SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding
David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: June 6, 2024   TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: Before 4:00 PM today you must notify the:

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in-person appearances. If you must appear virtually, you must use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:
https://www.scscourt.org/general_info/court_reporters.shtml

FOR YOUR NEXT HEARING DATE: Use Court Schedule to reserve a hearing date for your next motion. Court Schedule is an online scheduling tool that can be found on the court's website here:
https://reservations.scscourt.org/

FREE MCLE Civil Bench Presentation:
Civil Trials and Civil Motion Practice:
Best Practices in Santa Clara County Superior Court

Date: June 20, 2024
Time: 12-1:00
Place: Microsoft Teams: https://msteams.link/YGLE

Calendar lines 1-2
Case Name: *Cryplex, Inc. vs Bitmain Technologies Holding Company*
Case No.: 18CV337836

Before the Court is Defendant Bitmain Technologies Holding Company's ("Bitmain") motion to compel Plaintiff Cryplex, Inc.'s ("Cryplex") production of improperly withheld documents and second motion to compel non-party Bitdeer Inc.'s ("Bitdeer") production of documents and testimony. Pursuant to California Rule of Court 3.1308, the Court issues its tentative rulings.

I.   Background

This is a trade secret case. Cryplex alleges Bitmain's former co-CEO, Jihan Wu, was involved in the acts leading to this lawsuit. While this case was pending, Mr. Wu left Bitmain and is now the Chief Executive Officer, Chief Financial Officer, and Secretary of Non-Party Bitdeer. Bitmain has evidence from its discovery of Cryplex that Cryplex contacted Mr. Wu at Bitmain to discuss this lawsuit, including "litigation funding", "acquisition of claims", or "business transactions." Bitmain seeks to obtain further discovery on these topics directly from Bitdeer and Cryplex. Bitdeer purports to be agnostic as to the production of these materials but refuses to do so because Cryplex claims the information sought about these topics is privileged.

The Court previously ruled that the discovery Bitmain seeks is relevant to this case. In its January 9, 2024 order granting Bitmain's ex parte application for request for international judicial assistance pursuant to Hauge Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters from Jihan Wu, the Court held:

> The Court has carefully reviewed Cryplex's opposition and does not require oral
> argument. The Cout finds the topics are likely to lead to the discovery of
> admissible evidence (i.e., not irrelevant). And, while the Court declines to make a
> blanket ruling that all aspects of the topics listed in section 10 and 11 are subject
> to the common interest privilege, this ruling is without prejudice to Cryplex
> asserting appropriate objections to particular communications, if necessary.
> Potentially privileged documents shall be listed on a privilege log. If there is a
> common interest privilege, the producing party will be equally motivated to
> preserve such privilege.

The Court later granted Bitmain's motion to compel this same information from Bitdeer, ruling:

> The Court fails to see how the analysis is different. The materials sought in these requests is likely to lead to the discovery of admissible evidence – the standard on a discovery motion. Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence."   (Code Civ. Pro. § 2017.010.)   Everything that is relevant to the subject matter is presumed to be discoverable. (*Id.*)
>
> If there really is a common interest privilege, such documents must be listed on a privilege log with "sufficient factual information for other parties to evaluate the merits of that claim". (Code Civ. Pro. §2031.240.)

Bitdeer produced a privilege log with 40 entries consisting of emails and Slack messages, and Cryplex produced a 216 page privilege log. Bitmain seeks production of Bitdeer's documents, Cryplex's documents regarding the subjects of the Bitdeer documents, and testimony from Bitdeer regarding these subjects.

II.   Legal Standard and Analysis

First, Bitdeer's argument that it does not control or otherwise have the authority to produce the documents listed on its privilege log is wrong. Bitdeer collected the listed documents from its corporate servers; Bitdeer is therefore in possession, custody, and control of the documents.

Next, Bitdeer employees using Bitdeer's email and Slack while at Bitdeer to communicate had no expectation of privacy over those communications according to Bitdeer's own corporation policies contained in the Bitdeer Technologies Group Code of Business Conduct and Ethics: "Officers and employees should not expect a right to privacy of their e-mail or Internet use. All e-mails or Internet use on Company equipment is subject to monitory by the Company." (Declaration of Nancy L. Schroeder, Ex. G; see also *Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal. App. 4th 1047,

1051-1052 ("By using the company's computer to communicate with her lawyer, knowing the communications violated company computer policy and could be discovered by her employer due to company monitoring of e-mail usage, Holmes did not communicate "in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." (Evid. Code, § 952.) Consequently, the communications were not privileged.").)

The only remaining hurdle to production of the documents on Bitdeer's privilege log is its assertion of a common interest privilege on behalf of Cryplex. Bitdeer has waived any privilege and is willing to produce these documents; Cryplex has not waived the privilege and argues they should not be produced.

All evidentiary privileges in California are statutory. (*People v. Barefiled* (2021) 68 Cal.App.5th 890, 899.) Unless a privilege is expressly or impliedly based on a statute, its existence may be found only if required by state or federal constitutional principles. (See, e.g., *McNair v. NCAA* (2015) 234 Cal.App.4th 25, 36.) The common interest privilege here is governed by Evidence Code section 912, which provides:

> Where two or more persons are joint holders of a privilege provided by Section
> 954 (lawyer-client privilege). . . a waiver of the right of a particular joint holder
> of the privilege to claim the privilege does not affect the right of another joint
> holder to claim the privilege.

Thus, the fact that Bitdeer waives the common interest privilege does not on its own mean the privilege does not apply. What remains is whether the common interest applies to these communications. The Court concludes that it does.

A survey of cases in this area reveals that California law is extremely protective of the attorney-client privilege and does not find waiver unless there is essentially no reasonable view of the facts that could support maintenance of the privilege. (See, e.g., *Behunin v. Superior Court* (2017) 9 Cal. App. 5th 833 (inapplicable to communications between petitioner and public relations consultant hired by petitioner's attorney as consultant did not seek legal advice from petitioner's attorney and

success of the public relations campaign was not an applicable common interest); *Citizens for Ceres v. Superior Court* (2013), 217 Cal. App. 4th 889 (inapplicable to communications between a city and developer during pre-approval period where city was required to be neutral).

The communications listed on Bitdeer's privilege log concern a potential IP transfer in connection with litigation funding. During these conversations, it would be reasonable for the parties to discuss the status of the litigation, including strategies, strengths and weaknesses, and potential outcomes. For Bitdeer, this was a potential business deal—a possible investment. And, given that this litigation is now Cryplex's sole business, it is the same for Cryplex. These facts are thus like those in *OXY Resources California LLC v. Superior Court* (2004), 115 Cal. App. 4th 874, 9 where it was error for the trial court to order production of documents reflecting communications exchanged during negotiations for a commercial transaction.

Accordingly, Bitmain's motion to compel documents and testimony regarding communications between and amongst Bitdeer, Wu, and Cryplex listed on Bitmain and Cryplex's privilege logs is DENIED.

Bitmain's motion to compel documents on Cryplex's privilege log that Bitmain alleges do not include attorneys is also DENIED. First, Bitmain fails to adequately identify which log entries it is referring to, and a blanket ruling on this issue would be inappropriate. Next, for those entries Bitmain did identify, the record is insufficiently developed to support waiver and production under California law.

Finally, it appears there is nothing for the Court to compel Bitdeer to do regarding Wu's document production. Bitdeer represents it has searched for communications sought by Bitmain's subpoena and no additional documents exist. So long as Bitdeer states this in written verified responses, its response will be Code compliant. Accordingly, Bitmain's motion to compel on that issue is also DENIED.