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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., et al., Plaintiff, vs. THE CENTER FOR MEDICAL PROGRESS, et al., Defendants.	Case No. 3:16-CV-00236 (WHO) Hon. Donna M. Ryu Opposition to Plaintiffs' Motion for In Camera Review of Defendant CMP's Privileged Documents (Dkt. 385, 384-3) Hearing Date: TBD Oakland Courthouse, Courtroom 4

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INTRODUCTION

A party cannot obtain *in camera* review merely because it is distrustful of the opposing party and opposing counsel. If so, *in camera* review would be warranted in every case. Rather, the moving party must provide evidence, with respect to each document for which it seeks in camera review, establishing that there is a good faith basis to suspect that the specific document is not privileged. Plaintiffs have woefully failed to meet that burden, and therefore their motion should be denied.

PROCEDURAL HISTORY

On July 6, 2018, Defendant CMP produced to Plaintiffs an updated privilege log which accounted for the production which this Court ordered in its May 31, 2018, Order on Joint Discovery Letters. Dkt. 384-5. A few days later, CMP sent Plaintiffs an addendum which brought the total number of communications on the log up to exactly 1,600. As this Court recalls, in that order, it required CMP to produce or log all documents relating to CMP's Human Capital Project. Dkt. 266 at 6:21-7:4. As a result, the log was necessarily very long. Trissell Decl., ¶ 2

For the sake of completeness, CMP included all attachments to emails as separate entries on its log.[1] These attachments had generally already been produced, were not separately privileged, and inflated the log to 2,523 entries. *See* Dkt. 384-5. Due to Plaintiffs' complaints in their October 5 letter about the attachment entries, Dkt. 384-6, CMP agreed to re-review all of the attachments, only list those which are privileged, and produce all removed entries. Dkt. 384-7. Contrary to Plaintiffs' assertion, Mtn. 2 n.1, Defendants completed that production on December 24 prior to Plaintiffs filing the present motion. That production consisted of 2,071 pages. Plaintiffs also complained to CMP about the inclusion of some non-attorney third-parties on its log. As a result, CMP re-reviewed many of those entries and produced some of them on October 25, 2018. Trissell Decl., ¶ 3.

On November 7, 2018, Plaintiffs wrote to CMP with additional complaints. In sum, Plaintiffs asserted that it was "simply not credible" that CMP had counsel advising on its investigative journalism project; simply not credible that it had personnel at all; simply not credible that the

[1] *See* SCHWARZER, ET AL., FED. CIV. PROC. BEFORE TRIAL, ¶ 11:1921 (2018) ("Any attachment to an allegedly privileged document should be listed separately from the document to which it is attached.").

common interest doctrine could be applied; and demanded all of CMP's communications with Life Legal Defense Foundation on the basis of the crime-fraud exception. Dkt. 384-9 ("[U]nless CMP discloses all communications with Katie Short immediately, we will take the matter to the court."). Plaintiffs, however, provided no evidence to support their beliefs. Trissell Decl., ¶ 4.

After the Thanksgiving holiday, CMP responded that Plaintiffs' assertions of incredulity, without any evidence, were insufficient to convince CMP to waive the attorney-client privilege. Dkt. 384-10. As a result, on November 29, the parties engaged in a telephonic meet and confer. The next day, CMP decided that it may be the case that within the 1,600 privileged communications on its log, there may be some which contain an admixture of both legal and business advice. CMP further decided that the junior attorneys who reviewed the original communications may not have had sufficient experience to engage in the judgment calls necessary to parse legal advice from business advice. As a result, CMP asked Plaintiffs for one week in which to re-review all of the entries on its privilege log. Plaintiffs inexplicably refused, and filed a motion to compel on December 6. Dkt. 364. This Court then denied Plaintiffs' motion without prejudice, ordered the parties to continue meeting and conferring, and then Plaintiffs could re-file their motion if necessary on Christmas Eve. Dkt. 372. Trissell Decl., ¶ 5.

The parties engaged in a further telephonic meet and confer on Monday, December 17, and agreed to exchange revised logs on Wednesday, December 19. In the interim, CMP had seven attorneys re-review every entry on its privilege log to determine that privilege was properly asserted. The attorneys were Charles LiMandri, Matthew Heffron, Peter Breen, Jeffrey Trissell, and Dean Wilson (all counsel of record in this case), and Mary Walker and Milan Brandon (attorneys who have not appeared). Together, these attorneys have a combined experience of approximately 143 years. As a result of its counsel's re-review, CMP agreed to produce an additional approximately 680 pages of documents. For some of these, privileged portions would be redacted and the document itself would remain on the log. On Wednesday December 19, CMP produced an updated privilege log which now contains 1,417 entries. Dkt. 384-12. On Friday December 21, CMP inquired of Plaintiffs whether CMP's re-review of the documents using senior counsel, and agreement to produce additional documents, satisfied Plaintiffs' concerns. Dkt. 384-14. Plaintiffs never responded, and proceeded to file the present motion on Christmas Eve. Trissell Decl., ¶ 6.

LEGAL STANDARD

Regardless of under which theory the moving party asserts that the attorney-client privilege does not apply (*e.g.*, waiver, crime-fraud), the standard for invoking *in camera* review is the same. *See In re Grand Jury Investigation*, 974 F.2d 1068, 1074 (9th Cir. 1992).

> [I]n camera review is not automatically warranted. Before conducting an in camera review to determine whether the attorney-client privilege applies, the party opposing the privilege must show a *factual basis* sufficient to support a reasonable, good faith belief that in camera inspection may reveal evidence that information in the materials is not privileged. Once the party challenging the privilege's application makes this showing, whether to conduct an in camera review lies within the Court's discretion.

U.S. Commodity Futures Trading Comm'n v. WeCorp, Inc., No. 2:09-CV-00153-PMP, 2009 WL 10676994, at *2 (D. Haw. Dec. 23, 2009).[2] The "factual basis" must be "determine[d] separately for each document" for which *in camera* review is requested. *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 644 (8th Cir. 2001); *see also Fair Isaac Corp. v. Experian Info. Sols., Inc.*, No. CV 06-4112 (ADM/JSM), 2009 WL 10677479, at *11 (D. Minn. Mar. 23, 2009) ("Fair Isaac's failure to make the threshold showing required by *Zolin for each document* it is asking this Court to perform an in camera review, is fatal to its motion"). It is only after this factual basis is satisfied, that the Court has discretion to engage in *in camera* review. *Kilpatrick v. King*, 499 F.3d 759, 766 (8th Cir. 2007). This is because "[a]lthough in camera review of documents does not destroy the attorney-client privilege, it is an intrusion which must be justified." *In re Grand Jury Investigation*, 974 F.2d 1068, 1074 (9th Cir. 1992); *cf. also McClure v. Thompson*, 323 F.3d 1233, 1250 (9th Cir. 2003) ("One of the oldest and most sacrosanct duties of an attorney [is] the duty of confidentiality").

LEGAL ARGUMENT

1. Communications with Americans United for Life

Plaintiffs seek *in camera* review of CMP's communications with Americans United for Life (AUL) on three bases. Mtn. 5:5-23. Amazingly, Plaintiffs' *only* evidence is the declaration of AUL's current general counsel, which CMP filed. *See* Mtn. 5:16-20. Plaintiffs' attempt to twist the language in that declaration to support their unsubstantiated "understanding" fails the mark.

[2] Citations, quotation marks, and brackets, are always omitted; emphasis is always added.

First, with respect to Mr. Lamontagne, Plaintiffs cite *United States v. Martin,* 278 F.3d 988, 1000 (9th Cir. 2002), for the proposition that "as AUL's General Counsel at the time, *he could not have had* an attorney-client relationship with CMP." Mtn. 5:8-11. This is an egregious misrepresentation of *Martin*, which states: "Defendant did not present sufficient evidence to establish such a relationship. [The attorney] was hired as general counsel for a corporation. The corporation's privilege *does not extend automatically to Defendant in his individual capacity*." *Martin*, 278 F.3d at 1000. Here, CMP has "present[ed] sufficient evidence" in the form of a declaration from AUL asserting that it, and Mr. Lamontagne, had an attorney-client relationship with CMP. Aden Decl., ¶ 2.

Second, Plaintiffs imply that CMP's privilege log reveals that CMP was largely communicating with AUL's non-attorney CEO herself, without attorneys present. Mtn. 5:11-14. This is not the case. The rule is that "[t]he attorney-client privilege undeniably extends to communications with 'one employed to assist the lawyer in the rendition of professional legal services.'" *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Tr. Corp.*, 5 F.3d 1508, 1514 (D.C. Cir. 1993). Here, the vast majority of entries which list Ms. Yoest (and other non-attorney staff)[3] show that AUL attorneys *copied* her—presumably "to assist [them] in the[ir] rendition of professional legal services." *Id.* Plaintiffs provide no support for the proposition that only clerical or administrative "assist[ance]" is permissible—which of course, is not the case, as experts who "assist" may be given privileged information. *In re Grand Jury Subpoenas Dated Mar. 24, 2003 Directed to (A) Grand Jury Witness Firm & (B) Grand Jury Witness*, 265 F. Supp. 2d 321, 323, 325, 330-31 (S.D.N.Y. 2003). Six entries (of the 300 AUL entries which Plaintiffs counted, Mtn. 5:7-8) are solely between Ms. Yoest and CMP, but there is nothing untoward about that. They consist of two email chains on which Ms. Yoest was copied and where she pressed "reply" instead of "reply all." That does not waive the privilege. *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1077 (N.D. Cal. 2002) ("[A] communication between nonlegal employees in which the employees discuss or transmit legal advice given by counsel" are protected by the attorney-client privilege).

[3] Plaintiffs assert that Ms. Maxon held a "high-ranking non-legal position[]" in AUL. Mtn. 5:12-14. This is incorrect. Ms. Maxon served as VP of External Affairs and Corporate Counsel.

Third, and finally, Plaintiffs' efforts to twist the Aden declaration fail. It states that CMP "engaged AUL and its counsel . . . in an attorney-client relationship for the purpose of providing legal counsel and strategic assistance relating to proposed investigations by Mr. Daleiden and the Center for Medical Progress into alleged wrongdoing in the fetal tissue procurement industry." Aden Decl., ¶ 2. Plaintiffs assert that there is something untoward about the phrase "strategic assistance"—there is not.

> Given the evident confusion in some cases, we also think it important to underscore that the primary purpose test, sensibly and properly applied, cannot and does not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other. After all, trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task. . . . Sensibly and properly applied, the test boils down to whether obtaining or providing legal advice was *one* of the significant purposes of the attorney-client communication."

In re Kellogg Brown & Root, Inc., 756 F.3d 754, 759-60 (D.C. Cir. 2014) (Kavanaugh, J.). Here, seven attorneys—including four senior attorneys—re-reviewed all of the communications on CMP's privilege log. Trissell Decl., ¶ 6 For all of the communications which continue to be withheld, they determined that "one of the significant purposes" was the seeking or provision of legal advice. The fact that some practical "strategic" advice may have been interwoven is irrelevant. Plaintiffs' mere speculation that some purely strategic emails may heave been withheld does not warrant *in camera* review.[4]

2. Communications with Life Legal Defense Foundation

Five individuals associated with Life Legal Defense Foundation (LLDF) are listed on CMP's privilege log—four attorneys and one staff. The sole non-attorney is Mary Riley, LLDF's

[4] *Compare Skyline Wesleyan Church v. California Dep't of Managed Health Care*, 322 F.R.D. 571, 585 (S.D. Cal. 2017) ("Plaintiff's mere speculation, without more, that these two emails may not be privileged is insufficient to . . . persuade the Court that it needs to review these documents *in camera*."); *with Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 610 (8th Cir. 1977) ("[A] matter committed to a professional legal adviser is prima facie so committed for the sake of the legal advice which may be more or less desirable for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice."); *see also Leadership Studies, Inc. v. Blanchard Training & Dev., Inc.*, No. 15CV1831-WQH(KSC), 2017 WL 2819847, at *12 (S.D. Cal. June 28, 2017) ("Nor is there anything in the record as presented to indicate there is a factual basis to justify the expenditure of the Court's limited resources to conduct an *in camera* review of a large number of documents just to verify that they are indeed privileged."). Plaintiffs also point to entries 1805-07 as worthy of specific attention. Mtn. 5:22-23. Those are listed on CMP's log as containing redactions. Those documents contain a single redaction of Mr. Daleiden's date of birth, and are otherwise being produced in full.

VP of Operations. Short Decl., ¶ 2.[5] But Ms. Riley was never communicating with CMP herself—she was always only copied on communications with CMP made by LLDF President Cody. There is no basis here for engaging in *in camera* review. By providing declarations from Mr. Daleiden and Ms. Short, CMP has more than met their burden. *Compare* Daleiden Decl., ¶¶ 12-13; Short Decl., ¶¶ 1-2; *with Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 637 (D. Nev. 2013) ("While Plaintiff appears to claim that Bard was obligated to produce supporting affidavits in conjunction with its privilege log, this [i]s not . . . a requirement in this circuit.").

Plaintiffs also specifically seek CMP's communications with LLDF attorney Catherine Short on the basis of the crime-fraud exception.[6] To assert the "crime-fraud" exception, the moving party must establish by a "preponderance of the evidence" that the asserting party was engaged in a criminal or fraudulent scheme. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009). The moving party must also present evidence establishing that the "the communication [was] made with an intent to further the crime" or fraud. *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986); *see also In re Sealed Case,* 107 F.3d 46, 50 (D.C. Cir. 1997); *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986). Once those showings have been made, the court then engages in an *in camera* review. *In re Grand Jury Investigation*, 810 F.3d 1110, 1114 (9th Cir. 2016).

Here, Plaintiffs are putting the cart well ahead of the horse. At an early stage of this litigation, this Court disallowed Plaintiffs' deficient RICO mail and wire fraud claim. Dkt 124 at 11:5. Nevertheless, this Court found that three Plaintiffs adequately *pleaded* common law fraud, but it held that the question of whether Plaintiffs ultimately would be able to prove their fraud claim "is more appropriately addressed at summary judgment or trial." *Id.* at 36:10-11. After finally receiving

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[5] In previous filings, CMP erroneously referred to some of those attorneys as "law firm staff."

[6] Plaintiffs have repeatedly changed their theory as to how the crime-fraud exception applies, sometimes asserting various criminal statutes, and now asserting that CMP's investigative journalism itself was fraudulent. *See* Dkt. 384-6 ("In its Amended Complaint, Planned Parenthood detailed the facts demonstrating Defendants' criminal activity."). Even here, Plaintiffs insert—without any analysis—a sentence implying that the exception might be applicable due to some unspecified criminal statute. Mtn., 10:3-4 ("[T]he videos that Defendants produced are themselves further evidence that Defendants violated federal and state criminal law.") Without knowing to which statute Plaintiffs are referring, CMP cannot meaningfully respond. But if Plaintiffs were referring to any of the recording statutes, this Court has said that whether CMP violated those statutes is "highly fact-intensive" and "a question of fact for the jury to resolve." Dkt. 124 at 37:6, 41:7-8, 41:20-21.

Plaintiffs' delayed itemization of damages, *see* Dkt. 313–14, one defendant moved for summary judgment as to Plaintiffs' fraud claims on grounds that will apply to all Defendants. Dkt. 354 (moving papers); Dkt. 389, 388-4 (opposition papers).[7] Plaintiffs' assertion that they have already established the evidentiary basis for the crime-fraud exception, and thus logically for Defendants' ultimate liability, is premature at best, absurd at worst. *See Criswell v. City of O'Fallon*, Mo., No. 4:06CV01565 ERW, 2008 WL 250199, at *4 (E.D. Mo. Jan. 29, 2008) ("The difficulty in the case at bar is that the alleged criminal or fraudulent activity, is the exact activity which is the subject of the pending suit. Therefore, whether the advice of the City's attorneys was sought in furtherance of that alleged illegal activity requires a finding on the ultimate question. The Court is not able to make such a determination based on the information before it, and therefore Plaintiff has failed to provide a sufficient factual basis to support the application of the exception.").

Moreover, Plaintiffs have *no* evidence, let alone a "preponderance of the evidence," that Ms. Short provided legal advice "inten[ding]" to further fraud and not investigative journalism. *Cf. City of Pontiac Gen. Employees' Ret. Sys. v. Wal-Mart Stores, Inc.*, No. 5:12-CV-05162, 2018 WL 1558574, at *6 (W.D. Ark. Mar. 29, 2018) ("[L]aw is complicated and business entities often need to consult attorneys in order to comply with the law."). Nevertheless, if the Court wishes to engage in *in camera* review of these communications at this time, rather than after a ruling on the pending motion for summary judgment on the fraud claim, CMP is willing to provide its communications with Ms. Short to the Court for *in camera* review.[8]

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[7] *See also* Komal S. Patel, *Testing the Limits of the First Amendment: How Online Civil Rights Testing Is Protected Speech Activity*, 118 COLUM. L. REV. 1473, 1490 (2018) ("[T]he *Desnick* court explicitly stated there was no fraud in a tester scheme because a 'scheme to expose publicly any bad practices that the investigative team discovered' was not fraudulent.") (quoting *Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1355 (7th Cir. 1995)); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194–95 (9th Cir. 2018) ("The targeted speech—a false statement made in order to access an agricultural production facility—cannot on its face be characterized as made to effect a fraud.").

[8] Plaintiffs' citations to *NAF v. CMP*, No. 15-CV-03522-WHO, 2016 WL 454082 (N.D. Cal. Feb. 5, 2016), *aff'd*, 685 F. App'x 623 (9th Cir. 2017) are misleading, Mtn. 9:23-10:4. Those opinions considered solely NAF's breach of contract claim, not fraud, and thus the Court's statements concerning fraud were necessarily dicta. Plaintiffs also point to entries 172 ("Confidential email regarding seeking attorney-client legal representation") and 2514-16 ("Confidential email containing client information to provide legal advice regarding nonprofit corporations") as containing improperly "vague descriptions." Mtn. 6:7-10. The only case which Plaintiffs cite regarding the appropriate level of particularity is *Apple Inc. v. Samsung Elecs. Co.*, 306 F.R.D. 234, 239 (N.D. Cal.

3. Communications with Attorneys Allen, Leo & Bunch

Here too, Plaintiffs merely assert without any substantiating evidence that it is "far more likely [that Allen, Leo and Bunch were] involved with CMP's fundraising efforts than legal representation" due to the fact that they are not employed by law firms. Mtn. 6:13-7:5. To be clear, CMP did not have a relationship with those attorneys' employers, including the Federalist Society—rather CMP had a relationship with the attorneys themselves. Daleiden Decl., ¶¶ 7, 13; Allen Decl., ¶ 2. Plaintiffs' lack of *any* evidence necessitates denial of their request for *in camera* review. The only real wrinkle here is that Mr. Allen was jointly consulted by CMP and Mr. Ray Ruddy to provide legal advice regarding the Human Capital Project. Daleiden Decl., ¶ 13; Allen Decl., ¶ 2. Plaintiffs argue that "CMP . . . has never identified any common legal interest that existed between it and Ruddy." Mtn. 6 n. 2. This is incorrect, Dkt. 384-10, as their "communications . . . were specifically made in anticipation of litigation. We expected that Mr. Daleiden's project would ultimately result in litigation against the various bad actors whose illegal conduct his project unearthed." Allen Decl., ¶ 2; *see also In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007) (the common interest doctrine applies outside of the litigation context); *Tucker v. Fischbein*, 237 F.3d 275, 288 (3d Cir. 2001) (Alito, J.) ("That reporters regularly consult with in-house counsel to discuss potential liability for libel does not thereby deprive those communications of the protection of the attorney-client privilege.").[9]

2015) (citing *Hynix Semiconductor Inc. v. Rambus Inc.*, No. CV-00-20905-RMW, 2008 WL 350641, at *3 (N.D. Cal. Feb. 2, 2008)). *See* Mtn. 4 n. 2. The issue in *Hynix* was that a corporation's VP was presenting the general counsel's legal advice to the board of directors. *Hynix*, 2008 WL 350641, at *2. The court held that the VP's declaration merely stating that the presentation contained legal advice, when the presentation also contained a lot of business advice, without explaining what exactly was the legal advice, was insufficient. *Id.* at *3. The lack of an attorney on the communication also appears to have been a significant issue in *Apple*, although *in camera* review later revealed that privilege attached. *Apple*, 306 F.R.D. at 239. Here, that is not the case, as CMP was communicating directly with its counsel—Ms. Short. CMP does not believe that its descriptions are improperly vague—but in any event, the level of particularity is reviewed on a sliding scale. *See* Fed. R. Civ. P. 26(b)(5) advisory committee's note to 1993 amendment ("Details . . . may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected"); *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 638 (D. Nev. 2013) ("[W]here the volume of documents is unquestionably large, the . . . privilege logs . . . satisfy the requirements of" Fed. R. Civ. P 26). Here, due to the size of the privilege log—which in good faith proceeds on an individual email (and not email chain) basis—the level of detail provided is proportional to the burden.

[9] Here, with respect to Attorney Allen, Plaintiffs point to entries 91, 93-95, 97-100, 128, and 131. Mtn. 7:3-5 (entries 92, 96, 129, and 130 were removed from the log and will be produced). Entries 91 through 100 ("Confidential email providing legal communication with counsel regarding

4. Communications on which CMP personnel were copied

CMP is a nonprofit that, at the relevant times, had a three-person board of directors. Also at the relevant times, CMP retained numerous independent contractors to work on various projects for CMP, including seven individuals listed on CMP's privilege log. Daleiden Decl., ¶¶ 3-4. To be clear, CMP's privilege log reveals that six of those individuals (Moore, Baxter, Lopez, Dugyon, Bryan, and Gonzalez) never communicated directly with CMP's counsel, and the other (Davin) only communicated with counsel once, at entry 48—in which she directly requested legal advice on behalf of CMP. The issue, therefore, is not whether their communications are privileged—rather, the issue is whether copying them on Mr. Daleiden's communications with counsel waives the privilege. As a result, Plaintiffs' citation to *United States v. Lonich*, No. 14-CR-00139-SI-1, 2016 WL 1733633, at *6 (N.D. Cal. May 2, 2016) is inapposite.

The answer to the waiver question, generally, is no. *See Nesse v. Pittman*, 206 F.R.D. 325, 329 (D.D.C. 2002). When privileged documents are shared with third-parties, waiver is not found so long as there is a "significant relationship" between the privilege holder and the third-party, and the document is shared with a "limited dissemination." *In re Bieter Co.*, 16 F.3d 929, 937 (8th Cir. 1994); *F.T.C. v. GlaxoSmithKline*, 294 F.3d 141, 148 (D.C. Cir. 2002). In the corporate personnel context, the "significant relationship" is necessarily met, and so "[t]he only relevant consideration . . . is that of confidentiality." *Nesse*, 206 F.R.D. at 330 n. 4. Even then, confidentiality is presumed, and the court "must focus exclusively on the reason why the lawyer collects the information from the client in the first place"—*i.e.*, whether the privilege would apply in the first place. *Id.* at 330.

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arrangements and planning") all concern setting up the attorney client relationship. Entries 128 and 131 ("Confidential email containing client information for counsel to provide legal advice regarding nonprofit law and collaboration") primarily concern bringing in Attorney Phil Kline to provide advice, and discuss the reasons why his legal expertise would be needed. With respect to Attorneys Leo and Bunch, Plaintiffs point to entries 2488-89 ("Confidential email providing legal communication with counsel regarding pertinent facts or information") and 2500-01 ("Confidential email providing legal communication with counsel regarding legal planning"). Mtn. 6:17-19. CMP agrees that these descriptions could be more precise. Because privilege does not cover "general descriptions of the work that [the attorney] performed," *United States v. Olano*, 62 F.3d 1180, 1205 (9th Cir. 1995), CMP will note that Attorneys Leo & Bunch provided legal advice on how to ensure successful prosecutions of the criminal actors which CMP identified. The "facts or information" were provided so that the advice could be formulated. Daleiden Decl., ¶ 13.

Here, all CMP personnel (and even most, if not all, of its attorneys) signed stringent non-disclosure agreements, drafted for the purpose of ensuring that the undercover investigation proceeded appropriately. Daleiden Decl., ¶ 3. Those non-disclosure agreements ensured that privileged communications shared with CMP personnel remained confidential. This is sufficient.

> [W]hen a corporation provides a confidential document to certain specified employees or contractors with the admonition not to disseminate further its contents and the contents of the documents are related generally to the employees' corporate duties, absent evidence to the contrary we may reasonably infer that the information was deemed necessary for the employees' or contractors' work."

GlaxoSmithKline, 294 F.3d at 148. Plaintiffs appear to not contest that Mr. Daleiden properly communicated directly with CMP's counsel due to his status as CMP's CEO. With respect to Ms. Davin, Plaintiffs simply misunderstand her role. Her duties were significant and did warrant her directly requesting legal advice on behalf of CMP. Daleiden Decl., ¶ 3.[10]

CONCLUSION

Plaintiffs' motion is rank conjecture and speculation, spurred on by ad hominem attacks against CMP, its personnel, and its attorneys, and misinterpretations of the law. Those attacks are not evidence; without evidence, this Court must deny Plaintiffs' motion. Both junior and senior counsel have reviewed and re-reviewed CMP's privileged documents, and are withholding them appropriately. In light of Plaintiffs' seriously deficient motion, CMP requests that the Court sanction Plaintiffs for bringing a motion without "a substantially justified position." Dkt. 372.

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[10] Plaintiffs also argue that CMP cannot assert the attorney-client, patient-therapist, and clergy-communicant privileges with respect to the same document. Mtn. 8:18-24. In essence, Mr. Daleiden shared some attorney-client privileged communications with his therapist and spiritual director, which Plaintiffs argue constitutes waiver of the privilege. But Plaintiffs do not argue that the patient-therapist and clergy-communicant privileges do not apply. Therefore, for purposes of this motion, CMP does not object to the Court finding that the attorney-client privilege does not apply, but that the documents may be withheld on the basis of the patient-therapist and clergy-communicant privileges. Moreover, if this Court were to do Plaintiffs' work for them and engage in a meaningful analysis, the Court should look to the above analysis, which shows that there is non-waiver where there is a significant relationship and limited dissemination. Under that analysis, the attorney-client privilege is not waived by sharing information with "a spouse, parent, business associate, joint client or any other person"—such as a personal counselor—where the sharing is meant to further the client's interests. *Benge v. Superior Court*, 131 Cal. App. 3d 336, 346 (1982). In a footnote, and without legal authority, Plaintiffs also argue that sharing privileged information with key donors necessarily defeats the privilege. Mtn. 8 n. 5. For the same reasons, this is not the case. *See, e.g., Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308, 310 (N.D. Cal. 1987); *Eagle Harbor Holdings, LLC v. Ford Motor Co.*, No. C11-5503 BHS, 2014 WL 1681623, at *1 (W.D. Wash. Apr. 28, 2014).

Respectfully submitted,

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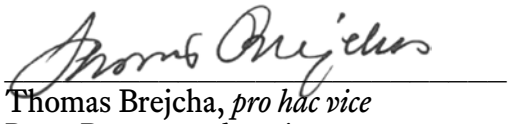

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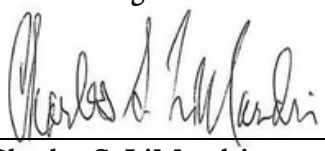
ATTESTATION PURSUANT TO CIVIL L.R. 5.1(i)(3)

As the filer of this document, I attest that concurrence in the filing was obtained from the other signatories.



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