UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOANNE SIEGEL and LAURA SIEGEL LARSON,

Plaintiff,

vs.

WARNER BROS. ENTERTAINMENT INC., et al.,

Defendants.

CASE NO. CV 04-8400-RSWL (RZx)

ORDER ON DEFENDANTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

This matter came before the Court on August 14, 2006 on Defendants' Motion to Compel. Defendants appeared through their attorneys, Michael Bergman and Anjani Mandavia. Plaintiffs appeared through their attorneys Marc Toberoff and Nicholas C. Williamson. The Court heard argument of counsel and took the matter under submission.

Defendants seek to compel Plaintiffs to produce documents falling within five categories, identified as Requests 52-59. In general, these categories concern writings involving certain settlement negotiations between the parties in 2001 and 2002. Plaintiffs apparently have produced documents responsive to these requests, but the documents currently sought all involve attorney-client communications, and the Defendants assert that those documents should be produced because Plaintiffs have waived the privilege.

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Defendants assert that Plaintiffs have waived the privilege by putting in issue the authority of their prior counsel to negotiate a settlement. The privilege may be impliedly waived where a party to a lawsuit places into issue a matter that is normally privileged, if the gravamen of the lawsuit is so inconsistent with the continued assertion of the privilege as to compel the conclusion that the privilege has in fact been waived. *Wilson v. Superior Court,* 63 Cal. App.3d 825,134 Cal. Rptr. 130 (1976). Defendants assert the alleged settlement in a counterclaim, responding to Plaintiffs' claim to recapture their copyright. At oral argument, both sides confirmed that Plaintiffs had not *pleaded* any lack of authority when they filed the reply to the counterclaim called for by FED. R. CIV. P. 7(a). Thus, as a matter of pleading, Plaintiffs have not themselves taken steps to bring into issue a matter that is so inconsistent with maintenance of the attorney-client privilege that it requires disclosure of attorney-client communications.

Instead, Defendants argue that Plaintiffs have done so by their response and supplemental response to a request to admit. Defendants requested that Plaintiffs admit that their prior counsel was authorized to send a letter of October 19, 2001, the letter which, at oral argument, Defendants stated constituted the contract of settlement. In response to the request to admit, Plaintiffs asserted various objections, including (by apparent incorporation of introductory objections) the objection of attorney-client privilege, and then denied the request subject to those objections. In a supplemental response, Plaintiffs qualified their denial further.

From these responses, Defendants assert that Plaintiffs have denied that their prior counsel had authority to negotiate a settlement, and therefore have placed the matter in issue and necessarily have waived the privilege with respect to that issue. This argument makes the request to admit do too much work. To begin with, the response was not an unqualified denial; it was a denial accompanied by objections. Whatever the meaning of "subject to" in this context, and whatever the validity of incorporating general objections into specific responses — neither matter of which Defendants address — it is hard to read the response as a denial without limitation. And assuming that the objections

are properly stated, Defendants never moved to determine the sufficiency of the objections. *See* FED. R. CIV. P. 36(a).

More importantly, however, Defendants misconstrue the office of a request to admit. A request to admit is not a discovery device in the customary sense of "discovery." 8A WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE §2253 at 524 (1994) Rather, it is a method of short-circuiting proof for trial. Those matters which are admitted do not have to be proved otherwise. Those which are denied require proof. FED. R. CIV. P. 36(b). And if a party denies a matter he should have admitted, the remedy is to require him, upon appropriate motion, to reimburse the party who propounded the request for the expenses incurred in proving up the matter at trial. FED. R. CIV. P. 37(c); *see, e.g.*, *Marchand v. Mercy Medical Center*, 22 F.3d 933 (9th Cir. 1994). In short, responding to a request to admit by denying the request is not the same as affirmatively placing the matter in issue, and certainly not the same as the situation where the gravamen of the action necessarily is inconsistent with maintaining the privilege.

Defendants also assert that Plaintiffs waived the privilege explicitly, by sending a copy of a letter, dated September 21, 2002, to a Vice President of DC Comics. That letter, signed by both Plaintiffs, and addressed to their then counsel, states:

> As we previously discussed with you and hereby affirm, we rejected DC Comics' offer for the Siegel Family interest in Superman and other characters sent to us by you on February 4, 2002. We similarly reject your redraft of the February 4, 2002 document which you sent to us on July 15, 2002. Therefore due to irreconcilable differences, after four years of painful and unsatisfying negotiations, this letter serves as formal notification that we are totally stopping and ending all negotiations with DC Comics, Inc., its parent company AOL

Time Warner and all of its representatives and associates, effective immediately.

This letter is also notification that, effective immediately, we are terminating Gang, Tyre, Ramer & Brown, Inc., and all of your firm's partners, associates and employees as representatives of the Siegel Family interest regarding Superman, Superboy, the Spectre and all related characters and entities. We instruct you to take no further actions on our behalf.

Please return all materials regarding the above including but not limited to files, correspondence, notes and documents to us forthwith. These should be sent to Joanne Siegel at the above address.

It is a shame that four years were wasted due to DC Comics and AOL Time Warner's greed. We have no intention of publically disparaging DC or any individual in the parent company. However, should DC or its parent company, officers, attorneys, representatives or spokespersons disparage us or our rights, we will vigorously respond in kind.

Weinberger Declaration, Ex. B. Disclosure of materials previously held in confidence can waive the attorney-client privilege. Here there is no doubt that the privilege, if any exists, has been waived as to this letter. The Court does not agree that it has been waived any more broadly than that.

The first paragraph of this letter appears to refer to irreconcilable differences between Plaintiffs and Defendants, not irreconcilable differences between Plaintiffs and their counsel. The entire subject of the paragraph is the settlement negotiations, and how DC Comics' proposal is not acceptable and the underlying negotiations have not been

fruitful. While it is possible to read the reference to "irreconcilable differences" as a reference instead to differences with Plaintiffs' counsel, that reading is not the one supported by the context in which the statement is made.

More importantly, the letter does not open the door to an exploration of the reasons that Plaintiffs discharged their counsel, or just what the irreconcilable differences may have been, or what conversations they had with their counsel about settlement. These topics are all mentioned in the briefest of terms, as slight incidents to the overall message of the letter, which is Plaintiffs' disagreement with Defendants and Plaintiffs' decision to end negotiations. Plaintiffs have not revealed a significant portion of the communications, and that is what is required to create a waiver based on sending the communication to someone other than counsel. *See Mitchell v. Superior Court,* 37 Cal.3d 591, 602,208 Cal. Rptr. 886, 691 P.2d 642 (1984); *Travelers Ins. Companies v. Superior Court,* 143 Cal. App. 3d 436, 444,191 Cal. Rptr. 871 (1983); *People v. Hayes*,21 Cal.4th 1211, 1266 (2000). Accordingly, the Court finds that Plaintiffs have not waived the privilege, other than with respect to the letter itself.

Finally, Defendants assert that the privilege log prepared by Plaintiffs is insufficient. At oral argument, Plaintiffs agreed to review the log, and verify that they had listed all recipients for any memoranda or letters referenced in the log. They also agreed to provide, not later than September 30, 2006, a supplement to the log, covering other periods of time. The only remaining issue is whether the descriptions in the log are sufficient. The Court notes that the log appears to follow the form suggested in a commonly-used treatise, W. SCHWARZER, W. TASHIMA AND J. WAGSTAFFE, FEDERAL CIVIL PROCEDURE BEFORE TRIAL, Form 11:A (Rutter2006). Moreover, the log appears to have the same information which the Court found sufficient in *Dole v. Milonas*, 889 F.2d 885 (9th Cir. 1989); *see in re Grand Jury Investigation,* 974 F.2d 1068, 1071 (9th Cir. 1992). Accordingly, this Court too finds that by providing this log, the Plaintiffs have sufficiently asserted the attorney-client privilege and the work product doctrine.

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In accordance with the foregoing, with the exception of the September 21, 2002 letter, Defendants' Motion to Compel is denied.

IT IS SO ORDERED.

DATED: August 18, 2006

RALPH ZAREFSKY
UNITED STATES MAGISTRATE JUDGE