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UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, v. 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.	CR No. 22-00048-TMB-NC UNITED STATES' RESPONSE BRIEF REGARDING MAI'S ASSERTION OF ATTORNEY-CLIENT PRIVILEGE

Nearly 20 days after the Court's ruling on the United States' Motion *in Limine* No. 6, wherein the Court invited "MAI to intervene expediently" if it intended to assert the attorney-client privilege, and following a subsequent briefing schedule set by the Court requiring MAI to brief "the elements and relevant issues

regarding MAI's assertion of attorney-client privilege in this case, including how MAI or the Defendants plan to assert any such claimed privilege," ECF No. 587 at 2, MAI has still presented no basis for its assertion of attorney-client privilege (whether publicly, under seal, or otherwise). At this juncture, given MAI's failure to abide by the Court's clear instructions, the Court should find the privilege waived. *See* ECF No. 587 at 2 ("Should MAI fail to appear and support its claim by the date certain below, the Court will thereafter consider any asserted attorney-client privilege impliedly waived.").

I

PROCEDURAL HISTORY

On March 19, 2024, in granting the United States' Motion *in Limine* No. 6, the Court stated that "if MAI continues to seek to assert an attorney-client privilege in this case from Tanaka's role as corporate counsel, the Court will require MAI to intervene expediently. Further, the Court will require MAI to brief the elements and all relevant issues regarding its assertion of attorney-client privilege in this case, including how it plans to raise any objections." ECF No. 549 at 13. Following MAI's failure to then intervene, on March 27, 2024, the Court set a briefing schedule regarding the attorney-client issue. ECF No. 587. Therein, the Court "direct[ed] MAI to appear and brief its position on MAI's claimed attorney-client privilege and all issues related to this claim." *Id.* at 2. The Court further ordered MAI to "identify how it intends to lodge objections, if any." *Id.*

On April 3, 2024, MAI filed for permission to intervene, which the Court granted. ECF Nos. 619, 629. On April 8, 2024, Tanaka, the United States, and MAI filed briefs in accordance with the Court's briefing schedule. ECF Nos. 640, 644, 646. However, MAI and Tanaka's briefs are largely empty shells, void of the analysis ordered by the Court. The United States now responds to them.

II

ARGUMENT

MAI and Tanaka have failed to abide by the Court's order. In its brief, MAI completely sidesteps the analysis regarding the eight elements of the attorney-client privilege and instead requests an *ex parte* hearing involving only MAI and Tanaka. ECF No. 640 at 10. Tanaka similarly fails to analyze the elements of the attorney-client privilege as to MAI and instead claims it is "premature" for her to make any decision about her right to testify. ECF No. 646. In light of the Court's instructions set forth in its briefing schedule, the United States requests that the Court find MAI has failed to establish that an attorney-client privilege exists or, in the alternative, find that any such privilege, even if it exists, has now been waived.

A. MAI's Brief

MAI suggests it is not capable of engaging with the attorney-client analysis until Tanaka comes forward to precisely identify the contours of her testimony. *See* ECF No. 640 at 6. And, alas, MAI states, "Ms. Tanaka is not yet in a position to

have to decide whether she might testify, much less what she might testify to."[1] ECF No. 640 at 6. This chicken-or-egg hypothesis does not withstand scrutiny: almost two months ago, Lois Mitsunaga submitted a declaration stating, "I hereby assert 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." ECF No. 435-1. Surely MAI knows what those purported communications are, irrespective of the exact contours of Tanaka's testimony. Indeed, if MAI does not have an inkling as to what Tanaka will testify about, then under what circumstances did it file a motion to intervene in this case based on the assertion of its attorney-client privilege? In the end, the Court ordered MAI to do the work necessary to justify asserting attorney-client objections during the trial of this case, and MAI has failed to do that work—further increasing the prejudice of its tardy and blanket assertion of privilege.

As previously briefed by the United States, the attorney-client privilege contains eight essential elements: (1) where legal advice of any kind is sought, (2) from a professional legal adviser in her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are, at the

[1] One wonders how MAI would even know to make this statement, given its privilege brief was filed around six hours *before* Tanaka's privilege brief. This would seem to be another confirmation that MAI's asserted privilege "appears to be a hand-in-glove attempt to engineer a legal conundrum to the benefit of the individual defendants." ECF No. 643 at 2.

client's instance, permanently protected (7) from disclosure by the client or legal adviser (8) unless the protection is waived. *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002). The burden of proving that the privilege applies belongs to the party asserting it. *Id.* at 1379; *see also SEC v. Gulf & Western Industries*, 518 F. Supp. 675, 682 (D.D.C. 1981) ("The proponent must conclusively prove each element of the privilege."). MAI has not engaged with the requirements of the attorney-client privilege, so the United States is not equipped to adequately respond. For now, the United States offers two observations as to MAI's current position.

First, MAI may be invoking a blanket attorney-client privilege as to its all of its communications with Tanaka. But, as this Court well knows, such a blanket invocation is impermissible. *See Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (9th Cir. 1992) ("[B]lanket assertions of the privilege are extremely disfavored." (internal quotations and citation omitted)); *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983) ("The claim of privilege must be made and sustained on a question-by-question or document-by-document basis." (internal quotations and citation omitted)). Moreover, such a blanket invocation does not address the Court's clear directive to MAI to "brief its position on [its] claimed attorney-client privilege and all issues related to this claim." ECF No. 587 at 2.

Second, it is difficult to imagine that MAI is not aware of Tanaka's anticipated testimony. MAI and Tanaka have been in lockstep since the beginning of the grand jury investigation around three years ago. Tanaka represented numerous MAI witnesses appearing before the federal grand jury, including her friend from high school, Lois Mitsunaga (MAI's CEO, who has stepped forward to assert MAI's privilege). Moreover, MAI cannot persuasively claim it is not aware of the charges in this case. Tanaka is not some arms-length attorney—she is deeply imbedded in the relationships and fabric of MAI. Therefore, it is entirely reasonable to assume MAI possesses the information it needs to analyze the applicability of the attorney-client privilege—it simply chose not to. *See United States v. Ruehle*, 583 F.3d 600, 609 (9th Cir. 2009) (As the party asserting the privilege, Ruehle . . . has made no effort to identify with particularity which of his communications to the Irell attorneys are within his claim of privilege, in either his public or sealed filings before us. Under federal law, the attorney-client privilege is strictly construed. Ruehle's failure to define the scope of his claim of privilege weighs in favor of disclosure[.]").

One thing is true: MAI has failed to abide by the Court's order and has further delayed resolution of an issue it put into play nearly two months ago. Two months later, we remain at square one. Given MAI's failures, the Court should find that MAI has not met its burden of establishing the attorney-client privilege and that any such privilege has been waived.

Relatedly, at this point, if the Court is not prepared to deny MAI's assertion of privilege on the basis of the record as it currently stands, MAI should first be required to brief the basis for its assertion of attorney-client privilege, including all eight required elements.[2] Only then would the United States be able to meaningfully participate in the privilege determination process (such as to establish the crime-fraud exception to any claimed privileged communication).

B. Tanaka's Brief

Tanaka's brief is similarly unsatisfying. Tanaka merely asserts that it is premature to tell whether she will testify at trial. However, that basic response does not abide by the Court's order, which required the parties to "brief MAI's claimed attorney-client privilege." ECF No. 587 at 3. This is an issue that should be fleshed out *before* whenever it is Tanaka chooses whether to testify. *United States v. Cook*, 608 F.2d 1175, 1186 (9th Cir. 1979) (en banc) ("[A]dvance planning helps both parties and the court. Trial by ambush may produce good anecdotes for lawyers to exchange at bar conventions, but tends to be counterproductive in terms of judicial economy.") (overruled on other grounds in *Luce v. United States*, 469 U.S. 38 (1984)). While some sealed proceeding might be warranted at some point,[3] MAI's

[2] In so doing, even if MAI cannot publicly detail the allegedly privileged communications, it may at least list categories of communications that it expects would surface during Tanaka's testimony which might contain privileged information so that the United States may file a more informed response.

[3] MAI and Tanaka suggest they be permitted to deal with privilege issues in an *ex parte* fashion with the Court. In the event further proceedings are required, the United States requests that the Court fashion a proceeding that enables the United

failures to even establish the basic elements of the attorney-client privilege render that decision premature.

III

CONCLUSION

The Court should find MAI has waived any attorney-client privilege that may exist between MAI and Tanaka with regard to the charges in this case. In the alternative, MAI should be required to identify communications it believes implicate the attorney-client privilege and brief all elements of the attorney-client privilege.

Dated: April 15, 2024.

Respectfully submitted,

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/s/ Colin M. McDonald
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States to meaningfully engage with the privilege analysis. *See, e.g.*, *United States v. Hansen*, Case No. 18-cr-00346-DCN, 2019 WL 6137450, *2 (D. Idaho, Nov. 19, 2019 (unpublished) ("The Court appreciates Hansen's desire to maintain his attorney-client privilege, but this presents a sticky situation. side—in this case, the Government—is somewhat at a disadvantage; it knows that Hansen is attempting to invoke the attorney-client privilege, but it does not know the claimed basis for that privilege. This obviously limits the Government and forces it to defend a very broad, general claim.").

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, v. 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.	CR No. 22-00048-TMB-NC CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that:

I, Colin M. McDonald, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, CA 92101-8893. I am not a party to the above-entitled action. I have caused service of the foregoing on all parties in this case by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 15, 2024. */s/ Colin M. McDonald*
COLIN M. MCDONALD