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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WILLIAMS & COCHRANE, LLP;

vs.

ROBERT ROSETTE; **ROSETTE & ASSOCIATES, PC**; **ROSETTE, LLP**; **QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION**, *a federally-recognized Indian tribe*; *and* **DOES 1 TO 100**.

Case No.: 17-CV-01436 GPC MSB

WILLIAMS & COCHRANE'S MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF OBJECTIONS TO AND MOTION FOR RECONSIDERATION OF MAGISTRATE'S APRIL 17, 2020 ORDER, PURSUANT TO FED. R. CIV. P. 72(a) [DKT. NO. 284]

Date: June 26, 2020
Time: 1:30 PM
Dept: 2D
Judge: The Honorable Gonzalo P. Curiel

OBJECTIONS

a. Introduction. Williams & Cochrane, LLP ("Williams & Cochrane" or "Firm") hereby files the below objection(s) to the April 17, 2020 order by Magistrate Judge Berg denying the Firm access to any materials that either the Quechan Tribe of the Fort Yuma Indian Reservation ("Quechan" or "Tribe") or the Rosette Defendants listed on their respective privilege logs. *See* Dkt. Nos. 271, 272, 284. The first six month of the discovery period was a frustrating and futile exercise for Williams & Cochrane. It was unable to get even basic discovery from the Rosette Defendants related to keyword searches for Cheryl Williams, Kevin Cochrane, Williams & Cochrane, and Pauma for purposes of developing its claim under the Lanham Act, 15 U.S.C. § 1051 *et seq*. *See, e.g.*, Dkt. No. 274. It also did not receive any meaningful evidence from Quechan, just recently (and belatedly) receiving word that this is apparently due to the fact that the contents of the email accounts for most of the tribal leaders who were in office during 2016-17 have been purged and thus spoilated. *See* Declaration of Cheryl A. Williams ("Williams Decl."), Ex. 1 at p. 34.[1] (Ms. Williams: "As I had mentioned in connection with my fairness argument, that we recently discovered that there are large swaths of emails that disappear when a tribal councilmember leaves office, and we understand that those are no longer accessible; we will not be receiving them.").

There was a glimmer of hope, however, as each group of Defendants was ordered to produce a document by document privilege log. *See* Dkt. No. 263. The Defendants complied, at least to some extent, and the Rosette Defendants produced one that was 98 pages while Quechan produced one that was eighty-four pages shorter, at 14 pages. *See* Dkt. Nos. 271-4, 272-4. The parties filed joint motions to determine whether any of these materials claimed as being privileged should be disclosed in this malpractice action involving successor attorneys, and yet the Magistrate held that not a single one of the approximately 1,110 documents on the 112 pages of privilege logs should be disclosed to

[1] Page number citations to the transcript are to the actual pages of the transcript, and not the page of the PDF document being submitted as an exhibit.

Williams & Cochrane, even though it has to defend against a number of professionally-charged counterclaims that the Court desires to hear on the merits. *See* Dkt. No. 284. This decision obviously has enormous impacts for the fundamental fairness of the proceeding, but it also runs counter to established law, as the Magistrate elected to apply California privilege law to resolve the issues in this federal question case rather than the federal privilege law that the Ninth Circuit holds applies and the parties actually briefed. *See* § c, *infra*. Thus, Williams & Cochrane respectfully requests that the Court consider the timely objection(s) herein in due course, even if it is merely to flesh out important matters for purposes of appeal.[2]

b. Legal Standard. "Discovery is a nondispositive matter . . . ." *Hutchinson v. Pfeil*, 105 F.3d 562,566 (10th Cir. 1997). When reviewing an objection to a magistrate judge's non-dispositive ruling, the Court must adopt the ruling unless it finds that the ruling is "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A); *Hutchinson*, 105 F.3d at 566; *Ariza v. U.S. West Commc'ns*, Inc., 167 F.R.D. 131, 133 (D. Colo. 1996). The clearly erroneous standard "requires that the reviewing court affirm unless it on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Ocelot Oil Corp. v. Sparrow Indus*., 847 F.2d 1458, 1464 (10th Cir. 1988). The "contrary to law" standard permits "plenary review as to matters of law," 12 Charles Alan Wright et al., Federal Practice & Procedure § 3069 (2d ed., Apr. 2015 update), but the Court will set aside a Magistrate Judge's order only if it applied the wrong legal standard or applied the appropriate legal standard incorrectly, *see Wyoming v. U.S. Dep't of Agric*., 239 F. Supp. 2d 1219, 1236 (D. Wyo.

[2] The Defendants in this action have recently indicated an intent to seek additional time to conduct discovery despite having more than six months to do so and vigorously opposing a prior request to stay discovery on account of the COVID situation. *See* Dkt. Nos. 278, 279. Should they obtain the additional time they previously represented was unnecessary either through an *ex parte* motion or joint stipulation, then Williams & Cochrane may file an *ex parte* motion to shorten time on this motion so the remainder of the discovery period is fair for all those involved.

2002). "The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a).

c-1. Objection: Federal Privilege Law Applies. The Magistrate indicated at the outset of the hearing on both joint motions that it intended to apply California privilege law to address the propriety of the claims of privilege by the Defendants in this federal question case. *See* Williams Decl. Ex. 1 at p. 4. As far as Williams & Cochrane can tell, the parties were not in dispute about the source of law that would apply to resolve privilege issues when briefing the joint motions, and thus the Firm was caught off guard by this remark that California law would apply. Nevertheless, the undersigned tried to argue off the cuff that federal law should apply in lieu of California law.

> MR. COCHRANE: Well, this is Kevin Cochrane for the plaintiff. There was a 2005 case from the Ninth Circuit called *Agster v. Maricopa County*, and it sort of dealt with the situation in which you had a federal question claim that was joined with other pend[ant] state law claims, and I believe they held in that situation that the federal law [of] privilege applies. Usually, in that situation, what happens is you will look at federal common law [of] privilege. State law can sort of serve [in] a gap-filling capacity if it's instructive in some way, but I think that we are probably more comfortable with federal law applying, first and foremost.

Williams Decl., Ex. 1 at p. 4. The other attorney representing Williams & Cochrane then read from one of the leading treatises on the subject to provide additional support and reasoning for the application of federal privilege law:

> MS. WILLIAMS: Your Honor -- yes, Your Honor. This is Cheryl Williams for plaintiff. We did not address or brief this issue at any great length because it was not really disputed in the briefing. I believe even the Rosette defendants stated that they thought federal privilege law applied. So I would like a chance to address that a little bit further. And I am reading right from the my [Rutter] guide. It says, "In diversity cases, privileges are determined under the state law that otherwise governs the decision of the case. Federal Rule of Evidence 501." And it cites the Ninth Circuit case, Star Editorial Incorporated v. United States District for the Central District of California, Ninth Circuit, 1993. 7 F.3d. 856, [page] cite 859. And that says, "Where state" -- "federal and state claims are joined" -- "Where federal and state

> laws may be joined in the same action, claims of privilege are determined under federal law. It would be unworkable to hold information privileged for one set of claims and not the other." And it cites a Third Circuit case, William P. Thompson Company v. General Nutrition Corp., Incorporated. Third Circuit 1982, 671 F.2d 100, [page] cite 104. And, also, Wilcox v. [Arpaio], Ninth Circuit, 2014, 753 F.3d 872, page cite 876. So we do strongly believe that federal law is the applicable law that applies here, and I think we would have to rebrief everything if we are only applying state law at this point.[3]

Williams Decl. Ex. 1 at p. 8-9. This discussion did not persuade the Magistrate to change his approach for dealing with the issue, and he ultimately cut off further discussion when the undersigned tried to raise additional reasons as to why federal privilege law should apply:

> MR. COCHRANE: Could I articulate one more position that we have with respect to the federal law versus state law issue, just for record purposes?
> THE COURT: No. That's been made and we are – that ship has sailed, Mr. Cochrane.

Williams Decl., Ex. 1 at p. 58.

However, federal privilege law *is* supposed to apply in this case. The *Agster v. Maricopa* case referenced by the undersigned during the hearing is an opinion issued by the Ninth Circuit in 2005 that cited to the advisory notes for Federal Rule of Evidence 501 and another federal circuit opinion from some twenty years earlier to explain that, "[w]here there are federal question claims and pendent state law claims present, the federal law of privilege applies." *Agster v. Maricopa County,* 422 F.3d 836, 839-40 (9th Cir. 2005) (citing, e.g., *Wm. T. Thompson Co. v. Gen. Nutrition Corp.,* 671 F.2d 100, 104 (3d Cir. 1982)). And here, the case involves a Lanham Act claim and assorted state law claims, none of which, for argument sake, are separable from each other – a fact made

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[3] Counsel for the Quechan Tribe also conceded in its brief that federal law was controlling on the issue of privilege. *See* Dkt. No. 271-7, p. 3, lines 16-20 ("Thus, absent controlling federal law to the contrary, California privilege law provides strong guidance in favor of concluding that the Tribe's privilege with Rosette remains intact. *See Lewis v. United States*, 517 F.2d 236, 237 (9th Cir. 1975) (holding that federal courts may consider state privilege law absent controlling federal authority).").

clear by the Defendants claiming solicitation materials are privileged and then including all the communications/documents predating the Rosette Defendants alleged retention at Quechan on the privilege logs. *See* Dkt. Nos. 271-04, 272-4.

c-2. One Continuous Fact Pattern. As to that, there is ample and good reason for adhering to the *Agster* rule in the case at hand, on top of it being binding precedent. The first one relates to the continuity of the fact pattern and how applying the various privilege laws to the various materials will create an unworkable result, just as the Rutter Guide warns. Again, both privilege logs begin well before the purported retention of the Rosette Defendants at Quechan, which means that any materials dated on or before the alleged retention date of June 23, 2017 likely relate to the false advertising claim under the Lanham Act and should thus be reviewed using federal privilege law. *See* Dkt. Nos. 271-04, 272-04. Yet, applying federal privilege law to these materials and then shifting to state privilege law for the ones that come afterwards produces an awkward result that is anomalistic under case law.

c-3. Arizona v. California. Further, the decision to apply California case law to the communications between an *Arizona* attorney and an *Arizona* tribe about work being done under an *Arizona*/California hybrid contract also appears to be problematic. Here, Quechan admits its reservation falls on both sides of the California/Arizona border. *See* Dkt. No. 231, ¶ 14. Further, the Rosette Defendants "admit that Rosette LLP is a limited partnership registered in the State of Arizona" with its main office "located at 565 West Chandler Boulevard, Suite 212, Chandler, Arizona 85225." Dkt. No. 233, ¶ 15. Not to mention, the Rosette Defendants filed what they claim to be their "attorney services contract" with Quechan earlier in this case, the scope of which covers the "California and Arizona Compact Negotiations" as follows:

> Section 1: Scope of Engagement
> A. California and Arizona Compact Negotiations
> The firm shall conduct all legal work regarding the negotiation, finalization, and execution of a Class III Tribal-State Gaming Compact ('Compact') with the State of California and the State of Arizona pursuant to the Indian

> Gaming Regulatory Act ('IGRA'), 25 USC 2701 *et seq*. Firm's legal services will include ratification and approval of the Compact in the California Assembly and senate as well as submission of the Compact to the Department of Interior Office of Indian Gaming for approval. Firm's legal representation will also include current and ongoing negotiations between the State of Arizona and other Arizona tribes and will include the ratification and approval of the Compact with the State of Arizona as well as submission of the Compact to the Department of Interior Office of Indian Gaming for approval by the federal government.

Dkt. No. 54-2, p. 25. With counsel for Quechan previously taking the position that many allegedly privileged documents contain substance on *both* the California and Arizona compact negotiations, what that means is that California law is reflexively being applied wholesale to documents that also concern Arizona work by an Arizona firm for an Arizona tribe. Yet, by mixing different jurisdictional matters under a single contract, the Defendants created a situation in which it is not clear cut (and they bear the burden to prove) that California law should apply if the Court departs from precedent and resorts to a certain state's privilege laws.

c-4. No Advance Notice. Finally, one of cornerstones of federal litigation is that a party has a "full and fair opportunity to ventilate the issues involved in the matter," as the failure to receive such is grounds for vacating the decision. *See, e.g., Gospel Mission of Am. v. City of L.A.,* 328 F.3d 548, 553 (9th Cir. 2003). Here, Williams & Cochrane tried to jumpstart a discussion about privilege issues (including the applicable law) before the discovery period even started (in February 2019), but was unsuccessful in that endeavor. *See* Dkt. No. 191-1, p. 17. Instead, the first time that Williams & Cochrane learned that the Magistrate may apply State of California privilege law in this federal question case to resolve issues under the Defendants' privilege logs was during the April 16, 2020 hearing on the matter – five weeks after the filing of the joint motions and six months into the discovery process. *See* Dkt. Nos. 232, 272, 274, 282. The propriety of applying California law in this case is by no means a clear choice, and the parties should have received the opportunity to fully brief the issue before this law was in fact applied and then used as the

basis for denying Williams & Cochrane access to any of the thousand-plus supposedly privileged documents. Unfortunately, the decision to do this puts Williams & Cochrane in a rather difficult situation, where it has to argue the merits portion of this case based solely upon the Defendants' cherry-picked evidence. For that and the other reasons set forth above, Williams & Cochrane respectfully requests that the Court uphold these objections and overturn the Magistrate's April 17th order.[4]

RESPECTFULLY SUBMITTED this 28th day of April, 2020

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By: */s/ Kevin M. Cochrane*

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[4] Williams & Cochrane further objects to the specific determinations (i.e., analyses and findings) made by the Magistrate that neither group of Defendants waived privilege in any way, including, but not limited to, the ten (10) grounds listed within the joint motion with Quechan and the nine (9) grounds listed within the joint motion with the Rosette Defendants. *See* Dkt. Nos. 271, 272.