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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
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MINUTE ENTRY
SHUSHAN, M.J.
FEBRUARY 19, 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MURPHY OIL USA, INC.

CIVIL ACTION

VERSUS

NO: 99-3564

FLUOR DANIEL, INC.

SECTION: "T"(1)

HEARING ON MOTION

APPEARANCES: Submitted on briefs

MOTION: MOTION TO COMPEL DISCOVERY RESPONSES FROM FLUOR DANIEL INCLUDING THOSE RELATED TO FRAUD ALLEGATIONS AND FOR ATTORNEYS FEES (Rec. doc. 41).

GRANTED IN PART AND DENIED IN PART

Before the undersigned is the motion of the plaintiff, Murphy Oil U.S.A., Inc. ("Murphy"), to compel the defendant, Fluor Daniel, Inc. ("Fluor Daniel"), to respond to interrogatories and requests for production of documents and for attorney's fees. Rec. doc. 41. Fluor submitted a memorandum in opposition (Rec. doc. 44); Murphy submitted a reply (Rec. doc. 49); and Fluor

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submitted a supplemental memorandum in opposition. The last two submissions by the parties showed that Fluor served discovery responses that resolved all but four issues: (1) Fluor's production of e-mail; (2) its response to interrogatory 5; (3) its response to interrogatory 21; and (4) Murphy's request for attorney's fees.

BACKGROUND

Murphy contracted with Fluor for the performance of a "turnaround" at its refinery in Meraux, Louisiana. Murphy describes the project as a general inspection and overhaul. Fluor describes it as repair and maintenance work. Fluor performed the work in 1999. Murphy seeks damages in the millions of dollars for Fluor's alleged breach of the contract. Fluor counterclaimed and alleged: (1) breach of contract claims; (2) claims for additional amounts due under the contract; and (3) claims based upon fraudulent and negligent misrepresentation.

FLUOR'S E-MAILS

Murphy seeks an order compelling Fluor to produce e-mail responsive to all of Murphy's discovery requests. Fluor argues that the expense of production outweighs the benefit of discovery. Murphy contends Fluor was contractually obligated to save and maintain the e-mail for its inspection. The contract between Murphy and Fluor contained the following provision:

OWNER'S [Murphy] duly authorized representative shall have access . . . to all CONTRACTOR'S [Fluor] . . . books, records, correspondence, instructions, plans, drawings, receipts, vouchers, data stored in computers, and memoranda of every description pertaining to WORK under CONTRACT for the purpose of auditing or for any other reasonable purpose.

Rec. doc. 41 at 5. Fluor contends that this provision only applies to electronic data dealing with the turnaround, such as engineering and scheduling and it does not apply to intra-company e-mail communications. Murphy replies there is no basis for this distinction. Even assuming that Fluor is

not in compliance with its contractual obligations to maintain the e-mail "for the purpose of auditing or for any other reasonable purpose," it does not resolve the issue of the cost of production.

Fluor says the turnaround work at the Murphy refinery occurred in January and February of 1999, but the bidding and planning stages began as early as February 27, 1998 and some pertinent activity continued through April of 1999. During this fourteen month period there were 37 individuals at Fluor involved in the Murphy turnaround. Each of these had a mail box on the Fluor e-mail system. These 37 persons were not exclusively involved in the Murphy turnaround, so they sent and received some e-mail that was unrelated to the project.

During this period there were more than 650 other mail boxes on the Fluor e-mail system. Because of these employees' non-involvement in the turnaround, it must be inferred that they neither sent nor received any e-mail communications pertaining to it. Thus, only about five percent of the assigned e-mail boxes contain any e-mail pertinent to the Murphy turnaround, and within those mail boxes only a portion of the e-mail will pertain to the Murphy turnaround.

During the course of the fourteen month period Fluor contemporaneously printed 157 e-mail communications and made them part of the files on the Murphy turnaround. Fluor reports that it produced 33 of these and designated 114 as privileged. Fluor did not contemporaneously print all of the e-mails concerning the Murphy turnaround and Fluor has not described any policy that determined which ones were of sufficient importance to be printed and filed.

Fluor's e-mail retention policy provided that backup tapes were recycled after 45 days. If Fluor had followed this policy, the e-mail issue would be moot. Fluor does not explain why, but it

maintained its backup tapes for the entire fourteen month period.¹ As a consequence it has 93 e-mail backup tapes. Each tape includes not only the e-mail communications for the 37 persons involved in the Murphy turnaround, but also from the 650 other mail boxes.

Fluor hired IKON Office Solutions ("IKON") for a pilot project to restore data from representative samples of Fluor backup tapes for the fourteen month period and to provide a detailed estimate of the cost of processing all e-mail from the mailboxes of the 37 Fluor individuals who worked on the Murphy turnaround. Fluor submitted an affidavit describing the following steps to be performed on the 93 backup tapes: (1) restore the tape; (2) convert all e-mail and attachment files to a TIFF² format (each of the 93 tapes is estimated to have 25,000 e-mail messages); (3) break password protected e-mail attachment files; and (4) print all TIFF images (estimated at 2.3 million e-mail communications plus attachments, or 19.7 million pages). IKON estimates it will take \$6.2 million and more than 6 months to complete this project. Exhibit 2 to Rec. doc. 44. Fluor contends that it will be necessary for its counsel to review all of the documents to determine those that pertain to the Murphy turnaround and from that group determine whether any are privileged.

Murphy correctly argues that since Fluor seeks rescission for error and fraud Murphy must be able to show what Fluor knew about the project and when it knew it. Murphy also argues that

¹ Murphy appears to contend that Fluor did this in compliance with the contract, but this does not follow from Fluor's description of the cost of retrieving e-mail pertaining to the project from the backup tapes. Fluor shows that Murphy followed its own document retention policy and so has no backup tapes for e-mail message for the fourteen month period. Fluor further contends that Murphy had an obligation to maintain its backup tapes of e-mail communications, because the tapes were destroyed at a time that Murphy planned to file the lawsuit. Fluor, however, does not seek any relief from Murphy on this issue, so it is not before the undersigned.

² Tagged Image File Format ("TIFF").

the contemporaneous e-mail communications among the Fluor employees may be the best source of this information. Murphy contends that e-mail may show whether Fluor's failure to perform was attributable to its own fault, rather than Murphy's alleged fraud. Even Murphy couches what it contends the e-mail will show in terms of possibilities, because until the e-mail communications are reviewed no one can be certain what they contain and they may contain nothing of value to Murphy's claims or defenses.

Fluor contends that Murphy has failed to demonstrate how and why Fluor's electronic communications are so critical to Murphy's claims as to merit the cost of retrieval. It also contends that Murphy has failed to identify a single factual dispute that it believes will support its allegations with additional documents. Fluor ignores that Murphy has shown the importance of contemporaneous information to the fraud and error issues. At this point it is impossible to show whether the e-mail communications are critical to Murphy's defense of those issues.

If all of the e-mail for the Fluor persons involved in the Murphy project was segregated, the undersigned would have little hesitation in ordering the production of the non-privileged e-mail. The fact remains that Fluor has presented uncontroverted evidence that it would cost \$6.2 million and take more than six months, excluding attorney time, to place the e-mail in a form where it can be produced.

Fluor contends that if it is required to produce the e-mail, Murphy should bear the entire cost of production and the production should be substantially narrowed. Fluor does not, however, suggest how the production can be narrowed in order to reduce its cost. Murphy replies that Fluor should produce copies of the backup tapes to Murphy, but Fluor responds that: (1) it is not possible to directly copy Fluor's backup tapes; and (2) it would be highly prejudicial for Murphy to receive

e-mail from throughout Fluor that is unrelated to the Murphy turnaround and which may contain privileged or confidential information.

ANALYSIS

The issue before the court is which party should bear the cost of retrieval, production and review of the responsive e-mail.

[T]he presumption is that the responding party must bear the expense of complying with discovery requests, but he may invoke the district court's discretion under Rule 26(c) to grant orders protecting him from "undue burden or expense" in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery.

Oppenheimer Fund, Inc. v. Sanders, 98 S.Ct. 2380, 2393 (1978). When a party, as does Fluor, contends that the burden or expense of the discovery outweighs the benefit of the discovery, Fed.

R. Civ. P. 26(b)(2)(iii) requires the court to take into account:

[T]he needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Id.

Rowe Entertainment, Inc. v. The William Morris Agency, Inc., 2002 WL 63190 (S.D.N.Y. Jan. 16, 2002), provides sound guidance for resolution of these issues where the retrieval, production and review of e-mail from backup tapes is at issue. In Rowe, black concert promoters contended they were frozen out of the market for promoting events with white bands through discriminatory and anti-competitive practices of the defendant booking agencies and promoters. The plaintiffs served sweeping discovery requests. The defendants moved for an order relieving them of producing e-mail responsive to the plaintiffs' request because the burden and expense involved would far outweigh any possible benefit. Rowe outlined the burden on each defendant. One of defendants,

The William Morris Agency, Inc. ("WMA"), presented problems similar to the ones described by Fluor.

[I]n order to comply with this [request] it must engage in a three-step process: cataloguing, restoring, and processing. Cataloguing involves identifying the tapes that contain the mailbox files of the designated employees and marking them for restoration. Restoration consists of saving all e-mails from the identified files to a master database and then removing all duplicates. Finally, each file must be processed so that it is not only readable on a computer screen, but also may be printed and Bates-stamped. Where an e-mail contains an attached file such as a word processing document, WMA proposes converting the attachment into a Tagged Image File Format or "TIFF" file. According to WMA, this would be necessary in order to make any redactions.

Id. at *2 (Citations omitted). WMA submitted a cost estimate from a computer consultant, Fios, Inc., of \$395,944 for eight selected backup tapes and \$9.75 million for all backup tapes. Id. at *2. The plaintiffs disputed WMA's estimate and their consultant said WMA could provide responsive e-mail communications at a cost of \$24,000 to \$87,000.

Fluor argues that it printed out the important e-mail communications, so there is no need for it to produce the e-mail on the backup tapes. Rowe rejected this contention by the defendants. The defendants did not show any policy that defined what e-mail should be reduced to hard copy because of its importance. Id. at *7. Fluor also has not shown any such policy.

As with Murphy's demand for Fluor's e-mail, the critical issue in Rowe was who should bear the cost of producing the e-mail. The traditional rule when dealing with paper records is that the responding party should bear the costs. In contrast, Rowe points out that:

[E]ven if this principle is unassailable in the context of paper records, it does not translate well into the realm of electronic data. The underlying assumption is that the party retaining information does so because that information is useful to it, as demonstrated by the fact that it is willing to bear the costs of retention. That party may therefore be expected to locate specific data, whether for its own needs or in response to a discovery request. With electronic media, however, the syllogism

breaks down because the costs of storage are virtually nil. Information is retained not because it is expected to be used, but because there is no compelling reason to discard it. And, even if data is retained for limited purposes, it is not necessarily amenable to discovery.

Id. at *7. Rowe described backup tapes as not amenable to discovery because their purpose was to permit the recovery of data in the event of a disaster and they are not created for the purpose of archival preservation. Fluor's description of its backup tapes conforms to Rowe's description. After considering the traditional approaches for imposing the costs on either the responding party or the requesting party, Rowe said:

Because of the shortcomings of either bright-line rule, courts have adopted a balancing approach taking into consideration such factors as: (1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party. Each of these factors is relevant in determining whether discovery costs should be shifted in this case.

Id. at *8.

a. Specificity of Murphy's Requests

In Rowe this issue weighed in favor of shifting the costs to the plaintiffs because of the "sweeping" nature of their requests. Id. at *8. Murphy only seeks e-mail responsive to its supplemental interrogatories and requests for production of documents. Fluor does not urge these are sweeping discovery requests. This factor favors maintaining the cost of discovery with Fluor.

b. Likelihood of a Successful Search

In Rowe there was "a high enough probability that a broad search of the defendants' e-mails will elicit some relevant information that the search should not be precluded altogether." Id. at *9.

But there was no showing by deposition testimony or other evidence that any e-mail communications allegedly reflected discriminatory or anti-competitive practices. Rowe described the marginal value of searching the backup tapes as modest at best. This weighed in favor of imposing the cost on the plaintiffs, who were seeking the information. Id. at *9. Murphy has not pointed to any evidence that shows that "the e-mails are likely to be a gold mine." Id. at *9. Murphy has only referred to the fact that the e-mails are contemporaneous communications. The inference is that the e-mails will reflect more candor than may be found in the hard copy documents or in the recollections of witnesses. Under all of the circumstances, the marginal value of searching the e-mail is modest at best and therefore this factor weighs in favor of imposing the cost of the search on Murphy.

c. Availability From Other Sources

Rowe cites Anti-Monopoly, Inc. v. Hasbro, Inc., 1996 WL 22976, at *1 (S.D.N.Y. Jan. 23, 1996), for the proposition that when the defendant produces hard copies and the plaintiff also wants the documents in electronic form, the plaintiff is required to bear the cost. In Rowe there was no showing that the defendants' e-mail communications were generally available other than by a search of their hard drives or backup tapes. Rowe found that this weighed in favor of the defendants bearing the expense of production. 2002 WL 63190, at *9. The same situation is present with Fluor's e-mail, so this factor weighs in favor of Fluor bearing the cost of the production.

d. Purposes of Retention

Rowe said:

[A] party that happens to retain vestigial data for no current business purposes, but only in case of an emergency or simply because it has neglected to discard it, should not be put to the expense of producing it. In this case, the back-up tapes clearly fall into this category. There is no evidence that the defendants themselves ever search these tapes for information or even have a means for doing

so. Cost-shifting is therefore warranted with respect to the back-up tapes.

Id. at *10. Murphy has not shown that Fluor retained the backup tapes for any current business purpose. Fluor has shown that its retention policy did not call for these backup tapes to be retained after 45 days. Rec. doc. 44 at p. 12. As in Rowe, this factor favors shifting the cost of production to Murphy.

e. Benefit to the Parties

Rowe found that where the responding party itself benefitted from the production, there was less rationale for shifting the costs to the requesting party. Murphy has not shown that Fluor will derive any benefit from the production. In Rowe there was consideration of whether the defendants' e-mail communications were relevant to any issue on which they carried the burden of proof. There is no showing that the e-mail is relevant to Fluor's claims of alleged breach of contract and fraud, so this factor weighs in favor of shifting the cost to Murphy.

f. Total Costs

Rowe found that even at the plaintiffs' estimate of \$24,000 to \$87,000 for the cost to produce the WMA e-mail, the magnitude of the expenses favored shifting the costs to the plaintiffs. Here there is only the one estimate of more than \$6 million. As noted, the procedure described by IKON bears some similarity to the procedure described in Rowe for WMA. In the absence of any evidence from Murphy, the undersigned must accept Fluor's estimate of the cost. Its magnitude clearly favors shifting the cost to Murphy.

g. Ability to Control Costs

Rowe found this factor favored shifting the cost to the plaintiffs because of their low estimate of the cost to produce the documents. Murphy has not submitted its own estimate. Rowe also found

that the discovery process would be incremental in that the plaintiffs would be able to calibrate their discovery based upon what they learn from their initial sampling. Id. at *11. The same holds for Fluor's e-mail, so this factor weighs in favor of Murphy bearing the cost.

h. The Parties' Resources

In Rowe all parties had sufficient resources to bear the cost of the litigation, so this was a neutral factor. The same is true in this contest between Murphy and Fluor, so this factor does not weigh in favor of either party.

Of the eight relevant factors described in Rowe, five weigh in favor of shifting the cost of production to Murphy, two weigh in favor of Fluor bearing the cost and one is neutral. The relevant factors tip in favor of shifting the cost to Murphy.

i. Privilege Claims

The final issue addressed by Rowe was the contention of the defendants that the e-mail contained privileged and confidential communications. The Rowe defendants provided estimates of between \$120,000 and \$250,000 to review the documents for privileged and confidential communications. Fluor also says that the e-mail must be reviewed by it to cull out privileged and confidential communications. Rowe addressed these issues in the following manner:

1. Copies of the backup data would be produced to the plaintiffs, so the plaintiffs could extract the e-mail at their expense;
2. The confidentiality of the e-mail communications would be preserved through a protective order that included a requirement that the e-mail communications be reviewed on an attorneys'-eyes-only basis; and
3. The review of attorney-client documents would not be deemed a waiver of the privilege.

Id. at *11. Rowe noted, however, that it could not compel the disclosure of privileged

communications.

Therefore, it must be determined who should bear the costs if, notwithstanding the recommended precautions, the defendants still choose to conduct a complete review prior to production. Apparently, the defendants retained privileged or confidential documents in electronic form but failed to designate them to specific files. This situation is analogous to one in which a company fails to shred its confidential paper documents and instead leaves them intermingled with non-confidential, discoverable papers. The expense of sorting such documents is properly borne by the responding party, and the same principle applies to electronic data. Accordingly, if any defendant elects to conduct a full privilege review of its e-mails prior to production, it shall do so at its own expense.

Id. at *12. Rowe held that if a defendant elected to conduct a review prior to production, then the full cost of retrieval from the backup tapes would be borne by that defendant. The undersigned must part company with Rowe on this issue. Fluor must have an opportunity to assert that e-mail is confidential or privileged without bearing the cost of retrieving the e-mail. Fluor, however, will have to bear the cost of culling pertinent e-mail from the non-responsive e-mail and identifying the privileged or confidential e-mail found within the pertinent e-mail.

Fluor has presented evidence that it cannot copy the backup tapes. The undersigned has found that the initial purpose of the backup tapes was to provide a means of retrieval for a limited period in the event of an emergency. This is in accord with Fluor's description of its retention policy that backup tapes were to be recycled after 45 days. In the absence of evidence to the contrary, the undersigned assumes that Fluor simply neglected to recycle the backup tapes in accord with its retention policy. Accordingly, the backup tapes from February 1998 through April 1999 no longer serve any purpose to Fluor. There is no harm to Fluor in producing the original backup tapes to an expert designated and paid for by Murphy.

As to Fluor's concern that Murphy will gain access to privileged or confidential information, Fluor has two choices. First, Fluor may review only the e-mail that Murphy has seen and determined is pertinent. If Fluor selects this option, there will be a protective order requiring that the e-mail extracted from the backup tapes be reviewed only by Murphy's outside counsel and persons retained by them, including Murphy's computer expert, and not by anyone associated with Murphy. Second, if Fluor wants to review the e-mail retrieved at Murphy's expense prior to Murphy's counsel seeing it, then Fluor has to bear the cost of culling out all the e-mail pertaining to the Murphy turnaround project and identifying those portions that it maintains are privileged. If Fluor selects this option, then Murphy's expert will have to agree in advance that it will not disclose any of the e-mail to Murphy until Fluor concludes the culling process and confidentiality and privilege issues are resolved.

j Protocol for Option One

Assuming Fluor selects option one and elects not to review the communications on the backup tapes prior to production, the parties shall follow the protocol described below, which is based upon the one described in Rowe. Id. at *12. As in Rowe the protocol contains guidelines that Murphy and Fluor may modify by agreement.

1. At its expense Fluor shall produce a log of the backup tapes to Murphy that identifies the dates of the e-mail communications on the backup tapes. Murphy shall select one tape (the "selected backup tape").
2. Murphy shall designate one or more experts who shall work for Murphy's counsel on the retrieval of the e-mail from the selected backup tape. Fluor shall be given an opportunity to object to the experts. If the parties cannot resolve Fluor's objection,

the parties shall initiate a conference with the undersigned. In no event shall anything be done to the selected backup tape until the issue of the designation of experts to perform the work is resolved. After the resolution of such issues and the required protective order³ is in place, the selected backup tape shall be delivered to Murphy's experts.

3. Murphy's counsel shall review the e-mail communications retrieved by the designated experts from the selected backup tape on an attorneys'-eyes-only basis. Once Murphy's counsel identify the e-mail communications they consider responsive to their discovery, they shall provide Fluor with hard copies with Bates numbers and the selected backup tape. Murphy shall destroy any hard copy or electronic documents not provided to Fluor. The costs associated with this step shall be borne by Murphy and from this point forward the costs shall be borne by the party incurring them.
4. Fluor shall review the documents and designate by reference to the Bates numbers four categories of documents in a privilege log: (1) proprietary; (2) attorney-client communications; (3) communications that represent the work product of an attorney; and (4) discoverable documents. After review of the privilege log, if Murphy agrees with Fluor's designation of a document as proprietary it shall be subject to the terms of a protective order. If Murphy agrees with Fluor's designation of a document as

³ If Fluor selects option one the parties shall submit an appropriate protective order that includes an attorneys'-eyes-only provision within ten (10) working days of the entry of this order. If Fluor selects option two, the protective order shall not include the attorneys'-eyes-only provision.

privileged, Murphy shall destroy its hard and electronic copies of the document.

5. If Murphy disagrees with Fluor's designation, then the parties shall present the issues to the undersigned for resolution, but only after a meeting to resolve the issues where each document is discussed. Fluor shall submit a proprietary/privilege log describing only the documents in dispute and a supporting memorandum. Murphy shall submit its memorandum. Fluor shall submit separately the documents for an *in camera* inspection.
6. The fact that an expert employed by Murphy's counsel or Murphy's counsel has reviewed a document that is determined to be proprietary or subject to any claim of privilege shall not constitute a waiver of the proprietary or privilege claim.
7. After the parties have worked through the protocol for the selected backup tape, they shall initiate a telephone conference with the undersigned to resolve further procedures.

k. Protocol for Option Two

If Fluor selects option two to review the e-mail communications on the backup tapes prior to production to Murphy, the parties shall follow the protocol guidelines described below.

1. The first two steps are the same as for the protocol for option one except that Murphy's experts shall agree in writing in a form acceptable to both parties that they shall not disclose to Murphy or its counsel any information pertaining to the substance of the e-mail communications until after the proprietary and privilege issues are resolved. Murphy's experts shall be able to communicate with Murphy's counsel during this phase concerning cost issues and technical issues only (for

example is it possible to retrieve e-mail only from certain mail boxes rather than from all mail boxes on the selected backup tape).

2. At Murphy's expense and direction, its experts shall retrieve the e-mail communications on the selected backup tape.
3. At its expense Fluor shall review the e-mail communications retrieved by Murphy's experts and cull out the e-mail communications that are not responsive to Murphy's discovery requests and Bates number the remaining e-mail. By reference to the Bates numbers Fluor shall designate the e-mail communications that it contends are proprietary or privileged. The responsive e-mail that is not subject to proprietary or privilege claims shall be produced to Murphy.
4. After review of the privilege log, if Murphy agrees with Fluor's designation of a document as proprietary, it shall be subject to the terms of the protective order described for the protocol for the first option.
5. If Murphy disagrees with Fluor's designation of proprietary or privilege, then the parties shall follow the procedure described in the protocol for the first option for the resolution of proprietary or privilege issues.
6. After the parties have worked through the protocol for the selected backup tape, they shall initiate a telephone conference with the undersigned to resolve further procedures.

INTERROGATORIES 5 AND 21

Interrogatory nos. 5 and 21 are as follows:

No. 5 Please identify by court and case number any lawsuit filed by or

against you regarding turnaround or plant maintenance services within the past ten years and identify the resolution of that suit, including whether there exists any unsatisfied judgment against you.

No. 21. Please identify the last ten (10) refinery turnaround projects which you contracted and performed. For each such project, please identify the start and completion dates, location, refinery owner, and identify the work performed.

Fluor argues that these two interrogatories are vague and ambiguous because the terms "turnaround" and "plant maintenance services" are not defined. Fluor contends that it performs services that could be characterized as "plant maintenance" at numerous plants in the United States and elsewhere in the world, and it does not track turnaround work separately from other work. Fluor argues that responding to these two interrogatories will impose an undue burden on it and that the interrogatories do not seek information regarding a matter that is relevant to the claim or defense of any party pursuant to Fed. R. Civ. P. 26(b)(1). It contends that evidence of its performance on other jobs is not relevant to its performance on its contract with Murphy.

Murphy responds that, notwithstanding Fluor's concerns with the terminology, Murphy is entitled to determine whether Fluor has made similar allegations of fraud against other plant owners so Murphy can question those plant owners concerning Fluor's allegations of fraud. Murphy may have a right to seek discovery from Fluor of contractual disputes where Fluor made allegations of fraudulent misrepresentation such as it has in this case, but interrogatory 5 is not so limited. Fluor contends that even if the interrogatory was so limited, the information sought would be not be relevant to a claim or defense of either party.

The undersigned agrees with Fluor that interrogatory 5 imposes an undue burden on it. Merely because Fluor is or has been in litigation over a maintenance or turnaround project elsewhere does not make it discoverable in this litigation. Murphy's motion to compel with respect to

interrogatory 5 will be denied without prejudice to Murphy's right to submit a more narrowly drawn interrogatory that seeks information on those projects where Fluor has raised defenses similar to the defenses that Murphy confronts.

Murphy has not shown that the information sought on Fluor's last ten refinery turnaround projects relates to a claim or defense by either party. Murphy's motion to compel with respect to interrogatory 21 is denied.

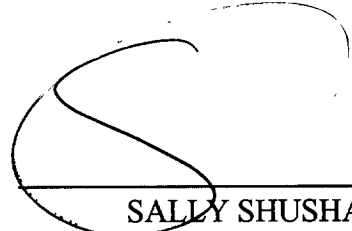
ATTORNEY'S FEES

Murphy's request for attorney's fees and costs is denied.

IT IS ORDERED that Murphy's motion to compel discovery responses from Fluor, including those related to fraud allegations and for attorneys' fees (Rec. doc. 41) is GRANTED in PART and DENIED in PART as follows:

1. Within ten (10) working days of the entry of this order the parties shall begin compliance with one of the two protocols for production of Fluor's backup tapes;
2. If an appropriate protective order has not already been entered in this matter, the parties shall submit a joint motion for a protective order within ten (10) working days of the entry of this order. If the parties cannot agree on the form of a protective order, they shall submit separate orders. The parties are cautioned that the undersigned will sign one of the two orders and will not attempt to bridge the gap between the two orders;
3. Murphy's motion to compel with respect to interrogatory 5 is denied without prejudice;
4. Murphy's motion to compel with respect to interrogatory 21 is denied;

5. Murphy's request for attorneys' fees and costs is denied; and
6. In the event either party appeals this order, the implementation of either protocol described herein shall be stayed.



SALLY SHUSHAN
United States Magistrate Judge

cc: District Judge Porteous