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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

No. CIV S-09-2445 KJM EFB

vs.

SIERRA PACIFIC INDUSTRIES, et al.,

Defendants.

ORDER

This matter was before the court on September 7, 2011, for hearing on the California Department of Forestry and Fire Protection (“CalFire”) and the California Attorney General’s Office’s motion for a protective order and to quash Sierra Pacific Industries’ subpoena to the California Attorney General. Deputy Attorney General Tracy Winsor appeared on behalf of third parties CalFire and the California Attorney General. Bill Warne, Meghan Baker and Michael Schaps of Downey Brand appeared on behalf of Sierra Pacific Industries. Todd Pickles and Kelli Taylor appeared for the United States. For the reasons explained below, the motion is granted in part and denied in part.

I. Factual Background

This court previously held that the United States waived any applicable privileges and protections pertaining to certain documents that may have or should have affected the opinions

1 of two of the United States' expert witnesses, Josh White and Dave Reynolds, who prepared the
2 Origin and Cause report for the Moonlight Fire. Dckt. No. 210. The court ordered the United
3 States to produce "all documents and communications that White and Reynolds considered,
4 generated, saw, read, reviewed, and/or reflected upon in connection with their analysis of the
5 Moonlight Fire." *Id.* at 19.

6 The United States represented that it did not produce some of the documents because it
7 did not have possession, custody or control over them as the documents were solely held by
8 CalFire. The court denied SPI's motion to compel as to these documents and noted that Sierra
9 Pacific would have to subpoena the documents from the state. *Id.* at 18. Sierra Pacific issued a
10 subpoena to the California Attorney General. CalFire then filed this motion, asking for a
11 protective order or to quash Sierra Pacific's subpoena for production of documents.¹

12 The documents at issue pertain to the United States' experts White and Reynolds, who
13 helped prepare the Origin and Cause report for the Moonlight Fire. White was an investigating
14 officer for CalFire with respect to the Moonlight Fire. Dckt. No. 285 at 4. After January 2008,
15 when he had finished the Origin and Cause Report and submitted it to CalFire,² he became a case
16 manager for the Moonlight Fire in the state court litigation. Dckt. 285 at 10. According to
17 CalFire, he "generated, received, and transmitted documents he had not considered and did not
18 consider in his capacity as the origin and cause investigator for the Moonlight Fire." *Id.*

19 Sierra Pacific has deposed White for a total of 16 days in the state and federal actions.
20 *Id.* CalFire represents that it has already produced "all documents that White read, reviewed,
21 relied upon, generated, received, considered, or considered and rejected in undertaking his 2007
22 investigation and analysis of the Moonlight Fire, and in writing his report about that

23
24 ¹ Although more than 200 documents were originally in dispute, through the meet and
25 confer process the parties narrowed the documents at issue to approximately two dozen. Dckt.
26 No. 285 at 33.

² After January 2008, CalFire claims that White made no edits to the report other than
correcting a typographical error. Dckt. 285 at 9.

1 investigation and analysis.” Dckt. No. 285 at 11. The remaining documents that CalFire refuses
2 to produce were authored by White in his separate capacity as a Moonlight Fire case manager.
3 *Id.* at 11.

4 As for Reynolds, CalFire retained him as an expert consultant in the Moonlight Fire
5 litigation in August 2010. *Id.* The only documents in the possession of the California Attorney
6 General’s office “that reflect communications with Reynolds are limited to contract documents,
7 invoices, and one scheduling logistics communication.” Dckt. No. 285 at 12. Thus, there are no
8 documents pertaining to Reynolds that are presently in dispute. However, CalFire is concerned
9 that Sierra Pacific will continue to serve subpoenas on the California Attorney General in the
10 future for work that Reynolds has not yet done. *Id.*

11 II. The Parties’ Arguments

12 The court must determine whether under these circumstances, where CalFire and the
13 United States have entered into a joint prosecution agreement, but CalFire is not a party to this
14 case, documents stemming from CalFire’s use of White as a case manager and a discovery
15 consultant and retention of Reynolds as a consultant must be produced, despite the documents’
16 privileged nature, because the United States has designated White and Reynolds as testifying
17 experts in this action.

18 CalFire argues that Sierra Pacific’s subpoena should be quashed because the documents
19 sought are privileged and work product, and that CalFire, as the holder of these privileges, has
20 done nothing to waive them. CalFire further contends that Sierra Pacific’s arguments are barred
21 by judicial estoppel, and that the subpoena “assumes too much and overreaches the Court’s May
22 26, 2011, ruling.” Dckt. No. 285 at 7, 12. Sierra Pacific argues that it is entitled to the
23 documents, as Fed. R. Civ. P. 26 creates a bright-line rule mandating disclosure of all documents
24 provided to testifying experts, and this trumps CalFire’s privilege and work product claims, and
25 rebuts CalFire’s other arguments. *Id.* at 34-35.

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1 III. Rule 26 Trumps Privilege

2 A. Existing Legal Standards

3 The parties discuss several persuasive district court cases. In *Bitler Investment Venture II*
4 *v. Marathon Ashland Petroleum*, 2007 WL 465444 (N.D. Ind. Feb. 7, 2007), one plaintiff
5 forwarded privileged documents to an expert witness without the knowledge or consent of the
6 other plaintiff or of the shared counsel for both plaintiffs. The other plaintiff argued that the
7 documents should not be disclosed because both plaintiffs did not agree to the disclosure. *Id.* at
8 *3. The court rejected this argument and ordered that the documents be produced, finding:
9 “Because one of the purposes of disclosure under [an earlier case] is to assist opposing counsel
10 in uncovering all of the information that potentially influenced an expert’s testimony, it makes
11 little difference whether the attorney or someone else provided the information and influenced
12 the expert’s opinion.” *Id.* at *4. The court did not explicitly analyze whether the conduct of the
13 holder of the privilege was relevant, but did write that “counsel can easily protect genuine work
14 product by simply not divulging it to the expert . . . [and] instructing clients not to provide the
15 materials to the expert.” *Id.* at *5.

16 *In re Commercial Money Center, Inc.*, 248 F.R.D. 532 (N.D. Ohio 2008), involved a
17 similar situation. SafeCo and other Sureties entered into a joint-interest agreement and shared a
18 common consultant. *Id.* at 535. SafeCo disclosed the consultant as a testifying expert; the others
19 did not. *Id.* The other side sought discovery of all of the documents in the testifying expert’s
20 file, including documents generated or reviewed by the expert witness in his role as a consultant
21 for the non-SafeCo Sureties. *Id.* The non-SafeCo Sureties argued that SafeCo could not waive
22 the privilege for all of them. *Id.* The court disagreed and ordered that the documents in the file
23 be produced. *Id.*

24 The court’s ruling was somewhat complicated. First, the court noted that all of the
25 documents must be produced because the parties had entered into an Agreed Protocol which
26 provided that expert files must be produced. *Id.* at 535. Therefore, consistent with that protocol,

1 all of the documents in the expert's file had to be produced. *Id.* But next, the court wrote that it
2 would "nonetheless analyze the documents under Rule 26, as it concludes that the vast majority
3 of the documents must be produced under Rule 26 as well." *Id.*

4 The court noted that Rule 26 required the disclosure of all documents given to testifying
5 experts, and that "Rule 26 'trumps any assertion of work product or privilege.'" *Id.* (internal
6 citations omitted). Next, the court disposed of the non-SafeCo Sureties' argument that the
7 common interest doctrine protected the documents, because an unauthorized waiver by SafeCo
8 did not operate as a waiver as to the non-SafeCo Sureties. *Id.* at 536. The court described this
9 argument as seeking "an exception to the requirement of Rule 26 that a testifying expert disclose
10 all information and data considered in forming the expert's opinion," and rejected the argument,
11 writing:

12 "Rule 26(a)(2)(B) 'trumps' any assertion of work product or privilege." *Bitler*,
13 2007 WL 465444, at *3 (quoting *Karn*, 168 F.R.D. at 639). Rule 26 contains no
14 exception for documents provided to an expert by third parties. Once an expert is
15 designated, the expert must disclose all information and data considered in forming
16 the expert's opinions. The Sixth Circuit requires that "all 'documents provided to a
testifying expert' be disclosed." *Reg'l Airport Auth.*, 460 F.3d at 715. Moreover,
in light of the purpose behind the disclosure requirement--to enable the opposing
party to challenge the expert's opinions at trial--from whom the expert obtained
the documents is simply not relevant.

17 *Id.* at 537.

18 The court went on to dispose of the non-SafeCo Sureties' argument that the documents
19 need not be produced because they were reviewed by the expert solely in his role as a consultant
20 for the non-SafeCo Sureties and did not relate to the opinions expressed in his expert report for
21 SafeCo. *Id.* at 538. When an expert serves as both a litigation consultant and a testifying witness
22 to the same party, the court noted, "an expert's proponent may still assert a privilege over such
23 materials, but only over those materials generated or considered *uniquely* in the expert's role as
24 consultant." *Id.* (citing *S.E.C. v. Reyes*, 2007 WL 963422 at *2 (N.D. Cal. 2007)). "If the line
25 between consultant and witness is blurred, the dispute must be resolved in favor of the party
26 seeking discovery." *Id.* The court noted that no precedent had applied this rule in a case where

1 an expert worked as a consultant for one party and as a witness for a different party, but held that
2 “under these circumstances,” if the documents were related to the subject matter of the expert’s
3 report, they should be produced.

4 The relevant circumstances that the court discussed included: SafeCo and the non-SafeCo
5 Sureties aligned their interests in obtaining the expert’s consulting services; they shared him as a
6 consultant, and entered into an information sharing agreement with respect to his work; he was
7 not asked to keep, and did not keep, separate files for the work he did for SafeCo and the non-
8 SafeCo Sureties; and it was therefore reasonable to assume that the expert performed his work for
9 all of the Sureties jointly. *Id.* at 538. Relatedly, the Sureties had not met their burden of showing
10 that the documents at issue were generated or reviewed by the expert uniquely in his role as a
11 consultant. *Id.* at 539.

12 The court addressed the non-SafeCo Sureties’ argument that it would unfair to force them
13 to produce documents when only SafeCo had designated the expert to testify. *Id.* at 541. The
14 court wrote:

15 In invoking a “fairness” doctrine, the Sureties are asking the Court to balance the
16 interests of the Sureties in withholding the documents against the interests of the
17 SafeCo Claimant Banks in obtaining them. Even of [sic] the Court considered the
18 equities in this case, the Sureties would not prevail. The Sureties created the
19 situation in which they now find themselves. Moreover, the situation was
20 foreseeable and the Sureties could have taken steps to avoid it, but did not. At the
21 time the Sureties entered into their Joint Information Sharing Agreement, they
22 could have anticipated that one of them might later decide to designate Huhn as a
23 testifying expert. They could have discussed the possibility and addressed it in the
24 terms of the agreement so as to avoid the current situation. They also could have
25 required Huhn to maintain separate files for the work he did for each of the
26 Sureties individually, as well as a file for the work he did for the Sureties jointly.
They did neither. Whatever hardship results from the instant circumstance, it is
more fairly born by the parties who created the circumstance than by the SafeCo
Claimant Banks, who are entitled to the information under Rule 26.

23 *Id.* at 541.

24 Finally, the court found that a certain category of documents that were reviewed by the
25 expert solely in his role as a consultant for SafeCo were unrelated to the subject matter of his
26 report, and therefore did not have to be produced under Rule 26 (although they did have to be

1 produced under the Agreed Protocol). *Id.* at 541.

2 In sum, the court held that 1) Rule 26’s disclosure requirements generally trumps claims
3 of privilege or work product protection, but 2) if an expert serves as both a litigation consultant
4 and a testifying witness to the same party, only “those materials generated or considered *uniquely*
5 in the expert’s role as consultant,” may still be undisclosed as privileged, and 3) even if the court
6 considered the equities of the facts of the case, the non-SafeCo Sureties would not prevail because
7 they had failed to take precautions to prevent this situation.

8 The *Reyes* case that *Commercial Money Center* cited is persuasive on the issue of the
9 “multiple hats” problem—that is, the discoverability of documents generated and reviewed by an
10 expert who serves as both a consultant and a testifying expert. 2007 WL 963422 at *1-*2. *Reyes*
11 noted that courts generally held that where the same expert serves both as a testifying expert and
12 as a litigation consultant for the same party, only materials “generated or considered uniquely in
13 the expert’s role as consultant” are discoverable. *Id.* at *1. *Reyes* concluded that the expert’s
14 proponent could assert the work-product privilege only as to materials that did not pertain to the
15 subject matter on which his experts testified. *Id.* at *2. “Any ambiguity as to the role played by
16 the expert when reviewing or generating the documents should be resolved in favor of the party
17 seeking discovery.” *Id.* (citing *B.C.F. Oil Refining, Inc. v. Consol. Edison Co. of New York*, 171
18 F.R.D. 57, 61-62 (S.D.N.Y. 1997)). Specifically, *Reyes* stated:

19 This Court finds that the appropriate test for disclosure is not what function the
20 expert was ostensibly serving when he reviewed or generated the particular
21 documents in question. Rather, the test must be whether the documents reviewed
or generated by the expert could reasonably be viewed as germane to the subject
matter on which the expert has offered an opinion.

22 *Id.* at *2 n.2.

23 B. Analysis

24 Although the United States and CalFire have entered into a joint prosecution agreement,
25 they have not jointly retained White or Reynolds as expert witnesses. In this case, White and
26 Reynolds have dual capacities—they are non-retained, non-reporting experts for the United States

1 in this action, and they are also (at least thus far) non-testifying litigation consultants to CalFire in
2 pending state court litigation related to the same fire at issue in this case.

3 *Bitler* and *Commercial Money Center* both hold that the disclosure requirements of Rule
4 26 trump privilege and work product protections, regardless of who provided the documents to
5 the expert witness. *See Bitler*, 2007 WL 465444 at *4; *Commercial Money Center, Inc.*, 248
6 F.R.D. at 537. The cases did not make any exceptions to this rule pertaining to the identity of the
7 holder of the privilege or whether the holder of the privilege had waived it through their conduct,
8 although both cases noted that the party disadvantaged by the ruling had failed to act diligently.
9 *See Bitler*, 2007 WL 465444 at *5 (noting that counsel in that case had failed to protect its work
10 product); *Commercial Money*, 248 F.R.D. at 541 (discussing the equities of the situation and
11 finding that the non-SafeCo Sureties were at fault for creating the situation). Here, CalFire, who
12 is not a party to this action, is the holder of the privilege, and has not explicitly waived the
13 privilege by its conduct. However, CalFire voluntarily entered into a joint prosecution agreement
14 with the United States, and is reaping the benefits of that arrangement.

15 Both *Commercial Money* and *Reyes* found that Rule 26 trumped all claims of privilege
16 even where the expert witness was acting in a dual role as a litigation consultant and as a
17 testifying expert. *Reyes* announced that the test for whether the materials at issue were generated
18 or considered uniquely in the expert's role as a consultant, and therefore protected, was not "the
19 particular role ostensibly played" by the expert at the time the materials were generated or
20 reviewed, but whether the materials could reasonably be viewed as germane to the subject matter
21 on which the expert has offered an opinion. 2007 WL 963422 at *2 n.2. The court finds the
22 reasoning of *Commercial Money Center* and *Reyes* persuasive and adopts that test here.

23 Following the test in *Commercial Money Center* and *Reyes*, the court must determine
24 whether the documents at issue here were generated or considered uniquely in White's role as a
25 consultant for CalFire, keeping in mind that if the line between consultant and witness is blurred,

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1 the documents must be produced.³ *Reyes* explains that the test to determine whether documents
2 are generated or considered uniquely in the role of a consultant is whether the documents
3 generated or reviewed by the expert could reasonably be viewed as germane to the subject matter
4 on which the expert has offered an opinion.

5 White, as a non-retained testifying expert for the United States in this case, has offered
6 opinions on the origin and cause of the Moonlight Fire. He is also a current employee of CalFire,
7 and acted as a litigation consultant for CalFire in litigation pertaining to the Moonlight Fire. His
8 origin and cause investigation lasted from September 3, 2007 until September 17, 2007; he
9 completed a draft of the report “around October 2007,” and finally submitted the report in January
10 2008. Dckt. No. 289 at 2. White declares that at that time, his opinions regarding origin and
11 cause were final (with the possible exception of correcting a typographical error). *Id.* No
12 attorneys provided input regarding the preparation of the report. *Id.*

13 After he completed and submitted the Origin and Cause report, in January 2008, White
14 became the “case manager” for the Moonlight Fire for CalFire. *Id.* at 3. He declares that his
15 duties as a “case manager were different and separate from my role as the case investigator.” *Id.*
16 As a case manager, he acted as CalFire’s liaison with the California Attorney General’s office.
17 *Id.* He “ensured that the documentation related to the costs of suppressing the fire were
18 completed and submitted” to the AGO; helped with scheduling; drafted the letter of demand; and
19 served as a discovery consultant by helping the AGO in prepare written discovery and prepare for
20 depositions. *Id.*

21 From these facts, it appears that at the time White generated or reviewed the documents at
22 issue, he was playing the role of a litigation consultant. However, under *Reyes*, this is not the
23 controlling test. Rather, the proper inquiry is whether the documents could reasonably be viewed
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25 ³ No documents generated or reviewed by Reynolds are currently in dispute. The court
26 does not analyze whether hypothetical documents that may be generated or reviewed in the
future need be produced.

1 as germane to White's opinions regarding the origin and cause of the Moonlight Fire.

2 Based on the court's review of the documents submitted for in camera review, many of the
3 documents meet this test and those documents must be produced. However, documents numbered
4 53, 75, 76, 83, 154, and 156, as well as the documents titled, "Email from Josh White to Chris
5 Van Cor," and "Email from Alan Carlson to Joshua White and Mike Jarvis," could not reasonably
6 be viewed as germane to White's opinions on origin and cause, and need not be produced. All of
7 the other documents submitted for in camera review could reasonably be viewed as germane to
8 origin and cause and must be produced.

9 IV. Judicial Estoppel

10 CalFire argues that Sierra Pacific should be judicially estopped from arguing that the
11 documents could have influenced White's percipient expert opinions and conclusions about the
12 origin and cause of the Moonlight Fire. Dckt. No. 285 at 15. CalFire argues that Sierra Pacific
13 has advanced inconsistent arguments in the state and federal actions and are gaining an unfair
14 advantage by misleading at least one court. *Id.*

15 Judicial estoppel prevents a party from prevailing on an argument in one phase of a case
16 and then relying on a contradictory argument to prevail in another phase. *New Hampshire v.*
17 *Maine*, 532 U.S. 742, 749 (2001). Factors relevant to determining whether a party should be
18 judicially estopped from advancing a position include: 1) the party's position is "clearly
19 inconsistent" with its earlier position; 2) the judicial acceptance of the party's second position
20 would create the "perception that either the first or the second court was misled;" and 3) the party
21 would derive an unfair advantage or impose an unfair detriment if not estopped. *Id.* at 750.

22 Sierra Pacific did not advance inconsistent arguments in state court and in this court. In
23 state court, when Sierra Pacific wanted to depose White in the percipient phase of the state court
24 cases, Sierra Pacific argued that White was a witness with percipient knowledge. *See* Dckt. No.
25 288, Ex. D (stating that during the percipient witness deposition of White, Sierra Pacific would
26 not explore White's opinions formed after the litigation commenced, and that had not yet been

1 provided during expert discovery; and stating that Sierra Pacific wanted information about
2 White's first hand observations and investigation of the fire, which form the basis of the report
3 that he wrote before the cases were filed). This is not inconsistent with Sierra Pacific's current
4 argument. Sierra Pacific wanted to depose White as a percipient witness during the first phase of
5 discovery, and it promised to limit the deposition to those opinions which stemmed only from
6 White's percipient knowledge. This does not mean that White never formed expert opinions with
7 the input of counsel, and it does not mean that Sierra Pacific is precluded from seeking documents
8 that may show how his expert opinions were influenced.

9 Accordingly, accepting Sierra Pacific's argument would not create a perception that either
10 the state court or this court was misled. Neither would accepting Sierra Pacific's argument give
11 Sierra Pacific an unfair advantage or impose an unfair detriment on CalFire or the United States.

12 V. Burdensomeness of the Subpoena

13 CalFire also argues that the subpoena is burdensome and overreaches the court's previous
14 ruling. *See* Dckt. No. 285 at 15, 18. But CalFire admits that there are only about two dozen
15 documents at issue, and CalFire has already submitted the documents for in camera review.
16 CalFire has already expended the effort to comply with the subpoena; clearly it is not unduly
17 burdensome.

18 CalFire also objects that the subpoena "assumes too much and overreaches the Court's
19 May 26, 2011, ruling." *Id.* CalFire notes that the court's previous ruling allowed discovery of
20 "documents and communications that White and Reynolds considered, generated, saw, read,
21 reviewed, and/or otherwise reflected upon in connection with their analysis of the Moonlight
22 Fire." Dckt. No. 285 at 18. But Sierra Pacific's subpoena asks for all documents authored, sent
23 or received by the experts relating to the Moonlight Fire, without reference to the "analysis" of
24 the Fire. CalFire states that it has already produced all of the documents referred to in the court's
25 order, and it need not produce documents that the experts did not review in connection with their
26 analysis of the fire.

1 As the court has explained in the past, it is not enough for an expert to say that he did not
2 consider a document in his analysis of the fire. Rather, the other side ought to be able to test an
3 expert's opinions against documents that he could have, but did not consider in his analysis.
4 Documents that are related to the fire, but were not considered by the experts in their analysis,
5 may be valuable for testing the reliability of the experts' opinions. The distinction between "in
6 connection with their analysis of the Moonlight Fire" and "related to the Moonlight Fire" makes
7 little difference.

8 VII. Conclusion

9 For the reasons explained above, it is hereby ORDERED that the California Attorney
10 General and CalFire's motion to quash Sierra Pacific's subpoena for the production of documents
11 is granted as to documents numbered 53, 75, 76, 83, 154, and 156, as well as the documents titled,
12 "Email from Josh White to Chris Van Cor," and "Email from Alan Carlson to Joshua White and
13 Mike Jarvis," and denied as to the rest of the documents submitted for in camera review.
14 CalFire's request for a protective order is denied.

15 DATED: November 8, 2011.

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17 EDMUND F. BRENNAN
18 UNITED STATES MAGISTRATE JUDGE
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