

1 THE COURT: It's your motion of the document
2 dump.

3 Okay. Number four, the November 11 letter,
4 forensic search of MPCA computers, servers, and the
5 Relators' version of privilege log intrigue.

6 Who is going to go?

7 MS. MACCABEE: I will, your Honor.

8 THE COURT: Okay.

9 MS. MACCABEE: Paula Maccabee.

10 And I get the sense from the fact that it's
11 noon that you would prefer we be brief.

12 THE COURT: Yeah.

13 MS. MACCABEE: We're making two requests that
14 we feel have to be answered today and another that we're
15 bookmarking but we are still attempting to work out and
16 confer. We understand the PCA didn't have time to
17 respond to all of our privilege log claims other than the
18 fact that they say -- they acknowledge that they are
19 foregoing what they call the liberty of privilege, which
20 we say doesn't exist, but otherwise, we have committed to
21 work with them on the other issues having to do with the
22 log.

23 Two issues we're concerned about, one is
24 there are two very important documents authored by
25 Michael Schmitt, and those are summaries of April 17,

1 2018, and September 27, 2018. And in the case of
2 April 17, that is the only remaining documentation from
3 the critical time when EPA read its comments on the draft
4 PolyMet permit aloud to MPCA on April 5. And
5 Ms. Handeland had discarded her notes. Mr. Clark
6 testified that if he had any, he has also discarded them.
7 And Mr. Schmitt said in his declaration to the court of
8 appeals that he had handwritten notes and he discarded
9 them when he incorporated them in his summary later.

10 THE COURT: But you now know they actually
11 exist.

12 MS. MACCABEE: Yes, we do. We know that this
13 is document, I believe it's 301 on the privilege log.
14 And Relators are not saying this is not work product.
15 What we're saying is that there's a substantial need and
16 that it would be a hardship because this information is
17 not available from any other source. And the information
18 is not just what EPA said in its comments but what PCA
19 understood, because they say we saw this was all same old
20 same old. And there's a -- I think we cited the *Kobluk*
21 case. And one of the points made in that case is that --

22 (Reporter clarification.)

23 MS. MACCABEE: K-o-b-l-u-k against University
24 of Minnesota. And one of the points made in that case on
25 574 N.W.2d at 439 is that there's no privilege when an

1 attorney is a mere scrivener. In other cases, what has
2 been done is the factual information about what was said
3 would be left in the document. If there was an
4 attorney's impression, "we believe this case is blah,
5 blah, blah or we have this opinion about this matter,"
6 redact it.

7 Similarly, Mr. Schmitt provided a very
8 important document that is referenced over and over in
9 the privilege log. It is a document dated September 27
10 immediately after the big meeting between EPA and PCA and
11 PolyMet on September 25 and between EPA and PCA on
12 September 26. And in the deposition on written questions
13 of Mr. Udd, U-d-d, one of the issues that came up was
14 what transpired and was EPA still interested in the issue
15 of water quality-based effluent limits. And so this is a
16 very important document to memorialize what happened.
17 Again, we are -- and that's document 302 in the privilege
18 log. Again, if there are mental impressions in addition
19 to a recitation of what happened, we would anticipate
20 that under this Court's direction those would be
21 redacted, because that is the customary practice.

22 So that's the first issue, sir.

23 And then --

24 THE COURT: Okay.

25 MS. MACCABEE: And then the second issue is the

1 this -- we know that the only search that has been done
2 so far is of Ms. Lotthammer's computer, and we believe
3 that that is legally insufficient.

4 THE COURT: And a search of what was not
5 deleted in her computer or a search of her hard drive
6 including items that might have been deleted?

7 MS. MACCABEE: Your Honor, I don't know the
8 details. But the cases that we cite asked for both a
9 search of the computers and a search of the servers. And
10 that is the -- the *Antioch* case in the U.S. District
11 Court in Minnesota is at 210 --

12 THE COURT: I've got the cite.

13 MS. MACCABEE: You have that, sir?

14 THE COURT: Yes.

15 MS. MACCABEE: Okay. Any other questions, sir?

16 THE COURT: No. No.

17 MS. MACCABEE: Thank you.

18 THE COURT: Okay. You're up.

19 MR. MARTIN: Thank you, your Honor.

20 John Martin for MPCA.

21 THE COURT: Yeah.

22 MR. MARTIN: Let's talk about the easy issue
23 first, Michael Schmitt and the documents that Relators
24 are asking for there. Everyone recognizes that this is
25 attorney work product. The other side has made an

1 argument that they have the dire need for these documents
2 and that, as a consequence, we're required to produce
3 them. They can't get them from another source. That may
4 or may not be true. When I conferred with my client,
5 they explained to me that we're an agency that's
6 concerned about transparency. We don't want to rely on a
7 technicality. You know, if this is a document that they
8 have requested and it does have an account of what
9 transpired on the two dates that are at issue, then we're
10 going to give it to them.

11 THE COURT: Okay.

12 MR. MARTIN: Judge, I want to put some
13 parameters around this, and it's very important.

14 THE COURT: Well, first, are you going to give
15 it to them or not?

16 MR. MARTIN: Yes.

17 THE COURT: Okay.

18 MR. MARTIN: Yes.

19 THE COURT: Okay.

20 MR. MARTIN: Our client has said we want to
21 give this up. And we will.

22 THE COURT: Okay. That would be both of these
23 documents --

24 MR. MARTIN: This is --

25 THE COURT: -- 301 and 302.

1 MR. MARTIN: Judge, this is where it's
2 important that I establish the parameters on this.

3 THE COURT: Okay.

4 MR. MARTIN: Everyone understands that it's
5 attorney work product.

6 The way Michael Schmitt -- and we only learned
7 this when we were able to get access to his documents,
8 and that's been fairly recently. But what he would do is
9 he would have a series of meetings over time. And, for
10 example, document number 301 has an account of meetings
11 that occurred over the course of a period of years. But
12 what they have asked for are the two dates that we think
13 are the dates that are important to them, and that's
14 September 26 and April 5. And so what we're willing to
15 do in response to the request is provide them with
16 Mr. Schmitt's notes from that day that were in fact
17 incorporated into --

18 THE COURT: From those days?

19 MR. MARTIN: -- his computer. Those two days.

20 THE COURT: Okay.

21 MR. MARTIN: Correct, your Honor.

22 We would ask, consistent with Relators'
23 position, that we be allowed to redact those things that
24 are mental impressions, and we would be happy to provide
25 your Honor with an in camera inspection of both of those

1 documents so you can be certain that we haven't gone too
2 far with those redactions.

3 THE COURT: That's not necessary unless there's
4 a disagreement --

5 MR. MARTIN: Okay.

6 THE COURT: -- like the other issues that you
7 left on the table.

8 So it's my understanding that 301 and 302 would
9 be produced. The notes from the two days at issue will
10 be provided. There will be redactions of mental
11 impressions. I understand that to mean that you will try
12 to distinguish between notes where he's serving as a mere
13 scrivener and notes where he says, oh, my God, I can't
14 believe what I just heard --

15 MR. MARTIN: We'll try to distinguish between
16 those two.

17 THE COURT: -- which would be plainly a mental
18 impression.

19 MR. MARTIN: Yeah.

20 THE COURT: I was trying to be as dramatic as I
21 could. So with that understanding, then once that is
22 provided, then the Relators will look it over, and they
23 might have some questions about the redactions and the
24 scope of the notes provided, and if you can't -- I would
25 assume that these discussions can take place between now

1 and next Friday.

2 MS. MACCABEE: And, your Honor, since what
3 Mr. Schmitt testified under oath to the court of appeals
4 is that what he heard on April 5 was just same old same
5 old, I would say that even the same old same old going
6 back historically, we need. However, once again, I think
7 the law is really clear that if it's a mental impression
8 saying whatever it is that we're not asking for it, and
9 we'll look at the document, and if we believe there's a
10 question, then we'll ask for an in camera review.

11 THE COURT: Okay.

12 MS. MACCABEE: So that's the reason why we
13 would like to go back. We're not just making a nuisance
14 review.

15 MR. MARTIN: You know, and I think that's
16 reasonable.

17 THE COURT: All right.

18 MR. MARTIN: So, your Honor, I think that
19 disposes of the first issue.

20 The forensic search.

21 THE COURT: Yes.

22 MR. MARTIN: Judge --

23 THE COURT: Before you start what you plan to
24 say, my question is, you received the definitions and the
25 like in the request of the Relators, which included