

**Mesquite Cr. Wind LLC v Mars Wind, Inc.**

2024 NY Slip Op 31470(U)

April 19, 2024

Supreme Court, New York County

Docket Number: Index No. 655535/2021

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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MESQUITE CREEK WIND LLC,

Plaintiff,

- v -

MARS WIND, INC., MARS, INCORPORATED,

Defendant.

INDEX NO. 655535/2021

MOTION DATE 01/19/2024

MOTION SEQ. NO. 011

**DECISION + ORDER ON  
 MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 147, 148, 169, 170, 171, 172, 173, 174, 175, 176 were read on this motion to/for DISCOVERY.

Upon the foregoing documents and for the reasons set forth on the record (*tr.* 4.10.24), Mars Wind, Inc. (**Mars**)’s motion (Mtn. Seq. No. 011) to compel is granted to the extent set forth below.

In its motion, Mars moves to compel production of three categories of documents (the **Documents**): (1) certain 2017 communications between Duke Energy Corporation (**Duke**) and its in-house counsel regarding weatherization certifications in connection with Mesquite Creek Wind LLC (**Mesquite**)’s wind energy farm in Texas; (2) communications between the joint venture partners of Mesquite concerning the drafting and negotiation of a certain contract in 2017, long before the events giving rise to this lawsuit; and (3) communications between the partners of Mesquite which concern the events during and immediately after a severe winter storm in February 2021 (**Winter Storm Uri**), some of which communications and documents contain legal advice and the provision of legal advice by in-house counsel and/or outside

counsel. Mesquite has either withheld or redacted these documents based on the following doctrines: attorney-client privilege, attorney work product, and the common interest exception as to any potential waiver.

By way of background, this case concerns certain contractual obligations that may entitle Mesquite to certain sums pursuant to certain contracts relating to the production, receipt, sale, and hedging of wind energy in the Texas energy market. Mesquite is a joint venture that was composed, at all relevant times, of Duke and Sumitomo Corporation of the Americas (**Sumitomo**). Mesquite operates a wind farm in Texas, but having no employees itself, Duke's employees were responsible for the day-to-day operations of the wind farm, except for the wind turbines themselves, which were General Electric's responsibility (NYSCEF Doc. No. 137, at 5; NYSCEF Doc. No. 176, page 22, lines 9-13).

Prior to the events that give rise to the instant lawsuit, Mesquite was a wholly owned subsidiary of Sumitomo (NYSCEF Doc. No. 22, ¶ 27) and contracted with BP Energy to provide BP Energy a certain amount of power according to a fixed schedule, which energy was due whether Mesquite's wind farm generated the power or not (NYSCEF Doc. No. 22, ¶¶ 23-25; NYSCEF Doc. No. 137, at 6). Mesquite also contracted to sell to Mars, at a fixed price, all of the energy that was generated by the wind farm in excess of the amount required to be delivered to BP Energy (**Excess Energy**) (NYSCEF Doc. No. 22, ¶¶ 26-27). Mars, in turn, contracted with Pacific Summit Energy LLC (**PSE**), an affiliate of Sumitomo, for PSE to purchase all Excess Energy from Mars at the prevailing market price (*id.*, ¶¶ 26-28). Mars and Mesquite entered into a certain Production and Basis Risk Mitigation Agreement to allocate market price fluctuation

risk in that (i) if Mesquite did not produce enough energy to meet the BP Energy minimum and had to go out into the market to purchase energy at a cost greater than \$33.50/MWh, Mars would pay for any amount in excess of that price ceiling and (ii) if the cost of the energy purchased on the open market were less than that, Mesquite would pay Mars the differential (*id.*, ¶¶ 46-49; the **PBRMA**; NYSCEF Doc. No. 3).

Pursuant to a certain Administrative Services Agreement (the **Services Agreement**; NYSCEF Doc. No. 178)<sup>1</sup> between Mesquite and Duke, dated August 31, 2015, Duke undertook to run the day-to-day operations of Mesquite (*id.*, at § 2.01[a]).

The Services Agreement contained an “Independent Contractor” clause in which both sides disclaimed a contractual agency relationship:

Nothing contained in this Agreement and no action taken by any Party shall be (a) deemed to have made any Party, or any of such Party’s employees, agents or representatives an employee, agent or representative of any other Party or any of its Affiliates; (b) deemed to create any company, partnership, joint venture, association or syndicate among or between any Party; or (c) deemed to confer on any Party any expressed or implied right, power or authority to enter into any agreement or commitment, express or implied, or to incur any obligation or liability on behalf of any other Party, except as expressly authorized in writing, and except with respect to authority of the Administrator, as expressly contemplated by Section 2.01 or as otherwise directed by the Company in accordance with the provisions of this Agreement.

(*id.*, § 12.05). The Services Agreement disclaims Duke’s liability to Mesquite under a variety of circumstances (*id.*, at § 3.03) and limits Duke’s aggregate liability under the Services Agreement to Mesquite (other than for fraud or willful misconduct) to \$100,000 (*id.*, at § 10.02).

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<sup>1</sup> A copy of this document was provided to the Court for *in camera* review following argument on the instant motion (4.10.2024).

During and after the February 2021 winter storm that caused massive disruptions in the Texas energy market, Mesquite distributed to the joint venture partners a number of documents, including meeting agendas, emails, agreements, and conveyances of legal advice from a number of attorneys relating to Mesquite's potential exposure flowing from events transpiring during and immediately after the winter storm.

Mesquite's outside counsel in connection with certain of the communications at issue was Willkie Farr & Gallagher LLP (**Willkie**) and Troutman Pepper Hamilton Sanders LLP along with its predecessor, Troutman Sanders (**Troutman**, together with Willkie, hereinafter, collectively, **Outside Counsel**). These Outside Counsel communications were distributed to an aggregate total of 41 different individuals who are located at different places in the corporate chains of both Duke and Sumitomo and to certain individuals who worked for Sumitomo's subsidiary (NYSCEF Doc. No. 174).

As discussed above, some documents at issue in this motion allegedly predate the February 2021 winter storm. Some of the withheld emails include Outside Counsel to Mesquite, whereas other emails include discussions only between in-house counsel of Duke and Sumitomo and certain personnel who worked for Duke and Sumitomo or one of Sumitomo's subsidiaries. Some communications include personnel for Pacific Summit Energy (**PSE**) or Perennial (**Perennial**), which are the wholly owned subsidiaries of Sumitomo referred to above.

Other communications were among individuals where no lawyers (including in-house of counsel of either Duke or Sumitomo) were involved at all, *i.e.*, merely between the employees of the joint venture partners.

In support of their motion to compel production of these documents, Mars argues (i) that Duke and Sumitomo's personnel are not agents of Mesquite so as to preclude application of the attorney-client privilege and the agency exception to waiver; (ii) that "adversarial tensions" between Duke and Sumitomo preclude application of the work-product doctrine and common interest doctrine; and (iii) that in-house counsel for Duke does not represent Sumitomo and in-house counsel for Sumitomo does not represent Duke such that communications between these lawyers (without Outside Counsel who represents Mesquite) are not protected by the attorney-client privilege.

In their opposition papers, Mesquite argues (i) that Mesquite has no employees and as such must avail itself of the personnel of the Duke and Sumitomo (and its subsidiaries employees) in order to seek, consider, or act on any legal advice, such that these personnel are in fact necessary and agents of Mesquite; (ii) that Mesquite, Duke, and Sumitomo have a common legal interest with respect to the instant litigation and Mesquite's potential liability in connection with Winter Storm Uri; and (iii) for an extension of existing law to find that communications between the in-house counsel for the joint venture partners (Duke and Sumitomo and Sumitomo's subsidiaries) are protected by the attorney client privilege.

In support of the first two propositions, Mesquite heavily relies upon *Lebedev v Blavatnik*, 2017 WL 11614287 (N.Y. Sup Ct, New York County 2017).

In *Lebedev*, a special master assessed privilege claims in a case brought by a purported joint venture partner against other members of the purported joint venture, seeking the plaintiff's share of the joint venture (*id.*, at \*1). The joint venture in that case, Oil and Gas Industrial Partners Ltd. (**OGIP**), was formed to obtain control over a certain target gas company, Tyumenskaya Neftyanaya Kompania (**TNK**) (Index. No. 650369/2014, NYSCEF Doc. No. 12, ¶¶ 2-3, 8). OGIP had no staff of its own and was run by the employees, officers, and directors of the joint venture partners (*Lebedev*, 2017 WL 11614287, at \*9).

The *Lebedev* plaintiff sought documents in the possession of three law firms that represented the defendants and their respective companies; specifically, the defendant Blavatnik and his company, Access, were represented by Curtis, Mallet-Prevost, Colt & Mosle (**CMP**), and the defendant Vekselberg and his company, Renova, were represented by a firm then known as Rinderknecht, Klein & Stadelhofer (**RKS**) (*id.*, at \*1-2). Access and Renova were the joint venture partners behind OGIP (*id.*). In the relevant privilege log, most of the holders of the attorney-client and work product privilege<sup>2</sup> were identified as Access and Renova (but sometimes a third holder, Alfa, was included because it had separate joint ventures with Access and Renova) (*id.*, at \*2). The *Lebedev* plaintiff challenged the assertion of privilege as to a number of documents, leveling numerous arguments as to why the privilege was waived or inapplicable.

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<sup>2</sup> The non-movant expressly disclaimed any reliance on the common interest exception (*id.*, at \*9).

First, the *Lebedev* plaintiff asserted waiver of documents and communications from CMP that included Alfa and Renova or vice versa because they were never CMP clients (*id.*, at \*2). The *Lebedev* defendants argued (i) that the joint venture entities were in fact CMP clients and (ii) the fact that the joint ventures did not have any employees of their own meant that the only persons who could make decisions on behalf of those joint ventures were employees or agents of the joint venture partners, such that there was no waiver (*id.*).

After examining the challenged documents *in camera*, the special master determined that, in the case of a merger undertaken for the benefit of only Access and Blavatnik (rather than the joint venture, OGIP), that CMP did not represent the interests of, and there was no basis to claim that CMP represented, Renova; the disclosure to Renova thus vitiated or waived the privilege with respect to those merger documents (*id.*, at \*6). However, in the case of other transactions, the special master found that there was an attorney-client relationship between CMP and the joint venture separate and apart from the representation of Blavatnik and Access, such that inclusion of Renova did not waive the privilege (*id.*).

As a second challenge, the *Lebedev* plaintiff asserted that the defendants' failure to demarcate the individual senders and receivers' roles constituted waiver. The special master rejected this argument, looking rather to whether the joint venture partners "shared privileged information with only those persons in their employ whose participation was reasonably necessary in order to seek and secure legal advice for the joint ventures" (*id.*). The special master noted that the defendants' failure "to identify which of numerous potential roles each author or recipient of a

document was serving at any given time” was not fatal to the assertion of privilege, as such demarcation would be complicated by the number of documents at issue and the fact that the relevant actors may have been wearing different hats at different times depending upon the circumstances (*id.*, at \*8). The special master then assessed the role(s) that select actors seemed to play in each challenged communication, noting for example that “a significant player at Renova” was in fact acting on behalf of the joint venture, so his inclusion on communications did not vitiate the privilege (*id.*).

As a third challenge, the *Lebedev* plaintiff argued that a total universe of 61 individuals exceeded those necessary for the joint venture to secure legal advice because this number was (i) too large to be necessary and (ii) included employees, not only directors and officers of the joint venture partners (whose roles were not always demarcated, as noted above) (*id.*, at \*2, 10). The special master rejected this argument and was not convinced that the exception should be read so narrowly as to exclude simple employees from the exception, observing that there was no authority in New York to support such a strict limitation (*id.*, at \*10). The fact that 61 individuals comprised the total universe of senders and recipients did not necessitate waiver of the privilege (*id.*). The special master concluded that, in light of the unique circumstances presented by OGIP’s situation, it was reasonable for OGIP to communicate with CMP regarding the legal concerns of the joint venture *not only* through the OGIP’s directors but also through personnel employed by the joint venture partners as well, which did not diminish the reasonable expectation that their communications with counsel would remain confidential (*id.*).

Many of the issues presented in the instant motion are substantially similar to those addressed by the special master in *Lebedev*, *i.e.*, (i) whether Mesquite waived any attorney-client privilege or attorney work product privilege by communicating with employees, officers, and directors of the joint venture partners, Duke and Sumitomo. To be clear, however, the *Lebedev* court was not faced with Mesquite's novel argument – *i.e.*, that this Court should extend application of the attorney-client privilege to hold that communications between in-house counsel of the joint venture partners (*i.e.*, Duke and Sumitomo) are protected communications of an attorney-client relationship with Mesquite, a company which employs neither Duke's nor Sumitomo's in-house counsel.

## DISCUSSION

### ***1. Communications between Duke and Sumitomo's respective in-house counsel are not protected by the Attorney-Client Privilege***

As to Mesquite's novel argument, Mars asserts (and Mesquite admits in its opposition papers) that they are unaware of any instance where in-house attorneys of a joint venture partner were found to have had an attorney-client relationship with the other joint venture partner (NYSCEF Doc. No. 169, at 8). Thus, even if this were the factual situation here (that in-house counsel was actually representing the joint venture's interests rather than merely representing their own joint venture partner's client's interests), Mesquite has provided no support for this proposition.

Rather, Mesquite argues that New York courts have found an attorney-client relationship flowing from the joint venture's outside counsel up the ownership chain to the joint venture partners, where attorneys for the joint venture also simultaneously represented the joint venture partners (*see Rosman v Shapiro*, 653 F Supp 1441, 1445 [SDNY 1987]). Of course, in a close corporation consisting of only two shareholders with equal interests in the corporation, it is

indeed reasonable for each shareholder to believe that the corporation's attorney is in effect each individual's own attorney (*id.*). But this is not what is at issue. What is at issue, as discussed above, is at best the inverse of that situation. Each partner employs its own lawyers, and those lawyers are communicating with each other about a company that each of their separate employers has invested in. This simply does not present the creation of an attorney-client relationship between the partners such that their communications are protected. It simply does not matter that it is more efficient for the joint venture than to hire its own attorney (*see* NYSCEF Doc. No. 169, at 10). Indeed, the joint venture ultimately *did* hire their own lawyers – two sets of them – from two different firms – Troutman and Wilke. To be clear, the communications of the joint venture partners with those lawyers retained by Mesquite are in fact protected attorney-client communications (as discussed below). However, inasmuch as the communications between the joint venture partners are not protected, they must be produced without redactions. As discussed below, because these communications are not protected by the attorney client privilege, these communications do not present the issue of waiver or whether the common interest doctrine otherwise protects them from production.

## ***2. Employees of Duke and Sumitomo and Sumitomo's subsidiaries are agents of Mesquite***

Disclosure of attorney-client communications to a third party or communications with an attorney in the presence of a third party who is not an agent or employee of counsel vitiates confidentiality required for asserting attorney-client privilege (*Lebedev*, 2017 WL 11614287, at \*3). The concept of agency in the attorney-client context is not defined by the third party's employment or function, however, but rather depends upon whether the client had a reasonable expectation of confidentiality under the circumstances (*Stroh v Gen. Motors Corp.*, 213 AD2d

267, 268 [1st Dept 1995]). In New York, the proponent of the privilege bears the burden of demonstrating that disclosure to the third-party agent was necessary, not merely helpful (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 [2016]; *Spicer v GardaWorld Consulting (UK) Ltd.*, 181 AD3d 413, 414 [1st Dept 2020]; see *The People of the State of New York v The Trump Org., Inc.*, 2020 N.Y. Slip Op. 34173[U], 2 [N.Y. Sup Ct, New York County 2020]; cf. *United States v Kovel*, 296 F2d 918, 921 [2d Cir 1961]). The absence of a formal agent-principal relationship is not fatal to this exception, as the scope of the privilege is not defined by the third parties' employment or function but rather depends on whether the client had a reasonable expectation of confidentiality under the circumstances (see *Ross v UKI Ltd.*, 02 CIV. 9297(WHP)JCF, 2004 WL 67221, at \*3 [SDNY Jan. 15, 2004]; *People v Osorio*, 75 NY2d 80, 84 [1989]).

In the instant case, as in *Lebedev*, it appears that Mesquite maintained no employees of its own and could only act through the joint venture partners' personnel. Accordingly, if Mesquite were to ever act on legal advice, it necessarily had to act through someone – *i.e.*, Sumitomo or its subsidiaries' employees or Duke's employees (see *Ross v UKI Ltd.*, 02 CIV. 9297(WHP)JCF, 2004 WL 67221, at \*4 [SDNY Jan. 15, 2004] [finding privilege where attorneys and necessary representatives of the holding company, which had no employees, were privy to the communications]). That some of these employees were not officers or directors is also not a bar to the assertion of privilege (*Lebedev*, 2017 WL 11614287, at \*10). It also does not matter that there were 41 recipients or that Mesquite under the circumstances presented here has not demarcated the role of each and every individual on a given communication (*id.*, at \*8-10 [61 total individuals was not fatal to assertion of privilege]). For the avoidance of doubt, it also does

not matter that the Services Agreement indicates that neither Mesquite nor Duke are agents of each other because the lack of a formal agent-principal relationship is not determinative in the attorney-client agency privilege analysis (*see Ross*, 2004 WL 67221, at \*3; *People v Osorio*, 75 NY2d at 84]). As discussed above, unquestionably under the circumstances presented here, Duke and Sumitomo and their employees were agents of Mesquite for the purposes of receiving legal services from Outside Counsel.

As such, Mesquite's assertion of the agency exception is proper as to communications including Duke or Sumitomo personnel that were to or from attorneys with whom **Mesquite** had an attorney-client relationship – Outside Counsel, provided (i) that those attorneys were actually acting in furtherance of Mesquite's interests and (ii) the personnel included were reasonably necessary to the provision of legal services to Mesquite (*id.*, at \*6).

### ***3. The Common Interest Exception Does Not Apply to the Otherwise Not Protected Communications***

When two or more parties are engaged in or reasonably anticipate litigation in which they share a common legal interest, the common interest exception shields otherwise privileged communications from waiver that would otherwise result from disclosure to a third party, namely the other party with it shares a common legal interest. This exception protects communications regarding coordinated legal strategy to promote candor that may otherwise be inhibited by the threat of mandatory disclosure, which may chill the parties' exchange of privileged information and therefore thwart any desire to coordinate on their legal strategy (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 628 [2016]; *see Lebedev*, 2017 WL 11614287, at \*9). Statements made in the presence of those with conflicting interests, however, negate any

reasonable expectation of confidentiality and result in waiver (*People v Osorio*, 75 NY2d 80, 84-85 [1989]).

Like the special master in *Lebedev*, however, this Court need not address the common interest exception in this case. As discussed above, there was simply no waiver in respect of the privileged communications (in furtherance of legal advice) to or from Outside Counsel. The communications between Duke and Sumitomo excluding those involving Outside Counsel, on the other hand, were not privileged. Thus, the Court need not address whether the common-interest exception to applies to those communications.

#### ***4. The Attorney Work-Product Was Not Waived***

Under New York law, the attorney work product doctrine provides that the mental impressions of an attorney, documents prepared by counsel acting as such, and materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's private mental impressions, legal research, analysis, conclusions, legal theory, or strategy are privileged (CPLR § 3101[c]; *Deutsche Bank Tr. Co. of Americas v Tri-Links Inv. Tr.*, 43 AD3d 56, 65 [1st Dept 2007]; *Lebedev*, 2017 WL 11614287, at \*3). Similar to the attorney-client privilege, the work product privilege is waived upon disclosure to a third party. Waiver however as to work-product is much more limited – *i.e.*, it should only be found when there is a likelihood that the disclosures will be revealed to an adversary under conditions that are inconsistent with a desire to maintain confidentiality (*Lebedev*, 2017 WL 11614287, at \*3).

As discussed above, this litigation arises from events which occurred in February 2021 by virtue of Winter Storm Uri. Litigation was not reasonably anticipated before then and the work product doctrine does not otherwise apply to documents or communications which predate this event. As to documents, they must otherwise be produced if they are not otherwise privileged as discussed in this decision. However, the dissemination of work product to the joint venture partners – Sumitomo and Duke – did not constitute a waiver such that production is required. Simply put, Mars fails to establish (i) a likelihood that the work product would be revealed to them (*i.e.*, the adversary) or (ii) that it was otherwise shared under conditions that are inconsistent with a desire to maintain confidentiality (*Bluebird Partners, L.P. v First Fid. Bank, N.A., New Jersey*, 248 AD2d 219, 225 [1st Dept 1998]). The inclusion of the joint venture partners’ employees (*i.e.*, and not just directors and officers) does not diminish or otherwise change the reasonable expectation that these communications would be kept confidential (*Lebedev*, 2017 WL 11614287, at \*10). Lastly, there is no evidence that the confidentiality of the work product at issue was in any way compromised by this dissemination (*Bluebird Partners, L.P.*, 248 AD2d at 225).

Mars’ argument that Duke and Mesquite are potentially adverse because Duke ran the day-to-day operation of the plant for the joint venture – *i.e.*, Mesquite – fails. Among other things, the argument is belied by Mars’ pleadings in this case. The Second Amended Answer with Counterclaims (the **Counterclaims**; NYSCEF Doc. No. 158) alleges that the incident was *Mesquite’s* fault by (i) failing to purchase a “Winter Ice Operation Mode package” for the wind farm and (ii) by lying to Mars about the turbines being equipped with such functions (*id.*, at ¶¶ 32-33). The Counterclaims do not allege any failures by Duke’s personnel apart from their being

unfamiliar with “Winter Ice Operation Mode” (*id.*, at ¶ 32). Additionally, the Services Agreement itself disclaims Duke’s liability to Mesquite under a variety of circumstances (NYSCEF Doc. No. 178, at § 3.03) and limits Duke’s aggregate liability to Mesquite under the Services Agreement (other than for fraud or willful misconduct) to \$100,000 (*id.*, at § 10.02). In the context of this arrangement this amount is insignificant.

***5. However one of the Documents Which Mesquite indicates was withheld on, among other grounds, the attorney-work product doctrine was not work product and must be produced***

At oral argument (*tr.* 4.10.24), the Court indicated that it would review a sampling of documents with redactions (the **Alleged Work Product Documents**)<sup>3</sup> predicated on the assertion of attorney work-product because it was not clear from the Redaction Log whether in fact these Alleged Work Product Documents were in fact protected from production as attorney-work product.

Following a thorough review of the Documents *in camera*, Alleged Work Product Documents 2, 18, 20, 25, 31, 32, 36, 49, 50, 51 & 52 reflect the mental impressions of an attorney, documents prepared by counsel acting as such, and materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's private mental impressions, legal research, analysis, conclusions, legal theory, or strategy. As such, these documents are protected by the attorney-work product doctrine and production is not required.

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<sup>3</sup> The document numbers referred to in this Decision correspond with the document numbers in the Plaintiff’s **Redaction Log**; NYSCEF Doc. No. 174).

However, as discussed on the record (*tr.* 4.18.24), the email dated February 17, 2021, 11:08 AM from William Cannon to Lewis Farberman and Diana Rosales (both in-house counsel to Sumitomo), Isaac Young, Juliet Wallace, Atsushi Ohgi (non-attorneys at Sumitomo), and Hasegawa Hisashi (Perennial), does not contain any mental impressions of an attorney, documents prepared by counsel acting as such, or materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's private mental impressions, legal research, analysis, conclusions, legal theory, or strategy. This is merely an email which Mr. Cannon identifies a business issue which he anticipates with Mars and forwards an email that he had sent to Masaki Nakajima Masaki, Mitsuhiro Takeda, Tim Sander, Kentaro Hori, Kenichiro Uesugi, and Hisashi Hasegawa (all of Sumitomo) on February 17, 2021, 10:54 AM. Mr. Cannon at one point writes in the first-person "I can only imagine ..." as if to emphasize that these are his own thoughts. Mr. Cannon is not an attorney, and this email was drafted by him. Nothing in the email includes anything remotely suggestive of a lawyer's learning and professional skills or the private mental impressions, legal research, analysis, conclusions, theory or strategy of any attorneys. The only mention of an attorney is that Mr. Cannon indicates that Andy Schifrin (Troutman) had been made aware of the issue and was working on a response with Duke's legal team – not included on this email. This is plainly not attorney work-product. For completeness, the Court notes that neither Mesquite nor Sumitomo can claim attorney-client privilege over this communication because it was not with Outside Counsel, and it was forwarded to Kelly Hendley of Duke<sup>4</sup> which, as discussed above, is not represented by the attorneys from Sumitomo. Thus, this email must be produced.

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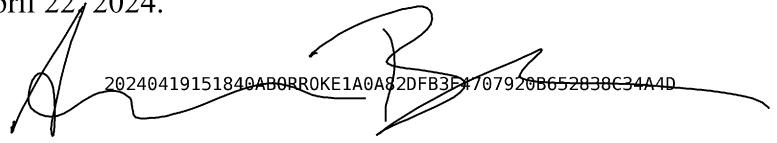
<sup>4</sup> The Court notes that Ms. Hendley's email, dated February 16, 2021, 6:54 PM, must have been sent from an earlier time zone than the surrounding emails because her email replies to an email that is dated February 17, 2021.

For the avoidance of doubt, only the February 17, 2021, 11:08 AM email from Mr. Cannon must be produced in unredacted form. The balance of the redactions in Document 47 relate to the private mental impressions and legal strategy of both in-house counsel and Outside Counsel and need not be produced.

The Court has considered the parties' other arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that Mesquite shall produce the unredacted documents in accordance with this decision and order no later than 5:00 pm on April 22, 2024.



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4/19/2024  
DATE

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ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE