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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CITY OF ROSEVILLE EMPLOYEES'  
RETIREMENT SYSTEM,

Plaintiff,

v.

APPLE INC., et al.,

Defendants.

Case No. 19-cv-02033-YGR (JCS)

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
COMPEL**

Re: Dkt. No. 227

**I. INTRODUCTION**

Plaintiff brings a Motion to Compel Production of Documents as Privileged (“Motion”), asserting that Defendants have failed to justify their assertion of attorney-client privilege as to five categories of documents listed in their privilege logs. A hearing on the Motion was held on April 15, 2022 and after additional meet-and-confer efforts that reduced the number of documents in dispute from 451 to 232, the parties submitted supplemental briefs. They also lodged the documents that remained in dispute with the Court and the undersigned has reviewed *in camera* a sample of those documents. A second hearing was held on July 29, 2022. The Court sets forth below rulings on certain legal issues that bear on the dispute, and its rulings on certain sample documents that the Court has reviewed. Using this guidance, Apple is ordered to review the remaining documents in dispute, produce all documents that are not privileged under the guidance issued today, produce the supplemental declarations permitted below, and then meet and confer with Plaintiff in an effort to resolve any remaining disputes.

**II. BACKGROUND**

**A. The Underlying Action**

United States District Court  
Northern District of California

1 CEO, Tim Cook, and CFO Luca Maestri based on allegedly fraudulent and misleading statements  
 2 Cook and Maestri made on November 1, 2018 describing Apple’s performance in China with  
 3 respect to the sale of iPhones. *See* Revised Consolidated Class Action Complaint for Violation of  
 4 the Federal Securities laws (Dkt. 114) (“Complaint”) ¶¶ 54-56. The Complaint alleges that shortly  
 5 after these statements were made, on November 5, 2018, the Nikkei Asian Review published an  
 6 article (“the Nikkei article”) reporting that Apple was cutting production of iPhones, contradicting  
 7 these earlier statements about strong demand for iPhones in China. *Id.* ¶ 68.

8 Then, Plaintiff alleges, on January 2, 2019, “after the close of trading, Apple disclosed the  
 9 true condition of its business, including the impact of deteriorating economic conditions in China,  
 10 among its largest growth markets, and demand for the iPhone.” *Id.* ¶ 33. This preannouncement  
 11 was made in the form of a “Letter from Tim Cook to Apple Investors” (“Investor Letter”) and  
 12 informed investors that “revenue for 1Q19 was expected to be \$84 billion, far below the guidance  
 13 range of \$89 to \$93 billion [Apple] had announced on November 1, 2018.” *Id.* ¶ 34. This  
 14 shortfall was attributed, in part, to an unanticipated “economic deceleration, particularly in Greater  
 15 China[,]” where iPhone sales had been “poor” in 2018. *Id.* ¶¶ 34-35.

16  
 17 **B. Meet-and-Confer Efforts Related to the Privilege Dispute Prior to April 15, 2022  
 Hearing**

18 On April 16, 2021, the undersigned ordered the parties to agree on search terms in  
 19 connection with Plaintiff’s First Set of Requests for Production of Documents and for Defendants  
 20 to complete production of all responsive non-privileged documents found through this  
 21 search process by July 15, 2021. Dkt. 158. In part due to disputes about which custodians should  
 22 be included in the search, Defendants’ production of documents continued well beyond the July 15  
 23 deadline. According to Plaintiff, while Apple had produced approximately 317,000 documents by  
 24 that deadline, it produced another 192,241 documents between September 23, 2021 and October  
 25 25, 2021 and 90,042 additional documents between January 14, 2022 and February 21, 2022. *See*  
 26 Dkt. 228 at ECF p. 5. Defendants admit that by the July 15, 2021 deadline, they had produced just  
 27 a little over half of the documents that ultimately were produced. Opposition at 2 (citing Winawer  
 28 Deal ¶ 2). Under the Court’s Case Management Order, the deadline for “substantial completion

1 of document discovery” was January 14, 2022. Dkt. 128,

2 On November 24, 2021, Defendants produced an initial privilege log, in PDF format, for  
3 documents withheld or redacted from this production. Black Decl. ¶ 4. They produced the same  
4 privilege log in Excel format on December 21, 2021. *Id.* According to Plaintiff’s counsel, these  
5 privilege logs did not list attachments to withheld documents. *Id.* Plaintiff’s counsel met and  
6 conferred with Defendants’ counsel by telephone on December 21, 2021 and objected to “the  
7 conclusory nature and lack of detail supporting Defendants’ privilege assertions.” *Id.* ¶ 5. This  
8 was followed on January 19, 2022 by a letter from Plaintiff’s counsel with an itemized  
9 list of objections to the latest privilege log and, two days later, another telephone meet-and-confer  
10 between counsel. *Id.* ¶ 6.

11 According to Plaintiff, on February 3, 2022, Defendants produced a new privilege log  
12 which “added a field for email subjects, a field that was absent from prior versions of the privilege  
13 log.” *Id.* ¶ 7. The February 3, 2022 privilege log also listed attachments to withheld documents,  
14 for the first time. *Id.*

15 The parties met and conferred again on February 14, 2022. *Id.* ¶ 9. Although the parties  
16 were able to resolve their dispute as to two of Plaintiff’s objections, many disputes remained and  
17 the parties agreed to file a joint discovery letter as to those. *Id.* Defendants produced an updated  
18 privilege log on February 23, 2022. *Id.* ¶ 11. The parties filed the joint discovery letter (“Joint  
19 Discovery Letter”) the next day. Dkt. 227. After reviewing the parties’ Joint Discovery Letter, the  
20 undersigned requested full briefing of the parties’ dispute.

### 21 C. The Motion

22 In the Motion, Plaintiff contends Defendants have improperly asserted attorney-client  
23 privilege as to the following five categories of documents: 1) documents related to the Investor  
24 Letter that Defendants claim are privileged because they were created at the behest of Apple in-  
25 house counsel (Black Decl., Ex. 1); 2) two documents related to the Nikkei article about supplier  
26 cuts that Defendants redacted, first asserting the redactions were of material concerning “contract  
27 issues” and subsequently claiming the redacted material reflected “legal advice from in-house  
28 counsel David Tompkins regarding” the Nikkei article (Black Decl. Ex. 2); 3) emails that

1 were received by groups whose individual members have not been identified (Black Decl., Ex. 3);  
 2 4) seven unsent documents in files of Tim Cook, Tejas Gala and Adam Talbot, who are not  
 3 lawyers, as to which Defendants claim privilege on the basis that they contain legal advice from  
 4 unidentified in-house counsel (Black Decl., Ex. 4); 5) 209 email attachments as to which Plaintiff  
 5 claims the assertion of privilege is either facially improper based on the description provided or do  
 6 not contain a sufficient description to determine if the document is privileged. (Black Decl., Exs.  
 7 5a & 5b).

8 Defendants opposed the Motion as to all five categories of documents and offered  
 9 declarations in support of their privilege assertions by Apple Discovery Manager Robin Goldberg  
 10 and Apple in-house counsel Sam Whittington. Dkt. 233.

#### 11 **D. The April 15, 2022 Hearing**

12 At the April 15, 2022 motion hearing, the Court found that the declarations supplied by  
 13 Defendants in support of their assertion of attorney-client privilege were insufficient. It ordered  
 14 Defendants to provide to Plaintiff “for each withheld document listed in the exhibits attached to  
 15 Plaintiff’s motion: 1) if not already produced, a redacted version of the document that redacts out  
 16 any advice that was sought or given primarily for a legal purpose; and 2) a declaration by the  
 17 attorney whose advice was sought or given establishing that the redacted material was primarily  
 18 for a legal purpose.” Dkt. 238. The Court further ordered that “[w]ith respect to attached  
 19 documents, the declaration should establish that disclosure of the redacted material will  
 20 necessarily reveal an attorney’s legal advice or a request for legal advice or is otherwise  
 21 privileged.” *Id.* The Court also set a schedule for additional meet and confer efforts and  
 22 supplemental briefing as to any remaining disputes following those efforts. *Id.*

#### 23 **E. Results of Meet and Confer and Supplemental Briefs Addressing Remaining** 24 **Disputes**

25 On May 13, 2022, Defendants supplied the following additional declarations in support of  
 26 their claims of privilege: 1) Declaration of Katherine Adams Regarding Documents Withheld as  
 27 Privileged (Black Supp. Decl., Ex. 9 (Adams Decl.)); 2) Declaration of David Tom Regarding  
 28 Documents Withheld as Privileged (Black Supp. Decl., Ex. 17 (Tom Decl.)) and 3) Declaration of

1 Sam Whittington Regarding Documents Withheld as Privileged (Black Supp. Decl., Ex. 18  
 2 (Second Whittington Decl.). Black Supp. Decl. ¶ 2. The parties met and conferred and Defendants  
 3 supplied supplemental declarations by Whittington and Adams on June 15, 2022. *See* Black Supp.  
 4 Decl., Exs. 10 (Adams Supp. Decl.) & 19 (Whittington Supp. Decl.). As a result of their post-  
 5 hearing meet and confer efforts, the parties reduced the number of documents in dispute from 451  
 6 documents to 232. Black Supp. Decl. ¶ 15. They have now filed supplemental briefs addressing  
 7 their remaining disputes. *See* Dkt. 246-3, 248.

### 8 III. ANALYSIS

#### 9 A. Legal Standards

10 “Issues concerning application of the attorney-client privilege in the adjudication of federal  
 11 law are governed by federal common law.” *United States v. Ruehle*, 583 F.3d 600, 608 (9th Cir.  
 12 2009) (citations and internal quotations omitted). The party asserting the privilege has the burden  
 13 of establishing the privileged nature of the communication. *Id.* “Because it impedes full and free  
 14 discovery of the truth, the attorney-client privilege is strictly construed.” *Id.* at 607 (internal  
 15 quotations and citation omitted). “[A]ttorney declarations generally are necessary to support the  
 16 designating party’s position in a dispute about attorney-client privilege.” *Dolby Lab ’ys Licensing*  
 17 *Corp. v. Adobe Inc.*, 402 F. Supp. 3d 855, 865 (N.D. Cal. 2019).

18 “The attorney-client privilege protects confidential communications between attorneys and  
 19 clients, which are made for the purpose of giving legal advice.” *United States v. Sanmina Corp.*,  
 20 968 F.3d 1107, 1116 (9th Cir. 2020). Federal courts apply an eight-part test to determine if a  
 21 communication is subject to attorney-client privilege. *Id.* Under that test, attorney-client privilege  
 22 applies “(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his  
 23 capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by  
 24 the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the  
 25 legal adviser, (8) unless the protection be waived.” *United States v. Ruehle*, 583 F.3d at 607  
 26 (internal quotations and citations omitted).

27 The Ninth Circuit has recognized that “some communications might have more than one

28 “some” *United States v. Ruehle*, 583 F.3d at 607, 608 (9th Cir. 2020). There are two potential tests

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