

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Spring Street Courthouse, Department 12

BC601844

**WILLAM GANDSEY VS SOUTHERN CALIFORNIA GAS
COMPANY ET AL**

February 20, 2020

8:14 AM

Judge: Honorable Carolyn B. Kuhl
Judicial Assistant: Lori M'Greené
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Ruling on Submitted Matter

The Court, having taken the matter under submission on 02/11/2020 for Hearing on Motion for Sanctions of Private Plaintiffs for monetary, evidentiary and issue sanctions and an adverse-inference jury instruction (BC601844) on case BC601844, now rules as follows:

Motion of Private Plaintiffs for Monetary, Evidentiary, and Issue Sanctions and an Adverse-Inference Jury Instruction

Court's Ruling: The motion is granted in part. For the reasons set forth below, **the court awards monetary sanctions of \$525,610 against Defendant and defense counsel jointly**, payable within 20 days. The court also orders that Private Plaintiffs are allowed to reopen any deposition at the expense of Defendants up until the date of the final status conference, so long as Plaintiffs have a colorable claim that a document that was withheld under a claim of privilege, but then produced after November 1, 2019, will be the subject of the deposition. Defendants are ordered to pay both the costs and attorneys' fees for any such depositions. Plaintiffs may submit an accounting of such reasonable costs and fees to the court, to be accompanied by briefing if necessary. The court also imposes the following issue sanctions: (1) all documents on Defendants' privilege logs that were produced after November 1, 2019 shall be deemed authenticated; and (2) all documents on Defendants' privilege logs that were produced after November 1, 2019 shall be deemed admissible under the business records exception to the hearsay rule (but Defendants may object to a hearsay statement within such documents).

I. The Current Motion

Private Plaintiffs bring the current motion in order to seek monetary, evidentiary and issue sanctions, which Plaintiffs premise on Defendants' repeated failure to provide sufficient justification for the withholding of thousands of supposedly privileged documents. Plaintiffs

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argue that sanctions are warranted because Defendants have violated this court's September 18, 2019 order requiring production of a good faith and legally compliant privilege log and have engaged in a pattern of abusive discovery by repeatedly withholding large numbers of documents without substantial justification and by producing privilege logs that are insufficient to allow Plaintiffs or the court to evaluate Defendants' claims of privilege. Plaintiffs seek hundreds of thousands of dollars in monetary sanctions and numerous evidentiary and issue sanctions as set forth in Private Plaintiffs' Amended Notice of Motion, filed on January 16, 2020. They also seek a jury instruction pursuant to Evidence Code section 413.

Defendants argue that their claims of privilege were made in good faith and that their decisions to withdraw multiple claims of privilege also should be viewed as evidence of their good faith conduct of discovery. They point out that this case is large and complex, making discovery very burdensome for Defendants and state that they have done their best to meet their discovery obligations while acknowledging that some mistakes were made. They argue that this court's September 18, 2019 order is unenforceable, but that they have tried to comply with this court's "high standards" for claiming privilege. Defendants also argue that the requested sanctions are inappropriate, grossly excessive, and unavailable as a matter of law.

In their Reply papers, Plaintiffs challenge the argument that they will not suffer significant prejudice as a result of the late production of documents previously designated as privileged by Defendants. Lead counsel for Plaintiffs, Mr. Panish, explains that, with four months until trial, Plaintiffs have been placed at a significant disadvantage in trial preparation because they now will be required to spend time reviewing thousands of late-produced documents, and potentially have to reconvene completed depositions and spend substantial time questioning witnesses about those documents. (See Panish Decl. ISO Reply, ¶¶ 9-13.) Moreover, Mr. Panish states that continuing the trial date would prejudice his clients, as it would delay much-needed relief for a community that has been waiting for relief for over four years. (Panish Decl. ISO Reply, ¶ 8.)

II. Chronology of Defendants' Prior Unsubstantiated Claims of Privilege in this Case

The chronology below is largely repeated from this court's prior ruling of January 14, 2020 on Private Plaintiffs' Motions to Compel. It is equally relevant to the current Motion for Sanctions.

A. Summary of Prior Claims of Privilege and Extent of Unsubstantiated Claims

The current motion must be decided against the backdrop of the prior history of Defendants' withholding of documents purportedly on the basis of privilege. In summary:

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- As to one group of documents (AECOM communications), Defendants originally claimed privilege with respect to 771 documents; after two motions, claims of privilege were sustained as to a mere 6 documents.
 - As to another group of documents (communications with public relations firms), an initial claim of privilege as to 358 documents was eventually reduced to 32 claims of privilege after this court required trial counsel to personally assert that there was a good faith basis for assertion of the privilege as to each document.
 - Regarding a third group of documents (documents concerning development of data to be furnished to regulatory agencies) claims of privilege with respect to more than 4,000 documents were eventually reduced to 176 documents.
 - SoCalGas listed more than 36,000 privileged documents on a privilege log in June of 2019. On September 18, 2019 there were 14,417 documents still listed. And 3,472 documents of the original 36,000 documents claimed to be privileged were listed on the November 1, 2019 SoCalGas privilege log.

Based on the prior history of this case up to the time Defendants filed their November 1, 2019 privilege logs, Defendants' initial claims of privilege are unsupportable and/or are withdrawn an average of 94 percent of the time.

As demonstrated by the tortured history below, the documents that were withheld by Defendants were provided only after extraordinary efforts by Plaintiffs' counsel and by the court to force defense counsel to abandon unreasonable claims of privilege. What is not evident from this recitation, but is undeniably the case, is that the Plaintiffs were deprived of relevant documents during the time they were taking percipient discovery to meet the discovery deadline agreed to by the parties. (On July 2, 2019 this court set a trial date of June 24, 2020 for the first phase trial. Although counsel for defense requested a later trial date, both sides agreed to set the cut-off for percipient discovery of January 31, 2020. (See Minute Order of July 31, 2019.))

B. Detailed Chronology Regarding Defendants' Prior Claims of Privilege

AECOM was an environmental consultant to SoCalGas. On August 2, 2017, Private Plaintiffs issued a deposition subpoena for production of documents to AECOM. SoCalGas served objections, including objections on the basis of attorney client and work product privilege. After meet and confer efforts between counsel, AECOM produced documents on December 5, 2017, December 28, 2017 and June 7, 2018; eventually the production totaled 53,000 documents. The June 7, 2018 production included a 34-page privilege log listing 771 items. Subsequent to meet and confer discussions between Private Plaintiffs and SoCalGas, on July 26, 2018, AECOM,

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with SoCalGas's permission, produced 62 documents previously withheld on the basis of privilege. (Private Plaintiffs' Motion to Compel Production of Documents, Aug. 1, 2018, at pp. 4-5.)

At a hearing on August 27, 2018, the Hon. Lisa Hart Cole ordered the parties to continue to meet and confer in order to either resolve the issues or to narrow them for the court's consideration. Pursuant to the meet and confer, SoCalGas authorized the production of an additional 97 documents that previously were asserted to be privileged. (Defendant SoCalGas Company's Supplemental Brief in Opposition to Motion to Compel Production of Documents Relating to AECOM, Oct. 12, 2018, at p. 1.)

On October 18, 2018, the Hon. John Wiley ruled on Private Plaintiffs' Motion with respect to the remaining assertedly privileged AECOM documents and held as follows:

For the most part, Southern California Gas Company has failed to prove the voluminous and diverse communications among Company employees, people at third-party contractor AECOM, and Company lawyers were "reasonably necessary" for the lawyers to represent the Company. [Citations omitted.] There is no attorney work product privilege for the same reason. There is an exception, however, for four categories of documents: One: Documents that AECOM authored at the request of a Company lawyer. Two: Documents Company lawyers gave to AECOM for review and comment regarding technical expertise that would assist the lawyers in developing legal strategy. Three: Documents containing legal opinions that Company lawyers gave to AECOM for the purpose of evaluating whether technical information in the document was accurate. Four: Documents that are communications with the Company's retained (but not testifying) experts. As to these four categories of documents, the motion is denied. These four categories of documents are privileged.

(Notice of Ruling on Private Plaintiffs' Motion to Compel Third Party AECOM's Production of Documents, Oct. 19, 2018.) Defendants were ordered to produce all documents not included in these four specific categories. As explained below, Defendants did not do so.

When this court took over as the coordination trial judge for this proceeding, privilege issues had proliferated. In a Status Conference statement filed April 26, 2019, Plaintiffs attached a 26-page Appendix discussing Plaintiffs' disagreements with Defendants' claims of privilege and the status of meet and confer efforts with respect to those issues.

In a Minute Order dated May 1, 2019, the court ordered counsel to file (1) a joint statement of issues with respect to interpretation and application of Judge Wiley's ruling regarding documents involving AECOM and (2) a joint statement of issues regarding documents withheld by

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Defendants on the basis of privilege regarding development of data to be furnished by Defendants to regulatory authorities.

Having reviewed those joint statements, at a hearing on June 17, 2019 this court ordered Defendants to file a motion for protective order “[w]ith respect to privilege issues concerning the 400+ documents subpoenaed from AE Com [sic] that have been withheld on grounds of privilege.” (Minute Order, June 17, 2019.) With respect to “the 4000+ documents withheld by So Cal Gas on the theory that the data collection for regulatory agencies was directed by in-house counsel” the court ordered that Defendants “supplement the privilege log within 30 days by adding a column giving dates and names of counsel who directed the strategy for a particular data request that is the subject of the document and/or what other attorney involvement justifies the assertion of privilege as to that document.” (Id.)

In the Joint Status Conference Report filed August 12, 2019, Private Plaintiffs stated that they had become aware at a deposition that Defendants had withheld as privileged all communications between Defendants and a public relations firm. Defendants contended that Private Plaintiffs were incorrect in their “extreme, categorical position that no communications between a client, its attorneys and a public relations consultant can ever be protected by the attorney-client privilege or attorney work product doctrine.” (Joint Status Conference Statement for August 14, 2019, Aug. 12, 2019, at p. 13 (emphasis in original).) Defendants did not contest Private Plaintiffs’ representation that Defendants had withheld all communications with the public relations firm. Defendants asserted that the issue was not “ripe” for the court’s decision and that further meet and confer should take place. (Id. at pp. 13-16.)

On August 12, 2019, the court heard argument on Defendants’ Motion for a Protective Order with respect to the AECOM documents on which Defendants continued to claim privilege. The court ruled on the Motion on August 15, 2019. In the Motion, Defendants continued to claim privilege with respect to 174 AECOM documents. The court ordered all but 6 documents to be produced. The court ordered sanctions against Defendants because “there was not a colorable claim of privilege supported by this motion as to the vast majority of the documents at issue.” In litigating this motion, and true to a pattern of updating privilege logs only once formally challenged, Defendants filed an “updated version of the AECOM [privilege] Log” with its Reply brief. Even after the court issued a tentative ruling on August 11, 2019, on the day of the hearing Defendants attempted to file a supplemental declaration to support their privilege claims. The court did not consider those manifestly late-filed documents. (Minute Order, Aug. 15, 2019.)

The court’s level of concern with respect to Defendants’ good faith in claiming privilege was

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heightened at that juncture. Defendants had claimed privilege on a group of 771 AECOM documents. After a ruling by Judge Wiley, they continued to claim privilege on over 400 documents, and then on 174 documents. Defendants' claims of privilege were colorable only as to 6 of the original 771 documents.

Because of the court's concern over the good faith basis for Defendants' privilege claims, the court issued an order that was unprecedented in this court's 24 years of experience on the bench (including more than 12 years in a complex civil litigation assignment). With respect to the 358 documents evidencing communications between Defendants and their public relations consultant, the court ordered trial counsel to submit a "declaration stating that counsel has personally reviewed the documents in this category as to which privilege continues to be claimed, that counsel is familiar with the relevant case law and statutes pertaining to privilege concerning such documents and that there is a good faith basis for withholding such documents on the basis of privilege." (Minute Order, Aug. 14, 2019 (emphasis added).)

On September 3, 2019, trial counsel for Defendants filed declarations with respect to the 358 documents involving or referencing public relations consultants that had been withheld based on privilege. Counsel stated that attorneys under their direction or control had reviewed the documents, that SoCalGas was continuing to claim privilege as to 32 such documents, and that the declarants had a good faith basis to assert SoCalGas's attorney-client or work product privilege as to the 32 documents. (Declarations of James J. Dragna and Michelle Park Chiu, Sept. 3, 2019.) In a subsequent joint status conference report, counsel for Private Plaintiffs asserted that, of the 32 documents listed on that privilege log, only 17 continued to be withheld in their entirety, and that 14 documents had an identical redaction of an email communication. (Joint Status Conference Statement filed Sept. 20, 2019, at p. 14.)

On July 17, 2019, Defendants produced a revised privilege log with regard to the documents pertaining to data collection for regulatory agencies. Defendants continued to withhold 1,293 such documents (out of the original 4000+ documents claimed to be privileged). Private Plaintiffs contended that there was no appropriate basis for privilege disclosed in the revised privilege log. (Joint Status Conference Statement for Sept. 11, 2019, at pp. 16-19, 43-44.)

At the September 11, 2019 status conference, the court issued the following order: "Defense counsel shall report to the court at a specially set status conference on Sept. 18, 2019 at 1:45 pm as to how they propose to address the problem of Defendants' over-designation of privileged documents." (Minute Order, Sept. 11, 2019.)

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At the September 18, 2019 status conference, after hearing argument from counsel, the court ordered as follows:

- Within 45 days defense counsel shall review all previously produced privilege logs and shall produce, on a rolling basis, all documents as to which privilege is not legally supportable. Defense counsel shall correct and re-serve the privilege logs previously produced so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable.
- Before the September 25, 2019 status conference, defense counsel shall produce to plaintiffs all “data request” documents as to which privilege is not legally supportable and shall re-serve the privilege log previously produced for this category of documents so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable. To the extent any document is redacted to protect a legally supportable privilege, the redacted document shall be produced to plaintiffs. Defense counsel shall bring to the September 25, 2019 status conference all documents in the “data request” category that have been fully or partially withheld on the basis of privilege.
- Counsel shall meet and confer with respect to the deadline(s) for defendants to prepare and serve additional legally supportable privilege logs for documents that have been and will be produced in the future.

At the September 25, 2019 status conference, counsel for Defendants reported that 176 “data request” documents remained on the Defendants’ privilege log. Originally, privilege had been claimed on more than 4000 of these documents, and the previous privilege log (of July 17, 2019) listed 1293 documents in this set. The court reviewed the privilege log and discussed with both counsel several of the documents on which privilege continued to be claimed. The revised log had been produced at 6:00 pm the prior evening, and counsel for Private Plaintiffs had little time to prepare for the informal discussion with the court. The court ordered counsel to meet and confer if Plaintiffs’ counsel had additional questions with respect to the “data request” group of documents.

On November 1, 2019, Defendants produced a privilege log for SoCalGas with over 150,000 entries, as well as a privilege log for Sempra with 5,913 entries. As stated above, on September 18, 2019 the court had ordered Defendants to “correct and re-serve the privilege logs previously produced so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable.” At a status conference on December 4, 2019, the court asked counsel for Defendants to state how many documents that had been listed on previous privilege logs remained on the November 1, 2019 privilege log. In response to the court’s query, defense counsel reported that, whereas there had been 36,295 documents on SoCalGas’s privilege log in

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June 2019, on September 18, 2019 there were 14,417 documents still listed, and of those, 3,472 documents remained on the November 1, 2019 SoCalGas privilege log. (Declaration of Deanne L. Miller re Minute Order of December 4, 2019 Regarding Defendant Southern California Gas Company's Privilege Log, ¶¶ 3-10.)

At the December 4, 2019 status conference, this court ordered counsel for Private Plaintiffs to lodge 80 consecutive pages of the November 1, 2019 SoCalGas privilege log for the court's review. The court also ordered counsel for each side to file a two-page document on December 9, 2019 making a recommendation as to how the court should address the extent to which Defendants' claims of privilege were proper in light of Private Plaintiffs' claims that they were overbroad.

On December 10, 2019, the court held an informal discovery conference to discuss the court's observations about the sufficiency of the November 1, 2019 defense privilege logs. The court will let the court reporter's record for that hearing speak for itself and will not attempt to summarize the discussion. At the conclusion of the December 10, 2019 status conference, the court stated that Private Plaintiffs would be permitted to file a motion to compel with respect to Defendants' privilege claims.

C. Plaintiffs' Motion to Compel Production of Documents Listed on Defendants' November 1, 2019 Privilege Logs

On December 19, 2019, Private Plaintiffs filed a Motion to Compel Production of 136,504 of the documents as to which SoCalGas claimed privilege in its November 1, 2019 privilege log and a Motion to Compel Production of 5,459 of the documents as to which Sempra claimed privilege in its November 1, 2019 privilege log. These Motions were set for hearing on January 14, 2020.

Although Defendants' Opposition Briefs on the Motions to Compel contended that the November 1, 2019 privilege logs were sufficient to meet legal requirements, Defendants nevertheless filed substitute privilege logs with their Opposition Briefs on January 6, 2020. These privilege logs dropped claims of privilege as to 33,787 documents listed on the SoCalGas November 2019 privilege log, and as to 1,550 documents listed on the Sempra November 2019 privilege log. The January 6, 2020 privilege logs also provided some additional information as to claims of privilege for some documents for which privilege continued to be asserted. (On January 10, 2020, Private Plaintiffs filed the current Motion for Sanctions.)

On January 14, 2020, this court heard argument on the Motions to Compel and issued its

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decision. The court's reasoning is set forth at length in the January 14, 2020 Minute Order. The court ordered Defendants to produce by February 11, 2020 a privilege log for all documents that continue to be claimed as privileged by Defendants. The court required the privilege log to comply with the prior rulings of the court (including the prior rulings of Judge Wiley), and required it to be sufficient under the law set forth in the court's January 14 ruling. Further, the court required the revised privilege logs to be accompanied by a declaration of trial counsel that there is a good faith basis for the assertion of the privileges claimed. The court ordered rolling production of documents on which the Defendants will not be claiming privilege as a result of this further review. As of the date the current Motion for Sanctions was argued, the revised privilege logs and declarations of counsel had not been filed. Thus, the legal sufficiency of those privilege logs and of the claims of privilege included therein are not considered in ruling on the current motion.

The court also ordered Defendants to produce by Friday, January 17, 2020 all documents listed on the January 6, 2020 privilege logs that are claimed to be privileged solely on the basis that they were attachments to a privileged communication. This order extended to documents where the asserted basis for the privilege claim was only the following: "Attachment to confidential communication between client and in-house and/or outside counsel made in the course of the attorney-client relationship." This portion of the court's order subsequently was stayed by the Court of Appeal after Defendants (without seeking a stay from this court) filed a petition for writ of mandate and request for an immediate stay. The Court of Appeal ordered a briefing schedule, which was concluded on January 31, 2020. The stay was lifted by the Court of Appeal on February 19, 2020, but this court has not considered the substance of the appellate court's order in this ruling on the Motion for Sanctions.

III. Sanctions Are Warranted in Light of Defendants' Abuse of the Discovery Process

A court may impose monetary, issue, evidence, terminating, and contempt sanctions "against anyone engaging in conduct that is a misuse of the discovery process." (Code Civ. Proc., § 2023.030.) "Misuse of the discovery process" includes, but is not limited to, such actions as "[e]mploying a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense," "[m]aking, without substantial justification, an unmeritorious objection to discovery," or "[m]aking an evasive response to discovery." (Code Civ. Proc., § 2023.010.) Code of Civil Procedure Section 128(a)(4) empowers a court to "compel obedience to its judgments, order, and process" (See also *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal.App.3d 272, 288 (holding that courts have the inherent power to curb abuses and promote fair process));

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Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal.4th 953, 967 (“courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them”).)

The court finds that Defendants’ (1) abusive misconduct in discovery; (2) repeated, unmeritorious objections to discovery by assertion of unsubstantiated claims of privilege; (3) repeated failure to provide opposing counsel and the court with legally required information to permit opposing counsel and the court to evaluate Defendants’ claims of privilege; and (4) willful violation of court orders addressing these issues, when taken together, warrant sanctions under Code of Civil Procedure section 2023.030, under Code of Civil Procedure section 128(a)(4), and pursuant to the inherent authority of the court.

A. Unmeritorious Objections to Discovery

As set forth above in the “Summary of Prior Claims of Privilege and Extent of Unsubstantiated Claims,” more than 90 percent of Defendants’ initial claims of privilege either have been determined by the court to be unsupported or have been withdrawn by Defendant. As described in detail above in the “Detailed Chronology,” the documents that were withheld by Defendants were provided only after extraordinary efforts by Private Plaintiffs’ counsel and by the court to force defense counsel to abandon unreasonable claims of privilege. Thus, Defendants have misused the discovery process by making unmeritorious objections to discovery without substantial justification and by using those objections, and the quantity of unsupported objections, to delay Plaintiffs’ right to discovery of relevant documents.

Defendants attempt to defend their conduct by asserting that they removed from earlier privilege logs “approximately 36.40% of the 197,513 documents over which Defendants have asserted privilege in the course of these proceedings (not 94%).” (Defs’ Opp., at p. 16.) Defendants’ calculation is based on initial claims of privilege that include the more than 150,000 documents on the November 1, 2019 privilege log. However, it remains to be seen how many of the documents listed as privileged on the November 1, 2019 privilege log will meet the test of a good faith assertion of privilege. This court ordered on January 14, 2020 that Defendants were required to produce by February 11, 2020 a privilege log that “compl[ies] with the prior rulings of this court (including the prior rulings of Judge Wiley), [is] sufficient under the law set forth [in this court’s order of January 14, 2020] and [is] accompanied by a declaration of trial counsel that there is a good faith basis for the assertion of the privileges claimed.” (Minute Order, Jan. 14, 2020.) The court further ordered that documents on which the Defendants are no longer claiming privilege are to be produced on a “rolling” basis. (Id.) As stated above, because the

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February 11, 2020 compliance date was the same date that the current Motion for Sanctions was heard, the court has no final tally with which to calculate the percentage of initial claims of privilege on the November 1, 2019 privilege log that will be withdrawn or determined to be without merit. Defendants do not take issue with the court's calculation of 94% as the percentage of their claims of privilege withdrawn or determined to be unsupported prior to November 1, 2019.

Defendants argue that their initial claims of privilege have been made in good faith. The record does not support that characterization. Defendants complain that they have produced more than 1.5 million documents in this case and have borne an exceptional burden to collect and produce these documents as well as to prepare privilege logs for withheld documents. The necessary document production in this case has been exceptional, but it has not necessarily been more challenging than the burden other mass tort defendants face in JCCP or MDL litigation (for example, in litigation against pharmaceutical defendants). The firm appearing to represent Defendants in this case does not contend that it lacks the resources to properly litigate this case.

Defendants argue that the privilege issues were difficult and that initially they lacked clear guidance. However, even when Defendants had clear guidance from a prior court order, they ignored those legal standards. As discussed above, on October 18, 2018 then-Judge John Wiley ruled on a discovery motion and explained that Defendants had failed to demonstrate privilege as to "the voluminous and diverse communications" between SoCalGas and AECOM. The court's order carefully delineated four specific categories of documents involving AECOM as to which privilege could be claimed. (Notice of Ruling on Private Plaintiffs' Motion to Compel Third Party AECOM's Production of Documents, filed Oct. 19, 2018.) Rather than carefully apply Judge Wiley's ruling, Defendants required this court to hear another Motion, with respect to 174 AECOM documents. The court determined that all but 6 documents were required to be produced and determined that "there was not a colorable claim of privilege supported by this motion as to the vast majority of the documents at issue." (Minute Order, Aug. 15, 2019.)

With respect to the data request documents, Defendants admit that they did not make sufficient inquiry to determine whether there was a defensible claim of privilege for each document when submitting the privilege logs. Defendants state: "In order to comply with the evidentiary requirements this Court requires for Defendants to protect their privileged communications, Defendants would have had to muster proof of attorney involvement and direction on a document-by-document basis for tens thousands [sic] of data request documents. ... [T]hat would have been extremely burdensome and in many instances, impossible." (Defs' Opp., at p. 11.) When a party asserts a claim of privilege on the ground that an attorney directed the actions

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of non-attorneys in creating documents so as to assist counsel in providing legal advice, the party must have a basis for stating that the attorney did provide such direction and that the documents claimed to be privileged resulted from carrying out that direction. (See *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 735-736 (fact-gathering by an attorney is privileged where its purpose is to allow the attorney to render legal advice); Cal. Prac. Guide Civ. Trials & Ev. (The Rutter Group) Ch. 8E-A ¶ 8:1946 (“[t]he party claiming a privilege has the burden of establishing whatever preliminary facts are essential to the claim (e.g., existence of privileged relationship when communication was made”) (emphasis in original).) Whether or not this is burdensome, it is legally required. The size of these proceedings does not give Defendants license to hide behind unjustified privilege claims; nor does it mean that Plaintiffs and the court must be subject to an infinite process wherein Defendants’ logs are reviewed, challenged, and then ordered to be re-served with greater detail to justify the privilege claims.

In their papers, Defendants repeatedly make reference to the court’s “high standards” for claims of privilege. (See, e.g., Def’s Opp., at p. 4.) Defendants do not argue in opposing the current Motion that the court’s standards for review of privilege have been wrong—just “high.” The requirements for a claim of privilege are established by case law. “It is established that otherwise routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is ‘copied in’ on correspondence or memoranda.” (*Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1504.) “[T]he attorney-client privilege attaches only to confidential communication made in the course of or for the purposes of facilitating the attorney-client relationship.” (*Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1129, fn. 5 (Catalina Island).) Sometimes these determinations can be made on the face of the document; sometimes they cannot. Certainly, further inquiry is necessary when the document is not itself a communication to or from an attorney. For example, many of the documents concerning development of data to be furnished to regulatory agencies were not directed to or from an attorney. In order to have a reasonable basis to claim privilege on these documents, inquiry beyond the face of the document was necessary. Defendants apparently take the position that they can claim privilege without making an individualized inquiry as to the basis for a claim of privilege where the basis for the claim of privilege is not apparent on the face of the document. By this reasoning, Defendants have attempted to shift the burden to the Plaintiffs to challenge Defendants’ broad claims of privilege. However, our discovery statutes make clear that it is sanctionable conduct to “[m]ak[e], without substantial justification, an unmeritorious objection to discovery.” (Code Civ. Proc., § 2023.010, subd. (e).)

In many ways, what is most upsetting about the litigation tactics of Defendants is that they have

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only asserted good faith objections when threatened with sanctions or when this court required trial counsel to declare under penalty of perjury that there was a good faith basis for the privilege claims asserted. As described in the chronology above, after finding that the Defendants' claims of privilege for the AECOM documents were not substantially justified (even after a prior order by Judge Wiley), the court continued to be faced with extensive, broad claims of privilege that were insufficiently described on existing privilege logs. This court then issued an order that the court never before had felt necessary in the court's previous 24 years of experience as a judge. The August 14, 2019 Minute Order required, as to 358 documents that involved Defendants' public relations firm, that trial counsel declare under penalty of perjury that there was a good faith basis for a claim of privilege. When counsel's declaration was filed, there were 32 documents remaining on the privilege log. (In a subsequent status conference report, Plaintiffs asserted that of the 32 documents only 17 continued to be withheld in their entirety and 14 had an identical redaction of an email communication; Defendants did not take issue with this characterization.)

On the basis of that exercise of good faith by counsel, the court did not require trial counsel's declaration under penalty of perjury to support the privilege log revisions ordered by the court on September 18, 2019. The court expected that counsel would ensure that only objections in good faith and with substantial justification would be made when the court ordered that privilege logs be prepared "so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable." (Minute Order, Sept. 18, 2019.) The court did not wish to impose a specific burden on Defendants' trial counsel in the midst of the many depositions that were occurring at that time. However, the November 1, 2019 privilege logs had over 155,000 entries and the court has found that these privilege logs were legally insufficient. (Minute Order, Jan. 14, 2020.) It is disturbing, to say the least, that the court only can obtain legally compliant litigation conduct by making outside trial counsel individually responsible in a posture that could support sanctions against counsel personally.

B. Defendants Have Repeatedly Failed to Provide Legally Adequate Privilege Logs in a Manner that Has Caused Private Plaintiffs Undue Burden and Expense

As the procedural history above makes clear, this court has repeatedly found that Defendants have failed to offer sufficient explanation to support their claims of privilege. In this court's January 14, 2020 Minute Order deciding Private Plaintiffs' Motions to Compel, the court found that Defendants' November 1, 2019 privilege logs did not provide the information required by the caselaw and did not provide Private Plaintiffs or the court with sufficient information to evaluate Defendants' claims of privilege as to the 155,000 documents listed on those privilege

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logs. (Minute Order, Jan. 14, 2020.)

In part this court found:

The November 1, 2019 privilege logs do not meet the standard set forth in *Catalina Island*. As the court noted at the December 10, 2019 status conference, after the court had reviewed 80 pages of the November 1, 2019 log entries, the logs substantially employ generic macros that fail to offer a sufficiently detailed explanation of the basis for withholding individual documents. Thousands of documents contain the explanation “Confidential communication between client and in-house and/or outside counsel made in the course of the attorney-client relationship.” Seldom does the accompanying description of the document itself meet the statutory requirement of “provid[ing] sufficient factual information for other parties to evaluate the merits of [the privilege] claim” (CCP sec. 2031.240(c)(1).) “Even assuming all of the documents were communications with an attorney, not all communications with an attorney are privileged. Instead, the attorney-client privilege attaches only to confidential communication made in the course of or for the purposes of facilitating the attorney-client relationship.” (*Catalina Island*, supra, 242 Cal.App.4th at p. 1130, fn. 5.) “The purpose of providing a specific factual description of documents is to permit a judicial evaluation of the claim of privilege.” (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 292.) “The information in the privilege log must be sufficiently specific to allow a determination of whether each withheld document is or is not in fact privileged.” (*Wellpoint Health Networks v. Superior Court* (1997) 59 Cal.App.4th 110, 130.)

Many of the documents on which privilege is claimed have an attorney listed among several “cc” recipients and have a generic “re” line subject matter. Defendants’ conclusory statement that such documents are communications “made in the course of the attorney-client relationship” are insufficient to allow Private Plaintiffs or the court to evaluate whether each withheld document is or is not in fact privileged. This is particularly so when the attorney name is an in-house counsel, who may be involved in a communication in a business capacity. As discussed in previous rulings of this court, when business persons are doing their work and copying an in-house lawyer, the communication may not be privileged unless the business person is seeking advice of counsel or is providing information requested by counsel so as to assist counsel in providing legal advice. (Minute Order of Sept. 11, 2019 at pp. 3-4.) “It is established that otherwise routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is ‘copied in’ on correspondence or memoranda.” (*Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1504.) Unless Defendants provide factual information to indicate the purpose of the communication, Defendants have not met the requirements for

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creating a legally compliant privilege log.

(Minute Order, Jan. 14, 2020 at pp. 10-11.) This court also found that Defendants had failed to provide a complete list of attorneys who had represented Defendants and whose names appeared on the privilege logs until January 6, 2020. (Id. at pp. 11-12.) Finally, the court found that Defendants had improperly claimed privilege for documents attached to emails sent to attorneys on the sole basis that such documents were sent to counsel. (Id. at pp. 12-15.) The court's order as to the latter finding currently was stayed by the Court of Appeal until yesterday. In ruling on the current Motion for Sanctions, the court does not rely on its prior finding with respect to attachments claimed to be privileged on that basis alone.

The undue burden and expense caused to Private Plaintiffs by Defendants' insufficient privilege logs is obvious. The chronology set forth above details Private Plaintiffs' repeated attempts to challenge Defendants' claims of privilege and to find a way to overcome the disadvantage of privilege logs that were manifestly inadequate to allow Plaintiffs or the court to evaluate the claims of privilege. Defendants further manipulated the vague claims of privilege to present a moving target as they backed off substantial numbers of claims of privilege tardily and only when challenged. Such behavior continued even as Plaintiffs' Motions to Compel were being litigated in December 2019 and January 2020. With their Opposition to Plaintiffs Motion to Compel, Defendants submitted, on January 6, 2020, privilege logs that dropped claims of privilege as to 22% of the documents on the November 1, 2019 privilege logs and provided more detail as to the claims of privilege for some of the privilege claims. The undue burden and expense caused to Private Plaintiffs was substantially magnified by the fact that Plaintiffs were deprived of documents to which they were entitled during periods of intense litigation activity while the majority of Defendants' current and former employees were deposed.

C. Defendants' Conduct Was Willful and Violated Court Orders

Judge Wiley issued an order on October 18, 2018 stating that Defendants had, for the most part, failed to prove that voluminous claims of privilege with regard to communications involving third-party contractor AECOM were privileged. As part of that order, Judge Wiley defined four specific categories of AECOM documents as to which privilege could be claimed and ordered all other AECOM documents to be produced. (Notice of Ruling on Private Plaintiffs' Motion to Compel Third Party AECOM's Production of Documents, filed Oct. 19, 2018.) Nearly a year later, Defendants had not complied with Judge Wiley's Order. On August 12, 2019, this court heard argument on Defendants' Motion for a Protective Order with respect to the AECOM documents as to which Defendants continued to claim privilege. As to all but 6 of the 174

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documents still being withheld by Defendants the court found “there was not a colorable claim of privilege supported by this motion” (Minute Order, Aug. 15, 2019.) The failure to produce these documents during the 10-month period following Judge Wiley’s ruling was without substantial justification and constituted a violation of Judge Wiley’s order.

As the pattern of Defendants’ over-designation and insufficient designation of purportedly privileged documents continued to reveal itself (as described in the detailed chronology set forth above) the court ordered as follows: “Defense counsel shall report to the court at a specially set status conference on Sept. 18, 2019 at 1:45 pm as to how they propose to address the problem of Defendants’ over-designation of privileged documents.” (Minute Order, Sept. 11, 2019.) The court already had ordered defense trial counsel to declare under penalty of perjury that there was a good faith basis for withholding documents evidencing communications between Defendants and their public relations consultants. (Minute Order, Aug. 14, 2019.) The court was searching for a way to ensure that only good faith claims of privilege were asserted without imposing on trial counsel the personal obligation to review each document and declare under penalty of perjury that there was a good faith basis for claiming privilege. At the September 18, 2019 status conference, after hearing argument from counsel, the court ordered that, by November 1, 2019:

- [D]efense counsel shall review all previously produced privilege logs and shall produce, on a rolling basis, all documents as to which privilege is not legally supportable. Defense counsel shall correct and re-serve the privilege logs previously produced so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable.

.....

- [D]efendants [shall] prepare and serve additional legally supportable privilege logs for documents that have been and will be produced in the future.

(Minute Order, Sept. 18, 2019.)

As discussed above, the court’s January 14, 2020 order determined that the November 1, 2019 privilege logs were “insufficient to meet the legal requirement that a privilege log contain sufficient information to allow the requesting party to evaluate whether there is a colorable basis for the assertion of privilege.” (Minute Order, Jan. 14, 2020, at p. 9.) This violation of the court’s September 18, 2019 Order was not limited to a few document descriptions – it was widespread in the logs of 156,000 documents.

Defendants contend that this court’s September 18, 2019 order “cannot support the imposition of nonmonetary sanctions” because the order “was issued following a discussion by counsel during

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a status conference and was not based on the identification of specific documents or any briefing.” (Defs’ Opp., at p. 23.) Appellate precedent does not allow a trial court’s orders to be so lightly dismissed. Unless appellate review is timely sought, even an erroneous trial court order “does not excuse the failure to obey; i.e., disobedient parties may not avoid sanctions by challenging the validity of the order.” (Cal. Prac. Guide Civ. Pro. Before Trial (The Rutter Group) Ch. 8M-5 ¶ 8:2150 (emphasis in original), citing Marriage of Niklas (1989) 211 Cal.App.3d 28, 34-35.) Defendants also argue (without citation) that “[a] general directive to limit privilege claims to those that are ‘legally supportable’ is not so definite and does not compel production of certain documents; it permits good-faith privilege positions” (Defs’ Opp., at p. 23.) Given the prior history of the case, there was nothing vague about the court’s direction to produce legally supportable privilege logs. Defendants had previously been instructed as to the required content of a privilege log sufficient to allow opposing counsel and the court to evaluate the claims of privilege. Indeed, the court’s order did permit good faith assertions of privilege and a good faith effort to present a compliant privilege log. The clear and widespread deficiencies in the privilege logs demonstrate that Defendants’ noncompliance with the September 18, 2019 order was not in good faith but rather was part of a continuing effort to delay production of documents to which Plaintiffs were entitled while critical depositions proceeded.

Before Private Plaintiffs filed their Motions to Compel, this court had held an informal discovery conference based on review of 80 pages of the November 1, 2019 privilege logs and informed Defendants of the court’s tentative views that the privilege log was substantially insufficient. The court also had given Defendants an opportunity to state how the court should address the extent to which Defendants’ claims of privilege were proper. (Minute Order, Dec. 4, 2019.) Defendants did not offer to revise the November 1, 2019 privilege logs or to re-review and produce documents when the claim of privilege was not substantially justified. (See, e.g., Defendants’ Statement Pursuant to December 4, 2019 Minute Order, filed Dec. 9, 2019.) It is especially telling that Defendants, in a pattern that had already become familiar, attempted to derail a formal motion to challenge their actions by submitting revised (although still insufficient) privilege logs on January 6, 2020, with Defendants’ Opposition Brief to Private Plaintiffs’ Motion to Compel.

The intentionality of Defendants’ conduct in asserting unsubstantiated privilege claims and stonewalling Plaintiffs’ efforts to challenge those claims is evident from Defendants’ conduct (through its counsel) dating back to 2017. As recited in Plaintiffs’ Opening Brief on this Motion, and as supported by accompanying evidence, a privilege log produced by Defendants in 2017 had an identifiable attorney listed on only 2% of the 12,000 entries, and a privilege log produced

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in 2018 with 39,000 entries had an attorney identified on only 2% of the entries. (Motion for Sanctions, at p. 5, lines 8-12, p. 7, lines 15-19.) While documents that are not directed from or to an attorney may be privileged under certain circumstances (for example, if they disclose the legal advice of counsel), subsequent events have demonstrated that Defendants' claims of privilege where no attorney is an author or recipient have frequently been unsupported and withdrawn. Subsequently, defense counsel sought to shift the burden to Plaintiffs to identify documents from the privilege logs that did not include an attorney, provide a basis for why Plaintiffs required more information to evaluate such privilege claims, and provide legal authority for why non-attorney communications were not privileged. (Id. at p. 7, lines 10-14.)

In 2018, Plaintiffs filed three motions to compel production of documents withheld as privileged. Two of the motions addressed documents listed as privileged involving two custodians who were to be deposed as PMQ witnesses. In their Opposition briefs on these motions, Defendants represented that they had not refused to produce non-privileged documents pertaining to these witnesses. Private Plaintiffs withdrew those motions and proceeded with the PMQ depositions without the documents listed as privileged. Plaintiffs assert that they did so based on the presumed good faith of Defendants' assurances. However, according to Plaintiffs' evidence, in the past two months as Defendants have produced documents previously claimed to be privileged, Defendants produced 2,362 documents involving those two PMQ witnesses. (Id. at p. 7, line 20, to p.8, line 4.)

Thus, Defendants, through their counsel, stonewalled over an extended period of this litigation by misusing claims of privilege to attempt to throw Plaintiffs' counsel off the track with respect to documents to which they were entitled. As a result, Plaintiffs' counsel were delayed in obtaining documents at a time when they could have been used in deposing Defendants' current and former employees.

When resisting the production of documents listed on deficient privilege logs, Defendants have relied on *Catalina Island*, supra, to argue that a trial court may not find a waiver of attorney-client privilege and work product doctrine when an objecting party submits an inadequate privilege log. (See *Catalina Island*, 242 Cal.App.4th at p. 1120.) But the court in *Catalina Island* did not leave Plaintiffs without a remedy in the face of Defendants' repeated failure to justify the withholding of documents they claim to be privileged.

The court in *Catalina Island* offered guidance for the very situation before this court:

If the response and any privilege log provide sufficient information to permit the court to determine whether the asserted privilege protects specific documents from disclosure, the court

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may rule on the merits of the objection by either sustaining it or overruling it as to each document. [Citation.]

If the response and any privilege log fail to provide sufficient information to allow the trial court to rule on the merits, the court may order the responding party to provide a further response by serving a privilege log or, if one already has been served, a supplemental privilege log that adequately identifies each document the responding party claims is privileged and the factual basis for the privilege claim. [Citations.] In ordering a further response, the court also may impose monetary sanctions on the responding party if that party lacked substantial justification for providing its deficient response or privilege log. (§ 2031.310, subd. (h).)

If the responding party thereafter fails to adequately comply with the court's order and provide the information necessary for the court to rule on the privilege objections, the propounding party may bring another motion seeking a further response or a motion for sanctions. At that stage, the sanctions available include evidence, issue, and even terminating sanctions, in addition to further monetary sanctions. (§ 2031.310, subd. (i).) But the court may not impose a waiver of the attorney-client privilege or work product doctrine as a sanction for failing to provide an adequate response to an inspection demand or an adequate privilege log. [Citations.]

(Id. at pp. 1127 (emphasis added) (citations omitted).) Notwithstanding Defendants' arguments to the contrary, it is clear that Defendants have failed to adequately comply with court orders, and that sanctions are therefore justified under the structure adopted by Catalina Island as an alternative to requiring production of assertedly privileged documents.

Refusal to furnish an adequate privilege log is not an insignificant violation of the duty to abide by the rules of discovery. A privilege log not only allows the opposing party to assess the claims of privilege; a factual description of withheld documents also permits a judicial evaluation of the claim of privilege. (Best Products, Inc. v. Superior Court (2004) 119 Cal.App.4th 1181, 1188–1189.) In the absence of a good-faith attempt to inform the parties and the court of the basic facts supporting a claim of privilege, a party's privilege claims could easily serve as a mere strategy for flaunting the discovery rules and thereby avoiding the disclosure of relevant information. That is the case here.

“A trial court has broad discretion to impose discovery sanctions, but two facts are generally prerequisite to the imposition of nonmonetary sanctions . . . : (1) absent unusual circumstances, there must be a failure to comply with a court order, and (2) the failure must be willful.” (Biles v. Exxon Mobil Corp. (2004) 124 Cal.App.4th 1315, 1327.) Findings that a party “acted

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intentionally and in bad faith are the functional equivalent of a finding that it acted willfully.” (Karlsson v. Ford Motor Co. (2006) 140 Cal.App.4th 1202, 1225 (Karlsson).) A finding of bad faith need not be based only on the circumstances surrounding a violation of a court order or orders, but may consider “a persistent pattern of discovery abuse.” (Id. at p. 1217.)

Given the history of Defendants’ repeated failure to submit adequate privilege logs, the court concludes that Defendants’ failure to comply with the September 18, 2019 order was willful. The court, through its past orders and comments during hearings and status conferences, gave more than sufficient guidance on what the law requires in preparing privilege logs; Defendants repeatedly failed to comply.

Defendants have repeatedly failed to stand by their initial privilege claims. The court, after viewing the conduct of Defendants and defense counsel over the course of the proceedings, determines that Defendants make blanket, unsupported claims of privilege, which then force Plaintiffs to dedicate hours reviewing deficient privilege logs and bringing privilege issues to this court’s attention. Pushed to offer basic justifications for the withholding of documents, Defendants either make unsupported statements to try to deter Plaintiffs from pursuing assistance from the court or hand over some documents and further edit the privilege logs. The sheer number of privilege assertions that ultimately were unsupported is evidence that Defendants’ conduct is the result of a concerted policy, and not the hapless mistakes of a few document-review attorneys.

The court already has discussed and rejected Defendants’ excuse that the work was burdensome and that a document-by-document review should not be expected. The court has merely required that Defendants meet their most basic obligations under the discovery rules: namely, that an assertion of privilege be made in good faith and supported by sufficient factual information so that it can be evaluated by Plaintiffs and by this court; anything less would allow a party to hide relevant, non-privileged documents from its opponent, thereby undermining the entire litigation process. Plaintiffs and the court cannot be subjected to an infinite process wherein Defendants’ logs are reviewed, challenged, and then ordered to be re-served with greater detail to justify the privileges. Catalina Island offers the imposition of sanctions as Plaintiffs’ only way out of such an impasse.

The court finds that Defendants’ pattern of conduct in this case with respect to Defendants’ claims of privilege, including repeated assertion of unmeritorious objections, repeated refusal to furnish a legally compliant privilege log, violation of court orders (in particular this court’s September 18, 2019 order) and related efforts over an extended period (as discussed above) to

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misuse claims of privilege to attempt to deprive Plaintiffs of documents to which they are entitled, was willful, intentional and in bad faith.

IV. Determination of Appropriate Sanctions

There is clear prejudice to Plaintiffs resulting from Defendants' conduct. Fact discovery as to Defendants' current and former employees and as to the initial discovery group of individual Plaintiffs was ordered to end (by agreement of the parties) on January 31, 2020. Ninety-four depositions occurred before November 1, 2019, when Defendants submitted yet another set of inadequate privilege logs. More documents may be produced with the privilege logs required to be filed February 11, 2020. The late production of documents for which there was no colorable claim of privilege has meant that Plaintiffs conducted many depositions without access to necessary documents, that deposition witnesses were improperly instructed on the grounds of privilege not to answer questions, and that Plaintiffs have been delayed in general case preparation and strategy.

Moreover, while defense counsel now can turn to depositions of third-party witnesses and to preparing for expert depositions, Plaintiffs' counsel is required to (1) continue to analyze yet another revised privilege log to be produced with a declaration by trial counsel on February 11, 2020; (2) review for the first time key documents recently produced (as described by Plaintiffs' counsel at oral argument on this Motion) and documents that will be produced with the again-revised privilege logs of February 11; (3) make decisions as to which witnesses that have already been deposed will need to be deposed again in order to allow Plaintiffs' counsel to question witnesses as to key documents recently produced; (4) as part of the decision as to which witnesses to depose again, weigh the potential value of a renewed deposition against the loss of time and effort from other trial preparation tasks; and (5) prepare experts for their testimony without knowing whether recently produced documents can be authenticated and without having a deposition to lay a foundation for the business records exception to the hearsay rule. These are substantial disadvantages to Private Plaintiffs in this challenging litigation.

Where "sanctions are called for, they " "... "should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." [Citations.] " "... [¶] The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks, but the court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose punishment. [Citations.]' " [Citations.]' [Citation.]" (Do it Urself, supra, 7 Cal.App.4th at p. 35.)" (Biles v. Exxon Mobil Corp. (2004) 124 Cal.App.4th 1315, 1327.)

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“Sanctions should be designed to remedy discovery abuses, but should not put the party seeking the sanctions in a better position than he or she would have been in, had the requested discovery been provided.” (NewLife Sciences, LLC v. Weinstock (2011) 197 Cal.App.4th 676, 689, fn. 10.) In other words, the court should utilize sanctions to level the playing field in light of the discovery abuse.

A. Monetary Sanctions

In their motion, Plaintiffs seek a total of \$949,699.50 in monetary sanctions: \$498,650 in monetary sanctions against Defendants and their counsel for time spent directly on privilege disputes; and \$451,049.50 in monetary sanctions against Defendants and their counsel for lost productivity and inefficiencies related to depositions resulting from Defendants’ misuse of discovery. Given Defendants’ discovery abuses, Plaintiffs are entitled to recover “the reasonable expenses, including attorney’s fees, incurred by anyone as a result of [Defendants’] conduct.” (Code Civ. Proc., § 2023.030, subd. (a).)

As for the first category of sanctions, Defendants point to time spent directly on privilege disputes, “including meet and confers, analysis of Defendants’ privilege logs, court hearings, and motion practice.” (Pls’ Mot., at p. 26.) To support this claim, Plaintiffs point to the declarations of Jesse Creed, Devin Bolton, Gary Praglin, Kelly Weil, Michael Kelly, Patricia Oliver, Brian Panish, and Alexander Behar. For example, Mr. Praglin states that he has been in practice for 38 years, his published billing rate is \$850.00, and that he spent approximately three hours meeting and conferring regarding privilege issues and preparing his declaration. (Praglin Decl., ¶¶ 11-13.) Mr. Panish gives his billing rate as \$1,500 per hour and asserts that he spent approximately 10 hours on activities such as meeting and conferring on privilege issues with Defense counsel and collaborating with Mr. Creed on privilege issues. (Panish Decl., ¶¶ 1-7.) Mr. Behar states that he spent 3 hours preparing an ex parte application related to privilege issues in this coordinated proceeding and provides a billing rate of \$250 per hour. (Behar Decl., ¶ 2-5.) Ms. Weil declares that she spent 10 hours meeting and conferring regarding privilege and contributing to Plaintiffs’ motion to compel, that she spent 1.5 hours preparing her declaration, and that her published hourly billing rate is \$650. (Weil Decl., ¶ 12-14.) Mr. Kelly states that he spent one hour preparing his declaration in support of the Motion for Sanctions, and that his hourly billing rate is \$950.00. (Kelly Decl., ¶¶ 15-16.) Mr. Bolton states that he has spent 303.49 hours working to resolve privilege issues and to obtain the discovery to which Plaintiffs believe they are entitled, and that he anticipates spending another 10 hours responding to this issue, for a total of \$172,419.50 at an hourly rate of \$550. (Bolton Decl., ¶¶ 31-33.) Mr. Creed, who claims an hourly billable rate of \$650, requests \$196,878.50 in fees for 302.89 hours spent on privilege

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issues. (Creed Decl., ¶¶114-117.)

The vast majority of hours claimed are from Mr. Creed, Ms. Oliver, and Mr. Bolton. Mr. Creed offers a detailed account of his hours spent on privilege issues. (See Creed Decl., ¶ 14.) Though Mr. Creed includes travel time to and from court in his total hours, he only does so where his participation in a status conference was due to the fact that privilege issues were set to be discussed at the hearing. (Creed Decl., ¶ 14(g), fn. 1.) Similarly, Mr. Bolton has lodged with the court a ten-page document offering a detailed account of his time spent working on privilege issues. (See Bolton Decl., Ex. 28.) The court is satisfied by Exhibit 28 that Mr. Bolton's claimed costs are reasonable.

Ms. Oliver asserts that her team spent 238.30 hours (with a cost of more than \$101,277 in attorney fees) reviewing privilege logs, and that this time estimate excludes paralegal work. (Oliver Decl., ¶ 21.) To explain the billing rate, Ms. Oliver states that her team "relied almost entirely on first year attorneys billing at \$425 to assess these privilege log issues to avoid excess costs." (Oliver Decl., ¶ 21.) She also states that she spent approximately 2 hours preparing her declaration, and that her hourly billing rate is roughly \$675. (Oliver Decl., ¶ 23-24.) The court credits Ms. Oliver's statement that her team spent 238.30 hours reviewing privilege logs. Defendants have not challenged any of the hourly rates sought by the various members of Plaintiffs' counsel's team.

The court credits the declarations of counsel and finds that the billable rates and time spent on privilege issues are reasonable in light of the large number of documents at issue. The majority of these costs are due to the fact that Plaintiffs, rather than Defendants, were required to expend time reviewing the withheld documents to assess the claims of privilege. These costs were the result of Defendants' conduct.

With their Reply papers, Plaintiffs request an additional \$33,460 for time spent on the privilege disputes after the filing of the current motion. Mr. Creed asserts that he has spent 38.4 hours preparing for oral argument on the January 14, 2020 privilege motions, on appearing for that hearing, on reviewing Defendants' Opposition to the current motion, and preparing the Reply papers for the current motion. (Creed Decl. ISO Reply, ¶ 22.) This time amounts to \$24,960. (Creed Decl. ISO Reply, ¶ 23.) Similarly, Mr. Praglin asserts that, since the time of the filing of the current motion, he has spent approximately 10 hours in connection with evaluating privilege issues for the current motion: i.e., reading the Opposition papers, reviewing privilege claims and making comparisons to previous versions, searching deposition transcripts, and conferring with co-counsel. (Praglin Decl. ISO Reply, ¶ 9.) Given Mr. Praglin's hourly rate of \$850, the cost of

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February 20, 2020

8:14 AM

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Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

such time is \$8,500. (Praglin Decl. ISO Reply, ¶ 9.) These costs are reasonable.

The court may not award monetary sanctions on top of monetary sanctions that already have been awarded based on Defendants' unmeritorious privilege claims. In denying Defendants' Motion for a Protective Order with respect to the vast majority of AECOM documents, the court awarded monetary sanctions in the amount of \$6,500. (Minute Order, Aug. 15, 2019, at p. 1.) The court therefore deducts that amount from the monetary sanctions awarded on this Motion.

The court awards monetary sanctions in favor of Private Plaintiffs' counsel and jointly against Defendants and defense counsel in the amount of \$525,610, payable within 20 days. Counsel should meet and confer with respect to how Private Plaintiffs' counsel desire to receive payment.

With respect to the monetary sanctions Plaintiffs' counsel request for lost productivity, however, the court finds that Plaintiffs' counsel have failed to offer a reasonable basis on which to award sanctions. To illustrate what Plaintiffs mean by "lost productivity and inefficiencies," they offer the example of Mr. Creed, who states that, when preparing for a deposition, he has "repeatedly had [the] experience of searching for unprivileged versions of improperly redacted documents that are clearly privileged." (Creed Decl., ¶ 133.) Other declarants note that the prevalence of claims of privilege slows down the deposition, requires more preparation, and may ultimately require that some depositions be retaken. (See, e.g., Weil Decl., ¶¶ 2-10.) From these claims, most counsel declarants take the position that roughly 20% of the total time spent on preparing for and completing depositions can be attributed to inefficient or lost time because of privilege issues. (Weil Decl., ¶ 11; Praglin Decl., ¶ 9; Oliver Decl., ¶ 22; Baymann Decl., ¶ 3.) Apart from lacking sufficient evidentiary support, the 20% figure appears to be an arbitrary number that is not likely to represent the actual amount of time wasted because of privilege issues. At oral argument Mr. Panish stated that there were inefficiencies because he would fully prepare to depose a witness only to receive, the night before the deposition, newly produced documents as to which Defendants previously had claimed privilege. The court does not doubt that additional time had to be spent preparing for depositions of defense witnesses when counsel taking the deposition had to add preparation time because of recently produced documents. But there has been no reliable estimate to show that this added preparation time resulted in a 20% inefficiency as to every deposition.

As Plaintiffs state, the effect of Defendants' conduct is likely to result in the reopening of certain depositions, given that previously withheld documents have since been produced or may be produced in the future. A more certain calculation of Plaintiffs' reasonable costs with respect to depositions can thus be determined based on the time spent in taking those future depositions.

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Therefore, the court rules that Private Plaintiffs counsel are entitled to reasonable costs, including attorneys' fees, for the taking of any future depositions that are reopened due to the late production of documents over which Defendants previously asserted privilege or work product protection. The court will allow Plaintiffs to reopen any deposition at the expense of Defendants up until the date of the final status conference, so long as Plaintiffs have a colorable claim that a document which was withheld under a claim of privilege, but then produced after November 1, 2019, will be the subject of the deposition. Once such depositions are concluded, Plaintiffs may submit an accounting of such costs and fees to the court, to be accompanied by briefing if necessary.

B. Non-monetary Sanctions

Given the conduct of Defendants and Defense counsel, the court may "impose an issue sanction ordering that designated facts shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process," "impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses," and/or "impose an evidence sanction by an order prohibiting any party engaging in the misuse of the discovery process from introducing designated matters in evidence." (Code Civ. Proc., § 2023.030, subs. (b), (c).)

This court is not able to level the playing field for the parties to try this case by precluding the party that misused the discovery process from introducing previously withheld documents that are unfavorable to that party. Nevertheless, the court needs to consider how the delay in production of documents previously claimed to be privileged has adversely affected Plaintiffs' trial preparation, and to determine whether that disadvantage can be mitigated.

Ninety-four depositions took place prior to November 1, 2019, the date on which Defendants produced another inadequate privilege log. Plaintiffs were disadvantaged during those depositions because they were unable to question witnesses based on Defendants' documents that were initially withheld on the basis of privilege but produced after November 1, 2019. Because of the delay in production of purportedly privileged documents, Plaintiffs are now put to the choice of whether to spend valuable trial preparation time setting additional days of deposition of previously deposed witnesses merely to lay a foundation for documents that were withheld on the basis of Defendants' claims of privilege. Plaintiffs are now having to depose third party witnesses based on such documents without knowing whether a foundation can be laid for the admissibility of such documents. And Plaintiffs are having to prepare their experts' testimony without knowing whether they will be able to lay an evidentiary foundation for the

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admissibility of such documents.

These adverse effects on Private Plaintiffs caused by Defendants' unwarranted withholding of documents on the basis of privilege can be mitigated by an issue sanction that limits the grounds upon which Defendants can challenge the admissibility of any document that once appeared on Defendants' privilege logs but was produced after November 1, 2019. In order to attempt to even the playing field but not punish Defendants, the court determines that Defendants may not oppose admissibility of such documents on the basis of lack of authenticity or the inapplicability of the business records exception to the hearsay rule. These are, after all, Defendants' own records. Defendants are not precluded, however, from objecting to a hearsay statement within such documents.

These sanctions will allow Plaintiffs to immediately begin relying on the documents as to which Defendants' improperly delayed production on grounds of privilege. However, such sanctions are not sufficient to level the playing field in light of Defendants' misconduct. Private Plaintiffs do not have unlimited resources and they do not have unlimited time. Defendants repeatedly say that there is still plenty of time for Plaintiffs to prepare their case set for trial four months from now. But Defendants cannot deny that the preparation of this case for trial is such a mammoth undertaking that Defendants themselves argued strenuously for a trial in September, 2020, not June, 2020, on the assumption that the cut-off for discovery of Defendants' and Plaintiffs' witnesses would be January 31, 2020. It ill-behooves Defendants now to argue that four months is plenty of time for Plaintiffs to prepare for trial.

Plaintiffs should not have to accept a trial continuance in order to be able to properly prepare for trial in light of Defendants' misconduct. There are 36,000 Plaintiffs in this case and, despite this court's best efforts, not a single trial has begun. The event that is the subject of this lawsuit occurred in 2015 and the five-year rule on the first cases filed would run in November 2020 if the parties had not waived that rule in light of the exigencies of case management and trial preparation. The Plaintiffs' right to present their case to a jury should not be further delayed as a result of Defendants' misconduct.

At this time, Plaintiffs have not made a sufficient showing to justify issue sanctions that affect proof of the elements of Plaintiffs' claims. However, even on the eve of the hearing on this Motion for Sanctions, Plaintiffs were reviewing for the first time recently produced documents that, Plaintiffs contend, contradicted the positions that Defendants' witnesses had taken in deposition. Without the documents, Plaintiffs assertedly were unable effectively to cross examine Defendants' witnesses at deposition. Nevertheless, the Motion currently before the

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court does not draw a sufficient connection between late-produced or still-withheld documents formerly claimed by Defendants to be privileged and a disadvantage suffered by Plaintiffs in their ability to prove a particular element of their claims against Defendants. Without such a connection, issue sanctions that would find Plaintiffs to have made out a prima facie case on an element or elements of one of their claims or would preclude Defendants from offering a defense on a matter at issue in the case are not currently appropriate.

As to Plaintiffs' request for a jury instruction pursuant to Evidence Code section 413, such an instruction is meant to inform a jury about their consideration of evidence when a party's conduct has made evidence unavailable, or effectively unavailable, at trial. (CACI 204; Karlsson, supra, 140 Cal.App.4th at pp. 1215, 1224-1227.) Evidence Code section 413 allows a jury to have insight into the discovery process (e.g., spoliation of evidence) and invites them to draw conclusions unfavorable to a party when evidence is absent. As with Private Plaintiffs' request for stronger issue sanctions, the current Motion does not sufficiently connect the Defendants' misuse of privilege claims, privilege logs, or late production of evidence to specific categories of documents that have not been made available to them. The court will not, at this stage of the proceedings, determine that CACI 204 should be given to the jury.

The sanctions imposed herein are made under the assumption that Defendants will keep their promise that "Plaintiffs have received or will receive by the deadline set by this Court's January 14, 2020 order every document to which they are entitled." (Defs' Opp., at p. 22.) If Defendants fail to keep their promise to abide by this court's January 14, 2020 order, then the court will allow further briefing and consider stricter additional evidentiary and issue sanctions, as well as a jury instruction under Evidence Code section 413. The court also may permit Private Plaintiffs to seek additional sanctions based on information about withheld documents that have only recently been disclosed to them.

The Judicial Assistant hereby gives notice.

Clerk's Certificate of Service By Electronic Service is attached.

A copy of this minute order will append to the following coordinated case under JCCP4861:
BC601844.