

1 Committee, and the file herein,

2 IT IS HEREBY ORDERED that the motion for protective order filed by the Audit
3 Committee is DENIED, and its privilege and work product objections are OVERRULED for the
4 reasons stated herein.

5 IT IS FURTHER ORDERED that Lead Plaintiff's motion to compel the deposition testimony
6 is GRANTED. The parties and non-party Fisher shall promptly meet and confer to set a date for the
7 resumption of Fisher's deposition in order to answer questions about the communications that
8 occurred during the Audit Committee's interview of Fisher.

9 **I. THE INFORMATION SOUGHT IS NOT PRIVILEGED**

10 The attorney-client privilege is strictly construed, because it impedes full and free discovery
11 of the truth. *See Weil v. Investment/Indicators, Research & Management*, 647 F.2d 18, 24 (9th Cir.
12 1981). Attorney-client communications in the presence of a third party who is not the agent of either
13 are generally not protected by the privilege. *See Weatherford v. Bursey*, 429 U.S. 545, 554 n. 4,
14 (1977) (citing 8 J. Wigmore, *Evidence* s 2311, pp. 601-602 (McNaughton rev. ed.1961)). Moreover,
15 the voluntary disclosure of a privileged attorney communication to a third party constitutes waiver of
16 privilege. *Weil*, 647 F.2d at 24.

17 The "joint defense" or "common interest" doctrine is "an extension of the attorney client
18 privilege." *See Waller v. Financial Corp. of America*, 828 F.2d 579, 583 n. 7 (9th Cir. 1987).

19 "It serves to protect the confidentiality of communications passing from one party to
20 the attorney for another party where a joint defense effort or strategy has been decided
21 upon and undertaken by the parties and their respective counsel. Only those
22 communications made in the course of an ongoing common enterprise and intended
23 to further the enterprise are protected. 'The need to protect the free flow of
24 information from client to attorney logically exists whenever multiple clients share a
25 common interest about a legal matter,' and it is therefore unnecessary that there be
26 actual litigation in progress for the common interest rule of the attorney-client
27 privilege to apply." *See U.S. v. Schwimmer*, 892 F.2d 237, 243-44 (2nd Cir. 1989)
(citations omitted).

28 The burden of establishing that the "joint defense" or "common interest" doctrine applies is
on the party asserting the privilege. *See, e.g., U.S. v. Bay State Ambulance and Hosp. Rental Service,*
Inc., 874 F.2d 20, 29 (1st Cir. 1989). Among other things, the party asserting the a claim resting on
the common interest doctrine must show that "the communication in question was given in

1 confidence and that the client reasonably understood it to be so given.” *See U.S. v. Schwimmer*, 892
2 F.2d at 244 “It is fundamental that the ‘joint defense privilege cannot be waived without the consent
3 of all parties to the defense.’” *See John Morrell & Co.*, 913 F.2d 544, 555-56 (8th Cir. 1990).¹

4 In the present case, the Audit Committee has not carried its burden of establishing that the
5 communications that occurred during the Audit Committee’s interview of Fisher were privileged.
6 The communications occurred in the presence of Fisher’s attorney (a third party who was not the
7 agent of either Juniper or its attorneys), and the Audit Committee has not shown that the “joint
8 defense” or “common interest” doctrine applies.

9 Fisher’s statements during her interview with the Audit Committee do not appear to have
10 been made in the course of an “ongoing common enterprise”² between Fisher and the Audit
11 Committee. The fact that Fisher may have had some legal interests that were similar to the Audit
12 Committee’s legal interests is insufficient to show that a joint strategy was actually decided upon and
13 undertaken by her, the Audit Committee and their respective counsel. Moreover, the fact the Audit
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15 ¹ The Audit Committee makes much of the fact that the employer in *Morrell* was able to
16 unilaterally waive privilege as to four otherwise protected documents that it had turned over to the
17 employee class. However, those documents were created by the employer prior to—and separate and
18 apart from—the common interest communications that occurred between the employer and the employee
19 class and their attorneys. Different rules apply to waiver with regard to pre-existing privileged
20 documents that are shared in the course of joint defense or common interest endeavors than apply to
21 communications that occur during a joint defense or common interest meeting itself.

22 As to the pre-existing privileged documents that are shared in the course of joint defense or
23 common interest endeavors, the original holder of the privilege for such documents naturally retains the
24 right to waive the privilege. *See Morrell*, 913 F.2d at 555-56.

25 With regard to communications that actually occur during a joint defense or common interest
26 meeting, all parties must agree to any waiver of the privilege. Otherwise, for example, a criminal
27 defendant could decide after the fact to testify at trial as to admissions made by his co-defendant during
28 their joint defense meetings. That is not the law. *See, United States v. McPartlin*, 595 F.2d 1321, 1336
(7th Cir. 1979) (“McPartlin was entitled to the protection of the attorney-client privilege, because his
statements were made in confidence to an attorney for a co-defendant for a common purpose related to
both defenses”). Thus, if the Audit Committee’s interviews with Juniper’s employees and former
employees were protected by the common interest doctrine, it would have been required to obtain the
employees’ consent before disclosing to a third party, such as its outside auditors or the SEC, the
substance of the statements made by those employees during the interviews.

² In *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308, 311 (N.D. Cal.
1987), relied on by the Audit Committee, *did* involve an actual “common enterprise” – the
negotiations for a potential sale of a division of one company to another company. The court held that
disclosure of a privileged attorney opinion letter to the potential buyer did not waive the privilege
because the disclosure was necessary to the sale negotiations. No such common enterprise has been
shown in the present case. Moreover, that case involved a pre-existing privileged document rather
than communications that occurred during a joint defense or common interest meeting.

1 Committee expressly informed Fisher that it could waive the privilege (which it erroneously assumed
2 would attach to the communications) demonstrates that there was no such common enterprise. On
3 the contrary, the Audit Committee claimed the exclusive right to decide whether or not to disclose
4 information from the interview to others. The Audit Committee's express reservation of the right to
5 disclose Fisher's statements to others shows that Fisher had no reasonable expectation that her
6 statements would be kept confidential. Absent such an expectation of confidentiality, no common
7 interest based privilege attached. *See U.S. v. Schwimmer*, 892 F.2d at 244.

8 In any event, even if the attorney-client privilege initially attached to the communications, the
9 Audit Committee's disclosure of the substance of the communications to Juniper's outside auditors
10 effected a waiver of the privilege. *See Weil v. Investment/Indicators, Research & Management*, 647
11 F.2d at 24; *see also, U.S. v. Ruele*, 583 F.3d 600, 612 (9th Cir. 2009) ("any voluntary disclosure of
12 information to a third party waives the attorney-client privilege"). The cases cited by the Audit
13 Committee all involved a finding of no waiver of *work product* protection, not attorney-client
14 privilege. In fact, in *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441 (S.D.N.Y.
15 2004), Merrill Lynch conceded that disclosure of otherwise privileged information to its independent
16 auditors waived the attorney-client privilege. *See, id.* at 444.

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18 **II. THE AUDIT COMMITTEE HAS NOT ESTABLISHED THAT INFORMATION SOUGHT IS
PROTECTED WORK PRODUCT**

19 With regard to the assertion of work product protections, the Audit Committee has not shown
20 that the interview occurred in anticipation of litigation. The Audit Committee submitted no
21 declarations showing that the purpose of its interviews was in any way related to litigation. Its entire
22 factual showing amounts to nothing more than pointing out that litigation was pending at the time
23 the interview occurred. However, the mere fact that a company has a committee conduct an
24 investigation at the same time that litigation is pending is insufficient to show that the purpose of the
25 investigation is in any way connected to the litigation.

26 As Lead Plaintiff points out, work product protection is available only for information that
27 would not have been generated "but for" litigation. *See Kintera, Inc. v. Convio, Inc.*, 219 F.R.D. 503
28 (S.D.Cal 2003), quoting *Kelly v. City of San Jose*, 114 F.R.D. 653, 659 (N.D.Cal. 1987). As the

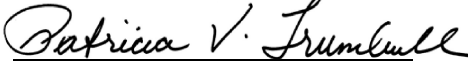
1 court explained in *Kelly*,

2 “The work product doctrine does not apply to information collected or
3 communications made in the normal course of business. It applies only to material
4 generated primarily for use in litigation, material that would not have been generated
5 but for the pendency or imminence of litigation.” *See Kelly v. City of San Jose*, 114
6 F.R.D. at 659, citing *Hickman v. Taylor*, 329 U.S. 495 (1947).

7 There is no evidence in the record that the Audit Committee would not have interviewed
8 Fisher “but for” the pending litigation, or that the Audit Committee has or had any role at all with
9 regard to the pending litigation. Thus, there is no basis for a finding that the Audit Committee is
10 anything other than an “audit committee” within the meaning of 15 U.S.C. section 7201(3), or that it
11 has any purpose other than a *business* purpose of overseeing Juniper’s accounting and financial
12 reporting processes and Juniper’s audits of its financial statements. *See* 15 U.S.C. § 7201(3). Thus,
13 work product protection does not apply, and the work product objection is overruled.

14 Dated: 12/9/09

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PATRICIA V. TRUMBULL
United States Magistrate Judge