UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

CAPITAL CITY MORTGAGE CORP., *et al.*,

Defendants.

Civil Action No. 98-00237 (JHG) (AK)

CLYDE HARGRAVES, *et al.*,

Plaintiffs,

v.

CAPITAL CITY MORTGAGE CORP., *et al.*,

Defendants.

Civil Action No. 98-1021 (JHG) (AK)

MEMORANDUM ORDER

Pending before the Court are Defendants Capital City Mortgage Corporation and Thomas K. Nash's Motion to Compel Federal Trade Commission for Deposition [232], Defendants Capital City Mortgage Corporation and Thomas K. Nash's Motion to Compel Plaintiff Federal Trade Commission to Produce Brookeville Discovery [252], and the oppositions and replies thereto.

Upon consideration of the pleadings and the entire record, the Court grants both motions in part. Specifically, Defendants have leave to notice a Rule 30(b)(6) representative of the FTC

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to inquire about responses to the discovery requests of defendants Capital City and Nash, identified as topic (f) in Defendants' Motion to Compel; communications between the FTC and Eric Sanne, identified as part of topic (g) in Defendants' Motion to Compel; and communications between FTC and one borrower who later became a *Hargraves* Plaintiff, identified as part of topic (g) in Defendants' Motion to Compel. In addition, Plaintiff will produce to Defendants its maps, charts and depictions of the Brookeville file cabinets but may redact any notes on those documents that constitute attorney work product.

I. Defendants' Motion to Compel FTC for Deposition

In its Motion, Defendants ask the Court to direct the FTC to produce one or more witnesses for deposition pursuant to Rule 30(b)(6) to testify as to the following matters:

> (a) All allegations of the amended complaint;
> (b) All allegations that any Defendant violated TILA;
> (c) All allegations that any Defendant violated FDCPA;
> (d) All allegations that any Defendant violated ECOA;
> (e) All allegations that any Defendant violated FTCA;
> (f) All responses to the discovery requests of defendants Capital City and Nash; and
> (g) All communications between the FTC and any other party to this lawsuit.

Defendants' Motion, Exh. A.

Defendants served their First Notice of Rule 30(b)(6) deposition on September 21, 1998. In response to the Notice, FTC designated two Rule 30(b)(6) witnesses who Defendants deposed over the course of three days. At the depositions, FTC objected to questions regarding three topics: (1) all analyses of Capital City; (2) the basis for FTC's answers to interrogatories; and (3) allegations in the Complaint. In response to those objections, Defendants filed a motion for preclusion of trial testimony on these three subjects by FTC witnesses. In recommending denial

of Defendants' Motion for Preclusion, this Court noted that if Defendants thought they were entitled to deposition testimony on those three subjects, they should have filed a motion to compel. April 27, 1999 Report & Recommendation. On August 19, 1999, Defendants served their Second Notice of Rule 30 (b)(6) deposition. Subjects (a)-(f) in the Second Notice are essentially a breakdown of the three disputed topics from the First Notice. After FTC counsel notified Defendants of their objections to the Second Notice, Defendants filed the instant Motion to Compel.

A. Defendants' Topics (a)-(f)

FTC objects to topics (a)-(f) on the basis of the work product doctrine. The work product doctrine provides qualified immunity to documents and tangible things that lawyers prepare in anticipation of litigation or for trial. Fed. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495, 512 (1947). Inquiries at a Rule 30(b)(6) deposition about the facts and documents which support FTC's claims implicate the work product doctrine because such notice would require the Rule 30(b)(6) designee to marshall all of FTC's factual information in support of its claim and disclose FTC attorneys' mental processes and strategies. *American Nat'l Red Cross v. Travelers Indemnity Co.*, 896 F. Supp. 8 , 13-14 (D.D.C. 1995)(holding that party's request that Rule 30(b)(6) designee describe the facts and documents which Defendant contends support each affirmative defense "intrude[s] upon protected work product"); *In re Independent Serv. Organizations Antitrust Litigation*, 168 F.R.D. 651, 654 (D. Kan. 1996)(concluding that party's attempt to discover the facts upon which opponent will rely for its defense and counterclaims is "overbroad, inefficient, and unreasonable" and "implicates serious privilege concerns"); *United States v. District Council of New York City*, 1992 WL 208284, at *15 (S.D.N.Y. Aug. 18, 1992).

While fact work product is subject to qualified immunity, opinion work product is afforded almost absolute protection from disclosure. *In re Sealed Case*, 676 F.2d 793, 811 (D.C. Cir. 1982). An attorneys mental processes and legal strategies such as those at issue in the instant case constitute opinion work product. *SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992). Defendants would therefore have to demonstrate an extraordinary need for the information in order prevail on their motion to compel. *Id.* (internal citations omitted); *In re Sealed Case*, 676 F.2d at 811. Defendants may, however, notice a Rule 30(b)(6) deposition for the purpose of clarifying written discovery responses already produced. *See e.g. Alexander v. FBI*, 186 F.R.D. 137, 142 (D.D.C. 1998) (denying plaintiff's motion for a new Rule 30(b)(6) witness without prejudice and permitting plaintiff's to move to compel again if, after receiving written discovery responses on the subject, a new Rule 30(b)(6) witness then becomes necessary); *Alexander v. FBI*, 186 F.R.D. 148 (D.D.C. 1998)(same). Accordingly, Defendants can depose an FTC Rule 30(b)(6) designee only on Defendants' topic (f).

B. Defendants' Topic (g)

Defendants' topic (g) seeks to inquire about all communications between FTC and other parties to this litigation. This topic includes FTC's communications with Defendants, Third-Party Defendants, the *Hargraves* Plaintiffs, and Eric Sanne.

(1) Communications Between FTC and Defendants

With regard to communications between FTC and Defendants, it appears that Defendants already deposed one of FTC's Rule 30(b)(6) designees in October and December of 1998 and the designee answered all of their questions on this topic. Opposition at 11. In addition, Defendants have had access to FTC's correspondence files and were themselves a party to those

communications. In light of the foregoing, the Court will deny the motion as to communications between FTC and Defendants because Defendants have provided no reason why they need a second Rule 30(b)(6) deposition on the same topic.

(2) Communications Between FTC and Third-Party Defendants

With regard to communications between FTC and Third-Party Defendants Michael Shelton, Chester Katz, and Ronald Deutsch, FTC indicates in its opposition brief that it will provide a declaration to Defendants stating that all FTC correspondences with Third-Party Defendants have already been provided to Defendants. This issue is therefore moot.

(3) Communications Between FTC and the *Hargraves* Plaintiffs

FTC notes in its opposition that its only communication with a *Hargraves* Plaintiff involved one borrower who subsequently became a plaintiff in the *Hargraves* action. Opposition at 13. The Court concludes that Defendants may inquire about FTC's communications with this individual at a Rule 30(b)(6) deposition. To the extent that Defendants' questions implicate attorney work product, FTC may object on the basis of the work product doctrine.

Any mental impressions or recollections of communications between FTC and the *Hargraves* counsel are protected by the work product doctrine. The purpose of the work product doctrine is to safeguard an attorney's mental impressions and legal strategies from his or her opponent. *United States v. American Tel. &Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980). Therefore, "a disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege." *Id.; In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990)(common interest rule applies to communications protected by the work product doctrine). "[P]ersons who share a common

interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims." *In re Grand Jury Subpoenas*, 902 F.2d at 249. Accordingly, the Court will deny the motion as to communications between FTC and the *Hargraves* Plaintiffs.

(4) Communications Between FTC and Eric Sanne

The parties dispute whether Defendants can inquire at a Rule 30(b)(6) deposition about communications between FTC and Eric Sanne, Defendant Capital City's counsel during the period relevant to the allegations in the Complaint. By pursuing this discovery, Defendants "seek to discover the factual positions on the claims in this case as they were disclosed" to Mr. Sanne as well as "accommodations, agreements, understandings or the offers or prospects thereof as between an adversary and a potential witness." Reply at 8. FTC indicates in its opposition that those communications would include settlement discussions. Opposition at 16. FTC contends that the public policy considerations underlying Federal Rule of Evidence 408 and the relevance requirement of Federal Rule of Civil Procedure 26(b) prohibit discovery of the settlement discussions in this case. Plaintiff responds that Rule 408 is not intended to limit discovery of settlement discussions.

The principal inquiry in this discovery dispute is whether the information Defendants seek to obtain falls within the scope of Federal Rule of Civil Procedure 26. Rule 26(b)(1) permits parties to obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . [t]he information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Unlike Rule 26(b)(1), Federal Rule of Evidence 408, which seeks to foster settlement negotiations, "was never intended to be a broad discovery privilege." *NAACP Legal Defense & Educ. Fund v. DOJ*, 612 F. Supp. 1143, 1146, n.1 (D.D.C. 1985) (citing Weinstein's Evidence ¶ 408[1] at 408-14 (1981)). Rule 408 limits the admissibility at trial of evidence produced during settlement negotiations but does not prohibit the disclosure of such information during discovery. *Weissman v. Fruchtman*, 1986 WL 15669, at *19 (S.D.N.Y. Oct. 30, 1986).[1] Indeed, if Rule 408 was intended to restrict the scope of discovery, "parties would be unable to discover compromise offers *which could be offered for a relevant purpose*, i.e., proving bias or prejudice of a witness, opposing a claim of undue delay, proving an effort to obstruct a criminal investigation or prosecution, or enforcing a settlement agreement." *Weissman,* at *19 (emphasis added).

In light of the foregoing analysis, "[t]his Court has specifically rejected finding a 'settlement negotiation privilege' emanating from Rule 408." *Childers v. Slater*, 1998 WL 429849, at *5 (D.D.C. May 15, 1998)(internal citations omitted). Notwithstanding the absence of such a privilege, courts addressing this issue have attempted to balance the public policy

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[1] Federal Rule of Evidence 408 provides:
Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

concerns underlying Rule 408 against the moving party's need to support its claims or defenses. *Id.* at *6. Some courts have required the requesting party to meet a heightened standard, *Bottaro v. Hatton Associates*, 96 F.R.D. 158, 159-60 (E.D.N.Y. 1982)("[w]e think the better rule is to require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of the settlement agreement."), while at least one court has rejected the *Bottaro* standard in favor of a Rule 26(b) relevancy standard, *Bennett v. La Pere*, 112 F.R.D. 136, 140 (D.R.I. 1986)(" . . . . the party opposing discovery should have the burden of establishing some good cause or sound reason for blocking disclosure.").[2]

Having reviewed the pertinent case law, this Court concurs with *Bennett* that the purpose of pretrial discovery is "to allow a wide search for facts which may aid a party in the attempt to ready the prosecution or defense of a claim. Once it is determined that material sought by discovery is relevant and not privileged, the discoverer has crossed the modest threshold which Rule 26(b) erects." *Bennett,* 112 F.R.D. at 140. Accordingly, the court will grant Defendants' motion to compel as to communications between FTC and Eric Sanne. If FTC attorneys choose to object at the Rule 30(b)(6) deposition to certain questions, the Court will, upon FTC's motion, consider those objections if FTC can demonstrate that the information would be inadmissible at trial and is not reasonably calculated to lead to the discovery of admissible evidence.

II. Motion to Compel FTC to Produce Brookeville Discovery

Defendants seek to compel the production by the FTC of any maps, drawings, or

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[2] It is noteworthy that in both *Bottaro* and *Bennett*, the parties had entered into settlement agreements whereas here the Court is not aware of any settlement agreement between the FTC and Eric Sanne.

depictions of file cabinets or labels at Defendant Capital City's office or Defendant Nash's home in Brookeville, Maryland and a declaration which sets forth the FTC's analysis and conclusions concerning the documents which were produced from the Brookeville files, including, "any conclusions and the bases therefor, reached by the FTC on documents, or categories of documents, which the FTC claims should have been but which were not contained in the Brookeville files produced to the FTC." Defendants' Proposed Order. FTC objects to the discovery request on the basis of the qualified immunity of the work product doctrine.

The Brookeville documents are the 1984-1990 Capital City paid-off loan files which were originally stored at Capital City's office and later transported to Defendant Nash's home in Brookeville, Maryland. FTC contends that 10 file drawers at Defendant Nash's home contained files when FTC attorneys first inventoried the file cabinets but were empty when an FTC paralegal returned to pick up the documents. By Order dated March 10, 1999, the undersigned permitted the parties to take depositions on the issue of the allegedly missing paid-off loan files.[3]

The Court notes at the outset that when Defendants' motion was filed, it was technically deficient. Defendants' moved the Court to compel the production of the disputed documents pursuant to Fed. R. Civ. P. 33, 34 and 37. Motion at 1. Rule 33 governs the service of interrogatories on parties and is therefore irrelevant. Had Defendants served a written request for production pursuant to Rule 34, then upon receipt of FTC's objections to the request, Defendants

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[3] Defendants make much of alleged inconsistencies in the deposition testimony taken pursuant to this Court's March 10, 1999 Order. To the extent that there are any possible inconsistencies in the sworn testimony of parties, third-party witnesses and counsel, the Court will not speculate as to the credibility of the parties. Any questions that remain as to the whereabouts of the allegedly missing Brookeville files have no direct bearing on the issue of whether Defendants are entitled to maps and analyses generated by FTC counsel.

could have moved to compel production pursuant to Rule 37. The only formal discovery request for the disputed information in existence at that time, however, was Defendants' Subpoena. Defts' Exh. 5g. Subsequent to the filing of their Motion, Defendants filed their Sixth Request for Production of Documents "[t]o moot any procedural issue." Reply at 9. While the Court does not condone Defendants' failure to adhere to the Federal Rules of Civil Procedure, the Court nevertheless will treat the procedural deficiencies of Defendants' motion moot in light of the subsequent request for production and objections thereto. Accordingly, the Court will address the merits of the parties positions.

A. Defendants' Request for Depictions of the File Cabinets

The work product doctrine is designed to create a "zone of privacy within which an attorney can think, plan, weigh facts and evidence, candidly evaluate a client's case and prepare legal theories." *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 864 (D.C. Cir. 1980). Because the doctrine is intended to shield only an attorney's mental impressions and legal strategies, "it does not protect facts concerning the creation of work product or facts contained within work product." *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir 1995). Upon review of the record, the Court concludes that the maps or depictions of the file cabinets created by FTC attorneys are purely factual. Indeed, the record indicates that the attorneys were not reviewing the contents of the files in order to make a decision as to which files would be useful. Rather, the FTC attorneys "were really just writing down borrower names and loan numbers and origination dates for the loans, for the most part. And so we weren't taking notes of materials within each loan file." FTC's Opposition, Blower Deposition at 9-10 [ostensibly the FTC attorneys were identifying the physical location of certain files within the cabinets]. *See* FTC's Opposition at 2-

3 (noting that "the purpose of this limited inventory was to determine the number of loan files for copying and the names of the borrowers involved."). Because the record does not reflect that the FTC attorneys were, for example, weighing the usefulness of certain loan files when they created their inventory on October 1st 1998, FTC cannot now claim that its drawings. Charts, and depictions of the file cabinets are protected work product. Accordingly, FTC will produce the maps, charts or depictions of the files. To the extent that any notes on these documents constitute attorney work-product, FTC may redact such notes.

B. Defendants' Request for Conclusions and Analyses of FTC Attorneys

Defendants also seek a declaration from FTC setting forth the outcome of any analysis conducted by FTC of the Brookeville files, including any conclusions about whether loan files are in fact missing. *See* Defendants' Proposed Order. Any documents prepared by FTC attorneys with an eye toward litigation that contain the attorneys' mental impressions of the Brookeville discovery constitute protected opinion work product. *Upjohn Co. v. United States*, 449 U.S. 383, 397-400 (1981).

In response to FTC's work product objection, Defendants contend that FTC waived any work product objections by producing some notes and by failing to raise a work product objection at the depositions of FTC attorneys. Reply at 7. The Court finds Defendants' waiver argument unavailing because the record clearly reflects FTC's work product objections. See FTC's Objections to Defendants' Subpoena Duces Tecum at 2-3 ("However, as the Commission had already agreed . . . to provide Defendants with all documents relevant to Brookeville, we are producing those documents to Defendants by separate letter . . . pursuant to our informal agreement. . . To the extent a request seeks work product or statutorily protected materials, our

response is detailed in that letter."); Motion, Exh. 5i (noting that FTC does not waive its right to claim work product protection); Defts' Supplement, Exh. DX8. Accordingly, the Court concludes that FTC's work product objection to Defendants' request for FTC's analyses and conclusions is proper. It is this 30 day of March, 2000

ORDERED, that Defendants' Motion to Compel Federal Trade Commission for Deposition be and is hereby **GRANTED IN PART AND DENIED IN PART**; and it is further

ORDERED, that FTC will make a Rule 30(b)(6) designee available for deposition on topic (f), which relates to all responses to the discovery requests of defendants Capital City and Nash, and topic (g), to the extent that it relates to communications between FTC and Eric Sanne and communications between FTC and one *Hargraves* Plaintiff. Defendants' Motion to Compel FTC for Deposition is denied as to topics (a)-(e) and the remainder of topic (g); and it is further

ORDERED, that Defendants' Motion to Compel Plaintiff Federal Trade Commission to Produce Brookeville Discovery be and is hereby **GRANTED IN PART AND DENIED IN PART**; and it is further

ORDERED, that FTC will produce all maps, charts or depictions of the paid off loan file cabinets at Capital City's office and Mr. Nash's home in Brookeville, Maryland. FTC may redact any notes that constitute attorney work-product; and it is further

ORDERED, that the parties shall have until May 1, 2000 to conduct the discovery permitted herein.

March 30, 2000

ALAN KAY
UNITED STATES MAGISTRATE JUDGE