[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Case No. 09-5171

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
Appellant

v.

DELOITTE & TOUCHE USA, LLP,
Appellee

THE DOW CHEMICAL COMPANY,
Intervenor

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF INTERVENOR ON BEHALF OF APPELLEE

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October 29, 2009

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Intervenors make the following certification:

1. Parties and Amici:

All parties and intervenors appearing before the District Court and in this Court are listed in the Government's Brief. There were no amicus curiae appearing in the District Court, and there are currently none on appeal.

2. Rulings Under Review:

All references to the rulings at issue appear in the Government's Brief.

3. Related Cases:

This case has not previously been before this Court. A related consolidated case is pending in the United States District Court for the Middle District of Louisiana, Nos. 05-944-RET-DLD, 06-258-RET-DLD,

and 07-405-RET-DLD, in which the Chemtech Partnership is the plaintiff and the Government is the defendant. The case on review involves third-party discovery issued to Appellee Deloitte in connection with that litigation.

/s/ Hartman E. Blanchard, Jr.
Hartman E. Blanchard, Jr.
Attorney for Intervenors

October 29, 2009

AMENDED CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, Dow hereby makes the following disclosures with respect to current ownership interests in Dow and in Chemtech II, L.P. Prior to 1998, the Chemtech Partnership was named Chemtech Royalty Associates, L.P. Notwithstanding the name change, the Chemtech Partnership has continued in existence from 1993 through the present.

1. No parent companies or publicly held companies hold a 10% or greater ownership interest in Dow.

2. The Chemtech Partnership is 100% owned by Dow and two of Dow's wholly-owned subsidiaries, Dow Chemical Delaware Corporation and IFCO, Inc.

3. Dow is a leading science and technology company that provides innovative chemical, plastic, and agricultural products and services to many essential consumer markets. The general nature and purpose of the Chemtech Partnership is to manage certain patent and plant assets in a manner that would attract third-party minority equity financing. The Government has challenged the tax treatment of the Chemtech Partnership in an action filed in the United States District Court for the Middle District of

Louisiana. Any reallocation of partnership tax items in the Louisiana case will flow through to Dow's consolidated tax return and impact Dow's consolidated tax liability. The Government sought to compel the production of privileged documents directly related to the Louisiana litigation. Dow and the Chemtech Partnership have a direct interest in protecting those privileges.

/s/ Hartman E. Blanchard, Jr.
Hartman E. Blanchard, Jr.
Attorney for Intervenors

October 29, 2009

INTEREST OF INTERVENORS

Pursuant to D.C. Circuit Rule 28(d)(4), Intervenors make the following statement regarding the necessity for a brief separate from the Appellee:

The Government seeks to discover three documents that it claims are potentially relevant to the civil tax litigation in which the Chemtech Partnership is the plaintiff and the Government is the defendant. Any reallocation of partnership tax items in the Louisiana case will flow through to Dow's consolidated tax return and impact Dow's consolidated tax liability. Dow is seeking to protect a privilege that belongs to Dow and not to Deloitte. Dow's interest in protecting its privilege is not adequately represented by Deloitte. Although Deloitte has complied with Dow's instruction to withhold the privileged documents unless directed otherwise by a court, Dow is best situated as a result of its factual knowledge to make appropriate arguments that adequately support its privilege claims.

Moreover, Deloitte lacks incentive to argue the privilege issues vigorously because disclosure of the privileged documents would not

directly impact Deloitte. Deloitte has filed a Notice of Intention Not to File a Brief in this appeal.

/s/ Hartman E. Blanchard, Jr.
Hartman E. Blanchard
Attorney for Intervenors

October 29, 2009

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GLOSSARY

Abbreviation	Definition
AICPA	American Institute of Certified Public Accountants
Chemtech I	Chemtech Royalty Associates, L.P.
Chemtech II	Chemtech II, L.P.
Chemtech Partnership	Chemtech I and/or Chemtech II
Code	Internal Revenue Code, 26 U.S.C.
Deloitte	Deloitte & Touche USA, LLP
Doc.	Documents in the District Court record as numbered by the Clerk
Dow	The Dow Chemical Company
GAAP	Generally Accepted Accounting Principles
Gov. Br.	Principal brief filed by the Government in this Appeal on September 14, 2009
Government	United States of America
IDR	Information Document Request
IRS	Internal Revenue Service
JA	Joint Appendix
MIT	Massachusetts Institute of Technology

PCAOB	Public Company Accounting Oversight Board
SEC	Securities & Exchange Commission

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This case involves clear attorney opinion work product appearing in three documents. The Government concedes the initial applicability of work product protection to two of these documents; it contests the initial applicability of work product protection only to attorney thoughts, impressions, and analyses developed in anticipation of litigation that were disclosed orally to Deloitte and recorded by Deloitte in a draft file memorandum. The Government further argues that any work product protection in the three documents was waived by virtue of Dow's disclosure of that work product to Deloitte. Accordingly, the issues are as follow:

(1) Whether the District Court acted within the scope of its discretion in finding that the Deloitte file memorandum contains protected work product; and

(2) Whether the District Court acted within the scope of its discretion in finding that Dow's disclosure of the work product contained in all three documents at issue to its financial auditor did not waive work product protection over those documents.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Government's Brief.

STATEMENT OF FACTS

I. BACKGROUND

On September 20, 2007, the Government issued a subpoena to Deloitte requesting the production of documents. (JA 9-14.) Deloitte complied with the subpoena but withheld three documents (collectively, the "Disputed Documents") on privilege grounds at Dow's direction. On June 30, 2008, the Government filed this action to compel Deloitte to produce the Disputed Documents.[2] The privileges at issue belong to Dow. The subpoena arises out of tax litigation in the U.S. District Court for the Middle District of Louisiana (the "Louisiana Litigation") in which Dow's majority-owned partnership, the Chemtech Partnership, has petitioned for the readjustment of IRS reallocations of partnership items.

II. OVERVIEW OF THE CHEMTECH LITIGATION

The Louisiana Litigation concerns Dow's participation in a series of partnership transactions, first in 1993 and again in 1998. Dow formed the

[2] The Government's motion to compel also sought documents from a Deloitte affiliate located in Switzerland. The Government has not appealed the District Court's decision that Deloitte is not required to produce documents from its Swiss affiliate. (Gov. Br. 7 n.1.)

Chemtech I partnership with five foreign banks in 1993 as a means of raising minority equity capital without adversely affecting its credit ratings or its balance sheet. In order to minimize the risk of a credit downgrade, Dow decided to meet its funding requirements in part through Chemtech I. At the time that Chemtech I was formed in 1993, the partnership vehicle enabled Dow to monetize valuable patent assets and to obtain $200 million in third-party capital that was treated for financial accounting purposes as minority equity on Dow's consolidated U.S. GAAP financial statements. As a result, Dow raised equity capital without impairing its credit ratios.

In 1998, Dow exercised its option to purchase the partnership interests of the foreign banks due to changes in U.S. withholding tax laws that might have required Dow to indemnify the banks for U.S. withholding taxes. Following the purchase, Dow contributed a chemical plant to the partnership, and a U.S. subsidiary of Rabobank invested $200 million in the restructured partnership, Chemtech II. This investment enabled Dow to replace the $200 million in minority equity financing previously provided by the five foreign banks.

The Government found objectionable certain tax consequences mandated by the Internal Revenue Code's partnership provisions that were

favorable to Dow. Accordingly, it reallocated the partnership items of the Chemtech Partnership on multiple theories, including that the partnership was not valid for federal tax purposes.[3]

III. DOW'S ANTICIPATION OF LITIGATION OVER THE CHEMTECH PARTNERSHIP AND THE CREATION OF THE DISPUTED DOCUMENTS

Throughout Dow's participation in the Chemtech Partnership, Dow expected that the IRS would challenge its tax treatment of the Chemtech Partnership. (JA 29-30.) Dow engaged outside tax counsel prior to entering into the partnership and tasked its in-house lawyers and accountants with reviewing the tax issues on an ongoing basis.

Each of the Disputed Documents constitutes or contains legal opinions and legal analysis that Dow received related to its participation in the Chemtech Partnership. All of the opinions and analyses contained in the Disputed Documents were created by Dow's outside counsel or its in-house lawyers and accountants in anticipation of a Government challenge related to the Chemtech Partnership.

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[3] The Government's implication (Gov. Br. 8 n.2) that the "lease stripping" authorities it cites are at all relevant to the Chemtech Partnership is erroneous.

Although Dow asserted multiple privileges over the Disputed Documents, the District Court's decision addressed only Dow's work product claims. Dow asserted work product protection over the following three Disputed Documents: (1) a tax legal opinion from Dow's outside counsel, McKee Nelson LLP, to Dow's current Tax Director, William L. Curry, dated June 20, 2005 (the "Chemtech II Tax Opinion"); (2) an internal file memorandum dated September 15, 1998, written by Craig Jones, an in-house attorney for Dow, and Michael Cone, an in-house accountant for Dow (the "Cone Memo") (collectively, the Chemtech II Tax Opinion and the Cone Memo are sometimes referred to as the "Dow Documents"); (3) a draft memorandum prepared by a Deloitte employee, Robert Valdez, on July 21, 1993 (the "Deloitte Memo"), shortly before Dow entered into Chemtech I. The Deloitte Memo records oral communications of legal analysis from Dow's outside counsel that was developed independently of Dow's financial audit and prior to the oral communication to Deloitte.[4]

[4] The Deloitte privilege log also asserted the attorney-client privilege over the Deloitte Memo. This assertion was incorrect, and Dow withdrew that claim in its District Court brief. (Doc. 7-2 at 2 n.1.)

Dow did not undertake the sort of in-depth legal analysis present in the Disputed Documents for every tax position on its return, or even every position that it thought might arise in an audit. Dow only resorted to these measures when management believed that an IRS challenge was likely. In this case, as affirmed by Dow's current Tax Director Bill Curry, Dow's management expected that the IRS would challenge the Chemtech Partnership for numerous reasons, including (1) that the Chemtech Partnership transactions were relatively large and involved significant tax benefits; (2) that the transactions arose in an evolving and uncertain area of the tax law; and (3) that by the time Chemtech II was formed, the IRS already had begun to dispute Dow's treatment of Chemtech I. (JA 29-30.) As evidenced by the Disputed Documents themselves, Dow was aware of the IRS's focus on certain partnership tax provisions applicable to the Chemtech Partnership, predicted the likely IRS challenge of the tax treatment mandated by the Code, and prepared early on for a potential dispute.

The reasonableness of Dow's anticipation of litigation has been confirmed in hindsight. By early 1997, Dow's IRS audit team had begun reviewing the Chemtech I transaction. By March 1997, the first of at least

33 IDRs related to Chemtech I had been issued. On October 29, 1999, the IRS exam team issued a Form 5701 report adjusting the treatment of Dow's tax reporting positions with respect to Chemtech I, which presented many of the arguments that Dow had anticipated during the pre-transaction period. (JA 33-49.) Although confident its tax treatment of the Chemtech II transaction was proper, Dow also believed that the IRS would challenge the Chemtech II transaction. The Cone Memo and the Chemtech II Opinion were created knowing that the Government challenge to the tax treatment of the Chemtech Partnership was well underway.

IV. DOW'S DISCLOSURE OF THE DISPUTED DOCUMENTS TO DELOITTE

Like every other public company, Dow maintains reserve accounts reflecting contingent tax liabilities. Dow's in-house attorneys, with the assistance of outside counsel, analyze the merits of any uncertain tax positions, and calculate a reserve amount factoring in the likelihood of success on the merits (i.e., a hazards of litigation assessment). Acting in a similar role, Dow's auditor, Deloitte, is required to review and approve the amount Dow has established as a reserve before Deloitte will attest to the soundness of Dow's public financial statements.

Prior to the collapse of Enron, the enactment of Sarbanes-Oxley, and the creation of the Public Company Accounting Oversight Board, auditors often would meet with a corporation's counsel to discuss the merits of any uncertain tax positions and agree upon the appropriateness of a given reserve amount. Consistent with this practice, Dow shared with Deloitte its ongoing belief in the likelihood of litigation over the tax treatment of the Chemtech Partnership. The Deloitte Memo reflects one such discussion among Dow, its outside counsel, and auditors at Deloitte. (JA 30.)

New rules now require auditors to review any legal opinions or analyses obtained by a corporation related to each tax uncertainty. (JA 62-63.) As a result, Deloitte required Dow to disclose the Dow Documents to Deloitte. Dow disclosed these documents with the expectation that Deloitte would maintain their confidentiality, and Deloitte maintained this confidentiality. (JA 30, 51-52.)

V. THE DISTRICT COURT PROCEEDINGS

In support of its motion to compel production of the Disputed Documents demanded under the September 20, 2007, subpoena, the Government argued (i) that the Deloitte Memo was not entitled to work product protection in the first instance because it was prepared by an

independent financial auditor and (ii) that Dow waived any existing work product privileges with respect to each of the Disputed Documents by disclosing these documents to Deloitte.

The District Court rejected the Government's claims that the work product doctrine did not apply to the Disputed Documents. As a threshold matter, the District Court ruled that the Disputed Documents were "protected from discovery as attorney work product because they were created in anticipation of future litigation over the tax treatment of Chemtech." (JA 156.) The District Court then rejected the Government's argument that disclosure of the work product within the Disputed Documents to Dow's independent auditor waived Dow's work product protection. The District Court found that such disclosure was not inconsistent with the maintenance of secrecy from Dow's adversary because "Deloitte . . . , as Dow's independent auditor, was not a potential adversary, and no evidence suggests that it was unreasonable for Dow to expect Deloitte . . . to maintain confidentiality." (JA 157.) This appeal followed.

SUMMARY OF ARGUMENT

This case concerns three Disputed Documents that the Government seeks to obtain from Dow's auditor, Deloitte. Each of these documents contains the opinion work product of Dow's attorneys. The Government seeks these Disputed Documents for the purpose of gaining insight into Dow's litigation strategy in the Louisiana Litigation, through the thoughts, analyses, and mental impressions of Dow's attorneys developed in anticipation of that litigation and contained in the Disputed Documents. There can be no other possible purpose for obtaining the documents given that the Government has completed extensive fact and expert discovery on the Chemtech Partnership transactions.

1. The District Court correctly concluded that all three of the Disputed Documents are protected work product in the first instance. The Government has conceded as much with respect to the two Dow Documents. Exactly like the Dow Documents, the contents of the Deloitte Memo "record the thoughts of Dow's counsel regarding the prospect of litigation." (JA 156 n.1.) The thoughts and impressions of Dow's counsel recorded in the Deloitte Memo are quintessential opinion work product, generated "because of" the prospect of litigation. That this work product was transmitted by

Dow's counsel orally and recorded by Deloitte for use in its audit review does not vitiate the privilege because the proper focus is whether the attorney analyses were developed in the first instance "because of" litigation, not whether those analyses may have been used subsequently for some other purpose.

2. The District Court also correctly concluded that disclosure to Deloitte of the attorney work product contained in the Disputed Documents did not cause a waiver of the protection afforded under the work product doctrine. So long as the disclosure to Deloitte was consistent with maintaining secrecy against Dow's opponents, work product protection was not waived. Instead, waiver of work product occurs only where the party claiming the privilege had no reasonable basis for believing that the disclosed materials would be kept confidential. The record amply supports the District Court's finding that Dow reasonably expected Deloitte to maintain confidentiality over Dow's work product. Moreover, the District Court's holding is consistent with the majority of relevant cases, which have held that an independent financial auditor is neither an adversary, potential adversary, nor conduit to a potential adversary.

ARGUMENT

Standard of Review

This Court reviews decisions enforcing or rejecting document subpoenas for arbitrariness or abuse of discretion. *In re Sealed Case*, 146 F.3d 881, 883 (D.C. Cir. 1998). "A motion to compel discovery is committed to the discretion of the trial court, and our function on appeal is solely to determine whether the trial court abused its discretion in entering the challenged order." *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981). The District Court's decision is entitled to deference unless "it rests upon a misapprehension of the relevant legal standard or is unsupported by the record." *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 633 (D.C. Cir. 1992).[5]

In this case, the District Court applied the correct legal standard for attorney work product and waiver thereof. (JA 156-57 & n.2-3.)

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[5] The Government cites no D.C. Circuit authority for its contention that the District Court's decision is best characterized as an "abstract issue of law" subject to "plenary" review (Gov. Br. 22), instead citing to the First Circuit's decision in *United States v. MIT*, 129 F.3d 681 (1st Cir. 1997). There, the First Circuit held that "discretionary judgments such as evidentiary rulings are reviewed for abuse of discretion." *Id.* at 683.

Accordingly, the abuse of discretion standard is the appropriate standard of review of the District Court's Order.

I. WORK PRODUCT CONTAINED IN THE DISPUTED DOCUMENTS IS ENTITLED TO PROTECTION ABSENT WAIVER

The work product contained within all three Disputed Documents is of the same character—opinion work product that reflects the thoughts, impressions, and analyses of Dow in-house and outside counsel and that is entitled to the highest level of protection. The Government has conceded that work product of this nature is protected in the case of the Dow Documents, which were authored by Dow in-house and outside counsel. Although the remaining document—the Deloitte Memo—contains opinion work product of precisely the same nature, the Government contends that it cannot be work product because the attorney analyses are recorded in a document authored by an accountant in the context of a financial audit.

The Government's analytical framework is faulty. Just like the Dow Documents, the Deloitte Memo records the thoughts and analyses of Dow counsel in anticipation of litigation. The Deloitte Memo differs from the Dow Documents only in that this advice was disclosed to Deloitte orally instead of in writing; and that the oral disclosure was reduced to writing by

an accountant and not the Dow attorney providing the advice. These are distinctions without a difference, and the Government's attempt to focus the Court on the author and audit use of the document is misplaced. The proper analysis looks to the author and function of the work product itself.

A. Applicable Work Product Standards

The work product doctrine prohibits discovery of materials prepared in anticipation of litigation. *See* Fed. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947).[6] The privilege ensures that a lawyer may "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *United States v. Nobles*, 422 U.S. 225, 236-37 (1975) (citations omitted). The privilege prevents an attorney's opponent from benefiting from the other's labor, and its "very purpose is to prevent a

[6] Courts have recognized that although Rule 26(b)(3) speaks in terms of "documents and tangible things," the Rule and *Hickman* confer protection on "intangible" work product that may not have been memorialized in writing. *See, e.g., In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("It is clear from *Hickman* that work product protection extends to both tangible and intangible work product."); *United States v. 266 Tonawanda Trail*, 95 F.3d 422, 428 n.10 (6th Cir. 1996) ("When applying the work product privilege to . . . nontangible information, the principles enunciated in *Hickman* apply, as opposed to Rule 26(b)(3) of the Federal Rules of Civil Procedure, which applies only to 'documents and tangible things.'").

party from 'performing its functions . . . on wits borrowed from the adversary.'" *E.E.O.C. v. Lutheran Soc. Servs.*, 186 F.3d 959, 969 (D.C. Cir. 1999) (quoting *Hickman*, 329 U.S. at 516) (internal citation omitted). Work product consisting of "opinions, judgments, and thought processes of counsel" is known as opinion work product and receives near "absolute protection from discovery." *In re Vitamins Antitrust Litig.*, 211 F.R.D. 1, 4 (D.D.C. 2002) (internal quotation marks omitted); *see also Director, Office of Thrift Supervision v. Vinson & Elkins*, 124 F.3d 1304, 1308 (D.C. Cir. 1997) (noting that opinion work product is "virtually undiscoverable"); Fed. R. Civ. P. 26(b)(3)(B) ("If the court orders discovery of [documents prepared in anticipation of litigation], it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.").

Courts historically have applied two distinct standards in determining when a document is prepared "in anticipation of litigation." The D.C. Circuit applies the "because of" test, which analyzes "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." *In re Sealed Case*, 146 F.3d at 884 (emphasis added)

(citations and internal quotation marks omitted). Courts following the more narrow "primary purpose" test confer work product protection only where the "primary motivating purpose behind the creation of the document was to aid in possible future litigation." *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981).

The "because of" test is more permissive than the "primary motivating purpose" test because it recognizes that attorney work product may be used for ordinary business purposes and retain its protected status. The seminal case analyzing the "because of" test in the context of tax analyses is *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998). In *Adlman*, the Second Circuit addressed a memorandum used by the taxpayer in assessing whether to enter into a transaction. The memorandum contained a detailed legal analysis of likely challenges to the transaction's structure and the taxpayer's tax refund claim, discussion of relevant authorities, including case law and IRS administrative authority, and counter-arguments to potential IRS attacks.

In determining that a document could be prepared both in anticipation of litigation *and* to inform a business decision, the court recognized that "a requirement that documents be produced primarily or exclusively to assist in

litigation . . . is at odds with the text and policies of Rule 26(b)(3)." *Id*. at 1198 ("Nowhere does Rule 26(b)(3) state that a document must have been prepared to aid in the conduct of litigation in order to constitute work product, much less primarily or exclusively to aid in litigation."). Concerns about the prejudicial effect of disclosure also guided the court's decision. "[A] study reflecting the company's litigation strategy and its assessment of its strengths and weaknesses cannot be turned over to litigation adversaries without serious prejudice to the company's prospects in the litigation." *Id*. at 1200; *see also United States v. Roxworthy*, 457 F.3d 590 (6th Cir. 2006) (holding that an accounting firm's memoranda analyzing federal tax consequences of certain transactions were created in anticipation of litigation notwithstanding that they were intended in part to assist in avoiding underpayment penalties during the audit); *see generally In re Grand Jury Subpoena*, 357 F.3d 900, 909 (9th Cir. 2004) (stating documents created under agreement with EPA were not subject to discovery because the litigation "threat animated every document . . . prepared, including the documents prepared to comply with the Information Request and Consent Order, and to consult regarding the cleanup"); *United States ex rel. Bagely v. TRW, Inc.*, 212 F.R.D. 554, 561 (C.D. Cal. 2003) (applying work product

where a document's creation was required by statute and for anticipated litigation). *But see United States v. Textron*, 577 F.3d 21 (1st Cir. 2009) (discussed below at Section I.C).

B. All Three Disputed Documents Contain Quintessential Opinion Work Product

The Government did not contest the applicability of work product to the Dow Documents in the District Court proceeding. (JA 156 n.1 (citing Doc. 8 at 2-3).) Nor does the Government attempt in the present Appeal to dispute the District Court's finding that the Dow Documents were protected work product in the first instance. (Gov. Br. 30-31 ("We have not challenged Dow's claim (or the court's conclusion) that the tax-advice documents satisfied Rule 26(b)(3) when they were originally generated.").) The legal advice contained within the Dow Documents was opinion work product (JA 30, 156) that the Government has conceded was "generated by Dow's outside and in-house counsel for the purpose of providing Dow tax advice (not to evaluate Dow's financial statements)" and "because of the prospect of litigation with the IRS over the tax treatment of Chemtech." (Gov. Br. 30-31.) Thus, the only issue with respect to the Dow Documents

is whether their disclosure to Deloitte waived work product protection, which is addressed in Section II, below.

The advice contained within the Deloitte Memo was of precisely the same character as that in the Dow Documents. The advice was generated by the very same outside counsel who authored Dow's tax opinion relating to Chemtech I (not at issue in this appeal) and the Chemtech II Tax Opinion. Like the advice conceded to be work product in the Dow Documents, the advice orally disclosed to Deloitte assessed and analyzed the strengths and weaknesses of likely IRS legal challenges to the tax treatment of the Chemtech I transaction.

The Government argued in the District Court that the Deloitte Memo was not protected by the work product doctrine because it was created by Deloitte and not Dow or Dow's attorneys. (JA 148.) The District Court correctly rejected that reasoning. First, the District Court found, based on ample evidentiary support, that the contents of the Deloitte Memo "record the thoughts of Dow's counsel regarding the prospect of litigation." (JA 156 n.1.) The Government's assertion that an independent auditor is not a "representative" for purposes of Rule 26(b)(3) misses the point and, as a result, the Government argument and the District Court Order are like ships

passing in the night. The District Court correctly recognized that the relevant "representative" for purposes of the work product at issue in the Deloitte Memo is outside counsel for Dow. It is outside counsel, and not Deloitte, who generated the opinion work product at issue and orally disclosed that work product to Deloitte. Deloitte's reduction of that oral work product to writing does not in and of itself detract from the character of the work product.

Moreover, the record unequivocally supports the District Court's findings, which the Government does not appear to have disputed, that the attorney communications recorded in the Deloitte Memo were the thoughts of Dow's counsel generated because of the prospect of litigation.[7] Dow management expected from the outset that the Chemtech Partnership transactions would be challenged by the IRS and were likely to result in litigation. (JA 29.) Among other things, the transactions were large, involved significant tax benefits, and arose in an area of the tax law that was in a state of flux before and during Dow's participation in the Chemtech

[7] Because the Government looks with blinders to the function of the overall document from Deloitte's perspective, as discussed below in Section I.C, the Government erroneously ignores the function of the attorney analyses actually at issue.

Partnership. Moreover, during the 1990s, the IRS was increasingly aggressive in auditing Dow's returns, resulting in two tax litigations in addition to the underlying Louisiana Litigation. (JA 29-30.) Based on its expectations, Dow discussed the likelihood of a dispute with the IRS frequently with its tax counsel and outside legal advisors *during the planning period for Chemtech I.* (JA 30.) The Deloitte Memo summarized Dow's ongoing legal analyses, which were disclosed to Deloitte during a meeting. (*Id.*) Although the District Court chose not to review the Deloitte Memo *in camera*, counsel for Dow represented that the document "directly reflects statements that are clearly the mental impressions, thoughts and legal analyses of Dow outside-counsel as to the . . . relative merits of various potential IRS challenges." (JA 136.)

C. The District Court Properly Focused on the Content in the Deloitte Memo, Rather than Its Author

A number of cases analyze the circumstances under which attorney thoughts and impressions may function in the ordinary course of business as opposed to in anticipation of litigation. The Government erroneously infers from this case law that work product contained within a document functioning in whole or in part for ordinary business reasons loses its work

product character. Because the Deloitte Memo was prepared as part of Deloitte's review of Dow's tax contingency, the Government argues that the function of the attorney analyses contained therein are to be ignored. (Gov. Br. 37-40.) The pertinent cases make clear, however, that the proper focus is on the function of the attorney's analyses themselves and that preexisting work product contained within documents created for a business use is no less entitled to protection, particularly in the context of opinion work product.

Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124 (D.C. Cir. 1987), chiefly relied on by the Government, actually supports the District Court's analysis. The Government seizes upon, and takes out of context, references in *Delaney* to the "function" of "the withheld material." (Gov. Br. 37.) The Government implies that this language requires the Court to ignore the content of attorney analyses contained within a document and to consider only the function of the document. (*See id.*) *Delaney* is inconsistent with the Government's implication. The issue in *Delaney* was whether to adopt as a blanket rule the Court's observation in *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980), that anticipation of litigation requires "that a specific claim had arisen, was

disputed . . ., and was being discussed in the memorandum." *Delaney*, 826 F.2d at 126-27. The Court rejected a blanket rule, finding instead that whether to apply a "specific claim" test depended upon the function of the "withheld material." In focusing on the content of the attorney analyses, the Court distinguished the function of attorney analyses appearing within the IRS memoranda at issue, which were in the nature of litigation hazards assessments, from the function of attorney analyses appearing within the documents at issue in *Coastal States*, which were in the nature of objective agency pronouncements of law:

> [In *Coastal States*], the documents were like an agency manual, fleshing out the meaning of the statute it was authorized to enforce. Here the IRS memos advise the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome. Similarly, plaintiff here is not trying to ascertain the agency's view of the law in order to comply or to advise clients on how to comply; it is seeking the agency's attorneys' assessment of the program's legal vulnerabilities in order to make sure it does not miss anything in crafting its legal case against the program. This is precisely the type of discovery the Court refused to permit in *Hickman v. Taylor*, 329 U.S. 495 (1947).

Delaney, 826 F.2d at 127 (finding material withheld to be attorney work product).

The District Court's adoption of the reasoning of *Regions Financial Corp. v. United States*, No. 2:06-CV-00895, 2008 U.S. Dist. LEXIS 41940 (N.D. Ala. May 8, 2008), is consistent with *Delaney*. The facts and context of *Regions* are similar to those in the present case. Regions hired outside counsel to analyze the tax impacts of a transaction. *Id.* at *3. The memoranda produced by outside counsel (3 of 4 "Core Documents") "express[ed] opinions, evaluate[d] legal theories, and analyze[d] possible IRS attacks on Regions' tax reporting of the transaction." *Id.* These opinions were provided to Regions' accounting firm, which created documents that discussed, quoted, or explained the Core Documents in connection with the tax accrual analysis. *Id.* at *4.

The court found that both the documents expressing the opinions of outside counsel *and* documents created by accountants that "discussed, quoted, or explained" the opinions were prepared in anticipation of litigation under either the "because of" test or the more stringent "primary motivating purpose" test. Notwithstanding that "the documents may have had some utility outside of litigation, they would not have been created were Regions not *primarily concerned* with litigating with the IRS concerning the transaction." *Id.* at *24-25 & n.11 (emphasis original) ("Even the strictest

application of the 'primary motivating purpose' test would still allow a document whose *creation* was primarily motivated by litigation to be *used* in some other fashion."). Moreover, the court found the rationale for protecting these documents "especially strong" because "Regions [was] only seeking to withhold the mental impressions and legal theories of its counsel." *Id.* at *25.

Like the Dow Documents, the IRS memoranda in *Delaney*, and the documents in dispute in *Regions*, the Deloitte Memo reflects pre-existing attorney opinions and legal thought processes developed for the primary, if not sole, purpose of analyzing the anticipated dispute with the IRS over the tax implications of the Chemtech Partnership. The attorney impressions memorialized in the Deloitte Memo—thoughts, mental impressions, and legal opinions of Dow outside counsel regarding likely litigation—would never have been created in "essentially similar form irrespective of the [likely] litigation." *Roxworthy*, 457 F.3d at 599 (citations and internal quotation marks omitted); *see also In re Honeywell Int'l, Inc. Sec. Litig.*, 230 F.R.D. 293, 300 (S.D.N.Y. 2003) (protecting documents created by an auditor as work product that "memorialize[d]" the company's opinion work product). Finally, like the plaintiff in *Delaney*, the Government here seeks

to obtain precisely the type of tactical litigation advantage from the fruits of Dow's litigation preparation that *Hickman* proscribed. *See also Roxworthy*, 457 F.3d at 590 (noting that "the IRS would appear to obtain an unfair advantage by gaining access to [the accounting firm's] detailed legal analysis of the strengths and weaknesses of [the taxpayer's] position").

D. *Arthur Young* and *Textron* Are Inapposite

The Government relies substantially on two cases that are not germane to the Deloitte Memo because they did not involve situations where the content of the document was clear work product. First, the Government's extensive citation to *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), is misplaced. *Arthur Young* did not involve attorney work product at all. Rather, the issue before the Court was whether to establish a new work product privilege applicable to accountants. *Id.* at 815. The Court's determination that it was the prerogative of Congress and not the courts to create an accountant work product privilege[8] is of no moment

[8] Congress since has created a privilege under 26 U.S.C. § 7525(a)(1) extending "the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney" to communications

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in this case because Dow is asserting *attorney* work product over oral communications from its attorneys to Deloitte, not *accountant* work product.

Nothing in *Arthur Young* suggests that what is clearly attorney opinion work product in the first instance loses protection when it appears within a document generated by an accountant.[9] The Government recognizes as much in its understated concession that "the Court [in *Arthur Young*] did not directly address whether a taxpayer's tax-accrual analysis was protected by the attorney-work product doctrine." (Gov. Br. 27.) In fact, the Court neither directly nor indirectly opined on the presence of attorney work product in accountant workpapers. The Government's

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"between a taxpayer and any federally authorized tax practitioner [including certified public accountants]" for statements made after July 22, 1998.

[9] The Government's attempts to characterize the Deloitte Memo as tax accrual workpapers, similar to those at issue in *Arthur Young*, is misguided. (Gov. Br. 25-30.) The IRS itself excepts from the definition of tax accrual workpapers "[p]reexisting documents that a taxpayer, the taxpayer's accountant, or the taxpayer's independent auditor consults, refers to, or relies upon in making evaluations or decisions regarding the tax reserves or in performing an audit." I.R.M. 4.10.20.2(3) (July 12, 2004); *see also* IRS CC-2004-010 (Jan. 22, 2004). Because the Deloitte Memo merely records pre-existing legal advice, it is not properly considered a tax accrual workpaper and is distinguishable from the documents at issue in *Arthur Young*.

reliance on *Arthur Young* obfuscates the real issue, discussed below, which is whether the clear *attorney* work product is waived through disclosure to and recordation by Dow's accountant.

The First Circuit's opinion in *United States v. Textron, Inc.*, 577 F.3d 21 (1st Cir. 2009), is similarly inapposite. At the threshold, the work product test enunciated by the majority in Textron is inconsistent with the "because of" test followed by the D.C. Circuit.[10] In an *en banc* court split three to two, the majority purports to continue to follow the "because of" test but articulates the standard for anticipation of litigation as whether a document was "prepared for use in possible litigation." *Id.* at 27. The dissent correctly recognizes that the decision represents a results oriented approach that "ignores a tome of precedents from the circuit courts," "contravenes much of the principles underlying the work product doctrine,"

[10] The Government errs in asserting that a ruling in Dow's favor will create a circuit split. (Gov. Br. 40.) To the contrary, such a ruling would "be merely an application of a widely acknowledged existing difference between [D.C. Circuit] law and the law of the Fifth Circuit." *See Textron*, 577 F.3d at 63 (Torruella, J., dissenting). Regardless of any existing circuit split, it is clear that the advice recorded in the Deloitte Memo was generated in anticipation of litigation over the potential tax treatment of the Chemtech Partnership under any of the existing tests.

and "brushes aside the actual text of Rule 26(b)(3)." *Id*. at 32 (Torruella, J., dissenting) (quoting *Adlman*, 134 F.3d at 1198).[11]

The dissent in *Textron* correctly noted as well that hazards of litigation assessments like the attorney assessments recorded in the Deloitte Memo are inextricably intertwined with preparation for potential conflict. Such preparation includes an assessment of whether and at what level to pursue compromise and settlement of a dispute. *See Textron*, 577 F.3d at 41 (Toruella, J., dissenting) (noting that "in the case of tax contingency reserves, the prospect of future litigation and the business need for the

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[11] The *Textron* majority's "for use in litigation" test has come under fire from practitioners as well. One commentator noted that "[t]he majority's new work-product rule—'prepared for use in possible litigation'—is directly in conflict with the Second Circuit's decision in *Adlman* and is even more restrictive than the Fifth Circuit's 'primary motivating purpose' standard." Jeremiah Coder, *En Banc First Circuit Reverses Course in Textron*, Tax Notes Today (Aug. 14, 2009) (elec. cit. 2009 TNT 155-1). Others have voiced support for the dissent's view, arguing that "if this is the law to be applied going forward, it will reduce the frequency with which lawyers convey candid remarks in writing to make it less likely that they will be 'discovered' by an adversary." *Id*.; *see also* Michelle M. Henkel, *Textron Eviscerates 60-Year-Old Work Product Privilege*, Tax Notes Today (Oct. 12, 2009) (elec. cit. 2009 TNT 195-6) ("If left to stand, *Textron* will . . . hinder the ability of in-house attorneys and outside counsel to perform their proper role of fairly evaluating legal risks in litigation, and will result in wide spread unfairness. These are the exact results the Supreme Court in *Hickman* sought to avoid . . . .").

documents are so intertwined that the prospect of future litigation itself creates the business need for the document") (internal quotation and citation omitted).

Moreover, even if this Court were to adopt the flawed legal standard set forth in *Textron*, the case is factually distinguishable because the workpapers at issue there did not contain the extensive opinion work product present in the Deloitte Memo. Whereas the Deloitte Memo contains specific impressions identifying, analyzing, and otherwise commenting upon the strengths and weaknesses of various likely IRS arguments, the workpapers at issue in *Textron* primarily consisted of "summary spreadsheets showing for each disputable item the amount in controversy, estimated probability of a successful challenge by the IRS, and resulting reserve amounts" and "back up e-mail and notes." *Id*. at 25.[12]

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[12] *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), also is distinguishable. First, the Fifth Circuit applies the more stringent "primary purpose" test, whereas the D.C. Circuit has adopted the "because of" test. Second, the documents at issue in *El Paso* were "tax pool analyses," which the court noted could be prepared without consulting an attorney. *Id.* at 534. Finally, the *El Paso* court stated that "El Paso's tax litigation is handled by outside counsel" and that "[t]here is no evidence in the record that the tax pool analysis or underlying memoranda are referred to outside counsel or used by El Paso's attorneys to prepare for trial or negotiations." *Id.* at 543.

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Finally, the policy considerations at issue in *Textron* and *Arthur Young* are not present here. Both of those cases involved records sought pursuant to IRS summonses under 26 U.S.C. § 7602, and both cases highlighted that the concept of relevance under section 7602 is informed by different policies than those at issue in Rule 26 discovery. Thus, *Textron* cited the role of "administrative discovery" and "other comparatively unusual tools . . . furnished to the IRS" as targeted to "[t]he practical problems confronting the IRS in discovering under-reporting of corporate taxes." *Id*. at 31; *see also Arthur Young*, 465 U.S. at 814 (noting "Congress' express intention to allow the IRS to obtain items of even *potential* relevance to an ongoing investigation" in light of the Congressional view that the IRS summons "is critical to the investigative and enforcement functions of the IRS") (emphasis in original).

Here, the IRS long ago identified the transaction at issue and has taken extensive document discovery and discovery of fact and expert

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By contrast, the Deloitte Memo records legal opinions and the thought processes of Dow's outside counsel in anticipation of litigation, including a detailed discussion of the applicable legal precedents that would apply in the event of an IRS challenge.

witnesses to develop the facts underlying the transaction and Dow's tax liability. The Deloitte Memo adds nothing to the Government's understanding of the Chemtech Partnership other than what Dow's outside counsel viewed as the litigation hazards at the time the transaction was entered into. Disclosure of these opinions will not advance any recognized policy ends but instead will derogate the work product rationale set forth in *Hickman*. *See Textron*, 577 F.3d at 35 (Torruella, J., dissenting).

II. DOW DID NOT WAIVE WORK PRODUCT PROTECTION THROUGH DISCLOSURE OF WORK PRODUCT TO DELOITTE

The Government argues that Dow waived its work product protection with respect to the Disputed Documents through disclosure of its work product to Deloitte. In the D.C. Circuit, work product waiver turns on whether the disclosure was inconsistent with maintaining secrecy from a party's adversary. The District Court correctly found the disclosure not to have met the D.C. Circuit's standard for waiver. The circumstances in the present case are consistent with the overwhelming weight of the authorities that have found no waiver of work product in the context of disclosures to a company's independent auditor, and the District Court did not err in following this well-reasoned precedent. This is particularly the case here,

where the communications are attorney opinions, subject to the highest level of protection.

A. The Relevant Factors Support Non-Waiver of Work Product Embedded in the Disputed Documents

It is undisputed that work product protection is less susceptible to waiver than the attorney-client privilege. Whereas the attorney-client privilege protects a confidential relationship, the work product privilege exists "to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent." *United States v. AT&T Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). Accordingly, the applicable standard for determining whether a disclosure to a third party constitutes a waiver is whether such disclosure is consistent with maintaining secrecy against one's opponents. *Id*. Under this standard, work product is waived only through disclosure to one's adversary, or where a party "had no reasonable basis for believing that the disclosed materials would be kept confidential by the [third party.]" *In re Subpoena Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984).

Most recently, the Court articulated three main factors that determine whether work product protection has been waived: "(1) the party claiming

the privilege seeks to use it in a way that is not consistent with the purpose of the privilege; (2) the party had no reasonable basis for believing that the disclosed materials would be kept confidential by the [party to whom the work product is disclosed]; and (3) waiver of the privilege in these circumstances would not trench on any policy elements now inherent in this privilege." *United States v. Williams Cos., Inc.*, 562 F.3d 387, 394 (D.C. Cir. 2009) (internal quotation marks omitted) (citing *In re Subpoena Duces Tecum*, 738 F.2d at 1372). Dow does not violate any of these three tests.

First, Dow is not seeking to use the work product privilege in a manner inconsistent with the purpose of the privilege. In *Williams*, the Court made clear that the import of this factor is to disallow "selective waiver" to one's adversary. *Id.* at 394. Thus, a party cannot "select according to [its] own self-interest to which adversaries [it] will allow access to the materials." *Id.* (internal quotation marks omitted) (quoting *In re Subpoena Duces Tecum*, 738 F.2d at 1372). Here, Dow has disclosed the work product at issue only to Deloitte. As discussed below, an independent auditor is not an adversary, in litigation or otherwise. Thus, Dow has not made a selective disclosure that impinges on the purposes of the work product doctrine.

Second, the District Court correctly found that "Deloitte . . ., as Dow's independent auditor, was not a potential adversary, and no evidence suggests that it was unreasonable for Dow to expect Deloitte . . . to maintain confidentiality." (JA 157.) This finding is supported by the uncontroverted declarations of Dow's current Tax Director and the Deloitte audit partner familiar with the disclosures. (*See* JA 30, 52.) Moreover, under the AICPA Code of Professional Conduct section 301, Deloitte has an affirmative duty "not [to] disclos[e] any confidential client information without the specific consent of the client." (JA 55.) The Government's observation that Section 301 is subject to the accountant's "obligation to comply with a validly issued and enforceable subpoena or summons" (Gov. Br. 47) does not undermine Dow's expectation because subpoenas and summonses generally do not require production of documents subject to the traditional attorney-client and work product privileges. *See Upjohn Co. v. United States*, 449 U.S. 383, 398-99 (1981) (noting that the "obligation imposed by a tax summons remains 'subject to the traditional privileges and limitations'") (*citing United States v. Euge*, 444 U.S. 707, 714 (1980)); Fed. R. Civ. P. 26(b)(1) (permitting discovery only of "nonprivileged" matters); *see also* Fed. R. Civ. P. 81(a)(5) (stating that the Federal Rules of Civil Procedure, including Rule

26(b)(1), apply in proceedings to compel testimony or produce documents pursuant to a subpoena issued by the United States). Indeed, Deloitte's protection of Dow's privileges in this matter arises in the context of a litigation subpoena, and Deloitte's scrupulous refusal to impair Dow's privileges provides powerful support for the reasonableness of Dow's expectation of confidentiality.

Third, the Court in *Williams* considered the impact of public policy only in considering whether to craft an exception to waiver. The Court had found under the second prong of the waiver analysis that the expectation of confidentiality did not reasonably supersede the Government's constitutionally mandated disclosure obligations in a criminal matter. In that context, the Court found that it was not "the appropriate forum in which to craft [a public policy] exception [to work product waiver]." *Williams*, 562 F.3d at 395. Here, the Court need not consider whether a public policy exception to waiver is warranted because, as discussed, Dow's expectation of confidentiality was reasonable and no waiver occurred.

Nonetheless, public policy strongly supports the District Court's finding that Dow did not waive its work product privilege by disclosing documents to Deloitte during the course of Deloitte's audit. As Dow's

declaration indicates, Deloitte "compelled Dow's production of the Dow Documents by informing the company that access to these documents was required in order to provide Dow with an unqualified audit opinion for its public financial statements." (JA 30.) Dow's experience is consistent with the increased aggressiveness with which public accounting firms have pursued privileged documents from their audit clients in a post-Sarbanes-Oxley environment. (*See, e.g.*, JA 62 ("If the client's support for the tax accrual or matters affecting it, including tax contingencies, is based upon an opinion issued by an outside adviser with respect to a potentially material matter, the auditor should obtain access to the opinion, *notwithstanding potential concerns regarding attorney-client or other forms of privilege*.") (emphasis added).) If disclosure of attorney work product to an independent auditor is deemed a waiver, and given the accountants' mandate and leverage over their audit clients to obtain such work product, then the very creation of work product relating to litigation hazards in and of itself will constitute a *de facto* waiver. The inevitable result of such a rule will be to encourage the very type of "[i]nefficiency, unfairness and sharp practices" that *Hickman* sought to avoid. *Hickman*, 329 U.S. at 511. This is especially true in circumstances such as the instant case where the only conceivable

benefit to the Government of disclosure would be access to attorney opinions directly related to litigation hazards in a pending case.

B. Disclosure to an Independent Auditor Is Not Disclosure to a Potential Adversary or a Conduit to a Potential Adversary

Because the work product privilege protects information from reaching one's adversary, only disclosure to an adversary or a conduit to a potential adversary causes a waiver of the privilege. Courts considering the issue consistently have found that an independent auditor is neither the adversary of an audit client nor a conduit thereto and have held that disclosures to independent auditors do not result in work product waiver.[13] *See, e.g.*, *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006) ("[T]he fact that an independent auditor must remain independent from the company it audits does not establish that

[13] The Government seems to imply that it was error for the District Court to have ignored the First Circuit's waiver discussion in the vacated panel decision in *Textron* (*see* Gov. Br. 19) and even insisted upon including a copy of this vacated decision in the Joint Appendix. The District Court issued its Memorandum Order after the *Textron* panel decision had been vacated and withdrawn. Obviously, the panel decision is a nullity for purposes both of the decision below and this Appeal. However, to the extent that the Government appears still to rely upon the decision, it bears noting that the panel decision clearly held that Textron and its auditors were not adversaries. (JA 100.)

the auditor also has an adversarial relationship with the client as contemplated by the work product doctrine. Disclosing documents to an auditor does not substantially increase the opportunity for potential adversaries to obtain the information."); *In re JDS Uniphase Corp. Sec. Litig.*, No. 02-1486, 2006 U.S. Dist. LEXIS 76169, at *11 (N.D. Cal. Oct. 5, 2006) (holding that disclosure of redacted board minutes to outside auditors did not waive work product); *Am. S.S. Owners Mut. Protection and Indem. Ass'n v. Alcoa S.S. Co.*, No. 04-Civ-4309, 2006 U.S. Dist. LEXIS 4265, at *10-12 (S.D.N.Y. Feb. 2, 2006) (refusing to find that disclosure of legal opinions to a public auditor constitutes disclosure to an adversary resulting in waiver of work product); *Frank Betz Assocs., Inc., v. Jim Walter Homes, Inc.*, 226 F.R.D. 533, 535 (D.S.C. 2005) (finding that disclosure of privilege litigation reserve numbers to outside auditors did not waive work product protection); *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 445-48 (S.D.N.Y. 2004) (holding that disclosure of a report generated at the request of counsel to the outside auditor was not "inconsistent with maintaining secrecy from possible adversaries"); *In re Honeywell Int'l, Inc. Sec. Litig.*, 230 F.R.D. at 300 (protecting documents prepared by auditors memorializing internal and external counsel's opinion work product); *In re*

Raytheon Sec. Litig., 218 F.R.D. 354, 360 (D. Mass. 2003) ("[T]here is no evidence that materials disclosed to an independent auditor are likely to be turned over to the company's adversaries except to the extent that the securities laws and/or accounting standards mandate public disclosure."); *Gutter v. E.I. DuPont de Nemours & Co.*, No. 95-2152, 1998 U.S. Dist. LEXIS 23207, at *13-14 (S.D. Fla. May 15, 1998) ("Transmittal of documents to a company's outside auditors does not waive the work product privilege because such a disclosure 'cannot be said to have posed a substantial danger at the time that the document would be disclosed to plaintiffs.'") (citations omitted). *But see Medinol Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113 (S.D.N.Y. 2002); *In re Diasonics Sec. Litig.*, No. C-83-4584-RFP, 1986 U.S. Dist. LEXIS 24177 (N.D. Cal. June 15, 1986) (both cases discussed below).

Nor is there reason to believe that an auditor's duty to the public creates the potential for litigation between the auditor and its client.[14] The

[14] The Government, citing *Arthur Young*, claims that an auditor's "public obligations" may run counter to the interests of its clients. (Gov. Br. 26.) *Arthur Young*, however, offers no support for such a proposition. Rather, the Supreme Court merely observed that an auditor may issue an adverse opinion regarding its clients' financial statements. The argument that such

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mere requirement for an auditor to assess independently and objectively the accuracy of its clients' financial statements does not result in the type of tangible adversarial relationship that is required to effectuate a waiver of the work product privilege.[15] "Any tension between an auditor and a corporation that arises from an auditor's need to scrutinize and investigate a corporation's records and book-keeping practices simply is not the equivalent of an adversarial relationship contemplated by the work product doctrine." *Merrill Lynch*, 229 F.R.D. at 445-48 (quotation at 448).

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an action inherently causes an "adversarial relationship" between an auditor and its client is without merit.

[15] The Government's interpretation of the term "potential adversary" is so expansive as to swallow the privilege itself. (Gov. Br. 49-55.) Any two parties have the potential for future conflict; indeed, even attorneys and clients at some point may become adversaries. Courts examining whether work product has been waived focus on whether a particular disclosure *substantially increases* the likelihood that a potential adversary will gain access to the information at the time the disclosure was made. *See, e.g.*, *Lawrence E. Jaffe Pension Plan*, 237 F.R.D. at 183 ("It is well established that the work product privilege is waived by disclosures to third parties in a manner which substantially increases the opportunity for potential adversaries to obtain the information.") (internal quotation and citation omitted).

Most recently, the court in *Regions* reaffirmed these holdings in the context of disclosures made to independent public auditors for the purpose of evaluating tax reserve accounts. Like other courts, the *Regions* court recognized that the relationship of the client and the independent auditor was not adversarial and, in particular, that "[t]here [wa]s simply no conceivable scenario in which [the auditor] would file a lawsuit against Regions because of something [the auditor] learned from Regions' disclosures." *Regions*, 2008 U.S. Dist. LEXIS 41940, at *27-28. In light of this relationship and the expectation of confidentiality, the court found that work product protection was not waived by virtue of Regions' disclosure of work product to its auditor. *Id.*

The cases on which the Government relies are either distinguishable or outliers. *MIT* is plainly distinguishable. There, the disclosure at issue was by a Government contractor to an auditing arm ("DCAA") of the Department of Defense ("DOD"), whose job it was to review MIT's expense submissions. *MIT*, 129 F.3d at 687. The key consideration supporting the finding of a waiver in *MIT* was that DCAA had both the obligation to review the accuracy of MIT's expense submissions and the authority to sue MIT to recoup any overcharges. Thus, the *MIT* court held that "the potential for

dispute and even litigation [between MIT and DOD] was certainly there." *Id.* The District Court correctly distinguished *MIT* on the basis that "Deloitte . . . was an independent auditor with no similar obligation or authority, and therefore the potential for adversity identified in *MIT* is absent." (JA 157 n.2.); *see also Regions*, 2008 U.S. Dist. LEXIS 41940, at *27 (noting that "[t]he decisive factor" in *MIT* was that the auditor was "*a branch of the Department of Defense*") (emphasis added); *Merrill Lynch*, 229 F.R.D. at 446 ("The First Circuit found that the audit agency—which was responsible for preventing an overcharge for services—was a potential adversary because a review of MIT's billing statements could result in dispute or even litigation."); *cf. In re Subpoena Duces Tecum*, 738 F.2d at 1372 (finding waiver where "[t]here [wa]s no question that the SEC [to whom documents were disclosed] was an adversary to [the party disclosing the documents]").[16]

[16] Even if *MIT* were not distinguishable on these bases, the work product at issue there was *fact* work product, not *opinion* work product, and the court expressly so limited its holding. 129 F.3d at 688 ("Conceivably, the strong policy underlying [the opinion work product reservation in Fed. R. Civ. P. 26(b)(3)] might serve to protect such materials, even if protection of ordinary work product materials were deemed waived because of selective disclosure.").

Medinol and *Diasonics*, two cases upon which the Government chiefly relies, appear to be the only courts to date to have concluded, after analyzing the issue, that an auditor is an adversary or conduit to a potential adversary. These decisions are aberrations that other courts correctly have declined to follow. Subsequent authority from the Southern District of New York and other courts within the Second Circuit have criticized *Medinol* as contrary to controlling Second Circuit precedent. *See Vacco v. Harrah's Operating Co.*, No. 1:07-CV-0663, 2008 U.S. Dist. LEXIS 88158, at *20 (N.D.N.Y. Oct. 29, 2008) ("*Medinol* . . . has been almost uniformly rejected as adopting far too restrictive of a view regarding the circumstances under which a waiver can occur.") (citing *Am. S.S. Owners*, 2006 U.S. Dist. LEXIS 4265 (refusing to follow *Medinol* and stating that the holding was in direct opposition to the decision in *Adlman*, 134 F.3d at 1200 (noting that work product should apply where "[t]he company's independent auditor requests a memorandum prepared by the company's attorneys estimating the likelihood of success in litigation and an accompanying analysis of the company's legal strategies and options to assist it in estimating what should be reserved for litigation losses"))).

In any event, the rationale behind *Medinol* is unclear, as the court acknowledged that disclosure to an auditor does not substantially increase the risk that work product will reach an adversary. *Medinol*, 214 F.R.D. at 116. Likewise, reliance on the decision in *Diasonics* is misplaced, as subsequent authority in the Northern District of California has declined to follow its reasoning, most recently in *SEC v. Schroeder*, No. C07-03798, 2009 U.S. Dist. LEXIS 39378, at *26-28 (N.D. Cal. Apr. 27, 2009) (rejecting *Diasonics* and finding that the "better view" is "that disclosures to outside auditors do not have the tangible adversarial relationship requisite for waiver." (quotation at *27) (citation and internal quotation omitted); *see also SEC v. Roberts*, 254 F.R.D. 371, 381-82 (N.D. Cal. 2008) (refusing to follow *Diasonics*'*s* waiver test).

C. The District Court Correctly Rejected the Government's Waiver Arguments That Focused on SEC Regulatory Requirements, Auditor Independence, and a Lack of Common Litigation Interests

The District Court was correct to reject each of a number of miscellaneous, specious arguments in support of waiver raised in the

Government's Reply Brief (Doc. 8 at 4-8) and at the hearing before the District Court (JA 113-14).[17]

First, consistent with the case law discussed in Section II.B, an auditor's independence obligations do not convert the auditor to an adversary, and certainly not to a litigation adversary. It is true that an auditor's independence obligations may lead it to probe beyond the client's comfort zone. Indeed, the very same type of independent investigation in the present matter led to the disclosure to Deloitte of work product that Dow otherwise would not have provided. However, adversity is antithetical to independence, and an auditor would be precluded from representing a potential client that is also a potential adversary. *See, e.g.*, AICPA Code of Professional Standards, A.U. § 220.02 (1972), *available at* http://www.aicpa.org/download/members/div/auditstd/AU-00220.PDF (last visited October 29, 2009) (stating that auditor independence "does not imply

[17] To the extent these or any other issues raised by the Government were not directly addressed in the District Court's Order, the District Court implicitly rejected those issues, which the parties briefed and addressed at the hearing. *See In re Felt*, 255 F.3d 220, 225 (5th Cir. 2001) ("[T]hough not expressly addressed in an initial appeal, those matters that were fully briefed to the appellate court and were necessary predicates to the ability to address the issue . . . are deemed to have been decided tacitly or implicitly . . . .").

the attitude of a prosecutor but rather a judicial impartiality that recognizes an obligation for fairness not only to management and owners of a business but also to creditors and those who may otherwise rely . . . upon the independent auditor's report . . . ."); AICPA Code of Professional Conduct, ET § 100.15, *available at* http://aicpa.org/about/code/et_100.html (last visited October 29, 2009) (stating that commencing or stating an intention to commence litigation by either the company or auditor creates a threat to independence).

Once again, the United States cites extensively to inapposite discussion in *Arthur Young*. There, in declining to find an *accountant* work product privilege, the Court notes that "[t]o insulate from disclosure a *certified public accountant's* interpretations of *the client's financial statements* would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations." *Arthur Young*, 465 U.S. at 818 (emphasis added).[18] By contrast, the work product at issue in

[18] The Government cites to Wright & Graham's treatise to support the purported adversarial relationship between an auditor and client. (Gov. Br. 51, 54.) However, the selected excerpts from that treatise discuss the application of an *accountant-client* privilege which, as discussed above, is not at issue. The Government omits from its brief those arguments that the

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the Disputed Documents represents *the lawyer's* interpretations, analyses, and impressions of *anticipated litigation*. Insulating this work product from disclosure would further the adversarial process protected by *Hickman* without in any way diminishing the accountant's actual or perceived independence. Nor does a "qualified" or "adverse" opinion—let alone the mere potential for such a result—mean that the accountant is any less independent or more adversarial.

Second, nothing in the SEC regulations imposes obligations to disclose the client's attorney work product to an adversary.[19] The SEC

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treatise cites in favor of an accountant-client privilege, for example, that "accountants are under an ethical obligation to preserve the confidences of their clients, that confidentiality is essential in the professional relationship, and that courts should honor the pledge of confidentiality because of the public importance of sound accounting practices." 23 Wright & Graham, Fed. Prac. & Proc.: Evidence § 5427, at 808 (1980).

[19] The Government's assertion (Gov. Br. 46 & n.17) that the trend in accounting standards is for more disclosure in a company's financial statements is of no relevance to the issue of waiver. The Government does not and cannot point to any accounting standard requiring public disclosure of attorney opinion work product. Nor does the relatively new FIN 48 compel such a result. FIN 48 standards relate to overall tax contingency reserves. In this case, the Government is attempting to obtain attorney work

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regulations that the Government cites come into play only in situations where the auditor detects that an illegal act may have occurred.[20] 15 U.S.C. § 78j-1(b)(1) (Oct. 21, 2009) (detailing procedures to follow when "an illegal act (whether or not perceived to have a material effect on the financial statements of the issuer) has or may have occurred"). If so, the auditor first must disclose its findings to company management. *Id.* § 78j-1(b)(1)(B). Only if management fails to take remedial action and the alleged illegal act has a material effect on the company's financial statements is the auditor required to make some disclosure to the company's Board of Directors and the SEC. *See id.* § 78j-1(b)(2)-(3). Moreover, even if a disclosure were warranted, there is no reason to suspect that the work product in the Disputed Documents would be a part of any such disclosure. Thus, the prospect that these regulations would trigger a disclosure of the work product within the Disputed Documents is purely hypothetical, and it was

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(Footnote continued from previous page)

product specific to this transaction to assist in preparing its litigation strategy.

[20] The Chemtech Partnership litigation is a civil matter, and neither the IRS nor the SEC ever alleged or otherwise suggested that Dow engaged in illegal conduct.

eminently reasonable for Dow and Deloitte to believe that these regulations would not result in the disclosure of the Disputed Documents to an adversary.

Finally, the Government erroneously implies that work product is waived if disclosed to a third party without a "common interest," and supports its flawed argument by mischaracterizing the authorities it relies upon. At the outset, cases citing to "common interest" typically involve disclosure between parties in the litigation context and assess whether the parties have a common *litigation* interest. *See, e.g.*, *AT&T*, 642 F.2d at 1299 ("So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts."). Because the disclosures here occurred outside the litigation context, common litigation interests are not relevant.

Moreover, the cases relied upon by the Government that analyze common interests do not apply a different waiver test. (Gov. Br. 54.) Rather, they acknowledge that common interests may be *relevant*—not prerequisite—to the waiver analysis. *See, e.g.*, *AT&T*, 642 F.2d at 1299 (finding common interest "*relevant* to deciding whether the disclosure is

consistent with the nature of the work product privilege") (emphasis added). The Government argues for a broader relevance for common interests than is articulated in the cases it cites. (*See* Gov. Br. 54.) The *Merrill Lynch* decision specifically rejected the notion that common interest is required, stating that "the fact that Merrill Lynch and Deloitte & Touche did *not* share a common litigation interest *is of no moment*." 229 F.R.D. at 447 (emphasis added). The *Gutter* decision does not mention common interest at all. *Gutter*, 1998 U.S. Dist. LEXIS 23207, at *13-14 (holding work product not waived following disclosure to outside accountant based on lack of "substantial danger" of adversarial disclosure as opposed to commonality of interests). And the *Pfizer* case simply noted that "[d]isclosure of work product to a party sharing common interests is not inconsistent with the policy of privacy underlying the doctrine." *In re Pfizer Sec. Litig.*, No. 90 Civ. 1260, 1993 U.S. Dist. LEXIS 18215, at *21 (finding that the corporation and auditor with whom reserve information was shared

"obviously shared common interests in the information, and Peat Marwick is not reasonably viewed as a conduit to a potential adversary").[21]

CONCLUSION

The District Court found upon review of the evidence presented that (i) the Disputed Documents are "protected from discovery as attorney work product because they were created in anticipation of future litigation over the tax treatment of Chemtech"; and (ii) that such protection remains intact because Dow's disclosure to Deloitte was not inconsistent with the maintenance of secrecy from Dow's adversaries. The record amply supports these findings, and the District Court applied the correct legal standards. Accordingly, the District Court did not abuse its discretion in denying the Government's motion to compel, and the decision of the District Court should be affirmed.

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[21] To the extent relevant, Dow agrees with the *Pfizer* court that Dow shares with Deloitte a common interest in the information contained in the Disputed Documents. Moreover, Dow and Deloitte share a common interest in ensuring that Dow's consolidated financial statements are accurate and compliant with GAAP. *See*, *e.g.*, *Merrill Lynch*, 229 F.R.D. at 448 ("A business and its auditor can and should be aligned insofar as they both seek to prevent, detect, and root out corporate fraud. Indeed, this is precisely the type of limited alliance that courts should encourage.").

Respectfully submitted,

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October 29, 2009

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), and with this Court's Order dated October 27, 2009 (granting Intervenors leave to file a brief not to exceed 14,000 words) because:

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October 29, 2009

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I hereby certify that on this 29th day of October, 2009, the foregoing BRIEF OF INTERVENOR ON BEHALF OF APPELLEE was filed electronically with the Clerk of the Court using the ECF system. Eight paper copies will be delivered by hand to the Clerk within two days of filing this brief. Service of this brief was made on counsel for the Appellant and Appellee by sending an electronic copy to, respectively, Judith.A.Hagely@usdoj.gov, and mwarden@sidley.com, and by mailing two copies thereof by First Class Mail to counsel at each address set forth below, properly addressed as follows:

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