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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 JAVIER TORRES, ALMA SANTIAGO)
and LIA RIVADENEYRA, on behalf of
10 themselves and others similarly situated,)

No. CV 06-2482-PHX-SMM

11

Plaintiffs,)

ORDER

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v.)

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TERRY GODDARD, Attorney General of
the State of Arizona, in his individual and
14 official capacities, and CAMERON)
("KIP") HOLMES, in his individual
15 capacity,)

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Defendants.)

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18 Plaintiffs previously notified the Court that the parties had reached an impasse
19 regarding certain discovery requests and the second version of Defendants' privilege log.
20 According to Plaintiffs, Defendants assert that the requested materials are not discoverable
21 on account of attorney-client privilege, work product protection, or the documents are "law
22 enforcement sensitive." Plaintiffs contend that the issues in this case involve attorney
23 conduct, and therefore Defendants' assertion of privilege and work product are in error.

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25 While most discovery disputes are handled via telephonic hearing, the Court ordered
26 the parties to submit written memoranda given the subject matter of the dispute (attorney-
27 client privilege and work-product protection) (Doc. 128). Plaintiffs and Defendants both
28 complied with the Court's Order (Doc. 135, 136).

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In a July 29, 2010 Order, the Court examined the parties' arguments, and concluded
that many of the documents in dispute were protected work product (Doc. 190). However,

1 as to certain documents for which the attorney-client privilege or law enforcement
2 investigatory privilege was claimed, Defendants were ordered to provide the Court with a
3 further showing of the grounds for assertion of the privilege. Specifically, those documents
4 requiring a further showing were as follows:

- 5 • Attorney-Client Privilege documents numbered 9, 14, and 323
- 6 • Law Enforcement Investigatory Privilege documents numbered 25, 81, 126, 130,
7 131, 132, 133, 166, 202, 213, 222, 228, 229, and 343

8 On August 20, 2010, Defendants provided additional briefing to the Court on the
9 remaining contested documents (Doc. 191). Defendants stated that after review of the
10 Court's July 29, 2010 Order and the specified documents, they had chosen to produce to the
11 Plaintiffs the documents numbered 9, 25, 126, 130, 131 (with redaction of names), 132, 133,
12 213, 323, and 343. Thus, the only documents still in dispute currently are numbered 14, 81,
13 166, 202, 222, 228, and 229. For each of these documents, Defendants have provided the
14 Court with its justification for protection of the remaining documents, as well as suggestions
15 for resolution of the dispute.

16 Document 14: According to Defendants, this document represents a compilation of
17 spreadsheet data provided by Dan Kelly, an investigator with the Arizona Department of
18 Public Safety, in March 2008. The data was maintained by the Arizona Financial Crimes
19 Task Force call center, and is related to the seizure of wire transfers through the Sonora
20 Warrant. The information was compiled by Kelly to assist defense counsel in identifying
21 specific examples of evidence already in the record that substantiated defense counsel's
22 argument.

23 While Defendants claim that such a compilation of evidence used to assist counsel in
24 developing a theme or argument is protected work product, the privilege log reveals that the
25 document was withheld based upon the attorney-client privilege, not work product. "The
26 attorney-client privilege protects confidential disclosures made by a client to an attorney in
27 order to obtain legal advice, . . . as well as an attorney's advice in response to such
28 disclosures." United States v. Chen, 99 F.3d 1495, 1501 (9th Cir. 1996) (internal quotation

1 omitted). The privilege applies to communications between a lawyer and a client where the
2 lawyer counsels, as well as when the lawyer represents the client in litigation. Id. Based
3 upon Defendants' description, it does not appear that the document represents a
4 communication for the purpose of securing legal advice. Thus, the Court finds that
5 Document 14 should be provided to Plaintiffs.

6 Document 81: This document includes summaries of two homicide investigations as
7 well as data regarding Western Union transactions connected to the investigations. The
8 document was created in an effort to encourage joint law enforcement efforts between
9 Mexico and Arizona. Defendants state that they are unaware of whether the homicide
10 investigations are still open, and thus, they are concerned that the release of this information
11 could compromise any ongoing investigation or prosecution. For Defendants to assert the
12 law enforcement investigatory privilege, certain elements must be met: (1) a formal claim of
13 privilege by the head of the department with control over the requested information; (2) the
14 assertion of the privilege must be based on personal consideration by that official; and (3)
15 the information for which the privilege is claimed must be specified with an explanation as
16 to why it falls within the scope of the privilege. U.S. ex rel Burroughs v. DeNardi Corp.,
17 167 F.R.D. 680, 687 (S.D. Cal. 1996). With their briefing, Defendants have attached an
18 affidavit from Cameron Holmes of the Arizona Attorney General's Office that meets the
19 criteria for invoking the law enforcement investigatory privilege. Additionally, the Court
20 finds that the homicide investigations appear unrelated to the transactions or seizures of funds
21 at issue in this case. As a result, the Court will not order the production of this document.

22 *Document 166: This document consists of a fax cover sheet and a letter from Texas
23 prosecutors to an individual in Texas regarding suspected illegal activities of a corporation.
24 The Court finds that Defendants have not complied with the law enforcement investigatory
25 privilege because there is no evidence that the government official claiming the privilege
26 considered the contents of this document. Burroughs, 167 F.R.D. at 687. However, the
27 Court will not order production of this document on relevancy grounds. Given the nature of
28 the correspondence, the letter appears to have no connection to the claims in this litigation.

1 There is thus no reasonable basis to find that disclosure of the record involves evidence
2 relevant to this case or could lead to the discovery of admissible evidence.

3 Documents 202/228: According to Defendants, document 202 reflects criminal
4 investigatory conduct by Arizona law enforcement involving Western Union transactions,
5 and includes statements from an informant. Document 228 contains a discussion of the
6 development of evidence related to potential criminal prosecution of Western Union. The
7 affidavit of Cameron Holmes states that these two documents are in the possession of the
8 Arizona Attorney General's Office, and relate to investigations and potential prosecutions
9 for which he has primary responsibility. The affidavit also states that the documents have
10 been considered personally by Mr. Holmes and contain information on the potential criminal
11 prosecution of Western Union should it willfully and materially breach its February 2010
12 settlement agreement with the State of Arizona. Due to the possibility of criminal
13 prosecution, Mr. Holmes believes that it is important to maintain the confidentiality of
14 internal law enforcement strategy as to the development of evidence and prosecution to avoid
15 compromising any future investigation by the state. After consideration of Mr. Holmes'
16 affidavit, the Court finds that the criteria for invoking the law enforcement investigatory
17 privilege have been met as to documents 202 and 228. As a result, the Court will not order
18 the production of these documents.

19 Document 222: Document 222 is a Concept of Operations memorandum prepared by
20 the United States Department of Homeland Security, Immigration and Customs Enforcement
21 for its Ice Storm operation. The document is dated August 27, 2003, and contains a legend
22 "Limited Official Use, Law Enforcement Sensitive." The Court finds that Defendants have
23 not complied with the law enforcement investigatory privilege because there is no evidence
24 that the government official claiming the privilege considered the contents of this document.
25 Burroughs, 167 F.R.D. at 687. However, as the seizures at issue were conducted as part of
26 law enforcement activity by the State of Arizona, rather than as part of the federal Ice Storm
27 operation, the Court finds that document 222 is not relevant and will protect it from
28 disclosure on this basis.

