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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WILLIAMS & COCHRANE, LLP,

Plaintiff,

v.

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

Defendants.

QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, *a federally-recognized Indian tribe*,

Counterclaim-Plaintiff,

v.

WILLIAMS & COCHRANE, LLP,

Counterclaim-Defendant.

Case No.: 17-cv-01436-GPC-DEB

THE QUECHAN TRIBE'S AND ROSETTE DEFENDANTS' JOINT OPPOSITION TO WILLIAMS & COCHRANE'S MOTION FOR RECONSIDERATION OF MAGISTRATE JUDGE BERG'S APRIL 17, 2020 ORDER (ECF NO. 292)

Judge: Hon. Gonzalo P. Curiel
Courtroom: 2D
Trial Date: Not Set

INTRODUCTION

On April 17, 2020, after a lengthy telephonic discovery hearing to address multiple discovery disputes raised by Williams & Cochrane ("W&C") against both the Quechan Tribe (the "Tribe") and Rosette & Associates, PC, Rosette, LLP, and Robert Rosette ("the Rosette Defendants"), Magistrate Judge Berg issued an Order resolving those disputes. *See* ECF No. 284 (the "April 17 Order").[1] W&C then filed its Objections and Motion for Reconsideration of the April 17 Order. *See* ECF No. 292 (the "Motion").

W&C challenges portions of the April 17 Order that address two overlapping discovery motions. The first motion is directed at the Tribe, W&C's former client. *See* ECF No. 271. The second motion is directed at the Rosette Defendants, who replaced W&C as the Tribe's attorneys in June 2017, during the Tribe's negotiations with the State of California over a new gaming compact. *See* ECF No. 272.[2] The underlying discovery motions filed by W&C broadly seek to compel production of privileged attorney-client communications made in the course of the Rosette Defendants' legal representation of Quechan. *See* ECF Nos. 271, 272.

As relevant to this Motion, W&C argues that the attorney-client privilege applicable to communications between the Tribe and the Rosette Defendants was waived because of: (1) the Tribe's counterclaims against W&C, including for malpractice; (2) the crime-fraud exception; and (3) "successor attorney's animus." *See generally id.* W&C's Motion seeks review of one issue: Magistrate Judge Berg's application of California privilege law in evaluating whether communications between the Tribe and the Rosette Defendants were properly withheld. Defendants

[1] On May 8, 2020, two subsequent orders were issued (ECF Nos. 295 and 296) which addressed certain portions of the underlying discovery motions that the April 17 Order deferred pending the parties' submission of supplemental information.

[2] W&C's current Motion does not challenge Magistrate Judge Berg's separate ruling in the April 17 Order that the Rosette Defendants complied with a previous ruling on discovery matters. *See* ECF Nos. 274, 284 at 5.

respectfully submit that Magistrate Judge Berg applied the correct body of privilege law, and, even if federal law applies, any error was harmless because the outcome would have been the same under federal law.

I. LEGAL STANDARDS

Magistrate judges are vested with broad discretion to coordinate discovery. *See, e.g.*, *Grimes v. City & Cty. of San Francisco*, 951 F.2d 236, 240 (9th Cir. 1991). Consistent with that discretion, the standards for reversing a Magistrate Judge's order set forth by Federal Rule of Civil Procedure 72(a) are quite high. Thus, a Magistrate Judge's decision shall be set aside only if it is "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); *see also Mavrix Photographs, LLC v. Livejournal, Inc.*, 873 F.3d 1045, 1051 (9th Cir. 2017). Under the clear error standard of review, a Magistrate's findings of fact are afforded particular deference, and may only be set aside if the reviewing court is "left with the definite and firm conviction that a mistake has been made." *Ctr. for Biological Diversity v. Fed. Highway Admin.*, 290 F. Supp. 2d 1175, 1199-1200 (S.D. Cal. 2003).

Consistent with these standards, a district court "may not simply substitute its judgment for that of the deciding court." *Grimes*, 951 F.2d at 241. Similarly, harmless error does not warrant reversal of a Magistrate Judge's order. *See Riviera Exploration Co. v. Gunnison Energy Corp.*, 412 Fed. Appx. 89, 95 (10th Cir. 2011).

II. JUDGE BERG'S APPLICATION OF CALIFORNIA ATTORNEY-CLIENT PRIVILEGE LAW WAS CORRECT

Federal Rule of Evidence 501 provides that federal common law generally applies to claims of privilege in federal cases. But "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed. R. Evid. 501. Accordingly, where the rule of decision is federal law, federal common law of privilege applies; where the rule of decision is state law, state law of privilege applies. *See, e.g.*, *Crowe v. Cty. of San Diego*, 242 F. Supp. 2d 740, 746 (S.D. Cal. 2003) ("Rule 501 is properly read as requiring application of state

privilege law with respect to a claim or defense as to which State law supplies the rule of decision where the evidence sought relates to an element of that state law claim or defense."). The choice of law rules are far less clear where federal and state law claims are both at issue, as they are here. *See, e.g.*, *Love v. Permanente Medical Grp.*, 2013 WL 4428806, at *2 (N.D. Cal. Aug. 15, 2013) ("The interplay of [Rule 501's] two principles has created somewhat inconsistent case law regarding the application of federal privilege doctrine to pendent state law claims in federal question cases.").

W&C asserts one claim for relief against the Rosette Defendants under the Lanham Act, and it asserts multiple claims for relief against the Tribe all under California law. The disputed evidence consists of communications between the Tribe and its attorneys in a State compact negotiation, over which the Tribe has asserted the attorney-client privilege. Such communications—to the extent they are relevant to this case at all—relate to W&C's state-law contract claims against the Tribe, and are irrelevant to W&C's federal Lanham Act claim against the Rosette Defendants. Because the disputed evidence relates only to claims for which state law provides the rule of decision, Judge Berg's application of California privilege law to the Tribe's claim of attorney-client privilege was not clearly erroneous—it was correct. *See* Fed. R. Evid. 501; *see also* Wright & Miller, 23A Fed. Prac. & Proc. § 5434 ("[I]f [the evidence over which privilege is claimed] is in a line of proof that culminates in an element of a state claim or defense, then state rules of privilege apply."). Accordingly, the Motion should be denied. *See* Fed. R. Civ. P. 72(a); *Mavrix*, 873 F.3d at 1051.

W&C relies primarily on a Ninth Circuit decision that states, without explanation, that where "federal question claims and pendent state law claims" are present, "the federal law of privilege applies." *Agster v. Maricopa Cty.*, 422 F.3d 836, 839 (9th Cir. 2005). But *Agster* did not involve a situation where the *only* claims against the defendant whose privilege is being challenged (here, the Tribe) are

state law claims. And the Ninth Circuit has so far declined to weigh in on the question "whether, in federal question cases, state or federal privilege law governs the admissibility of evidence that relates exclusively to state law claims." *Wilcox v. Arpaio* 753 F.3d 872, 876, n.3 (9th Cir. 2014). District courts, however, have concluded that "[w]here the application of state privilege law to evidence in support of a claim arising under state law creates no conflict, such as where the evidence sought can be relevant only to state law claims, the state law privilege should be applied consistent with the express language of Rule 501." *Platypus Wear, Inc. v. K.D. Co., Inc.*, 905 F. Supp. 808, 812 (S.D. Cal. 1995). That is the proper outcome here. An application of *Agster* to circumstances like this one would mean the application federal privilege law to state law claims based exclusively on the presence of a single federal claim against *a different defendant*. Such an anomalous result goes directly against the express language of Rule 501.

III. THE APPLICATION OF FEDERAL PRIVILEGE LAW DOES NOT CHANGE THE OUTCOME

Even if federal law did apply to the Tribe's privilege over communications possessed by the Tribe and the Rosette Defendants, the outcome—that the evidence W&C seeks is protected by the attorney-client privilege and therefore protected from discovery—would not change. W&C argued that the Tribe waived its privilege with Rosette on a categorical basis, and that it is accordingly entitled to *all* correspondence between the Tribe and its attorneys. *See* Dkt. 271-1 at 3-5. These arguments are entirely without merit, no matter which body of law applies. Accordingly, any error in the April 17 Order's application of California law was harmless, and does not warrant reversal. *See Riviera Exploration*, 412 Fed. Appx. at 95.

First, W&C argued that, under federal law, privilege is waived between a malpractice plaintiff and its successor attorney. This is simply not the case, particularly given that malpractice claims are always creatures of state law. It makes no sense for there to be a federal waiver rule in these state law cases. Plaintiff's

argument is based on a single district court case, *Rutgard v. Haynes*, 185 F.R.D. 596 (S.D. Cal. 1999), which held that a malpractice plaintiff waived privilege with his successor attorney because his damages claim (based in part on a settlement negotiated by the successor attorney) could have turned on the successor attorney's work as well as the allegedly-negligent attorney's work. *See* 185 F.R.D. at 599.

Here, the Tribe's counterclaim damages arise from W&C's actions alone. Thus, W&C charged the Tribe over $400,000 over eight months for very little work, misrepresented the applicability of the contingency fee provision of the W&C-Tribe Fee Agreement, failed to negotiate a gaming compact the State was willing to sign, and then refused to transmit the Tribe's case file once the Tribe terminated W&C. None of these facts, nor the damages that arise from them, have any causal connection to the work of Rosette, which the Tribe hired to replace W&C.

Regardless, *Rutgard* has been widely criticized. *See, e.g.*, *Lincoln General Ins. Ryan Mercaldo LLP*, 2015 WL 12672143, at *2 (S.D. Cal. July 31, 2015) (declining to follow *Rutgard* and noting that it "has been criticized in recent years"); *Woodbury Knoll, LLC v. Shipman & Goodwin, LLP*, 48 A.3d 16, 37 (Conn. 2012) (noting *Rutgard* as an "outlier" based on "questionable" reasoning given that the majority of jurisdictions hold that privilege is not waived with a successor attorney). That *Rutgard* is of questionable vitality is not surprising: its reasoning was largely premised on an Illinois state court case that was later overruled by the Illinois Supreme Court. *See Fischel & Kahn v. Straaten Gallery, Inc.*, 703 N.E. 2d 634 (Ill. App. Ct. 1998) *rev'd*, 727 N.E.2d 240 (2000); *see also Rutgard*, 185 F.R.D. at 598-99 (relying on *Fischel* to support theory of successor-attorney waiver).

There is accordingly no controlling federal authority providing for the waiver of a malpractice plaintiff's privilege with a successor attorney. And when "determining the federal law of privilege in a federal question case, absent a controlling statue, a federal court may consider state privilege law." *Lewis v. United States*, 517 F.2d 236, 237 (9th Cir. 1975); *see also Homeland Housewares LLC v.*

Sensio Inc., 2006 WL 8434684, at *5 (C.D. Cal. Sept. 13, 2006). California law, which is therefore also relevant to a federal common law privilege analysis here, *see Lewis*, 517 F.2d at 237, militates strongly against W&C's position. California courts have squarely rejected the theory that a malpractice plaintiff waives privilege with subsequent attorneys. *See, e.g.*, *Schlumberger Ltd. v. Superior Court*, 115 Cal. App. 3d 386, 393 (Cal. Ct. App. 1981) ("If tendering the issue of damages in a malpractice action waived the privilege [with successor attorneys], there would be no privilege, and [Cal. Evid. Code § 954] would be meaningless."). Put simply: W&C finds no support in either federal or California privilege law for its contention that the Tribe categorically waived its privilege with Rosette simply by filing malpractice counterclaims against W&C.

Second, W&C challenged the Tribe's claim of privilege under the crime-fraud exception. But for the crime-fraud exception to apply, W&C must show (1) that Quechan was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further that scheme, and (2) that the communications sought are "sufficiently related to" and were made "in furtherance of [the] intended, or present, continuing illegality. *In re Grand Jury Proceedings*, 87 F.3d 377, 381-83 (9th Cir. 1996). W&C established neither of these elements. Indeed, Judge Berg specifically determined at the hearing that "[n]ot only is there no evidence that the [T]ribe sought to commit fraud, there's not even a hint that the [T]ribe sought an attorney's help in committing a crime or fraud." *See* Ex. A to Vittor Decl., 04/16/2020 Hr'g Tr. at 21:17-20. This factual finding cannot be set aside unless the Court has "a definite and firm conviction that a mistake has been made." *Biological Diversity*, 290 F. Supp. 2d at 1199-1200.

Third, W&C advanced the illogical theory that "an attorney cannot claim privilege with respect to a specific representation if he or she exhibited actual malice." ECF No. 271 at 9. This argument exclusively relies on inapplicable Illinois state law, *Marc Dev. Inc. v. Wolin*, 904 F. Supp. 777, 784 (N.D. Ill. 1995), which, in

any event, has nothing to do with attorney-client privilege. *Marc* addresses whether attorneys advising clients about contractual obligations enjoy "a privilege which shields them from claims of tortious interference with contract when [their] advice results in the employer's breach of contract." *Marc*, 904 F. Supp. at 784. W&C has conflated attorney-client privilege—an evidentiary rule—with an Illinois state-law qualified immunity from suit where an attorney's advice results in a client's breach of contract. In addressing this particular argument, Judge Berg observed that it "***is so far afield and such a stretch, I have trouble even stating that this claim was made in good faith. I am really sorely disappointed that I am even having to spend time addressing it. To me, that plaintiff even makes this argument is beyond reason***[.]" Ex. A to Vittor Decl., 04/16/20 Hr'g Tr. at 25:22-26:1 (emphasis added). Under the circumstances, it is particularly unreasonable for W&C to move to reconsider. W&C has no reasonable basis to believe it can meet the high burden for reconsideration. *See* Local Rule 7.1(i). *See also Hernandez v. Arctic Glacier USA, Inc.*, 2017 WL 1957567, at *3 (S.D. Cal. May 11, 2017) (denying motion for reconsideration where party's "disregard for the Court's authority and limited resources has caused the filing of three separate motions, regarding the same two discovery requests, and unreasonably prolonged the discovery process.").

For the foregoing reasons, W&C's arguments that the Tribe waived its attorney-client privilege over communications with the Rosette Defendants all fail as a matter of federal law. Thus, even if the application of state privilege law in the April 17 Order was an error, it was harmless and Magistrate Judge Berg's ruling should stand. *Riviera Exploration*, 412 Fed. Appx. at 95

IV. CONCLUSION

Judge Berg's application of California privilege law was neither clearly erroneous nor contrary to law. Consequently, the Motion should be denied.

Dated: June 5, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2020, I electronically filed the foregoing with the clerk of the court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 5, 2020 at Los Angeles, California.

/s/ Joshua A. Vittor
Joshua A. Vittor