By order of the court. GRANTED *Judge PERRY B. INOS*

IN THE SUPERIOR COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

GUERRERO FAMILY TRUST, et al., **Plaintiffs,** **v.** **KINKI NIPPON TOURIST, LTD., et al.,** **Defendants.**	**CIVIL ACTION NO. 04-0574** **ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM MORGAN STANLEY BASED UPON SELECTIVE DISCLOSURE AND WAIVER OF PRIVILEGE**

THIS MATTER came for hearing on November 7, 2008. William Fitzgerald and Daniel Benjamin appeared on behalf of plaintiffs Herman T. Guerrero and Jesus T. Guerrero, as trustees of the Guerrero Family Trust, Carmen Deleon Guerrero Borja, Soledad T. Tenorio, as trustee of the Jose C. Tenorio Trust, Juan S. Tenorio, as administrator of the Estate of Santiago C. Tenorio, Juan T. Guerrero, Jesus T. Guerrero, and Antonio C. Tenorio, as trustee of the AJT Trust (collectively, "Plaintiffs"). Anita Arriola appeared on behalf of defendants Morgan Stanley Japan Limited (Morgan Stanley) and Marianas Holdings, LLC (MH). Thomas Clifford appeared on behalf of defendants Kinki Nippon Tourist Co., Ltd. (KNT) and K.K. Ing Karuiza Wa Training Institute (ING).

Having considered the arguments of counsel, the pleadings, materials on record, and the relevant rules and case law, the Court is prepared to rule.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs in this case are local minority shareholders in two corporations, defendants Saipan Hotel Corporation (SHC) and Pacific Development Inc. (PDI). Before December 2003, PDI owned a majority of SHC's voting stock and was controlled by defendant KNT. KNT only owned non-voting shares in SHC directly. The primary asset of SHC is the Hafadai Beach Hotel ("the Hotel"). Plaintiffs allege that KNT, along with the other defendants, conspired to reorganize SHC to sell the controlling interest in SHC and the Hotel. The reorganization of SHC resulted in the allegedly unauthorized conversion of KNT's non-voting shares to voting shares and the issuance of additional shares, seriously diluting Plaintiffs' shares in the process. According to Plaintiffs, Morgan Stanley's role in this alleged scheme was both as planner and future purchaser of the Hotel.

After Plaintiffs filed suit, however, Morgan Stanley decided not to pursue the investment in SHC. Nevertheless, Plaintiffs allege that Morgan Stanley still aided and abetted KNT in breaching its fiduciary and statutory duties to them by substantially assisting KNT in selling the unauthorized shares to ING. Plaintiffs Third Amended Complaint (TAC) asserts that KNT was able to sell its shares to ING by relying on the due diligence and planning work conducted by Morgan Stanley. (TAC ¶ 104.) Because the Court inferred from the pleadings that Morgan Stanley had actual knowledge of KNT's breaches of fiduciary and statutory duties, Plaintiffs claims survived Morgan Stanley's Motion to Dismiss.

On February 29, 2008, Morgan Stanley filed a motion for summary judgment. That motion is still pending before the Court. One of the grounds upon which Morgan Stanley asserts it is entitled to summary judgment is that there is no evidence Morgan Stanley actually knew its conduct substantially assisted KNT's breaches of fiduciary duty. (MS Mot. for

Summ. J. at 1-2.) To satisfy its initial burden on its motion, Morgan Stanley submitted Proposed Findings of Undisputed Facts ("PFUF"). (MS Mot. for Summ. J., App. A.) PFUF number thirteen (13) states,

> To conduct legal due diligence, Morgan Stanley retained the Carlsmith Ball law firm . . . Morgan Stanley obtained advice from Carlsmith on whether there were any shareholder agreements or special rights for minority shareholders under CNMI law. After providing a formal conflict waiver, Morgan Stanley asked Carlsmith Ball to review minutes from the SHC shareholders meeting from December 2003 concerning the reorganization of SHC. Carlsmith advised Morgan Stanley that KNT owned the shares that it proposed selling. Prior to the filing of the lawsuit, Morgan Stanley was never informed by anyone that there was anything illegal about the December 2003 Reorganization of SHC, nor was Morgan Stanley ever advised by anyone that any aspect of the proposed transaction with KNT that (sic) would be in any way be unlawful under CNMI law.

(MS Mot. Summ. J., App. A at 4.)

Morgan Stanley's PFUF also cites evidence for the Court to consider in determining whether to accept each PFUF. To support PFUF number thirteen (13), Morgan Stanley cites the affidavit of Todd Coltman, one of Morgan Stanley's employees. Specifically, Morgan Stanley cites paragraphs fifteen (15) and twenty-eight (28) of Mr. Coltman's affidavit. In paragraph fifteen (15), Mr. Coltman states,

> Morgan Stanley instructed Carlsmith to, among other things, determine if KNT's actions in connection with a December 2003 reorganization of SHC were legal, and whether KNT legally owned the SHC interests it was attempting to sell to Morgan Stanley. It is my understanding that Carlsmith reviewed the December 2003 SHC shareholders meeting minutes. Morgan Stanley was never informed by Carlsmith that the December 2003 Reorganization of SHC was illegal, ineffective or conditional, nor was Morgan Stanley ever informed that any aspect of the proposed transaction with KNT that would in any way be unlawful under CNMI law.

(Coltman Aff. ¶ 15.) In paragraph twenty-eight (28) of his affidavit, Mr. Coltman states,

> In addition to relying on KNT's representation that it owned 98% of SHC shares, Morgan Stanley . . . retained legal counsel in Saipan, Carlsmith Ball, for advise on whether there were any shareholder agreements or special rights for minority shareholders under CNMI law. We asked Carlsmith to review the minutes of the December 2003 Board meeting and Carlsmith advised us that KNT owned the shares that it proposed selling to us.

(Coltman Aff. ¶ 28.)

Furthermore, in the Argument section of its Motion for Summary Judgment, Morgan Stanley states,

> [E]ven assuming the December 2003 Reorganization were invalid, there is no evidence that Morgan Stanley had knowledge of any such invalidity and resulting harm to the minority shareholders. PFUF 13-28-31. To the contrary, Morgan Stanley relied on its legal advisors, as is standard practice, to undertake legal due diligence, such as reviewing the historical corporate meeting minutes provided to Morgan Stanley by the sellers. Id. Morgan Stanley was not informed, following this work done by its outside legal team, that there was any issue with the validity of the reorganization. PFUF Nos. 13, 27-31.

(MS Mot. for Summ. J at 15.)

Plaintiffs argue that Morgan Stanley's selective disclosure of the privileged communications between it and Carlsmith waived Morgan Stanley's attorney-client privilege. (Pl's Mot. to Compel at 2.) Plaintiffs first requested the communications between Carlsmith and Morgan Stanley in a letter on March 19, 2008. (Fitzgerald Dec. ¶ 20 & Ex. 17). Morgan Stanley denied the request. (Fitzgerald Dec. ¶ 20 & Ex. 18). Plaintiffs then filed their Motion to Compel requesting that Morgan Stanley be ordered to produce "all communications between it and Carlsmith . . . that have any relationship to this case such that they may tend to prove or disprove Mr. Coltman's assertions regarding what was and what was not said between Carlsmith and Morgan Stanley." (Pl's Mot. to Compel at 4.)

In June 2007, however, Morgan Stanley submitted its privilege log asserting that its communications with its attorneys were protected by the attorney-client privilege, as attorney work product, or both. Plaintiffs did not challenge Morgan Stanley's privilege determinations at that time. Furthermore, in September 2007, Plaintiffs deposed Morgan Stanley witnesses who gave similar testimony to what Mr. Coltman stated in his affidavit. (*See* Opp. to Mot. to Compel, App. A.) Plaintiffs did not challenge Morgan Stanley's attorney-client privilege determinations during those depositions. Plaintiffs first challenge to Morgan Stanley's privilege determinations came after Morgan Stanley filed its Motion for Summary Judgment in February 2008.

II. ANALYSIS

A. The Attorney-Client Privilege

Pursuant to Commonwealth Rule of Civil Procedure 26(b)(1), relevant but privileged matters are not discoverable.[1] In this case, the communications between Carlsmith and Morgan Stanley are relevant to whether Morgan Stanley aided and abetted the majority shareholders because Plaintiffs must prove that Morgan Stanley actually knew that KNT's actions with respect to the December 2003 reorganization were illegal in order to prevail on the aiding and abetting claims.[2] Communications from Carlsmith advising Morgan Stanley that

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[1] Commonwealth Rule of Civil Procedure 26(b)(1) states,

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

[2] The Restatement (Second) of Torts § 876 states, "For harm resulting to a third person from the tortuous conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and

KNT's actions were illegal or that KNT did not own the shares it was attempting to sell would make it more probable than not that Morgan Stanley had knowledge of those facts.[3]

Even though the communications between Carlsmith and Morgan Stanley are relevant, however, such communications are normally protected by the attorney-client privilege. There are two main purposes for the privilege. *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). First, it assures that a client seeking legal advice may do so safely, which encourages the client to fully disclose the facts. *Id.* Second, it allows the attorney to effectively represent the client because the attorney needs to know the facts in the client's possession to effectively represent the client. *Id.* Thus, the privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Id. citing Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). The societal benefits of upholding the privilege are great in cases such as this where Morgan Stanley sought legal advice to ensure that its actions with respect to the December 2003 reorganization of SHC were in compliance with the law.

According to the Restatement, "the attorney-client privilege may be invoked . . . with respect to: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client." RESTATEMENT (THIRD)

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gives substantial assistance or encouragement to the other so to conduct himself . . . ." Furthermore, in granting Morgan Stanley's motion to dismiss Plaintiffs' Second Amended Complaint, this Court noted that "The majority of modern courts . . . have held that Section 876(b) requires nothing less than actual knowledge." Order Granting Def.'s Mot. to Dismiss, and Dismissing Mots. to Stay Disc. and to Compel Disc. at 3-4.)

[3] According to Commonwealth Rule of Evidence 401, "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

OF THE LAW GOVERNING LAWYERS § 68.[4] In this case, Morgan Stanley has invoked the privilege with respect to the requested communications between it and Carlsmith. Morgan Stanley and Carlsmith are both privileged persons within the meaning of § 68 because of their attorney-client relationship. The communications were made in confidence because Morgan Stanley and Carlsmith reasonably believed that no one else would learn the contents of their communications except another privileged person. Finally, the communications at issue were for the purpose of obtaining advice concerning the legality of KNT's actions in connection with the December 3003 reorganization of SHC and whether KNT owned the shares it was attempting to sell. (Coltman Aff. ¶ 15.) Thus, the communications between Morgan Stanley and Carlsmith were protected by the attorney-client privilege until Morgan Stanley waived its privilege.

B. Morgan Stanley Waived its Attorney-Client Privilege by Putting Its Attorney's Assistance "In Issue".

Morgan Stanley waived its attorney-client privilege because it put the advice of Carlsmith "in issue." The attorney-client privilege is waived for any relevant communication if the attorney's assistance is placed "in issue," which occurs when "the client asserts as to a material issue in a proceeding that: (a) the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct." RESTATEMENT

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[4] In the Commonwealth, the general rule regarding privilege is codified in Commonwealth Rule of Evidence 501, which provides,

> [T]he privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States and of the Commonwealth in the light of reason and experience.

Com. R. Ev. 501. Furthermore, where CNMI case law has not addressed an issue of law, the Court applies "the rules of common law, as expressed in the restatements of law [and] as generally understood and applied in the United States . . . ." 7 CMC § 3401; *Ito v. Macro Energy, Inc.*, 1993 WL 614805, at *7 (N. Mariana Island Oct. 26, 1993). Therefore, the common law of privilege as interpreted by the courts of the United States and the Commonwealth governs this case. Where the Commonwealth has not addressed the issue, the restatements also control.

THIRD OF THE LAW GOVERNING LAWYERS § 80(1). Here, even if Morgan Stanley can somehow show it did not act upon the advice of its lawyer, it certainly asserted as to a material issue that the advice of its lawyer was relevant to the legal significance of its conduct.

First, Morgan Stanley's knowledge concerning the legality of the December 2003 reorganization of SHC and the ownership of the shares KNT was attempting to sell is a material issue in the case. Plaintiffs allege that Morgan Stanley aided and abetted KNT in breaching fiduciary duties that KNT owed to Plaintiffs and in wrongfully diluting Plaintiffs' shares in SHC. Both of these claims require Plaintiffs to prove that Morgan Stanley actually knew of KNT's breaches of fiduciary and statutory duties. Therefore, what Morgan Stanley knew concerning the legality of KNT's actions with respect to the December 2003 reorganization of SHC and the ownership of the shares KNT was attempting to sell is a material issue in this case.[5]

Second, Morgan Stanley made the communications between it and Carlsmith relevant to the legal significance of its conduct. In its Motion for Summary Judgment, Morgan Stanley indicates that the advice it received from Carlsmith formed, in part, the basis of its knowledge concerning the legality of the December 2003 reorganization of SHC. (*See* MS Mot. for Summ. J., App. A at 4.) Specifically, Morgan Stanley sought to satisfy its initial burden on its Motion by attaching Proposed Findings of Undisputed Facts ("PFUF") to its Motion.[6] (MS Mot. for Summ. J., App. A.) Morgan Stanley's thirteenth PFUF states that Morgan Stanley

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[5] In fact, one of the grounds upon which Morgan Stanley argues it is entitled to summary judgment is that it had no knowledge it was substantially assisting any breach of fiduciary duty. (MS Mot. for Summ. J. at 14.) Morgan Stanley supports this argument by attempting to prove that there is no evidence that it had knowledge that the December 2003 reorganization was invalid. (*Id.* at 15.)

[6] On a motion for summary judgment, after a moving party satisfies its initial burden of providing undisputed facts that defeat the elements of the plaintiffs' claims, plaintiffs can only avoid summary judgment if they "establish that there exists a genuine issue of material fact." *Santos v. Santos*, 4 N.M.I. 206, 209-10 (1994) (citations omitted).

"was never informed by anyone that there was anything illegal about the December 2003 Reorganization of SHC." (MS Mot. Summ. J., App. A at 4.) As evidence of this proposed finding of fact, Morgan Stanley cites paragraphs fifteen (15) and twenty-eight (28) of the affidavit of Todd Coltman. In his affidavit, Mr. Coltman avers that "Morgan Stanley instructed Carlsmith to . . . determine if KNT's actions . . . were legal," and that "Morgan Stanley was never informed by Carlsmith that the December 2003 Reorganization of SHC was illegal." (Coltman Aff. ¶ 15). Mr. Coltman also avers that "[Morgan Stanley] asked Carlsmith to review the minutes of the December Board meeting and Carslmith advised that KNT owned the shares that it proposed selling to us." (*Id.* at ¶ 28). Furthermore, in the Argument portion of its Motion, Morgan Stanley argues that it "relied on its legal advisors" and "was not informed, following this work done by its outside legal team, that there was any issue with the validity of the reorganization. PFUF Nos. 13, 27-31." (MS Mot. for Summ. J at 15.) In essence, Morgan Stanley is asserting that Carlsmith's advice was the basis of its knowledge concerning the legality of the December 2003 reorganization of SHC. Because the legal significance of Morgan Stanley's conduct hinges on whether it had knowledge, Morgan Stanley has made Carlsmith's advice relevant to the legal significance of its conduct.

Moreover, in determining whether there has been a waiver of the attorney-client privilege, the Court's focus is on whether the party claiming the privilege has interjected the issue into the litigation and whether, if the privilege is upheld, it would deny the inquiring party access to proof needed fairly to resist the client's own evidence on that very issue.[7] This

[7] The Reporter's Note regarding Section 80 of the Restatement describes three approaches the Courts have used in determining whether a waiver of the attorney-client privilege has occurred. The third approach, preferred by the Restatement, is described as follows:

> [I]t focuses on whether the client asserting the privilege has interjected the issue into the litigation and whether the claim of privilege, if upheld, would deny the

approach is consistent with the court's reasoning in *Hearn v. Rhay*, cited by Plaintiffs. *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975).[8] In *Hearn*, the plaintiff sought information concerning the legal advice received by the defendants after the defendants asserted the affirmative defense of qualified immunity and that they had acted in good faith when confining the plaintiff to the mental health unit of a prison. *Id.* at 577. The court found that the defendants waived their attorney-client privilege because they invoked the privilege in furtherance of an affirmative defense which they asserted for their own benefit, it was the affirmative act of asserting the defense that placed the communications in issue, and the plaintiff would have been unable to challenge the affirmative defense if the privilege was upheld. *Id.* at 581.

In this case, Morgan Stanley invoked the privilege in furtherance of its Motion for Summary Judgment. Although its motion is not an affirmative defense, Morgan Stanley did interject its attorney's advice into the litigation, which was an affirmative act made for its own benefit.[9] By asking the Court to consider Carlsmith's legal advice in support of its Motion for

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> inquiring party access to proof needed fairly to resist the client's own evidence on that very issue. (citations omitted).

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 reporter's note. This is the approach that will be applied in this case.

[8] In *Hearn*, the Court found that the attorney-client privilege is implicitly waived where (1) assertion of the privilege was a result of some affirmative act; (2) the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege denies the opposing party access to information vital to its defense. *Hearn*, 68 F.R.D. at 581.

[9] The Restatement discusses that while many courts find a waiver only occurs when the privilege is asserted offensively, this rule can sometimes lead to erroneous results. The comment to the Restatement explains that,

> Decisions sometimes invoke a shield-but-not-a-sword rationale--a client should be permitted to assert the privilege only in a defensive posture (citations omitted). The shield-sword metaphor fails to capture the sense of the doctrine fully. If followed literally, it could lead to upholding erroneously a claim of privilege, for often the client asserts the privilege defensively. The preferred approach is to require that the client either permit a fair presentation of the issues raised by the client or protect the right to keep privileged communications

Summary Judgment, Morgan Stanley's affirmative act put Carlsmith's advice "in issue" because Morgan Stanley made the advice relevant to its knowledge concerning the December 2003 reorganization of SHC. Finally, there is no way for Plaintiffs to examine the truthfulness of Morgan Stanley's assertions concerning Carlsmith's legal advice if the privilege is upheld.[10] Plaintiffs' ability to examine the basis of Morgan Stanley's knowledge concerning the alleged illegality of the December 2003 reorganization of SHC is vital to their ability to survive Morgan Stanley's Motion for Summary Judgment.

In their Opposition, Morgan Stanley argues that the advice of counsel is only placed in issue when the client asserts a claim or defense and attempts to prove that claim or defense by disclosing or describing an attorney-client communication of that legal advice. Def's Opp. at 4. Morgan Stanley argues that it did not assert an advice-of-counsel defense, and therefore it did not waive its privilege. While it is true that a party can place the advice of its counsel in issue by asserting that it "acted upon the advice of its lawyer," the privilege is also waived in a broader context where "the client asserts as to a material issue in a proceeding that . . . the advice was otherwise relevant to the legal significance of the client's conduct." RESTATEMENT THIRD OF THE LAW GOVERNING LAWYERS §80. Furthermore, the Restatement suggests that courts adopt an approach requiring that "the client either permit a fair presentation of the issues raised by the client or protect the right by not raising at all an issue whose fair exposition requires examining the communications." RESTATEMENT (THIRD) OF THE LAW GOVERNING

> secret by not raising at all an issue whose fair exposition requires examining the communications (citations omitted).

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 reporter's note to cmt b.

[10] One of the concerns of the Restatement is that "If the communication could not be introduced, a client could present the justification of legal advice in an inaccurate, incomplete, and self-serving way." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 cmt b.

LAWYERS § 80 cmt b. Thus, regardless of how Morgan Stanley characterizes its reasons for referencing paragraphs fifteen (15) and twenty-eight (28) of Mr. Coltman's affidavit, Morgan Stanley put its attorney's advice "in issue" by interjecting it into the record through its Motion for Summary Judgment.

C. Referring to the advice of counsel to establish state of mind does not preserve the privilege because Morgan Stanley interjected the advice into the litigation to limit its liability.

Relying on *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851 (3d Cir. 1994), Morgan Stanley next argues that it only referred to the advice of its counsel in seeking to establish its state of mind (lack of knowledge), and thus it did not waive its attorney-client privilege. In *Rhone-Poulenc*, the court stated that "a party does not lose the privilege to protect the attorney client communications from disclosure in discovery when his or her state of mind is put in issue in the action." *Id.* at 864. A central issue in *Rhone-Poulenc* was whether or not the insureds knew before they obtained coverage that Armour's pharmaceutical products were causing the transmission of HIV. The insureds, however, did not interject the advice of their counsel into the litigation and the issue was whether the advice should be admissible merely because it was relevant to the insureds' state of mind. In this case, the advice of Morgan Stanley's counsel is not only relevant to the legal significance of its conduct, Morgan Stanley also affirmatively interjected the advice into the litigation. Additionally, in *Rhone-Poulenc* the court held that "the advice of the infringer's counsel is not placed in issue, and the privilege is not waived, unless the infringer seeks to limit its liability by describing that advice and by asserting that he relied on that advice." Although Morgan Stanley asserts that it only referred to the advice of its counsel to establish its state of mind, Morgan Stanley attempted to limit its liability by referring to the advice of its counsel. If Morgan Stanley wins its Motion for

Summary Judgment on the knowledge issue, Morgan Stanley's liability would be nothing. Thus, the fact that Morgan Stanley used the advice of its counsel to establish its state of mind does not preserve its privilege.

D. Plaintiffs' Motion to Compel is Timely.

Plaintiffs' challenge to Morgan Stanley's attorney-client privilege was timely because Morgan Stanley did not waive the privilege until it filed Mr. Coltman's affidavit in support of its Motion for Summary Judgment. Although Morgan Stanley did not base its timeliness argument on any case law, statutes or portions of the restatements, it argues that Plaintiffs should have challenged its privilege determinations earlier in the proceedings. First, Morgan Stanley asserts that its privilege log filed in June 2007 provided Plaintiffs with the predicate information to challenge its privilege determinations if Plaintiffs believed Morgan Stanley was withholding factual communications on privilege grounds. (Opp. to Mot. to Compel at 8.) Secondly, Morgan Stanley argues that Plaintiffs should have challenged Morgan Stanley's privilege determinations in September 2007 when Morgan Stanley witnesses gave similar deposition testimony to what Mr. Coltman stated in his affidavit. (*See* Opp. to Mot. to Compel, App. A.)

As discussed above, Morgan Stanley waived its privilege when it filed Mr. Coltman's affidavit in support of its Motion for Summary Judgment on February 29, 2008. On March 19, 2008, Plaintiffs responded to the statements contained in Mr. Coltman's affidavit with a letter requesting a copy of all communications between Morgan Stanley and Carlmisth. After their request was refused, Plaintiffs filed their motion to compel on March 28, 2008. Plaintiffs therefore responded to Mr. Coltman's affidavit within weeks and their Motion to Compel is not untimely.

E. Morgan Stanley May Not Withdrawal Mr. Coltman's Statements from his Affidavit.

Now that Morgan Stanley has taken the affirmative step of interjecting its attorney's statements into the litigation, it may not simply withdraw the statements from its Motion.[11] In *Pabst Licensing*, the attorney-client privilege was challenged because an attorney's statements were contained in an affidavit submitted in support of the client's Opposition to a Motion for Summary Judgment. *In re Pabst Licensing, GmbH Patent Litigation*, 2001 WL 1135265, *4 (E.D. La. 2001). The Magistrate ruled that by introducing the affidavit, the offering party had waived the attorney-client privilege and could not simply withdraw the portions of the affidavit referencing its communications with counsel. *Id.* at *3-4. The District Court affirmed, holding that the offering party "has cited cases that involve parties who . . . did not take the affirmative step of offering arguably privileged communications to the Court in support of its case." *Id.* at *3. In this case, Morgan Stanley offered privileged communications with its counsel to the Court by submitting Mr. Coltman's affidavit in support of its Motion for Summary Judgment. Morgan Stanley may not now "simply withdraw the portions of the affidavit referencing its communications with counsel." *Id.* at *3-4.

Although the Restatement (Third) of the Law Governing Lawyers allows courts some discretion in permitting a party to withdraw statements from a pleading, the cases cited by Morgan Stanley allowing such a withdrawal are distinguishable from this case.[12] Morgan

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[11] In its Opposition, Morgan Stanley requests that it be permitted to withdraw the last sentence from paragraph 15 and paragraph 28 of the affidavit of Todd Colman.

[12] Comment b to Section 80 of the Restatement (Third) of the Law Governing Lawyers states that

> The exceptions stated in Subsection (1) are based on considerations of forensic fairness (compare § 79) . . . . A tribunal may control discovery to postpone or pretermit the issue. For example, if legal advice is presented as an alternative defense, discovery with respect to that issue may be postponed to allow the client opportunity to determine whether to withdraw that defense.

Stanley first relies on *In re Carbo Ceramics, Inc.*, 81 S.W. 3d 369 (Tx. Ct. App. 2002), where a party amended a discovery response indicating it might call one of its attorneys as a witness and inadvertently produced a copy of a letter it had written to its attorney. *Id.* at 371. The opposing party sought a waiver of the attorney-client privilege regarding the letter "as well as all other documents listed on Carbo's privilege log." *Id.* The court found the privilege waived as to the letter, but not waived as to the other documents because the privileged party was not seeking affirmative relief and had made clear to the trial court it did not intend to rely on advice of counsel as it had previously asserted. *Id.* at 379. In this case, Morgan Stanley has already relied on the advice of its counsel in support of its Motion for Summary Judgment and cannot now retract that reliance. Furthermore, as discussed below, the fact that Morgan Stanley is not seeking affirmative relief through its Motion for Summary Judgment is not dispositive.

Morgan Stanley also cites *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W. 2d 458 (Tex. 1993). In *Nat'l Union*, National Union filed a motion for summary judgment in a bad faith insurance case, arguing that the evidence established a reasonable basis for disputing the plaintiff's underlying compensation claim. *Id.* at 459. To support its motion for summary judgment, National relied on the deposition testimony of its lawyer stating that the plaintiff's compensation claim had been questionable and "deserved to be tried." *Id.* After the plaintiff subpoenaed National's attorney's entire investigation file, the court held that the file was protected as attorney-work product, even if certain documents within the file were not protected by the attorney-client privilege. *Id.* at 460-61. Furthermore, the Court found that National did not waive its attorney-client privilege because it had amended its motion for

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RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 cmt b.

summary judgment to delete all references to its attorney's testimony, represented to the court that it did not intend to rely on such testimony, and there had been no waiver by offensive use. *Id.* at 461-62.

Although the *Nat'l Union* court permitted National to retract the reference to its attorney's testimony from its motion for summary judgment, the court did not discuss the basis for allowing such a withdrawal. Furthermore, the court upheld the privilege largely because there had been no "offensive use" of the attorney's deposition testimony.[13] The court held that National's assertion that it had a reasonable basis to deny the plaintiff's compensation claim was merely a "rebuttal" to the bad faith insurance claim, and not an "offensive use." *Id.* at 461. This Court, however, does not adopt the offensive use doctrine, nor does it invoke the shield-but-not-a-sword language quoted in Plaintiffs' Motion to Compel.[14] According to the Restatement,

> Decisions sometimes invoke a shield-but-not-a-sword rationale--a client should be permitted to assert the privilege only in a defensive posture (citations omitted). The shield-sword metaphor fails to capture the sense of the doctrine fully. If followed literally, it could lead to upholding erroneously a claim of privilege, for often the client asserts the privilege defensively. The preferred approach is to require that the client either permit a fair presentation of the issues raised by the client or protect the right to keep privileged communications secret by not raising at all an issue whose fair exposition requires examining the communications (citations omitted).

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[13] In *Nat'l Union Fire Ins. Co.*, the court explained the "offensive use" doctrine which holds that "A plaintiff can not use one hand to seek affirmative relief in court and with the other lower an iron curtain of silence against otherwise pertinent and proper questions which may have a bearing upon his right to maintain his action. *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W. 2d 458, 461 (Tex. 1993) citing *Ginsberg v. Fifth Court of Appeals*, 686 S.W. 2d 105, 108 (Tex. 1985).

[14] Plaintiffs' Motion to Compel cites *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991) which refers extensively to the shield-but-not-a-sword language. However, in their Reply, Plaintiffs' also cite *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975), which adopts the approach to implicit waiver of the attorney-client privilege preferred by the Restatement.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 reporter's note to cmt b. This Court follows the advice of the Restatement. Accordingly, Morgan Stanley must allow a fair presentation of the issues it raised in its Motion for Summary Judgment.

III. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS Plaintiffs' Motion to Compel Documents from Morgan Stanley based upon selective disclosure and waiver of privilege. The waiver is limited to the two subjects referred to in Mr. Coltman's affidavit. The first subject is whether Morgan Stanley was ever informed that the December 2003 Reorganization of SHC was illegal, ineffective, or conditional, or that any aspect of the proposed transaction with KNT would in any way be unlawful under CNMI law. The second subject is whether KNT owned the shares of SHC it proposed selling to Morgan Stanley. The Court grants Plaintiffs' Motion only in regards to those specific documents concerning interactions with counsel on which Mr. Coltman based his disclosures.

SO ORDERED this 26th day of February 2009.

/s/
PERRY B. INOS, Associate Judge