

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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

Plaintiffs,

v.

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

Defendants.

Civil No. 09-cv-02076 MJD/JJG

**DEFENDANTS’  
MEMORANDUM IN  
OPPOSITION TO PLAINTIFFS’  
MOTION TO COMPEL THE  
PRODUCTION OF DOCUMENTS**

**INTRODUCTION**

Plaintiffs’ motion to compel is based on a fundamental misunderstanding of the facts and of the scope of the attorney-client privilege. Plaintiffs contend, without factual basis, that a voluntary limited waiver of the privilege must be expanded beyond its subject matter to other, unrelated advice, beyond the lawyers involved to a separate law firm and, indeed, beyond even the clients involved to a separate entity. That position in all respects is untenable.

In connection with the June 24, 2009 recapitalization merger Plaintiffs challenge in this lawsuit, Restaurant Technologies, Inc. (“RTI” or the “Company”) sought advice from Dorsey & Whitney LLP (“Dorsey”). RTI’s directors also sought advice from Dorsey regarding their fiduciary duties in the circumstances. Parthenon Capital LLC (“Parthenon”), RTI’s largest investor, sought advice from its own counsel, Kirkland &

Ellis LLP (“Kirkland”), regarding the recapitalization merger and had Kirkland draft various related documents and interact on its behalf with RTI’s counsel, Dorsey. By longstanding agreement, RTI was required to—and did—pay the cost of Parthenon’s separate counsel.

When this litigation ensued, the individual officer and director Defendants asserted the defense of reliance on the advice of Dorsey, RTI’s counsel, regarding claims related to their approval of the recapitalization merger. RTI and Dorsey accordingly produced thousands of pages of documents reflecting legal advice in connection with the recapitalization merger that had been initially withheld as privileged. Neither produced documents regarding other subject matters, such as advice received in connection with earlier preferred stock transactions. Nor did Parthenon produce any documents reflecting privileged communications with its separate counsel, Kirkland, regarding any subject matter. Plaintiffs now argue that RTI should produce privileged documents from different time periods relating to other subject matters and that Parthenon should be required to produce its privileged documents. The facts and the law dictate otherwise.

The facts reflect that RTI and the individual Defendants have voluntarily waived the privilege as to a limited subject matter: the advice received from Dorsey regarding the recapitalization merger. There is no evidence of waiver as to other subject matters and none is intended. Nor has there been any waiver at all by Parthenon. Instead, Plaintiffs argue that the subject matter of the recapitalization merger somehow incorporates other, earlier transactions but offer no facts to support that argument. Nor

do they offer any evidence that any individual Defendant received advice from Kirkland on which he relied in carrying out his fiduciary duties as an RTI officer or director.

There is no basis in fact or law for the evisceration of the attorney-client privilege that Plaintiffs have asked this Court perform. Plaintiffs' motion to compel should be denied in its entirety.

### **BACKGROUND**<sup>1</sup>

In the spring of 2009, facing potential bankruptcy and violations of covenants in RTI's lending agreements, a special committee of RTI's Board, and the Board itself, recommended proceeding with a recapitalization merger. Dorsey, corporate counsel to RTI, advised the special committee and the Board regarding the terms of the recapitalization merger, as well as the Board's fiduciary duties with respect to the transaction. Kirkland, which served as counsel to Parthenon, drafted certain documents for the transaction and advocated for certain terms on behalf of its client.

After Plaintiffs brought this lawsuit, RTI, through its officers and directors, decided to assert the advice-of-counsel defense with respect to advice from Dorsey, counsel to RTI and the special committee, relating to the recapitalization merger that occurred on June 24, 2009. As such, RTI has waived the privilege with respect to advice it received from Dorsey regarding the recapitalization. RTI has produced all documents reflecting communications with its counsel, Dorsey, regarding that subject, such

---

<sup>1</sup> A more detailed discussion of the facts in this case can be found in Defendants' Opposition to Plaintiffs' Motion for Punitive Damages (Dkt. Nos. 104-105).

communications falling generally between January 1, 2009 and June 24, 2009.<sup>2</sup> Dorsey has also produced all of its files regarding the recapitalization merger.

The documents produced include all communications with or among counsel from Dorsey regarding the recapitalization merger, including:

- advice provided to the Board of Directors in January 2009 regarding fiduciary duties;
- advice relating to draft term sheets regarding the recapitalization merger that were circulated in February 2009;
- the Special Committee of the Board of Directors and its deliberations, including all communications between counsel and the Special Committee;
- the Board of Directors and its deliberations, including all communications between counsel and the Board of Directors;
- the B-2 preferred stock offering done in April 2009;
- the Proxy Statement Offering Memorandum that went to shareholders on May 13, 2009 describing the recapitalization merger and the Class Z stock offering;
- the June 3, 2009 shareholder presentation discussing the recapitalization merger;
- the shareholder vote on the recapitalization merger;
- the closing of the recapitalization merger on June 24, 2009;
- the Class Z stock offering that was part of the recapitalization merger;
- the merger agreement by which the recapitalization was accomplished;
- the Second Amendment and Waiver to Note Purchase Agreement dated June 24, 2009, that was a result of negotiations with lenders in 2009 to waive defaults to the existing Note Purchase Agreement; and
- all other agreements or documents that were part of the recapitalization merger, including the Management Services Agreement and the Release Agreement.

---

<sup>2</sup> Dorsey & Whitney has acted as corporate counsel to RTI for several years and was specifically engaged to assist with the recapitalization merger in March 2009. Declaration of Michelle S. Grant (“Grant Decl.”) at ¶ 2.

RTI and Dorsey produced approximately 17,000 pages that otherwise would have been withheld on the basis of attorney-client privilege. In addition, Plaintiffs deposed the lead transaction attorney from Dorsey for over ten hours as well as an associate that worked on the recapitalization merger. Defendants did not raise any privilege objections during these depositions.<sup>3</sup>

RTI has not asserted an advice of counsel defense with respect to any other subject matter, including the B-1 preferred stock offering done in March and June 2008; the B-2 preferred stock offering done in December 2008; the sale process in 2008 (referred to as Project French Fry); negotiations with lenders with respect to the Note Purchase Agreement entered into in May 2008; a letter of credit agreement with Cargill, a supplier of RTI, done in May 2008; and communications with shareholders unrelated to the recapitalization merger. *See* Alton Aff. Ex. 13.

Neither Parthenon, nor its representatives on the RTI Board (Messrs. Rutherford, Grad and Sadek), have asserted the advice-of-counsel defense as to any legal advice

---

<sup>3</sup> Communications with Dorsey & Whitney from 2009 that have been withheld relate to separate subject matters, including:

- the B-2 preferred stock offering that occurred in December 2008;
- investor communications, including responses to complaint letters received by certain investors;
- contract negotiations with Burger King and Jack in the Box (which Plaintiffs agree have not been waived);
- a books and records request made by Plaintiffs on May 22, 2009 (which Plaintiffs agree have not been waived);
- communications with Plaintiffs' counsel in late May and early June 2009 in which litigation counsel was involved and which were a precursor to this lawsuit; and
- the June 3, 2009 letter from Mr. Tate to shareholders.

RTI has not asserted the advice-of-counsel defense with respect to any of these subject matters.

provided by its counsel, Kirkland, relating to any subject matter. Similarly, Phil Clough, an officer of ABS Capital Partners (“ABS”) and member of RTI’s board of directors, has not asserted the advice-of-counsel defense as to any legal advice provided by ABS’s counsel, Piper Rudnick LLP and Saul Ewing LLP, as to any subject matter.<sup>4</sup>

### **ARGUMENT**

Plaintiffs’ motion to compel should be denied because the documents withheld from Defendants’ production contain privileged communications that are outside the narrow scope of RTI’s advice-of-counsel waiver because they concern different subject matters on which there has been no waiver.

#### **I. THE DOCUMENTS WITHHELD ARE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.**

To the extent Plaintiffs are arguing that Defendants have failed to show that the documents on Defendants’ logs are privileged, *see* Pls.’ Mem. at 17, Plaintiffs have not only failed to satisfy their obligation to meet and confer on the issue, they have also failed to identify specific documents that they believe are not privileged. Indeed, they cannot.

The documents that are on Defendants’ privilege logs and that are the subject of Plaintiffs’ motion are protected by the attorney-client privilege. The majority of documents withheld reflect “confidential disclosures of a client to his attorney for the purpose of obtaining legal representation.” *In re Grand Jury Proceedings*, 402 F. Supp.

---

<sup>4</sup> The documents Plaintiffs claim have not been produced that relate to the Class Z stock offering, the merger agreement, and the release, *see* Pls.’ Mem. at 10-11, are all communications between Parthenon, ABS, and their separate counsel. *See* Alton Aff. Ex. 29 at Doc. Nos. 54, 43, 62, 69.

2d 1066, 1067 (D. Minn. 2005); *see also Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 440 (Minn. 1998) (defining the attorney-client privilege). In addition, some of the documents withheld include protected inter-attorney communications and attorney's notes and memoranda, which include legal advice or confidential information received from the client. *See, e.g., In re U.S. Healthcare, Inc. Sec. Litig.*, No. 88-0559, 1989 WL 11068, at \* 1 (E.D. Pa. Feb. 8, 1989) ("As a general rule, confidential information disclosed by a client to an attorney for purposes of obtaining legal advice is protected. The privilege also attaches to an attorney's communications to a client, as well as to inter-attorney communications, attorney's notes and memorandum, which include legal advice or confidential information received from the client."); *Green v. I.R.S.*, 556 F. Supp. 79, 85 (N.D. Ind. 1982) (holding that inter-attorney communications are entitled to the same degree of protections from disclosure as the actual communication to the client itself); *Natta v. Zletz*, 418 F.2d 633, 637 n.3 (7th Cir. 1969) (same).

Defendants have provided Plaintiffs with detailed privilege logs, which "for each document withheld listed the type of document, the date of creation, the author, the recipient, the subject matter, and the applicable privilege." *Triple Five of Minn. v. Simon*, 212 F.R.D. 523, 528 (D. Minn. 2002). Privilege logs that provide such information meet the requirements of the Federal Rules of Civil Procedure and have been deemed adequate in this District. *See id.* (concluding that by providing such logs, "Defendants have met their burden"); *see also* Fed. R. Civ. P. 26(b)(5)(A) (requiring the party claiming the privilege to "describe the nature of the documents . . . in a manner that, without revealing information itself privileged or protected will enable other parties to assess the claim").

Plaintiffs seek 75 percent of the documents on Defendants' privilege log, but have not identified one single document that was not a confidential communication with a lawyer for the purpose of seeking legal advice, inter-attorney communications, or attorney's notes and memoranda. Any argument that Defendants have failed to satisfy their burden to establish that the withheld documents are protected from disclosure should be rejected.<sup>5</sup>

**II. THE SCOPE OF THE SUBJECT MATTER WAIVER WAS NARROW AND DOES NOT INCLUDE THE COMMUNICATIONS COMPLAINED OF BY PLAINTIFFS.**

Plaintiffs' real argument instead appears to be that Defendants have withheld documents "that pertain[] to a waived subject matter." *See* Pls.' Mem. at 17. As discussed above, RTI asserted the advice-of-counsel defense with respect to advice it received from its counsel, Dorsey, relating to the June 24, 2009 recapitalization merger. To that end, RTI and Dorsey produced 17,000 pages of privileged documents relating to the recapitalization merger. Contrary to Plaintiffs' assertions, RTI did not "selectively determine which documents are to be disclosed" and only disclose "favorable" documents. RTI has disclosed all communications with Dorsey regarding the recapitalization merger.

---

<sup>5</sup> In an effort to resolve this dispute, Defendants have provided Plaintiffs with revised descriptions for many documents, including the ones referenced in Plaintiffs' Mem. at 11, to further clarify that any documents withheld are not related to the recapitalization merger. *See* Grant Decl. ¶ 9, Exs. 3-10.

Defendants did not produce, however, documents that fell outside of the subject matter that was waived by the advice-of-counsel defense, including the following separate subject matters:

- The B-1 stock offering that occurred in March and June 2008, a full year before the recapitalization merger. Plaintiffs agree that this transaction was not part of the recapitalization merger, but rather argue that “language, drafting, and attorney advice was transplanted from the B-1 offering materials for use in the B-2 offering.” Pls.’ Mem. at 10. This cannot be the test. If that were the case, the waiver would extend back to 2001 when the original Series A-1 preferred stock offering was done (an offering in which Dorsey was not even involved) because the later offerings amended and restated those original agreements. *See* Dkt. No. 105 at Ex. 8-9, 18-19, 22-23, 33, 46. Furthermore, to the extent Plaintiffs are referring to the offering memorandum that was provided to all shareholders for the Series B-1 stock offering, no such memorandum was done for the Series B-2 stock offering in December 2008. There was no “advice” that was “reused.”
- The B-2 stock offering that occurred in December 2008.<sup>6</sup> This was a separate transaction that included separate agreements not part of the recapitalization merger. *See* Alton Aff. Ex. 1 at 23 (testimony of Dorsey partner, Tim Hearn, stating “the first B-2 round was done *in anticipation* of the recapitalization” (emphasis added)); Dkt. No. 105 at Ex. 46. RTI has not asserted the advice-of-counsel defense with respect to the B-2 stock offering or the Eighth Amended and Restated Certificate of Incorporation that was done in relation to this stock offering in December 2008. *See* Alton Aff. Ex. 29 at Record Nos. 45-46.<sup>7</sup>
- Debt financings done in 2006 and 2007, the Amended Note Purchase Agreement negotiated and entered into in May 2008, and an additional note issuance in October 2008. Plaintiffs make no argument why these transactions relates to the recapitalization merger nor can they. RTI has not

---

<sup>6</sup> RTI has produced documents relating to the second B-2 preferred stock offering that was done in April 2009 after the recapitalization merger was approved by the special committee and the Board of Directors.

<sup>7</sup> Plaintiffs inaccurately state that the Eighth Amended and Restated Certificate of Incorporation was executed in connection with the 2009 recapitalization. It was the Ninth Amended and Restated Certificate that was done as part of the recapitalization. *See* Dkt. No. 11, Ex. 3 at Ex. H (proxy materials).

asserted the advice-of-counsel defense with respect to negotiations with lenders or any debt financings done prior to 2009.<sup>8</sup>

- Letter of Credit agreement with Cargill in May 2008. *See, e.g.*, Alton Aff. Ex. 29 at Record Nos. 201, 207. Again, Plaintiffs make no argument why this transaction relates to the recapitalization merger, but have placed a “black mark” next to many (but not all) of these documents.
- General legal advice relating to corporate matters prior to 2009. *See, e.g.*, Alton Aff. Ex. 29 at Record Nos. 108-109, 205-206.
- Communications with investors prior to 2009, including a December 5, 2008 letter to shareholders, that are not related to the recapitalization merger. *See, e.g.*, Alton Aff. Ex. 29 at Record No. 60; Pls.’ Mem. at 11. RTI is not asserting the advice-of-counsel defense with respect to any communications with investors prior to 2009.
- Communications with Plaintiffs’ counsel in late May and early June 2009 in which litigation counsel was involved and which were a precursor to this lawsuit. *See, e.g.*, Alton Aff. Ex. 29 at Record Nos. 18, 342-34; Ex. 31 at RTI175424, RTI188551, RTI182453.

Plaintiffs’ attempt to expand the scope of the waiver by seeking documents that do not relate to Dorsey’s advice on the recapitalization merger is inconsistent with the well recognized principle that the “doctrine of subject matter waiver is narrowly construed.” *In re Commercial Fin. Servs., Inc.*, 247 B.R. 828, 847-48 (N.D. Okla. 2000). Thus, “[d]isclosure of privileged materials concerning one subject matter does not waive privileges attaching to materials concerning other subject matters.” *Id.* at 847 (citing *United States v. Nobles*, 422 U.S. 225, 240 (1975)). Many courts have recognized that the subject matter of the waiver is limited to the communications and documents relating to the narrow topic of the waiver. *See, e.g.*, *Lee Nat’l Corp. v. Deramus*, 313 F. Supp. 224 (D. Del. 1970) (concluding that the subject matter of the waiver was limited to the

---

<sup>8</sup> RTI has produced all privileged communications relating to the negotiations with lenders in 2009 as these relate to the recapitalization merger.

specific topic of the communications revealed by the deponent); *Naglak v. Penn. State Univ.*, 133 F.R.D. 18, 23 (M.D. Pa. 1990) (concluding that plaintiff's contention that she had been erroneously urged to settle a lawsuit based on her attorney's advice did not permit a blanket disclosure of all communications between her and her attorney).<sup>9</sup>

Plaintiffs' attempt to broaden the scope of the narrow waiver of the attorney-client privilege in an effort to get thousands of documents not in any way relating to the 2009 recapitalization merger should be denied.

### **III. RTI'S WAIVER DID NOT WAIVE OTHER DEFENDANTS' PRIVILEGE WITH THEIR ATTORNEYS.**

Plaintiffs also seek attorney-client privileged communications involving other law firms, specifically Kirkland. This request should be denied because the documents withheld reflect privileged communications between separate clients and their attorneys.

#### **A. RTI's Counsel Was Dorsey & Whitney.**

As a basis for disclosure of privileged communications, Plaintiffs erroneously assert that Kirkland represented RTI in connection with the recapitalization merger. *See* Pls.' Mem. at 13, 24. As Plaintiffs know, this is not true. Dorsey was retained as RTI's

---

<sup>9</sup> Plaintiffs' cases are thus inapposite because they deal with clients who disclosed part of a privileged communication, but not all of it. *See, e.g., Swanson v. Domning*, 86 N.W.2d 716, 722 (Minn. 1957) (concluding that once client had waived the privilege, the attorney could be called to "rebut or complete the conversation on that matter"); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 487 (3d Cir. 1995) (concluding that client could not limit subject matter to tax advice received on transaction, but instead had to disclose all communications between the client and its counsel regarding the entire transaction); *United States v. Workman*, 138 F.3d 1261, 1263-64 (8th Cir. 1998) (concluding that client could not introduce certain aspects of his conversation with his lawyer but not others).

counsel during the recapitalization merger while Kirkland represented Parthenon, a private equity firm that is a significant investor in RTI. *See* Alton Aff. Ex. 1 at 166.

Despite knowing these facts, Plaintiffs attempt to argue that an attorney-client relationship was established between Kirkland and RTI because RTI paid some of Kirkland's fees or because Kirkland drafted certain documents relating to the recapitalization merger. *See* Pls.' Mem. at 25. Neither of these facts created an attorney-client relationship.

First, various agreements, including the A-1 preferred stock offering agreements approved by Mr. Tate when he was a member of RTI's board in 2001, provided that RTI was to pay for Parthenon's legal fees. *See* Dkt. No. 105, Ex. 9 at § 9.5. Such an arrangement is not unusual, nor does it establish an attorney-client relationship.<sup>10</sup> The existence of an attorney-client relationship and privilege is not dependent on the client himself paying the attorney. *In re Bame*, 251 B.R. 367, 376 n.6 (Bankr. D. Minn. 2000). The relationship and the privilege may exist even though the attorney's fees are paid by a third party. *Id.* Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. *See* Minn. R. Prof. Conduct 1.8 cmt. 11. Thus, where another party pays the client's legal fees, there is no reason to conclude that such an arrangement would fail to create an attorney-client relationship between the client and the attorney or that an attorney-client relationship would be established between the attorney and the third party who pays the legal fees.

---

<sup>10</sup> RTI also paid the legal fees of lenders with respect to the various financing agreements. *See* Dkt. No. 105, Ex. 25 at § 12.1.

Indeed, Comment 13 to Rule 1.7 specifically provides that when a lawyer is paid from a source other than the client, the arrangement must “not compromise the lawyer’s duty of loyalty or independent judgment to the client.” The fact that RTI paid Parthenon’s legal fees does not establish an attorney-client relationship between RTI and Kirkland.

Second, even though Kirkland drafted certain documents during the recapitalization merger, Kirkland was not acting as RTI’s counsel with respect to the transaction. *See* Alton Aff. Ex. 1 at 166-171. Kirkland represented Parthenon, a private equity investor with a significant stake in the Company. In such circumstances, it is common to have the equity investor’s counsel prepare some of the documents for the transaction and for that counsel to have input on all such documents.

Because Kirkland was not acting as RTI’s counsel, RTI produced all communications between Kirkland on the one hand and RTI and/or Dorsey on the other relating to the recapitalization merger long before RTI waived the privilege.<sup>11</sup> RTI has never claimed that such communications were protected by the attorney-client privilege. *See, e.g.*, Alton Aff. Exs. 19, 20, 24. As explained below, RTI’s waiver of the privilege with respect to advice it received from its counsel did not, and could not, result in a waiver of the privilege with respect to Kirkland’s legal advice to its own clients, Parthenon and its principals.

---

<sup>11</sup> Though Defendants have produced all communications between Dorsey and Kirkland relating to the recapitalization merger, certain communications between the firms relating to potential litigation have been withheld under the common interest doctrine.

**B. RTI Did Not Have the Authority to Waive Other Defendants' Privilege.**

RTI asserted the advice-of-counsel defense with respect to Dorsey's advice to it concerning the recapitalization merger. Because RTI acts through its board of directors, any privileged communications between Dorsey and individual officers and directors regarding the recapitalization merger have also been waived. However, to the extent Parthenon and ABS had separate counsel, communications between them and their lawyers remain privileged, and RTI did not—and could not—waive the privilege as to those communications.

The attorney-client privilege belongs to the client and cannot be waived unilaterally by the attorney. *See, e.g., Swanson*, 86 N.W.2d at 722 (“The attorney-client privilege is personal to the client.”). “[C]orporations, like individuals, enjoy the protections of the attorney-client privilege.” *Citibank, N.A. v. Andros*, 666 F.2d 1192, 1195 (8th Cir. 1981) (citing *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 608 (8th Cir. 1978)). The privilege, however, belongs to the corporation. *Id.* Therefore, the power to assert or waive the privilege belongs to management, not the individual officers of the corporation. *Id.*; *Meredith*, 572 F.2d at 611 n.5; *see also Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) (“the power to waive the attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors”). Managers must exercise the privilege in a manner “consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals.” *Weintraub*, 471 U.S. at 348-49 (citation omitted).

Here, RTI waived its privilege with respect to advice it received from RTI's lawyers, Dorsey, regarding the 2009 recapitalization. RTI did not waive, nor did it have the authority to waive, the attorney-client privilege that attaches to communications between other clients and their lawyers.

Moreover, Parthenon has not asserted an advice-of-counsel defense, and therefore has not waived any privilege that attaches to communications it had with its lawyers, Kirkland. Nor have any of the individual defendants, acting in their capacities as shareholders (rather than as members of the RTI board) raised the advice-of-counsel defense with respect to any advice they received from Kirkland. Plaintiffs' motion to compel should be denied to the extent it seeks communications between Parthenon and ABS and their separate counsel.<sup>12</sup>

**C. Defendants Are Not Attempting to Use the Privilege as Both a Sword and a Shield.**

Contrary to Plaintiffs' argument that Defendants are attempting to shield certain communications from disclosure because they are unfavorable to Defendants, RTI has disclosed all communications from its lawyers relating to the subject matter covered by the advice-of-counsel defense. The communications withheld are those between a different client—Parthenon—and its individual counsel, Kirkland. As shown above, RTI did not receive legal advice from Kirkland regarding the recapitalization merger; therefore, there is no advice that RTI has failed to disclose on the waived subject matter.

---

<sup>12</sup> Even if the Court finds that a waiver of the privilege between Kirkland and Parthenon or between ABS its counsel, has occurred, such a waiver would only be as to communications relating to the recapitalization merger. This is a small portion of the 95 percent of such communications that Plaintiffs seek.

Plaintiffs' cases are inapposite because in every case, the issue was whether an individual client could shield advice received from its lawyers on the same subject matter, even though the advice might be harmful to the client's case. None of the cases involve a situation where one party's decision to waive the privilege meant that another party's privilege on the same subject matter had been waived. *See Minn. Specialty Crops, Inc. v. Minn. Wild Hockey Club, L.P.*, 210 F.R.D. 673, 678 (D. Minn. 2002) (concluding that client had to disclose all legal advice it received concerning legality of its use of a trademark); *In re EchoStar Comm'ns Corp.*, 448 F.3d 1294, 1299 (Fed. Cir. 2006) (concluding that when defendant asserted advice-of-counsel defense to a charge of willful infringement of a patent, it waived its privilege with its other lawyers "relating to the same subject matter"); *In re Smirman*, 267 F.R.D. 221 (E.D. Mich. 2010) (similar); *Abbott Labs. v. Baxter Travenol Labs.*, 676 F. Supp. 831, 832 (N.D. Ill. 1987) (similar); *Duhn Oil Tool, Inc. v. Cooper Cameron Corp.*, 2009 WL 3381052, at \*14 (E.D. Cal. Oct. 15, 2009) (similar); *Dunhall Pharm., Inc. v. Dscus Dental, Inc.*, 994 F. Supp. 1202, 1209 (C.D. Cal. 1998) (similar); *Mushroom Assoc. v. Monterey Mushrooms Inc.*, 1992 WL 442892 (N.D. Cal. May 19, 1992) (similar).

RTI has produced all communications with its counsel, Dorsey, regarding the June 2009 recapitalization.<sup>13</sup> Accordingly, Plaintiffs' motion to compel privileged communications between other defendants and their individual counsel should be denied.

**CONCLUSION**

For all the reasons set forth above, Defendants respectfully request that Plaintiffs' Motion to Compel the Production of Documents be denied with prejudice.

Dated: July 8, 2010

DORSEY & WHITNEY LLP

By s/ Michelle S. Grant

James K. Langdon #0171931  
langdon.james@dorsey.com  
Michelle S. Grant #0311170  
grant.michelle@dorsey.com  
Gretchen A. Agee #0351532  
agee.gretchen@dorsey.com  
50 South Sixth Street, Suite 1500  
Minneapolis, MN 55402-1498  
Telephone: (612) 340-2600

*Attorneys for Defendants*

---

<sup>13</sup> Plaintiffs' suggestion that RTI has waived its advice-of-counsel defense should be rejected, *see* Pls.' Mem. at 20 n.7, not only because Defendants have produced all documents that fall within the scope of the waiver, but also because fairness dictates that the defense cannot be waived while discovery is ongoing. *See LG Philips LCD Co., Ltd. v. Tatung Co.*, 243 F.R.D. 133, 138-39 (D. Del. 2007) (finding no waiver of advice-of-counsel defense where, despite the fact that the discovery deadline had passed, the parties were still completing outstanding factual discovery).