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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

RICHARD L. CHANG,

Plaintiff,

v.

BIOSUCCESS BIOTECH CO., LTD., and DOES 1–10,

Defendants.

BIOSUCCESS BIOTECH CO., LTD.,

Counterclaimants,

v.

RICHARD L. CHANG and DOES 1–10,

Counter-Defendants.

Case No. CV13-01340 JAK (ANx)

DEFENDANT BIOSUCCESS BIOTECH CO., LTD.'S REPLY ISO MOTION IN LIMINE **NO. 1** TO EXCLUDE EVIDENCE FROM OR RELATED TO JEFFREY KING

[SUPPL. LIANG DECL. FILED CONCURRENTLY HEREWITH]

[MOTION TO STRIKE KING DECLARATION FILED CONCURRENTLY]

Judge: Hon. John A. Kronstadt
Place: Courtroom 750
Date: June 2, 2014
Time: 3:00 p.m.

Trial: June 17, 2014

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff continues to run in circles, repeating the same arguments and raising the same issues regarding which this Court has already ruled against him. This Court held that Biosuccess is the **sole** holder of attorney-client privilege with Mr. King. Thus, the common interest exception does **not** apply and Mr. King is prohibited from testify about **post**-January 2013 matters.

Because Biosuccess is the sole holder of attorney-client privilege, the Court should likewise prohibit Mr. King from testifying about **pre**-January 2013 matters.

Finally, the argument by Plaintiff (and King) that Biosuccess has somehow misled the Court by producing "carefully redacted emails" is baseless. Defendant Biosuccess is ready and willing to submit for *in camera* inspection the two *complete, unredacted* attorney-client privileged February 2013 and May 2013 emails between Jeff King and Biosuccess, so long as such this is understood to not be a waiver of attorney-client privilege.

I. Plaintiff Does Not Meet the Standard For Reconsideration Of The Court's May 2 Order

Together with Jeff King, Plaintiff essentially attempts to re-argue his previous motion to compel regarding Jeff King's post-January 2013 documents and communications with Biosuccess. However, Plaintiff does not even try to meet the standards for reconsideration.

Under Local Rule 7-18, a motion for reconsideration may be made on the grounds of a ***material difference*** in fact or law from that presented to the Court, only when the exercise of ***reasonable diligence*** would not have

uncovered such information to the moving party at the time of the Court's decision. *See* L.R. 7-18. Plaintiff does not meet this standard.

First, Plaintiff failed to file a motion for reconsideration under L.R. 7-18. Instead, Plaintiff improperly raises reconsideration in Plaintiff's opposition to Biosuccess's motion *in limine* by asking the Court to reconsider its May 2, 2014 decision based on "new" evidence. Plaintiff should have followed the proper procedure and filed a noticed motion for reconsideration, which would allow Biosuccess to properly oppose. Because he failed to do so, all of Plaintiff's arguments for reconsideration, and all of the allegedly new evidence presented on that basis, should be disregarded.

Second, Plaintiff fails to meet the standard for reconsideration because there is no ***material difference*** in fact or law from what was originally presented to the Court. Instead, as has become almost commonplace in this litigation, Mr. King has again conveniently filed a statement to allege "new" information in support of Plaintiff's position. But this new declaration is nothing more than recitations of essentially the same arguments and information already presented. Information that this Court has ruled is protected by attorney-client privilege and was ***improperly*** disclosed by Mr. King the first time around. [*See* Liang Decl., ¶ 3, Exh. A at 7:3-5 ("I believe there's been disclosure of confidential attorney/client communications by Mr. King.")].].

Finally, Plaintiff fails to meet the ***reasonable diligence*** requirement for reconsideration. Mr. King is and has been apparently at Plaintiff's disposal and has been able and willing to make (unethical) statements and/or declarations in support of Plaintiff. Plaintiff cannot argue that, in the exercise of reasonable diligence, there is no way he could have uncovered this allegedly "new" information from Mr. King.

Plaintiff's assertion that he is "still unaware of the true facts" is unpersuasive. [Dkt No. 168 at 3:8]. Plaintiff produced documents showing that Mr. King has been providing legal advice **to Plaintiff himself**, while Mr. King intentionally concealing this fact from Biosuccess. Specifically, Susan Wanger, a paralegal who works for Mr. King, sent an August 2013 email to Ben Chang with draft assignment documents for Plaintiff to assign the '814 Patent and other patent rights at issue in this case to Richard L. Chang Holdings LLC. [*See* Suppl. Liang Decl., ¶ 3, Exh. S (Email from Susan Wanger, who works for Jeff King, to Ben Chang for Richard Chang's assignment to Richard Chang Holdings); ¶ 4, Exh. T (Email chain from Susan Wanger to Biosuccess counsel – showing Susan Wanger works for Jeff King)]. Mr. King caused these documents to be sent **before** he was terminated by Biosuccess in September or October 2013. Hence, it is **Biosuccess** and not Plaintiff who has been and continues to be in the dark about the ongoing unethical relationship between Plaintiff and King.

Because Plaintiff failed to file a proper motion for reconsideration and likewise does not meet the standard for reconsideration under the Local Rules, all arguments set forth in support of reconsideration, and all allegedly new evidence, must be disregarded.

II. Matters Prior to January 2013 Are Also Privileged As to Biosuccess

The Court held that Biosuccess is the **sole** holder of attorney-client privilege with Mr. King [*See* Dkt No. 144 at 17], and that the common interest exception does **not** apply [*Id*]. Following this determination, the Court prohibited Mr. King from testifying about **post**-January 2013 matters. [*Id*. at 19]. Because Biosuccess is the sole holder of attorney-client privilege,

the Court should likewise prohibit Mr. King from testifying about **pre**-January 2013 matters.

Plaintiff attempts to circumvent the Court's ruling by analogizing this case to a whistleblower action for retaliatory termination.[1] However, ***Plaintiff's claim in this litigation is not for retaliatory termination***—in fact, the Opposition to MIL No. 1 is the first time Plaintiff (or his son) ever raised such a claim for retaliatory termination.

In any event, Plaintiff's argument is unpersuasive for the following reasons. **First**, Plaintiff asserts that he made statements to Mr. King that support a whistleblower action – "Plaintiff was fired for raising questions about the financials and other missing records" [Dkt No. 168 at 3:17-19], and that Plaintiff and Ben Chang were "the individuals communicating directly with Attorney King" [Dkt No. 168 at 4:1-3].

Yet, Plaintiff then contradicts what he supposedly told Mr. King -- namely "facts" about patent prosecution, which makes sense since Mr. King was hired as Biosuccess's patent attorney. [Dkt No. 168 at 4:4-7 (Plaintiff and Ben Chang "were communicating facts with Attorney King, and ***much of the results of those communications*** ended up in the public record before the U.S. Patent and Trademark Office.") (emphasis added)]. Clearly, any information related to the Changs' termination would not have ended up in the USPTO filings or in their communications with King.

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[1] The "facts" Plaintiff asserts regarding this whistleblower argument are entirely unsupported and also in violation of the Local Rules. "Factual contentions involved in any motion and opposition to motions shall be presented, heard, and determined upon declarations and other written evidence . . . alone." L.R. 7-6.

Plaintiff submits no declarations from himself for his son, relying simply on rhetoric and inflammatory assertions, none of which are supported by a shred of evidence, to support his arguments. This cannot stand.

Second, Plaintiff's reliance on *Becker* to argue waiver of attorney-client privilege is equally unpersuasive. [Dkt No. 168 at 3-4]. *Becker* involved a whistleblowing case where the plaintiff was allowed to testify as to ***her own*** communications with corporate counsel. *Becker v. Willamette Cmty. Bank*, 2013 U.S. Dist. LEXIS 71529 at *4. This does not support the situation here, where Plaintiff is asserting that ***King*** should be allowed to testify about his communications with Biosuccess.

In fact, *Becker* cites cases that support Biosuccess's position – namely that confidential communications between a company client and its counsel are privileged and ***cannot*** be disclosed to a third party litigant (including a former employee). *See Becker*, 2013 U.S. Dist. LEXIS 71529 at ** 6-7 (citing *Ross v. City of Memphis*, 423 F.3d 596, 604-05 (6th Cir. 2003) (municipal employer could assert privilege to prevent disclosure of legal advice given to defendant police officer by employer's attorneys)); *Fitzpatrick v. Am. Int'l Group, Inc.*, 272 F.R.D. 100, 102-103, 109, n.6 (S.D.N.Y 2010) (attorney-client privilege asserted by corporation barred former officer and director's request for documents reflecting "any privileged communications between [the corporation] and corporate counsel dating from when [plaintiff] was President and Board member," including documents "he once authored or received or otherwise viewed while serving as President and Board member"); *Winans v. Starbucks Corp*, 2010 WL 5249100 at *2-3 (S.D.N.Y. Dec. 15, 2010) (attorney-client privilege prohibited disclosure of communications between employees and corporate counsel regarding the execution of employee declarations prepared for litigation).

The communications between Biosuccess and King are privileged. Biosuccess alone holds this privilege, which it never waived. Despite Plaintiff's far-reaching efforts to create an exception to the attorney client

privilege, none apply. Biosuccess's communications with Mr. King, including those **prior** to January 2013—even if made thru the Changs—remain confidential.

III. A Rule 104 Hearing Is Unnecessary

A Rule 104 hearing is not only unnecessary, but a waste of the parties' time as well as the Court's time. This Court has already been briefed on, heard oral argument on, and ruled on the identical issues that Plaintiff now seeks to rehash. [*See* Dkt No. 144 (Court's May 2, 2014 Order)]. As shown above, Plaintiff has failed to meet the standard for reconsideration. Moreover, even if Plaintiff could meet such a standard, King's new declaration raises no new issues that change the fact that his communications with Biosuccess are privileged, as this Court has already found.

CONCLUSION

For the foregoing reasons, the Court should exclude testimony, documents, and any other evidence by or from Biosuccess's former patent counsel Jeffrey King, or which is derived from a violation of attorney-client privilege or other transgression of rule of professional conduct.

Dated: May 19, 2014

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By: */s/ Enoch H. Liang*
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