IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FIRST AMERICAN CORELOGIC, INC.,	§	
	§	
Plaintiff,	§	**C.A. No. 2:10-cv-132**
v.	§	
	§	**JURY TRIAL DEMANDED**
FISERV, INC., *et al.*,	§	
	§	
Defendants.	§	

DEFENDANT LENDER PROCESSING SERVICES, INC.'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER TO PRECLUDE DISCLOSURE OF CONFIDENTIAL, ATTORNEY-CLIENT PRIVILEGED AND ATTORNEY WORK PRODUCT INFORMATION TO LENDER PROCESSING SERVICES, INC.

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I. INTRODUCTION

Despite the consistent efforts of Defendant Lender Processing Services, Inc. ("LPS") to work with Plaintiff First American CoreLogic, Inc. ("CoreLogic") and its counsel to resolve any concerns they have regarding LPS's communication with Robert Walker and Renjie Chen, CoreLogic has chosen to abandon those efforts and bring this matter before the Court. In doing so, CoreLogic appears to have waived the very privilege it seeks to protect by disclosing to LPS's counsel several allegedly privileged communications attached to its Motion for Protective Order ("Motion"). *See* Exhibits 1-6 to Motion. As such, CoreLogic's Motion may well be moot. In any event, CoreLogic's counsel did not even attempt to comply with the Local Rules of this Court by conducting a proper meet-and-confer (s*ee* Local Rule CV-7(h)) before filing its Motion, despite being advised by LPS's counsel of the need for such a conference. Instead, CoreLogic simply chose to abandon any attempts at negotiation and burden the Court with the issue.

As LPS has stated from the beginning, and reiterated many times to CoreLogic's counsel, LPS has neither the need nor the desire to obtain CoreLogic's attorney-client or work product privileged information. LPS has not and will not attempt to elicit such information (absent a finding by this Court that CoreLogic has waived its privilege). As CoreLogic knows, LPS also has instructed all relevant persons not to have any communications with Messrs. Walker and Chen regarding CoreLogic or this lawsuit until the parties could work out a reasonable solution that would address CoreLogic's concerns and allow LPS to have access to the relevant, non-privileged information to which it is entitled. To that end, LPS offered to conduct depositions of Messrs. Walker and Chen for the sole purpose of determining the boundaries of their knowledge and whether they possess any relevant, non-privileged information – a reasonable compromise that would have allowed CoreLogic a full opportunity to protect any attorney-client privileged or work product information. Notably, LPS's proposed solution is similar to the solution adopted

by the court in one of the principal cases cited by CoreLogic in its Motion. Nonetheless, CoreLogic rejected this proposal.

Rather than working with LPS to try to reach a compromise solution that protects privileged information while not obstructing proper discovery or impeding factual development of the case, CoreLogic and its counsel have insisted from the outset that LPS "erect a wall" around Messrs. Walker and Chen and refrain completely from any communication regarding issues in this litigation, including communications about LPS's *own* products. CoreLogic's proposed solution is unnecessary, unreasonable and unworkable. LPS is entitled to any relevant, non-privileged information that Messrs. Walker and Chen may have obtained while at CoreLogic and certainly has the right to communicate with its own employees about its own products. To the extent not waived due to CoreLogic's disclosure of privileged communications to LPS's counsel, CoreLogic's privileged or work product information can be adequately protected by far less restrictive measures. Accordingly, this Court should deny CoreLogic's Motion for Protective Order.

II. FACTS

CoreLogic's Motion mischaracterizes the facts and attempts to distract the Court from the issue at hand by reciting numerous allegations that are not only untrue but irrelevant.[1] LPS does not dispute that Messrs. Walker and Chen may have had access to some attorney-client privileged or work product information while employed by CoreLogic. Thus, the only issue relevant to the Court's consideration of CoreLogic's Motion is the reasonable protection of any such

[1] CoreLogic devotes substantial space in its Motion to reciting allegations from an unrelated lawsuit pending in state court in California. *See* Motion at 5-7. LPS has denied the allegations in that lawsuit, and it remains pending. In any event, CoreLogic's dispute with LPS and a former employee not involved in this litigation is irrelevant to the issue before the Court.

alleged attorney-client privileged and attorney work product information – to the extent not already waived.

Contrary to CoreLogic's allegations, LPS and its outside counsel, Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury"), have not "refused to take any action to protect [CoreLogic's privileged] information from inadvertent or intentional disclosure." Motion at 8. To the contrary, in its May 11, 2010, letter to CoreLogic's counsel, Pillsbury assured CoreLogic that it has neither the need nor the desire to obtain CoreLogic's privileged information and stated that "LPS is willing to discuss reasonable safeguards to protect CoreLogic's allegedly privileged information." *See* Ex. A at 1. Moreover, LPS has a policy prohibiting employees from accessing, using or disclosing any proprietary information or other trade secret belonging to a former employer. *See* Declaration of Sheryl Newman ("Newman Decl.") at ¶ 3. Both Messrs. Walker and Chen have signed acknowledgments of this policy. *See id.*

Despite LPS's efforts to reach a reasonable solution, CoreLogic has failed to cooperate at every turn. For example, in its May 11 letter, Pillsbury requested that CoreLogic provide additional information necessary for the parties to have a meaningful discussion of this issue, including a list of allegedly privileged communications with Messrs. Walker and Chen, a log of CoreLogic's contacts with them since the filing of this lawsuit, and any authority supporting CoreLogic's request that LPS "erect a wall" around these employees. *See* Ex. A at 1. CoreLogic has yet to fully respond to LPS's requests for this information.

Instead, on July 7, 2010, CoreLogic's counsel, Thomas Gray, sent a proposed protective order to Jeffrey Johnson of Pillsbury, which included a provision for erecting an "ethical wall" between Messrs. Walker and Chen and any individuals working on LPS's defense in this case.

See Declaration of Jeffrey Johnson ("Johnson Decl.") at ¶ 4.[2] In response, Mr. Johnson explained that a complete "ethical wall" around Messrs. Walker and Chen would prevent LPS from obtaining even non-privileged, factual information to which it is entitled. *See* Johnson Decl. at ¶ 5. Further, Mr. Johnson explained that such a wall might prevent LPS from using Messrs. Walker and Chen as its own witnesses for its own products and defenses, apart from their allegedly privileged knowledge. *Id.* Mr. Johnson again requested that CoreLogic provide the information requested in Pillsbury's May 11 letter so that the parties could move forward with meaningful discussion. *Id*.

Rather than providing the requested information, Mr. Gray simply responded that, in CoreLogic's judgment, Messrs. Walker and Chen are not relevant to this case because they were not inventors of the patents-in-suit and have only been at LPS for a few months. *Id*. at ¶ 6. Regardless of the opinion of CoreLogic's counsel, however, Messrs. Walker and Chen are relevant to this case. Although they have only been at LPS since February 2010, given their experience in the industry, Messrs. Walker and Chen are very knowledgeable about the technology at issue. *See* Newman Decl. at ¶ 4. Moreover, other individuals knowledgeable about the accused LPS products have recently left the company, increasing the importance of Messrs. Walker and Chen as potential witnesses in this case. *See id.* In any event, as Mr. Johnson explained in response, LPS is entitled to determine for itself whether Messrs. Walker and Chen are relevant witnesses. *See* Johnson Decl. at ¶ 7. CoreLogic's only legitimate concern is the protection of its allegedly privileged information, which, as Mr. Johnson has reiterated several times, LPS has

[2] The fact that CoreLogic proposed a full protective order to LPS itself creates additional concerns. If a protective order like the one proposed by CoreLogic were entered, it would apply only to LPS and CoreLogic, as the other defendants have not yet weighed in on the provisions of a protective order to govern this case. Thus, it is likely that LPS and CoreLogic would eventually be subject to two separate, and possibly inconsistent, protective orders – one entered only between LPS and CoreLogic and one entered for all parties in the case. At most, any protective order between LPS and CoreLogic at this stage should be limited to the narrow issue of communications with Messrs. Walker and Chen.

agreed not to seek from the outset and is willing to address with reasonable safeguards. *See id*. at ¶¶ 7-8.

Instead of seeking compromise, however, CoreLogic's counsel continued to insist on nothing short of a blanket "ethical wall" around Messrs. Walker and Chen. Nonetheless, as recently as July 23, Mr. Johnson assured Mr. Gray of LPS's desire to find common ground that would meet both parties' needs. *See id*. at ¶ 8. Further, Mr. Johnson informed Mr. Gray that LPS had instructed all relevant persons not to have communications with Messrs. Walker and Chen regarding CoreLogic or the lawsuit while the parties worked out a solution. *See id*. To that end, Mr. Johnson proposed that LPS be allowed to depose Messrs. Walker and Chen (without counting against either party's discovery limits) for the sole purpose of determining the boundaries of their knowledge and whether they possess any relevant non-privileged information. *See id.* at ¶ 8. Mr. Johnson also reiterated that LPS respects CoreLogic's privilege and does not want or need to obtain its privileged information. *See id.* On July 30, CoreLogic rejected LPS's deposition proposal and indicated that it would likely bring the matter before the Court. *See id.* at ¶ 9.

Subsequently, CoreLogic's counsel, Barrington Dyer, called Mr. Johnson to inform him that CoreLogic intended to file a motion for protective order and to ask whether LPS would be opposed to the filing of certain documents under seal. *See id.* at ¶ 10. Still trying and willing to work out a reasonable solution, Mr. Johnson explained to Mr. Dyer that the parties needed to hold a meet-and-confer in compliance with the local rules of this Court prior to the filing of any motion. *Id*. Mr. Dyer responded that he was not aware of the meet-and-confer issue and that he was not calling to have a meet-and-confer, but would communicate the request to CoreLogic's lead counsel. *Id*. After that call, however, CoreLogic's counsel made no attempt to communicate with anyone at Pillsbury before filing the Motion. *Id*.

On August 6, 2010, CoreLogic filed its Motion and attached several exhibits, including Exhibits 1-6, which it claims are attorney-client privileged communications among CoreLogic's in-house counsel, Robert Walker and others. *See* Motion at 11. While Exhibits 1-6 were filed under seal with the Court, on that same day, CoreLogic's counsel emailed copies of Exhibits 1-6 containing the allegedly privileged communications to LPS's counsel. *See* Johnson Decl. at ¶ 11.

III. ARGUMENT

A. CoreLogic Has Not Met Its Burden Of Showing The Necessity Of The Proposed Protective Order.

With respect to a protective order, "the burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *In re Terra Int'l*, 134 F.3d 302, 306 (5th Cir. 1998); *see also* FED. R. CIV. P. 26(c). CoreLogic has failed to meet its burden of showing that a complete "ethical wall" around Messrs. Walker and Chen is necessary or appropriate in this case. First, due to CoreLogic's disclosure of the allegedly privileged communications in Exhibits 1-6 to LPS's counsel, it appears that CoreLogic has waived, in whole or in part, any claim of privilege over communications related to the pre-filing investigation in this case. Second, even if not waived, CoreLogic's privileged and attorney work product information is not "in jeopardy" and can be protected through far less restrictive measures.

1. CoreLogic appears to have waived privilege by disclosure of attorney-client privileged communications to LPS's counsel.

Despite its strenuous assertions to the contrary, it is CoreLogic, not LPS, that has put CoreLogic's privileged information "in jeopardy." Privilege issues in federal question cases are governed by federal common law. *See United States v. Zolin*, 491 U.S. 554, 562 (1989). Under federal common law, "voluntary disclosure of information which is inconsistent with the confi-

dential nature of the attorney client relationship waives the privilege." *Alldread v. City of Grenada*, 988 F.2d 1425, 1435 (5th Cir. 1993); *see also Shields v. Sturm, Roger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989) ("The attorney-client privilege exists to protect confidential communications and is waived by disclosure of confidential communications to third parties."). A waiver of privilege typically extends to "all communications pertaining to the subject matter of the communications." *GFI, Inc. v. Franklin Corp*., 265 F.3d 1268, 1273 (Fed. Cir. 2001) (applying Fifth Circuit law).

CoreLogic chose to attach Exhibits 1-6 to its Motion, – expressly characterizing these documents as "confidential and privileged" – provide them to LPS's counsel, and to rely upon their contents to establish the basis for the relief CoreLogic is seeking. Attempts to use privileged information as both a sword and a shield, as CoreLogic has done, are not countenanced and result in a waiver of the privilege under established law. *See, e.g., Nguyen v. Excel Corp*., 197 F.3d 200, 207 n.18 (5th Cir. 1999). Because CoreLogic has waived its privilege with respect to communications related to the pre-filing investigation in this case, its Motion should be denied as moot.

2. Even if not waived, CoreLogic's privileged information is not "in jeopardy" and can be protected by less restrictive measures.

Even if not waived, CoreLogic's privileged information is not "in jeopardy" of unauthorized disclosure to LPS. *See* Motion at 14-15. As LPS has repeatedly stated, it has not and will not seek CoreLogic's privileged information (absent a determination by the Court that CoreLogic has waived any claim of privilege). Adequate protections are already in place with respect to Messrs. Walker and Chen. LPS has a policy prohibiting employees from accessing, using or disclosing any proprietary information or other trade secret belonging to a former

employer. Messrs. Walker and Chen have signed acknowledgements of this policy. *See* Newman Decl. at ¶ 3.[3]

LPS seeks only to discover any factual, non-privileged information that Messrs. Walker and Chen may have acquired while at CoreLogic – information to which LPS is undoubtedly entitled. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."). LPS also needs to communicate with Messrs. Walker and Chen with respect to the technical aspects of its own accused products. *See* Newman Decl. at ¶ 4. Surely CoreLogic cannot claim any privilege with respect to technical information about LPS's own products. Yet, the broad-sweeping "ethical wall" proposed by CoreLogic would prohibit all communications with Messrs. Walker and Chen "with respect to any issues related to or arising from the patent litigation." *See* Motion at 8. Presumably, that would include discussions about LPS's own accused products.

CoreLogic's proposal for a complete "ethical wall" is far too broad and burdensome. CoreLogic's legitimate attorney-client privileged or work product information, if any, can be protected by far less restrictive measures, such as the deposition option proposed by LPS. Notably, in *G-I Holdings, Inc. v. Baron & Budd*, 199 F.R.D. 529, 535 (S.D.N.Y. 2001), one of the principal cases relied on by CoreLogic (*see* Motion at 9, 15), the court rejected the movants' request for a complete bar on *ex parte* interviews of their former employees by opposing counsel. Instead, the court gave the parties two options – (1) the opposing party could continue to conduct interviews of the movants' former employees as long as it gave notice to movants' counsel and allowed them to be present or (2) the parties could conduct such interviews in the presence of a

[3] Further, as a legal matter, Messrs. Walker and Chen simply have no authority to waive the privilege of their former employer. As CoreLogic points out in the Motion, CoreLogic is the holder of any privileged

special master. *Id.* Both options are similar to the deposition compromise offered by LPS to determine whether Messrs. Walker and Chen possess any factual, non-privileged information they obtained while at CoreLogic.[4] In any event, LPS would, of course, retain the right to communicate with its own employees about the technical aspects of its own products – information over which CoreLogic can have no legitimate claim of privilege.

Because LPS must be able to talk to its own employees, CoreLogic's proposed "ethical wall" is unreasonable. It is also unnecessary given that CoreLogic's privileged information can be adequately protected by far less restrictive measures.

B. LPS Will Be Prejudiced If CoreLogic's Proposed Protective Order Is Issued.

LPS will suffer substantial prejudice if CoreLogic's Motion is granted. LPS will be precluded from obtaining factual, non-privileged information to which it is entitled from Messrs. Walker and Chen. More importantly, LPS will be prohibited from communicating with its own employees about its own products in preparation of its defense. Messrs. Walker and Chen are very knowledgeable about the technology at issue in this case. Given that other employees knowledgeable about the accused LPS products have recently left the company, Messrs. Walker and Chen may, in fact, be the most knowledgeable witnesses with respect to these products. *See* Newman Decl. at ¶ 4. Thus, prohibiting LPS and its counsel from communicating with Messrs.

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communications between employees and its counsel. *See* Motion at 10.

[4] The other principal case relied on by CoreLogic, *MMR/Wallace Power & Industrial, Inc. v. Thames Assoc.*, 764 F. Supp. 712 (D. Conn. 1991), is readily distinguishable. In *MMR*, the court disqualified the attorney for one of the parties after he held secret meetings with a former employee of the opposing party who had worked extensively on litigation strategy. *MMR*, 764 F. Supp. at 716-17. The attorney offered to pay the former employee as a trial consultant for his client. *Id*. at 717. The court found that such behavior so tainted the case that disqualification of the offending counsel was the only appropriate remedy. *Id*. at 727-28. No similar facts exist here. LPS has not conducted any "secret" meetings with Messrs. Walker or Chen or attempted to hire them as litigation consultants. Rather, LPS simply wants to communicate freely with its own employees. Moreover, LPS has even offered to depose Messrs. Walker and Chen with CoreLogic's counsel present to determine the extent of their knowledge and whether they possess any relevant, non-privileged information that they obtained while at CoreLogic.

Walker and Chen regarding LPS's accused products will seriously impair LPS's ability to prepare an adequate defense.

IV. CONCLUSION

For the foregoing reasons, LPS respectfully requests that the Court deny Plaintiff's motion for protective order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on this 23rd day of August, 2010. Any other counsel of record will be served by first class U.S. mail on this same day.

/s/Claudia Wilson Frost
Claudia Wilson Frost