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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Francie E. Moeller,

No. C 02-5849 PJH (JL)

Plaintiff,

ORDER GRANTING PLAINTIFFS'
MOTION TO COMPEL (Docket # 446)

v.

Taco Bell Corporation, et al.,

Defendants.

I. Introduction

All discovery in this case has been referred by the district court (Hon. Phyllis J. Hamilton) pursuant to 28 U.S.C. §636(b). The deadline for filing of dispositive motions on ADA liability is October 20, 2009, set for hearing on December 16. Plaintiffs' motion to compel production of documents (Docket # 446) came on for hearing before this Court. Appearing for Plaintiffs was Timothy P. Fox, pro hac vice, Fox & Robertson, P.C., Denver, Colorado. Appearing for Defendant was Richard H. Hikida, Greenberg Traurig, LLP. The Court carefully considered the moving and opposing papers and the arguments of counsel and concludes that the motion should be granted. By having witnesses testify in their declarations in support of its opposition to Plaintiffs' motion for summary judgment, Defendant has waived attorney-client privilege and the work product doctrine for documents related to the testimony submitted. Defendant shall produce documents

1 responsive to Plaintiffs' discovery requests which relate to the subject matter of the
2 witnesses' testimony -- door opening force, queue lines, and accessible seating. The
3 parties shall meet and confer to develop a plan for Defendant's compliance with this order.
4 Within ten days of issuance of this order, the parties shall submit their plan to the Court.

5 **II. Background**

6 In this case, Plaintiffs allege that Defendant's corporate restaurants in California
7 have various architectural elements that do not comply with Title III of the Americans with
8 Disabilities Act ("ADA"), 42 U.S.C. § 12181-89, and California accessibility regulations. The
9 court appointed a Special Master to survey the approximately 220 restaurants at issue, and
10 the Special Master found thousands of violations. See generally Order Appointing Special
11 Master (Filed October 5, 2004, Docket no. 101); Notice of Plaintiffs' Submission of Special
12 Master Reports (and associated exhibits) (Filed December 14, 2006, Docket nos. 216-240.)
13 Mr. Kane and Ms. Wright worked for Alianza Development International, LLC ("Alianza"),
14 Alianza Development International, LLC ("Alianza"), a construction management firm the
15 Defendant retained to attempt to fix some of the barriers found by the Special Master.

16 In 2007, Plaintiffs moved for partial summary judgment, and in response, Defendant
17 argued that Plaintiffs' motion should be denied as moot because Defendant had allegedly
18 fixed many of the barriers at issue. Defendant based this argument on the declarations of
19 Kane and Wright (Ms. Wright was formerly known as Ford), who stated that these barriers
20 had been fixed in a manner that complied with state and federal law. (Filed March 23, 2007,
21 Docket nos. 264 and 265, respectively – hereinafter "Kane Decl." and "Ford Decl.").
22 Plaintiffs seek an order compelling Defendant to produce documents that it has withheld as
23 privileged that reasonably relate to Mr. Kane's and Ms. Wright's testimony that the barriers
24 are now allegedly remedied and comply with law, including for example communications
25 that specifically address the legality of these barriers.

26 Mr. Kane and Ms. Wright in their declarations specifically addressed three subject
27 areas:

- 28 1) Door opening force;

- 1 2) queue lines; and
 2 3) accessible seating.

3 **III. Relief Requested**

4 Plaintiffs ask this Court to order Defendant to produce documents that it withheld as
 5 privileged that reasonably relate to Mr. Kane's and Ms. Wright's testimony that the barriers
 6 are now allegedly remedied and comply with law, including for example communications
 7 that specifically address the legality of those barriers.

8 Defendant has withheld various emails and other communications between it and
 9 Mr. Kane and Ms. Wright that are directly relevant to their testimony that the restaurants
 10 are now in compliance, including, for example:

- 11 • Defendant's communications with Alianza "that addressed the legal
 12 implications of the modification work . . ."; and
 13 • Legal advice from Defendant's in-house counsel and outside counsel to
 14 Alianza personnel "in response to Alianza's modification inquiries. . ."

15 **IV. Discussion - - Witnesses' testimony waives privilege.**

16 The sole legal issue to be decided in this motion is whether Defendant, by relying on
 17 Mr. Kane's and Ms. Wright's testimony that certain barriers at issue here have been fixed
 18 and are now in compliance with state and federal law, has waived all privileges with respect
 19 to documents reasonably related to that testimony. Defendant has waived any applicable
 20 privilege with respect to pertinent privileged materials that might refute the declarants'
 21 testimony. *United States v. Reyes*, 239 F.R.D. 591, 604 (N.D. Cal. 2006); see also *Home*
 22 *Indemnity Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322, 1326 (9th Cir. 1995)
 23 (discussing waiver by implication).

24 **A. The *Nobles* decision is on point.**

25 This issue was squarely addressed by the Supreme Court in *United States v.*
 26 *Nobles*, 422 U.S. 225 (1975). In *Nobles*, an investigator for the defense interviewed
 27 prosecution witnesses and preserved the essence of those conversations in a written
 28 report. *Id.* at 227. The defense lawyer relied on the report in conducting his cross

1 examination of the prosecution witnesses, *Nobles*, 422 U.S. at 227, and the Court held that
2 this use ordinarily did not waive the privilege. *Id.* at 239 n.14. The Court addressed the
3 work-product privilege, but the waiver doctrine also applies to the attorney-client privilege.
4 See *United States v. Ortland*, 109 F.3d 539, 543 (9th Cir. 1997) ("The privilege which
5 protects attorney-client communications may not be used both as a sword and a shield.
6 Where a party raises a claim which in fairness requires disclosure of the protected
7 communication, the privilege may be implicitly waived." (Internal citation omitted.)).

8 Defendant in *Nobles*, however, subsequently sought to have his investigator testify
9 as to the inconsistency between his recollection of the witness interviews and that of the
10 prosecution's witnesses. *Id.* at 239. The lower court informed defense counsel that the
11 investigator could only testify if relevant portions of his report were produced to the
12 prosecution. *Id.* at 229.

13 The Supreme Court held that the district court was correct in finding waiver. If the
14 investigator testified, then "the normal rules of evidence come into play with respect to
15 cross-examination and production of documents." *Id.* at 239 n.14. Thus if the defendant
16 used the investigator's testimony, it waived the privilege with respect to "matters reasonably
17 related to those brought out in direct examination," including relevant portions of his report.
18 *Id.* at 240.

19 In this case, Defendant used the testimony of Mr. Kane and Ms. Wright that various
20 barriers had been brought into compliance with state and federal law to support its
21 mootness argument in opposition to Plaintiffs' motion for summary judgment. It is not
22 necessary that they will be witnesses at trial for their testimony under oath in their
23 declarations to waive Defendant's privileges. Pursuant to the Supreme Court's opinion in
24 *Nobles*, Defendant in this case has waived privilege with respect to "matters reasonably
25 related" to their declarations' testimony. As a matter of common sense, communications
26 from Defendant's attorneys to Mr. Kane and Ms. Wright "that addressed the legal
27 implications of the modification work," as well as communications providing "legal advice"
28 to Mr. Kane and Ms. Wright in response to their "modification inquiries," are pertinent to

1 their subsequent testimony that those modifications complied with state and federal
2 regulations. Defendant may not use the declarations of Kane and Wright as a sword to
3 strike down Plaintiffs' motion while hiding behind the shield of privilege any documents
4 which might undermine or contradict those declarations.

5 At the same time, the waiver of privilege is limited to "matters covered in [their]
6 testimony." *Nobles*, 422 U.S. at 239. The Court reviewed the Kane and Wright declarations
7 and observes that they deal with door opening (and closing) force, queue lines, and
8 accessible seating. Accordingly, any waiver of privilege is limited to documents and
9 communications on those subjects.

10 **B. Defendant's arguments miss the point.**

11 Defendant's Memorandum Of Points and Authorities in Support of its Opposition to
12 Plaintiffs' Motion to Compel ("Opposition Brief") consists largely of arguments that are
13 irrelevant to Plaintiffs' Motion to Compel.

14 Most striking, Defendant's Opposition Brief devotes less than one paragraph -- out of
15 24 pages -- to the most significant basis for Plaintiffs' waiver argument: Defendant's
16 submission of the Alianza Declarations in support of its contention that Plaintiffs' claims are
17 moot. Defendant's only response is that Plaintiffs had the opportunity to depose Mr. Kane
18 and Ms. Wright. Opp'n Br. at 18. Significantly, however, at those depositions, Defendant
19 refused to let these deponents answer concerning the topics at issue in Plaintiffs' Motion to
20 Compel.

21 **1. Defendant argues non-issues or the reverse of the applicable law.**

22 Defendant argues that it has not waived privilege because the withheld documents
23 have not been introduced in evidence. Defendant contends that Plaintiffs seek to blur the
24 distinction between defense counsel's potential reliance upon the work-product materials
25 reflected in Taco Bell's supplemental privilege log at trial and the testimonial use of such
26 materials, the latter of which amounts to pure speculation. Plaintiffs continue to ignore the
27 distinction drawn by the U.S. Supreme Court in *Nobles*, wherein the Court held:

28 "What constitutes a waiver with respect to work-product materials depends, of

1 course, upon the circumstances. Counsel necessarily makes use throughout trial of
2 the notes, documents, and other internal materials prepared to present adequately
3 his client's case, and often relies on them in examining witnesses. When so used,
4 there normally is no waiver. But where, as here, counsel attempts to make a
5 testimonial use of these materials the normal rules of evidence come into play with
6 respect to cross-examination and production of documents."

7 422 U.S. at 239 n.14 (emphasis added).

8 Defendant argues that the facts in *Nobles* are dissimilar to this case. In particular,
9 Defendant attempts to distinguish *Nobles* because the investigator in that case intended to
10 testify as to the eyewitnesses' alleged statements to him, while the declarants in this case
11 will not be testifying at trial. Defendant argues that Plaintiffs in this case do not contend that
12 Alianza or Maintco personnel conducted witness interviews and that the withheld emails at
13 issue contain witness statements that Alianza or Maintco personnel intend to testify about
14 in order to impeach their eyewitness testimony. Similarly, argues Defendant, Plaintiffs'
15 assumption that Taco Bell intends to introduce into evidence at trial all of the emails
16 described in Taco Bell's supplemental privilege log, which constitute confidential
17 communications between defense counsel and Alianza or Maintco, is simply not true.

18 However, as discussed below, whether or not Alianza or Maintco personnel will
19 testify has no relevance to the question whether Defendant waived privilege by submitting
20 the Kane and Wright declarations in support of its opposition to Plaintiff's summary
21 judgment motion.

22 **2. The fact that Defendant does not intend to introduce privileged
23 materials into evidence is the reason for the waiver doctrine.**

24 Plaintiffs ask this Court to reject Defendant's argument that because it does not
25 intend to introduce privileged material at trial -- the very material that it is withholding and
26 that Plaintiffs' are moving to compel -- it has not waived the privilege with respect to that
27 material. See, e.g., Opp'n Br. at 17 (asserting that Defendant does not intend to introduce
28 at trial documents that it has withheld as privileged).

1 This argument turns the waiver-by-testimony doctrine on its head. Every case
2 involving this doctrine concerns documents that one party is withholding and thus does not
3 intend to introduce. Waiver is justified precisely because of the unfairness resulting from a
4 party submitting testimony while simultaneously withholding documents that its adversary
5 might need to contest that testimony. See, e.g. *John Doe Co. v. United States*, 350 F.3d
6 299, 303 (2d Cir. 2003)) ("the unfairness courts have found which justified imposing
7 involuntary forfeiture generally resulted from a party's advancing a claim to a court or jury . .
8 . while relying on its privilege to withhold from a litigation adversary materials that the
9 adversary might need to effectively contest or impeach the claim."). Thus the fact that a
10 defendant does not intend to introduce withheld material does not negate the waiver
11 doctrine -- to the contrary, that fact is the very reason for the doctrine.

12 Once again, *Nobles* is on point. The privileged document at issue in *Nobles* was the
13 defendant's investigator's report, which the defendant did not want to produce or use at
14 trial. Under Taco Bell's theory, the fact that the defendant did not intend to introduce the
15 report would mean that there was no waiver. This was not the holding of the Supreme
16 Court. Rather, it held that if defendant had its investigator testify, the defendant would
17 waive privilege as to any documents reasonably related to the testimony, including the
18 investigator's report. 422 U.S. at 240. Mr. Kane and Ms. Wright, like the defendant's
19 investigator in *Nobles*, have provided testimony on behalf of Defendant, and thus, as in
20 *Nobles*, Defendant has waived the privilege with respect to documents and information
21 reasonably related to their testimony.

22 **3. Defendant waived the privilege, not by arguing mootness, but by**
23 **submitting Mr. Kane's and Ms. Wright's testimony.**

24 Defendant argues that it has not waived the privilege by "the mere fact that Taco
25 Bell intends to invoke the mootness doctrine at trial . . ." Opp'n Br. at 16-17. Plaintiffs
26 agree. The Supreme Court in *Nobles* clearly delineated the types of acts that do, and do
27 not, result in waiver. For example, referring to notes or other internal materials during trial
28 does not waive the privilege. 422 U.S. at 239 n.14. Here, Plaintiffs do not argue that

1 Defendant waived the privilege simply by arguing mootness or by preparing notes or other
2 materials based on Mr. Kane's and Ms. Wright's work.

3 The Supreme Court, however, was equally clear that once a party elects to use
4 testimony in support of its position, then that party "waive[s] the privilege with respect to
5 matters covered in [that] testimony" Id. at 239. Here, it is undisputed that Defendant
6 submitted the testimony of Mr. Kane and Ms. Wright in support of its mootness argument,
7 and it has thus waived the privilege with respect to matters covered in that testimony.

8
9 **4. Defendant refused to permit Mr. Kane or Ms. Wright to answer**
10 **questions at deposition concerning the topics at issue.**

11 Defendant suggests, without legal support, that the fact that Plaintiffs deposed Mr.
12 Kane and Ms. Wright negates a finding of waiver. Opp'n Br. at 18. Defendant, however,
13 instructed these deponents not to answer questions concerning the topics at issue. See
14 Pls.' Mot. to Compel at 4. Plaintiffs therefore did not have any meaningful opportunity to
15 depose Kane and Wright on the subject matter of their declarations, so Defendant's waiver
16 is not mitigated.

17 **5. Defendant makes a number of irrelevant arguments:**

18 **a. For purposes of this motion, Plaintiffs do not contest that the**
19 **documents and information at issue are privileged.**

20 For purposes of their Motion, Plaintiffs do not dispute that the documents and
21 information they seek would be privileged if Defendant had not submitted the testimony of
22 Mr. Kane and Ms. Wright. Rather, they argue that by submitting this testimony, Defendant
23 waived the privilege. Again, this is identical to the situation in *Nobles*, in which there was no
24 dispute that the investigator's report was privileged and the issue turned on whether that
25 privilege was waived when the investigator testified. Thus Defendant's lengthy arguments
26 attempting to establish that the materials at issue are privileged are irrelevant to Plaintiffs'
27 Motion.

1 **b. A "substantial need" analysis is irrelevant.**

2 Under Rule 26(b)(3)(a)(ii) of the Federal Rules of Civil Procedure, some material
3 protected by the work-product privilege must be produced if the adversary demonstrates
4 substantial need for the material. Defendant argues that Plaintiffs have not shown
5 substantial need for the material at issue. This is both correct and irrelevant. Plaintiffs are
6 arguing that Defendant waived the privilege by submitting the testimony of Mr. Kane and
7 Ms. Wright, and the substantial need analysis has nothing to do with whether such waiver
8 occurred.

9 **c. Plaintiffs do not contend that Defendant's waiver resulted from**
10 **disclosing privileged material to third parties, so Defendant's argument**
11 **on this issue is pointless.**

12 Defendant spends several pages arguing that it has not waived the privilege by
13 disclosing privileged materials to Alianza and Maintco because these entities are "part of
14 the privileged circle" and were not a "conduit to Plaintiffs." Opp'n Br. at 14-15, 20-23. This
15 argument is irrelevant because Plaintiffs do not contend that Defendant waived the
16 privilege by disclosing privileged material to third parties. Rather, Plaintiffs contend that
17 Defendant waived the privilege by submitting Mr. Kane's and Ms. Wright's testimony in
18 support of its mootness argument.

19 **V. Conclusion**

20 For all the above reasons, Plaintiffs' motion to compel is granted. By submitting the
21 testimony of Wright and Kane in favor of its opposition to Plaintiffs' motion for summary
22 judgment and in support of its argument that Plaintiffs' claims are moot because the
23 restaurants have been brought into full compliance with the ADA and state disability law,
24 Defendant has waived privilege with respect to any other documents related to the Wright
25 and Kane declarations. Defendant may not proffer favorable information and conceal
26 potentially unfavorable information on the same subject by hiding behind a claim of
27 privilege. It may not use the Kane and Wright declarations as a sword to strike down
28 Plaintiffs' motion for summary judgment, while concealing potentially contradictory
documents behind the shield of privilege. Defendant shall produce documents responsive

1 to Plaintiffs' discovery requests which relate to the subject matter of the witnesses'
2 testimony: door opening force, queue lines, and accessible seating.

3

4 The parties shall meet and confer to develop a plan for Defendant to comply with the
5 Court's order as expeditiously as possible. The parties shall meet and confer to develop a
6 plan for Defendant's expeditious production of documents. Within ten days of issuance of
7 this order, the parties shall submit their plan to the Court.

8 IT IS SO ORDERED.

9 DATED: October 6, 2009

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JAMES LARSON
U.S. Magistrate Judge

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