

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

In the Matter of the Denial of Contested
Case Hearing Requests and Issuance of
National Pollutant Discharge
Elimination System/State Disposal
System Permit No. MN0071013 for the
Proposed NorthMet Project, St. Louis
County, Hoyt Lakes, Babbitt,
Minnesota.

Court File Number: 62-CV-19-4626

Honorable Judge John H. Guthmann

**MINNESOTA POLLUTION CONTROL AGENCY'S RESPONSE IN
OPPOSITION TO RELATORS' MOTION FOR PRODUCTION OF
DOCUMENTS IDENTIFIED IN MPCA'S PRIVILEGE LOGS AND FOR
ATTORNEY WORK PRODUCT**

INTRODUCTION

Relators have challenged MPCA's privilege log that was developed in connection with the now-voided production of documents and challenge the MPCA's claim to attorney-client protection. Relators also assert that they are entitled to access an MPCA attorney's work product – not just for the dates originally requested – but for a number of other dates on the ground that MPCA has somehow affected a waiver of attorney work product and that the crime fraud doctrine can be applied in a setting where there is no evidence of fraudulent activity. MPCA submits that, for the documents that remain on the privilege log at issue, the documents are privileged and that they are properly described. To the extent that Relators seek to access attorney work product, the documents at issue are opinion work product and no evidence supports a claim that

MPCA has waived protection afforded for attorney work product. Moreover, the crime-fraud exception is not implicated since no evidence suggests even the presence of such fraud much less that the attorney at issue somehow participated in fraudulent activity. Accordingly, MPCA submits that the Court should deny Relators' motion.

BACKGROUND

MPCA has produced a large volume of documents in this case.¹ Between October 4, 2019 and October 17, 2019, MPCA produced approximately 1,190 documents, totaling almost 20,000 pages. Declaration of Alison C. Hunter in Support of Response in Opposition to Relators' Motion for Production of Documents Identified in MPCA's Privilege Log ("Hunter Decl."), ¶ 4. On November 11, 2019, Relators' raised issues with approximately 350 documents on MPCA's privilege log. MPCA reviewed all of the challenged documents, produced an updated privilege log responding to each of the items flagged by Relators, and produced almost 200 of the challenged documents.² *Id.*

On November 27, 2019, Relators asserted additional challenges to 63 documents on MPCA's privilege log (Relators had previously challenged 30 of these documents and the additional 33 challenged documents were added to MPCA's privilege log on November 26, 2019 following an additional production of documents). *Id.* at ¶ 5.

¹ Indeed, substantially more discovery than ever allowed under Minnesota Statutes Section 14.68 or its predecessor statute. *See, e.g., Mampel v. E. Heights State Bank of St. Paul*, 254 N.W.2d 375, 378 (Minn. 1977) (voiding a trial court's discovery order as exceeding the scope of that allowed by MAPA and concluded that "only limited discovery"—in the form of "depositions of witnesses upon written questions"—was permissible); *Ellingson & Associates, Inc. v. Keefe*, 396 N.W.2d 694, 695 (Minn. Ct. App. 1986) (discussing the need to limit discovery in order to protect public officials from undue burdens).

² These included documents that upon further review are not privileged for various reasons, documents to which only the deliberative process privilege applies and redacted copies of the two documents for which Relators claimed a substantial need (including Privilege Log Number 301).

Relators' basis for challenging these documents was that they were "likely to have segregable, if any, privileged content." Relators' November 27, 2019 Letter to the Court. MPCA again reviewed all of the challenged documents, produced a second amended privilege log ("Amended Privilege Log") further clarifying the basis for the privilege claimed, and produced 20 of the challenged documents, some with limited redactions. Hunter Decl. ¶ 6.

To meet this Court's December 16, 2019 deadline for producing documents identified in the forensic search, MPCA produced approximately 300 additional documents through Xact, as well as a Supplemental Privilege Log for the forensic search ("Supplemental Privilege Log"), with documents identified as privileged by Xact document review attorneys. *Id.* at ¶¶ 7, 8. MPCA removed a number of documents from the Supplemental Privilege Log on December 16, 2019, prior to its production but was unable to thoroughly review the documents that the Xact document review attorneys identified as privileged, which were located on Xact's Relativity database. *Id.* at ¶ 8. Before MPCA was able to further review the documents included on the Supplemental Privilege Log, this Court ruled that the forensic search was void and MPCA was to have no unilateral communications with Xact. *Id.*

As approved by this Court, on December 20, 2019, MPCA asked Xact (copying Relators) for copies of the challenged privileged documents. *Id.* at ¶ 9 and Att. 1 (Copies of the correspondence among Xact, Relators and MPCA). MPCA did not receive copies of the challenged privileged documents until Friday, December 27, 2019, when it also received the approximately 30,781 documents identified by the Court-ordered forensic

search terms. *Id.* at ¶ 10. Therefore, MPCA had been unable to meet and confer with Relators regarding the challenged documents on the Supplemental Privilege Log prior to Relators filing its Motion on December 23, 2019—four days before MPCA received copies of those documents. *Id.*

Following review of the 156 challenged documents on the Supplemental Privilege Log, MPCA produced 115 documents on December 30, 2019, some with limited redactions. *See* Hunter Decl., ¶ 11 and Att. 2 (Updated Supplemental Privilege Log addressing documents Relators challenge). MPCA removed another 35 documents from the Supplemental Privilege Log because they were either nonresponsive or duplicative of documents³ on MPCA's Amended Privilege Log. *Id.* This leaves only six documents at issue from the Supplemental Privilege Log.⁴

SUMMARY OF MPCA'S ARGUMENT

The Court should decline to issue an order founded on Relators' groundless speculation, suspicions, and beliefs. With respect to privilege log issues, many of the documents Relators contest have been produced. For the remaining documents, in terms of attorney-client privilege, (i) privileged documents containing legal advice that are forwarded to an executive within MPCA clearly retain their privileged status and should not be disclosed; (ii) a communication authored by counsel and sent to an MPCA employee is described in the log as authored by counsel and plainly retains its privileged

³ Sixteen documents were duplicative of other documents Relators' challenge on MPCA's Amended Privilege Log. *See* Hunter Decl., Att. 2.

⁴ This result is consistent with MPCA's representations to the Court that much of the privilege log issues could be resolved without the necessity of motion practice.

character, (iii) documents containing legal advice unrelated to this case. With respect to work product documents, case law makes clear that opinion work product is immune from discovery except in very rare circumstances. The opinion work product immunity has not been waived and the case law cited by Relators does not suggest otherwise. Finally, Relators have absolutely no basis for an accusation that Michael Schmidt, the attorney at issue, engaged in fraudulent activity or participated in some sort of cover-up. Absent some basis for their extraordinary assertion, Relators are not entitled to an exemption from opinion work product immunity.

ARGUMENT

I. MPCA’S RESPONSE TO RELATORS’ REQUEST FOR PRODUCTION OF PRIVILEGED DOCUMENTS

Relators request that the Court order MPCA to produce 35 documents listed on its Amended Privilege Log and 151 documents on its Forensic Search Privilege Log. Only two of the documents from MPCA’s Supplemental Privilege Log (the privilege log for the void forensic search) remain at issue, while all 35 of the documents challenged on MPCA’s Amended Privilege Log remain at issue. As will be discussed further below, MPCA has properly asserted the attorney client privilege and/or work production protection for the remaining documents at issue that Relators request MPCA to produce.

A. MPCA Has Properly Asserted the Attorney/Client Privilege and Adequately Described the Documents in its Amended Privilege Log.

Of the 160 documents Relators challenge as lacking sufficient indicia of privilege, only eleven documents remain at issue: Privilege Log Numbers 1114, 1117, 1118, 1162, 1168, 1169, 1170, 1247, 1249 and Supplemental Privilege Log Numbers Supp-247 and

Supp-248. All of these documents are privileged communications, and in some cases also work product, and MPCA's Privilege Log sufficiently describes these documents. Moreover, as to the nine challenged documents on MPCA's Amended Privilege Log, MPCA has repeatedly addressed the specific concerns Relators have raised with these documents, providing additional information concerning the document and the description of the privilege. *See* Hunter Decl. ¶¶ 4, 6.

As a preliminary matter, MPCA (through its employees) is entitled to communicate with its in-house legal counsel and to assert the attorney-client privilege with respect to privileged communications. The attorney client privilege exists “(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.” *Brown v. Saint Paul City Ry. Co.*, 241 Minn. 15, 33, 62 N.W.2d 688, 700 (1954). When legal advice is sought, the privilege extends to a communication prepared by an agent or employee of the client whether it is transmitted directly to the attorney by the client or by his agent or employee. *Id.* Additionally, “documents which come into existence as confidential communications between attorney and client by reason of that relationship are privileged, and neither attorney nor client may be compelled to disclose or produce them.” *Id.* at 34.

Where a client is a corporation or agency, “any advice sought by its representatives will obviously be, on some level, for the purposes of determining how that corporation should conduct its business.” *Premiere Digital Access, Inc. v. Central*

Telephone Co., 360 F. Supp. 2d 1168, 1174 (D. Nev. 2005). However, where “the primary purpose of the communication is to discern the legal ramifications of a potential course of action, that communication is for a ‘legal’ purpose.” *Id.*

In addition, an attorney-client communication will necessarily involve some amount of factual information and does not lose the cloak of the privilege merely because of the inclusion of some factual information. In *Rossi v. Blue Cross and Blue Shield of Greater New York*, 540 N.E.2d 703 (N.Y. 1989), the Court concluded that the attorney-client privilege is not lost merely by reason of the fact that the communication also refers to certain non-legal matters. This is because in the process of giving legal advice, an attorney may incorporate relevant non-legal considerations without losing the privilege of nondisclosure. *U.S. v. International Business Machines Corp.*, 66 F.R.D. 206 (S.D.N.Y. 1974). Moreover, client communications intended to keep the attorney apprised of business matters may be privileged if they embody an “implied request for legal advice based thereon.” *Jack Winter, Inc. v. Koratron Co.*, 54 F.R.D. 44, 46 (N.D. Cal. 1971).

1. Privilege Log Numbers 1114, 1118 and 1162

Relators seek production of Privilege Log Numbers 1114, 1118 and 1162 because an attorney is not listed as the author or recipient of the communication. Relators’ Mem. at 7. Privilege Log Numbers 1114 and 1162, however, are both emails forwarding attorney client communications to another MPCA employee. Specifically, both of these documents are emails from Jeff Udd to Shannon Lotthammer forwarding MPCA counsel Michael Schmidt’s attorney-client communications and work product. The descriptions for these documents explain the basis for the privilege as “forwarding attorney client

communication and work product.” Far from being widely disseminated, Mr. Udd forwarded to Ms. Lotthammer a direct attorney-client communication between himself and MPCA counsel. It is widely recognized that internal confidential communications between non-attorneys of a corporation or agency that discuss the substance of privileged information are themselves protected by the attorney-client privilege. *See, e.g., United States v. ChevronTexaco Corp.*, 241 F.Supp.2d 1065, 1077 (N.D. Cal. 2002); *McCook Metals LLC v. Alcoa, Inc.*, 192 F.R.D. 242, 254 (N.D. Ill. 2000); *F.C. Cycles Intern., Inc. v. Fila Sport, S.p.A.*, 184 F.R.D. 64, 71 (D. Md. 1998) (“The communications retain their privileged status if the information is relayed from a non-lawyer employee or officer to other employees or officers of the corporation on a need to know basis.”).

Privilege Log Number 1162 is a document drafted by Mr. Udd at the direction of and with input from Mr. Schmidt. The Amended Privilege Log describes this document “[w]ork product created at request of counsel and to receive legal advice” and shows that this document was attached to a June 6, 2018 email communication from Mr. Udd to Ms. Lotthammer and Mr. Schmidt. Thus, contrary to Relators’ assertions, an attorney was a recipient of this document.

2. Supplemental Privilege Log Numbers Supp-247 and Supp-248

Relators claim that the Court should order production of these two documents because information regarding the author or recipient is lacking. Supplemental Privilege Log Number Supp-247 is an email from Mr. Schmidt to MPCA employee Anne Foss and this information was included on the Supplemental Privilege Log produced on December 16, 2019. Supplemental Privilege Log Number Supp-248 is an attachment to the email

from Mr. Schmidt to Ms. Foss consisting of legal advice authored by Mr. Schmidt. MPCA has updated the Supplemental Privilege Log to indicate that Mr. Schmidt is the author of Supplemental Privilege Log Number Supp-248.

3. Privilege Log Numbers 1117, 1168, 1169, 1170, 1247 and 1249

Relators seek production of Privilege Log Numbers 1117, 1168, 1169, 1170, 1247 and 1249 because “an attorney is merely included among other recipients.” Relators Mem. at 8. Relators provide no case law or basis for the assertion that inclusion of multiple employees on a communication voids the attorney-client protection for the communication.

Privilege Log Number 1117 is an email from Jeff Udd to Mr. Schmidt and Ms. Lotthammer consisting of attorney client communications and work product regarding a different permit. Similarly, Privilege Log Numbers 1168, 1169, 1170, and 1249 are emails consisting of attorney client communications to and from MPCA General Counsel Adonis Neblett regarding legal advice on permitting issues that are not relevant to Relators’ procedural irregularity claims. Privilege Log Number 1249, as described in MPCA’s Amended Privilege Log, is a communication from Mr. Schmidt to Ms. Lotthammer providing legal advice. Therefore, Relators have provided no basis for asserting this document should be produced. Moreover, this document is also irrelevant to Relators’ procedural irregularities claim as the legal advice concerns the Great Lakes Water Quality Agreement.

B. Documents Prepared by or at the Request of Counsel in Anticipation of Litigation during the Permitting Process Are Protected Work Product.

Relators assert that 26 documents⁵ on MPCA's Amended Privilege Log that were prepared during the permitting process were prepared during ordinary business and are therefore not covered by the work product protection.

The work-product doctrine "should be applied in a commonsense manner in light of reason and experience as determined on a case-by-case basis." *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 732 (8th Cir. 2002). The Supreme Court has held that the work product doctrine applies to documents created by investigators working for attorneys, provided the documents were created in anticipation of litigation. *United States v. Nobles*, 422 U.S. 225, 239, (1975). To qualify for work product protection, documents must have two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by or for another party or by or its representative. Minn. R. Civ. P. 26.02(d).

There was extraordinary public interest in the NorthMet project's environmental impact statement even before the PolyMet NPDES permit application was filed with MPCA. This Court has recognized that MPCA should have anticipated litigation on this permit by the time the application was filed. *See Telephone Conference to Discuss Discovery Disputes*, Transcript at 97-98. Accordingly, the challenged documents authored by or at the request of counsel were created in anticipation of litigation. *Cf. In re Grand Jury Subpoena*, 357 F.3d 900 (9th Cir. 2004) (documents prepared by investigator in anticipation of litigation qualified as "work product" protected from

⁵ Relators seek production of Amended Privilege Log Numbers 308 and 949-973. *See Relators Mem.*, Ex. A-1.

discovery despite contention that the documents would have been created in substantially similar form for another basis).

C. The Court Should Deny Relators' Request for Production of these Documents.

Courts have found that the type of information provided on MPCA's Amended Privilege Log is adequate, and nothing more is required. *Dole v. Milonas*, 889 F.2d 885, 888 n.3 (9th Cir. 1989); *In Re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992) (finding comparable information requested in *Dole* "to be sufficient to establish the attorney-client privilege"). The information MPCA provided in its Amended Privilege Log is more than adequate to assess the privilege, the standard for assessing the Privilege Log.

It is disingenuous to suggest that this motion could have been avoided if only the descriptions were more detailed, rather than less. Previously, Relators requested more information regarding the basis for the privilege and the authors for certain documents on MPCA's Amended Privilege Log, and MPCA addressed those concerns. Nonetheless, if the Court concludes that the subject description of the documents is somehow inadequate, MPCA can further amend the descriptions to address the Court's concerns. The documents, however, will remain what they are—attorney-client communications and documents created by clients for their lawyers or by lawyers for their clients. These descriptions are sufficient to verify application of the privilege.

In any event, Relators' proposed remedy is unsupported. Even were the Court to find a shortcoming in MPCA's Amended Privilege Log or Supplemental Privilege Log, MPCA has not waived its privilege claim. *Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Ct.*, 408 F.3d 1142, 1149 (9th Cir. 2005) (rejecting a mechanistic approach to waiver issues and adopting a "holistic reasonableness" approach). Courts recognize that basing waiver on alleged privilege log inadequacies is draconian and routinely order a revision of a privilege log rather than imposing waiver. *See, e.g., Jadwin v. County of Kern*, 2008 WL 2025093, *4 (E.D. Cal. 2008); *Kelley v. Crate & Barrel, Inc.*, 2008 WL 2233568, **3-4 (E.D. Cal. 2008).

II. MPCA'S RESPONSE TO RELATORS' REQUEST FOR IN CAMERA REVIEW OF PRIVILEGED DOCUMENTS

Relators request that the Court order MPCA to produce to the Court for in camera review 7 documents listed on its Amended Privilege Log and 13 documents listed on its Supplemental Privilege Log. Only three of the documents from MPCA's Supplemental Privilege Log remain at issue (Privilege Log Numbers Supp-222, Supp-244 and Supp-245), while all of the documents challenged on MPCA's Amended Privilege Log remain at issue.

A. Scope of Work Product Doctrine

There are two types of work product: (1) "ordinary" work product, which includes raw factual information; and (2) "opinion" work product, which includes a lawyer's mental impressions, conclusions, opinion, or legal theories. *Baker v. General Motors Corp.*, 209 F.3d

1051, 1053-54 (8th Cir. 2000); *see also* Minn. R. Civ. P. 26.02(d). Ordinary work product must be produced *only if* the demanding party proves a “substantial need” for the information and establishes “undue hardship” absent disclosure. Minn. R. Civ. P. 26.02(d). By contrast, opinion work product “enjoys almost absolute immunity and can be discovered only in very rare and extraordinary circumstances, such as when the material demonstrates that an attorney engaged in illegal conduct or fraud.” *Baker*, 209 F.3d at 1054; Minn. R. Civ. P. 26.02(d) (“In ordering discovery of such materials when the required [substantial need and undue hardship] showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”).

Examples of opinion work product include notes and memoranda of a party’s attorney or agent from a witness interview, and the selection and compilation of documents in preparation for trial. *Baker*, 209 F.3d 1053–1054 (citing *Petersen v. Douglas Co. Bank & Trust Co.*, 967 F.2d 1186, 1189 (8th Cir. 1992) (mere acknowledgment of attorney’s selection and compilation of business records in preparation for litigation would reveal mental impressions concerning the potential litigation); *Upjohn Co. v. United States*, 449 U.S. 383, 399–400 (1981) (“[f]orcing an attorney to disclose notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal the attorney’s mental processes”)).

B. MPCA General Counsel Michael Schmidt’s Notes Are Opinion Work Product.

1. Relators’ Position Regarding Substantial Need

Relators have acknowledged that Michael Schmidt's notes in Document 301 are attorney work-product. *See* Nov. 13, 2019 Transcript at 83 (“And Relators are not saying this is not work product.”). They nonetheless claimed a substantial need for Mr. Schmidt's work-product for September 27, 2019 and April 5, 2019. *See id.* at 82-83. Specifically, Relators argued that “[T]here are two very important documents authored by Michael [Schmidt], and those are summaries of April 17, 2018, and *September 27, 2018*.² And in the case of April 17, that is the only remaining documentation from the critical time when EPA read its comments on the draft PolyMet permit aloud to MPCA *on April 5*.” (emphasis added). Relators did *not* claim substantial need or hardship for other elements of Mr. Schmidt's work product; and, in their submission they did not assert a dire need for notes from other days. This position conforms to Relators' written submission of November 11, 2019 (asserting substantial need *only* for Mr. Schmidt's notes regarding the April 5, 2019 conversation with EPA and notes regarding September 25-26, 2018 meeting). Nelson Letter to Court, at 2 (Nov. 11, 2019). Despite significant arguments supporting opposition to Relators' position, (*see infra* at 2-3), MPCA agreed to – and did – produce Mr. Schmidt's notes for the two days at issue.

At the December 6 telephonic hearing, Relators expanded their demand. Relators argued that they should be allowed to view Mr. Schmidt's attorney work-product from other meeting days. Relators had previously made no such demand but MPCA nonetheless agreed to provide a list of the days of Mr. Schmidt's notes on meetings.

Relators now assert a newfound substantial need for *all* the dates covered in Mr. Schmidt's notes and request in camera review of all of these notes. The Court has noted the "moving target" that Relators present and MPCA respectfully submits that the Court should not entertain untimely arguments that reflect Relators' attempt to shift grounds.

2. Opinion Work Product

On December 6th, the Court ruled that Mr. Schmidt's notes from meetings are attorney opinion work product. The Court noted the principle that opinion work product is accorded near immunity from disclosure. Despite the ruling, Relators continue to press their argument in their most recent filing, asserting that the notes are not opinion work product. MPCA submits that the Court's previous ruling should remain intact. MPCA's counsel's notes from these meetings were taken in anticipation of litigation⁶ and are opinion work product. Consistent with this Court's ruling, the Eighth Circuit explained in *Baker*, "attorney notes reveal an attorney's legal conclusions because, when taking notes, an attorney often focuses on those facts that she deems legally significant." *Id.* Thus, an attorney's choice to record certain facts or statements and not others tends to reveal the attorney's opinions, theories, and legal strategies, which are all protected opinion work product.

Here, Mr. Schmidt's notes are his "mental impressions" that "enjoy almost absolute immunity." Relators have no ground for further inquiry into this opinion work-

⁶ This Court has consistently concluded that correspondence during this period of time was in anticipation of litigation and Relators have never challenged this position.

product. And the Court need not consider Relators' untimely repetition of their claimed substantial need since substantial need only allows invasion of attorney work product where the work product is factual as opposed to opinion work product. Accordingly, this Court should deny Relators access to the remainder of Mr. Schmidt's notes in Privilege Log Number 301.

C. Relators Have Not Established Substantial Need for Requested Privileged Documents.

Setting aside the immunity afforded opinion work product, Relators have not established a substantial need for the documents at issue. Even for factual work product, using Rule 26.02(d) as a guide, Relators bear the burden of establishing that they "[have] substantial need of the materials in the preparation of the [their] case and that [they are] unable without undue hardship to obtain the substantial equivalent of the materials by other means." Relators must shoulder this burden. Instead, Relators advance the conclusory assertions that Mr. Schmidt's notes are "relevant, [have] unique value and cannot otherwise be obtained by Relators." Relators' Mem. at 12-15. Yet, Relators fail to set forth any *evidence* that they cannot obtain such information by other means. For example, employee notes of meetings between EPA and MPCA, and the agendas for those meetings, are contained in the administrative record. Relators have had access to those documents for over six months, but they have not even attempted to demonstrate why they have a "substantial need" for Mr. Schmidt's notes relating to those meetings.

Perhaps more importantly, this fishing expedition is well beyond the irregularities that comprise the subject matter of this proceeding. The governing statute and the Court

of Appeals' referral Order identified two issues in dispute: "whether (1) it was unusual for EPA not to submit written comments; and (2) the MPCA sought to keep the EPA's comments out of the public record." The Court's transfer was "for a hearing and determination of the alleged irregularities" is limited to these issues. Court of Appeals Order at 4. The transfer order never intended to grant Relators unbounded discovery.⁷

D. MPCA Has Not Waived Attorney-Client Privilege or Work Product Protection.

Relators now argue that MPCA has waived any attorney-client or attorney work product privilege as to Mr. Schmidt's notes of EPA concerns during the permitting process. Relators' Mem. at 19-23. In fact, quotes from Mr. Schmidt's declaration can hardly be construed as the basis for waiver. He notes that the comments EPA chose to read to MPCA staff overlapped with written comments received during the comment period and that MPCA responded to the comments in accordance with Minnesota law. Any further response to EPA at that time would have entailed only a cross-reference to existing responses. Similarly, Mr. Clark's declaration explains that the comments EPA read had been fully considered and that "EPA had not raised any new, substantial concerns" but instead had reiterated concerns that had already been considered. *See* Relators' Mem. at 21-22. (As the Court is aware, MPCA agreed that EPA could respond to the permit MPCA developed *after* incorporating changes from public comment period and this approach conforms to the Memorandum of Agreement between the agencies. In fact, MPCA agreed to an additional 45 days beyond the time prescribed by the MOA for

⁷ Notably, MPCA has produced work product that bear on these limited issues, including notes from the April 5, 2018 telephone conversation in which EPA took it upon itself to read comments to MPCA staff.

EPA to submit comments.) Nothing in this declaration suggests the basis for waiver of attorney work product and to suggest otherwise simply does not follow from the text of the declarations.

Case law cited by Relators distinctly does not support their waiver argument. For instance, in *Schuler v. Tahash*, a client testified at length about the contents of his communication with his counsel and attacked the counsel's professional competence. *State ex rel. Schuler v. Tahash*, 154 N.W.2d 200, 204-05 (Minn. 1967). This led the court to hold that by voluntarily testifying to communications with his counsel, particularly where the client's testimony reflected upon the attorney's professional competence, the client waived the attorney-client privilege. *Id.* at 205. Nothing of the sort is at issue in this litigation.

Courts have been very protective of opinion work product. Indeed, in *Baker*, the court there declined to extend waiver to a situation where a party made representations allegedly contrary to what privileged documents would have revealed. 209 F.3d at 1055. Indeed, *Baker* explained that "attorney notes reveal an attorney's legal conclusions because, when taking notes, an attorney often focuses on those facts that she deems legally significant." *Id.* at 1054. Thus, an attorney's choice to record certain facts or statements and not others tends to reveal the attorney's opinions, theories, and legal strategies, which are all protected opinion work product. *See id.*

Similarly, in *Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 732 (8th Cir. 2002), the court found waiver of privilege under Nebraska law, but only because the information sought related to the indemnification action seeking recovery for legal

expenses, thereby putting the work of attorneys directly at issue in the case. This is hardly comparable to Mr. Schmidt's recitation of a principle of law under the statute at issue.⁸ Moreover, the information sought in *Pamida* involved prior terminated litigation and policies animating the work product doctrine were not present since the underlying litigation had been completed. *Pamida*, 281 F.3d at 731.

Here, Mr. Schmidt's and Mr. Clark's declarations do not waive attorney-client privilege or work product protection. The portion of Mr. Clark's declaration that Relators allege to have caused a waiver refers to MPCA's position, the gist of which is that EPA did not present any new, substantial concerns about the draft permit but instead reiterated the principal concerns that it had previously raised. Relators' Mem. at 21 (citing Clark Decl. May 28, 2019, ¶¶ 17, 15). Similarly, Mr. Schmidt's declaration referenced in Relators' memorandum discusses why MPCA did not respond to the content of EPA's comments. *See* Relators' Mem. at 22 (citing Schmidt Decl. June 12, 2019, ¶¶ 11, 14). But these two declarations cannot be conflated with Mr. Schmidt's mental processes at the time he took the notes, which constituted his mental processes and "enjoys almost absolute immunity." *Baker*, 209 F.3d at 1054. Relators are merely seeking information regarding the MPCA discussions with EPA, which can be obtained through trial testimony and other evidence in the record.

Relators mischaracterize *Shukh v. Seagate*, suggesting that "[i]f waiver is intentional, the subject-matter waiver doctrine provides that the privilege may be

⁸ Taken to its logical extreme, if Relators' position were correct, every time a lawyer cites a principle of law in written communication, there would be a waiver of attorney work-product. We are unaware of case law suggesting so broad an understanding of waiver.

extinguished as to the entire subject matter of the disclosed information.” *See* Relators’ Mem. at 22 (citing *Shukh v. Seagate Technology, LLC*, 848 F. Supp. 2d 987, 990 (D. Minn. 2011)). However, the court in *Shukh* explicitly limited the scope of the subject-matter waiver in that case to only those communications related to the five intentional, invention disclosures at issue, and denied plaintiffs’ request that waiver be applied to “all communications, whether internal or external ... in regard to the consideration and treatment of inventorship.” *Shukh*, 848 F. Supp. 2d at 992. Again, no comparable “intentional” waiver exists in this case; the declarations are not intentional waivers, and MPCA’s statements in the declarations did not put Mr. Schmidt’s mental processes during the call or his call notes at issue.

Despite Relators’ attempt at expansively framing exceptions to work product immunity, none of the cases cited require a party to reveal notes of his or her mental processes during an event simply because the party later references that event or expresses an opinion about the event. Certainly, nothing would serve as the basis for the Court to invade Mr. Schmidt’s opinion work product. *See also Upjohn Co. v. United States*, 449 U.S. 383, 399–400 (1981) (“[f]orcing an attorney to disclose notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal the attorney’s mental processes”).

III. THE CRIME FRAUD EXCEPTION DOES NOT APPLY.

Relators also seek a waiver of attorney-client privilege and work product protection under the crime-fraud exception. Relators’ Mem. at 23-28. In order to invoke this exception, Relators concede that they must demonstrate some form of “fraud upon

the court,” *see* Relators Mem. at 24, perpetrated by Mr. Schmidt. Yet, literally *no evidence* supports this allegation.

Instead, Relators cite to a benign piece of correspondence emanating from MPCA staff – that has nothing to do with Mr. Schmidt’s work product. In a 2015 email, MPCA manager Ann Foss complained about inaccuracies in EPA correspondence and noted that MPCA had not begun the permitting process. EPA explained its purpose, reflecting the ordinary back-and-forth between the agencies concerning permitting. That an agenda in 2016 concerns “communication, documentation and record management” is hardly evidence of an attempt by MPCA to prevent EPA from commenting on the permit. *See* Relators Mem. at 25-26. In short, Relators provide absolutely no indicia of fraudulent behavior. Certainly nothing in the cited correspondence provides evidence that would implicate Mr. Schmidt’s work product.

These baseless allegations do not support a waiver of privilege. And what MPCA did here—responding to public comments without identifying which of them MPCA had also discussed with EPA—does not rise to the level that courts have found sufficient to invoke the crime-fraud exception. *See, e.g., Volcanic Gardens Mgmt. Co. v. Paxson*, 847 S.W.2d 343, 348 (Tex. App. 1993) (holding that the perception or allegation that a claim is fraudulent is not enough to invoke crime-fraud exception but remanding for *in camera* review where there was evidence that a client may have employed a lawyer in a fraudulent claim to attribute preexisting injuries to the defendant); *In re Green Grand Jury Proceedings*, 492 F.3d 976, 978 (8th Cir. 2007) (invoking the crime fraud exception was proper where there was *prima facie* evidence that a client lied to the attorney by

providing the attorney with a false back-story for the monies the client had allegedly improperly received).

In *Phillip Morris*, the court affirmed that the tobacco companies' documents were not privileged where (unlike here, where the issues raised informally by EPA were already known to and commented on by the public) they related “*directly to the control or suppression of research*, and the creation of privilege shields to *conceal possession of dangerous information*” or where they “*involved safety-related scientific research.*” *State ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 683 (Minn. Ct. App. 2000) (emphases added and internal citations omitted); *see also Fellerman v. Bradley*, 99 N.J. 493, 505, 493 A.2d 1239, 1246 (1985) (invoking crime-fraud exception where a client, through his attorney, attempted to perpetrate a fraud on the court—to “mock justice”—by consenting to and subsequently flouting a judgment that obligated him to bear the costs of an accountant).

Relators' suggestion that MPCA's response to their motion to transfer would somehow lend support to their position is unfounded. That MPCA recounted the fact that MPCA “did not take *any actions* to ‘request, encourage or otherwise affect’ EPA’s decision not to submit written comments on the PolyMet Permit,” (which quote is itself Relators' grossly misleading extraction from MPCA's brief)⁹ provides no basis for a demand for Mr. Schmidt's opinion work product. This is a simple assertion of fact. And

⁹ The citation is extracted to mischaracterize the cited brief by omitting the ensuing pages in which MPCA accurately explained that it was requesting EPA to comment only *later*, after it had seen the revisions to the draft permit that addressed the subjects that EPA had discussed with MPCA. *See MPCA Sur-reply to WaterLegacy Transfer Mot.* At 7-9 (attached hereto as Exhibit A).

MPCA is aware of no case law that suggests that when a party denies unfounded allegations, the party has somehow engaged in fraudulent activity that effects a waiver of work product immunity. There simply is not authority for this position.

In sum, the procedural irregularity Relators allege cannot invoke crime-fraud exception to privilege.

CONCLUSION

For the foregoing reasons, MPCA request that the Court deny Relators' request for production of privileged documents.

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