Case No. 13-30282

IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

JOHN AKINS, ET AL

Plaintiff - Appellants

Vs.

WORLEY CATASTROPHE RESPONSE, LLC, AND WORLEY CATASTROPHE SERVICES, LLC

Defendants - Appellees

ON APPEAL
FROM THE JUDGMENT OF THE
HONORABLE JOSEPH C. WILKINSON, JR., PRESIDING MAGISTRATE JUDGE
FOR THE UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF LOUISIANA

APPELLANTS' ORIGINAL BRIEF

FILED ON BEHALF OF
MICHAEL Sullivan, CHARLES BALDWIN, JOHNNY KNIGHTEN, JIMMY PHILLIPS AND RON DICKERSON,

Intervenors-Appellants

COLVIN AND SMITH, APLC
James H. Colvin, Jr. (La. Bar #21532)
Cole B. Smith (La. Bar # 30063)
900 Market Street, Suite 300
Post Office Box 1831
Shreveport, Louisiana 71101
Telephone: (318) 429-6770
Facsimile: (318) 429-6771

Timothy W. Cerniglia (La. Bar #3964)
1521 St. Charles Avenue
New Orleans, Louisiana 70130
Telephone: (504) 586-0550
Facsimile: (504) 586-0555

HYMEL, DAVIS & PETERSEN
L.J. Hymel (La. Bar # 07137)
10602 Coursey Boulevard
Baton Rouge, Louisiana 7081
Telephone: (225) 298-8118
Facsimile: (225) 298-8119

Attorneys for Intervenors

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and/or entities listed have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

J.P. "Jay" Hughes
1300 Access Road, Suite 100
Oxford, MS 38655
Attorney for the *Akins Plaintiffs*

Michael A. Starzyk
April L. Walter
Hessam Parzivand
Starzyk & Associates
10200 Grogan Mill Road, suite 300
The Woodlands, TX 77380
Attorneys for the *Akins Plaintiffs*

Joseph E. Fieschko, Jr.
Fieschko and Associates
2230 Koppers Building
Pittsburgh, PA 15219
Attorneys for the *Akins Plaintiffs*

John R. Linkosky
John Linkosky & Associates
715 Washington Avenue
Carnegie, PA 15106
Attorneys for the *Akins Plaintiffs*

Akins Plaintiffs - 210 named individuals in *Akins* Complaint and those plaintiffs who have "opted in" to the collective action.

Jennifer L. Anderson
Jones Walker
Four United Plaza
8555 United Plaza Blvd
Baton Rouge, LA 70809
Attorneys for Worley Catastrophe Response LLC., and
Worley Catastrophe Services, LLC.

Mary Margaret Spell
Jones Walker
201 St. Charles Avenue
New Orleans, LA 70170
Attorneys for Worley Catastrophe Response LLC., and
Worley Catastrophe Services, LLC.

James R. Lewis
Crawford & Lewis
450 Laurel Street, Suite 1600
Baton Rouge, LA 70801
Attorneys for Worley Catastrophe Response LLC., and
Worley Catastrophe Services, LLC.

Worley Catastrophe Response, LLC

Worley Catastrophe Services, LLC

Michael Worley

Timothy W. Cerniglia
1521 St. Charles Avenue
New Orleans, LA 70130
Attorney for *Sullivan Intervenors*

James H. Colvin, Jr. (La. Bar # 21532)
Cole B. Smith (La. Bar # 30063)
COLVIN AND SMITH, LLC
900 Market Street, Suite 300
Post Office Box 1831
Attorneys for *Sullivan Intervenors*

L.J. Hymel (La. Bar # 07137)
Hymel, Davis, & Petersen
10602 Coursey Boulevard
Baton Rouge, Louisiana 7081
Attorney for *Sullivan Intervenors*

Michael Sullivan

Charles Baldwin

Johnny Knighten

Jimmy Phillips

Ron Dickerson

Putative Members of the state class action entitled *Sullivan, et al vs. The Worley Companies*, et al, No. 599-055 Div. I, 19th Judicial District Court.

Leonard Blackmon

Alicia Goerlitz

William Haygood

Daniel J. King

Traci Overmyer

Arthur Reinaur

Kimberly Reinaur

Scott Shoemaker

Olga Souders

Doug Taylor

Alexia Watkins

Hardy Wendenburg

John White

INTERVENORS' REQUEST FOR ORAL ARGUMENT

In accordance with Local Rule 28.2.3, Intervenors request oral argument in order to better present and articulate issues raised in written briefs. This appeal involves a number of interrelated issues, including the interest of members in a state class action in the subject matter of a purported federal collective action, which is best augmented by oral argument. Intervenors suggest that this Court's decisional process will be aided by oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. STATEMENT OF JURISDICTION

In accordance with Federal Rule of Appellate Procedure 28(a)(4)(A)-(D), Intervenors hereby provide the following Jurisdictional Statement:

A. Jurisdiction in this matter was conferred on the District Court pursuant to 28 U.S.C. 1131, federal question jurisdiction, and 29 U.S.C. 216 (b), the Fair Labor Standards Act. The Plaintiffs and Defendants consented in writing to its referral to a United States Magistrate Judge for all proceedings and entry of judgment in accordance with 28 U.S.C. § 636 (c), signed by District Court Judge Carl Barbier on November 30, 2012. R. 766.

B. Jurisdiction is conferred on the United States Court of Appeals for the Fifth Circuit by 28 U.S.C. § 1291, as this is an appeal from a final decision of the United States District Court for the Eastern District of Louisiana and is a final judgment as to Intervenors, dismissing their claims in intervention.

C. Magistrate Judge Wilkinson, Jr., issued his ruling, Order and Reasons on Motions, denying Intervenors' Motion to Intervene on March 4, 2013. R. 1382. Intervenors timely filed their Notice of Appeal on March 18, 2013. R.1570.

D. Appellants certify that the denial of Intervenors' Motion to Intervene disposes of all of Intervenors' claims, and as such, this is an appeal from a final Judgment of the District Court for the Eastern District of Louisiana.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether Appellant/Intervenors have a direct, substantial, and legally protected interest in the instant litigation, given that they are/will be collective action notice recipients herein and that they are also named representatives in a state class action arising out of the same employment made the basis of this litigation, *i.e.* their employment by Defendants to perform adjusting work in the aftermath of the BP Oil Spill;

B. Whether Intervenors and putative class members' direct, substantial, and legally protected interest that will be hindered, impeded or prejudiced if, without Intervenors' participation, Plaintiffs and Defendants either 1) concede at trial that all the adjusters employed by Worley for the BP Oil spill were nonexempt employees under the FLSA, without informing putative class members of the consequences of such a concession, or 2) agree to a settlement whereby the collective action members must waive all rights and claims in the *Sullivan* class action without sufficiently informing or explaining to them their rights and

options;

C. Whether Intervenors have a direct, substantial and legally protected interest in representing putative members of a state class action in an intervention herein, even though notice in the state class action, for reasons beyond Intervenors' control, has not yet been disseminated;

D. Whether Intervenors' interests are adequately protected by either party presently involved in this suit considering that 1) Plaintiffs' claims are possibly mutually exclusive with those of Intervenors and the state putative class members they represent, and 2) both Plaintiffs and Defendants have demonstrated an intent to dispose of the matter in such a way as to decimate, if not extinguish, the state class action through a waiver/release of all claims against Defendants in connection with a settlement of claims based on the FLSA. *Edwards v. City of Houston*, 78 F.3d 983 (5th Cir. 1996); *City of Houston v. American Traffic Solutions, Inc*., 668 F.3d 291, at 294 (5th Cir. 2012);

E. Whether the lower court abused its discretion in denying intervenors' permissive intervention based on a determination that there were no common questions of fact or law and that the intervention would unduly delay or prejudice the adjudication of the rights of the original parties despite finding that "no party will be prejudiced by the *Sullivan* Plaintiffs' four-month filing delay, if it can even

be called a delay"; and

F. Whether the trial court erred in finding that an email authored by counsel for the *Altier* plaintiffs concerning the *Sullivan* class action that contained ***no*** confidential communication from a client and that was revealed by a recipient of the email was a "confidential communication" protected by the attorney-client privilege.

III. STATEMENT OF THE CASE

Intervenors are class representatives in a state class action that was certified on September 9, 2011 by the 19th Judicial District Court for the State of Louisiana in *Sullivan, et al* v *Worley Catastrophe Response, LLC*, et al, No. 599,055, Div I, ("*Sullivan* class action") and affirmed by the Louisiana First Circuit Court of Appeal on December 21, 2012, (R. 884). Therein, Intervenors asserted a claim by some 1,200 adjusters against Defendants, Worley Catastrophe Response, LLC, and Worley Catastrophe Services, LLC, for improper payment of wages under a written employment agreement to adjust claims resulting from the BP Horizon Oil Spill in April, 2010. On September 30, 2012, Plaintiffs in this matter filed a collective action against the same defendants under the Fair Labor Standards Act ("FLSA") on behalf of those adjusters who failed to "opt in" to a previous, identical collective action entitled *John J. Altier v. Worley Catastrophe Response,*

LLC et al., Civil Action No. 11-241, c/w Civil Action No. 11-242 ("*Altier*"), which was settled and dismissed on August 6, 2012. (Order and Reasons On Motions, p. 4-5, R.1385-86).

Intervenors attempted to intervene in the earlier *Altier* matter when Intervenors learned that the parties were in the process of settling all claims by the *Altier* Plaintiffs against Worley, including any claims asserted or which could have been asserted against Worley in the *Sullivan* class action. The court denied the Motion to Intervene in *Altier*, and the parties in *Altier* did, in fact, enter into a settlement agreement that contained a release of any and all claims arising out of the adjusters' employment on the BP Oil Spill, specifically including any claims asserted in the *Sullivan* class action. (Order and Reasons On Motions, p. 4, R - 1385).

On January 14, 2013, Plaintiffs herein filed a Motion to Intervene in the *Sullivan* class action. At that time, Intervenors first learned about the *Akins* collective action, and filed their Motion to Intervene in the present matter, on January 29, 2013 (Rec. Doc. 48 & 49 - placed under seal by order of court, R.1409). On January 30, 2013, Plaintiffs filed "Objections and Assertions of Privilege Over Evidence Submitted in the *Sullivan* Plaintiffs' Motion for Leave to File Petition for Intervention and Motion to Intervene and Request that Such

Evidence, and Any Discussion Thereof, be Stricken From the Record and Clawed-Back". (R. 1160). On February 19, 2013, Plaintiffs filed an Opposition to Intervenors' Motion to For Leave to File Petition of Intervention and Motion to Intervene. (R. 1223). Defendants herein did not file any opposition to either the Motion for Leave to Intervene or the Motion to Intervene.

Plaintiffs and Defendants in the *Akins* collective action, by written agreement of the parties pursuant to 28 U.S.C. § 636(c), agreed to refer the entire matter to the United States Magistrate Judge for all proceedings and entry of Judgment. (R. 766). On March 4, 2013, Magistrate Judge Wilkinson issued his Order and Reasons on Motions. He found that the Motion to Intervene was timely; however, he denied the Motion to Intervene and granted Plaintiffs' Motion to Claw Back materials asserted to be confidential communications subject to the attorney-client privilege. (R. 1382-1409). It is from this order that Intervenors appeal.

IV. STATEMENT OF FACTS

Intervenors and all putative collective action participants were similarly employed by the "Worley Companies" (hereinafter "Defendants") to provide claims handling services for BP/Amoco in the aftermath of the BP/Amoco, Inc. Deepwater Horizon Oil Spill Catastrophe ("Oil Spill"). Defendants stipulated that it required all 1,200 +/- individual claims adjusters to sign a written employment

agreement, wherein each was to perform "all aspects of general insurance adjusting."

On February 8, 2011, Intervenors filed the *Sullivan* class action on behalf of all similarly situated individuals that were hired by Defendants, asserting that, pursuant to the written employment agreement each signed, Defendants should have paid them each 65% of the amount that Defendants billed and were paid by BP/Amoco for their work, as opposed to a day rate that was significantly less. On September 9 2011, the trial court certified the action as a class action. Defendants objected to the wording of the class notice, resulting in at least one status conference with the state judge and several exchanges between Intervenors and Defendants concerning an acceptable class notice.

Before the parties could agree on an acceptable class notice, Defendants appealed the class certification. On December 21, 2012, the Louisiana First Circuit Court of Appeal affirmed the trial court's ruling on class certification. Defendants timely applied for rehearing, which was denied on February 6, 2013. Thereafter, Defendants applied for writs to the Louisiana Supreme Court and moved the state court for a stay of the dissemination of class notice, which the trial court granted on April 1, 2013. Consequently, notice has not yet been disseminated in the *Sullivan* class action.

Approximately two days before the filing of the *Sullivan* class action, two suits, both entitled *Altier, et al* v *Worley Catastrophe Response, LLC*, *et al*, were filed in the Eastern District of Louisiana. The first *Altier* case was a class action, making nearly the same allegations as the *Sullivan* class action, except that it also contained a claim for punitive damages for each of the similarly situated putative class members. The second *Altier* case was a collective action under the FLSA for all similarly situated individuals, alleging a failure by Defendants to pay overtime wages. Both cases were referred, by written agreement of the parties, to Magistrate Judge Joseph C. Wilkinson, Jr. Magistrate Wilkinson declined to certify the *Altier* class action but conditionally certified the *Altier* collective action. The *Sullivan* plaintiffs attempted to intervene in the *Altier* collective action after learning that the parties were preparing to settle the matter with all those who "opted in" to the *Altier* collective action, considering that all such participants were being required to waive any and all other claims they may have against Defendants, including any claims they may have in the *Sullivan* class action, as a precondition to collective action participation and settlement.

Magistrate Judge Wilkinson denied the *Sullivan* plaintiffs' motion to intervene in the *Altier* case, finding that the motion was not timely and that the Intervenors lacked a direct, substantial, and legally protected interest in the suit.

The *Sullivan* plaintiffs did not appeal that Order.

The settlement was confected, and approximately 538 members of the *Altier* collective class action settled with Defendants, and all did, in fact, release any and all claims that they may have had in the *Sullivan* class action.

On January 14, 2013, the *Akins* plaintiffs filed a Motion to Intervene in the *Sullivan* class action and alleged that they were members of a putative collective action that had been filed in the Eastern District of Louisiana. The *Akins* plaintiffs are represented by the same attorneys as the *Altier* Plaintiffs. The *Akins* collective action was filed on behalf of all similarly situated individuals, namely those who were employed by Defendants to perform adjusting work in the aftermath of the BP Oil Spill but who had not opted in to the *Altier* case, despite having received notice of same. As in *Altier,* the *Akins p*laintiffs alleged that they were nonexempt employees under the FLSA and had not been paid overtime wages.

After learning of the existence of the second collective action, the *Akins* collective action, the *Sullivan* Plaintiffs filed a Motion to Intervene in *Akins*. On March 4, 2013, Magistrate Judge Wilkinson denied the *Sullivan* plaintiffs' Motion to Intervene. On March 18, 2013, Intervenors filed a Notice of Appeal.

V. SUMMARY OF ARGUMENTS

The lower court erred in denying Intervenors' Motion to Intervene and erred

in granting Plaintiffs' claw-back motion. The lower court erroneously concluded that the fact that both Plaintiffs and Intervenors seek damages arising from their employment by Defendants was insufficient to establish that the interests of the *Sullivan* plaintiffs were related to the property or transaction that is the subject of the controversy herein. The trial court wrongly determined that Intervenors have no direct, substantial, and legally protected interest because their interest and Plaintiffs' interests were not aligned and would require different elements of proof.

First and foremost, the facts, subject matter, and applicable legal issues involved herein are extremely relevant to Intervenors' interest, and it is the possible mutual exclusivity of Intervenors' and Plaintiffs' positions which makes Intervenors' interest direct, substantial and legally protected. Intervenors are the representatives of some 1,200[1] putative class members of adjusters who performed work adjusting claims for Defendants in the aftermath of the BP Oil Spill. In the *Sullivan* class action, Intervenors have asserted that Defendants underpaid them based upon a written employment agreement that obligated Defendants to pay 65% of what Defendants billed for such services. This claim is premised upon the fact

[1] With the settlement in the Altier case, some 538 collective action members fully and finally released all claims against Worley, including all claims in the Sullivan class action. To the extent those settling members knowingly and intelligently released their claims against Defendants, they would no longer be considered putative members of the Sullivan class.

that Intervenors were (i) adjusters, which appears to be inapposite to Plaintiffs' claims herein given that adjusters may be exempt employees under the "administrative employee" exception of the FSLA.

Plaintiffs herein have asserted the same claims against the Defendants as were asserted in *Altier* and have alleged that the Plaintiffs were "evaluators" who were employed by Defendants to adjust claims made in the BP Oil Spill. Intervenors have a substantial interest in enforcing the written employment agreement and protecting their status as adjusters, especially considering that Defendants required all 1,200 adjusters to execute a written employment agreement that employed Plaintiffs and Intervenors to perform "adjusting services" in the aftermath of the BP Oil Spill. This work was the same work performed by Plaintiffs herein; and to the extent that Plaintiffs seek to characterize themselves as non-adjusters to avoid the "administrative employee" exception to the FLSA, such a finding of fact may lead to adverse consequences in the *Sullivan* matter. *Sierra Club v. Espy,* 18 F.3d 1202 (5th Cir. 1994). In this way, Intervenors' interests may be drastically impeded, if not completely decimated, if Intervenors are not allowed to intervene in this matter.

This Court has recognized that where it is "financially feasible" that defendants could have the option to preclude a viable class action from ever

reaching the certification stage by "picking off" plaintiffs, intervention is appropriate. *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, at 1050 (5th Cir., 1981) *Sandoz v. Cingular Wireless LLC,* 553 F.3d 913 , at 921 (5th. Cir., 2008). This Court has also recognized another "well publicized danger" of "strike suits," used to collect quick, undeserved damages. *Roper v. Consurve, Inc*., 578 F.2d 1106 (5th Cir., 1978), aff'd sub nom. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980).

Based upon the existing parties' actions in the *Altier* case, and what is likely occurring in the present case, without Intervenors' participation, the fruition of both of these dangers is likely and imminent. Without Intervenors' participation herein, Plaintiffs and Defendants will likely not fully inform those who receive notice of the collective action of the *Sullivan* class action or of their rights and options thereunder. Then, the existing parties may either (i) concede at a trial, which will binding all who "opt in" to the collective action, that all adjusters employed by Worley for the BP Oil Spill were not employed pursuant to the employment contract that each were required to execute, or (ii) agree to a settlement waiving all rights and claims in the *Sullivan* class action without informing those who "opted in" of or fully explaining their rights and options. Either course would eliminate substantial numbers of, if not all, putative state class

members who, because of legal maneuvering by Defendants in that case, have not received notice of the class action. Such results impede or hinder the direct, substantial, and legal interest of Intervenors and the putative class members they represent.

The lower court also erroneously concluded Intervenors lacked a direct, substantial and legally protectable interest in representing a *Sullivan* litigation class herein because "the state court has not yet defined the scope of the class and no notice of the state court class action has been formalized or sent to putative class members." This belief is directly at odds with Intervenors' duties as class representatives to putative class members and the right of putative members of a class to intervene. It is also in derogation of the trial court's duty to protect both an "absent class and the integrity of the judicial process by monitoring the actions of the parties before it." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980); *Roper v. Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978), aff'd sub nom. *Deposit Guaranty Nat'l Bank v. Roper*, *supra.*

The lower court also mistakenly determined that Intervenors' interests were adequately protected by the parties, although their interests are not aligned with either Plaintiffs or Defendants. Neither Plaintiffs nor Defendants have the same ultimate objective of Intervenors. Both Plaintiffs and Defendants have an interest

adverse to those of Intervenors, including decimation of the *Sullivan* class action by a settlement of FLSA claims. By having adverse interests, Intervenors have established that there is no adequacy of representation in this matter by either Plaintiff or Defendant. *Edwards v. City of Houston*, 78 F.3d 983 (5th Cir. 1996).

Regarding permissive intervention, Intervenors contend that the lower court's determination that intervention under Rule 24 (b) was not proper was an abuse of discretion. The lower court's ruling is not supported by a proper inquiry or view of the case, the record, or the court's previous findings in this matter.

Lastly, Intervenors submit that the email in question was not a protected client communication, was released by one of the recipients, and is proper evidence of the inability of Plaintiffs' counsel to adequately protect the interests of Intervenors and the putative class members they represent. Rather, the content of the email was obtained from the public record in the *Sullivan* class action, not from any client communication. Further, the email was released by a recipient of the email and did not disclose any confidential communications from any of the other group of clients in the *Altier* matter. Lastly, the email was competent evidence of the adverse interests of counsel herein, being the same attorney in the *Altier* case, who sent this email in an effort to convince the collective members of that case to fully and finally execute the release papers and settlement documents. Lastly, the

Altier case has been dismissed and no members of the *Altier* collective action have complained of or were prejudiced by the email. Thus, there is a question of the privilege being raised by someone in the capacity of the Plaintiffs herein.

VI. STANDARD OF REVIEW

The denial of intervention of right is a final order for appeal purposes. *Edwards v. City of Houston,* 78 F.3d 983, 992 (5th Cir.1996) (en banc). This Court reviews *de novo* denials of intervention of right. *Id.* at 995. Rulings denying permissive intervention are reviewed for "clear abuse of discretion" and will be reversed only if "extraordinary circumstances" are shown. *Cajun Elec. Power Coop. v. Gulf States Utils., Inc*., 940 F.2d 117, 121 (5th Cir.1991); *United States v. Texas E. Transmission Corp*., 923 F.2d 410, 416 (5th Cir.1991);*Trans Chemical v. China Nat. Machinery Import*, 332 F.3d 815 (5th Cir., 2003).

Rulings as to whether an intervention was timely under Rule 24 (a) is reviewed for an abuse of discretion. *Piambino v. Bailey*, 610 F.2d 1306 (5th Cir. 1980). However, where timeliness was not at issue, the denial of the right of intervention is reviewed *de novo*. *City of Houston v. American Traffic Solutions, Inc*., 668 F.3d 291, at 293 (5th Cir. 2012).

The application of the attorney-client privilege is a question of fact, and determined in the light of the purpose of the privilege, guided by judicial

precedents. The clearly erroneous standard of review applies to the district court's factual findings. The controlling law is reviewed *de novo*. *In re Auclair*, 961 F.2d 65, 68 (5th Cir.1992); *Hodges, Grant & Kaufmann v. United States Gov't,* 768 F.2d 719, 721 (5th Cir.1985); *U.S. v. Neal*, 27 F.3d 1035 (5th Cir., 1994).

VII. ARGUMENTS

Rule 24 (a)(2) establishes an intervention of right by anyone who, on a timely motion, claims an interest 1) relating to the property or transaction that is the subject of the action; 2) is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, and 3) existing parties cannot adequately represent that interest. Federal Rule of Civil Procedure 24 (a).

The lower court held that the instant Motion to Intervene was timely. Thus, the relevant issues are whether 1) Intervenors had an interest relating to the subject matter of the action, 2) whether "***as a practical matter***" a disposition of the case "***may***" impair or impede the Intervenors' interest, and 3) whether the existing parties will "***adequately represent***" that interest.

This Court has defined the required interest under Rule 24(a)(2) as a "direct, substantial, and legally protectable interest." The lower court concluded that Intervenors failed to show such an interest relating to the present action, or that its

interest would be impaired or impeded, and that Intervenors' interest would be adequately protected by the existing parties. Intervenors submit that the lower court erroneously applied each of these requirements and that they should be allowed to intervene as a matter of right.

A. INTERVENORS HAVE DIRECT, SUBSTANTIAL, AND LEGALLY PROTECTED INTEREST.

In the *Sullivan* class action, Intervenors are the representatives of all those adjusters who were hired by the Worley defendants to perform work adjusting claims in the aftermath of the BP Oil Spill.[2] These necessarily include the Plaintiffs herein, as well as any putative members in the present collective action. All of these adjusters are putative members of the *Sullivan* class action and the *Akins* collective action, and they will soon receive notice of the second collective action, if they have not already received notice of same. Intervenors are not privy to either the content of the notice or when it will be disseminated. However, counsel for Defendants and Plaintiffs have advised counsel for Intervenors that the notice will not mention the *Sullivan* class action.

[2] As indicated above, the number of putative members of the Sullivan class action is reduced by those who knowingly entered into a settlement in the Altier case, being specifically required to waive all rights they had in the Sullivan class action.

The *Sullivan* plaintiffs are asserting that Defendants underpaid them based on a written employment agreement that Defendants required each of them to execute as part of their employment. A basic component of that claim is that all the members in the putative *Sullivan* class action were hired as adjusters, which class of employees are seemingly exempt employees under the FLSA. Plaintiffs in this case claim they worked as nonexempt "evaluators," the implication being that the written employment agreement defining them as "adjusters" does not necessarily apply. Defendants claim in both the present case and the *Sullivan* class action that the written employment agreement did not govern the employer-employee relationship. Rather, Defendants claim that the adjusters' compensation was governed by an alleged oral agreement when the adjusters were first solicited for employment. Thus, the present suit concerns the employment of the Plaintiffs, Intervenors, and the putative class members of the *Sullivan* class action whom Intervenors represent, what their respective job duties entailed, their status as adjusters, and the applicability of the written employment agreement.

The lower court determined that this was "not enough to establish that the interests of the *Sullivan* Plaintiffs are related to the property or transaction that is the basis of the controversy in this case." The lower court's primary reason for this

determination was the flawed belief that Intervenors' claims were not aligned with Plaintiffs' interests and would require different elements of proof.

This is an incorrect view of the interest requirement under rule 24 (a)(2). This Court has held that the interest does not have to be of a legal nature identical to that of the claims asserted in the main action. Rather, all that is required is an interest in the property or "other rights that are at issue," provided, of course, the other elements of intervention are present. *Diaz v. Southern Drilling Corp*., 427 F.2d 1118, at 1124 (5th. Cir., 1970). This requirement was described in *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452 (5th Cir., 1984), as an interest being one which the substantive law recognizes as belonging to the intervenor who seeks intervention in order to assert a claim as to which he is the "real party in interest."

In *Doe v. Glickman*, 256 F.3d 371 (5th Cir., 2001), a panel of this Court, quoting *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994), observed that "Federal courts should allow intervention where no one would be hurt and the greater justice could be attained." *Doe* involved an intervention by the Animal Protection Institute into a suit to enjoin the production of a list of users of certain livestock protection collars. Regarding the issue of the intervenor's interest, this Court held the following:

> The ***transaction that forms the basis of the controversy*** in the Waco Lawsuit ***is the disclosure of the Identifying Information***. "Since the interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process," *Espy*, 18 F.3d at 1207 (internal quotations and citations omitted), we conclude that the Institute asserts an interest related to the transaction that forms the basis of the controversy in the Waco Lawsuit.

Doe v. Glickman, supra at 377-80. (Emphasis added)

In *Espy,* this Court found that two trade organizations that represented timber purchasers in Texas national parks had a legally protected interest in a suit by an environmental group against the Secretary of the Department of Agriculture. This Court noted the following:

> These member companies have ***legally protectable property interests in existing timber contracts*** that are threatened by the potential bar on even-aged management. Since "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process", *Ceres Gulf*, 957 F.2d at 1203 n. 10 (citation omitted), we conclude that movants had an interest sufficient to satisfy rule 24.

Espy, *supra* at 1207, (Emphasis added).

Intervenors have a legally protected interest in the resolution of whether they were adjusters, and thus seemingly exempted from a FLSA claim. Intervenors' interests thus "concern" the transaction that is the subject matter of the present case. Further, their interests are not aligned with Plaintiffs who, in order to have a colorable claim under the FLSA, must assert that their work on the BP Spill was

not governed by the written employment agreement they were required to execute. Likewise, their interests are not aligned with Defendants, who assert that all those hired to work on the BP Oil Spill were adjusters whose compensation was governed by an alleged oral agreement, not the written employment agreement.

As in *Espy, supra*, Intervenors have a legally protected interest in the determination of whether the work they performed in the aftermath of the BP Oil Spill was as adjusters being compensated pursuant to the written employment agreement or in some other capacity, pursuant to an oral agreement. The characterization of their work by the lower court, whether at trial or on summary judgment, may have an adverse impact upon the *Sullivan* class. Moreover, "the greater justice could be attained" by Intervenors' participation. Intervenors should be involved in any disposition of the lawsuit.

B. INTERVENORS INTEREST WILL BE IMPAIRED OR IMPEDED.

In *Doe v Glickman, supra*, this Court observed the following:

> If not allowed to intervene, the Institute would be prevented from ever being heard in a lawsuit that has the potential to end its quest to compel the USDA to disclose the Identifying Information. Moreover, that ruling could collaterally estop the Institute from re-litigating the Issue in the D.C. Court. Thus, the Waco Lawsuit has the potential to prevent the Institute from obtaining the Identifying Information without ever being heard. For these reasons, we conclude that the disposition of the Waco Lawsuit has the potential to impair the Institute's interest.

Doe v. Glickman, supra at 380.

In *City of Houston v. American Traffic Solutions, Inc.*, 668 F.3d 291 (5th Cir. 2012), this Court found that citizens of the City of Houston established the impairment to their interest in a suit between the City of Houston and its traffic light camera contractor. Although during the pendency of the appeal the city passed an ordinance withdrawing authorization for the use of traffic cameras, the citizen intervenors alleged that the city would not present the strongest defense of the charter amendment because it opposed their position from the outset, attempted to reinstate the cameras before the litigation had concluded, and stood to lose millions of dollars in potential revenue if the authorization for traffic cameras were reinstated. This Court, reversing a denial of the intervention of right, held the following:

> They [citizen intervenors] have demonstrated a particular interest in cementing their electoral victory and defending the charter amendment itself. If the amendment is overturned, their money and time will have been spent in vain. Finally, they have raised substantial doubts about the City's motives and conduct in its defense of the litigation with ATS. Without these intervenors' participation, the City might well be inclined to settle the litigation on terms that preserve the adverse ruling on the charter amendment and thus preserve its flexibility to reinstate red light cameras in the future.

American Traffic Solutions, *supra* at 294.

Intervenors herein have likewise established that they are so situated that, absent participation in this suit, their interest will be impaired and possibly decimated. First, the interest of both Plaintiffs and Defendants are inapposite to those of the Intervenors. Again, *Altier* involved a settlement in which all plaintiffs were required to release all claims against Defendants, including the very claims asserted in the *Sullivan* class action. *Altier* involved the same type of plaintiffs as the plaintiffs involved herein; counsel is the same for both sets of plaintiffs in both collective actions; and the same defendants with the same counsel are involved in both collective actions. The email that was stricken by the trial court and found to constitute confidential attorney-client material demonstrates what can only be described as a misleading, whether intentional or not, email that did not fully and accurately describe the correct legal status of the *Sullivan* litigation in an effort to cause those recipients to fully and finally release their clams against the Worley defendants.

Now, the same scenario is playing out. Putative members of the collective action herein, without even being informed of the existence of the *Sullivan* class action, much less of their rights and options in that class action, are being enticed to "opt in" to a collective action under the FLSA. Both Plaintiffs and Defendants appear, once again, motivated to settle for damages which may not be due.

Defendants may pay more than the value of any claim under the FLSA, not on the basis of nuisance value or possible costs, but rather on the value of decimating the *Sullivan* class action.

In *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1050 (5th Cir., 1981), and then again in *Sandoz v. Cingular Wireless LLC, supra*, in a collective action, this Court recognized that where it was economically feasible, a defendant could effectively prevent a class action by settling with the named class representatives.

> A series of individual suits, each brought by a new named plaintiff, could individually be "picked off" before class certification; as a practical matter, therefore, a decision on class certification could, by tender to successive named plaintiffs, be made just as difficult to procure in a case like the one now before us as it was in *Gerstein* and *Swisher*. . . . We recognize, of course, that this tactic would not work for all defendants in all suits brought as class actions. Often there would be too many named plaintiffs, or the individual claim of each would be too great, to make such a tactic financially feasible. But the difficulty inherent in any use of this tactic does not make it acceptable. The fact remains that ***in those cases in which it is financially feasible to pay off successive named plaintiffs, the defendants would have the option to preclude a viable class action from ever reaching the certification stage***.

J. Ray McDermott, supra, at 1050; *Cingular Wireless, supra* at 920, (emphasis added.)

In the case at bar, without Intervenors' participation, Defendants can economically achieve the same result, *i.e.* to "pick off" members of the *Sullivan*

class action to the point where the class could be decertified for failing to meet the numerosity requirement.[3]

It must be noted that, due to legal maneuvering in the state class action by Defendant, such as continuances, motions for rehearing, appeals, writ applications, and most recently a motion to stay, the putative members of the *Sullivan* class action have not received any notice of the *Sullivan* class action. The notice for the collective action in *Altier*, which was sent to all adjusters hired by Worley, all of whom would be putative members in the *Sullivan* class action, did not mention the *Sullivan* class action. Counsel for both parties herein have indicated that the notice for the present collective action, likewise, will not mention the *Sullivan* class action.

In the *Altier* case, those who "opted in" to in that collective action were represented by the same attorneys representing Plaintiffs herein, and they settled with the same Defendants that were represented by the same attorneys as in the present case. The settlement agreement required a release of all claims against Defendants, specifically including any claims made in the *Sullivan* class action. It is not known to what extent those who settled in the *Altier* case were fully

[3] In its decision upholding the class certification, the Louisiana First Circuit Court of Appeal, citing Louisiana Code of Civil Procedure Article 592(A)(3)(a), on page 3 of its decision, noted that the trial court could at any time "recall its initial ruling on certification". (R. 906).

informed of the rights and claims that were being released. It is known, however, that, in an email to those who had opted in, the attorney representing the collective members, in what can only be described as an effort to entice them to sign the release documents, misstated therein that the dismissal of the Sullivan class action was "final" and failed to mention any appellate rights in that case. This email is the subject of the lower court's "claw back" order, which is briefed below. The primary point, though, is that there is evidence that the members of the present collective action will not be fully and fairly informed of all the rights and options of the *Sullivan* class members and will, in all likelihood, be enticed to settle with a release of those claims.

This Court in *Roper v. Consurve, Inc*., 578 F.2d 1106 (5th Cir., 1978), aff'd sub nom. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980), also recognized what it characterized as a "well-publicized danger" in a class action, "the possibility that it will be used to collect quick, undeserved damages; this type of effort to establish a quick coup has been called a 'strike suit.'" Without Intervenors' participation in this case, there is a very real danger that the existing parties would use the collective action as just such a "strike suit" to decimate, if not entirely eliminate, the state class action. Rule 24 (a)(2) requires a showing that the movants are "so situated" that a disposition of the suit

"may as a practical matter impair or impede the mover's ability to protect its interest." (Emphasis added). A "strike suit" settlement, without the putative class members ever knowing of their rights and options, would very much impair or impede the Intervenors' interest in this matter. As more fully argued below, Intervenors' duty as class representatives include protecting their own interest as well as the rights of class members. Intevenors have established this requirement of Rule 24 (a)(2).

C. RELIANCE ON LACK OF NOTICE IN *SULLIVAN* CLASS ACTION WAS ERROR.

The lower court relied heavily on the fact that notice has not as yet been sent in the *Sullivan* class action.

> I again find that the *Sullivan* Plaintiffs lack a direct, substantial and legally protectable interest in representing a *Sullivan* litigation class in this court, because the state court has not yet defined the scope of the class and no notice of the state court class action has been formalized or sent to putative class members. (Order and Reasons on Motions, p. 17, R. 1398).
>
> Until these contingencies occur, the named *Sullivan* Plaintiffs and their counsel do not represent any members of the putative *Sullivan* class, except those who have expressly agreed to be represented by counsel, and certainly do not represent those who have elected to proceed with their claims in this court. (Order and Reasons on Motions, p. 18, R. 1399).

While it is true that Defendants' legal maneuvers in state court, including continuances, appeals, requests for rehearing, a writ application, and motion to

stay, have continuously delayed notice being sent to putative members of the state class action, it is wrong to conclude that the putative members have no direct, substantial, and legally protected interest in this matter or that class representatives have no duty to putative members of the class until such time as notice is sent and the opt out period has expired.

To the contrary, this Court in *Roper v. Consurve, Inc*., 578 F.2d 1106 (5th Cir. 1978), aff'd sub nom. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980), held that, where a class had not been certified, "the very act of filing a class action, the class representatives assume responsibilities to members of the class." The Supreme Court, in *Roper*, *supra,* though deciding that case on but one of three "diverse" though "interrelated" issues, noted as to class representatives:

> A separate consideration, distinct from their private interests, is ***the responsibility of named plaintiffs to represent the collective interests of the putative class***. Two other interests are implicated***: the rights of putative class members as potential intervenors***, and the ***responsibilities of a district court to protect both the absent class and the integrity of the judicial process*** by monitoring the actions of the parties before it.

Deposit Guaranty , *supra* at 331.

This Court in *J. Ray McDermott, supra,* commented on the Supreme Court's decision in *Roper, supra,* as follows:

> Indeed, the Court recognized the relevance to justiciability questions in the class action context of several other important interests, including the responsibilities both of the named plaintiffs and of the district court to the members of the absent class, and the rights of the putative class members as intervenors.

J. Ray McDermott, supra at 1042-43.

Again in *Dugas v. Trans Union Corp*., 99 F.3d 724, 726 (5th Cir. 1996), citing its decision in *Roper* v. *Consurve*, *supra*, this Court noted that a class representative represents "represents both his personal interests and the interests of the class."

Interevenors, individually and on behalf of the putative class members they represent have an interest in preserving the state class action and properly asserting the basis and status of their employment by Defendants on the BP Oil Spill in this matter as well as in the state class action.

The fact that tactical maneuvering by Defendants in the state class action has prevented notice in that class action from being sent to putative members of the class does not diminish the Intervenors own interest in this matter, their responsibility to protect the interest of the putative class members, or the putative class members' right of intervention. If anything, the lack of notice heightens their responsibility to putative class members to make certain that putative class

members' rights are not cutoff without affording them full and complete knowledge of all their rights, options, and possible courses of actions.

While it is understandable that Defendants prefer to eliminate as many putative state class members as possible, while very economically disposing of the collective class members, Intervenors have an interest in ensuring that the interest of all the putative members they represent are protected and not impaired. This means that, at trial, the full facts would need to be revealed and properly explored. Further, there is no prohibition of settlement discussions with Intervenors being a part of this suit, including the true value of Intervenors and the putative class members they represent. In short, ensuring that any trial on the merits fully explores the facts and issues involved, ensuring that any settlement in the collective action is based upon the true economic value of the case given the merits of that case, and ensuring that all that receive notice of the collective action also receive notice of their rights and options as putative class members – all are interests that are unique to Intervenors, and the interests are indeed a direct, substantial, and legally protected.

D. Existing Parties Cannot Adequately Protect Intervenors' Interest.

The Intervenors burden to establish that representation of their interest "may be" inadequate is minimal. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n. 10, 30 L.Ed.2d 686 (1972)**;** *Edwards v. City of Houston,* at 1005-1006; *Doe v Glickman*, at 380-81. The jurisprudence of this Circuit has established two "presumptions of adequacy," the first for government entity representation, as a sovereign, and the other for when the would be intervenor has the same objective as a party. *Edwards v. City of Houston,* at 1005-1006. Neither of these two are presumptions are applicable here, as the existing parties do not have the same objectives as Intervenors. Moreover, their interests are adverse to one another.

In *Doe v Glickman*, *supra,* the issue was whether the USDA, which was charged with the burden of representing the general public's interest, thereby adequately represented the interest of the intervenor, the Animal Institute. This Court held the following:

> The USDA is a governmental agency that must represent the broad public interest, not just the Institutes's concerns. See *Espy*, 18 F.3d at 1208. Given the Institute's ***minimal burden*** and USDA's duty to represent the broad public interest, not just the Institute's, we conclude that USDA's representation of the Institute may be inadequate.
> *Id.* at 380-381.

Herein, part of Plaintiffs' objective is to establish that the status of their employment was not as adjusters, but as "evaluators," in order to qualify as nonexempt employees under the FLSA. While Defendants ultimate objective is to establish that the Plaintiffs were hired as adjusters and therefore were exempt employees, Defendant also seek to avoid the written employment agreement as the basis of employment. More importantly, the existing parties ultimate objective appear to be the quick disposition of any claims in the *Sullivan* class action by collateral effort, without ever informing the potential members of the collective action of the existence of and their rights and options in the *Sullivan* class action. Given these opposite and conflicting interest, Intervenors have satisfied their minimal burden of showing that their interest may not be adequately protected by the existing parties.

E. ABUSE OF DISCRETION TO DENY PERMISSIVE INTERVENTION.

Intervenors alternatively moved for permissive joinder under Rule 24 (b), which the lower court found unavailable to them. Intervenors submit it was an abuse of discretion by the lower court to determine that Intervenors' claims did not share common issues of law or fact and that it would predjudice the existing parties. Although, a decision finding an abuse of discretion in denying a

permissive intervention is would be "so unusual as to be almost unique" [4], that cannot mean an abuse of discretion can never exist. While the lower court paid lip service to rule 24 (b), it cited no reasons for determining that Intervenors' claims shared no common issues of fact or law. The fact is that the issues of the employment of the 1,200 adjusters, their status, and the extent to which they may be administrative employees, exempt from the FLSA, have everything to do with Intervenors' claims.

Likewise, the lower court, in determining the parties would not be prejudiced by the timing of the intervention, noted that trial is a significant way off, discovery has not yet been completed, and that there has essentially been no real delay. When this is added to the fact that Plaintiffs waited over two years to institute their complaint, after first knowingly declined to participate in an identical collective action, there is simply no prejudice to the parties.

Further, the lower court failed to consider other important issues which this Court has indicated should be considered when deciding a motion for permissive intervention. In *United Gas Pipeline, supra*, this Court noted that factors to consider in determining whether permissive intervention should be allowed,

---

[4] New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 471 (5th Cir., 1984)

include whether the intervenors' interest will be adequately protected and whether intervenors will contribute significantly to a full development of the underlying facts.

> In acting on a request for permissive intervention, it is proper to consider, among other things, "whether the intervenors' interests are adequately represented by other parties" and whether they "will significantly contribute to full development of the underlying factual issues in the suit."

Supra at 472.

The lower court took neither of these factors into consideration. For the reasons set forth above, the parties cannot protect Intervenors' interest, as their respective positions are inapposite to those of Intervenors. Moreover, the presence of Intervenors will ensure a full and complete exploration and development of the underlying factual issues in this matter.

Intervenors submit that it was an abuse of discretion for the lower court to allow permissive intervention.

F. EMAIL NOT PROTECTED BY ATTORNEY-CLIENT PRIVILEGE.

Plaintiffs moved to strike and claw back, as being protected by attorney client privilege, a group email sent by counsel to the plaintiffs in the *Altier* matter, which had been revealed to counsel for Intervenors by one or more of those who had received it. The email was intended to entice the recipients to accept the settlement by representing that the *Sullivan* class action had been dismissed and

that it was a final dismissal.[5] The email did not contain any confidential information that was communicated by a client to his or her attorney. Rather, it was factual information obtained from the public records, although the rendition of the facts was misleading in that the dismissal was not final, and in fact was reversed on appeal.

Although the Plaintiffs herein are represented by the same attorneys who represented the plaintiffs in *Altier*, the Plaintiffs themselves were not clients in the *Altier* case. Notwithstanding that none of the clients in the *Altier* case raised any concern about the disclosure of the email, and even though it contained no confidential information from any client to an attorney, the lower court granted the motion, ordering the materials clawed back and placed under seal. Intervenors had noted this point in its memorandum in reply to Plaintiffs' motion, although without specific written argument. (Record doc. 48, 49, ordered sealed). The lower court without addressing that point granted Plaintiffs' motion.

---

[5] The lower court referred to the pertinent part of the email as a prelude to his determination that the Sullivan plaintiffs had no "direct, substantial and legally protectable interest in representing a Sullivan litigation class" because the state court had not defined the scope of the class or sent notice. Herein, pursuant to the claw-back portion of the Magistrate's Order and Reasons for Judgment, appellants will only refer to the Magistrate's rendition of that email and not quote from it. It is, however, sealed in the record and has been provided by the Clerk to this Court under seal, to the extent it becomes necessary for this Court to review it.

The lower court based its ruling, in part, on the Louisiana Code of Evidence, presumably because the Louisiana Code of Evidence refers to confidential communications *between* a client and his or her attorney, whereas, federal jurisprudence on attorney-client privilege protects confidential communications *from* the client to the attorney, or a communication from the attorney that contains client confidential communication. In that the context of the asserted attorney-client privilege arises in a claim under federal law and are before this court on federal question jurisdiction, federal common law of attorney client privilege should govern this Court's analysis, and not an unannotated section of the Louisiana Code of Evidence.

> As Willy's claims arise under federal law-and are before us on federal question jurisdiction under 28 U.S.C. § 1331-the federal common law of attorney-client privilege governs our analysis.

Willy v. Administrative Review Bd., 423 F.3d 483,(5th Cir. 2005).

Under federal common law, the well established doctrine of attorney client privilege requires that it be narrowly construed, as it is an impediment to a full exploration and finding of the truth.

> The attorney-client privilege, however, is not a broad rule of law which interposes a blanket ban on the testimony of an attorney. To the contrary, . . . the privilege stands in derogation of the public's 'right to every man's evidence', 8 Wigmore (McNaughton rev. ed. 1961) s 2192 at 70, and as 'an obstacle to the investigation of the truth,' id., s 2291 at 554; thus, as Wigmore has said, 'It ought to be ***strictly***

> ***confined within the narrowest possible limits consistent with the logic of its principle***.'

U.S. v. Pipkins, 528 F.2d 559, at 563 (5th Cir. 1976), Emphasis added.

The underlying principle of the attorney-client privilege has always been to protect against revealing a ***client's confidential disclosure*** in order to seek legal advice.

> However, since the privilege has the effect of withholding relevant information from the fact-finder, **it applies only where necessary to achieve its purpose**. Accordingly **it protects only those disclosures necessary to obtain informed legal advice** which might not have been made absent the privilege.

Fisher v. U.S., 425 U.S. 391, at 403, 96 S.Ct. 1569, 48 L.Ed. 2d 39 (1976). (Emphasis added).

> [T]he privilege is to be construed narrowly to apply only where its application would serve its purposes; where it is doubtful that a client means to communicate confidentially, the privilege does not attach, as the client would have acted similarly even without the privilege.

U.S .v Robinson, 121 F.3d 971, at 975. (5th Cir. 1997).

The communication at issue here was not from the client and does not reveal any confidential disclosures to the attorney. The statement in question is from the attorney to those whom he asserts to be his clients in the *Altier* case. The "important information" relayed by the attorney was for the benefit of the clients who may have heard of the *Sullivan* case, which itself establishes that this

information was not a confidential communication obtained from the clients. Communications from an attorney to a client are not protected by the attorney client information unless it reveals a confidential disclosure by the client, or provides legal advice or a legal opinion based on such a confidential disclosure.

This Court has held that communications from an attorney to a client are only protected if it reveals the confidential disclosures of a client or legal advice or a legal opinion based on such disclosures.

> The oldest of the privileges for confidential communications, the attorney-client privilege protects communications made in confidence by a client to his lawyer for the purpose of obtaining legal advice. The privilege also protects communications from the lawyer to his client, at least ***if they would tend to disclose the client's confidential communications***.

Hodges, Grant & Kaufmann v. U.S. Government, Dept. of the Treasury, I.R.S., 768 F.2d 719, 720-721 (C.A.5 (Tex.), 1985). Emphasis added.

Again in *U.S. v. Neal*, 27 F.3d 1035,(5th Cir.,1994), the Fifth Circuit reiterated the following:

> Where the privilege exists, it protects communications from the client to the attorney made in confidence for the purpose of obtaining legal advice. It shields communications from the lawyer to the client ***only to the extent that these are based on, or may disclose, confidential information provided by the client or contain advice or opinions of the attorney***.

Supra at 1048, emphasis added.

This is also the jurisprudence of many of other United States Courts of Appeal that have visited the issue. In In *re Jury*, 616 F.3d 1172, (10th Cir. 2010), the Tenth Circuit Court of Appeals examined the issue of communications from the lawyer to the client in some detail and reasoned as follows:

> Although this description of the attorney-client privilege suggests the privilege only applies one way, operating to protect the client's communications to a lawyer, it is generally also recognized that "the privilege will protect at least those attorney to client communications ***which would have a tendency to reveal the confidences of the client***." Kenneth S. Brown, *McCormick on Evidence* § 89 (6th ed.2006); see also *United States v. Defazio*, 899 F.2d 626, 635 (7th Cir.1990) ("Communications from attorney to client are privileged ***only if they constitute legal advice, or tend directly or indirectly to reveal the substance of a client confidence****."). However, "****when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged***." 15 *In re Sealed Case*, 737 F.2d 94, 99 (D.C.Cir.1984) (internal quotation omitted); see also McCormick § 89 (The "prevailing rule [of the attorney-client privilege] does not bar divulgence by the attorney of information communicated to him or his agents by third persons, ***[n]or does information so obtained become privileged by being in turn related by the attorney to the client in the form of advice.***"**)**.

In re: Jury, supra, at 1082-83, emphasis added.

Similarly, the Seventh Circuit Court of Appeals in *American Standard Inc. v. Pfizer Inc*., 828 F.2d 734 (7th Cir., 1987), held that communications from the lawyer to the client are shielded only when they would reveal the confidences of the client. There the court stated the following:

> The privilege is that of the client, not that of the attorney.(citations omitted). It protects ***communications made in confidence by clients*** to their lawyers for the purpose of obtaining legal advice.(citations omitted). Whether the privilege protects the legal advice given or other communications from the attorney to the client depends on circumstance. . . . Though the Seventh Circuit has not specifically discussed such communications, it has expressed "general principles" which one district court in that circuit has interpreted as requiring ***application of the privilege to lawyer-to-client communications that reveal, directly or indirectly, the substance of a confidential communication by the client***. *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 90 F.R.D. 21, 28 (N.D.Ill.1980). We agree with that interpretation, and, because there is no such revelation in the opinion letter at hand, we cannot view as clearly erroneous the district court's finding that it was not privileged.

Pfizer, supra at 745.

The Court of Appeal for the District of Columbia in *In re Sealed Case*, 737 F.2d 94 (C.A.D.C., 1984), also discussed in detail the concept of attorney client privilege to communications by the attorney to the client. After setting forth a precise summation of the elements of the attorney client privilege, the Court of Appeals emphasized the following:

> To this we append two additional black letter statements. Communications from attorney to client are shielded if they rest on ***confidential information obtained from the client***. *Mead Data Central, Inc. v. United States Department of Air Force*, 566 F.2d 242, 254 (D.C.Cir.1977). Correlatively, ***"when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged***." *Brinton v. Department of State*, 636 F.2d 600, 604 (D.C.Cir.1980) (footnote omitted), cert. denied, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1981).

> In practice, however, advice does not spring from lawyers' heads as Athena did from the brow of Zeus. Inevitably, attorneys' opinions reflect an accumulation of education and experience in the law and the large society law serves. In a given case, advice prompted by the client's disclosures may be further and inseparably informed by other knowledge and encounters. ***We have therefore stated that the privilege cloaks a communication from attorney to client " 'based, in part at least, upon a confidential communication [to the lawyer] from [the client].'*** " *Brinton,* 636 F.2d at 604 (Emphasis ours) (footnote omitted) (quoting 8 in 1 *Pet Products, Inc. v. Swift & Co.*, 218 F.Supp. 253, 253 (S.D.N.Y.1963)).
>
> It remains the claimant's burden, however, to present to the court sufficient facts to establish the privilege; ***the claimant must demonstrate with reasonable certainty***, *Federal Trade Commission v. TRW, Inc*., 628 F.2d 207, 213 (D.C.Cir.1980), ***that the lawyer's communication rested in significant and inseparable part on the client's confidential disclosure***.

In re Sealed Case, *supra* at 99, (Emphasis added).

The communication to which Plaintiffs object does not contain any confidential disclosures of a client, and does not provide any legal advice or legal opinion. That information was ostensibly provided at the time the notices of the collective action were sent to the putative class members of those similarly situated to the *Altier* plaintiffs. The core information related in the email was unsolicited by the *Altier* clients and was factual in nature, though it failed to mention the right of appeal being exercised by the *Sullivan* plaintiffs.

More importantly, the tenor of the entire communication was to solicit as many of the *Altier* plaintiffs into executing the settlement agreement thereby

waiving their rights to participate in the *Sullivan* action. The information provided, incomplete and misleading as it was, directly appealed to the pecuniary interest of the recipients of this unsolicited email.

The core information conveyed in the email was the supposed final dismissal of the *Sullivan* case. The communication does not concern, reveal, disclose or even suggest any confidential information received from any of the *Altier* clients. The thrust of the communication is obvious - to dissuade anyone from continuing in the *Sullivan* case and to encourage them to execute the release because the final dismissal of the *Sullivan* case closed all other avenues of recovery. This communication did not reveal any confidences of the *Altier* clients. The information conveyed was merely relaying facts, albeit in accurately. Simply because facts are communicated by an attorney to clients does not make the information privileged. The lower court erred in determining that this email was a privileged attorney-client communication.

Further, though not addressed by the Magistrate, even if this communication could be considered a confidential communication of a client to his or her attorney, it was ostensibly raised by the *Akins* plaintiffs and not by any of the *Altier* plaintiffs to whom any attorney-client privilege belongs. The *Akins* plaintiffs cannot raise the attorney-client privilege of third persons who are not co-plaintiffs.

The privilege is that of the client, not of other clients or the attorney of those other clients. *Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976)*; U.S. v. Juarez*, 573 F.2d 267 (5th Cir. 1978).

Also, the lower court's reliance on *Alldread v. City of Grenada,* 988 F.2d 1425, 1434 (5th Cir. 1993) and *In re Teleglobe Comm'c'ns Corp*., 493 F.3d 345, 363 (3d Cir. 2007) is misplaced. In addition to the matter not being a confidential communication from a client or disclosing any confidential communication from one of a group of existing clients, the communication at issue does not involve the disclosure of a co-client's confidential communication. The individual who divulged the email had every right to do so. It did not contain any confidences of any other *Altier* client. Once it was so divulged, it was in the public domain and not something that can be shielded by either the attorney who sent it or by that attorney's clients in another case that is closed.

This is especially true if the communication divulged is relevant information in a judicial proceeding. For example, if one or more of those who agreed to the settlement in *Altier* were to claim that they only agreed to waive their rights in the *Sullivan* class action because the email led them to believe that the settlement in *Altier* was the only option available to them, the document would be relevant and admissible evidence. Such individuals should have a right to introduce it as

evidence of the basis for their erroneous belief in settling, and not be prohibited from doing so simply because there are other *Altier* plaintiffs who were not influenced by the email's content where it does not contain any confidences or confidential information provided by those other *Altier* plaintiffs. Likewise, the same email also evidences the likelihood that the *Sullivan* putative class members' interest will be not be adequately protected by the existing parties, and it should be considered relevant for that reason and not shielded from disclosure.

VIII. CONCLUSION

The interest of Intervenors and the putative class members they represent are very much related to the claims in the *Akins* suit. That suit concerns the employment duties, status, and work performed for Defendants by those hired to work on the BP Oil Spill. Intervenors' claims likewise involve the employment, duties, status, and work performed for Defendants on the BP Oil Spill. They bring to this inquiry facts, evidence, and arguments that bear directly on these issues.

The interest that Intervenors and the putative class members they represent have in this matter is a direct, substantial, and legally protected. When Intervenors filed a class action lawsuit as class representatives of all those similarly situated, they assumed a duty to protect the interest of all putative class members. Intervenors and the putative class members they represent have a legally protected

interest in maintaining a class action against Defendants for the underpayment of wages pursuant to the written employment agreement which all 1,200 adjusters hired by Defendants were required to execute in connection with the work they performed on the BP Oil Spill. They should be allowed to participate in any determination of the status of such employment, as well as in any settlement discussion as a result of that same employment.

There is no doubt that the interest of Intervenors and the putative class members they represent may, as a practical matter, be impaired or impeded. Their claims are adverse to those of both existing parties. The existing parties could collaterally affect their interest in any trial of the matter by stipulated testimony or other similar means. Likewise, the existing parties both have a great economic incentive to settle the collective suit in such a way as to decimate, if not entirely destroy, the *Sullivan* class action.

Similarly, the very adverse positions of Intervenors to that of the existing parties show that their interests will not be protected by the existing parties. The past history, as well as the email that was stricken and ordered clawed back, establishes that Intervenors' interest will not be adequately protected by the existing parties. In short, all of the elements of an intervention of right have been established. It was error for the lower court to deny the intervention of right.

Lastly, the email communication at issue was not a confidential disclosure of any of any of the *Altier* clients. The attorney-client privilege has the effect of withholding relevant information from the fact-finder. It applies only where and to the extent necessary to achieve its purpose, the disclosure of confidential information related by a client to any attorney. It protects only those disclosures of a client necessary to obtain informed legal advice which might not have been disclosed absent the privilege.

The email was disclosed by one of those to whom it was sent. That person or persons had the absolute right to do so, even if the person who sent it was an attorney who was interested in maintaining its confidentiality. Having so disclosed its content, and considering that it did not contain confidential disclosures by other *Akins* clients, there is no reason to protect it with the attorney client privilege, especially if it is relevant and admissible evidence in some other judicial proceeding.

FOR THE REASONS DESCRIBED ABOVE, the lower court's denial the intervention sought, as well as its claw back of the subject email, should be REVERSED, allowing Intervenors' intervention herein and declaring that the email at issue herein is not protected by the attorney-client privilege.

Respectfully submitted,

By: /s/Timothy W. Cerniglia
Timothy W. Cerniglia (La. Bar #3964)
1521 St. Charles Avenue
New Orleans, Louisiana 70130
Telephone: (504) 586-0550
Facsimile: (504) 586-0555

COLVIN AND SMITH, APLC
James H. Colvin, Jr. (La. Bar # 21532)
Cole B. Smith (La. Bar # 30063)
900 Market Street, Suite 300
Post Office Box 1831
Shreveport, Louisiana 71101
Telephone: (318) 429-6770
Facsimile: (318) 429-6771

HYMEL, DAVIS & PETERSEN
L.J. Hymel (La. Bar # 07137)
10602 Coursey Boulevard
Baton Rouge, Louisiana 7081
Telephone: (225) 298-8118
Facsimile: (225) 298-8119

Attorneys for Intervenors

IX. CERTIFICATE OF SERVICE

I hereby certify that, on the 3rd day of May, 2013, in accordance with Fifth Circuit Rule 31.1, one electronic version and two copies of Intervenors' appellate brief were served on J.P. "Jay" Hughes, 1300 Access Road, Suite 100, Oxford, MS 38655 and Jennifer L. Anderson, Jones Walker, Four United Plaza, 8555 United Plaza Blvd., Baton Rouge, LA 70809 by placing a copy of same in the United States mail, properly addressed and postage prepaid.

/s/Timothy W. Cerniglia
Timothy W. Cerniglia
Attorney for Intervenors/Appellant

X. CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Undersigned counsel hereby certifies that,

1. This brief complies with the type-volume limitation of Federal Appellate Procedure 32(a)(7)(B) because, this brief contains 10,955 words, excluding the parts of the brief exempted by Federal Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Appellate Procedure 32(a)(5) and the type requirements of Federal Appellate Procedure 32(a)(6 because this brief has been prepared in a proportionally spaced typeface using WordPerfect, version X5 in font size 14 Times New Roman.

/s/Timothy W. Cerniglia
Timothy W. Cerniglia

Attorney for Intervenors/Appellant
May 3, 2013