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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAVANNI MUNGUIA-BROWN, et al.,

Plaintiffs,

v.

EQUITY RESIDENTIAL, et al.,

Defendants.

Case No. 16-cv-01225-JSW (TSH)

DISCOVERY ORDER

Re: Dkt. No. 184

Companies sometimes analyze the legality of their policies in order to achieve legal or regulatory compliance, not because they anticipate or are defending litigation. Defendants say they did that here to make sure their late fee was legal. In 2008 they analyzed their proposed late fee, including having in-house counsel and outside counsel give advice, and annually thereafter continued that review to ensure legal compliance. The Court summarized this evidence in its June 9, 2020 order at ECF No. 171. Defendants asserted that these legal communications were protected by the attorney-client privilege, not the attorney work product doctrine. ECF No. 170 at 5. For example, RFP No. 71 asked for “all documents and communications related to Defendants’ monitoring or evaluation of the standard late fee following its implementation, including all documents related to the regular monitoring referred to in paragraph 16 of the Beihoffer declaration.” Defendants invoked the attorney-client privilege in response, but not the attorney work product doctrine. ECF No. 184-1, Ex. 3. So, this seemed like a consistent story about analyzing the late fee, both when it was initially developed and annually thereafter, to achieve legal compliance.

The story seems to have changed following the Court’s June 9 order, which found a subject matter waiver of the attorney-client privilege concerning legal advice from outside counsel

1 and in-house counsel concerning the legality of the late fee. Because Defendants had not invoked
2 the work product doctrine for those documents, the Court's order had no occasion to consider it
3 (ECF No. 171 at 2 (observing that "only the attorney-client privilege is at issue")), so the finding
4 of waiver was limited to privilege and did not encompass work product. In the wake of that order,
5 Defendants now say that every single document concerning the monitoring of the validity of the
6 late fee after the day this lawsuit was filed was attorney work product. ECF No. 184-1, Ex. 5
7 ("For monitoring documents post-dating 2014, Defendants' position is that any monitoring of the
8 validity of the late fees is tied up with the lawsuit, and that Judge Hixson's order does not
9 contemplate that such documents will be produced.").

10 There are two problems with Defendants' new position. First, this categorical assertion of
11 work product based solely on time frame is totally incredible simply on its face. Some people can
12 safely be assumed to be generators of work product once a lawsuit has been filed, such as outside
13 counsel hired to defend the case and in-house counsel who work with them. For other people,
14 work product protection might apply to particular documents depending on whose direction they
15 were acting at the time. However, it is not true that on the day a lawsuit is filed, work product
16 protection falls like snow on everybody at the company. Legal and regulatory compliance
17 practices that were in place for years before a lawsuit was filed do not become work product when
18 a lawsuit is filed if the people involved are simply doing what they did before. Remember that
19 Defendants said they hired landlord-tenant law firms as part of their monitoring efforts and that
20 they had in-house attorneys whose portfolios consisted of different markets and it was their job to
21 be aware of changes in statutory or case law or what was happening in the court systems. ECF
22 No. 171 at 4-5. Those people are not defending this lawsuit. How on earth could the work
23 product doctrine apply to their documents?

24 Second, Defendants themselves did not think their monitoring documents were protected
25 as work product until after the Court ruled they had waived privilege. Recall that RFP 71 asked
26 for Defendants' documents related to their monitoring or evaluation of their late fee following its
27 implementation, and Defendants did not assert a work product objection. Plaintiffs suggest this
28 failure alone is enough to find a waiver.

1 However, given the importance of the work product doctrine, it is better to take this in
2 steps. Knowing the dimensions of the problem will help in deciding what to do about it. The
3 Court orders Defendants to produce a privilege log for any document concerning monitoring of the
4 late fee over which Defendants claim work product protection. See Fed. R. Civ. Proc. 26(b)(5)(A)
5 (party withholding documents based on work product must provide a privilege log). However, the
6 log should not include any communications with, or documents authored by, outside counsel that
7 were retained by Defendants to litigate this case, as we will simply assume work product
8 protection for those. Further, if Defendants have any in-house counsel whose work concerning the
9 late fee solely involved the defense of this lawsuit (for example, the in-house counsel had no
10 involvement with analyzing or monitoring the legality of the late fee before the lawsuit was filed),
11 Defendants can submit a declaration from that in-house attorney so swearing in lieu of logging his
12 or her documents.

13 The Court realizes, of course, that despite the plain language of Rule 26(b)(5)(A), litigants
14 do not generally log their litigation-related communications, no matter how relevant, because of
15 the burden of doing so and because communications between certain people (outside counsel and
16 in-house litigation counsel) are so nearly certain to be protected that logging them all would be a
17 pointless waste of time. The problem we are facing in this case is that Defendants are claiming
18 that work product protection has descended on every single person who monitored the validity of
19 the late fee over the last six years such that all such communications are litigation-related.
20 Defendants are implementing this claim with a per se date restriction, not by analyzing individual
21 documents to see if they are actually reflective of attorney work product. So, we can't tell
22 Defendants to leave litigation-related documents off their privilege log because, under their
23 expansive theory of what is related to litigation, they would leave off everything. Accordingly, the
24 Court has carved out categories of documents from the logging requirement (outside counsel
25 documents, and documents from a specific type of in-house counsel) where those categories are
26 likely to be burdensome and the work product claim is likely to be valid. The remaining
27 documents require scrutiny, and the logging requirement is narrowly tailored to identify them.

28 Defendants must serve the privilege log (and any in-house declarations) on Plaintiffs

1 within 30 days. Any deficiencies in the log or the declarations should be raised in a joint
2 discovery letter brief. If Plaintiffs wish to move to compel any documents over the work product
3 objection, either because the documents are not work product or because the objection has been
4 waived, they should do so in a full written motion under Local Rule 7 and not a joint discovery
5 letter brief.

6 **IT IS SO ORDERED.**

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8 Dated: October 19, 2020

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10 THOMAS S. HIXSON
11 United States Magistrate Judge

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United States District Court
Northern District of California