

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 15-01330-JLS (KESx) Date December 28, 2016  
Title WIMO Labs, LLC v. eBay, Inc., et al.

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Present: The Honorable Karen E. Scott, United States Magistrate Judge

Jazmin Dorado

n/a

**Deputy Clerk**

**Court Reporter / Recorder**

**Attorneys Present for Plaintiffs:**

**Attorneys Present for Defendants:**

n/a

n/a

**Proceedings:** (In Chambers) **TENTATIVE RULING:**  
In Camera Review of Documents on Wimo's Privilege Log

The Court considered Wimo's November 30, 2016 privilege log and eBay's challenges to Wimo's claims that all of the logged documents are privileged attorney-client communications (at Dkt. 143-1, pp. 50-69) together with the emails lodged by Wimo for in camera review.

In this case where subject matter jurisdiction is based on a federal question, privilege issues are governed by federal common law. FRE 501. The attorney-client privilege protects communications between lawyers and clients, or agents of a client, where such communications are for the purpose of rendering legal advice. Upjohn Co. v. United States, 449 U.S. 383 (1981). The purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Id. at 389.

The Court makes the following findings with regard to Wimo's privilege claims:

**Log #1;5 – NOT PRIVILEGED**

While these emails may have been sent by Mr. Crosby for the purpose of soliciting representation and/or obtaining legal advice for himself or his business, the emails merely forward an article published online.

**Log #2;3;4 – NOT PRIVILEGED**

This email chain relates to the potential representation of Mr. Crosby by the Parris Law Firm. However, all messages are cc'd to a public relations consultant (Eric Rose). Copying a public relations consultant may or may not destroy the privilege, depending on the purpose of communicating with the consultant. See Grand Canyon Skywalk Dev. LLC v. Cieslak, 2015 U.S. Dist. LEXIS 107457 (D. Nev. Aug. 13, 2015) (discussing cases).

In Viacom, Inc. v. Sumitomo Corp. (In re Copper Mkt. Antitrust Litig.), 200 F.R.D. 213, 215 (S.D.N.Y. 2001), a Japanese corporate defendant hired a "crisis management" public relations firm, RLM, to be its spokesperson to the western media concerning the scandal arising out of the price-fixing

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lawsuit. All documents prepared by RLM relating to legal issues were vetted by Sumitomo's in-house counsel and/or outside counsel. Id. at 216. On these facts, RLM was the functional equivalent of an in-house public relations department, and copying RLM on communications between Sumitomo and its counsel did not destroy the attorney-client communication privilege. See also Schaeffer v. Gregory Village Partners, L.P., 78 F. Supp. 3d 1198, 1204 (N.D. Cal. 2015) ("Craig acted as the public face of the company and provided information to Gregory Village's legal staff that was useful and necessary to evaluate legal strategy for the company going forward. Craig acted as Gregory Village's functional employee for the purposes of the attorney-client privilege.").

In contrast, in Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54 (S.D.N.Y. 2000), plaintiff's counsel retained RLM for "communication services" in connection with their high-profile representation of Calvin Klein. The court found that counsel's communications with RLM which "simply provid[ed] ordinary public relations advice" were not communications for the purpose of rendering legal advice and were not privileged. Id.

Here, Mr. Rose was not hired by counsel. Nothing in the emails suggests that Mr. Crosby chose to include Mr. Rose in his communications with prospective counsel in order to obtain better-informed legal advice from the Parris Firm. Nothing suggests that Mr. Rose was performing public relations tasks for Mr. Cosby or The Counterfeit Report ("TCR") in connection with litigation that made him the functional equivalent of an employee of TCR for purposes of communicating with the Parris Firm. The purpose of Mr. Crosby's copying Mr. Rose appears to have been seeking ordinary public relations advice on how to turn contemplated litigation into favorable publicity for TCR.

eBay attached its challenges to Wimo's privilege log to its pending fee motion and explicitly challenged the claim of privilege for communications with Mr. Rose because he was an "unidentified third party." (Dkt. 143-1 at 50.) Wimo did not address this in its opposition. (Dkt. 146.) As the party asserting the privilege, it was Wimo's burden to show that the privilege applies. Wimo has not carried that burden.

Log #6 – NOT PRIVILEGED

This email does not relate to the prospective representation of Mr. Crosby by the Parris Firm. Rather, it concerns Mr. Crosby's efforts to "locate victims" who might become the Parris Firm's clients. This is not an attorney-client communication, and it is again cc'd to Mr. Rose.

Log #7;8;9;10;11;14;17 – NOT PRIVILEGED

These emails continue the subjects raised in Log #6 and concern Mr. Crosby and his attorney (not from the Parris Firm) attempting to arrange a meeting with the Parris Firm. Again, contrary to Wimo's log, they are not communications concerning the prospective representation of Mr. Crosby by the Parris Firm.

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Log #12;13;15;16 – NOT PRIVILEGED

These emails continue the communication chain in Log #6-11. Wimo's log says that these relate to the potential representation of Wimo. No employee or agent of Wimo, however, is cc'd, so the prospective attorney-client relationship between the Parris Firm and Wimo cannot be the basis for deeming these emails privileged.

Log #18 (and Log #19 which appears identical) – NOT PRIVILEGED

Wimo's log characterizes this email as relating to the prospective representation of a client other than Wimo by the Parris Firm. In fact, the email references Lunatik and other potential clients of the Parris Firm. Mr. Crosby is relaying to the Parris Firm information from conversations he had with those companies for the apparent purpose of assisting the Parris Firm in being retained. This is not an attorney-client communication.

Mr. Crosby apparently drafted "proposals" to the prospective clients that were "attached" to the original email, although no attachments were submitted for in camera review. Given Wimo's failure to log the attachments separately or provide them for in camera review, any claim of privilege as to the proposals has been WAIVED. In any event, communications between Mr. Crosby and prospective clients of the Parris Firm are not attorney-client communications. Wimo must produce the attachments.

Log #20 – NOT PRIVILEGED

Wimo's log characterizes this email as relating to the prospective representation of a client other than Wimo by the Parris Firm. In fact, the email references Wimo as a potential client of the Parris Firm. Again, Mr. Crosby is relaying to the Parris Firm information from conversations he had with counsel for Wimo and another prospective client for the apparent purpose of assisting the Parris Firm in being retained. This is not an attorney-client communication.

Log #21 – NOT PRIVILEGED

Wimo's log characterizes this email as relating to the prospective representation of a client other than Wimo by the Parris Firm. In fact, the email references Wimo (Lunatik) as a potential client of the Parris Firm. Again, Mr. Crosby is relaying to the Parris Firm information from conversations he had with prospective clients for the apparent purpose of assisting the Parris Firm in being retained.

Log #22 – NOT PRIVILEGED

Wimo's log characterizes this email as relating to the prospective representation of Wimo and consisting of counsel's graphic signature. Based on the date/time and the to/from/cc fields, the email the Court identified as Log #22 (because Wimo did not number the documents presented for in camera review, or correlate them to the log in any way) is an email chain that involves Mr. Crosby relaying to the Parris Firm information from conversations he had with prospective clients (including Wimo) for the apparent purpose of assisting the Parris Firm in being retained. It does include Mr. Parris's graphic signature, but includes other content as well.

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Log #23 – NOT PRIVILEGED

Wimo’s log characterizes this email as relating to the prospective representation of a client other than Wimo by the Parris Firm. The unique portions of this email chain do reference another prospective client (called “Client X” herein), but again, communications between Mr. Crosby and the Parris Firm for the purpose of assisting the Parris Firm in securing business from third parties are not attorney-client privileged communications.

Log #24;25;26;27;28;29;30;31;33;34;35;36;37;38;39;40;48 – NOT PRIVILEGED

These emails are part of a chain of communications about the Parris Firm potentially representing Client X. Because they involve Mr. Crosby, they are not attorney-client privileged communications.

Log #32 –NOT PRIVILEGED, BUT ONLY PARTIALLY RELEVANT

This is an email from the Parris Firm transmitting a draft engagement letter to Client X, cc’d to Mr. Crosby. The attachment was not submitted for in camera review. Wimo need only produce the portion of the attachment, if any, that discusses the role of Mr. Crosby in the proposed relationship between Client X and the Parris Firm.

Log #41 –NOT PRIVILEGED

Wimo’s log characterizes this email as relating to the prospective representation of a client other than Wimo, but nevertheless being a communication “regarding litigation strategy in this case and an unrelated action.” In fact, Mr. Crosby is relaying information to the Parris Firm that may assist the Parris Firm in litigation against eBay and others. The email does not discuss any potential clients of the Parris Firm. It is not an attorney-client communication.

Log #42 –NOT PRIVILEGED

Wimo’s log characterizes this email as relating to the prospective representation of a client other than Wimo, but the chain references Mike (presumably Mike Turner, Wimo’s counsel). Because they involve Mr. Crosby, they are not attorney-client privileged communications.

Log #43 –NOT PRIVILEGED

Wimo’s log characterizes this email as relating to the prospective representation of a client other than Wimo. In fact, Mr. Crosby is relaying information to the Parris Firm that may assist the Parris Firm in litigation against eBay on behalf of Client X.

Log #44;45;46 –NOT PRIVILEGED

Wimo’s log characterizes this email chain as relating to the prospective representation of Mr. Crosby by the Parris Firm. It does not. Mr. Crosby is apparently inquiring whether other prospective clients have retained the Parris Firm.

Log #47 –NOT PRIVILEGED

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Wimo's log characterizes this email as relating to the prospective representation of a client other than Wimo. In fact, the chain includes emails with Mike Turner, Wimo's counsel. The Parris Firm forwarded Mr. Turner's email to Mr. Crosby, thereby destroying the attorney-client privilege.

Log #49 –NOT PRIVILEGED

Wimo's log characterizes this email as relating to the prospective representation of a client other than Wimo. In fact, Mr. Crosby is inquiring whether Lunatik or Client X have engaged the Parris Firm.

Log #50;53 – NOT PRIVILEGED

Wimo's log characterizes this email as relating to the prospective representation of a client other than Wimo and consisting of counsel's graphic signature. Based on the date/time and the to/from/cc fields, the email the Court identified as Log #50 is an email chain that includes a reference to Mike Turner from Lunatik, as well as counsel's graphic signature and discussions about prospective Client X. Log #53 is solely counsel's graphic signature.

Log #51;52;54– NOT PRIVILEGED

Wimo's log characterizes these emails as relating to the prospective representation of Mr. Crosby by the Parris Firm. They do not. Wimo's log accurately (although inconsistently) says that the emails discuss the Parris Firm's prospective representation of Wimo and Client X.

Log #55;56;59;60– NOT PRIVILEGED

In this chain, Client X emailed Mr. Crosby declining to retain the Parris Firm, and Mr. Crosby emailed back (cc'ing his own attorney, Mr. Schaap, along with attorneys at the Parris Firm) addressing Client X's concerns. Because Mr. Crosby is not a lawyer or an agent of the Parris Firm or even a prospective co-party with Client X, these are not privileged attorney-client communications.

Log #57;58 – NOT PRIVILEGED

Wimo's log characterizes these emails as messages "reflecting an email from counsel to Crosby had been read." In fact, both appear to be messages to Mr. Crosby confirming to him that attorneys at the Parris Firm read emails he sent to them.

Log #61;62;63 – NOT PRIVILEGED

Wimo's log characterizes these emails as messages concerning the "actual representation of Wimo" and also "regarding a pending arbitration matter" involving TCR and eBay. In these emails, Mr. Crosby is forwarding to the Parris Firm communications (on which Mr. Crosby was copied) between an ADR agency and counsel for eBay. The emails do not mention Wimo (although the attachments, which were not produced for in camera review, might). Again, since Mr. Crosby was neither a client nor prospective client of the Parris Firm at the time of these communications, they are not attorney-client communications.

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Log #64 – PRIVILEGED, IN PART

The top email in this chain is an internal communication between lawyers at the Parris Firm and is privileged (although it relates to Client X, not the “actual representation of Wimo”). The remaining emails in the chain are Log #55 and are not privileged.

Log #65 – PRIVILEGED, IN PART

The top email in this chain is an internal communication between lawyers at the Parris Firm and is privileged. The remaining emails in the chain are between attorneys at the Parris Firm and Mr. Crosby concerning Lunatik products, so they are not privileged.

Log #66 – PRIVILEGED, IN PART

The top email in this chain is an internal communication between lawyers at the Parris Firm and Wimo’s representative and is privileged. The remaining emails in the chain are the same communications involving Mr. Cosby as in Log #65

Log #67 – NOT PRIVILEGED

Wimo’s log characterizes this email as relating to the “actual representation of Wimo” and consisting of counsel’s graphic signature. While it contains counsel’s graphic signature, it also has substantive content reflecting communications between the Parris Firm, Mr. Crosby and Mr. Rose trying to arrange a meeting with Mr. Rose.

Initials of Clerk jd