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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

GOOD MORNING TO YOU PRODUCTIONS CORP.; et al.,

Plaintiffs,

v.

WARNER/CHAPPELL MUSIC, INC., et al.,

Defendants.

Lead Case No. CV 13-04460-GHK (MRWx)

DEFENDANTS' OPPOSITION TO PLAINTIFFS' *EX PARTE* APPLICATION

Judge: Hon. Michael R. Wilner
Room: H-9th Floor

Fact Disc. Completion:	July 11, 2014
Expert Reports:	July 25, 2014
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L/D File Jt. MSJ:	Nov. 14, 2014
Pretrial Conference:	N/A
Trial:	N/A

Plaintiffs' *ex parte* application asks the Court to extend the discovery cut-off date *again* so that Plaintiffs may present a discovery dispute regarding the application of privilege to the Court. Specifically, Plaintiffs challenge Warner/Chappell's claim of privilege over legal memoranda analyzing copyright issues regarding "Happy Birthday to You." The memoranda were drafted by legal counsel at Coudert Brothers, at the time counsel to Warner/Chappell's predecessor-in-interest (the "Coudert Memos"). The Coudert Memos were produced to Plaintiffs in this case by ASCAP, to whom Plaintiffs had issued a subpoena. ASCAP was, and to this day is, responsible for administering Warner/Chappell's (and its predecessors') exclusive right of public performance in "Happy Birthday to You" and many other songs. ASCAP produced the Coudert Memos without Warner/Chappell's (the privilege holder's) knowledge or consent.

Upon learning of ASCAP's production, Warner/Chappell *on May 22* notified Plaintiffs of the privilege claim, and requested clawback of the document pursuant to Rule 26(b)(5)(B) and Paragraph 11 of the Protective Order. Dkt. No. 97. Plaintiffs' counsel stated that he would "sequester" the document pending judicial resolution of the question whether ASCAP's possession and production of the Coudert Memos waived privilege. Plaintiffs, however, tactically delayed bringing the motion until now—just days before a fact discovery cut-off the Court already extended once—allegedly so Plaintiffs could develop facts for the privilege-contest motion.

To obtain the requested *ex parte* relief, Plaintiffs must demonstrate that they are "without fault in creating the crisis that requires *ex parte* relief, or that the crisis occurred as a result of excusable neglect." *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal.1995). Here, Plaintiffs cannot meet either of these requirements. Plaintiffs' application acknowledges that Plaintiffs have been aware since late May that Warner/Chappell claimed privilege over the Coudert

Memos and that it would not consent to a discovery expedition into the underlying privilege claim.

Nothing prevented Plaintiffs from raising their claims earlier, when they could have been timely resolved without need for *ex parte* relief. In fact, as the Court is aware, since this dispute arose in May, Plaintiffs filed a motion challenging *other* Warner/Chappell privilege claims and presenting issues strikingly similar to the issues presented by the Coudert Memos. But Plaintiffs never raised the Coudert Memos as a part of that motion, which they eventually withdrew. Instead, Plaintiffs sought depositions as to the Coudert Memos to develop facts that they thought would bolster their privilege challenge. Federal Rule of Civil Procedure 26(b)(5)(B) does not permit that kind of fact development with regard to a claim of privilege in connection with a produced document. Plaintiffs not only *had* the opportunity to raise the privilege issues their *ex parte* application seeks extra time to advance, they *took* that opportunity—and consciously avoided raising the document as part of that motion. This Court should not grant *ex parte* relief to afford additional time after the discovery cut-off for Plaintiffs to advance a motion that they consciously decided against raising earlier.

Plaintiffs cannot claim surprise at the consequences of failing to raise this issue in time for it to be heard before the discovery cut-off. The District Court's Case Management Order makes clear that "[d]iscovery disputes of a significant nature should be brought promptly before the Magistrate Judge. *The court does not look favorably upon delay resulting from unresolved discovery disputes*," and that the Court "entertains *ex parte* applications only in extraordinary circumstances." Dkt. No. 14, ¶¶ 8-9 (emphasis added). It is well-established that "[e]x parte applications are not intended to save the day for parties who have failed to present requests when they should have, and should not be used as a way to 'cut in line' ahead of those litigants awaiting determination of their properly noticed and timely filed motions." *In re Intermagnetics Am., Inc.*, 101 B.R. 191, 193 (C.D. Cal. 1989)*;*

see also ESG Capital Partners LP v. Stratos, No. 2:13-cv-01639-ODW(SHx), 2014 WL 1830903, at *1 (C.D. Cal. May 8, 2014) (denying *ex parte* application seeking additional time for discovery in part because Court's Case Management Order made clear the Court's disfavor of such efforts). Because Plaintiffs chose to delay for more than a month in bringing this discovery motion, the Court should deny their *ex parte* application.

A. Plaintiffs Unreasonably Delayed In Presenting This Dispute.

Plaintiffs had ample opportunity to raise this issue with the Court well in advance of the fact discovery cut-off (already extended for Plaintiffs' since-withdrawn privilege motion) and well before the eve of a long holiday weekend. Plaintiffs acknowledge that they knew *as of May 22* that Warner/Chappell maintained that the challenged documents that ASCAP had produced were subject to Warner/Chappell's attorney-client privilege. Manifold Decl. ¶¶ 12-13; Declaration of Kelly M. Klaus ("Klaus Decl.") ¶¶ 5-7. Plaintiffs also acknowledge that they knew *as of May 27* that Warner-Chappell would not provide the second 30(b)(6) deposition Plaintiffs sought, which was aimed exclusively at exploring Warner/Chappell's claim of privilege. Manifold Decl. ¶ 14. At that time, Plaintiffs could have and should have presented the challenged documents to the Court "promptly" (*i.e.*, several weeks ago) as Federal Rule of Civil Procedure 26(b)(5)(B) requires.

The delay since May 22 and 27 is according to the facts as Plaintiffs' application presents them. Warner/Chappell contends that Plaintiffs should have raised this issue with the Court even earlier. Plaintiffs' counsel acknowledged that he immediately understood the privilege issues presented by the May 9 production of the Coudert Memos. By his own admission, he went to Warner/Chappell's privilege log upon reviewing these documents to see whether they had been logged there. Klaus Decl. ¶ 6. But instead of advising Warner/Chappell immediately, Plaintiffs' counsel began efforts to use the document in the litigation.

Warner/Chappell only became aware of its production when Plaintiffs' counsel sought ASCAP's permission to remove the confidentiality designation, and ASCAP advised Warner/Chappell of the request. *Id* ¶¶ 2-3. On May 22, Warner/Chappell advised Plaintiffs' counsel that the document was subject to Warner/Chappell's attorney-client privilege and needed to be handled pursuant to Federal Rule of Civil Procedure 26(b)(5)(B). *Id.* ¶ 5. That same day, after Warner/Chappell had explained to Plaintiffs the basis for its privilege claim over the Coudert Memos, Plaintiffs wrote Warner/Chappell that they disputed "any purported claim of privilege" and would "investigate and bring the matter to the Court's attention." *Id.* ¶ 7.

Nothing prevented Plaintiffs from presenting the document to the Court for resolution of the privilege dispute on May 22, or even earlier once Plaintiffs saw the obviously privileged Coudert Memos. In fact, as the Court will recall, Plaintiffs did exactly that during the same time frame as to a very similar privilege challenge. On May 27, Plaintiffs sent Warner/Chappell their portion of a motion to compel the production of documents Warner/Chappell had withheld as privileged. *Id.* ¶ 8. Among other things, this motion argued that Warner/Chappell had waived its privilege over documents that had been shared with third-party performing rights organizations. Dkt. No. 101-1. If Plaintiffs intended to challenge whether the privilege applied to the Coudert Memos, Plaintiffs should have included their then-pending dispute regarding the Coudert Memos. And they easily could have done so. Plaintiffs' motion raised the precise questions underlying Plaintiffs' instant, untimely challenge—*i.e.*, whether Warner/Chappell waived privilege by sending materials to performing rights organizations, such as ASCAP, that Warner/Chappell claims were its agents and parties with whom it also shared common legal interests.[1]

[1] Dkt. No. 101-1 at 34 ("ASCAP and Warner Chappell do not share a common legal interest in any copyright to the Song."), *id*. at 34-35 (arguing that ASCAP was not Warner/Chappell's "privileged agent").

But Plaintiffs' motion did not mention the Coudert Memos—which Plaintiffs had asserted were not privileged five days earlier when ASCAP and Warner/Chappell provided Plaintiffs the requisite clawback notice. *Id*; Klaus Decl. ¶¶ 5, 7-8. Had Plaintiffs included in the motion to compel their challenge regarding the Coudert Memos, the Court would have had time to rule on the issue before the completion of fact discovery, as required by the District Court's March 24 Scheduling Order. Dkt. No. 92.

The Court acted promptly in response to Plaintiffs' motion, and contacted the parties within days of the filing to give his initial views on Plaintiffs' motion. Your honor advised the parties to consider those initial views and continue informal efforts to resolve the motion. Your honor made clear he would make himself available for an additional conference as needed, and conferred with the District Court to ensure that the parties would have adequate time to resolve the privilege dispute before the then-looming discovery cut-off of June 27. Plaintiffs met and conferred with Defendants as the Court had advised. At an in-person meeting on June 16, Defendants' counsel suggested that the parties work together to come up with an efficient means of presenting any remaining discovery issues to the Court (either by joint letter or otherwise). Instead, Plaintiffs elected to withdraw that motion entirely on June 24. Plaintiffs cancelled a scheduled conference with the Court that was set for June 27. Instead of raising the Coudert Memos at any point during the course of that motion at these several opportunities, Plaintiffs now ask for *ex parte* relief to afford them time to present *nearly the identical* issue regarding the application of the common interest doctrine and agency principles for resolution.

B. *Ex Parte* Relief Is Unavailable Because Plaintiffs' Delay Was Deliberate And Tactical.

Plaintiffs try to excuse their delay on the ground that they sought depositions "[t]o establish facts the Court may deem necessary to determine whether any of the [challenged documents] are privileged." Manifold Decl. ¶ 13; *Ex Parte* Appl. at 5-

6. That admittedly tactical decision does not excuse Plaintiffs' delay or justify the relief they seek.

Over the last five weeks, Warner-Chappell advised Plaintiffs repeatedly that the Federal Rules do not allow for discovery into the underlying claim of privilege before presenting a dispute regarding a produced document "promptly" to the Court. Fed. R. Civ. P. 26(b)(5)(B); Klaus Decl. ¶ 9. If the document is not submitted to the Court, it must be returned, destroyed or sequestered—not serve as the basis for further discovery. Plaintiffs say they sought discovery on May 22 and afterwards to show that Warner/Chappell's predecessor-in-interest had waived privileged over the Coudert Memos by sending them to ASCAP, and that ASCAP waived privilege by producing the Memos to Plaintiffs "knowingly and intentionally." *Ex Parte* Appl. at 5-6. But Plaintiffs were required promptly to present their privilege contest-motion to the Court *regardless*.

Federal Rule 26(b)(5)(B) "does not provide for the non-asserting party to make the determination [regarding privilege] on its own. If it disputes the assertion of the privilege and the erroneous disclosure, it can invoke the decision making authority of the court, but cannot divine justice on its own." *Piasa Commercial Interiors, Inc. v. J. P. Murray Co*., No. 07-617-DRH, 2010 WL 1241563, at *2 (S.D. Ill. March 23, 2010); *see also Woodard v. Victory Records, Inc.*, No. 11 CV 7594, 2013 WL 4501455, at *2 (N.D. Ill. Aug. 22, 2013) ("[Rule 26(b)(5)(B)] does not, however, address the question of whether the documents in dispute are in fact privileged or whether the inadvertent disclosure amounted to a waiver of the claimed privilege.").

Moreover, as Warner/Chappell explained to Plaintiffs weeks ago and will further detail in its substantive response to the Court to Plaintiffs' motion, not only is the requested discovery improper to develop facts to attack the privilege, it seeks irrelevant information under settled law. Klaus Decl. ¶ 9. ASCAP could not waive Warner/Chappell's privilege, so whether the production was "knowing and

intentional" does not matter. *United States v. Gonzalez*, 669 F.3d 974, 982 (9th Cir. 2012). And, as Warner/Chappell has explained at length—including during the meet-and-confer process the Court ordered on the first privilege motion: on-point law demonstrates that the common interest doctrine applies and Warner/Chappell's predecessor-in-interest did not waive privilege. *Major League Baseball Props., Inc. v. Salvino, Inc.*, No. 00 CIV.2855 JCF, 2003 WL 21983801, at *1 (S.D.N.Y. Aug. 20, 2003) (common interest doctrine applied to communications between major league baseball clubs and organization created to register and enforce the clubs' intellectual property rights).

If the Court had been presented with this issue, the Court could have assessed whether, in its view, additional "facts" were "necessary." If so, the Court could have conducted an evidentiary hearing *in camera*. *See United States v. Gonzalez*, 669 F.3d 974, 976-77, 981 (9th Cir. 2012). Nonetheless, Plaintiffs elected to delay in raising this issue for precisely the purpose of attempting to conduct additional fact-development in contravention to existing law. Having chosen to delay rather than present the issue to the Court "promptly" for resolution, Plaintiffs must now accept the consequences of that delay.

DATED: July 8, 2014

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