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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 DENYING MOTION TO
COMPEL**

(Re: Docket No. 213)

United States District Court
Northern District of California

Last week, the court ordered Defendant Pixar to submit for in camera review various documents involving former Pixar Executive Vice President and General Counsel Lois Scali.¹ Pixar has asserted that these documents are subject to the attorney-client privilege.² Notwithstanding that assertion, and after considering evidence from Pixar supporting that assertion,³ the court held that Plaintiffs had shown there was “a reasonable, good-faith belief that review of the privileged documents may reveal evidence to establish the claim that the crime fraud exception applies.”⁴ The exception applies where (1) the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme and (2) the attorney-client communications for which production is sought are “sufficiently related to” and

¹ See Docket No. 236.

² See Docket No. 221 at 16.

³ See *In re Napster Inc. Copyright Litig.*, 479 F.3d 1078, 1093 (9th Cir. 2007).

⁴ *Id.* (quoting *In re Grand Jury Investigation*, 810 F.3d 1068, 1073 (9th Cir. 1992)); see Docket No. 236 at 4-5.

1 were made in furtherance of the intended, or present, continuing illegality.⁵

2 In compliance with the court's order, Pixar submitted the documents at issue.⁶ Together
3 with a document index,⁷ Pixar also submitted a declaration from outside counsel explaining the
4 organization of the documents and providing context to assist the court in its review.⁸

5 While Plaintiffs initially sought in camera review of the documents, what they ultimately
6 seek is the documents' production. Production, as compared to mere in camera review, carries a
7 higher burden of proof than merely a "reasonable, good-faith belief." In civil cases such as this
8 one, that burden is preponderance of the evidence,⁹ or whether "it is more likely than not that the
9 party resisting the disclosures sought or used legal advice to commit or to try to commit a crime or
10 fraud."¹⁰ Having read each and every document submitted, the court holds that Plaintiffs' burden,
11 at least as to the first part of the applicable test, is not yet met.

12 Plaintiffs contend that the criminal or fraudulent scheme here was an unlawful conspiracy
13 to restrain competition for labor, in violation of Section 1 of the Sherman Act.¹¹ 15 U.S.C. § 1
14 provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in
15 restraint of trade or commerce among the several States, or with foreign nations, is declared to be
16 illegal." As the court explained earlier, while the Ninth Circuit has yet to consider the question,
17 every other circuit that has done so has concluded that the crime fraud exception can apply in the
18 context of a civil antitrust suit.¹² It also is true, as Plaintiffs note, that the Department of Justice

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20 ⁵ In re Napster Inc. Copyright Litig., 479 F.3d at 1090.

21 ⁶ See Docket No. 243.

22 ⁷ See Docket No. 243-1.

23 ⁸ See Docket No. 244-4.

24 ⁹ See In re Napster, 479 F.3d at 1094-95.

25 ¹⁰ Laser Indus. v. Reliant Techs., 167 F.R.D. 417, 441 (N.D. Cal. 1996).

26 ¹¹ See Docket No. 213 at 18-21.

27 ¹² See Docket No. 236 at 3 n.12; see also Rambus, Inc. v. Infineon Techs. AG, 222 F.R.D. 280, 288

1 investigated and sued Pixar for a Section 1 violation on these same facts.¹³ But that case was
2 settled without any admission by Pixar or adjudication of any violation of law.¹⁴

3 A bigger problem is that, beyond highlighting the “gentleman’s agreement” that it
4 challenges in this case, Plaintiffs offer insufficient case law to establish their theory that this
5 agreement might qualify as an illegal “restraint of trade.”¹⁵ As for evidence in support of their
6 theory, Plaintiffs principally rely on the DOJ’s conclusions—which again, were never admitted or
7 established.¹⁶ While enough to meet the lower threshold to trigger in camera review in
8 conjunction with the materials cited in the court’s prior order,¹⁷ these conclusions are not enough
9 to meet the higher standard of proof by preponderance of the evidence. Plaintiffs also point to
10 their own allegations in their complaint and the presiding judge’s ruling on Defendants’ motion to
11 dismiss.¹⁸ But given the court’s obligation to “accept[] as true Plaintiffs’ factual allegations” and
12 “make[] all reasonable inferences in favor of Plaintiffs” when deciding a motion to dismiss,¹⁹ the
13 court’s ruling on the sufficiency of those allegations is irrelevant for purposes of establishing the
14 crime-fraud exception applies.

15 Critically, nothing in the documents reviewed moves Plaintiffs closer to the goal line. Put
16 another way, these documents do not establish a Section 1 violation by a preponderance of the

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18 (E.D. Va. 2004) (collecting cases applying exception beyond the confines of crime and fraud).

19 ¹³ See Docket No. 213 at 18-19.

20 ¹⁴ See Docket No. 221 at 2.

21 ¹⁵ Cf. *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (observing that
22 “a certain degree of discretion, and thus lawmaking, inheres” in construing what constitutes a
23 “restraint of trade” under the Sherman Act).

24 ¹⁶ See Docket No. 213 at 18-19; Docket No. 221 at 2.

25 ¹⁷ See Docket No. 245 at 5 n.17.


26 ¹⁸ See Docket No. 213 at 19.

27 ¹⁹ Docket No. 147 at 35 n.14.

1 evidence any more than the materials previously considered. This does not mean that Plaintiffs
2 are out of luck on the underlying claim—that is a question for a finder of fact on a complete
3 record. It does mean that, on the record assembled and presented to the undersigned, Plaintiffs
4 have not persuaded the undersigned that a per se violation is more likely than not. No production
5 is warranted.

6 **SO ORDERED.**

7 Dated: March 30, 2016

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9 PAUL S. GREWAL
United States Magistrate Judge

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