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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey III, its Department of Health, and its Pollution Control Agency,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION; HOUSING AND REDEVELOPMENT AUTHORITY OF ST. LOUIS PARK; OAK PARK VILLAGE ASSOCIATES; RUSTIC OAKS CONDOMINIUM, INC.; and PHILIP'S INVESTMENT CO.,

Defendants,

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant,

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

Civil No. 4-80-469

MEMORANDUM OF REILLY TAR & CHEMICAL CORPORATION IN OPPOSITION TO THE STATE OF MINNESOTA'S MOTION FOR RETURN OF DOCUMENTS

INTRODUCTION

This memorandum is submitted in opposition to the motion of the State of Minnesota ("the State") for return of documents which the State claims are privileged and inadvertently produced to Reilly Tar & Chemical Corporation ("Reilly").

The documents which the State seeks to have returned fall into two categories. The first includes documents reflecting communications between attorneys for the State and State employees. The second category includes documents which reflect communications between the Pollution Control Agency ("PCA") and the City of St. Louis Park ("the City"). The plaintiffs claim that the basis for the privilege between the State and the City is that these parties were engaged in a common enterprise and their communications were therefore privileged. For both categories of documents the State claims that the documents are protected by the attorney-client privilege and work product protection in spite of the voluntary disclosure of these documents to Reilly.

In its brief in support of its motion, the State contends that approximately 50,000 documents were produced to Reilly during the summer of 1979 in response to a Rule 34 request for production. The document request was served on April 18, 1979 and Reilly did not begin reviewing the documents until the end of June 1979. With regard to this discovery

proceeding, there was no Court order requiring an accelerated discovery schedule. Nor does the State content that the two month period which it had to review and prepare documents for production was inadequate or unreasonable. Similarly, the State does not allege that Reilly would not give the State more time to review the documents or to implement a more rigorous screening procedure to insure that privileged documents were not produced.

If the lawyers for the State were concerned that the discovery schedule did not allow an adequate opportunity to screen the documents for privilege, they could have asked Reilly for a stipulated agreement prior to the document production, setting forth that any release of privileged documents would not be construed as a waiver of privilege. However, the State did not choose to implement any such measure to protect its privilege claims.

The Shakman Affidavit submitted in support of the State's motion sets forth the review procedure that was implemented for the document collection and screening process. That affidavit states that "[a]ll documents were screened for privilege." (emphasis added). The screening and processing was conducted exclusively by five attorneys employed by the State, with no non-lawyer involvement. With the exception of certain large files "at most indirectly related to the action," every page of each document to be produced was manually stamped

with a unique seven digit number. The fair inference to be drawn from this information is that during the processing of the documents, every page of each document was looked at by the attorneys.

The documents were all reviewed by attorneys who presumably could recognize a potentially privileged document. With the exception of RTC Deposition Exhibits 287 and 288,[1/] all exhibits clearly state the attorneys names on the first page of each document. In addition, two of the exhibits (RTC Deposition Exhibits 14 and 18) were written on the letterhead of the Popham law firm. In light of these facts, there does not appear to be any justification for these documents slipping through a careful screening procedure.

1/ Reilly submits that there is no basis for the assertion of privilege with respect to these two exhibits. Both documents were written during a period of time when there was no common enterprise between the State and the City. In addition, they do not contain either attorney-client communications or work product materials. Additionally, RTC Exhibit 287 was introduced during the deposition of Dale Wikre on November 1, 1983. Neither counsel for the State or the City objected to the use of the exhibit at the deposition. See, Wikre deposition at 133 et seq. RTC Exhibit 288 was also introduced during the Wikre deposition and counsel for the plaintiffs did object to the use of the document on grounds that the document reflected conversation between the City and the State in pursuing claims against Reilly. See, Wikre deposition at 137. The exhibit is a one-page document of notes taken by Mr. Koppy of the City recording a conversation with Dale Wikre of the PCA. Neither Mr. Koppy nor Mr. Wikre are attorneys. Accordingly, there is no basis for a claim of privilege with respect to their conversations.

The State fails to note in its brief that Reilly did not begin receiving copies of the documents which it requested at the State document production until a month after the actual production. Reilly received approximately 5,000 documents from the State shortly after July 27, 1983. Over 10,000 additional documents were not received from the State until August 20, 1979.

Reilly reviewed the documents produced by the City on July 9, 1979, two and one half months after the initial request for production. On August 21, 1979, counsel for Reilly received the documents which were requested from the St. Louis Park files.

Both the State and the City had a considerable period of time to review the documents which Reilly had requested, either before or after the documents were copied. The failure of the plaintiffs to take the necessary precaution of again reviewing the copies of the documents before they were actually turned over to Reilly was not inadvertent; it shows a lack of concern for protecting the privilege and may only be viewed as an intentional waiver.

Any claim of inadvertent production appears even more unlikely when one takes into consideration that the plaintiffs produced numerous copies of many of the documents which are

subject to the State's motion to compel.[2/] Additionally, RTC Deposition Exhibit 85 was not only produced by the State in 1979, the State produced the document to Reilly again on January 19, 1984. Similarly, the State produced two copies of RTC Deposition Exhibit 287 in 1979, and produced another copy of the document on December 9, 1983. The recent production of these documents occurred long after the State began claiming that certain of its "privileged" documents had been inadvertently produced, and illustrates the continuing lack of concern which has been demonstrated by the State insofar as actually shielding these documents from disclosure.

Also indicative of the lack of concern on the part of the City and the State on the issue of waiver of privileges is the untimely nature of their motion to compel the return of the

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2/ Three separate copies of RTC Exhibit 23 were produced to Reilly by the State and two copies of that exhibit were produced by the City (Document Nos. 1000276-1000279; 3600175-3600178; 2200012-2200015; 50000297-50000300; 40000680-40000683). Three separate copies of RTC Exhibit 27 were produced to Reilly by the State and one copy of that exhibit was produced by the City (Document Nos. 1000256-1000257; 3600166-3600167; 2200003-2200004; 40000665-40000666). Two copies of RTC Exhibit 22 were produced by the State (Document Nos. 3600178; 40000679). Two copies of RTC Exhibits 28 and 42 were produced by the State (Document Nos. 3000119-3000121; 1000253-1000255). Two copies of RTC Exhibit 85 were produced by the State (Document Nos. 3000171-3000182; 7300494-7300505). Three copies of RTC Exhibit 287 were produced by the State (Document Nos. 7300625-7300626; 6000036-6000039; 1300133-1300136). Two copies of RTC Exhibit 290 were produced by the State (Document Nos. 7300337-7300344; 6900290-6900297).

documents which they claim they had "inadvertently" produced. The State claims that it first learned that Reilly received documents which the State claims are privileged during the depositions of Messrs. Lindall and Van de North on August 25 and 26, 1982. During those depositions and in subsequent depositions where documents were introduced which the State and the City claimed were privileged and asked for the return of the documents, Reilly refused to do so and continued to use the so-called privileged documents in subsequent depositions. In fact during the deposition of Mr. Lindall, Mr. Schwartzbauer, counsel for Reilly, requested that the State identify documents which were produced inadvertently so that Reilly could either return them, or the State could submit them to the Court to determine the issue. See, Lindall deposition at 13, 15. Such a list was never prepared.

The State in its brief in support of its motion to compel states that it is appropriate for the Court to resolve the issue of inadvertent production now that Reilly's motion to compel deposition testimony is before the Court. Brief of State at page 3. What the State has failed to mention is that Reilly's motion to compel deposition testimony was previously scheduled to be heard before the Court on July 29, 1983. The State did not bring its motion to compel the return of the documents at that time. Rather, the State waited a year and a half since it claims it first learned of the so-called

"inadvertent" production, knowing that Reilly intended to and was in fact using those documents in its preparation of the case.

That delay is significant. During this time period Reilly has introduced documents which the State claims were inadvertently produced in the depositions of fifteen witnesses. For the most part, the plaintiffs did object to the use of the documents on grounds that they were privileged. However, the State was not consistent in the assertion of privileges. For example, during the deposition of Lawrence Anderson on September 15, 1982, Mr. Anderson was asked a series of questions about RTC Exhibit 46, which the State now claims is privileged and inadvertently produced. Yet the plaintiffs made no claim of privilege or inadvertent production with respect to that document. Anderson deposition at 23-26, attached as Exhibit 1 to the Affidavit of Mark R. Kaster dated May 22, 1984. Similarly, during the deposition of Dale Wikre on November 1, 1983, although the witness was cautioned not to answer questions that reveal confidential communications for the State, counsel for the State made no claim that the RTC Exhibit 287 was privileged or inadvertently produced. See, Wikre deposition at 132-134.

Reilly has also cited to the exhibits which the State seeks to have returned in various briefs and has attached a number of the exhibits as appendices to various affidavits

which have been submitted to the Court.[3/] The State did not specifically object to the inclusion of the documents in the

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3/ The State indicates in its brief that it will submit the documents to the Court for an in camera inspection. With the exception of two of the exhibits, all exhibits subject to this motion have been submitted to the Court, with no objection by the State or the City at the time. The following exhibits were attached as appendices to the Affidavit of Edward J. Schwartzbauer in Support of Reilly Tar & Chemical Corporation's Renewed Motion for an Order Compelling Discovery dated April 20, 1984: RTC Exhibit 14-Appendix 9; RTC Exhibit 85-Appendix 3, RTC Exhibit 111 - Appendix 10. The following exhibits were referred to or quoted in the Revised Memorandum in Support of Reilly's Renewed Motion for an Order Compelling Discovery dated April 20, 1984: RTC Exhibit 14-p. 16; RTC Exhibits 22, 23, 27-p. 50; RTC Exhibit 85-pp. 12, 50-54; RTC Exhibit 111-pp. 17-18.

The following exhibits were referred to or quoted in Reilly's Petition for Writ of Mandamus to the Eighth Circuit Court of Appeals dated November 30, 1983: RTC Exhibit 14-pp. 20, 47; RTC Exhibits 22, 23-pp. 21, 47; RTC Exhibit 27-pp. 21, 22, 47; RTC Exhibit 28-p. 47; RTC Exhibit 85-pp. 19, 22, 24; RTC Exhibit 111-p. 33. The following exhibits were attached as appendices to the Writ of Mandamus: RTC Exhibit 14-Appendix 39; RTC Exhibit 22-Appendix 46; RTC Exhibit 23-Appendix 47; RTC Exhibit 85-Appendix 34; RTC Exhibit 111-Appendix 85.

RTC Exhibit 28 is quoted at page 6 of the Reply Memorandum In Support of Reilly Tar & Chemical Corporation's Motion for Reconsideration or Other Alternative Relief, dated October 11, 1983. The following documents were referred to or quoted in the Memorandum in Support of Reilly Tar & Chemical Corporation's Motion for Reconsideration or Other Alternative Relief dated September 16, 1983: RTC Exhibits 14, 22, 23-pp. 15, 22; RTC Exhibits 27, 28-pp. 15, 17, 22; RTC Exhibit 85-pp. 5-6, 22; RTC Exhibits 20, 46, 37, 113-p. 22.

RTC Exhibit 85 was quoted in the Supplemental Affidavit of Edward J. Schwartzbauer dated September 16, 1983 at pages 3-4, and referred to the Reply Brief of Reilly Tar & Chemical Corporation In Support of Its Motion to Compel dated July 27, 1983 at pages 7-8.

record in this form. Nor did the State or the City attempt to move the Court for an order prohibiting the documents from being included in the public record.

In fact, the City itself has offered RTC Deposition Exhibit 85 into the record. See, Exhibit 20 to the Affidavit of Kathleen M. Martin In Support of the Memorandum of the City of St. Louis Park in Opposition to the Motion of Reilly Tar & Chemical Corporation for an Order to Compel Discovery dated July 19, 1983, on file herein.

In addition, Steve Shakman, counsel for the State, during the hearing before Judge Magnuson on the State's motion for summary judgment on Reilly's settlement defense, encouraged the Court to review the 113 deposition exhibits which Reilly submitted to the Court. See, Motion Hearing Transcript before

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3/ (Footnote Continued)

The following exhibits were referred to in the Memorandum in Support of Reilly Tar & Chemical Corporation's Motion for an Order Compelling Discovery dated June 24, 1983: RTC Exhibit 14-p. 14; RTC Exhibits 22, 23, 27-pp. 39-40; RTC Exhibit 85-pp. 40-41. The following exhibits were referred to or quoted in the Memorandum of Reilly Tar & Chemical Corporation In Opposition to the State of Minnesota's Motion for Summary Judgment on First Affirmative Defense dated June 24, 1983: RTC Exhibit 14-p. 9; RTC Exhibits 22, 23, 27, 85-p. 10; RTC Exhibit 111-pp. 22-23.

In addition, RTC Deposition Exhibits 14, 20, 22, 23, 27, 28, 37, 46, 85, 111, 113, 167, 287, 288 and 290 have been filed with the Court and Clerk of Court in conjunction with Reilly's Motions to Compel Deposition Testimony.

the Honorable Paul A. Magnuson dated July 29, 1983, pgs. 76-77. Included in this set of 113 exhibits are eleven documents for which the State is seeking an order compelling their return because they are privileged.

The inconsistency of the plaintiffs in guarding their alleged privileges is also demonstrated by the scope of the present motion to compel. The State is requesting the return of eight documents on grounds that they reflect communications between the State and the City, and that the communications between these parties are privileged. However, the State does not seek the return of RTC Deposition Exhibits 19, 21, 34, and 281 which also reflect communications between the State and the City, and which the plaintiffs objected to on the basis of privilege in depositions.[4/] Similarly, the State does not

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4/ Exhibits 19, 21, 34 and 281 have been submitted to the Court in conjunction with Reilly's motion to compel deposition testimony. RTC Exhibit 19 is a September 20, 1971 letter from Gary Macomber to Robert J. Lindall. RTC Exhibit 21 is page 8 of the Chronology of Events prepared by the City of St. Louis Park and reflects communications between the City and State in 1971. RTC Exhibit 34 is a June 15, 1973 letter from Jack Van de North to Rolfe A. Worden. RTC Exhibit 281 is a Chronology of Events prepared by the City of St. Louis Park reflecting communications between the City and State during the years 1970 through 1972. This document was first disclosed to Reilly in 1978, when Scott Goldsmith, former counsel for Reilly reviewed the public documents at the PCA for the Reilly matter. See Affidavit of Scott K. Goldsmith dated June 16, 1978 attached as Exhibit 2 to the affidavit of Mark R. Kaster dated May 22, 1984. The chronology discloses in part the contents of RTC Exhibit 37, p. 4; RTC Exhibit 14, p. 7; RTC Exhibits 20, 113 and 167, p. 8; RTC Exhibit 22, p. 8; RTC Exhibit 23, p. 8; RTC Exhibit 27, p. 9.

seek the return of RTC Exhibits 63 and 64, letters of January 1974 between Rolfe Worden, counsel for the City, and Eldon Kaul, the Special Assistant Attorney General, concerning conditins acceptable to the PCA for a formal dismissal of the litigation.

The State seeks the return of RTC Exhibits 23 and 27 on grounds that the documents were inadvertently produced and that no privileges have been waived. However, the contents of these documents were disclosed in RTC Exhibit 182, a chronology of Republic Creosote dated October 29, 1974, which was also disclosed by the plaintiffs to Reilly. The State does not claim that the chronology is privileged because the document was disclosed to the public at a MPCA Board meeting. See, document production acknowledgement executed by Mark R. Kaster dated March 9, 1984, attached as Exhibit 3 to the affidavit of Mark R. Kaster dated May 22, 1984. This chronology discloses the contents of RTC Exhibits 23 and 27 in the following manner:

> November 19, 1971: Letter from H. McPhee, St. Louis Park, to R. J. Lindall, Special Assistant Attorney General, MPCA, requesting MPCA assistance in determining what corrective measures must be taken following termination of the company's operations. Questions included will saturated soil have to be removed and will existing pipes and storage tanks have to be removed.
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> December 17, 1971: Letter to W. G. Popham, Attorney for City of St. Louis Park, from R. J. Lindall, MPCA. Letter transmits a rough draft of an office memo written to answer the November 19, 1971 request. The memo concludes that a considerable area near the plant is saturated with oil, the exact amount could not be determined. This saturated ground is a potential source of ground and surface water pollution; however, to require the company to remove all

> this ground is unrealistic. The memo recommends that the most heavily saturated soils should be removed, the exact amount to be determined by future investigations.

RTC Exhibit 182, p. 3. Since the chronology discloses the contents of RTC Exhibits 23 and 27, there is an additional waiver of any privileges that may have attached to these documents by the public disclosure of the chronology.

The State, in its brief in support of its motion, incorrectly asserts that Reilly does not dispute that the challenged documents are privileged. Reilly has consistently challenged the assertions of the State and the City that their communications are privileged because of a common enterprise. See, Revised Memorandum in Support of Reilly Tar & Chemical Corporation's Motion for an Order Compelling Discovery dated April 20, 1984, pgs. 18-21, 35-36 (hereinafter "Revised RTC Memorandum"). Reilly has also outlined in the Revised RTC Memorandum various other reasons why the documents are not privileged and the variety of ways in which the privileges were waived.[5/]

5/ The subject matter of this motion is closely related to that of Reilly's Renewed Motion for an Order Compelling Discovery dated April 20, 1984, wherein Reilly has moved the Court for an order compelling deponents to answer deposition questions which have been objected to on privilege grounds. In order to avoid burdening the Court with repetitive material, Reilly incorporates by reference the legal arguments set forth in its Revised Memorandum in support of that motion as to why the privileges asserted by the State and the City are inapplicable and how any privileges that may have existed have been waived.

As of April 14, 1972, when the City signed the Purchase Agreement, the City agreed to take over the property "as is" and had assumed some degree of clean-up responsibility. Since the PCA is the state agency responsible for the environment, it is clear from at least that date on they no longer shared the same interests in the litigation. Furthermore, in 1973, when the City signed the Hold Harmless Agreement and agreed to hold Reilly harmless from any and all claims of soil and water contamination that may be asserted by the State of Minnesota, it is clear that the City's interests became adverse to those of the State and any privilege which might have existed was destroyed. In order to assert a privilege for communications between parties on the basis of a common enterprise, "[t]he key consideration is that the nature of the interest be identical, not similar." Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974). From 1972 until 1978 when the State amended its complaint against Reilly, and St. Louis Park intervened in the action, the interest of the State and the City were not only not identical, but they were adverse. There is no grounds for claiming that their communications were privileged during that time period. Indeed in the present action and in the 1978 action, the City and State are still adverse as to the subject matter of communications between the City and State during the period of time in question. In both actions the City filed

cross-claims against the State requesting that the State be estopped from enforcing any judgment against Reilly to the extent such judgment is passed on to the City and that any judgment awarded in favor of the State which would be passed on to the City be declared null and void. See Reply and Cross-Claim of the City of St. Louis Park dated May 18, 1983, ¶¶ 18-24, on file herein; Reply to Counterclaim and Cross-Claim of the City of St. Louis Park, dated November 29, 1978, attached as Exhibit 4 to the Affidavit of Mark R. Kaster dated May 22, 1984.

In light of the fact that there was no common enterprise between the State and the City during this period, there can be no privilege which attaches to RTC Exhibits 85, 111 and 288. The fact that the State is now seeking the return of RTC Exhibit 85 on grounds that it was inadvertently produced is ludicrous in light of the number of times which this document has been disclosed to Reilly and the circumstances of the disclosures. The State originally disclosed this document to Reilly during the document production in the summer of 1979. On January 19, 1984 the State produced another copy of this document.

In addition, on October 31, 1979, Wayne Popham, representing St. Louis Park, met with Edward Schwartzbauer, counsel for Reilly, to discuss the involvement of the Pollution Control Agency in the settlement and RTC Exhibit 85. See, Schwartzbauer Affidavit of June 23, 1983 and Exhibits A-D,

attached as Appendix 29 to the Affidavit of Edward J. Schwartzbauer in Support of Reilly Tar & Chemical Corporation's Renewed Motion for an Order Compelling Discovery dated April 20, 1984, on file herein. Mr. Popham made no claim that his memo had been inadvertently produced and displayed no concern for the work product privilege. As the exhibits to the Schwartzbauer affidavit of June 23, 1983 indicate, later correspondence between Messrs. Popham and Schwartzbauer illustrate a continued willingness to develop and expose the subject matter detailed in the memorandum.

The Popham memorandum, both in general and particular, reveals information which both the City and the State otherwise claim is privileged. See, Revised RTC Memorandum, pgs. 51-54, on file herein, for a detailed discussion of the contents of RTC Exhibit 85. However, the City in 1983, in response to Reilly's originally filed motion for an order compelling deposition testimony, stated that had Reilly asked for the information contained in the memorandum through formal discovery, Reilly would have been given the same information delivered by Popham through his disclosure of the memorandum to Kaul and the documents referred to therein. See, Memorandum of the City of St. Louis Park in Opposition to the Motion of Reilly Tar & Chemical Corporation for an Order Compelling Discovery dated July 19, 1983, pgs. 27-28 of the file herein. RTC Exhibit 85 reflects Mr. Popham's impressions and judgments regarding the conclusions to be drawn from the facts. These

impressions and judgments were disclosed to the State during a period when there was no common enterprise between the State and the City. The document itself was disclosed to Reilly with no apparent concern for any privileges and at least the City demonstrated a continued willingness to make additional disclosures with respect to the document.

The State has also demonstrated a lack of concern for the privilege which it now asserts, attached to the document. This document has been referred to by Reilly in briefs and has been submitted as an exhibit or appendix to affidavits on at least nine separate occasions. Indeed, the City has also submitted it to the Court. See Exhibit 20 to the Affidavit of Kathleen M. Martin dated July 19, 1983, on file herein. The State has not objected to its inclusion or attempted to move the Court to exclude the document from the public record. For the State to now ask for the return of this document on grounds that it is confidential and privileged is outrageous.

I. ANY PRIVILEGES WHICH MAY HAVE ATTACHED TO THE DOCUMENTS WHICH THE STATE NOW SEEKS TO HAVE RETURNED HAVE BEEN WAIVED.

A. Waiver Has Occurred by the State and the City Affirmatively Placing in Issue the Scope of the 1970 Lawsuit, the Intent of the Parties in Entering into the Agreement for Purchase of Real Estate and the Hold Harmless Agreement, As Well As By the State's Use of Its Attorney's Factual Affidavits on the Issue of Settlement.

If one assumes that the attorney-client privilege or work product protection which is asserted by the State and the

City is applicable to the documents which the State is requesting to be returned, there is still no valid basis for their assertion in this case.

The City, in its cross-claim against the State, has put into issue the question of what communications, representations and understandings existed between it and the State with respect to the Purchase Agreement, the Hold Harmless Agreement and the settlement of the 1970 lawsuit.[6/] The City has also sought a declaratory judgment from this Court alleging

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6/ The State in its memorandum in support of its motion to compel states that Reilly should not be permitted further discovery on its Second Affirmative Defense to the State's Amended Complaint because the Court granted the State partial summary judgment on that defense. See Brief of State at p. 5. That defense asserts in substance that the issues raised by the State's complaint in intervention are barred by the implicit acceptance and acquiescence in the settlement by the State through its actions and inactions. The present motion does not deal with the issue of additional discovery on the Second Affirmative Defense, therefore the fact that partial summary judgment has been granted is of no significance in deciding the motion at hand. The State points out that the Court focused on the lack of a particular, direct communiction between a lawyer for the State and a lawyer for Reilly that explicitly states the settlement. Memorandum Order of August 25, 1983, at p. 13. However, there is no requirement that the parties' intentions be expressly stated to be effective. United States v. O. Frank Heinz Construction Co., 300 F. Supp. 396, 399 (S.D. Ill. 1969)(Court stated that it is clear that a meeting of the minds is not required to be shown by an unequivocal acceptance of an implied contract.) Reilly has set forth the reasons why summary judgment is not appropriate on this defense in its Petition for Writ of Mandamus (attached as Appendix 1 to the Schwartzbauer affidavit of April 20, 1984, on file herein. As previously stated in Reilly's memorandum in support of

that the agreements were never intended by either the City or the State to cover groundwater contamination. The State, apparently concerned that it may also be held to have acquiesced in the settlement, has supported the City's position that the 1970 lawsuit was not intended to cover groundwater. See, Affidavits of Sandra S. Gardebring and Dale Wikre attached as Appendices 26, 27 to the Affidavit of Edward J. Schwartzbauer in Support of Reilly Tar & Chemical Corporation's Renewed Motion for an Order Compelling Discovery dated April 20, 1984, on file herein. Thus, the State and the City are presently joint venturers in their attempt to prove to this Court that the 1970 lawsuit and the 1972 and 1973 agreements did not involve groundwater.

Virtually all of the documents which the State seeks to have returned deal with either the party's knowledge or

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6/ (Footnote Continued)

its motion to compel deposition testimony, Judge Magnuson's ruling is an interlocutory decision that the Court may reconsider. See Revised RTC Memorandum, pp. 29-32.

Moreover, questions relevant to the issue of the State's knowledge of, reaction to, conditions for, participation in or refusal to perform under a settlement by issuing dismissal are highly relevant on several questions clearly remaining in the suit. For example, even if, as SLP intends, the Hold Harmless was only meant to be a substitute for a dismissal by the State, the various reasons for the State's refusal to dismiss, the communication of those reasons to St. Louis Park, and St. Louis Park's acknowledgment of those reasons and its decision nonetheless to hold Reilly harmless from them bear directly on the intended scope of the Hold Harmless Agreement drafted by St. Louis Park and presented to Reilly.

understanding of the extent of the contamination or the remedial measures which the parties felt were necessary for the cleanup of the site. When a party affirmatively places in issue information and communications which are privileged, which in this case is the intended scope of the 1970 lawsuit and thus, the intended scope of the settlement, the party waives the privilege which may attach to such information or communications. Reilly has set forth the legal arguments which support a finding of waiver by issue injection in its memorandum in support of its motion to compel deposition testimony and hereby incorporates that argument by reference. See, Revised Memorandum at pp. 42-44.[7/]

Furthermore, with respect to the settlement of the 1970 lawsuit, the State has used the factual affidavits of its

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7/ The State has asserted that the Court should look to state privilege law as the rule governing this issue. Reilly points out that the defenses which it asserts go to federal claims and do not solely have impact on state law claims. Federal courts are competent to apply their own law in deciding whether a lawsuit has been settled, particularly when the rights of the litigants and operative legal policies derive from a federal source. Cf, Bergstrom v. Sears, Roebuck and Co., 532 F. Supp. 923, 931 (D. Minn. 1982). It is thus not at all clear that state privilege law should apply when privileges are asserted with regard to discovery on such an issue. Reilly agrees, however with the State's position that state law being silent on the point, the Court need not overly convern itself with this question and should look to federal cases to aid its decision.

attorneys to support its position that the State did not settle the 1970 lawsuit against Reilly. See, Lindall affidavit, June 21, 1978, Exhibit E to Reiersgord affidavit of June 23, 1983; Lindall affidavit, April 20, 1983; John B. Van de North, Jr. affidavit, April 14, 1983, on file herein. In his 1978 affidavit, Mr. Lindall explicitly stated that his testimony that the State did not settle the lawsuit was made after he had reviewed the file concerning the matter including "correspondence, memoranda and attorney notes." He thus testified as to his own recollection, which presumably was refreshed by the documents, and as to his interpretation of those documents. The documents which the State seeks to have returned also address the issue of the involvement of the PCA in the settlement of the lawsuit. By the State's use of the affidavits of attorneys which purport to be based on information received as attorneys for their clients, any existing attorney-client privilege is waived. The legal argument setting forth the rationale for a privilege waiver by the use of attorney affidavits is also set forth in Reilly's memorandum in support of its motion to compel deposition testimony and that argument is incorporated by reference. See, Revised RTC Memorandum at pp. 21-22, 54-55.

B. Waiver Has Occurred by the Voluntary Disclosure of Documents by Plaintiffs to Counsel for Reilly.

Reilly has set forth the legal justification for a finding of waiver of privileges by the plaintiffs' voluntary

production or disclosure of privileged documents in the Revised Memorandum In Support of Reilly Tar & Chemical Corporation's Renewed Motion for an Order Compelling Discovery dated April 20, 1984. The arguments on waiver by voluntary disclosure set forth in that memorandum are incorporated by reference. See, Revised RTC Memorandum, pp. 44-57.

As stated in that memorandum, there are cases that suggest that waiver must be intentional and disclosure voluntary. However, the majority of the cases suggest that waiver can be made by implication. The case of In re Grand Jury Investigation of Ocean Transportation, 604 F.2d 672 (D.C. Cir. 1979), cert. denied subnom., Sea Land Services Inc. v. United States, 444 U.S. 915 (1979) is instructive. In Ocean Transportation, the defendant brought a motion for the return of documents which were allegedly protected by the attorney-client privilege and which were inadvertently disclosed to the Department of Justice in response to a grand jury subpoena. Counsel for the defendant did not seek return of the documents until a year after counsel learned of the mistake. The District of Columbia Circuit affirmed the order of the district court denying the motion for return of documents stating that "[a]n intent to waive one's privilege is not necessary for such a waiver to occur." 604 F.2d at 675. Noting that the documents had been thoroughly examined and used

by the government for several years, the court stated that "it would be unfair and unrealistic now to permit the privilege's assertion." Id.

In the instant case, four and a half years have passed since the plaintiffs disclosed the documents and well over a year has passed since the plaintiffs learned of their disclosure. Reilly has used these documents in the course of deposing fifteen individuals. Although the plaintiffs' objected to the use of the documents, their contents have often been read into the record. See, e.g., Lindall deposition at pp. 72, 131; Popham deposition at pp. 102-104; Wikre deposition at pp. 132-133, 134-137, 161-162; Johannes deposition at pp. 169-170, 220-230. Many of the documents or their contents have been included in the public record, during the briefing of various issues in this action. Reilly has used these documents extensively in the course of trial preparation. As in Ocean Transportation, it would be unfair and unrealistic to permit the assertion of the privilege as "the mantle of confidentiality which once protected the documents has been so irretrievably breached that an effective waiver of the privilege has been accomplished." Id.

Inadvertence of disclosure does not as a matter of law prevent the occurrence of waiver. Weil v. Investment/ Indicators, Research and Management, Inc., 647 F.2d 18, 24 (9th Cir. 1981); see also, In re Grand Jury Proceedings, 727 F.2d

1352, 1356 (4th Cir. 1984); Suburban Sew'n Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 258 (N.D. Ill. 1981); Duplan Corporation v. Deering Milliken, Inc., 397 F. Supp. 1146, 1162 (D.S.C. 1974); Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546 (D.D.C. 1970); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954).

In Underwater Storage, supra, the plaintiff's attorney voluntarily produced a document for inspection by the defendant. The defendant later attempted to question the attorney-author of the document during deposition on the subject matter of the document and he refused to answer. The defendant brought a motion to compel deposition testimony and the plaintiff claimed that the production was inadvertent and involuntary or if it was deemed voluntary, that the privilege was waived only as to the piece of paper but nothing else. The District Court for the District of Columbia rejected the plaintiff's argument stating that "(o)nce the document was produced for inspection, it entered the public domain. Its confidentiality was breached thereby destroying the basis for the continued existence of the privilege." 314 F. Supp. at 549.

Similarly, in United States v. Kelsey-Hayes Wheel Co., supra, the court found that when the plaintiff inadvertently made documents protected by the attorney-client privilege and work product doctrine available to defendants in an antitrust

proceeding, the associated privileges were waived. The court noted that as a result of the claimants' own acts, the protection of confidential communications was no longer present. "Since the privilege exists in derogation of the overriding interest in full disclosure of all competent evidence, where the policy underlying the rule can no longer be served [because the communications are no longer confidential], it would amount to no more than mechanical obedience to a formula to continue to recognize it." 15 F.R.D. at 465. In the instant case, the confidentiality of the documents has been breached not only by disclosure to defendant Reilly, but also the majority of the exhibits are part of the public record in this action. Under such circumstances, common sense as well as the law dictates that a waiver of associated privileges be found.

The State has not established that it is entitled to the benefit of an exception to the principle that voluntary disclosure of a privileged document constitutes a waiver of privilege. The State presents a number of cases which suggest that waiver must be intentional and disclosure voluntary before the privilege ceases. However, in these cases the waiver argument was rejected under unique factional situations, none of which bear a resemblance to the facts of this case.[8/]

8/ The State incorrectly identifies the widely held view that any disclosure negates the privilege as the "older" view, and the cases that suggest that waiver must be intentional

In Control Data Corp. v IBM Corp., 16 Fed. R. Serv. 2d 1233 (D. Minn. 1972), the Minnesota Federal District Court ruled that the privilege for documents was not waived because the documents were produced under a massive document inspection program which was accelerated by a court order. During that production, 80 million CDC and 17 million IBM documents were produced. CDC during the production period sent 61 people to the IBM offices to inspect the documents. Given the crash nature of the production, the court noted that "(c)ertain confusion and errors were bound to result in such a strenuous program." 16 Fed. R. Serv. 2d at 1234.

This exception was further explained in Transamerica Computer Co. v. IBM Corp., 573 F.2d 646 (9th Cir. 1978). There, the Ninth Circuit noted that critical to the disposition of the appeal were the "unique circumstances under which IBM produced the . . . documents in the CDC litigation." 573 F.2d

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8/ (Footnote continued)

and disclosure voluntary before the privilege ceases as the "more recent view". A great number of recent cases suggest that voluntary disclosure without regard to intent constitutes waiver, and that waiver may be made by implication. In re Grand Jury Investigation of Ocean Transport, 604 F.2d 672 (D.C. Cir. 1979) cert. denied subnom., Sea Land Services, Inc. v. U.S., 444 U.S. 915 (1979); Champion International Corp. v. International Paper Co., 486 F. Supp. 1328 (N.D. Ga. 1980); W. R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771 (W.D. Okla. 1976); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974); Underwater Storage Inc. v. United States Rubber Co., 314 F. Supp. 546 (D.D.C. 1970).

at 648. The court noted that Judge Neville's pretrial order "dramatically accelerated the document inspection program . . . to require IBM to produce within a three-month period for inspection and for adversary copying approximately 17 million pages of documents." 573 F.2d at 648. The situation was exacerbated by the fact that most of the documents were difficult to screen for privilege; IBM was compelled to seek assistance from outside attorneys unfamiliar with IBM's business or with the specifics of the particular lawsuit and had to employ outside clerical help who lacked the motivation or competence that full-time IBM employees would be expected to possess. The court noted that the "extensive use of workers who had been previously unfamiliar with the case obviously increased the risk that privileged material would be accidentally produced." Id. The responsive files of 103 executives and 60 departments had to be found in the files of thirty Branch Offices, one District Office and ten different Headquarters. 573 F.2d at 649. The production was further complicated by the fact that at the time IBM was being compelled to produce the documents to CDC, "it was also being compelled to produce the same documents to the United States Department of Justice in the gargantuan civil suit instituted by the United States against IBM." 573 F.2d at 648.

The Transamerica court held that given the "incredible burdens" imposed on IBM by the document inspection program, IBM

was in effect "compelled" to produce privileged documents which it would not have produced had discovery preceded under a less demanding schedule. 573 F.2d at 651. The court observed that its decision would not serve as a general exception for waiver of privileges on the basis of inadvertent production in the context of accelerated discovery proceedings. The court was "convinced that the accelerated discovery proceedings in the CDC litigation represent what is probably a truly exceptional and a unique situation." Id.

The actions of the plaintiffs in the instant case do not meet the standard for exception recognized in Control Data Corp. v. IBM, supra, and Transamerica. The State and the City took four months to produce and copy only a minute fraction of the documents which were produced in the IBM production. The plaintiffs were not compelled to accelerate their initial production responses, to hire outside legal and non-legal personnel unfamiliar with the State's operations, nor were any of the other circumstances peculiar to the IBM situation present. Without the presence of a unique and massive expedited discovery proceeding, these decisions are irrelevant when considering a claim of inadvertent production.

The State also relies on Mendenhall v. Barber-Greene Co., 531 F. Supp. 951 (N.D. Ill. 1982), as authority supporting its position that the documents were inadvertently produced. However, in Mendenhall, the waiver argument was predicated on

the inadvertent production of documents for a "brief period of time." 531 F. Supp. at 952. In that case, plaintiff produced documents to the defendant and defendant later requested copies of four documents which were reviewed during the course of production. The plaintiff refused to turn over copies of the documents. In the instant case, the State apparently did not take the precaution which was demonstrated by the plaintiff in Mendenhall of reviewing the documents requested by Reilly before copies were provided. Rather, the State, without further review, turned over copies of the documents to Reilly, which have now been thoroughly examined and used by Reilly for over four and a half years. In such a case, where the documents have been in the hands of an adverse party for such an extensive period of time, it would be unfair and unrealistic to permit the privilege assertion at this time. The privilege has been permanently destroyed. In re Grand Jury Investigation of Ocean Transport, 604 F.2d 672, 675 (D.C. Cir. 1979) cert. denied subnom., Sea Land Services Inc. v. U.S., 444 U.S. 915 (1980).

The State's reliance on Champion International Corp. v. International Paper Co., 486 F. Supp. 1328 (N.D. Ga. 1980), is also misplaced. As the State correctly points out, the plaintiff in that case did not challenge the waiver of privilege for material already disclosed; rather the issue in that case was whether the disclosure of a very slight amount of

privileged material could be the basis for a waiver of a large amount of other privileged material.[9/] The court was reluctant to find a subject matter waiver noting that "(n)o significant part of any communication privileged due to attorney-client confidence has been disclosed." 486 F. Supp. at 1333. In Champion, the plaintiffs produced transmittal letters which were written to attorneys. The primary purpose of the letters were "to identify and explain the attached technical information." 486 F. Supp. at 1331. The authors of

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9/ The State also relies on Connecticut Mutual Life Insurance Co. v. Shields, 18 F.R.D. 448 (S.D.N.Y. 1955). In that case the defendant was not seeking the return of privileged documents produced; rather, the defendant challenged the right of the plaintiff to seek answers to deposition questions on grounds of waiver by production of many privileged documents. The decision also involved the application of a New York State statute that governed the use of privilege in that jurisdiction. 18 F.R.D. at 451. See also, Weil v. Investment/Indicators, Research & Management, 647 F.2d 18, 24 n. 12 (9th Cir. 1981); Duplan Corporation v. Deering Milliken, Inc., 397 F. Supp. 1146, 1163 (D.S.C. 1974). Similarly, Dunn Chemical Co. v. Sybron, 1975-2 Trade Cas. (CCH) ¶ 60,561 (S.D.N.Y. 1975) dealt with subject matter waiver due to production of documents. The court was willing to uphold the privilege based on the fact that the documents were not "openly available to just anyone, either within or without the corporation" and that the documents produced were not "indiscriminately mingled with the other routine documents of the corporation." Id. at 67,461. In the instant case, the State has failed to demonstrate this requisite attempt to keep the documents confidential. Moreover, neither of these cases dealt with the extent and several forms of waiver of privileges involved here.

the letters "requested no legal advice and none was given in response to them." Id. Implicit in the court's decision in Champion is that when, as here, a significant part of a privileged communication is disclosed, fairness requires that the privilege shall cease. See, 486 F. Supp. at 1333 (citing 8 Wigmore, Evidence § 2327, at 636 (McNaughton rev. 1961).

The State has failed to demonstrate that it is entitled to an exception to the rule that when documents are voluntarily disclosed to an opposing party, the privileges that attach to the documents are waived.

CONCLUSION

As the foregoing analysis indicates, the State has failed to establish that a privilege exists for many of the documents that are subject to this motion. Furthermore, any privileges that may have attached to the exhibits have been waived not only by the disclosure of the documents to Reilly, but also by affirmatively placing in issue the subject matter of the documents, by the State's use of its attorney's factual affidavits, and by the disclosure of the contents of the exhibits in other documents which the plaintiffs have disclosed to Reilly. For the reasons stated above, the motion of the State of Minnesota to compel the return of documents produced, should be denied. Additionally, the Court should assess costs against the State of Minnesota pursuant to Fed. R. Civ. P.

37(a)(4) for expenses incurred by Reilly Tar and Chemical Corporation in opposing this motion.

Dated: May 22, 1984.

Respectfully submitted,

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