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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE ANIMATION WORKERS
ANTITRUST LITIGATION

Case No. [5:14-cv-04062-LHK](#)

**ORDER GRANTING-IN-PART
MOTION TO COMPEL**

(Re: Docket No. 213)

This consolidated class action alleges that animation and visual effects companies Pixar, Lucasfilm, DreamWorks, Walt Disney, Sony Pictures Animation, Sony Pictures Imageworks, Blue Sky Studios and ImageMovers Digital conspired in violation of antitrust laws to restrain competition for labor and reduce compensation class-wide.¹ Plaintiffs allege that in order to accomplish their anticompetitive goals, these companies agreed not to solicit each other's employees, to take special procedures when contacted by each other's employees and to coordinate compensation policies through direct, collusive communications.²

Yesterday, the court heard argument on Plaintiffs' motion to compel various documents from Defendants.³ During that hearing, the court resolved the parties' disputes regarding all but two categories of documents, to which the court now turns.

The first outstanding category concerns 50 documents claimed as privileged and/or work product that were sent to or received by the Palmer Advantage, a third-party consultant to

¹ See Docket No. 121.

² See *id.* at ¶ 1.

³ See Docket No. 233.

1 Lucasfilm. “[W]here a consultant performs work that is substantially intertwined with the subject
2 matter of a corporation’s legal concerns and the consultant provides information to the
3 corporation’s attorney to aid the attorney in advising the corporate client, the privilege extends to
4 the consultant as the corporation’s functional employee.”⁴ Plaintiffs’ primary challenge to
5 Lucasfilm’s claim is that, at least as to 38 of the documents, Lucasfilm has not established that any
6 attorney was involved in either their creation or dissemination. But the record suggests that the
7 Palmer Advantage was retained by Lucasfilm to help its legal department figure out how best to
8 comply with various wage and hour laws.⁵ Working at the direction of in-house attorney Christina
9 Cordoza and retained counsel Judith Keyes,⁶ the Palmer Advantage prepared the disputed
10 documents for Cordoza and Keyes to navigate “an environment dense in regulations.”⁷ And this
11 information appears relevant to these attorneys’ responsibility to “render sound legal advice.”⁸

12 Plaintiffs nevertheless are right to insist that these suggestions be backed up by firm
13 evidence. To that end, no later than April 12, 2016, Lucasfilm shall serve a sworn declaration
14 from Cordoza or Keyes confirming its representations. Alternatively, by that same date Lucasfilm
15 shall produce the 38 documents.

16 The second outstanding category concerns Pixar’s privilege claims over documents
17 involving Pixar Executive Vice President and General Counsel Lois Scali. While Plaintiffs
18 dispute whether Pixar has met its burden of clearly showing that Scali was obtaining or providing
19 legal advice, there is no real question that it has. Scali was the senior attorney at the company
20

21 ⁴ Schaeffer v. Gregory Vill. Partners, L.P., Case No. 13-4358, 2015 WL 166860, at *4 (N.D. Cal.
22 Jan. 12, 2015); see also McCaugherty v. Sifferman, 132 F.R.D. 234, 239 (N.D. Cal. 1990).

23 ⁵ See Docket No. 213-4 at 6.

24 ⁶ See *id.*

25 ⁷ McCaugherty v. Sifferman, 132 F.R.D. 234, 239 (N.D. Cal. 1990).

26 ⁸ Memry Corp. v. Kentucky Oil Tech., N.V., Case No. 04-3843, 2007 WL 39373, at *2 (N.D. Cal.
27 Jan. 4, 2007).

1 during this time, and her “dual-role” status does nothing to deprive the disputed documents of
2 their privileged status. “Where legal advice of any kind, is sought from a professional legal
3 advisor in his capacity as such, the communication relating to that purpose, made in confidence,
4 by the client, are at his instance permanently protected from disclosure by himself or by the legal
5 advisor, unless the protection is waived.”⁹ Unlike in *Genentech, Inc. v. Trustees of University of*
6 *Pennsylvania*,¹⁰ nothing suggests that Scali was acting in any capacity other than as General
7 Counsel at the time the documents were exchanged.

8 The real issue is whether the documents might nevertheless fall within the well-recognized
9 “crime-fraud” exception to the privilege.¹¹ Pixar is right that, at least as far as this court can tell,
10 the Ninth Circuit has yet to recognize the crime-fraud exception in the context of a civil antitrust
11 case. But every other circuit to consider the question has.¹²

12 _____
13 ⁹ *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009).

14 ¹⁰ Case No. 10-2037, 2011 WL 7074211, at *3 (N.D. Cal. Oct. 18, 2011).

15 ¹¹ See *In re Grand Jury Investigation*, 810 F.3d 1110, 1113 (9th Cir. 2016) (“First, the party must
16 show that the client was engaged in or planning a criminal or fraudulent scheme when it sought
17 the advice of counsel to further the scheme. Second, it must demonstrate that the attorney-client
18 communications for which production is sought are sufficient related to and were made in
19 furtherance of the intended, or present, continuing illegality.”) (internal quotation marks and
20 brackets omitted).

21 ¹² See *In re Santa Fe Int’l Corp.*, 272 F.3d 705, 714 & n.9 (5th Cir. 2001) (“It is possible that the
22 disclosures were made to facilitate future price fixing in violation of the antitrust laws, as the
23 plaintiffs contend. If so, they would fall outside the scope of any attorney-client privilege as
24 communications made for criminal or fraudulent purposes.”); *In re Richard Roe*, 168 F.3d 69, 72
25 (2d Cir. 1999) (“[O]ne may violate the antitrust laws by bringing baseless litigation intended to
26 delay entry into a market by a competitor. If the litigation objectively lacked a factual or legal
27 basis, some communications or work product generated in the course of such litigation might . . .
28 fall within the crime-fraud exception.”); *In re Burlington Northern, Inc.*, 822 F.2d 518, 524 (5th
29 Cir. 1987) (“The parties also do not challenge the district court’s conclusion that a civil violation
30 of the antitrust laws is a ‘crime’ or ‘fraud’ for purposes of abrogating the attorney/client privilege.
31 See *Pfizer v. Lord*, 456 F.2d 545 (8th Cir. 1972).”); see also, e.g., *Parkway Gallery Furniture v.*
32 *Kittinger/Pennsylvania House Grp.*, 116 F.R.D. 46, 52 (M.D.N.C. 1987) (“Courts have extended
33 coverage of this exception . . . beyond instances of fraudulent or illegal conduct and have applied
34 it to business litigation such as patent, antitrust, or securities matters.”); *Leybold-Heraeus Techs. v.*
35 *Midwest Instrument Co.*, 118 F.R.D. 609, 615 (E.D. Wis. 1987) (“[The crime-fraud exception]
36 also applies when alleged attorney communications are made in furtherance of a business tort such
37 as an antitrust violation.”); *Portland Wire & Iron Works v. Barrier Corp.*, Case Civ. No. 75–1083
38 (D. Or. May 20, 1980) (Burns, J.), op. at 10–11 (“Communications made to further a business tort

1 Nor can the court ignore that what Plaintiffs seek at this point is not production but rather
2 in camera review by the court. The Ninth Circuit has long recognized that “in camera review of
3 privileged information may be used to establish whether the crime-fraud exception applies.”¹³
4 There is “a considerably lower threshold for conducting in camera review than for fully disclosing
5 documents”: it “requires only a factual showing sufficient to support a reasonable, good-faith
6 belief that review of the privileged documents ‘may reveal evidence to establish the claim that the
7 crime fraud exception applies.’”¹⁴ This threshold “is set sufficiently low to discourage abuse of
8 privilege and to ensure that mere assertions of the attorney-client privilege will not become
9 sacrosanct,”¹⁵ and to mitigate “the problem of limited access to proof by the party seeking to
10 vitiate the attorney-client privilege.”¹⁶
11

12 such as an antitrust violation may also vitiate the attorney-client privilege.”); Duplan Corp. v.
13 Deering Milliken, 397 F. Supp. 1146, 1197 (D.S.C. 1974) (“[T]his prima facie showing of an
14 antitrust violation establishes the tort exception to the attorney-client privilege.”).

15 ¹³ In re Grand Jury Investigation, 974 F.2d 1068, 1071 (9th Cir. 1992). In fact, the Ninth Circuit
16 recently held that “district courts must review documents in camera before deciding whether they
17 should be produced under the crime-fraud exception”:

18 While in camera review is not necessary during step one to establish a prima facie
19 case that “the client was engaged in or planning a criminal or fraudulent scheme
20 when it sought the advice of counsel to further the scheme,” a district court must
21 examine the individual documents themselves to determine that the specific
22 attorney-client communications for which production is sought are “sufficiently
23 related to” and were made “in furtherance of the intended, or present, continuing
24 illegality.”

25 In re Grand Jury Investigation, 810 F.3d at 1114 (quoting In re Grand Jury Proceedings, 87 F.3d
26 377, 381-83 (9th Cir. 1996)).

27 ¹⁴ In re Grand Jury Investigation, 974 F.2d at 1073 (quoting U.S. v. Zolin, 491 U.S. 554, 572
28 (1989)).

¹⁵ In re Grand Jury Investigation, 974 F.2d at 1072.

¹⁶ In re Napster, 479 F.3d 1078, 1096 (9th Cir. 2007), abrogated on other grounds by Mohawk
Industries, Inc. v. Carpenter, 558 U.S. 100 (2009) (recognizing that “the best evidence is likely to
be in the hands of the party invoking the privilege”).

1 The evidence showing Scali’s involvement in Pixar’s alleged conspiracy suggests that
2 Plaintiffs are reasonable and in good faith in believing that Pixar was engaged in or planning a
3 criminal or fraudulent scheme when it sought Scali’s advice to further that scheme.¹⁷

4 A final point. Pixar’s assertion that Plaintiffs are seeking “a premature merits
5 determination” simply ignores the authority that recognizes that piercing the privilege, let alone
6 merely conducting an in camera review, does not require or reflect a merits decision.¹⁸ “Indeed to
7 require otherwise would seem to obviate the benefit to be gained by access to the privileged
8 communications since the party would already have substantiated the alleged fraud or illegal act
9 without the evidence excluded by the privilege.”¹⁹

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11 ¹⁷ See, e.g., Docket No. 213 at 19-21; Docket No. 213-13 at PIXAR_AWAL_00101123 (Scali
12 colleague McAdams testifying that she learned about Pixar’s “still in place” “gentleman’s
13 agreement” with Lucasfilm from Scali); Docket No. 213-16 at PIXAR_AWAL_00004725 (“we
14 should call Ed in Hawaii and have him call the Sony women . . . and remind them of our
15 gentleman’s agreement not to raid each other and to let us know when we are talking with key
16 employees”); Docket No. 213-17 at PIXAR_AWAL_00097937 (“I’ve spoken to [Imageworks] in
17 the past about our non poaching practices, but I’ll make sure they’re still honoring it”); Docket
18 No. 213-18 at PIXAR_AWAL_00003777 (“I’ve spoken to [Blue Sky] Director of HR to assure
19 her that we are not making calls to their people or trying to poach them in any way”); Docket No.
20 213-19 at PIXAR_AWAL_00063109 (“Subject: Disney trying to hire Pixar employees”); Docket
21 No. 213-21 at DISNEY_AWAL_00000524 (“I will reiterate to our team that Pixar employees are
22 off limits”); Docket No. 213-22 at PIXAR_AWAL_00003701 (“we’d just like to make sure we’re
not overstepping the spirit of our relationship” with Lucasfilm); Docket No. 213-23 at
LUCAS_AWAL_00215280 (“spoke with Ed and he would like me to meet with [Lucasfilm
president] and confirm our current arrangements”); Docket No. 213-24 at
PIXAR_AWAL_00000027 (Scali: “we will observe our usual protocol of talking to appropriate
folks at Lucas before officially moving forward”); Docket No. 213-25 at
LUCAS_AWAL_00214389 (Scali: “JUST SO YOU KNOW THAT GEORGE LUCAS IS OKAY
WITH THIS MOVE”); Docket No. 213-28 at PIXAR_AWAL_00000272 (“Sounds like [Pixar
recruiter] might not be up on the details of our restrictions with Disney”).

23 ¹⁸ See, e.g., *United States v. Schussel*, 291 F. App’x 336, 346 (1st Cir. 2008) (“The crime-fraud
24 exception may apply, however, even if the client is ultimately found not to be guilty. By necessity,
25 the assessment of documents during a legal proceeding is generally preliminary and does not
26 reflect a finding that a client acted wrongfully.”); accord, e.g., *Oasis Research v. Carbonite*, Case
27 No. 4:10-CV-435, 2015 WL 5317600, at *4 (E.D. Tex. Sept. 11, 2015) (“Defendants are
28 confusing their substantive argument regarding the RICO allegations with the Court’s limited
piercing of the attorney-client privilege for discovery purposes.”).

¹⁹ *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, Case No. 4-71 CIV. 435,

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Pixar shall submit the Scali documents for the court's in camera review no later than
March 25, 2017.

SO ORDERED.

Dated: March 23, 2016



PAUL S. GREWAL
United States Magistrate Judge

1971 WL 601, at *4 (D. Minn. Oct. 1, 1971) (ordering documents produced upon “prima facie showing of [civil] violation of the Sherman Act”).