UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

In re: SILICONE GEL BREAST	)	Master File CV 92-P-10000-S
IMPLANT PRODUCTS LIABILITY	)	
LITIGATION (MDL-926)	)	(Applies to all cases)

Order

(*3M Privilege Log; Joint Defense Privilege*)

On September 20, 1995, plaintiffs filed a motion for an *in camera* inspection of documents listed on Minnesota Mining and Manufacturing's (3M's) privilege log, requesting examination by the court of 3M's second supplemental privilege log, which contained 775 documents. On November 22, 1995, 3M submitted a third supplemental privilege log containing 747 documents.

The plaintiffs, contending that many of the documents listed on 3M's logs are neither privileged nor protected by the work-product doctrine, have categorized their objections in certain areas. Responding to plaintiffs' request and to aid the court in its evaluation of these claims of privilege or work-product protection, 3M has submitted 34 documents to the court for *in camera* inspection, which either are asserted to be generally representative of the documents in question or have been identified by plaintiffs as particularly in dispute.

One category of documents deserves special consideration; namely, correspondence generated after 3M's divestiture of McGhan on August 3, 1984, between 3M's in-house attorneys (or paralegals) and McGhan's personnel. As a result of the indemnification agreement that was a part of the divestiture, it was necessary from time to time for the parties to communicate with respect to claims involving McGhan implants, particularly since after divestiture McGhan had no in-house counsel. 3M claims that, despite the existence of separate corporate entities, these documents are privileged or protected under what is generally referred to as the joint defense doctrine.

To establish the existence of a joint defense exception to the requirement of confidentiality otherwise required by the attorney-client privilege, the party asserting the privilege must show that: (1) the communication was made in the course of a joint defense effort; (2) the statement was designed to

further that effort; and (3) the privilege has not been waived. *In re Bevill, Bresler and Schulman Asset Management Corp.,* 805 F.2d 120, 126 (3rd Cir. 1986); *In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F. Supp. 381, 388 (S.D.N.Y. 1975).

Plaintiffs argue that, in order for the joint defense exception to apply, the communications must concern a pending action in which the parties have a common interest and the parties must not be adversarial. It is not required, however, that the communications be between parties to already-existing litigation, so long as there is a strong possibility of future litigation. The joint defense exception operates to preserve the confidentiality of communications between potential parties if they reasonably believed the statements were made within the context, and in furtherance, of a potential joint defense. *Polycast Technology Corp. v. Uniroyal, Inc.*, 125 F.R.D. 47, 50 (S.D.N.Y. 1989). A party must establish that there was existing litigation or a strong possibility of future litigation and that the materials were provided for the purpose of mounting a common defense to such litigation or potential litigation. *Metro Wastewater Reclamation Dist. v. Continental Casualty Co.*, 142 F.R.D. 471, 479 (Colo. 1992). Furthermore, the joint defense doctrine is not limited to situations in which the positions of the parties are compatible in every respect, but may apply even if some of the interests of the parties are adverse. *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979); *Griffith v. Davis*, 161 F.R.D. 687, 693 n. 6 (S.D. Calif. 1995) (*citing Hanwood v. United States,* 355 F.2d 183, 185 (9th Cir. 1965)).

Although not every jurisdiction has adopted the joint defense doctrine, the parties acknowledge that, of those states which have considered the question, all have adopted it as part of the attorney-client privilege. The court concludes that the doctrine is or would be applied in all jurisdictions. Of course, just as not every in-house document generated or received by a company's attorneys (whether outside or inside) is privileged or protected, so also the joint-defense doctrine does not necessarily provide protection against disclosure to every document that may be exchanged between companies with a common interest in defending actual or potential lawsuits.

Applying these principles and after an *in camera* review of the proffered documents, the court concludes--

> (1) that the following documents (and others similar to them) are protected from disclosure either by the attorney-client privilege or the work-product doctrine:
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> Doc. #18; #54; #202; #213; #293; #294; #344; #394; #414; #415; #424; #444; #469; #475; #489; #493;#532; #536; #542; #552; #586; #608; #621; #632; #633; #638; #653; #670; #681; and
>
> (2) that the following documents (and others similar to them) are not so protected, but should be produced:
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> Doc. #89 (relating to preparation of response to FDA); #416 (draft bibliography for package inserts); #545 (repayment schedules for promissory note); #549 (summary of payouts under agreement); #605 (sales records).

The parties are directed to attempt to resolve all further disputes regarding other documents on

3M’s privilege logs by reference to the rulings on these documents.

This the 21st day of October, 1996.

/s/ Sam C. Pointer, Jr.

Chief Judge Sam C. Pointer, Jr.