

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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Mr. Elliot H. Scherker
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Re: Case No. 17-2290, *In re: United Shore Financial Service*
Originating Case No. : 2:15-cv-12639

Mr. Scherker,

The petition for writ of mandamus has been docketed as case number **17-2290** with the caption listed above. If you have not already done so, you must mail a copy of the petition to the lower court judge and counsel for all the other parties.

The district court judge to whom this petition refers has been served with this letter. Please file an appearance form for the above cause 14 days.

Sincerely yours,

s/Cheryl Borkowski
Case Manager
Direct Dial No. 513-564-7035

cc: Mr. David J. Weaver

Case No. _____

IN THE
United States Court of Appeals
FOR THE SIXTH CIRCUIT

IN RE UNITED SHORE FINANCIAL SERVICES, LLC

Petitioner-Defendant

FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
CASE No. 15-12639

**PETITION FOR WRIT OF MANDAMUS OF
UNITED SHORE FINANCIAL SERVICES, LLC**

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PETITION FOR WRIT OF MANDAMUS

Pursuant to 28 U.S.C. § 1651 and Federal Rule of Appellate Procedure 21, Petitioner United Shore Financial Services, LLC (United Shore) petitions this Court to issue a writ of mandamus to compel the United States District Court for the Eastern District of Michigan, Southern Division, to vacate its August 28, 2017 Order Regarding Discovery Motions (the Discovery Order) and October 4, 2017 Order Denying United Shore's Motion for Clarification (the Clarification Order), to the extent those orders direct United Shore to produce privileged attorney-client communications.

ISSUE PRESENTED

Whether the district court committed clear error in ruling that Petitioner United Shore must disclose privileged communications between United Shore's counsel and an investigative service retained by United Shore to provide expert assistance to United Shore and its counsel in this matter, which disclosure will violate United Shore's attorney-client privilege and cause irreparable injury, so as to warrant the issuance of a writ of mandamus.

INTRODUCTION

The district court has ordered United Shore to produce to its co-defendant in the underlying action, Xerox Mortgage Services (XMS), attorney-client privilege protected communications. Based on a ruling that United Shore—merely by

responding to an interrogatory (as to which all objections based on privilege were preserved, and disclosing that United Shore’s lawyers had retained a third party, Navigant, to investigate the data breach that gave rise to this action)—had waived the privilege as to its communications, as well as its counsel’s communications, with the third party. In denying United Shore’s request for clarification, the district court ruled that United Shore “must produce communications between it (and/or its counsel) and [the third party] to the extent those communications are otherwise responsive” to XMS’s interrogatory.

There was no dispute in the district court as to whether the communications sought to be produced are covered by the attorney-client privilege. Nor could there be a dispute. It is well established that the attorney-client privilege extends to communications between counsel and agents or consultants who counsel retains to help provide legal services to the client.

Investigating the technical aspects of a data breach often (if not always) requires expert assistance, such as that provided by Navigant to United Shore and its counsel. The district court’s ruling has the clear potential to chill or inhibit communications between counsel and agents retained to investigate and resolve data breaches. The district court’s sole justification for such an intrusion is that, “[b]ecause United Shore disclosed the privileged conclusions of the [the third party’s] investigations, and because it appears United Shore intends to use the

findings of the investigation to prove the cause of the intrusion in to XMS's database, XMS is entitled to see documents related to how that investigation was conducted and what was considered during the investigation.”

The Discovery Order cites no authority—and United Shore has found none—holding that a disclosure in an out-of-court unfiled response to an interrogatory seeking only factual information (as distinguished from a response to an issue or contention interrogatory) constitutes “use” that can be sufficient impliedly to waive *all* privileged communications related to the facts disclosed. Nor does the Order cite any authority—and, again, United Shore has found none—for the proposition that the mere “appear[ance]” of an “inten[t] to use the findings” at some future (and unknown) time sufficiently puts those “findings” at issue now, so as to constitute an implied waiver of *all* privileged communications related to the investigation.

The district court's rulings provide no basis for stripping United Shore of its attorney-client privilege with respect to its counsel's investigation. Because United Shore will suffer irreparable injury if compelled to produce privileged documents, this Court's mandamus jurisdiction properly is invoked to seek vacatur of the district court's Discovery Order.

FACTUAL BACKGROUND

This case is pending on a class action complaint brought by Plaintiff Al Leibovic against XMS and United Shore. Docket Entry Number (hereinafter “DE”) 84 at 1-2. XMS provided document management services to United Shore, using “BlitzDocs” software, and United Shore stored confidential information with XMS, which information included Leibovic’s mortgage application. *Id.* In 2011, intruders stole United Shore’s confidential information from XMS, which engendered Leibovic’s action. *Id.*

On December 15, 2016, XMS filed, among other things, its first set of interrogatories. (DE:85-2). Included among the interrogatories was No. 8, which requested that United Shore respond as to “all actions . . . taken . . . in response to any unauthorized use” of its XMS accounts. (DE:85-2:5). United Shore responded that, “[u]pon discovering facts suggesting that an external system attack may have occurred,” United Shore retained counsel. (DE:85-4:9-10). Counsel retained Navigant “to conduct an investigation and analysis of the suspected data breach incident.” *Id.* at 10. As a result of its investigation, Navigant “determined that certain files stored in XMS’s BlitzDocs system . . . had been accessed without authorization.” *Id.* United Shore took appropriate countermeasures, including cooperation with “various law enforcement and federal government agencies.” *Id.* When United Shore thereafter learned of a second breach, Navigant conducted

another investigation, through which it determined that the breach had been “caused by multiple instances in which XMS provided account password information to third party criminals . . . in plain violation of established security protocols.” *Id.* at 10-11.¹ In addition to its interrogatory response, United Shore disclosed in excess of 150 non-privileged documents regarding Navigant’s investigation, including non-privileged communications, withholding only items protected by the attorney-client privilege. (DE:93:2-3).

XMS moved to compel United Shore “to produce information and documents about Navigant’s investigation,” asserting that United Shore’s interrogatory response had “use[d] offensively the alleged results of that investigation offensively to allege fault on the part of XMS.” (DE:84).² XMS accused United Shore of “engaging in impermissible selective waiver.” *Id.* In response, United Shore explained:

United Shore did not “offensively” use a Navigant finding. XMS’s Interrogatory No. 8 asked United Shore to “[s]tate with particularity all actions including, but not limited to, investigations . . . taken by you at any time” regarding the unauthorized access of United Shore customer information. XMS Mot. at Ex. E (Interrogatory No. 8).

¹ XMS acknowledged in the district court that there had been at least three instances in which “an XMS employee has, in violation of security protocols, changed the password on a [United] Shore account based on a request from someone who is not an authorized [United] Shore employee,” and that this “continue[d] to happen despite [XMS’s] own internal security protocols as well as the additional security protocols [United] Shore has requested of [XMS] (and which [XMS] represented to [United Shore] that [it] implemented.” (DE:88-1:51).

United Shore answered by supplying, among other things, factual information about Navigant's investigation. United Shore did not disclose any privileged communications; did not use any information, privileged or otherwise, "offensively" to support any claim or defense; and did not place the subject matter of a privileged communication at issue. XMS cannot ask for information in an interrogatory and then claim the responding party, in answering the interrogatory, is using the requested information "offensively."

(DE:88:11-12). United Shore also rejected XMS's "selective waiver" argument as unfounded, because—in disclosing that Navigant had "determined third parties gained access to United Shore customer information in BlitzDocs"—United Shore "did not disclose any privileged communications or private information," as that information had previously been publicly disclosed in the criminal case instituted against the intruder. *Id.* at 12.

The district court granted XMS's motion to require disclosure of privileged communications. (DE:92).³ The court ruled that United Shore's disclosure of the already-disclosed Navigant investigation waived the attorney-client privilege as to

² XMS's motion raised other purported discovery defaults, as did United Shore in separate filings. (DE:84; DE:92:1). The parties resolved all other disputes after their papers had been filed, leaving only the attorney-client privilege issue for the district court to decide. (DE:92:1).

³ The motion was originally scheduled for hearing on August 23, 2017. On August 10, the district court ordered the parties to appear on August 18 to resolve outstanding issues in the parties' respective motions to compel. (DE:90). On August 17, the district court told the parties that "counsel . . . no longer had to appear" on August 18 after the parties informed the court they had resolved all disputes except those concerning privilege, which the parties would present at the August 23 hearing. On August 22, the district court cancelled the August 23 hearing. (DE:93:13).

all United Shore-Navigant communications, including communications between United Shore's lawyers and Navigant:

Although United Shore was responding to XMS's Interrogatory regarding investigations it had commissioned, its response went beyond providing factual information regarding the existence of the investigation and retention of Navigant. United Shore's response also included details regarding Navigant's conclusions. This exceeded the scope of the Interrogatory and—as XMS contends—United Shore fails to explain “why the conclusions of a supposedly privileged investigation commissioned by counsel would not themselves be privileged.”

Because United Shore disclosed the privileged conclusions of Navigant's investigations, and because *it appears* United Shore intends to use the findings of the investigation to prove the cause of the intrusion of XMS's database, XMS is entitled to see documents related to how the investigation was conducted and what was considered during the investigation.

(DE:92:6-7) (emphasis added; internal record citations omitted).

United Shore moved for clarification, explaining that, with respect to the court's ruling that “XMS is entitled to see documents related to how the investigation was conducted and what was considered during the investigation,” United Shore had “already produced over 150 non-privileged documents in the normal course of discovery concerning Navigant's investigation, including non-privileged communications with Navigant.” (DE:93:2, 13).⁴ United Shore accordingly sought clarification as to whether the Discovery Order is “a direction

⁴ United Shore further explained that “it does not take and has not taken the position that all communications with Navigant are protected by its attorney-client privilege.” (DE:93:3).

to produce non-privileged communications related to how the investigation was conducted and what was considered during the investigation until such time (if ever) as United Shore actually offensively uses Navigant's conclusions in the case and thereby waives its attorney-client privilege over its counsels' communications with Navigant by putting them at issue in the litigation." *Id.* at 3-4.⁵

The district court denied the motion. (DE:96). The court ruled that "United Shore must produce communications between it (and/or its counsel) and Navigant to the extent that those communications are otherwise responsive to XMS's Interrogatory No. 8." *Id.*

REASONS WHY THE WRIT SHOULD BE GRANTED

This Court's power to issue writs of mandamus is conferred by 28 U.S.C. § 1651 and Federal Rule of Appellate Procedure 21. This Court applies a "flexible" approach to determining whether this "extraordinary remedy" should be extended, taking into consideration whether: (i) "[t]he party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired"; (ii) "[t]he petitioner will be damaged or prejudiced in a way not correctable on appeal," which is "closely related to the first [factor]"; (iii) "[t]he district court's order is

⁵ In its reply to XMS's response, United Shore specifically stated that not only "has it neither used nor indicated it would use the conclusions of Navigant's investigation for any offensive purpose"—but that "United Shore has no intention of doing so and would stipulate to the same." (DE:95:2)

clearly erroneous as a matter of law”; (iv) “[t]he district court’s order is an oft-repeated error, or manifests a persistent disregard of the federal rules”; (v) “[t]he district court’s order raises new and important problems, or issues of law of first impression.” *In re Perrigo Co.*, 128 F.3d 430, 435 (6th Cir. 1997); accord *In re Powerhouse Licensing, LLC*, 441 F.3d 467, 471 (6th Cir. 2006); *In re Lott*, 424 F.3d 446, 449 (6th Cir. 2005). The “flexible” approach eschews any requirement that “every element be met in order for mandamus to issue.” *Lott*, 424 F.3d at 449. Here, because the attorney-client privilege is at issue, the first and second factors readily weigh in favor of review. *Powerhouse*, 441 F.3d at 472. “[F]orced disclosure of privileged material may bring about irreparable harm.” *Perrigo*, 128 F.3d at 437. This Court reviews *de novo* “[a] district court’s decision regarding the waiver of the attorney-client privilege.” *Powerhouse*, 441 F.3d at 472.

Neither XMS nor the district court cited any support for the district court’s ultimate ruling that United Shore’s unremarkable disclosure of *non-privileged* information in its interrogatory response—information that was well-known to XMS long before XMS propounded the interrogatory—waived the privilege as to *all* communications among United Shore, its lawyers, and Navigant. And none exists.

As this Court has held, the privilege “extends only to *communications* and not to facts.” *Powerhouse*, 441 F.3d at 472 (emphasis added; citations omitted).

Here, United Shore has asserted the privilege only as to communications—and *not* as to facts. That the communications at issue are between United Shore’s lawyers and Navigant is of no consequence to their privileged status; the privilege extends to experts retained to assist a client’s lawyers. *See, e.g., United States v. Krug*, 868 F.3d 82, 87 (2d Cir. 2017); *Lluberes v. Uncommon Prods., LLC*, 663 F.3d 6, 24 (1st Cir. 2011).

Because “a court should begin its analysis with a presumption in favor of preserving the privilege . . . , the burden of establishing a waiver under the balancing approach rests on the party seeking discovery.” *Perrigo*, 128 F.3d at 440 (citation and internal quotation marks omitted). Upon a proper showing, a court may determine that the privilege was expressly waived—usually “by voluntary disclosure of private communications by an individual or corporation to third parties”—or, alternatively, “a client may waive the privilege by conduct which implies a waiver of the privilege or a consent to disclosure.” *Lott*, 424 F.3d at 452 (citing *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002)).

Implied waivers are narrowly construed, such that courts “must impose a waiver no broader than needed to ensure the fairness of the proceedings before it.” *Lott*, 424 F.3d at 453 (citation omitted). Although parties “cannot hide behind the privilege if they are relying upon privileged communications to make their case,”

courts have restricted implied waivers to situations in which “the holder of the privilege has taken some affirmative step to place the content of the confidential communication into the litigation.” *Id.* at 454-55. To be sure, the privilege “cannot at once be used as a shield and a sword”—“[b]ut, while the sword stays sheathed, the privilege stands.” *Id.* at 454 (citation omitted). Here, there is neither an express nor an implied waiver of the privilege.

There is no express waiver because the information disclosed by United Shore is not privileged in the first instance. United Shore’s disclosure is entirely consistent with its obligations under Federal Rule of Civil Procedure 26(b)(1).⁶ United Shore does not and has not taken the position that *all* communications with Navigant are protected by its attorney-client privilege, but only those communications between its counsel and Navigant or to facilitate its counsel’s provision of legal advice. United Shore accordingly produced over 150 documents concerning Navigant’s investigation, including non-privileged communications with Navigant. The facts disclosed in the interrogatory response are no more privileged than were the source documents disclosed in discovery—and XMS

⁶ The irony here is that, had United Shore refused to provide any information regarding Navigant’s non-privileged factual determinations, XMS most assuredly would have sought to compel an answer to its interrogatory. And it would have prevailed; because United Shore lived up to its discovery obligations, however, XMS sought to confect a waiver of the privilege.

notably never suggested otherwise in the district court.⁷ There is nothing in the law that supports a finding that the disclosure of non-privileged, non-private facts contained in a non-privileged communication constitutes a voluntary disclosure of privileged information that expressly waives all attorney-client privileged communications related to those facts.

Moreover, United Shore objected to Interrogatory No. 8's request for privileged information, expressly stating: "Nothing contained in this Response is intended to be, nor should be construed as, a waiver of any privilege. Should United Shore inadvertently respond with documents or information protected by any such privilege, such response shall in no way be intended, nor shall it be construed, as a waiver of such privilege." (DE:93:18). No clearer indication of United Shore's intent to maintain its attorney-client privilege, where appropriate to do so, could be stated.

Nor is there any basis whatsoever for finding an implied waiver of the privilege, because United Shore asserted no claim of privilege with respect to

⁷ For example, United Shore previously produced a non-privileged email from United Shore to Navigant, relaying the BlitzDocs account names Navigant should be analyzing in connection with the second breach incident. (DE:93-1:21-22). Significantly, this email does not reveal any communications between counsel and Navigant, but rather sets forth details of Navigant's investigation, including the manner in which the investigation was conducted and items considered by Navigant during its investigation. *Id.*

Navigant's conclusions, as disclosed in the interrogatory response, in the first instance. There is no basis in the record before the district court to support a determination that United Shore is "relying upon privileged communications to make [its] case," such as would warrant imposing an implied waiver. *Lott*, 424 F.3d at 454.⁸ And there is nothing in the law that supports a finding that a disclosure of non-privileged information in an unfiled interrogatory answer constitutes an offensive "use" of privileged communications.

Compelling a litigant to reveal privileged communications is the paradigmatic irreparable injury. *E.g., Perrigo*, 128 F.3d at 437. And that injury is magnified here, because the district court's sweeping directive that—regardless of any claims of privilege—United Shore "must produce communications between it (and/or its counsel) and Navigant to the extent that those communications are otherwise responsive to XMS's Interrogatory No. 8" (DE:96), may well have further deleterious impacts when, as presently contemplated, the parties commence oral discovery early next year. (DE:102). The only remedy for the district court's

⁸ Indeed, the district court did not find otherwise. Rather, the court stated that "it *appears* United Shore *intends* to use the findings of the investigation to prove the cause of the intrusion of XMS's database." (DE:92:7) (emphasis added). There is no legal basis for finding that statements in an unfiled interrogatory answer constitute an offensive "use" of privileged communications. For that matter, even if it is assumed that Navigant's conclusions were privileged, there would be no implied waiver until and unless United Shore affirmatively relies on those conclusions to support either a claim or defense.

facially erroneous waiver ruling is this Court's writ of mandamus, as United Shore will suffer irreparable injury if compelled to produce privileged documents.⁹

CONCLUSION

As this Court rightly has stated, “[i]t is not hyperbole to suggest that the attorney-client privilege is a necessary foundation for the adversarial system of justice.” *Lott*, 424 F.3d at 450. United Shore has no adequate means to protect itself against a full-scale invasion of the privilege other than mandamus, because there would be no viable post-judgment remedy. United Shore accordingly requests the Court to issue its writ of mandamus, directing the district court to vacate the Discovery Order and the Clarification Order, to deny XMS's motion to compel disclosure of privileged communications, and to grant such other and further relief as may be deemed necessary to protect United Shore's privilege.

⁹ The district court's ruling also frustrates public policy. United Shore sought third-party expertise to immediately identify and resolve all issues that might adversely impact its customers. This type of good corporate citizenship is in the best interests of the public and should be encouraged, not thwarted.

Respectfully Submitted,

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United Shore Financial Services, LLC

By: /s/ Elliot H. Scherker
Elliot H. Scherker

CERTIFICATE OF SERVICE

I hereby certify that, on October 26, 2017, I electronically filed the foregoing petition with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on the district court and on all counsel of record identified below via UPS.

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/s/ Elliot H. Scherker

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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitations of Fed. R. App. P. 21(d)(1) because it contains 3,274 words, excluding accompanying documents required by Fed. R. App. P. 21(a)(2)(C).

This petition complies with the requirements of Fed. R. App. P. 32(c)(2) and Fed. R. App. P. 32(a) because it has been prepared using Microsoft Word 2010 in Times New Roman, 14-point font.

/s/ Elliot H. Scherker

Elliot H. Scherker

ATTACHMENT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AL LEIBOVIC,

Plaintiff,

v.

Case No. 15-12639

Honorable Victoria A. Roberts

UNITED SHORE FINANCIAL
SERVICES, LLC, *et al.*,

Defendants.

ORDER REGARDING DISCOVERY MOTIONS [Docs. 75, 78, 81, and 84/85]

I. INTRODUCTION

Four discovery motions were filed on August 1, 2017: (1) Plaintiff Al Leibovic's motion to compel Defendant Xerox Mortgage Services, Inc.'s ("XMS") production of documents and interrogatory responses [Doc. 75]; (2) Plaintiff and Defendant United Shore Financial Services, LLC's ("United Shore") joint motion to compel XMS to produce certain documents and for an order denying XMS's attempt to clawback documents its says it inadvertently produced [Doc. 78]; (3) United Shore's motion to compel XMS to respond to discovery requests [Doc. 81]; and (4) XMS's motion to compel United Shore to respond to discovery requests [Docs. 84/85].

The Court entered a preliminary order concerning the discovery motions to aid further discussion among counsel, and ordered them to appear on Friday August 18, 2017 to settle remaining discovery disputes. [Doc. 90]. On August 17, the parties submitted a joint letter via email indicating that they had resolved all issues raised in the four motions except for three legal issues. [Doc. 91]. Based on that, the Court informed counsel they no longer had to appear on August 18.

The parties resolved all issues in Plaintiff's motion to compel XMS [Doc. 75] and United Shore's motion to compel XMS [Doc. 81]; those motions are **MOOT**.

The Court now rules that Plaintiff and United Shore's joint motion to compel XMS [Doc. 78] is **DENIED** as to the one unresolved issue and **MOOT** in all other respects.

Also, XMS's motion to compel United Shore [Docs. 84/85] is **GRANTED IN PART** and **DENIED IN PART** regarding the two unresolved issues – as set forth below; concerning the other issues in the motion which the parties resolved, the motion is **MOOT**.

II. DISCUSSION

The unresolved issues are: (1) XMS's assertion of the work product doctrine to clawback documents; (2) XMS's assertion that United Shore waived the attorney-client privilege with respect to its communications involving third-party Navigant; and (3) a disagreement regarding "a privilege issue in connection with the production of settlement communications between counsel for Plaintiff and United Shore, in response to XMS Document Request No. 2." [See Doc. 91].

1. XMS's Assertion of the Work Product Doctrine to Clawback Non-Responsive Documents Inadvertently Produced [Doc. 78]

The first unresolved issue is raised in Plaintiff and United Shore's joint motion to compel XMS. [Doc. 78].

On April 24, 2017, XMS produced approximately 1,150 documents; the production of documents was made from a database of documents compiled by XMS's counsel. Two days later, on April 26, XMS informed Plaintiff and United Shore that it had unintentionally produced approximately 400 "non-responsive" documents. XMS indicated that, pursuant to Federal Rule of Evidence 502 and a "claw-back" provision in

the parties' stipulated Discovery Plan, it intended to claw-back the entire production and make an updated production as soon as possible. On April 27, XMS elaborated on its initial email, stating it was clawing back the non-responsive documents because they were "inadvertently produced" and "privileged under the work-product doctrine."

The parties' Discovery Plan includes a claw-back provision pursuant to Fed. R. Evid. 502(d) and (e), providing that a party's inadvertent production of documents is without prejudice to a claim by the producing party that the documents are protected by a legally cognizable privilege or evidentiary protection – including the work product doctrine – if the producing party gives notice to the receiving party within 15 days of discovering the inadvertent production. [See Doc. 37, PgID 380-81].

XMS informed Plaintiff and United Shore of its inadvertent production and claim under the work product doctrine in a timely manner. However, the parties dispute whether XMS can claw-back "non-responsive" documents under the work product doctrine. XMS says it can. Plaintiff and United Shore disagree, and request an order from the Court rejecting XMS's attempt to claw-back the documents – which would allow them to use the documents in the case. Plaintiff and United Shore essentially request the Court to order XMS's counsel to produce its entire database of documents – regardless of whether or not the documents in the database are responsive to their discovery requests.

The work product doctrine "extends beyond confidential communications between the attorney and client to any document prepared in anticipation of litigation by or for the attorney." *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 304 (6th Cir. 2002) (citation and internal quotation marks omitted). "It is

axiomatic that the purpose of the work-product doctrine is to allow an attorney ‘to assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference ... to promote justice and to protect [his] clients’ interests.’” *In re Powerhouse Licensing, LLC*, 441 F.3d 467, 473 (6th Cir. 2006) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947))). XMS, as the objecting party, has the burden to show the applicability of the work product doctrine. *Id.*

As XMS acknowledges, a non-privileged, *responsive* document is discoverable wherever it may be located – including counsel’s database. The operative fact here is that the underlying documents XMS seeks to claw-back were non-responsive to Plaintiff’s and/or United Shore’s discovery requests. Although Plaintiff and United Shore say some of the documents XMS seeks to claw-back are relevant, they do not dispute that those documents were non-responsive to their requests. Therefore, but for the inadvertent production of those documents, XMS never would have produced those documents.

The circumstances here are analogous to the circumstances in *Cason-Merenda v. VHS of Michigan, Inc.*, 118 F. Supp. 3d 965, 969 (E.D. Mich. 2015), which found the work product doctrine covered documents in an attorney’s database.

In *Cason-Merenda*, defendant requested plaintiffs to produce copies of all documents produced in the lawsuit, which plaintiffs’ counsel had in its database. *Id.* at 970. In denying defendant’s request, the Court held “that a collection of documents that Plaintiffs’ counsel saw fit to gather, maintain, and organize into a database during the course of discovery qualifies as protected work product.” *Id.* at 969.

Here, XMS's counsel directed XMS to search and turn over a multitude of documents in anticipation of litigation. XMS's counsel produced all responsive documents; it also inadvertently produced non-responsive documents that it had gathered, maintained and organized in its database in anticipation of litigation.

Because the approximately 400 documents XMS inadvertently produced are *non-responsive* and were compiled by XMS's counsel in anticipation of litigation, they are protected by the work product doctrine and subject to claw-back under the Discovery Plan. See *Cason-Merenda*, 118 F. Supp. 3d at 969. See also *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir.1986) ("In cases that involve reams of documents and extensive document discovery, the selection and compilation of documents is often more crucial than legal research.").

Regarding this issue, Plaintiff and United Shore's joint motion to compel [Doc. 78] is **DENIED**. Unless the parties agree to a different procedure, Plaintiff and United Shore must return the entire production, which includes the approximately 400 non-responsive documents, and XMS must make an updated production as soon as possible.

Because the parties resolved all other issues raised by Plaintiff and United Shore, the joint motion is otherwise **MOOT**.

2. XMS's Assertion that United Shore Waived the Attorney-Client Privilege With Respect to Communications Involving Non-Party Navigant [Docs. 84/85]

The second unresolved issue is raised in XMS's motion to compel against United Shore. [Docs. 84/85].

In the aftermath of the alleged intrusions to XMS's software system, United Shore's counsel commissioned Navigant – a third-party – to conduct an investigation.

XMS's Interrogatory No. 8 asked United Shore to state with particularity all investigations, notifications and remedial efforts taken in response to any unauthorized use of its accounts – in relation to the alleged intrusions to XMS's database. In response, United Shore indicated that Navigant conducted an investigation, and it also provided Navigant's conclusions from the investigation. However, United Shore withheld a significant amount of documents related to Navigant's investigation on the basis that they were protected by attorney-client privilege, since its counsel had commissioned the investigation.

XMS says United Shore is engaging in impermissible selective waiver because it is seeking the benefit of using the results of the investigation, but withholding information about what the investigation considered and how the investigation was conducted. It further says that by including Navigant's conclusions in its response to the Interrogatory, it was using the results of the investigation offensively, which waived the privilege.

United Shore says it was merely responding to the Interrogatory with factual information related to its retention of Navigant and the existence of Navigant's investigation.

Although United Shore was responding to XMS's Interrogatory regarding investigations it had commissioned, its response went beyond providing factual information regarding the existence of the investigation and retention of Navigant. United Shore's response also included details regarding Navigant's conclusions. This exceeded the scope of the Interrogatory and – as XMS contends – United Shore fails to

explain “why the conclusions of a supposedly privileged investigation commissioned by counsel would not themselves be privileged.” [Doc. 86, PgID 2343].

Because United Shore disclosed the privileged conclusions of Navigant’s investigations, and because it appears United Shore intends to use the findings of the investigation to prove the cause of the intrusion of XMS’s database, XMS is entitled to see documents related to how the investigation was conducted and what was considered during the investigation.

Regarding this issue, XMS’s motion to compel [Docs. 84/85] is **GRANTED**.

3. Production of Settlement Communications Between Counsel for Plaintiff and United Shore

The remaining unresolved issue was also raised by XMS in its motion to compel United Shore [Docs. 84/85].

XMS’s Document Request No. 2 sought all communications related to XMS between United Shore and its counsel and Plaintiff and its counsel. In response to that request, United Shore indicated that it produced all non-privileged communications responsive to the request that were in its possession and control. It also objected to the request because, among other things, XMS sought documents which United Shore says are protected by attorney-client privilege. Finally, United Shore objected that the request was directed to counsel for United Shore rather than United Shore itself.

In its motion to compel, XMS says notwithstanding that the request was directed to United Shore’s counsel, the documents were within United Shore’s control. But, XMS fails to address United Shore’s objection under the attorney-client privilege. XMS fails to establish that it is entitled to an order compelling production of any documents not

already produced, inasmuch as United Shore says it had already produced all non-privileged, responsive documents.

On this issue, XMS's motion to compel United Shore [Docs. 84/85] is **DENIED**.

III. CONCLUSION

As set forth above: (1) Plaintiff's motion to compel XMS [Doc. 75] and United Shore's motion to compel XMS [Doc. 81] are **MOOT**; (2) Plaintiff and United Shore's joint motion to compel XMS [Doc. 78] is **DENIED** as to the one unresolved issue and **MOOT** in all other respects; and (3) XMS's motion to compel United Shore [Docs. 84/85] is **GRANTED IN PART, DENIED IN PART** and **MOOT IN PART**.

IT IS ORDERED.

s/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: August 28, 2017

ATTACHMENT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AL LEIBOVIC,

Plaintiff,

v.

Case No. 15-12639

Honorable Victoria A. Roberts

UNITED SHORE FINANCIAL
SERVICES, LLC, *et al.*,

Defendants.

ORDER DENYING UNITED SHORE'S MOTION FOR CLARIFICATION [Doc. 93]

Before the Court is Defendant United Shore's motion for clarification of the Court's order granting Defendant XMS's motion to compel. [Doc. 93].

United Shore's motion is **DENIED**.

The Court disagrees with United Shore's position that the prior order is unclear. United Shore must produce communications between it (and/or its counsel) and Navigant to the extent those communications are otherwise responsive to XMS's Interrogatory No. 8.

IT IS ORDERED.

S/Victoria A. Roberts

Victoria A. Roberts

United States District Judge

Dated: October 4, 2017