UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Howington v. Taiwan Semiconductor Manufacturing Co., Ltd.

Howington · No. 24-cv-05684-VKD · Decided September 8, 2025

SUMMARY

The United States District Court for the Northern District of California addresses a discovery dispute concerning plaintiffs’ claims of attorney-client privilege, work-product protection, and the common interest doctrine. The court finds that the record is insufficient to resolve the dispute and directs plaintiffs to amend their privilege log, while permitting further briefing or in camera review if disagreements remain. The court also orders the parties to propose a briefing schedule and states that no party may resist deposition discovery solely because the privilege dispute remains unresolved.

CASE DETAILS

COURT	United States District Court for the Northern District of California
WRITING FOR THE COURT	Virginia K. DeMarchi
JURISDICTION	United States District Court for the Northern District of California
DECIDED	September 8, 2025
DOCKET	24-cv-05684-VKD
DISPOSITION	other
PROCEDURAL POSTURE	The parties submitted an expedited discovery dispute concerning plaintiffs' claims of attorney-client privilege, work-product protection, and the common-interest doctrine in response to defendants' document requests.
STANDARD OF REVIEW	The court applied the burdens governing claims of attorney-client privilege and work-product protection, including the requirement that the asserting party establish the protection and adequately describe withheld materials under Federal Rule of Civil Procedure 26(b)(5)(A). Requests for in camera review are committed to the court's discretion after the requesting party makes the required showing.
PRECEDENTIAL VALUE	Unpublished federal district court discovery order; persuasive value only.

PARTIES	Deborah Howington, et al., Plaintiffs v. Taiwan Semiconductor Manufacturing Co., Ltd., et al., Defendants

TOPICS

discovery dispute · attorney client privilege · work product doctrine · class actions · civil procedure

PRACTICE AREAS

civil procedure · evidence · commercial litigation

QUESTIONS PRESENTED

1. Whether the record was sufficient to determine whether communications among named plaintiffs were protected by attorney-client privilege or work-product protection.
2. Whether communications between named plaintiffs and absent putative class members were privileged or protected, or whether disclosure waived any protection.
3. Whether plaintiffs established that the common-interest doctrine preserved privilege or protection for communications shared with absent class members or other non-parties.
4. Whether the privilege log adequately described the withheld materials as required by Federal Rule of Civil Procedure 26(b)(5)(A).
5. Whether defendants were entitled to immediate in camera review of the disputed communications.

HOLDINGS

1. The court could not fully resolve the discovery dispute because plaintiffs had not supplied sufficient communication-specific information establishing the asserted privilege or protection and the privilege log did not clearly identify all disputed entries.
2. Communications among jointly represented named plaintiffs may be privileged or protected even when counsel did not participate, but only if the communication was privileged or protected in the first instance and concerned the common representation or a common legal interest.
3. Absent putative class members generally are not clients of class counsel merely because they may become members of a certified class; before certification, pre-certification communications with potential class members are generally not privileged unless plaintiffs establish a separate attorney-client relationship.
4. A shared interest in the filing or outcome of litigation, without a demonstrated common legal interest and communication made to further that interest, is insufficient to invoke the common-interest doctrine.
5. Disclosure of work product to a third party does not necessarily waive protection, but waiver occurs when disclosure is made to an adversary or in a manner that substantially increases the opportunity for potential adversaries to obtain the work product; plaintiffs did not make the required showing.
6. The court did not order immediate in camera review; defendants could renew the request after further development of the record, or the parties could stipulate to submission of a representative sample.

KEY QUOTATIONS

> *"The doctrine does not create a privilege but comes into play only if a privilege or protection already covers the material disclosed to the third party."* (at 2)

> *"A shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within [the common interest] exception to the ordinary rules of waiver that govern attorney-client privilege."* (at 5)

FACTUAL BACKGROUND

Defendants requested plaintiffs' communications with any person concerning the claims and allegations in the action, including communications among named plaintiffs, with absent putative class members, and with other non-parties. Plaintiffs withheld or redacted some communications, asserting attorney-client privilege, work-product protection, and the common-interest or joint-prosecution doctrine. The privilege log supplied for Deborah Howington contained approximately 56 entries, but it was unclear which entries were disputed and whether the claimed protections applied to each communication.

PROCEDURAL HISTORY

Defendants served requests for communications concerning plaintiffs' claims and allegations. Plaintiffs withheld or redacted communications based on privilege and work-product objections and invoked the common-interest or joint-prosecution doctrine. The court found the record insufficient to resolve the dispute, ordered plaintiffs to amend their privilege log, and allowed further briefing and possible in camera review if the dispute continued.

DISPOSITION

other

CASES CITED

- United States v. Sanmina Corp., 968 F.3d 1107, 1116, 1119, 1121 (9th Cir. 2020)
- United States v. Ruehle, 583 F.3d 600, 607, 612 (9th Cir. 2009)
- United States v. Martin, 278 F.3d 988, 999-1000 (9th Cir. 2002)
- United States v. Richey, 632 F.3d 559, 567 (9th Cir. 2011)
- In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management), 357 F.3d 900, 907 (9th Cir. 2004)
- Admiral Ins. Co. v. U.S. Dist. Ct., 881 F.2d 1486, 1494 (9th Cir. 1989)
- Weil v. Inv./Indicators, Research & Mgmt., Inc., 647 F.2d 18, 25 (9th Cir. 1981)
- In re Pacific Pictures Corp., 679 F.3d 1121, 1129 (9th Cir. 2012)
- Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575, 578-579 (N.D. Cal. 2007)
- In re Grand Jury Investigation, 974 F.2d 1068, 1072-1075 (9th Cir. 1992)
- United States v. Zolin, 491 U.S. 554, 572 (1989)
- Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont., 408 F.3d 1142, 1148 (9th Cir. 2005)
- Apple Inc. v. Samsung Elecs. Co., 306 F.R.D. 234, 237 (N.D. Cal. 2015)

- Telectronics Proprietary, Ltd. v. Medtronic, Inc., 836 F.2d 1332, 1338 (Fed. Cir. 1987)
- Parks v. Eastwood Ins. Servs., Inc., 235 F. Supp. 2d 1082, 1084 (C.D. Cal. 2002)
- HBOC, Inc. Sec. Litig., 126 F. Supp. 2d 1239, 1245 (N.D. Cal. 2000)
- In re Apple Inc. Device Performance Litig., No. 18-md-02827-EJD, 2018 WL 4998142, at *4 (N.D. Cal. Oct. 15, 2018)
- In re Lidoderm Antitrust Litig., No. 14-MD-02521-WHO, 2016 WL 861019, at *4 (N.D. Cal. Mar. 7, 2016)
- Gross v. Scottsdale Ins. Co., No. 24-cv-02069-EJD (VKD), 2025 WL 885853, at *3 (N.D. Cal. Mar. 21, 2025)
- RJ v. Cigna Health & Life Ins. Co., No. 20-cv-02255-EJD (VKD), 2023 WL 187565, at *1 (N.D. Cal. Jan. 13, 2023)

OPINION

Howington v. Taiwan Semiconductor Manufacturing Co., Ltd.

PER CURIAM.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

DEBORAH HOWINGTON, et al., Case No. 24-cv-05684-VKD Plaintiffs,

ORDER RE AUGUST 6, 2025

v. DISCOVERY DISPUTE RE

PLAINTIFFS' PRIVILEGE CLAIMS

TAIWAN SEMICONDUCTOR

MANUFACTURING CO., LTD., et al., Re: Dkt. No. 85 Defendants. The parties ask the Court to resolve a dispute concerning plaintiffs’ reliance on the common interest doctrine with respect to several categories of communications. Dkt. No. 85. The Court finds this dispute suitable for resolution without oral argument. Civil L.R. 7-1(b). The Court is unable to fully resolve this dispute on the record presented and orders further proceedings, as specified below.

I. BACKGROUND

Defendants Taiwan Semiconductor Manufacturing Co. Ltd., TSMC North America, TSMC Technology, Inc., TSMC Arizona Corporation, and TSMC Washington, LLC (collectively, “TSMC” or “defendants”) served document requests asking plaintiffs to produce all of their communications “exchanged with any person”—including another named plaintiff or another member of the putative class—regarding plaintiffs’ claims and allegations in this action. Dkt. No. 85 at 1 (citing Dkt. No. 85-1, defendants’ RFPs 8-16). As pertinent to this dispute, plaintiffs object to producing certain responsive communications, or portions of those communications, on the grounds that they contain information protected from disclosure by the attorney-client responses to RFPs 8-16). Plaintiffs argue that these communications are also subject to the “common interest/joint prosecution privilege.” Id. TSMC argues that plaintiffs have not established that any privilege or protection applies, and they argue further that any such privilege or protection has been waived by disclosure to non-parties. Id. at 2-3. Alternatively, TSMC asks the Court to review the disputed documents in camera. Id. at 3. The parties attach plaintiffs’ privilege log for one named plaintiff, Deborah Howington, which appears to include 56 entries. Dkt. No. 85-2. It is not entirely clear which of these 56 entries are disputed.

II. LEGAL STANDARD

“The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice.” United States v. Sanmina Corp., 968 F.3d 1107, 1116 (9th Cir. 2020).[1] The privilege extends to a client’s confidential disclosures to an attorney in order to obtain legal advice, as well as an attorney’s advice in response to such disclosures. United States v. Ruehle, 583 F.3d 600, 607 (9th Cir. 2009) (citations and quotations omitted). In the Ninth Circuit, whether information is protected by the attorney-client privilege is determined using an eight-part test: Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived. Sanmina, 968 F.3d at 1116. “Because it impedes full and free discovery of the truth, the attorney- client privilege is strictly construed.” Ruehle, 583 F.3d at 607 (citations and quotations omitted). The party claiming the privilege has the burden to establish that it applies. See United States v. Martin, 278 F.3d 988, 999-1000 (9th Cir. 2002). The work product doctrine protects from discovery materials prepared by a party or his representative in anticipation of litigation. United States v. Richey, 632 F.3d 559, 567 (9th Cir. 2011). To qualify for work-product protection, documents must: (1) be prepared in anticipation of litigation or for trial and (2) be prepared ‘by or for another party or by or for that other party’s representative. In re Grand Jury Subpoena (Mark Torf/Torf Env’t Mgmt, 357 F.3d 900, 907 (9th Cir. 2004). “The doctrine protects both ‘material prepared by agents for the attorney as well as those prepared by the attorney himself,’ and its primary purpose is to ‘prevent exploitation of a party’s efforts in preparing for litigation.’” Entangled Media, LLC v. Dropbox Inc., No. 23-cv- 03264-PCP (VKD), 2025 WL 1069896, at *2 (N.D. Cal. Apr. 8, 2025) (quoting Sanmina, 968 F.3d at 1119, and Admiral Ins. Co. v. U.S. Dist. Ct., 881 F.2d 1486, 1494 (9th Cir. 1989)). The party resisting production of material based on work product protection bears the burden of proving that the protection applies. See Hernandez v. Tanninen, 604 F.3d 1095, 1102 (9th Cir. 2010). The voluntary disclosure of privileged or protected information to a third party ordinarily waives that privilege or protection. Ruehle, 583 F.3d at 612; Weil v. Inv./Indicators, Research & Mgmt., Inc., 647 F.2d 18, 25 (9th Cir. 1981). The “common interest” or “joint defense” doctrine is an exception to ordinary waiver rules that applies when parties, who are

[1] As all of plaintiffs’ claims in this action are based on alleged violations of federal statutes,

not jointly represented, 17 communicate in confidence about a matter of common legal interest, and where the 18 communication is made in furtherance of that common legal interest. See In re Pac. Pictures 19 Corp., 679 F.3d 1121, 1129 (9th Cir. 2012); Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575, 20 578 (N.D. Cal. 2007). The doctrine does not create a privilege but comes into play only if a 21 privilege or protection already covers the material disclosed to the third party. In re Pac. Pictures 22 Corp., 679 F.3d at 1129; see also Nidec, 249 F.R.D. at 578-79 (describing boundaries and 23 application of common interest doctrine). 24 A party challenging application of the attorney-client privilege or work product protection 25 may request in camera review, but only if the party establishes that such review is warranted. See 26 In re Grand Jury Investigation, 974 F.2d 1068, 1074 (9th Cir. 1992). "To empower the district 27 court to review the disputed materials in camera, the party opposing the privilege need only show 1 reveal evidence that information in the materials is not privileged. If the party makes such a 2 showing, the decision whether to conduct the review rests within the discretion of the district 3 court." Id. at 1075; see also id. at 1072-1075 (citing United States v. Zolin, 491 U.S. 554, 572 4 (1989)). The court's discretion is guided by the following factors: (a) the amount of material to be 5 reviewed, (b) the relevance of the material to the case, and (c) the likelihood that in camera review 6 will reveal evidence establishing that the material is not privileged. Id. at 1073 (citing Zolin, 491 7 U.S. at 572 (listing factors)).

8 III. DISCUSSION

9 This dispute concerns three categories of communications: (1) named plaintiffs' 10 communications among themselves; (2) named plaintiffs' communications with unnamed 11 members of the putative classes (i.e. "absent class members"); and (3) named plaintiffs' 12 communications with non-parties who are not within the scope of the putative classes. The Court 13 addresses each disputed category separately. 14 A. Communications Among Named Plaintiffs Only 15 All named plaintiffs are jointly represented by plaintiffs' counsel of record in this action. 16 Communications between and among jointly represented clients may be privileged or otherwise 17 protected from disclosure, even if counsel is not a participant, but only if the information withheld 18 from production is, in fact, privileged or protected in the first instance and concerns the common 19 representation or a matter of common legal interest. 20 A party asserting privilege or work product protection must "describe the nature of the 21 documents . . . in a manner that, without revealing information itself privileged or protected, will 22 enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A); see also Burlington N. & 23 Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont., 408 F.3d 1142, 1148 (9th Cir. 2005). The 24 Ninth Circuit has held a party meets its burden by providing a privilege log that identifies "(a) the 25 attorney and client involved, (b) the nature of the document, (c) all persons or entities shown on 26 the document to have received or sent the document, (d) all persons or entities known to have been 27 furnished the document or informed of its substance, and (e) the date the document was generated, 1 F.2d 885, 888 n.3 (9th Cir. 1989)). However, a party may substantiate a claim of privilege by 2 other means.

Apple Inc. v. Samsung Elecs. Co., 306 F.R.D. 234, 237 (N.D. Cal. 2015) (“Briefs, declarations or other proof may establish the purpose of the communication or the specific role of the sender and each individual recipient.”). Here, plaintiffs argue, correctly, that communications exchanged among named plaintiffs that include legal advice or attorney work product may retain their protections by operation of the common interest doctrine. However, they have not provided sufficient information for the Court to determine whether the privilege or protection applies in the first instance to a particular communication. Moreover, plaintiffs do not address, on a communication-by-communication basis whether, at the time of the alleged disclosure, all parties to a particular communication were, in fact, jointly represented by counsel of record. See, e.g., Dkt. No. 85-2, line 3, describing communication as “[m]essages between Howington and Fisher (putative class member, now Plaintiff) . . . .”). It is not sufficient for plaintiffs to suggest, without further elaboration or support, that putative class members who were not represented jointly with a named plaintiff at the time of the communication nevertheless “believed” their “interests” were represented by plaintiffs’ counsel of record. See Dkt. No. 85 at 5 n.2. Attorneys represent clients, not interests. See Telectronics Proprietary, Ltd. v. Medtronic, Inc., 836 F.2d 1332, 1338 (Fed. Cir. 1988).

B. Communications Between Named Plaintiffs and Putative Class Members

As with communications among named plaintiffs, plaintiffs must establish that their disputed communications with absent class members are privileged or protected in the first instance. Plaintiffs do not dispute that absent class members are not clients of plaintiffs’ counsel merely because they are potential members of a class that may be certified. See Dkt. No. 85 at 3, 5. Most courts agree that absent class members become clients of class counsel when the class is certified but not before. See Parks v. Eastwood Ins. Servs., Inc., 235 F. Supp. 2d 1082, 1084 (C.D. Cal. 2002) (collecting authority). While plaintiffs’ counsel owes a “generalized duty” to absent class members prior to certification, the existence of such a duty “does not create an inviolate HBOC, Inc. Sec. Litig., 126 F. Supp. 2d 1239, 1245 (N.D. Cal. 2000); see also ABA Formal Op. 07-445 (“A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired.”). Indeed, potential class members who are not named plaintiffs are considered unrepresented parties, and while pre-certification communications with such potential class members are generally permitted, see In re Apple Inc. Device Performance Litig., No. 18-md-02827-EJD, 2018 WL 4998142, at *4 (N.D. Cal. Oct. 15, 2018), they are also generally not privileged. While plaintiffs are correct that nothing prevents their counsel from separately establishing an attorney-client relationship with an absent class member, see Dkt. No. 85 at 5, the Court does not merely assume that such a relationship has been established; plaintiffs must show that it has been. On the record presented, plaintiffs have not shown that their counsel of record had an attorney-client relationship with any absent class member involved in the disputed communications at the time those communications were exchanged. For communications alleged to contain attorney-client privileged information, disclosure to non-parties outside of the attorney-client relationship (such as absent class members) destroys the privilege, unless an exception to the ordinary waiver rules applies. It is not clear whether, or to what extent, plaintiffs rely on the common interest doctrine as the basis for withholding the contents of these communications. In any event, the mere fact that an absent class member has some interest in the filing or outcome of this action is not sufficient to support application of the common interest doctrine. “[A] shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within [the common interest] exception” to the ordinary rules of waiver that govern attorney-client privilege. In re Pacific Pictures Corp., 679 F.3d at 1129; see also In re Lidoderm Antitrust Litig., No. 14-MD-02521-WHO, 2016 WL 861019, at *4 (N.D. Cal. Mar. 7, 2016) (“[T]he common interest privilege protects documents shared between parties who have a common legal interest; it does not extend to and cannot protect disclosure of communications regarding a common business interest. . . . [W]hile Endo and Teikoku shared a ‘common interest’ in wanting to see the FDA adhere to its 01242-LHK (VKD), 2020 WL 6205215, at *3 (N.D. Cal. Oct. 22, 2020) (“While there need not be actual litigation against both HCL and VDart for them to have a common legal interest . . . mere speculation that VDart might also be sued some day is not a legal interest that is within reasonable contemplation.”); cf. RJ v. Cigna Health & Life Ins. Co., No. 20-cv-02255-EJD (VKD), 2023 WL 5187565, at *1 (N.D. Cal. Jan. 13, 2023) (defendants and non-parties shared a common legal interest in defending against the same claims by plaintiffs in separate actions involving use of the same pricing methodology for insurance claims and engaged in privileged communications regarding a common legal strategy). Here, plaintiffs have not shown that, to the extent they rely on the common interest doctrine, the privileged communication at issue was shared with an absent class member who had a legal interest in common with the named plaintiffs and that the communication was shared for the purpose of furthering that legal interest. For communications alleged to contain attorney work product, plaintiffs correctly observe that disclosure to a third party does not necessarily waive work product protection. Rather, a disclosure waives the protection where it is made to an adversary in litigation or where it is made in a manner that substantially increases the opportunities for potential adversaries to obtain the work product. Sanmina, 968 F.3d at 1121 (citing 8 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2024 (3d ed. 2020)); Gross v. Scottsdale Ins. Co., No. 24-cv-02069-EJD (VKD), 2025 WL 885853, at *3 (N.D. Cal. Mar. 21, 2025); see also Fed. R. Evid. 502(b). Here, plaintiffs do not adequately identify the work product in question or explain the steps they took to ensure that disclosure of counsel’s work product to absent class members would not substantially increase the opportunity for potential adversaries to obtain it. Furthermore, to the extent plaintiffs rely on the common interest doctrine, plaintiffs have not shown that the protected communication at issue was shared with an absent class member who had a legal interest in common with the named plaintiffs and that the communication was shared for the purpose of furthering that legal interest.

C. Communications Between Named Plaintiffs and Other Non-Parties

Apparently, the parties agree that plaintiffs have withheld from production at least some members. See Dkt. No. 85 at 6 (referring to individuals who “turned out not to be class members”). No party identifies these items on plaintiffs’ privilege log. Plaintiffs have not shown that any of these non-party communications contain privileged or protected communications in the first instance, nor have they adequately explained why disclosure of these communications to non-parties, who have no interest (legal or otherwise) in this litigation, does not waive any such privilege or protection.

IV. CONCLUSION

For the reasons discussed above, the Court is unable to fully resolve this dispute on the record presented. The parties shall review and consider their respective positions, in view of the guidance provided in this order. At a minimum, plaintiffs must amend their privilege log to clarify, consistent with Rule 26(b)(5), the basis for any privilege or protection claimed in the first instance. Plaintiffs must also amend their privilege log to clarify the basis for their reliance, if any, on the common interest doctrine to avoid waiver. Plaintiffs’ amended privilege log must be served by September 19, 2025. The Court appreciates that its expedited procedures for submitting discovery disputes for resolution do not allow for the submission of declarations and other evidence, absent leave of court. If a dispute remains regarding plaintiffs’ assertions that a responsive communication may be withheld as privileged or protected, the Court will permit the parties to brief the dispute as a regularly noticed motion so that plaintiffs and TSMC may make any evidentiary showing necessary to support their respective positions. TSMC may renew its request for in camera review at that time, or the parties may stipulate to the submission of a representative sample of disputed communications for in camera review. The parties shall confer regarding a proposed briefing schedule for any remaining disputes regarding the disputed communications at issue, and shall advise the Court of their proposed briefing schedule no later than September 26, 2025. In the meantime, no party may resist deposition discovery solely because of an unresolved dispute about whether a disputed communication is privileged or protected. Rule 30(c)(2) governs the appropriate use of instructions not to answer in deposition where necessary to preserve a

IT IS SO ORDERED.

Dated: September 8, 2025

Virginia K. DeMarchi
United States Magistrate Judge