

Not Reported in S.W.3d, 2010 WL 5187730 (Tex.App.-Hous. (1 Dist.))  
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SEE TX R RAP RULE 47.2 FOR DESIGNATION  
AND SIGNING OF OPINIONS.

### MEMORANDUM OPINION

Court of Appeals of Texas,  
Houston (1st Dist.).

In re **ENERGY XXI GULF COAST, INC.** and **En-  
ergy XXI** (Bermuda) Limited, Formerly Known as  
**Energy XXI** Acquisition Corporation (Bermuda)  
Limited, Relators.

No. 01–10–00371–CV.  
Dec. 23, 2010.

West KeySummary **Pretrial Procedure 307A**   
**381**

[307A](#) Pretrial Procedure

[307AII](#) Depositions and Discovery

[307AII\(E\)](#) Production of Documents and  
Things and Entry on Land

[307AII\(E\)3](#) Particular Documents or  
Things

[307Ak381](#) k. Insurance Policies and  
Related Documents. [Most Cited Cases](#)

In litigation arising from a dispute between insured and insurance broker regarding the amount of coverage on insured's oil and gas well which had suffered a blowout, a reasonable person would have concluded that there was a substantial chance that litigation would ensue between insured and broker after broker sent an e-mail which denied responsibility for any coverage deficiency, and thus insured's internal communications generated after the e-mail was sent were protected by the work-product privilege under the Rules of Civil Procedure. The communications established that as of the time broker sent the e-mail to insured, insured and broker were taking directly adverse positions as to which party stood at fault for failing to secure the additional coverage for the well. [Vernon's Ann.Texas Rules](#)

[Civ.Proc., Rule 192.5\(a\)](#).

Original Proceeding on Petition for Writ of Mandamus.

[Joann Storey](#), [Jimmy G. Williamson](#), [Michael Kersensky](#) and [Cindy Lynn Rusnak](#), for Energy XXI, et al.

[Neal S. Manne](#), [Geoffrey L. Harrison](#) and [Amira Mae El-Hakam](#), for Houston Series of Lockton Companies, LLC.

Panel consists of Justices [JENNINGS](#), [ALCALA](#), and [SHARP](#).

### MEMORANDUM OPINION

[TERRY JENNINGS](#), Justice.

\*1 By a petition for writ of mandamus, relators, Energy XXI Gulf Coast, Inc. and Energy XXI (Bermuda) Limited, formerly known as Energy XXI Acquisition Corporation (Bermuda) Limited (collectively, “Energy”), challenge the trial court's order (i) overruling Energy's privilege objections to a first set of documents and compelling Energy to produce those documents to real party in interest, Lockton Companies, LLC (“Lockton”), <sup>FN1</sup> and (ii) sustaining Energy's privilege objections to a second set of documents, but nevertheless ordering Energy to produce those privileged documents to Lockton subject to a protective order “and for review on an attorney's eyes only basis.” <sup>FN2</sup> In three issues, Energy contends that it lacks an adequate remedy by appeal and the trial court abused its discretion in overruling Energy's privilege objections as to the first set of documents and in ordering the production of the second set of privileged documents “for attorney's eyes only.”

**FN1.** Lockton identifies the following other real parties in interest: Houston Series of Lockton Companies, LLC, Lockton Insurance Agency, Inc., Lockton Companies of Houston, Inc., formerly known as Lock-

ton Insurance Agency of Houston, Inc., John Rathmell, and Mark Mozell. We collectively refer to these parties as “Lockton.”

**FN2.** The underlying case is *Energy XXI Gulf Coast, Inc. v. Lockton Companies, LLC*, No.2008–35345, in the 157th Judicial District Court of Harris County, Texas, the Honorable Randy Wilson presiding.

We conditionally grant the petition for writ of mandamus.

### **Background**

Lockton served as an insurance broker for Energy, an oil and gas exploration company, during periods in 2006 and 2007, and Energy obtained through Lockton well-control insurance, which provides coverage for costs associated with oil and gas well blowouts. The parties agree that on January 20, 2007, Energy representatives, including John Schiller, West Griffin, and Steve Weyel, met with Lockton's account brokers, Mark Mozell and John Rathmell, to discuss whether the applicable well-control insurance should be increased for a Louisiana well in which Energy maintained a 35 percent working interest. At that time, because Energy's well-control insurance limit for this well was \$25 million, it had \$8.75 million available in well-control insurance coverage. The parties disagree as to whether, at the June 20th meeting, Energy requested that Lockton increase its applicable coverage on the Louisiana well to \$50 million. Energy alleges that it did, and Lockton asserts that no such instruction was given and, instead, Energy indicated that it would provide Lockton with an answer at a later date, which Energy never did. In June 2007, the well suffered a blow out, triggering Energy's well-control insurance and giving rise to the underlying dispute.

Contending that it had, prior to the blowout, instructed Lockton to increase the applicable well-control insurance from \$25 million to \$50 million and Lockton had failed to secure the increased cov-

erage, Energy brought suit against Lockton, asserting claims for negligence, negligent misrepresentation, breach of fiduciary duty, breach of contract and implied contract, violations of the Texas Insurance Code, and fraud. A lengthy discovery dispute developed and, during the course of this dispute, Lockton filed a motion to compel Energy to produce certain documents that Energy had resisted producing. Energy objected to Lockton's motion to compel and filed a privilege log, within which Energy asserted that certain documents are covered by the attorney-client and work-product privileges. Energy also filed, on April 5, 2010, affidavits prepared by Granger Anderson, Energy's Vice President of Land, West Griffin, Energy's Chief Financial Officer, and BoShara Boyd, Energy's Vice President of Law, in support of its privilege objections.

\*2 The trial court conducted a multi-day hearing, during which it considered Lockton's motion to compel and Energy's objections, and it conducted an in camera review of the documents identified by Energy as privileged. The trial court divided the subject documents into two sets and made separate rulings in regard to each set. The first set of documents are Energy's internal communications related to the allegations in Energy's Fifth Amended Petition in the underlying case and predate November 19, 2007. The second set of documents are all of Energy's “internal and external communications relating to the blow-out preventer case,” a separate lawsuit involving some separate parties that arose from the well blowout. In the challenged order, the trial court expressly noted that it had considered Energy's objections under [Texas Rule of Civil Procedure 192.5](#), which sets forth the work-product privilege, as well as Energy's affidavits. In the first paragraph of the order, the trial court overruled Energy's privilege objections “as to all of [Energy's] internal communications” before November 19, 2007 and ordered Energy to produce this first set of documents, which it identified by Bates Numbers, to Lockton. In the second paragraph of the order, the trial court sustained Energy's privilege objections “to all of its internal and external communica-

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tions relating to the blow-out preventer case.” However, the trial court ordered Energy to produce this second set of documents to Lockton “subject to the parties' protective order and for review on an attorney's eyes only basis.”

### Standard of Review

Mandamus is an extraordinary remedy, which is available only when (1) a trial court clearly abuses its discretion and (2) there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex.2004); *In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53, 57 (Tex.App.-Houston [1st Dist.] 2005, orig. proceeding). A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992). With respect to a trial court's determination of legal principles, “a trial court has no ‘discretion’ in determining what the law is or applying the law to facts.” *In re Prudential*, 148 S.W.3d at 135 (quoting *Walker*, 827 S.W.2d at 840). Appeal is inadequate when a trial court erroneously orders the production of confidential information or privileged documents. *In re Ford Motor Co.*, 211 S.W.3d 295, 298 (Tex.2006); *In re E.I. DuPont de Nemours and Co.*, 136 S.W.3d 218, 223 (Tex.2004); see also *In Re BP Prods. N. Am. Inc.*, 263 S.W.3d 106, 111 (Tex.App.-Houston [1st Dist.] 2006, orig. proceeding) (“There is not an adequate remedy by appeal when a trial court erroneously orders the disclosure of privileged information because the error cannot be corrected once the benefit of the privilege is lost.”).

### Work–Product Privilege

\*3 In its first and third issues, Energy argues that it has no adequate remedy by appeal and the trial court abused its discretion in overruling its work-product privilege objections as to the first set of documents and compelling it to produce those documents to Lockton because, as revealed by an e-mail contained within the documents, “[f]rom 3:13 p.m. October 11, 2007, there was more than an ab-

stract possibility that there would be litigation” between Energy and Lockton and “[f]rom that point forward, both parties were on notice that the other party unequivocally and unambiguously stood in opposition to the other's claims. Litigation ensued.”

The party who seeks to limit discovery by asserting a privilege has the burden of proof. *In re E.I. DuPont de Nemours and Co.*, 136 S.W.3d at 223. “To meet its burden, the party seeking to assert a privilege must make a prima facie showing of the applicability of a privilege by first asserting the privilege.” *In Re BP Prods. N. Am. Inc.*, 263 S.W.3d at 112. The documents in issue may themselves constitute sufficient evidence to make a prima facie showing of attorney-client or work-product privilege. *In re E.I. DuPont de Nemours and Co.*, 136 S.W.3d at 223.

“Work product” is defined as:

- (1) material prepared or mental impressions developed *in anticipation of litigation* or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX.R. CIV. P. 192.5(a) (emphasis added). The Texas Supreme Court has generally described “work product” as “specific documents, reports, communications, memoranda, mental impressions, conclusions, opinions, or legal theories, prepared and assembled *in actual anticipation of litigation* or for trial.” *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 200 (Tex.1993) (emphasis added).

The “anticipation of litigation” test is met when a reasonable person would have concluded from the totality of the circumstances that there was a sub-

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stantial chance that litigation would ensue and the party asserting the work product privilege subjectively believed in good faith that there was a substantial chance that litigation would ensue. *Id.* at 195, 204, 207; see also *Trevino v. Ortega*, 969 S.W.2d 950, 956 (Tex.1998) (stating that “trial courts must look at the totality of the circumstances and decide whether a reasonable person in the party's position would have anticipated litigation and whether the party actually did anticipate litigation”). A “substantial chance of litigation” does not “refer to any particular statistical probability that litigation will occur” but “simply means that litigation is more than merely an abstract possibility or unwarranted fear.” *Brotherton*, 851 S.W.2d at 204. Common sense dictates that a party may reasonably anticipate suit being filed, and conduct an investigation to prepare for anticipated litigation, before a party manifests an intent to sue by filing suit. *Id.*; see also *In re Tex. Farmers Ins. Exchange*, 990 S.W.2d 337, 342 (Tex.App.-Texarkana 1999, orig. proceeding [mand. denied] ).

\*4 The critical issue presented to this Court is whether Energy established that the work-product privilege attached to protect certain internal communications after 3:13 p.m. on October 11, 2007 when Lockton sent to Energy an e-mail in which Lockton denied Energy's claim that Energy had requested a \$25 million increase in well-control insurance on the Louisiana well and, thus, confirming that only \$25 million in coverage, instead of \$50 million, had been secured on Energy's behalf. The trial court, after conducting an in-camera review of Energy's internal communications, necessarily found that Energy had not established the applicability of the work-product privilege to these communications. Rather, the trial court found November 19, 2007 to be the date on which the work-product privilege attached to protect Energy's internal communications.

Initially, we must address Lockton's extensive complaints about the trial court's proceedings below. Lockton argues that Energy did not establish a

prima facie case of the work-product privilege because it did not timely file affidavits or other evidence and did not formally introduce the affidavits or other evidence in support of its claims of privilege. Alternatively, Lockton argues that, even if Energy's affidavits were in fact timely filed and properly considered, Energy's affidavits only apply to a small subset of the documents that the trial court reviewed in camera. Based upon the express terms of the trial court's order and settled law, we reject Lockton's procedural complaints.

The trial court, in its order, included a written notation that it considered Energy's objections under rule 192.5 and the affidavits filed by Energy on April 5, 2010. Lockton's suggestion that the trial court did not, or could not, have considered the affidavits is contrary to the plain language of the order. Also, Lockton's suggestion is contrary to case law, which provides that our review should include the affidavits because the “record of the hearing” and the trial court's own order “shows that the parties and the court undisputedly considered the affidavits.” *In re Monsanto Co.*, 998 S.W.2d 917, 926 (Tex.App.-Waco 1999, orig. proceeding). In regard to Lockton's assertion that Energy was required to present affidavits or evidence to establish its claim of privilege with respect to each document that the trial court reviewed in camera, the supreme court, as noted above, has stated that the documents in issue may themselves constitute sufficient evidence to establish the work-product privilege. *In re E.I. DuPont de Nemours and Co.*, 136 S.W.3d at 223. Accordingly, in conducting our review of the trial court's order compelling the production of Energy's internal communications that are in the sealed record before us, i.e., the internal Energy communications between 3:13 p.m. on October 11, 2007 to November 19, 2007, the date the trial court found that the privilege applies,<sup>FN3</sup> we will consider the affidavits filed by Energy, the documents the trial court reviewed in camera, and the other documents in the record before us.<sup>FN4</sup>

FN3. Lockton does not challenge the trial

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court's finding that the work-product privilege applies to Energy's documents dated on or after November 19, 2007.

**FN4.** The trial court's order identifies by Bates Number the first set of documents that Energy is ordered to produce. The trial court identifies the following documents: ENERGY XXI 025891–025896; 030916; 061164–061239; 061275–061330; 066312–066323; 066326; 066359–066360; 066589–066591; 066801–066802; 066808–066828; and 066834–066845. However, on appeal, Energy states that certain documents identified by the trial court in its order are no longer at issue. Accordingly, based upon its concession, we now consider the applicability of the work-product privilege to the following documents: ENERGY XXI 030916; 061164–061239; 066321–066323; 066326; 066359–066360; and 066819–066828.

**\*5** In order to determine if the work-product privilege attached on October 11, 2007 at 3:13 p.m., following Lockton's e-mail to Energy, we review the parties' preceding communications. On October 11, 2007, at 9:36 a.m., Energy's Jerry Mysak e-mailed Lockton's Heather McCarthy, asserting that Energy had “advised” Lockton's Mark Mozell “to increase limits as discussed with Glynn Broussard [of Energy] in E-mail.” Mysak included in his e-mail to McCarthy a copy of a January 28, 2007 e-mail from Mark Mozell of Lockton to Broussard of Energy in which Mozell discussed the possibility of increasing coverage on the Louisiana well. Mysak stated in the e-mail, “We need to do this prior to the well being spud” and “Time frame is around year end 2006 since well drilled early 2007. Need to address ASAP—of very high importance!!!!!!”

Subsequently, that afternoon, Mark Mozell of Lockton e-mailed John Rathmell of Lockton to report that he had received a telephone call from Mysak during which Mysak asserted that Energy had

previously instructed Lockton to increase coverage on the Louisiana well. In this e-mail, Mozell reported to Rathmell that he had advised Mysak during this telephone conversation that Lockton had never received confirmation from Energy to increase coverage on the well. Mozell further stated that Mysak had then claimed that Glenn Broussard of Energy had called Mozell and had instructed him to increase coverage on the well. Mozell reported to Rathmell that he had responded, “Yeah right!”

Subsequent to this phone conversation, at 3:13 p.m. on the same day, Mozell e-mailed Mysak in response to the coverage inquiries. Mozell stated,

Jerry, pursuant to our conversation this afternoon, below is an e-mail from John Rathmell to Steve and West [of Energy] relative to suggestion about increasing the limit of liability. We [Lockton] received no response or communication from your firm [Energy] subsequently instructing us to do so. As such, no request was made to underwriters to increase the limit of liability.

Please call me or John if you wish to discuss further.

As noted, Mozell included in this e-mail the referenced January 29, 2007 e-mail from Rathmell to Lockton, which included a “strong” recommendation that Energy carry, at a minimum, \$50 million in coverage on the Louisiana well. In the January 29, 2007 e-mail, Rathmell stated:

Steve and West:

Further to our call I spoke to Mark Mozell about the potential for EXII to take an interest in a Area II well with an AFE approaching \$30M. Currently you have a limit of \$25M for Area II Wet Wells (Marsh). We generally recommend that you carry limits around 3–5 times the dry hole cost. At a minimum you should carry limits of \$50M.

We are strongly recommending that we increase the limits for the higher AFE wells.

We are ready to discuss ASAP.

The October 11, 2007 e-mail sent from Lockton to Energy at 3:13 p.m. is the e-mail that Energy contends triggered its anticipation of litigation against Lockton. Energy asserts that the work-product privilege protects its subsequent internal communications between Energy employees that were made in anticipation of litigation. In support of its claim of privilege, Energy submitted the affidavits of Anderson and Griffin. In his affidavit, Anderson testified,

\*6 I am the Vice-President of Land of Energy XXI and was in October 2007. Attached to this affidavit are certain documents which I was the author of. Such communications took place in October 2007. I sent these e-mails, thinking they were private communications between members of management of the company. I sent these private communications expressly for the purpose of disclosing, discussing, and thinking about different strategies that would be available for Energy XXI, should it decide to go forward with a lawsuit against Lockton. At this time, I knew that Lockton had denied that they had ever been given instructions regarding the Cote de Mer [the Louisiana well]. I also know that Energy XXI felt that Lockton had not acted properly with respect to Cote de Mer [the Louisiana well], and was thinking about its legal options. Accordingly, the emails attached authored by me after October 11, 2007 deal with no business purpose other than the possibility of litigation, and the litigation thoughts that I had, regarding the business dispute with Lockton. At this point, litigation with Lockton was being actively discussed; it was more than an abstract possibility.

Griffin provided identical testimony in regard to documents that he had authored. In addition to these affidavits, which by their plain terms apply to documents authored by Anderson and Griffin, the trial court had the sealed documents themselves to consider and the other documents in the record. Because the trial court reviewed them in camera and

they remain sealed in the record before us, we are not at liberty to discuss the contents of these documents in our opinion, but they are extremely important to our review.

After considering these documents, the correspondence preceding the “triggering” 3:13 p.m. e-mail, the substance of the triggering e-mail itself, and the affidavits submitted to the trial court, we conclude that Energy established the applicability of the work-product privilege with respect to the internal communications that the trial court reviewed in camera. The record before us makes clear that, prior to the 3:13 p.m. e-mail, Energy executives and employees questioned whether Lockton had secured the additional coverage. Although some of Energy's correspondence reflects that even Energy's own employees openly questioned what was done by Energy to obtain coverage, it is evident that Energy employees were discussing whether they could prove that the fault lay with Lockton.

On October 11, 2007, Energy made contact with Lockton, both by telephone conversation and e-mail, informing Lockton that it was taking the position that Energy had requested additional coverage and Lockton had failed to secure the requested, additional coverage. Mozell's own internal e-mail to Rathmell at Lockton recites that, during his conversation with Mysak, Mysak asserted that Energy had requested the additional coverage and Mozell rejected outright Mysak's assertion that any such verbal request had been made by Energy. Moreover, with its 3:13 p.m. e-mail, Lockton provided Energy with a more formal response in which Lockton stated that, on January 29, 2007, it had recommended to Energy that additional coverage be obtained, and Lockton included in this e-mail its prior recommendation. Lockton also stated that, despite its strong recommendation, Lockton had “received no response or communication from” Energy and, accordingly, Lockton had made “no request” to the underwriters “to increase the limit of liability” on the Louisiana well. Thus, at 3:13 p.m., Lockton officially denied responsibility for any

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coverage deficiency and specifically denied Energy's assertion that it had in fact made a request for additional insurance coverage on the well. Although we cannot detail the substance contained in the documents reviewed in camera by the trial court, an Energy e-mail, timed shortly after Lockton's denial, reveals that Energy believed it could "make [a] case"<sup>FN5</sup> against Lockton.

**FN5.** This passage is contained in one of the sealed e-mails, but has previously been disclosed in public documents filed with the Court.

\*7 The documents establish that, as of 3:13 p.m. on October 11, 2007, both Energy and Lockton were taking directly adverse positions as to which party stood at fault for failing to secure an additional \$25 million worth of insurance coverage for a well that subsequently had blown out. The stakes were high. The positions were clear. A reasonable person would have to conclude from the totality of the circumstances that there was a substantial chance that litigation would ensue between Energy and Lockton. *Brotherton*, 851 S.W.2d at 203-04, 207. Moreover, based upon the affidavits and the correspondence contained in the record that preceded the 3:13 p.m. e-mail, and based upon the sealed documents themselves, we conclude that Energy subjectively believed in good faith that there was a substantial chance that litigation would ensue. *Id.* Thus, we further conclude that Energy satisfied both the objective and subjective tests set forth in *Brotherton*. In sum, Energy established that the internal communications in the sealed record before us are protected by the work-product privilege. Accordingly, we hold that the trial court abused its discretion in compelling Energy to produce these documents. We further hold that because Energy would lose the benefit of its privilege by having to produce these documents, Energy has no adequate remedy by appeal. See *In re Ford Motor Co.*, 211 S.W.3d at 298.

Finally, we must reject Lockton's alternative argument that Energy's internal communications are

discoverable because they are "witness statements." As Lockton notes, "witness statements" under rule 192.3, even if made or prepared in anticipation of litigation or for trial, are "not work product protected from discovery." **TEX.R. CIV. P. 192.5(c)(1)**. A witness statement is defined as "(1) a written statement signed or otherwise adopted or approved in writing by the person making it, or (2) a stenographic, mechanical, electrical, or other type of recording of a witness's oral statement, or any substantially verbatim transcription of such a recording." **TEX.R. CIV. P. 192.3(h)**. "Notes taken during a conversation or interview with a witness are not a witness statement." *Id.* Lockton cited no authority for the proposition that internal executive e-mails made in anticipation of litigation that would otherwise qualify as protected work product somehow constitute discoverable witness statements.<sup>FN6</sup> The plain language of the rule suggests that these types of internal communications are not discoverable witness statements.

**FN6.** Within its response, Lockton agrees that, under **rule 192.5**, communications between a party and its representatives can qualify as protected work-product, but it further argues that it is "still highly relevant" that no lawyers were copied by Energy representatives on the e-mails at issue. We agree that the inclusion of lawyers on communications could be "highly relevant" in determining the applicability of the work-product privilege, but the fact that no lawyers were involved in the communications at issue does not trump the documents themselves, which we conclude establish that the communications were made in anticipation of litigation.

We sustain Energy's first issue and that portion of its third issue in which it contends that it has no adequate remedy by appeal to challenge the trial court's order that it produce the first set of documents.

#### **"Attorney's-Eyes Only" Provision**

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In its second and third issues, Energy argues that it has no adequate remedy by appeal and the trial court abused its discretion in ordering Energy to produce the second set of privileged documents related to the blow-out-preventer litigation to Lockton subject to a protective order “and for review on an attorney’s eyes only basis” because such an order is contrary to the Texas Rules of Civil Procedure and is inappropriate in that they are privileged.

\*8 Lockton has not challenged the trial court’s ruling sustaining Energy’s privilege objections to the second set of documents related to the blow-out-preventer case. There is no authority that would allow a trial court to order a party to produce privileged documents to the opposing party’s attorney, even with the qualification that the documents be produced for “attorney’s eyes only” and subject to the parties’ protective order. At oral argument, Lockton essentially conceded that there is no authority for such an order. Accordingly, we hold that the trial court abused its discretion in compelling Energy to produce these documents to Lockton on an “attorney’s-eyes only” basis, after it had sustained Energy’s privilege objections to produce these documents. We further hold that Energy has no adequate remedy by appeal. *See In re Ford Motor Co.*, 211 S.W.3d at 298.

We sustain Energy’s second issue and that portion of its third issue in which it contends that it has no adequate remedy by appeal to challenge the trial court’s order that it produce the second set of documents.

### Conclusion

We conditionally grant the petition for writ of mandamus, direct the trial court to vacate its May 4, 2010 order, and direct the trial court to enter an order sustaining Energy’s privilege objections to the first set of documents described in the first paragraph of its May 4, 2010 order and to sustain Energy’s privilege objections to the second set of documents described in the second paragraph of its May 4, 2010 order without compelling Energy to produce its privileged documents to Lockton. The

writ will issue only if the trial court fails to comply.

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