

# Exhibit 2129

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UNITED STATES DISTRICT COURT  
Northern District of California  
San Francisco Division

CALLWAVE COMMUNICATIONS, LLC, No. C 14-80112 JSW (LB)

Petitioner,

v.

WAVEMARKET, INC. D/B/A LOCATION  
LABS,

Respondent.

**ORDER REGARDING CALLWAVE  
AND LOCATION LABS' JOINT  
DISCOVERY DISPUTE LETTER  
DATED FEBRUARY 6, 2015**

[Re: ECF No. 63]

**INTRODUCTION**

In this miscellaneous action, Petitioner Callwave Communications, LLC (“Callwave”) originally asked this court to compel Respondent Wavemarket, Inc. d/b/a Location Labs (“Location Labs”), a non-party to underlying litigation in the United States District Court for the District of Delaware,<sup>1</sup> to comply with Callwave’s subpoena for certain documents. (See Petition, ECF No. 1.<sup>2</sup>) After many months and several discovery disputes, production has begun. Now, however, the parties ask the

<sup>1</sup> The subpoena was issued in *Callwave Communications LLC v. AT&T Inc., AT&T Mobility, LLC, and Google, Inc.*, No. 12-cv-1701 (D. Del.). In its motion, Callwave states that it is the plaintiff in five related patent infringement cases being heard in the District of Delaware and that Location Labs possesses materials that are relevant to at least two of them. See Petition, ECF No. 1 at 5, 7.

<sup>2</sup> Record citations are to documents in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 court determine whether Location Labs should be ordered to produce the six documents that it  
 2 identified on the privilege log that it provided to Callwave on January 20, 2015. (2/6/2015 Joint  
 3 Letter, ECF No. 63 at 1.) The court's answer is "no."

#### 4 **STATEMENT**

5 This miscellaneous action relates to five patent infringement actions (the "Underlying  
 6 Litigation") that currently are pending in the United States District Court for the District of  
 7 Delaware in which Callwave claims that one of its patents (U.S. Patent No. 6,771,970 (the "970  
 8 Patent") was infringed. (See 5/5/2014 Joint Letter, ECF No. 17 at 1.) According to Callwave,  
 9 Location Labs provides some of the defendants to the Underlying Litigation with customized  
 10 software for locating mobile devices, which Callwave says is the infringing functionality in the  
 11 defendants' products. (*Id.*) One of the defendants to the Underlying Litigation is AT&T.

12 On January 20, 2015, Location Labs provided Callwave with a privilege log. (2/6/2015 Joint  
 13 Letter, ECF No. 63 at 1-2 & Ex. D (privilege log).) It lists six documents. (*Id.*, Ex. D.) For five of  
 14 the documents, Location Labs asserts that the documents are protected from disclosure under the  
 15 attorney work-product doctrine and the common interest doctrine. (*Id.*, Ex. D.) For the sixth  
 16 document, Location Labs asserts that it is protected from disclosure under the attorney work-product  
 17 doctrine, the common interest doctrine, and the attorney-client privilege. (*Id.*, Ex. D.) Callwave  
 18 argues that Location Labs's assertions are without merit. (See *id.* at 2-3.)

#### 19 **ANALYSIS**

##### 20 **I. THE COURT APPLIES FEDERAL LAW TO THIS DISPUTE**

21 "Questions of privilege that arise in the course of the adjudication of federal rights are 'governed  
 22 by the principles of the common law as they may be interpreted by the courts of the United States in  
 23 the light of reason and experience.'" *United States v. Zolin*, 491 U.S. 554, 562 (1989) (quoting  
 24 Federal Rule of Evidence 501); see *Heathman v. United States District Court*, 503 F.2d 1032, 1034  
 25 (9th Cir. 1974) ("[I]n federal question cases the clear weight of authority and logic supports  
 26 reference to federal law on the issue of the existence and scope of an asserted privilege."). Federal  
 27 law applies to privilege-based discovery disputes involving federal claims, even if allied with by  
 28 pendent state law claims. See, e.g., *Pagano v. Oroville Hospital*, 145 F.R.D. 683, 687 (E.D. Cal.

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1 1993); *Martinez v. City of Stockton*, 132 F.R.D. 677, 681-83 (E.D. Cal. 1990). Because this  
2 miscellaneous action is an outgrowth of the five federal law-based patent infringement actions  
3 pending in the District of Delaware, the court applies federal law when resolving the parties'  
4 dispute.

5 **II. THE SIXTH DOCUMENT IS NOT PROTECTED UNDER THE ATTORNEY-CLIENT**  
6 **PRIVILEGE**

7 Location Labs asserts that the sixth document is protected from disclosure under the attorney-  
8 client privilege. Location Labs describes the document on its privilege log as a chain of emails  
9 among AT&T's outside counsel, AT&T's in-house counsel, and Location Labs's outside counsel  
10 regarding "indemnification/defense and issues related thereto." (2/6/2015 Joint Letter, ECF No. 63,  
11 Ex. D.) AT&T's outside counsel (Chad Rutkowski Jacqueline Lesser, and Michelle Miller) and  
12 AT&T's in-house counsel (Brian Gaffney) are listed as the authors of the communications, and  
13 Location Labs's outside counsel (Imran Khaliq, Mark Hogge, and Shailendra Maheshwari) are listed  
14 as the recipients of the communications. (*Id.*, Ex. D.)

15 Location Labs says in its section of the parties' joint letter that the document is protected under  
16 the attorney-client privilege because it "involve[s] matter[s] confidentially disclosed between an  
17 attorney and client" and that Callwave "does not and cannot dispute this." (*Id.* at 4.) This is not  
18 correct. In its section of the letter, Callwave clearly argues (albeit in a footnote) that the document is  
19 not privileged because there is no attorney-client relationship between AT&T and Location Labs's  
20 counsel, or between AT&T's counsel and Location Labs. (*Id.* at 2 n.1.)

21 In any event, the court finds that Location Labs has not met its burden to show that the document  
22 is protected. *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) ("[A] party asserting the  
23 attorney-client privilege has the burden of establishing the [existence of an attorney-client]  
24 relationship and the privileged nature of the communication.") (quoting *United States v. Bauer*, 132  
25 F.3d 504, 507 (9th Cir. 1997)). "Because it impedes full and free discovery of the truth, the  
26 attorney-client privilege is strictly construed." *Id.* (quoting *United States v. Martin*, 278 F.3d 988,  
27 999 (9th Cir. 2002)). An eight-part test determines whether information is covered by the  
28 attorney-client privilege:

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1 (1) Where legal advice of any kind is sought (2) from a professional legal adviser in  
 2 his capacity as such, (3) the communications relating to that purpose, (4) made in  
 3 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.

4 *Id.* (quoting *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 n.2 (9th Cir. 1992)). “The party  
 5 asserting the privilege bears the burden of proving each essential element.” *Id.* at 608 (citing *United*  
 6 *States v. Munoz*, 233 F.3d 1117, 1128 (9th Cir.2000), *superseded on other grounds as stated in*  
 7 *United States v. Van Alstyne*, 584 F.3d 803, 817 (9th Cir. 2009)).

8 Under this standard, Location Labs’s simple statement that the document is protected under the  
 9 attorney-client privilege because it “involve[s] matter[s] confidentially disclosed between an  
 10 attorney and client” clearly is insufficient, and Callwave’s point about the lack of an attorney-client  
 11 relationship is well-taken. Accordingly, the court finds that Location Labs did not establish that the  
 12 sixth document listed on its privilege log is protected under the attorney-client privilege. Whether it  
 13 is protected as attorney work product is discussed below.

14 **III. THE DOCUMENTS ARE SUBJECT TO THE ATTORNEY WORK-PRODUCT**  
 15 **DOCTRINE**

16 Location Labs also asserts that all six of the documents listed on its privilege log—including the  
 17 sixth document discussed above—are protected from disclosure under the attorney work-product  
 18 doctrine. As the party asserting the privilege, Location Labs has the burden of establishing that it  
 19 applies to these documents. *See Skynet Elec. Co. Ltd. v. Flextronics Int’l, Ltd.*, No. C 12–06317  
 20 WHA, 2013 WL 6623874, at \*2 (N.D. Cal. Dec. 13, 2013) (“Where a party asserts work-product  
 21 immunity over a piece of evidence, the proponent of the privilege bears the burden of establishing its  
 22 applicability to the present circumstances.”) (citing *P. & B. Marina, Ltd. v. Logrande*, 136 F.R.D.  
 23 50, 53-54 (E.D.N.Y. 1991)). The attorney work-product doctrine is incorporated into Federal Rule  
 24 of Civil Procedure 26(b)(3)(A), which states: “Ordinarily, a party may not discover documents and  
 25 tangible things that are prepared in anticipation of litigation or for trial by of for another party or its  
 26 representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or  
 27 agent).” *See also In re Grand Jury Subpoena*, 357 F.3d 900, 906 (9th Cir. 2004) (quoting *Admiral*  
 28 *Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1494 (9th Cir. 1989)). The plain language of Rule 26

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