IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: LONGVIEW ALUMINUM, LLC, Debtor,	)	Chapter 11
WILLIAM A. BRANDT, JR., Chapter 11 Trustee for the Estate of Longview Aluminum, LLC, Plaintiff,	)	Case No. 03 B 12184 Hon. Eugene R. Wedoff U.S. Bankruptcy Judge
v.	)	Case No. 08 A 00123
ALCOA, INC.; MICHIGAN AVENUE PARTNERS, LLC; McCALL ENTERPRISES, LLC; JAMES McCALL, JR.; and DOES 1 through 20, Defendants.	)	

NOTICE OF MOTION

To: See Attached List

PLEASE TAKE NOTICE that on July 1, 2009 at 9:30 a.m., or any other date and time set by the Court, the undersigned shall present to the Honorable Eugene R. Wedoff, or any judge sitting in his stead, in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, at 219 South Dearborn Street, Courtroom 744, Chicago, Illinois, **PLAINTIFF'S MOTION TO COMPEL**, a copy of which is attached hereto and herewith served upon you.

Dated: June 12, 2009

Respectfully submitted,

WILLIAM A. BRANDT, JR., NOT INDIVIDUALLY BUT SOLELY AS CHAPTER 11 TRUSTEE FOR LONGVIEW ALUMINUM, LLC

By: /s/Nicole Nehama Auerbach
One of His Attorneys

CERTIFICATE OF SERVICE

Plaintiff hereby certifies that on June 12, 2009 a copy of the **PLAINTIFF'S MOTION TO COMPEL** was served via the method indicated on the attached service list.

/s/Nicole Nehama Auerbach __
One of His Attorneys

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WILLIAM A. BRANDT, JR., Chapter 11 Trustee for the Estate of Longview Aluminum, LLC, Plaintiff, v. ALCOA, INC.; MICHIGAN AVENUE PARTNERS, LLC; McCALL ENTERPRISES, LLC; JAMES McCALL, JR.; and DOES 1 through 20, Defendants.	)	Case No. 03 B 12184 Hon. Eugene R. Wedoff U.S. Bankruptcy Judge Case No. 08 A 00123

PLAINTIFF'S MOTION TO COMPEL

One week before fact discovery was scheduled to close, Defendant Alcoa Inc. completed production of a privilege log that: (a) was produced in 11different parts; (b) consists of more than 1,600 pages; (c) lists more than 10,000 entries; (d) includes more than 460 non-attorney communicants; and (e) withholds more than 4,500 documents, the equivalent of approximately one-third of Alcoa's total production.

Contrary to the Federal Rules of Civil Procedure, and despite the Trustee's repeated requests, Alcoa has refused to provide any information about the titles or roles of hundreds of communicants listed on its privilege log and, in some cases, even to identify them. Alcoa's find-it-yourself position impermissibly seeks to shift to the Trustee the burden of ferreting out the information necessary to determine if these individuals are properly within Alcoa's corporate

privilege. Alcoa's claim that its corporate privilege extends to more than 460 non-attorneys – and in the case of two documents, to the entire company – is blatantly wrong; Illinois law limits the corporate privilege to a narrow control group to prevent the privilege from being abused in this manner to impair the conduct of discovery and fact finding by the trier.

Accordingly, pursuant to Federal Rule of Bankruptcy Procedure 7037, the Trustee moves to compel the production of all documents listed on Alcoa's privilege log that were sent or received by any individual not within Alcoa's "control group," which, as best as the Trustee can determine, is limited to Alain Belda, A. Irene Schmidt, Lawrence Castner, Barbara Jeremiah, Kevin Anton, G. John Pizzey, and Lawrence Purtell.[1]

BACKGROUND

1. Full access to Alcoa's non-privileged documents is critical to the full and fair adjudication of this case. A central issue in this lawsuit is Alcoa's state of mind. The Trustee claims, among other things, that Alcoa aided and abetted Michael Lynch's breaches of his fiduciary duties to Longview Aluminum, LLC ("Longview LLC") in connection with Alcoa's February 2001 sale to Longview LLC of an aluminum smelter located in Longview, Washington (the "Longview Smelter"). Alcoa did so primarily by ignoring numerous red flags raised by the conduct of Lynch, who controlled Longview LLC and related entities: Lynch's bizarre, erratic, and dishonest behavior; the financial troubles and indebtedness to Alcoa of his other aluminum companies; his willingness to grossly overpay for the smelter; his last-minute decision to shut down the smelter after he had maintained that its continued operation was essential to the viability of his other companies before U.S. and foreign regulators and in U.S. courts; and his inability to obtain financing for the deal except by liquidating the smelter's most valuable asset,

[1] As required by L. R. Bankr. N.D. Ill. 7037-1, the Trustee made several unsuccessful good faith efforts to resolve the issues subject to this motion. These efforts are described in detail in paragraph 2 of the Raffals Declaration.

its energy, into a $226 million stream of cash. These red flags, known but yet ignored by Alcoa, indicated that Lynch was a grossly unsuitable buyer and was likely to divert the assets of the Longview Smelter to his struggling companies and himself.

2. Alcoa's documents provide crucial contemporaneous evidence of what its employees knew or should have known about Lynch, his companies, and the transaction. Due to the lapse in time and the unavailability of certain key witnesses, Alcoa's documents in many cases provide the only available evidence. For example, in a January 23, 2001 e-mail, written just after Lynch's last-minute reversal on operating the smelter, Alcoa's lead negotiator, Irene Schmidt, labeled "the whole process" a "sham." (*See* Exh. A to Raffals Decl.) Yet, as other Alcoa documents show, Alcoa not only went along with this "sham" – to secure regulatory approval of its multi-billion dollar merger with Reynolds Metals Company, and rid itself of an "aging, smelter in the Pacific Northwest," Alcoa also provided critical assistance to Lynch.

Previous Issues Relating to Privilege.

3. Alcoa's mammoth privilege log is the latest in a series of discovery practices that at best reflect its carelessness and, at worst, are abusive discovery tactics. On April 23, 2009, and again on April 29, Alcoa invoked a provision in the parties' protective order to "claw back" more than 20 documents that it belatedly claimed were privileged. (*See* Exh. B to Raffals Decl., 4/23/09 S. McArthur Letter.)[2] Even though Alcoa had produced these documents months earlier, it was only weeks before the scheduled depositions of Alcoa's key witnesses that Alcoa raised the issue. Alcoa claimed that these documents had been inadvertently produced. Yet Alcoa had already produced some of the documents numerous times, and it produced them at least three more times in a "small production" of 9,000 pages days before the depositions were to begin and

[2] (*See also* Exh. C to Raffals Decl., 4/29/09 S. McArthur Letter at 2 (clawing back additional versions of document)).

during the pendency of the Trustee's motion to compel production of these documents. (*See* Exh. D to Raffals Decl., 5/10/09 J. Park E-mail (clawing back versions produced during the weekend of 5/9-5/10/09) & 5/9/09 H. Totten E-mail (detailing Alcoa's 9,000 page production).)

4. Although Alcoa ultimately agreed to produce the documents at issue, the unredacted documents demonstrate Alcoa's abuse of the privilege to withhold documents that are not only not privileged but that also provide crucial support for the Trustee's theory of the case. The redacted portions of the e-mails show that Alcoa doubted Lynch's ability to complete the purchase of the Longview Smelter and that, contrary to Alcoa's claim that this was an arm's-length transaction, "We [Alcoa] should agree to sell [Lynch's] McCook 100% and give them every help in achieving that end." (*See* Exh. E to Raffals Decl., withdrawn redactions highlighted.)

The Current Privilege Issues.

5. Alcoa began producing the bulk of its privilege log on a rolling basis the week of May 18. Over the next two weeks, Alcoa produced five installments broken into 11 separate files of what turned out to be a 1,640 page log claiming the attorney client and work product privileges for at least 4,526 documents.[3] (*See* Exh. F to Raffals Decl., detailing production of log.) Many of these documents contain multiple entries for each exchange in an e-mail thread, exponentially increasing the number of listed entries for the thousands of documents. (*See* Exh. G to Raffals Decl., excerpts from 5/29/01 Alcoa Privilege Log.)

6. Counsel for the Trustee pointed out in a June 5 meet and confer that Alcoa's log failed to identify either an author or recipient for a large number of documents; identified distribution lists as the recipients of others; and claimed the privilege in some cases for

[3] That the log was produced in 11 different installments makes it even more unwieldy, as any search for a particular individual or description must be performed in 11 different documents.

documents sent to third parties. (*See* Exh. H to Raffals Decl., 6/5/09 N. Auerbach Letter.) Most troubling was Alcoa's claim that its corporate privilege extended to at least 462 non-attorney communicants. (*See* Exh. I to Raffals Decl., list of non-attorney communicants.) Contrary to the requirements of Federal Rule of Civil Procedure 26, Alcoa failed to provide any information about the corporate capacities of these individuals.

7. On June 9, Alcoa responded by letter. (*See* Ex. J to Raffals Decl., 6/9/09 J. Park Letter.) Alcoa's letter epitomizes the confusing mix of errors, admissions, excuses, corrections, and do-overs typical of Alcoa's conduct of discovery: through 12 pages, eight footnotes, and two tables, Alcoa provides a convoluted account of documents that will be produced, some in full, others redacted; documents that, even though they were withheld on Alcoa's log, had in fact been produced elsewhere; documents that were inaccurately described on the log; and documents that were being withdrawn because Alcoa had just now noticed their inadvertent production. Alcoa even expanded its claim of privilege to cover the entire company, which, according to its 2000 Annual Report, consisted of approximately 142,000 Alcoans in 37 countries.[4] The bottom line, though, is that Alcoa continues to maintain that all 462 people listed on its log, and perhaps all of its 142,000 employees, are within a relevant "privileged group" under Pennsylvania law, and that Alcoa has no obligation to provide any information about them. (*Id.* at 1-2.)

ARGUMENT

8. Alcoa's privilege log, and by extension its assertions of privilege, are premised on two astounding, and flawed, propositions: (1) that Alcoa need not comply with the requirement

[4] In addressing the entries on the log that cite a distribution list as the recipient, Alcoa stated that "a number of the withheld communications…often required company-wide communications. The document withheld as Entries 2174 and 2176 is one such communication, in which Larry Purtell, Esq., Alcoa's general counsel, is providing legal advice to the company regarding regulatory compliance with the Reynolds acquisition. That document is properly withheld." (Exh. J to Raffals Decl., 6/9/09 J. Park Letter at 3.)

that it provide sufficient information about the corporate capacities of the communicants listed on its log to allow an assessment of whether they were properly included within Alcoa's corporate privilege; and (2) that its corporate privilege extends to over 450 people. Neither of these propositions can be squared with the properly applicable privilege law, Illinois's, or even with the privilege law Alcoa contends is applicable, Pennsylvania's.

ALCOA'S LOG FAILS TO COMPLY WITH THE FEDERAL RULES AND IS INADEQUATE UNDER ANY STATE LAW

9. Rule 26(b)(5) of the Federal Rules of Civil Procedure, which is made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7026, requires that the party asserting a claim of privilege describe the documents not produced in a manner that "will enable other parties to assess the claim." "To that end, a privilege log must identify the following information for each separate document: the date; the author and recipients, *including their capacities*; the subject matter of the document; the purpose for its production; and a specific explanation of why it is privileged." *Naik v. Boehringer-Ingelheim Pharms., Inc.*, No. 07 C 3500, 2008 WL 4866015, at *3 (N.D. Ill. June 19, 2008) (emphasis added); *see also Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84, 88 (N.D. Ill. 1992) ("For *each* document, the log should identify the date, the author and *all* recipients, along with their capacities.").

10. The information about the communicants' capacities is particularly important where, as here, a corporation claims the privilege. As one court noted in connection with the use of e-mail distribution lists, "without the identities and job descriptions of the persons on the distribution lists, there is no way for an opposing party to assess whether they are within the sphere of corporate privilege, as is required by Federal Rule of Civil Procedure 26(b)(5)(A)." *Muro v. Target Corp.*, 250 F.R.D. 350, 364 (N.D. Ill. 2007). In that case, which was decided

under the broader *Upjohn*[5] regime, the Court affirmed a magistrate judge's ruling that certain "cryptic job titles" were inadequate because these "titles were insufficient to permit [the party opposing the privilege] to assess the applicability of privilege …" *Id.* at 364-65.

11. Here, Alcoa has failed to list any job titles for the 462 non-attorney communicants on its log, let alone "cryptic" titles. Alcoa provides a name and nothing more:

Doc ID	BegBates	EndBates	Date	To	From	CC	Privilege	Description
4357	ELONG20013336	ELONG20013337	05/07/2002	Shannon, Joan A.; Renken, Alan C.; Waechter, Ralph W., Esq.; Storm, Nicolaas G., Esq.; Kluthe, Donald A.; Quaglia, Joe; Wilson, John M., Esq.; Taylor, Shariane M., Esq.; Fu, Jaw K.; Bear, Robert S.; Jarrell, Paul A.; Lammel, Mary Ellen; Hilderbrand, Janet M.; Tanchuk, Mike F.; Moore, Kent W.; Porter, Russell W., Jr., Esq.; Seligson, Thomas F., Esq.; Petrie, Hamish; Schmidt, Irene A.	Castner, Lawrence V., Esq.		AC	Email providing legal advice regarding ground lease and curtailment of the Longview Smelter.

(Exh. G to Raffals Decl., 5/29/09 Alcoa Privilege Log at Doc ID 4357.)[6] Alcoa contends that it is the Trustee's duty to ferret out identifying information, assuming such information exists for all individuals on the log, by hunting through the more than 14,000 documents produced by Alcoa or gleaning it from depositions. (*See* Exh. J to Raffals Decl., 6/9/09 J. Park Letter at 1.)

12. Alcoa's failure to provide any information about the corporate capacities of these individuals is not only inexcusable, it precludes any independent assessment of its breathtakingly broad assertion of the corporate privilege no matter what state's privilege law applies.

13. Alcoa's use of distribution lists, and its failure to identify the authors or recipients of numerous other documents, is also inadequate. (*See, e.g.*, Exh. K to Raffals Decl., 5/21/09

[5] In *Upjohn Co. v. U.S.*, 449 U.S. 383, 394 (1981), the U.S. Supreme Court rejected the control group test for cases under federal law and extended the privilege to any employee who communicates with counsel at the direction of his superiors regarding matters within the scope of his duties.

[6] Alcoa's log does provide a "Esq." designation for certain individuals not included among the 462 listed on Exh. I. However, Alcoa does not indicate whether many of these individuals were in-house counsel or had roles that involved the provision of legal, as opposed to business, advice. (*Cf.* Exh. J to Raffals Decl., 6/9/09 J. Park Letter at 6 (explaining that Barbara Jeremiah, designated Esq. in Alcoa's log, "was in fact an attorney … but she was not acting as an attorney" with respect to Longview).)

Alcoa Privilege Log at Doc ID 507-664.) Perhaps recognizing the impropriety of including entries with distribution lists as recipients, Alcoa has withdrawn its privilege claim or provided additional information with respect to many of these entries. For others, however, Alcoa has inexplicably refused to identify the individuals who comprise such lists (*e.g.*, "RMC Personnel (All locations) restricted"), implying that the Trustee should accept on blind faith Alcoa's assertion of the privilege. (*See* Exh. J to Raffals Decl., 6/9/09 J. Park Letter at 2-5 (refusing to identify the individuals included among distribution lists for Doc ID 2174, 2175, 2176, 4052).) Alcoa has also refused to produce or identify the authors of certain memoranda or other undefined "documents" that merely "reflect" an attorney's legal advice, even though it is unclear whether the document was authored by an attorney or someone within Alcoa's corporate privilege group. (*See id.* at 9-12, Table B (Doc ID 585, 645, 1034, 2068).)

14. Because, as will be shown below, the Trustee has established that Alcoa has waived any applicable attorney client privilege by disclosure to employees not within its corporate privilege, it would be futile and cause needless delay to order Alcoa to revise its log to provide the necessary information at this late stage of the game. Alcoa should instead be ordered to produce the documents for which it has waived the privilege.

ALCOA WAIVED THE ATTORNEY CLIENT PRIVILEGE FOR ALL DOCUMENTS DISCLOSED TO NON-ATTORNEYS NOT WITHIN ITS CONTROL GROUP

15. "[T]he burden is on the party opposing discovery to show that the attorney-client privilege applies, and mere conclusory statements will not suffice to meet that burden." *ConAgra, Inc. v. Arkwright Mut. Ins. Co.*, 32 F. Supp. 2d 1015, 1017 (N.D. Ill. 1999) (internal quotation marks omitted). "The claimant must show certain threshold requirements in order to avail itself of the privilege, including a showing that the communication originated in confidence

and that it was not disclosed except to certain authorized parties, i.e., the 'control group' of a corporation." *CNR Invs., Inc. v. Jefferson Trust & Savs. Bank of Peoria*, 451 N.E.2d 580, 583 (Ill. App. Ct. 1983). Alcoa has not, and indeed cannot, meet this burden.

Illinois Privilege Law Is Applicable.

16. In adversary proceedings in bankruptcy where state law provides the rule of decision, such as this case, courts apply state privilege law and determine the applicable state law under the forum state's choice of law rules. *See In re Megan-Racine Assocs., Inc.*, 189 B.R. 562, 569 (N.D.N.Y. 1995); *see also* Fed. R. Evid. 501. In this case, the parties dispute the applicable state privilege law, making a determination by this Court necessary. The Trustee contends that the law of the forum state, Illinois, is applicable. Alcoa maintains that the law of the state in which it had it headquarters at the time, Pennsylvania, applies.

17. Illinois courts engage in a choice of law analysis only if there is a genuine conflict between the competing laws. *See Sterling Fin. Mgt., L.P. v. UBS PaineWebber, Inc.*, 782 N.E.2d 895, 899 (Ill. App. Ct. 2002). Such a conflict exists here. The Illinois Supreme Court reaffirmed the continuing vitality of the control group test in Illinois notwithstanding the U.S. Supreme Court's decision in *Upjohn*. *See Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 257 (Ill. 1982). Under Illinois law, the corporate privilege is limited to "top management who have the ability to make a final decision" and certain of their direct advisors. *Id.* at 257-58.

18. Pennsylvania law, on the other hand, is unsettled. Its supreme court has not weighed in on the continuing vitality of the control group test, and its lower courts and federal courts applying Pennsylvania law have applied different tests to determine the scope of the corporate privilege. The weight of authority appears to favor the "authority to bind test" as set forth by the Third Circuit in *In re Ford Motor Co.* *See* 110 F.3d 954, 965 (3d Cir. 1997) ("A

corporation may claim the privilege for communications between its counsel and its employees who have authority to act on its behalf.").[7] Alcoa appears to agree that the "authority to bind" test prevails in Pennsylvania, although it incorrectly asserts that the focus of the analysis is "on the substance of the communication" rather than the role of the individual. (*See* Exh. J to Raffals Decl., 6/9/09 J. Park Letter at 2.)

19. Given the potential for different outcomes under these two tests, the Court must determine which law applies under Illinois choice of law rules. In addressing choice-of-law issues regarding the attorney client privilege, Illinois courts follow § 139 of the Restatement (Second) of Conflict of Laws. *See Allianz Ins. Co. v. Guidant Corp.*, 869 N.E.2d 1042, 1057 (Ill. App. Ct. 2007). Under these rules, "[e]vidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum *will be admitted* unless there is some special reason why the forum policy favoring admission should not be given effect." *Sterling*, 782 N.E.2d at 904 (quoting Restatement (Second) of Conflicts of Laws § 139(2); emphasis in original).

20. Even if, as Alcoa contends, Pennsylvania had the most significant relationship to the communications in question, and even if Alcoa's documents would be deemed privileged under that law, there is no "special reason" to depart from Illinois's narrower control group. The factors relevant to this consideration are: (1) the number and nature of the contacts the forum state has with the parties and the transaction involved; (2) the relative materiality of the evidence

[7] *Compare Land v. Gen. Motors Corp.*, No. CI.A.99-642, 2000 WL 976819, at *1 (E.D. Pa. July 14, 2000) (rejecting argument that "the broader test" of *Upjohn* is applicable under Pennsylvania law rather than the test set forth in *In re Ford*), *with Gould v. City of Aliquippa*, 750 A.2d 934, 937 (Comm. Ct. Pa. 2000) (applying test set forth in *In re Ford* but also citing *Upjohn*), *and Haggerty v. Yamaha Motor Corp.*, 3 Pa. D & C. 4th 499, 502-03 (Pa. Com. Pl. 1989) (applying the broader *Upjohn* test to extend privilege to those "who are affected by or will affect any legal advice"; but not widely followed). To the extent that Alcoa suggests that *Haggerty*, the authority to bind test, and *Upjohn* are simply consistent with one another, by citing them interchangeably, it is incorrect. (*See* Exh. J to Raffals Decl., 6/9/09 J. Park Letter at 1-2.)

sought to be excluded; (3) the kind of privilege involved; and (4) fairness to the parties. *Id.* "In view of the fact that Illinois does recognize the privilege, in the first instance, but construes it strictly in the corporate context, *we cannot foresee any situation where a special reason would exist not to give effect to this clear, strongly articulated policy in favor of another state's broader corporate attorney-client privilege*." *Id.* at 905 (applying control group test to communications with the most significant relationship to New York; emphasis added).

21. There is no such "special reason" to override Illinois's strong policy favoring admission here, where at least 3, if not 4, factors favor Illinois. *See Allianz*, 869 N.E.2d at 1060 (no "special reason" where 2 of 4 factors favored Illinois); *People v. Allen*, 784 N.E.2d 393, 396 (Ill. App. Ct. 2003) (same).

(1) Nature of Contacts Illinois Has with the Parties and Transaction: In relocating this case here from Washington, Alcoa stressed the contacts "of the parties and the transaction involved" with Illinois. (*See* Dkt. No. 14, Alcoa Opp. to Plaintiff's Mtn. for Abstention at 4.) These contacts – this case was brought by an Illinois Trustee, relates to a bankruptcy estate located in an Illinois federal court, arises from a transaction between Alcoa and individuals (Michael Lynch and his partners) and companies (McCook Metals and Michigan Avenue Partners) based in Illinois, and involves many acts that occurred in Illinois – favor Illinois. *See Allianz Ins.*, 869 N.E.2d at 1059 (Illinois favored where a party and transaction had contacts with the state).

(2) Materiality of Evidence Sought To Be Excluded: The evidence is highly material. As mentioned above, Alcoa's documents are the primary, and in some cases exclusive, source of contemporaneous information about key issues in the case. Apart from depositions of Alcoa's witnesses concerning events that occurred over eight years ago, and the few Longview documents in the Trustee's possession, there is no other way to show what Alcoa knew and should have known about Lynch, his companies, and the transaction during the relevant time. *Id.* (Illinois favored where evidence bore on opposing party's state of mind and could affect outcome of case).

(3) Nature of the Privilege: The factor concerning the kind of privilege involved, in particular how well it is established, *id.*, does not weigh heavily either way given the uncertainty of the law. *Id.* As the *Sterling* court observed, "Among the fifty states, there are a number of competing tests for determining the applicability of the attorney-client privilege in the corporate context, and the issue, despite *Upjohn*, is far

from settled … The majority of states … have yet to decide which standard, if either, will apply." 782 N.E. 2d at 901-02 (internal quotation marks omitted). This uncertainty is reflected in the different tests applied by Illinois and Pennsylvania courts.

(4) Fairness: This factor favors Illinois. Alcoa should not be heard to complain of the application of Illinois law when it was Alcoa who insisted on moving this case to Illinois. To the extent that this factor looks to the expectations of the communicants, *Allianz Ins.*, 869 N.E.2d at 1060, Alcoa's contention that the parties "expected Pennsylvania law to apply" is misplaced. Given Alcoa's global operations, its more than 462 communicants were likely located throughout several states and foreign countries, with the majority of them likely outside of Pennsylvania when the communications were made or received.[8] And even if the parties expected Pennsylvania law to be applicable, the unsettled nature of Pennsylvania state law on this issue would not support any firm expectation regarding privilege.[9]

If Illinois Law Applies, Alcoa's Designations Wildly Exceed the "Control Group."

22. As an initial matter, it is simply inconceivable that the entire Alcoa company, or even the 462 non-attorneys on its privilege log, could somehow be shoehorned into the control group under Illinois law. To the contrary, withholding such a vast number of documents under the guise of privilege is exactly the sort of abuse that the Illinois Supreme Court sought to prevent:

> [I]n the corporate context, given the large number of employees, frequent dealings with lawyers and masses of documents, the 'zone of silence grows large.' That result, in our judgment, is fundamentally incompatible with this State's broad discovery policies looking to the ultimate ascertainment of the truth, which we continue to find essential to the fair disposition of a lawsuit.

Consolidation Coal, 432 N.E. at 256-57 (internal citations omitted).

[8] For example, in the e-mail thread challenged in the Trustee's earlier motion to compel, eight of the communicants were in Pittsburgh, but the other 12 were in New York (4), Tennessee (6), and Washington state (2). (Dkt. No. 69, Mem. in Opp. to Pl. Mtn. to Compel, Exh. 2 at ¶ 12.) Further, as Irene Schmidt pointed out when asked the location of John Pizzey when he wrote and received these e-mails, "It's a global company, and [Pizzey's] primary business is a global business, so he could have been anywhere." (Exh. L to Raffals Decl., 5/13/09 Vol. 1, Dep. of A. Irene Schmidt at 103:1-3.)

[9] The contrary result reached in *Equity Residential v. Kendall Risk Mgt., Inc.*, 246 F.R.D. 557, 565-66 (N.D. Ill. 2007) is distinguishable because in that case all four factors weighed against the application of Illinois law.

23. To prevent the fact finder from being deprived of the large number of documents corporations might attempt to withhold as privileged, the Court limited the control group to two tiers of corporate employees. The first includes "top management who have the ability to make a final decision." *Id.* at 257. The second tier includes those employees "[1] whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and [2] whose opinion in fact forms the basis of any final decision by those with actual authority …" *Id.* at 258. The focus is "on individual people who substantially influenced decisions, *not on facts that substantially influenced decisions*." *Archer Daniels Midland Co. v. Koppers Co.*, 485 N.E.2d 1301, 1304 (Ill. App. Ct. 1985) (emphasis added).

24. As the Trustee stated in his June 5 letter, Alcoa's "control group" includes Alain Belda (Chairman and CEO), Irene Schmidt (lead deal negotiator), Larry Castner (lead attorney on the Longview deal), Barbara Jeremiah (Irene Schmidt's boss, and vice president of corporate development), Kevin Anton (CFO), John Pizzey (vice president of Primary Metals), and Larry Purtell (general counsel). (*See* Exh. H to Raffals Decl., 6/5/09 N. Auerbach Letter at 2). While a small number of additional Alcoa personnel might come within this group, this does not open the floodgates, as it were, to include every person in the company or every person who had any communication relating to some aspect of the Longview sale, as Alcoa appears to contend. (*See* Exh. J to Raffals Decl., 6/9/09 J. Park Letter at 2); *see Archer Daniels*, 485 N.E.2d at 1304 (control group does not extend to the parts of the corporate "decision-making process" that include the provision of analysis, expertise, or facts, "regardless of how expert their skills are, or how inexperienced the decision makers are in those same skills"); s*ee also Consolidation Coal*, 432 N.E.2d at 258 ("individuals upon whom [a control group member] may rely for supplying information are not members of the control group").

25. Two representative examples of those included in Alcoa's definition of the privilege group, but who are not within the control group, are Len Rettinger and Jack Speer. Neither of these low-ranking and marginally involved Alcoa employees were members of the control group; they were neither top management nor the type of advisors without whose advice a decision would not normally be made, and whose opinion in fact formed the basis of any final decision by top management. Mr. Rettinger was a regional credit manager during the time in question and his involvement in the Longview transaction was limited to Irene Schmidt's requests that he cease pursuing credit issues relating to McCook Metals until after the negotiations, and then later, the close, of the transaction. (*See* Exh. M to Raffals Decl., 5/21/09 Dep. of L. Rettinger, Jr. at 31-32, 71, 123-24.) Similarly, Jack Speer, Northwest Power Manager, testified that he reported to the plant manager in Wenatchee, Washington; typically did not interact with Irene Schmidt; and had no role in the Longview sale, except to make a presentation to Mr. Lynch and his colleagues in June 2000 regarding energy issues affecting the Longview plant. (*See* Exh. N to Raffals Decl., 5/28/09 Dep. of J. A. Speer at 36, 45, 123-125.)

26. Neither of these gentlemen were in the "control group" under Illinois law. Yet numerous entries pertain to communications that included one or the other, all of which were withheld for privilege.[10] Any documents disclosed to Messrs. Rettinger and Speer, or any of the other individuals listed on Alcoa's privilege log who are not within Alcoa's control group, have lost any applicable attorney client privilege and should be produced. *See CNR Invs.*, 451 N.E.2d at 583.

[10] Tellingly, despite claiming that these individuals fall within the operative "privilege group" Alcoa not only did not collect any documents from the individuals listed above, it did not even ask them if they had any documents that might be relevant to the instant litigation. (*See* Exh. M. to Raffals Decl., Rettinger Dep. at 18, 23 & Exh. N, Speer Dep. at 27.)

Even Under Pennsylvania Law, 462 People Did Not Have Authority to Bind Alcoa.

27. Alcoa contends that under Pennsylvania law, the "privilege extends to communications between its attorney and agents or employees *authorized to act on its behalf*." (*See* Exh. J to Raffals Decl., 6/9/09 J. Park Letter at 1.) (emphasis added). Even under this test, Alcoa's claim that all 462 non-attorneys on its log, much less the entire company, were "authorized to act" on the company's behalf defies belief. Under Pennsylvania corporate law, absent special board authorization, "the authority to act on behalf of a corporation is vested in the directors and the officers." *Maleski v. Corp. Life Ins. Co.*, 641 A.2d 1, 3 (Pa. Comm. Ct. 1994).

CONCLUSION

28. For the foregoing reasons, the Court should compel production of all documents that were sent or received by any Alcoa employee who was not within Alcoa's "control group."

Dated: June 12, 2009

WILLIAM A. BRANDT, JR., NOT INDIVIDUALLY BUT SOLELY IN HIS CAPACITY AS CHAPTER 11 TRUSTEE FOR LONGVIEW ALUMINUM, LLC

By: /s/ Nicole Nehama Auerbach
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