

UNITED STATES DISTRICT COURT
FOR THE 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.

Case No. 1:22-cr-00048-TMB-NC

ORDER SETTING BRIEFING
SCHEDULE REGARDING
ATTORNEY-CLIENT PRIVILEGE
ISSUES

ORDER

Before the Court is Defendant Dennis Mitsunaga's ("Mitsunaga") notice of potential attorney-client privilege issues in this case.¹ Attached to Mitsunaga's notice, Lois Mitsunaga, current President and CEO of Mitsunaga & Associates, Inc. ("MAI") and daughter of Defendant Mitsunaga, provided a declaration ("MAI Declaration") stating that MAI would not waive its privilege regarding its corporate counsel Defendant Sheri Tanaka ("Tanaka").² The MAI Declaration states:

I hereby assert MAI's attorney-client privilege regarding any and all attorney-client privileged communications made between attorney Sheri

¹ Dkt. 435 (Trial Brief) at 2–3.

² *Id.*; Dkt. 435-1 (Lois Mitsunaga Declaration) at 1–2.

Tanaka and any current or former MAI representatives, officers, or employees.

The assertions made in the MAI Declaration alone fail to sufficiently address the issues of attorney-client privilege in this case. The Court invited MAI to support its position regarding attorney-client privilege, but to date, MAI has neither appeared nor provided responsive briefing on this issue.³ MAI is a nonparty asserting its alleged attorney-client privilege in this criminal action, and therefore intervention is appropriate.⁴ If MAI continues to assert a claim of attorney-client privilege in this case, or, if any Defendant seeks or will seek to assert this alleged attorney-client privilege, the Court directs 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. 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.⁵

Regarding notice of this Order to MAI, a nonparty in this case, the Court observes that the MAI Declaration was both a statement of Defendant Mitsunaga's daughter and

³ Dkt. 549 (Order on Government's Motion *in Limine* No. 6) at 13 ("However, 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. The Court will also require responses from the Defendants and the United States.").

⁴ See *United States v. Bergonzi*, 216 F.R.D. 487, 492 (N.D. Cal. 2003) (finding third-party intervention in criminal action appropriate where nonparty corporation asserted attorney-client privilege to challenge production of subpoenaed documents).

⁵ See *United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1041 (D. Nev. 2006) ("The privilege may be waived by implication . . . if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter.") (citing *United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992)).

filed by Mitsunaga himself. Therefore, the Court directs Mitsunaga to convey this Order to Lois Mitsunaga to give timely notice to MAI of the briefing required, and to file a notice of compliance **by 4:30 PM on March 28, 2024.**

Further, the Court directs all Parties to brief MAI's claimed attorney-client privilege and any other issues of attorney-client privilege that may be implicated in this case, and to respond to the initial briefs.

Initial briefs from MAI and all Parties must address all 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. All briefs must include pinpoint citations to any legal authority they would like the Court to consider and are due **on or before 12:00 PM (noon), April 8, 2024.**

Any Response briefs must directly respond to issues raised in the initial briefs and include pinpoint citations to any legal authority they would like the Court to consider. All Response briefs are due **on or before 12:00 PM (noon), April 15, 2024.**

Dated this 27th day of March, 2024.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE