UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CALENDAR RESEARCH LLC, Plaintiff, v. STUBHUB, INC., et al., Defendants.	Case No. CV 17-4062 SVW (SSx) **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO COMPEL ADDITIONAL DISCOVERY FROM INDIVIDUAL PLAINTIFFS MICHAEL HUNTER GRAY AND LASHA EFREMIDZE** **(Dkt. No. 265)**

I.

INTRODUCTION

On February 27, 2019, Plaintiff Calendar Research LLC filed a Motion to Compel Additional Discovery from Individual Defendants Michael Hunter Gray and Lasha Efremidze ("MTC"), supported by the declaration of Douglas S. Curran ("Curran Decl."). (Dkt. No. 265). On February 28, 2019, Plaintiff filed an Ex Parte Application to Shorten Time for Hearing on the Motion, ("Ex Parte Appl."), supported by another declaration of Douglas S. Curran. (Dkt. No. 266). That same day, Gray and Efremidze filed an Opposition to

the Ex Parte Application, including the declaration of Michael M. Baranov. (Dkt. No. 269).[1] The next day, Corporate Defendants StubHub and eBay collectively filed an Opposition to the Ex Parte Application, (Dkt. No. 268), in which the remaining Individual Defendant, Lisa Dusseault, joined. (Dkt. No. 271). On March 5, 2019, the Court granted the Ex Parte Application to Shorten Time for Hearing. (Dkt. No. 275). Pursuant to the Court's briefing schedule, on March 8, 2019, the Corporate Defendants StubHub, Inc. and eBay, Inc. filed a joint Opposition to the Motion to Compel, ("Corp. Opp."), including the declaration of Jocelyn Ma ("Ma Decl."). (Dkt. No. 276). Dusseault joined in the Corporate Defendants' Opposition. ("Dusseault Joinder," Dkt. No. 277). Gray and Efremidze filed an Opposition ("Indiv. Opp."), supported by the declaration of Michael M. Baranov ("Baranov Decl.").[2]

The Court took the matter under submission without a hearing. (See Dkt. No. 266 at 2; Local Rule 7-15). For the reasons stated below, the Motion is GRANTED IN PART and DENIED IN PART. The request for an Order requiring Gray and Efremidze to supplement their production of Slack messages and their vendor to submit a declaration describing the search is GRANTED. The supplemental production shall be completed by close of business on Monday, March 18, 2019 and shall be accompanied by a declaration from Defendants' vendor as further detailed below. All other requests are DENIED.

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[1] The Opposition filed by Gray and Efremidze includes Exhibit G, which was docketed separately. (Dkt. No. 270).

[2] The Court exercises its discretion to consider the Individual Defendants' untimely Opposition.

II.

BACKGROUND FACTS

Plaintiff alleges violations of the Defend Trade Secrets Act ("DTSA"), 18 U.S.C. § 1836, and the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, and numerous state law claims. According to the allegations of the operative Fifth Amended Complaint, Defendant Gray was a co-founder and CEO of a start-up company called Calaborate, Inc., which developed a scheduling application called Klutch. (Dkt. No. 181, ¶ 5). Knight and Bishop, the assignor to Plaintiff Calendar Research, invested in Calaborate while it developed its application. (Id.). Defendants StubHub and its parent, eBay, made an offer to buy Calaborate, but the deal fell through. (Id. ¶ 6). Although the acquisition effort failed, Gray went to work for StubHub and eBay, bringing with him the other two Individual Defendants in this case, Efremidze and Dusseault. (Id.). A company called "Block & Tackle," of which Gray was an officer, was the contractor through which the Individual Defendants were hired by the Corporate Defendants. (MTC at 1; Indiv. Opp. at 4).

Calendar Research eventually bought all of Calaborate's assets, including the intellectual property related to Klutch. (Dkt. No. 181, ¶ 7). However, Calendar Research alleges that "Gray, Dusseault, and Efremidze purposefully and maliciously withheld, and continue to withhold, Calendar Research property" to the benefit of the Corporate Defendants. (Id.). Calendar Research

filed suit in state court, which StubHub and eBay removed to this Court on May 31, 2017.

The instant discovery dispute arises from Gray's and Efremidze's document production. Calendar Research states that Defendants stipulated that they would produce all documents by February 19, 2019. (MTC at 1). While Gray and Efremidze collectively produced over 23,000 documents on that date,[3] Calendar Research maintains that the production omitted relevant "Slack" messages[4] from the period when Block & Tackle was working with the Individual Defendants to finalize their hiring by the Corporate Defendants. (Id.). Calendar Research states that it learned of these omissions because Efremidze's production contained Slack email notifications, which alert users to pending messages, but not the messages themselves. (Id. at 1-2). Efremidze produced another 2,635 documents on February 25, 2019, one week past the stipulated deadline, claiming that the delay was due to vendor oversight. (Id. at 2).

Efremidze promised to produce a privilege log by February 22, 2019, but "instead served a completely incomprehensible document." (Id.). Although Efremidze produced a "supplemental log" on February 28 to correct the errors in the original log, Calendar Research maintains that the "supplemental log" is still deficient

[3] In the February 19, 2019 production, Gray produced 19,497 documents; Efremidze produced 3,826 documents. (MTC at 4).

[4] Calendar Research explains that "Slack is an internal messaging system used by companies, teams and firms to message and collaborate in real-time." (Id. at 5).

because it reflects that Efremidze withheld documents based on "privacy" and "relevance" concerns, which, according to Calendar Research, suggests that Efremidze did not conduct a proper privilege review. (Id. at 23 n.5). Calendar Research also claims that the documents that Gray produced on February 19 were intentionally delivered without a privilege review at all. (Id. at 2). Calendar Research has sequestered thirty potentially privileged documents from Gray's production, but has not returned them. (MTC at 8). On March 4, 2019, the District Judge continued the discovery cut-off from March 4 to March 18, 2019. (Dkt. No. 274).

III.

PLAINTIFF'S MOTION

Calendar Research seeks an order: (1) requiring Defendants Gray and Efremidze to produce "all relevant Slack messages" by a date certain and requiring their vendor to submit a declaration under oath confirming that "all Block & Tackle Slack channels and messages have been searched using the parties' stipulated terms" and identifying the steps taken to perform the search, (id. at 11); (2) declaring that Gray and Efremidze have waived any claim of privilege, Efremidze by failing to produce a coherent privilege log identifying documents withheld, and Gray by intentionally failing to review documents for privilege before producing them, (id. at 12-17); (3) requiring Efremidze to produce any documents withheld pursuant to a waived privilege by a date certain, (id.); (4) imposing evidentiary sanctions against Gray and Efremidze in

the form of adverse inferences establishing as fact that (a) Gray and Efremidze conspired to violate the Defend Trade Secrets Act and the Computer Fraud and Abuse Act, (b) Gray and Efremidze disclosed Calaborate's trade secrets, including the Klutch code, in violation of the Defend Trade Secrets Act, (c) Gray and Efremidze violated the Computer Fraud and Abuse Act, and (d) their conduct caused monetary harm to Calendar Research, (id. at 20); and (5) imposing monetary sanctions against Gray, Efremidze, and their counsel, for Calendar Research's costs and fees in bringing this Motion. (Id. at 2).

IV.

SCOPE OF PERMISSIBLE DISCOVERY

Federal Rule of Civil Procedure 26(b)(1) provides as follows:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this

> scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). Because discovery must be both relevant and proportional to the needs of the case, the right to discovery, even plainly relevant discovery, is not limitless. Discovery may be denied where: "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C); accord Tedrow v. Boeing Emps. Credit Union, 315 F.R.D. 358, 359 (W.D. Wash. 2016). It is "[t]he court's responsibility, using all the information provided by the parties, [] to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery." Fed. R. Civ. P. 26(b), Advisory Committee Notes (2015 Amendment).

V.

DISCUSSION

A. Production Of Slack Messages

Calendar Research seeks an Order requiring Defendants Gray and Efremidze to produce "all relevant Slack messages" by a date certain in "JSON file format organized by Day, Date, and

Conversation Group with metadata fields indicating the UserID and the date/time." (MTC at 11-12). It also seeks a declaration under oath from Defendants' vendor confirming that "all Block & Tackle Slack channels and messages have been searched using the parties' stipulated terms" and identifying the steps taken to perform the search. (MTC at 11).

1. Standard

Rule 34 provides that a party may serve a request for production of any documents relevant to the litigation "in the responding party's possession, custody or control." Fed. R. Civ. P. 34(a)(1). The responding party must either permit the document inspection as requested, or object to the request, in whole or in part, and provide the reason for the objection. Id. 34(b)(2). Rule 37(a)(3)(B) specifically permits a requesting party to bring a motion to compel when a responding party fails either to state in its written response that the requested documents will be produced, or to complete the production.

2. Discussion

The issue of Defendants' production of Slack messages is moot to the extent that Gray and Efremidze have made an initial production of the Slack messages.[5] On February 28, 2019,

[5] Gray and Efremidze dispute that Block & Tackle's Slack messaging account was within the scope of the requests. (Indiv. Opp. at 4). However, they do not challenge the production on that ground.

Defendants' counsel sent an email to Plaintiff stating, "Enclosed please find a copy of the Block & Tackle Slack account in JSON format, as plaintiff['s] counsel had requested. This is an export of all presently available files in the account." (Baranov Decl., Exh. G at 1).

However, the request for Slack messages is not entirely moot, as additional messages have been identified but have not yet been produced. According to Defendants' counsel, certain Slack folders were not retrievable at the time of the February 28 production because Block & Tackle had used a free account, and full access to the database required a premium account, which Defendants have now obtained. (Baranov Decl. ¶ 25). After the upgrade, Slack informed Defendants that it would not allow full corporate export of the entire account without the consent of all parties who used the account. (Id. ¶ 26). However, it provided a utility tool that allowed Defendants to extract private channels used by Gray and Efremidze. (Id. ¶¶ 27-28). After extracting those files, Defendants were told by StubHub that certain files contained communications subject to its attorney-client privilege. (Id. ¶ 28). StubHub identified the privileged files, and Defendants have asked their vendor to remove them from the remaining files to be produced. (Id. ¶ 29). Defendants' counsel states that "[o]nce I receive from [the vendor] the revised extraction of the Slack private channels and direct communications which redacts the privileged documents identified by StubHub, I will immediately turn it over to counsel." (Id. ¶ 30).

Accordingly, the Motion to Compel is GRANTED to the extent that it seeks production of any remaining Slack messages. The Court ORDERS Defendants to produce any outstanding non-privileged Slack message files by close of business on Monday, March 18, 2019. Defendants' vendor shall submit a declaration by the same date confirming that "all Block & Tackle Slack channels and messages" made available to it "have been searched using the parties' stipulated terms" and identifying the steps taken to perform the search.

B. Waiver Of Privilege

Calendar Research seeks a declaration that Efremidze and Gray have waived any claim of privilege, Efremidze by failing to produce a coherent privilege log identifying documents withheld, and Gray by intentionally failing to review documents for privilege before producing them. Calendar Research also seeks an Order requiring Efremidze to produce any documents withheld pursuant to a waived privilege by a date certain. (MTC at 12-17).

1. Standard

The party asserting the attorney-client privilege has the burden of proving that the privilege applies to a communication or document. In re Grand Jury Subpoenas (Hirsch), 803 F.2d 493, 496 (9th Cir. 1986); see also United States v. Martin, 278 F.3d 988, 999-1000 (9th Cir. 2002) ("The burden is on the party asserting

the privilege to establish all the elements of the privilege.").[6] Accordingly, when a party withholds otherwise discoverable information by claiming that the information is privileged, the party must describe the nature of the communications or documents in a way that will enable other parties to assess the claim. According to the Ninth Circuit, a party may meet this burden by producing a log that identifies (a) the attorney and client involved, (b) the nature of the document, (c) all persons or entities shown on the document to have received or sent the document, (d) all persons or entities known to have been furnished the document or informed of its substance, and (e) the date the document was generated, prepared, or dated. See In re Grand Jury Investigation, 974 F.2d 1068, 1071 (9th Cir. 1992) (listing requirements). While a privilege log is not the only means of establishing a privilege that is recognized by the Ninth Circuit, see Dole v. Milonas, 889 F.2d 885, 888 n.3, 890 (9th Cir. 1989), it is often the most efficient.

Although the failure to produce an adequate privilege log may, in some circumstances, constitute a waiver, it does not automatically result in waiver. See Burlington N. & Santa Fe R.R. Co. v. U.S. Dist. Court, 408 F.3d 1142, 1147-49 (9th Cir. 2005)

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[6] The Martin Court identified the elements of the attorney-client privilege as follows: "(1) When legal advice of any kind is sought (2) from a professional legal adviser in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are, at the client's instance, permanently protected (7) from disclosure by the client or by the legal adviser (8) unless the protection be waived." Martin, 278 F.3d at 999 (citing 8 Wigmore, Evidence § 2292, at 554 (McNaughton rev. 1961).

(rejecting a per se rule of waiver even where privilege log was inadequate and untimely). In determining whether an assertion of privilege or protection is sufficient, courts "should make a case-by-case determination, taking into account the following factors: the degree to which the objection or assertion of privilege enables the litigant seeking discovery and the court to evaluate whether each of the withheld documents is privileged . . .; the timeliness of the objection and accompanying information about the withheld documents . . .; the magnitude of the document production; and other particular circumstances of the litigation that make responding to discovery unusually easy . . . or unusually hard." Id. at 1149. "These factors should be applied in the context of a holistic reasonableness analysis . . . ." Id.[7]

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[7] While the majority of the entries on Efremidze's updated privilege log assert the attorney-client privilege, the updated log also includes several entries reflecting that the basis for withholding documents was "privacy-relevancy." (Curran Decl., Exh. N; Baranov Decl., Exh. F). The documents withheld on these grounds are generally tax returns and other tax- or finance-related documents, apartment applications, insurance applications, etc.

"Federal Courts ordinarily recognize a constitutionally-based right of privacy that can be raised in response to discovery requests." Soto v. City of Concord, 162 F.R.D. 603, 616 (N.D. Cal. 1995) (citing, inter alia, Breed v. United States Dist. Ct. for Northern District, 542 F.2d 1114, 1116 (9th Cir. 1976), and Johnson by Johnson v. Thompson, 971 F.2d 1487, 1497 (10th Cir. 1992)). "Unlike a privilege, the right of privacy is not an absolute bar to discovery. Rather, courts balance the need for the information against the claimed privacy right." Lind v. United States, 2014 WL 2930486 at *2 (D. Ariz. June 30, 2014); see also E.E.O.C. v. California Psychiatric Transitions, 258 F.R.D. 391, 395 (E.D. Cal. 2009) ("[T]he right to privacy is not a recognized privilege or absolute bar to discovery, but instead is subject to the balancing of needs."); Ragge v. MCA/Universal Studios, 165 F.R.D. 601, 604 (C.D. Cal. 1995) (same); Soto, 162 F.R.D. at 616 ("Resolution of a privacy objection or request for a protective order requires a

Where the basis for a claim of waiver is producing party's actual disclosure of privileged materials, courts distinguish between intentional and inadvertent disclosures. "Waiver by voluntary disclosure 'occurs when a party discloses privileged information to a third party who is not bound by the privilege, or otherwise shows disregard for the privilege by making the information public . . . once documents have been turned over to another party voluntarily, the privilege is gone, and the litigant may not thereafter reassert it to block discovery of the information and related communications by his adversaries.'" Centuori v. Experian Information Solutions, Inc., 347 F. Supp. 2d 727, 729 (D. Ariz. 2004) (quoting Bittaker v. Woodford, 331 F.3d 715, 719 n. 4 (9th Cir. 2004)). Where the disclosure is not purposeful, courts have approached the question of waiver in a number of ways. However, courts in this Circuit generally "look to the following factors, developed in the context of inadvertent waiver: '(1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of the disclosure; and

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balancing of the need for the information sought against the privacy right asserted.").

Because none of the Parties submitted copies of the production requests, the Court has no basis for determining whether these documents are responsive or critical to the litigation of this case. However, Calendar Research does not even attempt to show why its need for Efremidze's tax documents, apartment applications and insurance applications outweighs Efremidze's interest in keeping this information private, or even why these documents have any relevance to the claims and defenses in this action. Accordingly, the Court will assume, without deciding, for purposes of ruling on this Motion only, that the assertions of "privacy-relevancy" are proper.

(5) the overriding issue of fairness.'" In re McKesson Governmental Entities Average Wholesale Price Litig., 264 F.R.D. 595, 599 (N.D. Cal. 2009) (quoting Eureka Financial Corp. v. Hartford Accident and Indemnity Co., 136 F.R.D. 179, 184 (E.D. Cal. 1991); some internal quotation marks omitted); see also U.S. ex rel. Bagley v. TRW, Inc., 204 F.R.D. 170, 177 (C.D. Cal. 2001) ("[I]n determining whether a privilege has been waived by the inadvertent production of privileged documents, courts within the Ninth Circuit consider 'the circumstances surrounding the disclosure,' including whether the privilege holder has made efforts 'reasonably designed' to protect and preserve the privilege.') (quoting United States v. de la Jara, 973 F.2d 746, 749-750 (9th Cir. 1992)).

2. Discussion

Calendar Research's request for a declaration that Efremidze waived the attorney-client privilege by producing an inadequate privilege log was moot by the time the Motion was filed because Efremidze had by then produced a supplemental privilege log correcting the problems in the original log. (See MTC at 23 n.5 (acknowledging that Efremidze had filed a supplemental privilege log); Curran Decl., Exh. N at 45-46 (copy of supplemental privilege log); Baranov Decl., Exh. F (same)). Most of the entries in the updated log that assert the attorney-client privilege appear to be drafts of discovery responses or other legal documents filed or served in this action. Whether the drafts properly fall under the attorney-client privilege may be debatable, but it would appear

that they easily qualify for work product protection. Pursuant to the work product doctrine, material obtained and prepared by an attorney or the attorney's agent in anticipation of litigation or in preparation for trial may be immune from discovery. Fed. R. Civ. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495, 509-12 (1947); United States v. Richey, 632 F.3d 559, 567 (9th Cir. 2011). Ordinary work product may be discovered if the party seeking the discovery demonstrates a "substantial need" for the materials and there is no other means for obtaining that information without undue hardship. Fed. R. Civ. P. 26(b)(3); Hickman, 329 U.S. at 511. However, Calendar Research has not shown any such substantial need.

Accordingly, the Motion is DENIED to the extent that it seeks a declaration that Efremidze has waived the privilege with respect to the documents listed on the updated privilege log. Because the Court finds that the documents on Efremidze's updated log are entitled to protection from disclosure, the Court also DENIES Calendar Research's Motion for an Order requiring production of the documents listed on the log.

The Court similarly DENIES the Motion to the extent that it seeks a declaration that Gray waived the attorney-client privilege by failing to review the documents he produced at the end of February. Calendar Research discovered that approximately 30 out of the over 19,000 documents produced by Gray were potentially privileged. Although it stopped all review of them and has

sequestered them, it now seeks authorization to review and use the documents due to their reckless disclosure.

It is certainly risky for a party to produce documents without conducting an adequate privilege review. Here, Gray's decision to produce all documents responsive to certain search terms appears to have been driven by a desire to meet the production deadline in the Parties' stipulation, which gave a short turn around time to produce. While a time crunch is not, by itself, a sufficient reason to excuse the failure to conduct a pre-production privilege review, in the particular circumstances of this case, where Gray and Efremidze are represented by a solo practitioner, the stipulated production deadline was very tight, the number of documents produced was relatively substantial, and the number of potentially privileged documents that slipped through was relatively small, the Court is reluctant to find a waiver. A waiver would be particularly unfair here because for at least some of the potentially privileged documents that Gray produced, StubHub and eBay appear to be the holders of the privilege, as they explain in their Opposition to the Motion to Compel. (See Corp. Opp. at 1-3). The Corporate Defendants argue that Gray was the "functional equivalent of an employee of StubHub" during the time the communications were sent, and a "former employee does not have the power to independently waive a company's privilege protections." (Ma Decl., Exh. 1 at 2-3) (citing United States v. Chen, 99 F.3d 1495, 1502 (9th Cir. 1996)).

Although Gray's failure to conduct a pre-production privilege review does not show an effort to avoid an inadvertent disclosure, and would normally weigh in favor of finding a waiver, the Court concludes that the protections for inadvertently-produced privilege documents set forth in the Protective Order in this case control the outcome here. (See Dkt. No. 54 at 24-25); see also Beilstein-Institut Zur Forderung Der Chemischen Wissenschaften v. MDL Info. Sys., Inc., 2006 WL 2578264, at *1 (N.D. Cal. Sept. 6, 2006) (rejecting plaintiff's argument that defendant's failure to conduct a pre-production privilege review waived the privilege on the ground that the protective order in that case provided that unintentional disclosures of privileged documents did not constitute a waiver). Accordingly, the Motion is DENIED to the extent that it seeks a declaration that Gray waived the attorney-client privilege.

C. Request For Evidentiary Sanctions

Calendar Research seeks an Order imposing evidentiary sanctions against Gray and Efremidze in the form of adverse inferences establishing as fact that Gray and Efremidze:

- conspired to violate the Defend Trade Secrets Act and the Computer Fraud and Abuse Act;
- disclosed Calaborate's trade secrets, including the Klutch code, in violation of the Defend Trade Secrets Act;
- violated the Computer Fraud and Abuse Act; and
- caused monetary harm to Calendar Research by their conduct.

(MTC at 20). According to Calendar Research, the authority for the imposition of sanctions in this case arises either from the Court's inherent authority or Rule 26(g). (Id.).

1. Standard

"[D]istrict courts enjoy very broad discretion to use sanctions where necessary to insure . . . that lawyers and parties . . . fulfill their high duty to insure the expeditious and sound management of the preparation of cases for trial." Lee v. Max Int'l, LLC, 638 F.3d 1318, 1320 (10th Cir. 2011) (internal quotation marks and citation omitted); see also Unigard Sec. Ins. v. Lakewood Engineering & Mfg. Corp., 982 F.2d 363, 368 (9th Cir. 1992) ("Courts are invested with inherent powers that are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'") (internal quotation marks and citation omitted). "Sanctions are intended to ameliorate prejudice caused to an innocent party by a discovery violation, punish the party that violated its obligations, and/or deter others from committing similar violations." Urban v. United States, 2006 WL 2037354, at *9 (N.D. Ill. July 14, 2006). "[T]he court should endeavor to impose a sanction that will restore the parties to the position they would have occupied but for the breach of discovery obligations and deter future misconduct." In re September 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114, 131–32 (S.D. N.Y. 2007).

However, "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980). Accordingly, before a court may award sanctions under its inherent powers, the court must make an explicit finding that the sanctionable conduct constituted or was tantamount to bad faith. Mendez v. County of San Bernardino, 540 F.3d 1109, 1131 (9th Cir. 2008); see also Oregon RSA No. 6, Inc. v. Castle Rock Cellular of Oregon Ltd. P'ship, 76 F.3d 1003, 1007 (9th Cir. 1996) (a party or counsel who "'wilfully abuse[s] the judicial process'" may be subject to sanctions under the court's inherent power upon a showing of subjective bad faith) (quoting Roadway Express, 447 U.S. at 766).

Rule 26(g) also allows for "appropriate" sanctions when an attorney or party improperly certifies a discovery response. It provides:

> If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Fed. R. Civ. P. 26(g)(3).[8] The court must apply an objective standard when determining whether conduct violates Rule 26(g). Oregon RSA No. 6, 76 F.3d at 1007.

Pursuant to Rule 26(g)(1)(B), by signing a discovery request or response, the attorney or party "certifies that to the best of the person's knowledge, information, and belief, formed after a reasonable inquiry," the request or response is consistent with existing law and is not interposed for an improper purpose. Fed. R. Civ. P. 26(g)(1)(A-B) (emphasis added). However, Rule 26(g)(1)(B) "does not call for certification that the discovery

[8] A certification violates the requirements of Rule 26(g) when it does not conform to the following:

> (1) Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name -- or by the party personally, if unrepresented . . . . By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:
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> > (A) with respect to a disclosure, it is complete and correct as of the time it is made; and
> >
> > (B) with respect to a discovery request, response, or objection, it is:
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> > > (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
> > >
> > > (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
> > >
> > > (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

Fed. R. Civ. P. 26(g)(1).

response is 'complete,'" as does the parallel provision for mandatory disclosures under Rule 26(a), "but rather incorporates the Rule 26(b)(2)(C) proportionality principle." Moore, 287 F.R.D. at 188.

The nature of the sanction to be imposed under Rule 26(g) is left to the discretion of the court. As one court explained:

> Where Rule 26(g)(3) requires the Court to impose an appropriate sanction, "[t]he nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances." Fed. R. Civ. P. 26(g) advisory committee's note (1983). Although Rule 26(g)(3) sanctions are mandatory, Rule 26(g)(3)'s "mandate . . . extends only to whether a court must impose sanctions, not to which sanction it must impose." Chambers v. NASCO, Inc., 501 U.S. 32, 51 (1991) (emphasis in original). But, "[w]hen invoking Rule 26(g) as a basis for sanctions, the district court must specify which discovery certification was sanctionable." Ibarra v. Baker, 338 Fed. Appx. 457, 470 (5th Cir. 2009).

Heller v. City of Dallas, 303 F.R.D. 466, 477 (N.D. Tex. 2014) (parallel citations omitted); see also MetroPCS v. Thomas, 327 F.R.D. 600, 614 (N.D. Tex. 2018) (quoting same).

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2. Discussion

Calendar Research has failed to show that either Gray or Efremidze acted in bad faith. As such, the present circumstances do not justify an adverse inference instruction under the Court's inherent powers. Furthermore, although Calendar Research argues that Defendants' prior certifications that their productions were complete or that no responsive documents exist were inaccurate, it does not show why the harsh sanction of an adverse inference instruction would be an "appropriate" sanction under Rule 26(g)(3). Adverse inference sanctions under Rule 26(g) would appear particularly inappropriate under the facts of this case because Gray and Efremidze have by now actually produced the documents sought by Plaintiff and have represented that they will supplement that production as soon as they receive the remaining Slack files from their vendor. Accordingly, the Motion is DENIED to the extent that it requests an adverse inference instruction.

D. Request For Monetary Sanctions

Calendar Research seeks an order under Rule 37 against Gray, Efremidze, and their counsel for its costs and fees in bringing this Motion. (MTC at 2).

1. Standard

Rule 37 provides in relevant part:

> If the [discovery motion] is granted -- or if the disclosure or requested discovery is provided after the motion was filed -- the court must, after giving an opportunity to be heard, require the party . . . whose conduct necessitated the motion, the party or attorney advising the conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees.

Fed. R. Civ. P. 37(a)(5)(A). Conversely, if the discovery motion is denied, the court must require the movant, the attorney filing the motion, or both to pay the party who opposed the motion its reasonable expenses, including attorney's fees, incurred in opposing the motion. Id. 37(a)(5)(B). Finally, if the motion is granted in part and denied in part, the court "may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion." Id. 37(a)(5)(B). However, if the non-prevailing party can demonstrate "substantial justification" for its motion, nondisclosure, or opposition, Rule 37 provides that the court must deny sanctions. Fed. R. Civ. P. 37(a)(5)(A)(ii).

2. Discussion

The Court declines to grant monetary sanctions. Calendar Research has prevailed on only a portion of its Motion. Furthermore, the Court finds that Calendar Research's extended argument regarding the inadequacies of Efremidze's original privilege log, even though it had his supplemental, superseding

privilege log by the time it filed the Motion, weighs against the award of sanctions. Accordingly, the Court DENIES the Motion to the extent that it seeks monetary sanctions.

V.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Compel Additional Discovery is GRANTED IN PART and DENIED IN PART. Calendar Research's request for an Order requiring Gray and Efremidze to supplement their production is GRANTED. The Court ORDERS Defendants to produce any outstanding non-privileged Slack message files, by close of business on Monday, March 18, 2019. Defendants' vendor shall submit a declaration by the same date confirming that "all Block & Tackle Slack channels and messages" made available to it "have been searched using the parties' stipulated terms" and identifying the steps taken to perform the search. Calendar Research's request for a declaration that Gray and Efremidze have waived the attorney-client privilege is DENIED. The request for an Order requiring Efremidze to produce the privileged documents on the production log is DENIED. The request

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for adverse inference instructions is DENIED. The request for monetary sanctions is DENIED.

IT IS SO ORDERED.

DATED: March 14, 2019

/S/
SUZANNE H. SEGAL
UNITED STATES MAGISTRATE JUDGE