

defendant's testifying expert, Orin Godsey, and therefore subject to disclosure pursuant to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. In their motion for reconsideration, the defendants argue that the court misapplied the relevant standard with respect to the disclosure of expert materials.

Specifically, they contend that "[t]he court's order would require the disclosure of categories of documents which were created by Godsey or reviewed by him in his capacity as a consultant and which are unrelated to his opinions or testimony." Consequently, the defendants reason, the contested 599 documents are protected under the work product doctrine.

FACTS

Examination of the plaintiffs' motion to compel and its supporting documents, the defendants' response thereto, and the defendants' motion for reconsideration discloses the following relevant facts:

On April 3, 1996, the CT-43 crashed into a mountain approximately 1.8 nautical miles north, northeast of the Cilipi Airport in Dubrovnik, Croatia. All thirty four passengers were killed and, as a result, numerous actions were filed in federal district courts throughout the country. On May 29, 1997, pursuant to 28 U.S.C. § 1407, the judicial panel on multidistrict litigation transferred the actions to this court for consolidated pre-trial proceedings.

In November 1997, a consultant for the defendants contacted Godsey, a recently retired general in the United States Air Force, and put him in touch with James Hunt, counsel for the defendants. Shortly thereafter, Godsey and Hunt met for approximately two hours during which time Hunt provided Godsey with "a little more detail about the case" including "the scenario of the accident, the flight that the crew flew, [and] how the accident occurred"

In late 1997 or early 1998, the defendants retained Godsey as a consultant. After being retained, Godsey performed the following tasks for the defendants: (1) reviewed various materials relating to the air crash that defense counsel provided him; (2) "assisted the defendants in obtaining Air Force Freedom of Information Act materials;" (3) "prepared materials to assist [defense counsel] in understanding the various instruments on the [CT-43];" and (4) "arrang[ed] [for the] [d]efendants' acquisition of raw AWACS radar data recorded by the Royal Air Force."

On March 24, 1999, the defendants sought permission from the Air Force to use Godsey as an expert witness. In September 1999,¹ the defendants formally designated Godsey as a Rule 26

¹ The defendants' motion states that "[i]t was not clear until the [c]ourt granted [the] defendants' motion for a protective order, on November 30, 1999, that [Godsey] was going to be an expert witness in this case." The parties do not dispute, however, that Godsey's expert witness statement is dated September 28, 1999.

expert, a designation requiring him to testify and report on a number of issues, including: 1) Air Force procedures, training, and culture; 2) alleged failures occurring within each level of Air Force command; 3) interpretation of all data gathered by accident investigation boards relating to the CT-43's instruments, as found at the crash site; 4) the flight path of the CT-43, 5) the crash site; and 6) the training (or lack of training) of the CT-43 crew on Jeppesen instrument approach charts and legends. In forming his opinion in connection with these topics, Godsey "rel[ie]d on . . . publicly available information, discovery conducted in this case, and reports of other experts."

On January 27-28, 2000, the plaintiffs deposed Godsey. During the deposition, it became apparent that Godsey had reviewed numerous documents relating to the litigation in his role as a consultant, and that some of these documents were not identified in his Rule 26 report. Included in these materials were documents that Godsey generated himself as well as documents that defense counsel provided him. Defense counsel asserted that, while Godsey reviewed these materials, they were "aside from the report" and therefore constituted "work product." Consequently, the defendants refused to produce these documents. On February 24, 2000, one month after Godsey's deposition, and five months after Godsey disclosed his expert report, the

defendants produced a privilege log listing all the documents in Godsey's possession which were not disclosed.

On March 17, 2000, the plaintiffs filed a motion to compel, seeking the disputed documents. On May 10, 2000, the court directed the defendants to furnish the contested documents to the court for an in camera inspection so that the court could determine whether they were subject to disclosure pursuant to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. See In re Air Crash at Dubrovnik, Croatia on April 3, 1996, No. 3:98cv2464(AVC), at 1 (D. Conn. May 10, 2000).

On October 27, 2000, after reviewing over 9,300 documents, the court ordered the defendants to produce some 7,100 of those documents. See In re Air Crash at Dubrovnik, Croatia on April 3, 1996, No. 3:98cv2464(AVC), at 1 (D. Conn. Oct. 27, 2000). On November 21, 2000, the defendants filed the within motion, asking the court to reconsider its October 27th order with respect to 599 documents that they maintain are protected by the work-product doctrine.

DISCUSSION

Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure, amended in 1993, requires that reports be prepared for each testifying expert containing "the data or other information considered by the [expert] witness in forming the opinions." Fed. R. Civ. P. 26(a)(2)(B). The Advisory Committee notes

explain this requirement as follows:

The [expert] report is to disclose the data and other information considered by the expert and any other exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their expert to be used in forming their opinions - whether or not ultimately relied upon by the expert - are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Fed. R. Civ. P. 26(a)(2) advisory committee's notes.

Courts addressing the issue of what constitutes discoverable material under Rule 26(a)(2) have held that "when an attorney furnishes work product - either factual or containing the attorney's impressions - to [a testifying expert witness], an opposing party is entitled to discovery of such a communication." Musselman v. Phillips, 176 F.R.D. 194, 202 (D. Md. 1997); see TV-3, Inc. v. Royal Ins. Co. of America, 193 F.R.D. 490, 491 (S.D. Miss. 2000) ("Rule 26, requiring disclosure of material 'considered,' allows discovery of all communications between counsel and a retained testifying expert, even if those communications contain the attorney's mental impressions or trial strategy or [are] otherwise protected by the work product privilege.") In ordering these types of communications produced, courts have echoed the concerns underlying the Advisory Committee's admonishment to parties who seek to assert the work-product objection when asked for materials "considered" by a testifying expert. For instance, "[i]f the attorney hiring the

expert sets forth the desired theory of the case on the front end, then the opposing side should have the right to be made aware of the fact that the expert's viewpoint was initially couched by the attorney's desired theory." TV-3, Inc. v. Royal Ins. Co. of America, 193 F.R.D. 490, 491 (S.D. Miss. 2000).

Similarly, "when an attorney hires an expert both the expert's compensation and his 'marching orders' can be discovered and the expert cross-examined thereon. If the lawyer's 'marching orders' are reasonable and fair, the lawyer and his client have little to fear. If the orders are in the nature of telling the expert what he is being paid to conclude, appropriate discovery and cross-examination thereon should be the consequence. Such a ruling is most consistent with an effort to keep expert opinion testimony fair, reliable and within the bounds of reason." TV-3, Inc. v. Royal Ins. Co. of America, 193 F.R.D. 490, 492 (S.D. Miss. 2000).

Woven into this analysis is the unique situation presented here, where the defendants initially hired Godsey as a consultant in late 1997 only to later designate him as their expert witness under Rule 26(a)(2)(B) in September 1999. Several district courts in this circuit have addressed cases with similar circumstances. In Messier v. Southbury Training Sch., No. 3:94CV1706 (EBB), 1998 WL 422858 (D. Conn. June 29, 1998), the district court held that where "an expert is retained as both a consultant and a testifying witness, the work-product doctrine

may be invoked to protect work completed by the expert in [his] consultative capacity as long as there exists a clear distinction between the two roles." Messier v. Southbury Training Sch., No. 3:94CV1706 (EBB), 1998 WL 422858, at *2 (D. Conn. June 29, 1998). The Messier court included a caveat, however, stating that "[a]ny ambiguity about which function was served by the expert when creating a document must be resolved in favor of discovery." Id.

The Messier case, in turn, cites B.C.F. Oil Refining Inc. v. Consolidated Edison Co. of New York, Inc., 171 F.R.D. 57 (S.D.N.Y. 1997), which also provides guidance on the issue now before this court. In B.C.F. Oil, the district court addressed a discovery dispute in which the defendant sought to compel production of documents concerning "communications with and work performed by [the] plaintiff's expert and [that] expert's subcontractor." Id. at 60. The defendant argued that the documents should be disclosed in compliance with Rule 26's mandate that "an expert disclose all material 'considered by the [expert] witness in forming the [expert's] opinion.'" Id. at 60. The plaintiff objected, however, maintaining that the information sought was protected by the work-product doctrine. Id. In addressing the discovery dispute, the court divided the contested documents into five categories. Id.

Category one consisted of "documents which, though coming from plaintiff's expert (or sent to him) have nothing to do with

the preparation of his expert report or his expert testimony[.]” B.C.F. Oil Refining Inc. v. Consolidated Edison Co. of New York, Inc., 171 F.R.D. 57, 60 (S.D.N.Y. 1997). The B.C.F. Oil court concluded that it would not require the plaintiff to produce documents having “no relation to the expert’s role as an expert . . . but that any ambiguity as to the role played by the expert when reviewing or generating documents should be resolved in favor of the party seeking discovery.” Id. at 62. Despite the plaintiff’s insistence that the “vast majority of the documents submitted [for in camera review] relate[d] to the expert’s role as a consultant,” the court concluded that “it [was] not clear whether the expert reviewed them solely as a consultant or whether they informed his expert opinion as well.” Id. at 62. The court ordered all the documents in this category to be produced, with the exception of ten where the court that the consultant role played by the expert was “clearly established.” Id.

Category two included “documents[] consisting of material consulted or generated by the expert in connection with his role as an expert[.]” Id. With respect to this category, the plaintiff argued that disclosure was not required because none of the disputed documents related to the expert’s testimony. Id. at 62. The court rejected this argument after performing an in camera review, observing that the party seeking to compel the

production of the documents "should not have to rely on the [resisting party's] representation that the[] documents were not considered by the expert in forming his opinion." B.C.F. Oil Refining Inc. v. Consolidated Edison Co. of New York, Inc., 171 F.R.D. 57, 62 (S.D.N.Y. 1997). The documents falling into this category were ultimately ordered produced. Id. Category three comprised "data provided by . . . counsel to the expert for his review[] . . . [which] do not contain the attorney's mental impressions or opinions but merely relay facts which the expert is presumably expected to consider." Id. The court ordered these documents produced. See id. ("[I]t would strain credulity to maintain that [Rule 26(a)(2)] somehow exempts factual information that counsel gave the expert.").

Category four included documents containing "the thoughts and mental impressions of the attorney [which] were given to the expert for his consideration." Id. The court acknowledged that the documents in this fourth category "require[d] the most rigorous analysis since there is a clear split of authority on how to deal with them." Id. at 60-61. The court ultimately ordered documents falling into this category to be produced, observing that "the [Advisory Committee note] evinces an intent to require parties to produce attorney opinions given to the expert and considered by the expert in forming his or her opinion." See id. Finally, category five included "a series of

documents consisting of notes taken or memoranda generated by counsel after having had oral conversations with the expert." B.C.F. Oil Refining Inc. v. Consolidated Edison Co. of New York, Inc., 171 F.R.D. 57, 61, 67 (S.D.N.Y. 1997). The expert in B.C.F. Oil never saw these documents and, accordingly, the court found that the work product privilege shielded them from discovery.

With these standards in mind, the court now addresses the various groups of documents that the court ordered produced initially, and that the defendants continue to contend are protected by the work product doctrine.

A. Documents allegedly used to assist defense counsel in preparation of discovery and deposition questioning²

The defendants contend that documents numbered CAM 7810-7811 are responses by Godsey to defense counsel's requests for information and investigation undertaken in preparation for discovery. The defendants summarily conclude that "[t]hey were generated in [Godsey's] role as a consultant." The court disagrees. First, the fact that these documents are related to defense counsel's request for information does not mean that Godsey generated them solely in his role as consultant. Second,

² For the sake of convenience, the court has chosen to address the documents as grouped by the defendants in their motion to reconsider. As explained in more detail throughout the ruling, the court's decision in this regard should not be interpreted as a signifying the court's agreement with the defendants' characterization of each document.

the subject matter of the documents -- 76th Airlift Squadron Test Flights of Airfields -- relates to matters contained in Godsey's expert witness statement, which encompasses flight planning to the Dubrovnik airport and Air Force procedures and training. At a minimum, there exists an ambiguity as to the capacity in which Godsey generated or reviewed these materials. Where this is so, the court must resolve the dispute "in favor of discovery."

Messier v. Southbury Training Sch., No. 3:94CV1706 (EBB), 1998 WL 422858, at *2 (D. Conn. June 29, 1998). Accordingly, the documents shall be produced as originally ordered.

The defendants also contend that documents numbered CAM 7790 and 8651-52³ should not have been included in the court's October 27th order, asserting that it relates to defense counsel's discovery strategy. The court concludes that it is not sufficiently clear that Godsey generated this document while acting in his role as a consultant. The party seeking to compel the production of documents under Rule 26(a)(2)(B) "should not have to rely on [the resisting party's] representation that . . . documents were not considered by the expert in forming his opinion." B.C.F. Oil Refining Inc. v. Consolidated Edison Co. of New York, Inc., 171 F.R.D. 57, 62 (S.D.N.Y. 1997). Also, it is not at all clear that this document represents, as the defendants maintain it does, Godsey's handwritten notes concerning discovery

³ The court addresses CAM8651-8652 in section C infra.

strategy and evaluation of the defendants' investigation. A more probable, or at least an equally feasible, interpretation of those notes suggests that they were taken by Godsey in connection with a mock trial. That these notes may contain strategy or an evaluation of the defendants' investigation does not, by itself, render them privileged. Musselman v. Phillips, 176 F.R.D. 194, 202 (D. Md. 1997) ("[W]hen an attorney furnishes work product - either factual or containing the attorney's impressions - to [a testifying expert witness], an opposing party is entitled to discovery of such a communication."). The critical issue is whether it is clear that Godsey "considered" these documents in his capacity as a consultant. With respect to this document, the court finds that the requisite clarity is lacking. The plaintiffs should have the opportunity to question Godsey with respect to whether or not his opinion was influenced by the results of a mock trial, if one was actually conducted. Hence, because the court cannot determine what role Godsey was playing when he generated this document, it must be produced. See Messier v. Southbury Training Sch., No. 3:94CV1706 (EBB), 1998 WL 422858, at *2 (D. Conn. June 29, 1998) ("any ambiguity . . . must be resolved in favor of discovery").

The defendants maintain that they should not be required to produce documents numbered CAM8378 and 8422-8426, because those documents "provide [Godsey's] evaluation of defense counsel's

discovery and investigative methods and list his suggestions to counsel for types of information about which they should inquire." First, the subjects discussed in these documents represent topics addressed in Godsey's expert report. Second, there is nothing in these documents demonstrating that Godsey reviewed or generated them in his capacity as a consultant, and not an expert. In other words, the clear distinction that Messier requires is absent. See Messier v. Southbury Training Sch., No. 3:94CV1706 (EBB), 1998 WL 422858, at *2 (D. Conn. June 29, 1998). Also, with respect to documents CAM8422-8426, the court notes that these contain facts to which certain Air Force witnesses can testify. These do not constitute attorney-work product. It is well-settled that simply because facts are conveyed to or from an attorney does not make the documents containing those facts privileged. See W.R. Grace & Co. v. Zotos Int'l, No. 98-CV-838S(F), 2000 WL 1843258, at *3 (W.D.N.Y. Nov. 2, 2000) (collecting cases). It is not even clear that these documents were created by an attorney. Even if they were, it is similarly unclear whether they were given to Godsey for the purpose of him rendering consultative advice or whether he was to consider them for his expert report. The documents, CAM8378 and 8422-8426, shall be produced as originally ordered.

As to documents CAM8571-8574 and CAM8577-8583, the court is persuaded that they were sent to Godsey by defense counsel asking

for Godsey's "insight" with respect to a letter concerning several witnesses. Accordingly, the court concludes that the required "clear distinction" is present and the defendants need not produce these documents.

Finally, the defendants argue that CAM00252-00253 should not be produced because they are not "germane to Godsey's expert opinion" and "were forwarded to [Godsey] in his capacity as a consultant." The court's initial ruling ordering the production of these documents shall stand. First, from the documents, there is no way for the court to confirm, as the defendants' log suggests, that this "index" belongs to a "[n]on-testifying consultant." Also, based on Godsey's expert statement, the items listed in these documents could not be more germane to Godsey's expert report in that they include "Pilots flight instrument panel," "Dubrovnik area topo chart and final approach segment," and "Approach plate for Split, Croatia."

B. Documents allegedly assisting defense counsel in locating witnesses, experts and documents, and suggesting avenues for further investigation in the context of litigation

The defendants contend that CAM7816-7817, 7831, 7893-7898, 8735, 8796-8824, 8826-8839 should remain privileged because they "were created by [Godsey] in his role as a consultant to aid defense counsel in the search for pertinent records." With the exception of CAM7831, the court agrees with the defendants and concludes that these the documents need not be produced. The

court is not convinced, however, that document CAM7831 was generated by Godsey solely in his consultative role. The document speaks of Joseph Cox⁴ reviewing tapes and providing Godsey with the results of the tapes the following day. As information that an attorney provides to his expert is not covered by the work product doctrine, neither is information provided to the expert by the attorney's consultant. See Musselman v. Phillips, 176 F.R.D. 194, 202 (D. Md. 1997) ("[W]hen an attorney furnishes work product - either factual or containing the attorney's impressions - to [a testifying expert witness], an opposing party is entitled to discovery of such a communication."); accord W.R. Grace & Co. v. Zotos Int'l, No. 98-CV-838S(F), 2000 WL 1843258, at *3 (W.D.N.Y. Nov. 2, 2000). This does not appear to relate to a "search for pertinent records," as the defendants contend, and there is nothing in this document to demonstrate that Godsey reviewed it in his capacity as a consultant, as opposed to an expert. Again, the "clear distinction" that the law requires is absent. See Messier v. Southbury Training Sch., No. 3:94CV1706 (EBB), 1998 WL 422858, at *2 (D. Conn. June 29, 1998); B.C.F. Oil Refining Inc. v. Consolidated Edison Co. of New York, Inc., 171 F.R.D. 57, 62 (S.D.N.Y. 1997) ("[A]ny ambiguity as to the role played by the expert when reviewing or generating documents should be resolved

⁴ Mr. Cox is a nontestifying expert retained by the defendants.

in favor of the party seeking discovery.").

The defendants argue that CAM7820, 7822, 8002, 8232-8233, 8286-8291, 8300-8301, 8366, 8377, 8381, 8694-8697, 8715-8717, 8719-8723, and 8728, should remain privileged because Godsey created these documents to "assist counsel in their search for potential experts" and because they "have absolutely nothing to do with his expert opinions." With the exception of documents CAM8366, 8719-8723, the court, on reconsideration, agrees with the defendants and concludes that these documents need not be produced. Godsey's role as a consultant in connection with these documents is clear. As to the excepted documents (CAM8366 and 8719-8723), the defendants have not convinced the court that Godsey generated or reviewed these documents in his role as a consultant as opposed to his role as an expert. Where there is an ambiguity with respect to which role Godsey was playing, this court will heed the advice of Messier and B.C.F. Oil and resolve the ambiguity in favor of discovery. See Messier v. Southbury Training Sch., No. 3:94CV1706 (EBB), 1998 WL 422858, at *2 (D. Conn. June 29, 1998); B.C.F. Oil Refining Inc. v. Consolidated Edison Co. of New York, Inc., 171 F.R.D. 57, 62 (S.D.N.Y. 1997).

With respect to CAM7935-7936 and 8115-8116, the defendants argue that these documents "detail [Godsey's] assistance as a consultant to defense counsel with regard to AWACS data" and should not be produced. Other than the assurances of their

counsel, the defendants point to nothing that persuades the court that Godsey was playing the role of a consultant when he created this document. See B.C.F. Oil Refining Inc. v. Consolidated Edison Co. of New York, Inc., 171 F.R.D. 57, 62 (S.D.N.Y. 1997) (noting that party seeking to compel production of documents "should not have to rely on the [resisting party's] representation that the[] documents were not considered by the expert in forming his opinion.") At this point, the court has only the defendants' representations, which, it concludes, are insufficient to shield these documents from discovery.

The defendants submit that documents numbered CAM8780 and 7997, which are identical, should be produced only in a redacted form such that certain typed notes are removed. The defendants describe these notes as "commentary suggesting follow up investigation." Again, the court is unconvinced, as it is unable to discern who generated this document, or when it was generated. Likewise, there is nothing about this document that suggests it was reviewed by Godsey while wearing his consultant hat, as opposed to his expert witness cap. In light of this, the court will resolve this ambiguity in favor of discovery. Messier v. Southbury Training Sch., No. 3:94CV1706 (EBB), 1998 WL 422858, at *2 (D. Conn. June 29, 1998) ("Any ambiguity about which function was served by the expert when creating a document must be resolved in favor of discovery."). The defendants shall produce

documents CAM8780 and 7997 in their unredacted form.

Documents CAM413-414, the defendants submit, "comprise a copy of a non-testifying consultant's background communication regarding a witness[,]" "were generated well before [Godsey] took on the role of expert[,]" and "clearly [are] not germane to his opinion or testimony." The court disagrees. First, the fact that the documents were generated before Godsey was designated as an expert is irrelevant: Godsey could have -- indeed he must have -- considered numerous documents that were generated before he took on the role of expert. Rule 26(a)(2) contemplates that an expert disclose data "considered by the expert," not simply data that was generated after the expert was designated. Second, to contend that the documents are not "germane" to Godsey's opinion is disingenuous, as these materials discuss orders regarding "test flights at Dubrovnik, Croatia on the CT-43." The author of this document provides information regarding "several [rolls] of photographs of not only the test flight, but the accident scene as well." Certainly, these two documents are pertinent to Godsey's opinion. As they appear to be relevant and as it is unclear in what role Godsey may have reviewed them, the court orders the defendant to produce these documents.

The defendants argue that the court improperly ordered them to produce CAM7950-7954 and 8271-8272 because these documents "deal solely with information regarding the Croatian airport, and

are not related to [Godsey's] expert opinion or testimony." The court finds no error in its original decision ordering production. Once again, the court cannot conclude that these documents were generated or reviewed by Godsey in his capacity as a consultant. See Messier v. Southbury Training Sch., No. 3:94CV1706(EBB), 1998 WL 422858, at *2 (D. Conn. June 29, 1998). Based on the content of the documents, which includes the interpretation of other aircrafts making approaches into Dubrovnik in the hour before the mishap occurred and conclusions about the landing strips at Dubrovnik on the date of the mishap, the court finds that these documents relate to Godsey's expert opinion. The court's initial determination, therefore, stands.

Upon reconsideration, the court agrees with the defendants with respect to the nature of CAM8698-8708 and 8589-8597. From the face of these documents, the court is able to determine that they relate to a search for technical witnesses, and as such, the required "clear distinction" between roles is present. These documents need not be produced.

The defendants have also challenged the court's initial order with respect to document CAM262, which "is a marked-up copy of a Jeppesen chart obtained by a non-testifying consultant from a witness which provides no information relevant to [Godsey's opinion] and which was not considered by him in his expert capacity." The court stands by its original determination.

Naturally, Godsey's expert report refers to Jeppesen charts numerous times and in various lights. The defendants' assurances that the chart was not "considered by [Godsey] in his expert capacity" is insufficient to shield it from protection in light of Messier's admonishment that ambiguities should be resolved in favor of discovery. See Messier v. Southbury Training Sch., No. 3:94CV1706 (EBB), 1998 WL 422858, at *2 (D. Conn. June 29, 1998); see also B.C.F. Oil Refining Inc. v. Consolidated Edison Co. of New York, Inc., 171 F.R.D. 57, 62 (S.D.N.Y. 1997) (noting that party seeking to compel production of documents "should not have to rely on the [resisting party's] representation that the[] documents were not considered by the expert in forming his opinion.").⁵

C. Documents allegedly generated to assist defense counsel in understanding Air Force documents, customs, procedures, regulations, equipment and resources

The defendants argue that a "large body of documents . . . were generated in [Godsey's] role as a consultant retained to explain the distinctive customs, documents, procedures, regulations, resources and equipment of the Air Force to defense counsel." Specifically, the defendants contend that CAM166,

⁵ Documents numbered CAM8726-8727, included in the defendants' "Log B," were not addressed in the defendants' motion for reconsideration, nor were they included in the documents the submitted with the motion. The court's initial ruling as to these documents, therefore, remains in place.

7985, 7988-7989, 7937-7938, 7996, 8019, 9226-9258,⁶ and 8779 all "provide [Godsey's] consultative interpretation and explanation of Air Force . . . data, regulations, and equipment for the benefit of counsel."

The court stands by its original order with respect to these documents, as it concludes that there exists no clear distinction between the roles Godsey was playing when he created and/or reviewed them. See Messier v. Southbury Training Sch., No. 3:94CV1706 (EBB), 1998 WL 422858, at *2 (D. Conn. June 29, 1998). For instance, CAM7988-89 comprise a letter to defense counsel written by a non-testifying consultant explaining "a collection of drawings of the CT-43A instrument panel" The defendants' claim in connection this letter illustrates the problem posed by the reasoning they apply to this entire grouping of documents. First, the letter contains factual information relating to a topic addressed by Godsey's expert report - the aircraft's instrument panel - and, therefore, is relevant. Second, the letter was channeled through Godsey by virtue of his being "copied" on it. As a result, Godsey could have considered this document in forming his opinion. The only "evidence" that the defendants offer suggesting that he considered the letter in consultative capacity, as opposed to his expert capacity, is the

⁶ In its October 27th order, the court directed the defendants to produce CAM9219-9259. In the instant motion, the defendants challenge only the even numbers between CAM92267-9258.

assurances of defense counsel contained in their brief. This is insufficient. See B.C.F. Oil Refining Inc. v. Consolidated Edison Co. of New York, Inc., 171 F.R.D. 57, 62 (S.D.N.Y. 1997) (noting that party seeking to compel the production of the documents "should not have to rely on the [resisting party's] representation that the[] documents were not considered by the expert in forming his opinion."). The plaintiffs' argument in this respect is well-taken by the court. Ruling that documents such as the letter described immediately above are privileged, would permit a party to designate its consultant as an expert late into the litigation and conceal many of the documents that the expert was exposed to and considered (or inappropriately did not consider). "[Expert testimony is often determinative of one or more central issues in a case . . . [t]herefore, it is critical that an adverse party have an opportunity to explore any biases or unreliabilities that might affect an expert's objectivity." Messier v. Southbury Training Sch., No. 3:94CV1706 (EBB), 1998 WL 422858, at *1 (D. Conn. June 29, 1998) (citing Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 394 (N.D. Cal. 1991)).

Documents CAM9226-9258, 8779, and 7996 also demonstrate the difficulty the court has with the arguments advanced by the defendants. The defendants describe these documents as (1) an "evaluation of witness testimony and [an] explanation of

instruments for the benefit of counsel" and (2) "[c]ommentary and analysis of instruments and witness testimony created for defense counsel." After a thorough review of these undated documents, the court concludes that they contain factual information regarding numerous topics addressed in Godsey's expert statement and that it is equally plausible that Godsey created these documents in connection with his expert statement. The court's review reveals nothing to suggest that counsel requested this material from Godsey in his capacity as a consultant or that Godsey sent this material to counsel at all. Again, the only basis on which the court could conclude that the documents were created in Godsey's consultative capacity are the bald statements of defense counsel, which courts have acknowledged are not enough. See B.C.F. Oil Refining Inc. v. Consolidated Edison Co. of New York, Inc., 171 F.R.D. 57, 62 (S.D.N.Y. 1997).

The defendants have also challenged the court's ruling with respect to documents CAM7966, 7976-7977, 7979-7980, 8609-8610, and 8651-8652, stating that they "were created solely in response to defense counsels' inquiries and were generated in [Godsey's] consultative role only." The court observes that Godsey generated these letters and forwarded them defense counsel. Also, the letters were written by Godsey late in the litigation. In fact, one of the letters was sent to defense counsel after Godsey had been formally designated as a testifying expert.

Finally, the letters patently touch upon topics and information addressed in Godsey's expert statement. See W.R. Grace & Co. v. Zotos Int'l, No. 98-CV-838S(F), 2000 WL 1843258, at *6-7 (W.D.N.Y. Nov. 2, 2000) (ordering disclosure of memoranda generated by expert where memoranda include general discussions of topics in expert's report). In light of these characteristics, and in light of the fact that the clear distinction required by Messier is not evident, the court rejects the defendants' arguments and orders these documents to be produced with the exception of CAM7966.

The court's original ruling with respect to documents CAM547-622,⁷ 8845-9002 has also been challenged. The defendants submit that these documents: (1) "provide explanations of diagrams, charts, mock-ups and other visual aids created by consultants for the sole purpose of educating defense counsel[;]" and (2) are part of "a notebook prepared for defense counsel in the early stages of the case to assist lawyers to understand the instrumentation in the mishap aircraft." The defendants request that the court permit them to "redact all commentary and explanatory text created by consultants for the benefit and strategy of defense counsel." The information contained in these documents is related to Godsey's expert opinion. As the

⁷ In its October 27th order, the court directed the defendants to produce all 75 of these documents. Here, the defendants challenge only 39. As described infra, the court's initial ruling stands with respect to all 75 documents.

defendants concede, these materials contain comments of consultants, which the court concludes also relate to the expert opinion. These marked up charts and visual aids were distributed to Godsey late in the litigation, and, after a thorough examination, the court is not convinced that he reviewed them or commented on them in his capacity as a consultant. Again, the court does not see the clear distinction required by the case law. See B.C.F. Oil Refining Inc. v. Consolidated Edison Co. of New York, Inc., 171 F.R.D. 57, 62 (S.D.N.Y. 1997); Messier v. Southbury Training Sch., No. 3:94CV1706 (EBB), 1998 WL 422858, at *2 (D. Conn. June 29, 1998) ("[T]he work product doctrine may be invoked to protect work completed by the expert in [his] consultative capacity as long as there exists a clear distinction between the two roles."). Documents CAM547-622, 8845-9002, therefore, shall be produced in their entirety.

D. Communications allegedly from defense counsel with regard to trial preparation and strategy, containing mental impressions, conclusions, opinions and legal theories of counsel concerning litigation

The defendants assert that documents falling into this category "are classic work product" that "details legal strategy, mental impressions, . . . and opinions of counsel." As such, they contend that the October 27th ruling improperly ordered these materials produced.

With respect to CAM32-52, 7868-7876, 9174-9218 and 8507-

8515,⁸ the court disagrees and stands by its initial ruling. The defendants correctly note that defense counsel generated these documents and that they extensively discuss factual information concerning the crash, Air Force procedures, and the flight crew, as well as various aspects of defense strategy. This, however, do not mark the end of the court's inquiry. As noted earlier, the court must determine whether these documents relate to the expert statement and were considered by Godsey in forming his opinion. The defendants do not -- and cannot -- deny that these documents address topics also contained in Godsey's expert statement. The subjects covered in these documents include, but are not limited to, the following: information about the crew on the CT-43, various Jeppesen charts, the flight path of the aircraft, the alleged negligence of the aircraft crew, and a variety of other topics relating to Godsey's expert opinion. Even if these documents do represent product, the defendants cannot shield them from discovery after they have been passed on to the testifying expert. See Musselman v. Phillips, 176 F.R.D. 194, 202 (D. Md. 1997) ("[W]hen an attorney furnishes work product - either factual or containing the attorney's impressions - to [a testifying expert witness], an opposing party is entitled

⁸ The court observes that CAM3892-3900 is a copy of CAM8507-8515 and both were ordered produced in the October 27th order. In its motion for reconsideration, for whatever reason, the defendants chose not to challenge the court's determination with regard to CAM3892-3900.

to discovery of such a communication."); W.R. Grace & Co. v. Zotos Int'l, No. 98-CV-838S(F), 2000 WL 1843258, at *5 (W.D.N.Y. Nov. 2, 2000) ("Preventing access to such information, even if constituting 'core' work product, . . . impedes informed . . . proper evaluation of any expert's report").⁹

With respect to documents CAM8632, 9156-9173 and 148-165, the court concludes, on reconsideration, that they need not be produced as the court is satisfied that Godsey generated or reviewed these materials in his capacity as a consultant and that the clear distinction required by Messier is present.

E. Documents which allegedly are the subject of inconsistent rulings by the court

The defendants noted that the court's October 27, 2000 order regarding the 9,300 documents it reviewed contained "a few inconsistent rulings." In some instances, as the defendants correctly point out, the court ordered one document withheld while ordering an identical document (with a different bates number) produced. The court regrets this oversight and, on

⁹ See also TV-3, Inc. v. Royal Ins. Co. of America, 193 F.R.D. 490, 491 (S.D. Miss. 2000) ("Rule 26, requiring disclosure of material 'considered,' allows discovery of all communications between counsel and a retained testifying expert, even if those communications contain the attorney's mental impressions or trial strategy or is otherwise protected by the work product privilege."); id. ("[I]f the attorney hiring the expert sets forth the desired theory of the case on the front end, then the opposing side should have the right to be made aware of the fact that the expert's viewpoint was initially couched by the attorney's desired theory.").

reconsideration, concludes that CAM296, 4267-4268, and 7838 need not be produced.

F. Document 29 -- General Godsey's two steno notebooks

The defendants have also challenged the court's order with respect to approximately 120 pages spanning two notebooks that Godsey's kept since he began working for the defendants. The defendants contend that these pages contain: (1) handwritten notes of Godsey's telephone conversations with defense counsel relating to "conclusions, opinions, and legal theories of counsel about the case[,]"; (2) handwritten "'to do lists' of consultant follow up on defense counsel instructions and requests[,]"; (3) recordings of Godsey's activities surrounding the location of expert witnesses and suggestions regarding discovery, and (4) "personal information unrelated to the case"

The court stands by its October 27th ruling with respect to CAM9011, 9012, 9040, 9060, 9061, 9067, 9068-9069, 9074-9078, 9081-9085, 9089-9092, 9098-9099, 9102-9104, 9106 (the entire page), 9109-9113, 9116-9117, 9125-9126, 9134 (redacted as proposed by defendants), 9141, 9145, and 9147-9148. As noted earlier, there were times when the role Godsey played as a consultant blurred with the role he played as an expert. With respect to this group of documents, the court is unable see the clear distinction between these two roles. As a result, it will resolve the ambiguity in favor of discovery. Messier v.

Southbury Training Sch., No. 3:94CV1706 (EBB), 1998 WL 422858, at *2 (D. Conn. June 29, 1998) (“[T]he work product doctrine may be invoked to protect work completed by the expert in [his] consultative capacity as long as there exists a clear distinction between the two roles.”).

With respect to the remaining documents previously ordered produced and now challenged by the defendants as privileged, on reconsideration, the court is satisfied that they were generated or reviewed by Godsey in his capacity as a consultant, and that a clear distinction between the consultant and expert roles exists. Accordingly, all documents challenged, with the exception of those just mentioned (i.e., CAM9011, 9012, 9040, 9060, 9061, 9067, 9068, 9069, 9074-9078, 9081-9085, 9089-9092, 9098, 9099, 9102-9104, 9106, 9109-9113, 9116-9117, 9125, 9126, 9134 (redacted as proposed by defendants), 9141, 9145, 9147, and 9148) need not be produced.

CONCLUSION

Based on the foregoing, the defendants’ motion for reconsideration (document no. 357) is GRANTED and the relief requested therein is GRANTED in part and DENIED in part. Accordingly, the court directs the defendants to produce all documents ordered produced in the court’s October 27, 2000 ruling with the exception of the following documents that the court has organized to correspond to the sections of this ruling:

Section A CAM8577-8583, 8571-8574

Section B CAM7816-7817, 7820, 7822, 7893-7898,
7997/8780 (in their redacted form), 8002,
8232-8233, 8286-8291, 8300-8301, 8377, 8381,
8589-8597, 8694-8708, 8715-8717, 8728, 8735,
8796-8824, 8826-8839

Section C CAM7966

Section D CAM148-165, 8632, 9156-9173

Section E CAM296, 4267-4268, 7838

Section F CAM9003-9010, 9013-9019, 9021-9022, 9024-
9028, 9030-9035, 9037-9039, 9041-9051, 9053-
9058, 9062-9066, 9070-9073, 9079-9080, 9086,
9093-9097, 9105, 9107, 9108, 9115, 9123,
9128-9130, 9137-9139, 9143, 9149.

It is so ordered this 4th day of June, 2001 at
Hartford, Connecticut.

Alfred V. Covello, Chief U.S.D.J.