IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WATERKEEPER ALLIANCE, INC. Plaintiff, v. ALAN AND KRISTIN HUDSON FARM, *et al*. Defendants.	Civil Action No. WMN-10-487

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S FIRST MOTION TO COMPEL PRODUCTION [1]

Plaintiff, Waterkeeper Alliance, Inc., by its undersigned counsel, hereby submits this Reply to Defendants' Opposition to Plaintiff's Motion to Compel Production of Defendants' sampling data. Defendants offer nothing in their Opposition that limits Plaintiff's right to any samples taken by Defendants on Perdue's Hudson Farm. Defendants are in possession of purely factual sampling data that, despite Defendants' claimed ignorance,[2] go right to the heart of the matter in this case. In compelling production of that factual data, there is no implication of attorney work product; sampling data that is otherwise unavailable to Plaintiff does not, as

[1] On March 25, 2011 Defendant Hudson Farm turned over surface and pile samples taken at the facility on January 26, 2010, January 27, 2010, and February 1, 2010, however they have not confirmed that these sample results are the only ones in their possession.

[2] In their Opposition, Defendants state that Plaintiff has not explained the relevancy of water and pile pollutants sampling data in a Clean Water Act case focusing on illegal discharges of pollutants. Given the several references in Plaintiff's Motion to the obvious link between samples taken on site and the pollutants found in the ditch leaving the farm, the self-evident import of such samples should be clear, but is further explained below.

Defendants suggest, disclose the thoughts and impressions of defense counsel. Additionally, the argument offered by Defendants that Plaintiff had equal access to the facility to conduct its own testing at the time they sampled is based on a complete misrepresentation of the facts of this case and Defendants own actions during this discovery period. Finally, even if the results of environmental sampling were work product or subject to the expert consulting protections in Federal Rule of Civil Procedure 26(b)(4)(D), Plaintiff has demonstrated "substantial need" and "undue hardship," as well as "exceptional circumstances" sufficiently to overcome the protections and require the production of the sampling data.

As is detailed below, Plaintiff was continually given mixed messages by various defense counsel as to the opportunity to sample at the farm, the willingness of Defendants to turn over samples they had previously taken and even, as seen in a recent letter from Perdue's counsel, the application of the work product doctrine to purely factual information such as sample results. Defendants' inconsistent and even contradictory behavior with regard to these samples and their discoverability undermines any claim they make in their Opposition. The fact remains indisputable, however, that Plaintiff did not have access to sample the Hudson Farm when Defendants conducted their sampling and therefore cannot replicate that sampling to gather the facts that are in the exclusive possession of Defendants.

I. PLAINTIFF'S MOTION TO COMPEL IS TIMELY

Defendants assert that Plaintiff has "delayed far beyond the [30 day] time limit allowed by Local Rule 104.8(a) to seek to compel production" of the samples in question. Defendant

Perdue points to the time elapsed since the filing of their response to Plaintiff's First Request for Production of documents in the fall of 2010; however, that argument fails for several reasons.

First, as part of a boilerplate response, Defendants raised work product privileges on all of their responses to Plaintiff's request for documents. At the time of Perdue's response, Plaintiff had no specific knowledge of sampling done by Perdue. The notion that Plaintiff needed to file a Motion to Compel the production of materials that they did not know existed[3] in response to an across-the-board claim of work product makes little sense. Certainly, under any reasonable reading of Local Rule 104.8, the 30 days contemplated for service of the motion tolls until all documents have been produced[4] and Plaintiff receives a privilege log asserting that Defendant possessed responsive materials that were claimed covered under the work product doctrine.

Local Rule 104.8(a) states that motions to compel shall be served within 30 days when, ". . . a party who has propounded interrogatories or requests for production is dissatisfied with the response of them." Plaintiff's Motion to Compel Production against Perdue arose when counsel for Perdue made a claim of work product during the deposition of Perdue's environmental officer, Mr. Jeff Smith on February 16, 2011. It was during that deposition that Perdue's counsel instructed Mr. Smith not to answer any questions about sampling because of alleged work

[3] Though counsel for defense chose to omit this fact in their Opposition, the Court should also note that, to date, neither party has produced a privilege log of documents being withheld for work product or attorney/client reasons.

[4] Defendants' production was not complete at the time the written responses were provided to Plaintiff as represented by Defendants in their Opposition. For example, Perdue last turned over documents in response to Plaintiff's Request for Production on February 11, 2011.

product[5] and it was after this deposition that Plaintiff approached counsel for Perdue about providing those samples. Plaintiff's attempt to get Perdue to turn over its samples and provide related factual information continues to date.

With regard to Defendant Hudson's sampling results, again Defendants provided the Court with a significantly abridged accounting of the facts. Early on in discovery, Hudson's counsel conveyed to attorneys for Plaintiff that he would be providing the results of water samples taken by Defendant Hudson Farm. During a site visit to Hudson Farm on October 22, 2010, Mr. Hugh Cropper, IV indicated to two of Plaintiff's attorneys that he would arrange to have sample results available the following week. Mr. Cropper even indicated that he would simply sign a release for Plaintiff's to interface directly with the consultant hired to take the samples.

What ensued was a series of correspondences between Plaintiff's attorneys and Hudson Farm's attorneys in which Plaintiff's attorneys continually sought to have defense counsel honor their commitment to turn over samples. As late as mid-February, Hudson's attorney, George Ritchie, was asking Plaintiffs to provide legal authority for our position that the samples were not protected under the work product doctrine. It was not until February 28, 2011 that Mr. Ritchie responded in an email to Plaintiff's attorney, Chris Nidel, that he was not swayed by Plaintiff's

[5] Defendants again attempt to ignore pertinent facts when they claim that Plaintiff's Motion is "woefully inadequate," in part, because "it makes no specific allegations about when Defendants sampled or what Defendants sampled, …" (Opposition at p. 3). What Defendants fail to tell the Court is that during Mr. Smith's deposition, in addition to claiming work product on the samples themselves, Perdue's counsel claimed work product and instructed Mr. Smith not to respond to the question of whether samples were even taken, when they may have been taken or where that sampling may have been done. (See Smith Deposition at pp. 54-64 attached hereto as Exhibit 1). The claim that Plaintiff should be able to provide that information given Defendants' action is, at best, disingenuous.

argument that samples should be produced. This Motion to Compel was served on Defendants seven days later.

II. ENVIRONMENTAL SAMPLING DATA GENERATED BY DEFENDANTS IS RELEVENT FACTUAL INFORMATION AND IS NOT PROTECTED WORK PRODUCT UNDER RULE 26(B)(3).

A. The Sampling Data Defendants Possess is Clearly Relevant

Defendants dispute that the requested waste and water sampling data is relevant to the issues in this matter but do not explain the basis for its disagreement. (Opposition at p. 3, 9.) In fact, Defendants' failed attempt to argue that the sample results are irrelevant highlights the very flaw in their argument.

Defendants are in possession of samples, including some taken from potential sources of pollutants at the Hudson Farm, that they do not want to disclose. Yet they have made clear that they intend to argue in their defense that pollutants have not been discharged from the Hudson Farm to waters of the United States.[6] The sampling data and associated information has been put at issue by Defendants and are directly relevant to Plaintiff's central claim in this case – that pollutants have been discharged from the Hudson Farm to waters of the United States.

Defendants have refused to provide any information related to the environmental sampling data in their possession on the grounds that it is protected work product but do not deny the existence of the data.[7] Defendants do not even provide information that must be provided on

[6] In their Opposition, Defendants argue that the ditch where Plaintiffs found such high numbers of several pollutants is impacted by sources other than the Hudson facility. (Opposition at 1, 2).

[7] Defendants assert that Plaintiff is seeking test results from January 26, 2010. (Opposition at p. 2). Plaintiff is seeking all environmental sampling and related information for the Hudson Farm, not just a sample collected on January 26, 2010. Notably, Defendants do not state that the January 26, 2010 sample they identify is the only sampling they conducted at Hudson Farm after December 17, 2009 and claim they are not required to disclose whether either Defendant did any

a privilege log if a privilege is asserted. (Opposition at p. 1). Yet at the same time, Defendants argue that Plaintiff has not demonstrated the relevance of the sampling data because Plaintiff "makes no specific allegation about when Defendants sampled or what Defendants sampled . . ." (Opposition at p. 3). While Plaintiff is uncertain precisely what Defendants are arguing here, it seems that Defendants are suggesting that Plaintiff's Motion must contain the precise allegations relating to these sample results for the results to be relevant. Sampling of pollutants on the Hudson Farm is undeniably relevant notwithstanding Defendants' Catch-22 interpretation of relevance. Plaintiff is seeking data generated from sampling potential sources of pollutants, including precisely those pollutants allegedly discharging from the Facility. As described above, the data is in the exclusive possession of Defendants and the data could not be more relevant.

B. The Environmental Sampling Data Sought by Plaintiff is Factual Information Not Protected by the Work Product Doctrine

Contrary to Defendants' characterizations, Plaintiff does not seek "to find out whether counsel for Perdue thought to test or sample anything, and, if so, what counsel wanted sampled, when he wanted it, where he wanted it, and how he wanted it sampled and/or tested."[8] (Opposition at p. 2). Rather, Plaintiff is seeking only the raw results of environmental sampling and related information described in Plaintiff's Requests for Production that were collected by Defendants at Hudson Farm and "generated from sampling the area of contamination, including

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other sampling at Hudson Farm subsequent to that date under the work product doctrine. (Opposition at p. 2, 6, 8,10)

[8] Defendant Perdue's claims of work product attaching to sample results did not stop Perdue's counsel from sending a letter to Plaintiff on March 16, 2011, literally while this issue was being briefed by both sides, in which Perdue demanded all sampling-related documents from Plaintiff. Perdue's demand, which directly contradicts its position in its Opposition, was made under the mistaken impression that Plaintiff had recently conducted additional sampling at the Hudson facility.

the waste generated at the facility, the soil on which it was disposed of, and the waters located on and leaving the facility…" Plaintiff's First Motion to Compel Production and Supporting Memorandum of Law, at p. 2 ("Pl. Mtn"). In other words, Plaintiff seeks facts in the exclusive possession of Defendants regarding the existence of bacteria and nutrients in the waste, soil and water at Hudson Farm at times and locations of the sampling events. Plaintiff does not seek the motivations, thoughts and impressions of counsel as these are not disclosed in sampling results indicating, for example, the level of E. Coli in water flowing in a ditch from a poultry house or uncovered pile of waste.

As Defendants recognize in their Opposition, "the principles articulated in *Hickman* [regarding the work product doctrine] were codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure…" (Opposition at p. 5). Defendants attempt to argue that environmental sampling results actually reflect the "mental impressions" of defense counsel. In support of their argument, Defendants analogize the environmental sampling data at issue here to requests for disclosures regarding different types of witnesses interviewed in anticipation of litigation, citing to the cases of *Lefkoe v. Jos. A. Banks Clothiers,* 2008 WL 7275126 at *12 (D. Md. May 13, 2008) and *In re MTI,* 2002 WL 32344347, at *3 (C.D. Cal. June 13, 2002). This analogy is inapposite to this case.

In *Lefkoe*, the court held that the identity of confidential witnesses whose roles were described in the Complaint were discoverable whereas the form, place and substance of all communications persons regarding the incidents, subject matter or allegations were not discoverable because the interrogatories "[a]s worded…seek information going to the heart of attorney work product." *Lefkoe, at *10-12.* In *In re MTI*, the court held that the identity of

former employees identified in the Complaint was not discoverable based on the work product doctrine and important public policy implicated by disclosure of former employees acting as informants. *In re MTI*, at 3-5. Each of those cases turned on a detailed analysis of the request at issue and the facts surrounding the particular case. Neither of these cases demonstrates that production of environmental sampling data would reveal the "mental impressions" of defense counsel that would otherwise be privileged.

Defendants also cite two cases for the proposition that "scientific testing information" is protected from disclosure under the work product doctrine. (Opposition at p. 6-7). The first case, *Kimberly-Clark Worldwide v. First Quality Baby Products,* 2010 U.S. Dist. LEXIS 134113 (M.D. Pa. Nov. 3, 2010, involved a request for unidentified "testing data and related documents" in a patent infringement case. The court determined that the "testing data and related documents" were protected as attorney work product based solely on the fact that they were prepared in anticipation of litigation. *Id.* The court did not analyze whether the material at issue was purely factual information not subject to the doctrine or whether the requesting party demonstrated a substantial need for the information. *Id.* The relevance of this case remains inconclusive because the nature of the "testing data and related documents" at issue in *Kimberly-Clark* is left unexplained. Certainly, as all parties here agree and the *Kimberly-Clark* court considered, the work product protection exists to safeguard the mental impressions of attorneys involved in litigation. Whether data and related documents in that patent infringement case contain such impressions is unknown; therefore it does not support Defendants' contention that the environmental sampling data (without the "related documents") requested here is more than factual information or that production would reveal the "mental impressions" of counsel.

The second case cited by Defendants, *Banks v. United States*, 90 Fed.Cl. 707 (Fed. Cl. 2009), involves a request for some unidentified type of soil sampling information conducted by a consulting expert under the Rules of the Federal Court of Claims. The court held that the Defendant did not meet the exception for "substantial need" and "undue hardship" because the areas Plaintiff sampled were just as accessible to the Defendant as they were to Plaintiffs, and Defendant provided no reason why it did not sample the area. *Id.* at 712. The court further held that the "raw, unanalyzed data could be discoverable if the court agreed that defendant has demonstrated 'substantial need' and 'undue hardship' [exceptions]…" and that "[i]f the court had found that defendant had demonstrated 'substantial need' and 'undue hardship' in this case, the court could be required to sever the opinion and analysis of the consulting expert(s) from any **discoverable factual information**." *Id*. at 713 (emphasis added). Again, as in *Kimberly Clark*, the court did not analyze whether the soil sampling information at issue in that case was purely factual information that is not protected by the work product doctrine in the first place, but rather proceeded with an analysis that the information at issue was either fact or opinion work product. *Id*.

Defendant also attempts to distinguish two cases cited in Plaintiff's Motion that do directly address the issue before the Court. Contrary to Defendants' characterization of the decision in *Southern Scrap Material Co. v. Fleming,* 2003 U.S. Dist. LEXIS 10815, **58.65* (E.D. La. June 18, 2003), the case did not turn solely on the fact that the information sought related to another pending case that formed the basis of the Plaintiff's allegation. Rather, it turned on the fact that the information was purely factual information relevant to the claims and defenses of the parties in the action pending before the court. Specifically, the court held that:

> Insofar as documents sought recount factual information relevant to the claims against Southern Scrap in the underlying litigation, whether it is simply unannotated raw data, test results, maps indicating where samples were taken from, or a graphic display of test sample results, these factual matters are fully discoverable. This type of underlying factual information does not fall within the work-product doctrine. Moreover, this factual information goes to the very heart of the defendants' affirmative defenses in the captioned federal RICO case (*i.e.,* the existence of a basis in fact for the underlying state court cases filed against Southern Scrap).

Id. at 64.

In so holding, the court recognized that "...the work-product doctrine is a judicially created immunity to prevent a party to a lawsuit from receiving the benefits of an opposing counsel's preparations for trial…" but that "[n]otwithstanding the foregoing, work product protection does not extend to the underlying facts relevant to the litigation." *Id.* at 63-4. *See also; Garcia v. City of El Centro,* 214 F.R.D. *587, 591* (S.D.Ca. 2003) ("However, "[b]ecause the work product doctrine is intended only to guard against the divulging of attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within the work product." *Onwuka*, 178 F.R.D. at 513 (*citing Phillips Electronics North America Corp. v. Universal Electronics, Inc.*, 892 F.Supp. 108 (D.Del.1995)) (emphasis added). Only when a party seeking discovery attempts to ascertain facts, "which inherently reveal the attorney's mental impression," does the work product protection extend to the underlying facts. *Id*. (emphasis added); *see also* Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2024 (pocket part).

Similarly, Defendants attempt to distinguish the case of *Horan v. Sun*, 152 F.R.D. 437, 439 (D. R.I. 1993) by arguing that the sampling data at issue in that case was the "basis for the claim" and that "*Horan* would be analogous to a situation in which Plaintiff Waterkeeper Alliance refused to produce sampling results that form the basis for its notice letter and complaint."

(Opposition at p. 9) In *Horan*, the Defendant sought sampling information from Plaintiff that related to Plaintiff's claims regarding contamination at a service station leased from Defendant. Specifically, Defendant sought "the results of the environmental testing, the methods utilized therein, the location of the test site(s), the name and qualifications of the person(s) performing the test(s), quality assurance techniques and the location on the premises of any contaminant located by the test. *Horan*, 152 F.R.D. at 438-39. In holding that the information sought by Defendant was not protected by the work product doctrine, the court found that "[t]he plaintiff's environmental test results contain relevant, non-privileged facts. These results do not contain any thought processes or mental impressions of plaintiff's counsel." *Id*. at 439. Contrary to Defendants characterization of the case, the holding turned on whether the information was factual information that was relevant to the litigation[9] and the court concluded that information like that sought in this Motion was relevant and not protected by the work product doctrine.

The two cases Plaintiff cite deal directly with the issue before the Court while none of the cases cited by Defendant stand for the proposition that environmental sampling data is protected from discovery.

[9] In this case, the sampling of potential pollutant sources is clearly relevant to both Plaintiff's allegations and to Defendant's allegations in defense. For example, Defendants dispute the existence of discharges from Hudson Farm and have both raised the issue in their affirmative defense in their Answers to the Complaint ("Plaintiff fails to state a claim under the CWA because they cannot establish a continuing violation"; "Plaintiffs fail to state a claim under the CWA because they cannot establish that the Hudson Farm CAFO was the source of any pollutants allege…" Answer of Alan and Kristin Hudson Farm, 6 and 7 Affirmative defenses, pg. 11; Answer of Perdue Farms, Inc., 7th and 8th Affirmative Defenses, p. 12.

C. Even if the Environmental Sampling Data Constituted Work Product, Plaintiff has Demonstrated Substantial Need

Cases cited in Plaintiff's opening Motion hold that purely factual, raw environmental data is not work product because such data lacks attorney mental impressions. However, even if this Court were inclined to consider such data to be "factual work product" material, Plaintiff has established substantial need for the environmental sampling data, and Plaintiff simply cannot obtain the substantial equivalent of the information by other means. As described in detail above, the sampling information is highly relevant to the claims and defenses of the parties to this case. Defendants' environmental sampling information directly relates to a central issue in the case and potentially reveals the nature of pollutant sources on the Hudson Farm. Plaintiff could not have obtained the substantial equivalent of this information by other means because it did not have access to Hudson Farm at the time of the sampling[10] and cannot now obtain this information because sampling anytime after the alleged discharge would not provide the same scientific information.

Defendants cite to *Martin v. Bally's Park Place Hotel & Casino,* 983 F.2d 1252, 1256 (3d Cir. 1993), in support of their argument that Plaintiff has not demonstrated "substantial need" and "undue hardship." However *Martin* is not analogous to the present case since it dealt with a dishwasher that had been removed from service, not environmental sampling. The *Martin* court held that the plaintiff did not establish substantial need because there was no evidence that the plaintiff could not have done its own tests on a dishwasher that had been removed from service but could have been retrieved by the defendant. The pollutants present in waste, soil and water

[10] Defendants did not disclose their sampling activities to Plaintiff so that it could have taken split samples.

at the Hudson Farm is far different from a dishwasher that has been moved to another location. A dishwasher's fundamental nature and defects do not change over time and the dishwasher can be moved around, yet preserved in its original condition to allow for testing to be conducted without regard to temporal considerations. Here, Plaintiff bases its allegations in its complaint on pollutants discharged from the Hudson facility. The nature of manures, soil, water and other material found on the Hudson Farm inevitably changes because of weather, seasonal changes, etc. This means that Plaintiff can never duplicate the samples taken by Defendants or obtain the same information any other way. [11]

Defendants attempt to argue that Plaintiff should have simply asked to sample Hudson Farm or sought assistance of the Court to gain access during the relevant time periods that Defendants conducted their sampling. (Opposition at p. 11). As Defendants did not disclose they were conducting the sampling and assert that all information related to the sampling is work product, it was an impossibility for Plaintiff to have asked for and received permission from Defendants to sample for the same pollutants at the same times and locations as Defendants. In fact, Plaintiff still doesn't know when or where Defendants took samples at Hudson Farm.

"Pursuant to Rule 26(b)(5), when a party seeks to withhold production of discoverable materials under the work product privilege, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a

[11] Further, it would also be futile to ask the Court for access to the Hudson Farm to sample as Plaintiff has no ability to turn back the hands of time, or the wind, snow and rain. The Court should also note that in December 2009 and January 2010, in the weeks just after Plaintiff sent its Notice of Intent letter, the Maryland Department of the Environment attempted to sample the Hudson Farm on several occasions, but Defendant-Hudson Farm denied MDE sampling-access. It was not until 5 weeks later, and after threats of legal action, that the Defendant finally allowed MDE onto the site to sample.

manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. *Garcia v. City of El Centro,* 214 F.R.D. 587, 591 (S.D.Ca. 2003).[12] Defendants have never done so in this matter. Both Defendants simply asserted boilerplate work product objections in their Responses to Requests for Production, failed to provide a privilege log for the objections, directed a witness not to answer questions about the sampling at a deposition, and have not provided any information about the sampling information in its Response to the Plaintiff's First Motion to Compel.

III. DEFENDANTS HAVE NOT DEMONSTRATED THAT THE ENVIRONMENTAL SAMPLING DATA WAS GENERATED BY CONSULTING EXPERTS.

Defendants argue that the sampling data is protected under Rule 26(b)(4)(D) as consulting expert information. Notably, however, Defendants do not actually state that the sampling information was collected by and in the possession of a consulting expert. Plaintiff is not seeking *the opinions* of any consulting expert. Rather, Plaintiff only seeks the factual results of relevant sampling done at the Hudson Farm. Based on the limited information available to Plaintiff regarding Perdue's sampling, it appears to have been done by Jeff Smith, Perdue's

[12] Contrary to Defendants' representations, Plaintiff is not arguing that the mere passage of time creates a substantial need and undue hardship – instead it's a complete change of conditions on the Hudson facility. However, even if our argument was restricted to time, Defendants misconstrue the holding of *Garcia v. City of El Centro* to support their argument. (Opposition at p. 11–12); *Garcia v. City of El Centro,* 214 F.R.D. 587, 595–96 (S.D.Ca. 2003). The case deals only with the concerns regarding accuracy associated with the passage of time in relation to taking witness statements and the relevant event, and actually states that "[t]here is a split of authority among courts regarding whether the mere passage of time is enough to establish substantial need under Rule 26(b)(3)."

Director of Corporate Environmental Science; a Perdue employee and not a consulting expert. (Opposition at p. 2, 8).

Even if the samples had been collected by a consulting expert, as set forth above and in its Motion to Compel, Plaintiff has demonstrated exceptional circumstances that justify the need for the sampling data possessed by Defendants, and Plaintiff cannot obtain the information by other means. *See* Fed. Rule. Civ. Proc. 26(b)(4)(D). As set forth above, the conditions represented by the sampling are no longer observable and this demonstrates a substantial need. *Hollinger Int'l., Inc. v. Hollinger, Inc.*, 230 F.R.D. 508, 522 (N.D. Ill. 2005) (*citing Ludwig v. Pilkington N. Am., Inc.*, No. 03 C 1086, 2003 WL 22242224, at *3 (N.D. Ill. September 29, 2003)).[13]

Faller v. Faller, 2010 WL 3834865 *14 (D. Md. Sept. 28, 2010), cited by Defendants, lends no support for their argument that Plaintiff has failed to demonstrate exceptional circumstances. In that case, the court held that "[w]hether an expert's evidence is protected by Rule 26(b)(4) from discovery must be determined in the light of the nature of the documents or testimony sought, and the total factual situation in the particular case." *Id.* at 15. The *Faller* court found that the information sought was not protected under Rule 26(b)(4)(D), because retaining additional experts and conducting new appraisals would not "remedy the situation for the Plaintiffs". *Id.* at 16 ("Not only is it 'impracticable' for Plaintiffs to obtain what they seek through other methods, it is impossible."). In so holding, the *Faller* court noted that "[s]everal courts have 'recognized the availability of other means of obtaining information sought under

[13] Defendants attempt to argue that Hollinger Int'l, Inc. supports their argument. However, the fact that the court ultimately held that an *expert report containing opinions* was protected as work product and consulting expert material, is not relevant to the issues presented here as Plaintiff is not seeking expert opinions or reports in this motion. *Id.* at 522.

Rule 26(b)(4)(B) as a conclusive factor militating against a finding of exceptional circumstances.'" *Id.* (citing 33 A.L.R. Fed. 403 § 18(a)). Here, as in *Faller*, Plaintiff cannot remedy the sitation by retaining additional experts and conducting additional sampling. It is impossible for Plaintiff to obtain the factual information contained in the sampling information through other means and, accordingly, Plaintiff has demonstrated exceptional circumstances.

IV. CERTIFICATION OF ATTEMPTS TO CONFER WITH DEFENDANTS

Plaintiff conferred with the counsel for Hudson Farm and Perdue Farms in a good faith effort to resolve the issues raised in this motion, but the parties were unable to reach agreement.

V. CONCLUSION

For the foregoing reasons, Plaintiff requests that this Court issue an order directing Defendants to produce all sampling data and related information responsive to Plaintiff's First and Second Requests for Production.

Dated: March 29, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, a true an accurate copy of the foregoing was served on the attorneys of record for Defendants via electronic mail as follows:

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