UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Michael Tate, Joseph Shuster, Lyle Evanson and John Ayers, individually and on behalf of all other individuals similarly situated,

Plaintiffs,

vs.

Restaurant Technologies, Inc., Parthenon Capital LLC, Jeffery R. Kiesel, John C. Rutherford, Jonathan O. Grad, Zachary F. Sadek, Philip A. Clough and Robert E. Weil,

Defendants.

Civil File No. 09-cv-02076 (MJD/JJG)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS

INTRODUCTION

In April 2010, Defendants informed Plaintiffs of their intent to rely on the advice-of-counsel defense with respect to the 2009 recapitalization transaction, a key aspect of Plaintiffs' claims. Plaintiffs indicated that such reliance would result in a waiver of the attorney-client privilege with respect to the subject matter of the Defendants' reliance. Defendants agreed, but have adhered to a narrow, confusing, and apparently inconsistent view of which documents must be produced pursuant to that admitted waiver.

Essentially, Defendants have created their own definition of waiver of attorney-client privilege in which Restaurant Technologies, Inc. ("RTI") officers and directors can inexplicably rely on one counsel for a transaction, profess not to rely on another counsel giving advice relating to the same transaction and provide ill defined descriptions of the

transaction itself to permit a selective production of only those documents which they wish to produce. Plaintiffs bring this motion because of several contradictory positions which need to be reconciled – including, in particular, witnesses who claim to have relied on counsel with respect to the transactions at issue in this litigation, Defendants' counsel who claims to have acknowledged the privilege waiver associated with such reliance (and claims to have produced all relevant records), and Defendants' recent service of over 260 pages of privilege and redaction logs suggesting that much remains to be produced. Through their logs, Defendants have created a Rubik's cube in which it is impossible to know what has been produced and what has not been produced and for what transactions they agree the privilege is being waived and when it is not. Plaintiffs require, and are entitled to receive, clarity that has not been forthcoming due to Defendants' obfuscation of the issue.

Nineteen depositions have taken place in this litigation, including the depositions of several attorneys from Dorsey & Whitney ("Dorsey") who worked on many aspects of the underlying 2009 recapitalization transaction on behalf of RTI, some of which are critical to the allegations in the Complaint. Further, it appears that depositions of Kirkland & Ellis ("Kirkland") attorneys may be necessary as they played a crucial role is shaping the insufficient communications transmitted to RTI shareholders in advance of the 2009 recapitalization. However, before this deposition regime resumes, Plaintiffs need clarity as to the boundaries of the attorney-client waiver: Clarity which is not apparent on the face of the many pages of logs when those logs are juxtaposed against testimony and the assertions made by Defendants in this litigation.

BACKGROUND

A. DEFENDANTS' DELAYED PRODUCTION OF PRIVILEGE LOGS CONCEALED THEIR IMPROPER WITHHOLDING OF DOCUMENTS UNTIL RECENTLY.

On July 17, 2009, Plaintiffs served a Summons, Complaint, and First Set of Document Requests upon Defendants RTI, Jeffery R. Kiesel ("Kiesel"), John C. Rutherford ("Rutherford"), Jonathan O. Grad ("Grad"), and Philip A. Clough ("Clough"). (Alton Aff. Ex. 5.) The document requests demanded the production of a privilege log. On July 29, 2009 Plaintiffs also served a subpoena upon Dorsey & Whitney ("Dorsey") – counsel to Defendants in this action – which similarly demanded the production of a privilege log. (*Id.* Ex. 6.) Plaintiffs also served a November 13, 2009 subpoena upon Parthenon Capital, LLC ("Parthenon") – who was not then a party but is now a Defendant – that similarly demanded a privilege log. (*Id.*, Ex. 7.)

On August 26, 2009, Plaintiffs' counsel contacted Dorsey with regard to Dorsey's subpoena production and indicated that the production of a privilege log was still expected. (*Id.*, Ex. 8.) Document production proceeded to slowly roll out from both Dorsey and Defendants. (*See* Plaintiffs' Memorandum in Opposition to Partial Summary Judgment (Dkt. #86) at 3-7.) Ultimately, and with the understanding that any privileged documents being produced by Dorsey would be reflected in the RTI privilege log, Plaintiffs' counsel agreed that it would be appropriate to receive only one privilege log that covered the productions from Defendants and Dorsey in response to the outstanding discovery requests and subpoenas. (*Id.*, Exs. 10-11.)

After seven months of litigation, Plaintiffs received the first of what would be a series of privilege logs from RTI. First, Plaintiffs received a "Privilege Log" for Defendants on February 22, 2010 identifying 705 privileged documents that had been withheld from production and then a separate "Redacted Documents" log for Defendants on March 19, 2010. (*Id.* Exs. 28, 32.) Then, on April 23, 2010, Defendants' counsel informed Plaintiffs' counsel that a number of Dorsey documents had been withheld that were not reflected on the February 22, 2010 privilege log. (*Id.*, Ex. 10.) The same day, Plaintiffs' counsel demanded logs of all documents withheld on the basis of privilege. (*Id.*, Ex. 12.) Thereafter, Plaintiffs received the following logs:[1]

Identification of Log	**Date Produced**	**Attached to the Alton Aff. as Exhibit:**
Parthenon Capital's Privilege Log	May 28, 2010	35
Parthenon Capital's Privilege Log for Redacted Documents	May 28, 2010	36
Parthenon Capital's Non-Relevant Redaction Log	May 28, 2010	38
Defendants' Supplemental Privilege Log	May 28, 2010	30
Defendants' Supplemental Privilege Log for Redacted Documents	May 11, 2010	31
Dorsey & Whitney LLP Privilege Log	June 3, 2010	33

[1] All of Defendants' and Dorsey's privilege logs have been attached to the accompanying affidavit. Two of the logs have been yellow highlighted by Defendants to reflect documents that have already been produced. Plaintiffs have marked all of the documents that they believe should be produced (or that Defendants have simply failed to sustain their burden to show that they should not be) with a black mark in the margin.

Dorsey & Whitney LLP's Privilege Log for Redacted Documents	June 3, 2010	34

Plaintiffs had not been advised until late April 2010 that there were undisclosed documents that had been withheld by Defendants and Dorsey, and had no knowledge of the volume of documents claimed to be privileged until these logs were produced in late May and early June.[2]

B. DEFENDANTS ASSERT THE ADVICE-OF-COUNSEL DEFENSE, WAIVING THE ATTORNEY-CLIENT PRIVILEGE WITH RESPECT TO THE RECAPITALIZATION.

Concurrently with the above-mentioned production of multiple and lengthy privilege logs, Defendants determined that they intended to rely on an advice-of-counsel defense with respect to the 2009 RTI recapitalization.[3] On March 18, 2010, Plaintiffs' counsel asked on the record whether the Defendants intended to assert reliance on counsel as a defense in this matter. (Alton Aff., Ex. 3 (Larson Dep. at 188).) Plaintiffs' counsel asserted that the reliance on advice of counsel as a defense would result in a

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[2] These logs were produced with the production of over 17,000 pages of material Defendants previously withheld on a claim of privilege. When Plaintiffs received the 17,000 pages, it was initially thought that very few documents were still being withheld. Subsequently, upon the recent production of seven additional logs in May and June, Plaintiffs learned that thousands of other documents remain to be produced.

[3] As this Court is aware, the 2009 recapitalization is a significant centerpiece of Plaintiffs' claims. (*See, e.g.*, Complaint (Dkt. #1); Memorandum in Support of Punitive Damages (Dkt. #82).) In that transaction, Defendants portrayed an exaggerated view of RTI's troubles while awarding RTI's controlling shareholders a percentage of RTI's equity value that they were not entitled to—all while freezing out the class members. Plaintiffs challenge the fraudulent and self-dealing aspects of that transaction and seek to have it rescinded and/or to be paid the fair value of their shares.

waiver of the attorney-client privilege. (*Id.*) Defendants' counsel indicated that the Defendants had not yet determined whether they would rely on that defense. (*Id.*)

Around the end of April 2010, Defendants first made clear their intent to assert a reliance on counsel defense regarding the 2009 recapitalization. In relation to their decision to pursue this defense, Defendants acknowledged that they "have waived the privilege with Dorsey & Whitney with respect to matters relating to the June 24, 2009 recapitalization merger." (*Id.*, Ex. 15.)

Though Defendants have indicated an intent to assert the advice-of-counsel defense only with respect to the 2009 recapitalization, as opposed to the entirety of Plaintiffs' claims in this action, this is still a factually broad basis for the assertion of the defense. In general terms, Plaintiffs have alleged that the 2009 recapitalization was the culmination of a longstanding effort by RTI controlling shareholders Parthenon and ABS Capital to upstream RTI's equity and prospects to themselves at the expense of RTI's other shareholders, many of whom were smaller independent investors. As outlined more fully in Plaintiffs' Memorandum in Support of Punitive Damages, Defendant Parthenon obtained majority control over RTI's board of directors and then the directors appointed by Parthenon consistently placed the interests of Parthenon over those of other class members in disregard of their fiduciary duties. (*See generally* Dkt. #82 at 1-27 and associated exhibits.)

In late 2008, Defendant Grad, a Parthenon designee on the RTI Board, determined that the best way to protect Parthenon's investment in RTI would be to have a "change in control" transaction without actually having a "change in control" under which class

members would vote to "cram themselves down." (*See* Dkt. #83 at Ex. 28.) Soon after, the plan to do just that was set in motion and Parthenon, through its board designees, began to orchestrate a recapitalization that would achieve the end result it desired. In arranging the "waterfall" that would determine who would receive equity in the post-recapitalized RTI, Defendants decided to find a way to obtain accreted value[4] on their shares, even though they were not entitled to such value in connection with a recapitalization. Under RTI's governing documents and the share certificates, RTI preferred shareholders were entitled to obtain accreted value on their shares if one of two events occurred: (1) a sale of substantially all of RTI's assets, or (2) a change-in-control transaction. (Dkt. # 11, Ex. 1 at G.) Though the recapitalization presented neither scenario, Defendants drafted, approved of, and conveyed proxy materials that indicated they were entitled to receive accreted value in connection with the recapitalization and never disclosed to RTI shareholders that they were not, in fact, entitled to such value. (*See* Alton Aff. Ex. 1(Hearn Dep. at 41-51).) In short, they tricked the class members into giving RTI controlling shareholders a larger share of RTI equity than they were entitled to receive.

Plaintiffs allege that Defendants acted unfairly in connection with the structure of the recapitalization in other ways. For instance, Kirkland and Defendant Parthenon suggested that requiring any common shareholder wishing to convert their shares into

[4] In the event of a "liquidation, dissolution or winding up" of RTI, preferred shareholders had the right to receive certain liquidation preferences (or "accreted value") on preferred stock. Accreted values varied among the Series A preferred stock offerings, but ranged between 20% to 27% annually. (*See, e.g.*, Dkt. #83, Ex. 8 at 77575.)

stock in the new entity should be required to sign an extremely broad release. (Alton Aff. Ex. 4 at Reqs. 200-201); Dkt. #11, Ex.2 at Ex. B).) The Defendants also elected to leave certain positive developments relating to RTI – including more favorable pricing on RTI's long-term service contracts and large new customer bases that were recently signed – out of the proxy materials. (*See, e.g.*, Alton Aff. Ex. 23.) Further, financial numbers used in the shareholder informational presentation given in connection with the recapitalization were altered to reflect a bleaker outlook for RTI than what was being used internally. (*See* Dkt. #82 at 24 (providing table).) There are also self-dealing aspects of the recapitalization that Plaintiffs complain of – including secret plans to pay RTI CEO Defendant Kiesel options potentially worth millions if the transaction went through and an agreement to pay a Defendant Parthenon related entity $450,000 per year through a "management services agreement." (Dkt. #11, Ex. 1 at 22.)

Plaintiffs have alleged fraud in connection with these activities. Defendants have elected to rely on the advice they received from counsel, presumably to show that they acted in good faith with respect to the aspects of the recapitalization that the Plaintiffs complain of. However, as outlined below, Defendants improperly seek to pick and choose the attorney-client communications they choose to disclose in order to assert the defense.

C. THOUGH THEY HAVE WAIVED THE ATTORNEY-CLIENT PRIVILEGE, DEFENDANTS REFUSE TO PRODUCE RESPONSIVE DOCUMENTS TO PLAINTIFFS.

Though the Defendants agree that they have waived their attorney-client privilege at least in part, Defendants have vastly circumscribed the scope of that waiver along with

the documents they are required to disclose in connection with it. On April 19, 2010 Plaintiffs' counsel parsed Defendants' privilege log, highlighted the documents they were willing to stipulate were not waived communications, and transmitted the proposed document list to Defendants' counsel. (*Id.*, Ex. 9.) Defendants' counsel ignored the proposal. Instead, on May 26, 2010, they emailed their previously–produced Privilege Log and Redacted Log with highlighting to indicate what documents they considered discoverable (and had produced) in view of their waiver of the attorney-client privilege.

Review of the logs shows that, although Defendants received attorney advice involving every aspect of the 2009 recapitalization that the Plaintiffs complain of, they have only produced a very narrow selection of their related attorney-client communications. For example, though they have asserted reliance-on-counsel as a defense with respect to the "recapitalization," they have produced only documents concerning the 2009 recapitalization itself and have excluded numerous documents concerning advice related to agreements executed as part and parcel with that transaction. Additionally, though the officers and directors of RTI received advice from several different attorneys with regard to the recapitalization, they selectively produced only the advice rendered by Dorsey while withholding other advice that they received.

In particular, the following subject matters have been withheld by Defendants from production despite their relation to the 2009 recapitalization:[5]

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[5] Plaintiffs have marked the documents they believe to have been waived on the accompanying Exhibit 29. Because of the number of withheld documents, it would be ungainly to elaborate upon each of the challenged subject matters in the body of this Memorandum. Plaintiffs' counsel conferred in good faith with Defendants' counsel in an

- Defendants have refused to provide documents and information regarding the B-2 stock offering, an offering that was offered to RTI controlling shareholders (Parthenon and ABS) in advance of the 2009 recapitalization and purportedly began "accreting" value in the months before the recapitalization. (*E.g.*, Alton Aff. Ex. 29 at Doc. Nos. 11, 15, 16, 17, 41, 44, 45, 48-51, 55, 56, 58, 119-21, 216, 288). As acknowledged by Dorsey partner T. Hearn, who worked on the transaction, the B-2 offering was a "part of" the recapitalization. (Alton Aff. Ex. 1 Hearn Dep. at 23, 29-32 (agreeing that the B-2 preferred stock offering was really part of the overall recapitalization).)

- Defendants have refused to provide documents and information regarding the Z class preferred stock offering. In the 2009 recapitalization transaction, Defendants conducted a first round offering and closing – the B-2 stock – to RTI controlling shareholders like Parthenon, and purported to offer the "same" stock to other shareholders in connection with the recapitalization in the form of Z-class stock in the "new" (or post-recap) RTI. (*See* Dkt. #11 (attaching the proxy materials and Z offering).) The Z class offering was integrally related to the recapitalization, and yet Defendants have withheld documents reflecting advice in connection with it. (*See, e.g.*, Ex. 29 Doc. Nos. 54, 122.)

- Defendants have refused to provide documents and information regarding the B-1 offering. The B-1 offering was done approximately one year in advance of the 2009 recapitalization. However, language, drafting, and attorney advice was transplanted from the B-1 offering materials for use in the B-2 offering, which was part and parcel with the recapitalization itself. (Alton Aff. Ex. 1 (Hearn Dep. at 23, 31.) Thus, Defendants relied on their attorneys' advice for B-1—advice that was directly reused with respect to B-2—and none of this information has been produced. (*See, e.g.*, *id.* at Ex. 29 Doc. No. 57.)

- Defendants have refused to provide documents and information regarding the Eighth Amended and Restated Certificate of Incorporation which was executed in connection with the 2009 recapitalization and attached to the proxy materials Plaintiffs allege to be misleading. (Dkt. #11. Ex. 3 at Ex. G; Alton Aff. Ex. 1 (Hearn Dep. at 34, 36 (statement by RTI's attorney that the Eighth Amended and Restated Certificate was done in connection with the B offerings done as part of the recapitalization)); (*E.g.*, Alton Aff. Ex. 29 Doc. Nos. 46, 47.)

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effort to resolve this matter without Court action in accordance with D. Minn. LR 37.1. (*See, e.g.*, Alton Aff. Ex. 15.) Plaintiffs and Defendants are continuing their efforts to resolve their dispute with regard to particular documents that have been withheld and will inform the Court if any further resolution is achieved in advance of the July 13, 2010 hearing.

- Defendants have refused to provide documents and information regarding: (1) the Merger Agreement (*e.g.*, Alton Aff. Ex. 29 at Doc. Nos. 18, 43, 62, 69); (2) the Release that all RTI common shareholders were required to execute in connection with the 2009 recapitalization in order to convert their shares into stock in the new company (and which was suggested by Kirkland/Parthenon and drafted by Kirkland) (*e.g.*, Alton Aff. Ex. 31 at RTI188551); (3) the December 2008 letter informing common shareholders that their shares were "worthless" (which Plaintiffs allege was sent out in order to prime class members to acquiesce in the recapitalization) (*e.g.*, Alton Aff. Ex. 29 at Doc No. 60)); and (4) regarding "stock issuance" during the time period of the recapitalization (*e.g.*, Alton Aff. Ex. 29 at Doc. Nos. 317, 318).

- Defendants have refused to provide documents and information indicating that they constitute legal advice "regarding recapitalization merger." (*E.g.*, Alton Aff. Ex. 29 at Doc. Nos. 330, 334, 351, 355-57, 381-82.)

Additionally, there are a number of subject matters that may be within the scope of the waived materials, but it is impossible to tell from the generic description given in the privilege logs. For example:

- "Board of Directors Meeting Minutes reflecting legal advice." (*E.g.*, Alton Aff. Ex. 31 at RTI002759.)

- Email "for purpose of providing legal advice regarding stockholder's agreement." (*E.g.*, Alton Aff. Ex. 31 at RTI035561; Ex. 29 at Doc. Nos. 52, 63.)

- Email "for purpose of providing legal advice regarding shareholder communication" in June 2009. (*E.g.*, Alton Aff. Ex. 31 at RTI60248; Ex. 29 at Doc. Nos. 60; 211; 342; 343.)

- Email "for purpose of providing legal advice regarding merger vote." (*E.g.*, Alton Aff. Ex. 31 at RTI75424)

- Email "providing merger information to counsel for purpose of legal review and analysis." (*E.g.*, Alton Aff. Ex. 31 at RTI182453)

- Email requesting "legal advice regarding sale process." (*E.g.*, Alton Aff. Ex. 31 at RTI182755.)

- Email requesting legal advice "regarding release agreement." (*E.g.*, Alton Aff. Ex. 31 at RTI188551.)

- "Email and attachments providing information at counsel's request for purpose of legal advise [sic]." (*E.g.*, Alton Aff. Ex. 29 at Doc. Nos. 12; 25; 32.)

- Blank privilege log entry containing only dates and persons between whom the communication took place. (*E.g.*, Alton Aff. Ex. 29 at Doc. No. 280.)

To make matters worse, Defendants have refused to disclose advice from counsel other than Dorsey, even though RTI officers and directors were advised by other counsel on an almost continual basis. Kiesel, Rutherford, Grad, Sadek, Clough and Robert E. Weil ("Weil") are all officers and directors of RTI. (Dkt. #67 at ¶¶ 6-11.) RTI directors and officers, including Rutherford, Grad, Sadek, Clough and Weil, all received attorney advice from attorneys *outside of* Dorsey regarding the recapitalization. Kirkland conveyed comprehensive advice regarding the recapitalization, drafted the involved documents, and was in near-constant communication with both Dorsey and RTI directors. RTI director Clough was advised by Piper Rudnick LLP regarding the recapitalization and merger agreement. (*E.g.*, Alton Aff. Ex. 29 at Doc. Nos. 62, 70, 71, 80-94.) Because of the intimate involvement of these attorneys with the recapitalization process – including advising RTI directors and officers on negotiations with banks in connection with the recapitalization and regarding the propriety of requiring RTI common shareholders to sign a release in connection with the recapitalization – there is no justification for Defendants' withholding of such documents.

D. DEFENDANTS RECEIVED ADVICE CONCERNING THE 2009 RECAPITALIZATION THAT THEY HAVE NOT DISCLOSED.

Historically, Kirkland represented RTI controlling shareholder Parthenon. However, RTI sometimes hired both Dorsey and Kirkland to collaborate on particular projects. In the case of the 2009 recapitalization, RTI employed both Kirkland and Dorsey's services. It paid Kirkland $358,569 in connection with its work on the recapitalization, (*see id.*, Ex. 27) and Dorsey and Kirkland split up the work in completing the transaction (*id.*, Ex. 21). In preparing the 2009 recapitalization, the attorneys worked out a "deal checklist" to help organize which firm would be responsible for particular aspects of the transaction. (*Id.*, Ex. 21.) Kirkland was, for example, responsible for the following:

- Documents related to the formation of the parent corporation for the recapitalization, including the Bylaws, the Certificate of Formation, the Stock Subscription Agreement, and the Consent of the Sole Incorporator;

- Documents related to the merger subsidiary for the recapitalization, including the Bylaws, the Certificate of Formation, the Stock Subscription Agreement, and the Consent of the Sole Incorporator;

- Jointly drafting documents for execution in connection with the planned recapitalization, including the Merger Agreement, and the letter of transmittal;

- Drafting documents for execution in connection with the planned recapitalization, including the Securityholder's Agreement, the Class Z Preferred Securities Purchase Agreement, the Amendment to the Amended and Restated Note Purchase Agreement, the Registration Rights Agreement, the Ninth Amended and Restated Certificate of Incorporation, and the Revised Bylaws;

- Drafting the Board Consent of Merger Sub Approving Merger Agreement and the Shareholder Consent of Merger Sub Approving Merger Agreement;

- Drafting the Management Services Agreement under which controlling-shareholder Parthenon's related entity, Pcap, would receive payment for "management" of RTI; and
- Drafting of the release that the class members challenge as an unfair and prejudicial aspect of the recapitalization transaction (as well as indicative of the intent to use the recapitalization to deprive shareholders of their derivative claims).

(*Id.*, Ex. 21 at RTI053947-53; Ex. 22.) Even where Kirkland was not specifically designated as the responsible party for particular aspects of the transaction, it had weighty input. For example, in correspondence that Plaintiffs highlighted in their motion for punitive damages (*see* Dkt. #82 at 23), Kirkland and Parthenon principal/RTI director Sadek submitted extensive comments on the proxy disclosure memorandum. (Alton Aff. Exs. 23, 24.) Sadek's and Kirkland's comments included deletions of entire sections of the proxy memoranda that, in the Plaintiffs' view, required disclosure. Kirkland and Sadek told Dorsey that the "Recent Developments" section (which contained positive disclosures regarding RTI) should be deleted in its entirety. (Alton Aff. Ex. 23 at RTI51224.) Similarly, they opined that the "Investment Highlights" section, which also contained material positive information about RTI, should be deleted. (Alton Aff. Ex. 23 at RTI51225.) The deletions of these sections (and the lack of inclusion of other positive information) constituted material nondisclosures to RTI shareholders, a significant and material aspect of this case.

Thus, Kirkland's advice to delete positive information from the company's disclosures was relied upon, and those deletions provide a basis for the claims Defendants seek to defend by saying that they relied on the advice they received from counsel. In confirmation that Kirkland's advice was relied upon by RTI, on May 5, 2009, RTI CFO

Bob Weil informed Dorsey counsel Eric Larson that "it is alright to delete whatever sections of the business sections of the business section that [Kirkland] proposes to eliminate, which I believe are discussed in footnotes 48 and 51 of the [Proxy] Memorandum." (Alton Aff. Ex. 23 at RTI210223.)

Indeed, the involvement of Kirkland attorneys to the 2009 recapitalization was so intimate that Kirkland and Dorsey constantly conferred about the particulars of the transaction, including details regarding which firm would be in charge of particular aspects of the transaction. For example, in June of 2009, Dorsey "checked in" with Kirkland regarding which firm would be housing execution versions of the documents to be executed in connection with the recapitalization transaction. (Alton Aff. Ex. 26.) Kirkland also insisted on inserting waiver of conflict of interest language into the Merger Agreement – a confusing thing to demand if Kirkland was not a counselor to RTI. (Alton Aff. Ex. 1 (Hearn Dep. at 166-172).) Kirkland outlined the "timeline" for the Special Committee to "approve" the recapitalization transaction, (Alton Aff. Ex. 20 at RTI203461), and even revised letters to be sent to shareholders by Kiesel (*id.* at Ex. 16-18).

The fact that RTI directors received attorney advice regarding the recapitalization that has not been disclosed to Plaintiffs is apparent in the privilege logs. (*See, e.g.*, Ex. 29 at Doc. Nos. 70 (legal advice regarding recapitalization); 72 (legal advice regarding merger agreement); 73 (same); 74 (same). Plaintiffs seek to contravene Defendants' selective production of attorney advice they received, as all such documents are discoverable in light of their decision to pursue the advice-of-counsel defense.

ARGUMENT

A. LEGAL STANDARD

Pursuant to Rule 26(b)(1) of the Federal Rules of Civil Procedure, "parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Rule 37(a) provides that a party may move for an order compelling disclosure or discovery. Such a motion may be made if a party fails to make a document production under Rule 34. *See* Fed. R. Civ. P. 37(a)(3)(B)(iv). If the motion is granted, or if the requested discovery is provided after the motion is filed, the court may require the party whose conduct necessitated the motion to pay the movant's reasonable expenses in bringing the motion, including reasonable attorney's fees. *See* Fed. R. Civ. P. 37(a)(5).

Where a federal court's jurisdiction relies upon diversity jurisdiction, state law defines the scope of the attorney-client privilege. *Bituminous Cas. Corp. v. Tonka Corp.*, 140 F.R.D. 381, 386 (D. Minn. 1992). The person asserting a privilege has the burden of showing that the privilege exists and should prevent disclosure. *State v. Lender*, 124 N.W.2d 355, 358 (Minn. 1963). According to Minnesota state law,

> [a]n attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent.

Minn. Stat. § 595.02, subd. 1(b). The privilege covers communications 1) where legal advice is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) are 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) except if the protection is waived. *City Pages v. State*, 655 N.W.2d 839, 844 (Minn. Ct. App. 2003).

As a threshold matter, there are possibly thousands of documents withheld from disclosure for which Defendants have failed to sustain their burden to show that the documents are privileged. The confusing array of privilege logs Defendants have provided are vague and for the majority of entries, it is impossible to establish whether the withheld document (1) meets the requirements of the attorney-client privilege as a general matter and (2) if it does meet those requirements, whether or not it pertains to a waived subject matter (or could lead to discoverable evidence regarding the waived subject matter). (*See* Alton Aff. Exs. 28-38.)

For example, Defendants have professed that all communications with Dorsey pertaining to the "recapitalization" have been produced. But there are numerous documents on the attached 260 pages of confusing logs that proclaim that they constitute advice regarding the "recapitalization" that have not been produced. (Alton Aff. Ex. 29 at Doc. Nos. 330, 334, 351, 355-57, 381-82).) Counsel have conferred as to why such documents have not been produced, and RTI's counsel has suggested that there might be other reasons the identified documents concerning the recapitalization have not been

produced.[6] Yet it is impossible to tell from the log what the rationale is for withholding the documents, since all the description states is that the communication concerns (for example) the recapitalization – an undisputedly waived subject matter. This problem pervades the entire log. Plaintiffs simply cannot tell from these deficient logs whether a document is privileged or concerns a waived subject matter, and, to make matters worse, documents have been inconsistently produced by Defendants. Some documents concerning advice regarding the "merger" have been produced, while others have not. Some documents constituting communications between two Dorsey attorneys have been produced, while others have not. There is no identifiable or consistent justification to distinguish between documents the Defendants believe to be discoverable and have been produced and documents which have been withheld.

Defendants may not selectively determine which documents are to be disclosed in relation to the 2009 recapitalization and advice-of-counsel defense. If Defendants wish to disclose certain communications between Dorsey attorneys that they perceive as favorable, the Plaintiffs have the right to view other communications between Dorsey attorneys that may not reflect the same viewpoint. The determinations regarding the materials to be produced must be consistent and in accordance with law, and without the seemingly arbitrary or inconsistent production that a review of the 260 pages of privilege logs demonstrates. Because Defendants' grossly inadequate descriptions regarding the documents withheld are vague, inconsistent, and indeed are sometimes even *blank*,

[6] In telephone conversations, RTI's counsel, Ms. Grant, suggested that they might concern communications related directly to this litigation.

Defendants have not sustained their burden to show that these documents are privileged and all withheld documents must therefore be produced.

B. DEFENDANTS' RELIANCE ON ADVICE-OF-COUNSEL DEFENSE WAIVED THE ATTORNEY-CLIENT PRIVILEGE WITH RESPECT TO THE RECAPITALIZATION.

When a party states that he or she has taken substantive action based on the advice of counsel, he or she may not then refuse to reveal the substance of that advice by claiming the attorney-client privilege, and the attorney may be examined regarding that advice. *See Swanson v. Domning*, 86 N.W.2d 716, 722 (Minn. 1957) (holding that plaintiff waived the attorney-client privilege by stating that she had relied on the advice of counsel in deciding not to sign a contract for deed); *United States v. Workman*, 138 F.3d 1261, 1263 (8th Cir. 1998) (stating that the attorney-client privilege is implicitly waived by raising attorney advice as a defense). A defendant "cannot selectively assert the privilege to block the introduction of information harmful to his case after introducing other aspects of his conversations with [his attorney] for his own benefit." *Workman*, 138 F.3d at 1262. "The attorney client privilege cannot be used as both a shield and a sword, and [a defendant] cannot claim in his defense that he relied on [his attorney]'s advice without permitting the prosecution to explore the substance of that advice." *Id.* at 1263; *accord Minn. Spec. Crops v. Minn. Wild Hockey Club, L.P.*, 210 F.R.D. 673, 675 (D. Minn. 2002). "When a party intends to rely at trial on the advice of counsel as a defense to a claim of bad faith, that advice becomes a factual issue, and opposing counsel is

entitled to know not only whether such an opinion was obtained but also its content and what conduct it advised."[7] *Minn. Spec.*, 210 F.R.D. at 676.

i. Defendants have improperly withheld documents that fall within the scope of their broad waiver of the attorney-client privilege.

"Given the nature of the defense being asserted, the scope of the waiver must of necessity be somewhat broad and is, in fact, a 'subject matter' waiver-i.e., a waiver of all communications on the same subject matter." *Minn. Spec.*, 210 F.R.D. at 676; *see also In re Smirman*, 267 F.R.D. 221, 224 (E.D. Mich. 2010).[8] For example, in *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486-487 (3rd Cir. 1995), the defendant asserted the advice-of-counsel defense and attempted to limit the associated waiver to the opinion relied upon. However, the court determined that the waiver extended to the entire transaction rather than the isolated opinion pursuant to which the defendant asserted its

[7] If Defendants fail to make a full production, their advice-of-counsel defense is waived. *Minn. Spec.*, 210 F.R.D. at 677 ("A party who intends to rely at trial on the advice of counsel must make a full disclosure during discovery; failure to do so constitutes a waiver of the advice-of-counsel defense.")

[8] "In addition to waiving the attorney-client privilege, invoking the advice-of-counsel defense can also constitute a waiver of the work-product doctrine." *In re Smirman*, 267 F.R.D. at 224. As a threshold matter, the work-product doctrine does not apply unless the document is prepared in anticipation of litigation or trial and prepared by or for a party. Fed. R. Civ. P. 26(b)(3). Materials prepared in the ordinary course of business are not covered by the work-product doctrine. *Simon v. GD Searle & Co.*, 816 F.2d 397, 400-401 (8th Cir. 1987). The burden to show that a memorandum is prepared in anticipation of litigation is not met by the mere assertion of counsel. *Travelers Property Cas. Co. of America v. Nat'l Union Ins. Co. of Pittsburgh, PA*, 250 F.R.D. 421, 424 -425 (W.D. Mo. 2008) (counsel's assertion that memorandum was prepared in anticipation of litigation is not evidence and cannot form the basis for the court's factual determination that the documents are protected by the work product doctrine). With the exception of less than approximately twenty documents, Defendants have apparently not relied on the work-product doctrine in withholding materials. These items may similarly require disclosure under the tests articulated in the Eighth Circuit.

defense. *Id.* at 487. In coming to its determination, the *Glenmede* court noted that the party asserting the advice-on-counsel defense "should not be permitted to define selectively the subject matter of the advice of counsel on which it relied in order to limit the scope of the waiver of the attorney-client privilege and therefore the scope of discovery. To do so would undermine the very purpose behind the exception to the attorney-client privilege at issue here-fairness." *Id.* at 486 n.14. The *Glenmede* court explained:

> The party opposing the defense of reliance on advice of counsel must be able to test what information had been conveyed by the client to counsel and vice-versa regarding that advice-whether counsel was provided with all material facts in rendering their advice, whether counsel gave a well-informed opinion and whether that advice was heeded by the client. . . . Here, the advice that [defendant] placed at issue related to the structure of the transaction . . . . Testing the advice of counsel defense regarding [the structure of the transaction requires review of more than tax advice.] We agree with the district court that [defendant] waived the attorney-client privilege as to all communications, both written and oral, to or from counsel as to the entire transaction [and] the back-up documents to the Opinion Letter, which include [attorney]'s internal research and other file memoranda. A review of these internal documents may lead to the discovery of admissible evidence regarding what information had been conveyed to [defendant] about the structure of the buy-back transaction and the advice of counsel in that regard.

Id. at 486-87; *accord Abbott Labs. v. Baxter Travenol Labs., Inc.*, 676 F. Supp. 831, 832 (N.D. Ill. 1987) (finding broad waiver of attorney-client privilege); *Mushroom Assoc. v. Monterey Mushrooms, Inc.*, 24 U.S.P.Q.2d 1767, at *2-5 (N.D. Cal. 1992) (waiver extends not just to particular opinion relied upon but to all documents related to alleged

patent infringement); *Dunhall Pharm., Inc. v. Discus Dental, Inc.*, 994 F. Supp. 1202, 1209-10 (C.D. Cal. 1998) (holding that documents in the client's files that refer or reflect attorney advice are waived and highly relevant; that there was no temporal limit on the waiver so it applied to the entire relevant time period; and that "Defendants have waived the privilege as to all materials or communications by the Defendants to the attorney that was used or considered in preparing the opinion").

Defendants have improperly failed to produce documents within the broad subject-matter waiver created by their reliance on the advice-of-counsel defense. Defendants have inconsistently produced documents that concern integral parts of the challenged 2009 recapitalization, such as advice concerning the "merger," and have withheld numerous documents that appear to be related to the recapitalization based upon the vague descriptions contained in the privilege logs. Defendants have withheld numerous documents concerning attorney advice given pursuant to the B-2 stock offering provided in advance of the recapitalization – even though this offering was part and parcel with the recapitalization itself and the Z-class offering in the post-recapitalization RTI. And though the B-2 documents were largely drafted in connection with the B-1 offering, no B-1 documents have been produced. Defendants have withheld documents conveying attorney advice between themselves (and presumably their comments regarding the same) and the conveyance of information to Defendants' attorneys intended to provide a basis for the legal advice rendered. *See Dunhall Pharm., Inc*, 994 F. Supp. at 1209 (noting that such materials are both waived and highly relevant). Defendants have apparently cherry-picked the attorney advice they are willing to disclose, and this is improper.

Plaintiffs are entitled to full disclosure of the attorney advice received by the Defendants – as well as their own internal communications reflecting or considering that advice – with respect to the 2009 recapitalization.

ii. Defendants' assertion that they are not required to produce all attorney advice received by any and all Defendants concerning the recapitalization is baseless.

Communications between the defendant and *any* lawyer regarding the waived subject matter are subject to discovery. *In re Smirman*, 267 F.R.D. at 224; *In re Echostar Comm'ns Corp*, 448 F.3d 1294, 1299 (Fed. Cir. 2006) (determining that communications with firm that defendant professed not to have relied upon, but who had transmitted advice to defendant, must be produced because they were within the scope of the waiver and stating that "when EchoStar chose to rely on the advice of in-house counsel, it waived the attorney-client privilege with regard to any attorney-client communications relating to the same subject matter, including communications with counsel other than in-house counsel, which would include communications with Merchant & Gould"); *Duhn Oil Tool, Inc. v. Cooper Cameron Corp.*, No. 05-01411, 2009 WL 3381052, at *14 (E.D. Cal. Oct. 15, 2009) (determining that the defendant was required to make disclosures related to advice from all counsel, not just the counsel it professed to have relied upon); *Dunhall Pharm., Inc.*, 994 F. Supp. at 1209 n.3 (stating that scope of waiver includes opinions from other counsel and stating that "[b]y requiring that these materials (if they exist) be produced, one avoids the danger of a favorable opinion being used while a less favorable one remains undisclosed").

Defendants maintain that Kirkland was Defendant Parthenon's counsel and that Piper Rudnick LLP was ABS Capital's counsel. However, those claims are not determinative with regard to whether or not *Defendants* are required to produce communications with Kirkland or with Piper. Parthenon is a Defendant in this matter. It received advice from Kirkland regarding the recapitalization. It has asserted advice from counsel as a defense in this action with respect to that subject matter. The analysis is simple: Defendant Parthenon cannot pick-and-chose which counsel's advice it is going to disclose. As the cases cited above repeatedly concluded, it must disclose all of it. Similarly, Clough is a Defendant in this action and an RTI director. He has asserted the advice-of-counsel defense with regard to the recapitalization. He therefore must turn over all of his attorney-client communications with respect to that broad subject-matter. Finally, Defendant RTI received advice from Kirkland and from Dorsey. The bald assertion that it only "relied" upon Dorsey is both unbelievable and clearly insufficient to preserve these documents from disclosure: the issue is not whether or not RTI relied on Kirkland's advice (though it appears to have done so); the issue is whether it received advice on the 2009 recapitalization that it has not disclosed. *See In re Echostar Comm'ns Corp*, 448 F.3d at 1299 (directing disclosure of communications with Merchant & Gould even though Merchant & Gould was not relied upon). The analysis is simple and pervasively recognized. Plaintiffs are entitled to the documents Defendants have improperly withheld on this basis.

C. THE COMMON INTEREST DOCTRINE PROVIDES NO DEFENSE TO DEFENDANTS' OBLIGATION TO PRODUCE THE REQUESTED DOCUMENTS.

Defendants claim that Kirkland was Parthenon's counsel and Dorsey was RTI's counsel, that Defendants purportedly relied only upon Dorsey with respect to the 2009 recapitalization, and therefore claim that they do not have to disclose their communications with other attorneys. First, the facts belie any assertion that Kirkland was not RTI's attorney. RTI paid for Kirkland's legal fees with respect to their work on the 2009 recapitalization – to the tune of $358,569. Kirkland demanded language in the merger agreement waiving any conflict of interest that arose with respect to its joint representation of RTI and Parthenon. (Alton Aff. Ex. 1 (Hearn Dep. at 166-71).) Kirkland drafted, commented on, and directed the recapitalization and the recapitalization documents.

But even if Kirkland was not RTI's counsel and was instead collaborating with RTI's counsel through some kind of undisclosed common-interest or joint-defense theory, communications with Kirkland have still been waived. First, the analysis is quite simple given the fact that Parthenon, Kirkland's purported client, is also a Defendant and has to disclose all communications on the subject matter of the 2009 recapitalization. Second, the presence of a joint-defense or common-interest agreement does not expand or unwaive the attorney client privilege. The common interest rule "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." *US v. Agnello*, 135 F. Supp.2d 380, 382-83

(E.D.N.Y. 2001) (considering privilege and stating that "[t]he joint defense privilege is not an independent basis for privilege but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party" and that "[o]nly those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected"); *see also In re TeleGlobe Comm'ns, Inc.*, 493 F.3d 345 364-65 (3d Cir. 2007) (holding that the common-interest exception to waiver of the attorney-client privilege by disclosure to a third party only applies to allow disclosures between attorneys to coordinate a joint defense; it does not allow clients to make these disclosures to another's attorney and still maintain the privilege; and further stating that the two parties formulating the joint defense or common interest must have identical legal interests with respect to the subject matter to allow the privilege to be maintained in the presence of a disclosure to a co-defendant) (emphasis added); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997) (considering identity of interests required for application of common interests doctrine).

In the context of communications with an attorney utilized under a joint-defense theory where the attorney client privilege is later waived through the assertion of a reliance-on-counsel defense, communications with a non-party's attorney are also waived. *In re Smirman*, 267 F.R.D. at 224 (directing disclosure of communications with non-party's attorney made pursuant to a common-interest agreement). Thus, even if Kirkland *was not* RTI's counsel with respect to the recapitalization, and even if Parthenon *was not* a Defendant in this action also relying on an advice-of-counsel defense who was also required to disclose these communications, and even if there *was* a

common-interest agreement that would otherwise preserve communications between RTI's and Parthenon's counsel, *the communications relating to the 2009 recapitalization would still have to be disclosed* because any Defendant's communication with any lawyer on the waived subject matter must be conveyed to Plaintiffs as a result of Defendants' decision to assert an advice-of-counsel defense.

CONCLUSION

For all the above reasons, Plaintiffs request that Defendants be compelled to produce the identified documents that they have improperly withheld from production in accordance with the Proposed Order filed herewith.

Dated: June 28, 2010

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