

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

\*\*E-filed 3-08-2011\*\*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

WI-LAN, INC.,

Plaintiff,

v.

LG ELECTRONICS, INC. and LG  
ELECTRONICS USA, INC.,

Defendants.

Case Number C 10-80254-JF (PSG)

ORDER<sup>1</sup> DENYING MOTION FOR  
RELIEF FROM NONDISPOSITIVE  
PRETRIAL ORDER OF  
MAGISTRATE JUDGE

[Re: Docket No. 24]

**I. BACKGROUND**

Pursuant to Fed. R. Civ. Pro. 72 and Civil L.R. 72-2, the law firm of Townsend and Townsend and Crew LLP (“Townsend”) seeks relief from a non-dispositive pretrial order issued by Magistrate Judge Paul S. Grewal on February 8, 2011. The order granted in part and denied in part Townsend’s motion to quash a subpoena *duces tecum* served by LG Electronics, Inc. and LG Electronics U.S.A. Inc. (“LG”).

---

<sup>1</sup> This disposition is not designated for publication in the official reports.

1 Judge Grewal addressed three discrete issues: (1) whether Fed R. Evid. 502(a) applies to  
2 the instant action; (2) whether the disclosure of a letter authored by Townsend (“the Townsend  
3 Letter”) constitutes a subject-matter waiver for purposes of the attorney-client privilege; and (3)  
4 whether the waiver of privilege extends to “opinion work product.” Judge Grewal concluded that  
5 Rule 502 does not apply because the disclosure of privileged material occurred outside of any  
6 “federal proceeding.” (Grewal Order, Dkt. No. 22, 6:18.) Judge Grewal also rejected  
7 Townsend’s argument that the waiver of privilege is limited to the Townsend Letter only.  
8 Specifically, he denied “Townsend’s motion to quash the subpoena seeking all communications  
9 and work product related to the subject matter covered by the Townsend Letter. . . .” (*Id.* at 7:21-  
10 8:1). Finally, Judge Grewal agreed with Townsend that the waiver of privilege does not extend  
11 to opinion work product. (*Id.* at 8:2-4.)

12 Townsend objects to the order on two grounds. First, it contends that the “order fails to  
13 apply Fed. R. Evid. 502, nor does it determine the specific effect of the disclosure in question,  
14 and [] as being interpreted by counsel for LG, Judge Grewal’s order effects an improper and  
15 unjustified subject-matter waiver even as to communications with trial counsel regarding the  
16 underlying litigation.” (Townsend Mot. for Relief, Dkt. 24, 1:7-11.) Second, Townsend argues  
17 that the Court should not “elevate form over substance” and should determine that Rule 502 does  
18 apply to the instant action. (*Id.* at 2:26-3:3.) Alternatively, Townsend argues that Judge Grewal’s  
19 order “fails to set forth sufficient detail of the scope of the waiver to the facts at hand.” (*Id.* at  
20 3:4-5).

## 21 II. LEGAL STANDARD

22 Townsend has the burden of showing that the magistrate judge's ruling is clearly  
23 erroneous or contrary to law. “[T]he magistrate's decision on a nondispositive issue will be  
24 reviewed by the district court judge under the clearly erroneous standard.” *Bahn v. NME*  
25 *Hospitals, Inc.*, 929 F.2d 1404, 1414 (9th Cir.1991); *see also* Fed.R.Civ.P. 72(a) (“The district  
26 judge in the case must ... set aside any part of the order that is clearly erroneous or is contrary to  
27 law.”). “In finding that the magistrate judge's decision is ‘clearly erroneous,’ the Court must  
28 arrive at a definite and firm conviction that a mistake has been committed.” *EEOC v. Lexus of*

1 *Serramonte*, No. C 05-0962 SBA, 2006 WL 2619367, at \*2 (N.D.Cal. Sept.5, 2006). “This  
2 standard is extremely deferential and the [m]agistrate's rulings should be considered the final  
3 decisions of the [d]istrict [c]ourt.” *Id.*

### 4 III. DISCUSSION

#### 5 **A. Judge Grewal’s Determination That Rule 502 Does Not Apply Is Not Clearly** 6 **Erroneous.**

7 Fed. R. Evid. 502(a) provides that:

8 [w]hen the disclosure is made in a Federal proceeding . . . and waives the attorney-client  
9 privilege or work-product protection, the waiver extends to an undisclosed  
communication or information in a Federal or State proceeding only if:

- 10 (1) the waiver is intentional;  
11 (2) the disclosed and undisclosed communications or information concern the same  
subject matter; and  
(3) they out in fairness to be considered together.

12 Fed. R. Evid. 502(a). Judge Grewal found that the disclosure of the Townsend Letter to LG  
13 “undeniably occurred before, and not in, a ‘Federal Proceeding.’ The plain language of Rule 502  
14 therefore confirms that the Rule simply does not apply, and Townsend identifies no basis for  
15 substituting a policy preference for Congress’ clear directive.” (Grewal Order, Dkt. 22, 6:19-22.)

16 Having conducted its own review of the record, this Court cannot conclude that this  
17 determination is “clearly erroneous.”

#### 18 **B. Judge Grewal’s Determination That Wi-LAN’s Disclosure Constituted A** 19 **Subject-Matter Waiver Is Not Clearly Erroneous.**

20 Judge Grewal reasonably concluded that the voluntary disclosure by Townsend’s client of  
21 the Townsend Letter constituted a subject-matter waiver. (Grewal Order, Dkt. No. 22, 7:11-21.)  
22 Accordingly, he denied “Townsend’s motion to quash the subpoena seeking all communications  
23 and work product related to the subject matter covered by the Townsend Letter . . . .” (*Id.* at  
24 7:21-8:1.)

25 Townsend argues that a subject-matter waiver should not apply and attempts  
26 unsuccessfully to distinguish the authorities relied upon by Judge Grewal. (Mot. for Relief, 4:20-  
27 5:23.) However, Judge Grewal properly rejected Townsend’s contention that subject-matter  
28 waiver extends only to “information considered, reviewed, relied upon or created in preparation

1 of the Townsend opinion and to information communicated to third parties” (*Id.* at 5:27-28)  
2 (Grewal Order, Dkt. No. 22, 7:13-21) (“[B]oth the Ninth Circuit and Federal Circuit reject the  
3 notion that waiver should be limited to the Townsend Letter only.”).

4 Finally, this Court concludes that Judge Grewal’s order is sufficiently detailed to permit  
5 the affected parties to understand the scope of the waiver.

6 **IV. ORDER**

7 Accordingly, Townsend’s request for relief is **DENIED**.

8  
9 IT IS SO ORDERED

10  
11 DATED: March 8, 2011

12   
13 JEREMY FOGEL  
14 United States District Judge