SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

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J.P. MORGAN CHASE & CO. and JP MORGAN CHASE BANK,

Plaintiffs,

-against-

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., et al.,

Defendant.

---x

INDEX NO. 600261/2003

MOTION DATE

MOTION SEQ. NO. 009

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is

ORDERED that the motion is decided in accordance with the accompanying Decision and Order.

Dated: August 20, 2004

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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J.P. MORGAN CHASE & CO. and JP MORGAN CHASE BANK,

Plaintiffs,

Index No. 600261/2003

-against-

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., et al.,

DECISION and ORDER

Defendant.

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MOSKOWITZ, KARLA J:

Motion sequence numbers 9, 10, 11, 12, 13 and 14 are consolidated for disposition. The court detailed the facts of this case in a decision and order dated February 9, 2004 (the "prior order") and therefore need only repeat those facts necessary to this decision. The court presumes familiarity with the prior order.

This is a declaratory judgment action arising from a dispute over whether plaintiffs J.P Morgan Chase & Co., and JP Morgan Chase Bank (collectively "Plaintiffs" or "JPMC") are entitled to insurance coverage for defense costs and amounts they paid to settle certain claims in an underlying consolidated action. Defendants are insurers who provided plaintiff with certain insurance coverage for the time period at issue. In the underlying action, non-party Sumitomo Corporation sued Chase Manhattan Bank ("Chase"), now known as JP Morgan Chase Bank, to recover approximately $532 million arising from secret loans Chase allegedly made to a trader

named Yasuo Hamanaka thereby enabling Hamanaka to conceal $2.6 billion in unauthorized, off book trading. In the separate action that the district court later consolidated with the action against Hamanaka, Sumitomo sued JP Morgan, Morgan Guaranty (collectively "Morgan") and Keith Murphy ("Murphy"), a Vice President and Managing Director of Morgan. Sumitomo alleged that Morgan, through Murphy, engaged in a series of derivative transactions with Hamanaka from 1993 to 1996 and that these transactions were actually loans with extremely high effective interest rates.

On April 1, 2002, the parties settled the consolidated actions for a total of $125 million. A major issue in this case is whether the settlement of the Sumitomo action represents Morgan and Chase's disgorgement of profits they wrongfully acquired. The insurers contend that this sort of payment is not recoverable through insurance.

These six motions, five by various defendants and one by plaintiff, all seek discovery. The court decided motions 12 and 14 on the record at oral argument on March 4, 2004. With respect to motion sequence number 14, the court ordered plaintiff to respond to two interrogatories seeking disclosure of information relating to certain damage calculations. In motion sequence number 12, JPMC moved, *inter alia*, to compel the production of documents some of which the insurers contended were privileged. The court resolved most of this motion on the record at the hearing and ordered some of the insurers to produce a limited set of documents. The court also agreed to perform an *in camera* inspection of certain documents the insurers contended were privileged, but that JPMC suspected involved business communications. This decision and order discusses the results of that in camera inspection. In addition, this decision and order addresses the remaining motions: 9, 10, 11 and 13.

I. National Union's motion to compel JP Morgan to produce documents JPMC has with held as privileged (Motions 10, 11 and 13).

In motion number 13, insurance companies National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), AIU Insurance Company ("AIU"), Lexington Insurance Company ("Lexington") and American International Surplus Lines Insurance Company ("AISLIC") (collectively the "insurers") seek several categories of documents from JPMC. The first group of documents the insurers concede are privileged, but claim that JPMC has waived that privilege by placing the contents at issue in this lawsuit. The second group of documents the insurers seek involve those documents that JPMC shared with the Federal Reserve Bank and the New York State Department of Banking. The final category of documents the insurers seek are those that JPMC has withheld on the grounds of privilege but that the insurers contend involve statements to opposing counsel or contain statements of objective facts and, therefore, are not privileged.

A. Waiver of Privilege By Virtue of this Suit for Coverage

There are three groups of privileged documents that the insurers agree are privileged but contend that JPMC has waived any applicable privileges by bringing this lawsuit for coverage. The court will deal with each group independently, but notes at the outset that the insurers' suggestion, that merely by bringing this lawsuit JPMC has waived privilege, is misplaced. (*See, e.g., Occidental Chem. Corp. v. Hartford Accident & Indem. Co.*, 184 AD2d 1038-1039).

1. Settlement Documents

The first group of documents concern JPMC's discussions with its counsel about its settlement strategy in the Sumitomo litigation. The insurers contend that JPMC has waived the

privilege by seeking reimbursement from them for the settlement. First, as noted earlier, this contention is misplaced. Moreover, there is no reason to invade the privilege here as the insurers can obtain the same information from other, non-privileged sources. (*See Long Island Lighting Co., v. Allianz Underwriters Ins. Co.*, 301 AD2d 23, 33 [compulsion unnecessary where information concerning LILCO"s knowledge of its potential liability was available from numerous non-privileged sources]). At issue is the type of claims the Sumitomo settlement meant to settle. The insurers will be able to obtain discovery about JPMC's settlement negotiations with Sumitomo representatives. Thus, there is no reason to discover JPMC's internal discussions with its own counsel that bear upon how the parties in the underlying litigation came to their agreement.

2. Documents Concerning the Indemnification of Murphy

The second group of materials the insurers seek relates to the indemnification of Keith Murphy who was a Vice President and Managing Director of JP Morgan at the time of the alleged transactions underlying the Sumitomo Settlement. Again, there is no dispute that these documents are privileged. However, the insurers contend that, to the extent there was a conflict between JP Morgan and Murphy, JPMC has waived any applicable work product or joint defense privilege. (Insurer Mem. at 16). JPMC contends that the documents the insurers seek by this motion are Morgan's internal communications on the issue of Murphy's indemnification as to which JPMC is not even claiming a joint defense privilege. (Opp. Mem at 15 n. 8). To the extent that the documents are JPMC internal communications, it is axiomatic that there is no waiver from sharing the materials. To the extent that JPMC, Morgan, Chase or Murphy shared materials, the court addresses that issue in the discussion of motion number 9.

The insurers do not appear to be arguing "at issue" waiver with respect to the Murphy documents. However, to the extent the insurers intended to argue this point, the court rejects it.

The directors and officers policy affords coverage for settlement costs that the insured, here Murphy, became "legally obligated to pay." However, the Sumitomo settlement agreement does not recite any obligation from Murphy. Because of the lack of inclusion of an obligation from Murphy, the insurers are concerned JPMC is trying to use the Directors and Officers policy to cover JPMC's own corporate liability.

The documents are obviously relevant to this lawsuit. However, the insurers can discover what portion, if any, of the settlement the parties allocated to Murphy without invading JPMC's private, internal communications with its counsel or work product of counsel. For example, the insurers can question Sumitomo representatives concerning what portion of the settlement they understood was for Murphy. Therefore, this part of the insurers' motion to compel is denied.

3. Documents Concerning the Timing of Chase's Knowledge of the Improper Lending Practices

The insurers contend that the policy that Lloyd's of London issued to Chase contains an exclusion that would preclude coverage for acts, errors and omissions about which Chase's Risk and Insurance Management Department ("RIMD") became aware before November 30, 1996. The insurers also contend that, to the extent the documents on JPMC's privilege log reflect what its RIMD knew about Chase's trading with Sumitomo prior to November 30, 1996, JPMC has waived any otherwise applicable privilege by bringing this lawsuit for coverage. As stated earlier, merely bringing this lawsuit does not mean that JPMC has waived privilege. Further, the RIMD documents specifically would support an insurer defense (i.e. the exclusion for knowledge

before November 30, 1996) and, therefore, it is the insurers, not JPMC who have placed this matter in issue. Finally, the insurers can again glean the information they need from non-privileged sources, such as depositions of RIMD personnel. Thus, there is no need to invade the privilege.

However, there is a concern that certain of the documents in this category, such as board meeting minutes, may not be privileged in the first instance because they involve business discussions. To the extent that documents in this category are not patently privileged, the court orders an *in camera* inspection to make a final determination as to their privileged nature.

B. Waiver As To Information Produced to Government Investigating Authorities

In 1996, Morgan shared certain materials with the Federal Reserve Bank ("FRD") and the New York State Banking Department ("NYSBD") in response to requests for information these regulators made about Morgan's commodities trading. Some of the materials were privileged. Morgan produced those privileged materials pursuant to a strict agreement of confidentiality that contained a clause stating that production did not amount to a waiver of applicable privileges.

The insurers contend that Morgan's voluntary disclosure to the FRD and the NYSBD constitutes a waiver of the attorney-client and work product privileges because the government agencies were third parties with whom Morgan stood in an adversarial position as a subject of investigation. JPMC concedes that Morgan shared documents with these agencies, but contends that the privilege is preserved for two reasons. First, JPMC points to the confidentiality agreement that contained a non-waiver clause. Second, JPMC contends that Morgan and the regulators shared a strong common interest in ensuring the integrity of Morgan's operations and therefore Morgan did not share privileged documents with an adverse party.

In general, a party waives the attorney-client privilege by voluntary disclosure to third parties. (*NY Times Newspaper Division of New York, v. Lehrer, McGovern Bovis, Inc.*, et al 300 AD2d 169). The work product privilege is harder to waive by disclosure. Because the purpose of the privilege is to protect the work of an attorney in preparation for litigation, there is usually no waiver unless the disclosure risks the material winding up in the hands of an adversary. (*See Bluebird Partners, L.P. v. First Fidelity Bank, N.A., New Jersey et al*, 248 AD2d 219, 225).

However, some courts have refused to recognize a waiver when a client shares privileged information with the government under a confidentiality agreement while cooperating during an investigation. (*See, e.g., In re Leslie Fay Companies, Inc., Securities Litigation*, 161 F.R.D. 274, 284 [SDNY 1995] [privilege of documents underlying audit committee's investigation into complaints of securities fraud not waived where shared with government under confidentiality agreement]; *Maruzen Co., v. HSBC USA, Inc.*, 2002 WL 1628782 at *1 [SDNY July 23, 2002] [no waiver of work product protection because defendants had obtained explicit confidentiality agreements from each of the governmental agencies to which they had produced the privileged documents]). These courts accept the possibility of a "selective waiver" of the attorney-client and work-product privileges.

Selective waiver was the recent subject of an unpublished decision of the Delaware Court of Chancery. In *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622 (Del. Ct. Ch. Nov. 13, 2002) the court protected a report that defendant's outside counsel, working with accountants, wrote for the defendant's audit committee in conjunction with an internal investigation. The defendant later shared that report with the Securities and Exchange Commission ("SEC"), but had entered into a confidentiality agreement with the SEC prior to disclosure.

The Delaware court upheld the privilege analyzing two factors: (1) whether the defendant had a reasonable expectation that its disclosures would remain confidential; and (2) whether the court should sanction an expectation of privacy when it arose from an attempt to cooperate with a law enforcement agency investigation. With respect to the first factor, the court determined that McKesson had a reasonable expectation that disclosure to the SEC under a confidentiality agreement would not "reach the hands of its other adversaries." (Id. at 7). The court then determined that it should sanction the expectation of privacy to encourage cooperation with government agencies. The court reasoned that the plaintiffs were in no worse position than had disclosure never occurred and found "no good reason why an opponent should borrow the wits of its adversary simply because that adversary was cooperating with a law enforcement agency." (Id. at * 10). The court also found that the plaintiff shareholders benefitted from the corporate compliance that upholding the privilege encouraged. (Id. at * 11).

Other courts have rejected selective waiver entirely. In *In re Columbia/HCA Healthcare*, 293 F.3d 289 (6th Cir. 2002), the Sixth Circuit Court of Appeals refused to protect privileged documents that defendant, a provider of health insurance, had previously furnished to the Department of Justice under a stringent confidentiality agreement. The Sixth Circuit reasoned that once there was disclosure to a third party, the policy behind the attorney-client privilege, the promotion of unfettered communication between attorney and client, no longer mattered. The court also found waiver with respect to work product materials because the disclosure had been to a potential adversary. Although the court recognized the importance of encouraging cooperation with government agencies investigating misconduct, it doubted that finding waiver would significantly reduce cooperation with the government. The court also raised the concern

that, by entering into confidentiality agreements, the investigatory agencies were actually assisting wrongdoers in concealing information from the public. (Id. at 303). Further, the court recognized, without explanation, that upholding the privilege would allow the defendant to use the privilege as a sword, rather than a shield. (Id at 307).

Other Circuit Courts of Appeal have rejected selective waiver in a variety of contexts. (*See also., Permian Corp. v. U.S.* 665 F.2d 1214 [DC Cir. 1981] [disclosure of attorney-client communications, even pursuant to a confidentiality agreement, waives the privilege because that privilege assumes that the legal advice will remain strictly confidential]; *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 [1st Cir. 1997][in case that did not involve a confidentiality agreement, university forfeited attorney-client and work product privileges by disclosing documents to Defense Contract Audit Agency].

Most recently, the United States District Court for the District of Massachusetts ruled against selective waiver in the context of an agreement to keep the documents confidential. *(See In re Lupron ® Marketing and Sales Practices Litigation*, 313 FSupp2d 8, 10 [D. Mass. April 16, 2004] [TAP Pharmaceutical's voluntary production to prosecutors of privileged material waived attorney-client and work product protection even though prosecutors agreed to keep the material confidential]).

In still another variation on a theme, the Second Circuit Court of Appeals advocates a case by case approach to selective waiver. In a case that did not involve a confidentiality agreement, *In re Steinhardt Partners*, L.P. 9 F. 3d 230 (2d Cir. 1993), the court found that a treasury note trader's voluntary submission of legal memoranda to the SEC waived the work product privilege. The court reasoned that, because the trader was the subject of an SEC

investigation, the trader was in an adversarial position to the SEC. Therefore, disclosure to the SEC involved voluntary disclosure to an adversary and waiver of the privilege. The court did leave open the possibility of selective waiver in situations "where the disclosing party and the government may share a common interest in developing legal theories and analyzing information or situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials." (Id. at 236, emphasis added). However, the court also warned that "selective assertion of the privilege should not be merely another brush on the attorney's palette, utilized and manipulated to gain a tactical or strategic advantage." (Id. at 235).

This court adopts the case by case approach that the Second Circuit advocates. To encourage cooperation with government agencies is of course important, particularly in light of the recent spate of corporate fraud and abuse. However, I doubt that finding waiver in appropriate circumstances would impact that cooperation, as far as the Delaware court believes, nor have as little impact as the Sixth Circuit states. This is because corporations will continue to cooperate with the government with or without the disclosure of privileged materials to the extent it is in their interest to do so. This will naturally depend upon the nature of the materials and the gravity of the situation.

Turning to the case at hand, the court will not uphold the privilege in this context. First, the court rejects the plaintiffs' notion that it had a common interest with the FRB and the NYSBC. These agencies were clearly in an adversarial relationship with Morgan, as the disciplinary action these agencies took against the corporation as a result of their investigation amply demonstrates. (Genova Aff. Ex B.). Further, these materials are material and necessary

because they likely speak to the main issue in the case: whether or not the insured disgorged profits obtained wrongfully.

Also, the court is mindful of the Second Circuit's admonishment not to allow attorneys to use the doctrine of selective waiver to avoid legitimate discovery. It would be fundamentally unfair to allow the plaintiff here to turn over documents to government agencies presumably to receive some mitigation in punishment and then to refuse to turn over those same documents when suing for insurance coverage for the same underlying conduct. Accordingly, JPMC must produce the documents it shared with the Federal Reserve and the New York State Banking Commission within ten days from the date of service of this order with notice of entry.

C. Documents to which the Insurers Challenge the Privilege

A third category of documents that JPMC has withheld on the grounds of privilege the insurers contend are ordinary business documents, such as regular board meeting minutes. JPMC contends that the portions they did not produce are either privileged or irrelevant. To the extent these documents are still in contention, the court will review them in camera.

II. JPMC's Motion to Compel (Motion Seq. No. 12).

At oral argument on March 4, 2004, the parties stated on the record that they had resolved many of the issues the motion addressed. The court resolved nearly all of the remainder of the motion on the record including ordering the production of: (1) certain information concerning Sumitomo's coverage (tr. pg. 24) and (2) certain interpretative materials (tr. Pg. 29). The court also ordered the excess carriers to produce limited documents related to the specific policies at issue (tr. pgs. 33- 42) . The court struck one of JPMC's requests because it was too broad. (tr.

pgs. 42-44).

Concerning the documents that various insurers had withheld as privileged to which JPMC challenged the privilege, the court agreed to perform an *in camera* inspection. In general, JPMC challenges the privilege designation of these documents because it suspects that the insurers have withheld documents concerning business, rather than legal, matters. JPMC also asserts that the insurers have withheld a large number of documents that contain newspaper articles, pleadings or other non-privileged information.

A. Business or Legal

JPMC contends that the insurer's regular course of business ends only when the insurer disclaims coverage and therefore all material before that date is discoverable. JPMC also contends that any document, from any time period involving investigation of the underlying dispute or how the underlying dispute impacts coverage are routine business materials, even if attorneys generate them, and therefore are not privileged. JPMC is incorrect as to the first point, but correct on the second point.

"[P]ayment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding which of the two indicated actions to pursue are made in the regular course of its business." *(Landmark Ins. Co., v. Beau Rivage Rest.*, 121 AD2d 98, 101). However, to say that the insurers' regular course of business ends no earlier than the point of disclaimer is too narrow and runs the risk of invading the privilege. Indeed, even the cases JPMC cites hold that the regular business of the insurance company involves "those communications which occurred before the date that the defendant had reasonable grounds to reject the claim" as opposed to the date the insurer communicates the

disclaimer to the insured. (*Bertalo's Restaurant Inc., v. Exchange Ins. Co.*, 240 AD2d 452, 455).

The point at which an insurance company's investigation shifts from being in the ordinary course of business to in anticipation of litigation is a fact specific inquiry. (*United States Fidelity & Guaranty Co., v. Braspetro Oil Services Co.*, 2000 WL 744369 at * 9 [SDNY June 8, 2000]) Complicating matters in this case, outside counsel in this case may have worn two hats: (1) sometimes as an investigator to keep the insurer informed about the progress of the underlying dispute and (2) as coverage counsel. Here, activities related to the former would not be privileged while activities relating to the latter would. (*Bertalo's* at 455). This rule avoids the risk that the insurer will cloak normal business activities by using outside attorneys. (*See United States Fidelity & Guaranty Co.*, 2000 WL 744369 at * 9]["an insurance company may not insulate itself from discovery by hiring an attorney to conduct ordinary claims investigation"] [citations omitted]).

In this context, and after reviewing the documents in camera, the court finds that with few exceptions, the documents are primarily of a legal character. The documents largely involve legal advice concerning coverage, legal analysis of the underlying claims or of the claims the insured might assert, invoices for legal services and other materials that are not part of the regular course of the business of insurance claims investigation. However, the following documents should be produced as discussed below:

1. Materials Relating to 2002 Meetings with JPMC

The insurers have withheld attorney reports to file and attorney handwritten notes on the basis of the attorney-client and work product privileges. To the extent these documents merely record what happened at those meetings without any legal analysis, they do not qualify for either

attorney-client or work product privilege. [*See IMO Industries, Inc v. Anderson Kill & Olick, P.C.*, 192 Misc.2d 605, 613 [NY Cty, Solomon J.] [status reports to client's board of directors were not work product because there were mere factual recitals and not dependent upon legal expertise or created to foster attorney's preparation]). Moreover, the attorney-client privilege only operates to protect the communication of legal advice, rather than communications between attorney and client generally. *(See Ross v. Blue Cross & Blue Shield*, 73 NY2d 588, 593 communication must be "for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship"]). At least one of the documents, NU 0007426, does not contain a shred of legal advice or analysis. Therefore, the attorney work product or attorney - client privileges do not shield it.

It is possible that the National Union meant to withhold this document and others like it because it was anticipating litigation. However, National Union has failed to show that the documents were generated solely in anticipation of litigation. (*See JP Foodservice Distributors Inc., v. Sorrento*, Inc. 305 AD2d 266; *Agovino III v. Taco Bell 5083*, 225 AD2d 569, 570 [attorney affirmation insufficient to sustain burden of demonstrating that documents were prepared exclusively for litigation]). As the 2002 meetings with JPMC were at least partly to discuss whether the insurers would consent to the settlement with Sumitomo, the notes from those meetings were not solely in anticipation of litigation. The court also notes that only one affidavit, that of Lance Chabus, on behalf of Chubb Group of Insurance Companies, refers to the point in time when that company anticipated litigation, and that point was March 2002. All the other insurers failed to address the issue of prospective litigation, including when each anticipated litigation. It was their burden to do so. (Id). Therefore the insurers have failed to

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demonstrate that the documents were generated in anticipation of litigation for this reason as well. To the extent that the handwritten notes of meetings do contain attorney thoughts or impressions, but the court was unable to discern these comments due to difficulty in reading the penmanship, these comments may be redacted.

Accordingly, the following documents from this category should be produced within ten days from service of this order with notice of entry: NU 7295-99; NU 0007426-33; NU 7483; NU 7836-41 (unless already produced with redactions); NU 007842-47; NU 0007487-88; NU 0007788-832; AISLIC 00007184-7196 (unless already produced with redactions); LCD 00591.

2. Materials Concerning Notice of the Sumitomo Claims

Morgan and Chase provided notice to their insurers in 1999 of their respective claims. To the extent documents from the initial stages of the claims process were part of the insured's ordinary business of claims evaluation, as opposed to being primarily legal in nature (neither requests for nor the communication of legal advice) they should be produced. These documents are: NU 0007196; AIU 0000222-223; LCD 00355; 00679. Although the insurers have attempted to argue that these materials were in anticipation of litigation, as noted earlier, these conclusory assertions are insufficient. The court also notes that, to the extent these documents involve a lawyer's review of the Sumitomo complaint and contain a legal analysis of that complaint, they would be work product because legal analysis of a complaint is only something a lawyer can do.

3. Materials Reflecting Status Reports about the Underlying Sumitomo Action

As with the reports about the 2002 JPMC meetings, these documents must be produced to the extent they merely report what was happening in the underlying case as opposed to attorney thought processes or legal analysis. These documents also do not qualify for attorney-client

protection if they do not communicate legal advice. They also do not qualify for protection as materials prepared in anticipation of litigation because the insurers have failed to carry their burden to show that attorneys prepared the materials solely in anticipation of litigation. Thus, the following documents must be produced: NU 0007293; NU 0007331

4. Documents otherwise available

JPMC also objects to the withholding of certain newspaper articles, materials from the internet, pleadings and other documents that are equally available to JPMC. As these documents are publically available, there is no need for JPMC to request them from its adversaries.

5. Lloyd's of London's Documents and Privilege Log

The privilege log from Lloyd's of London is patently insufficient. For example, the log corresponding to LCU 000265-278 states the document involves correspondence with co-counsel but does not provide any basis for asserting the privilege. From the *in camera* review, the document does appear to be privileged and, therefore, the court will not order its production without giving Lloyd's the chance to amend its log. Other documents Lloyd's has withheld, such as invoices from counsel, do not appear to be privileged, but do appear to be irrelevant.

There are several entries for "Pattison & Flannery/Faraday Underwriting electronic bordeau claims update." It would appear from these documents that Pattison & Flannery was acting in the capacity as claims manager, not as legal counsel. The log is insufficient to explain why these documents are otherwise privileged. Therefore, Llyods must correct these entries or produce the documents. Finally, the court is at a loss to understand why LCD 00483-487 is privileged as it does not appear to be a "draft status report" as the log claims. This entry needs to

be redone or the document produced . Lloyd's has 20 days from the date of this order with notice of entry to reformulate its log or produce documents.

III. Motion to Compel the Morvillo Law Firm Documents (Motion Seq. No. 9)

In this motion, defendants National Union, AIU, Lexington and AISLIC move for an order pursuant to CPLR 3124 directing non-party Morvillo, Abramowitz, Grand, Iason & Silberberg, PC ("Morvillo") to produce documents that it is withholding on the grounds of privilege. Morvillo was Kevin Murphy's lawyer in the underlying Sumitomo litigation.

Chase, Morgan and Murphy defended the underlying Sumitomo litigation under a joint defense agreement. The parties agree (and are correct) that if these parties had a common interest, they could share privileged information amongst themselves without risking waiver. *(See Gulf Island Leasing, Inc. v. Bombardier Capital Inc.*, 215 FRD 466, 471 [SDNY 2003]).

Although Morgan and Murphy had different lawyers, JPMC claims they entered into settlement discussions unified in interest because Morgan had an obligation to indemnify Murphy fully. The insurers contend that any documents involving matters in which Murphy and Morgan's interests were not in common are discoverable. As examples, the insurers speculate that documents exist that involve the extent to which the settlement resolved Sumitomo's claims against Morgan rather than Murphy or disgorgement by Morgan of profits the bank earned from dealings with Sumitomo. This court agrees with the insurers. To the extent the withheld documents constitute or reflect communications between the Morvillo law firm and Morgan's counsel, Davis Polk, or Chase's counsel, Simpson Thatcher, involving Murphy's settlement position or any competing interests of Murphy regarding the settlement, including any

disagreement as to the extent of Murphy's individual obligations under the settlement, there is no joint defense or common interest privilege. Therefore, Morvillo must produce the documents it has withheld for an *in camera* inspection for this court to determine whether any of the documents concern competing interests of Morgan and Murphy within ten days from the date of service of this order with notice of entry.

Accordingly, it is

ORDERED THAT plaintiffs JP Morgan Chase & Co., and JP Morgan Chase Bank's motion to compel the production of documents (motion sequence no. 12) is granted in part as decided on the record on March 4, 2004 and is otherwise denied; and it is further

ORDERED THAT National Union Fire Insurance Company of Pittsburgh, PA, AIU Insurance Company Lloyd's of London and American International Surplus Lines Insurance Company are directed to produce documents that the court reviewed *in camera* as the court discussed in motion sequence no. 12 no later than ten days following receipt of a copy of this order with notice of entry; and it is further;

ORDERED THAT Lloyd's of London shall produce either a corrected privilege log or the documents the court reviewed in camera and discussed in motion sequence no. 12 no later than twenty days following receipt of a copy of this order with notice of entry; and it is further;

ORDERED THAT the motion of National Union Fire Insurance Company of Pittsburgh, PA, AIU Insurance Company, Lexington Insurance Company and American International Surplus Lines Insurance Company to compel plaintiff to produce documents (motion sequence no. 13) is granted to the extent set forth in this decision and is otherwise denied; and it is further

ORDERED THAT plaintiffs JP Morgan Chase & Co., and JP Morgan Chase Bank shall

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produce documents responsive to the requests at issue in motion sequence no. 13 to the extent this decision dictates for an *in camera* inspection no later than ten days following receipt of this order with notice of entry; and it is further

ORDERED THAT the motion of National Union Fire Insurance Company of Pittsburgh, PA, AIU Insurance Company, Lexington Insurance Company and American International Surplus Lines Insurance Company to compel non-party the Morvillo lawfirm to produce documents (motion sequence no. 9) is granted and the Morvillo firm shall produce documents for an *in camera* inspection no later than ten days following receipt of this order with notice of entry; and it is further

ORDERED THAT the motion of Continental Casualty Company (motion sequence no. 10) to compel is granted in accordance with the decision in motion sequence no. 13; and it is further

ORDERED THAT the motion of Zurich Insurance Company, USF&G Specialty Insurance Company of American and Liberty International Canada (motion sequence no. 11) to compel is granted in accordance with the decision in motion sequence no. 13); and it is further

ORDERED THAT the parties are directed to attend a status conference on December 16, 2004 at 10:00 am in the courtroom, room 248, 60 Centre Street.

Dated: August 10, 2004

J.SC.