

TOWERS WATSON DELAWARE, INC., :

Plaintiff, :

v. :

MORGAN, LEWIS & BOCKIUS, LLP :

- and - :

JEREMY P. BLUMENFELD, ESQUIRE, :

Defendants. :

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

April Term, 2017

No. 02096

ORDER

AND NOW, this _____ day of _____, 2018, upon consideration of Plaintiff Towers Watson Delaware, Inc.'s Motion to Quash Subpoena Directed to Nonparty Pepper Hamilton LLP, Plaintiff's Former Counsel, and for Protective Relief, and any response thereto, it is hereby ORDERED and DECREED that Plaintiff's Motion is GRANTED, and the deposition subpoena to Pepper Hamilton LLP, including the requests for production of documents attached thereto, is hereby QUASHED.

IT IS FURTHER ORDERED that Defendants are prohibited from seeking testimony or documents from Pepper Hamilton LLP as to any matters subject to attorney-client privilege and/or attorney work product protection, including but not limited to testimony or documents concerning confidential communications between Pepper Hamilton LLP and Plaintiff or information learned therefrom, legal advice sought by or rendered to Plaintiff, and Pepper

Hamilton LLP's mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research or legal theories.

BY THE COURT:

, J.

SPRAGUE & SPRAGUE

By: Richard A. Sprague, Esquire (ID #04266)
Joseph R. Podraza, Jr., Esquire (ID #53612)
Peter A. Greiner, Esquire (ID #81957)
Brooke Spigler Cohen, Esquire (ID #204648)
William H. Trask, Esquire (ID #318229)

Wellington Building, Suite 400
135 S. 19th Street
Philadelphia, PA 19103
(215) 561-7681

*Counsel for Plaintiff
Towers Watson Delaware, Inc.*

TOWERS WATSON DELAWARE, INC., :

Plaintiff, :

v. :

MORGAN, LEWIS & BOCKIUS, LLP :

- and - :

JEREMY P. BLUMENFELD, ESQUIRE, :

Defendants. :

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

April Term, 2017

No. 02096

**PLAINTIFF’S MOTION TO QUASH SUBPOENA DIRECTED
TO NONPARTY PEPPER HAMILTON LLP, PLAINTIFF’S
FORMER COUNSEL, AND FOR PROTECTIVE RELIEF**

Plaintiff Towers Watson Delaware, Inc. (“Towers” or “Plaintiff”), by and through its undersigned counsel, hereby moves this Court to quash Defendants Morgan Lewis & Bockius LLP and Jeremy P. Blumenfeld, Esquire’s (collectively, “Morgan” or “Defendants”) subpoena directed to nonparty Pepper Hamilton LLP (“Pepper”), Towers’ former counsel, and to issue a protective order prohibiting Morgan from invading Towers’ attorney-client privilege. Morgan’s flagrantly overbroad and improper subpoena seeks clearly privileged documents and testimony,

including categories of documents and information that this Court has already ruled Morgan is not entitled to discover.¹ In support thereof, Plaintiff states as follows:

I. BACKGROUND

A. Morgan's Disloyal Conduct Giving Rise to the Instant Action

1. This action arises from Defendants' egregious breach of their fiduciary and contractual duties to Towers by surreptitiously assisting another of Morgan's clients, Meriter Health Services, Inc. ("Meriter"), in manufacturing and preserving claims against Towers, culminating in an action by Meriter against Towers (the "Meriter Action") that Towers eventually settled at significant cost. Towers seeks disgorgement of the legal fees it paid to Morgan for its disloyal representation as well as damages that include amounts Towers paid to settle the Meriter Action.

2. Morgan represented Towers in various legal matters spanning several years. While continuing to represent and to collect millions of dollars in legal fees from Towers, Morgan also accepted engagement as defense counsel in a class action (the "Class Action") for another client, Meriter, the interests of which Morgan recognized were potentially adverse to Towers' interests. Yet Morgan not only failed to inform Towers of any conflict, but—in utter disregard of Morgan's duty of undivided loyalty—Morgan also secretly coordinated with, communicated with, and assisted a second law firm that Morgan knew Meriter had retained for the purpose of pursuing claims against Towers.

3. Pepper served as Towers' outside counsel in connection with the Meriter Action beginning in 2015.

¹ A true and correct copy of the subpoena along with the cover email to Towers is attached hereto as Exhibit 1.

B. Morgan's Prior Failed Attempt to Discover Towers' Privileged Documents Relating to the Meriter Action Settlement, and the Instant Subpoena

4. On May, 29, 2018, Morgan filed a motion to compel in the instant action seeking, *inter alia*, to compel Towers to produce privileged documents and information relating to the settlement of the Meriter Action—including privileged documents, communications, advice and/or analyses from or with Pepper—on the alleged ground that Towers had waived the attorney-client privilege and work product protection for such documents and information by bringing the instant action and seeking damages for amounts Towers paid to settle the Meriter Action. (Defs. Mot. to Compel, attached hereto (without exhibits) as Exhibit 2.) Significantly, ***this Court rejected Morgan's argument that Towers had waived privilege and work product protection as to documents and information related to the Meriter Action settlement***, denying Morgan's motion to compel as to such documents and information. (6/28/18 Order by McInerney, J., attached hereto as Exhibit 3.)² No appeal of that aspect of the Order was taken.³

5. After the close of business on Friday, September 28, 2018, Morgan informed Towers of the subpoena to Pepper that is the subject of the instant motion. (Ex. 1.) The subpoena orders Pepper to appear and testify on October 17, 2018 and includes numerous, flagrantly overbroad requests for production which, on their face, seek privileged and/or work

² While the Court left open the possibility that an analysis by Pepper "*may* have to be produced in discovery" in the future "*if* a Towers' witness relies on or claims to have relied on" an analysis by Pepper "in support of Towers' claim for damages arising out of the settlement of the underlying dispute," such hypothetical circumstances have indisputably not come to pass. (Ex. 3, 6/28/18 Order at ¶ 2 (sic) n.3 (emphasis added).)

³ Towers timely appealed to the Superior Court the portion of the Court's June 28, 2018 Order granting in part Morgan's motion to compel as to Morgan's discovery requests "with respect to Towers' informed consent to Morgan Lewis' alleged conflict of interest," which collateral order appeal is currently pending. (Ex. 3, 6/28/18 Order at ¶ 2.) However, that aspect of the motion to compel, according to Morgan, sought documents and information relating to Towers' knowledge of potential conflicts "when [Towers] agreed to the prospective waiver in the 2010 engagement letter" and "in 2012 when it reaffirmed the 2010 engagement letter"—an issue and time periods in which Pepper had no involvement. (Ex. 2, Defs. Br. for Mot. to Compel at p. 12.) Thus even assuming *arguendo* that Towers' appeal were later resolved in Morgan's favor, the ruling still would not entitle Morgan to any of the privileged documents it seeks from Pepper in the subpoena.

product protected documents, including documents that this Court has already ruled are protected from discovery. (*Id.* at “Attachment A.”)

6. For example, Request for Production No. 1 in the attachment to the subpoena seeks: “[a]ll documents and communications concerning the Meriter Action, including but not limited to documents and communications relating to (i) litigation of the Meriter Action; (ii) the strengths and weaknesses of the claims and defenses asserted in the Meriter Action; (iii) settlement of the Meriter Action; (iv) the reasonableness of the terms of the settlement of the Meriter Action; (v) the risk facing Towers at trial and on appeal in the Meriter Action; and (vi) the potential consequences to Towers of not settling and deciding to go to trial in the Meriter Action.” (Ex. 1.) This request includes precisely the category of privileged information and documents that Morgan previously sought in its motion to compel Towers and that this Court ruled Morgan was not entitled to discover. (Ex. 2; Ex. 3.)

7. Moreover, nearly every other request for production in Morgan’s subpoena to Pepper seeks information indisputably subject to the attorney-client and/or work product privileges, which Morgan did not (and cannot) even argue were waived by Towers. In fact, the subpoena explicitly and improperly requests *all communications between Pepper and its client, Towers*, concerning Towers, the Class Action, or the Meriter Action. (Ex. 1 at Request for Production No. 4.) And Morgan outrageously requests privileged documents from Towers’ attorneys concerning Towers’ intent to file the instant action against Morgan and Towers’ claims alleged therein. (*Id.* at Request for Production No. 10.)

B. ARGUMENT

8. Discovery in Pennsylvania is expressly limited to “any matter, *not privileged*, which is relevant to the subject matter involved in the pending action”; privileged materials and information are not subject to disclosure. Pa.R.C.P. 4003.1 (emphasis added).

9. In addition, the Rules of Civil Procedure prohibit discovery that is sought in bad faith, is beyond the permitted scope of discovery, or that would cause unreasonable annoyance, burden, or expense. Pa.R.C.P. 4011.

10. In Pennsylvania, the attorney-client privilege is codified by statute, which provides:

In a civil matter *counsel shall not be competent or permitted to testify to confidential communications made to him by his client*, nor shall the client be compelled to disclose the same, *unless* in either case *this privilege is waived* upon the trial by the client.

42 Pa.C.S. § 5928 (emphasis added) (emphasis added). Thus, once the privilege is invoked, counsel cannot disclose confidential communications unless and until the privilege is waived by the client. *Gregury v. Greguras*, 2018 PA Super 261 (Pa. Super. Ct. Sept. 20, 2018); *see also Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1266 (Pa. Super. Ct. 2007) (when privilege is properly invoked, party seeking disclosure has burden to show it has been waived or some exception applies). “[T]he attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.” *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011).

11. Not only does Morgan’s subpoena to Pepper fail to exclude attorney-client privileged (and/or work product protected) information, the requests for production therein specifically target privileged documents and communications, including those this Court

previously ruled are protected from discovery. In addition, the subpoena places no restrictions on the testimony sought from Towers' counsel, and it is difficult to conceive of non-privileged information Morgan might seek from Pepper that would be relevant to issues in this litigation.

12. The subpoena and its requests for production are patently overbroad and improper, and there is no basis for Morgan to discover the privileged and/or work product protected documents and information it seeks in the subpoena.

13. Pennsylvania Rule of Civil Procedure 234.4 provides that “[a] motion to quash a subpoena, notice to attend or notice to produce may be filed by a party,” and that “[a]fter hearing, the court may make an order to protect a party, witness or other person from unreasonable annoyance, embarrassment, oppression, burden or expense.” Pa.R.C.P. 234.4; *see also* Pa.R.C.P. 4012 (providing that a court may, for good cause shown, grant protective orders).

14. Such relief is warranted here, where Morgan's subpoena seeks testimony and documents from Towers' attorneys that necessarily will invade Towers' attorney-client privilege and attempts an end-run around a prior ruling of this Court precluding discovery sought in the subpoena.

WHEREFORE, Plaintiff Towers Watson Delaware, Inc. respectfully requests that this Court grant its Motion to Quash and issue an order in substantially the form attached hereto.

Respectfully submitted,

Dated: October 2, 2018

SPRAGUE & SPRAGUE

By: /s/ Joseph R. Podraza, Jr.
RICHARD A. SPRAGUE, ESQUIRE
JOSEPH R. PODRAZA, JR., ESQUIRE
PETER A. GREINER, ESQUIRE
BROOKE SPIGLER COHEN, ESQUIRE
WILLIAM H. TRASK, ESQUIRE
The Wellington Building, Suite 400
135 South 19th Street
Philadelphia, PA 19103

(215) 561-7681

*Counsel for Plaintiff,
Towers Watson Delaware, Inc.*

EXHIBIT “1”

From: Masters, Jeffrey [jeffrey.masters@dechert.com]
Sent: Friday, September 28, 2018 5:45 PM
To: jpodraza@spragueandsprague.com; bspiglercohen@spragueandsprague.com; William H. Trask
Cc: Heim, Robert; Kichline, Michael; Wigglesworth, Catherine
Subject: Towers Watson Delaware, Inc. v. Morgan, Lewis & Bockius, LLP et al.
Attachments: Subpoena to Pepper Hamilton.PDF; Attachment A to subpoena to Pepper.DOCX

Counsel,

Attached please find a copy of a subpoena that was served on Pepper Hamilton LLP.

Best,
Jeff

Jeffrey Masters

Dechert LLP

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Philadelphia, PA 19104-2008
+1 215 994 2931 Direct
+1 215 655 2931 Fax
jeffrey.masters@dechert.com
dechert.com

This e-mail is from Dechert LLP, a law firm, and may contain information that is confidential or privileged. If you are not the intended recipient, do not read, copy or distribute the e-mail or any attachments. Instead, please notify the sender and delete the e-mail and any attachments. Thank you.



COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

In the matter of:

Court of Common Pleas

TOWERS WATSON DELAWARE, INC. VS MORGAN, LEWIS & BO

April Term, Yr. 17

No. 02096

Subpoena

To: Pepper Hamilton LLP

(Name of Witness)

(Nombre del Testigo)

1. YOU ARE ORDERED BY THE COURT TO COME TO *(El tribunal le ordena que venga a)*
Dechert LLP, 2929 Arch Street, AT PHILADELPHIA, PENNSYLVANIA ON *(En Filadelfia*
Pensilvania el) October 17, 2018, AT *(a las)* 02:00 O'CLOCK P.M., TO
TESTIFY ON BEHALF OF *(para atestiguar a favor de)* Pepper Hamilton LLP IN THE
ABOVE CASE, AND TO REMAIN UNTIL EXCUSED *(en el caso arriba mencionado y permanecer hasta que le autoricen irse)*.

2. AND BRING WITH YOU THE FOLLOWING *(Y traer con usted lo siguiente)*:

The materials described in Attachment A.

Notice

If you fail to attend or to produce the documents or things required by the subpoena, you may be subject to the sanctions authorized by Rule 234.5 of the Pennsylvania Rules of Civil Procedure, including but not limited to costs, attorney fees and imprisonment.

Aviso

Si usted falla en comparecer o producir los documentos o cosas requeridas por esta cita, usted estara sujeto a las sanciones autorizadas por la regla 234.5 de las reglas de procedimiento civil de Pensilvania incluyendo pero no limitado a los costos, remuneracion de abogados y encarcelamiento.

INQUIRIES CONCERNING THIS SUBPOENA SHOULD BE ADDRESSED TO *(Las preguntas que tenga acerca de esta Citacion deben ser dirigidas a)*:

ISSUED BY: Jeffrey Masters

(Attorney)

(Abogado/Abogada)

Address *(Direccion)*:

Dechert LLP
2929 Arch St

Telephone No. *(No. de Telefono)*:

215 994-2931

Attorney ID # *(Abogado ID#)*:

322439

BY THE COURT *(Por El Tribunal)*:

Eric Feder

Deputy Court Administrator *(Administrador del Tribunal Adjunto)*

Director, Office of Judicial Records *(Director de la Oficina de Registros Judiciales)*

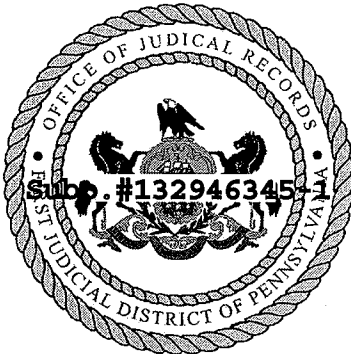
PRO

(Clerk)

(Escribano)

You may contact the Office of Judicial Records to verify that this subpoena was issued by the Philadelphia County Court of Common Pleas.

Phone: (215) 686-4251 or Email: eCommCertSupport@courts.phila.gov





COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA

In the matter of:

Court of Common Pleas

April Term, Yr. 17

TOWERS WATSON DELAWARE, INC. VS MORGAN, LEWIS & BO

No. 02096

Return of Service

On the _____ day of _____, Yr. _____,

I, _____, served with the foregoing subpoena by (described method of service):

I verify that the statements in this return of service are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

Date

Signature

Name of Witness

Name of person Served

**ATTACHMENT A
TO SUBPOENA TO PEPPER HAMILTON LLP**

DEFINITIONS

For purposes of these Requests for Production of Documents, the following definitions will apply:

1. “Defendants” means Morgan, Lewis & Bockius LLP (“Morgan Lewis”) and Jeremy P. Blumenfeld, Esq.
2. “You” or “Your” means Pepper Hamilton LLP, its attorneys, employees, agents, representatives, and all other persons acting or purporting to act on its behalf.
3. “Towers” means Towers Watson Delaware, Inc., its attorneys, employees, agents, representatives, predecessors in interest, predecessor entities, and all other persons acting or purporting to act on its behalf.
4. “Meriter” means Meriter Health Services, Inc.
5. The term “Class Action” means the action filed in the United States District Court for the Western District of Wisconsin captioned *Tammy J. Boyd v. Meriter Health Services, et al.*, 10-cv-426-wmc.
6. The term “Meriter Action” means the action filed in the Wisconsin Circuit Court of Dane County, Wisconsin, captioned as *Meriter Health Services, Inc. v. Towers Watson Delaware, Inc., et al.*, No. 15-cv-0028 (Wis. Circuit Ct., Dane County).
7. “Requests” shall mean the instant Defendants’ Requests for Production Issued to Pepper Hamilton LLP.
8. “Document” means and includes, without limitation: any writing or record of any type or description, such as electronic information; recordings; e-mails; hard copy documents; voicemails; tape recordings; spreadsheets; databases; contact information; letters; telegrams;

correspondence; notes; memoranda; telephone messages and logs; diaries; calendars; worksheets; computations; financial statements; bank statements; checks and stubs thereof; auditor's reports and letters; workpapers; reports; instructions; notebooks; scrapbooks; contracts; agreements; minutes of shareholders', directors', or other meetings, corporate or otherwise; plans; designs; drawings; sketches; tracings; renderings; photographs; photocopies; charts; descriptions; invoices; purchase orders; receipts; evidence of payment; motion pictures; published or unpublished speeches or articles; transcripts of telephone conversations, and other retrievable data. All Documents should be produced, whether originals, drafts, or copies (including, but not limited to, carbon, handwritten, typewritten, microfilm, or photostatic copies), and including any non-identical copies (whether different from the original because of any alterations, notes, comments or other material contained thereon or attached thereto, or otherwise), wherever located, however produced or reproduced, and in whatever language, and all other things in which words, figures, notations, or writing as are affixed, or sounds are recorded, in writing or by any other means, and any underlying or supporting material, or material used in the preparation thereof, and any other method of information recording.

9. All phrases following the terms "including," "including, but not limited to," and "including without limitation" are intended to illustrate the kind of information responsive to each Request herein. Such examples are not intended to be exhaustive of the information sought and shall not in any way be read to limit the scope of the Requests.

10. The terms "relate to" and "relating to" mean analyzing, containing, concerning, dealing with, constituting, defining, describing, discussing, embodying, evidencing, explaining, identifying, mentioning, reflecting, referring to, setting forth, showing, stating, summarizing, supporting, or in any way pertaining to the subject matter of the relevant Request.

11. "Concerning" means in connection with, regarding, relating to, describing, evidencing, constituting, showing, or reflecting.
12. "Between" means "among" and vice versa.
13. The terms "any" and "all" shall each mean "any and all."
14. The terms "all" and "each" shall each be construed as "all and each."
15. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the Request all responses that might otherwise be construed to be outside of its scope.
16. The use of the singular form of any word includes the plural and vice versa.
17. Verbs shall be construed to include all tenses.

INSTRUCTIONS

1. You are required to not only furnish Documents in Your possession but also to furnish Documents that are in the possession of Your attorneys, investigators, trustees, employees, experts, accountants, agents or anyone else acting on Your behalf or under Your control, without regard to the physical location of such Documents, except to the extent that such information is privileged. If You are not in possession of Documents responsive to any Request, so state in writing in response to the Request.
2. Documents produced in response to these Requests shall be organized either to correspond to the categories set forth in these Requests, or in the manner in which they are kept in the ordinary course of business, including identification of the applicable file folder and source.
3. The parties will meet and confer regarding the format in which electronically stored information will be produced prior to Your first production, and electronically stored

information should be produced in the format upon which the parties agree. In the event that the parties cannot reach an agreement on the format for the production of electronically stored information, Defendants will specify a format and You should produce electronically stored information in that format.

4. If any Document responsive to a Request has been lost, destroyed, or otherwise disposed of, furnish a list identifying each such Document and stating the following information with respect to each Document:

- (a) the nature of the Document (*e.g.*, memorandum, letter, computer printout, etc.) and its contents;
- (b) the persons who prepared or authored the Document, and, if applicable, the persons to whom the Document was sent or to whom the contents of the Document were divulged;
- (c) the date on which the Documents was prepared or transmitted;
- (d) the location of any copies of the Document;
- (e) the date on which the Document was lost, destroyed, or otherwise disposed of;
- (f) the name of the person who ordered or authorized the destruction;
- (g) the conditions of and reasons for such destruction or disposition of the Document, including but not limited to, any Documents existing at the time of such loss or destruction setting forth or concerning any policy or procedure then in effect for destruction or retention of Documents and electronically stored information; and

- (h) the identity of any and all person(s) having knowledge or who had knowledge of the contents thereof.

5. If You decline to produce any of the Documents requested hereunder, in full or in part, upon the ground of privilege, identify in a privilege log each such Document or portion thereof as to which the objection is made, and with respect to each Document or portion thereof so identified, state:

- (a) the nature of the privilege being asserted (including work product), and, if the privilege being asserted in connection with a claim or defense governed by state law, indicate the state and its privilege rule that is being invoked;
- (b) the medium, length, and nature of the Document (*e.g.*, letter, memorandum, notes, attachment, etc.);
- (c) a summary of the subject matter of the Document;
- (d) the date of the Document or information;
- (e) the author(s), recipient(s), copyee(s), and address(ees) of the Document and their respective titles or positions;
- (f) the person(s) to whom any copy was furnished;
- (g) the Request herein to which the Document is responsive; and
- (e) the exact basis, legal and factual, for Your claim that such Document (or portion thereof) need not be disclosed.

6. If, in answering any of these Requests, any ambiguity in construing either the Request or definition or instruction relevant to the inquiry contained within the Request is encountered, identify the matter deemed ambiguous and set forth the construction chosen or used in responding to the Request.

7. If You are unable to respond to any of the Requests as set forth herein for any reason whatsoever, identify each such Request and state the facts and circumstances surrounding Your inability to respond. If You cannot respond fully, or if You object in part, to any of these

Requests, You shall nevertheless respond to the remaining portions to the extent You are capable of doing so and to the extent not objected to.

8. Each Request contemplates production of the Document in its entirety without abbreviations or expurgation. Each and every non-identical copy of a Document (whether different from the original because of stamps, indications of receipt, handwritten notes, marks, post-its, attachment to different Documents or any other reason) is a separate Document to be produced.

9. A Request for a Document shall be construed to include a Request for any and all copies, versions, and drafts of such Document, and any and all transmittal sheets, cover letters, enclosures, or attachments relating to such Document.

10. In producing Documents, all Documents that are physically attached to each other in files shall be made available in that form regardless of whether the attached Documents are otherwise requested herein. Documents that are segregated or separated from other Documents whether by inclusion in binders, files, sub-files, or by use of dividers, tabs, or any other method, shall be made available in that form.

11. The fact that investigation is continuing or that discovery is not complete shall not be used as an excuse for failure to respond to each Request based on the knowledge and information currently available.

12. The obligation to respond to these Requests is of a continuing nature so that if at any time after answering these Requests You should acquire possession, custody or control of any additional Documents within the scope hereof, except to the extent such information or Documents are obtained by discovery in the public record of this case, You shall be obligated to produce such Document.

13. For the purposes hereof, the reference to any entity shall include any and all past or present officers, directors, employees, associates, consultants, attorneys, representatives, and agents or any other Person or entity representing such entity or acting on its behalf as well as any and all affiliate entities, predecessors and successors in interest, and their respective officers, directors, employees, associates, consultants, attorneys, representatives, and agents.

14. Defendants reserve the right to propound additional Requests.

REQUESTS FOR PRODUCTION

1. All documents and communications concerning the Meriter Action, including but not limited to documents and communications relating to (i) litigation of the Meriter Action; (ii) the strengths and weaknesses of the claims and defenses asserted in the Meriter Action; (iii) settlement of the Meriter Action; (iv) the reasonableness of the terms of the settlement of the Meriter Action; (v) the risk facing Towers at trial and on appeal in the Meriter Action; and (vi) the potential consequences to Towers of not settling and deciding to go to trial in the Meriter Action.

2. All documents and communications from July 30, 2010 through the present relating to the Class Action, including but not limited to documents and communications concerning (i) the strengths and weaknesses of the claims and defenses asserted in the Class Action; (ii) Towers' potential exposure or liability to Meriter or any other entity in connection with the Class Action; and (iii) the reasonableness of the terms of the settlement of the Class Action.

3. All documents and communications relating to Towers' role as a non-party witness in the Class Action or as a source of non-party discovery in the Class Action.

4. All communications between You and Towers and/or its agents and/or its attorneys and/or its insurers concerning Towers, the Class Action, or the Meriter Action.
5. All communications between You and Meriter and/or its agents and/or its attorneys concerning Towers, the Class Action, or the Meriter Action.
6. All documents and communications concerning any knowledge or information you gained or received relating to the tolling agreement between Meriter and Towers.
7. All communications between You and Godfrey & Kahn S.C. and/or its agents and/or its attorneys concerning Towers, the Class Action, or the Meriter Action.
8. All communications between You and Littler Mendelson P.C. and/or its agents and/or its attorneys concerning Towers, the Class Action, or the Meriter Action.
9. All communications between You and Morgan Lewis and/or its agents and/or its attorneys concerning Towers, the Class Action, or the Meriter Action.
10. All documents concerning any knowledge or information you gained or received regarding Towers' intent to file a lawsuit against Morgan Lewis or the substance of Towers' alleged claim against Morgan Lewis.
11. All documents concerning any knowledge or information you gained or received regarding provision(s) governing waiver of conflicts in the engagement letter(s) between Morgan Lewis and Towers.
12. All documents concerning any knowledge or information you gained or received regarding any alleged conflict between Morgan Lewis' representation of Meriter and any representation by Morgan Lewis of Towers.

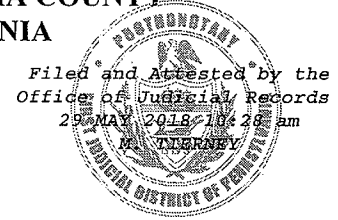
13. Timesheets, billing records, and documents and communications relating to timesheets and billing records for all the work and services You provided to Towers in connection with the litigation and settlement of the Meriter Action.

14. Timesheets, billing records, and documents and communications relating to timesheets and billing records for all the work and services outside consultants, experts, and other professionals provided to Towers connection with the litigation and settlement of the Meriter Action.

15. Your engagement letter with Towers.

EXHIBIT “2”

**THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
 FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
 CIVIL TRIAL DIVISION**



TOWERS WATSON DELAWARE, INC.,)	
)	
Plaintiff,	)	COURT OF COMMON PLEAS
	)	PHILADELPHIA COUNTY
v.)	
	)	COMMERCE COURT
MORGAN, LEWIS & BOCKIUS LLP, et al.,	)	April Term, 2017
	)	No. 02096
Defendants.)	
)	

ORDER

AND NOW, on this ____ day of _____, 2018, it is hereby ORDERED that Defendants’ Motion to Compel Answers and Production of Documents from Plaintiff is GRANTED. This Court finds that Towers has waived the attorney-client privilege and work product protections as to the issues of (1) the settlement of the Meriter Action, and (2) informed consent to Morgan Lewis’s alleged conflict of interest. With regard to these issues, Towers is hereby ORDERED to promptly (1) provide amended responses to Defendants’ Interrogatories, and (2) produce all documents responsive to Defendants’ Document Requests.

BY THE COURT

J.

DECHERT LLP

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*Attorneys for Defendants Morgan, Lewis & Bockius LLP
and Jeremy P. Blumenfeld, Esquire*

TOWERS WATSON DELAWARE, INC.,)	
)	
Plaintiff,	)	COURT OF COMMON PLEAS
	)	PHILADELPHIA COUNTY
v.)	
	)	COMMERCE COURT
MORGAN, LEWIS & BOCKIUS LLP, et al.,	)	April Term, 2017
	)	No. 02096
Defendants.)	
)	

DEFENDANTS’ MOTION TO COMPEL ANSWERS AND PRODUCTION OF DOCUMENTS FROM PLAINTIFF TOWERS WATSON DELAWARE, INC. BY REASON OF PLAINTIFF’S WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTIONS

Defendants Morgan, Lewis & Bockius LLP (“Morgan Lewis”) and Jeremy P.

Blumenfeld, by and through their undersigned counsel, move this Court to compel Plaintiff Towers Watson Delaware, Inc. (“Towers”) to produce documents and information with regard to which Towers has waived the attorney-client privilege and work product protections. In support thereof, Defendants allege as follows:

1. In 2010, Meriter Health Services, Inc. (“Meriter”) was sued in federal court in Wisconsin by a class of pension plan participants challenging certain amendments to the plan

and the manner in which participants were advised about the changes in their pension benefits (the “Class Action”). Morgan Lewis represented Meriter in that case.

2. Towers provided actuarial and benefits services to Meriter in connection with the plan. As a consequence, discovery was taken of Towers, and the quality of Towers’s services was brought into question, in turn raising the possibility of liability by Towers to Meriter.

3. Morgan Lewis represented Towers in matters unrelated to the Class Action. When it became apparent that Towers may be subject to claims arising from the matters at issue in the Class Action, Morgan Lewis promptly notified Meriter that because of its representation of Towers in unrelated legal matters, it would not be adverse to Towers. Meriter retained separate counsel to assess Towers’s role in the events giving rise to the Class Action, and Morgan Lewis had no involvement in assessing these claims.

4. In late 2010, representatives of Meriter and Towers began to discuss an agreement that would toll the statute of limitations on any claims by Meriter against Towers. A tolling agreement was signed in 2013, and deferred any litigation by Meriter against Towers until after the conclusion of the Class Action. Morgan Lewis played no role in negotiations surrounding the tolling agreement

5. The Class Action was settled in 2014, and thereafter Meriter brought claims against Towers for professional negligence and breach of duty in connection with the services Towers provided to Meriter’s pension plan (the “Meriter Action”).

6. In the Meriter Action, Towers argued that Meriter waived attorney-client privilege and work product protections over documents relating to the settlement of the Class Action when it “placed its attorney-client privileged information and work product ‘at issue’ in the litigation.” The state court in Wisconsin agreed and required Meriter and Morgan Lewis to

produce all of the communications between them and any work product relating to the defense of the Class Action. Accordingly, Morgan Lewis turned over its entire file relating to its representation of Meriter.

7. Towers settled Meriter's claims against it in 2017.

8. In this case, Towers contends that in the course of defending Meriter in the Class Action, Morgan Lewis secretly assisted Meriter in developing the claims against Towers that would eventually form the basis of the Meriter Action.

9. Towers claims that it is entitled to recover attorneys' fees that it paid to Morgan Lewis in unrelated matters from 2010 to 2016, and the amount it paid in 2017 to settle the Meriter Action.

10. Towers also claims that Morgan Lewis could not have offered assistance to Meriter with respect to its claims against Towers because to do so would violate the terms of Towers's engagement of Morgan Lewis. But in the engagement letter Towers signed with Morgan Lewis in 2010, Towers specifically agreed to a prospective waiver of any conflict that may arise out of Morgan Lewis's future representation of other clients. The 2010 engagement letter was reaffirmed in 2012.

11. In bringing the claims in this case, Towers has placed at issue—and thereby waived privilege over—two key matters: (1) the circumstances of its settlement of the Meriter Action, including the reasonableness of the amount paid; and (2) information surrounding the terms of Towers's engagement of Morgan Lewis, and in particular the extent to which Towers gave informed consent to a waiver of future conflicts of interest.

12. On April 17, 2018, Towers and Defendants entered into a protective order prohibiting, among other things, the disclosure of confidential information produced during discovery.

13. Morgan Lewis has served discovery requests seeking documents and information related to Towers's damages claims, and specifically the settlement of the Meriter Action. Towers has objected to producing this discovery on privilege grounds. Despite having previously and successfully argued in the Meriter Action that Meriter waived the attorney-client privilege and work product protections by placing the settlement of the Class Action at issue, Towers now takes a contrary and inconsistent position and claims that it did *not* waive privilege by placing the settlement of the Meriter Action at issue in this case.

14. Morgan Lewis also seeks discovery relating to the conflicts waiver and Towers's knowledge of Morgan Lewis's alleged conflict. Towers refuses to produce this discovery on privilege grounds.

15. Counsel for the parties have met in person and conferred in an attempt to resolve their disagreement. Such efforts were unsuccessful, thus necessitating this motion.

16. “[A] party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party” Pa. R.C.P. 4003.1. Discovery “is liberally allowed with respect to any matter, not privileged, which is relevant to the cause being tried.” *George v. Schirra*, 814 A.2d 202, 205 (Pa. Super. Ct. 2002). Plaintiff is claiming privilege over two critical issues in this case: (1) Towers's settlement of the Meriter Action, and (2) Towers's decision to sign engagement letters with Morgan Lewis

containing prospective conflict waiver provisions. Discovery related to these issues is not just relevant, but critical to the resolution of this case.

Settlement of the Meriter Action

17. Towers claims as damages the amount of the settlement it paid to Meriter to settle the Meriter Action. It makes this claim based on its theory that Morgan Lewis in some manner assisted Meriter in bringing its claims against Towers, and thus that Morgan Lewis somehow caused the settlement.

18. Towers should be compelled to produce the documents related to the settlement. Such documents are necessary, *inter alia*, so that Morgan Lewis (and the Court) may assess the reasonableness of the settlement and the strength of Meriter's claims and Towers's defenses.

19. The attorney-client privilege is not without exceptions, and is waived if a party "intends to rely on portions of the privileged communications in establishing a claim or defense." *Mueller v. Nationwide Mut. Ins. Co.* 31 Pa. D. & C.4th 23, 36 (Allegheny Cty. Com. Pl. 1996). "A party is not permitted to use the attorney-client privilege as a sword and as a shield." *Id.* at 31.

20. By relying on privileged communications to establish the reasonableness of its settlement strategy, Towers has thus placed those privileged communications at issue in this case.

21. By playing those communications at issue, Towers has waived privilege over those documents.

22. Just like the attorney-client privilege, work product protection is not absolute.

23. In Pennsylvania, work product may be discoverable in litigation if “the legal opinion of an attorney becomes a relevant issue in an action.” Pa.R.C.P. No. 4003.3 Explanatory Note.

24. As courts have held in analogous contexts, a party seeking compensation for its payment of a settlement in an underlying action must produce work product relating to the reasonableness of the settlement in order to establish an entitlement to the settlement amount. *See, e.g., Bowman v. Am. Homecare Supply, LLC*, No. CIV.A. 07-3945, 2009 WL 1873667, at *1 (E.D. Pa. June 25, 2009).

25. Here, Towers’s claim that Morgan Lewis is liable to it for the amount that it paid to settle the Meriter Action is functionally equivalent to a claim for indemnification, because Towers is suing Morgan Lewis to reimburse it for its loss.

26. Morgan Lewis therefore is entitled to examine the documents and analysis that gave rise to the settlement in the first place, so that it may contest the reasonableness of the settlement and the reasons for which the case was settled. Having placed the settlement of the Meriter Action at issue in this case, Towers has waived privilege over that issue and must produce all relevant documents to Morgan Lewis.

Informed Consent

27. Morgan Lewis also seeks production of documents relating to Towers’ agreement to the prospective conflicts waivers in the 2010 and 2012 engagement letters, including but not limited to (1) Towers’s awareness of the potential for a conflict when it agreed to the prospective waiver in the 2010 engagement letter, and (2) Towers’s awareness of Morgan Lewis’s alleged conflict in 2012 when it reaffirmed the 2010 engagement letter.

28. Towers claims that notwithstanding the prospective waiver, it did not give informed consent to the alleged conflict. But at the same time, Towers refuses to produce documents that would either support or disprove that argument.

29. As discussed above, “a party waives . . . privilege if it intends to rely on portions of the privileged communications in establishing a claim or defense.” *Mueller*, 31 Pa. D. & C.4th at 36.

30. By affirmatively arguing that Towers, through its attorneys, was unaware of or otherwise did not consent to Morgan Lewis’s alleged conflict of interest, Towers has placed its knowledge of the conflict squarely at issue and has thus waived both the attorney-client privilege and work product protections with regard to that fact.

31. Additionally, courts have held that when a party places its knowledge of a particular fact at issue, the party thereby waives privilege over documents relevant to the party’s knowledge of the fact. *See, e.g., Feld v. Fireman’s Fund Ins. Co.* 292 F.R.D. 129, 132 (D.D.C. 2013).

32. Towers contends that it did not give informed consent to any alleged conflict of interest, thereby effectively denying that it knew of (1) the potential for a conflict when it agreed to the prospective waiver in the 2010 engagement letter, and (2) a conflict in 2012 when it reaffirmed the 2010 engagement letter. At the same time, however, Towers is claiming privilege over any documents that might disprove these critical facts.

33. Towers’s affirmative argument that it did not provide informed consent to the alleged conflict places its knowledge of the conflict and the circumstances surrounding its agreement to the prospective waiver at issue. Privilege is therefore waived as to documents and information relating to the prospective waiver.

34. Accordingly, for the reasons set forth herein and more fully in the accompanying Memorandum of Law, Plaintiffs have placed at issue and thus waived privilege over (1) the settlement of the Meriter Action, and (2) Towers' agreement to the prospective conflicts waivers in the 2010 and 2012 engagement letters.

WHEREFORE, Defendants respectfully request that this Court grant its Motion and compel Plaintiff to produce discovery related to (1) the settlement of the Meriter Action, and (2) Towers' agreement to the prospective conflicts waivers in the 2010 and 2012 engagement letters.

Dated: May 25, 2018



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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2018, the foregoing Motion to Compel Answers and Production of Documents from Plaintiff Towers Watson Delaware was electronically served upon each of the counsel below and a copy of the same was served on counsel via email:

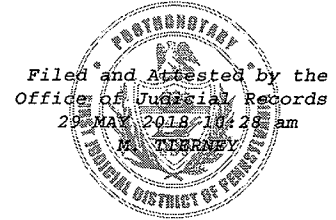
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TOWERS WATSON DELAWARE, INC.,)	
)	
Plaintiff,)	COURT OF COMMON PLEAS
)	PHILADELPHIA COUNTY
v.)	
	)	COMMERCE COURT
MORGAN, LEWIS & BOCKIUS LLP, et al.,	)	April Term, 2017
	)	No. 02096
Defendants.)	
)	

DEFENDANTS’ MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL ANSWERS AND PRODUCTION OF DOCUMENTS FROM PLAINTIFF TOWERS WATSON DELAWARE, INC. BY REASON OF PLAINTIFF’S WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTIONS

Plaintiff Towers Watson Delaware, Inc. (“Towers”), a former client of Morgan, Lewis & Bockius LLP (“Morgan Lewis”), contends that Defendants Morgan Lewis and Jeremy P. Blumenfeld, Esquire breached fiduciary duties and contractual obligations that they owed to Towers in the course of Morgan Lewis’s defense of a different client, Meriter Health Services, Inc. (“Meriter”) in an ERISA-based employee benefits class action.

MATTER BEFORE THE COURT

This motion addresses a wrongful assertion of the attorney-client privilege and work product protection as to matters that Towers has placed at issue in this litigation.

In 2010, Meriter was sued in federal court in Wisconsin by a class of pension plan participants challenging certain amendments to the pension plan and the manner in which participants were advised about the changes in their pension benefits (the “Class Action”). Morgan Lewis defended Meriter in that case. Towers had provided actuarial and benefits services to Meriter in connection with the plan. As a consequence, discovery was taken of Towers, and the quality of Towers’s services was brought into question, in turn raising the possibility of liability by Towers to Meriter.

Because Towers was a client of Morgan Lewis in unrelated matters, Meriter retained separate counsel to assess Towers’s role in the events giving rise to the Class Action, among other things. Morgan Lewis had no involvement in assessing any potential claims Meriter may have had against Towers. After the Class Action was settled in 2014, Meriter, through its separate counsel, brought claims against Towers for professional negligence and breach of duty in connection with the services Towers provided to Meriter’s pension plan (the “Meriter Action”). Meriter’s claims against Towers were settled in 2017.

Towers now seeks to shift the blame arising out of the errors it committed in connection with the Meriter pension plan to Morgan Lewis. Towers contends that in the course of defending Meriter in the Class Action, Morgan Lewis secretly (and apparently without any motive) assisted Meriter in developing the claims against Towers that would eventually form the basis of the Meriter Action. As a result, Towers contends that it is entitled to recover attorneys’ fees that it

paid to Morgan Lewis in unrelated matters from 2010 to 2016, and the settlement amount it paid in 2017 to settle the claims asserted by Meriter in the Meriter Action.

In bringing these claims, Towers has placed at issue two key matters: (i) the circumstances of, and reasons for, its settlement of the Meriter Action; and (ii) information surrounding the terms of Towers's engagement of Morgan Lewis, and in particular the extent to which Towers gave informed consent to a waiver of any conflicts of interest. First, Towers claims the settlement amount it paid to Meriter as damages. As a result, Towers has placed directly at issue the details surrounding that settlement, including the reasons for and reasonableness of the settlement of the Meriter Action and Morgan Lewis's alleged role in causing the losses that Towers incurred.

Second, Towers alleges that Morgan Lewis was ethically precluded from assisting Meriter with respect to its potential claims against Towers because to do so would violate the terms of Towers's engagement of Morgan Lewis. Morgan Lewis expressly denies that it provided assistance to Meriter. But in any event, Towers ignores that in the engagement letter it signed with Morgan Lewis in 2010 (and reaffirmed in 2012), Towers specifically agreed to a waiver of any conflict that may arise out of Morgan Lewis's representation of other clients. Towers apparently contends that the conflict waivers were granted without informed consent, but in so arguing, Towers has placed at issue the extent to which its in-house attorneys understood the potential for adversity when they first agreed to the prospective waiver in 2010, and then recognized existing adversity with Meriter during the pendency of the Class Action in 2012 when the 2010 engagement letter was reaffirmed.

Having placed the circumstances surrounding the settlement of the Meriter Action and the prospective conflict waiver squarely at issue by bringing this case, Towers cannot now use a

waived claim of privilege as a shield to block the very discovery that pertains to these central issues in this case. Towers should be compelled to produce these documents forthwith.

QUESTION PRESENTED

Should the Court grant the Defendants' motion to compel and hold that Plaintiff has waived privilege and work product protection over documents and interrogatory answers relating to (1) Towers's settlement of the Meriter Action, and (2) Towers's knowledge of potential conflicts when it agreed to the prospective conflict waivers in 2010 and 2012?

Suggested Answer: Yes.

FACTUAL BACKGROUND

A. The ERISA Class Action and Meriter's Claims Against Towers

In August of 2010, a class action lawsuit was brought in federal court in Wisconsin against Meriter under ERISA, 29 U.S.C. §§ 1001 *et seq.* Compl. ¶ 15. The Class Action plaintiffs contended that certain amendments to the Meriter pension plan were inconsistent with ERISA and that plan participants were misled about the changes to their benefit accruals. Meriter retained Morgan Lewis to defend it in the Class Action. *Id.* ¶ 16.

Towers was not a named defendant in the Class Action, but it became apparent during the course of the litigation that it was involved in the matters that gave rise to the claim: Towers and a predecessor firm that it acquired in 2005 provided actuarial and other employee benefit consulting services to Meriter and the pension plan, and Towers was instrumental in the development of the pension plan provisions that were alleged to have been unlawful. *Id.* ¶ 19. When it became apparent that Towers may be subject to claims arising from the matters at issue in the Class Action, Morgan Lewis promptly notified Meriter that because of its representation of Towers in unrelated legal matters, it would not be adverse to Towers. *Id.* ¶¶ 20-21. Meriter then retained separate counsel to advise it on matters relating to insurance coverage for the Class

Action and any possible third party claims, including any claims against Towers and the law firm that had represented Meriter in matters relating to the challenged pension plan amendments. *Id.*

¶ 26. Morgan Lewis affirmatively refused to offer any advice relating to potential claims against Towers, and was not involved in the assertion of such claims.

In late 2010, representatives of Meriter and Towers began to discuss an agreement that would toll the statute of limitations on any claims by Meriter against Towers. New Matter at ¶ 5. The tolling agreement was ultimately signed in 2013, and deferred any litigation by Meriter against Towers until after the conclusion of the Class Action. Morgan Lewis played no role in negotiations surrounding the tolling agreement.

After extensive discovery and motion practice, an agreement to settle the Class Action was reached in July of 2014. Compl. ¶ 18. After the settlement was approved, Meriter, through its separate counsel at Nixon Peabody, brought the Meriter Action against Towers and the law firm that had handled benefits work for the pension plan. *Id.* ¶ 19. Meriter alleged that Towers's negligence in the provision of professional services caused or contributed to Meriter's liability in the underlying Class Action, and sought to recover from Towers portions of the \$82 million that Meriter paid to settle the Class Action. *Id.*; see *Meriter Health Servs., Inc. v. Godfrey & Kahn, S.C., et al.*, No. 15-cv-0028 (Wis. Cir. Ct., Dane Cty.). Morgan Lewis did not represent Meriter in the Meriter Action, nor did it have any involvement in the case other than to respond to discovery.¹

¹ As noted below, Morgan Lewis produced documents in response to requests from Towers. Additionally, Mr. Blumenfeld, gave deposition testimony as a fact witness. Mr. Blumenfeld objected to the request that he provide opinion or expert testimony at his deposition, and the Wisconsin court sustained that objection

Towers denied that it was responsible for any losses incurred by Meriter and sought extensive discovery on, among other things, the reasons why Meriter settled the Class Action. In a striking parallel to the instant action, Towers argued that Meriter waived attorney-client privilege and work product protections over documents relating to the settlement of the Class Action when it “placed its attorney-client privileged information and work product ‘at issue’ in the litigation.” Ex. A, Oct. 25, 2016 Towers’s Opp. to Meriter’s Mot. for a Protective Order (“Towers Waiver Brief”), *Meriter Health Services, Inc. v. Godfrey & Kahn, S.C., et al.*, No. 15-cv-0028 (Wis. Circuit Ct., Dane County), at 11. The state court in Wisconsin agreed and required Meriter and Morgan Lewis to produce all of the communications between them and any work product relating to the defense of the Class Action. Ex. B, Feb. 2, 2017 Order to Show Cause, *Meriter Health Services, Inc. v. Godfrey & Kahn, S.C., et al.*, No. 15-cv-0028 (Wis. Circuit Ct., Dane County). Accordingly, Morgan Lewis turned over its entire file relating to its representation of Meriter. Towers and Meriter eventually settled the Meriter Action in 2017.

B. Towers’s Privilege Assertions

Despite having previously and successfully argued in the Meriter Action that Meriter waived the attorney-client privilege and work product protections by placing the settlement of the Class Action at issue, Towers now takes a contrary and inconsistent position and claims that it did *not* waive privilege by placing the settlement of the Meriter Action at issue in this case. Morgan Lewis has served discovery requests seeking documents and information related to Towers’s damages claims, and specifically the settlement of the Meriter Action. Ex. C, Defs.’ Reqs. for Produc. of Docs. (“Defendants’ Document Requests”), at 10-13, 15; Ex. D, Defs.’ Interrog. (“Defendants’ Interrogatories”), at 19-20, 24-25. Towers has objected to producing this discovery on privilege grounds. Ex. E, Pl’s. Resp. to Defs.’ Reqs. for Produc. of Docs.

(“Plaintiff’s Discovery Objections”), at 12-15, 18; Ex. F, Pl’s. Objs. and Resps. to Defs.’ Interrogs. (“Plaintiff’s Interrogatory Objections”), at 15-16, 21.

Towers also affirmatively claims that it did not provide informed consent to Morgan Lewis’s alleged conflict, but at the same time claims that it did not waive the privilege when it placed that consent at issue in this case. Towers signed an engagement letter with Morgan Lewis in 2010 (before the Class Action was filed) that prospectively waived any future conflict that may arise. In 2012 (while the Class Action was ongoing, and with full knowledge that Morgan Lewis was representing Meriter in the Class Action), Towers reaffirmed the terms of the 2010 engagement letter, including the broad waiver of conflicts. New Matter ¶¶ 1-2. Morgan Lewis thus seeks discovery relating to the conflicts waiver including Towers’s knowledge of Morgan Lewis’s alleged conflict and any adversity between Meriter and Towers. Defendants’ Document Requests at 14; Defendants’ Interrogatories at 22-24. Towers again refuses to produce this discovery on privilege grounds. Ex. E, Plaintiff’s Discovery Objections at 17; Ex. F, Plaintiff’s Interrogatory Objections at 18-20.

Counsel for the parties have met in person and conferred in an attempt to resolve their disagreement. Such efforts were unsuccessful, thus necessitating this motion.

ARGUMENT

“[A] party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party” Pa. R.C.P. 4003.1. Discovery “is liberally allowed with respect to any matter, not privileged, which is relevant to the cause being tried.” *George v. Schirra*, 814 A.2d 202, 205 (Pa. Super. Ct. 2002).

Here, Plaintiff is claiming privilege over two critical issues in this case: (1) Towers’s settlement of the Meriter Action, and (2) Towers’s decision to sign engagement letters with

Morgan Lewis containing prospective conflict waiver provisions. Discovery related to these issues is not just relevant, but critical to the resolution of this case. The law is clear that Towers may not bring this suit and demand tens of millions of dollars from Morgan Lewis, and at the same time cloak critical facts necessary to Morgan Lewis's defense in a dubious shroud of privilege. Especially given the confidentiality order that already is in place in this case and would protect any documents produced, Towers's insistence on withholding this discovery is particularly troubling and should not be allowed.

I. TOWERS HAS WAIVED PRIVILEGE OVER DOCUMENTS AND INFORMATION RELATING TO THE SETTLEMENT OF THE MERITER ACTION

Towers claims as damages the amount of the settlement it paid to Meriter to settle the Meriter Action. It makes this claim based on its theory that Morgan Lewis in some manner assisted Meriter in bringing its claims against Towers, and thus that Morgan Lewis somehow caused the settlement. Even assuming that such a theory of liability could ever be viable (a doubtful proposition at best), it is plain that before Towers can even begin to argue that it is entitled to recover from Morgan Lewis the amount of the settlement, it must produce the documents and other information related to the settlement. Such documents and information are necessary, *inter alia*, so that Morgan Lewis (and the Court) may assess the reasonableness of the settlement and the strength of Meriter's claims and Towers's defenses. Through its actions and representations, Towers has waived both the attorney-client privilege and work product protections with respect to these documents and information.

A. Towers's Previous Inconsistent Argument Undermines Its Claim

"To recover the [cost of the] settlement as damages, [the plaintiff] . . . must demonstrate that the settlement was reasonable." Ex. A, Towers Waiver Brief, at 3. "[T]he reasonableness of the . . . settlement" is "an element of its claim." *Id.* at 11. "[A] party waives the attorney-client

privilege by placing its communications with counsel ‘at issue’ in this litigation; that is, ‘when a party has asserted a claim or defense that he intends to prove by use of the privileged materials.’” *Id.* at 9 (citing Third Circuit case law). By relying on privileged materials to prove the reasonableness of the settlement, the plaintiff “has placed its attorney-client privileged information and work product ‘at issue’ in the litigation and, therefore, has waived both privileges.” *Id.* at 11.

The language quoted in the previous paragraph is not Morgan Lewis’s. Rather, it is *Towers’s own argument* from its briefing on a remarkably similar privilege issue in the Meriter Action. In the Meriter Action, Towers argued that Meriter waived the attorney-client privilege and work product protections with regard to the settlement of the Class Action by relying on privileged information to satisfy the “reasonableness of the settlement” element required to prove damages. Towers’s argument was successful, and the Wisconsin court ordered that Meriter and Morgan Lewis produce the documents. Ex. B, Feb. 2, 2017 Order to Show Cause, *Meriter Health Services, Inc. v. Godfrey & Kahn, S.C., et al.*, No. 15-cv-0028 (Wis. Circuit Ct., Dane County). Towers now seeks the protections of the privileges that it previously (and successfully) sought to pierce. But what is sauce for the goose is sauce for the gander: As a matter of both logic and equity, Towers should not be permitted to withhold plainly relevant materials relating to the settlement of the Meriter Action based on a claim of privilege, when it placed that very matter at issue in its assertion of its claims here.

B. Towers Has Waived the Attorney-Client Privilege

The attorney-client privilege is not without exceptions, and is waived if a party “intends to rely on portions of the privileged communications in establishing a claim or defense.” *Mueller v. Nationwide Mut. Ins. Co.* 31 Pa. D. & C.4th 23, 36 (Allegheny Cty. Com. Pl. 1996); see Ex. A, Towers Waiver Brief at 9; see also *Salsman v. Brown*, 51 A.3d 892, 895 & n.3 (Pa.

Super. Ct. 2012) (in a suit to enforce a settlement in an underlying case, finding that the defendants waived attorney-client privilege by placing at issue whether their attorney had been given the authority to make a settlement offer).

In *Mueller*, for example, a motorist sued an insurance company and alleged that the company acted in bad faith in settling the motorist's claims. *Mueller*, 31 Pa. D. & C. 4th, at 36. The motorist requested the insurance company's communications with its counsel, arguing that the documents were relevant to the insurance company's defense that it negotiated the settlement reasonably and in good faith. *Id.* at 30. Although Judge Wettick rejected the motorist's argument that privileged materials should be compelled "whenever state of mind is a central issue in the case," *id.*, and therefore denied the motion to compel, he explicitly noted, "***there will be instances in which [a party] will contend that it was influenced by the advice of counsel,***" and that in such instances, "***the privilege is deemed to have been waived by the client.***" *Id.* at 32 (emphasis added). The rationale is simple: "A party is not permitted to use the attorney-client privilege as a sword and as a shield." *Id.*

This case presents a factual scenario akin to the one that Judge Wettick envisaged. Towers relies on privileged communications to establish the reasonableness of its settlement strategy, but refuses to permit Morgan Lewis to obtain the discovery to which Towers refers. See Ex. F, Plaintiff's Interrogatory Objections at 15-16, 21; Ex. E, Plaintiff's Discovery Objections at 12-15, 18. In fact, through its interrogatory responses, Towers specifically notes that its attorneys are the ones who have knowledge of the alleged damages in this case and the circumstances surrounding the settlement of the Meriter Action, Ex. F, Plaintiff's Interrogatory Objections at 3-4, 15-16. Nevertheless, despite putting these attorneys' knowledge at issue, Towers seeks to withhold the very documents and communications between certain of these

attorneys relating to this issue. *See, e.g.*, Towers Watson First Revised Privilege Log, at entries 56-112, attached as Ex. G.

This stratagem should not be allowed; if Towers bases an element of its claim on privileged materials and communications, it has thus waived privilege as to those materials and should be compelled to produce them. *Mueller*, 31 Pa. D. & C. 4th, at 32; *see* Ex. A, Towers Waiver Brief at 11; *cf. E.E.O.C. v. Rose Casual Dining, L.P.*, No. Civ.A. 02-7485, 2004 WL 231287, at *3 (E.D. Pa. 2004) (defendant argued in a wrongful termination case that it conducted a reasonable pre-termination investigation; court held that the defendant placed at issue, and therefore waived privilege over, the reasonableness of the investigation). The reasons for and the reasonableness of Towers's settlement of the Meriter Action are reflected in those materials.

C. Towers Has Waived Work Product Protection

Just like the attorney-client privilege, work product protection is not absolute. In Pennsylvania, it is clear that work product may be discoverable in litigation, even absent the showing of "substantial need" required by the federal rules, if "the legal opinion of an attorney becomes a relevant issue in an action." Pa.R.C.P. No. 4003.3 Explanatory Note.

As courts have held in analogous contexts, a party seeking compensation for its payment of a settlement in an underlying action must produce work product relating to the reasonableness of the settlement in order to establish an entitlement to the settlement amount. In *Bowman v. Am. Homecare Supply, LLC*, for example, American Homecare Supply, which had acquired the plaintiff's home health business, contended that it was entitled to indemnification by the plaintiffs for American Homecare Supply's settlement of a lawsuit arising out of a product manufactured by the acquired business. No. CIV.A. 07-3945, 2009 WL 1873667, at *1 (E.D. Pa. June 25, 2009). American Homecare Supply requested the work product of the plaintiff's attorney, asserting that his "opinions, mental impressions, and legal theories regarding the

strength of the . . . claims will be critical to . . . determining the reasonableness of . . . settlement costs and attorneys' fees." *Id.* at *3. The court agreed with American Homecare Supply that these documents were relevant to the case and producible even under the federal rules' heightened "substantial need" standard, and compelled production of work product that discussed the settlement amount and the attorney's evaluation of the claims. *Id.* at *5.

Here, Towers's claim that Morgan Lewis is liable to it for the amount that it paid to settle the Meriter Action is functionally equivalent to a claim for indemnification, because Towers is suing Morgan Lewis to reimburse it for its loss. *Cf. id.* To the extent that Morgan Lewis could be held liable, it is entitled to discovery regarding the documents and analysis that gave rise to the settlement in the first place, so that it may contest the reasonableness of the settlement and the reasons for which the case was settled. *See id.* Having placed the settlement of the Meriter Action at issue in this case, Towers has waived privilege over that issue and must provide documents and information to Morgan Lewis.

II. TOWERS HAS WAIVED PRIVILEGE OVER DOCUMENTS AND INFORMATION RELATING TO INFORMED CONSENT

Morgan Lewis also seeks documents and information relating to (1) Towers's awareness of the potential for a conflict when it agreed to the prospective waiver in the 2010 engagement letter, and (2) Towers's awareness of Morgan Lewis's alleged conflict in 2012 when it reaffirmed the 2010 engagement letter. Towers claims that notwithstanding the prospective waiver, it did not give informed consent to the alleged conflict. But at the same time, Towers refuses to produce documents and information that would either support or disprove that argument.

As discussed above, "a party waives . . . privilege if it intends to rely on portions of the privileged communications in establishing a claim or defense." *Mueller*, 31 Pa. D. & C.4th at

36; *see* Ex. A, Towers Waiver Brief at 9. By affirmatively arguing that Towers, through its attorneys, was unaware of or otherwise did not consent to Morgan Lewis's alleged conflict of interest, Towers has placed its knowledge of the conflict squarely at issue and has thus waived both the attorney-client privilege and work product protections with regard to that fact.

Courts have held that when a party places its knowledge of a particular fact at issue, the party thereby waives privilege over documents and information relevant to the party's knowledge of the fact. In *Feld v. Fireman's Fund Ins. Co.*, for example, the plaintiff-insured sued the defendant-insurer in part over the defendant's refusal to reimburse the plaintiff for the plaintiff's attorneys' full hourly rates. 292 F.R.D. 129, 132 (D.D.C. 2013). The defendant claimed that it agreed to reimburse the plaintiff's legal expenses up to certain capped hourly rates, while the plaintiff argued that he never agreed that the reimbursement would be capped. *Id.* at 140.

In order to determine the plaintiff's knowledge of the hourly rate cap, the defendant sought production of documents relevant to the issue, and the plaintiff objected on privilege grounds. *Id.* The court agreed with the defendant that the plaintiff "placed at issue his understanding of [the defendant's] position on rates . . . and whether he expressly or impliedly agreed to or acquiesced in the rates set by [the defendant]." *Id.* The court noted that although the plaintiff did not "disclose[] the content of a particular attorney-client communication, he is essentially claiming that no communications of a particular type—those demonstrating that he and/or [his attorneys] did in fact agree to [the defendant's] proposed rates—ever took place," thus making those communications "integral to the outcome of his claims." *Id.* at 141; *see also* *Naglak v. Pennsylvania State Univ.*, 133 F.R.D. 18, 22, 23 (M.D. Pa. 1990) (when plaintiff sued university alleging that she had been fraudulently induced to settle a prior litigation against it,

she waived the attorney-client privilege regarding representations conveyed to her by her attorney during settlement negotiations); *Goss v. Allstate Ins. Co.*, 50 Pa. D. & C.4th 383, 388 (Dauphin Cty. Ct. Com. Pl. 2000) (in a fraud case, finding that the plaintiff placed at issue previous communications with an attorney, when the plaintiff alleged that she justifiably relied on the misrepresentation in the fraudulent document and that she did not discuss the document with anyone else). The court ultimately determined that the plaintiff waived the attorney-client privilege with regard to those documents, reasoning that the plaintiff “may not affirmatively disclaim agreement and yet use the privilege to shield materials that might show otherwise.” *Feld*, 292 F.R.D. at 141; *see also, e.g., Stephens-Martin v. Bank of New York Mellon Tr. Co.*, No. 12 MISC 465277 AHS, 2015 WL 732087, at *17 (Mass. Land Ct. Feb. 20, 2015) (finding waiver with respect to party’s communications with counsel regarding notice of foreclosure where “Petitioner clearly put at issue at trial the question of whether she . . . had knowledge of the postponed foreclosure sale by asserting lack of such knowledge”).

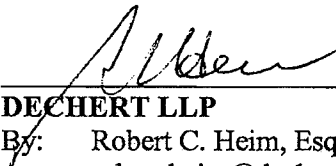
As in *Feld*, Towers contends that it did not give informed consent to any alleged conflict of interest, thereby effectively denying that it was (1) aware of the potential for a conflict when it agreed to the prospective waiver in the 2010 engagement letter, and (2) aware of a conflict in 2012 when it reaffirmed the 2010 engagement letter. At the same time, Towers is claiming privilege over any documents and information that might disprove these critical facts. Towers even notes that its attorneys have knowledge of the circumstances surrounding Towers’s decision to enter into engagement agreements containing conflict waivers, Ex. F, Plaintiff’s Interrogatory Objections at 6-7, 18-20. Towers, persists, however, in withholding the emails between certain of these attorneys that bear on this key issue. *See Towers Watson Privilege Log*, at entries 4244-4250, attached as Ex. H. Just as the *Feld* court correctly recognized, Towers cannot have it both

ways. Towers's affirmative argument that it did not provide informed consent to the alleged conflict places its knowledge of the conflict and the circumstances surrounding its agreement to the prospective waiver at issue. Privilege is therefore waived as to documents and information relating to the prospective waiver.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court enter an Order determining that Towers has waived the attorney-client privilege and work product protections as to the issues of (1) the settlement of the Meriter Action, and (2) informed consent to Morgan Lewis's alleged conflict of interest. Defendants further respectfully request that this Court order Towers to promptly (1) respond fully with amended written, verified responses to Defendants' Interrogatories, and (2) produce all documents responsive to Defendants' Document Requests.

Dated: May 25, 2018



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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2018, the foregoing Memorandum of Law in Support of Defendants' Motion to Compel Answers and Production of Documents from Plaintiff Towers Watson Delaware was electronically served upon each of the counsel below and a copy of the same was served on counsel via email:

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EXHIBIT “3”

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION- CIVIL

TOWERS WATSON DELAWARE, INC., : APRIL TERM, 2017
: :
Plaintiff, : NO. 02096
: :
v. : COMMERCE PROGRAM
: :
MORGAN, LEWIS & BOCKIUS, LLP, and : Discovery Motion Filed 5/29/18
JEREMY P. BLUMENFELD, ESQ., : &
: Motion Control No. 4832033
Defendants. :
18032033

DOCKETED

JUN 28 2018

R. POSTELL
COMMERCE PROGRAM

ORDER

AND NOW, this 28th day of June, 2018, upon consideration of plaintiff's Motion for Judgment on the Pleadings, defendants' Motion to Compel Answers to Interrogatories and Production of Documents, the responses thereto, and all other matters of record, and after oral argument on the discovery Motion, it is **ORDERED** as follows:

1. The Motion for Judgment on the Pleadings is **DENIED**.¹
2. The Motion to Compel is **GRANTED in part**, and plaintiff shall amend its responses to defendants' Interrogatories and produce all documents responsive to defendants' Document Requests with respect to Towers' informed consent to Morgan Lewis' alleged conflict of interest.²

Towers Watson Delaware,-ORDER



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¹ The court will not enter a judgment for liability for legal malpractice based on emails and other communications where such documents, in their entirety, are not part of the record before the court.

² Plaintiff has agreed to let defendants take the depositions of the in-house counsel who dealt directly with Morgan Lewis with respect to the 2010 and 2012 retainer agreements containing the prospective conflict waivers.

2. The remainder of the Motion to Compel is **DENIED** without prejudice to be raised at a later time.³

BY THE COURT,



PATRICIA A. McINERNEY, J.

³ Specifically, if a Towers' witness relies on, or claims to have relied on, the Pepper analysis in support of Towers' claim for damages arising out of the settlement of the underlying dispute, then the Pepper analysis may have to be produced in discovery. However, since the amount paid by Towers in that settlement may prove not to be recoverable damages in this action, the Pepper analysis may not be relevant.