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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

STONE BREWING CO., LLC,  
  
Plaintiff,  
  
v.  
  
MOLSON COORS BREWING  
COMPANY;  
MILLERCOORS LLC; and  
DOES 1 through 25,  
  
Defendants.

Case No.: 18cv331-BEN-LL

**ORDER DENYING PLAINTIFF  
STONE BREWING’S REQUEST  
FOR PARTIAL  
RECONSIDERATION OF THE  
COURT’S JULY 2, 2019 ORDER**

**REDACTED**

**[ECF No. 145]**

MILLERCOORS LLC,  
  
Counter Claimant,  
  
v.  
  
STONE BREWING CO., LLC,  
  
Counter Defendant.

Currently before the Court is Plaintiff’s Motion for Partial Reconsideration of the Court’s July 2, 2019 Order [ECF No. 145 (“Motion” or “Mot.”)], Defendant MillerCoors LLC’s Opposition [ECF No. 149 (“Opposition” or “Oppo.”)], Defendant’s Declaration of Grace Needleman and accompanying Exhibit [ECF Nos. 184, [REDACTED] (“Declaration”)], and

1 Plaintiff's Reply [ECF Nos. 189, ■■■ ("Reply")]. For the reasons set forth below,  
2 Plaintiff's Motion is **DENIED**.

3 Plaintiff requests reconsideration of the Court's July 2, 2019 Order to the extent that  
4 it "(1) granted Defendant MillerCoors LLC's request to claw back communications  
5 between individuals at Mekanism and MillerCoors that were designated attorney-client  
6 privileged, and (2) denied Stone's request for a proper identification of the documents on  
7 Defendant's privilege log that relate to Stone and to the Keystone Rebrand." Mot. at 2.  
8 Plaintiff argues that this information is "critically important information that relates to  
9 MillerCoors knowledge of Stone and its trademark, all of which MillerCoors has attempted  
10 to obscure throughout this litigation." Id.

11 Defendant opposes Plaintiff's Motion on the grounds that it is "time-barred under  
12 Local Civil Rule 7.1.i.2, which requires such motions to be filed 'within **twenty-eight (28)**  
13 **days** after the entry of the ruling, order or judgment sought to be reconsidered,' which fell  
14 on July 30." Oppo. at 2 (emphasis in original). Plaintiff's Motion was filed on August 1,  
15 2019. See Docket. Plaintiff states that it did not obtain the final transcript from  
16 MillerCoors' new Rule 30(b)(6) witness until July 9, 2019. Mot. at 2. The Court notes that  
17 at least part of Plaintiff's Motion is based on this deposition testimony. As set forth in the  
18 undersigned Magistrate Judge's Chambers Rules, "[f]or oral discovery, the event giving  
19 rise to the dispute is the completion of the transcript of the relevant portion of the  
20 deposition." See Judge Lopez's Civil Chambers Rules at V(C). Accordingly, the Court  
21 overrules Defendant's objection on the basis of timeliness. The Court will discuss the  
22 remaining issues raised in Plaintiff's Motion below.

23 **1. Communications Between Mekanism and MillerCoors**

24 **a. Parties' Respective Positions**

25 Regarding the first issue of whether communications between Mekanism and  
26 MillerCoors are protected by the attorney-client privilege under the functional equivalence  
27 standard applied by the Ninth Circuit, Plaintiff argues that "Stone did not previously have  
28 the opportunity to brief the issues or present the Court with the dispositive testimony of the

1 key witnesses prior to the Court’s July 2 Ruling.” Id. at 4. Plaintiff argues that “[t]he  
2 undisputed evidence shows that the marketing agency personnel here were nothing like the  
3 individuals found to be functional employees in Graf and In re Bieter, 16 F.3d 929 (8th  
4 Cir. 1994), the Eighth Circuit case on which Graf relied.” Id. at 5. Specifically, Plaintiff  
5 argues that “Mr. Thornhill, Mekanism’s 30(b)(6) witness, testified that MillerCoors did not  
6 exercise managerial authority over Mekanism personnel, and that Mekanism personnel  
7 ‘operate[d] as an outside vendor,’ not as employees.” Id. at 7 (internal citations omitted).  
8 Plaintiff states that Mr. Thornhill, Mekanism’s corporate representative, “testified  
9 unequivocally that agency personnel were not the functional equivalent of employees of  
10 MillerCoors.” Id. at 4. Plaintiff cites to Mr. Thornhill’s deposition testimony as follows:

11 Q: Would it be fair to say that Mekanism personnel functionally operated as  
12 employees of MillerCoors, or did they operate separately as independent  
13 contractors?

14 [Objections]

15 A: We operate as an outside vendor.

16 Q: Not as employees?

17 A: Correct.  
18

19 Id. (citing Ex., 1, Thornhill Tr. At 14:1-19). Plaintiff further argues that “[b]ecause  
20 Mekanism did not ‘possess[] information that is possessed by no other,’ there is no  
21 privilege. Mot. at 6 (citing Bieter, 16 F.3d at 938).

22 Defendant opposes Plaintiff’s Motion on the grounds that it “comes nowhere close  
23 to meeting the ‘narrow standard’ required for the ‘extraordinary remedy’ for  
24 reconsideration. Oppo. at 2 (internal citations omitted). Defendant argues that “[n]either  
25 the facts nor the law have changed since Stone Brewing presented its arguments to the  
26 Court on June 28.” Id. Defendant further argues that “there can be no doubt that this Court  
27 correctly ordered that (1) MillerCoors could claw back certain communications between  
28 MillerCoors and Mekanism that were attorney-client privileged, and (2) MillerCoors was

1 not required to supplement its privilege log or response to Interrogatory No. 21.” Id. In  
2 sum, Defendant argues that “Stone Brewing’s motion – the third it has filed for  
3 reconsideration in this case – repeats the same arguments Stone Brewing presented to the  
4 Court on June 28.” Id.

5 With respect to the communications between Mekanism and MillerCoors, Defendant  
6 argues that “the witness did not ‘unequivocally’ testify that its employees did not meet the  
7 ‘functional equivalent test,’ rather, the witness – obviously confused by the legalese  
8 embedded into the question – stated: ‘I’m sorry I’m a little unclear on the question.’” Oppo.  
9 at 7 (internal citation omitted). Defendant further argues that “[u]ltimately whether  
10 Mekanism employees’ communications with MillerCoors are privileged is a question for  
11 the Court, not a lay witness.” Id. Defendant also argues that “this Court correctly extended  
12 privilege to Mekanism’s communications with MillerCoors’ in-house counsel, as  
13 Mekanism had been retained to develop marketing campaigns that required MillerCoors’  
14 legal review and input.” Id. at 8. Defendant argues that “Mekanism was tasked with  
15 designing advertising materials that required legal review” thereby necessitating the  
16 protection of the attorney-client privilege to non-employees. Id. at 8-9. Finally, Defendant  
17 argues that “[a]s the Mekanism corporate representative explained, Mekanism employees  
18 often communicated directly with MillerCoors’ in-house counsel by providing proposed  
19 advertising materials for legal review. In turn, MillerCoors’ in-house counsel often  
20 provided legal guidance directly to Mekanism employees regarding needed revisions to  
21 marketing materials or concerning certain advertisements that the in-house counsel rejected  
22 in their entirety.” Id. at 5 (internal citations omitted).

23 Defendant’s Declaration, declared by Ms. Grace Needleman, under penalty of  
24 perjury, sets forth that as the Associate Marketing Manager on the Economy Brands  
25 portfolio she is “familiar with the role played by our agency Mekanism in the Keystone  
26 refresh.” ECF Nos. 184 and [REDACTED] at ¶ 3. Ms. Needleman’s Declaration states that  
27 “Mekanism was tasked with creating the communications campaign for Keystone” and  
28 “[a]t that time, MillerCoors did not have an in-house design group responsible for

1 designing content to enter the marketplace.” Id. at ¶ 5. The Mekanism Statement of Work  
2 for the Keystone brand in the 2016 to 2018 time frame sets forth that Mekanism was  
3 responsible for the [REDACTED]

4 [REDACTED]  
5 [REDACTED] Ex. 1 attached to the Declaration. Mekanism’s Statement of Work  
6 further states that Mekanism was to [REDACTED]

7 [REDACTED]  
8 [REDACTED] Id. Ms. Needleman states that “Mekanism employees involved in the Keystone  
9 refresh had a continuous and close working relationship with the Keystone brand team”  
10 and “worked hand-in-hand with the brand team on the communications strategy for  
11 Keystone, communicating on an almost daily basis by phone, e-mail, or in person.” Decl.  
12 at ¶ 8. Ms. Needleman further states that [REDACTED]

13 [REDACTED]  
14 [REDACTED] Id. at ¶ 9. The Declaration further provides that [REDACTED]

15 [REDACTED]  
16 [REDACTED] Id. at ¶ 10. The Declaration states that [REDACTED]

17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED] Id. Finally, the  
20 Declaration provides that [REDACTED]

21 [REDACTED]” and [REDACTED]

22 [REDACTED]  
23 [REDACTED] Id.

24 Plaintiff argues in its Reply that “Ms. Needleman’s declaration does not establish  
25 that Mekanism employees were the functional equivalent of MillerCoors’ employees or  
26 come close to meeting the standard outlined in U.S. v. Graf, 610 F.3d 1148 (9th Cir. 2010),  
27 and In re Bieter Co., 16 F.3d 929 (8th Cir. 1994).” Reply at 2. Specifically, Plaintiff argues  
28 that “[t]he declaration does not establish that Mekanism spoke on behalf of MillerCoors,

1 managed or controlled MillerCoors employees, or served as MillerCoors’s agent, all key  
2 factors in the functional equivalence test.” Id. Plaintiff further argues that the “declaration  
3 does not establish that MillerCoors attorneys needed to speak with Mekanism personnel in  
4 order to provide legal advice because Mekanism ‘possesse[d] information that is possessed  
5 by no other.’” Id. (citing Bieter, 16 F.3d at 938). Plaintiff further argues that “Mekanism  
6 personnel did not run the show” because “[t]hey did not attend meetings on behalf of  
7 MillerCoors without MillerCoors personnel, did not speak on MillerCoors’s behalf, did not  
8 manage MillerCoors’s employees, and did not lead entire divisions of the business without  
9 supervision.” Reply at 4. Finally, Plaintiff states [REDACTED]

10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED] Id.

13 **b. Analysis**

14 As this Court held in its July 2, 2019 Order, Defendant shall be allowed to claw back  
15 the disputed communications between the individuals at Mekanism and Defendant that  
16 Defendant has designated as attorney-client privileged. ECF No. 137 at 2. Notably, the  
17 Court’s Order does not allow Defendant to withhold all communications between  
18 Mekanism and MillerCoors, but only those where Mekanism was communicating with  
19 MillerCoors’ in-house counsel for the purpose of obtaining confidential legal advice.  
20 Having reviewed Plaintiff’s additional arguments and evidence, the Court finds that they  
21 do not present a basis for reversing its prior decision. Specifically, the Court does not find  
22 that the deposition testimony of Mr. Thornhill, a non-lawyer lay witness, establishes that  
23 Mekanism was operating as an outside agency and not as a “functional equivalent” of  
24 MillerCoors employees under United States v. Graf. 610 F.3d 1148 (9th Cir. 2010).  
25 Indeed, when Mr. Thornhill was asked during his deposition whether “Mekanism personnel  
26 functionally operated as employees of MillerCoors,” he responded “I’m sorry. I’m a little  
27 unclear on the question.” ECF No. 145-1 at 14:1-9. The Court acknowledges that Mr.  
28 Thornhill, a non-lawyer corporate witness, testified that Mekanism operated as an “outside

1 vendor” for MillerCoors. Id. at 14:17. However, the Court finds that this legal conclusion  
2 from a lay witness does not warrant reconsideration. Notably, Mr. Thornhill also testified  
3 that Mekanism was responsible for submitting “creative” to MillerCoors’ lawyers for legal  
4 review. ECF No. 145-1 at 105:4-21.

5 Additionally, the Court finds that the information submitted in Defendant’s  
6 Declaration and the accompanying exhibit establish that Mekanism was responsible for the  
7 Keystone brand refresh for a two-year time frame and Mekanism worked closely with the  
8 Keystone brand team at MillerCoors. Decl. at ¶¶ 5, 8. Notwithstanding Stone’s argument  
9 to the contrary, Ms. Needleman declares under penalty of perjury that [REDACTED]

10 [REDACTED]  
11 [REDACTED] Id. at ¶ 10. The Declaration further sets forth that

12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED] Id. In fact, the declaration states that

15 [REDACTED]  
16 [REDACTED] Id. The Court finds that these facts establish a scenario  
17 where “it is inappropriate to distinguish [for purposes of applying the attorney-client  
18 privilege] between those on the client’s payroll and those who are instead, and for whatever  
19 reason, employed as independent contractors.” In Re Bieter Co., 16 F.3d at 937. Here, the  
20 Court finds that the record supports a situation where “too narrow a definition of  
21 ‘representative of the client’ will lead to attorneys not being able to confer confidentially  
22 with nonemployees who, due to their relationship to the client, possess the very sort of  
23 information that the privilege envisions flowing most freely.” Id. at 938.

24 The Court has considered Plaintiff’s arguments made in the Reply and finds them to  
25 be unconvincing. For example, Plaintiff cherry-picks the excerpt from Ms. Needleman’s  
26 declaration that Mekanism “‘functioned as the design arm’” of the Keystone brand team  
27 and ignores the next paragraph which states that Mekanism employees “‘worked hand-in  
28 hand with the brand team on the communications strategy for Keystone, communicating

1 on an almost daily basis by phone, e-mail, or in person.” Reply at 3; see also Decl. at ¶¶ 7,  
2 8. Plaintiff’s Reply also fails to address that Ms. Needleman highlights in her declaration  
3 the Statement of Work for Mekanism to provide [REDACTED]

4 [REDACTED]  
5 [REDACTED] See Reply; see also Decl. at ¶ 7. Instead, Plaintiff takes issue with the fact that  
6 “Mekanism employees always maintained their own physical offices and email addresses  
7 and were not solely devoted to Keystone.” Reply at 4. The Court does not find the caselaw,  
8 including Graf, to limit the application of the privilege to outside consultants who work  
9 full time at the physical headquarters of the corporation. See, e.g., U.S. ex rel. Strom v.  
10 Scios, Inc., 2011 WL 4831193 (N.D. Cal. Oct. 12, 2011); see also Gen-Probe Inc. v.  
11 Becton, Dickinson and Co., 2012 WL 1155709, at \*3 (S.D. Cal. Apr. 6, 2012) (holding  
12 privilege extends to plaintiff’s patent prosecution counsel’s communications with third  
13 party independent contractor hired specifically for the project and thus, the functional  
14 equivalent of employee). Accordingly, for the reasons stated herein, the Court **DENIES**  
15 Plaintiff’s Motion for Reconsideration on this issue.

16 The Court also **DENIES** Plaintiff’s Motion to the extent it requests the Court enter  
17 an order requiring Defendant to “stipulate that Mekanism’s statements and actions are  
18 attributable to MillerCoors” under the doctrine of respondeat superior. Mot. at 7. As an  
19 initial matter, this is a new argument raised improperly on a Motion for Reconsideration.  
20 Plaintiff’s displeasure with the Court’s order does not constitute a basis for reconsideration.

## 21 **2. MillerCoors’ Privilege Log**

22 Regarding the second issue of whether reconsideration is warranted on the privilege  
23 log issue, Plaintiff argues that “MillerCoors should identify *all of* the privileged entries that  
24 relate to Stone and the Rebrand and *distinguish* the documents.” Mot. at 10 (emphasis in  
25 original). Plaintiff states that “MillerCoors is obligated to provide this information under  
26 three separate sources of authority: (1) the ESI Protocol as to its privilege logs, which  
27 requires a ‘summary of the content’ of every document listed thereon (Dkt. 84 at 8); (2)  
28 Stone’s Interrogatory No. 21, which requests that MillerCoors identify (by details of the



1 type found on a privilege log) all legal advice regarding the ‘Keystone Rebrand, the  
2 federally registered STONE® TRADEMARK, U.S. Registration No. 2168093, and/or the  
3 infringement thereof;’; and (3) Stone’s Amended 30(b)(6) Deposition Notice, Topic 3,  
4 which requests a corporate representative witness regarding ‘MillerCoors’s knowledge of  
5 Stone and . . . the STONE® trademark.’” Mot. at 8. Plaintiff cites to Mr. Wexelbaum’s  
6 testimony from his deposition noting that he “could not answer basic questions” on Topic  
7 No. 3, which concerned MillerCoors’s knowledge of Stone Brewing and its trademarks.  
8 Id. Plaintiff further argues that “[t]he Court has already ruled on this issue and MillerCoors  
9 has evaded that decision.” Id.

10 Defendant opposes on the grounds that none of Plaintiff’s “arguments are ‘new,’ and  
11 Stone Brewing had all of these facts in its possession when it made these arguments to the  
12 Court on June 28.” Oppo. at 10. Defendant argues that “Topic No. 3 did not require Mr.  
13 Wexelbaum to review hundreds of privileged documents listed on MillerCoors’ privilege  
14 log so that he could summarize the substance of each privilege communication during his  
15 deposition.” Id. at 11. Defendant further argues “[n]or has Stone Brewing provided any  
16 legal support for the claim that Topic No. 3 reasonably required Mr. Wexelbaum to commit  
17 to memory the time and content of all of MillerCoors’ privilege communications related to  
18 the Keystone refresh or Stone Brewing’s trademark.” Id. (internal citation omitted).  
19 Defendant further argues that “[i]n sum, Stone Brewing’s 30(b)(6) Topic No. 3 is simply  
20 not a basis to demand that MillerCoors supplement its privilege log or response to  
21 Interrogatory No. 21.” Id.

22 Upon a review of the parties’ arguments, exhibits in support thereof, and relevant  
23 authority, the Court finds that Plaintiff has not presented new or different facts and  
24 circumstances that establish that the Court’s previous orders [ECF Nos. 126, 137] were  
25 erroneous or based on incorrect information. Defendant represents that “[e]ach entry on  
26 MillerCoors privilege[] log – served long ago on June 1, 2019 – contains a summary of the  
27 content of the [sic] each of the documents in accordance with this Court’s ESI Protocol.”  
28 Oppo. at 12 (internal citations omitted). Defendant also represents that “contrary to Stone

1 Brewing’s suggestion (Mot. 7), MillerCoors fully complied with this Court’s June 11  
2 Order, which required MillerCoors to ‘identify the privilege log entries that relate to the  
3 subject matter of Interrogatory No. 21.’” Id. (internal citation omitted). The Court has  
4 already considered Plaintiff’s arguments with respect to the ESI Protocol and for a  
5 supplemental response to Interrogatory No. 21 and has already ruled on these issues.  
6 Additionally, Plaintiff’s attempt to connect the deposition testimony of Mr. Wexelbaum to  
7 these issues as a reason for the Court to reconsider its prior orders is without merit.  
8 Accordingly, Plaintiff’s Motion for Reconsideration on the privilege log issue is **DENIED.**

9 **IT IS SO ORDERED.**

10 Dated: September 4, 2019



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Honorable Linda Lopez  
United States Magistrate Judge