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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

NISSAN NORTH AMERICA, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 16-0883-BC**
	)	
WEST COVINA NISSAN, LLC; UNIVERSAL CITY NISSAN, INC.; GLENDALE NISSAN/INFINITI, INC.; MICHAEL SCHRAGE; JOSEPH SCHRAGE; STACY STEPHENS; JEFF HESS and EMIL MOSHABAD, and LEONARD SCHRAGE,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER: (1) GRANTING PLAINTIFF'S MOTION TO TERMINATE DEPOSITION OF WALTER H. BURCHFIELD AND (2) DENYING IN PART AND GRANTING IN PART DEFENDANT WEST COVINA NISSAN, LLC'S SECOND MOTION TO COMPEL

On January 26, 2018, oral argument was conducted on two motions: (1) Plaintiff's *Motion To Terminate Deposition Of Walter H. Burchfield*; and (2) *Defendant West Covina Nissan, LLC's Second Motion To Compel Against Plaintiff*. The rulings on the *Motions* are as follows.

Motions Concerning Deposition on Plaintiff's Markup

In issue on both parties' pending motions is the deposition discovery the Defendant seeks on how much profit the Plaintiff earns on parts sold to dealers. The Defendant asserts this discovery is related to the issue of damages.

The Court finds that the record establishes the fact that the prior net transaction between the Plaintiff and the dealer is separate from the warranty claims on which the Plaintiff seeks to recover damages.

The *Restatement (Second) of Torts* § 549(1), adopted in Tennessee cases such as *Hodge v. Craig*, 382 S.W.3d 325, 348 (Tenn. 2012), provides that "[t]he recipient of a fraudulent misrepresentation is entitled to recover damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause."

Applying this to the record, the Court concludes that the Plaintiff's claim is that the Defendant's alleged misrepresentations, that the warranty claims presented were valid, caused the Plaintiff to pay the amount of each claim. Accordingly, the amounts on which the Plaintiff earns a profit on the sale of parts to the Defendant, has no relevance to the amount of this loss.

Thus, based upon *Restatement (Second) of Torts* § 549 and the Comments, the Plaintiff's profit on parts sold to dealers is not a factor in or relevant to the loss and measure of damages. For this reason deposing Mr. Burchfield about how much profit the Plaintiff earns on parts sold to dealers is denied as not calculated to lead to the discovery of admissible evidence.

It is therefore ORDERED that the Plaintiff's *Motion To Terminate Deposition Of Walter H. Burchfield* is granted, and for this same reason the first portion of *Defendant West Covina Nissan, LLC's Second Motion To Compel Against Plaintiff,* seeking testimony from Walter Burchfield, Nissan's Vice-President of After Sales, relating to Nissan's markup of warranty replacement parts above their cost, is denied.

Second Part of Defendant West Covina Nissan, LLC's Second Motion To Compel Concerning Plaintiff's Knowledge of Alleged Fraud

The second portion of Defendant's motion to compel seeks deposition testimony related to Plaintiff's knowledge, before filing this lawsuit, of the alleged fraud.

> Nissan hides behind the cloak of the attorney-client privilege to withhold relevant information related to its knowledge, before filing this lawsuit, of the alleged fraud. It asserts that it had no knowledge of any fraud before, during, or as a result of its audit of West Covina. But because Nissan's in house counsel analyzed the audit findings and acted as Nissan's decision-maker during and after the audit, its management that also was involved, claiming privilege, refused to testify about the basis of those findings and decisions, including if based upon their knowledge of fraud.

Defendant West Covina Nissan, LLC's Second Motion To Compel Against Plaintiff And Memorandum In Support, pp. 4-5 (Jan. 12, 2018).

The Defendant seeks to compel testimony from Clay Gassaway, Nissan's then-Director of Audit, relating to Nissan's audit of West Covina and the ultimate audit findings and decision making process behind, on one hand, upholding the audit findings for claims appealed by West Covina, yet on the other granting the appeal and reducing the chargeback amount corresponding to those claims. The Defendant also seeks to compel Mr. Gassaway's testimony regarding communications he had with the audit team related to an anonymous fax that Nissan received during the audit about Keith Jacobs' fraudulent warranty practices.

Along these same lines, the Defendant seeks to compel testimony from Walter Burchfield, NNA's Vice-President of After Sales, relating to information from a presentation from Nissan's in-house Counsel addressing the alleged fraud by West

Covina and whether Nissan's audit of West Covina was related to Nissan's decision to file the lawsuit which could indicate Nissan's knowledge of the alleged fraud.

In opposition, the Plaintiff argues that the attorney-client privilege is applicable to preclude the discovery.

> West Covina seeks to obtain information protected by the attorney-client privilege in three respects. First, West Covina seeks to discover the substance of Mr. Gassaway's communications with Nissan's counsel concerning an "anonymous fax." On page 30 of his deposition, Mr. Gassaway testified that he consulted with Nissan's counsel, Chambre Malone, concerning an anonymous fax that Nissan received from an employee of West Covina complaining about the warranty fraud in which the dealership was engaged. (Gassaway Depo. 30.) In responding to Mr. Dolenac's questions during his deposition, Mr. Gassaway—at the direction of Nissan's counsel—did not disclose the substance of his communications with Ms. Malone on the basis of the attorney client privilege. (*Id.* at 30–32.) The assertion of the attorney-client privilege in this context was entirely appropriate. Communications between an attorney and client regarding a legal matter are privileged, as plainly set out in *Boyd*.

Response To West Covina Nissan, LLC's Second Motion To Compel, pp. 3-4 (Jan. 22, 2018).

The Defendant argues that for two reasons the Plaintiff's assertion of the attorney-client privilege does not apply. First, the Defendant argues that the communications it seeks to compel between in-house Counsel and Nissan did not involve legal advice, but rather involved business communications for the purpose of making business decisions. Second, even if the communications were privileged, the attorney-client privileged has been waived because the Plaintiff's cause of action for fraud in the lawsuit has put the communications at issue by making the communications relevant to whether Nissan can prove the essential element of fraud that it reasonably relied upon West Covina's alleged

misrepresentation or omission. "If Nissan knows that it is being defrauded, then it is not deceived and has no claim for fraud, or in other words, Nissan cannot establish that it relied to its detriment upon the alleged misrepresentation." *Defendant West Covina Nissan, LLC's Second Motion To Compel Against Plaintiff And Memorandum In Support*, pp. 8-9 (Jan. 12, 2018).

After studying the briefs and conducting additional research, the Court concludes that the Defendant shall be granted leave to take limited, supplemental depositions of Mr. Gassaway and Mr. Burchfield to obtain their knowledge of facts they knew about the alleged fraud, when and how they became aware of those facts, their state of mind at these relevant times, and their belief or understanding as to the underlying lawsuit.

These limited depositions are permitted to explore those aspects of the conversations between in-house Counsel and the deponents that are non-privileged including any facts or knowledge that in-house Counsel may have learned and/or communicated to the deponents from independent sources. This type of attorney-client communication is not privileged.

The deponents are not required, however, to disclose confidential communications between them and in-house Counsel concerning giving or obtaining legal advice.

It is therefore ORDERED that the second part of Defendant's *Motion* related to discovery of facts concerning the alleged fraud is granted to a limited extent—the Defendant is permitted to take supplemental depositions of Clay Gassaway and Walter Burchfield, limited in time to two hours for each deposition, and limited in scope to the

three topics identified by the Defendant in its *Motion To Compel*: (1) Nissan's position taken on the audit appeal; (2) the anonymous fax received during Nissan's audit; and (3) the presentation by Nissan's in-house Counsel, and that the questioning permitted during these supplemental depositions shall be particularized to (a) seeking information about any facts the deponents knew regarding the alleged fraud, (b) when and how they became aware of those facts, (c) their state of mind at these relevant times, and (d) their belief or understanding as to the underlying facts of the lawsuit.

In entering the foregoing orders, the Court's additional research on the attorney-client privilege revealed that the initial questioning by the Defendant at the first depositions was too broad and not sufficiently particularized to elicit discoverable testimony and therefore the Plaintiff was warranted in asserting the attorney-client privilege. However, the additional research also revealed that some of the information sought by the Defendant would be discoverable with particularized questioning. For this reason, Defendant's motion for supplemental depositions is limited in the above orders in time, scope, and particularity in questioning.

In making this ruling, the Court dismisses the Defendant's argument that the discovery it is seeking is "not privileged, because counsels' purpose behind the communications was not to provide legal advice, but rather to make business decisions." There is insufficient evidence in the record at this time to reach this conclusion. The testimony cited by the Defendant in their *Motion To Compel* does not provide enough detail, at this stage, to determine as a matter of law that the in-house Counsel's actions

were so intertwined with the business decisions of the Plaintiff such that their role was that of decision maker instead of legal advisor. For this reason, the Defendant has failed to establish that the Plaintiff waived the attorney-client privilege in its entirety as to communications between the deponents and in-house Counsel.

As to the second ground asserted by the Defendant that the "at issue" waiver applies to this case, the Defendant relies on the Court of Appeals decision in *Outpost Solar, LLC v. Henry, Henry & Underwood, P.C.* where the Court stated the applicable legal standard.

> Moreover, as explained by the Tennessee Court of Criminal Appeals in *Bryan:*
>
> > [A] party asserting the attorney-client privilege has impliedly waived it through the party's own affirmative conduct where three conditions exist:
> >
> > (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party;
> >
> > (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and
> >
> > (3) application of the privilege would have denied the opposing party access to information vital to his [or her] defense.
>
> *Bryan*, 848 S.W.2d at 81 (citing *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D.Wash.1975)).

No. M201600297COAR9CV, 2017 WL 6729292, at *5–6 (Tenn. Ct. App. Dec. 29, 2017).

While stating the legal standard, the *Outpost Solar, LLC v. Henry, Henry & Underwood, P.C.* case, however, does not address the applicability of the "at issue" waiver standard with regard to the specific argument raised by the Defendant. Researching for more Tennessee law on this issue, the Court was unable to locate any cases in Tennessee addressing the "at issue" waiver analysis based on this specific argument raised by the Defendant that the mere allegation of fraud by the Plaintiff has put the communications of its in-house Counsel at issue with regard to whether the Plaintiff's reasonable relied to its detriment upon the alleged misrepresentations. Expanding its search, the Court did locate authority from other jurisdictions that have addressed the "at issue" waiver. These authorities provide that pleading a claim sounding in fraud does not automatically waive the attorney-client privilege under the "at issue" waiver. The relevant inquiry consists of the facts the party knew and when those facts were known. Lengthy explanatory quotations from these out-of-state authorities are provided below because the above Orders are derived from these cases.

In *Tribune Co. v. Purcigliotti*, a case applying the same elements outlined above from the *Outpost Solar, LLC v. Henry, Henry & Underwood, P.C.* case, United States Magistrate Judge Katz analyzed in detail the application of the "at issue" waiver to the attorney-client privilege when a claim of fraud is alleged in the lawsuit by the Plaintiff.

> Of particular relevance to the instant motion is another variant of the fairness doctrine -- the "at issue" waiver. A privilege may be impliedly waived where a party makes assertions in the litigation or "asserts a claim that in fairness requires examination of protected communications." *Bilzerian*, 926 F.2d at 1292; *accord Grant Thornton v. Syracuse Sav. Bank*, 961 F.2d 1042, 1046 (2d Cir. 1992); *In re Kidder Peabody*, 168 F.R.D. at 470-72 (use of report to SEC in litigation to demonstrate "good

faith" and as authoritative source of facts results in waiver of work product and attorney-client privilege as to report and underlying documents); *Paramount Communications v. Donaghy,* 858 F. Supp. 391, 395 (S.D.N.Y. 1994). Common examples of such waivers are when a defendant asserts an advice-of-counsel defense or a good-faith defense which places in issue whether his attorney made him aware that his acts were illegal or otherwise improper.

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The more critical question that has been raised is whether plaintiffs have put privileged communications at issue or defendants have demonstrated a substantial need for them. I must agree with plaintiffs, that simply by pleading an action in fraud, plaintiffs have not placed in issue their attorneys' work product or thought processes, or privileged communications with their attorneys. While it may be true that plaintiffs must demonstrate reasonable reliance on the purported misrepresentations of defendants, and that they acted reasonably in settling the hearing loss claims, they can clearly do so without relying on privileged documents or communications with their attorneys. Although defendants are free to attempt to demonstrate the converse conclusion -- that plaintiffs settled the claims cavalierly, without regard for the facts or even the representations made by defendants -- they cannot justify breaching plaintiffs' privileges based on defenses they choose to assert. *See Chase Manhattan Bank N.A. v. Drysdale Secs. Corp.,* 587 F. Supp. 57, 59 (S.D.N.Y. 1984) (filing of securities fraud suit, which necessarily involves justifiable reliance as an element, does not give rise to implied waiver of attorney-client privilege and "[i]t cannot be possible for [a defendant] to justify breaching [the plaintiff's] privilege by reason of its own pleading of an affirmative defense. That would give an adversary who is a skillful pleader the ability to render the privilege a nullity."); *Arkwright,* 1994 WL 510043, at *13 (although defendant-reinsurer may attempt to show that plaintiff-insurance company suing for indemnification did not settle underlying claim in good faith, plaintiff did not place "at issue" the content of its legal advice or make allegations that make an issue of its counsel's conduct); *Standard Chartered Bank,* 111 F.R.D. at 84-85 ("If SCB's position were correct, the [[[attorney-client] privilege would be a nullity in all the vast commercial litigation in which fraud or reliance is an issue."); *Paramount Communications,* 858 F. Supp. at 397 (simply because a party's claims involve proof of reliance upon statements of an adversary, it does not impliedly waive the attorney-client privilege).

> What was said between client and counsel may be useful for an adversary to know, but may not be particularly relevant, no less essential, to proving or disproving a claim of fraud. Rather, what is relevant is what the client knew or reasonably should have been expected to know. *See Standard Chartered Bank,* 111 F.R.D. at 79-82 ("I fail to see how any privileged opinion rendered by [counsel] can bear upon the issue of whether [the client] actually did rely on SCB's statements and whether, as a matter of law, it was entitled to so rely based on all the facts known to it. Information on the former question can be obtained from [the client], and the latter question is to be determined by proceedings in this court, not by the opinion of [the client's] lawyers."); *Paramount Communications,* 858 F. Supp. at 395-96; *Arkwright Mut. Ins. Co.,* 1994 WL 510043, at *12 ("Even where a party's state of knowledge is particularly at issue, such as in a case involving claims of laches or justifiable reliance, waiver of the [attorney-client] privilege should not be implied because the relevant question is not what legal advice was given or what information was conveyed to counsel, but what facts the party knew and when."). Therefore, the client in a fraud or similar action, may be required to disclose *its* thoughts and knowledge, whether or not those were acquired in whole or in part from conversations with its attorneys. It is not required to disclose what was said between client and counsel.

No. 93 CIV. 7222 LAP THK, 1997 WL 10924, at *5, 7–8 (S.D.N.Y. Jan. 10, 1997), *modified,* No. 93 CIV. 7222, 1998 WL 175933 (S.D.N.Y. Apr. 14, 1998).

In *In re Divine Tower Int'l Corp.*, the Southern District of Ohio, citing the *Tribune Co. v. Purcigliotti* case, reached a similar conclusion that merely pleading a claim sounding in fraud or misrepresentation is insufficient to automatically waive the attorney-client privilege under the "at issue" waiver.

> Further, the overwhelming majority of courts which have addressed this issue have agreed that a party does not waive the attorney-client privilege simply by pleading a claim which sounds in fraud or misrepresentation. Indeed, such claims are common, and it would substantially undercut the attorney-client privilege if the privilege were deemed waived in every case where a party made a claim of reasonable reliance upon the misrepresentations or omissions of the other party. In rejecting such a broadside assault on the attorney-client privilege, courts have said, for example, that although "the client in a fraud or similar action, may be

> required to disclose *its* thoughts and knowledge, whether or not those were acquired in whole or in part from conversations with its attorneys ... [i]t is not required to disclose what was said between client and counsel." *Tribune Co. v. Purcigliotti*, 1997 WL 10924,*8 (S.D.N.Y. Januar y 10, 1997), citing, *inter alia, Chase Manhattan Bank N.A. v. Drysdale Securities Corp.,* 587 F.Supp. 57, 58 (S.D.N.Y.1984). The court in *Tippenger v. Gruppe*, 883 F.Supp. 1201 (S.D.Ind.1994) reached a similar result, as did the court in *Sedco International, S.A. v. Cory,* 683 F.2d 1201 (8th Cir. 1982) (observing that receipt of ordinary legal advice was simply irrelevant to the issue of whether a party reasonably relied upon misrepresentations made by an opposing party). *See also Standard Chartered Bank PLC v. Ayala International Holdings (US),* 111 F.R.D. 76 (S.D.N.Y.1986).
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> Of course, it bears observing that "the [attorney-client] privilege does not protect facts which an attorney obtains from independent sources and then conveys to his client." *Allen v. West Point-Pepperell, Inc.*, 848 F.Supp. 423, 427-28 (S.D.N.Y.1994). Thus, if the two law firms at issue were involved in gathering facts concerning the relevant transactions, that is a legitimate subject of discovery even if that factual information was never communicated to Apollo. In other words, what the attorneys, acting as Apollo's agents, may have known or learned is both relevant and discoverable. However, what they communicated to Apollo is privileged. Since Kegler, Brown concedes that these subpoenas call for the production of such communications, the motion to quash will be granted.

No. 04-02169, 2007 WL 1108457, at *2–3 (S.D. Ohio Apr. 10, 2007).

Furthermore, in *Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, the Court, in discussing the "at issue" waiver when there is a claim involving justifiable reliance, the relevant inquiry is not about the content of the communications with Counsel, but rather what a party knew and when.

> Even where a party's state of knowledge is particularly at issue, such as in a case involving claims of laches or justifiable reliance, waiver of the privilege should not be implied because the relevant question is not what legal advice was given or what information was conveyed to counsel, but what facts the party knew and when. *See Allen v. West Point–Pepperell Inc.*, 848 F.Supp. 423, 431 (S.D.N.Y.1994); *Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc.*, 111 F.R.D. 76, 81 (S.D.N.Y.1986).

> Invasion of the attorney-client privilege is not necessary; rather, the discovering party should simply inquire directly of the other party as to its knowledge of relevant facts, which must be disclosed. *Allen,* 848 F.Supp. at 431; *Standard Chartered Bank,* 111 F.R.D. at 81. Invasion of the privilege may, however, be warranted where the specific content of legal advice received must be shown to prove a claim or a defense. *Compare United States v. Bilzerian,* 926 F.2d 1285, 1292 (2d Cir.) (defendant waived attorney-client privilege where his good faith defense in securities fraud prosecution placed his knowledge of the legality of transactions, and accordingly his communications with counsel, directly at issue), *cert. denied,* 502 U.S. 813, 112 S.Ct. 63 (1991) *and Village Board v. Rattner,* 130 A.D.2d 654, 655, 515 N.Y.S.2d 585, 586 (2d Dep't 1987) (mem.) (party who asserts affirmative defense of reliance on advice of counsel waives attorney-client privilege as to communications with counsel about transactions for which advice was sought) *with Manufacturers & Traders Trust Co. v. Servotronics, Inc.,* 132 A.D.2d 392, 396–97, 522 N.Y.S.2d 999, 1003 (4th Dep't 1987) (no "at issue" waiver where plaintiff bank did not need to present evidence contained in privileged documents because its claims were based on enforcement of written agreements, not on content of legal advice, and agreements contained no conditions precedent requiring advice of counsel).

No. 90 CIV. 7811 (AGS), 1994 WL 510043, at *12 (S.D.N.Y. Sept. 16, 1994).

Applying the foregoing cases to the Defendant's *Motion to Compel*, the Court concludes that the Plaintiff did not waive the attorney-client privilege simply by pleading a claim which sounds in fraud or misrepresentation. The mere filing of a lawsuit alleging fraud does not automatically trigger the "at issue" waiver of the attorney-client privilege.

As detailed in the above cases, however, the Court does conclude that the Defendant's *Motion To Compel* should be granted to the extent that the Plaintiff is "required to disclose *its* thoughts and knowledge, whether or not those were acquired in whole or in part from conversations with its attorneys"[1] related to its knowledge, before

[1] *Tribune Co. v. Purcigliotti*, No. 93 CIV. 7222 LAP THK, 1997 WL 10924, at *5, 7–8 (S.D.N.Y. Jan. 10, 1997), *modified,* No. 93 CIV. 7222, 1998 WL 175933 (S.D.N.Y. Apr. 14, 1998).

filing this lawsuit, of the alleged fraud, including its knowledge of any fraud before, during, or as a result of its audit of West Covina. Included within this discovery would be any facts the Plaintiff knew regarding the alleged fraud, when they became aware of those facts, and their state of mind at all relevant times, including their belief or understanding as to the underlying facts of the lawsuit.

In making this distinction, the Plaintiff is not required to disclose what was said between client and counsel, but rather must disclose the facts, thoughts and knowledge of the Plaintiff regarding the fraud claim. Included in this are any facts or knowledge that the in-house Counsel may have learned and/or communicated to the Plaintiff from independent sources. This type of attorney-client communication is not privileged. *See, e.g., Navigators Mgmt. Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 4:06CV1722SNLJ, 2009 WL 465586, at *3 (E.D. Mo. Feb. 24, 2009) ("The company cannot claim attorney-client privilege over facts conveyed to them by its attorneys which the attorneys learned from an independent source…. Any facts learned from the companies attorney from an independent outside source are discoverable."); *Allen v. W. Point-Pepperell Inc.*, 848 F. Supp. 423, 431 (S.D.N.Y. 1994) ("To reiterate our finding at 8, a party's knowledge of facts, from whatever source and at whatever time they became known, is not privileged.").

In addition to the foregoing, the Court rejects the Defendant's alternative argument that the "at issue" waiver should apply and completely bar the use of the attorney-client privilege because "Nissan made the same implied waiver argument to compel testimony about communications between Mr. Jacobs and West Covina's outside counsel, Victor

Danhi, in connection with West Covina's fraud claim against Mr. Jacobs." The use of the "at issue" waiver previously is distinguishable from the present circumstances because it was previously asserted in conjunction with the Court's ruling that the crime-fraud exception was applicable to remove the attorney-client privilege between Mr. Jacobs and his attorney. With the possibility of fraud being perpetrated between and among Mr. Jacobs, his attorney, and Defendant West Covina, the "at issue" waiver of the attorney-client privilege was appropriate in conjunction with the crime-fraud exception. For this reason, the comparison to the earlier application of the "at issue" waiver is distinguishable from the present situation.

s/ Ellen Hobbs Lyle
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