

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS

* * * * *

IN THE MATTER OF: * NO. 07-11862
RON WILSON AND LARHONDA WILSON, * SECTION "A"
DEBTORS. * CHAPTER 13

* * * * *

Transcript of the proceedings taken in the above captioned matter on **Wednesday, January 13, 2010**, the Honorable Elizabeth W. Magner, United States Bankruptcy Judge, presiding.

AUDIO OPERATOR: Gaynell Donelon
TRANSCRIPTIONIST: Ann B. Schleismann
1403 Calder Street
Gretna, Louisiana 70053
(504) 366-6672

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

APPEARANCES :

Office of the U.S. Trustee
By: Amanda Burnette, Esquire
400 Poydras Street, Suite 2110
New Orleans, Louisiana 70130

Office of the U.S. Trustee
By: Sean Haynes, Esquire
200 Jefferson Avenue, Suite 400
Memphis, Tennessee 38103

Representing the United States Trustee's Office

Gardere Wynne Sewell, LLP
By: Michael P. Cash, Esquire
1000 Louisiana, Suite 3400
Houston, Texas 77002

Representing Fidelity National Foreclosure Solutions

P R O C E E D I N G S

(Wednesday, January 13, 2010)

THE CLERK: This is a continuation of the calendar for Judge Elizabeth W. Magner on today, Wednesday, January 13th, 2010. We're going to hear Case Number 07-11862, Ron and LaRhonda Wilson.

THE COURT: Appearances, please.

MR. HAYNES: Your Honor, I'm Sean Haynes for the United States Trustee, and my colleague is Amanda Burnette.

MR. CASH: Your Honor, Michael Cash for Fidelity.

THE COURT: Okay, Mr. Haynes, your motion.

MR. HAYNES: All right, thank you, Your Honor.

Your Honor, first we pointed out in our reply yesterday that Fidelity's response was filed past the bar date and we ask our motion to be granted. I know Mr. Cash is here and we've seen their response and I'll go ahead with our --

THE COURT: I'll go ahead and take the argument from Mr. Cash.

MR. HAYNES: All right. Thank you, Your Honor.

Your Honor, I'll start off with the relief that we'd ask from the Court and that is that documents concerning communications between the United States Trustee and Counsel on or after May 9th, 2008, and work product materials created after May 9th, 2008 not be subject to production or inclusion in a privilege log. And, Your Honor, there's some basic

1 concepts that I'd ask the Court to keep before it. First is
2 that date, May 9th, 2008, which is when the Court entered the
3 first Order to Show Cause when in essence this collateral
4 proceeding began.

5 Next, Your Honor, is that we have fully responded.
6 The sequence here isn't that we filed a Motion for Protective
7 Order and then we responded. We responded. Your Honor, we
8 have given written responses, of course that are exhibits to
9 what we filed our motion that we filed, and we've answered the
10 interrogatories. We've produced 345 pages of documents. And
11 of course, Your Honor, that doesn't even speak to the documents
12 that Fidelity itself has that would be highly relevant, or that
13 Option had and Boles had, and as well we've given over a one
14 page log where we invoked the investigative files privilege.
15 So, we fully responded. All that's left, Your Honor, is what
16 we've come into this Court for relief on and those are the
17 documents created after May 9th, 2008.

18 Your Honor, finally, if --

19 THE COURT: And when you're saying the documents
20 created after May 9th --

21 MR. HAYNES: Correct, Your Honor.

22 THE COURT: -- you've turned over any document that
23 even if you received it after May 9th, 2008 that was a third
24 party document?

25 MR. HAYNES: We have, Your Honor. And I think we've

1 bend over backwards, because I think that this --

2 THE COURT: Okay, and you've also turned over -- and
3 when I say "a third party document," that third party --

4 MR. HAYNES: Externally created.

5 THE COURT: Right. Whether it came from another
6 U.S. Attorney's Office or your own office.

7 MR. HAYNES: All right, Your Honor, no, --

8 THE COURT: Okay.

9 MR. HAYNES: -- I mean external to our agency.

10 THE COURT: Well, when I say "external," I mean the
11 same thing. When I say a document from another U.S. Attorney's
12 Office, I mean let's suppose that there was a document that was
13 prepared by Countrywide -- I'll just throw out a number, you
14 know, a document for some how it's relevant. And the
15 U.S. Attorney's Office in Pittsburgh sent that document to you.
16 It is a copy of an external document in that it was not
17 produced by the U.S. Attorney's Office in Pittsburgh. It's not
18 their document. It's something that was in their files that
19 they're giving to you.

20 MR. HAYNES: Oh, I see what you're saying. Well,
21 first of all, Your Honor, I'm trying to think of any instance
22 where that would be -- and I assume Your Honor is also
23 including United States Trustee's Office, not just the
24 U.S. Attorney's Office.

25 THE COURT: Right.

1 MR. HAYNES: But I cannot think of any instance, but
2 there's also an aspect which I would submit, Your Honor, that
3 that could be work product privilege and we might not turn that
4 over. I'm just -- right now I know we've asserted in our
5 responses --

6 THE COURT: Okay, here's my problem, Mr. Haynes. If
7 there is a document that is what I call a true external
8 document, meaning it was not produced by, authored by, created
9 by a U.S. Trustee's office no matter wherever in the country,
10 or U.S. Attorney's Office wherever in the country, but is in
11 fact was either authored, created, or produced by a third
12 party, a true external document, then I guess I need to know
13 why that would not be subject to the discovery, assuming it
14 meets the parameters of the question. And from reading your
15 arguments in our memo in support and your reply it indicated to
16 me that those had been turned over. Now, if they don't exist,
17 that's fine, but --

18 MR. HAYNES: Okay, all right, I have two ways of
19 responding, Your Honor.

20 THE COURT: All right.

21 MR. HAYNES: You know we're talking about thousands
22 of pages of documents, but my recollection is that there's no
23 document that would fall in that category that would not have
24 been turned over.

25 THE COURT: Okay.

1 MR. HAYNES: But on the other hand, Your Honor, I
2 would just refer the Court to for example the *1100 West, LLC*
3 case that we cited in our reply --

4 THE COURT: Okay.

5 MR. HAYNES: -- where the court deals with -- excuse
6 me, in our original motion, our memorandum supporting our
7 motion. Okay, in that case the subpoena goes to the
8 investigator's file. And the court works through the analysis
9 of saying in the course of this investigator's file he may have
10 obtained an external document, a document that's not
11 privileged, but it was a document that he thought was relevant
12 to assisting the attorney he had been hired to assist in this
13 case. And so the court says that that document would be
14 protected; it would not have to be turned over.

15 Or for example, Your Honor, in the *Oklahoma v Tyson*
16 *Foods* case and in that case Oklahoma was concerned about the
17 runoff of waste product from this farmland into these creeks
18 and rivers and it had sent a request for production to the
19 defendant. And the defendant had contracts with these farmers
20 to raise poultry, and of course there's I guess waste or
21 manure. And the question is what have you done with that?
22 Have you used it as fertilizer and the runoff? After the
23 litigation commenced -- well, I guess I'm getting -- that's an
24 example of a document which was created by the attorney from
25 external sources. And the court there said, "You don't have to

1 turn that document over.”

2 Now, the counsel in that case had a problem because
3 they had falsely answered an interrogatory. And that’s where
4 the court says that’s where that information has got to be
5 disclosed. Facts have to be disclosed, not documents. And so
6 therefore, Your Honor, I hope that --

7 THE COURT: Well, not completely.

8 MR. HAYNES: Okay.

9 THE COURT: You’ve got me in this position of trying
10 to rule on first of all documents I don’t even know if they
11 exist, and secondly what types of documents I’m might be
12 allowing to be turned over or not. It seems to me it would be
13 a very rare case, a very rare case where a third party external
14 document as I have defined it here, would be privileged subject
15 to work product, or you know any type of internal creation by
16 either the U.S. Attorney’s Office or the U.S. Trustee’s Office.

17 MR. HAYNES: And, Your Honor, that’s again where I
18 would refer the Court to the analysis in that just as an
19 example in that *Oklahoma v Tyson Foods* case, because I think
20 the court there very carefully combs through why in that
21 situation --

22 THE COURT: But I don’t think I have that situation
23 here is what I’m really saying. You’re going to have to give
24 me a reason why a document that is a third party’s document as
25 I’ve defined it in this hearing meaning not created by the

1 U.S. Attorney's Office or the U.S. Trustee's Office, a true
2 external document --

3 MR. HAYNES: Okay, all right. Here's -- and again
4 this is hit on in the *1100 West, LLC* case, it's okay for
5 Fidelity to say "I want a specific type of document." And the
6 example given in this *1100 West, LLC* case is for example an
7 accident report. You've specifically identified that type of
8 document. The problem that was with Fidelity's request is
9 basically all relevant documents or things of that nature.
10 It's not identifying a specific type of document and that's the
11 concern.

12 The same issue in the *Aiken* case that we cited in our
13 memorandum from Mississippi where the court -- and of course we
14 cited that for the no need to log problem, but the court gives
15 an example. Sure, you can ask for a specific type of document.
16 And that case apparently dealt with either a denial of an
17 insurance claim or something of that nature. And the court
18 said, you've launched a request for production as to the
19 insurance claim file. Well that's a business document that the
20 insurer had a contract with the insured. Yes, you have to
21 produce that. But just a broad request, and again I'll refer
22 to the types of requests that are of concern here, Your Honor,
23 "Produce documents which you have used in any way during your
24 preparation for the Wilson case." Okay, so if Fidelity
25 identifies a specific type of document, but just basically

1 saying go through your entire file and tell us any document
2 that you've used, that's completely unfair. That's completely
3 overbroad.

4 So, Your Honor, my recollection is we don't have any
5 documents that fall within that category anyway, but I think
6 the bigger issue is the legal issue there. Again, if they want
7 to identify specific documents, then that's fine, let them do
8 that. But not, you know, any documents you have used in any
9 way during your preparation. That goes to the heart of the
10 issue.

11 Your Honor, if I've address Your Honor's question,
12 then I'll move on into my comments.

13 THE COURT: I may have some follow-ups, but keep
14 going.

15 MR. HAYNES: Yes, Your Honor, okay.

16 Your Honor, just to kind of walk through this, I'm
17 going to hit on just a summary of the facts and then the
18 attempt we had to resolve the dispute with Fidelity, and then
19 law that's applicable.

20 You recall, Your Honor, that the Court's May 9th,
21 2008 Order to Show Cause dealt with that Motion to Lift Stay
22 filed on March 10th, 2008 and it alleges multiple missed
23 payments by the Debtors. The Debtors immediately responded and
24 said "We've made every payment." And the Court conducted
25 several status conferences that "Y'all need to exchange

1 records." That didn't work. I think Counsel may not have
2 appeared on the April 22nd, 2008 hearing. And so the Court
3 said, "I'm going to enter an OSC." The Court did on May 9th,
4 2008 and set it for hearing on June 26th, 2008.

5 Several things happened at that hearing. First,
6 witnesses who were supposed to appear don't appear. Second,
7 it's disclosed that within Counsel for Option's own file are
8 literally the payments that are received, some of the payments
9 from the Debtors themselves. Also, there's a pretty extensive
10 discussion of the role that Fidelity had played in the
11 execution of the affidavit. And, Your Honor, in the end
12 Your Honor decreed first of all the Debtors are current as of
13 June 30th, 2008, and secondly there was a false affidavit given
14 here.

15 The Court set this over for hearing on August 21st,
16 2008. And by that point the United States Trustee had become
17 involved. The Court took several hours of testimony. At the
18 conclusion of that hearing Your Honor said, "I agree the
19 U.S. Trustee can go forward with discovery. There's
20 information that's missing here and there's conflicting
21 statements about these payments."

22 We issued our discovery. I know the Court will
23 recall there was protracted litigation over the discovery,
24 hearings before this Court, motions in the District Court. In
25 the end discovery was permitted. We received Fidelity's

1 responses to our discovery on July 10th, and three weeks
2 later we receive the discovery requests from Fidelity. And
3 that takes us to where we are.

4 Your Honor, initially I contacted Mr. Cash about, you
5 know, we're still in an investigative phase. Let's go ahead
6 and take the depositions before we're required to answer your
7 discovery and that was not satisfactory with Fidelity. So, we
8 committed to respond.

9 Your Honor, I've already alluded a moment ago to the
10 types of requests here that are inappropriate. They're
11 overbroad. Things like as I said, "Produce documents used in
12 any way during preparation of your case." "Produce documents
13 which you contend evidence any wrongdoing by Fidelity." These
14 are very broad categories. Interrogatory requests, "Identify
15 any documents demonstrating that Fidelity has violated the
16 Bankruptcy Rule or Code." "Identify documents from the Office
17 of the U.S. Trustee for any other region which you have
18 reviewed, utilized, or considered in the Wilson case."
19 Nonetheless, we're trying to avoid coming before the Court with
20 a discovery dispute.

21 The first thing we did was we undertook a significant
22 effort to assess what it would take to log the documents we
23 were going to claim a privilege as to. And what we recognized,
24 Your Honor, is this would be burdensome, oppressive. It would
25 be a massive task because we're talking about thousands of

1 pages of documents. But it's really not the burdensomeness,
2 Your Honor, that's at issue here. It's where does this wind
3 up? It's a futile task because where we wind up is again we're
4 talking about documents created after May 9th, 2008 is
5 documents that are at the heart of attorney client privilege
6 and work product document privilege.

7 So, I contacted -- this is the other part of our good
8 faith effort to resolve this, I contacted Mr. Cash and I said,
9 "I'd like for there to be an understanding, an interpretation
10 of what 'documents' means, and that is is that after the
11 litigation commences and going forward that the discovery
12 documents definition does not apply to those documents." And
13 the date I used as June 26th, 2008 and our motion of course
14 backs that up a few weeks to May 9th, 2008, but the same
15 concept. And Mr. Cash would not agree. I think as I
16 understood it initially was is that there's no privilege at
17 all, or if there is a privilege it's only as to the
18 United States Trustee for Region 5 and his counsel. And the
19 other part of it is that, hey, that's a duty under the
20 discovery rules; you just have to give us a privilege log.

21 Well, Your Honor, that brings us before the Court.
22 The law now, Your Honor, is what I just want to take a moment
23 to look at. First of all the seminal case of course is the
24 *Hickman v Taylor* case, and paraphrasing from the Fifth
25 Circuit's *Wynne* case basically quoting from *Hickman*, "Discovery

1 was hardly intended to enable a learned profession to perform
2 its functions on wits borrowed from the adversary." They don't
3 need to see the documents in our file. They don't need to see
4 our attorney client communications. And this is such an
5 important principal --

6 THE COURT: Isn't the difficulty here really with
7 the nature of the U.S. Trustee's Office? Typically, discovery
8 is propounded on a party, a corporation, a defendant, a third
9 party witness and that party's counsel is not subject to
10 discovery. I mean you don't send out a subpoena to a
11 particular defendant's attorney and say "Turn over your file,"
12 or "Give me a list of everything that's privileged or otherwise
13 subject to a work product privilege." And the privilege logs
14 and the rules of evidence really apply under the concept that
15 the discovery is being propounded on a party and typically a
16 party's files are open to discovery unless there is a
17 privilege. So, it's the exception rather than the rule,
18 whereas in the U.S. Trustee's Office we have both going hand-
19 in-hand. There is a portion of the U.S. Trustee's Office and
20 files that are really a party, and then there's a portion which
21 are I guess what you're identifying as its litigation file
22 which is really similar to its counsel's file.

23 MR. HAYNES: And if I may address that in two ways,
24 Your Honor. First, Your Honor, I would say that there are lots
25 of cases out there. I've seen at least two SEC cases just in

1 the last couple of days that talk about this is an attorney
2 driven investigation. It can't be helped. That's how the
3 agency functions. And so a concept from each of the cases I
4 was looking at was, you know, the prohibition on a 30(b)(6)
5 notice, that there's other ways to get the information such as
6 interrogatories or a written depositions. So that's just a
7 general concept.

8 The other part of it is, Your Honor, is so often in
9 those cases whether an SEC case, an EEOC case is that the
10 agency would have been involved before the litigation
11 commenced.

12 THE COURT: Right.

13 MR. HAYNES: And that's the distinction for this
14 case, Your Honor.

15 So, Your Honor, to go on, if I may return to my point
16 is that the notions from the *Hickman* case are so vital that
17 they've been now codified in the Civil Rules, and particularly
18 Rule 26(b)(3)(B) that the court "must protect against
19 disclosure of the mental impressions, conclusions, opinion, or
20 legal theories of a party's attorney or other representative
21 concerning the litigation." Your Honor, this is such a basic
22 precept that multiple jurisdictions have this as a local rule.

23 THE COURT: How do courts protect -- I accept that
24 concept, Mr. Haynes. But how do courts protect against relying
25 on just counsel's representation that we've given you

1 everything and that what we are holding back is really the
2 litigation file? Typically, as I've said, in most discovery
3 disputes it is the client that the discovery is being
4 propounded against and the privilege log is designed to give
5 the court or the opposing party some sort of ability to
6 challenge or discern whether or not the document that is being
7 claimed as privileged is or is not privileged. Vary rarely do
8 you get into a dispute where counsel has been subpoenaed and
9 you're talking about their file. So, I have to be honest, I've
10 never been in a situation where counsel's files were being done
11 and I think there are very few courts that are ready to just
12 turn over litigation files.

13 When you have the type of situation that I asked you
14 about and you are responding to where really the agency is the
15 enforcement, I mean it really is a legal function that you're
16 doing and, frankly, I find the discovery interesting against
17 you for that reason, how is it that Fidelity for example
18 protects itself from your allegation that this is all just in
19 our litigation file, so therefore it's not discoverable and we
20 don't have to do a log, because it's a litigation file as
21 opposed to this file drawer over here which is our regular
22 administrative file?

23 MR. HAYNES: Your Honor, I will say this, I mean I
24 think there's -- you know I'm representing to Your Honor I
25 believe we have turned over every single document that predated

1 the litigation, okay. There's also a degree of trust that
2 Mr. Cash has, you know, in responding to our discovery that he
3 and his client have turned over everything. I mean the Court
4 hasn't examined their entire --

5 THE COURT: Well, clearly.

6 MR. HAYNES: -- Mr. Cash's litigation file. And
7 again we were not a party to this until after the collateral
8 proceeding was initiated.

9 THE COURT: So your answer is that's just the way it
10 works?

11 MR. HAYNES: No, Your Honor.

12 THE COURT: No, I'm not meaning to be flippant by it,
13 but that Counsel make representations to each other and to the
14 Court that everything has been turned over and that the files
15 that are being withheld are the litigation support file if you
16 will and not the administrative file and that until proven
17 wrong we rely on the representations.

18 MR. HAYNES: And maybe the flip side of it, what
19 would there be given that we were not, you know, filing some
20 complaint, or filing some motion that is the substance of
21 litigation itself, what would there be? We came in after
22 May 9th, 2008.

23 THE COURT: Well, I'm following you.

24 MR. HAYNES: Right.

25 THE COURT: I mean I'm surprised you had much to turn

1 over to start off with, but I'm asking the questions because
2 I'm trying to get my head around what types of files exist in
3 your office, what could be the subject of discovery versus what
4 would not be the subject of discovery. And, unfortunately, in
5 the case of your agency it's not this easy line like there
6 usually is in litigation. That's why I'm trying to make sure
7 that I understand how your office operates, when I say the
8 U.S. Trustee's Office, nationally, and that there really are
9 separate files that are litigation files and then there are
10 files that are administrative files, and that the
11 administrative files to the best of your information,
12 knowledge, and belief have been turned over. And that's why I
13 started with the question about the external third party
14 documents --

15 MR. HAYNES: Right.

16 THE COURT: -- that those have been turned over.

17 MR. HAYNES: Right.

18 THE COURT: And so now what we really are talking
19 about are internal communications with the U.S. Trustee's
20 Office --

21 MR. HAYNES: Yes. Yes, Your Honor.

22 THE COURT: -- including communications between
23 various U.S. Trustee's Office.

24 MR. HAYNES: That would certainly fall within that
25 scenario, agency attorney communications, right.

1 THE COURT: All right. Documents received, maybe
2 work privilege documents received from other offices to you
3 based on investigations that they have into Fidelity's
4 operations. That would be a potential -- I'm doing in
5 hypotheticals.

6 MR. HAYNES: Correct.

7 THE COURT: But it would be work product in the sense
8 that it's prepared by a U.S. Trustee's Office --

9 MR. HAYNES: Right.

10 THE COURT: -- internally, not by a third party.

11 MR. HAYNES: Right.

12 THE COURT: I guess the other --

13 MR. HAYNES: And again going back to that point,
14 Your Honor, if there is a particular type of document, a
15 specific document that Fidelity wants to ask about, not just
16 sort of generally any document but a specific type of document,
17 say that. They have the opportunity to do that in a discovery
18 request.

19 THE COURT: Well, to some extent they're at a loss
20 because the point they make and it's a valid one is that we're
21 still more in the nature of a 2004 type of discovery. There
22 isn't a complaint. There isn't a specific delineation of what
23 the U.S. Trustee's Office may or may not think was correct
24 about their behavior and --

25 MR. HAYNES: And all the more reason --

1 THE COURT: -- and we are very much in the fishing
2 expedition if you will, you know using the present stage. So
3 it's hard to respond to say "Turn over this" when you're not
4 really sure where you're going.

5 Now, that may just be the nature of where we are, but
6 I do understand their inability to clarify or define what they
7 want when they're not sure what the question is.

8 MR. HAYNES: Right. And of course it's not just
9 difficult, it's impossible for us to say when they say, you
10 know, basically you contention about our violating the
11 Bankruptcy Code, we haven't brought any claims.

12 THE COURT: Right.

13 MR. HAYNES: We haven't brought any contentions.

14 THE COURT: And in some ways the answer may be we may
15 decide you haven't done anything wrong. We're still in the
16 investigative stage. And certainly that's Fidelity's position
17 that they haven't done anything wrong. So, all of this may
18 result in you're fine. You didn't break any laws. You didn't
19 violate any rules. Civilly, criminally, everything is fine.
20 And so there isn't something to address, which is the whole
21 point of you doing the investigation I suppose.

22 MR. HAYNES: Correct. Correct, Your Honor.

23 THE COURT: Okay, so let me talk to Mr. Cash, if you
24 don't mind.

25 MR. HAYNES: Okay. Yes, Your Honor.

1 THE COURT: Okay, Mr. Cash, --

2 MR. CASH: Yes, Your Honor.

3 THE COURT: -- I hear your frustration. I mean I see
4 where you are. What I'm trying to determine at this point is I
5 do believe that the U.S. Trustee's Office is correct that the
6 work product privilege applies not only to their office but any
7 other U.S. Trustee's Office in the country. So, what they
8 received in terms of internal communications, work product,
9 investigative reports, conclusions, I believe that is all
10 subject to work product privilege. I'm not going to define
11 their office so narrowly as to only be Region 5.

12 MR. CASH: Your Honor, if I can --

13 THE COURT: I'm just telling you where I am. The
14 second issue on the evidence of wrongdoing, you know I hear
15 what you're saying and I know what you're after. My problem is
16 I'm not sure your client did anything wrong at this point. I
17 don't know that they're sure your client did anything wrong.
18 What I would really like to know, I guess what I would like is
19 a representation from the U.S. Trustee's Office is they've
20 given you all third party external documents, however they've
21 been obtained. I think that's subject to discovery. I can't
22 imagine that that becomes a work product issue or even a
23 privilege issue. If it does, that can be specifically
24 requested for protective order.

25 MR. CASH: Okay.

1 THE COURT: Okay, but I want all those turned over
2 or represented that they have been turned over to you.

3 And I guess on the issue of, you know, what's going
4 to -- you know I heard Mr. Haynes says that he was getting
5 ready to take depositions of your client and I understand you
6 want to be able to defend your client when those depositions
7 are taken. So how about this, to the extent that your client
8 is going to be asked to explain or testify to a particular
9 document, or policy, or piece of conduct, how about that that
10 be turned over -- you know that that be identified so that you
11 can prepare your client for the deposition. Because I know
12 that you're shooting in the dark here to some extent and I
13 understand that you have a right to know to some extent what's
14 coming at you. So, I guess would that satisfy your immediate
15 concern if the U.S. Trustee's Office at least identified the
16 documents that they intend to ask your client about. You know
17 presumably they've already turned them over to you, but they at
18 least say, "Well, these 100 documents may be discussed in the
19 deposition." Or if there is an external document or a policy
20 manual that you produced to them, that they identify these are
21 the subject matters of the deposition that we will get into.

22 MR. CASH: I think that would go a long way,
23 Your Honor.

24 Where we were at and the reason that I propounded
25 this discovery is I know what's been given and what's been

1 available to the U.S. Trustee so far. They've heard
2 testimony, as we all have, and they've been given a number of
3 documents. Where I want it is at this point in time based on
4 what you have so far is there anything you say we did wrong?
5 And I understand they say, "We're continuing our investigation,
6 but as we stand right now do you say we did anything wrong?
7 And I was looking for the answers to that question, because if
8 not --

9 THE COURT: Is that an interrogatory question?

10 MR. CASH: It is.

11 THE COURT: Okay. And was the response that you were
12 just still investigating, Mr. Haynes?

13 MR. HAYNES: Yes, Your Honor, that we have not made a
14 final determination.

15 THE COURT: Okay, well then what I would say that we
16 solve this issue by saying, "These are the subject matters that
17 we will be discussing with your client." You know I think at
18 this point before you take a deposition you are going to have
19 an idea of the areas that you would like to discuss with a
20 particular witness. I would word it a little differently. I
21 don't know that I would contend that they did anything wrong as
22 much as I would say what areas will you be discussing.

23 MR. HAYNES: Much like a 30(b)(6) deposition.

24 THE COURT: Correct. Correct. Right, where at least
25 there's some idea of where this is going, because I think it

1 only fair that the witness be prepared. In theory, Mr. Cash,
2 they could raise an issue that has to do with something that
3 happened in Idaho -- you know, I don't know, just making
4 something up -- and I think your client ought to at least be
5 able to say, I don't know anything about it, or let me check.

6 MR. CASH: And I think that's part of the problem,
7 Your Honor, is we did try to limit. I know he's saying
8 discovery was wide ranging, but it really wasn't. In fact,
9 ironically, I literally took Mr. Haynes deposition --

10 THE COURT: It's a little different though because
11 they're an agency versus a company. And so when you just
12 mirror flip it, it doesn't quite fit the same way.

13 MR. CASH: Here's an example, and I don't mistrust
14 Mr. Haynes and I understand that when he says he believes
15 everything he's held is privileged, he believes it. And I
16 would never question that. I think he's above reproach.

17 THE COURT: No, I don't question either one of you
18 actually. I'm just trying to get an idea of how one polices
19 this.

20 MR. CASH: Well, here's why I need the log, because
21 we're going to disagree. The only log I did get is only four
22 things.

23 THE COURT: Well and it may only be four things.

24 MR. CASH: And that may be, but those four aren't
25 privileged.

1 THE COURT: Okay, that will be your ability to
2 challenge those things. I'm going to hold that the litigation
3 file is work product privilege with the exceptions that I have
4 just said to you which are third party external documents as I
5 have defined it, meaning documents produced, created, authored
6 by a party other than a U.S. Attorney's Office or
7 U.S. Trustee's Office anywhere in the country. Okay, so if the
8 document was authored by the U.S. Trustee's Office in
9 Pittsburgh, it's part of their litigation file or their work
10 privilege, part of privilege. If it was authored by Fidelity
11 in Pittsburgh, then it isn't, it needs to be turned over to
12 you. Okay, so that's how I'm going to divide the two files,
13 the two administrative files at this point. And I don't
14 believe that they have to make a privilege log on attorney work
15 product.

16 Now having said that, I'm also -- this is a little
17 unusual -- I'm going to order them to give you a list of the
18 documents they intend to ask your client about in any
19 deposition, and I don't know how many people they're deposing,
20 but whomever the witness is that they give a list that they're
21 going to ask them to look at and the areas that they intend to
22 cover, just like a regular civil deposition, so that your
23 clients will have a fair opportunity to understand the scope
24 and the nature of the depositions.

25 I think wording it as wrongdoing maybe narrows it too

1 much from your perspective, because it could very well be
2 that your client is not the subject of any wrongdoing. It may
3 be Option One that is the subject of wrongdoing, or it may be
4 the Boles Law Firm. And to say "Just tell me about what I have
5 done wrong" is maybe a little too narrow. Do you follow me?

6 MR. CASH: I understand, Your Honor. I guess where I
7 come down, Your Honor, at least where we are right now is from
8 the Eastern District there is a 2007 case --

9 THE COURT: Eastern District of Louisiana?

10 MR. CASH: Of Louisiana, yes, Your Honor. There is a
11 2007 case *Stiward v United States of America* very similar where
12 the United States is trying to enforce. And the court there
13 said, "The work product doctrine does not protect against
14 discovery of facts known to a party."

15 THE COURT: Correct.

16 MR. CASH: So facts known to the U.S. Trustee they
17 ought to have to answer our interrogatories and they haven't,
18 regardless of their source.

19 THE COURT: I agree with you on that, by the way.
20 Okay, tell me specifically what facts -- I know they gave
21 documents and they also asserted defenses to responses. So
22 tell me where you don't believe that they responded.

23 MR. CASH: The *Stiward* case has a perfect example.
24 It says "The name, address, and telephone numbers of potential
25 witnesses and information about the existence of interviews or

1 statements are neither privileged attorney client
2 communications nor protected work product." Now, here they
3 admit they've received unsolicited e-mails from some unknown
4 party with unknown content. That's not generated by them.
5 That's an outside person who allegedly has knowledge of
6 relevant facts. We're entitled to know who they are and what
7 they said.

8 THE COURT: Okay.

9 MR. CASH: And we haven't gotten that. We don't know
10 who they've interviewed and according to the *Stiward* case we
11 have the right to know the existence of interviews or
12 statements, the name, address, telephone numbers of those
13 persons. We haven't been given that.

14 Now, Mr. Haynes may very well answer, "We haven't
15 done any interviews of anybody outside of Fidelity." But if
16 it's even Fidelity former employees or Option One employees --

17 THE COURT: Right.

18 MR. CASH: -- I have the right to know those kinds of
19 things. So, I'd like to know --

20 THE COURT: Okay, so that gives us two specifics, e-
21 mails from third parties -- I'm writing this down -- and
22 interviews of third parties or statements taken from third
23 parties. Okay, any other specifics that you think that you
24 want certified don't exist or were turned over.

25 MR. CASH: Yes, Your Honor. Give me just one moment.

1 One of the interrogatories asked "The identity of
2 any documents you may have to support any claim against
3 Fidelity." I understand they have not yet brought a claim.
4 But if they're at a point, and you get to this point during
5 this series of litigation and investigation, if at this point
6 they say, "Yes, these are documents I know I'll use. These
7 will support my claim if I bring a claim," identify those to
8 me. Tell me what those documents are.

9 THE COURT: Well, the reason why I asked them to
10 identify them in the deposition is because I think at this
11 point they're at that stage where they're just going to ask
12 about documents they have in their files. Presumably they've
13 turned over every document, because it's going to be a third
14 party document, to you. So you have it in your possession or
15 you will be certified that you will have it in your possession
16 very shortly. The real issue is what's relevant. I could
17 flood you with a 100,000 pieces of paper --

18 MR. CASH: Sure.

19 THE COURT: -- and it's like a needle in a haystack,
20 what is it. So that's why I just ordered that they tell you
21 which documents are going to be discussed in the deposition, so
22 that at least you will have an idea of what in their mind is
23 important in this deposition. I'm going to hold off on the
24 rest, because I don't know that they've formed at this point
25 any claim.

1 MR. CASH: Then let me focus on the interrogatories
2 then more than the documents, Your Honor. One we asked is
3 "Tell us what capacity you contend Dory Goebel was acting in
4 when she executed these documents." What's the U.S. Trustee's
5 position? You've heard Dory's testimony. You've got all the
6 documents regarding that. What do you contend --

7 THE COURT: I think that's probably putting the horse
8 you know ahead of the cart. At this point I don't know that
9 they've come to that conclusion. They're going to take the
10 depositions as I appreciate it of your client, I assume
11 Option One, and other individuals. That's a legal conclusion
12 that I think will only occur if and when they decide to bring
13 some action. I think that's the type of appropriate request
14 after a complaint has been filed.

15 MR. CASH: And I guess finally, Your Honor, my
16 feeling is and I think the cases, and especially the Middle
17 District case and the Eastern District case go directly to
18 this, the Middle District case being -- the Middle District of
19 Louisiana, I'm sorry -- being 232 F.R.D. 552, it's the *Estate*
20 *of Manship v United States*, again another governmental case.
21 And the court is very clear in saying Rule 25(b)(5), "The rule
22 employs the mandatory term 'shall' requiring that the
23 responding party prepare a privilege log where a privilege is
24 asserted." And in that case it was just like this case where
25 they said, in fact they almost quoted, "It was an unabashed,

1 brazen attempt to gain insight into the mental impressions
2 and strategies of counsel for the United States." That's
3 exactly what we have claimed here. And the court there said,
4 "You can claim your privileges, but the other side has the
5 right to test them. They have a right to have you produce a
6 privilege log." And even if we look at *In re Pabst*, which is
7 out of the Eastern District, in that case there were thousands
8 of pages of documents, far more than the 1,800 e-mails which
9 are mentioned here, over 40,000 documents. And there court
10 there required a document-by-document privilege log as opposed
11 --

12 THE COURT: That's what normally it is.

13 MR. CASH: -- as opposed to even the SEC type
14 privilege log which you at least have to tell them dates of
15 documents, groups of documents. I guess Fidelity is entitled
16 to know at least what's out there in their files without giving
17 away the secrets. But the courts that have addressed this and
18 particular with the United States on the other side, because
19 that is -- and I agree with the Court, this is a unique
20 situation. It's not like being against another company which
21 I'm far more used to. But the United States because it has
22 such power and because they are almost a quasi law enforcement
23 arm, what makes this an awkward situation is if they were doing
24 an investigation outside of the case we have the right to say
25 we're not going to play. Y'all go do your investigation and if

1 you have something, bring it, bring a case against us.

2 In a civil case if they had brought an adversary
3 proceeding we'd know their complaints and we'd fight back and
4 forth.

5 THE COURT: Right.

6 MR. CASH: Here we're not quite where we can't say
7 "Y'all do it. We're not going to cooperate. Let us know when
8 you have something." And we're not quite "Oh, that's what
9 you're saying." We're kind of in between and the problem we've
10 got is we have no end in sight. We don't know what the
11 parameters are. We don't know if this is a case that can
12 remain open and will be investigated for a year. It's already
13 been a year. So, I guess what we're trying to do is in a ring
14 that has no ropes we're just trying to get some ropes.

15 THE COURT: Okay, then let's do this, we'll start
16 with some small ropes.

17 MR. CASH: Okay.

18 THE COURT: I've directed that they give you the
19 documents they want to discuss and the parameters of the
20 deposition, subject matter parameters so that you will
21 presumably be able to prepare your client for those
22 depositions.

23 I've directed that all third party external documents
24 be turned over.

25 I want a certification that they aren't any to the

1 best of their knowledge, information, or belief. Obviously
2 if they find, discover some later in good faith, they can
3 supplement.

4 In terms of interviews or statements from third
5 parties, I think you're right, you have a right to know who
6 they've interviewed, name and address and telephone number, and
7 if there's a statement that's been taken. Now, this is not a
8 criminal action, so if there's a statement that's been taken
9 that has to be turned over as well.

10 E-mails from third parties, that's a little tougher
11 because that's going to depend on whether or not the e-mails
12 are part of their attorney client investigation. And I don't
13 know who the e-mails were. If I say e-mails outside of the
14 U.S. Trustee's Office --

15 MR. CASH: The four in question were unsolicited e-
16 mails to them from outside the Trustee's Office is my
17 understanding.

18 THE COURT: Why are those privileged, Mr. Haynes?

19 MR. HAYNES: Your Honor, --

20 THE COURT: There are only four of them.

21 MR. HAYNES: Okay. I'd ask that if there is an issue
22 with the log that we've produced, then let's take it in proper
23 sequence, because I'm kind of --

24 THE COURT: You're not prepared for that one. All
25 right, let's do --

1 MR. HAYNES: Right, right. Let's have a meet and
2 confer.

3 THE COURT: Wait, wait -- I want you to just confer
4 with -- I will say on the record that an unsolicited e-mail
5 from a third party to the U.S. Trustee's Office I find hard to
6 believe would be privileged, okay, because it's unsolicited and
7 it was just a statement to the U.S. Trustee's Office. I'm
8 having a hard time understanding how that would be privileged.
9 So, with that caveat, Mr. Haynes, I'm not saying it isn't; I'm
10 just saying you need to think about it.

11 MR. HAYNES: Okay. And that we meet and confer. If
12 he needs to bring a Motion to Compel, he can do that.

13 THE COURT: Yeah.

14 MR. HAYNES: And, Your Honor, remember it's not
15 attorney client privilege we've claimed. It's not work product
16 we've claimed. It was investigative files privilege that we
17 claimed.

18 MR. CASH: Well, Your Honor, that has not been
19 properly invoked and I discussed that at length in my brief.

20 THE COURT: Okay, so that's got to be invoked. If
21 that's what you are alleging, change it, invoke it on this log
22 so that --

23 MR. HAYNES: We clearly invoked it on the log.

24 THE COURT: Just do it again, okay?

25 MR. HAYNES: Yes, Your Honor. Okay, I'll clarify it.

1 THE COURT: Because he's saying it's not and I'm
2 not going to get into that today.

3 MR. HAYNES: Thank you, Your Honor.

4 THE COURT: Okay, so that we know that the parameters
5 and the scope is of that particular issue on those.

6 Also to you, Mr. Cash, is at that point I think you
7 will at least be in a position to let the depositions go
8 forward, defend your client. I don't know how much longer the
9 investigation will go. The next step would be that you ask for
10 a status conference to ask just that question.

11 MR. CASH: Okay.

12 THE COURT: You know, have you gotten all your
13 documents, have you taken all your depositions, how much longer
14 to we anticipate this will go on, and I can get an idea of
15 what's left to be done, and whether or not there will or will
16 not be a complaint filed.

17 MR. CASH: I guess what I would ask, Your Honor, if
18 the Court would be willing to do this is kind of maybe a little
19 bit of the opposite, could we impose some deadlines that if
20 you're going to file a complaint, you know take depositions by
21 a certain date --

22 THE COURT: I don't know yet what their discovery
23 schedule is, so what I'd rather do is let's go forward with
24 these depositions under the parameters and the directives I've
25 just set today. And then after the depositions are complete --

1 I'm sure you'll know how many they're going to take --

2 Mr. Haynes, I'm going to ask that you tell Mr. Cash
3 what you anticipate taking.

4 MR. HAYNES: I understand.

5 THE COURT: -- and after those are complete, then we
6 go to status conference. Okay?

7 MR. CASH: Okay.

8 MR. HAYNES: And, Your Honor, just a few housekeeping
9 matters about this, if I could address Your Honor?

10 THE COURT: Sure.

11 MR. HAYNES: Okay, first of all I know -- I think I
12 heard Your Honor say that if we're getting into a conflict
13 about what's going to be turned over or what's to be
14 represented that we can seek further --

15 THE COURT: Yes, absolutely.

16 MR. HAYNES: -- order from the Court.

17 THE COURT: Always.

18 MR. HAYNES: I think the one category that is of
19 greatest concern is documents from an external source. Well,
20 there's probably hundreds of millions of pages of documents out
21 floating around the world about lender processing or Fidelity,
22 okay, or I happen to read something in the newspaper about
23 Fidelity --

24 THE COURT: Well, I think at this point it's as I
25 read the production request it was documents that you,

1 Mr. Haynes, had received regardless of where it came from.
2 So, yes, the U.S. Attorney's Office in Minnesota might have
3 something, but if they haven't turned it over to you, I don't
4 know that that's an answer to the question.

5 MR. HAYNES: And I'm trying to faithfully make sure I
6 understand.

7 THE COURT: No, I understand.

8 MR. HAYNES: What Your Honor is saying is that if
9 it's an external third party document that I have received from
10 another U.S. Trustee's Office, I've got to represent to
11 Mr. Cash either it's been turned over and that there's no more
12 to be turned over, or here it is, or here's a privilege log of
13 it and we need to come back to Court and meet and confer over
14 that.

15 THE COURT: Right, because as I appreciate it, you've
16 already turned over every other document, it was just --

17 MR. HAYNES: Correct.

18 THE COURT: -- the ones that have come from a
19 U.S. Trustee's Office that were at issue.

20 MR. HAYNES: And again I think I won't have anything
21 further --

22 MR. CASH: And the e-mails.

23 THE COURT: Well, I know, we're getting to that.
24 That's a different category.

25 MR. HAYNES: Right. Those were third party e-mails

1 outside --

2 THE COURT: Right. Third party e-mails.

3 MR. HAYNES: Right.

4 THE COURT: Somebody who e-mails the U.S. Trustee's
5 Office. I think what you've just told me is that those are on
6 a log, a privilege log. And you've alleged that you asserted
7 the investigative privilege and they believe you haven't, so
8 that may be an issue for another day that we'll fight about
9 about whether or not that properly asserted. But as long as
10 they've been identified and they're put on a document at this
11 point, that's all that can be said about them.

12 MR. CASH: And I do think, Your Honor, you also said
13 that they would have to answer the interrogatory about the
14 name, address, and telephone number of anybody they talked to
15 or --

16 MR. HAYNES: Okay, --

17 THE COURT: Yes.

18 MR. CASH: -- received information from --

19 MR. HAYNES: -- that's another point I wanted to get
20 to, Your Honor, is --

21 THE COURT: Okay, let's go through that one.

22 MR. HAYNES: -- I don't understand how much more I
23 can do. We've answered it. It was Interrogatory Number 4.

24 THE COURT: Then that's all you have to do is say
25 "That's it."

1 MR. HAYNES: We've answered it. We've given them
2 the names of the --

3 THE COURT: Mr. Haynes, then all you have to do is
4 say, "That's all I have."

5 MR. HAYNES: Okay. And if there's a disagreement
6 I'll be glad to --

7 MR. CASH: Well, the four e-mails are the name,
8 address, and telephone number of someone --

9 MR. HAYNES: Okay, --

10 MR. CASH: -- with knowledge of facts that they
11 haven't given us.

12 MR. HAYNES: All right, we need to maybe confer about
13 that. We should met and confer I understand about that,
14 because I believe that involves one individual.

15 THE COURT: Okay.

16 MR. HAYNES: And again, I understand he and I need to
17 meet and confer about that and resolve if we've got an issue
18 there.

19 THE COURT: If there's no one else, there's no one
20 else.

21 MR. HAYNES: Right, Your Honor. Okay.

22 THE COURT: And that's all you can say.

23 MR. HAYNES: Right, right, right.

24 Your Honor, the only other thing I can think of is --
25 let me see -- all right, I think I understand Your Honor's

1 ruling.

2 THE COURT: It sounds to me like you've turned over
3 everything but four e-mails and the identity of that proponent,
4 the person that produced it. So, that may be the next issue --

5 MR. HAYNES: Right.

6 THE COURT: -- but that's what you need to certify to
7 Mr. Cash is that everything else has been turned over. And
8 from there let him know what you're going to discuss with his
9 client at the depositions --

10 MR. HAYNES: Right, right.

11 THE COURT: -- and then take your depositions. And
12 then we'll all have a status conference.

13 MR. HAYNES: Right. Okay, and I want to make sure
14 just before I go home that I've understood the Court's ruling
15 is, is that otherwise --

16 THE COURT: Look, all of you can only perform as you
17 can perform in good faith, all right.

18 MR. HAYNES: Yes.

19 THE COURT: Nobody is going to get, you know, their
20 head handed to them.

21 MR. HAYNES: Yes, Your Honor, I understand.

22 THE COURT: I think y'all understand where I'm
23 headed. Just do your best to cooperate --

24 MR. HAYNES: Yes, Your Honor.

25 THE COURT: -- with each other --

1 MR. HAYNES: Yes, Your Honor.

2 THE COURT: -- and if there's another issue, call.
3 You know we'll do an oral hearing, we can do an oral --

4 MR. HAYNES: Okay, okay.

5 THE COURT: -- just let's deal with it.

6 MR. HAYNES: Okay.

7 MR. CASH: Exactly, Your Honor.

8 MR. HAYNES: But at this point no further logging or
9 production other than as the Court has ruled.

10 THE COURT: Correct.

11 MR. HAYNES: Now, will Your Honor be drawing the
12 order or do you want the parties to draw the order?

13 THE COURT: Mr. Cash to draw the order.

14 MR. HAYNES: Okay. And he'll circulate it --

15 THE COURT: And send it to Mr. Haynes.

16 MR. CASH: And, Your Honor, just to be clear, the
17 U.S. Trustee's Office has been cooperative. We have different
18 opinions on what is and isn't, but there's never been a
19 situation where they have not been cooperative and tried to
20 work with us.

21 THE COURT: Y'all are getting along much better
22 these days. I can see, I can tell. But as I'm saying,
23 Mr. Cash, let's take it the next step and let's see where the
24 U.S. Trustee's Office is going. We'll have our status
25 conference and then I'll have a better idea. Okay?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. CASH: Okay, thank you, Your Honor.

MR. HAYNES: Thank you, Your Honor.

THE COURT: Thank you very much.

* * * * *

(Hearing Concluded)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceeding in the above-entitled matter.

/S/Ann B. Schleismann
ANN B. SCHLEISMANN

1/22/10
Date