

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 POWERTECH TECHNOLOGY, INC.,

No. C 11-6121 CW

5 Plaintiff,

ORDER DENYING
MOTION FOR RELIEF
FROM

6 v.

NONDISPOSITIVE
PRETRIAL ORDER
(Docket No. 157)

7 TESSERA, INC.,

8 Defendant.

9 _____/

10 Plaintiff Powertech Technology, Inc. (PTI) moves for relief
11 from a nondispositive discovery order of the Special Master issued
12 on September 5, 2012. Docket No. 157. The Court considers PTI's
13 objections de novo and DENIES PTI's motion for relief.

14 PTI objects to the Special Master's order on three bases.
15 First, PTI challenges the order that it provide further deposition
16 testimony from C.C. Liao, D.K. Tsai and P.C. Lee and an unredacted
17 transcript of Mr. Lee's deposition testimony. PTI argues that the
18 testimony at issue was protected under the common interest
19 doctrine because it concerned a privileged communication with
20 non-party Elpida. The common interest doctrine is not a privilege
21 itself, but instead is an exception to the general rule of waiver
22 when privileged communications are disclosed to third parties.
23 Nidec Corp. v. Victor Co., 249 F.R.D. 575, 578 (N.D. Cal. 2007).

24 "The common interest privilege . . . applies where (1) the
25 communication is made by separate parties in the course of a
26 matter of common [legal] interest; (2) the communication is
27 designed to further that effort; and (3) the privilege has not
28 been waived.'" Id. (quoting United States v. Bergonzi, 216 F.R.D.

1 487, 495-96 (N.D. Cal. 2003) (formatting in original). "Of
2 course, since it is an anti-waiver exception, it comes into play
3 only if the communication at issue is privileged in the first
4 instance." Id. PTI, who bears the burden of establishing that
5 the material is privileged, has not identified any privileged
6 material that was put in issue by the deposition questions and
7 testimony. Although PTI contends that certain documents in its
8 recently-produced privilege log were protected by attorney-client
9 privilege and the work product doctrine, it has not shown that
10 these particular documents were the subject of the testimony at
11 issue. That PTI and Elpida may have communicated about some
12 privileged material does not mean that all of their communications
13 concerned such material.¹ Accordingly, PTI has not demonstrated
14 the existence of any underlying privilege with respect to the
15 deposition testimony and questions.

16 Second, PTI contends that it should not be required to
17 identify and produce the documents used to refresh Mr. Lee's
18 recollection. Federal Rule of Evidence 612 provides certain
19 options to an adverse party when a witness uses a writing to
20 refresh memory before testifying, if the court decides that
21 justice requires the party to have those options. Fed. R. Evid.
22 612(a)(2). These options include to have the writing produced, to
23 inspect it, to cross-examine the witness about it, and to
24 introduce in evidence any portion that relates to the witness's
25 testimony. Fed. R. Evid. 612(b). The testimony at issue is

26
27 ¹ In this Order, the Court expresses no opinion as to whether
28 the documents identified in the privilege log were withheld
properly.

1 central to the disputed issues in this case. The interest of
2 justice requires that Tessera be allowed the opportunity to cross-
3 examine Mr. Lee regarding any discrepancies between his memory and
4 the writings. Further, to the extent that PTI argues that its
5 selection of documents to refresh Mr. Lee's memory, as opposed to
6 the documents themselves, is itself privileged information, the
7 options set forth in Rule 612 necessarily require that the
8 documents be identified and PTI waived any privilege that might
9 exist over its selection by using the documents to refresh Mr.
10 Lee's recollection.

11 Finally, PTI argues that it should not be required to produce
12 a "full privilege log" by a date certain while Defendant Tessera,
13 Inc. has no corresponding deadline to complete its privilege log.
14 However, the Special Master's order did not require PTI to provide
15 a full privilege log by a date certain; instead, it required PTI
16 to do so only for documents withheld in reliance on the common
17 interest doctrine.

18 IT IS SO ORDERED.

19
20 Dated: 10/4/2012



CLAUDIA WILKEN
United States District Judge

21
22
23
24
25
26
27
28