

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

BILLJCO, LLC,

Plaintiff,

v.

CISCO SYSTEMS, INC.,

Defendant.

Case No. 2:21-cv-00181-JRG
(Lead Case)

BILLJCO, LLC,

Plaintiff,

v.

HEWLETT PACKARD ENTERPRISE
COMPANY, ARUBA NETWORKS, LLC

Defendants.

Case No. 2:21-cv-00183-JRG
(Member Case)

**DEFENDANTS HEWLETT PACKARD ENTERPRISE COMPANY AND ARUBA
NETWORKS, LLC'S MOTION TO COMPEL DISCOVERY**

I. INTRODUCTION

Defendants Hewlett Packard Enterprise Company (“HPE”) and Aruba Networks, LLC (“Aruba”) (collectively, “Defendants”) respectfully file this motion to compel Plaintiff BillJCo, LLC (“BillJCo”) to: (1) produce its corporate witness Mr. William Johnson for an additional four hour deposition regarding the over 4000 documents that were improperly withheld until after Mr. Johnson’s deposition; and (2) produce documents underlying Mr. Johnson’s monetization of a patent portfolio related to location-based services (“LBS Portfolio”), which BillJCo has improperly withheld solely on relevance grounds.

II. BACKGROUND AND INFORMATION SOUGHT

BillJCo was founded by inventor Mr. Johnson to monetize his patent portfolio related to so-called Location Based eXchange technology (“LBX Portfolio”). (Dkt. 69 at 2-3.) Mr. Johnson and his wife are the only owners and employees of BillJCo. BillJCo asserted three patents from the LBX Portfolio (“Asserted Patents”) against Defendants HPE and Aruba in this patent infringement action.

A. BillJCo Produced More Than 4,000 Documents That Were Improperly Withheld as Privileged *After* the Johnson Deposition

On March 18, 2022, three days before the close of fact discovery in this case—and two days after the deposition of BillJCo’s sole corporate witness, Mr. Johnson—BillJCo produced 4,663 documents—*more than doubling* BillJCo’s previous document production. When asked what the 4,663 documents were, BillJCo’s counsel responded that these were “documents that were on BillJCo’s privilege log.” (Ex. 1, Westbrook Email dated March 18, 2022).)

BillJCo served a privilege log on January 21, 2022 with 7,179 entries, many of which did not list any attorneys and many others, which consisted of barebones descriptions, such as “communication regarding legal advice related to potential monetization of asserted and/or related

patents.” After Defendants’ repeated objections, including the fact that documents concerning monetization of patents are not privileged, (Ex. 2, Prey Letter dated January 28, 2022; *see also* Ex. 3, Araj Email dated February 24, 2022),¹ BillJCo served an Amended Privileged Log consisting of 3,498 entries on March 8, 2022. While BillJCo dropped its assertion of privilege with respect to 3,681 documents, these documents, and others, were withheld for twenty more days—until after Mr. Johnson’s deposition was completed.

The withheld documents come directly from Mr. Johnson’s own files and emails, including for example, correspondence with patent brokerage and licensing entities concerning the licensing of the LBX Portfolio and are undisputedly relevant to damages. For example, in one of the documents, [REDACTED]

[REDACTED], which is undisputedly relevant to damages, including the hypothetical negotiation.

[REDACTED]

(Ex. 5, BILLJCO_HPARUBA0102716.) Tellingly, there is not any attorney anywhere on the email chain. Other documents—without *any* listed attorney—also included a draft [REDACTED] [REDACTED] circulated by Mr. Johnson that is also unquestionably not privileged and highly relevant, as it indicates that the entire LBX patent

¹ *See United States ex rel. Mitchell v. CIT Bank, N.A.*, Civil Action No. 4:14-CV-00833, 2021 U.S. Dist. LEXIS 140307, at *15 (E.D. Tex. July 28, 2021) (“[A]ttorney-client privilege protects the communication only if the legal advice predominates.”); *Slocum v. Int’l Paper Co., No. 16-12563*, 2021 U.S. Dist. LEXIS 240043, at *9 (E.D. La. June 28, 2021) (“In order for attorney-client privilege to apply, legal advice must be the primary purpose of the communication.”).

portfolio could be licensed for [REDACTED]. (Exs. 6-7, BILLJCO_HPARUBA0102721-732.) Further, while BillJCo asserted a conception date prior to the filing of the Asserted Patents, BillJCo also produced all documents concerning conception after Mr. Johnson’s deposition.

Moreover, BillJCo indicated during the meet and confer for this Motion that it is still in the process of producing even more documents previously improperly withheld as privileged. Thus the exact scope of BillJCo’s discovery deficiency, and the extent of prejudice it causes Defendants, are still not fully revealed.² Significantly, BillJCo’s Amended Privilege Log still contains vague privilege claims such as “communication regarding legal advice related to negotiations over monetization of asserted and/or related patents,” but the entries appear to be Mr. Johnson’s correspondence with other patent brokerage and licensing entities regarding licensing his patent portfolios. Even Mr. Johnson readily admitted at deposition that he communicated with these entities to [REDACTED] and that the individuals never represented him as his attorney. There are hundreds of such entries in BillJCo’s Amended Privilege Log improperly withheld even though they are related to “negotiations over monetization” of patents.

#	DOCTYPE	DATE	FROM/AUTHOR	TO	CC	Privilege	PRIVILEGE DESCRIPTION
3303	E-Mail	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	AC	Communication regarding legal advice related to negotiations over monetization of asserted and/or related patents.
3304	E-Mail	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	AC	Communication regarding legal advice related to negotiations over monetization of asserted and/or related patents.
3305	E-Mail	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	AC	Communication regarding legal advice related to negotiations over monetization of asserted and/or related patents.
3306	E-Mail	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	AC	Communication regarding legal advice related to negotiations over monetization of asserted and/or related patents.
3307	E-Mail	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	AC	Communication regarding legal advice related to negotiations over monetization of asserted and/or related patents.

(BillJCo’s Amended Privilege Log dated March 8, 2022.)

² BillJCo only informed Defendants for the first time today in the meet-and-confer, after Defendants served another deficiency letter on March 16, 2022 identifying continued deficiencies in its Amended Privilege Log.

B. Mr. Johnson’s History with [REDACTED] Including His Sale Of A Related LBS Portfolio [REDACTED]

BillJCo’s infringement allegations against Defendants HPE and Aruba are based on the alleged use of iBeacon—a technical standard promulgated by Apple, Inc. (“Apple”). (*See* Case No. 21-183, Dkt. 1, ¶ 29.) Mr. Johnson has a long history of [REDACTED] his location-based technologies [REDACTED]. As explained in BillJCo’s opposition to Defendants’ Motion to Transfer, Mr. Johnson initially sold a Location Based Services patent portfolio (“LBS Portfolio”) [REDACTED] in 2007. (Dkt 69-1, ¶ 7.) Mr. Johnson then developed the LBX Portfolio that purportedly improved upon the LBS technology. (*Id.* ¶ 10.) After many failed [REDACTED] the LBX Portfolio to [REDACTED] and other parties which started in late 2009, BillJCo filed lawsuits asserting patents from the LBX Portfolio against various defendants in 2021.

The LBS Portfolio is plainly relevant as it is frequently referred to and compared with the asserted LBX patents in BillJCo’s own documents, and there is no dispute that the LBS patents are prior art. Mr. Johnson referred to LBX as [REDACTED] at deposition and explained that [REDACTED] [REDACTED] (Ex. 8, Johnson Dep Tr. 13:2-12; Ex. 9, Johnson Dep. Tr. 341:10-15; Ex. 10, BILLJCO_ARUBA0062340.) By BillJCo’s own admission, the early LBS Portfolio is relevant “as least to willfulness and prior art.” (Dkt. 69 at 3.) Moreover, the factual circumstances around negotiation and sale of the LBS Portfolio is further relevant to the valuation of the LBX Portfolio, as well as the issue of damages. Yet, BillJCo. has refused to produce them solely based on relevance grounds. Indeed, at deposition, Mr. Johnson testified that he was in possession of documents related to the LBS Portfolio negotiation, but was never asked to collect them and provide them to his attorneys. (*See* Ex. 4, Prey Letter dated March 16, 2022.)

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