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UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI`I

UNITED STATES OF AMERICA, Plaintiff, vs. KEITH MITSUYOSHI KANESHIRO (1), DENNIS KUNIYUKI MITSUNAGA (2), TERRI ANN OTANI (3), AARON SHUNICHI FUJII (4), CHAD MICHAEL MCDONALD (5), SHERI JEAN TANAKA (6), Defendants.	)	Case No. CR 22-00048-TMB-NC BRIEF OF MITSUNAGA & ASSOCIATES, INC. ON ASSERTION AND CLAIM OF ATTORNEY-CLIENT PRIVILEGE

Mitsunaga & Associates, Inc. (MAI) now comes and submits this brief in response to the Court's Order requesting that MAI assert its claim of attorney-client privilege and address "all the elements and relevant issues regarding MAI's assertion of attorney-client privilege in this case, including how MAI…plan[s] to assert any such claimed privilege." ECF 587, p. 5.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL HISTORY:

The defendants named above appeared in Court on June 17, 2022, in response to an Indictment filed on June 2, 2022. A First Superseding Indictment was filed on September 8, 2022. On January 20, 2024, counsel for Sheri Tanaka, defendant six, sent a letter to counsel for Dennis Mitsunaga, defendant two, informing them that if Ms. Tanaka were to testify at trial, "her testimony may possibly include certain communications subject to the attorney-client privilege." ECF 435-2.

In response, Mr. Mitsunaga filed a trial brief on February 20, 2024, informing the Court of the possible issue. ECF 435. Along with the trial brief, Mr. Mitsunaga also filed a Declaration of Lois Mitsunaga, current President and C.E.O. of MAI, and holder of the power to exercise the attorney-client privilege on behalf of MAI. ECF 435-1. In the Declaration, Ms. Mitsunaga asserted MAI's attorney-client privilege "regarding any and all attorney-client privileged communications made between attorney Sheri Tanaka and any current or former MAI representatives, officers, or employees." *Id.*

On March 4, 2024, the government filed their *Motion in Limine No. 6: To Preclude an Improper Advice of Counsel Defense.* ECF 477. In its Motion, the government argued that "the defense should be precluded from soliciting testimony

or making arguments suggesting advice of counsel negates their intent to commit the charged offenses." *Id.* at 1. Since MAI is not a party in this litigation, the issue of an advice-of-counsel defense is not one that MAI has any stake in. However, at the end of its Motion, the government argued that the defendants were "poised to attempt to use the attorney-client privilege as a sword and a shield." *Id.* at 6. "[A]ny assertion of privilege—removing from reach the ability to properly scrutinize any advice of counsel claim—means there can be no advice of counsel defense. The defendants, and the entity they personify, cannot have it both ways." *Id.* at 7-8.

The Court, in its Order granting the government's *Motion in Limine No. 6,* found that there were additional issues that needed to be addressed. ECF 549. On March 27, 2024, the Court filed a separate Order on the issue, instructing MAI "to appear and brief its position on MAI's claimed attorney-client privilege and all issues related to this claim. In its brief, MAI must identify how it intends to lodge objections, if any." ECF 587 at 2.

II. LAW AND ARGUMENT:

A. What the attorney-client privilege covers

Confidential communications between attorneys and clients to provide legal advice are protected by the attorney-client privilege. *United States v. Sanmina Corp. & Subsidiaries*, 968 F.3d 1107, 1116 (9th Cir. 2020) (citing *Upjohn Co. v.*

United States, 449 U.S. 383, 389 (1981)). A corporation may assert the attorney-client privilege. *United States v. Grace*, 439 F. Supp. 2d 1125, 1137 (D. Mont. 2006) (citing *Upjohn*, 449 U.S. at 395).

> Whether the attorney-client privilege covers information is determined by an eight-part test:
>
> > (1) Where legal advice of any kind is sought
> > (2) from a professional legal adviser in his capacity as such,
> > (3) the communications relating to that purpose,
> > (4) made in confidence
> > (5) by the client,
> > (6) are at his instance permanently protected
> > (7) from disclosure by himself or by the legal adviser,
> > (8) unless the protection be waived.

Sanmina, 968 F.3d at 1116 (citing *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010)); *See also CP Salmon Corp. v. Pritzker*, 238 F. Supp. 3d 1165, 1171 (D. Alaska 2017) (The Ninth Circuit follows Wigmore's eight-part test for attorney-client privilege).

A rebuttable presumption of attorney-client privilege arises when a lawyer has been hired to provide advice. *Sanmina*, 968 F.3d at 1116. The attorney-client privilege is strictly construed and the party asserting the privilege has the burden of establishing an attorney-client relationship and the privileged nature of the communication. *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010).

> [I]t is important to recognize that the attorney-client privilege is a two-way street: "The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice, . . . *as well as an attorney's advice in response to such disclosures*." *United States v. Chen*,

> 99 F.3d 1495, 1501 (9th Cir. 1996) (emphasis added) (quotation omitted) (addressing a claim concerning the crime-fraud exception to the attorney-client privilege), cert. denied, 137 L. Ed. 2d 538, 117 S. Ct. 1429 (1997).

United States v. Bauer, 132 F.3d 504, 507-08 (9th Cir. 1997).

B. MAI has not waived the privilege

MAI continues to assert an attorney-client privilege based on the fact that MAI hired Ms. Tanaka to provide legal advice and she acted as corporate counsel to MAI.

Only the current managers of MAI, not displaced managers, can waive the privilege, regardless of whether the communication at issue occurred during the tenure of previous management. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348-349 (1985).

A **litigant** can waive the privilege by alleging malpractice, ineffective assistance of counsel, or that he/she acted upon the advice of counsel in an attempt to negate the *scienter*. *See Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003) (en banc); *United States v. Pinson*, 584 F.3d 972, 977 (10th Cir. 2009) (citing *Strickland v. Washington*, 446 U.S. 668, 691 (1984)) and *United States v. Bush*, 626 F.3d 527, 539 (9th Cir. 2010).

However, neither MAI nor Lois Mitsunaga is a litigant, and Ms. Mitsunaga has invoked the attorney-client privilege on behalf of MAI. None of the parties in

this case have the power to waive the attorney-client privilege between MAI and its counsel, Ms. Tanaka.

C. Advice-of-counsel defense as compared to the attorney-client privilege

The government's *Motion in Limine No. 6* asked the Court to preclude an advice-of-counsel defense. In their motion, they noted that the defendants seemed to be asking for an advice-of-counsel defense, which requires the breaking of attorney-client privilege, while still asserting attorney-client privilege. ECF 477 at p. 6-8. While the government's *Motion in Limine No. 6* combined the advice-of-counsel defense and the attorney-client privilege issue, these are two entirely separate inquiries. The Court has already addressed the advice-of-counsel defense in its Order granting the government's motion, ECF 549, and the Court need only address the issue of attorney-client privilege if and when Ms. Tanaka chooses to testify.

D. Process for asserting MAI's claim of privilege

The eight-part test, mentioned above, that assists the Court in determining whether a communication is privileged or not, cannot be used without knowing what the communication is. Ms. Tanaka is not yet in a position to have to decide whether she might testify, much less what she might testify to.

In support of her position, Ms. Tanaka's counsel cited *United States v. W.R. Grace*, 439 F. Supp. 2d 1125, 1148 (D. Mont. 2006). Montana District Judge

Molloy's handling of this matter in *Grace* might be instructive in determining an acceptable procedure here.

In *Grace,* a corporation and seven of its former officers were charged with crimes in connection with a polluted mining operation. All seven of the individual defendants moved to sever from the defendant corporation, Grace, based on varying grounds. Some wanted severance because they "intend[ed] to rely upon an advice of counsel defense that they say can only be established through the presentation of documents and testimony over which Defendant Grace claims an attorney-client privilege." *Grace,* 439 F.Supp.2d at 1136. In his analysis, Judge Molloy noted, "the resolution of each case has hinged on a fact-specific balance of the evidence offered by the defense versus the rule requiring its exclusion." *Id.* at 1140. In deciding the severance motions, Judge Molloy relied upon "the privileged documents and supporting materials submitted *ex parte* by the individual Defendants." *Id.* at 1142.

> The first question is whether and under what circumstances the attorney-client privilege must give way to a criminal defendant's Sixth Amendment right to present a defense where the privilege, if recognized, would **exclude exculpatory evidence**. If that question is answered in the affirmative, the Court must then assess in camera the documents submitted by the individual Defendants to determine whether they would be of such exculpatory value that their exclusion amounts to a denial of the individual Defendants' right to present a defense.

*Id. a*t 1136-1137.

In a 28 U.S.C. §2254 matter, the Ninth Circuit was unable to determine whether the attorney-client privilege had to give way to the defendant's Sixth Amendment rights because the privileged letter at the heart of the issue was not part of the record. The Court remanded the case to the District Court to "use its process to obtain the letter." *Murdoch v. Castro*, 365 F.3d 699, 706 (9th Cir. 2004) (overruled on other grounds).[1]

Additionally, when a Court determines there has been a waiver of the attorney-client privilege, appellate review is *de novo*. *See United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997). This strongly suggests a record must be made of what confidential communications Ms. Tanaka intends to reveal during her testimony.

Using these sources as a guide, MAI suggests that, in the event Ms. Tanaka elects to testify, an *ex parte* hearing be held where only MAI and Ms. Tanaka, and their respective counsel, are present. Ms. Tanaka would proffer any testimony which might be based on attorney-client communications. Then MAI and Ms. Tanaka could make arguments to the Court on whether those communications are

[1] "Because the Supreme Court has not clearly established whether and in what circumstances the attorney-client privilege must give way in order to protect a defendant's Sixth Amendment confrontation rights, the California state court could not have unreasonably applied clearly established Supreme Court law when it denied Murdoch access to the letter. *See Musladin II*, 549 U.S. at 77. To the extent that it holds to the contrary, *Murdoch I* is overruled." *Murdoch v. Castro*, 609 F.3d 983, 995-96 (9th Cir. 2010).

privileged, and, if they are, whether Ms. Tanaka's Sixth Amendment right to testify in her own defense overrules MAI's attorney-client privilege. Such a hearing need not be held before Ms. Tanaka has decided whether to testify, after the government and all other defendants rest their cases.

Because the privilege may not be used both as a sword and a shield, fairness may require disclosure of the protected communication that may waive the privilege completely. *United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997). Thus, if the Court permits Ms. Tanaka to testify about privileged communications with MAI, Ms. Tanaka may then be required to disclose other protected communications to the prosecution and other defendants for cross-examination purposes. Additionally, other defendants with inside information about the communications may be permitted to reveal those confidences as well. Allowing Ms. Tanaka to testify about confidential communication could open a Pandora's Box of issues.

Finally, if this Court determines Ms. Tanaka can testify to confidential communications protected by the attorney-client privilege, MAI requests their current attorney be allowed to participate during the trial when Ms. Tanaka testifies and be permitted to make objections.

III. CONCLUSION:

MAI requests this Court hold an *ex parte* hearing with MAI counsel and counsel for Ms. Tanaka, should Ms. Tanaka elect to testify. The Court and counsel could then determine what confidential communications Ms. Tanaka seeks to reveal during her testimony. If this hearing is held after the government and the other defendants have rested their cases, the Court will have abundant information to determine whether the proposed testimony is admissible[2] and if so, whether MAI's attorney-client privilege should give way to permit Ms. Tanaka to testify.

If the Court determines Ms. Tanaka can testify to any confidential communications, MAI requests permission for its attorney to participate in the trial during Ms. Tanaka's testimony to lodge objections to protect MAI's interests.

Respectfully submitted, April 8, 2024.

/s/ Caroline M. Elliot
Attorney for Mitsunaga & Associates, Inc.
Intervenor Asserting Attorney-Client Privilege

[2] For example, the proffered testimony could be inadmissible on other evidentiary grounds because it is irrelevant or self-serving hearsay. Additionally, where the defendant denied knowing that he was lying under oath, the Seventh Circuit found it, "hard to understand how the lawyer's role, whatever it was, can negate scienter." *United States v. Roti*, 484 F.3d 934, 935 (7th Cir. 2007)

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2024, I filed the original with the Clerk of the Court using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all Counsel of Record.

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