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CLERK U.S. BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA

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**UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
NORTHERN DIVISION**

In re  
REED E. SLATKIN,  
  
Debtor.

**CASE NO. ND 01-11549-RR  
CHAPTER 11  
A.P. NO. 02-01164**

R. TODD NEILSON, Trustee of the  
Chapter 11 Bankruptcy Estate of Reed E.  
Slatkin,

**MOTION FOR A PROTECTIVE  
ORDER MADE ON AN  
EMERGENCY BASIS**

Plaintiff,

Date: To be set  
Time: To be set  
Place: 1415 State Street  
Courtroom 201  
Santa Barbara, CA 93101  
[Judge Riblet]

v.

WILLIAM W. and ANNE HUTCHINS,  
individuals, and DOES 1-10,  
  
Defendants.

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1 **I. INTRODUCTION**

2 Two transcripts of interviews the Trustee’s counsel conducted as part of his  
3 investigation of Reed Slatkin have fallen into the wrong hands. The interviews are the  
4 Trustee’s protected work product, which he has gone to great lengths to preserve. The  
5 court reporting service that transcribed the interviews mistakenly and inadvertently  
6 provided the transcripts to William Hutchins, a defendant in this adversary proceeding.  
7 Mr. Hutchins is a defendant because he received more than \$5.6 million in false profits  
8 as a result of Mr. Slatkin’s Ponzi scheme. The Trustee moves the Court for a  
9 protective order under Federal Rule Of Civil Procedure 26(a) to retrieve the transcripts  
10 that were inadvertently produced. Specifically, the Trustee requests that the Court  
11 order Mr. Hutchins and his counsel to return the transcripts he obtained without the  
12 Trustee’s knowledge or consent and to cease and desist from all further efforts to  
13 obtain copies of these transcripts.

14 **II. STATEMENT OF FACTS**

15 **A. The Trustee’s thorough investigation included interviewing Mr.**  
16 **Slatkin.**

17 The Trustee and his professionals have conducted an extensive investigation into  
18 Mr. Slatkin’s activities. This investigation included a review of over 360 boxes of  
19 documents seized by the U.S. Government from Mr. Slatkin, documents from third  
20 parties produced voluntarily and under 2004 subpoenas, documents from the Securities  
21 and Exchange Commission (“SEC”), and documents from public sources. The Trustee  
22 has also conducted 2004 examinations of, taken sworn statements from, and  
23 interviewed numerous individuals. The investigation continues.

24 As part of Mr. Slatkin’s plea agreement, he was required to cooperate in  
25 investigations by the U.S. Attorney’s Office, the Federal Bureau of Investigation  
26 (“FBI”), the Internal Revenue Service (“IRS”) and the Trustee. *See* Declaration of  
27 Timothy B. Jafek in Support of the Trustee’s Motion for a Protective Order on an  
28 Emergency Basis (“Jafek Decl.”), Ex. 1 at ¶ 14 (Slatkin Plea Agreement). As part of

1 those investigations, the Trustee, in the presence of the FBI and the IRS, interviewed  
2 Mr. Slatkin, including on May 16 and 23, 2002. Those interviews were transcribed by  
3 a court reporter from Spherion Deposition Services (“Spherion”). The court reporter  
4 was acting as an agent for the Trustee when recording these interviews.

5 The Trustee, the FBI and the IRS had a common interest in conducting these  
6 interviews of Mr. Slatkin. Mr. Slatkin operated a massive Ponzi scheme for about 15  
7 years. In doing so, he and his associates violated federal criminal laws (of interest to  
8 the FBI and the IRS) and dispersed assets which now belong to the Estate (of interest  
9 to the Trustee). The interests of the Trustee, the FBI and the IRS overlap. These  
10 parties want to see that those who committed crimes with respect to Mr. Slatkin’s  
11 financial affairs are prosecuted for their involvement, and these three parties want to  
12 mitigate, as much as possible, the damage to the victims of Mr. Slatkin’s Ponzi  
13 scheme.

14 **B. The Trustee safeguarded the Slatkin transcripts.**

15 The Trustee took all reasonable steps to safeguard the Slatkin transcripts. Alex  
16 Pilmer, of Kirkland & Ellis, special counsel to the Trustee and the primary contact  
17 among the Trustee’s attorneys with Spherion, instructed Spherion that the Slatkin  
18 transcripts were privileged and confidential. *See* Declaration of R. Alexander Pilmer  
19 in Support of the Trustee’s Motion for a Protective Order on an Emergency Basis  
20 (“Pilmer Decl.”) at ¶ 2. He further instructed Spherion that copies of the Slatkin  
21 transcripts were not to be released to anyone except the parties present at the  
22 interviews. *See id.* The court reporter recording the interviews also repeatedly told  
23 Spherion that the transcripts should not be released to anyone except the parties present  
24 at the interviews. *See* Declaration of Nina Kirsch in Support of the Trustee’s Motion  
25 for a Protective Order on an Emergency Basis (“Kirsch Decl.”) at ¶ 7. The court  
26 reporter told Spherion that she was concerned that many people would approach  
27 Spherion to obtain access to the Slatkin transcripts because of the high-profile of the  
28 case. *See id.*

1 In accordance with Mr. Pilmer's instructions, Spherion took a number of steps to  
2 protect the transcripts. *See* Kirsch Decl. at ¶¶ 10-14.

3 First, a note was placed in the electronic file for the Slatkin case which stated  
4 "do not release transcripts -- see Nina or Sara," the senior Spherion employees  
5 responsible for the Slatkin transcripts. *See id.* at ¶ 10. The note should have triggered  
6 a symbol, "+", to appear on any computer screen relating to the Slatkin transcripts.  
7 *See id.* That symbol indicated that, before making a copy of the transcript, the  
8 Spherion employee should consult the note in the electronic file which would, in turn,  
9 refer the employee to Nina or Sara. *See id.* at ¶ 21.

10 Second, Spherion sent an e-mail to all relevant employees advising them that  
11 transcripts of the Slatkin interviews were privileged and confidential and were not to  
12 be provided to anyone besides the parties present at the interviews themselves. *See id.*  
13 at ¶ 11. Third, an additional e-mail reminding employees of the restricted access to the  
14 transcripts was sent to relevant Spherion employees. *See id.* at ¶ 12.

15 Fourth, Spherion followed other security procedures to protect the Slatkin  
16 transcripts. For example, no paper copies of the transcripts are maintained, only a  
17 handful of people in the office have complete access to the computer database which  
18 holds the electronic versions of the transcripts, and all computers can only be accessed  
19 by authorized users after entering a password. *See id.* at ¶ 13.

20 **C. Mr. Hutchins obtained the Slatkin transcripts from Spherion.**

21 Mr. Hutchins called Spherion on December 4, 2002 and asked to order the  
22 transcript of the sworn statement of Mr. Slatkin taken May 16, 2002. *See* Declaration  
23 of Margarine Harris in Support of the Trustee's Motion for a Protective Order on an  
24 Emergency Basis ("Harris Decl.") at ¶¶ 3-4. At that point in time, discovery had  
25 commenced and a motion for partial summary judgment was pending against Mr.  
26 Hutchins. *See* Jafek Decl. at ¶¶ 3-4.

27 Mr. Hutchins claims he was told by Michael Baum, an attorney who is also  
28 being sued (Adv. Proc. 02-01179) because he profited more than \$400,000 through his

1 participation in Slatkin's Ponzi scheme, that "an attorney for the trustee (no name was  
2 given), had told Mr. Baum that any deposition of any witness in the case, was available  
3 to him from the reporting service." *See id.*, Ex. 4. None of the Trustee's attorneys  
4 recall such a conversation. *See id.* at ¶ 5.

5 When Mr. Hutchins called Spherion, he was directed to the Spherion employee  
6 who handles general inquiries, Margarine Harris. *See Harris Decl.* at ¶ 3. Ms. Harris  
7 inquired of the database to confirm Spherion had a copy of the transcript. *See id.* at  
8 ¶ 4. Because Mr. Hutchins was not listed as a party to the suit in which the testimony  
9 was taken, Ms. Harris asked him to send her some proof that he was involved in the  
10 case. *See id.* at ¶ 5. He promptly faxed the first page of the Trustee's complaint in the  
11 adversary proceeding against him. *See id.* at ¶ 6. Ms. Harris then called Mr. Hutchins  
12 and arranged to send him a copy of the transcript, C.O.D., for delivery the next day.  
13 *See id.*

14 The following day, December 5, Mr. Hutchins called back to order a transcript  
15 of Mr. Slatkin's May 23 sworn statement. *See id.* at ¶ 8. Ms. Harris sent Mr. Hutchins  
16 a copy of that transcript. *See id.* at ¶ 9.

17 On either December 5 or 6, Mr. Hutchins called Ms. Harris again to ask for  
18 Volume I of the Slatkin transcript (the May 16 and 23 transcripts were labeled  
19 Volumes II and III, respectively). *See id.* at ¶ 10. Ms. Harris did not see that volume  
20 listed in the database, so she told him that some other court reporting service must  
21 have taken it. *See id.* Mr. Hutchins asked her what other court reporting service may  
22 have taken it. *See id.* Ms. Harris said that she did not know and suggested that Mr.  
23 Hutchins call Kirkland & Ellis to ask what court reporting service took Volume I. *See*  
24 *id.*

25 Neither Mr. Hutchins nor his counsel has ever called Kirkland & Ellis  
26 requesting that information. *See Jafek Decl.* at ¶ 5.

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1           **D. Immediately after realizing that copies of the Slatkin transcripts had**  
2           **been obtained by unauthorized persons, the Trustee requested return**  
3           **of the transcripts.**

4           On or about December 11, 2002, the Trustee became aware that an unauthorized  
5 party obtained the Slatkin transcripts when his attorneys saw that information posted  
6 on the Internet at [www.slatkininfo.com](http://www.slatkininfo.com). *See* Pilmer Decl. at ¶ 6. Mr. Pilmer  
7 immediately contacted Spherion to investigate how this happened and demanded that  
8 Spherion immediately return all materials in their possession to him regarding Slatkin  
9 matters. *See id.* at ¶ 7. Mr. Pilmer learned from Spherion that it had released copies of  
10 the Slatkin transcripts to Mr. Hutchins. *See id.* at ¶ 8.

11           On December 12, 2002, the Trustee demanded that Mr. Hutchins return all  
12 copies of the Slatkin transcripts. *See* Jafek Decl., Ex. 2. The Trustee included a  
13 demand that the transcripts be removed from the [www.slatkininfo.com](http://www.slatkininfo.com) website. *See*  
14 *id.*

15           On December 12, 2002, Mr. Hutchins again attempted to obtain Volume I of the  
16 Slatkin transcript. *See* Harris Decl. at ¶ 11. After Ms. Harris again told him that some  
17 other court reporting service must have taken it, he asked for the names of the top three  
18 court reporting services. *See id.* Mr. Hutchins said that he had looked in *Parker's* and  
19 that all he found was small court reporting services. *See id.* Ms. Harris again referred  
20 Mr. Hutchins to Kirkland & Ellis for additional information. *See id.* Neither Mr.  
21 Hutchins nor his counsel has ever called Kirkland & Ellis requesting that information.  
22 *See* Jafek Decl. at ¶ 5.

23           On December 13, 2002, Mr. Hutchins refused the Trustee's requests for a return  
24 of the Slatkin transcripts. *See id.*, Ex. 3. The Trustee is aware, however, that the  
25 website [www.slatkininfo.com](http://www.slatkininfo.com) appears to have removed the transcripts. *See id.* at ¶ 9.

26           On December 16, 2002, the Trustee again requested that Mr. Hutchins return the  
27 Slatkin transcripts and even explained his rationale and legal authority in a six-page

28 ///

1 letter. *See id.*, Ex. 4. Mr. Hutchins continued to refuse and this motion was filed. *See*  
2 *id.*, Ex. 5.

3 **E. The Trustee has consistently claimed work product protection for the**  
4 **Slatkin transcripts.**

5 The Trustee has consistently claimed work product protection for the Slatkin  
6 transcripts in other adversary proceedings. For example, in adversary proceedings  
7 against net debtors, the Trustee refused to produce the Slatkin transcripts and other  
8 interviews on the basis of the work product and common interest privileges. *See Jafek*  
9 *Decl.*, Ex. 6 at ¶ 5 (Trustee's Response to First Set of Requests for Production of  
10 Documents by Defendants Anthony and Margaret Hitchman ). In the proceeding  
11 against Union Bank and others, the Trustee asserted the same protection. *See Pilmer*  
12 *Decl.*, Ex. 1. No party has ever sought an order compelling the production of the  
13 Slatkin transcripts. *See Jafek Decl.* at ¶ 15.

14 **III. ARGUMENT**

15 **A. The Slatkin transcripts are work product.**

16 The Slatkin transcripts are protected by the work product rule. Work product  
17 issues are resolved under federal law. *See United Coal Cos. v. Powell Constr. Co.*, 839  
18 F.2d 958, 966 (3<sup>rd</sup> Cir. 1988).

19 In order to be protected by the work product rule, a party must show: (1) the  
20 material is a document or tangible thing, (2) that the material was prepared in advance  
21 of litigation, and (3) that the material was prepared by the party or for the party's  
22 representative. *See Zapata v. IBP, Inc.*, 175 F.R.D. 574, 576 (D. Kan. 1997).

23 Here, the Slatkin transcripts fulfill each of these three requirements. First, the  
24 Slatkin transcripts are physical documents. The Trustee has the original transcripts  
25 made from an electronic copy kept by Spherion. Mr. Hutchins has a copy made from  
26 that electronic copy. Second, the Slatkin transcripts were prepared in anticipation of  
27 litigation. *See Pilmer Decl.* at ¶ 3. The purpose of the interviews -- and the transcripts  
28 -- was to investigate all assets of the Estate, including potential litigation claims. *See*

1 *id.* By May 16, 2002, when the first Slatkin transcript at issue here was created, the  
2 Trustee was deep into preparation for litigation. In the First Interim Report of the  
3 Trustee and the Creditors Committee Under 11 U.S.C. §§ 1103, 1106 (a)(3)-(4), filed  
4 December 14, 2001 (Docket # 406) (“Trustee’s Report”), the Trustee stated that “the  
5 most substantial assets of the Estate are claims which the Trustee may assert on behalf  
6 of the Estate or creditors. . . . [However] it will not be possible to provide a definitive  
7 list of all such claims or to identify all potential defendants until their investigations  
8 are more complete.” Trustee’s Report at 88. By May 16, 2002, when the first Slatkin  
9 transcript at issue was created, the Trustee had already filed adversary proceedings.  
10 (See Adv. Procs. 02-01027 and 02-1060). Third, the transcripts were prepared by the  
11 Trustee or by the Trustee’s representative. The Trustee requested that the court  
12 reporter recording the sworn statement be present. See Pilmer Decl. at ¶ 3. The  
13 Trustee paid the court reporting services provided by Spherion. See *id.*<sup>1</sup>

14 Courts routinely provide work product protection to interviews of witnesses. In  
15 fact, the U.S. Supreme Court decision establishing the work product protection,  
16 *Hickman v. Taylor*, 329 U.S. 485 (1947) involved similar material -- witness  
17 statements taken by attorneys. See also *In re Convergent Technologies Second Half*  
18 *1984 Securities Litigation*, 122 F.R.D. 555, 557 (N.D. Cal. 1988) (“a statement a  
19 lawyer or an independent investigator takes from a witness is classic work product and  
20 is presumptively protected against disclosure.”) In *In re Convergent Technologies*,  
21 counsel for plaintiffs interviewed two former employees of the defendant corporation.

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22  
23 <sup>1</sup> The Trustee’s use of an agent, the court reporter, to transcribe Mr. Slatkin’s testimony, does  
24 not waive his work product protection. Cf. *United States v. Nobles*, 422, U.S. 225, 238 (1975)  
25 (“[T]he [work product] doctrine is an intensely practical one, grounded in the realities of litigation in  
26 our adversary system. One of those realities is that attorneys often must rely on the assistance of  
27 investigators and other agents in the compilation of materials in preparation for trial. It is therefore  
28 necessary that the doctrine protect material prepared by agents for the attorney as well as those  
prepared by the attorney himself.”) If the work product doctrine is broad enough to cover agents  
performing investigations for an attorney, certainly it is broad enough to cover a court reporter  
transcribing an interview.

1 *See id.* at 555. Defense counsel later learned of the interviews and sought production  
2 of them, arguing that purely factual statements from witnesses did not qualify for work  
3 product protection. *See id.* The court rejected that argument and held that the witness  
4 statements were protected by the work product rule. *See id.* at 567.

5 The underlying purpose of the work-product doctrine is to discourage counsel  
6 for one side from taking advantage of trial preparation undertaken by opposing  
7 counsel, and to encourage both sides to conduct thorough and independent  
8 investigations. *See Newport Pacific Inc. v. County of San Diego*, 200 F.R.D. 628, 632  
9 (S.D. Cal. 2001) (citing *Hickman v. Taylor*, 329 U.S. 495 (1947)). *See also United*  
10 *States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 685 (S.D. Cal. 1996)  
11 (“One of the primary functions of the work-product doctrine is to prevent a current or  
12 potential adversary in litigation from gaining access to the fruits of counsel’s  
13 investigative and analytical effort.”) To allow Mr. Hutchins access to transcripts of the  
14 Trustee’s interviews of Mr. Slatkin would be to allow Mr. Hutchins to unfairly ride the  
15 coattails of the Trustee’s independent investigation.

16 **B. Because of the common interest privilege, the Trustee did not waive**  
17 **his work product protection on account of the presence of the FBI**  
18 **and IRS special agents.**

19 The Trustee’s attorneys did not waive the work product protection. The  
20 presence of the special agents from the FBI and the IRS does not amount to a waiver  
21 because the Trustee, the FBI and the IRS share a common interest. The common  
22 interest privilege is an extension of the work product doctrine. *See In re Imperial*  
23 *Corp. of America*, 179 F.R.D. 286, 289 (S.D. Cal. 1998).

24 Under the common interest privilege, the presence of other parties does not  
25 amount to a waiver when: (1) the communications were made in the course of a joint  
26 defense (or prosecution); (2) statements were designed to further a joint defense or  
27 prosecution effort; and (3) the privilege has not been waived. *See United States ex rel.*  
28 *Burroughs*, 167 F.R.D. at 685. In short, the “critical inquiry is whether a ‘sufficient

1 commonality' of interests exists between the parties such that the privilege may be  
2 asserted." *See In re Imperial Corp. of America*, 179 F.R.D. at 289 (citation omitted).

3 The common interest privilege also applies between private parties and  
4 government entities. For example, the common interest privilege applies when a  
5 plaintiff shares work product with the government when the plaintiff and the  
6 government have claims against a common defendant. *See, e.g., United States ex rel.*  
7 *Burroughs*, 167 F.R.D. at 686 (applying common interest privilege when plaintiff  
8 shared work product with U.S. government in False Claims Act case); *United States v.*  
9 *Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1299-1300 (D.C. Cir. 1980) (applying common  
10 interest privilege where MCI shared work product regarding AT&T with U.S.  
11 government for the government action against AT&T.) The reason for applying the  
12 common interest privilege when a private party and the government are involved in  
13 similar litigation is simple -- it eliminates a duplication of effort. *See id., see also*  
14 *United States ex rel. Burroughs*, 167 F.R.D. at 686 ( "[T]he rationale for the privilege  
15 is clear: Persons who share a common interest in litigation should be able to  
16 communicate confidentially with their respective attorneys, and with each other, to  
17 more effectively prosecute or defend their claims.") (citation omitted).

18 Here, the Trustee, the FBI, and the IRS share a common interest in interviewing  
19 Mr. Slatkin regarding his assets and his associates. As explained above, each entity  
20 had a common interest in the same facts for different reasons and their joint presence at  
21 the interviews eliminated some duplication of efforts.

22 **C. The inadvertent production of the Slatkin transcripts to Mr.**  
23 **Hutchins does not waive the work product protection.**

24 Spherion's inadvertent production of the Slatkin transcripts does not waive the  
25 Trustee's work product protection, either. Where an inadvertent production of work  
26 product occurs, federal law and state ethical rules require that the inadvertently  
27 produced documents be returned immediately.

28 ///

1           **1. Under federal law, the Trustee did not waive his work product**  
2           **protection because of the inadvertent production.**

3           A waiver must be intentional. *See United States v. King Features Entm't, Inc.*,  
4 843 F.2d 394, 399 (9th Cir. 1988) (“Waiver is the intentional relinquishment of a  
5 known right with knowledge of its existence and the intent to relinquish it.”)  
6 Specifically, a waiver of work product protection must be intentional. *See Doe v.*  
7 *United States (In re Doe)*, 662 F.2d 1073, 1081 (4<sup>th</sup> Cir. 1981) cert. denied, 455 U.S.  
8 1000 (1982) (“The attorney and client can forfeit this advantage, but their actions  
9 effecting the forfeiture or waiver must be consistent with *a conscious disregard* of the  
10 advantage that is otherwise protected by the work product rule.”) (emphasis added).

11           The focus is on what *counsel* did to waive the protection. Courts focus on the  
12 intent of counsel -- not counsel’s support staff -- because waiver requires a knowing  
13 and voluntary relinquishment of a right by the person who holds that right. *See In re*  
14 *Convergent Technologies*, 122 F.R.D. at 565. For example, in *Zapata*, 175 F.R.D., a  
15 plaintiff’s attorney asked her secretary to send the defendant’s expert a copy of the  
16 plaintiff’s expert’s report. The secretary sent the report but, unbeknownst to the  
17 plaintiff’s attorney, the copy of the report sent contained the plaintiff’s attorney’s  
18 handwritten notes. The court focused on whether the *attorney* intended to waive the  
19 work product protection, not whether the secretary intended to deliver the document.  
20 *See id.* at 576 (finding that the disclosure was inadvertent “inasmuch as such disclosure  
21 was not *intended by [plaintiff’s] attorneys.*”) (emphasis added); *see also Doe*, 662 F.2d  
22 at 1081 (“[T]o effect a forfeiture of work product protection by waiver, disclosure  
23 must occur in circumstances in which *the attorney* cannot reasonably expect to limit  
24 the future use of the otherwise protected material.”) (emphasis added).

25           In determining whether an inadvertent production of documents protected as  
26 work product, federal courts apply a five-part balancing test. *See Zapata*, 175 F.R.D.  
27 at 577. The five factors are: (1) the reasonableness of the precautions taken to prevent  
28 inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of

1 discovery; (4) the extent of disclosure; and (5) the overriding issue of fairness. *See id.*  
2 (*citing Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D. Cal. 1985)). In  
3 sum, “a simple mistake, ‘immediately recognized and rectified’ is not a waiver of the  
4 work product protection.” *Niagara Mohawk Power Corp. v. Stone & Webster Eng’g*  
5 *Corp.*, 125 F.R.D. 578, 588 (N.D. N.Y. 1989) (citation omitted).

6 In applying this balancing test, courts recognize that the standard for waiver of  
7 work product protection is more lenient than the standard for waiver of attorney-client  
8 privilege because the two privileges serve different purposes. *See Am. Tel. & Tel.*, 642  
9 F.2d at 1298-99.

10 Here, the simple mistake of a Spherion employee sending a transcript to Mr.  
11 Hutchins which he should not have received says nothing about the Trustee’s  
12 *attorneys’* intention to waive the protection of their work product. An analysis of the  
13 five-part balancing test for the inadvertent production of documents confirms this.  
14 First, the Trustee took reasonable precautions to prevent inadvertent disclosure. Under  
15 the circumstances, the Trustee’s specific instructions to Spherion through Mr. Pilmer  
16 to protect the Slatkin transcripts, and the multiple steps Spherion took to comply with  
17 those instructions, make this factor count in the Trustee’s favor.

18 Second, the Trustee moved immediately to rectify the error. Within one day of  
19 learning of the inadvertent disclosure, the Trustee learned how the disclosure occurred  
20 and demanded a return of the materials. Within one week, the Trustee had met and  
21 conferred with Mr. Hutchins’s counsel, explained his reasoning and authorities in an  
22 extensive letter, and made this motion to the Court. The Trustee’s speedy reaction to  
23 this inadvertent production makes this factor count in his favor.

24 Third, the scope of the discovery and investigation in this case has been large.  
25 Most cases examining inadvertent production involve formal discovery between two  
26 parties. Here, the Trustee’s discovery efforts involve dozens of adversary proceedings,  
27 many 2004 examinations, and other extensive discovery and investigation. Thus, this  
28 factor counts in the Trustee’s favor.

1 Fourth, the extent of disclosure has been relatively small. Only two sworn  
2 statements from Slatkin have been inadvertently produced and they have only been in  
3 the adversary's hands since December 5, 2002, less than two weeks to date. Thus, this  
4 factor counts in the Trustee's favor.

5 Fifth, the overriding issue of fairness favors the Trustee. It would be unfair to  
6 punish the Trustee for Spherion's mistakes. Mr. Hutchins did not use normal  
7 discovery procedures, which would have prevented his access to the Slatkin  
8 transcripts. Instead, he sought a back-door to access the Trustee's protected work  
9 product. If opposing counsel could circumvent the protections of the Federal Rules of  
10 Civil Procedure by simply probing for weaknesses among the persons that might have  
11 access to privileged and protected material in this age of copy machines, computers,  
12 and computer networks, very few materials could be protected. Mr. Hutchins  
13 advocates a rule that the only way an attorney can protect her work product is if she  
14 writes it in her own handwriting on a yellow legal pad and locks it in her desk.

15 Furthermore, at some point Mr. Hutchins may even attempt to depose Mr.  
16 Slatkin, although he has made no real effort to do so yet. If he decides to depose Mr.  
17 Slatkin, Mr. Hutchins will be free to ask him whatever questions he desires. But it  
18 would be unfair to allow Mr. Hutchins to keep transcripts of the Trustee's interviews  
19 of Mr. Slatkin. Thus, the overriding fairness factor weighs in the Trustee's favor.

20 The remedy for an inadvertent production of documents is a protective order  
21 which requires the return of the inadvertently produced document and bars the party  
22 who should not have received the document from using the document. *See, e.g.,*  
23 *Zapata*, 175 F.R.D. at 578.

24 **2. California ethical rules on inadvertent production also require**  
25 **Mr. Hutchins to return the Slatkin transcripts to the Trustee.**

26 Mr. Hutchins's counsel is subject to California's ethical rules regarding  
27 inadvertent production. *See* Local Bankr. Rule 2090-1(e) (subjecting attorneys  
28 appearing in Bankruptcy Court to local rule of District Court which requires attorneys

1 to comply with California's ethical rules for attorneys). California's ethical rules  
2 require the prompt return of inadvertently produced materials:

3       When a lawyer who receives materials that obviously appear to be subject  
4 to an attorney-client privilege or otherwise clearly appear to be  
5 confidential and privileged and where it is reasonably apparent that the  
6 materials were provided or made available through inadvertence, the  
7 lawyer receiving such materials should refrain from examining the  
8 materials any more than is essential to ascertain if the materials are  
9 privileged, and shall immediately notify the sender that he or she  
10 possesses material that appears to be privileged. The parties may then  
11 proceed to resolve the situation by agreement or may resort to the court  
12 for guidance with the benefit of protective orders and other judicial  
intervention as may be justified. We do, however, hold that whenever a  
lawyer ascertains that he or she may have privileged attorney-client  
material that was inadvertently provided by another, that lawyer must  
notify the party entitled to the privilege of that fact.

13 *State Comp. Fund Ins. v. WPS, Inc.*, 70 Cal. App. 4th 644, 656-67 (1999).

14       The *State Comp. Fund* court also noted that, "in an appropriate case,  
15 disqualification might be justified if an attorney inadvertently receives confidential  
16 materials and fails to conduct himself or herself in the manner specified above,  
17 assuming other factors compel disqualification." *Id.* at 657.

18       Here, the Slatkin transcripts are attorney work product. Each transcript is  
19 labeled on its face as a "sworn statement." *See* Pilmer Decl. at ¶ 3. Neither transcript  
20 is the product of a noticed deposition or 2004 examination to which work product  
21 protection may not apply. It is also apparent that Mr. Hutchins obtained the materials  
22 through inadvertence -- the Trustee notified Mr. Hutchins's counsel of that as soon as  
23 the Trustee learned of the production. Furthermore, the unorthodox manner in which  
24 Mr. Hutchins obtained the transcripts -- namely, personally calling the reporting  
25 service on the advice of another defendant, although he was represented by counsel,  
26 and not seeking them through normal discovery channels -- suggests Mr. Hutchins may  
27 have designed his request to trigger an inadvertent production. Each of these factors  
28 points to one conclusion: the transcripts are the Trustee's work product and were

1 inadvertently produced to Mr. Hutchins. Under these circumstances, Mr. Hutchins's  
2 counsel has an ethical duty to return the transcripts to the Trustee.

3 **D. Trustee's counsel certifies that he made a good faith effort to resolve**  
4 **this dispute.**

5 Trustee's counsel certifies that he made a good faith attempt to resolve this  
6 dispute with Mr. Hutchins. *See Jafek Decl.* at ¶14.

7 **E. An emergency hearing on this motion is justified and convenient.**

8 An immediate decision is requested on the Trustee's motion for a protective  
9 order because the longer the Slatkin transcripts are in the hands of the Trustee's  
10 adversaries, the more difficult it will be to find all the copies to be returned and undo  
11 the damage. The second factor in the balancing test used to determine whether the  
12 inadvertent production doctrine applies recognizes this requirement for a speedy  
13 remedy. *See Zapata*, 175 F.R.D. at 577 ("time taken to rectify error" is second factor).

14 Furthermore, the two parties have essentially met the requirements of Local  
15 Bankr. Rule 9013-1(c) regarding discovery disputes. That rule requires parties with a  
16 discovery dispute to meet and confer and, failing an agreement, to submit a motion to  
17 the Court with a written stipulation. Here, the Trustee set forth his argument and  
18 authorities to Mr. Hutchins in a six-page, single spaced letter on December 16, 2002.  
19 *See Jafek Decl.*, Ex. 4. Mr. Hutchins replied with a two-page, single-spaced letter that  
20 sets forth his disagreements with the Trustee. *See id.* at Ex. 5. Thus, the parties have  
21 fully presented their arguments to each other and the issue is ripe for judicial  
22 determination.

23 Lastly, the two parties will appear before the Court on December 20, 2002 for a  
24 status conference and a motion for a writ of attachment in the adversary proceeding  
25 against Mr. Hutchins.

26 Thus, an immediate decision is required on a matter which is ready for judicial  
27 consideration at a time only one day away. An emergency hearing is not only justified,  
28 but convenient for the Court and the parties.

