

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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO COUNTY CREDIT UNION,
Plaintiff,
v.
CITIZENS EQUITY FIRST CREDIT UNION,
Defendant.

Case No.: 18cv967-GPC(MSB)

**ORDER ON JOINT MOTION FOR
DETERMINATION OF DISCOVERY
DISPUTE [ECF NO. 82]**

AND RELATED COUNTERCLAIMS

Before the Court is the parties’ “Joint Motion for Determination of Discovery Dispute Regarding SDCCU Privilege Log Entry 44” [ECF No. 82], which includes Defendant’s Citizens Equity First Credit Union’s (“CEFCU”) “Motion to Compel Discovery on Grounds of Implied Waiver of Privilege” [ECF No. 82-2 (“Mot.”)] and Plaintiff’s San Diego County Credit Union’s (“SDCCU”) Opposition [ECF No. 82-44 (“Opp’n”)], Reply Declaration of James W. Dabney [ECF No. 83], and Plaintiff’s Sur-Reply [ECF No. 92]. The parties ask the Court to resolve their discovery dispute concerning Entry No. 44 on Plaintiff’s Privilege Log, which contains a January 26, 2011 e-mail over which Plaintiff has

1 asserted attorney-client privilege, and to award their respective attorney's fees and
2 costs associated with the instant motion. (See id.)

3 **A. Defendant's Motion to Compel**

4 Defendant asks the Court to overrule Plaintiff's assertion of privilege with respect
5 to the January 26, 2011 e-mail and compel the production of the e-mail to Defendant.
6 (ECF No. 82-1 at 3.) Alternatively, Defendant asks the Court to review the e-mail at issue
7 *in camera* and "determine whether it refers to IT'S NOT BIG BANK BANKING. IT'S
8 BETTER[,] or a variant thereof"; and if it does so determine, order the production of the
9 e-mail and the unredacted copy of the January 27, 2011 time entry. (Id.) Plaintiff
10 opposes Defendant's motion to compel, arguing that the e-mail at issue is protected by
11 the attorney-client privilege, and the privilege has not been waived. (Opp'n at 2, 5.)
12 Plaintiff asserts that the disputed document contains communications between SDCCU
13 and its lawyers containing a request for legal advice regarding trademark applications.
14 (Id. at 2.)

15 The Federal Rules of Civil Procedure authorize parties to obtain discovery
16 regarding any nonprivileged matter that is relevant to any claim or defense and
17 proportional to the needs of the case, "considering the importance of the issues at stake
18 in the action, the amount in controversy, the parties' relative access to relevant
19 information, the parties' resources, the importance of the discovery in resolving the
20 issues, and whether the burden or expense of the proposed discovery outweighs its
21 likely benefit." Fed. R. Civ. P. 26(b)(1). District courts have broad discretion to
22 determine relevancy for discovery purposes. See Hallett v. Morgan, 296 F.3d 732, 751
23 (9th Cir. 2002). Similarly, district courts have broad discretion to limit discovery where
24 the discovery sought is "unreasonably cumulative or duplicative, or can be obtained
25 from some other source that is more convenient, less burdensome, or less expensive";
26 the requesting party has had ample opportunity to obtain discovery; or the discovery
27 sought is beyond the scope of Federal Rule of Civil Procedure 26(b)(1). Fed. R. Civ. P.
28 26(b)(2)(C).

1 “The attorney-client privilege exists where: ‘(1) [] legal advice of any kind is
2 sought (2) from a professional legal adviser in his capacity as such, (3) the
3 communications relating to that purpose, (4) made in confidence (5) by the client,
4 (6) are at his instance permanently protected (7) from disclosure by himself or by the
5 legal adviser, (8) unless the protection be waived.’” United States v. Richey, 632 F.3d
6 559, 566 (9th Cir. 2011) (quoting United States v. Graf, 610 F.3d 1148, 1156 (9th Cir.
7 2010)). The party asserting the attorney-client privilege has the burden of
8 demonstrating the privilege applies. In re Excel Innovations, Inc., 502 F.3d 1086, 1099
9 (9th Cir. 2007).

10 When a party discloses a privileged attorney communication, they waive the
11 privilege as to all other communications on the same subject. Weil v. Inv./Indicators,
12 Research, and Mgmt., Inc., 647 F.2d 18, 24 (9th Cir. 1981); see also Chevron Corp. v.
13 Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992) (“Where a party raises a claim which in
14 fairness requires disclosure of the protected communication, the privilege may be
15 implicitly waived.”). However, waiver is limited to “matter actually disclosed” in the
16 communication. Weil, 647 F.2d at 25.

17 On November 18, 2019, after reviewing the Joint Motion, and all related
18 pleadings, declarations, exhibits, and supplemental filings, the Court ordered Plaintiff to
19 lodge a copy of the January 26, 2011 e-mail, identified as entry No. 44 on its Privilege
20 Log, for *in camera* review. (ECF No. 96.) Plaintiff timely lodged the document. (See ECF
21 Nos. 96 & 97.) After reviewing the January 26, 2011 e-mail, as well as careful
22 consideration of the briefing and exhibits provided by the parties, the Court finds that
23 the document at issue is protected by the attorney-client privilege and the privilege has
24 not been waived. Accordingly, the Court **DENIES** Defendant’s motion to compel.

25 ///

26 ///

27 ///

28 ///

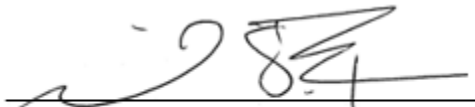
1 **B. Parties' Requests for Attorney's Fees and Costs**

2 Both parties move the Court to award their respective attorney's fees and costs
3 associated with the instant motion. (See Mot. at 15; Opp'n at 6.) If a motion to compel
4 discovery is denied, the Court "must, after giving an opportunity to be heard, require
5 the movant, the attorney filing the motion, or both to pay the party or deponent who
6 opposed the motion its reasonable expenses incurred in opposing the motion, including
7 attorney's fees," unless "the motion was substantially justified or other circumstances
8 make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(B). "Discovery conduct is
9 substantially justified if it is a response to a genuine dispute or if reasonable people
10 could differ as to the appropriateness of the contested action." Whitewater W. Indus.,
11 Ltd. v. Pacific Surf Designs, Inc., Case No.: 17cv1118-BEN (BLM), 2019 WL 1547407, at *8
12 (S.D. Cal. Apr. 8, 2019) (citing Pierce v. Underwood, 487 U.S. 552, 565 (1988)).

13 As discussed above, the Court denies Defendant's motion to compel.
14 Nevertheless, the Court finds that each party's position with respect to the instant
15 discovery dispute was substantially justified, and **DECLINES** to impose sanctions. See
16 Fed. R. Civ. P. 37(a)(5)(B).

17 **IT IS SO ORDERED.**

18 Dated: December 11, 2019

19 
20 _____
21 Honorable Michael S. Berg
22 United States Magistrate Judge
23
24
25
26
27
28