

~~UNDER SEAL~~ - Seal Removed  
Per 7-19-17 Order

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

NISSAN NORTH AMERICA, INC., )  
)  
Plaintiff, )  
)  
vs. )  
)  
WEST COVINA NISSAN, LLC; )  
KEITH JACOBS; JEFF HESS; AND )  
EMIL MOSHABAD, )  
)  
Defendants. )

No. 16-0883-BC

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**MEMORANDUM AND ORDER GRANTING DEFENDANT MOSHABAD'S  
MOTION TO COMPEL PRODUCTION OF DOCUMENTS BY 7/14/17  
AND REGULATING FURTHER DISCOVERY CONCERNING  
THE JACOBS SETTLEMENT**

This lawsuit was filed by an importer of Nissan automobiles who distributes the vehicles to dealerships to sell throughout the United States. The lawsuit is filed against one of those dealerships, West Covina Nissan, LLC (the "Defendant Dealership"), and its employees. The lawsuit alleges that all the Defendants engaged in a massive fraud to obtain payments from the Plaintiff for warranty and repair work not actually performed. The Plaintiff seeks to recover damages in the millions of dollars and asserts enhanced damages for the alleged extreme misconduct.

After the lawsuit was filed, the Plaintiff settled its claims against one of the Defendant employees, Keith Jacobs. The Jacobs Settlement Agreement at section 3

makes a Declaration of Keith Jacobs “an integral part” of the settlement. The Jacobs Declaration contains very damaging allegations against the remaining Defendants.

Another Defendant, Emil Moshabad, the General Manager of the Defendant Dealership, seeks to obtain discovery concerning the Jacobs Settlement. Some of the discovery has been objected to by the Plaintiff. Supported by the other Defendants, Emil Moshabad has filed a motion to compel production of information responsive to his Document Request 2 served on and objected to by the Plaintiff:

2. All correspondence, e-mail and other communications between Keith Jacobs or his counsel (including but not limited to Mr. Jacob’s counsel of record in this case) and any or all of the following:
  - NNA or any employee of NNA.
  - Any lawyer for NNA (including but not limited to counsel of record for NNA in this case).

This request is limited to communications that were sent or received after December 25, 2016.

For ease of reference, this disputed discovery is referred to herein as “the Documents.”

In opposition, the Plaintiff has denied production asserting the discovery is not relevant, and disclosure is barred by the work product doctrine.

After studying the law, argument of Counsel, and conducting an *in camera* inspection of the Documents, the Court grants the motion to compel with limits on further discovery, if any, related to the Documents.

It is ORDERED that Defendant Moshabad’s motion to compel is granted, and by July 14, 2017, the Documents shall be produced. It is further ORDERED that to obtain

additional discovery related to the Documents, the Defendants will be required to show why the production of the Documents granted herein is insufficient and that additional discovery related to the Documents is not merely cumulative.

It is additionally ORDERED that the seal on this Memorandum and Order shall be removed on July 14, 2017, unless before that date a party files an objection and states the redactions required and the reason for the redactions. This Memorandum and Order has been placed under seal, out of an abundance of caution to assure no breach of confidentiality, because some of the filings in connection with the Motion to Compel were filed under seal.

The legal authorities and analysis on which this decision is based are as follows.

### **Parties' Positions**

In support of the *Motion To Compel*, Defendant Moshabad, citing cases from other jurisdictions, argues the Documents are discoverable based on four reasons.

- (1) The Plaintiff failed to provide a privilege log and therefore waived any claim of work product that it might have had.
- (2) The documents and communications do not constitute work product because they were not prepared in anticipation of litigation or for trial by or for a party or that party's representative because some of the communications came from former defendant Keith Jacobs and his counsel.
- (3) The communications which were sent by the Plaintiff were not prepared in anticipation of litigation or for trial but rather were prepared in anticipation of settlement.
- (4) Even if the Plaintiff had a work product privilege for these communications and documents, the privilege has been waived because

the communications and documents were sent to defendant Keith Jacobs who was an adversary.

In opposition to the *Motion To Compel*, the Plaintiff asserts that the Documents are (1) not relevant and (2) even if they were otherwise discoverable, they are protected from disclosure by the work product doctrine based upon the analogous case of *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203 (Tenn. Ct. App. 2002).

In reply, Defendant Moshabad argues that (1) Plaintiff incorrectly presumes that communications between it and Mr. Jacobs (or their respective counsel) is work product; (2) even if the communications and documents had been work product, the Plaintiff waived the confidentiality of that work product; (3) the Plaintiff's reliance on *Boyd's* statement of law on waiver of the work product doctrine based on a footnote is incomplete and inapplicable to this case; and (4) the Plaintiff has made testimonial use of the Jacobs Settlement triggering a waiver of any work product protection.

### Analysis

The Court begins with the relevancy of the Documents. The Keith Jacobs Declaration, made a part of the Jacobs Settlement, contains very damaging allegations against the Defendants. One defense is for the Defendants to attack the credibility of Keith Jacobs and his motivations in settling with the Plaintiff. Defendant Moshabad asserts that the Documents may contain communications between Keith Jacobs and the Plaintiff which show that the settlement motivated Keith Jacobs to make false allegations against the Defendants. This explanation, the Court finds, establishes the threshold

showing under Tennessee Civil Procedure Rule 26.02(1) that the Documents are relevant to the subject matter in this case.

With respect to the other reasons asserted by Defendant Moshabad to compel and the Plaintiff's opposition, these are all encompassed in an analysis of the Plaintiff's assertion of the work product doctrine as barring production. The Plaintiff's assertion of the work product doctrine rests upon *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203 (Tenn. Ct. App. 2002). After studying *Boyd*, the Court concludes it does not preclude disclosure of the Documents.

The Court's reading of *Boyd* is that a key component to precluding disclosure in that case was a determination that the common interest privilege existed between the two parties resisting disclosure, and that the privilege shielded work product exchanged between the parties' Counsel from discovery. The "common interest" in *Boyd* was a creditor of a debt and successor to the debt. The work product sought was drafts of a Purchase Agreement between the creditor and the successor, and the correspondence between the lawyers for the creditor and the successor relating to the Agreement. *Id.* at 227.

In reversing the decision of the trial court, the Court of Appeals concluded that the work product doctrine in issue had not been waived by disclosure because there was a common interest. Central to the decision in *Boyd* is that the documents in issue were shared only between parties who "were pursuing a common interest in mounting a joint defense against the claims of the [Plaintiff]" *Id.* at 227. For this reason, the *Boyd* Court concluded that "the common interest privilege attached to their communications and

permitted the attorneys for the parties to communicate on matters of common interest without waiving the confidentiality of the communications.” The *Boyd* Court reasoned that “[t]he record contains no evidence that either Comdata or IPS shared the drafts of the Purchase Agreement or their correspondence regarding this agreement with third parties.”

The *Boyd* Court further explained that even if nonprivileged disclosure had occurred, that would not be sufficient to waive the work product privilege. To constitute waiver, the disclosure must amount to a “testimonial” use. Distinct from the attorney-client privilege is that “the work product doctrine is not waived by mere disclosure but instead by making a testimonial use of the protected material.” Restatement (Third) of the Law Governing Lawyers § 91 citing *United States v. Nobles*, 422 U.S. 225, 239 n. 14, 95 S. Ct. 2160, 2171 n. 14, 45 L.Ed.2d 141 (1975); *Wells v. Liddy*, 37 Fed. Appx. at 65; *Federal Election Comm’n v. Christian Coalition*, 178 F.R.D. 61, 76 (E.D.Va.1998). The *Boyd* Court explained that, “Neither Comdata nor IPS has undertaken to use these documents as a sword in this litigation. Therefore, there is no basis for concluding that Comdata or its attorneys have waived the work product protection of these documents.” *Id.* at 227.

In two material respects, this case differs from *Boyd*. First, the Documents in this case were shared with an adversary, former Defendant Keith Jacobs. He and the Plaintiff did not share a common interest in the litigation. The common interest privilege, central to the outcome and reasoning in *Boyd* that the work product privilege had not been waived, is not present in this case. Secondly, the Court adopts the arguments and reasoning on page 7-8 of Defendant Moshabad’s *Reply Memorandum In Further Support*

*Of Motion To Compel Production Of Documents* that the Plaintiff has made testimonial use of the Jacobs Settlement by filing Attorney Bulso's declaration in which he described the Jacobs Settlement and how it came to be.

One final distinction from *Boyd* is that the Documents in this case were created in furtherance of *settlement* negotiations. As discussed, the work product sought in *Boyd* involved drafts of a Purchase Agreement between a creditor and a successor, and the correspondence between the lawyers for the creditor and the successor. In *Boyd*, the creditor and successor shared a common interest and were not two adversary parties negotiating a settlement. Thus, the only connection in *Boyd* to the type of discovery sought in this case involving a settlement agreement is the *Boyd* Court's statement that "even drafts of settlement agreements have been found to be work product because they involve the mental processes of the attorneys involved in their preparation." *Id.* at 225 (citing *N.V. Organon v. Elan Pharmaceuticals, \*226 Inc.*, No. 99 Civ. 11674 (JGK)(RLE), 2000 WL 520622, at \*2, 2000 U.S. Dist. Ct. LEXIS 5629, at \*5-6 (S.D.N.Y. May 1, 2000); *In re Subpoena Duces Tecum Served on Rosenman & Colin*, No. M8-85 (RLE), 3:92 CV.00301 (WWE), 1996 WL 527331, at \*5, 1996 U.S. Dist. LEXIS 13590, at \*14 (S.D.N.Y. Sept. 16, 1996). Yet, in reviewing the cases cited in support of this statement, it is clear that the reference to "drafts of settlement agreements" that are afforded protection under the work product doctrine are drafts that are shared between common interest parties or their attorneys, not drafts of settlement agreements and correspondence that are discussed or exchanged between opposing parties as occurred in this case between the Plaintiff and former Defendant Keith Jacobs and their

attorneys. *See, e.g., N.V. Organon v. Elan Pharm., Inc.*, No. 99 CIV. 11674(JGK)(R, 2000 WL 520622, at \*2 (S.D.N.Y. May 1, 2000) (“The Court based its holding in part on the finding that the best evidence of the discussions between [Plaintiff’s Attorney] and [Defendant’s Attorney] would be contemporaneous notes by [Plaintiff’s Attorney] of their discussions, which were already produced to [the Plaintiff] by [the Defendant], *not* the drafts, which were produced later in time and contained [Plaintiff Attorney’s] impressions and other factors not discussed between [Plaintiff’s Attorney] and [Defendant’s Attorney].”).

For all these reasons, the Court concludes that *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203 (Tenn. Ct. App. 2002) is not support for precluding production of the Documents under the work product privilege in this case. The Court finds that to the extent the Documents could be considered work product, that protection has been waived by the Plaintiff, and the Documents must be produced.

There is, however, one other matter which the Court must address, and that is the potential undesirable results of allowing discovery of settlement documents—a policy argument made by the Plaintiff during oral argument.

As identified by the Sixth Circuit United States Court of Appeals, in the context of recognizing the existence in the federal court system of a federal settlement privilege, the disclosure of documents of settlement communications and negotiations (1) can have a chilling effect on settlement and (2) can lead to depositions of Counsel. In *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 983 (6th Cir. 2003), the plaintiffs sought to discover, in contravention of a confidentiality order, any statements



made by representatives of Goodyear Tire & Rubber Company in the course of settlement talks regarding a prior suit. *Id.* at 979. The District Court denied the discovery and declined to vacate or modify its order finding that the content of settlement talks are always confidential. *Id.* at 979. On appeal, the Sixth Circuit stated that: “The issue presented on appeal is whether statements made in furtherance of settlement are privileged and protected from third-party discovery.” *Id.* at 977. In affirming the decision below, the Sixth Circuit adopted for the first time what is now known as the “settlement privilege.” In creating this privilege, the Sixth Court discussed policy concerns inhibiting settlement and deposing Counsel which were voiced by Plaintiff’s Counsel in this case.

There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. This is true whether settlement negotiations are done under the auspices of the court or informally between the parties. The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system. In order for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of “impeachment evidence,” by some future third party. Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative *quid pro quos*, and generally make statements that would otherwise belie their litigation efforts. Without a privilege, parties would more often forego negotiations for the relative formality of trial. Then, the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost.

Moreover, confidential settlement communications are a tradition in this country. *See, e.g., Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir.1985) (citing *In re Franklin Nat'l Bank*, 92 F.R.D. 468, 472 (E.D.N.Y.1981)) (stating that “[s]ecrecy of settlement terms ... is a well-established American litigation practice”). This Court has always recognized the need for, and the constitutionality of, secrecy in settlement proceedings. In *In re the Cincinnati Enquirer*, 94 F.3d 198, 199 (6th Cir.1996), and *Cincinnati*

*Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 903–04 (6th Cir.1988), we denied members of the press access to pre-trial settlement procedures, relying on the historical secrecy in settlement talks. Although not recognizing a privilege as such, we stated that the need for privacy in settlement talks outweighed any First Amendment right of access to the proceedings. In each case, we addressed whether there exists a right of access to summary jury trials. In *Cincinnati Enquirer*, we found that summary jury trials are essentially settlement proceedings, and that no “tradition of accessibility” exists \*981 because “[s]ettlement proceedings are historically closed procedures.” *Cincinnati Enquirer*, 94 F.3d at 199. In *Cincinnati Gas & Elec.*, we found likewise, stating that “historically settlement techniques are closed procedures rather than open.” *Cincinnati Gas & Elec.*, 854 F.2d at 903–04.

Other courts have gone further and recognized the existence of some sort of *formal* settlement privilege. In *Allen Cty. v. Reilly Indus., Inc.*, 197 F.R.D. 352 (N.D.Ohio 2000), the defendant filed a motion to compel discovery and sought to obtain the content of settlement negotiations between the plaintiff county and another defendant. The district court denied the request, noting the “well-established privilege relating to settlement discussions.” *Id.* at 353 (citing *Cook v. Yellow Freight System, Inc.*, 132 F.R.D. 548 (E.D.Cal.1990), *overruled on other grounds by Jaffee*, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337). Likewise, in *Cook*, the court denied a third party’s motion to compel discovery. The court found that not only are statements made in settlement negotiations privileged, but such statements come with no guarantee of veracity. As the *Cook* court stated:

Settlement negotiations are typically punctuated with numerous instances of puffing and posturing since they are “motivated by a desire for peace rather than from a concession of the merits of the claim.” *United States v. Contra Costa County Water Dist.*, 678 F.2d [90, 92 (9th Cir.1982)]. What is stated as fact on the record could very well not be the sort of evidence which the parties would otherwise actually contend to be wholly true. That is, the parties may assume disputed facts to be true for the unique purpose of settlement negotiations. The discovery of these sort of “facts” would be highly misleading if allowed to be used for purposes other than settlement. *See Wyatt v. Security Inn Food & Beverage, Inc.*, 819 F.2d 69, 71 (4th Cir.1987).

*Cook*, 132 F.R.D. at 554. We agree with the reasoning of these lower courts. The public policy favoring secret negotiations, combined with the

inherent questionability of the truthfulness of any statements made therein, leads us to conclude that a settlement privilege should exist, and that the district court did not abuse its discretion in refusing to allow discovery.

\* \* \*

The settlement privilege is also necessary because permitting third-party discovery of negotiation communications would lead to other undesirable results. In general, and in this case, there is no transcript of the settlement talks. And it is unlikely that there exist any written notes reflecting Goodyear's alleged attempt to bribe Chiles. Thus, in order to obtain or refute any evidence, the parties would have to depose each of the persons present at the negotiations. In this instance, that includes not only the representatives of Heatway and Goodyear, but the parties' lawyers and the district court judge himself.

*Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980–82 (6th Cir. 2003) (footnotes omitted).

This Court has not located any Tennessee court decisions comparable to the Sixth Circuit applying or interpreting a “settlement privilege,” and it appears that there is no trend among state courts adopting a settlement negotiation privilege.

[T]here is no state consensus as to a settlement negotiation privilege. Although all states have apparently enacted a statutory mediation privilege, Jay M. Zitter, Annotation, *Construction and Application of State Mediation Privilege*, 32 A.L.R.6th 285, § 2 (2008), the negotiations in this case did not result from mediation but from settlement negotiations between two sides without the assistance of a third-party mediator. We are not aware of any state that recognizes a settlement privilege outside the context of mediation.”

*In re MSTG, Inc.*, 675 F.3d 1337, 1343 (Fed. Cir. 2012).<sup>1</sup>

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<sup>1</sup>At least two state court decisions have declined to adopt the “settlement privilege” recognized by the Sixth Circuit *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir.2003). See *Abbott v. GameTech Int'l, Inc.*, No. 03-06-00257-CV, 2009 WL 1708815, at \*6 (Tex. App. June 17, 2009) (declining to adopt a “settlement privilege” similar to that found in *Goodyear* because Texas courts do not have “authority to create a new common-law discovery privilege protecting settlement negotiations.”); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 2006-Ohio-5789, ¶ 89, 111 Ohio St. 3d 300, 322, 856 N.E.2d 213, 235 (West 2017) (declining to adopt a settlement privilege and stating that “[w]e do not find

Furthermore, at the federal level, it appears that there is a split of authority as to whether a “settlement privilege” exists to protect discovery of communications surrounding settlement negotiations.<sup>2</sup>

- It is worth noting that, with and without a detailed analysis of the issue, courts have reached widely divergent conclusions about whether or not a federal settlement privilege exists. The Sixth Circuit approved the application of a federal settlement privilege in *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir.2003). See also *Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548 (E.D.Cal.1990); *Allen County v. Riley Indus., Inc.*, 197 F.R.D. 352, 353 (N.D. Ohio 2000). Many courts have rejected the existence of a privilege. *In re Subpoena Issued to Commodity Futures Trading Comm'n*, 370 F.Supp.2d 201 (D.D.C.2005); *Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc.*, 831 F.Supp. 1516, 1531 (D.Colo.1993) (Rule 408 of the Federal Rules of Evidence is “not a broad discovery privilege”); *NAACP Legal Defense and Educ. Fund, Inc. v. The United States Dep't of Justice*, 612 F.Supp. 1143, 1146 (D.D.C.1985) (same). See also *Alcan Int'l Ltd. v. S.A. De Mfg. Co.*, 179 F.R.D. 403, 405 (W.D.N.Y.1998) (noting that Rule 408 does not limit the discovery of evidence); *In re Gen. Motors Engine Interchange Litig.*, 594 F.2d 1106, 1124 (7th Cir.1979) (finding “no convincing basis” for the proposition that “the conduct of settlement negotiations is protected from

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*Goodyear* persuasive, however, and decline to recognize a settlement privilege applicable to Ohio discovery practice.”).

<sup>2</sup> At least two other Federal Court of Appeals have declined to recognize a “settlement privilege.” *In re MSTG, Inc.*, 675 F.3d 1337, 1348 (Fed. Cir. 2012) (declining to follow the reasoning of the Sixth Circuit from *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.* and holding that “that settlement negotiations related to reasonable royalties and damage calculations are not protected by a settlement negotiation privilege.”); *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1124 (7th Cir. 1979) (declining to adopt a settlement privilege and stating in a footnote that neither party “has argued that the conduct of the settlement negotiations is protected from examination by some form of privilege, and we find no convincing basis for such an objection here. Although particular documents or discussions conceivably could be immune from discovery as attorney work product or as privileged attorney-client communications, the existence of such privileges is best determined in the context of particular demands for discovery. Inquiry into the conduct of the negotiations is also consistent with the letter and the spirit of Rule 408 of the Federal Rules of Evidence. That rule only governs admissibility....”).

examination by some form of privilege”); *Primetime 24 Joint Venture v. Echostar Commc'ns Corp.*, No. 98Civ.6738, 2000 WL 97680 at \*4 n. 5 (S.D.N.Y. Jan.28, 2000) (“[W]e agree with defendants' observation that Fed.R.Evid. 408 does not create a settlement privilege.”). Some courts have taken a middle ground and held that settlement negotiation materials may not be disclosed absent a showing greater than that required for ordinary discovery under Rule 26. *See, e.g., Bottaro v. Hatton Assocs.*, 96 F.R.D. 158, 160 (E.D.N.Y.1982) (requiring a “particularized showing”).

*Matsushita Elec. Indus. Co. v. Mediatek, Inc.*, No. C-05-3148MMC(JCS), 2007 WL 963975, at \*4 (N.D. Cal. Mar. 30, 2007).

- A ground-breaking 2003 decision by the 6th Circuit created a new “settlement privilege” that protects settlement communications from discovery. In *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*,<sup>1</sup> the 6th Circuit found that the settlement privilege promotes the public policy underlying Rule 408: preserving the secrecy of settlement communications promotes settlements, which lessens the burden on the judicial system.

*Goodyear Tire* is a remarkable case. It stands as the only federal appellate court decision to recognize the settlement privilege. It also represents the rare occasion of a federal appellate court exercising its power to create a new privilege pursuant to Federal Rule of Evidence 501. Rule 501 authorizes federal courts to determine new privileges by examining “common law principles ... in light of reason and experience.”

The 6th Circuit's decision, however, stands in stark contrast against the majority of federal district courts that refuse to acknowledge the settlement privilege. According to these district courts, the only federal rule to address settlement materials, Rule 408, is a rule about admissibility and not discoverability. These courts also reason that settlement communications are necessarily discoverable — indeed, Rule 408 allows their use at trial for purposes other than proving the liability for or invalidity of the claim or its amount.

June Pineda, *Protecting Settlement Communications from Discovery*, Bench & B. Minn., November 2005, at 22 (West 2017) (footnote omitted).

- The current judicial status of whether settlement negotiations are privileged against third-party discovery is unclear since the two circuit courts of appeal that have considered the issue have reached opposite conclusions. Similarly, the district courts use a variety of methods to resolve the issue. This uncertainty is harmful because attorneys are unsure what they can say and put in writing during settlement negotiations.

Andrew Sher, *FRCP 26 vs. Fre 408: Why Settlement Negotiations Should Be Privileged Against Third-Party Discovery*, 16 *Cardozo J. Conflict Resol.* 295, 314 (2014) (footnotes omitted).

- Although the Sixth, Seventh, and Federal Circuits are the only appellate courts to have explicitly considered the merits of recognizing settlement privilege, many district courts have considered the issue, and they are divided. The Southern District of California and Eastern District of California have employed reasoning similar to that of the *Goodyear* decision in recognizing a settlement privilege. Seven district courts have come out the other way, usually in cursory opinions that cite the Federal Circuit's analysis in *In re MSTG*. And at least one district court has issued inconsistent opinions on the matter.

In sum, 12 percent of federal trial courts in the United States recognize settlement privilege, and more may do so in the future.

Annie Gowen, *Saving Federal Settlement Privilege After Actavis*, 83 *U. Chi. L. Rev.* 1505, 1522–23 (2016) (footnotes omitted).

- Despite some prediction that *Goodyear's* emphasis on public policy might lead to a new era in acceptance of privileges, see Jeffrey J. Lauderdale, *A New Trend In The Law Of Privilege: The Federal Settlement Privilege And The Proper Use Of Federal Rule Of Evidence 501 For The Recognition Of New Privileges*, 35 *U. Mem. L. Rev.* 255 (Winter 2005), its effect on federal appellate decisions appears to be minimal. Instead, the *Goodyear* decision now looks more like an anomaly than the start of a trend. Indeed, while federal district courts in the Sixth Circuit have applied the privilege, e.g., *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, 2007 WL 1723506 (S.D. Ohio 2007), several courts not bound by Sixth Circuit precedent have rejected *Goodyear's* recognition of a settlement privilege and the privilege has not gained traction outside the Sixth Circuit. E.g., *Matsushita Electric Indus. Co. v. Mediatek, Inc.*, 2007 WL 963975 (N.D. Cal. 2007); *In re Subpoena Issued to CFTC*, 370 *F. Supp. 2d* 201 (D.D.C. 2005). Even district courts

within the Sixth Circuit have expressed “latent misgivings” about *Goodyear*, and have therefore narrowed its application solely to settlement negotiations occurring in a filed lawsuit, and ruled that it does not extend to settlement agreements or pre-lawsuit settlement talks. *E.g.*, *Westlake Vinyls, Inc. v. Goodrich Corp.*, 2007 WL 1959168 (W.D. Ky. 2007); *State v. Little River Band of Ottawa Indians*, 2007 WL 851282, (W.D. Mich. 2007); *Grupo Condumex, S.A. de C.V. v. SPX Corp.*, 331 F. Supp. 2d 623 (N.D. Ohio 2004).

Eric P. Schroeder, For the Defense, Appellate Advocacy, *Overview and Tips: A New Era In Recognizing Federal Evidentiary Privileges*, 50 No. 11 DRI For Def. 38 (West 2017).

This Court, therefore, is not authorized by Tennessee law to deal with concerns of the chilling effect on settlement and depositions of Counsel through a settlement privilege. This Court does, however, have tools in the Tennessee Rules of Civil Procedure, under Rules 16 and 26, to regulate discovery. These tools the Court will use if there is any subsequent discovery by Defendants to follow up on the production of Documents ordered herein. To obtain additional discovery related to the Documents, the Defendants will be required to show why production of the Documents ordered herein is insufficient and that additional information related to the Documents is not merely cumulative.



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6-29-17