Ruling Re SPI's Motion to Compel Compliance with Agreement to Produce Documents

California Department of Forestry and Fire Protection v. Sierra Pacific Industries, et al., and related actions

Case No. CV-09-00205

The Motion Defendant Sierra Pacific Industries ("SPI") to Compel Compliance with Plaintiff's Agreement to Produce Documents is denied; Request for Sanctions is granted.

This matter came on for hearing March 14, 2011. The parties presented oral argument and the Court requested further briefing regarding the issue of waiver of the attorney work product doctrine and Cal Fire provided the Court with a privilege log under seal relating to the attorney work product doctrine and attorney client privilege. The Court hereby finds the following.

As an initial matter, the Court agrees with SPI that this motion is properly considered a motion to compel compliance with Plaintiff California Department of Forestry and Fire Protection's ("Cal Fire") agreement to produce documents. Cal Fire's responses to the first request for production provide in part "Cal Fire has made a good faith, diligent effort to obtain all documents presently in existence and has identified and produced all responsive documents that could be located in its possession, custody, or control, except those items specified on Cal Fire's privilege log." Cal Fire's responses to the second request for production provides in part "Cal Fire provided all of [sic] non-privileged responsive documents responsive to this request on a CD containing documents bates labeled CDFMO018032-18043 on July 29, 2010. Cal Fire also provided a privilege log of documents withheld that are otherwise responsive to this request on July 29, 2010."

SPI's motion does not seek to compel Cal Fire to amend its responses; rather, the motion seeks to compel Cal Fire to produce the non-privileged documents that are referenced in the

responses. Even though the responses stated that it was not producing the documents identified in the privilege log, it does not necessarily follow that those documents are in fact privileged. Cal Fire agreed to produce non-privileged documents. There is no fixed time limit for a motion to compel compliance. California Code of Civil Procedure ("C.C.P.") § 2031.320. Thus, the motion is timely.

The Court further agrees that SPI was not required to file a separate statement given the plain reading of California Rule of Court, Rule 3.1345(a), which provides that a separate statement is required for "[a]ny motion involving the content of a discovery request or the responses to such a request…." The present motion to compel compliance does not involve the content of a discovery request or response. Cal Fire's arguments that it has been prejudiced by the fact that no separate statement was provided rings hollow. The notice of motion filed by SPI identifies very succinctly what documents are at issue.

The Court does not believe that Cal Fire met and conferred with SPI in a meaningful fashion. Cal Fire's refusal to substantively respond to SPI's meet and confer letters is not justified, which necessitated this Court's involvement in the present motion. This is particularly apparent in light of Cal Fire's request that the Court merely order it to provide a more detailed privilege log. Cal Fire should have done that before this Court's involvement. "The information in the privilege log must be sufficiently specific to allow a determination of whether each withheld document is or is not [in] fact privileged." *Wellpoint Health Networks, Inc. v. Sup. Court* (1997) 59 Cal. App. 4th 110, 130. Nonetheless, the Court does not take waiver of claims of privilege lightly. The Court notes that the original briefing on these substantive issues is very thin.

Attorney Client Privileged Documents: SPI claims that the documents identified in Cal Fire's privilege log at numbers 2, 3, 5, 15, 16, 17, 18, 20, 21, 29, 31, 44, 63, 73, 83, 84, 86, 87,

88, 97, 103, 104, 107, 108, 109, 110, 139, 141, 142, 149, 150, 151, 156, 157, 158, 159, White 005481, White 005486, White 005488, White 005489, and White 005482 are improperly withheld from production because the asserted attorney client privilege does not protect them. The Court has reviewed the privilege log entries identified above. The Court finds these communications to be protected by the attorney-client privilege. The Court has found no case to support the proposition that employee communications at the direction of counsel in furtherance of litigation effectuates waiver of the attorney-client privilege. Cal Fire has assured the Court that it reviewed the withheld documents between Cal Fire employees and has withheld documents properly protected by the attorney client privilege.

Attorney Work Product Doctrine: SPI argues that the attorney work product doctrine does not protect many of the documents withheld from production. These documents with the attorney work product doctrine designation are identified in the privilege log as numbers 2, 3, 5, 15, 16, 17, 18, 20, 21, 22, 23, 29, 31, 35, 42, 44, 45, 62, 63, 68, 71, 73, 75, 76, 83, 84, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 100, 101, 105, 106, 111, 116, 117, 119, 123, 126, 127, 128, 131, 139, 141, 142, 149, 150, 151, 155, 156 and 157.

The purpose of the attorney work product doctrine is to "[p]reserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; [and]…Prevent attorneys from taking undue advantage of their adversary's industry and efforts." C.C.P. 2018.020. The doctrine applies to the work of an attorney's employees or agents (investigators, researchers, experts, etc.). *Rodriguez v. McDonnell Douglas Corp*. (1978) 87 Cal. App. 3d 626, 647-648. The "work product protection extends only to 'derivative' materials: i.e., those created by or derived from an attorney's work on behalf of a client that reflect the

attorney's evaluation or interpretation of the law or the facts involved." *Coito v. Superior Court* (2010) 182 Cal. App. 4th 758, 764. Writings containing an attorney's impressions, conclusions, opinions are absolutely protected. C.C.P. § 2018.030. All other work product is entitled to qualified protection. *Id.*

Cal Fire having provided a more detailed explanation of the privilege log in chambers after hearing and having provided a further privilege log under seal, the Court finds the following:

Numbers 105, 106 and 111: Cal Fire has agreed to produce these documents.

Numbers 22, 23, 35, 42, 45, 62, 68, 71, 116, 117, 119, 123, 127 and 131: The Court finds that these documents are properly withheld based upon the attorney work product doctrine in that they reflect communications with Cal Fire staff at the direction of the Attorney General's office for purposes of Cal Fire's litigation strategy, trial preparation and counsel's anticipation of discovery. This description allows the Court to conclude that these documents are protected pursuant to C.C.P. section 2018.030(a) as a "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories…."

Numbers 75, 76, 89, 90, 91, 92, 93, 94, 95, 96, 100, 101, 126, 128 and 155: Review of Cal Fire's privilege log *in camera* also leads to the conclusion that the documents are properly withheld based upon the attorney work product doctrine pursuant to C.C.P. section 2018.030(a).

The parties further briefed the issue of waiver. The Court does not find that any waiver of the attorney client privilege and/or work product doctrine occurred with respect to the withheld documents.

Evidence Code section 1040: Cal Fire's reliance on Evidence Code section 1040 appears to be based upon the availability of the attorney work product doctrine for each document. The

court need not decide this issue since all documents were properly withheld pursuant to the attorney client privilege and/or work product doctrine.

In light of Cal Fire's failure to meet and confer in a meaningful manner and provide sufficient detail on its privilege log to enable SPI to confirm the existence of its asserted privilege, SPI's request for sanctions is granted. Attorneys' fees and costs are awarded in the amount of $3,492.50.