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July 9, 2010

Via ECF

The Honorable Joseph A. Dickson, U.S.M.J.
United States District Court
Martin Luther King, Jr. Federal Building & Courthouse
50 Walnut Street
Newark, New Jersey 07101

Re: *In re Schering-Plough Corporation ENHANCE Securities Litigation*,
Civil Action No. 08-397 (DMC) (JD)

In re Merck & Co., Inc. Vytorin/Zetia Securities Litigation,
Civil Action No. 08-2177 (DMC) (JD)

Dear Judge Dickson:

Pursuant to paragraph I(4) of the Pretrial Scheduling Order entered December 22, 2009, and Local Civil Rule 16.1(f)(1), we write together with Co-Lead Counsel for Plaintiffs in the above-referenced matters to inform the Court of disputes that have arisen between the parties concerning deficiencies in Defendants' responses to Plaintiffs' discovery requests. Plaintiffs seek the Court's assistance only after pursuing diligent, good faith efforts to resolve these issues with Defendants over the course of six months. Such efforts have included a meet-and-confer process that spanned over 14 weeks, along with at least ten letters and multiple e-mails in which Plaintiffs set forth their positions – and often tried to find common ground to compromise – on each of the disputed issues.

Although discovery in this case began in December 2009, Defendants have still failed to produce broad categories of highly relevant documents. Specifically, despite Plaintiffs' repeated requests, Defendants have not produced: (1) certain documents from the Officer Defendants; (2) responsive and highly relevant documents based only on the date they were created; (3) relevant documents from certain third-party custodians; and (4) Merck & Co, Inc.'s ("Merck's") document retention policy.

In addition to the above deficiencies, Defendants have informed Plaintiffs that their document production will not be completed until, at a minimum, the end of October 2010. This delay will impact the entire pre-trial schedule set by the Court in the December 22, 2009 Pretrial Scheduling Order.

Finally, Defendants have made numerous erroneous privilege claims. Defendants' privilege log reveals that Defendants have withheld from production numerous documents that were distributed to third party public relations consultants. And it remains unclear whether any additional documents were disclosed to Schering's or Merck's outside auditors or other third parties.

As discussed more fully below, Plaintiffs respectfully request that the Court compel Defendants to promptly correct the deficiencies in their document production and privilege log and complete their production of all non-privileged documents responsive to Plaintiffs' First Request for the Production of Documents on Defendants (the "First Set of Document Requests") by no later than October 31, 2010.

A. SUMMARY OF ALLEGATIONS

To enable the Court to better understand the nature of the discovery disputes described herein, a brief summary of the allegations in the two above-captioned cases is appropriate. The former Schering-Plough Corp. ("Schering") and the former Merck & Co, Inc. ("Merck"), are pharmaceutical companies that jointly marketed two anti-cholesterol drugs, Vytorin and Zetia.[1] In April 2006, Defendants completed a clinical trial called the ENHANCE study, which compared Vytorin (a combination of Zetia and a much cheaper generic statin) to a statin alone. The study showed that there was no statistically significant difference between Vytorin and the statin in terms of combating atherosclerosis, the disease that leads to heart disease. In fact, the Vytorin treatment arm in the ENHANCE study actually showed *progression* of atherosclerosis with no impact on preventing cardiovascular events. In the two years following completion of the ENHANCE study, Defendants did not disclose the negative results of the study and continued to actively promote the benefits of Vytorin and Zetia. During this time, Defendants repeatedly and unnecessarily attempted to reexamine the ENHANCE data to delay releasing the results. Finally, on January 14, 2008, only after public outcry and a Congressional inquiry began, Defendants publicly released preliminary top-line study results, and the public release of complete results followed on March 30, 2008. After nearly two years of delay, the ENHANCE results showed that Vytorin was slightly worse than using a statin alone in combating atherosclerosis. As a result, Defendants' stock prices plummeted and investors suffered substantial damages.

[1] Subsequent to the events at issue in this litigation, the two companies merged under the Merck name.

B. DEFENDANTS' DEFICIENT DOCUMENT PRODUCTION

Pursuant to the December 22, 2009 Pretrial Scheduling Order, Defendants were obligated to produce all of the 5.5 million documents that they had previously produced to various government agencies or to plaintiffs in a related litigation by no later than March 15, 2010. *See* Pretrial Scheduling Order ¶ IV(18)(1)-(2).[2] Defendants failed to do so. Indeed, despite representing on two occasions that this production was complete, Defendants continued to include such documents in at least two subsequent productions, including as recently as June 2, 2010.[3]

Furthermore, Defendants initially produced thousands of these previously produced documents with unjustifiable privilege redactions based on, *inter alia*, the vague explanation that the redactions were necessary to protect Schering's and Merck's "foreign business practices." Although Plaintiffs raised this issue with Defendants on February 8, 2010, it was not until April 27, 2010 that Defendants re-produced thousands of these documents without the improper redactions.

Plaintiffs served the First Set of Document Requests on Defendants on December 22, 2009 – more than 6 months ago. Yet, beyond the previously collected documents, Defendants have only produced an additional 55,000 documents in response thereto.

C. PLAINTIFFS' EFFORTS TO MEET AND CONFER

Pursuant to the Pretrial Scheduling Order, Defendants commenced their production of documents on December 24, 2009, followed by four rolling productions on January 19, 20, and 29, and on February 1, 2010. One week later, on February 8, 2010, Plaintiffs sent their first letter to Defendants detailing deficiencies in the document production to date. Similarly, within days of receiving Defendants' March 1, 2010 Responses and Objections to Plaintiffs' First Set of Document Requests, Plaintiffs sent a letter to Defendants detailing the deficiencies with these Responses. Over the course of the nearly four months that followed, Plaintiffs sent eight additional letters and multiple emails to Defendants detailing the deficiencies with Defendants' proposals and participated in at least five meet-and-confer telephone conferences in an attempt to resolve the parties' differences. On July 1, 2010, during the parties' final meet-and-confer on the longstanding issues concerning Defendants' production, Defendants refused to address the substance of the remaining disagreements. While Plaintiffs were ultimately successful in resolving many of the disputes between the parties through the meet-and-confer process, several important disputes between the parties remain.

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[2] The Pretrial Scheduling Order notes that "**FAILURE TO FOLLOW THIS DISCOVERY SCHEDULE WILL RESULT IN SANCTIONS PURSUANT TO Fed. R. Civ. P. 16(f) and 37**." ¶ IV(22) (emphasis in original).

[3] Although Defendants represented on April 28, 2010 and May 18, 2010 that they had completed production of all materials previously produced to the government, Defendants produced additional such documents on May 3, 2010 and June 2, 2010.

D. OUTSTANDING DOCUMENT PRODUCTION DISPUTES

Plaintiffs have identified five principal concerns relating to Defendants' document production:

(1) Defendants' failure to produce certain relevant documents from the Officer Defendants;

(2) Defendants' failure to produce responsive and highly relevant documents based only on the date they were created;

(3) Defendants' failure to produce relevant documents from third-party custodians;

(4) Defendants' failure to produce Merck's document retention policy; and

(5) Defendants' unreasonable timeline for completing the production of documents from all requested custodians.

We address these issues in turn below.

(1) Defendants Have Failed to Produce Documents from the Officer Defendants

The amended complaints in the above-referenced litigations (the "Complaints") name as defendants ten individuals (collectively, the "Officer Defendants") who served as senior officers of Merck and Schering during the relevant time period. As named Defendants who were responsible for making many of the alleged false and misleading statements identified in the Complaints and whose knowledge of the facts at issue is central to the question of scienter, the Officer Defendants are highly relevant to Plaintiffs' case. All responsive documents in their custody should have been promptly produced.

However, Plaintiffs' review of the documents produced to date demonstrates that Defendants have produced few, if any, documents from the Officer Defendants. Although Defendants have agreed to put documents from the Officer Defendants at the front of the queue for their document production,[4] Defendants (i) have not yet produced any documents from Defendants Schering Controller Steven Koehler, Merck former CFO Judy Lewent, or Merck Chief Marketing Officer Wendy Yarno; (ii) have produced only two documents for Schering CFO Robert J. Bertolini; (iii) have produced only ten documents for Schering Corporate Secretary and Associate General Counsel Susan Ellen Wolf; and (iv) have produced only 22

[4] Defendants agreed to do so only after a May 27, 2010 review by Plaintiffs revealed that Defendants had produced ***zero documents*** for Schering Controller Steven Koehler, Merck CFO Judy Lewent, and Merck Chief Marketing Officer Wendy Yarno; two documents for Schering CFO Robert J. Bertolini; 22 documents for Merck CEO Richard Clark; 61 documents for President of Merck Research Laboratories Peter Kim; and 140 documents for Schering CEO Fred Hassan.

documents for Merck CEO Richard Clark. The size of such productions is plainly insufficient. In addition, it is unclear whether all responsive documents have been produced for the remaining Officer Defendants.

Indeed, it appears almost certain that Defendants have omitted highly relevant information for each Officer Defendant because Defendants have stated that they limited their searches to business computers and electronic devices, only searching "home computers or other personal devices" to the extent that they "had reason to believe that relevant and non-duplicative documents existed in those media." In an era when employees – and particularly senior executives – routinely use personal electronic devices for business purposes, a search of the Officer Defendants' personal devices and email accounts is likely to lead to responsive information. Indeed, Defendants' production to date makes clear that at least one Defendant – Carrie Cox – used a personal email account for work purposes.[5] Furthermore, because there are only ten Officer Defendants, searching these individuals' personal devices should not be burdensome.

Plaintiffs respectfully request that the Court compel Defendants to produce within 45 days all responsive documents from the Officer Defendants, including responsive documents from personal devices and accounts. Defendants have been on notice of Plaintiffs' claims for more than two years, and their failure to timely produce documents from the Officer Defendants is highly inappropriate and prejudicial.

(2) Defendants Have Failed to Produce Highly Relevant Documents Based Only on the Date They Were Created

Defendants have indicated that "some inherent date limitations governed [their document review and collection] process." It appears that this limitation has improperly narrowed the scope of Defendants' document production for several important categories of documents:

Request No. 3 – Expert Panel. Defendants have not said they will produce any documents about the Expert Panel from outside the Class Period. The Expert Panel was a group of five outside physicians who were convened by Schering in November 2007 to review the ENHANCE data for purported problems.

A central theory of Plaintiffs' case is that Defendants had advance knowledge of the ENHANCE results and that the Expert Panel was convened to delay the release of the

[5] In addition, Plaintiffs recently learned that other key employees of Defendants have used personal email accounts to communicate highly relevant information. For example, Bo Yang, a manager in Schering's Department of Statistics, used personal email accounts to communicate information relating to ENHANCE and the ENHANCE trial data. To the extent Defendants have not done so already, Plaintiffs respectfully request that the Court compel Defendants to immediately produce all responsive documents from the personal computers and personal accounts of the Officer Defendants, Bo Yang, and a limited number of other individuals that Plaintiffs will be happy to identify.

ENHANCE results. The Complaints allege that Defendants painted an unjustifiably negative picture of the ENHANCE data by, among other things, cherry-picking the worst data for Expert Panel members. In addition, while no minutes were taken at the Expert Panel meeting, Defendants later circulated a draft set of "minutes" that falsely imputed that the Expert Panel members had recommended changing the study's endpoint, when in fact they had not done so. Thus, any discussions about the Expert Panel are almost certain to be relevant to our case, regardless of whether they took place before, during, or after the Class Period.[6]

Request No. 4 – Dr. Michiel Bots. Defendants have not said they will produce any documents relating to Dr. Michiel L. Bots from outside the Class Period. As alleged in the Complaints, Dr. Bots was hired by Schering in January 2007 as an independent consultant to prepare a report concerning purported problems with the ENHANCE data, but Dr. Bots concluded that same month that the ENHANCE data was "fine." Nevertheless, Defendants failed to release the ENHANCE results until fourteen months later. Dr. Bots was later a member of the Expert Panel.

A central allegation in the Complaints is that Defendants had knowledge that Dr. Bots concluded the ENHANCE results were "fine" in January 2007, but nevertheless convened the Expert Panel and continued to delay the release of the ENHANCE results for over a year. Any discussions about Dr. Bots are almost certain to be relevant to our case, regardless of whether they took place before, during, or after the Class Period. *See Control Data Corp.*, 1987 U.S. Dist. LEXIS 16829, at *7.

Request No. 2(j) – Changed Marketing Strategy. Although Defendants have agreed to produce press releases from before April 30, 2006 about changed marketing strategies for ENHANCE, they have not said whether they will produce e-mails, draft press releases, or other documents evidencing internal discussions from that time period.

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[6] *See In re Control Data Corp. Sec. Litig.*, No. 85-1341, 1987 U.S. Dist. LEXIS 16829, at *7 (D. Minn. Dec. 10, 1987) (holding that the class period "does not determine the period of relevancy for discovery purposes" and citing "numerous" securities fraud cases that have admitted statements, documents, or conduct as evidence on "scienter, intent, and knowledge"); *Upton v. McKerrow*, No. 97-cv-353, 1996 U.S. Dist. LEXIs 22978, at *12 (N.D. Ga. Feb. 21 1996) ("The Court agrees . . . that relevant documents [in a securities fraud class action] may have been created substantially prior to or after the proposed class period"); *In re Seagate Tech. II Sec. Litig.*, No. 89-cv-2493, 1993 U.S. Dist. LEXIS 18065, at *2-3 (N.D. Cal. June 15, 1993) (rejecting defendants' attempt to confine discovery to a "narrow period" three months before and three weeks after the class period as "artificial, arbitrary, and designed to lead to avoid production of relevant documents"). *See also Bell v. Lockheed Martin Corp.*, No. 08-cv-6292, 2010 U.S. Dist. LEXIS 62971, at *24 (D.N.J. June 23, 2010) (granting plaintiff's request to compel discovery predating proposed class period by two years in a Title VII class action).

As Defendants implicitly acknowledge, marketing strategies that were in place before April 30, 2006 but changed during the Class Period[7] are relevant to scienter. If press releases from this time period are relevant, then e-mails, drafts, and other internal communications about marketing changes are also relevant, especially to the extent they show the underlying reasons for the changes.

Request No. 7 – Internal Policies and Practices. Defendants have not said they will produce documents relating to their internal policies and practices relating to drug studies, trials, or tests from outside the Class Period.

Documents about Defendants' internal policies and practices from before and after the Class Period are relevant because they will permit Plaintiffs to identify any changes to or deviations from these policies or practices, which may be relevant to scienter. This is particularly important here because Plaintiffs allege that Defendants took a number of unusual steps, including attempting to change the ENHANCE study's clinical endpoint and delaying the release of the ENHANCE results long after Dr. Bots had concluded the data was "fine."

Request Nos. 11-13, 16 – Related Clinical Studies and Unpublished Articles on Vytorin/Zetia. Defendants have not said they will produce documents sufficient to identify any other clinical trials, drug studies, or tests of Vytorin/Zetia; any unpublished articles on Vytorin/Zetia; or any trials, studies, or tests where an endpoint was the change in the intima-media thickness of the carotid artery, from outside the Class Period.

Any such studies or articles before the Class Period are relevant to scienter because they contributed to the total mix of information that Defendants considered in conducting the ENHANCE study, assessing its likely outcome, and determining when to release its results. Any such studies or articles from after the Class Period may lead to relevant information because a comparison between the way the data was handled in these studies or articles with the way the data was handled in ENHANCE may be probative of Defendants' scienter.

Request No. 21 – CaféPharma. Defendants have not said that they will produce any documents relating to CaféPharma.com from outside the Class Period.

As detailed in the Complaints, CaféPharma is a website for pharmaceutical sales professionals to exchange information about pharmaceutical companies. Non-public results of the ENHANCE study results were posted anonymously on CaféPharma as early as March 2007, and these results were subsequently corroborated when the full study results were released in March 2008.

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[7] In the Complaints, Plaintiffs have proposed a class period from April 30, 2006 to March 28, 2008 in *Merck* and from July 24, 2006 to March 28, 2008 in Schering. "Class Period" refers to the period from April 30, 2006 to March 28, 2008. The length of the Class Period does not control discovery in these cases. *See infra* note 6.

Judge Cavanaugh recognized in his opinion denying Defendants' motion to strike that "[t]he CaféPharma postings … are relevant to the ultimate issue of *scienter* in that they purport to show the timing within which Defendants became aware of the ENHANCE study results." *Schering-Plough*, D.I. 114, at 2. Pre-Class Period information about which employees were monitoring, posting on, or otherwise aware of the CaféPharma website before the Class Period is probative of who was accessing the postings during the Class Period. Similarly, documents that reference CaféPharma but were generated after the Class Period may be relevant if, for example, they relate to discussions or investigations about which individuals posted the ENHANCE results on the CaféPharma website or viewed these results. *See Upton*, 1996 U.S. Dist. LEXIS 22978, at *11-12 (permitting discovery of post-class period documents that "relate back to the proposed class period").

Plaintiffs respectfully request that the Court compel Defendants to produce the above categories of documents from outside the Class Period.

(3) Defendants Have Failed to Produce Relevant Documents from Third-Party Custodians

As noted above and detailed at length in the Complaints in both the Schering and Merck actions, Defendants convened a five-member Expert Panel as a pretext to delay the release of the negative ENHANCE results. Defendants appear to have limited their production of documents from the Expert Panel members to documents previously produced to Congress, and have failed to provide any documents relating to the document collection procedures employed for these third parties.[8]

As a preliminary matter, under the terms of the Pretrial Scheduling Order, Defendants were required to produce no later than March 15, 2010 all documents previously submitted to Congress. If they have withheld any such documents, Defendants should be required to produce them immediately. Moreover, there is simply no basis for limiting the production of documents from Expert Panel members to documents previously produced to Congress. Any documents from the Expert Panel members that are responsive to the First Set of Document Requests should be promptly produced. Finally, Defendants should be required to promptly produce all documents relating to the document collection procedures employed for the Expert Panel members.

(4) Defendants Have Failed to Produce Merck's Document Retention Policy, and Should Produce Relevant Documents From Merck Back-Up Tapes

Defendants have acknowledged that they are obligated to produce document retention policies for both Schering and Merck. Defendants have produced Schering's document retention policy and stated in both April and May 2010 that "information regarding Merck's document retention policy" would be forthcoming within a week. However, Defendants have not yet

[8] Defendants have recently indicated that they will produce "certain communications" with the Expert Panel members relating to document collection procedures, although it is not clear whether any additional such documents exist and will be produced by Defendants.

provided Merck's document retention policy, though they have stated that Merck's computer system automatically deleted emails after 60 days unless archived by an employee. Plaintiffs have still not received a response on whether Merck has any back-up tapes that would include these deleted e-mails.

Plaintiffs respectfully request that the Court compel Defendants to produce Merck's document retention policy by July 30, 2010. In addition, to the extent any of the emails that were automatically deleted by Merck are preserved on back-up tapes, Plaintiffs respectfully request that the Court compel Defendants to promptly search these tapes for responsive documents.

(5) Defendants Should Produce all Responsive Documents from All Custodians by the End of October 2010

Defendants initially indicated that they "do[] not anticipate" completing their production in response to Plaintiffs' first set of document requests until the end of October 2010, over ten months after Plaintiffs served their document requests, nearly nine months after the parties were first permitted to notice depositions, and as little as one day before the deadline to amend the pleadings.

Now, Defendants say that the addition of 27 "newly identified" custodians to the production will "necessarily delay" Defendants' production even further, but have not provided Plaintiffs with any clarity on the duration of this "delay." In reality, 20 of these custodians are not newly identified at all, but rather were previously identified by Defendants in Defendants' initial disclosures dated February 1, 2010 and interrogatory responses dated March 7, 2010. Therefore, documents from these 20 custodians should already be subject to a litigation hold, and Defendants should have begun collecting documents from these custodians months, if not years, ago. The other seven custodians were identified by Plaintiffs on May 7, 2010 – thus providing Defendants with over five months to collect and complete such productions before the end of October 2010.

Defendants have also indicated they will not produce any documents from one of these 27 custodians, former Schering CEO Richard Kogen, because his employment at Schering ended before the start of the Class Period. Dr. Kogen, however, likely sent or received relevant information because he was CEO of Schering when the Companies initiated the ENHANCE trial protocol, which is at the center of this litigation. Indeed, Defendants have produced countless other documents concerning ENHANCE and the ENHANCE trial protocol that were created or authored in 2003, the same year that Dr. Kogen departed from Schering.

Plaintiffs respectfully request that the Court compel the production by October 31, 2010 of all documents responsive to First Set of Document Requests, including all responsive documents held by the 27 additional custodians. Under the Pretrial Scheduling Order, fact discovery is to be completed by April 30, 2011, and Plaintiffs need sufficient time to analyze the millions of additional documents we expect to be receiving before we depose numerous key witnesses and Defendants.

C. Privilege Issues

Plaintiffs have raised with Defendants the likelihood that Defendants are erroneously claiming privilege for numerous documents that were previously disclosed to third parties. Defendants have withheld on privilege grounds an unspecified number of documents that were previously disclosed to the Companies' outside public relations firms. Although Defendants have the burden of establishing the asserted privileges,[9] they have failed to make a showing that the documents they disclosed to outside public relations firms remain privileged.[10]

Plaintiffs also inquired on April 22, 2010 and May 7, 2010 whether any of the documents listed on the privilege log were previously produced, provided to, or were otherwise made available to the Companies' outside auditors, expert panel members or other third parties. To the extent such documents were produced to such third parties, the documents are no longer privileged. *See Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1423-31 (3d Cir. 1991) (rejecting selective waiver doctrine and finding that the disclosure of documents to the SEC and DOJ waived any existing privilege).[11] Although Plaintiffs first raised this issue approximately three months ago, it is our understanding that Defendants are still "looking into" this inquiry.

Plaintiffs respectfully request that the Court order Defendants to conduct an affirmative investigation into whether any of the logged documents were disclosed to the government, auditors, expert panel members or other third parties, and to complete that investigation by no later than July 30, 2010. To the extent any of the logged documents were disclosed to such parties, Defendants should produce them immediately.

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[9] *In re Grand Jury Empanelled February 14*, 603 F.2d 469, 474 (3d Cir. 1979) ("The burden of proving that the (attorney-client) privilege applies is placed upon the party asserting the privilege").

[10] The two out-of-Circuit cases Defendants have cited to Plaintiffs are inapplicable here. In *FTC v. GlaxoSmithKline*, 294 F.3d 141, 148 (D.C. Cir. 2002), "corporate counsel 'worked with [public relations] consultants in the same manner as they d[id] with full-time employees; indeed, … the consultants 'became integral members of the team assigned to deal with issues [that] … were completely intertwined with [GSK's] litigation and legal strategies.'" Similarly, in *In re Copper Market Antitrust Litig.*, 200 F.R. D. 213, 219 (S.D.N.Y. 2001), the public relations firm "was, essentially, incorporated into [the corporation's] staff to perform a corporate function," and "possessed authority to make decisions on behalf of [the corporation] concerning its public relations strategy."

[11] *See also Wachtel v. Guardian Life. Ins. Co.*, 2006 WL 1286188, at *1, n. 2 (D.N.J. May 8, 2006) (explaining that, under *Westinghouse*, "when a client makes a voluntary disclosure of privileged information to a third party, including a government entity, the privilege is waived"); *Rhoads Indus., Inc. v. Bldg. Materials Corp. of America*, 254 F.R.D. 216, 219 n. 3 (E.D. Pa. 2008) (noting that, "[t]he Third Circuit [has] adopted a fairly draconian rule rejecting selective waiver.").

To better address any concerns that may arise in the future with respect to privilege claims, Plaintiffs respectfully request that the Court order Defendants to provide Plaintiffs with a rolling privilege log within thirty days of each document production, and to provide the final installment of the privilege log by no later than November 15, 2010.[12]

Respectfully submitted,

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO

/s/ James E. Cecchi

JAMES E. CECCHI

cc: All Counsel on ECF Notice List in Civil Actions Nos. 08-397; 08-2177.

[12] While Defendants will likely argue that Plaintiffs "waited" to challenge specific entries of the privilege log, that is not the case. On April 22, 2010 – three days after defendants completed their rolling production of the initial privilege log – Plaintiffs sent a letter to Defendants regarding selective waiver. It would not have made sense (or been efficient) for Plaintiffs to challenge the privilege log on an entry-by-entry basis until the parties reached closure on that issue. Ultimately, on June 9, 2010, Plaintiffs had no choice but to send a detailed letter challenging specific entries of Defendants' privilege log due to Defendants' repeated delays in resolving the selective waiver dispute.