IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

THE DOW CHEMICAL COMPANY,	)
	)
Plaintiff,	)
	)C.A. No. 05-737-JJF
v.	)
	)
NOVA CHEMICALS CORPORATION (CANADA), and NOVA CHEMICALS, INC., (DELAWARE),	)
	)
Defendants.	)

Friday, June 6, 2008
11:00 a.m.
Courtroom 4B

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE JOSEPH J. FARNAN, JR.
United States District Court Judge

APPEARANCES:

MORRIS, NICHOLS, ARSHT & TUNNELL
BY: RODGER D. SMITH, ESQ.

-and-

JENNER & BLOCK, LLP
BY: HARRY J. ROPER, ESQ.
BY: AARON A. BARLOW, ESQ.
BY: DARRICK J. HOOKER, ESQ.

Counsel for the Plaintiff

APPEARANCES CONTINUED:

POTTER, ANDERSON & CORROON, LLP
BY: RICHARD L. HORWITZ, ESQ.

-and-

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, LLP
BY: FORD F. FARABOW, ESQ.
BY: JEFFREY W. ABRAHAM, ESQ.
BY: MARK J. FELDSTEIN, ESQ.

Counsel for the Defendants

THE COURT: All right. Be seated, please.

Good morning.

MR. SMITH: Good morning. Roger Smith from Morris Nichols on behalf of the plaintiff, Dow Chemical. With me today is my co-counsel from Jenner & Block, I believe you already know Mr. Roper, Aaron Barlow who will be making our presentation today, and Darrick Hooker.

THE COURT: Good morning. Welcome.

MR. HORWITZ: Good morning, Your Honor. Nice to see you back up on the bench instead of yesterday in the jury box. That was an interesting conference. With me today, you know Ford Farabow.

THE COURT: Mr. Farabow, good morning.

MR. FARABOW: Good morning.

MR. HORWITZ: Mark Feldstein and also Jeff Abraham who I'm not sure has been before you, at least not in this case before.

THE COURT: Good morning.

Welcome.

All right. We are here because Dow hasn't in view of the defendants properly prepared its privilege log and is apparently alleged to be withholding nonprivileged documents. And I guess we should -- let me listen to you, how you think you want to go through this. I have an open mind to it.

MR. BARLOW: What we have done is Nova has selected thirty documents from our log that they want submitted to the Court for in camera inspection. We have put them in a logical order so they're grouped so you go through one and maybe that makes the rest -- the next two or three clear.

And we're prepared to hand that up and go through them with Your Honor one by one, or we can pick one from each category and do it that way, whichever you prefer, and, you know, what Nova would want to do.

THE COURT: Mr. Farabow.

MR. FARABOW: Your Honor, we listed the documents in the attachment we sent to Your Honor in numerical order as they appear

on their log. I don't know whether they want to give you the good ones first or the bad ones first, but I'm willing to do it any way they want to do it, Your Honor.

Mr. Roper told me he thought it would save time to do it this way and that's fine with me and I'm sure will be fine with the Court.

THE COURT: Okay. What we'll do, then, is follow -- I'll have you hand them up in the form you've described and then I'll take a look at it and you'll make your argument on it. And I'll tell you what I think.

MR. BARLOW: Sure. Would you like us to hand up all thirty at once or go through them.

THE COURT: Pass them up one at a time so that -- the ones you're making your presentation on.

MR. BARLOW: Okay. We'll do that. We have a list, we have taken Nova's list and reordered it in the way we're going to present them and I'll hand that to Nova and we'll hand that up with the first document, you can use it

as a checklist.

THE COURT: That will be good. Are you oriented, Mr. Farabow, to the list that he has?

MR. FARABOW: I have the list they gave me, Your Honor, yes, which I think is the same list, but just in a different order.

THE COURT: Just in a different order. Okay.

MR. ROPER: We have counted them at least ten times.

THE COURT: Was that a Chicago count? I'm just checking. No offense, Mr. Roper.

MR. ROPER: None taken, Your Honor.

THE COURT: Actually I finally have gotten to Chicago. It's really a great place.

MR. ROPER: Glad you enjoyed it.

THE COURT: I did. I was impressed. It's my new favorite spot. It's overtaken New York, even, although I have to say, I was recommended and bit into the idea of

a Chicago hot dog, fully loaded. That's an experience.

All right.

MR. BARLOW: What we've done is we've put the privileged document in the folder on the right, and on the left we have documents that --

THE COURT: I hate to be a pain. Do you have a copy for the clerks?

MR. BARLOW: Of the privilege documents?

THE COURT: Do you have an extra copy?

MR. BARLOW: We don't. Sorry, Your Honor.

THE COURT: All right. No problem.

MR. BARLOW: And then on the right we have the supporting documents that tie up the privilege documents to the testing. For example, a lot of the documents have numbers on them, sample numbers that are cross-referenced in a data book that was prepared by the Dow technologists doing the testing.

And the way it worked was Mr. Johnson who coordinated all the testing had a technologist, Ken Reichek. And the only thing Ken Reichek did on Nova polymers was infringement testing.

If you look behind the summary sheet, there is a document, privilege number 2440, which is the data book assigned to Ken Reichek and its title is attorney/client work product, Nova. So the reason we conclude this in here is the privilege document, 1219, which is the one we're looking at, is cross-referenced to this data book. And I can walk you through how the cross-reference is shown in the documents.

So if you're looking at the second page of the data book, Your Honor, the page right after the cover page of the data book, it has what's listed as LIMS numbers, and Mr. Johnson in a declaration we provided to Nova with our new privilege logs explains that the LIM system is an internal database of Dow they use to keep track of testing they do. And samples get assigned LIMS numbers.

And what page 19 of this data book shows is that LIMS number 57-520 was assigned to a sample in this data book. And if you look at the privilege document 1219, 57-520 is one of the samples that's being -- the test results of shown of on the document.

THE COURT: Now, am I to understand that the data book cover sheet, and there is two here.

MR. BARLOW: Yes.

THE COURT: Were prepared in 2004?

MR. BARLOW: The first one was prepared in 2004, yes. And the second data book was prepared in 2005.

THE COURT: Five. Which is reasonably contemporaneous with the data reporting sheet?

MR. BARLOW: Yes, Your Honor.

THE COURT: Well, the testing results sheet. They have dates on them.

MR. BARLOW: The document 1219 does not have a date on it, but it presents data from samples that were prepared by Mr. Reichek and recorded in his work product data book.

THE COURT: In the backup documents?

MR. BARLOW: Yes.

THE COURT: I understand that 1219 doesn't have a date on it, but I understand that to be basically a summary document.

MR. BARLOW: 1219?

THE COURT: Yes.

MR. BARLOW: Privilege document 1219 is a summary, that's correct, a summary of other work product testing.

THE COURT: Am I looking at the principal document for those tests before they were charted?

MR. BARLOW: What you're looking at records what Mr. Reichek kept to keep track of the samples.

THE COURT: And those are dated?

MR. BARLOW: Yes, those are dated.

THE COURT: And one has 11/05 on it.

MR. BARLOW: That's right.

THE COURT: So I can understand that that means that that testing was done in

'05?

MR. BARLOW: Yes.

THE COURT: In anticipation of Nova litigation?

MR. BARLOW: That's correct. The testing that's shown on 1219 is referred to in the second data book on page four, and it is dated March 2005.

And the second data book, which is also from Mr. Reichek, who is the technologist Mr. Johnson used solely for infringement testing, not for competitive assessment testing, this second data book is called Nova attorney/client work product, that's the title that Mr. Reichek put on it.

And the reason he did that was Mr. Johnson wanted to segregate the work product testing from the competitive assessment testing. So he had a different technologist do all the work. He asked Mr. Reichek to put all the work in separate data books that were devoted solely to work product testing, and so it would be segregated into Dow's files.

And what the documents shows is

the testing summarized in 1219 is one, on samples that Mr. Reichek prepared and recorded in his data book solely for litigation because they're in his litigation data book.

And number two, the testing shown here is further testing on the same samples as recorded in the second data book which is again Mr. Reichek's work product data books. So that ties up --

THE COURT: 1219 is work product.

MR. BARLOW: Thank you, Your Honor.

THE COURT: Let's hand up the next one.

MR. FARABOW: May I respond, Your Honor, on 1219?

THE COURT: Yes, you may.

MR. FARABOW: Thank you.

Your Honor, they are relying principally on this declaration of Mr. Johnson, which says that Mr. Reichek only worked on litigation matters. That's not true, Your Honor.

May I hand up some documents?

THE COURT: Sure.

MR. FARABOW: Your Honor, Mr. Johnson has filed I think four declarations here, and each time there have been mistakes in the declarations. The first declaration he filed said that all 1,950 documents on their list were work product or privileged. We have now received about 600 of those which turn out not to be work product or privileged.

In this declaration that he filed, he says, among other things, that Mr. Reichek worked only on litigation matters and did not work on competitive analysis.

If Your Honor would turn in the book that I gave you -- have we given you a book?

MR. BARLOW: Yes.

MR. FARABOW: To tab number one, that is a document that was produced by Dow that relates to something called Project Highlander which was a comparative analysis of Nova and other competitive products. Mr. Reichek shows up on the cover as one of the people that worked on that.

If Your Honor would turn to page eight of that book, which has the last three production numbers 724, it shows in the next to the last column, Nova Surpass product being compared to various Dow products and Exxon products, that being competitive products.

Document number two in the book, Your Honor, deals with the same project, Highlander. It talks about better product design. Mr. Reichek again shows up on the cover as having worked on that project.

And there are numerous property comparisons in this book that deal with Nova as well as other products.

It is clear that Mr. Reichek, like Mr. Johnson, was working on both competitive analysis and also on perhaps the litigation matters. But it is totally unclear whether what he was working on when he did this work was work product or was competitive analysis.

And I'm willing to bet, Your Honor, that if you looked at only document 1219, you would not find it to be work product because there is nothing on that document, I believe, I

may be wrong, but I believe that will indicate that that document itself is work product.

Now, if you look at page ten of document number two in the book that I handed up, there is an analysis of Nova Surpass, experimental results, discussion of various portions of the product and what their impact is. So, Your Honor, our position is that Mr. Reichek was working in both areas.

I handed you up one individual document in addition to Mr. Johnson's declaration. That individual document which has production number 6111 at the end, Your Honor, do you see that one?

THE COURT: Say that again.

MR. FARABOW: There is one document I handed you not in the book, but a separate document.

THE COURT: Yes.

MR. FARABOW: And it has at the bottom 6111.

THE COURT: Yes.

MR. FARABOW: That document is an analysis of Nova Surpass lots. It says attorney

work product on it. It refers to those notebooks that Mr. Barlow was talking about, but it is clearly just testing for competitive purposes and has been produced by Dow to us in the case.

It has other note -- what they did, Your Honor, was take the samples that are identified in those notebooks and they used them for both purposes, they used them for competitive analysis and they also used them presumably for litigation materials.

Johnson headed up both projects, Reichek worked on both projects. Our view is in light of your Pfizer, unless the document itself reveals that it's work product and it is intend solely for litigation or at least primarily for litigation, it ought not be so held.

I can point out other errors in Mr. Johnson's declaration, and probably as we get to other documents, I would like to do so, but I think that's what I wanted to say right now, Your Honor.

THE COURT: All right.

MR. BARLOW: Your Honor, may I

respond?

THE COURT: Yes.

MR. BARLOW: First of all, with respect to the spreadsheet that Mr. Farabow pointed you to, he said that the data books on here were the data books that I was referring to that are work product. They're not. Not one of these data books is a work product data book. The data books, the work product data books are listed in Mr. Johnson's declaration, supplemental declaration. Do you have a copy for Mr. Farabow, which we have handed a copy of that up to Your Honor?

And none of the data books on these pages are from that document.

What this document is is a repeat of the competitive assessment testing.

In 2005, the competitive assessment testing, the original competitive assessment testing was two years old. It had been done in 2003. So the attorneys requested the competitive assessment testing be repeated, just for comparison purposes.

That is work product, but we

decided since it was competitive assessment testing to moot the issue, we would just pursue it. When this competitive assessment testing was collected in 2005, this repeat of the competitive assessment testing, Mr. Johnson put attorney work product on it because Mr. Roper had requested he do this repeat.

However, it is the same testing that was done before, so we decided to produce it. There is no -- the work that Mr. Reichek has done has never been used for competitive purposes at all.

The other documents that Mr. Farabow pointed you to in the binder, those are neither competitive assessment testing nor infringement testing.

Mr. Reichek has other duties within Dow, he doesn't solely work on Nova polymers. He was not doing any competitive assessment testing of the Nova polymers in 2003. All of his work on Nova polymers with respect to determining their properties and what to do with them with respect to competition or litigation was solely on the litigation side.

The work in the binder is fundamental blend studies conducted by Dow for scientific purposes to understand blend properties, this was not assessment of competitor's products and how customers would react to them.

So I don't think this takes away from the clear record shown in the folder I have handed up, privilege document 1219 doesn't refer to any of the kind of testing that's shown in the binder or in the other documents Mr. Farabow pointed you to.

And, in fact, it's quite clear that privilege document 1219 relates to data books Mr. Reichek prepared entitled attorney/client work product Nova, and Nova attorney work client product, so the record is clear that all of this work in 1219 was for litigation and not for competitive assessment purposes.

THE COURT: All right. Well, I have taken a look at Tab 2 of Nova's binder handed up, and specifically the page referred to, page ten, Nova's Surpass 900-C, and I have

considered that page against the support that 1219 is a work product document, and it's clear from both the data book and contemporaneous E-mail that the 900-C testing was conducted in contemplation of litigation under the direction of attorneys and, in fact, for attorney meetings and, in fact, over specific patent claims.

You don't have the benefit of what I'm taking a look at, but there is an E-mail here dated April 7th, 2004, that makes it real clear they have targeted Nova, Nova 900-C product, versus specific patents and specific attorneys, and that this work was done that's attached to have a meeting with the attorneys, this is an April E-mail and they're going to meet with the attorneys in June to prepare for litigation with Nova.

And I'm obviously not an expert in the technology here, but what's reported at page ten of the Nova notebook is different subject matter than what's in the data book and 1219, and it's reporting on different subject matter. Actually it's looking for claim infringement in the makeup the 900-C product.

So I'm going to find 1219 to be work product. And we're going to maintain this in a sealed record so it can be reviewed if necessary later on. And we'll maintain the Nova notebook and mark it as Nova Exhibit 1 since I have referred to it and page ten of Tab 2 in further support that 1219 is privilege.

MR. FARABOW: Your Honor, may I add one thing?

THE COURT: Yes, you may.

MR. FARABOW: I would like to point out that the document 6111 that I handed up to you, Your Honor.

THE COURT: Yes, I have it.

MR. FARABOW: Has at the top, it has Notebook Number 200302965, and that's the first notebook that is listed in Mr. Johnson's declaration as a privileged notebook. So I wanted to correct Mr. Barlow's statement that that document did not refer to any notebooks that were privileged. That's the document that has been produced.

I'm not trying to change Your Honor's mind.

THE COURT: You want to make the record clear.

MR. FARABOW: Correct the record, yes, sir.

THE COURT: And record this specific problem.

MR. FARABOW: Yes, sir.

MR. BARLOW: Your Honor, may I move on to the next document?

THE COURT: We'll also put as Nova Exhibit 2 to the hearing that document, 6111.

All right. We're at 1267.

MR. BARLOW: Your Honor, the next document is another test report with handwriting of Mr. Johnson on it. And there is also as with the previous document, there is one of these LIMS numbers on it, which is the internal database number that is used at Dow to track information about samples it test.

And again, there is a Ken Reichek data book, privilege document 2443 entitled attorney/client work product Nova, that on page eight identifies that LIMS number, 59408, and ask that it be -- the sample be treated and

tested for a specific type of structure. And that's shown in highlighting in the document.

And there is another document, again, showing that tying up that LIMS number with one of Ken Reichek's work product data books, and a note from Mr. Johnson to Ken asking him to conduct the testing on this, on fractions of Nova polymers. And fractions is another indication that this is work product testing because the fractionation of the Nova polymers was only done for work product purposes.

Mr. Johnson explains in his declaration that competitive assessment testing looks at the whole polymer and draws conclusions about the whole polymer based on the kind of information customers would like to see, whereas to prove infringement, or to investigate infringement, Dow had to take the polymer apart, and that involved fractionation, so the document refers to fractions on the -- in the handwriting on privilege document 1267. It refers to fractions of the Nova polymers.

MR. FARABOW: Two points I'd like to make in response, Your Honor. Number one is

going back to this document, 6111, it also refers to those notebooks and yet this testing was done as part of their competitive analysis. So the mere fact that they take the sample from that notebook and do further testing on it does not show that it was done for litigation as opposed to competitive analysis.

The other point is that if you would look in the notebook that I passed up to page -- I mean to Tab 8, Your Honor.

THE COURT: All right. You're talking about Nova 1, Exhibit 1?

MR. FARABOW: Nova 1, yes, Your Honor.

Now, Mr. Johnson in his declaration says flat out fractionation analysis is not a part of the protocol for conducting competitive assessment in the ordinary course of Dow's business. And that's what Mr. Barlow is relying on.

Well, here is a document where they fractionated Exxon resins and where they did testing on the fractionation for pure product development and competitive analysis.

If Your Honor looks at the first page, the first words are several LLD --

THE COURT: Where are you at?

MR. FARABOW: Tab 8, Your Honor, in the notebook.

THE COURT: Got you.

MR. FARABOW: Sorry. Several LLDPE resins and their fractions, and they talk about testing the fractions. It says at the end of that page an intense effort to the investigation of structured-property relationship of LLDPE resins and their fractions. If you go to page, the page that has production number 20450 at the bottom, Your Honor, 20450 in the Bates numbers at the bottom, it's page four of the document, Your Honor, fractions, it says the whole polymer was fractionated into twenty-four fractions.

And down in the next to last paragraph at the bottom of the page, two-thirds of the way through that paragraph, the higher molecular weight fraction has been shown to shift the onset of strain harding to a lower strain and to have a higher slope, those are

terms that are very relevant to this case, Your Honor.

And on page six of the document that has production number 20452. The authors of this document in the second line talk about the -- these relationships are extremely important to further product design and development.

So they clearly did use fractionation in the ordinary course of their business, contrary to Mr. Johnson's declaration, and the mere fact that something refers to fractions doesn't indicate that it was being evaluated strictly for litigation.

If you look at page 14 of that document, they talk about mechanical data on Exxon 3002 fractions. If you look at document nine in the book, Your Honor, they're analyzing fractions or dividing fractions by a Tref of Nova Surpass materials. One more document I would like to show the Court if I might is document ten in the book.

THE COURT: All right.

MR. FARABOW: This is a document

dated May 2003, and under status of Nova Surpass evaluation, they say that about five lines down, Your Honor, under the heading status of Nova Surpass evaluation, they talk about getting samples to determine the competitive threat and to evaluate versus key patents.

And two, or one paragraph further down, they say, "We will plan for second tier more advanced characterization like LCD and/or fractionation."

It's just clear from all of this that fractionation is not something that was used solely for litigation, and so we contest that argument that Dow is making here.

And we also contest Mr. Johnson declaration which is just clearly wrong again in multiple places.

MR. BARLOW: May I respond, Your Honor?

THE COURT: Sure.

MR. FARABOW: Thank you, Your Honor.

THE COURT: Thank you.

MR. BARLOW: The document

Mr. Farabow pointed to which the document number eight in his binder is from 1991, and it is not competitive assessment, it is not taking a competitive polymer and testing it to see how much of a threat is this going to be, and what can we do about it, what can we tell our customers. It is a fundamental scientific study and says that in the first sentence, it's trying to figure out the relationship between the structure of the polymers and properties within each fraction.

It's a scientific report conducted based on several months, if not years, of research within Dow to understand fundamental properties of polymers, and it's of a scientific nature. It's not a competitive assessment.

And Mr. Johnson is correct, fractionation is not the done for competitive assessment.

Furthermore, the documents, the documents included with privilege number 1267 show that the testing discussed, this testing shown in 1267, was done under Ken Reichek's coordination. He recorded the results. He

recorded the requests in his privilege data book entitled attorney/client work product Nova, and it is special fractionation conducted for litigation purposes.

The last document that Mr. Farabow pointed to was from the very early days of when the Surpass product was on the market. And it was when Dow saw the Surpass product and realized there might be an issue with its own patents. So it set up a process to as the document says, evaluate the product versus key patents.

And some of the testing referred to in here, including fractionation, was for the patent infringement analysis, not for the competitive assessment test.

And finally, Your Honor, the data book numbers on document, the Exhibit 2, Nova Exhibit 2, the data book numbers for the samples tested are all in row six of the document, and none of them are on Mr. Johnson's list of attorney/client work product data books.

THE COURT: Well, essentially Nova is arguing and I understand the argument, that

sometimes testing can have multiple purposes, and then you can draw out of that testing, you know, for whatever purpose, results for whatever purpose you want. And that was the case in the dispute that Nova cited.

I'm looking very carefully at these documents and comparing them to what Nova is trying to argue as a wedge to get behind the work product. In other words, if there is some cross purposes of this testing.

I have looked very carefully at both the first document and now 1267, and read the notes of Mr. Reichek and what he essentially was -- the purpose of his fractionation was. And it's clear from the documents on what he's reporting and the problems he's having is he's trying to do it for claim comparison, and not for any competitive purposes, at least in these documents.

Now, the documents that Mr. Farabow has, I would agree, they show if not a single purpose of competitive analysis, they show a cross purpose and those documents should have gone over and I assume that's why Nova has

them.

MR. BARLOW: That's correct, Your Honor.

THE COURT: But a review of this document and its supporting documents make it clear that this was testing for a specific litigation purposes. And they had a specific goal they were seeking, vis-a-vis the claims under two patents.

So I'm going to find 1267 to be work product and protected under that privilege.

MR. BARLOW: Your Honor, the next document is 1269, and that one shows some results of testing on the fractions of two sets of fractionations of Dow's -- of Nova's polymers.

Set number one is -- for example, set number one is shown on the first page in diamonds, and those are a series of fractions of one sample of Nova's polymers. And set number five which is shown as squares is a set of samples of another set, a set of fractions of another sample.

If you look in the supporting

documents at the first page marked of the tab, this page shows all the data on the first page of 1269 plus data from two other sets of fractionations.

And the reason I'm going to this document, the 255 which is in the supporting materials, is this document further on at the red tab includes the LIMS numbers, and these LIMS numbers again are tied to Mr. Reichek's data book, which is included at the back.

So what this collectively shows is that Mr. Reichek conducted some fractionations of the Nova polymers, recorded those fractionations and the results in his data book, did some further testing on each fraction, which he recorded in two places, one, which is in document 255, shown in the supporting materials, which does have LIMS numbers tying it up to his data books.

And the other is in 1269, the identical data is there, but this is a printout that Mr. Johnson had in his files of just a few of the pages of this analysis, so it doesn't have the LIMS numbers on there to tie it up.

But, again, using the LIMS numbers and the data book, one data book is entitled attorney/client work product Nova, and the other is entitled Nova attorney work product, attorney/client work product, they're both Mr. Reichek's data books.

And the type of testing that's shown is also referred to in a slide that was prepared as a result of a meeting between Dow and Jenkins & Gilcrest. And the title of the slide is follow-up action plan, and it mentions at the very bottom the exact type of testing shown on the first page of 1269, and the slide was forwarded to Greg Porter of Jenkins & Gilcrest, Mike Glenn, Bruce Kanuck and Steve Krupp, the last three people are in-house attorneys of Dow, and the E-mail cover says it refers to a planning meeting and the summary of what was discussed and decided.

THE COURT: I can tell, Mr. Farabow, they're working real hard to get your client in their sights here. There are have --

MR. FARABOW: Your Honor, it's a

tough argument when they come up with three or four supporting documents that we haven't seen. I don't know exactly how to argue --

THE COURT: Let me give you a quote. Firm up additional results on the '045. I mean, they're sighting your client, no question, and product. And then, I mean, I wish I could show you because it would make you feel better, but they're relating that testing directly to that sighting up.

MR. FARABOW: Okay. Your Honor, I can't argue with that, Your Honor, except that I want to reserve until the end renewing our motion on need as to these particular documents, so I want to alert the Court at this point, these are not core work product documents, and I think there are two points that I will want to make at the end of our hearing. Hopefully I won't have to make them because you would have found at least ten documents that are going to free all of these up.

But one point is they don't want us to know about all this fractionation work they did, 30,000 pages of fractionation over

three years. I don't think they ought to be allowed to come in and use fractionation to use their case of infringement and hold back these documents. That's point number one.

And point number two is they've got a special machine that they use that nobody else has got. It's described by one of their inventors as a huge Treff machine that's not available on the market. And therefore, I think that is an argument that I want to make to you at the end, that this noncore work product, we need to see it so we can prepare our defense, so those two points I just want to reserve, I don't want you to think I'm giving up at this point, Your Honor.

THE COURT: I know you better than that.

MR. FARABOW: Thank you, Your Honor.

THE COURT: Thank you.

1269 I'm going to find is protected by the work product privilege.

MR. BARLOW: 2216 is the next one. While it's being handed up, can I respond

briefly to two things Mr. Farabow said?

THE COURT: Okay.

MR. BARLOW: First of all, the fractionation. Fractionation covers a lot of ground. There are many different types of fractionations and the reason we're withholding this as work product is once we have the same information Nova has, we're in the same position they are, and know the two things they are blending together, then we can target our fractionation precisely.

This fractionation was shooting in the dark. We didn't know where the two components came from, and the fractionation that we are withholding is not something we are going to rely on, but we may use fractionation in a targeted way based on information that Nova has produced in this case.

THE COURT: You ought to know that you can't use this fractionation because there were problems in the testing --

MR. BARLOW: Right. Right.

THE COURT: -- that skewed the results. And that's what makes it interesting

reading. Maybe after the case Mr. Roper will buy you a bottle of wine and share it, but I understand what you're saying.

MR. BARLOW: And then the other thing is, this huge Treff machine that they are talking about, that machine they can have discovery on, they just can't have discovery on the testing we did of their products in anticipation of litigation, that's our position.

The huge Treff machine they can get discovery on and, in fact, it's not something nobody else can build. It's well known in the published literature and it's not a one-of-a-kind device at all.

This next document, 2216, is a series of E mails, and the first E-mail is from Ken Reichek, seeking assistance from another scientist on slope of strain hardening.

And Ken is the work product technologist that Mr. Johnson used. And he identifies four polymers that he ran slope of strain hardening testing on. And then in one of the supporting documents, the data book shows each of those samples. Slope of strain

hardening is a claim limitation, it is not something that's used for competitive assessment because customers don't talk about slope of strain hardening. And so the testing that was done as recording in Mr. Reichek's data book was part of his analysis of the Nova patent enforcement issue.

He then sends the data to another scientist to attempt to get assistance on analyzing the data. And so that's why this document relates to our work product testing and shows the types of testing we were doing.

THE COURT: Mr. Farabow.

MR. FARABOW: Thank you, Your Honor. If I can refer you back to our Nova Exhibit 1 book, to document number four in the book, Your Honor. This is slope of strain hardening data on Nova Surpass 900-C. This is the kind of data that is run, it talks about stress versus strain, and this is the data that's used to draw those stress/strain curves.

If Your Honor turns to Tab Number 5, this is a data book titled slope of strain hardening study done by Mr. Reichek who only

apparently Mr. Johnson says does litigation work, but this document was produced to us and apparently relates to other than litigation work.

If Your Honor looks at the page numbered 91553 at the bottom, this is a group of testing done to determine the slope of strain hardening, which is exactly the kind of data I understand is in the document that is under consideration.

If you turn to 557, Your Honor, there is testing in this same notebook on Nova Surpass products as shown on that page, the first two items tested or Nova Surpass. Here they're doing intensive, a tier analysis, but slope of strain hardening is what this notebook is all about.

And Mr. Reichek is doing the testing. And it has nothing to do with litigation as best I can determine.

If Your Honor looks at document six in the notebook, this is slope of strain hardening testing done on Nova 900-C product, this is SHC testing, probably looks exactly like

some of the documents that are on this list, I hope, Your Honor.

And so our point is that they were doing slope of strain hardening testing for competitive analysis, product development. I think Mr. Barlow has tried to pigeon hole competitive analysis too much. One of the reasons they were doing competitive analysis was to compare their product with ours and with Exxon's to try to see how they could improve their products. So when we're talking product development, we really are talking a part of competitive analysis.

And again, Your Honor, our point is if the document itself doesn't show that it's for litigation purposes, then it ought not to be held back. If it does like the other ones Your Honor has looked at, then I can't argue with that.

Thank you.

THE COURT: All right.

MR. BARLOW: Your Honor, slope of strain hardening is something in the claims and it is based on a way of analyzing stress/strain

data, load extension data, but stress/strain data can be used for other purposes. And that's why we produced documents like document number four in his binder and document number six in his binder.

Document number six, it's just stress/strain data, that's it. There is no slope of strain hardening analysis at all. It doesn't even refer to slope of strain hardening, it is simply stress/strain data and it could be used for competitive purpose.

Slope of strain hardening is not done for competitive assessment purposes, but stress/strain data may be. Tinsel curves are sometimes used for competitive assessment purposes.

The other documents that Mr. Farabow pointed to, the data book of Mr. Reichek's where he did slope of strain hardening testing on Nova Surpass, that was part of the same Highlander fundamental scientific study that we talked about earlier and which is shown in documents one and two in the binder.

It is not competitive assessment

testing on Nova's polymers, it's not saying let's take Nova's polymers, see how it stacks up against ours. It is a scientific study to say let's look at all the blends out there and see how they work so we can understand better how polymers, how the molecules in polymers interact with each other to result in final properties so that sometime in the future we can design another polymer.

Mr. Reichek did work on that, but in terms of the competitive assessment testing of Nova that was done in 2003, that Nova has tried to say all of this testing that Mr. Reichek -- Mr. Johnson supervised was for that purpose, this work in 2005 on this Highlander fundamental study is not part of the competitive assessment testing that was done.

THE COURT: That's where I'm a little confused. There was competitive testing from what I can tell in 2003.

MR. BARLOW: Yes, that's right.

THE COURT: And there were specific products that were compared.

MR. BARLOW: That's right.

THE COURT: And specifically, the '03 testing had to do with the slope of strain hardening tinsel curves.

MR. BARLOW: The '03 testing, the competitive assessment?

THE COURT: Well, tell me.

MR. BARLOW: Well --

THE COURT: The '03 testing.

MR. BARLOW: There was slope of strain hardening testing in '03, but it was for litigation purposes, it wasn't part of competitive assessment. The slope of strain -- the competitive assessment testing in '03, that looks at the properties the customer cares about, like machine tear, viscosity, density, how it reacts to impact, to a strike with a dart, how it reacts if you make it into a film and try to tear it.

Slope of strain hardening especially in the case of a patent focused on a fraction of the polymer, not the entire polymer, and so slope of strain hardening is not --

THE COURT: If you're testing the Nova Surpass product in '03 for potential

litigation on the hardening issue.

MR. BARLOW: Yes.

THE COURT: Right.

MR. BARLOW: Yes.

THE COURT: Why would you reference in the document a Dow product, or a Dow sample?

MR. BARLOW: The Dow sample was for comparison purposes --

THE COURT: But why would you --

MR. BARLOW: -- for infringement reasons. Because --

THE COURT: In the other documents you are referring to the patents and claims?

MR. BARLOW: Right.

THE COURT: In this document, there is reference to do you product lots.

MR. BARLOW: Well, this was in the very early days of the infringement testing, and Dow was trying to figure out what did Nova put together to make this blend. And part of assessing that, the polymer was tested in different ways, different pieces of the polymer were tested together, and the Dow polymer is

something the Dow scientists knew very well and knew how it was put together, so by comparing to Nova polymers against the Dow polymers with this test they might be able to figure out here is how we should chop it up in order to find out whether they have a component A and component B that are in your patent.

THE COURT: Well, in the subject document, which is an E-mail, what would intrinsic to the document set it apart from an at least partial or competitive -- to be discussing at least in part a competitive comparison, what in this E-mail would you point me to that would convince me that it's not at least partially competitive?

MR. BARLOW: Well, Ken Reichek at this time was -- his only work on Nova was on infringement testing, and as I've said, he has never done any competitive assessment testing designed to figure out what do we tell our customers, how much of a threat will this be in the marketplace. He is the one that started this off and sent the data on to the next person for analysis. That's number one.

And number two, the slope of strain hardening study, while that can be used for scientific purposes, it's not used for competitive assessment purposes, it's not used to say well, what's the customer going to think of the slope of strain hardening because the customer doesn't care. So those are the things intrinsic to the document.

In addition to that, we have the contemporaneous, the fact that on September 4th, Mark Johnson as shown in the data book, Mark Johnson requested the slope of strain hardening be conducted and that's part of Mr. Reichek's Nova patent enforcement data book.

THE COURT: What I'm going to do is reserve decision on this document, which is 2216, which is an E-mail. And let's move -- let me just hold this one for a minute, 2216.

MR. FARABOW: Yes, sir.

THE COURT: We have to move a little more quickly because I would like to get through all of them, not do them representatively. 828.

MR. BARLOW: Okay. This one is

notes of Mr. Johnson on different tests to be conducted to fractionate the Surpass polymers to break it down into its pieces to test. And the reason they were doing that was to apply the claims of the Dow patents which are directed to the pieces of the polymer.

So on the document itself, it references four types of testing that I have identified with the letters A, B, C and D, and there is a discussion in the privilege, in the document 828 about conducting those tests.

And then in the attached document which is a Ken Reichek data book entitled Nova patent enforcement, attorney/client work product, he includes on page five a statement, Mark Johnson asked me to submit the following samples for analysis and characterization, and it includes each of the four tests listed on the handwritten note.

And, in fact, mentions for the last one, labeled D, mentions the purpose is to isolate a particular fraction of the Surpass polymer. And the isolation of the fractions is the purpose of the work product testing.

In addition to that, there is a discussion of deconvolution the fractions on 828 which is highlighted and Mr. Johnson explains deconvolution is a mathematical analysis that is not done for competitive assessment testing, it was done here to figure out how to target the fractionation, they were shooting in the dark, they didn't know how Nova put the polymers together so they were trying to use deconvolution to try to get an idea.

THE COURT: All right.

Mr. Farabow.

MR. FARABOW: Thank you, Your Honor. I would like to point you to Document 7 in Nova Exhibit 1, which indicates on the cover that the competitive assessment was still ongoing in August of 2006, the competitive assessment of Nova product.

And if Your Honor would please turn to the page numbered 5671 at the bottom, it says under the heading not infringement litigation, under the heading practicing elite technology, it says Dow has dissected Surpass polymers, expertise in polymer characterization,

material science and modeling. They're doing all this stuff as part of their competitive analysis.

Now what of it is done for evaluating infringement and what of it is done for competitive analysis, in fact, Mr. Johnson was heading up both, so our position is whatever he was getting from one he was using for the other.

Mr. Johnson apparently sent this information to I believe it was Mr. Reichek. Johnson is not a lawyer, Reichek is not a lawyer, their claim is Johnson was acting as an agent for attorneys, but he was also head of their competitive analysis.

So, again, Your Honor, unless there is something in the document they're asserting work product on which indicates that it was directed primarily to litigation purposes, we think it ought to be produced because it clearly had a joint purpose.

THE COURT: All right. Thank you.

MR. FARABOW: Thank you, sir.

THE COURT: With regard to 828,

and the subject matter being a targeted fractionation specifically directed toward a potential litigation issue, I find that it falls under the work product privilege protection. And that that is internally apparent. It's apparent in the document itself. So 828, the privilege will be upheld.

832.

MR. BARLOW: 832 is another set of notes. This one is a request from Mark Johnson to Ken Reichek to conduct a number of tests, some of them were ones we just saw in the previous document, including the one second from the bottom that mentions isolating a particular fraction.

And it shows also the same list in the same format with the same checkmarks appears in Mr. Reichek's data book which is titled Nova patent enforcement attorney/client work product on page five, and shows the same tests in the same order and it relates -- this is a lot like the last document, Your Honor, same types of tests are referred to.

THE COURT: All right.

Mr. Farabow.

MR. FARABOW: I wonder if all the tests are directed to litigation or even if any of them from what Your Honor has seen are specifically directed to litigation. And if they're not, our position is they ought to be produced.

THE COURT: Well, you know, I'll tell you there is a little pattern developing here that the fractionation testing is pretty clearly directed at litigation. And that's -- again, there is some interpretation, but that's internal to the documents, that finding.

The slope of strain hardening on the curves, that's where I'm not so sure. And that's because of what is internal in the documents.

MR. FARABOW: Yes, sir.

THE COURT: So this basically is a fractionation request, so I'm going to find 832 to be privileged, but I'm looking real hard at that strain hardening.

MR. FARABOW: Thank you, Your Honor. If I might just say, Your Honor, when

they were testing, when they were fractionating the Exxon samples, that wasn't for litigation purposes, so I mean, if the document internally says it's for litigation purposes, I have no argument with the Court, if it just says fractionation.

THE COURT: And it's broad, I understand that.

MR. FARABOW: Thank you, Your Honor.

THE COURT: I'm on to that, I hope.

MR. BARLOW: The next document is a slope of strain hardening document and I think this one shows more clearly that it's related to the litigation.

In the supporting documents in addition to Mr. Reichek's data book, we have some notes between -- notes of the meeting that Mark Johnson had with Steve Bulk. Steve Bulk is a professor at a university in Canada, and he was -- and it's the second document behind the cover sheet, it's Number 961, the handwritten document on the left.

Doctor Bulk, Professor Bulk was retained as a consultant to look at the infringement testing. He was retained in anticipation of litigation to consult on whether Nova infringed Dow's patents, and he suggested some ways of analyzing the data.

So, for example, if you look in the notes of the meeting with Mr. Bulk it refers to doing some measurements and checking for variability and it says fifty samples and then it changes that to thirty samples, and that's -- I believe that's marked with a letter A.

And then if you look on the notebook, Mr. Reichek's notebook, this shows the thirty samples. It starts with the request, Mark Johnson asked me to run slope of strain hardening on thirty repeats, and it's dated two days after the meeting with Steve Bulk.

And if you look at the bottom row, specimen number 30, and the data that's shown there, highlighted in the second, third, fourth and fifth columns for row 30, it's identical to the results shown on the first page of Privilege Document 1771.

So this shows that Privilege Document 1771 was an analysis of data requested by a consulting expert to analyze Dow's infringement proofs in anticipation of litigation.

THE COURT: Mr. Farabow.

MR. FARABOW: Hard for me to respond without having the documents, Your Honor. I think you're in a better position than I am to look at them. I don't think the privilege -- a claimed work product document, in fact, itself indicates any work product activity. I have no way of knowing whether the other documents support that or not.

THE COURT: All right. So I'm to understand that the purported protected document that summarizes and charts the slope hardening testing done by Nova.

MR. BARLOW: Done by Dow, yes.

THE COURT: I mean done by Dow.

MR. BARLOW: Yes.

THE COURT: And when was the document prepared?

MR. BARLOW: The 1771?

THE COURT: Yes. Because in essence part of what it reports is what I've already found to be privileged in part, anyway.

MR. BARLOW: Oh, right. Yeah. You mean the part --

THE COURT: In other words, I found one document to be privileged, it at least in part is what is supportive of 1771, the same kind of testing being protected.

MR. BARLOW: That's correct, same kind of testing.

THE COURT: Right. But when was 1771 prepared?

MR. BARLOW: The date -- it's an electronic document, so the date we had for it was January 26, 2005. And the Steve Bulk meeting was January 18th, 2005. The request recorded in Mr. Reichek's notebook was January 20, 2005, so then the analysis was six days later, the analysis in 1771 is six days later on January 26th, 2005.

THE COURT: All right. Consistent with my other finding, I find that 1771 is privileged.

MR. BARLOW: The next series of documents are related to each other and it's a different kind of testing. This is testing at the very beginning of the time period, 2003, when infringement testing was conducted.

861 is a handwritten request from Mr. Johnson to Mr. Reichek asking for some testing to be conducted. It's dated 828, 2003. And on the same day, Mr. Reichek opened a new data book entitled Nova Patent Enforcement, attorney/client work product, and the first entry which is the next day, August 29th, 2003, it repeats the request that was made of him. And it repeats the specific type of analysis or what was being looked for and it mentions what was being looked for in the Nova polymer.

And this was the type of testing to try to identify the catalyst in Nova's polymer which is not part of competitive assessment testing. This testing is rather extensive testing, and takes a lot more time than the competitive assessment testing.

THE COURT: What I read here, again, this doesn't -- I understand what you're

saying about its purpose, you know, what you're looking for, the catalyst liquid, but this isn't going to be used in this case.

MR. BARLOW: No, definitely not.

THE COURT: From what I can read. Although it was prepared to do an infringement analysis.

MR. BARLOW: It was for another patent, it wasn't for the patents-in-suit.

THE COURT: Right. It's looking bad, Mr. Farabow. I mean, you can't read this, but it's not even going to be used in the case and what they're -- but it's clear that they're looking for claim infringement related to catalyst liquid.

MR. FARABOW: Sounds like we don't have to worry about that one.

THE COURT: You don't have to worry about this one. 861 is privileged. And we can tell from the document they can't even use it.

MR. BARLOW: 862 is related to the same subject.

THE COURT: I think Mr. Farabow

very cleverly has gone to document -- to compel document production really in an effort to have motions in liminae to exclude. Pretty clever litigation strategy he's got going here.

All right. 862.

MR. BARLOW: 862 relates to the same analysis, and it's E-mail exchanges between Dr. Stevens who is going to do the analysis and Mr. Johnson about the analysis and how they were going to do it. And it's dated on August 27th, the first E-mail, Dr. Stevens offers to do the analysis. The same day Mr. Johnson replies at the top of the E-mail.

The next day in the note we just looked at in 861, Mr. Johnson request that Ken give sample to Dr. Stevens so he can do the analysis and then the day after that, Mr. Reichek records in his work product data book that he's going to do that.

THE COURT: This clearly falls under the same finding as 861.

MR. FARABOW: Your Honor, as long as it indicates in the document itself that it's for patent analysis purposes, I can't argue it.

I think I just want to point out to the Court that at this point in time, they are characterizing Nova's Surpass samples for the dual purpose of competitive analysis apparently and also for consideration of litigation. And I would also point out that Nova Exhibit 2 shows a detailed analysis for components of catalysts and so forth, so they were doing this for a lot of different purposes.

This one Your Honor can see and I can't, and it may indicate that it's for patent purposes and I'm glad it's not involved in this case.

THE COURT: Yes. It's not going to be in this case.

MR. FARABOW: Thank you, sir.

THE COURT: 862, privileged.

MR. BARLOW: 2261 is a third document on the same subject. This is the next week, Mr. Johnson is saying -- asking Mr. Stevens how long --

THE COURT: Here what is I'm going to do. These are all pretty clear, it's a strain here. So I think Mr. Farabow understands

the ruling and he's made his point if it's -- you know, that hopefully I would find intrinsic to the document that it was being analyzed -- the product being analyzed for litigation and the patents were not competitive purposes or even part competitive purposes. And it's clear here that the experiments were for the identification and analysis of the catalysts, and it really is very directed. And then also, that none of this is going to be able to be used in this litigation.

Okay. So 2261. Is the rest of the strain to this?

MR. BARLOW: That's the rest for this subject matter.

THE COURT: Okay.

MR. BARLOW: The next document relates to slope of strain hardening, and it's 2277. And it's a chain of E-mails. And if you go to the last page of the chain there is an E-mail, the second E-mail in the chain begins Steven Krupp and I are evaluating the enforcement of one of our patents. It identifies it against Nova. We are collecting

strain hardening data and need to know and then it goes on.

Steve Krupp is a patent attorney at Dow. And then the E-mail chain is a result of this request to get this information.

And we think the document the way it begins shows it was -- this inquiry was for purposes of getting ready for litigation on the patents against Nova.

THE COURT: It's all this stuff when you get into these cases, it's amazing what people put in E-mails.

MR. FARABOW: I have always believed that, Your Honor, and I sure would love to see it.

THE COURT: In the Lipitor case there was a string of E-mails where they were talking about we didn't get the right thing, and they were looking for raising HDLs and they wound up lowering LDLs. And they didn't know why. And they argue with the marking department, $12 billion a year later, it's crazy. This is real patent talk, they're trying to figure out a lot of things about the patents

and Nova here.

MR. FARABOW: All right, sir. But it's a funny series. So where do you put those dog bones, but it's all about your client and the patents and the strength aspect of the patent versus your products, so 2277 is privileged.

You think there ought to be a course for business, people will read those ten years later, you should be more careful.

MR. BARLOW: Your Honor, the next document is closely related to the one we just looked at. These are handwritten notes of Mark Johnson from a discussion he had with Shih-Yaw who is one of the correspondents.

THE COURT: Who we now know works at home a lot.

MR. BARLOW: In Singapore.

THE COURT: Yes.

MR. BARLOW: Right. Exactly, Your Honor, in the chain, in the E-mail chain, there is discussion of arranging for a call between 8:00 and 9:00 a.m. on February or September 26, and 7242.

THE COURT: I don't think you have to argue this much. Mr. Farabow understands the tracking on the other document. This is clearly the same person. It's arranging a phone call about the subject matter, so I'm going to find 1188 privileged for the same reasons. It's just a follow-up to discuss the data.

MR. BARLOW: The next one is related as well. It is a precursor to the E-mail chain we just looked at and it is an instruction of slope of strain hardening and in it Kalyan recommends that Mark review this with Shih-Yaw. And this is dated the day before the 8:00 a.m. conference call, or 8:00 a.m. discussion between Mark and Dr. Lai about this testing.

So this document 2283 led directly to the one you just looked at which was an E-mail from Mark Johnson saying Steve Krupp and I are looking at this infringement issue, so this is also related to that subject.

THE COURT: And, again, the document itself demonstrates that after talking about putting the testing on spreadsheets and

comparisons for infringement purposes, 2283 privileged.

MR. BARLOW: 2317 is also related to slope of strain hardening, not the same exchanges we have just looked at, but in the supporting documents, the last one is a presentation --

THE COURT: Well, this falls in the same line. Mr. Farabow, just for your entertainment, now they're trying to figure out how you measure the slope.

MR. FARABOW: We would love to know that, Your Honor.

THE COURT: Yes, basic stuff here.

MR. FARABOW: Doesn't tell it in your patent, Your Honor.

THE COURT: I'm not getting into that yet. But I'm going to give you a hint that it really is on the patent.

2317 is privileged, clearly, and it tracks, Your Honor, the other documents.

MR. BARLOW: 1200, these are measurements of slope of strain hardening of the -- this relates to some of I think the testing

we saw in an earlier document, testing on Nova Surpass's product, and the data that's in 1200 is shown as well in the Ken Reichek data book entitled Nova patent enforcement.

If you look at -- I'm sorry, it's in the second Ken Reichek data book, the last document in the supporting materials. If you look at the last page, the highlighted line, those numbers in columns one, two, three, four and five, are the slope data shown on pages one, two, three, four and five respectively of document 1200, and the slopes have been highlighted to show the correspondence. So this is part of the testing that Dr. Reichek did with respect to the Nova patent enforcement issues.

THE COURT: Now, the product Dowex is produced pursuant to or under what?

MR. BARLOW: That's a commercial product.

THE COURT: Under what patent?

MR. BARLOW: Not these patents, but it is discussed in these patents as prior art.

THE COURT: It's discussed in the

subject -- in the patents-in-suit.

MR. BARLOW: Yes, as prior art.

THE COURT: As prior art. And, of course, that's a Dow patent, prior art?

MR. BARLOW: Yes, it's a Dow product, correct.

THE COURT: Product, I mean.

MR. BARLOW: Yes.

THE COURT: Mr. Farabow.

MR. FARABOW: Your Honor, we've shown that Mr. Reichek and others at Dow were doing slope of strain hardening tests on Nova's product in Exhibits 4, 5 and 6 of Nova Exhibit 1 that were not related to litigation, but rather to the competitive purposes.

We've also shown in Exhibit 8 that Dow tested Exxon products for slope of strain hardening related to competitive purposes. Dowex is a different product that is not intended to be competitive with the products in this case. You can't compare -- Your Honor knows you can't prove infringement by comparing your product to the other side's product. When you do that, you're doing it for commercial

purposes.

Again, if there is a reference in here to the claims or to comparing it to the claims or to the patent then --

THE COURT: There is reference here to the patent -- subject matter of the patent and -- well, let me just say, to the subject matter of the patent, and features of products that would be produced under the patent, and how you might test for those features.

MR. FARABOW: But they claim that they are elite products which are competitive products and which are the very products they were dealing with in their competitive analysis are within the scope of the patents, so this could well have been a competitive analysis document, unless they're evaluating it versus the claims.

THE COURT: Well, that's what I think they're doing and I think they're trying to figure out how to evaluate, is what I think. I mean, as part -- as you read document to document, you get some sense of the testing back

in -- this is in September of '03.

MR. FARABOW: This is early on.

THE COURT: This is early on, they're trying to figure some things out here about the patents vis-a-vis your client's product.

MR. FARABOW: Well, Your Honor, then --

THE COURT: I don't see anything that would be competitive here.

MR. FARABOW: Okay. Well, we're into -- let me make a different argument then.

THE COURT: Okay.

MR. FARABOW: If they haven't decided whether they have got a lawsuit yet or not --

THE COURT: No, they're looking for you.

MR. FARABOW: Okay. All right.

THE COURT: No. No. Early on they wanted Nova in a lawsuit. I mean, that's clear.

MR. FARABOW: It took them a long time, Your Honor.

THE COURT: It did. That's interesting. What took so long from back then, just being careful. I don't get it.

MR. ROPER: There was a lot of testing to make sure they were absolutely sure.

THE COURT: They kept testing all the products and kept talking about their patents and wanted to go after Nova, it's interesting why they would wait -- I guess they didn't have the testing complete to where they were satisfied. The law firm they had was not your law firm.

MR. ROPER: No, it was not, Your Honor.

THE COURT: It was a different law firm, but that was their litigation law firm?

MR. ROPER: Yes. We were involved in some litigation at the time. I don't remember exactly what was going on, but this other firm, yes, was indeed gearing up for litigation.

THE COURT: And that's who is directing Mr. Johnson?

MR. ROPER: At this point,

correct.

THE COURT: From what I can see here.

MR. ROPER: Yes.

THE COURT: That's interesting.

MR. FARABOW: I think Mr. Roper may have misstated, because I don't think Porter came into it until 2004 as I recall.

MR. ROPER: That may be.

MR. FARABOW: And this is 2003, so Johnson I think in these documents says he's working with in-house.

THE COURT: To get ready for that.

MR. FARABOW: That's what he says.

THE COURT: Where is that law firm, Porter?

MR. BARLOW: Texas, Your Honor, Houston.

MR. FARABOW: Jenkins & Gilcrest I think is the name.

THE COURT: Jenkins & Gilcrest and they're in Texas.

MR. FARABOW: Mr. Horwitz says they are no more.

THE COURT: They don't exist?

MR. HORWITZ: That's right.

THE COURT: Okay. All right.

We're at 1196.

MR. BARLOW: All right. 1196 is another example of the exact type of document we have just looked at. It has the slopes shown on the last page, one by one. The last page is not a competitive assessment document, it's a page from one of Mr. Reichek's work product data books.

The testing is requested on a page from another Ken Reichek data book that also request fractionation testing. So we think for the same reason as the last one, this is clearly work product.

THE COURT: All right. For the previous reasons I find 1196 is work product.

MR. BARLOW: The next document is handwritten calculations of the average slope from the exact data that was on the document we just looked at, 1196. So it's just a handwritten calculation showing the slope and then a calculation of the slope of strain

hardening coefficient based on that.

But if you look at the data that's averaged here, it's the same data from the data book that we just looked at, except that it's rounded to two decimal points. But if you look at the average number, it's identical, and so this is the same information as we just looked at.

THE COURT: I'm not -- this is whose writing?

MR. BARLOW: This is Mark Johnson's writing.

THE COURT: Right.

MR. BARLOW: Yes.

THE COURT: And it is the same information that's in the document?

MR. BARLOW: Yes. He's just doing a calculation of the average slope. And then taking -- if you look on the document, the data book, it shows the same information calculated by Excel and Mr. Johnson is apparently checking it by hand to see if everything was working right.

THE COURT: He's adding up the

same numbers.

MR. BARLOW: That's right, Your Honor, but it includes the data from the testing.

THE COURT: Right. All right.

MR. FARABOW: And, Your Honor, do I understand that there is some indication in 1195 and 1196 that litigation is the purpose of this?

THE COURT: No, I can't say that. This is just -- in the other documents there is, and what this appears to be is he put the documents down and got a sheet of paper, and just wrote the exact same numbers. It has the same information that's in the documents --

MR. FARABOW: But the other one you just looked at, 1196, not this one, but the other one, that does indicate a litigation purpose?

THE COURT: It does.

MR. FARABOW: Thank you, sir.

THE COURT: And this is just his sheet to recalculate on a sheet of paper.

MR. FARABOW: I understand, Your

Honor.

THE COURT: Okay. 1195. Work product. And none of this is in this litigation?

MR. BARLOW: None of this test testing, right.

THE COURT: Right.

MR. BARLOW: That's right.

The next document is another one, another handwritten calculation based on a slope of strain hardening study.

THE COURT: And this is Johnson.

MR. BARLOW: That's correct. And the numbers match up with the slope, the slope of strain hardening testing as well as Ken Reichek's work product data book.

THE COURT: All right. 1201 is the exact same thing, Mr. Johnson's recalculation on a plain sheet of paper, but what he's taking the calculation from is documents that intrinsically demonstrate that they were prepared for litigation.

MR. BARLOW: All right. The next document is 844, and this is an example of the

deconvolution analysis. And Mr. Johnson explained in his declaration that deconvolution analysis were used for infringement analysis here, but were not used for competitive assessment testing.

And the supporting materials, the first document is selected slides from a PowerPoint presentation entitled Nova AST Patent Enforcement, and it was presented by Mark Johnson as well as Mike Glenn and Steve Krupp who are attornies at Dow.

And on the next page, there should be highlighted the results, the final results of the deconvolution analysis. On slide number 22, I believe it is. And the way this slide ties up to the first page of 844 is shown in the next document, which is number 276, and that shows on the first page the deconvolution analysis. And then the next page shows the basis for it, which is identical to the first page of the 844.

In addition, document 276, it has -- no, it's just the identical page, it's got the same legends, the same graphs and is the same results. So this is a deconvolution

analysis prepared for this meeting of Mike Glenn and Steve Krupp and Mark Johnson participated in. Thank you.

MR. FARABOW: I don't know what the supporting documents show, Your Honor, so I mean, I think that the way the document is described, it does not indicate on its face that it is work product. You have other associated documents that may or may not indicate that. I don't know how the dates compare.

THE COURT: As I understand the presentation, the document 844 is contemporaneous to this Nova AST patent enforcement presentation by Johnson, Krupp and Glenn in May 3rd of 2004.

MR. BARLOW: Well, it's quite a bit earlier than that, but it was used to present the slide on the deconvolution analysis that was presented in May 2004. It was also presented earlier, in earlier infringements presentations, which we can provide, but this was the one --

THE COURT: But it was used in conjunction with 2004?

MR. BARLOW: Yes, Your Honor.

MR. FARABOW: But, Your Honor, if you do a test in 2003 and then you decide in 2004 you're going to use it in a slide related to an infringement analysis, that doesn't necessarily prove when it was done it was done for that purpose. And as far as Mr. Johnson's declaration is concerned, he's been wrong about a lot of things, Your Honor.

THE COURT: I'm going to look at this.

MR. BARLOW: Your Honor, we could provide the slides from the earlier meeting to show the same analysis. I would also like to point out that the analysis is not one that we will be using in this case, and it relates to patents not at issue here.

THE COURT: Here is a little bit of a problem in this presentation, you have it there, and if you go to the second page, this was -- I mean, I guess it's the first page, and you see where it says -- has the cover sheet of the patent enforcement, and has the name of the three people I guess who prepared this, and you

go right below that, and it has -- you have a box there, right lower corner, how do you explain some of those topics?

MR. BARLOW: This was to give audience background as to what the technology, the Nova technology was that was at issue to explain to the business people who were deciding whether to pursue this --

THE COURT: Look at the third bullet point. This is Mr. Farabow's argument about when you crossover and use what may have been prepared for a patent infringement analysis, but then you engage it, even in a minimal way in a competitive analysis.

MR. BARLOW: Are you looking at the lower, this one here?

THE COURT: No, to the right.

MR. BARLOW: Oh, to the right.

THE COURT: The third bullet.

MR. BARLOW: Right. Your Honor, that's referring to competitive assessment, that statement, that's referring to what they're doing. And it's by way of introduction of the last bullet point which is the patent

enforcement issue. And then they launch into --

THE COURT: See, it looks like here that they're using this document -- I understand what you're saying.

MR. BARLOW: Wherever -- this kind of information has been produced to them in slide presentations where we -- where there was both competitive assessment information discussed as well as work product testing. And in those presentations we redacted out the work product testing. So this is information they have, but it was also -- in other words, if information was used for both purposes, competitive assessment testing and infringement analysis, we gave it to them. If it was used for one purpose only, then we withheld it.

THE COURT: You withheld it, right.

MR. BARLOW: So this information --

THE COURT: You see on the red tab page, and you go to -- I see what you have outlined for me to look at, but you go to this lower back.

MR. BARLOW: Yes. The overall conclusions.

THE COURT: I'm assuming -- right. And then that's the conclusions of the paper.

MR. BARLOW: Right.

THE COURT: It looks like this is a combined strategy of market strategy along with patent enforcement strategy, and these documents are part of that presentation. They may be utilized on the patent enforcement side, but there sure looks like a mixed purpose here.

MR. BARLOW: Well, the meeting was for purposes of deciding the Nova patent enforcement issue, and they referred to other information they had. It was also for competitive assessment purposes, but anything like that has been produced. And I think this slide, in fact, has been produced in other presentations --

THE COURT: You think they have gotten this slide?

MR. BARLOW: Either this slide identically or in redacted form, but I think --

THE COURT: Here what is I'm going

to do, because I think this is problematic under my effort to be consistent here, so I'm going to order that if this document, 844, it's only really one slide, I mean, it's got multiple variations, I think, if it's already been given over, somehow be able to make that representation. If it hasn't, then I'm going to order 844 -- I'm going to find this not work product, it's got a mixed use with Dow, and therefore, should be provided. And if it's already gone over, then it's already gone over. Again, it doesn't look like it's going to be part of this litigation.

MR. BARLOW: It won't be.

THE COURT: But Mr. Farabow can read it on the train, give him something to do looking at those charts.

MR. FARABOW: Thank you, Your Honor.

MR. BARLOW: The next document is 1849, and this is a much older document. It's from the 1990s. And it relates to potential infringement litigation against Exxon, not Nova. And the document itself is from Mark Johnson to

three Dow personnel about testing related to the subject is Ticheng characterization, and what we have included in the supporting documents are related E-mails that some have the same subject, they all have -- they all involve the same people, Georgia Huff, Al Parrott, Larry Kale, Rajen Patel, but they also involve attornies such as Glenn, Korvitch, Steve Krupp, Charles Kaliel who are all in-house attorneys at Dow.

If you look at the third to the last page, it refers to efforts to fractionate and test Exxon's Exceed to determine if it infringes claims of -- this is an internal Dow designation for one of its patents.

And then the E-mail chain continues and Mr. Johnson sets up a meeting around August 26 to discuss this with Georgia Huff, Al Parrott, Rajen Patel, Larry Kale as well as others, including attorney Steve Krupp, and then two days later, it is the subject of document, privilege document 1849 where Mr. Johnson summarizes what happened at the meeting and says that Larry is going to do certain things and Al is going to do certain

things and Georgia is going to do something.

And then finally there is a document in the supporting materials, the last one which is the next week, it's also sent to attorneys including Steve Krupp, and it says the first item that Larry has done what he was supposed to do in 1849, and in item number four says that Al is going -- it repeats that Al is going to do one of the types of tests that 1849 says he was going to do. So we think these documents clearly tie up 1849 to testing related to determining whether Exxon infringed Dow patents.

THE COURT: Mr. Farabow.

MR. FARABOW: Your Honor, we just have the description of this one document which doesn't refer to any attorney, and you have now a chain of E-mail. We know that Dow was testing Exxon products for competitive purposes. If this is a mix use testing, then it should be produced. If it's just litigation, then it's just litigation.

THE COURT: All right.

MR. BARLOW: Your Honor, the

document itself, 1849, does not -- is not to or from an attorney, but it was marked attorney work product contemporaneously with its creation, and it relates to the identical testing discussed in documents that are sent to and from attorneys.

THE COURT: The document, 1849, doesn't itself other than its subject matter description and the fact that it's stamped as attorney work product, it just basically talks about what has to be done to get some testing accomplished. It's dated August 28th, 1997 and it ends up with they're going to meet around Thursday afternoon.

Then you go to September 5th of '97, and it's clear that the August 28th memo has now been acted upon and that memo clearly indicates that what was discussed in the August 28th memo was for purpose of litigation.

And then they're talking about reviewing the progress and get together on the Thursday afternoon again and then you move on to the other E-mails and it's clear that the August 28th was in combination -- what was requested

there was in combination with these other E-mails that clearly are describing meetings and results all for the purpose of suing Exxon for patent infringement. Did they get sued.

MR. BARLOW: I think, Your Honor, there were other litigations going and Exxon and Dow settled before this one got started.

THE COURT: Okay. So 1849 based on its relationship to other documents that clearly indicate internally that they were for litigation purposes is found to be covered by the work product privilege.

MR. BARLOW: The next document is 1630, and it is a copy of another document which is in the supporting materials, or a copy of a page of another document, which is 1245. And it refers to -- 1245 includes both the subject of 1630 as well as a fraction test on a fraction of Nova's polymers.

And further information about the subject of this document is shown in some meeting minutes between -- meeting minutes involving Steve Bulk who is the consulting expert Dow retained to look at the testing to

get ready for this litigation. And in the meeting minutes, Dr. Bulk wants Dow to look at the 1378 CM minus one wavelength for methyl, and if you look in the copy at 1630 that is in 1245, the next 1338 CM minus one is written there.

THE COURT: I got the two, explain that to me again.

MR. BARLOW: Sure. There is 1630, that's the document in question, it's a single page document.

THE COURT: Right.

MR. BARLOW: But it's part of -- it is also part of 1245.

THE COURT: Right.

MR. BARLOW: Which is a two-page document.

THE COURT: Right.

MR. BARLOW: And 1245, the first page has this handwritten note about this specific wavelength, and then the relevance of the wavelength and the analysis to the litigation is shown by the second set of meeting minutes which is document 982. And that shows that they were looking at the 1378 wavelength

for methyl. And the next page shows that as well.

And finally 1245, which is the two-page document also includes analysis of a document, of a sample with a LIMS number that comes right out of one of Ken Reichek's data books, and one of his attorney/client work product data books. So this single page test result is tied up to the work product testing through that chain of documents.

THE COURT: Tell me what this document reports again.

MR. BARLOW: It's reporting an analysis. They were looking for -- they were trying to resolve an issue regarding calibration. And they did this test at Steve Bulk's request to try to get at that issue. And the one page we have on 1630 doesn't have any information on it that ties itself to the work product setting.

But the first document we have included in the supporting materials, number 1245 shows that what they were looking for was this wavelength for this calibration issue. And

this is really an issue about impurity they had identified in some of the fractions, and they were trying to figure out what it was. So it certainly is not testing we're going to be using in this litigation, it was a problem that was found and resolved.

THE COURT: And I agree that it's testing with regard to a problem. Again, because there is some other references here in the supporting documents, I'm going to -- and there is listed in some of the supporting documents, there is a listing of competitive products, there is some comparison, so I'm going to find it's been given a mixed use by Dow, so Document 1630 and find that it's not privileged.

I don't know what use it's going to be in this case, it's hard to make sense out of it with all the explanation, but I'll order it given over.

MR. FARABOW: Thank you, Your Honor.

MR. BARLOW: Okay.

1786 is an Excel spreadsheet containing an analysis relating to slope of

strain hardening. And the supporting documents show that in discussions with Steve Bulk, the consulting expert, there was a discussion of doing a particular kind of correction that's referred to on the first page at the top and also at the bottom.

And there is another document that Mr. Johnson stamped attorney work product that also talks about this type of correction. And then if you look in the legend in the document 1786, it refers to the same type of correction calling it an adjustment in this case.

So this is a way of -- this is an analysis of the data conducted based on Steve Bulk's suggestion, and as part of an analyzing the Nova infringement testing.

MR. FARABOW: It sounds like a research purpose to me, Your Honor. I don't hear anything about infringement litigation. And we have shown that they use this slope of strain hardening for commercial evaluation.

So I leave it to Your Honor to see if there is anything about litigation in there. Certainly it could easily be a mixed purpose if

not solely a competitive analysis document.

MR. BARLOW: Your Honor, Steve Bulk was specifically retained to look at the testing on the Nova products in consultation with Dow in preparation for litigation. And his meetings with Mark Johnson were for that purpose. And the documents that refer to privilege document 1786 are meeting notes with Steve Bulk and mention the exact types of analysis that they're looking at. It relates to SSH which is an issue in the case.

THE COURT: It's clear, this document is -- well, the supporting documents that relate to this document are clearly the subject matter of them is about litigation, and specific litigation has the patent numbers that they're -- but what I'm trying to understand about this --

MR. BARLOW: Your Honor, it also discusses -- the Steve Bulk meeting minutes discuss curb fitting and the ways to do that. And another thing that's shown on the first page of 1786 which is different fits to the data.

THE COURT: What's peak Treff?

MR. BARLOW: That's a fractionation technique. That is a large scale fractionation technique that allows you to collect samples.

MR. FARABOW: Large samples that no other equipment can collect, Your Honor, other than this large machine at Dow.

MR. BARLOW: It's actually a well-known technique, well-known in the art, Your Honor.

THE COURT: They're working through problems in their analysis here. And I don't know much about that machine. I can't wait to hear a lot about it. But they already have some data which is this and it sounds like they're trying to get the data correct to assert the patents or to be prepared for litigation. It's all about data prep.

MR. BARLOW: That's right, Your Honor.

THE COURT: There is no comparisons being made here, it's all about preparing data from what I can read. And Mr. Farabow's going to get that machine on his

side of this case, he's working hard for it. 1786 is work product, internally demonstrates that it's preparation of data for litigation.

MR. BARLOW: 2325 is closely related to the one we just looked at. It includes -- it's a precursor to the spreadsheet we just looked at. It includes half the data in that spreadsheet, and it doesn't have all of it yet, but it was something collected for the process of doing the analysis.

And if you look at the two pages I have tabbed in blue, you can see that the data are identical. The one on the left is the document --

THE COURT: I agree, you don't have to go through it. This is basically another spreadsheet utilizing the same support documents which I've already made a finding on that they were data in preparation of litigation, and just has another reference to this information. And also how they're going to get better information for litigation.

MR. BARLOW: The next one, 1155, is also related. It's a hard copy printout of

the first page of the document we just looked at as well as printouts from another document.

Now, all except the first page of 1155 are printouts of a document that we have provided to Nova, and that's included in the supporting materials. But they contain the notes of Mr. Johnson that he put on the document in getting ready to do the analysis, he talked to Dr. Bulk about the analysis that was in the two documents we just looked at. But the first page is a printout of Document Number 2325 which we just looked at.

THE COURT: So the only difference is the notes?

MR. BARLOW: Well, the difference is the notes, and that it includes other pages.

THE COURT: Right.

MR. BARLOW: But the pages without the notes have been produced to Nova, and that's shown in the supporting materials, the yellow tabs.

THE COURT: So the first sheet is what is really making this different because you produced the underlying data.

MR. BARLOW: We have produced the pages behind the first sheet without the notes on them. And then so the first sheet makes a big difference, but the notes show an analysis of the data that hadn't been done before, and this analysis was done solely for litigation.

THE COURT: So basically you're trying to protect the spreadsheet again?

MR. BARLOW: Yes, that's right.

THE COURT: And again given over this because it came -- the spreadsheets were prepared for litigation with the lawyers and this data was already available because it had a cross competitive purpose.

MR. BARLOW: No, the first page of the document, that's purely -- the data in there is purely created for the litigation.

THE COURT: You didn't give that to them?

MR. BARLOW: Right.

THE COURT: And that's what we have seen before.

MR. BARLOW: Right.

THE COURT: This one has an

enhancement of notes on it.

MR. BARLOW: That's right.

THE COURT: Handwritten notes.

MR. BARLOW: That's right.

THE COURT: But what's under it could have -- I haven't seen this before, but it could have a cross purpose, but they already have these.

MR. BARLOW: They already have what's under it.

THE COURT: Right. I got it.

MR. FARABOW: I gather, Your Honor, however, that we do not have his notes on the underlying document. If the underlying document is a commercial document, then the notes must be commercial notes.

THE COURT: There is no notes on this.

MR. FARABOW: Oh, okay.

THE COURT: No. No. They took those tests and the documents and then they created their own spreadsheet to make comparisons of the various tests. On that spreadsheet he made his notes because they're

talking about a lawsuit. On the underlining documents he didn't make any notes on the underlying documents that you already got.

MR. FARABOW: I'm sorry, I misunderstood, Your Honor.

THE COURT: Right. All right. 1155 is found to be privileged.

You know, as you look at these, I see young lawyers sitting around, what a great future, never going to be out of work, this patent litigation. Look what Roper and Farabow created for you.

When I came to the bench, we had like fifteen patent cases and a huge workload. And you folks are probably in a few cases now. It's a cottage industry. It's amazing what you have done. Congratulations. All you young lawyers ought to be real happy with them.

They're probably going to be looking, what are they doing, they look for residuals, they'll probably walk out the door looking for residuals.

MR. FARABOW: Thank you, Your Honor.

MR. ROPER: We haven't figured that one out, though.

THE COURT: You took very straightforward patent issues and made it into a litigation boom. It's beautiful. And having sat here and seen it when we were all a lot younger. When you read this stuff, I mean, this litigation thing has -- I can remember early on, you never see any of this stuff where they now kick it into like it's asserting patents like seriously.

I mean, people when you were here with the twelve, somebody trying to get a little money, you had polypropylene and all that stuff, it was more straightforward. So I hope all you young lawyers appreciate it. You ought to be buying them dinner, lunches, giving up some of that bonus money.

All right. 806.

MR. BARLOW: 806 is a document for testing of a particular -- they're looking for a specific features that are highlighted, and this is -- these are features that are in a Dow patent included in the supporting materials that

is not asserted here. They're also highlighted in the claims of the Dow patent.

And there is also a note, a handwritten note from Mark Johnson also referring to this unasserted Dow patent, and mentioning the same features they were looking for in the polymer that the privilege document 806 refers to.

THE COURT: You got that big machine here again, Mr. Farabow.

MR. FARABOW: Your Honor, the only thing I would point out is that in Nova Exhibit 2, there are a lot of features that are in the claims that are analyzed for purposes other than patent litigation. I don't think the fact that they have enumerated things like melt index or whatever in there really makes it a litigation motive, unless they're talking about patent claims. I mean, he can't attach a patent that has --

THE COURT: I think what they're doing, they're sending them back to get better information or refined information for patent litigation. Is that a fair explanation of this?

MR. BARLOW: Yes.

THE COURT: And they're using your machine in part. You're going to have to buy one of those.

MR. FARABOW: I don't think there is but one.

THE COURT: I don't think you're going to get one. I think I described them and I find them as work product. 806.

MR. BARLOW: Next one is 57. And it is a document that contains a reference to a type of testing we did, and then a type of follow-up testing below that next to unknown identification. And this type of testing is fractionation testing, it's not the competitive assessment purposes.

And the follow -- the supporting materials show that in early '04, early 2004 as a result of a meeting with Jenkins & Gilcrest, Dow is requested to repeat this specific type of testing on this specific grade of Surpass with --

THE COURT: Right. I mean, this is real clear. This is a repeat of a sample of

a Nova Surpass they want to Treff. This is clearly a retest to refine against your product, the 900-C, for purposes of litigation which is backed up by the cover memo. It's all they're doing is retesting to target your product. I think 57, I find 57 is privileged.

MR. BARLOW: The next document is 1468, a PowerPoint presentation that was prepared to teach the lawyers at Jenkins & Gilcrest about some of the fractionation techniques being used. The supporting document is the excerpts from the full Jenkins & Gilcrest presentation that include the slides in 1468.

THE COURT: This is clearly a tutorial for lawyers in litigation, 1468. The document itself without supporting documents is clear that the document's purpose is to educate the lawyers on the test.

MR. BARLOW: The next document is, it says on it 9302. This is document 839. But it's clearly not 9302, it number 9303, because it's referring to parts of Nova's product, and looking at some of the issues, the splits between the two reactors that Dow is looking at

for examining infringement. And the supporting materials show that around this time, the day before, there was another meeting where there was a discussion of cross fractionation and different types of fractionation testing with respect to the Nova, the Nova products.

And this is a continuation of that meeting where they were looking at how to divide the product up into its parts that were made in each reactor. And it talks about some of the follow-up work that is going to be done.

MR. FARABOW: Judge, that's exactly what they were reevaluating for a competitive analysis. They were trying to determine how they could improve their product. They were trying to determine whether Nova would compete effectively with them in the market. They wanted to know how Nova made the product. And I didn't hear anything about litigation in any of that.

THE COURT: Well, I can tell you a little phrase here, enough to infringe. All this analysis of your product they have it right here, this document supplements this document,

and internal to the document what they're analyzing if there was -- I'm not going to tell you too much, but they're talking about your product.

MR. FARABOW: If there is enough.

THE COURT: If there is enough, they haven't made a decision yet, but it's clear that this is -- that's the summary of what they're doing, they're trying to determine if they have enough to -- I guess their prefiling investigation to establish infringement against your product.

MR. FARABOW: They're not also talking about how good it's going to be, are they, Your Honor?

THE COURT: I'm not going to get into that.

MR. FARABOW: No, I mean how good it's going to be commercially is what I meant to say.

THE COURT: No, they're talking about fractionation, and the samples they have and then if there is enough of a certain aspect to be able to establish infringement. That's

what they're talking about. And they're saying if Nova hires Farabow, so I'm not going to get into that.

MR. FARABOW: Thank you, Your Honor.

THE COURT: 839 is clearly intrinsic in the document that's in preparation of litigation.

MR. BARLOW: I think we only have two more documents, Your Honor.

THE COURT: I can make a decision on this one because of what I have seen. 2216 is protected by work product.

MR. BARLOW: The next document, 2003, is a result of a type of fractionation that was requested as the supporting documents show, in the last document is an E-mail from Mark Johnson to Bruce Kanuck who is an in-house attorney at Harry Roper.

And item two says did a search of recent and then it mentions this type of fractionation analysis. And then just to show you that fractionation analysis is what it looks like, the second page of the first document in

the supporting materials shows a typical output. And if you look at the third page of 2003, it shows the same type of thing.

So this was documents -- this was fractionation testing looking at these polymers that was in response to the E-mail from Mark Johnson to Bruce Kanuck and Harry Roper.

THE COURT: All right. Document 2003 is the document itself was requested and then delivered to counsel, and it's clearly litigation counsel. And this document is submitted as a follow-up to meetings with counsel and where counsel requested the information, and have a lot of other matters they were following up on for the litigation.

MR. FARABOW: Your Honor, could I ask a question?

THE COURT: Sure.

MR. FARABOW: The document is dated I believe August of 2003, and Mr. Roper must have asked for it in 2000 at least five, two years later.

THE COURT: Actually, this is a 2000 -- they're following up on Chicago meetings

and the document, the E-mail that is -- there is a whole host of things here about litigation. It's a 2004 document.

MR. FARABOW: My privilege log shows that this document number 2003.

THE COURT: Oh, 2003.

MR. BARLOW: That's correct.

THE COURT: Yes, that's --

MR. BARLOW: It does say in the privilege log that it was in 2003. It could be that we put in the date the document was created as opposed to when it was saved.

THE COURT: But it was delivered in 2004?

MR. BARLOW: Yes.

THE COURT: After these meetings?

MR. BARLOW: Right. Or '05, maybe. That's correct.

THE COURT: It says -- I mean, you know, actually this is December 2004, and it talks about recent cross fractionation analysis.

MR. BARLOW: That's right.

MR. FARABOW: Well, the document that we are interested in getting is the one

from August 2003, which is said to be thirty-nine pages long in the -- I mean, they may have decided later to use it for litigation purposes, but was it originally generated in August 2003 for litigation purposes.

MR. BARLOW: Your Honor, could I -- can we go back and check whether this document was indeed last saved after 2004, and if it is indeed a document from 2003, then we will produce that.

THE COURT: Then you will provide it?

MR. BARLOW: Yes, we will do that.

THE COURT: The date will be important. I was assuming that it was because of the discussion in the E-mail, and some of the attachments, which again appear to be refined chartings. Actually there is even reference to a test here. You'll have to sort this out. If this isn't contemporaneous with the Roper conversation, this document will have to go over, whether it's that earlier one or 2003.

MR. BARLOW: Thank you.

MR. FARABOW: Thank you, Your

Honor.

THE COURT: So I'm going to reserve decision on 2003 and then if it's resolved --

MR. BARLOW: Should we just advise the Court.

THE COURT: As long as Mr. Farabow doesn't get back to me.

MR. BARLOW: I believe this is the last document. This is document 1034. And these are a notes that Mr. Johnson took on a slide. The slide itself has been produced to the other side in various forms, but the handwritten notes were placed on the slide during a meeting with Jenner & Block in which Mr. Johnson was trying to explain certain aspects of the invention to the attorneys.

THE COURT: You can tell this document is in a meeting with -- it's marked up for purposes of litigation. I don't think you have to say anymore. And you're telling me that the document itself was given over?

MR. BARLOW: That's right.

THE COURT: And this is the

handwritten -- this is the document with the handwritten notes?

MR. BARLOW: Yes.

THE COURT: Presented to attorneys, which it appears from itself to have been that.

MR. BARLOW: That's right. The underlying documents have been provided in various forms.

THE COURT: So 1034 is privileged. I checked, Mr. Farabow, he doesn't mention you on this one.

MR. ROPER: That's all thirty of them, Your Honor.

MR. FARABOW: Your Honor, we really appreciate your patience in going through these documents like this. And sorry we put you to this expenditure of time.

THE COURT: No problem. It's always a pleasure to see you and Mr. Roper.

MR. FARABOW: Thank you, sir. In view of the Court's rulings, I don't think this is probably an appropriate time, but I wanted to tell the Court that we do want to consider

renewing our motion on the grounds of need in view of the Court's rulings and in view of the big machine that we've talked about, and other factors.

Additionally, if they want to use fraction or fractionation evidence later, we want to object that they need to produce these documents if they're going to use fractionation evidence in trying to prove infringement. And --

THE COURT: I don't think they're going to, but at this juncture, you don't plan to, do you?

MR. BARLOW: Not this kind of fractionation. We may have to divide the polymer in half, but not that fractionation.

THE COURT: Not that.

MR. BARLOW: That's right.

THE COURT: If you do, you'll then provide to Mr. Farabow.

MR. BARLOW: That's right.

THE COURT: When you see what's in these documents, then you won't use them, I don't think. It's lot of stuff in there.

MR. FARABOW: Your Honor, I think it might contradict what they do use.

THE COURT: I don't think so. I don't even think they get the test right.

MR. FARABOW: The other point is I raised with Mr. Roper before the hearing today that we believe we need a couple of extra months in the schedule to get through fact discovery. We have a lot of witnesses, documents that come sort of late because of this controversy that we've had and because of the documents that were produced to us after the last hearing that we had, and he and I agreed to talk about that and we may ask the Court for a couple more months to get through fact discovery.

THE COURT: Whatever you need to do, we'll go along with.

MR. FARABOW: Thank you, sir.

THE COURT: I'm sure you'll both be reasonable with each other and get it worked out.

MR. ROPER: As Mr. Farabow said, we agree to talk to see what impact any agreement may or may not have on the remaining

aspect of the schedule.

THE COURT: And we can address that once you get your discovery time figured out.

MR. ROPER: Okay. Good.

THE COURT: And we can work the rest of it out for you.

MR. FARABOW: Thank you, Your Honor.

MR. HORWITZ: Your Honor, one question. If we do decide to go forward with a motion based on need, should we do that separate from your nondispositive motion practice or is it a carry on to this so that we would schedule it separately.

THE COURT: You know, I'm getting myself in trouble with my staff because like I take things out like this, and I'm not a complainer, but now I think I'm assigned 76 patent cases and two NVLs, and I'm attention deficit disorder, and older. I think it's better if we at least notice it to a motion day so they can keep everything -- I mean, it's an unbelievable amount of paper on the staff. So I

think I'm going to just keep it, bring that motion and notice it.

Now, whether I hear it on a motion day depending on its volume will be another matter, but that way we'll be insured it's noticed and when I see it, I'll recall it comes from this. And I might take it out then, but I rather notice it so we keep a consistency of things being presented in a patent case.

MR. FARABOW: Thank you, Your Honor.

MR. ROPER: Your Honor, we should probably meet and confer on this issue as well.

THE COURT: Maybe it will go away.

MR. FARABOW: Maybe it will, Your Honor.

THE COURT: All right. Anything else we can help you with today?

All right. Have a good weekend.

(Court recessed at 1:35 p.m.)

State of Delaware)
)
New Castle County)

CERTIFICATE OF REPORTER

I, Dale C. Hawkins, Registered Merit Reporter and Notary Public, do hereby certify that the foregoing record is a true and accurate transcript of my stenographic notes taken on June 6, 2008, in the above-captioned matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 9th day of June, 2008, at Wilmington.

Dale C. Hawkins, RMR