UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TESLA, INC.,

Plaintiff,

v.

GUANGZHI CAO,

Defendant.

Case No. 19-cv-01463-VC (KAW)

ORDER REGARDING DISCOVERY LETTERS

Re: Dkt. Nos. 108, 109

On November 20, 2020, the parties filed two discovery letters. (Dkt. Nos. 108, 109.)

A. Discovery Letter re Requests for Admission (Dkt. No. 108)

The first discovery letter concerns Plaintiff's RFAs regarding whether Defendant performed certain acts, such as saving source code on his iCloud account. (Dkt. No. 108.) This is the second time the parties have raised the same dispute to the Court. (Dkt. No. 94.) Previously, the Court found that Defendant improperly rewrote the RFAs to limit his response to intentional actions and ordered Defendant to respond to the RFAs without limiting them to intentional conduct. (Dkt. No. 99 at 4-5.) Defendant subsequently filed amended responses, which Plaintiff asserts are inadequate. The Court agrees.

For example, RFA No. 30 asks Defendant to "admit that YOU SAVED AUTOPILOT SOURCE CODE in the folder 'iCloud Drive (Archive) – 1' on YOUR TESLA LAPTOP." (Dkt. No. 108 at 3.) In relevant part, Defendant responded:

> Defendant admits that some of the files in that folder have the same names as those identified by Tesla in its response to Cao's Interrogatory No. 1. Defendant further admits that he connected his TESLA LAPTOP to his personal iCloud Drive account and that the files in the folder named "iCloud Drive (Archive) – 1" include files that he stored in his iCloud Drive account, but he has no specific recollection of the timing or method by which such files came to be

stored in the specific "iCloud Drive (Archive) -1" folder.

(*Id.*)

Defendant asserts that this response is adequate because he is permitted to add a clarifying qualification to defend himself against misleading RFAs. (Dkt. No. 108 at 6.) Thus, Defendant contends that he "admit[ted] or acknowledge[d] facts embedded in Tesla's requests . . . ." (*Id.*)

Defendant is correct that he may add a qualification to explain the surrounding context. Fed. R. Civ. P. 36(a)4) ("when good faith requires that a party qualify an answer or deny only part of a matter, the answer must specify the part admitted and qualify or deny the rest"). As the Court previously found, however, Defendant is not permitted to rewrite the RFAs. *See MGA Entm't, Inc. v. Hartford Ins. Co. of the Midwest*, No. EDCV 08-00457 DOC (RNBx), 2011 WL 13142525, at *3 (C.D Cal. Oct. 27, 2011) ("while MGA may qualify its response in order to explain the surrounding context, MGA may not re-write the RFAs but rather must respond to each RFA as phrased"). Here, the RFA asks if Defendant saved the source code in a particular folder on his Tesla laptop. It does not ask if some of the files in the folder have the same names as identified by Plaintiff, or if he connected his laptop to his iCloud device. Defendant must admit or deny what the RFA straightforwardly asks; again, this does not prevent Defendant from qualifying his response, as long as he first admits or denies the RFA *as written*.

Accordingly, Defendant is ordered to respond to the RFAs as written within **ten days** of the date of this order. Again, the Court observes this is the **second** time the Court has been asked to resolve this same issue. The Court should not be required to use its limited judicial resources on relitigating disputes. If this issue comes before the Court a third time, the Court may deem the RFAs admitted if Defendant's responses are not made in good faith.

B. Discovery Letter re Investigator Notes and Memos (Dkt. No. 109)

The second discovery letter concerns Defendant's request for notes and summaries of witness interviews conducted by Plaintiff's internal investigators. (Dkt. No. 109 at 2.) The parties dispute whether these notes and summaries are covered by attorney-client privilege. (*Id.* at 4.) The Court finds that they are privileged.

The attorney-client "privilege exists to protect not only the giving of professional advice to

those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). This privilege extends "to confidential communications by a client . . . to a lawyer acting in the capacity of a lawyer (or a lawyer's subordinate), made for the primary purpose of securing legal advice or legal service . . . ." *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 327 (N.D. Cal. 1985).

Defendant argues that the documents at issue are not protected because they were not prepared by lawyers and not communications to in-house or outside counsel. (Dkt. No. 109 at 3.) Defendant also contends that the documents were not prepared for the purpose of seeking or giving legal advice because none of the interviewed witnesses ever sought legal advice. (*Id.*) In contrast to Defendant's assertions, however, Plaintiff makes clear that the interviews were conducted for counsel to provide legal advice as to whether Plaintiff should sue Defendant. (*Id.* at 4.) Thus, the interview scripts were reviewed by counsel to ensure that counsel would obtain the information needed to advise Plaintiff. (*Id.* at 5.) Additionally, an attorney personally attended and participated in at least four interviews. (*Id.*) Afterwards, the interviews were summarized in notes that were converted to formal memos and saved to an investigation file for assessment by counsel, so that counsel could determine whether to sue Defendant or press criminal charges. (*Id.*) The memos were also given to outside counsel. (*Id.*)

Defendant points to deposition testimony stating that there was a standard practice of conducting interviews and writing summaries during an investigation. (Dkt. No. 109 at 2.) While true, this does not mean that the interviews and summaries at issue here were not obtained for the purpose of obtaining legal advice as to whether to sue Defendant or bring criminal charges.

In the alternative, Defendant argues Plaintiff waived the privilege. In support, Defendant points to an e-mail, in which Plaintiff's counsel stated: "We are not asserting a work-product objection to your discovery requests relating to . . . (2) Tesla's investigation, in each case specifically concerning Cao's misappropriation of Autopilot source code. We therefore intend to reproduce documents previously withheld as work-product or previously redacted as work-product." (Dkt. No. 109 at 2.) As Plaintiff contends, however, the e-mail goes on to state: "There are certain communications by Tesla employees with Tesla attorneys for the purposes of obtaining

legal advice relating to Tesla's communications with law enforcement and Tesla's investigation to Cao's misappropriation of Autopilot source code. We continue to maintain our attorney-client privilege objection to producing or unredacting those communications." (*Id.* at 5-6.) Thus, at most, the e-mail waives work-product privilege, but *not* attorney-client privilege, which is the privilege at issue.

Defendant also argues that Plaintiff waived privilege by producing certain documents, including an interview memo of Dr. Karpathy and an investigative plan. (Dkt. No. 109 at 2.) The production appears inadvertent, as Plaintiff subsequently clawed back these documents. (*Id.* at 6.) This conclusion is further supported by the fact that Plaintiff did not produce the other interview memos; if Plaintiff purposefully meant to waive privilege as to interview memos, they presumably would have provided all of them, rather than just one. Further, while Defendant contends Plaintiff made no objection when Defendant asked Dr. Karpathy a single substantive question regarding the interview memo, Plaintiff states that they did not object because the memo did not reveal counsel's role. (*Id.* at 2, 6.) Thus, the Court finds that Plaintiff did not waive privilege, and need not produce the requested interview notes and summaries.

IT IS SO ORDERED.

Dated: December 10, 2020

Kandis Westmore

KANDIS A. WESTMORE
United States Magistrate Judge

United States District Court
Northern District of California