Pension Plan v. Household Int'l [Jaffe]*, 244 F.R.D. 412 (N.D.Ill. 2006). In *Jaffe*, the judge stated that "[t]his court cannot say with any certainty whether the Seventh Circuit would apply selective waiver in this context, and the court declines to adopt a *per se* rule regarding waiver with respect to government disclosures." *Id.* at 433. The court went on to "agree[] with those cases finding that selective waiver may be appropriate when the disclosing party took steps to preserve its privilege." Accordingly, it found that work-product privilege had not been waived by the company's voluntary disclosure of otherwise privileged documents to the SEC. *Id.*

Several other judges in the Northern District of Illinois, however, have held otherwise and found that work product and attorney-client privileges were waived when a document was

disclosed to a government entity, regardless of any confidentiality agreements. *See U.S. v. South Chicago Bank*, 1998 WL 774001 (N.D.Ill. 1998)(attorney-client and work product privileges were waived by disclosure of a report to an Illinois Commissioner, who had agreed to keep the report confidential); *In re Bank One Sec. Litig.*, 209 F.R.D. 418 (N.D.Ill. 2002)(bank waived work product privilege when it provided documents to a regulator, despite the existence of a confidentiality agreement); *Hobley v. Burge*, 2004 WL 856439 (N.D.Ill. 2004)(city waived any attorney-client and work product privileges upon disclosure of documents to the Special Prosecutor); *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407 (N.D.Ill. 2006)(holding that claims of privilege were waived when documents were produced to the DOJ).

Respondents rely heavily on the *Jaffe* decision to support their argument that they have not waived attorney-client and work product privileges as to the Sidley Report. Respondents also cite to cases in the Second and D.C. Circuits which leave open the possibility that a confidentiality agreement with the SEC may protect a party from waiving privilege. (Opposition at 23) (citing *Salomon Brothers Treasury Litig. v. Steinhardt Partners*, L.P., 9 F.3d 230, 236 (2d Cir. 1993)); *In re Natural Gas Commodities Litig.*, 232 F.R.D. 208, 211 (S.D.N.Y 2005); *In re Subpoenas Duces Tecum*, 738 F.3d 1367 (D.C.Cir. 1984)).

Complainant argues that the Seventh Circuit rejected selective waiver in *Burden-Meeks*, and that the majority of the judges in the Northern District of Illinois have held that selective waiver does not preserve privilege upon disclosure to a government agency or entity, even if a confidentiality agreement is present. (Reply at 8-11).[8]

In sum, the Seventh Circuit has not specifically ruled on the issue of selective waiver in this type of case. In one factually-analogous case in the Northern District of Illinois, selective waiver was applied. However, the majority of judges in the district have rejected the concept of selective waiver. Further, the vast majority of the circuit courts of appeal have held that privileges are waived when a document is disclosed to a government entity. Taking into account the range of approaches to this issue, the arguments of the parties, the policy behind

[8] Complainant also argues that only Navistar's counsel, Skadden Arps, had a confidentiality agreement with the SEC, and that the agreement did not cover material prepared by Sidley Austin. (Reply at 4-5). I reject this argument, as the confidentiality agreement was clearly between Navistar and the SEC.

the privileges, and the facts in this particular case, I agree with the majority of the courts that the attorney-client and work product privileges are waived upon disclosure to a third party adversary such as the SEC.

The attorney-client privilege exists "to encourage full and frank communication between attorneys and their clients." *Upjohn*, 449 U.S. at 389. Unlike the work product privilege, courts have generally held that the attorney-client privilege is waived when confidential communication is disclosed to any third party. The Seventh Circuit, when discussing the attorney-client privilege, specifically stated that "selective disclosure is not an option." *Burden-Meeks*, 319 F.3d at 899. Here, although Navistar had a confidentiality agreement with the SEC, I find that the attorney-client privilege was waived when Navistar knowingly disclosed the Sidley Report to a third party.

Waiver of work product protection involves a more stringent standard and requires a disclosure that is inconsistent with the adversary system. Courts have consistently held that the SEC is an adversary, particularly when it is investigating the company in question. *See e.g. In re Subpoenas Duces Tecum*, 738 F.3d at 1372; *Westinghouse*, 951 F.2d at 1428. Here, the SEC was investigating Navistar with respect to several years of financial restatements. I find that the SEC was an adversary of Navistar, and that by disclosing the Sidley Report to the SEC, Respondents waived any work product protection, despite the presence of a confidentiality agreement.

Disclosure to Navistar Employees & Accountants

As I have found that Respondents waived the attorney-client and work product privileges when the Sidley Report was disclosed to the SEC, I will not address the parties' arguments regarding whether any privileges were waived upon disclosure to other individuals.

ORDER

I have found that the Sidley Report is relevant and that the attorney-client and work product privileges have been waived; accordingly, **IT IS ORDERED** that:

1. Complainant's Motion to Compel is hereby **GRANTED**;

2. Respondents have thirty (30) days from the date of this Order to make available to Complainant's counsel the

Sidley Report and documents related to the internal investigation that were disclosed to the SEC; and,

3. Complainant and his counsel must treat the documents as confidential pursuant to the parties' Stipulated Protective Order.[9]

A

LARRY S. MERCK
Administrative Law Judge

[9] The parties have entered into a protective order, pursuant to which information must be kept confidential and used for this litigation only. Complainant has agreed that Navistar may designate the Sidley Report as confidential under the protective order. (Motion at 14).