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**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

GERALD CARLIN, JOHN RAHM, PAUL
ROZWADOWSKI and DIANA WOLFE,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

DAIRY AMERICA AND
CALIFORNIA DAIRIES;

Defendants.

CASE NO. 1:09-cv-430 AWI-EPG

**ORDER RE: PLAINTIFFS' DISCOVERY
MOTION**

(Docs. 295, 300, and 330)

I. Introduction

On April 21, 2016, Plaintiffs filed a Discovery Motion seeking to permit the use of a spreadsheet (DA000154), that Defendant Dairy America (“Dairy America” or “Defendant”)

1 previously produced in discovery, but is seeking to “clawback” pursuant to a protective order.¹
2 (Doc. 295). The parties also requested that the Court resolve a discovery dispute involving the
3 length of time of Doug White’s deposition, a third party to this litigation. The parties filed a joint
4 statement regarding discovery dispute on April 26, 2016, and supplemental briefing on July 22,
5 2016. (Docs. 300 and 330). The Court held hearings on May 20, 2016 and July 29, 2016. (Docs.
6 318, 319, 234, and 335). Upon a review of the pleadings and the arguments, and for the reasons
7 given on the record during oral argument, Plaintiffs’ Discovery Motion is GRANTED IN PART.

8 **II. Discussion**

9 **A. *The Spreadsheet***

10 At issue in this dispute is a document, referred to as the “2005-2006” spreadsheet, which
11 Dairy America previously produced in discovery. (Doc. 305). After the production, Dairy
12 America attempted to withdraw the document subject to a clawback provision in the protective
13 order. (Doc. 129, ¶ 11; Doc. 154, ¶ 3). It argues that the document is protected by the attorney-
14 client privilege and work product doctrine. It further contends that there has been no waiver of
15 these protections because the document was inadvertently disclosed during discovery, and they
16 attempted to claw the spreadsheet back as soon as the mistaken disclosure became apparent.
17 (Doc. 300-2, pgs.7- 24).

18 Plaintiffs contend that the document is critical to this case because it includes pricing data
19 that was requested by the USDA’s National Agricultural Statistics Service (“NASS”), but never
20 provided to NASS. Plaintiffs claim that the underlying data has not been otherwise produced in
21 discovery and is no longer available outside of this spreadsheet. Plaintiffs argue that the
22 spreadsheet is not covered under the above protections, and even if it were, Dairy America
23 waived these protections when it initially produced the document, and when Defendant’s witness,
24 Jean McAbee, testified to the contents of the spreadsheet during a deposition. (Doc. 300-1, pgs. 7-
25 16). Moreover, Plaintiffs contend that the attorney-client privilege does not apply because the
26 spreadsheet only contains factual data—not communications requesting or providing legal advice.

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28 ¹ The Court granted permission to file the instant discovery motions after the parties participated in several informal
discovery conferences involving several issues. (Docs. 241, 242, and 299).

1 Finally, even if the spreadsheet were attorney work product, Plaintiffs are entitled to use it
2 because they have a substantial need for the information, and cannot obtain an equivalent by other
3 means. (*Id.* at 27-31; Doc. 330, pgs. 2-15).

4 Plaintiffs rely on Fed. R. Civ. P. 26(b)(3)(A) which provides as follows:

5 A. Documents and Other Tangible Things:

6 Ordinarily, a party may not discover documents and tangible things that are prepared in
7 anticipation of litigation or for trial by or for another party or its representative (including
8 the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to
9 Rule 26(b)(4), those materials may be discoverable if:

- 10 (i) they are otherwise discoverable under Rule 26(b)(1); and
- 11 (ii) the party shows that it has substantial need for the materials to prepare its case and
12 cannot, without undue hardship, obtain their substantial equivalent by other means.

13 In an effort to resolve this conflict, at the hearing on May 20, 2016, the Court ordered that
14 that the parties meet and confer, and that Dairy America attempt to produce a reconstituted
15 spreadsheet using the underlying factual data it had used at the time the spreadsheet was created,
16 but based on legal assumptions identified by Plaintiffs wherever relevant. In this way, the Court
17 attempted to extricate any legal assumptions that would constitute attorney-work product while
18 providing the underlying factual data, which appears to be critical and discoverable. Dairy
19 America committed to do so. However, at a second hearing on July 29, 2016, Dairy America's
20 attempt at recreation of such a spread sheet was largely blank and did not contain the majority of
21 the underlying factual data that appears in the disputed spreadsheet. Defendant provided many
22 reasons why it was unable to produce the underlying data from the relevant time period.

23 After consideration of the record and oral argument by counsel at two hearings, the Court
24 finds that the information contained in the spread sheet is protected by the attorney work product
25 doctrine because the document was created after Dairy America had been notified of the
26 possibility of litigation, counsel was consulted to aid in potential litigation, and the creation of the
27 spreadsheet was based on counsel's request for certain data to evaluate potential liability, as well
28 as to assess damages. As explained more fully on the record at the hearing on July 29, 2016, the
Court also finds that Dairy America did not waive this protection because the disclosure was

1 inadvertent.² *See*, Fed. R. Evid. 502(b)(1). Mr. English, Dairy America’s counsel indicates the
2 spreadsheet was mistakenly attached to other unprivileged documents. Declaration of Charles
3 English, dated April 13, 2016, ¶¶ 2-11. (Doc. 300-2, pgs. 26-27). Mr. English quickly attempted
4 to clawback the document once the error became apparent. Fed. R. Evid. 502(b)(3); Fed. R. Civ.
5 P. 26(b)(5)(B). Similarly, a review of the deposition transcript of Jean McAbee, reveals that her
6 testimony was given due to a misunderstanding about how the spreadsheet was presented during
7 the deposition, because the spreadsheet was attached to a letter to NASS. (Doc. 300-2, pgs. 44-
8 47).

9 Notwithstanding the above, the Court finds that the spreadsheet contains data that are
10 highly relevant to the Plaintiffs’ assessment of liability and damages, and are not available
11 through other means. Even though the data in this spreadsheet do not appear to have been
12 reported to NASS, they are highly relevant to computation of damages during that time period.
13 Moreover, Dairy America’s inability to re-create the underlying factual data contained in the
14 disputed spreadsheet establishes that the data are not otherwise available, or at the very least that
15 an undue hardship exists in obtaining substantially equivalent information. *See*, Fed. R. Civ. P.
16 36(b)(3)(A)(ii) (A party may not discover documents prepared in anticipation of trial, unless “the
17 party shows that it has substantial need for the materials to prepare its case and cannot, without
18 undue hardship, obtain their substantial equivalent by other means.”) As discussed extensively on
19 the record, it thus appears that the disputed spreadsheet is the only source of this particular pricing
20 data for the covered time period.

21 Accordingly, Defendant’s request to clawback the document based on attorney work
22 product is denied. Plaintiffs may use the spreadsheet in the course of this litigation, however, the
23 exact scope of its use will be determined by Judge Ishii at the time of trial.

24 Finally, the Court is not persuaded by Defendant’s argument that the spreadsheet falls
25 under the attorney-client privilege.

26 As a preliminary matter, the parties largely rely on state law to evaluate the attorney-client

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28 ² Federal law applies to waiver of a privilege. *Bittaker v. Woodford*, 331 F. 3d 715, 726 (9th Cir. 2003) (“When the court is a federal court, the scope of the waiver is a matter of federal law.”)

1 privilege.³ (Doc. 300-1 pgs. 29-31; Doc. 300-2, pgs. 18-20). However, under Federal Rules of
2 Evidence 501, federal common law generally governs claims of privilege. “But in a civil case,
3 state law governs privilege regarding a claim or defense for which state law supplies the rule of
4 decision.” Fed. R. Evid. 501. In this case, both state and federal claims are alleged.⁴ The Ninth
5 Circuit has held that when the same evidence relates to both federal and state law claims, federal
6 privilege law governs. *Wilcox v. Arpaio*, 753 F. 3d 872, 876 (9th Cir. 2014). See also, *Agster v.*
7 *Maricopa County*, 422 F. 3d 836, 839-840 (9th Cir. 2005) (“Where there are pendant state law
8 claims present, the federal law of privilege applies.”).

9 In the Ninth Circuit, the attorney-client privilege protects confidential information
10 between a client and an attorney from disclosure, “(1) Where legal advice of any kind is sought,
11 (2) from a professional legal adviser in his capacity as such, (3) the communications relating to
12 that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently
13 protected, (7) from disclosure by himself or by the legal adviser, (8) unless the protection be
14 waived.” *United States v. Graf*, 610 F. 3d 1148, 1156 (9th Cir. 2010). It is worth noting that
15 California attorney-client privilege law is substantially similar. Cal. Evid. Code §§ 950 and 952.

16 Here, the spreadsheet consists of factual data maintained by Dairy America, albeit data
17 that was gathered based on an attorney’s request. The document does not contain
18 communications seeking or giving legal advice. The spreadsheet is merely a compilation of data
19 related to sales and pricing that was transmitted to an attorney for a work-product purpose. It
20 does not contain any request from a client, nor any advice--or indeed any response at all--from an
21 attorney. Accordingly, the document is not protected under the attorney-client privilege.

22 ***B. Doug White’s Deposition***

23 After considering the parties’ arguments and briefing (Doc. 330), and as discussed
24 extensively on the record during oral argument, Doug White shall be deposed for two, seven-hour
25 days. Plaintiffs will depose Mr. White on the first day. Defendants shall depose Mr. White on

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27 ³ Plaintiffs cite to federal and state law while Defendant cites only to state law.

28 ⁴ The operative causes of action in this case are state law claims of negligent and intentional misrepresentation against Dairy America and California Dairies, and a federal claim of conspiracy to commit RICO pursuant to 18 U.S.C. § 1962 against California Dairies. (Docs. 245, 303, 317).

1 the second day. Defendants may not use any of Plaintiffs' unused deposition time to complete
2 their depositions.

3 **III. Conclusion**

4 For the reasons more fully set forth on the record on May 20 and July 29, 2016, and as
5 outlined above, Plaintiff's Motion for Discovery (Doc. 295) is GRANTED IN PART.

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7 IT IS SO ORDERED.

8 Dated: August 15, 2016

/s/ Eric P. Gray
UNITED STATES MAGISTRATE JUDGE

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