STATE OF MAINE
CUMBERLAND, SS.

BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-AP-16-02

STATE TAX ASSESSOR, Petitioner, v. KRAFT FOODS GROUP, INC., KRAFT FOODS GLOBAL, INC., KRAFT PIZZA COMPANY, and CADBURY ADAMS USA LLC, Respondents.	)	**ORDER ON PENDING MOTIONS**

Presently before the court are the following motions: (1) the State Tax Assessor's (the "Assessor") motion for an order compelling non-party Mondeléz International, Inc. ("Mondeléz") to comply with a subpoena for the production of documents; (2) the Assessor's motion to compel Respondents Kraft Foods Group, Inc., Kraft Foods Global, Inc., Kraft Pizza Company, and Cadbury Adams USA LLC (collectively "Kraft" or "Kraft Respondents") to provide deposition testimony; and (3) Kraft's motion to bifurcate this matter. That State Tax Assessor is represented by Assistant Attorneys General Thomas Knowlton and Kim Patwardhan. Kraft is represented by Attorneys Jonathan Block and Sarah Beard. Mondelez is represented by Attorney Roy Pierce. Oral argument on these motions was heard on May 12, 2017.

I. BACKGROUND

The following background information is taken from the Assessor's petition for review. Since at least 1997, Kraft and its affiliates have filed Maine corporate income tax returns reporting that Kraft Foods, Inc. and its affiliates constitute a "unitary business." (Pet. ¶ 18.); *see* 36 M.R.S. § 5102(10-A). In 2010, Kraft sold certain assets related to its frozen pizza and frozen

food business (the "Frozen Food Assets") to another company. (*Id.* ¶ 19.) As a result of the sale, Kraft Food Global Brands LLC, Kraft Foods Global, Inc., and Kraft Pizza Company ("KPC"), recognized a roughly $3 billion capital gain. (*Id.* ¶¶ 23-24.) In its 2010 Maine income tax return, Kraft claimed a deduction for the entire $3 billion gain, asserting that the gain was "non-unitary" income. (*Id.* ¶¶ 31, 38.) The Assessor disallowed the deduction of the roughly $3 billion capital gain and assessed penalties against Kraft. (*Id.* ¶¶ 34, 36.) Kraft's request for reconsideration was denied. (*Id.* ¶ 40.) Kraft appealed the decision to the Maine Board of Tax Appeals (the "Board"), which held that KPC was part of Kraft's unitary business, but granted Kraft's request for an alternative apportionment formula and abated the assessed penalties. (*Id.* ¶¶ 42, 47.) On December 24, 2015, the Assessor filed a petition for judicial review pursuant to 36 M.R.S. § 151-D(10)(I), 5 M.R.S. § 11002, and Maine Rule of Civil Procedure 80C. This matter was subsequently transferred to the Business and Consumer Court.

On February 17, 2017, the Assessor filed a motion to compel Kraft's former corporate parent, non-party Mondeléz, to comply with a subpoena for the production of documents. Mondeléz filed an opposition on March 3, 2017. At the request of the court, Kraft filed a response on March 3, 2017, setting forth its position regarding the alternative apportionment issue in order to help the court evaluate the motion against Mondeléz. The Assessor timely replied on March 10, 2017. The Assessor also filed a motion to compel Kraft to provide deposition testimony on March 3, 2017. Kraft filed its opposition on March 24, 2017. The Assessor replied on March 31, 2017. Kraft filed a motion to bifurcate this matter on March 24, 2017. The Assessor filed an opposition to the motion to bifurcate on April 5, 2017. Kraft filed a reply to its motion on April 12, 2017. Oral argument on all pending motions was held on May 12, 2017. On May 17, 2017, at the court's invitation, the Assessor submitted a letter responding

to legal authority provided by Kraft during oral argument. Kraft also filed a letter regarding the additional legal authority on May 18, 2017.

II. KRAFT'S MOTION TO BIFURCATE

The Court first addresses Kraft's motion to bifurcate this case into two consecutive proceedings. Kraft contends there are only two issues in this case: (1) whether the alternative apportionment formula fairly represented the extent of Kraft's business activities in Maine in 2010; and (2) whether there was reasonable cause to abate the penalties assessed against Kraft. (Kraft Mot. Bifurcate 1-2.) Kraft contends that the Assessor's motion to compel deposition testimony regarding its income tax returns from other states and tax accrual work papers relates only to the penalty issue, not the apportionment issue. (*Id.* at 2.) Kraft argues that these discovery issues involve complex and novel questions of law. (*Id.*) Kraft also argues that the penalty issue involves a much smaller dollar amount ($458,179.00) than the apportionment issue ($1.8 million). (*Id.* at 3.) Kraft contends that the court should bifurcate these proceedings and decide the more significant apportionment issue first. (*Id.*) Kraft asserts that, if it prevails on the apportionment issue, most of the penalty would disappear and it would "probably" not contest the remaining penalty. (*Id.*) The court would avoid deciding the novel and complex discovery issues regarding the penalty issue. (*Id.*) Thus, according to Kraft, it is in the interest of judicial economy to bifurcate this matter.

The Assessor contends that bifurcation would be inconvenient and inefficient. (Assessor Opp'n Mot. Bifurcate 4.) The Assessor asserts that the discovery sought is relevant to both the apportionment and penalty issues. (*Id.* at 5.) The Assessor also asserts that, if the court were to bifurcate this matter, it would likely be forced to conduct discovery from the same witnesses

twice. (*Id.*) The court would also be required to hear much of the same evidence from the same witnesses twice. (*Id.* at 6.)

Maine Rule of Civil Procedure 42 provides, "The court in furtherance of convenience or to avoid prejudice may order a separate trial … of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues." M.R. Civ. P. 42(b). In ordering separate trials, "the court shall give due regard to the convenience of parties and witnesses and the interests of justice." M.R. Civ. P. 42(c). The following factors weigh against separation: (1) the substantial identity of parties and witnesses; (2) overlapping evidence; (3) relatively simple issues; (4) the time required to litigate different issues; and (5) the absence of discernable prejudice to the parties. *Estate of McCormick*, 2001 ME 24, ¶ 40, 765 A.2d 552.

Here, the only parties involved in this litigation are the Assessor and the four Kraft Respondents. This matter will be decided by the court *de novo* without a jury. *See* 36 M.R.S. § 151(2)(G). Moreover, the apportionment and penalty issues in this matter are intertwined. Much of the documentary evidence and witness testimony regarding whether the alternative apportionment formula fairly represented the extent of Kraft's business activities in Maine will be relevant to whether Kraft had substantial authority for its filing position and whether there was reasonable cause for abatement. *See* 36 M.R.S. § 5211(17); 36 M.R.S. § 187-B(7). Furthermore, Kraft has identified no prejudice caused to it by trying these issues together. All of these factors weigh against separating the issues. Therefore, the court declines to bifurcate this matter.

III. ASSESSOR'S MOTION TO COMPEL MONDELÉZ TO COMPLY WITH SUBPEONA

On December 1, 2016, the Assessor served a subpoena on non-party Mondeléz, Kraft's former corporate parent, for the production of three categories of documents. (Assessor Mot. Compel 4; Mondeléz Opp'n to Mot. Compel 1 n.1.) Mondeléz provided documents in response to the second and third categories. (*Id.*) Category 1 of the subpoena requested all minutes of board of directors, and committees thereof, for the period of January 2009 through December 2011 for Kraft Foods, Inc., which is not a party to the action, and all four Kraft Respondents. (*Id.* at 4-5.) The Assessor later agreed to remove the year 2011 from its request, thus limiting the scope of category 1 to the years 2009 and 2010. (*Id.* at 5-6.) The Assessor also contends that Kraft Food Group, Inc. did not exist during 2009 and 2010 and that Cadbury Adams USA LLC only joined the Kraft-affiliated group during 2010. (*Id.* at 6.) Thus, according to the Assessor, its subpoena is essentially limited to only the minutes from KPC, Kraft Foods, Inc., and Kraft Foods Global, Inc. for the two years. (*Id.*) The parties agree that some of the requested meeting minutes have already been provided to the Assessor by Kraft. (Mondeléz Opp'n to Mot. Compel 4; Assessor Reply to Mot. Compel 2.) Mondeléz objects to producing the remaining documents in Category 1. (Mondeléz Opp'n to Mot. Compel 1.)

The Assessor asserts that category 1 of its subpoena is neither overbroad nor unduly burdensome on Mondeléz. (Assessor Mot. Compel 5-6.) The Assessor also asserts that documents sought in category 1 of its subpoena are both relevant and "reasonably calculated to lead to the discovery of admissible evidence." (*Id.* at 6.) The Assessor contends Kraft will argue, as it did before the Board, that KPC is separate from and unrelated to Kraft's other businesses, and therefore, the regular apportionment formula does not fairly reflect KPC's business activity in Maine. (*Id.*) The Assessor asserts the Category 1 documents, the minutes

from board of directors meeting and committees thereof, are directly relevant to whether Kraft and KPC are a "unitary business" under Maine Income Tax Law. (*Id.* at 7.) The Assessor further contends that Kraft is also seeking the abatement of penalties on the grounds that it had "substantial authority" for its filing position that the sale of the Frozen Food Assets was not part of Kraft's unitary business income. (*Id.* at 7-8.) The Assessor argues that the Category 1 documents are also relevant to its position that no well-reasoned construction of the tax statute would support Kraft's position. (*Id.* at 8.)

In response, Mondeléz contends the Assessor mischaracterizes Kraft's position. (Mondeléz Opp'n to Mot. Compel 2.) Kraft is no longer asserting that KPC's business was separate from and unrelated to its other activities in Maine. (*Id.*) Rather, Kraft is now simply arguing that the one-time gain from the sale of the Frozen Food Assets was unrelated to Kraft's activities in Maine and that it was entitled to an alternative apportionment method for the one-time gain. (*Id.* at 2-3.) Mondeléz contends, because Kraft is no longer arguing that KPC was separate from its unitary business, the requested meeting minutes are not relevant to whether an alternative apportionment method was appropriate. (*Id.* at 3.) Mondeléz further argues the requested documents are also irrelevant to the abatement of assessed penalties. (*Id.*) Though Kraft has abandoned its argument that KPC was not a part of its unitary business, Kraft still contends that it had "substantial authority" for its position when it filed its return for 2010. (*Id.*) Mondeléz contends that the Assessor no longer needs to demonstrate that Kraft and KPC were a unitary business. (*Id.*) According to Mondeléz, the question of whether Kraft had substantial authority for its position concerns only the state of the legal authority at the time the return was filed. (*Id.*)

In its reply, the Assessor argues that, regardless of Kraft's new position, it should be permitted to both discover and present evidence regarding KPC's and Kraft's business activities in order to demonstrate there is no basis for treating the sale of the Frozen Food Assets differently from Kraft's unitary business activities. (Assessor Reply to Mot. Compel 3-4.) The Assessor also argues that whether Kraft had "substantial authority" for its position when it filed its return for 2010 does not merely turn on the state of the law at that time, but necessarily requires the application of the law to facts about Kraft's businesses. (*Id.* at 4.) Thus, according to the Assessor, it should be permitted to discover evidence tending to support its position. (*Id.* at 4-5.)

Pursuant to the Maine Rules of Civil Procedure, the court may issue orders as justice requires to protect any party or person from whom discovery is sought from any undue burden or expense. M.R. Civ. P. 26(c), 45(c)(1). However, the purpose of the discovery rules is to enforce full disclosure. *St. Paul Ins. Co. v. Hayes*, 2001 ME 71, ¶ 8, 770 A.2d 611. Thus, the rules of discovery are to be construed liberally. *Id.* Maine Rule of Civil Procedure 26(b) provides:

> Parties may obtain discovery regarding **any matter**, **not privileged, which is relevant to the subject matter involved in the pending action**, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, … It is not ground for objection that the information sought will be inadmissible at the trial **if the information sought appears reasonably calculated to lead to the discovery of admissible evidence**."

M.R. Civ. P. 26(b)(1) (emphasis supplied). "Discovery is not necessarily limited to the issues framed by the pleadings or even to the subject matter of the merits of the case,…" 2 Harvey, *Maine Civil Practice* § 26:3 at 627 (3d ed. 2011) (footnote omitted). "The rule contemplates the disclosure of information that will permit the parties to define the issues and to obtain evidence on all matters potentially involved in the litigation, whether or not those matters relate to specific evidence that will be introduced at trial." *Id.* § 26:3 at 627-28. "[A] party is not limited to

discovery related to its adversary's framing of the issues or even to the merits of the case, as long as the discovery properly relates to the subject matter involved in the action. Thus, a party may pursue discovery based on its own theory of the case…" *Id.* § 26:3 at 629 (footnote omitted).

Although Kraft has changed its position, the Assessor is permitted to discover evidence related to its theory that there is no basis for treating the sale of the Frozen Food Assets differently from Kraft's unitary business activities. The requested Category 1 documents relate to that subject, and therefore, appear to be "reasonably calculated to lead to the discovery of admissible evidence." Moreover, Mondeléz has failed to demonstrate that the Assessor's request is overbroad or unduly burdensome. Mondeléz has conceded that it has already provided some of the requested documents to Kraft. (Mondeléz Opp'n to Mot. Compel 4.) Therefore, the Assessor's motion for an order compelling Mondeléz to comply with the subpoena for the production of documents shall be granted.

IV. ASSESSOR'S MOTION TO COMPEL KRAFT TO PROVIDE DEPOSITION TESTIMONY

On February 1, 2017, the Assessor served Notices of Deposition on three of the Kraft Respondents: Kraft Foods Global, Inc., Kraft Foods Group, Inc., and KPC. (Assessor Mot. Compl. 4.) The three Notices listed twenty-seven items for deposition. (*Id.*) The Assessor now seeks an order compelling Kraft to provide deposition testimony regarding Item Nos. 13 and 25 in the Notices. (*Id.*) Item No. 13 seeks deposition testimony regarding "'state income tax returns and combined reports filed by Kraft Foods and its affiliates for 2008 – 2011 in others states, including without limitation California, Illinois, Kansas, Montana, and Wisconsin, and any audits or assessments by those states related to those returns.'" (*Id.* at 5.) The Assessor concedes it is willing to limit its request to 2008 – 2010. (*Id.*) Item No. 25 seeks deposition testimony regarding "'financial statements prepared by or on behalf of Kraft Foods and its

affiliates for 2008 – 2011, including without limitation any statements or disclosures concerning potential state income tax liabilities resulting from the capital gain at issue in this case…'" (*Id.* at 9.) The Assessor concedes it is willing to limit its request to 2009 – 2011. (*Id.*)

A. Item No. 13: Kraft's income tax returns filed in other states for 2008 – 2010

The Assessor contends that Kraft's primary objection to providing deposition testimony regarding its income tax returns filed in other states is a lack of relevancy. (*Id.* at 5.) According to the Assessor, Kraft's position is that its filing position in other states is no longer relevant because Kraft has stipulated that that KPC was part of its unitary business in 2010. (*Id.*) However, the Assessor contends that Kraft has not stipulated to any of the predicate facts establishing it is a unitary business and that those predicate facts are still relevant to the primary issue in the case: whether KPC's sale of the Frozen Food Assets is sufficiently unrelated Kraft's business activities in Maine to warrant an alternative apportionment method. (*Id.*) The Assessor asserts that testimony regarding Kraft's income tax returns for other states is discoverable because it is reasonably likely to lead to admissible evidence regarding Kraft business activities. (*Id.* at 6.) The Assessor cites *Gannett Co. v. State Tax Assessor*, 2008 ME 171, ¶ 6, 959 A.2d 741, for the proposition that our Law Court has found a taxpayer's income tax returns for other states to be relevant to determining whether the taxpayer's activities comprised a unitary business and whether a large capital gain was apportionable to Maine. (*Id.* at 6-7.)

The court disagrees with the Assessor's interpretation of *Gannett*. As part of its recitation of the background facts in *Gannett*, the Law Court noted that the taxpayer had filed as a unitary business in nine other states for 1998 – 2000 and that the taxpayer had also declared in its 2000 Kansas income tax return that the affiliate which generated the capital gain at issue was part of its unitary business. *Gannett*, 2008 ME 171, ¶ 6, 959 A.2d 741. However, in its analysis

of whether the taxpayer and its affiliates constituted a unitary business, the Law Court did not mention or consider the taxpayer's income tax returns for other states. *Id.* ¶¶ 15-27. Rather, the Law Court analyzed the facts and circumstances of the taxpayer's actual activities to determine whether the taxpayer and its affiliates demonstrated the "hallmarks" of a unitary business: functional integration, centralized management, and economies of scale. *Id.* ¶ 13. The Law Court found the taxpayer and its affiliates to be a unitary business based on the taxpayer's "provision of intercompany services, the sharing of expertise among affiliates, its centralized health and benefit plans, the interlocking directors and officers, and its cash management system," not its income tax returns from other states. *Id.* ¶ 27. Similarly, in its analysis whether the State's apportionment formula was fair or resulted in a gross distortion, the Law Court again looked to the facts and circumstances of the taxpayer's activities in Maine. *Id.* ¶¶ 28-36. The Law Court's conclusion that the State's apportionment formula did not result in a gross distortion was not based on the taxpayer's filing positions in other states. *Id.* ¶ 36. Therefore, *Gannett* does not stand for the broad proposition asserted by the Assessor.

Kraft objects to the Assessor's request for deposition testimony regarding its income tax returns, combined reports, and any related audits or assessments on the ground that the request is unduly burdensome, overbroad, and not reasonably calculated to lead to the discovery of admissible evidence. (Kraft Opp'n to Mot. Compel 1-2.) Kraft notes that the Superior Court has previously denied a discovery request by the Assessor for a taxpayer's filing position in other states. (*Id.* at 2, Attach. A.) However, the Superior Court order cited by Kraft is a two-page order following an in-chambers, Rule 26(g) conference with the court. (*Id.* Attach. A.) The order simply states that the Assessor's request for the petitioner's filing position in other states is

denied without prejudice. (*Id.*) The order provides no explanation or context for the court's ruling and is, therefore, unpersuasive to this court. (*Id.*)

At oral argument, Kraft provided the court with an opinion from the Oregon Tax Court, *Oracle Corp. v. Dep't of Revenue*, 2010 Ore. Tax LEXIS 32 (Or. T.C. Feb. 11, 2010), in which the Oregon Department of Revenue argued that the Tax Court should fashion an equitable doctrine estopping a taxpayer from taking different positions regarding the same income in different states. *Id.* at *6-7. The Oregon court noted many policy reasons for declining to adopt such a rule, namely that it would be unfair, unworkable, create illogical results, and would compromise the principals of federalism and another state's interest in maintaining its own tax laws and interpreting them in its own fashion. *Id.* at *8-12. The Oregon court declared, "the question of whether an item of income is business or nonbusiness must be governed by Oregon law,…" *Id.* at *10. Oregon Tax Court's opinion is persuasive. Like that case, the questions at issue here, whether the alternative apportionment method was appropriate and whether Kraft had substantial authority for its filing position, must governed by Maine law and decided based on the particular facts of this case. Thus, Kraft's income tax returns, combined reports, and related audits or assessments from other states are likely irrelevant.

However, this court is not being asked to decide the relevancy or admissibility of the requested income tax returns and related documents at this time. The court is being asked to decide whether the tax returns and related documents are simply discoverable. As discussed above, information is discoverable if it "appears reasonably calculated to lead to the discovery of admissible evidence." M.R. Civ. P. 26(b)(1). The Rules of Civil Procedure contemplate the disclosure of all matters potentially involved in the litigation, whether or not those matters relate to specific evidence that will be introduced at trial. 2 Harvey, *Maine Civil Practice* § 26:3 at

627-28. Although Kraft's income tax returns, combined reports, and any related audits or assessments may not be relevant or admissible, the tax returns and related documents may contain predicate facts and information regarding Kraft's business activities that may be relevant to the issues in this case and admissible at a later trial. Therefore, Kraft's income tax returns, combined reports, and any related audits or assessments from other states are discoverable.

However, the court agrees with Kraft that the Assessor's request for testimony from three of Kraft entities regarding all income tax returns, combined reports, and any related audits or assessments from other states without limitation for a three-year period is overbroad and unduly burdensome. Kraft represents that it conducts business in all fifty states. (Kraft Opp'n to Mot. Compel 1.) Thus, each deponent must be prepared to testify regarding 147 tax returns, combined reports, and any related audits or assessments. (*Id.* at 1-2.) Moreover, the fact that each state has its own statutes, regulations, case law, administrative interpretations, and policies that govern its tax laws would make providing accurate testimony even more unduly burdensome on Kraft. (*Id.* at 2.)

On a motion to compel discovery, the court may make such protective orders as justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. M.R. Civ. P. 26(c), 37(a)(2). As discussed above, the Assessor's Notices specifically identified the income tax returns and combined reports for the states of California, Illinois, Kansas, Montana, and Wisconsin, and any audits or assessments by those states related to those returns. (Kraft Mot. Compel 5.) The Assessor has already conceded it is willing to limit its request to 2008 – 2010. (*Id.*) Therefore, the court shall compel Kraft to provide deposition testimony regarding only those five states for the period of 2008 – 2010. If the Assessor wishes to depose any Kraft entities regarding its income tax returns, combined reports, and any related

audits or assessment for states other than those five, the Assessor must make a motion with this court explaining why those tax returns are likely to lead to discoverable evidence.

B. Item No. 25: Information about tax accrual work papers and other documents prepared by Kraft in connection with Kraft's 2009-2011 financial statements

In its motion, the Assessor clarifies that Item No. 25 of its Deposition Notices seeks testimony from the Kraft entities regarding "any tax accrual work papers and related documents in which Kraft disclosed internally (and to its independent auditors) its estimates of potential state income tax liabilities resulting from the $3 billion capital gain at issue here." (Kraft Mot. Compel 9.) The Assessor contends that these documents are prepared by Kraft as part of its obligations under federal securities law. (*Id.*) According to the Assessor, as part of its annual public financial statements, Kraft must calculate its reserves for contingent tax liabilities and have those reserves certified by an independent auditor. (*Id.*) The Assessor contends that Kraft objects to its request on the grounds that those requested documents are protected by the work-product doctrine. (*Id.*) The Assessor asserts that the First Circuit, in *United States v. Textron Inc.*, 577 F.3d 21 (1st Cir. 2009) (en banc), *cert. denied*, 560 U.S. 924 (2010), has ruled that these exact type of work papers and documents are not protected by the work-product doctrine. (*Id.* at 9-10.) The Assessor contends that the *Textron* is consistent with the work-product doctrine under Maine law. (*Id.* at 10.)

In support of its opposition, Kraft has provided an affidavit from its Director of State Income Taxes describing the requested documents. (*See* Lebiecki Aff.) According to Kraft, the requested documents consist of (1) memoranda prepared by the Chicago law firm Horwood, Marcus and Berk ("HMB"), at the request of Kraft's Senior Manager of State Income Taxes and Senior Director of State Taxes, analyzing the potential for and risks of litigation in Maine and other states associated with Kraft's position on the capital gain at issue in this case, and (2) a

spreadsheet prepared by Kraft's Senior Manager of State Income Taxes and Senior Director of State Taxes based on the memoranda, reflecting HMB's judgment regarding the chances of success in litigation and dollar amounts associated the position taken on the gain in each state. (*Id.* ¶ 5.) Kraft asserts HMB regularly represents Kraft with respect to tax issues, that the memoranda were shared only with Kraft's Senior Vice President of Taxes, and that the memoranda were not shared with anyone outside the company. (*Id.* ¶¶ 7-8, 10.) The spreadsheet was provided to Kraft's auditors to support its reserves for contingent tax liabilities. (*Id.* ¶ 9.) Kraft asserts that the memoranda are protected from disclosure by the attorney-client privilege, and that both the memoranda and the spreadsheet are protected by the work-product doctrine. (Kraft Opp'n to Mot. Compel 4, 6.) Kraft contends that the *Textron* case relied on by the Assessor is inconsistent with Maine law and that this court should adopt the approach of other federal and state courts regarding the work-product doctrine. (*Id.* at 7-9.) Kraft also asserts that the spreadsheet is irrelevant to remaining issues in this case. (*Id.* at 5-6.)

Foremost, a client has the privilege to refuse or prevent disclosure of any confidential communication between the attorney and client. M.R. Evid. 502(b). A communication is "confidential" if it is (1) made to facilitate the rendition of legal services to the client and (2) not intended to be disclosed to any third party other than those to whom the client revealed the information in the process of obtaining professional legal services. M.R. Evid. 502(a)(5); *see Fiber Materials, Inc. v. Subilia*, 2009 ME 71, ¶ 11 n.1, 974 A.2d 918. A person waives the privilege if he or she "voluntarily discloses or consents to the disclosure of any significant part of the privileged matter." Me. R. Evid. 510(a). The Law Court has stated, "a privilege is waived when a 'significant part' or 'key element' of the privileged communication has been disclosed by

the party claiming entitlement to the privilege." *Jensen v. S.D. Warren Co.*, 2009 ME 35, ¶ 31, 968 A.2d 528 (internal citation omitted).

According to the affidavit of Kraft's Director of State Income Taxes, the memoranda were confidential communications between a law firm and Kraft assessing the potential for and risk of litigation in Maine and other states that were not disclosed to anyone outside of Kraft. Therefore, the memoranda constitute a privileged communication between attorney and client. However, according to Kraft's affidavit, the spreadsheet was prepared "based on the HMB memoranda, reflecting HMB's judgment with respect to the chances of success in litigation…" and shared with Kraft's auditors. (Lebiecki Aff. ¶¶ 5, 9.) Therefore, based on Kraft's affidavit, a "key element" of the privileged communication has been disclosed by Kraft to a third party. Thus, attorney-client privilege has been waived.

Regarding the work-product doctrine, the First Circuit in *Textron* addressed whether the exact type of "tax accrual work papers" at issue in this motion were protected by work-product doctrine. *Textron*, 577 F.3d at 22-23. The majority stated that the work-product doctrine prevents disclosure of documents and other tangible things "'prepared in anticipation of litigation or for trial.'" *Id.* at 27 (quoting Fed. R. Civ. P. 26(b)(3)). It is not enough that the subject matter of a document might conceivably be litigated, the materials must be "prepared for" litigation or trial. *Id.* at 29. According to the majority, "Even if prepared by lawyers and reflecting legal thinking, materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity…" *Id.* at 30 (internal quotations, alterations, and citation omitted). Thus, "work product protection does not extend to documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the

litigation." *Id.* (internal quotation and citation omitted). The First Circuit held that, because the tax accrual work papers were independently required by statutory and audit requirements and were prepared to support financial filings and gain auditor approval, the tax accrual work papers were not "prepared for" litigation. *Id.* at 26, 31-32. Accordingly, tax accrual work papers were not protected by the work-product doctrine. *Id.* at 31-32.

In a dissenting opinion, Circuit Judge Torruella argues that the majority in *Textron* have applied the wrong test for the work-product doctrine. *Textron*, 577 F.3d at 32 (Torruella, J. dissenting). Judge Torruella contends that the majority's "prepared for" test is even narrower than the widely rejected "primary purpose test." *Id.* According to Judge Torruella, the appropriate test is "whether in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained **because of** the prospect of litigation." *Id.* (internal quotation and citation omitted) (emphasis in original). Judge Torruella states the "because of" test is not limited to documents "prepared for" use in litigation. *Id.* at 34. Quoting *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998), Judge Torruella states:

> The [work-product doctrine, codified in Federal Rule 26(b)(3),] does not limit its protection to materials prepared to assist at trial. To the contrary, the text of the Rule clearly sweeps more broadly. It expressly states that work-product privilege applies not only to documents "prepared… for trial" but also to those prepared "in anticipation of litigation." If the drafters of the Rule intended to limit its protection to documents made to assist in preparation for litigation, this would have been adequately conveyed by the phrase "prepared… for trial." The fact that documents prepared "in anticipation of litigation" were also included confirms that the drafters considered this to be a different, and broader category. Nothing in the Rule states or suggests that documents prepared "in anticipation of litigation" with the purpose of assisting in the making of a business decision do not fall within its scope.

Id. (quoting *Adlman*, 134 F.3d at 1198-99). Applying the "because of" test, Judge Torruella concludes that tax accrual work papers are protected by the work-product doctrine. *Id.* at 40.

According to Judge Torruella, the driving force behind the preparation of the tax accrual work papers was the need to reserve money in anticipation of litigation. *Id.* at 41. Although other business needs were also a motivating factor, those needs depended on anticipating litigation. *Id.* at 41. In other words, the dual purposes for creating the tax accrual work papers, anticipating litigation and gaining auditor approval for financial filings, were intertwined and the work-product doctrine should apply. *Id.*

Regarding the exception to the "because of" test that documents prepared in the ordinary course of business or that would have been created irrespective of litigation are not protected, Judge Torruella states that the exception does not strip away work-product protection for dual-purpose documents. *Id.* at 41-42. Rather, the exception should simply be read to distinguish business and regulatory purposes from litigation and to clarify that, although dual-purpose documents are protected, there is no work-product protection for but documents produced in the ordinal course of business "rather than" litigation. *Id.* at 42. Therefore, although the tax accrual work papers had a business and regulatory purpose, because the tax accrual work papers were prepared for the dual propose of anticipating litigation, they were not prepared irrespective of litigation and the exception does not apply. *Id.*

Under Maine law, a document is protected by the work-product doctrine, codified in Maine Rule of Civil Procedure 26(b)(3), "if it was created because of the party's subjective anticipation of future litigation." *Springfield Terminal Ry. Co. v. Dept. of Transp.*, 2000 ME 126, ¶ 16, 754 A.2d 353. "The preparer's anticipation of litigation must also be objectively reasonable." *Id.* (internal citation and quotation omitted). "Moreover, the document must also be of a type that can be considered work product. A party generally must show that the documents were prepared principally or exclusively to assist in anticipated or ongoing

litigation." *Id.* ¶ 17 (internal citation and quotation omitted). The test is "whether, in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." *Id.* (internal citation and quotation omitted).

Our Law Court has also held that "a document prepared in the regular course of business may be prepared in anticipation of litigation when the party's business is to prepare for litigation." *Harriman v. Maddocks*, 518 A.2d 1027, 1034 (Me. 1986) (internal citation and quotation omitted); *see Springfield Terminal*, 2000 ME 126, ¶ 17 n.5, 754 A.2d 353 (stating *Harriman* remains good law). In *Harriman*, the plaintiffs sought to discover the entire claim file compiled by defendants' insurance adjuster. *Harriman*, 518 A.2d at 1031. The plaintiffs argued that evaluation of policyholder claims is the regular business of an insurance company and not done in anticipation of litigation. *Id.* at 1034. However, the Court held that, because one of the routine functions of a claims adjuster is to prepare for litigation, documents prepared by an insurance adjuster were protected by the work-product doctrine. *Id.*

Maine law is consistent with Judge Torruella's dissent. It is a routine function of a law firm to anticipate and prepare for litigation. The tax accrual work papers at issue in this motion contain a law firm's legal analysis regarding the potential risk of litigation associated with Kraft's tax position. Thus, it can be fairly said that the tax accrual work papers were prepared because of the prospect of litigation. The fact that tax accrual work papers also have a dual business and regulatory function does not negate fact they were prepared because of the need to anticipate litigation by a law firm whose business it is to prepare for litigation. The documents' business and regulatory function is intertwined with the need to anticipate litigation. Therefore, the tax accrual work papers are protected by the work-product doctrine.

Pursuant to Maine Rule of Civil Procedure 26(b)(3), a party may still discover documents protected by the work-product doctrine "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." M.R. Civ. P. 26(b)(3). The Assessor has made no such showing. Therefore, the court declines to compel Kraft to provide deposition testimony regarding the tax accrual work papers and related documents.

V. CONCLUSIONS

The Kraft Respondents' motion to bifurcate is **DENIED**.

The State Tax Assessor's motion for an order compelling non-party Mondeléz International, Inc. to comply with a subpoena for the production of documents is **GRANTED**.

The State Tax Assessor's motion for an order compelling the Kraft Respondents to provide deposition testimony is **GRANTED IN PART AND DENIED IN PART** as follows:

(1) The State Tax Assessor's motion to compel Kraft Respondents to provide deposition testimony regarding state income tax returns, combined reports, and any audits or assessments in others states is **GRANTED IN PART**. The Kraft Respondents shall provide deposition testimony regarding state income tax returns and combined reports filed by Kraft Foods and its affiliates for the states of California, Illinois, Kansas, Montana, and Wisconsin, and any audits or assessments by those states related to those returns for the period of 2008 – 2010. If the State Tax Assessor wishes to depose any Kraft Respondents regarding income tax returns and combined reports filed in any other states and any related audits or assessments, the State Tax Assessor must make a motion with this court explaining why those tax returns are likely to lead to discoverable evidence.

(2) The State Assessor's motion to compel Kraft Respondents to provide deposition testimony regarding tax accrual work papers and related documents is **DENIED**.

Pursuant to Maine Rule Civil Procedure 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated: June 7, 2017

____/S_____
M. Michaela Murphy
Justice, Business and Consumer Court