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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE LDK SOLAR SECURITIES)
LITIGATION,)
)
)
)
This document relates to:)
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ALL ACTIONS.)
)

No. C07-5182 WHA (BZ)
NINTH DISCOVERY ORDER

Before the Court is lead plaintiff's motion to compel defendant to produce information it redacted from Dr. Yuepeng Wan's handwritten notebooks. Dr. Wan, defendant's Chief Technology Officer, kept notebooks in which he recorded information he received at meetings of company officers and employees. Defendant has produced Dr. Wan's notebooks but has redacted certain information which it claims is protected by the work-product rule. It does not assert the attorney-client privilege as to any of the redacted information.

Initially, I reviewed the redacted information and issued the Eighth Discovery Order which invited briefing on the scope of the work-product rule unless defendant was prepared to turn

1 over the redacted information. Two rounds of additional
2 briefing and one hearing followed. With the benefit of the
3 additional briefing and a better understanding of the context
4 in which the meetings were conducted, I again reviewed the
5 redacted information *in camera*.

6 Prior to Hickman v. Taylor, 329 U.S. 495 (1947), at least
7 some of what we now call work-product appears to have been
8 discoverable. See concurrence of Justice Jackson, *id.* at 518,
9 referring to Hickman v. Taylor, 4 F.R.D. 479 (E.D.Pa. 1945).
10 The Supreme Court created the work-product doctrine in Hickman
11 to advance two principal objectives: (1) to protect the mental
12 impressions and conclusions of counsel and (2) to prevent less
13 diligent lawyers from taking unfair advantage of more
14 productive opponents.¹ See Admiral Ins. Co. v. United States
15 Dist. Court, 881 F.2d 1486, 1494 (9th Cir. 1989).

16 Whatever its genesis, the work-product rule was expanded
17 to where it now protects information "prepared in anticipation
18 of litigation or for trial by or for another party or its
19 representative." Rule 26(b)(3) as amended in 1970.

20 Various courts have since read the Rule quite broadly to
21 protect a variety of information. See *e.g.* Goff v. Harrah's
22 Operating Co., 240 F.R.D. 659, 660 (D.Nev. 2007) ("It may be
23 surprising to long-time practitioners that 'a lawyer need not
24 be involved at all for the work product protection to take
25 effect,'"); Hertzberg v. Veniman, 273 F.Supp.2d 67, 77 (D. DC

26
27 ¹ "Discovery was hardly intended to enable a learned
28 profession to perform its functions either without wits or on
wits borrowed from the adversary." Hickman, 329 U.S. at 516.

1 2003) and cases collected therein. This means that even if a
2 document prepared by a party's employee does not contain an
3 attorney's mental impressions or conclusions, was not prepared
4 at an attorney's request or for an attorney's use, and is
5 sought for legitimate purposes and not to simply take
6 advantage of the opposing party's pretrial preparation, it may
7 be entitled to protection if it was prepared "because of" the
8 litigation. In re Grand Jury Subpoena, 357 F.3d 900, 907 (9th
9 Cir. 2004).²

10 Dr. Wan's notes do not fit neatly within any established
11 rule. Having reviewed them *in camera*, I find that they do not
12 contain the mental impressions or conclusions of counsel. Nor
13 is there any evidence that counsel, directly or indirectly,
14 asked Dr. Wan to take these notes or that they were made for
15 counsel's use. For the most part, they are Dr. Wan's notes of
16 routine intra-company meetings at which the litigation was
17 discussed and record information such as what lawyers will be
18 retained and what types of assistance Dr. Wan and his co-
19 employees might expect to render the attorneys.³ The specific
20 discussions would not have occurred and the redacted
21 information would not have been recorded but for the
22 litigation. Yet it is hard to understand why it should not be
23 discoverable if otherwise relevant and it is difficult for me

24
25 ². There is an exception for documents which would have
26 been prepared in the ordinary course of business, even if there
27 had been no litigation. See Schwarzer, et al., Federal Civil
28 Procedure Before Trial §11:842; U.S. v. Adlman, 134 F.3d 1202
(2d Cir. 1998).

³ Lawyers may have been attended some of the meetings,
but the attorney-client privilege is not being asserted.

1 to believe the Hickman court would have granted the redacted
2 information any protection.⁴ Nonetheless, I am constrained by
3 the literal wording of Rule 26(b)(3) and by its construction
4 by the courts to find that the information was prepared by a
5 party representative, Dr. Wan, because of the litigation, and
6 constitutes work-product.

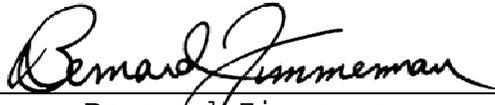
7 Plaintiff claims that even if the information is "work-
8 product," it still must be disclosed because he has shown a
9 sufficient need. He argues that he believes there was a
10 cover-up of the true facts concerning the quality of LDK's
11 inventory.

12 I find this argument largely unpersuasive. First, as
13 defendant points out, plaintiff has produced little if any
14 evidence in support of this contention and appears not to have
15 pursued it in other discovery. Second, my review of the
16 redacted information discloses no information that would
17 suggest any such cover-up. There are three entries which
18 pertain to inventory. Balancing the minimal work product
19 content of the information, against the asserted need for the
20 contemporaneous record of defendant's Chief Technology Officer
21 on this issue, I find sufficient need to order their
22 production. In re Harmonic, Inc. Sec. Litig., 245 F.R.D. 424,
23 429 (N.D. Cal. 2007). Defendant shall produce by **January 12,**

24
25 ⁴ "[A] determination that communications or materials
26 are privileged is simply a choice to protect the communication
27 and relationship against claims of competing interests. Any
28 inequity in terms of access to information is the price the
system pays to maintain the integrity of the privilege."
Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486,
1494 (9th Cir. 1989). I do not see much of a societal interest
in protecting Dr. Wan's notes.

1 **2010**, the third redacted line in #15480; redacted lines
2 6-11 in #15503; and redacted lines 1-7 in #15527. The motion
3 is otherwise **DENIED**.

4 Dated: January 7, 2010

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6 _____
7 Bernard Zimmerman
8 United States Magistrate Judge

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