

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RYAN SCHAEFFER, et al.,
Plaintiffs,
v.
GREGORY VILLAGE PARTNERS, L.P., et
al.,
Defendants.

Case No. 13-cv-04358-JST
ORDER RE DISCOVERY DISPUTE

Now before the Court is the parties’ discovery dispute regarding the applicability of the attorney-client privilege and work-product protection to the documents listed in Gregory Village Partners, LP and VPI, Inc.’s (collectively, “Gregory Village”) privilege log. See ECF No. 104. Having carefully reviewed the documents in camera and considered the arguments and evidence presented by the parties, the Court finds that certain documents identified by Gregory Village as privileged are not and orders Gregory Village to produce those documents to Plaintiffs.

I. BACKGROUND

A. Factual History

In June 2011, Plaintiffs brought this action against multiple defendants, seeking to remediate contamination at the site of their home. ECF No. 1-1. Gregory Village is the current owner of a property from which some of that contamination allegedly flowed. Id. at 2-4.

VPI, Inc.’s Vice President, Mary Haber, also serves as Gregory Village’s in-house general counsel. Decl. of Mary Haber in Supp. of Gregory Village Br. that Communications with Tracy Craig Are Privileged, ¶¶ 1, 2 (“Haber Declaration”); ECF No. 118 at 4. According to Haber, VPI, Inc. and Gregory Village are “associated entities.” Haber Decl. ¶ 1. Plaintiffs contend that it is not clear when Haber is acting in her role as general counsel as opposed to her role as a businesswoman, as she “wears multiple hats” in her work for the companies, and signs various

1 documents pertinent to this litigation either as Vice President of VPI, Inc., as general counsel to
2 Gregory Village, or both. ECF No. 118 at 4, 11.

3 In February 2009, Gregory Village hired Tracy Craig and her company, Craig
4 Communications, as public relations consultants. ECF No. 118 at 3 & Ex. 3. At that time, the
5 Regional Water Quality Control Board (“Board”) was working with Gregory Village regarding
6 possible contamination from its property and to determine what steps should be taken toward
7 remediation. Id. Ex. 4. Craig and her company’s official responsibilities included: (1) conducting
8 “community research,” identifying “key contacts,” and developing a “key contact list with
9 representative names, addresses,” etc.; (2) meeting with Gregory Village and the Board to
10 “develop initial outreach strategy and short-term outreach goals,” and following-up to “refine key
11 messages and project strategy”; (3) developing a one-page fact sheet summarizing “main project
12 points to provide to elected officials and key community representatives”; (4) scheduling and
13 attending “ten meetings with key stakeholders”; and (5) preparing a short report summarizing
14 “community characteristics and composition, key social and community organizations, preferred
15 methods to communicate with various segments of the community, [and] information gathered
16 from outreach meetings and recommended outreach tasks.” Id. at 3 & Ex. 3.

17 Craig participated in public meetings before the Board and the City of Pleasant Hill with
18 Ed Firestone, an outside attorney working for Gregory Village. Haber Decl. ¶¶ 5, 20. Craig also
19 went door-to-door in neighborhoods potentially affected by contamination from the Gregory
20 Village property to meet neighbors and, in some cases, seek to secure access agreements to permit
21 Gregory Village’s environmental consultants to perform sampling as required by the Board. Id.
22 She also met with neighbors, including the Plaintiffs, to persuade them to agree to the installation
23 of depressurization systems under their homes as a mitigation measure. Id. ¶ 21.

24 **B. Procedural History**

25 On May 16, 2012, Plaintiffs requested production from Gregory Village of various
26 documents related to this litigation. ECF No. 118 at 1. Gregory Village responded to Plaintiffs’
27 request on June 29, 2012, and on November 5, 2012, served on Plaintiffs a privilege log, claiming
28 attorney-client privilege or work-product protection for more than one thousand documents

1 encompassing thousands of pages. Id. The parties met and conferred regarding the request for
2 production and the privilege log, and Gregory Village has since modified versions its privilege log
3 three times. Id. Plaintiffs continue to object to Gregory Village’s claims of privilege for the
4 documents listed on the log. See ECF No. 104 at 1. In particular, Plaintiffs object to Gregory
5 Village’s claims of privilege or work-product protection for documents that contain
6 communications from or to Tracy Craig and/or Mary Haber. Id. Plaintiffs also object to the fact
7 that the descriptions of documents listed in past versions of the log have been shown to be
8 inaccurate, and therefore Plaintiffs do not believe that the current log entries accurately describe
9 the documents listed on the log. Id. at 2.

10 On October 6, 2014, the Court ordered Gregory Village to review its privilege log and to
11 verify that it continues to assert the privilege or work-product protection as to every item on it.
12 Id. at 3. To the extent Gregory Village, after review, no longer asserted the privilege for certain
13 log entries, it was ordered to revise its privilege log and submit it to Plaintiffs by October 16,
14 2014. Id. The Court also ordered Gregory Village to ensure that the descriptions of documents
15 contained in the log were accurate, and to file a brief in support of its claims of privilege. Id.

16 In response, Plaintiffs were ordered to identify up to fifty documents for which Gregory
17 Village asserted the privilege based on Haber’s participation in the communication contained in
18 the documents (“Haber Documents”), and fifty documents wherein the claim of privilege rested on
19 Craig’s participation in the communication (“Craig Documents”), and to which Plaintiffs objected
20 to the assertion of the privilege. Id. Also, Plaintiffs were to file an opposition to Gregory
21 Village’s brief in support of its privilege claims. Id. Finally, Gregory Village was to lodge with
22 the Court paper copies of the aforementioned documents, and the same documents saved to a CD.
23 Id.

24 The parties have complied with the Court’s October 6 Order, submitting the documents to
25 each other and to the Court as requested. The privilege log Gregory Village submitted to Plaintiffs
26 and the Court now contains 1,145 entries. Id. Plaintiffs continue to object to Gregory Village’s
27 claims of privilege. See ECF No. 118.

28

1 Gregory Village also submitted to the Court¹ a document entitled “Further Submission by
2 Defendants Gregory Village Partners, L.P. and VPI, Inc. Regarding Craig and Haber Documents
3 Designated as Privileged by Defendants and Selected by Plaintiffs for In Camera Review”
4 (“Further Submission”). In the Further Submission, Gregory Village either partially or fully
5 withdraws its claim of privilege with respect to several of the documents on the privilege log.²
6 Because, Plaintiffs contend, the Further Submission indicates that Gregory Village has not
7 carefully reviewed its privilege log to ensure that each entry on the log is justified, and because
8 descriptions of documents in the log continue to be inaccurate, despite the Court’s previous order,
9 Plaintiffs object to Gregory Village’s claim of privilege with respect to each document in the log.
10 ECF No. 118 at 2.

11 **II. LEGAL STANDARD**

12 Where, as here, subject matter jurisdiction is premised on a federal question, federal
13 common law governs privilege issues. Fed. R. Evid. 501; United States v. Ruehle, 583 F.3d 600,
14 608 (9th Cir. 2009). “A party asserting the attorney-client privilege has the burden of establishing
15 the existence of an attorney-client relationship and the privileged nature of the communication.”
16 United States v. Graf, 610 F.3d 1148, 1156 (9th Cir. 2010) (quotations and internal alterations
17 omitted). “Because it impedes the full and free discovery of the truth, the attorney-client privilege
18 is strictly construed.” Id. (quotations omitted). The Ninth Circuit applies an eight-factor test to

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20 ¹ Presumably because it contained the confidential documents of Gregory Village, and to avoid
placing the materials in the public record, the document was lodged with the Court but not filed.

21 ² In its Further Submission, Gregory Village explains that it no longer claims that portions of the
22 following documents are privileged as Craig Documents (for ease, the Court uses the document
23 numbers in Gregory Village’s privilege log): 722, 745, 754. Gregory Village still asserts these
24 documents are privileged as Haber Documents. Gregory Village also no longer asserts the
25 privilege with respect to the following Haber Documents: 33, 35, 36, 43, 81, 589, and portions of
26 1083. Accordingly, the Court finds that Gregory Village must produce these documents, or
27 portions thereof, to Plaintiffs within ten days of the date of this Order. (The Court rejects the
28 argument that these documents are separately protected from disclosure because they involve
financing.) Gregory Village also acknowledges that Craig was not included in the
communications in documents 519 and 609 on its privilege log, though it listed them as “Craig
Documents.” Gregory Village continues to assert the privilege as to these documents, however, as
“Haber Documents.” Finally, the Court notes that documents 786 and 1046 also appear to be
misabeled as Craig Documents.

1 determine whether communications are covered by the attorney-client privilege:

2 (1) Where legal advice of any kind is sought (2) from a professional legal adviser in
3 his capacity as such, (3) the communications relating to that purpose, (4) made in
4 confidence (5) by the client, (6) are at his instance permanently protected (7) from
5 disclosure by himself or by the legal adviser, (8) unless the protection be waived.

6 Id. The transmission of a communication to a party outside the attorney-client relationship
7 destroys the confidentiality of the communication and therefore the privilege may not be
8 invoked as to that communication. See Ruehle, 583 F.3d at 609. Where a given
9 communication contains both privileged and non-privileged information, the party
10 asserting the privilege may bear the burden of “segregat[ing] the privileged information
11 from the non-privileged information.” Id.

12 Work-product protection derives from Federal Rule of Civil Procedure 26(b)(3).
13 Under that rule, attorney work-product prepared in anticipation of litigation is protected
14 from disclosure. Fed. R. Civ. P. 26(b)(3); see, e.g., Great Am. Assurance Co. v. Liberty
15 Surplus Ins. Co., 669 F. Supp. 2d 1084, 1092 (N.D. Cal. 2009).

16 **III. DISCUSSION**

17 **A. Application of Privilege to Tracy Craig Documents**

18 The parties dispute whether Craig’s communications constitute “communications . . . by
19 the client” and whether they were communications for the purpose of providing and receiving
20 legal advice from a professional legal adviser.

21 **1. Tracy Craig as “client”**

22 Gregory Village contends that the attorney-client privilege extends to Craig as Gregory
23 Village’s agent and “functional employee.” Gregory Village Br. Regarding Applicability of
24 Privilege to Tracy Craig Docs., at 6 (“Gregory Village Brief”). Further, Gregory Village
25 contends, “[c]ommunications by third parties . . . concerning a client’s legal and litigation interests
26 are no less privileged than if the exchanges were directly between attorney and client.” Id. (citing
27 United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989)). Plaintiffs counter that Craig is
28 not a “functional employee,” but merely a third party, because her communications with Gregory
Village attorneys did not “emanate[] directly from” Gregory Village, and that “[t]he mere

1 possibility that a public relations firm might help counsel formulate legal advice is not sufficient to
2 invoke the privilege.” ECF No. 118 at 6 (citing Calvin Klein Trademark Trust v. Wachner, 198
3 F.R.D. 53 (S.D.N.Y. 2000).

4 The underlying basis for Gregory Village’s assertion of privilege of communications with
5 Craig is the decision in Upjohn Co. v. United States, 449 U.S. 383 (1981). In Upjohn, the
6 Supreme Court held that the proper inquiry for assessing the scope of the privilege in corporations
7 is which corporate employees or agents possess relevant information the corporate attorney needs
8 to render sound legal advice to the corporation. Id. at 391-92. “Functional employees” are agents
9 of a corporation that fall within the privilege’s scope under Upjohn.

10 Gregory Village cites several cases in support of its argument that Craig should be treated
11 as a functional employee. The most relevant here are Graf, In re Bieter Co., 16 F.3d 929 (8th Cir.
12 1994), and In re Copper Market Antitrust Litigation, 200 F.R.D. 213 (S.D.N.Y. 2001). See also
13 FTC v. GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002) (extending privilege to
14 communications between corporate employees and corporation’s public relations and government
15 affairs consultants; “the consultants became integral members of the team assigned to deal with
16 issues that were completely intertwined with [the corporation’s] litigation and legal strategies.”)
17 (internal alterations and quotations omitted); McCaugherty v. Siffermann, 132 F.R.D. 234, 239
18 (N.D. Cal. 1990) (concluding that the privilege applied to communications with consultants,
19 where the consultants performed work within “an environment dense in regulations,” and the
20 consultants “knew that whatever deals they considered had to be analyzed within that regulatory
21 framework,” and “also knew that there would be consequential legal implications of” their
22 actions).

23 In Bieter, the court found the privilege applied to communications between an attorney and
24 a consultant working for the client-company, where the consultant was intimately involved in the
25 subject matter of litigation arising from a real estate venture the consultant had been hired to assist
26 in developing. 16 F.3d at 938-40. The Ninth Circuit, in Graf, adopted Bieter’s functional
27 employee doctrine. Graf, 610 F.3d at 1156-59. Graf, however, presented a much more clear-cut
28 circumstance than that presented here. The “consultant” at issue in Graf was “heavily involved in

1 all facets of the company’s operations,” and there was evidence that the only reason the
2 “consultant” was not hired formally as a company employee was that the state of California had
3 banned him from insurance work, which was the company’s business. Id. at 1153 & n.2.

4 Most relevant here, in Copper Market, the court found that the privilege extended to
5 litigation-related communications to and from a public relations firm a corporation hired to
6 respond to anticipated and actual litigation. 200 F.R.D. 213. The court explained that, under
7 Upjohn, “there is no reason to distinguish between a person on the corporation’s payroll and a
8 consultant hired by the corporation if each acts for the corporation and possesses the information
9 needed by attorneys in rendering legal advice.” Id. at 219. The court went on to find that the firm
10 “was, essentially, incorporated into [the corporation’s] staff to perform a corporate function that
11 was necessary in the context of the government investigation, actual and anticipated private
12 litigation, and heavy press scrutiny obtaining at the time.” Id. The firm’s “function” included
13 “preparing statements for public release and internal documents designed to inform [corporate]
14 employees about what could and could not be said about the scandal” that formed the basis of
15 governmental action and litigation. Id.

16 These precedents indicate that, where a consultant performs work that is substantially
17 intertwined with the subject matter of a corporation’s legal concerns, and the consultant provides
18 information to the corporation’s attorney to aid the attorney in advising the corporate client, the
19 privilege extends to the consultant as the corporation’s functional employee. It is true that, by and
20 large, these cases involved consultants who had a much more extensive role in the company
21 claiming privilege than did Craig. But Craig’s responsibilities, though she was only retained for a
22 limited time and purpose, were very much intertwined with Gregory Village’s legal troubles—
23 both regulatory action and potential litigation—and her activities involved the collection of
24 information and direction by counsel that characterized the activities of the consultants who were
25 deemed functional employees.

26 Gregory Village also cites two cases in which courts found the privilege does not extend to
27 consultants: United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065 (N.D. Cal. 2002), and
28 Genentech, Inc. v. Trustees of the University of Pennsylvania, No. C 10-2037 PSG, 2011 WL

1 5079531 (N.D. Cal. Oct. 24, 2011). These cases are distinguishable from the present
2 circumstances.

3 In Genentech, the court found that communications between a consultant and owner of an
4 equity interest in a small life-sciences firm, Greene, and that firm’s attorney, Blitzer, were not
5 protected by the attorney-client privilege. 2011 WL 5079531, at *3. In particular, the court noted
6 that Greene was retained to advise the firm’s board of directors regarding the strength and
7 potential of the firm’s patent portfolio. Id. Further, the court found that though the patents would
8 later be the subject of suit, Greene’s communications with Blitzer were not made for the purpose
9 of providing legal advice, but rather served a business purpose—i.e., evaluating the strength of the
10 business’s patent portfolio and reporting the same to the firm’s board of directors. Id. Moreover,
11 when Blitzer was communicating with Greene, it appeared that he was not acting as the firm’s in-
12 house counsel, but rather as its CEO. Id. at *3 (“Nor do the communications reveal Blitzer acting
13 in any way as a lawyer. In fact, in the course of the email thread in dispute, Blitzer goes so far as
14 to announce that he is ‘speaking as the CEO’ . . .”). Accordingly, the court found that Greene
15 was not a “functional employee” and the privilege did not protect his communications with
16 Blitzer. Id.

17 In Chevron Texaco, Chevron asserted the privilege protected its communications with an
18 outside accounting firm. The court held that, in the realm of accounting, advice from tax
19 consultants is necessarily “legal” because it is inherently based on the interpretation of intricate tax
20 rules and regulations. 241 F. Supp. 2d at 1070-72. In such circumstances, an attorney can claim
21 privilege with respect to communications to and from an accounting firm only if the firm is
22 serving as a conduit of information to the attorney—i.e., is “translating” the client’s accounting
23 data and information into a form that the attorney can use to advise the client. Id. Where an
24 accounting firm is only serving to provide its own tax-related advice, the privilege does not apply.
25 Id. at 1072. Chevron-Texaco and its tax-accounting rule are not on point here.

26 Plaintiffs assert that various cases show that the Craig Documents should not be protected
27 by the privilege. For example, Plaintiffs cite Calvin Klein, 198 F.R.D. 53, which is their best case,
28 and Great American Surplus Lines Insurance Co. v. Ave Oil Co., 120 F.R.D. 533, 538 (E.D. Cal.

1 1988). Plaintiffs also cite Bieter and Graf, but as discussed above, the Court does not find that
2 those cases point in Plaintiffs’ favor.

3 Calvin Klein involved the assertion of privilege and work-product protection related to
4 communications with a public relations firm hired by plaintiff’s counsel. 198 F.R.D. 53. In that
5 case, however, the communications at issue “appear[ed] on their face to be routine suggestions
6 from a public relations firm as to how to put the ‘spin’ most favorable to [Calvin Klein] on
7 successive developments in the ongoing litigation.” Id. at 54. The court found that “few, if any,
8 of the documents in issue appear to contain or reveal confidential communications from the
9 underlying client . . . made for the purpose of obtaining legal advice.” Id. The court explained
10 that “the possibility that communications between [the firm] and [counsel] may help the latter to
11 formulate legal advice is not in itself sufficient to implicate the privilege” Id. (citation
12 omitted). The court reiterated that the firm was “simply providing ordinary public relations advice
13 so far as the documents” in question were concerned, so it was unlikely that the communications
14 were “originally made for the purpose of seeking legal advice.” Id.

15 Calvin Klein is a good case for Plaintiffs, but it is distinguishable. Here, unlike in Calvin
16 Klein, Craig communicated directly with the regulatory bodies and neighbors/potential legal
17 adversaries that were the source of Gregory Village’s legal concerns. She collected information
18 from neighbors that she transmitted to Gregory Village’s attorneys—information that would have
19 been difficult for Gregory Village to gather on its own—and also, under the direction of Gregory
20 Village attorneys, worked with neighbors to obtain access agreements and to attempt to dissuade
21 them from litigation by having them settling for the installation of depressurization systems. She
22 was hired solely to serve in this function, unlike the firm in Calvin Klein, which the company had
23 already retained for general public relations. In contrast to the firm in Calvin Klein, Craig’s duties
24 for Gregory Village were so intertwined with the subject matter for which Gregory Village sought
25 legal advice that she should be treated as a functional employee. Finally, the Calvin Klein court
26 expressly relied on the fact that the communications at issue were not made for the purpose of
27 obtaining legal advice; unlike here, the court did not expressly decide whether the firm’s
28 employees should be treated as Calvin Klein’s “functional employees.”

1 Great American also is distinguishable because it was decided under California’s law of
2 privilege, not under federal law, from which it differs materially. 120 F.R.D. at 536.

3 Under these precedents, Craig does, generally, count as a “functional employee.” At the
4 time she was hired, Gregory Village faced regulatory action by the Board in light of possible
5 contamination at the site, as well as potential litigation with neighbors whose properties might
6 have been contaminated. Accordingly, to the extent Craig was communicating with Gregory
7 Village attorneys regarding the contamination—the subject matter of the regulatory action and
8 potential litigation—she was acting as Gregory Village’s functional employee. She also interacted
9 with neighbors—potential opponents in litigation, who turned out, at least in this case, to be actual
10 opposing litigants—to gather information from them regarding their concerns about the
11 contamination; to secure access agreements so Gregory Village could perform on-site sampling; to
12 plan and execute sampling on site; and to attempt to avoid litigation on behalf of Gregory Village
13 by offering to install depressurization systems to prevent contaminated vapor particles from
14 entering Plaintiffs’ home. When attending public meetings, interacting with neighbors, and
15 otherwise being the face of the company, Gregory Village’s attorneys counseled her actions. In all
16 these activities, Craig acted as the public face of the company and provided information to
17 Gregory Village’s legal staff that was useful and necessary to evaluate legal strategy for the
18 company going forward. Craig acted as Gregory Village’s functional employee for the purposes
19 of the attorney-client privilege.

20 And because the Court finds that Craig was acting as a functional employee, disclosure of
21 confidential information to her does not destroy the privilege. So to the extent that Plaintiffs assert
22 that certain communications are not privileged because Craig was included in those
23 communications, Plaintiffs’ objections fail.

24 But, the fact that, in general, Craig was a functional employee does not answer the
25 question whether all of her communications with Gregory Village employees were for the purpose
26 of providing or receiving legal advice on behalf of Gregory Village, an element of the privilege
27 that Gregory Village bears the burden to prove.

28

1 **2. Communications related to a legal purpose**

2 After review of the Craig Documents, the Court finds that the following documents contain
3 communications for the purpose of providing or receiving legal advice related to potential
4 regulatory action by the Board or litigation by neighbors: 53, 594, 607-09, 617, 621, 634, 652, the
5 portion of 745 for which Gregory Village still asserts the privilege, the portion of 747 that is not
6 an email and draft agenda sent to Board members Kevin Brown and Chuck Headlee, 753, 785,
7 786, 808, 990, and 1141-45. The Court also finds that the following documents do not contain
8 communications related to a legal purpose: 478, 508-10, 512, 513, 515, 517, the portion of 722 for
9 which Gregory Village continues to claim the privilege, 754, 777, and 1115. Instead, these latter
10 documents contain communications regarding such matters as scheduling, acquiring babysitters,
11 and identifying which neighbors to give gift cards. With respect to the latter documents, Gregory
12 Village has not carried its burden to show that the documents are privileged. It therefore must
13 produce them to Plaintiffs.

14 **B. Objections to Haber Documents**

15 **1. Attorney-client privilege**

16 No party questions that Haber is an attorney. The parties do, however, dispute whether:
17 (1) Haber offered the communications in the Haber Documents in her capacity as a legal advisor,
18 as opposed to her position as the Vice President of VPI, Inc., (2) for the purpose of providing legal
19 advice to her client, Gregory Village, and/or (3) whether those communications were made in
20 confidence—i.e., outside the presence of third parties who would destroy the privilege. In this
21 case, the first two questions collapse into one.

22 Plaintiffs contend, based on Chevron Texaco, that Gregory Village has not made the
23 necessary showing to indicate that Haber made the communications in the Haber Documents in
24 her role as legal adviser, rather than in her role as Vice President of VPI, Inc. ECF No. 118 at 10-
25 12. In Chevron Texaco, the court explained that when communications for which the privilege
26 has been asserted involve in-house counsel, the entity asserting the privilege “must make a clear
27 showing that the speaker made the communications for the purpose of obtaining or providing legal
28 advice.” 241 F. Supp. 2d at 1076 (citation and internal alterations omitted). Thus, whether Haber

1 engaged in these communications in her role as legal adviser and whether the communications
2 were made for a legal purpose become the same fundamental question: whether Haber engaged in
3 the communications for the purpose of providing legal advice to Gregory Village.

4 Having reviewed the Haber Documents, the Court finds that Haber engaged in the
5 communications contained in the following documents for the purpose of providing or obtaining
6 legal advice: 12, 17, 18, 20, 21, 32, 84, 85, 103, 108, 112, 246, 543, 544, 571, 574, 575, 668, 689,
7 690, 695, 736, 744, 826, 864, 981-84, 1083 (as modified by Gregory Village's Further
8 Submission), 1095, 1118, 1124, and 1140. These communications were made for the purpose of
9 obtaining information about possible contamination at the Gregory Village site, conducting and
10 interpreting sampling at the site, and interacting with the Board, all of which involve the legal
11 troubles Gregory Village was facing. It can therefore be assumed that Haber, while she may also
12 have been engaging in the communications as VPI's Vice President, was engaging in the
13 communications for legal purposes. On the other hand, the Court finds that the communications in
14 the following Haber Documents were not engaged in for the purpose of providing or obtaining
15 legal advice, or at least that Gregory Village has not met its burden to show that they were made
16 for this purpose: 83, 519, 577, 642, and 1046.

17 As to confidentiality, Plaintiffs argue that Craig's inclusion in the Haber Document
18 communications destroyed the confidentiality of those communications and therefore the privilege
19 does not protect them. But, as explained in section III.A.1., supra, the Court has found that Craig
20 acted a functional employee, so her participation in communications did not destroy their
21 confidentiality. The Court does find, however, that the presence of third parties destroyed the
22 confidentiality of documents 134 and the portion of document 941 that was disclosed to Sylvia
23 Pong.

24 2. Work-product protection

25 A few documents for which Gregory Village claims confidentiality and to which Plaintiffs
26 object are not clearly communications, but rather appear to be Haber's research or other notes.
27 See docs. 1119, 1121, 1124, 1127. Because these documents do not represent communications,
28 they are not protected by the attorney-client privilege. But they are protected as attorney work-

1 product.

2 The Court finds that documents 1119, 1121, 1124, and 1127 reflect Haber’s notes and
3 research related to contamination at the Gregory Village property, and they reveal her mental
4 impressions regarding the Board’s regulatory action and potential litigation by neighbors. They
5 are thus Haber’s attorney work-product, see SEC v. Roberts, 254 F.R.D. 371, 382-83 (N.D. Cal.
6 2008), and are not subject to production to Plaintiffs without a showing of “substantial need,” Fed.
7 R. Civ. P. 26(b)(3)(A)(i). Plaintiffs have not indicated their substantial need for these documents
8 and so they remain protected and not subject to production to Plaintiffs.

9 **C. Gregory Village’s Failure To Comply With the Court’s Order To Review Its**
10 **Privilege Log**

11 The Court is troubled by Gregory Village’s apparent failure to review its privilege log
12 carefully after the Court specifically ordered it to do so. See supra note 1 and accompanying text;
13 ECF No. 104 at 3 (“By October 16, 2014, Gregory Village shall review its privilege log to ensure that
14 (a) Gregory Village continues to assert the attorney-client privilege as to each document on the log;
15 and (b) each document description on the log accurately reflects the subject matter of the underlying
16 communication.”). Gregory Village withdrew several of the challenged privilege log entries after it
17 had supposedly re-certified the legitimacy of its privilege log, but before the parties’ dispute was
18 submitted to the Court; documents on the privilege log continued to be mislabeled; and non-
19 privileged documents remained on the privilege log. These facts lead to the conclusion that
20 Gregory Village either did not review its privilege log as required by the Court’s order, or did not
21 take its obligations to the Plaintiffs or the Court seriously when it conducted that review. The
22 Court now has very little confidence in the remainder of Gregory Village’s privilege log. Indeed,
23 it appears likely that Gregory Village’s log is shielding additional relevant, unprivileged
24 documents from production.

25 This circumstance is frustrating to the Court. The Court has already ordered Gregory
26 Village to review its privilege log, and there would appear to be little benefit in the Court merely
27 repeating its order. It also appears that Gregory Village’s conduct leading up to the submission of
28 the motion may not have been in good faith, and that it may have unnecessarily multiplied the

1 proceedings. Accordingly, Gregory Village is hereby ORDERED TO SHOW CAUSE why
2 monetary sanctions should not be imposed against it pursuant to either Rule 37(a)(5) of the
3 Federal Rules of Civil Procedure, 28 U.S.C. § 1927, or both.³ Gregory Village is ordered to
4 respond in writing to this order by January 27, 2015. Plaintiffs may, but are not required, to file a
5 response to Gregory Village’s response by February 11, 2015. If Plaintiffs file a response,
6 Gregory Village may file a reply by February 18, 2015. The Court will conduct a hearing on this
7 Order to Show Cause on March 10, 2015 at 2:00 p.m.

8 By January 27, 2015, Gregory Village is also ordered to file a declaration under penalty of
9 perjury, by an attorney of record, that he or she has personally reviewed every entry on the
10 Gregory Village privilege log and affirmatively determined that (a) Gregory Village continues to
11 assert the attorney-client or work product privilege as to each document on the log; and (b) each
12 document description on the log accurately reflects the subject matter of the underlying
13 communication.

14 **CONCLUSION**

15 For the foregoing reasons, the Court orders Gregory Village to produce the documents the
16 Court has identified as not privileged to Plaintiffs within ten days of the date of this Order.

17 With respect to the documents on the privilege log that are not addressed in this Order, the
18 Court’s prior order, ECF No. 104, contemplated that the parties would meet and confer
19 immediately upon receipt of this Order to narrow or eliminate their differences over the entries on
20 Gregory Village’s privilege log. Given the Court’s doubts regarding the integrity of Gregory

21 ///
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23 _____
24 ³ See, e.g., Grider v. Keystone Health Plan Cent., Inc., 580 F.3d 119, 142 (3d Cir. 2009) (trial
25 court appropriately found attorneys “acted in bad faith in multiplying the proceedings” based in
26 part on their failure to provide privilege logs); Cnty. Ass’n Underwriters of Am., Inc. v.
27 Queensboro Flooring Corp., No. 3:10-CV-1559, 2014 WL 3055358, at *7 (M.D. Pa. July 3, 2014)
28 (“Because the information necessary to support the Defendants’ claims of attorney-client privilege
and work product protection was not produced until after the Pozarliks had filed the instant Rule
37 motion, the Defendants’ failure to timely produce an adequate privilege log may support an
award of reasonable expenses incurred in making that motion, including attorney fees.”).

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Village’s privilege log, the parties’ meet and confer obligation is suspended, although the parties remain free to conduct such discussions if the parties believe they would be helpful.

IT IS SO ORDERED.

Dated: January 12, 2015



JON S. TIGAR
United States District Judge