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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

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7 META PLATFORMS, INC.,
8 Plaintiff,
9 v.
10 BRANDTOTAL LTD., et al.,
11 Defendants.

Case No. 20-cv-07182-JCS

**ORDER REGARDING JOINT
DISCOVERY LETTER BRIEF**

Re: Dkt. No. 206

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13 On November 22, 2021, the parties filed a joint letter raising a discovery dispute as to three
14 documents Plaintiff Meta Platforms, Inc. (“Facebook”) has withheld from production based on
15 assertions of attorney-client privilege and the work product doctrine. Defendants BrandTotal, Ltd.
16 and Unimania, Inc. (collectively, “BrandTotal”) challenge those designations. The documents at
17 issue, which relate to Facebook’s investigation of certain BrandTotal products, are as follows:
18 (1) a “quip,” which is a collaboratively edited document that includes comments by counsel; (2) a
19 “task,” consisting of communications by Facebook employees, including counsel; and (3) a
20 second “task,” which does not include communications by counsel but was prepared at counsel’s
21 direction.¹

22 BrandTotal contends that these documents are governed by a previous stipulation and
23 order. That order provide that Facebook would produce “the contested document,” and such
24 production would not constitute waiver of privilege as to any other documents. Dkt. 190. The
25 stipulation described the contested document as “an investigatory document that it refers to as the

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27 ¹ Some parts of BrandTotal’s portion of the joint letter appear to seek production of *all* documents
28 regarding its factual investigation. Such a broad request does not appear to have been addressed
as part of the mandatory meet-and-confer process before filing the joint letter. This order is
limited to the three documents specifically addressed in the letter.

1 UpVoice task.” Dkt. 189. The stipulation is vague as to the specific document at issue, and
2 BrandTotal does not dispute that Facebook subsequently produced *a* task document related to its
3 investigation of BrandTotal’s product UpVoice. The apparent purpose of the stipulation was to
4 allow Facebook to produce a document, which might or might not ameliorate BrandTotal’s
5 concerns regarding the scope of Facebook’s production, without waiving privilege. While it is
6 understandable that BrandTotal “lacks Facebook’s insight into how many documents Facebook
7 created for its investigation,” *see* Joint Letter at 1, the terms of the stipulation only required
8 production of one document. If the parties had intended to require Facebook to produce *all* task
9 documents concerning its investigation, they could have used such language in their stipulation.
10 Facebook satisfied its obligations under the stipulation and order as written.

11 The fact that Facebook complied with the stipulation does not resolve the question of
12 whether other documents were properly withheld as privileged or as work product.

13 “The attorney-client privilege protects confidential communications between attorneys and
14 clients, which are made for the purpose of giving legal advice.” *In re Grand Jury*, 13 F.4th 710,
15 713 (9th Cir. 2021) (cleaned up). If a communication serves more than one purpose, the Ninth
16 Circuit has declined to resolve whether legal advice must be “*the* primary purpose” or merely “*a*
17 primary purpose,” but has affirmed a district court imposing contempt for failure to produce
18 documents where “the district court did not clearly err in finding that *the* predominate purpose of
19 the disputed communications was not to obtain legal advice.” *Id.* at 716–17.

20 The work product doctrine “affords protection when it can fairly be said that the document
21 was created because of anticipated litigation, and would not have been created in substantially
22 similar form but for the prospect of that litigation.” *In re Grand Jury Subpoena (Mark Torf/Torf*
23 *Env’t Mgmt.)*, 357 F.3d 900, 908 (9th Cir. 2004) (cleaned up). Rule 26(b)(3) of the Federal Rules
24 of Civil Procedure codifies work product protection but allows for discovery of protected material
25 on a showing of substantial need, so long as the court “protect[s] against disclosure of the mental
26 impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative
27 concerning the litigation.” Fed. R. Civ. P. 23(b)(3).

28 As described by Facebook’s in-house counsel Michael Chmelar, at least the first and

1 second documents at issue here consist of comments by multiple people over a period of time, and
2 the third also appears likely to include a series of separate comments. *See also* Ex. C (another
3 “task” document, which has already been produced, consisting of comments by multiple Facebook
4 employees). Treating these collections of communications as single “documents” for the purpose
5 of privilege and work product would place form over substance, and could allow for broader
6 withholding from production than would be permitted for other forms of serialized communication
7 like email or text messages.

8 To the extent the communications included in the three documents at issue describe
9 Facebook’s factual investigation, it is unclear if they are protected by either doctrine. The record
10 indicates that Facebook routinely investigates potential violations of its terms of use, documenting
11 those investigations in similar “tasks,” even where it is not specifically contemplating litigation
12 but instead considering whether to take technological measures to block access or improve
13 security. Accordingly, there is reason to doubt whether the primary purpose of all such
14 communications was to obtain legal advice, *cf. In re Grand Jury*, 13 F.4th at 713, and reason to
15 think the factual investigatory communications might “have been created in substantially similar
16 form but for the prospect of [this] litigation,” *cf. Torf*, 357 F.3d at 908.

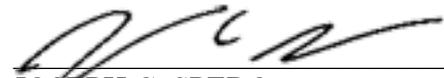
17 Communications that merely describe a factual investigation of potential terms-of-use
18 violations, overseen by counsel in anticipation of litigation, are better characterized as work
19 product than privileged, and the Court assumes for the sake of argument they qualify for
20 protection under the former doctrine. Since Facebook’s motivations for taking action to block
21 BrandTotal’s access go to the heart of BrandTotal’s defenses and counterclaims, the Court is
22 satisfied that BrandTotal has shown substantial need for these contemporaneous documents
23 describing the investigation. Of course, to the extent any communications actually request or
24 provide legal advice, they are privileged. For each of the three documents at issue, the Court
25 therefore orders as follows: (1) Facebook may redact as privileged specific *communications* within
26 those documents that request or provide legal advice; (2) Facebook shall produce *communications*
27 within those documents that instead convey factual information about Facebook’s investigation
28 and BrandTotal’s purported violations; and (3) Facebook may redact any portions of any

1 communications that reveal “the mental impressions, conclusions, opinions, or legal theories” of
2 any attorney or other Facebook employee.

3 Facebook shall complete production in accordance with this order no later than January 14,
4 2022. Any disputes regarding that production shall be addressed by the procedure set forth in the
5 Court’s standing order.

6 **IT IS SO ORDERED.**

7 Dated: January 10, 2022

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10 JOSEPH C. SPERO
11 Chief Magistrate Judge

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