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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)

) **[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR REVIEW
OF MAGISTRATE JUDGE WILNER'S
ORDER RE: DISCOVERY MOTION
DENYING PLAINTIFFS' MOTION TO
OVERRULE DEFENDANTS' CLAIM
OF ATTORNEY-CLIENT PRIVILEGE
AND PLAINTIFFS' APPLICATION TO
FILE CERTAIN DOCUMENTS UNDER
SEAL [FED. R. CIV. P. 72(a); L.R. 72-2.1]**

) Date: September 15, 2014
) Time: 9:30 A.M.
) Judge: Hon. George H. King
) Room:
) Disc. Cutoff: July 11, 2014
) Pretrial Conf.: N/A
) Trial Date: N/A
) L/D File Jt. MSJ: 11/14/14

1 **HAVING FOUND GOOD CAUSE APPEARING** in Plaintiffs’, Good
2 Morning To You Productions Corp., Robert Siegel, Rupa Marya, and Major
3 Productions, LLC (“Plaintiffs”), application pursuant to Federal Rule of Civil
4 Procedure 72(a) and Local Rule (“L.R.”) 72-2.1, for review of the Order re:
5 Discovery Motion (“Order”) of Magistrate Judge Michael R. Wilner filed on July
6 25, 2014 (Dkt. 132), denying Plaintiffs’ motion to overrule the claim of attorney-
7 client privilege by Defendants Warner/Chappell Music, Inc. and Summy-Birchard,
8 Inc., in certain documents produced by non-party American Society of Composers,
9 Artists, and Publishers (“ASCAP”). The Court makes the following findings:

10 **Findings of Fact and Conclusions of Law**

- 11 1. Plaintiffs served a document subpoena on ASCAP on March 28,
12 2014; and the parties received the ASCAP Documents on May 9,
13 2014. On May 22, 2014, for the first time, ASCAP advised Plaintiffs
14 that Defendants claimed certain of the ASCAP Documents were
15 privileged and that counsel for the Defendants would be contacting
16 Plaintiffs directly;
- 17 2. As required under Fed. R. Civ. P. 26(b)(5)(B), copies of the disputed
18 ASCAP Documents were sequestered by Plaintiffs’ counsel and were
19 submitted to the Magistrate Judge under seal for a determination of
20 Defendants’ claim of privilege;
- 21 3. On July 9, 2014, Magistrate Judge Wilner granted Plaintiffs’ *Ex Parte*
22 Application to extend the discovery deadline to resolve this
23 evidentiary dispute relating to Defendants’ privilege claims as to
24 certain ASCAP Documents;
- 25 4. On July 22, 2014, the parties completed their briefing on the
26 Discovery Motion. Magistrate Judge Wilner heard the dispute on an
27 expedited basis and held oral argument on July 25, 2014. The Order
28 was filed on the same day.
5. On July 29, 2014, the Magistrate Judge sealed the Confidential

1 Declaration of Mark C. Rifkin submitted in support of Plaintiffs'
2 Discovery Motion. Dkt. 137. Certain of these same exhibit were
3 submitted and discussed in Plaintiffs' Motion for Review.

4 6. On July 28, 2014, written notice of the Order was provided to the
5 parties (Dkt. 132) and Plaintiffs filed this Motion for Review within
6 14 days as provided by L.R. 72-2.1. Plaintiffs' Motion for Review is
7 timely.

8 7. Pursuant to Local Rule 72.2-1, Plaintiffs identified the following
9 portions of the Order for review by the Court:

10 The Court finds sufficient evidence to support Warner's
11 argument that *Summy gave the Coudert materials to ASCAP's*
12 *lawyer for the purpose of obtaining legal advice.* [*United States*
13 *v.*] *ASCAP*, 129 F. Supp. 2d [327,] 338 [(S.D.N.Y. 2001)]. Proof
14 that Summy owned a legitimate copyright was fundamental to
15 allowing the association to provide a fundamental service –
16 enforcing and patrolling its members' legal interest. The fact that
17 one of Summy's principals sent the Coudert materials directly to
18 the general counsel of a major rights enforcement agency fits
19 well within the established perspective that "[e]ach individual
20 member of the [unincorporated] association is a client of the
21 association's lawyer." *Schwartz [v. Broadcast Music]*, 16 F.R.D.
22 [16 F.R.D. 31,] 32 [(S.D.N.Y. 2954)]. If ASCAP's general
23 counsel acted as Summy's lawyer to obtain material relevant to
24 preparing future copyright infringement actions (even if such
25 actions didn't come to pass), then the client's action in conveying
26 privileged materials did not cause a waiver of the privilege.

27 The Court also finds the evidence sufficient to establish that
28 *Summy and ASCAP engaged in communication in furtherance*

1 *of a common interest.* As Summy’s agent, ASCAP was
2 contractually obliged to sue copyright infringers on behalf of
3 Summy. The transmission of material central to an infringement
4 action enabled the rights holder and its agent to pursue their
5 common interest in halting such infringement. *Nidec [v. Corp. v.*
6 *Victor Co. of Japan]*, 249 F.R.D. [575,] 578 [(N.D. Cal. 2007)].
7 Plaintiff correctly notes that ASCAP did not stand to benefit
8 directly from a successful copyright infringement action, as the
9 association did not own the song’s copyright or share
10 meaningfully in royalties derived from its public performances.
11 Yet, this merely establishes that ASCAP did not have a joint
12 commercial goal with Summy, which would be a factor against
13 finding a commonality of interest here. [*Bank of America, N.A.*
14 *v.] Terra Nova*, 211 F. Supp. 2d [493,] 497 [(S.D.N.Y. 2002)].
15 Rather, the rights owner and the non-profit association were
16 unified in asserting Summy’s copyrights for Summy’s benefit as
17 a result of the agency relationship. [*In re Fresh and Process*]
18 *Potatoes*] *Antitrust Litig.*, 2014 WL 2435581 at *6-7 [(D. Idaho
19 May 20, 2014)]. That common interest is adequate to warrant
20 protecting privileged communications in advance of future
21 conceivable litigation.

22 Order, Dkt. 132 at 7-8 of 9.

23 7. The standard of review from a magistrate judge’s order on a non-
24 dispositive matter (such as this one) is well-established. “A district
25 court will not modify or set aside a magistrate judge’s order unless it is
26 ‘found to be clearly erroneous or contrary to law.’ . . . The clearly
27 erroneous standard applies to the magistrate judge’s factual findings
28 while the contrary to law standard applies to the magistrate judge’s
legal conclusions, which are reviewed de novo.” *Columbia Pictures,*

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Inc. v. Bunnell, 245 F.R.D. 443, 446 (C.D. Cal. 2007) (*citing* Fed. R. Civ. P. 72(a)).

8. This deferential standard applies to discovery orders pertaining to the attorney-client privilege. *See McAdam v. State Nat. Ins. Co., Inc.*, 12-CV-1333 BTM-MDD, 2014 WL 1614515 (S.D. Cal. Mar. 21, 2014); *see also Fay Ave. Properties, LLC v. Travelers Prop. Cas. Co. of Am.*, 3:11-CV-02389-GPC, 2014 WL 2738682 (S.D. Cal. June 17, 2014).

9. Under the aforesaid standard, the Court has reviewed the factual findings and legal conclusions in the Magistrate Judge’s Order.

10. The Court hereby grants Plaintiffs’ Motion for Review and concludes that Defendants’ production of these documents to a third party, ASCAP, waived Defendants’ claim of privilege as to the documents reviewed by the Court.

ORDER

THEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, Plaintiffs’ Motion for Review is hereby **GRANTED**, as follows:

The Court having reviewed the ASCAP Documents at issue *in camera* concludes that Defendants waived their claim of privilege by production of these documents to a third party, ASCAP.

The Court grants Plaintiffs’ Application to file certain documents under seal.

IT IS SO ORDERED.

Dated: _____

HON. GEORGE H. KING
UNITED STATES DISTRICT COURT JUDGE