

WILMERHALE

August 29, 2023

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By ECF

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Judge Benita Y. Pearson  
Chambers 313  
Thomas D. Lambros United States Court House  
125 Market Street,  
Youngstown, Ohio

Re: *In re: East Palestine Train Derailment*; Case No. 4:23-CV-00242-BYP

Dear Judge Pearson:

Pursuant to Local Rule 37.1, and as directed by the Court, Defendants Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively “Defendants”) submit this position letter regarding their anticipated motion to quash Plaintiffs’ subpoena for the production of documents to Alvarez & Marsal Holdings, LLC (“A&M”) (Exhibit 1). Defendants are entitled to quash the subpoena because the document requests in the subpoena seek information from Defendants’ litigation consultant that are protected by the work product doctrine and attorney-client privilege.

### **Factual Background**

Within days of the February 3 derailment, multiple lawsuits were filed in this Court, the first of which was a putative class action filed on February 7. *See Feezle v. Norfolk S. Ry. Co.*, No. 4:23-CV-00242 (N.D. Ohio). More than 20 putative class actions followed, in addition to numerous individual complaints, and the Court subsequently consolidated the cases. As Defendants have made clear since the derailment and ensuing litigation, they are committed to creating several funds to assist the people of East Palestine and the surrounding area, including a property fund for homeowners who sell their homes. A&M was engaged by Defendants’ legal department as a third-party litigation consultant for that purpose as part of a final resolution of claims.

A&M is a top ranked global consulting firm that works on a variety of projects, including evaluating environmental risks, consulting expert assistance in class actions regarding contaminated sites, and related financial modeling. A&M was engaged by Defendants’ legal department on March 6, 2023—nearly a month after this litigation commenced—to provide advice regarding potential resolution of claims, including analysis and modeling for the litigation arising from the derailment. Specifically, at the direction of Defendants’ legal department, A&M worked to evaluate the local property market and develop a plan for a homeowner Value Assurance Program (VAP), including cost and timing projections. A VAP is designed to protect

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the value of eligible residential properties; such programs are used to encourage settlement and support the community.

A&M modeled scenarios for Defendants' consideration regarding potential resolution of claims, analyzing information such as the current and historical real-estate data, environmental conditions, regulatory requirements, and estimated VAP claims activity going forward.

### **Meet and Confer**

Defendants certify that the parties have met and conferred, through counsel, regarding the substance of this dispute by phone on August 21, 2023 and by several follow-up emails thereafter. *See* Exhibit 2.

Plaintiffs' subpoena to A&M seeks documents at the core of A&M's retention in response to litigation, including:

- Documents that concern/relate to the Derailment, Defendants, and Affected Properties;
- work product, research, computations, code, or analysis concerning or relating the Derailment and/or Affected Properties;
- retainer agreements, scope of work documents, timesheets, time logs, and invoices concerning A&M's work for Defendants regarding the Derailment and/or Affected Properties;
- Documents, records, reports, contracts, or billing information over the past five (5) years that concern services done by A&M on behalf of Norfolk Southern;
- Documents, Data, records, Communications, or other materials regarding any clean-up effort of hazardous materials related to the Derailment and/or Affected Properties;
- contracts or agreements between A&M and any Defendant or owner of any Affected Properties;
- Documents, Data, records, Communications, or other materials relating to environmental data obtained in East Palestine and the surrounding areas on or after the train derailment on February 3, 2023;
- Documents, Data, records, Communications, or other materials from any and all subcontractors used by You in any capacity concerning the Derailment and/or Affected Properties;

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- Documents, Data, records, Communications, or other materials concerning/related to plans for any ongoing and/or future sampling, research, modeling, testing, analysis, or monitoring concerning/related to the East Palestine Train Derailment and/or Affected Properties.

A&M's response to the subpoena is currently due on September 1.

During the initial meet-and-confer call, Defendants requested that Plaintiffs withdraw the subpoena because A&M was retained by Defendants' legal department as a litigation consultant and, therefore, A&M's work and communications were protected by the attorney-client privilege and work product doctrine. Plaintiffs responded by email, declining to withdraw the subpoena based on the assertions that (1) A&M's existence has been publicly disclosed; and (2) A&M has been in contact with residents and putative class members. *Id.*

Defendants responded, clarifying that A&M did not have any such contacts with residents or putative class members, and asked Plaintiffs for the basis of their understanding otherwise. *Id.* Plaintiffs declined to answer the question, stating that they were "not going to debate with you in emails about the subpoena," that they would not withdraw the subpoena, and that the deadline to respond to the subpoena was September 1. *Id.*

### **A&M's Communications and Work Are Protected by the Attorney-Client Privilege and Work Product Doctrine**

Pursuant to Rule 45(d)(3) of the Federal Rules of Civil Procedure, "[o]n timely motion, the court for the district where compliance is required must quash or modify a subpoena that: ... requires disclosure of privileged or other protected matter, if no exception or waiver applies[.]"<sup>1</sup>

The attorney-client privilege protects from disclosure "confidential communications between a lawyer and his client in matters that relate to the legal interests of society and the client." *In re Grand Jury Subpoena*, 886 F.2d 135, 137 (6th Cir. 1989) (citations omitted). This privilege extends to nonlawyers, including litigation consultants in particular. *See, e.g., In re Behr Dayton Thermal Prods., LLC*, 298 F.R.D. 369, 374 (S.D. Ohio 2013) (communications between in-house counsel and employees of environmental consulting firm that explained technical data to aid counsel in anticipated environmental litigation were protected by attorney-client privilege); *In re OM Grp. Sec. Litig.*, 226 F.R.D. 579, 588-89 (N.D. Ohio 2005)

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<sup>1</sup> Defendants have standing to quash the subpoena directed to A&M because Defendants have a "personal right or privilege with regard to the documents sought." *Griffiths v. Ohio Farmers Ins. Co.*, 2010 WL 2639918 (N.D. Ohio 2010), quoting *Mann v. University of Cincinnati*, 1997 WL 280188, at \*4 (6th Cir. May 27, 1997); *see also, e.g., James B. Oswald Co. v. Neate*, 2022 WL 4386863, at \*1 (N.D. Ohio Sept. 22, 2022) ("[A] party has a right to object to a subpoena if it has a claim of privilege with respect to the materials sought by the subpoena.").

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("[d]ocuments created by an accountant at the attorney's request to assist the attorney in providing legal advice to the client are protected by the attorney-client privilege"). The privilege applies squarely here. A&M is an agent of the Defendants' legal department, retained for the purposes of assisting with the litigation and resolution of claims arising out of the litigation, and all communications related to A&M's work were made for purposes of litigation-related legal advice.

*OM Group Securities* and *Behr Dayton Thermal Products, LLC* are instructive here. In *OM Group Securities*, the court held that the attorney-client privilege applied to documents and communications by the third-party accountants hired by a defendant's counsel. 226 F.R.D. at 587-589. Notes, spreadsheets, and memoranda of the accountants were made to assist counsel in providing legal advice to the defendant. *Id.* Similarly, communications between or among the accountants and counsel were protected because the communications contained confidential communications made for the purpose of enabling counsel to advise the defendant. *Id.* Likewise, in *Behr Dayton Thermal Products, LLC*, the court held that the attorney-client privilege applied to communications between a party's counsel and an environmental consultant company. 298 F.R.D. at 374. The court reasoned that the communications were made "for the specific purpose of explaining or interpreting technical data so as to allow counsel to provide legal advice." *Id.* (quotation marks omitted).

Those holdings apply settled law and apply squarely here. In this case, A&M was similarly hired by Defendants' legal department—indeed, A&M was hired for purpose of assisting and enabling Defendants' counsel to provide legal advice regarding resolution of claims arising out of the derailment. A&M analyzed, modeled, and projected complex information to assist Defendants' counsel with resolution of claims analysis. Thus, all work and communications emerging from A&M's work for Defendants are protected under the attorney-client privilege.

A&M's work is also not discoverable because it is protected by the work product doctrine. Federal Rule of Civil Procedure 26(b)(3) states that "a party may not discover documents ... that are prepared in anticipation of litigation ... by or for another party or its representative (including the other party's attorney, *consultant*, ... or agent)." (Emphasis added.) Likewise, "Rule 26(b)(4)(D) essentially extends the work product protection codified in Rule 26(b)(3) to facts known and opinions held by non-testifying, consulting experts." *Wilson v. Russo*, 2022 WL 911271, at \*3 (N.D. Ohio Mar. 29, 2022) (citations omitted). "Together, Rules 26(b)(3) and 26(b)(4)(D) generally protect materials prepared by a non-testifying expert in anticipation of litigation." *Id.* (citations omitted). Here, the entirety of A&M's work relating to East Palestine is protected work product under Rule 26(b)(3) and (b)(4)(D) because A&M—a non-testifying, consulting expert—undertook its potential claims resolution modeling and analysis work in direct response to existing litigation, not for an ordinary business purpose.

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*Wilson v. Russo* is illustrative, and the case for work product protection is even stronger here. In *Wilson*, a consulting firm was hired by a city to investigate a violent interaction between police officers and individuals. 2022 WL 911271, at \*1. The plaintiffs challenged whether the consultants were retained in anticipation of litigation, suggesting that the city hired the consultants for an internal review instead. *Id.* at \*4. After analyzing the firm’s proposal, the mayor’s statement, and the engagement letter, the court found that the report created by the consulting firm was work product and not discoverable because it was prepared by a non-testifying, consulting expert in anticipation of litigation. *Id.* at \*7.

In this case, A&M is clearly a non-testifying, consulting expert hired in anticipation of litigation. Indeed, at the time Defendants engaged A&M, there was not only an anticipation of litigation, but actual litigation. A&M’s work was in direct response to the litigation and the purpose of the work was to assist Defendants’ counsel in advising on the potential resolution of claims.

Without elaboration, Plaintiffs asserted two purported reasons why A&M’s communications and work are not protected. First, Plaintiffs asserted that “Alvarez and Marsal have been publicly disclosed.” Ex. 2 at p. 3. That is true, but wholly irrelevant to the privilege and work product analysis. The fact that A&M’s retention in relation to this litigation has been publicly disclosed—not their communications, work product, or analysis—is not a waiver of the privilege or work product with respect to A&M. Defendants are unaware of any case law supporting Plaintiffs’ apparent argument, and Plaintiffs cited none.

Second, Plaintiffs claimed that A&M “are in contact with residents (and putative class members) through the family assistance center.” *Id.* But Plaintiffs’ belief, which they have refused to substantiate, is not accurate. A&M has had no communications with any residents or putative class members. Indeed, A&M has not communicated regarding this work with anyone outside of Defendants’ counsel and, to the extent necessary to assist counsel, Defendants’ employees. Plaintiffs’ second contention regarding A&M’s supposed waiver of privilege and work product also fails.

### **Conclusion**

For the reasons above, Plaintiffs’ subpoena to A&M should be quashed pursuant to Rule 45(d)(3)(iii). Defendants look forward to participating fully in the Court’s informal resolution process in the hope that motion practice can be avoided on this issue.

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Best regards,

*/s/ Christopher A Rheinheimer*

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Exhibits Enclosed