

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICK JAMES, et al.,
Plaintiffs,
v.
UMG RECORDINGS, INC.,
Defendant.

Case No. [11-cv-01613-SI](#) (MEJ)

**ORDER RE: JOINT DISCOVERY
LETTER**

Re: Dkt. No. 176

I. BACKGROUND

This is a consolidated putative class action for breach of contract, breach of the covenant of good faith and fair dealing, and statutory violations of various state laws against defendant, UMG Recordings, Inc., and its affiliated and subsidiary entities (“UMGR”), filed by plaintiff recording artists and producers (“Plaintiffs”), who allege that UMGR underpaid licensing royalties on digital downloads of Plaintiffs’ recordings.

The current dispute concerns Plaintiffs’ motion to compel production of Privilege Log Entry Nos. 61-65, 75-80, 83-112, 114-128, 131-178, 180-240, 254-293, 300-317, and 337, which UMGR added to the log in May of 2013. *Jt. Ltr.* at 2. Plaintiffs assert that these documents relate to business decisions regarding: “(a) UMGR’s adoption of its policy for calculating digital download royalties, as reflected in the 2002 ‘Ostroff Memo’; (b) UMGR’s communicating such policy to artists and others; and (c) UMGR’s ‘digital media strategy.’” *Id.* at 3.

In support of its claims of privilege, UMGR has produced a privilege log in which it contends each of the attorneys making these communications were “in-house counsel.” *Id.* at 4. Plaintiffs argue that UMGR fails to meet the burden to establish these communications are attorney-client because the lawyers listed on the privilege log were serving in primarily business roles when the communications were made. *Id.* at 3. They contend the privilege log is insufficient

1 in that it fails to reveal the roles played by the attorneys writing or receiving the communications.
2 *Id.*, at 4, fn. 10. UMGR contends that it has made a prima facie showing that the attorney-client
3 privilege applies because the dominant purpose of UMGR’s relationship with the lawyers listed on
4 the log was a legal one at the time of the communications at issue. *Id.* at 5. UMGR denies
5 asserting a blanket privilege, and states that it has released all communications relating to business
6 decisions.

7 **II. DISCUSSION**

8 **A. Applicable Law**

9 Pursuant to Federal Rule of Evidence 501, attorney-client issues in diversity cases are
10 substantive and thus controlled by the forum state’s law. *Great Am. Assur.Co. v. Liberty Surplus*
11 *Ins. Corp.*, 669 F. Supp. 2d 1084, 1090 (N.D. Cal. 2009). Under California law, the attorney-
12 client privilege is governed by statute. Cal. Evid. Code § 911, *et seq.* Communications between a
13 lawyer and client which are intended to be confidential are protected from disclosure. *Id.* § 954.
14 Confidential communications include not only information given by a client to his or her attorney
15 but also the attorney’s legal opinion and advice given to the client. *Id.* § 952.

16 “The party claiming the privilege has the burden of establishing the preliminary facts
17 necessary to support its exercise, i.e., a communication made in the course of an attorney-client
18 relationship.” *Costco Wholesale Corp. v. Superior Court*, 47 Cal.4th 725, 733 (2009). “Once that
19 party establishes facts necessary to support a prima facie claim of privilege, the communication is
20 presumed to have been made in confidence and the opponent of the claim of privilege has the
21 burden of proof to establish the communication was not confidential or that the privilege does not
22 for other reasons apply.” *Id.*

23 To determine whether a communication is privileged, “the focus of the inquiry is the
24 dominant purpose of the relationship between the parties to the communication.” *Clark v.*
25 *Superior Court*, 196 Cal. App. 4th 27, 51 (2011). “Under that approach, when the party claiming
26 the privilege shows the dominant purpose of the relationship between the parties to the
27 communication was one of attorney-client, the communication is protected by privilege.” *Id.*
28 “The attorney-client privilege attaches to a confidential communication between the attorney and

1 the client and bars discovery of the communication irrespective of whether it includes
2 unprivileged material.” *Costco*, 47 Cal.4th at 734. “[B]ecause the privilege protects the
3 transmission of information, if the communication is privileged, it does not become unprivileged
4 simply because it contains material that could be discovered by some other means.” *Id.* at 735
5 (emphasis in original).

6 “The privilege does not apply to communications to an attorney who is transacting
7 business that might have been transacted by another agent who is not an attorney.” *Montebello*
8 *Rose Co. v. Agri. Labor rel. Bd.*, 119 Cal. App. 3d 1, 33 (1981). Whether a particular
9 communication is predominantly in furtherance of the attorney-client relationship is a question of
10 fact. *Id.*

11 **B. Analysis**

12 Plaintiffs argue that UMGR is improperly asserting the attorney client privilege to
13 withhold virtually all of its internal correspondence regarding business decisions about its digital
14 download policy, which were reflected in the 2002 “Ostroff Memo.” Crucial to Plaintiffs’
15 position is that the Ostroff Memo announced “an across-the-board, extra-contractual decision” to
16 pay artists higher royalties than they deserved” which was motivated solely by business concerns.
17 *Jt. Ltr.* at 3. Plaintiffs also contend that emails regarding UMGR’s communication of the new
18 policy to artists involve public relations, not legal issues. *Id.* at 3-4. Likewise, communications
19 regarding “digital media strategy” relate primarily to business concerns. *Id.* at 4.

20 The party claiming the privilege shoulders the burden of showing that the evidence it seeks
21 to suppress falls within the terms of an applicable statute. *Costco*, 47 Cal.4th at 733. Accordingly,
22 the Court turns to UMGR’s showing. UMGR contends that it has made a prima facie showing
23 that the dominant purpose between the parties to the communications was one of attorney client.
24 *Jt. Ltr.* at 5. UMGR asserts that “in 2001 –3, it had a corporate ‘center’ and various business units
25 (such as different record labels) each run by business executives, for whom UMGR claims no
26 privilege for the documents involved here.” *Id.* The center also had lawyers, led by UMGR’s
27 General Counsel, Michael Ostroff. *Id.* Many of the larger business units had their own lawyers.
28 *Id.* UMGR asserts that the dominant purpose of the relationship between UMGR and 22 of the 24

1 lawyers on the privilege log was a legal one at the time of the communications at issue. *Id.*

2 UMGR relies on the privilege log, which it claims provides sufficient foundational facts to
3 determine the privilege issue. *Id.* The information in a privilege log “must be sufficiently specific
4 to allow a determination of whether each withheld document is or is not [in] fact privileged.”
5 *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal. App. 4th 110, 130 (1997). For each
6 document, UMGR’s privilege log contains the author, date of preparation, recipients, description
7 of the contents and purpose of the document, and the specific privilege claimed. This is sufficient
8 information under *Wellpoint*. Accordingly, the Court finds that UMGR’s privilege log meets the
9 presumption.

10 However, the inquiry does not end there. As Plaintiffs contend, the attorney-client
11 privilege does not attach to an attorney’s communications when the client’s dominant purpose in
12 retaining the attorney was something other than to provide the client with a legal opinion or legal
13 advice. The attorney-client privilege “is inapplicable where the attorney merely acts as a
14 negotiator for the client, gives business advice or otherwise acts as a business agent.” *Chicago*
15 *Title Ins. v. Superior Court*, 174 Cal. App. 3d 1142, 1151 (1985). The attorney-client privilege
16 does not apply without qualification where the attorney is merely acting as a negotiator for the
17 client (*Montebello Rose Co.*, 119 Cal. App. 3d at 32-35, or merely gave business advice (*Estate of*
18 *Perkins v. Bigelow*, 195 Cal. 699, 710 (1925)). “To make the communication privileged the
19 dominant purpose must be for transmittal to an attorney ‘in the course of professional
20 employment.’” *Montebello*, at 32.

21 Plaintiffs largely rely on the deposition testimony of attorney Larry Kenswill, who was
22 then President of eLabs, UMGR’s division handling electronic commerce initiatives, to establish
23 that the communications pertain primarily to business advice, given by lawyers serving as
24 business advisors. When asked whether the decision to treat permanent download income not as
25 licensed income was primarily a legal or business decision, Kenswill stated: “I am not comfortable
26 with the word ‘primarily.’ I am comfortable saying that there were both legal and business...
27 issues to be thought of.” *Jt. Ltr.*, Kenswill Dep. at 140. Rand Hoffman, then an Executive Vice
28 President of Business and Legal Affairs (“BLA”), testified that he “wouldn’t characterize his

1 conversations with Ostroff leading up to the memo as either business or legal.” *Id.*, Hoffman Dep.
2 at 62, 72. Plaintiffs also rely on Kenswill’s statement that “Anyone who had a law degree in the
3 business affairs department was working largely in a business capacity” as support for their
4 contention that the attorneys on the privilege log all worked in non-legal capacities when the
5 communications were made. *Id.* at 3, Kenswill Dep. at 42.

6 Plaintiffs’ evidence fails to overcome UMGR’s claims of privilege. UMGR has
7 sufficiently supported its claim that the dominant purpose of the relationship with the attorneys at
8 the time the communications were made was legal. The log entries state that legal advice was
9 either sought or given with respect to digital downloads, artist communications, on-line royalties,
10 digital media strategy, and anti-piracy. Plaintiffs’ only evidence that the named attorneys were not
11 working in a legal capacity when they made these communications is Kenswill’s testimony
12 regarding the roles of BLA attorneys. However, this statement pertained to 1998, not the time
13 period in the log. *Jt. Ltr.* at 5, fn. 18. This is insufficient evidence that these lawyers worked in a
14 primarily non-legal capacity and gave primarily business advice. Nor does the fact that Hoffman
15 wouldn’t characterize his conversations with Ostroff as “either business or legal” defeat UMGR’s
16 claim of privilege. *Id.* at 2. Only thirteen of the challenged communications are between
17 Hoffman and Ostroff, nine of which also include other attorneys. (Privilege Log Entries 138, 140,
18 145, 149, 150, 151, 155, 162, 197, 210, 216, 218, and 233.)

19 Here, the Court finds that UMGR has not asserted a blanket privilege over its
20 communications. UMGR has produced non-privileged communications authored by the attorneys
21 on the log, and invoked attorney-client privilege only for those documents involving legal advice.
22 *See In re 3dfx Interactive, Inc.*, 347 B.R. 394, 403 (N.D. Cal. Bankr. 2006) (denying motion to
23 compel production of documents on the basis that defendant’s in-house counsel was acting as
24 business advisor; defendant consistently stated in letters, motions, and depositions that it produced
25 all documents pertaining to business purposes).

26 **III. CONCLUSION**

27 For the foregoing reasons, the Court finds the communications are privileged, and on that
28 basis DENIES Plaintiffs’ motion to compel production of Privilege Log Entries: Nos. 61-65, 75-

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

80, 83-112, 114-128, 131-178, 180-240, 254-293, 300-317, and 337.

IT IS SO ORDERED.

Dated: February 10, 2014



MARIA-ELENA JAMES
United States Magistrate Judge