EXHIBIT 5

Ratinoff, Jeffrey M.

From: Ratinoff, Jeffrey M.
Sent: Wednesday, October 20, 2010 7:41 PM
To: 'PAlsdorf@fbm.com'; EMar@fbm.com
Cc: SSkaff@fbm.com; JCooper@fbm.com; WWicker@woodburnandwedge.com; Davis, Harold H. Jr.; Walker, Timothy; Dhillon, Jas
Subject: RE: Moore document production

Paul,

Thank you for your response. As I stated in my prior email, the documents in question have been sequestered pending a resolution of our dispute.

However, TPL still has not adequately explained the legal relationship between TPL and Moore in a manner that warrants classifying communications between TPL, TPL's attorneys and Moore as privileged (the establishment which is a prerequisite relying on the common interest doctrine). In this regard, you have identified the attorneys in the emails in question as representing TPL, not Moore. As such, Moore appears to be an outside third party, thereby destroying any claim of privilege over the emails by TPL. Indeed, simply because Moore was an inventor of patents, which TPL claims to own, does not automatically make those communications privileged. *See, e.g. GP Industries, LLC v. Bachman*, 2008 WL 4279739 (D. Neb. Sep 16, 2008) (rejecting patent owner's claim that common interest relating to the validity and enforcement of a patent prevented disclosure of communications and documents exchanged between the patent owner and the inventor that assigned the patent).

Further, your reliance on the *Regents* case is misplaced. *Regents* did not involve an inventor who had assigned ownership of a patent to another party seeking to enforce that patent. Thus, unless TPL is now saying that Moore owns the patents-in-suit (which is inconsistent with TPL's complaint filed in the Texas case), *Regents* appears to be inapplicable. *Regents* is further distinguishable from this case as it involved the prosecution of a patent rather than the enforcement of one where the same attorneys effectively represented the patentee and an optionee/potential licensee.

Finally, TPL's reasoning that no waiver has occurred as a result of its failure to file a motion for protective order is inconsistent with the provisions of Rule 45. *See* FRCP 45(c)(3)(A); *see also* 2 Schwarzer et al., *Federal Civil Procedure Before Trial* ¶¶ 2286-88 (Rutter Group 2010). The fact that TPL did not communicate with Moore about the document production is also inconsequential since TPL had actual notice that the subpoena sought communications between Moore and TPL regarding the patents. *See* Amended Document Subpoena, Request No. 8. Likewise, TPL knew or should have know that TPL and Moore had communicated during the Texas lawsuit. The onus was therefore on TPL to either communicate with Moore concerning any privileged concerns, or as expressly provided by Rule 45, seek a protective order to ensure that Moore did not produce any alleged privilege documents.

The fact that the subpoena calls for the production of a privilege log also does not save TPL from waiver. In order to rely upon a privilege log, Moore and TPL would have had to first assert objections based on privilege ***prior*** to Moore complying with the subpoena.

Since the parties appear to be moving out tomorrow's deadline, I see no reason why we cannot discuss this further tomorrow morning. Please be advised that Acer cannot afford any further delay in resolving this matter. Thus, if TPL is unwilling to meet and confer tomorrow, Acer will have no other choice than to seek emergency relief to ensure that this dispute is resolved by the Court in advance of Moore's deposition.

Thanks,
Jeff

From: PAlsdorf@fbm.com [mailto:PAlsdorf@fbm.com]
Sent: Wednesday, October 20, 2010 12:46 PM
To: Ratinoff, Jeffrey M.; EMar@fbm.com
Cc: SSkaff@fbm.com; JCooper@fbm.com; WWicker@woodburnandwedge.com; Davis, Harold H. Jr.; Walker, Timothy; Dhillon, Jas
Subject: RE: Moore document production

Jeff,

I'm responding for Eugene, who's tied up on claim construction today.

Despite the pending claim construction deadline, we notified you of the two privileged documents as soon as they came to our attention. We therefore expect that you will abide by Rule 26 and 45's requirements and at the very least sequester the two documents until we are able to properly meet and confer on this issue. We will be available after the joint claim construction submission is complete.

Briefly responding to your points:

Basis for privilege:

- "mac336" is an August 14, 2008 email from Mac Leckrone to Larry Henneman, Dan Leckrone, Townsend lawyers Roger Cook, George Yee, Rodney LeRoy, Alan Minsk, and Ko-Fang Chang. Mr. Moore is also cc'ed. It (and the email chain attached thereto) is entitled "'336 re-exam interview summary" and relates to the interview of Mr. Moore and the interpretation of certain language in the then-ongoing re-examination of the '336 patent.
- Moore0058 is another email from that chain, sent by Mr. Moore on August 14, 2008 to the same group of recipients. It relates to the same subject matter.
- Mr. Henneman and Townsend were retained by TPL to provide legal advice on the '336 patent, including issues arising out of its re-examination. Mr. Moore and TPL - the inventor and exclusive licensee - had a clear and identical interest in a successful re-examination of the '336 patent; their communications with the counsel retained in connection with those proceedings are therefore protected by the attorney-client privilege. *See In re Regents of University of California*, 101 F.3d 1386 (Fed. Cir. 1996) (communications between patent owner, licensee, and counsel that filed patent application with the USPTO were privileged under common interest doctrine even if no formal retention agreement existed between licensee and counsel).

Timeliness

- TPL disputes that it has waived its right to assert the privilege over these documents.
- TPL was not privy to Mr. Moore's planned production and could not have anticipated that he would produce these privileged documents in response to Acer's requests. The subpoena itself calls for the production of a privilege log in the event Mr. Moore has any responsive privileged documents. TPL had no obligation to move to quash the subpoena or for a protective order prior to production.
- Instead, TPL promptly provided Acer with notice of its claim of privilege upon receipt of the privileged documents, as required by Rule 26 (which on its face applies to "information produced in discovery [that] is subject to a claim of privilege"). And even assuming that Rule 26 does not apply, Rule 45(d)(2)(B) authorizes TPL's assertion of privilege. Acer "must not use or disclose the information" until the claim of privilege is resolved.

Please let us know your availability to formally meet and confer after the claim construction statement is filed.

Regards,

Paul

-----Original Message-----
From: Ratinoff, Jeffrey M. [mailto:Jeffrey.Ratinoff@klgates.com]

Sent: Tuesday, October 19, 2010 6:17 PM
To: Mar, Eugene (20) x4927
Cc: Skaff, Stephanie (20) x4495; Alsdorf, Paul (22) x4494; Cooper, John (19) x4410; WWicker@woodburnandwedge.com; Davis, Harold H. Jr.; Walker, Timothy; Dhillon, Jas
Subject: RE: Moore document production

Eugene,

As you know, FRCP 26(b)(5)(B) permits a producing party to "claw-back" allegedly privileged documents that are inadvertently produced by that party. However, it is unclear whether this provision that allows a party to "claw-back" purportedly privileged documents produced (inadvertently or otherwise) by a non-party responding to a subpoena. If you have some authority to this effect, please provide the citations.

Assuming, arguendo, that FRCP 26(b)(5)(B) does apply to this situation, however, this provision allows Acer to sequester the documents in question until the privilege claim is resolved, and permits Acer to promptly present the information to the Court under seal for a determination of TPL's claim. Thus, Acer will sequester the two documents you identified below pending a resolution of the parties' dispute over TPL's privilege claim.

In this regard, it is Acer's position that TPL waived any claim of privilege over the documents in question. TPL had notice of the subpoena (and the subsequent amended subpoena, which only changed the date of production) by September 3, 2010. The subpoena clearly called for documents relating to the patents-in-suit and the prior Texas litigation. Moore also did not serve any written objections, indicating his willingness to fully comply with the document subpoena. Similarly, TPL failed to file a motion for protective order or to quash that subpoena to protect any alleged privilege that may have existed between TPL and Moore as required by Rule 45.

Even if TPL had timely filed a motion, the so-called common interest doctrine is an anti-waiver exception and "comes into play only if the communication at issue is privileged in the first instance." *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D.Cal. 2007). From the vague description below, it is unclear how TPL could claim such communications are subject to an underlying privilege. *See* FRCP 26(b)(6)(A); *see also United States v. Graf,* 610 F.3d 1148, 1156 (9th Cir. 2010) ("[a] party asserting the attorney-client privilege has the burden of establishing the existence of the attorney-client relationship and the privileged nature of the communication") (emphasis in original) (internal editing marks omitted). Consequently, TPL must provide ***specific*** foundational facts justifying its privilege claim, including explaining who each of the recipients of these communications are, their role in *TPL v. Fujitsu et al.*, and why they were included in the communications.

Moreover, there is no indication in the complaint filed in *TPL v. Fujitsu et al* that the attorneys representing TPL also represented Moore or asserted any claims on Moore's behalf. In fact, TPL alleges that "TPL is an owner of the right, title and interest to the '148 patent, the '336 patent, and the '584 patent (collectively, "the patents-in-suit"), has the exclusive right to enforce and license the patents-in-suit, and has standing to sue." As such, please also explain the common legal interest Moore had with TPL and how each of the recipients, including TPL's lawyers, was commonly representing Moore's interests at that time.

Given that Mr. Moore's deposition is currently scheduled for next Wednesday, please provide the requested information by 2pm tomorrow and let me know when you will be available tomorrow to discuss the foregoing.

Thanks,

Jeff

From: EMar@fbm.com [mailto:EMar@fbm.com]
Sent: Tuesday, October 19, 2010 12:30 PM
To: WWicker@woodburnandwedge.com; Ratinoff, Jeffrey M.
Cc: SSkaff@fbm.com; PAlsdorf@fbm.com; JCooper@fbm.com

Subject: Moore document production

Chris and Jeff,

We have identified two privileged documents in Friday's email production: "mac336.pdf" and the email produced at MOORE0058. Each of them contains communications between TPL, Mr. Moore, and the attorneys retained by TPL to represent TPL's and Mr. Moore's interests in the prior Texas litigation and before the USPTO (including Roger Cook of Townsend and Larry Henneman of Gray Plant Mooty). They discuss the subject matter of those representations and are therefore privileged attorney-client communications protected by the common interest privilege.

The common interest privilege cannot be waived unilaterally by Mr. Moore and the attorney-client privilege remains in place despite these documents' production. TPL objects to the production and/or use of those documents - as well as any similar materials - in this matter (including at Mr. Moore's deposition next week) as well as in any other proceedings. We note that, even if any party disputes that the materials are privileged, Fed. R. Civ. P. 26(b)(5) prohibits the use or disclosure of these materials until after the claim is resolved. TPL therefore requests, pursuant to Rule 26, that:

1. Acer destroy and/or return mac336.pdf and MOORE0058, as well as any other communications between TPL and/or Mr. Moore and TPL's counsel, including but not limited to Roger Cook and/or Larry Henneman; and
2. Mr. Moore withhold any additional privileged documents from future productions.

We have not yet completed our review of the additional materials on the disc received this morning, but request that any privileged materials on that disc be destroyed and/or returned as well. Please confirm to us in writing as soon as possible that you have complied with the requests in this email.

Regards,

Eugene