NORTH CAROLINA
DAVIDSON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
06 CvS 948
BTSF18409(f)

AZALEA GARDEN BOARD & CARE, INC.,
Plaintiff,

vs.

MEREDITH DODSON VANHOY, Personal Representative of the Estate of Ricky Dodson, Deceased, et. al.,
Defendants.

PLAINTIFF'S BRIEF IN OPPOSITION TO TUTTLE'S MOTION FOR SANCTIONS

Plaintiff, by and through counsel Joe E. Biesecker and Christopher Alan Raines, respectfully submits this Brief in Opposition to Tuttle's Motion to Compel. This brief and the accompanying materials demonstrate that Azalea Garden Board & Care, Inc. and its counsel are not confused about the applicable law, have not had any haphazard approach to the litigation and have otherwise not done anything to warrant sanctions.

Due to the nature of Tuttle's motion, it has become necessary for Azalea Garden's counsel to explain and justify to the Court how their actions were reasonable. To do so, Azalea Garden and its counsel must discuss their actions, discussions and the thoughts of counsel. Nothing in this Brief, the accompanying affidavits or exhibits or any statement is to be construed as a waiver by Azalea Garden or its counsel of the attorney-client privilege or the work-product privilege.

STATEMENT OF THE FACTS

A. Mr. Tarr's and Mr. Wagner's Roles in the Litigation

Tuttle's Motion for Sanctions concerns the designation of David Wagner and Gene B. Tarr as possible expert witnesses. The roles of these persons as actors or viewers with respect to the transactions and occurrences which are the subject matter of this litigation have been well-

known to Tuttle's counsel and others involved in this litigation prior to the designations of Mr. Wagner and Mr. Tarr as possible expert witnesses.

Mr. Wagner is an attorney and is the president and sole shareholder of Azalea Garden Board & Care, Inc. ("Azalea Garden"). At the time of the transactions, occurrences and contract at issue in this case, Azalea Garden owned the Brookside of Winston-Salem Rest Home ("Brookside") and was attempting to sell it. As Azalea Garden's president, Mr. Wagner participated in negotiations for the sale of Brookside, executed contract documents, knew what preparations Azalea Garden needed to make to deliver marketable title at closing and made such preparations. In particular, Mr. Wagner negotiated and secured the release of a lien and claims held by WRH Mortgage, Inc. ("WRH"), the primary lienholder on Brookside. (*Plaintiff's Exhibit 34.*)

Mr. Wagner was an actor and viewer with respect to *In re Azalea Gardens (sic) Board & Care, Inc. d/b/a Brookside of Winston-Salem*, 97-50365C-11W, and *In re Azalea Gardens (sic) Board & Care, Inc., d/b/a Brookside of Winston-Salem*, B-98-52421C-121W ("the bankruptcy proceedings"). He participated in preparing Azalea Garden's plan of reorganization (*Plaintiff's Exhibits 54 and 55*) and received numerous motions, orders and other documents in the bankruptcy proceedings. (*Plaintiff's Exhibits 56 and 58.*) Mr. Wagner has addressed Azalea Garden's preparations to deliver marketable title at closing and the effect of the bankruptcy proceedings on the Brookside transaction extensively in two depositions in *Azalea Garden Board & Care, Inc. v. Dodson et. al.*, 02 CVS 2522 (*Azalea I*)[1] and in answers and responses to a broad range of interrogatories, requests for admissions and requests for production of documents in *Azalea I* and *Azalea II*. Through Mr. Wagner, Azalea Garden fully answered and responded to

[1] As permitted by N.C.Gen.Stat. § 1A-1, Rule 41, Azalea Garden voluntarily dismissed without prejudice *Azalea I* on 14 September 2005.

defendant Smith's[2] First Set of Requests for Admissions, Interrogatories and Requests for Production of Documents, which contained ninety (90) requests for admissions, sixteen (16) interrogatories and 159 requests for production of documents ("the Smith Discovery"). *(Plaintiff's Exhibit 100.)* A number of the interrogatories and requests addressed Azalea Garden's title to Brookside and the bankruptcy proceedings. *(Plaintiff's Exhibit 100.)*[3] Mr. Wagner answered that WRH was prepared to release its lien on Brookside, that Azalea Garden would receive enough funds at closing to satisfy all liens and judgments of record against Brookside and that nothing in Azalea Garden's bankruptcy proceedings prevented the sale of Brookside pursuant to the contract which is the subject of this litigation. *(Plaintiff's Exhibit 100.)* These responses were served upon Tuttle's counsel and other opposing counsel and parties. As Tuttle's counsel has been and is or should be fully aware, Mr. Wagner was an actor and viewer with respect to the transactions and occurrences which are the subject matter of this litigation. *(Plaintiff's Exhibits 100, 105 and 108.)* Mr. Wagner formed his knowledge and opinions prior to the litigation, before Azalea Garden retained counsel in this litigation and independently of the information and thoughts of counsel.

Similarly, Tuttle's counsel has or should have been fully aware that Mr. Tarr was an actor or viewer with respect to the transactions and occurrences involved in this lawsuit. Mr. Tarr is an attorney with Blanco, Tackabery, Combs & Matamoros, P.A. ("BTCM"). *(Plaintiff's Exhibit 29.)* In *Azalea I*, Azalea Garden had issued a trial subpoena to Mr. Tarr. *(Raines Affidavit*, ¶13.) In response to the subpoena, Tuttle's counsel, who at the time ***were also attorneys with BTCM***,

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[2] Azalea Garden voluntarily dismissed *with prejudice* its claims against defendant Smith on 14 April 2008.

[3] Although Azalea Garden has presently identified 114 exhibits throughout the course of this litigation, it is not including ***all*** 114 exhibits with its response to Tuttle's Motion for Sanctions. Further, plaintiff is including as Plaintiff's Exhibit 100 only those responses and answers which relate to the status of Azalea Garden's title to Brookside, the readiness and ability of Azalea Garden to deliver marketable title at closing and the effect, if any, of the bankruptcy proceedings on the sale of Brookside pursuant to the contract at issue in this litigation.

arranged for Raines to review Mr. Tarr's file on the Brookside transaction. (*Raines Affidavit,* ¶13.) During that review, Raines obtained a copy of an e-mail from Mr. Tarr to Brian Herndon, an attorney in BTCM whom Raines had deposed in *Azalea I.* (*Plaintiff's Exhibit 29.*) According to the e-mail, Mr. Tarr reviewed pleadings, orders and other documents in Azalea Garden's bankruptcy proceedings, concluded that nothing in the bankruptcy prevented Azalea Garden from selling Brookside and informed Mr. Herndon of his actions and conclusions. (*Plaintiff's Exhibit 29.*)

B. The Designation of Mr. Wagner and Mr. Tarr as Experts

The designation of Mr. Wagner and Mr. Tarr as experts was not a hasty or haphazard decision. Interrogatory 11 of the Smith Discovery requested:

> "If Plaintiff or Plaintiff's attorneys expect to call to testify in this case an expert witness, state the following: (a) The name, employer, current address(es), telephone number(s), area(s) of expertise and qualification(s) of each such expert witness; (b) Describe in detail the substance of all facts, opinions and conclusions to which each expert is expected to testify; and (c) Provide the substance of the facts and opinions to which each such expert is expected to testify and a summary of the grounds of each such opinion."

(*Plaintiff's Exhibit 100.*) In its initial response served 3 July 2007, Azalea Garden did not designate anyone as an expert. (*Plaintiff's Exhibit 100.*) This was because Mr. Wagner was an actor or viewer with respect to the transactions and occurrences which are the subject matter of this litigation. However, as both Azalea Garden's counsel and everyone else involved in this litigation was aware, Mr. Wagner was an attorney. Upon further reflection, counsel for Azalea Garden concluded that Mr. Wagner might have knowledge or opinions which could be construed as expert testimony. In order to be fully responsive to discovery, revealing and identifying, and to alert opposing counsel that Mr. Wagner was a person who may have expert testimony, Azalea Garden supplemented its response to identify Mr. Wagner as a possible expert witness.

(*Plaintiff's Exhibit 101.*) Azalea Garden did not want to be trapped or himmed into an objection to any expert testimony if Mr. Wagner were not identified as an expert. This supplemental response was served upon Tuttle's counsel and other counsel and parties on 14 August 2007. (*Plaintiff's Exhibit 101.*)

On 11 March 2008, Tuttle served upon Azalea Garden a First Set of Interrogatories and Requests for Production of Documents ("the Tuttle Expert Discovery"). (*See Tuttle's Motion to Compel*, ¶ 2.) Eight days later, Mr. Atkinson mailed to Biesecker a Notice of Deposition and subpoena for the deposition of Mr. Wagner. (*Plaintiff's Exhibits 102, 103.*) Biesecker accepted service of the subpoena for Mr. Wagner. (*Plaintiff's Exhibit 104.*) Even though Mr. Wagner is a resident of ***Davidson County***, neither Azalea Garden nor Mr. Wagner nor its counsel objected to Tuttle's counsel taking Mr. Wagner's deposition at the offices of Tuttle's counsel in ***Forsyth County***. Azalea Garden and its counsel did not wish to waste the time or resources of the Court or others on disputing the location of Mr. Wagner's deposition.

Tuttle's counsel requested of Azalea Garden that "In addition to David Wagner, identify all persons who will or ***may*** testify as an expert witness in this matter." (*Tuttle Motion to Compel, Exhibit A, Interrogatory 1* [emphasis added].) As Tuttle's counsel expressly requested, Azalea Garden designated Mr. Tarr as a person who ***possibly may*** testify as an expert witness. (*Tuttle's Motion to Compel, Exhibit A; Plaintiff's Exhibit 105.*) As with Mr. Wagner, Azalea Garden and its counsel, along with Tuttle's counsel, knew that Mr. Tarr was an actor and viewer with respect to the transactions and occurrences which are the subject matter of this litigation. However, Mr. Tarr is also an attorney and had knowledge and opinions which could be construed as expert testimony. Therefore, as with Mr. Wagner, Azalea Garden designated Mr. Tarr as a possible expert witness in order to be revealing and identifying, rather than appearing to

be withholding, and to avoid being trapped into an objection to Mr. Tarr's opinion testimony if he were not designated as an expert. For purposes of the Tuttle Expert Discovery, Azalea Garden treated and identified the statements in Mr. Tarr's e-mail to Mr. Herndon (*Plaintiff's Exhibit 29*) as Mr. Tarr's expert opinions. (*Plaintiff's Exhibit 29*) Azalea Garden did so on the reasonable assumption that, if Mr. Tarr testified, he would do so consistently with the contents of the e-mail.

As requested by Tuttle, Azalea Garden stated that Mr. Wagner would testify that Azalea Garden was prepared to deliver marketable title at closing and that the bankruptcy proceedings did not prevent the sale of Brookside pursuant to the contract which is the subject matter of this litigation. (*Tuttle Motion to Compel, Exhibit A; Plaintiff's Exhibit 105.*) Azalea Garden presented essentially the same facts and grounds as it did in responding to other interrogatories and requests for admissions and as Mr. Wagner presented in his depositions.

As ordered by this Court, on 22 April 2008, Raines personally delivered (one day earlier than ordered) to Tuttle's counsel Azalea Garden's answers and responses to the Tuttle Expert Discovery. (*Tuttle Motion to Compel,* ¶ *6.*)

C. The Discovery Dispute

On 23 April 2008, Mr. Atkinson sent Azalea Garden's counsel a letter claiming that Azalea Garden was not entitled to the protections of the attorney-client and work-product privileges since Mr. Wagner was designated as an expert, that certain discovery responses were vague and that Mr. Tarr was required to be retained as an expert in order to render expert testimony.

Azalea Garden raised the attorney-client and work product privileges to alert Tuttle's counsel and others to the existence of the issues. (*Plaintiff's Exhibit 107.*) Azalea Garden's

counsel considered the Tuttle Expert Discovery so broad as to request every communication or thought of Azalea Garden's counsel, including communications and thoughts not related to Mr. Wagner's expert opinions. (*Plaintiff's Exhibit 107.*) In particular, Interrogatory 2c of the Tuttle Expert Discovery asked Azalea Garden to provide "the date(s) of any meetings, telephone conversations, [sic] correspondence (including email or other contact between David Wagner and your attorney)." (*Plaintiff's Exhibit 105.*)

Even though Azalea Garden claimed the privileges, Azalea Garden and its counsel reasonably considered the answers to interrogatories and responses to the document requests complete and legally sufficient. Azalea Garden disclosed the facts which formed the bases of the opinions which Azalea Garden identified as Mr. Wagner's possible expert opinions. (*Plaintiff's Exhibit 105.*) It is clear from the answers and responses to all interrogatories, requests for admissions and requests for production of documents that the basis of Mr. Wagner's opinions was his personal knowledge which he acquired as an actor and viewer with respect to the transactions and occurrences which are the subject matter of the lawsuit. Mr. Wagner formed his knowledge and opinions independently of the facts, knowledge and thoughts of counsel. Mr. Wagner held his knowledge and opinions before any lawsuit was filed or before Azalea Garden retained any counsel concerning this litigation. Azalea Garden's counsel repeatedly advised Tuttle's counsel of this. (*Plaintiff's Exhibits 105, 107, 108 and 110.*)

As to the answers to Interrogatories 2d and 2e, it was or should have been clear to all involved in the litigation that neither Mr. Tarr nor Mr. Wagner were retained by Azalea Garden as experts or had prepared expert reports for Azalea Garden (*see, e.g., Plaintiff's Exhibit 29*) and that Mr. Wagner has extensively discussed his opinions in discovery answers and responses and depositions. In the responses, Azalea Garden clearly stated that there had been no expert reports.

In the spirit of construing discovery requests and statutes broadly, Azalea Garden concluded that expert reports should be construed to mean all deposition testimony, answers to interrogatories and responses to requests for admissions in which Mr. Wagner stated that Azalea Garden was prepared to deliver marketable title at closing and that the bankruptcy proceedings did not prevent the sale of Brookside pursuant to the contract at issue in this litigation. Tuttle's counsel questioned Mr. Wagner extensively in two depositions in *Azalea I* on these subjects. Mr. Wagner fully explained in prior answers to interrogatories and responses to other discovery requests his opinions and the facts which supported them. (*Plaintiff's Exhibits 100 and 108.*) Therefore, Azalea Garden reasonably concluded that it had sufficiently answered the interrogatories by simply referring to prior discovery responses and deposition testimony. Nevertheless, to comply with this Court's subsequent order, Azalea Garden supplemented its responses by citing and quoting deposition testimony, answers and responses in which Mr. Wagner stated his opinions and knowledge. (*Plaintiff's Exhibit 108.*)

As to Mr. Tarr not being retained as an expert, Azalea Garden reasonably concluded that the law did not require such. (*Plaintiff's Exhibit 107.*) As with Mr. Wagner, everyone associated with this litigation knew or should have known that Mr. Tarr acquired his knowledge as an actor and viewer with respect to the subject matter of the lawsuit and that he stated his opinions in preparation for the closing, not in preparation for litigation. (*Plaintiff's Exhibit 29.*) Mr. Tarr was designated as a possible expert witness to alert counsel that Mr. Tarr had knowledge or opinions which might be construed as expert testimony.

On 6 May 2008, this Court ordered Azalea Garden to "retain Mr. Tarr and provide responses from him with respect to his opinions or he will not be permitted to testify as an expert." (*Second Order on Motion to Compel,* p. 2.) Subsequently, Azalea Garden filed a

Motion for Instructions for the sole purpose of seeking a ruling that Mr. Tarr could testify, as a fact witness and without being retained as an expert, that he reviewed documents, reached conclusions and informed the closing attorney of his review and conclusions. (*Plaintiff's Exhibit 29.*) Azalea Garden took the position that Mr. Tarr could testify as a fact witness to such matters since such testimony would reflect actions he took in connection with preparation for closing, not anticipation of litigation. Azalea Garden was not seeking a ruling on the admissibility in general of Mr. Tarr's testimony, nor a reconsideration of any order of this Court. The Court did not rule upon whether Mr. Tarr could testify as a fact witness as to the matters in Plaintiff's Exhibit 29.

D. The Withdrawal of the Designation of Mr. Tarr and Mr. Wagner as Experts

In light of all which had been revealed and since Azalea Garden's counsel concluded that it had achieved its objective of alerting opposing counsel, parties and the Court that Mr. Wagner and Mr. Tarr might have expert knowledge and opinions, Azalea Garden's counsel concluded that the designation of Mr. Wagner and Mr. Tarr as expert witnesses should be withdrawn. Azalea Garden withdrew the designation of Mr. Wagner and Mr. Tarr as expert witnesses. (*Plaintiff's Exhibit 111.*)

While Azalea Garden's counsel was reconsidering the treatment of Mr. Tarr and Mr. Wagner as expert witnesses, Mr. Patton sent Biesecker a letter dated 5 June 2008 claiming that the supplemental responses to the Tuttle Expert Discovery were not complete. Mr. Patton writes:

> "the Complaint has been amended to ***change the parties*** from whom you seek damages. Did you discuss that with Mr. Wagner? If Mr. Wagner is an expert who intends to testify about the ***Plaintiff's ability to transfer title*** to these particular Defendants, ***surely the conversations you had with Mr. Wagner about the proper defendants to be named*** may have some bearing on his opinions as an expert. And it is very clear from his earlier deposition that any opinion Mr. Wagner may have on ***damages*** is based on information received from counsel."

(*Plaintiff's Exhibit 109* [emphasis added].) Azalea Garden did not regard the identity of the parties or Azalea Garden's damages as opinions which required testimony by an expert. As Azalea Garden's counsel read the letter, Mr. Patton sought to probe and learn the entire file and thoughts of Azalea Garden's counsel regarding this case, regardless whether any such probe or information learned is related to the expert opinions Azalea Garden identified.

ARGUMENT

I. STANDARD ON MOTION FOR SANCTIONS

A motion for sanctions under Rule 26(g) should be denied unless (1) the responding party could not have reasonably believed that the position or response was warranted by existing law or a good faith argument for the extension, modification or reversal thereof or (2) the discovery response or position was interposed for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the costs of litigation or (3) the discovery response or position was not reasonable or was unduly burdensome or expensive, ***given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation***. N.C.Gen.Stat. §1A-1, Rule 26(g) [emphasis added].

Sanctions are not appropriate if the position or response was ***reasonable,*** even if ultimately found to be wrong. *See Bryson v. Sullivan*, 330 N.C. 644, 656, 401 S.E.2d 327, 333 (1992). "Counsel does not have to be right on their legal positions to avoid sanctions, but only reasonable." *Miltier v. Downes*, 935 F.2d 660, 663 (4th Cir. 1991). Therefore, the rejection by the court of a legal position "cannot serve as a substitute for the reasonably justified analysis demanded by [Rule 26(g)]." *Id.* The North Carolina Court of Appeals has stated that a claim should not be deemed inappropriate or unreasonable under Rule 11 merely because the plaintiff was not successful in maintaining the claim. *Grover v. Norris*, 137 N.C.App. 487, 529 S.E.2d

231 (2000). The court "should avoid hindsight and resolve all doubts in favor of the signer [non-movant]." *Bryson v. Sullivan*, 102 N.C.App. 1, 8, 401 S.E.2d 645, 651 (1991), *modified on other grounds*, 330 N.C. 644, 412 S.E.2d 327 (1992); *Miltier*, 935 F.2d at 663, *quoting* Advisory Committee Notes on the Federal Rules of Civil Procedure.

II. THE DESIGNATION OF MR. WAGNER AND MR. TARR AS POSSIBLE EXPERT WITNESSES AND THEIR LATER WITHDRAWAL WERE REASONABLE.

A. Defense Counsel Request That Azalea Garden Name Possible Experts.

Azalea Garden designated Mr. Wagner and Mr. Tarr as possible expert witnesses because ***defense counsel*** requested that Azalea Garden designate possible experts. In particular, Tuttle's counsel ***expressly*** requested that Azalea Garden identify anyone who ***may*** testify as an expert witness. (*Tuttle's Motion to Compel, Exhibit A; Plaintiff's Exhibit 105.*) While the Smith Discovery did not expressly say possible experts, Azalea Garden's interpretation of the Smith Discovery (as well as the Tuttle Expert Discovery) as requests to designate ***possible*** experts is consistent with the courts' broad and liberal construction of discovery statutes in order to facilitate disclosure prior to trial of non-privileged matter. *Williams v. N.C. Dept. of Corrections*, 120 N.C.App. 356, 462 S.E.2d 545 (1995); *Parkdale Am., LLC v. Travelers Cas. & Sur. Of Am.*, 2007 U.S. Dist. LEXIS 88820 (M.D.N.C. 2007). Azalea Garden designated Mr. Wagner and Mr. Tarr for the purpose and with the effect of being revealing and identifying, rather than appearing to be withholding. These persons are attorneys and have expert knowledge of the law. Their statements could have been construed by opposing counsel and parties and this Court as expert knowledge or opinions on matters involved in this litigation. Therefore, by naming Mr. Wagner and Mr. Tarr, Azalea Garden sought to avoid the risk that opposing counsel and the Court would object to their expert testimony on the grounds that they had not been identified as expert

witnesses.

B. The Law Treats Designated Experts as Possible Experts.

The identification of Mr. Tarr and Mr. Wagner as possible experts is reasonable because "the act of designating any expert trial witness (party or nonparty) is ***conditional,*** not absolute." *Shooker v. Superior Court (Winnick)*, 111 Cal. App. 4th 923, 928 (2003) [emphasis added], *citing County of Los Angeles v. Superior Court*, 222 Cal. App. 3d 647, 657 (1990). In *County of Los Angeles*, the appellate court held that an expert who had not yet been deposed could be withdrawn. *Id.* at 656. In fact, the court recognized with approval that "a party ***may for tactical reasons*** and in its ***own interest*** choose not to call one of its witnesses." *Id.* [Emphasis added.] "There is simply no requirement that a party call a particular witness." *Id.* In fact, an expert, when initially designated, is considered "possible" and does not lose such status until "it has become known that [the expert] will testify as an expert witness." *Sanders v. Superior Court*, 34 Cal. App. 3d 270, 279 (1973).

It is clear that, given the history, facts and subject matter of this litigation, Tuttle's counsel knew that Mr. Wagner and Mr. Tarr were actors and viewers with respect to the subject matter of this litigation and that neither had been retained or hired as experts for Azalea Garden or submitted expert reports for Azalea Garden. Numerous documents already produced show that Mr. Wagner signed contract documents, personally knew about and participated in Azalea Garden's bankruptcy proceedings, and knew and took necessary actions to prepare Azalea Garden to deliver marketable title at closing. As to Mr. Tarr, the knowledge of Tuttle's counsel is just as obvious, if not more. Tuttle's counsel, who at the time were in the same firm as Mr. Tarr, produced Mr. Tarr's file on Brookside, which contained the e-mail from Mr. Tarr to Mr. Herndon. (*Plaintiff's Exhibit 29.*) According to the e-mail, Mr. Tarr reviewed bankruptcy

documents, formed opinions and informed the closing attorney of his actions and opinions.

Despite such knowledge, neither Tuttle's counsel nor anyone else objected to the designations on the grounds that Mr. Wagner and Mr. Tarr did not qualify as expert witnesses within the meaning of Rule 26(b)(4). If Tuttle's counsel did not believe Mr. Wagner or Mr. Tarr qualified as expert witnesses, they could have objected and raised the issue rather than churn accusatory and threatening letters and motions.

III. THE INVOCATION OF THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES WAS REASONABLE.

Tuttle's counsel sought to probe the entire files and thoughts of Azalea Garden's counsel without regard to whether any such probe or information to be gleaned is actually related to the expert opinions. Under these circumstances and given the broad scope of the Tuttle Expert Discovery, it was reasonable and necessary for Azalea Garden raise the attorney-client and work-product privileges in order to preserve them rather than risk an argument that they are completely waived.

The attorney-client and work-product privileges are inviolate. As to the attorney-client privilege:

> "The attorney-client privilege has been a hallmark of Anglo-American jurisprudence for almost 400 years. [Citations omitted.] The privilege authorizes a client to refuse to disclose, and to prevent others from disclosing, confidential communications between attorney and client. [Citation omitted.] Clearly, the fundamental purpose behind the privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. [Citation.] In other words, the public policy fostered by the privilege seeks to insure 'the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense.' [Citation omitted.]"

Shooker, 111 Cal. App. 4th at 927-928. "The attorney-client privilege is intended to encourage those who find themselves in actual or potential legal disputes to be candid with lawyers who

advise them, and is one of the oldest recognized privileges protecting confidential communications." *Parkdale*, 2007 U.S. Dist LEXIS 88820 at 31, *citing Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), *and Hunt v. Blackburn*, 128 U.S. 464, 479, 9 S.Ct. 125, 32 L.Ed. 488 (1888). As to the work-product privilege:

> "Under the work product rule, codified in Fed. R. Civ. P. 26(b)(3), an attorney is not required to divulge, by discovery or otherwise facts developed by his efforts in preparation of the case or opinions he has formed about any phase of the litigation. . .Fact work product is discoverable only upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship. *Opinion work product is even more carefully protected, since it represents the thoughts and impressions of the attorney.* . . .An attorney's thoughts are inviolate,. . .and courts should proceed cautiously when requested to adopt a rule that would have an inhibitive effect on an attorney's freedom to express and record his mental impressions and opinions without fear of having these impressions and opinions used against the client. *As a result, opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances.*"

Parkdale, 2007 U.S. Dist. LEXIS 88820 at 30-31 [emphasis in original], *quoting Chaudhry v. Gallerizzo*, 174 F.3d 394, 403 (4th Cir.), *cert denied*, 528 U.S. 891, 120 S.Ct. 215, 145 L.Ed.2d 181 (1999). Under N.C.Gen.Stat. §1A-1, Rule 26(b)(3), as a general rule:

> "... the court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation ... or work product of the attorney ... of record ..."

The mere designation of Mr. Wagner as a possible expert does not waive the privileges. The designation of an expert witness does not waive the privileges and may be withdrawn "before the party discloses a significant part of a privileged communication ... or before it is known with reasonable certainty that the party will actually testify as an expert." *Shooker*, 111 Cal.App.4th at 930. In *Shooker*, a party had designated himself as an expert witness. *Id.* He appeared for his deposition and, during the course of the deposition, objected to certain questions on the grounds of the attorney-client privilege. *Id.* In holding that the witness ***could*** withdraw

himself as an expert and retain the privilege, the *Shooker* Court stated that the party-witness had testified to only what he had already disclosed prior to the designation and that no confidential information had been disclosed. *Id.* The *Shooker* court stated that his designation as an expert was conditional. *See id.* at 928.

The designation of Mr. Wagner as an expert is conditional. Mr. Wagner was deposed ***twice*** by Tuttle's counsel and others about his opinions. Mr. Wagner answered numerous interrogatories and responded to numerous requests about the readiness and ability of Azalea Garden to deliver marketable title at closing and the effect of the bankruptcy on Azalea Garden's ability to proceed with the contract. Mr. Wagner has clearly and repeatedly stated that he formed his opinions based on his own personal knowledge, independent of facts and thoughts held by counsel, and prior to the litigation. In answering the Tuttle Expert Discovery, Mr. Wagner disclosed only what was already disclosed or known to all involved in the litigation.

Further, Azalea Garden complied with Rule 26(b)(4) and this Court's order in that it was required only to produce the "documents [and information] considered by [the expert] in forming the opinion." *Vaughan Furniture Co., Inc. v. Featureline Manufacturing, Inc.*, 156 F.R.D. 123, 128 (M.D.N.C. 1994). This does not require that "***all*** documents from the attorney-expert witness's files be produced." *Id.* [Emphasis added.] Therefore, neither Mr. Wagner nor Azalea Garden nor its counsel is required to produce ***all*** of its files or thoughts. Instead, "only... those documents considered [by the expert] in the process of formulating the expert opinion, including documents containing opinions" must be produced. *Id.* In *Vaughan Furniture*, which involved an attorney of a party who was designated as an expert, Judge Eliason observed that "documents the attorney reviews in order to provide help in answering discovery requests or talk about

matters of trial strategy which are completely ***unrelated to the subject matter of his opinion are not included***" as documents which must be produced. *Id.* at 128-129 [emphasis added].

Azalea Garden identified as Mr. Wagner's expert opinions that (1) Azalea Garden was prepared to delivered marketable title to Brookside at closing and (2) nothing in Azalea Garden's bankruptcy prevented Azalea Garden from selling Brookside pursuant to the contract at issue in this litigation. Azalea Garden was not required to disclose any more than the documents, facts and grounds which related to these opinions and Azalea Garden did so. Azalea Garden has repeatedly stated on the record that Mr. Wagner based his opinions on his personal knowledge as an actor and viewer with respect to the transactions and occurrences which are the subject matter of the litigation. Mr. Wagner held these opinions prior to the lawsuit and held them independent of any facts or opinions supplied by counsel.

Further, Mr. Wagner did not base his opinions upon anything which he "could only have learned through the attorney-client relationship." *See National Steel Products Co. v. Superior Court*, 164 Cal. App. 3d 476, 484, 210 Cal. Rptr. 535 (1985), *quoted in Shooker*, 111 Cal. App. 4th at 928. In *National Steel*, the plaintiff sought discovery of an engineer's report prepared by the manufacturer's expert trial witness for a New York case arising out of the construction of a similar building. *National Steel*, 164 Cal. App. 3d at 484. In considering the plaintiff's contention that the attorney-client privilege was waived by the defendant's identification of its expert as a witness, the *National Steel* court stated:

> "If the client calls his attorney as a witness to testify to matters that the attorney could only have learned through the attorney-client relationship, he waives the privilege....It follows that the same waiver exists when an *agent* of the attorney is to testify to matters that he could only have learned because of the attorney-client relationship."

Id. [Emphasis in original.]

As Mr. Patton's letter of 5 June 2008 shows, Tuttle's counsel wants much more than the grounds for the expert opinion. *See Vaughan Furniture*, 156 F.R.D. at 128 (attorney expert had been deposed and documents which he claims he relied upon for his expert opinion had been produced). Neither the identity of the parties nor damages involve or relate to expert opinions. As Azalea Garden's president, Mr. Wagner can testify to damages without being an expert witness. His knowledge and opinions of the damages were formed prior to the litigation. The identity of the parties has absolutely no relation to Azalea Garden's ***title*** to Brookside, Azalea Garden's ability or readiness to deliver marketable title or the effect of Azalea Garden's bankruptcy on the sale of Brookside pursuant to the contract at issue in this litigation. Tuttle is not entitled to forage through the entire file or mind of Azalea Garden's counsel in the name of conducting expert discovery.

In addition, the attorney-client privilege is not waived as to attorney-client communications *prior* to the time David Wagner was designated as an expert. Mr. Wagner was not designated as an expert until 14 August 2007 in response to Timothy Smith's discovery requests. Therefore, whatever discussions between Mr. Wagner and Azalea Garden's counsel took place prior to 14 August 2007 clearly were not in Mr. Wagner's capacity as an expert.

IV. IT WAS REASONABLE FOR AZALEA GARDEN TO SEEK INSTRUCTIONS ON MR. TARR'S STATUS AS A FACT WITNESS.

Tuttle's counsel falsely accuses Azalea Garden of seeking "reconsiderations" of this Court's orders. Specifically, as to the Motion for Instructions, Azalea Garden sought only a ruling that Mr. Tarr could testify as a ***fact*** witness, without having to be retained as an expert, to what he did as reflected in Plaintiff's Exhibit 29. Azalea Garden did not seek a ruling on the general admissibility of Mr. Tarr's testimony. It was necessary for Azalea Garden to seek those instructions in an attempt to now settle the question of whether Mr. Tarr was a fact witness rather

than risk an objection at trial or some other later stage of the litigation to Mr. Tarr's testimony on the grounds that Mr. Tarr had not been retained as an expert witness.

CONCLUSION

In Tuttle's Motion for Sanctions, Tuttle's counsel has engaged only in hindsight and personal attacks on Azalea Garden's counsel. That this Court may have ruled in favor of Tuttle does not show or permit any finding that Azalea Garden and its counsel are confused about the law or have been haphazard in their approach to the litigation or that Tuttle is entitled to have sanctions imposed against Azalea Garden.

In contrast to the inappropriate and offensive attacks of Tuttle's counsel, the record demonstrates that all of Azalea Garden's actions were reasonable. The actions and decisions of Azalea Garden and its counsel were consistent with the goals and broad construction of discovery statutes and with the duty of Azalea Garden's counsel to protect the legitimate interests of Azalea Garden. Mr. Tarr and Mr. Wagner were designated as possible experts because Tuttle's counsel and the courts' broad interpretation of discovery statutes compelled such. Azalea Garden sought to be open, revealing, and identifying and to avoid objections to Mr. Tarr's and Mr. Wagner's opinion testimony on the grounds that they had not been previously designated as experts. It is well known to Tuttle's counsel that these men were actors and viewers with respect to the transactions and occurrences which are the subject matter of this litigation. Azalea Garden repeatedly made it clear that Mr. Wagner based his long-held opinions on his own personal knowledge, independent of the knowledge and thoughts of counsel.

As to the claim of the attorney-client and work product privileges, Azalea Garden sought to preserve its interests in obtaining the full and frank assistance and advice of counsel and to protect its counsel's impressions and opinions from disclosure. Azalea Garden does not dispute

that Tuttle's counsel is entitled to learn the facts and grounds upon which the expert opinions are based. However, Tuttle's counsel is not entitled to learn the communications or thoughts of Azalea Garden's counsel which are not related to the expert opinions. The designation of Mr. Wagner as an expert does not permit Tuttle's counsel or anyone else to explore the ***entire*** files or minds of Azalea Garden's counsel. Because the Tuttle Expert Discovery was written so broadly as to potentially ask for the entire file or minds of Azalea Garden's counsel, Azalea Garden concluded that it should raise the privileges to avoid the risk that a court would conclude that Azalea Garden had completely waived the privileges.

Based upon the foregoing, Azalea Garden respectfully requests that the Court deny Tuttle's Motion for Sanctions.

13 August 2008.

BIESECKER, TRIPP, SINK & FRITTS, L.L.P.

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CERTIFICATE OF COUNSEL REGARDING WORD COUNT

Pursuant to Rule 15.8 of the Business Court Rules, the undersigned certifies that this Brief complies with Rule 15.8 of the Business Court Rules. As indicated by the word count feature on the word processing system used to prepare this Brief, this Brief does not exceed 7,500 words.

/s/ Christopher Alan Raines
Christopher Alan Raines