UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 8:11-cr-115-T-30MAP

TODD S. FARHA, *et al.*, ORAL ARGUMENT REQUESTED

Defendants.
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WELLCARE HEALTH PLANS, INC.'S OBJECTIONS TO THE JANUARY 6, 2012 ORDER OF THE U.S. MAGISTRATE JUDGE AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Federal Rule of Criminal Procedure 59(a), WellCare Health Plans, Inc. ("WellCare"), a nonparty to this action, hereby files these objections to the U.S. Magistrate Judge's January 6, 2012 Order (Dkt. No. 130) (the "Magistrate Order").

SUMMARY OF THE ARGUMENT

The Magistrate Order is contrary to law and should be set aside. Criminal Rule 17(c) is not a discovery device. Unlike civil subpoenas that broadly seek materials calculated to lead to admissible evidence, criminal subpoenas cannot reach inadmissible hearsay materials for pretrial production even if relevant. Yet the Magistrate Order requires pretrial production of privileged attorney ***draft*** memoranda and notes never shared with WellCare, never shown to the interviewees, never produced to the Government, and never exposed to the light of day outside the law offices in which they were drafted. Moreover, the Magistrate Order requires this pretrial production even though WellCare has already produced all ***final*** interview

memoranda, including several final memoranda never produced to the Government. To date, it appears that no court has ever permitted pretrial enforcement of a Criminal Rule 17(c) subpoena directed to such purely inadmissible hearsay materials when final interview memoranda were available.

In improperly ascribing significance to the Government's failure to object to the Criminal Subpoena, the Magistrate Order also misapplies the admissibility and specificity prongs of *United States v. Nixon*, 418 U.S. 683, 700 (1974). In one sentence, the Magistrate Order concludes that the draft interview memoranda and notes are "admissible" because (applying the starkly different standard for ***civil*** subpoenas) they "***could lead to*** witnesses favorable to the defense" and "***could*** . . . ***counter***, " *i.e.*, impeach, "the government's version of events." Magistrate Order at 3 (emphases added). In doing so, the Magistrate Order ignores that virtually every court has found that, absent unique or exceptional circumstances not present here, impeachment evidence is never admissible within *Nixon*'s meaning for Criminal Rule 17(c) pretrial production purposes ***until the witness to be impeached has actually testified inconsistently with his or her prior statement(s)***. Moreover, even in such exceptional circumstances, pretrial *in camera* production has been ordered, not pretrial production directly to defendants.

As for the content of the draft memoranda and notes, the interviewees were never shown these documents. Accordingly, the only possible impeachable witnesses would be the note-taking ***attorneys*** themselves, not witnesses whose statements the attorneys characterized, organized, and summarized.

Next, the Magistrate Order mistakenly concludes that the draft interview memoranda and notes ***never*** constituted attorney work product, because they were prepared not "in anticipation of litigation," but rather (1) "to avoid litigation," and (2) to "meet business demands" such as SEC reporting. *Id.* at 4. The implications of this ruling for the conduct of internal investigations are staggering, because outside counsel could never effectively render legal advice knowing that litigants would be permitted to examine every draft or note taken. In any event, applicable precedent does not support such fine distinctions. The law is clear: documents constitute attorney work product even where they were prepared for dual business and legal purposes or to avoid litigation.

Lastly, the Magistrate Order concludes WellCare waived all work-product protections over drafts and notes, merely because the "central theme" of the Deferred Prosecution Agreement ("DPA") somehow "acknowledges" and "requires" WellCare's "continued cooperation." *Id.* The DPA, however, ***expressly*** contradicts this suggestion and provides that WellCare will not be required in the future to produce privileged materials. *See* DPA (attached hereto as **Exhibit "A"**) ¶ 9A (Government "will not suggest or require that WellCare waive any of WellCare's legal privileges"), ¶ 15C (future cooperation will require WellCare only to "[d]isclose all ***non-privileged*** information about which the Offices may inquire with respect to matters that have been the subject of the . . . investigation" (emphasis added)). Additionally, case law provides that drafts and notes used to prepare opinion work product do not forfeit their work-product protections merely because final drafts are disclosed. Were it otherwise, the work-product doctrine would not protect drafts and notes used to prepare publicly filed pleadings.

In sum, the Magistrate Order is contrary to law and should be set aside because it disregards Criminal Rule 17(c)'s strict limitations and misapplies the work-product doctrine.

STATEMENT OF THE CASE

A. The Parties

WellCare is a provider of managed-care services to government-sponsored health care programs. Headquartered in Tampa, Florida, WellCare operates mainly within the Medicaid and Medicare programs and serves the full spectrum of eligibility groups.

Todd Farha is a former President, Chief Executive Officer, Director, and Chairman of the Board of WellCare. Farha and his codefendants Thaddeus Bereday, Paul Behrens, William Kale, and Peter Clay (collectively, "Defendants") stand accused of defrauding the Florida Medicaid and Florida Healthy Kids Corporation programs. (Dkt. No. 1).

B. WellCare Forms A Special Committee To Perform An Internal Investigation

On October 24, 2007, law enforcement executed a federal search warrant at WellCare's Tampa headquarters. During this search, the Government seized hundreds of boxes of documents, electronic files, and other materials. In subsequent requests, WellCare provided additional documents to the United States, all of which has been disclosed to the Defendants.

After the search, WellCare retained King & Spalding and Greenberg Traurig. The Board of Directors then established an independent Special Committee to oversee an internal investigation and retained Davis Polk & Wardwell (collectively, WellCare's law firms are "Outside Counsel").

Between November 2007 and January 2009, the Special Committee through Outside Counsel conducted an internal investigation by interviewing numerous witnesses and ultimately preparing interview memoranda, which *inter alia* dealt with the so-called "80-20" issue. No Government attorneys or agents attended these interviews, and the interviewees were not asked to sign or approve the memoranda. Importantly, these final interview memoranda do not transcribe Outside Counsel's questions and the witness's answers, but rather summarize and characterize the interviews based on the subject matters and documents discussed.[1]

C. WellCare Discloses The Special Committee's Internal Investigation Findings To The Government

Following this internal investigation, the Special Committee through Outside Counsel presented its findings to the Department of Justice on February 20, 2008. Many of the final interview memoranda and documents were produced, but no drafts, notes, or other work product.

D. WellCare Enters Into The Deferred Prosecution Agreement While Defendants Are Indicted

On May 5, 2009, the Government filed an Information and a Deferred Prosecution Agreement ("DPA") against WellCare. *See United States v. WellCare Health Plans, Inc.*, No. 8:09-cr-203-T-27EAJ (M.D. Fla. filed May 5, 2009). The DPA's future cooperation obligations do not require WellCare to waive any legal privileges, such as the work-product doctrine. Rather, the DPA expressly provides that WellCare's future cooperation obligations

[1] All of the final interview memoranda are stamped "PRIVILEGED & CONFIDENTIAL" and "ATTORNEY WORK PRODUCT." Although some of the final interview memoranda still have "DRAFT" stamps, they were actually final when they were produced to the Government.

will require WellCare only to "[d]isclose all ***non-privileged*** information about which the Offices may inquire with respect to matters that have been the subject of the . . . investigation." DPA ¶ 15C (emphasis added). On March 2, 2011, the grand jury returned a nine-count indictment against Defendants. (Dkt. No. 1).

E. The Government And WellCare Produce All Materials Obtained From WellCare

During pretrial discovery, the United States and WellCare collectively disclosed all "80-20" final interview memoranda and attendant documents, including final interview memoranda not previously disclosed to the United States. As such, the Defendants have access to "80-20" final interview memoranda, the Special Committee's presentation to the United States, and all documents seized from or produced by WellCare.

F. Farha Serves The Rule 17(c) Criminal Subpoena

Thereafter, Farha served the Criminal Subpoena to obtain pretrial production of the draft memoranda and notes. Specifically, the Criminal Subpoena demands ***pretrial*** production of "***All documents relating to*** the [Special Committee Report ("SCR") presented to the Government at a February 20, 2008 meeting regarding the so-called "80/20" behavioral health loss ratio reporting issue] ***including but not limited to***: 1) all memoranda of interviews relating to the subject-matter of the SCR ***including but not limited to*** drafts of interview memoranda; 2) notes taken during ***or relating to*** those interviews; and 3) all documents shown to witnesses during those interviews." *Id.* at 2 (emphases added).

G. The Magistrate Denies WellCare's Motion To Quash

WellCare filed a motion to quash, which argued the Criminal Subpoena was unenforceable primarily because (1) *Nixon* held that Criminal Rule 17(c) cannot reach

inadmissible hearsay materials, and (2) the drafts and notes were opinion work product. (Dkt. No. 121).[2] In opposition, Farha primarily contended that (1) the Magistrate had discretion to disregard Criminal Rule 17(c)'s and *Nixon*'s general prohibition against permitting pretrial production of inadmissible hearsay materials, and (2) the notes and drafts were not opinion work product, but fact work product that was subject to subject-matter waiver. (Dkt. No. 122).

In denying the motion to quash, the Magistrate concluded that the attorney notes and drafts satisfied *Nixon*'s admissibility requirement because they "could lead to witnesses favorable to the defense and counter the government's version of events." *Id.* at 3. Likewise, the Magistrate concluded *Nixon*'s specificity requirement was met because the Criminal Subpoena "applies to a limited number of individuals." *Id.* at 4.[3]

The Magistrate also ruled that the notes and drafts were never protected by the work-product doctrine because they were not "prepare[d] . . . in anticipation of litigation, at least as the policy behind the doctrine contemplates." *Id.* Rather, the notes and drafts did not constitute attorney work product because they were "prepared . . . to avoid litigation (*i.e.*, prosecution) and [to] meet business demands (Securities and Exchange Commission reporting)." *Id.* Finally, the Magistrate ruled that WellCare waived any work-product protections when it entered into the DPA because "the ***central theme*** of the agreement is that

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[2] WellCare and Farha agreed that the Criminal Subpoena should be modified to clarify that only the attorney drafts and contemporaneous notes remain at issue.

[3] The Magistrate did apply the *Nixon* test even though the Criminal Subpoena was issued to a third party rather than the Government. *Compare United States v. Bearden*, 423 F.2d 805, 810 & n.4 (5th Cir. 1970) (applying *Iozio* test, adopted by *Nixon*, to third-party criminal subpoena), *with United States v. Nachamie*, 91 F. Supp. 2d 552, 562 (S.D.N.Y. 2000) (applying lesser standard to third-party criminal subpoena); *see also United States v. Fields*, 663 F.2d 880, 881 (9th Cir. 1981) ("we see no basis for using a lesser evidentiary standard merely because production is sought from a third party rather than from the United States").

WellCare will be transparent about the events that led up to the agreement and its remedial efforts post agreement." *Id.* (emphasis added).

STANDARD OF REVIEW

District judges "must consider timely objections" to nondispositive magistrate orders and "modify or set aside any part of the order that is contrary to law or clearly erroneous." Fed. R. Crim. P. 59(a). "The 'clearly erroneous' standard applies only to factual findings," whereas "conclusions of law are reviewed under the more lenient 'contrary to law' standard." *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 340 (S.D. Iowa 1993); *see also* 12 Wright & Miller, *Federal Practice and Procedure: Civil* § 3069 n.8 (2d ed. 2011) (same). This Court's de novo "review under the 'contrary to law' standard is 'plenary,' and it 'may overturn any conclusions of law which contradict or ignore applicable precepts of law, as found in the Constitution, statutes, or case precedent.'" *Gandee v. Glaser*, 785 F. Supp. 684, 686 (S.D. Ohio 1992) (quoting *Jernyd v. Nilsson*, 117 F.R.D. 416, 417 (N.D. Ill. 1987), and *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 205 (N.D. Cal. 1983)). The Magistrate Order rules that (1) the Criminal Subpoena satisfies *Nixon*'s admissibility and specificity requirements, and (2) the notes and drafts were either never attorney work product in the first place or their work-product protections were waived. Each of these rulings is either contrary to law, based on clearly erroneous findings of fact, or both.

ARGUMENT

I. DISCOVERY IN CRIMINAL CASES IS FAR MORE LIMITED THAN THAT AVAILABLE IN CIVIL CASES

Unlike civil litigants, criminal defendants get limited discovery. Civil litigants are "entitled as a general matter to discovery of any information sought if it appears 'reasonably

calculated to lead to the discovery of admissible evidence.'" *Degen v. United States*, 517 U.S. 820, 825-26 (1996) (quoting Fed. R. Civ. P. 26(b)(1)). In contrast, criminal defendants are "entitled to rather limited discovery, with no general right to obtain the statements of the Government's witnesses before they have testified." *Id.* at 825 (citing Fed. R. Crim. P. 16(a)(2), 26.2). Essentially, criminal defendants are entitled to Government disclosure of exculpatory, impeachment, and Rule 16 evidence in addition to Rule 17(c) subpoenas for admissible evidence. However, Criminal Rule 17(c) subpoenas are "not intended to provide a means of discovery for criminal cases." *United States v. Nixon*, 418 U.S. 683, 698 (1974); *accord United States v. Silverman*, 745 F.2d 1386, 1397 (11th Cir. 1984). Rather, they are designed merely "to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials." *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951); *accord United States v. Amirnazmi*, 645 F.3d 564, 595 (3d Cir. 2011).

II. THE MAGISTRATE ORDER DISREGARDS *BOWMAN*'S AND *NIXON*'S LIMITATIONS ON CRIMINAL SUBPOENAS[4]

A. Prior Legal Precedent

Neither Farha nor the Magistrate Order cites a single Criminal Rule 17(c) decision that has permitted pretrial production of ***draft*** interview memoranda and attorney notes when final interview memoranda were already disclosed.

[4] The Magistrate's repeated reliance on the Government's decision not to object to the Subpoena is inscrutable, given that the Government lacks standing to object to third-party criminal subpoenas in the first place. *Nachamie*, 91 F. Supp. 2d at 558-61; *see also United States v. Tucker*, 249 F.R.D. 58, 60 n.3 (S.D.N.Y. 2008).

B. Criminal Subpoenas Cannot Obtain *Pretrial* Production Unless The Materials Are "Evidentiary," "Relevant," "Admissible," And "Specific"

Bowman and *Nixon* instruct that criminal subpoenas must "clear three hurdles: (1) relevancy; (2) admissibility; [and] (3) specificity." *Nixon*, 418 U.S. at 700. Implicit in these three hurdles is the requirement that the materials sought be "evidentiary." *Bowman*, 341 U.S. at 219.[5] Additionally, even if a criminal subpoena seeks relevant, admissible, and specific evidence, the party serving it must also show that (1) it is "not otherwise procurable reasonably in advance of trial by exercise of due diligence," (2) the party "cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial," and (3) "the application is made in good faith and is not intended as a general 'fishing expedition.'" *Nixon*, 418 U.S. at 702.

C. Farha's Criminal Subpoena Does Not Satisfy *Bowman*'s Requirements

1. The Defendants Can Properly Prepare For Trial Without Such Production And Inspection In Advance Of Trial

Farha can properly prepare for trial without the drafts and notes because he already has the final interview memoranda. *See SEC v. Uzzi*, 2003 WL 1342962, at *2 (S.D. Fla. 2003) (denying production of attorney notes where the "information that may exist in the notes" was "readily available" from other sources). Additionally, the notes' and drafts' only potential impeachment value is based exclusively on Farha's speculation. *See United States v. Hang*, 75 F.3d 1275, 1283-84 (8th Cir. 1996) (mere hope that documents will contain

[5] Farha conflates *Bowman*'s "evidentiary value" test with *Nixon*'s "admissibility" test when he contends the Court can order pretrial production of the notes and drafts merely because they "have evidentiary value." Opp'n (Dkt. No. 122) at 1, 5 (citing *In re Martin Marietta Corp.*, 856 F.2d 619, 626-27 (4th Cir. 1988)). This is wrong. Evidentiary value is merely one of several Criminal Rule 17(c) requirements for pretrial production.

favorable evidence constitutes an improper fishing expedition). Because Farha can prepare for trial with the memoranda already disclosed, pretrial production of the drafts and notes would improperly transform Criminal Rule 17(c) into a discovery device.

2. The Criminal Subpoena Is A General Fishing Expedition That Is Not Made In Good Faith

Rule 17(c) "is not a discovery device to allow criminal defendants to blindly comb through [a subpoenaed party's] records in a futile effort to find a defense to a criminal charge." *United States v. Tokash*, 282 F.3d 962, 971 (7th Cir. 2002). In reviewing Farha's demand, it is obviously a bad faith "fishing expedition," because Farha can point to nothing other than his own speculation about what the drafts and notes may or may not contain. *See Hang*, 75 F.3d at 1283-84. Absent any showing of specificity, Farha's request should be denied.

3. The Attorney Drafts And Notes Are Not Evidentiary

The notes and drafts have no evidentiary value because they are not the witnesses' prior statements. Rather, they are merely a third party's characterizations of the witnesses' prior statements: "a witness may not be impeached with a third party's characterization or interpretation of a prior oral statement unless the witness has subscribed to or otherwise adopted the statement as his own." *United States v. Saget*, 991 F.2d 702, 710 (11th Cir. 1993); *see also United States v. Almonte*, 956 F.2d 27, 29 (2d Cir. 1992) ("'third party's characterization' of a witness's statement does not constitute a prior statement unless that witness subscribed to that characterization" (citation omitted)). For that reason, courts have not hesitated to quash subpoenas seeking such unfounded impeachment materials as inadmissible under *Nixon*. *E.g.*, *United States v. Weissman*, 2002 WL 31875410, at *2

(S.D.N.Y. 2002) (quashing criminal subpoena for "interview notes" as inadmissible under *Nixon* because "while a prior inconsistent statement of a witness may be admitted to impeach a witness's testimony, Kramer Levin—not the witnesses—prepared the interview notes").

Moreover, "documents are not evidentiary for Rule 17(c) purposes if their use is limited to impeachment." *United States v. Cherry*, 876 F. Supp. 547, 553 (S.D.N.Y. 1995); *cf. United States v. Liddy*, 478 F.2d 586, 587-88 (D.C. Cir. 1972) ("In general, pre-trial statements by a prospective government witness 'ripen into evidentiary material for purposes of impeachment if and when, and only if and when, the witness who has made the statement takes the stand and testifies.'" (citation omitted)).

Here, no witnesses ever reviewed, subscribed to, or adopted any of the attorney notes or drafts. At most, therefore, the notes and drafts could be used to impeach the lawyers who took and drafted them, not the interviewees.

D. The Criminal Subpoena Does Not Satisfy *Nixon*'s Requirements

1. Absent Exceptional Or Unique Circumstances, Courts Refuse To Order Pretrial Production Of Inadmissible Impeachment Materials

The Criminal Subpoena does not seek "direct evidence"; rather, the only purpose for the drafts and notes is for "possible impeachment purposes." Opp'n at 3. "Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial." *Nixon*, 418 U.S. at 701. Indeed, the Second, Third, Sixth, Ninth, and D.C. Circuits recognize that Criminal Rule 17(c) does not permit pretrial production of impeachment evidence because it remains inadmissible until the witness has testified. *United States v. Jackson*, 345 F.3d 59, 76 (2d Cir. 2003); *United States v. Cuthbertson*, 651 F.2d 189, 195 (3d Cir. 1981); *United States v. Hughes*, 895 F.2d 1135, 1146 (6th Cir. 1990); *Fields*, 663 F.2d at

881; *Liddy*, 478 F.2d at 587-88. Virtually every other court to consider the question has reached the same conclusion.[6]

In *United States v. Reyes*, a criminal defendant sought production of notes and interview memoranda related to a corporation's internal investigation. 239 F.R.D. 591 (N.D. Cal. 2006). The court refused because such internal investigation materials were inadmissible hearsay. *Id.* at 600-01. As such, "[u]nfortunately for Reyes, Rule 17(c) does not entitle him to the pre-trial production of impeachment material." *Id.* at 602 (citing *Nixon*, 418 U.S. at 701).[7] Farha's incomplete statement of the law wrongly suggests the Court's discretion renders Criminal Rule 17(c)'s strictures merely optional.

The sole exception to this general prohibition is where there is "no uncertainty" whether a given witness will testify, the witness's likely testimony is already known, and the impeachment material is "essential for a proper preparation of trial." *United States v. King*, 194 F.R.D. 569, 574-75 & n.5 (E.D. Va. 2000); *see also Wittig*, 250 F.R.D. at 553-54 ("some courts have concluded that when a person is almost certain to testify as a witness at trial and there is an indication of what that testimony will be, then pretrial production is appropriate,"

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[6] *See United States v. Wittig*, 250 F.R.D. 548, 553 (D. Kan. 2008) ("prior to trial, impeachment materials may not be obtained through a Rule 17(c) subpoena because such materials fail *Nixon*'s admissibility requirement"); *Weissman*, 2002 WL 31875410, at *1 ("several cases articulate an absolute prohibition on the use of a Rule 17(c) subpoena solely for impeachment purposes"); *United States v. Jenkins*, 895 F. Supp. 1389, 1393-94 (D. Haw. 1995) (criminal subpoenas cannot be used to gather impeachment materials); *United States v. Messino*, 882 F. Supp. 115, 116 (N.D. Ill. 1995) (criminal subpoena was "premature" where witness "has not yet testified" and was "not certain" to testify); *Cherry*, 876 F. Supp. at 553 ("documents are not evidentiary for Rule 17(c) purposes if their use is limited to impeachment"); *United States v. Giampa*, 1992 WL 296440, at *3 (S.D.N.Y. 1992) (criminal subpoena was "premature" because "such materials will only ripen, if at all, into evidentiary materials, for impeachment purposes, when Mr. D'Arco testifies at trial"); *see also United States v. Beckford*, 964 F. Supp. 1010, 1031-32 (E.D. Va. 1997).

[7] *Reyes* ordered production of the materials for *in camera* review "so that the court may review the material and disclose it, if ever, when it becomes ripe for impeachment." 239 F.R.D. at 601.

but "impeachment evidence only ripens into admissible evidence after the witness has presented direct testimony at trial").[8]

Here, this trial is scheduled one year away, the Government has not disclosed its witness list, and the Criminal Subpoena seeks inadmissible hearsay evidence. Farha meekly claims (Opp'n at 7) that the witnesses are "logically among" those whom the Government will call. Unfortunately, the case law reflects this is not enough, and Farha's request should be rejected.

2. The Criminal Subpoena Fails Nixon's Specificity Requirement

The Criminal Subpoena also fails *Nixon*'s specificity requirement because Farha provides only conjecture as to how the notes and drafts differ from the final interview memoranda. *See* Opp'n at 3. *Nixon*'s "'specificity and relevance elements,'" however, "'require more than the title of a document and conjecture as to its contents.'" *Hang*, 75 F.3d at 1283 (quoting *United States v. Arditti*, 955 F.2d 331, 345 (5th Cir. 1992)). "'If the moving party cannot reasonably specify the information contained or believed to be contained in the documents sought but merely hopes something useful will turn up, the requirement of specificity will not have been met.'" *Tucker*, 249 F.R.D. at 62-63 (citation omitted). As such, *Nixon*'s specificity requirement is not met where, as here, "defense counsel merely speculates that the materials ***may*** constitute inconsistent statements of expected witnesses." *Weissman*, 2002 WL 31875410, at *1 (emphasis in original). Courts therefore quash

[8] Farha's cases are readily distinguishable, because they either involve extraordinary or unique circumstances in which (1) key witnesses, whose general testimony was already known, were scheduled to testify, *see United States v. LaRouche Campaign*, 841 F.2d 1176, 1180 & n.7 (1st Cir. 1988); *United States v. Neal*, 2011 WL 4829664, at *2 (D. Colo. 2011); *King*, 194 F.R.D. at 573-75, or (2) no hearsay objection was interposed, *see In re Martin Marietta*, 856 F.2d at 622; *United States v. Clemens*, __ F. Supp. 2d __, 2011 WL 2489743 (D.D.C. June 23, 2011).

criminal subpoenas whenever the proponent has "failed to establish with sufficient specificity the evidentiary nature of the requested materials" and "cannot set forth what the subpoenaed materials contain" other than "speculat[ion]." *United States v. Hardy*, 224 F.3d 752, 756 (8th Cir. 2000). Indeed, without sufficient specificity, district courts are not even required to conduct an *in camera* review. *United States v. Morris*, 287 F.3d 985, 991 (10th Cir. 2002). Clearly, from the arguments presented by Farha, any statement describing the contents of the draft and notes is idle speculation, which does not meet the *Nixon* standards.

III. THE MAGISTRATE ORDER MISAPPLIES THE WORK-PRODUCT DOCTRINE

A. The Work-Product Doctrine Preserves The Litigation Process's Sanctity

Even if otherwise valid, the Magistrate should have quashed the Criminal Subpoena because "it calls for privileged matter." 2 Wright & Miller, *Federal Practice & Procedure: Criminal* § 276 (4th ed. 2011). The work-product doctrine "is distinct from and broader than the attorney-client privilege." *In re Grand Jury Proceedings*, 601 F.2d 162, 171 (5th Cir. 1979). It prevents litigants from intruding upon an attorney's work product as reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways" when obtained or prepared "with an eye toward litigation." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). "'[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.'" *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1421 (11th Cir. 1994) (quoting *Hickman*, 329 U.S. at 393). "Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in

assuring the proper functioning of the criminal justice system is even more vital." *United States v. Noble*, 422 U.S. 225, 238 (1975).

B. The Final Interview Memoranda, Drafts, And Notes Are Protected By The Work-Product Doctrine

1. WellCare's Internal Investigation Retained Its Work-Product Protections Despite Its Dual Legal And Business Purposes

From the outset, the Special Committee's primary purpose was to address ongoing criminal investigations, regulatory inquiries, and impending civil litigation; all of which came to pass. Ordinarily, internal investigations are conducted in anticipation of litigation and create privileged attorney work product. *E.g.*, *In re Grand Jury Investigation*, 599 F.2d 1224, 1228-30 (3d Cir. 1979). In *United States v. Davis*, the former Fifth Circuit stated that for the work-product doctrine to apply, "litigation need not necessarily be imminent" so "long as the ***primary motivating purpose*** behind the creation of the document was to aid in possible future litigation." 636 F.2d 1028, 1040 (5th Cir. 1981) (emphasis added). Here, the internal investigation's primary motivating purpose was formulating a litigation response to the ensuing government investigation and impending civil litigation.

Although a secondary purpose was for business needs, such as SEC reporting, that does not destroy work-product protections.[9] *E.g.*, *Hoover v. U.S. Dep't of Interior*, 611 F.2d 1132, 1139 n.8 (5th Cir. 1980) (extending work-product protection to appraisals prepared "both for the purpose of providing a basis for an offer, and to support a claim of just

[9] To the extent the Magistrate made any factual findings based on nothing more than lawyer assertions without the benefit of an evidentiary hearing, such as that the primary motivating purpose of the internal investigation was for business rather than legal needs or that WellCare always intended to waive its legal privileges over the internal investigation's work product, those findings are entitled to even "less deference than they would otherwise be entitled to under the 'clearly erroneous' standard of review." *Peek v. Kemp*, 784 F.2d 1479, 1505 (11th Cir. 1986).

compensation at a subsequent condemnation suit"); *see also United States v. Adlman*, 134 F.3d 1194, 1197-1203 (2d Cir. 1998) (canvassing authorities and adopting "because of" test, which permits dual-purpose documents); *In re Grand Jury Subpoena*, 357 F.3d 900, 907-10 & n.2 (9th Cir. 2004) (same). Indeed, many courts extend work-product protections to dual-purpose documents while rejecting the distinction between legal and business purposes as "artificial, unrealistic, and . . . essentially blurred to oblivion." *In re Woolworth Corp. Sec. Class Action Litig.*, 1996 WL 306576, at *3 (S.D.N.Y. 1996). A contrary rule would "eviscerate" the work product doctrine because publicly traded corporations always have mixed legal and business motives. *Hollinger Int'l Inc. v. Hollinger Inc.*, 230 F.R.D. 508, 515 n.9 (N.D. Ill. 2005). Not surprisingly, courts applying the *Davis* test routinely extend work-product protection to dual-purpose documents. *In re Trasylol Prods. Liab. Litig.*, 2009 WL 2575659, at *6 (S.D. Fla. 2009); *Eisenberg v. Carnival Corp.*, 2008 U.S. Dist. LEXIS 56573, at *7 (S.D. Fla. 2008); *United States v. Gericare Med. Supply Inc.*, 2000 U.S. Dist. LEXIS 19662, at *8-9 (S.D. Ala. 2000); *cf. Alexander v. Carnival Corp.*, 238 F.R.D. 318, 319-20 (S.D. Fla. 2006).[10]

[10] Defendants misplace their reliance (Dkt. No. 53 at 15-16) on *McMahon v. E. S.S. Lines, Inc.*, 129 F.R.D. 197 (S.D. Fla. 1989), *In re Royal Ahold N.V. Securities Litigation*, 230 F.R.D. 433 (D. Md. 2005), *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459 (S.D.N.Y. 1996), and *In re Leslie Fay Cos., Inc. Securities Litigation*, 161 F.R.D. 274 (S.D.N.Y. 2008). Ironically, *McMahon* ***completely undercuts*** Farha's position, because it held an internal investigation report was protected by the work-product doctrine under the *Davis* test notwithstanding its dual legal and business purposes. 129 F.R.D. at 199. *In re Royal Ahold* is easily distinguishable because it involved a chairman who announced the internal investigation was motivated primarily by business needs, and the application of the Fourth Circuit's more stringent test that prohibits dual-purpose documents. 230 F.R.D. at 435-36 & n.2. Likewise, *In re Kidder* and *In re Leslie Fay* involved the application of a more stringent "principally ***or exclusively***" test and factual findings that the internal investigations were primarily driven by business considerations, not legal needs. 168 F.R.D. at 467; 161 F.R.D. at 280-81. As such, they extend *Davis*'s rule far beyond its facts and original meaning in prohibiting work-product protections for dual-purpose documents. *Adlman*, 134 F.3d at 1197-1203 (rejecting wooden interpretation of *Davis* as improvident dictum).

2. The Internal Investigation Materials Are Opinion Work Product

WellCare's internal investigation materials constitute opinion work product. Opinion work product "consists of materials . . . that reflect an attorney's mental impressions, conclusions, opinions, or legal theories," whereas fact work product "includes all other documents and tangible things." *Maplewood Partners, L.P. v. Indian Harbor Ins. Co.*, 2011 WL 3918597, at *3 (S.D. Fla. 2011).

"In *Upjohn*, the Supreme Court made clear that an attorney's notes and memoranda of a witness's oral statements is considered to be opinion work product." *Cox*, 17 F.3d at 1421; *see also Upjohn Co. v. United States*, 449 U.S. 383, 399-400 (1981) (attorney's notes and memoranda of a witness's oral statements are opinion work product); *accord United States v. Paxson*, 861 F.2d 730, 736 (D.C. Cir. 1988). An attorney's notes of witnesses' oral statements "tends to reveal the attorney's mental processes because it discloses 'what he saw fit to write down regarding witnesses' remarks.'" *Hollinger*, 230 F.R.D. at 512 (quoting *Upjohn*, 449 U.S. at 399). As such, "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored." *Upjohn*, 449 U.S. at 399.

Outside Counsel's notes, drafts, and final interview memoranda were not verbatim transcriptions, but rather were attorneys' summaries and characterizations of witnesses' statements.[11] *See supra* p. 5 & note 1. As such, they are opinion, not fact, work product, and should receive the requisite protection.

[11] Defendants claim that the internal investigation's documents were never privileged, but they misplace their reliance (Dkt. No. 53 at 15) on *United States v. Oloyede*, 982 F.2d 133 (4th Cir. 1992), *Esposito v. United States*, 436 F.2d 603 (9th Cir. 1970), and *In re Syncor ERISA Litig.*, 229 F.R.D. 636 (C.D. Cal. 2005). *Oloyede* and *Esposito* involved the attorney-client privilege, not the work-product doctrine. And *In re Syncor* involved a fact not present here: "those documents were created with the intent to disclose them to the Government, if

C. WellCare's Disclosure Of The Final Interview Memoranda Did Not Waive The Drafts' And Notes' Work-Product Protections

1. There Was No Waiver Of The Opinion Work Product Privilege

Even though WellCare did disclose pertinent information to the Department of Justice, the "subject-matter waiver doctrine does not extend to materials protected by the opinion work product privilege." *Cox*, 17 F.3d at 1422 (citing with approval *In re Martin Marietta Corp.*, 856 F.2d 619, 625-26 (4th Cir. 1988)). As such, although WellCare may have waived its work-product protections with respect to the final interview memoranda produced to the United States, it did not waive opinion work-product protections of Outside Counsel's internal notes and drafts.[12] *See In re Trasylol*, 2009 WL 2575659, at *6; *In re Vioxx Prods. Liab. Litig.*, 2007 WL 854251, at *4 (E.D. La. 2007); *Ziner v. Cedar Crest College*, 2006 U.S. Dist. LEXIS 34858, at *15 (E.D. Pa. 2006); *Hollinger*, 230 F.R.D. at 511-19; *In re Commercial Fin. Servs., Inc.*, 247 B.R. at 853; *In re Woolworth*, 1996 WL 306576, at *3. Indeed, the "fact that final drafts were intended to be disclosed . . . does not render the privilege inapplicable" because otherwise prior drafts of pleadings would lack protection from disclosure. *In re Hillsborough Holdings Corp.*, 176 B.R. 223, 237 (M.D. Fla. Bkr. 1994) (quoting *Carey-Canada Inc. v. Cal. Union Ins. Co.*, 118 F.R.D. 242, 246 (D.D.C. 1986)).

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necessary, to benefit Syncor in any governmental investigation." 229 F.R.D. at 645. Here, WellCare's Board did not ultimately decide to waive its legal privileges until just before the February 20, 2008 disclosure.

[12] *Clemens* is distinguishable, because Outside Counsel's interviews required unique legal preparations and strategy, government agents and attorneys did not attend the interviews, and Outside Counsel characterized the witness's statements rather than striving for verbatim accuracy. *See* 2011 WL 2489743, at *14.

2. Fairness Does Not Require Pretrial Production

Despite Defendants' complaints (Dkt No. 53 at 20-21, Dkt. No. 122 at 8), there is no unfairness in denying pretrial production of the drafts and notes. Although there is subject-matter waiver where "fairness requires," Fed. R. Evid. 502(a) cmt., there is no fairness concern here because no party, not even WellCare itself, has ever possessed these drafts and notes. *See In re Grand Jury Proceedings*, 350 F.3d 299, 303-04 (2d Cir. 2003) (rejecting fairness argument). Through the lens of pure fairness, Farha cannot remotely demonstrate substantial need to overcome the drafts' and notes' work-product protections because he already has access to the final memoranda. *E.g.*, *Ziner*, 2006 U.S. Dist. LEXIS 34858, at *13-14; *In re Woolworth*, 1996 WL 306576, at *3.

LOCAL RULE 3.01(J) REQUEST FOR ORAL ARGUMENT

WellCare respectfully requests two hours of oral argument.

CONCLUSION

WellCare respectfully requests the Court to enter an Order setting aside the Magistrate Order and quashing the Subpoena.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 20, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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