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9 UNITED STATES DISTRICT COURT
 10 CENTRAL DISTRICT OF CALIFORNIA

11
 12 PERFORMANCE PRICING, INC.,

13 Plaintiff,

14 vs.

15 GOOGLE INC. and AOL LLC,

16 Defendants.
 17
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CASE NO.: CV 09-6283 MMM (CTx)

DISCOVERY MATTER

**[PUBLIC REDACTED]
 SUPPLEMENTAL
 MEMORANDUM IN SUPPORT OF
 DEFENDANTS' MOTION TO
 COMPEL PRODUCTION BY
 THIRD PARTIES NEAL COHEN
 AND VISTA IP LAW GROUP, LLP**

Crtrm.: Roybal- 780
 Judge: Margaret M. Morrow
 Hrg. Date: September 21, 2009
 Hrg. Time: 9:30 a.m.

1 **Introduction**

2 Cohen's portion of the Joint Stipulation only confirms why Defendants'
3 motion to compel should be granted. It is plain there were no excusable "errors" as
4 Cohen now claims that justify his evolving claims of privilege and work product
5 protection. Instead, Cohen and his counsel's tardy assertions of attorney-client
6 privilege are at best gross recklessness in preparing his log, but more likely an
7 attempt to re-engineer his privilege log in response to Defendants' legitimate
8 objections to his improper claims of work product protection. Either way, the Court
9 should find that Cohen has waived privilege for all of the documents at issue.

10 **Argument**

11 **I. COHEN'S GAMESMANSHIP WARRANTS FINDING THAT HE**
12 **WAIVED PRIVILEGE.**

13 Contrary to Cohen's assertions, Defendants do not ask the Court to enforce a
14 *per se* rule in assessing waiver of privilege. (Joint Stip., 11.) Instead, Defendants
15 request that the Court find that Cohen has waived privilege due to his repeated and
16 prolonged gamesmanship.

17 The record is clear. Cohen asserted work product protection for months
18 regarding documents that were not entitled to that protection. (Joint Stip., 2-3.)
19 Defendants repeatedly objected to Cohen's improper claims of work product
20 protection. (*Id.*) In his fifth and sixth privilege logs, Cohen finally removed his
21 improper claims of work product protection. (*Id.* at 3.) In response to Defendants'
22 objections to his claims of work product protection, Cohen belatedly asserted or re-
23 asserted attorney-client privilege in an attempt to avoid producing documents. (*Id.*
24 at 2-3, 8-9.)

25 Cohen now alleges—for the first time—that any failures to assert attorney-
26 client privilege were due to "error," rather than a conscious decision regarding
27 which privileges or protections to assert. (*Id.* at 5, 13-14.) But during the parties'
28 meet and confer process Cohen's counsel never alleged that the failures to assert

1 attorney-client privilege were due to error. Instead, the record supports that Cohen's
2 belated assertions of attorney-client privilege are a clear attempt to re-engineer his
3 privilege log, in order to avoid production of documents that were not entitled to
4 work product protection. Indeed, for the majority of the documents at issue, Cohen
5 chose to assert or re-assert attorney-client privilege at the same time he withdrew his
6 improper assertions of work product protection. (*Id.* at 8-9.) Cohen's late attempts
7 to claim attorney-client privilege are nothing more than the "kind of gamesmanship
8 that courts discourage in discovery." *In re Honeywell Intern., Inc. Sec. Litig.*, 230
9 F.R.D. 293, 300 (S.D.N.Y. 2003). Cohen should not be allowed to succeed in these
10 efforts.

11 Cohen's claims of error also do not square with his explanations of his other
12 revisions to the privilege logs. For example, he states that in preparing his third
13 privilege log, "each entry was reviewed to check for errors." (Joint Stip., 5.) But, it
14 was in the third privilege log that Cohen removed his claims of attorney-client
15 privilege for many of the documents at issue, only to then re-assert attorney-client
16 privilege for these same documents in his fourth and fifth privilege logs. (*Id.* at 8-
17 9.) In other words, Cohen seems to be telling the Court that it was the process for
18 checking for errors in his third log that resulted in the errors that were corrected in
19 his fourth and fifth logs. This does not pass the straight face test.

20 **II. COHEN'S PRIVILEGE LOGS DID NOT ENABLE DEFENDANTS**
21 **AND THE COURT TO EVALUATE THE CLAIM OF PRIVILEGE.**

22 Cohen asserts that the Cohen log "enables 'the litigant seeking discovery and
23 the court to evaluate whether each of the withheld documents is privileged.'" (Joint
24 Stip., 12 (citing *Burlington Northern & Santa Fe Ry. v. United States District Court*,
25 408 F.3d 1142, 1149 (9th Cir. 2005)).) Not so. Defendants could not be aware what
26 Cohen was asserting given the multiple documents for which Cohen either failed to
27 raise attorney-client privilege, or flip-flopped on his assertions of attorney-client
28

1 privilege and work product over the course of the many logs he provided, much less
2 on the first one he provided.

3 **III. TIMING WEIGHS AGAINST COHEN, WHERE HE KNEW SINCE**
4 **THE FIRST LOG THAT DEFENDANTS DISAGREED WITH HIS**
5 **ASSERTIONS OF WORK PRODUCT PROTECTION.**

6 Cohen argues that "the timeliness of the objection and the accompanying
7 information weigh against waiver." (Joint Stip., 12 (*citing Burlington Northern*, 408
8 F.3d at 1149.) But just the opposite is true. Cohen's objections were anything but
9 timely. Over the course of several months, Cohen served multiple privilege logs
10 continuing to improperly assert work product protection. Cohen only began
11 asserting, or re-asserting, attorney-client privilege for the documents-at-issue after
12 Defendants' repeated objections to these improper work product assertions. (*Id.* at 2,
13 8-9.) In no way does this provide a "a good-faith and timely correction of the
14 privilege log" as Plaintiff asserts. (Joint Stip., 13.)

15 **IV. THE SIZE OF THE PRODUCTION DOES NOT WEIGH AGAINST A**
16 **FINDING OF WAIVER.**

17 Cohen argues that "the magnitude of the document production" weighs
18 against finding waiver. (Joint Stip., 15 (*citing Burlington Northern*, 408 F.3d at
19 1149.) But this is not the case of an honest mistake made in a log that was promptly
20 corrected in the next log. Instead, Cohen's constantly evolving logs show a pattern
21 of deliberate gamesmanship, or at best, reckless sloppiness.

22 **V. WAYNE LIN WAS AWARE, OR SHOULD HAVE BEEN AWARE,**
23 **THAT COHEN WAS WAIVING PRIVILEGE**

24 Cohen also argues that there should be no waiver because "the holder of the
25 privilege at issue is the client, Mr. Lin, and not Mr. Cohen". (Joint Stip., 15.) But
26 Cohen, and his counsel, omit that his counsel, Dovel & Luner, in addition to
27 representing the Plaintiff, also represents Mr. Lin in connection with this matter.

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argument that Lin is an innocent bystander to this conduct is disingenuous at best.

**VI. DEFENDANTS DO NOT OBJECT TO ANY CLAIMS OF WORK
PRODUCT PROTECTION BECAUSE COHEN REMOVED ALL BUT
ONE CLAIM**

Cohen also argues that "Defendants do not challenge any of the work product designations in the Cohen privilege log." (Joint Stip., 6.) This argument makes no sense. Defendants do not challenge any of Cohen's work product designations because he already removed them from his privilege log for all but one document.

(*Id.* at 3.)

Conclusion

For all of the foregoing reasons and all of the reasons presented in the Joint Stipulation, Defendants' motion to compel should be granted in its entirety.

DATED: September 4, 2009

Respectfully submitted,

QUINN EMANUEL URQUHART OLIVER &
HEDGES, LLP

By /s/ Emily C. O'Brien

Emily C. O'Brien

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Google Inc.