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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CALLAWAY GOLF COMPANY, et al.,)	Civil No. 07-0373-LAB(LSP)
)	
Plaintiffs,)	
)	ORDER GRANTING IN PART AND
v.)	DENYING IN PART PLAINTIFFS'
)	MOTION TO COMPEL PRODUCTION OF
SCREEN ACTORS GUILD, et al.,)	DOCUMENTS (Doc. #84)
)	
Defendants.)	ORDER FOR <i>IN CAMERA</i> REVIEW

On November 7, 2008, Plaintiffs filed a Motion to Compel Production of Documents. On November 21, 2008, Defendants filed an Opposition to Plaintiffs' Motion. On November 26, 2008, Plaintiffs filed a Reply to Defendants' Opposition. On December 5, 2008, the Court held a hearing on Plaintiffs' Motion. The Court, having reviewed the Motion, Opposition and Reply papers and having heard oral argument on the Motion, HEREBY GRANTS in part and DENIES in part Plaintiff's Motion and ORDERS an *in camera* review of many of the disputed documents in issue.

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1 1. Nigro Karlin Documents¹

2 Plaintiffs served on Defendants several Requests for
3 Production of Documents seeking all communications between Defen-
4 dants and their independent auditor Nigro, Karlin, Segal & Field-
5 stone (hereafter "NK"). Defendants refused to produce any of the
6 requested documents between them and their attorneys and NK,
7 contending that such documents reflect communications that are
8 protected by either the attorney-client privilege or work product
9 doctrine.

10 Plaintiffs argue that the communications between Defendants,
11 their attorneys and NK are not protected by the attorney-client
12 privilege or work product doctrine.

13 a. Attorney-Client Privilege

14 Plaintiffs contend that the NK documents are not protected by
15 the attorney-client privilege because NK is not a client of
16 Defendants' attorneys. Rather, NK is a third party to this action
17 whose only role is that of a percipient witness. Moreover, NK does
18 not work for Defendants' attorneys. In fact, NK confirmed that it
19 is the independent accounting firm engaged by Defendants to perform
20 periodic examinations of signatories to the Commercials Contracts.
21 It performs work for Defendants, not Defendants' attorneys.

22 Defendants contend that NK, through its employee accountant
23 Brian Meath (hereafter "Meath") has played an integral role as part
24 of their litigation team in this case. Meath has provided informa-
25 tion to Defendants' attorneys to facilitate Defendants' attorneys

26
27 ¹ The documents at issue are listed on Defendants' Privilege Log as
28 Document nos. 17-19, 23, 27, 29-33, 34, 35-37, 40-44, 48, 49, 51,
53, 55, 57, 58, 60, 63-69, 72-83, 85, 86,88, 89, 92, 93, 94, 96, 99,
101, 104, 106, 115, 130, 134, 136, 139, 153. 155, 158, 163-168, 172,
185, 186, 190, 191, 199, 200, 205, 207, 208, 236, 237-241.

1 representation of Defendants in this action. Defendants cite U.S.
2 v. Hovel to support their position.

3 In Hovel, the court stated in pertinent part:

4 ... (T)he presence of an accountant, whether hired by
5 a lawyer or by the client, while the client is relating
6 a complicated tax story to the lawyer or by the client,
7 ought not to destroy the (attorney-client) privilege...
8 the presence of the accountant is necessary, or at
9 least highly useful, for the effective consultation
10 between the client and lawyer which the privilege is
11 designed to permit...

12 What is vital to the privilege is that the communication
13 be made in confidence for the purpose of seeking legal
14 advice from the lawyer. If what is sought is not
15 legal advice but only accounting service... or if the
16 advice sought is the accountant's rather than the
17 lawyer's, no privilege exists. We recognize this draws
18 what may seem to some a rather arbitrary line between a
19 case where the client communicates first to his own
20 accountant (no privilege as to such communications,
21 even though he later consults his lawyer on the same
22 manner), and others where the client in the first
23 instance retains an accountant as a listening post,
24 or consults the lawyer with his own accountant present...
25 but the distinction has to be made if the privilege
26 is neither to be unduly expanded nor to become a trap.
27 Hovel, supra at 922-923 (citations omitted)

18 Here, NK is clearly not a client of Defendants' attorneys nor
19 was it hired by Defendants' attorneys to assist them in giving legal
20 advice to Defendants. Rather, NK was hired by Defendants to perform
21 periodic examinations of signatories to the Commercial Contract,
22 note the base compensation for each and determine, based on pension
23 and health contributions reported by the signatory, what percentage
24 of the base compensation is allotted to TV commercials. Further, NK
25 provided Defendants with business-related advice in that Defendants
26 have used NK's services for several years to audit various signato-
27 ries. Communications regarding business-related advice, rather than
28 for legal advice, are not protected by the attorney-client privi-
lege. Therefore, the Court concludes that the NK docs are not

1 protected by the attorney-client privilege.

2 b. Work Product

3 Plaintiffs argue that the NK documents are not protected by
4 the work product doctrine. Defendants do not address the applica-
5 bility of the work product doctrine to the NK documents.

6 On January 17, 2003, Defendants announced the audit of
7 Plaintiffs. The audit period was to cover January 1, 1999 to
8 December 31, 2002. Defendants granted Meath the authority to
9 contact Plaintiffs to obtain the necessary records for a complete
10 review of the audit period. Thereafter, Meath engaged in a series
11 of communications with Plaintiffs in which he sought the documenta-
12 tion he needed to perform the audit. Plaintiffs sent Meath some
13 documentation. In late 2003, Meath determined that he could not
14 perform a complete audit because he had not received all the
15 documentation he needed from Plaintiffs.

16 On February 3, 2004, Defendants' attorneys sought from
17 Plaintiffs the documentation Meath needed to perform the audit. In
18 late June 2004, Plaintiffs and Defendants entered into a confidenci-
19 ality agreement. From September to November 2004, the parties
20 negotiated a tolling agreement to prevent the filing of the current
21 suit. Communications between Plaintiffs and Defendants regarding
22 the needed documentation continued through September 2005.

23 (Declaration of Brian Meath in Support of Counter-Claimants' Motion
24 to Compel Production of Documents, November 1, 2007)

25 Meath testified at his deposition that prior to 2005, when
26 Defendants would ask for his services, he would summarize the
27 Commercial Contract, summarize the base compensation in the
28 Contract and the contributions that were paid. If he was requested

1 to do so he would, and sometime in 2005 he began to, prepare a
2 calculation of what guideline applied and what additional contribu-
3 tions would need to be made to meet a potential shortfall, based on
4 his review of the Contract. If allocations required to be made for
5 covered versus noncovered services, he would refer the matter to
6 Defendants' Allocation Subcommittee for it to determine whether
7 there was a basis for accepting a different allocation. (Deposition
8 of Brian Meath, May 28, 2008, at 14, 17)

9 Federal Rule of Civil Procedure 26(b)(3) states in pertinent
10 part:

11 ... (A) party may not discover documents... that are prepared
12 in *anticipation of litigation* or for trial by or for another party
13 or its representatives. (emphasis added)

14 Here, the activities of Defendants, Defendants' attorneys and
15 Meath make it apparent that some time in 2004 or 2005, Meath's work
16 changed from performing audits and other business-related services,
17 as requested by Defendants, to performing some type of work to
18 assist Defendants' attorneys. However, from the papers filed by
19 Plaintiffs and Defendants, the Court cannot precisely determine if,
20 and at what point in time, the nature of Meath's work changed or
21 whether the work Meath did was done in anticipation of litigation.
22 At a certain point in time, the activities of Defendants, Defen-
23 dants' counsel and Meath may have shifted Meath's work from that of
24 a business nature to work to assist Defendants' attorneys in
25 providing legal advice to Defendants in anticipation of litigation.
26 See St. James Stevedoring Co. V. Femco Machine Co. 173 F.R.D. 431,
27 433 (E.D. La. 1997)

28 Therefore, on or before January 20, 2009, Defendants shall

1 produce to the Court the documents listed in footnote 1 for *in*
2 *camera* review so that the Court can determine from the documents the
3 nature of Meath's work and if and when the nature of Meath's work
4 changed from performing business activities for Defendants to
5 performing work to assist Defendants' attorneys in providing legal
6 advice to Defendants in anticipation of litigation.

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8 2. Allocation Subcommittee Meeting Minutes²

9 Plaintiffs contend that Defendants have long had a Collec-
10 tions Committee to address issues of unpaid or underpaid contribu-
11 tions and a separate Allocations Subcommittee to address what
12 portion of multi-service endorsement agreements should be allocated
13 to performing in TV commercials. Plaintiffs assert that the minutes
14 of the meetings of the Allocation Subcommittee are relevant to this
15 action. Therefore, they should be entitled to discovery of those
16 documents.

17 Defendants contend they have withheld from production these
18 documents because their attorneys were present at all of the
19 meetings of the Allocation Subcommittee. Therefore, everything
20 discussed at those meetings and the minutes summarizing the meetings
21 are protected from discovery by the attorney-client privilege and
22 work product.

23 An attorney's attendance at a meeting held for a business
24 purpose does not render privileged the communications made at such
25 meetings. For communications at such meetings to be privileged,
26 they must relate to acquisition or rendition of legal services. The

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² The documents at issue here are listed on Defendants' Privilege Log
as Document. nos. 121-129, 227, 229.

1 mere fact that clients were at a meeting with counsel in which legal
2 advice was requested or received does not mean that everything said
3 at the meeting is privileged. Neuder v. Battelle Pacific Northwest
4 194 F.R.D. 289 (D.C. D.C. 2000)

5 Here, from Plaintiffs' and Defendants' papers, the Court
6 cannot precisely determine whether the documents at issue are
7 protected from disclosure. Therefore, on or before January 20,
8 2009, Defendants shall submit the documents listed in footnote 2 to
9 the Court for *in camera* review.

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11 3. Defendant's Failure to Comply With Expert Witness Subpoenas

12 Defendants designated Jon Albert, John McGuire and John
13 McGuinn as expert witnesses. On July 25, 2008, Plaintiffs issued
14 subpoenas to Defendants for the expert witnesses' production of
15 documents and appearance at depositions. As to each subpoena,
16 Plaintiffs requested that the following documents be brought to the
17 depositions:

18 a. Experts' files pertaining to this lawsuit, including any
19 and all documents reviewed or considered in connection with the
20 preparation of their testimony, all draft reports, and all analyses
21 and notes made by them in preparation of their opinions and
22 testimony;

23 b. All documents provided to the experts in connection with
24 their services in this matter, from any source;

25 c. All documents related to experts' retention by Defendants,
26 including retention agreements, time records and invoices;

27 d. All communications between the experts and Defendants or
28 their counsel related to this case or to the subject of their

1 testimony; and

2 e. All prior expert reports and transcripts of prior
3 deposition and trial testimony.

4 The subpoenas had a production date of August 11, 2008, one
5 week prior to the first expert witness deposition. Defendants
6 produced thousands of documents and written responses to the
7 subpoenas. However, the produced documents were not segregated to
8 indicate which expert witness reviewed a particular document.
9 Therefore, Plaintiffs cannot determine if all of the documents
10 requested in the subpoenas were produced.

11 Plaintiffs argue that they are entitled to production of all
12 of the documents listed above. Plaintiffs further argue that
13 Defendants are required to segregate the documents to indicate which
14 expert witness reviewed a particular document.

15 Defendants argue that their expert witnesses did not perform
16 any independent work, research, studies or analyses, have no
17 "expert" files and relied upon their own knowledge and expertise in
18 proffering their opinions. Further, Defendants argue that none of
19 the documents produced in this case have been segregated according
20 to Responses to Requests for Production of Documents.

21 The Court determines that Plaintiffs are entitled to the
22 production of every document that is responsive to (a) through (e)
23 above. Therefore, on or before January 20, 2009, Defendants shall
24 produce all documents responsive to (a) through (e) above. The
25 documents shall be segregated and shall indicate for which request
26 the documents are responsive and for which expert witness the
27 documents pertain.

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1 4. Defendants' Failure to Comply With Prior Discovery Orders

2 On May 19, 2008, the Court ordered Defendants to produce
3 documents in response to specific discovery requests. Plaintiffs
4 contend that while Defendants produced some documents as ordered,
5 they did not produce all documents responsive to Requests for
6 Production of Documents nos. 9, 14 and 19. Defendants assert that
7 they have produced all documents responsive to those requests.

8 a. Request #9

9 Request #9 requests production of all documents concerning
10 any determination by any Defendant as to what portion of a multi-
11 service contract for a celebrity or athlete endorser of products or
12 services who appeared in any commercial, or who, pursuant to their
13 endorsement contract, could have been required to appear in a
14 commercial but did not, should be allocated to commercials produced
15 and shot in the United States.

16 Defendants argue that the requested documents are not
17 relevant to this litigation because the District Judge in this case
18 has ruled that the application of the guidelines Defendants have
19 used is not an adequate defense in this case. Further, Defendants
20 argue that they have produced to Plaintiffs thousands of documents
21 relating to numerous unrelated audits, contracts and Settlement
22 Agreements concerning claims litigated over the past ten years.

23 Plaintiffs argue that the date range for the documents
24 requested has never been established, so they are unsure whether
25 they have received all responsive documents.

26 The Court determines that to the extent Defendants have not
27 done so, on or before January 20, 2009, Defendants shall produce all
28 documents responsive to the request dated from January 1, 1999

1 through October 2007. The documents to be produced shall include
2 not only the documents reflecting the ultimate determination, but
3 all the documents reflecting negotiations that led to the ultimate
4 determination. Further Defendants shall serve on Plaintiffs a
5 formal response that all documents responsive to the request have
6 been produced.

7 b. Request #14

8 Request #14 requests all documents concerning settlements
9 entered into by any Defendant with any person or entity concerning
10 the amount of contributions to Defendants on behalf of any celebrity
11 or athlete endorser for the following entities: (i) Nike; (ii)
12 Bearing Point; and (iii) Titleist/Foot Joy.

13 Plaintiffs contend that Defendants produced thousands of
14 documents, but the documents produced are not responsive to the
15 request. Defendants contend that it has produced to Plaintiffs all
16 documents responsive to the requests with respect to Nike and
17 Titleist/Foot Joy. Defendant also produced the settlement agreement
18 with respect to Bearing Point.

19 The Court determines that to the extent Defendants have not
20 done so, on or before January 20, 2009, Defendants shall produce all
21 documents responsive to the request. The documents to be produced
22 shall include not only the documents reflecting the ultimate
23 determination, but all the documents reflecting negotiations that
24 led to the ultimate determination. Further Defendants shall serve
25 on Plaintiffs a formal response that all documents responsive to the
26 request have been produced.

27 c. Request #19

28 Request #19 requests all documents concerning how Defendants

1 actually calculated the contributions to them from producers of
2 motion pictures, television shows and commercials regarding multi-
3 service contracts. At the hearing on the Motion, Defendants'
4 counsel stated to the Court that Defendants will provide a formal
5 response to Plaintiffs' request stating that all documents respon-
6 sive to the request have been produced after a reasonable and
7 diligent search. To the extent that the formal response has not
8 been served on Plaintiffs, it shall be served no later than
9 January 20, 2009.

10 Plaintiff's Motion is GRANTED in part and DENIED in part.
11 IT IS SO ORDERED.

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13 DATED: January 12, 2009

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Hon. Leo S. Papas
U.S. Magistrate Judge

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