IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
MET-COIL SYSTEMS CORPORATION,	Case No. 03- 12676 (MFW)
Debtor.	Objection Deadline: May 21, 2004 @ 5:00 p.m.
	Hearing Date: May 24, 2004 @ 10:30 a.m.
	Relates to Docket No. 823

RESPONSE OF MESTEK, INC., IN OPPOSITION TO MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO COMPEL THE DEBTOR AND MESTEK, INC. TO COMPLY WITH RULE 2004 ORDER

Mestek, Inc. ("Mestek"), by its undersigned counsel, hereby respectfully submits its Response ("Response") in Opposition to Motion of the Official Committee of Unsecured Creditors to Compel the Debtor and Mestek, Inc., to Comply With Rule 2004 Order (the "Committee" and "Motion to Compel"). In opposition to the Motion to Compel, Mestek states as follows:

INTRODUCTION

1. Although the ostensible purpose of the Committee's Motion to Compel is to obtain discovery from the Debtor and Mestek, the Committee's transparent objective is simply to discredit the Debtor and Mestek with scurrilous allegations that have no basis in fact. The Debtor and Mestek have complied fully with this Court's April 30, 2004, Order ("Rule 2004 Order") authorizing Rule 2004 discovery by the Committee; it is the Committee that is proceeding in bad faith and in violation of both the express provisions of that Order and this Court's local rules governing Rule 2004 examinations.

2. First, the Committee brought this Motion to Compel without ever even informing Mestek that the Committee disputed the sufficiency of Mestek's discovery

responses. In fact, even though counsel for Mestek and the Committee sat in the same conference rooms together for three days of Rule 2004 depositions over the past two weeks, the Committee's counsel never raised any issue regarding the discovery provided by Mestek.

3. Rather than engage in a good faith effort to resolve any discovery dispute with Mestek, as required by Local Rule 2004-1(a) and (b), the Committee instead brought this Motion to Compel without any prior warning and on a shortened briefing schedule that permitted Mestek only three days to prepare a response to the Committee's 16-page motion. To compound the prejudice to Mestek, the Committee unilaterally breached its Confidentiality Agreement with Mestek and attached to its Motion to Compel documents and a deposition transcript clearly designated by Mestek as confidential under the parties' Confidentiality Agreement. Not only did the Committee file these exhibits in the public case file, the Committee also served copies of the exhibits upon the entire Rule 2002 service list in this case. The Committee's Motion constitutes blatant sandbagging of the worst sort, and its disclosure of confidential discovery is a clear violation of this Court's Rule 2004 Order, which expressly directed the Committee to preserve the confidentiality of discovery according to the terms of the parties' Confidentiality Agreement.

4. The specific privilege issues raised by the Committee's Motion to Compel are patently frivolous.[1] The Committee seeks disclosure of three categories of privileged communications:

[1] The Committee also seeks production of voluminous non-privileged correspondence files in the possession of Met-Coil or its former trial counsel; Mestek does not separately address this issue except to join in the objection raised by Met-Coil in its response to the Committee's Motion that the requested discovery would be unduly burdensome upon the Estate and has no apparent relevance to the Committee's investigation.

- the deliberations of Mestek's board of directors concerning pending litigation against Mestek;
- status reports regarding pending litigation prepared by insurance counsel representing both Mestek and Met-Coil and provided to the insurers participating in the defense of the litigation;
- the advice provided by the same insurance counsel to the Debtor and Mestek regarding the potential settlement value of certain insurance claims.

On their face, each of these categories of documents is plainly protected by both the attorney-client privilege and the work product doctrine. The Committee asserts that no attorney participated in the discussions by Mestek's board, but the minutes produced to the Committee plainly state that Mestek's current chief legal officer, his predecessor general counsel, or Mestek's associate general counsel was present at each board meeting for which the privilege has been asserted. As for the litigation status reports prepared by insurance counsel, Illinois law plainly treats as privileged litigation work product shared between the insurer and insured. Nor can there be any dispute that communications among counsel and clients in a joint representation are privileged under a straightforward application of the common interest doctrine.

5. Mestek and the Debtor have produced extensive discovery to the Committee. In addition to thousands of pages of document discovery, the Committee has conducted extensive oral examinations – in total exceeding 20 hours – of Met-Coil's CEO, Mestek's CFO, and Mestek's chief legal officer. The fact that the only disputes that the Committee has raised regarding the sufficiency of the Debtor's and Mestek's discovery responses are the frivolous privilege issues asserted in the Committee's Motion to Compel belies any suggestion by the Committee that the Debtor and Mestek have obstructed the Committee's investigation.

ARGUMENT

The Deliberations of Mestek's Board Concerning Pending Litigation Are Privileged From Discovery.

6. The Committee requested that Mestek produce "[c]opies of minutes of Mestek's Board of Directors' meetings relating to Met-Coil." (Document Request No. 22 to Mestek) In response, on April 15, 2004, Mestek produced to the Committee the minutes of each meeting of the Mestek Board of Directors at which any issue relating to Met-Coil had been discussed by the board. (Ex. A) Mestek's counsel redacted these minutes to exclude from the document production matters unrelated to Met-Coil. Mestek's counsel also redacted the portions of the minutes reflecting the board's discussions of the environmental litigation arising from the contamination at Met-Coil's Lockformer facility. Mestek provided the Committee with a privilege log identifying which redactions were made upon a claim of privilege and specifying the basis for the asserted privilege.[2] (Ex. A, B)

7. The Committee misleadingly suggests that all redactions in the board minutes relate to discussions of Met-Coil. In fact, however, the privilege log clearly identifies that only ten redactions have been made upon a claim of privilege; all remaining redactions concern board discussions that have nothing to do with Met-Coil and are not even responsive to the Committee's discovery request.

8. It is well established that the board of directors' deliberations concerning pending litigation against the corporation are privileged from discovery. *See Stopka v. Alliance of Am. Insurers* 1996 WL 204324, *6 (N.D. Ill. April 25, 1996) ("[the]

[2] The privilege log specifically identifies each privilege redaction by Bates number; these Bates numbers do not correspond to the documents attached to the Committee's Motion to Compel because the attached board minutes are taken from Met-Coil's production of its litigation files in response to the Committee's Rule 2004 request to Met-Coil, and not the copies produced by Mestek.

corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors."); *see generally* E. S. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 190 (2001). Indeed, it would be all but impossible for the board of directors to exercise any meaningful oversight over the legal affairs of the corporation unless the board may receive in confidence litigation status reports and discuss litigation risk, strategy, and settlement with the assistance of in-house or outside counsel.

9. Apart from the hyperbole describing Mestek's assertion of the privilege as "egregious" and lacking "any comprehensible basis" (Motion ¶ 20), the Committee's only basis for disputing Mestek's assertion of the privilege is that the board minutes supposedly do not reflect the presence of counsel at the board minutes. This is simply false. Each board meeting for which any redactions have been made upon grounds of privilege was attended by Mestek's current chief legal officer – J. Nicholas Filler; his predecessor as general counsel – R. Bruce Dewey; or Mestek's associate general counsel – Timothy Scanlan; and their attendance is clearly stated in the unredacted portions of the minutes as produced to the Committee.[3]

10. Apart from serving upon Mestek a copy of its Motion to Compel, the Committee has never requested that Mestek explain the basis for its assertions of privilege, and Mestek was not even aware that the Committee disputed the basis for the redactions until its counsel received the Motion to Compel. It is apparent from the

[3] Furthermore, Mestek does not rely solely upon attorney-client privilege; Mestek's privilege log also asserts that these communications are protected by the work product doctrine as discussions of litigation strategy for pending actions against the corporation. Work product protection extends well beyond the notes and memoranda of counsel and includes the work product of non-attorneys. See Fed. R. Civ. P. 26(a)(3). Thus, the minutes of a management meeting to discuss threatened litigation at which no attorney was present will still be protected from discovery as work product. *See Eoppolo v. Nat'l Railroad Passenger Corp.*, 108 F.R.D. 292 (E.D. Pa. 1985).

Committee's Motion that its counsel have never even reviewed Mestek's privilege log or the board minutes produced by Mestek, the unredacted portions of which clearly specify the persons in attendance and the general subject matter of the redacted discussions. Had the Committee complied with its obligations under the local rules of this Court and the Federal Rules, and simply raised their concerns with Mestek's counsel, the burden and expense of briefing this frivolous objection could have been avoided entirely.

Work Product Shared Between Insurer and Insured Is Privileged From Discovery.

11. Next, the Committee demands that Met-Coil produce certain litigation status reports that were drafted by Mestek's and Met-Coil's insurance counsel and submitted to certain insurers participating in the defense of the environmental litigation. Without citing any authority, the Committee asserts that no privilege can attach to communications between an insured and its insurer.

12. The litigation status reports are protected pursuant to the common interest doctrine outlined in *Waste Management v. International Surplus Lines, Inc.*, 144 Ill. 2d 178, 579 N.E.2d 322 (1991). In *Waste Management*, the Illinois Supreme Court held that there is a common interest between insurer and insured that extends to the work product of the insured's counsel. 144 Ill.2d at 193, 579 N.E.2d at 328. While the *Waste Management* case focused on disclosure of privileged documents in a dispute between the insurer and insured, the decision also stands for the proposition that the common interest doctrine protects the exchange of privileged information between an insured, the insured's defense counsel and the insurer. "[W]e believe that the [common interest] doctrine may properly be applied where the attorney, though neither retained by nor in

direct communication with the insurer, acts for the mutual benefit of both the insured and the insurer." 144 Ill.2d at 195, 579 N.E.2d at 329.

13. Furthermore, the Committee ignores entirely the fact that these litigation reports are attorney work product analyzing pending litigation. Even assuming that Mestek and Met-Coil's counsel's communications with their insurers are not protected by the common interest privilege recognized in *Waste Management*, these reports are still entitled to work product protection. *See* Fed. R. Civ. P. 26(a)(3); *Vardon Golf Co. Inc., v. Karsten Manufacturing Corp.*, 213 F.R.D. 528, 534 (N.D. Ill. 2003); *In re Bank One Securities Litigation*, 209 F.R.D. 418, 424 (N.D. Ill. 2002); *Wsol v. Fiduciary Management Associates, Inc.*, 1999 U.S. Dist. LEXIS 19002 at *16 (N.D. Ill. December 7, 1999)("Disclosure of materials protected by the work product doctrine to a third party does not automatically waive the protection. For waiver, the disclosure must be to an adversary.")

The Joint Defense Privilege Has Not Impeded Discovery By the Committee.

14. The Committee devotes the substantial portion of their Motion to Compel to Mestek and the Debtor's supposed "abuse" of the joint defense privilege. (Mot. ¶¶ 21-47) The Committee falsely asserts that Mestek and the Debtor have somehow substantially impeded the Committee's discovery by asserting a joint defense privilege. In fact, however, the Committee identifies only a single question in the Committee's six-hour examination of the Debtor's CEO that the Debtor refused to answer on the basis of its common interest with Mestek.

15. The essential elements of the joint defense privilege are well established. "The joint defense privilege enables counsel for clients facing a common litigation

opponent to exchange privileged communications and attorney work product in order to adequately prepare a defense without waiving either privilege." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Continental Illinois Group*, 1987 WL 18933, at *3 (N.D. Ill. 1987) (citing *Western Fuels Ass'n v. Burlington Northern Railroad Co.*, 104 F.R.D. 201 (D. Wyo. 1984)). Accordingly, "confidential communications between potential co-defendants and jointly retained counsel are privileged against third parties." *In re Sealed Case*, 120 F.R.D. 66, 71 (N.D. Ill. 1988) (citing *In re Matter of Grand Jury Subpoena Duces Tecum*, 120 F.R.D. 66 (S.D.N.Y. 1975)).

16. Even where the parties to a joint defense agreement subsequently become adverse, the privilege continues to protect their joint communications from discovery by a third party. *Nat'l Union,* 1987 WL 18933, at *3 (citing *Matter of Grand Jury*, 120 F.R.D. at 394); *see also Ohio-Sealy Mattress Mfg. Co. Kaplan,* 90 F.R.D. 21, 32 (1980) ("As to [a party that never participated in the joint defense], there is a reasonable expectation of confidentiality that cannot be lifted merely because another party in a separate litigation has obtained documents."); *Matter of Quantum Chemical/Lummus Crest* 1992 WL 71782, *4 (N.D. Ill. 1992) (citing *McPartlin*, 595 F.2d at 1336) (stating that the common interest doctrine applies even where the interests of the joint parties are not compatible in all respects). Accordingly, "[e]ven should allies become estranged, they would arguably still be entitled jointly to invoke the attorney-client privilege to protect shared confidences from disclosure at the behest of a third party." *Nati'l Union Fire* at *1 (citing *In re LTV Securities Litig.*, 89 F.R.D. 595, 604-05 (N.D. Tex. 1981)).

17. The Committee, however, incorrectly argues that the joint defense privilege has been waived by the Debtor's investigation of its alter ego claims against

Mestek. Even assuming, *arguendo,* that Mestek and Met-Coil are now adverse, the joint defense privilege still bars discovery by third parties. The United States Bankruptcy Court for the Northern District of Illinois in *In re Madison Mgmt Group, Inc.*, 212 B.R. 894 (N.D. Ill. 1997), squarely rejected this argument in a similar case. In *Madison*, a Chapter 7 Trustee brought an adversary proceeding against the debtor's former parent corporation to set aside allegedly fraudulent conveyances, and the Trustee filed a motion to lift protective orders as to documents withheld by the parent corporation on the basis of a joint-defense privilege with its subsidiary. *Id.* at 895. The *Madison* court noted that it was the first to address "the issue of whether there is a privilege ***as to third parties*** once the parent and subsidiary have become adversaries." *Id.* at 896. In summarily dismissing the Trustee's claim that "the joint privilege is lost when parties become adverse," the court reasoned:

> While this is generally true, the adversity or subsequent litigation exception has only been applied between the parties whose interests were originally joined. In those situations, as the Court notes above, there is not longer any purpose for containing information to which both parties have already had access. They are now using it against each other. ***It is quite a different matter, however, to reveal the information to a third party unless both of the parties whom the privilege is protecting consent to waive it.***

Id. at 897 (emphasis added). Further reasoning that the Trustee could not unilaterally waive the privilege as to third parties, the court denied the Trustee's motion to lift the protective orders. *Id.* at 897-98.

18. Here, the joint-defense privilege clearly applies to Mestek and Met-Coil. Both Met-Coil and Mestek retained the same insurance counsel to represent both Mestek and Met-Coil as insureds under the same insurance policies. Thus, Mestek and Met-Coil

were both clients in a joint representation receiving advice from their common counsel under a joint-defense arrangement.

19. Having established that the joint-defense privilege applies and has not been waived, it is clear that the examination of Mr. Kuoni directly invaded the attorney-client privilege. The Committee's counsel demanded that the Debtor's CEO disclose the advice of Met-Coil's insurance coverage counsel regarding the value of certain claims against Met-Coil's insurers. The Committee asserts that the presence of Mestek's counsel during the communication of that advice somehow defeats the attorney-client privilege. What the Committee ignores, however, is that Met-Coil and Mestek had both retained the same insurance counsel to represent both Met-Coil and Mestek as insureds under the same insurance policies. Thus, Mestek was not a stranger to the attorney-client communication; Mestek and Met-Coil were both clients in a joint representation receiving advice from their common counsel. The Committee's demand that Met-Coil must disclose this advice is frivolous.

20. The Committee cites a second instance in which Mestek and Met-Coil asserted the joint defense privilege. Met-Coil's counsel instructed the witness not to disclose the substance of discussions among Met-Coil, Mestek, and their common insurance counsel evaluating a settlement proposal from an insurer. Met-Coil's counsel also instructed the witness that he could testify regarding any discussions in the presence of the insurer or its representatives. Met-Coil's CEO then answered the question posed by the Committee's counsel.[4] The instruction of Met-Coil's counsel to the witness thus did not actually limit the Committee's examination.

[4] Mestek's and the Debtor's counsel repeatedly reminded the Committee's counsel that he had never asked the witness who was present during the meetings in question and suggested that, depending upon the

21. The Committee wants a broad ruling from this Court that Mestek and Met-Coil cannot assert a joint defense privilege in response to any question upon any subject that may be posed by the Committee. There is, however, no actual discovery dispute between the parties for the Court to resolve. The Committee has now completed substantially all of the discovery authorized by this Court's Rule 2004 motion, and the Committee has been denied the answer to only a single question by the Debtor's and Mestek's assertion of the joint defense privilege. This Court cannot decide in the abstract how to apply the parties' joint defense privilege prospectively, without even any indication of what further discovery the Committee may seek or the character of the documents or communications for which the Debtor and Mestek might assert a claim of privilege. The blanket ruling sought by the Committee is an invitation to error.

22. The broad ruling that the Committee seeks also would gravely prejudice both Mestek and Met-Coil, potentially opening years of joint defense communications among the parties to discovery by, not only the Committee, but any future litigation adversary whose environmental claims are not resolved by the Debtor's plan of reorganization. Once the Debtor and Mestek have produced these documents to the Committee, even subject to a confidentiality agreement, another court may decide that disclosure of those documents, even under compulsion of court order, waives the protection of any privilege. Of course, given the Committee's blatant violations of the confidentiality agreements in this case, the Debtor and Mestek can have no assurance that the Committee would even attempt to keep such documents confidential.

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answer to that question, there might not even be a privilege issue. The Committee's counsel refused to ask that question, however.

23. In any event, the joint defense privilege asserted by the Debtor and Mestek rests upon well established law. This bankruptcy case arises from the Debtor's environmental litigation crisis, in which the Debtor was effectively overwhelmed by a series of lawsuits in which the Debtor and Mestek were named as co-defendants. Having coordinated their defense of these actions under the terms of a joint defense agreement prior to the commencement of the bankruptcy case, the Debtor and Mestek reasonably chose to revisit their joint defense agreement as the Debtor was faced with the decision whether to seek protection in bankruptcy. There is simply nothing illicit or fraudulent about the Debtor's and Mestek's July 2003 joint defense agreement, which merely seeks to preserve the parties' ability to cooperate in the prosecution or defense of certain claims arising from the environmental contamination in which they have a common interest.

CONCLUSION

WHEREFORE, for the foregoing reasons, Mestek respectfully requests that the Court deny the Committee's Motion to Compel and grant Mestek such other and further relief as may be just.

Dated: May 21, 2004

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