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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DEBORAH ROTZ,  
  
Plaintiff,  
  
v.  
  
SYMETRA FINANCIAL  
CORPORATION, et al.,  
  
Defendants.

Case No.: 15-cv-01647-MMA (DHB)

**ORDER:**

**(1) RE: JOINT MOTION FOR DETERMINATION OF DISCOVERY DISPUTE (ECF NO. 68); AND**

**(2) GRANTING MOTION TO FILE DOCUMENTS UNDER SEAL (ECF NO. 69)**

Presently before the Court is a Joint Motion for Determination of Discovery Dispute Regarding Privileged Information (ECF No. 68) and a Motion to File Documents Under Seal filed by Defendants Symetra Financial Corporation, Symetra Life Insurance Company, and David Manning (collectively, “Defendants”) (ECF No. 69). In the Joint Motion, Defendants seek an order requiring Plaintiff Deborah Rotz (“Plaintiff”) to destroy allegedly privileged information in her possession.

Having considered the parties’ written submissions and evidence, the Court **GRANTS IN PART** and **DENIES IN PART** the Joint Motion (ECF No. 68). The Court further **GRANTS** Defendants’ Motion to File Documents Under Seal. (ECF No. 69.)

1 **I. BACKGROUND**

2 Plaintiff commenced this action in San Diego Superior Court on June 15, 2015, and  
3 it was removed to federal court on July 23, 2015. (ECF No. 1.) Plaintiff filed a First  
4 Amended Complaint on October 29, 2015. (ECF No. 36.) On December 17, 2015, this  
5 Court issued a Scheduling Order requiring all fact discovery to be completed by all parties  
6 by September 5, 2016. (ECF No. 49 at ¶ 6.) On January 25, 2016, Plaintiff filed a Second  
7 Amended Complaint (“SAC”), the operative complaint. (ECF No. 55.) Defendants filed  
8 an Answer to the SAC on February 10, 2016. (ECF No. 59.) A Protective Order was  
9 issued in this case on March 25, 2016. (ECF No. 64.)

10 In the SAC, Plaintiff alleges she was employed by Defendants Symetra Financial  
11 Corporation and Symetra Life Insurance Company (collectively, the “Corporate  
12 Defendants”) for more than twenty years as a Regional Group Manager, until they  
13 terminated her employment on or about February 13, 2015. (ECF No. 55 at ¶¶ 28, 34.)  
14 Plaintiff alleges that, prior to her termination, she made complaints to the Human  
15 Resources Relationship Manager for Corporate Defendants “regarding the improper and  
16 egregious conduct” directed to Plaintiff by Defendant Manning and the Corporate  
17 Defendants’ management. (*Id.* at ¶ 30.) “Such conduct included constant and ongoing  
18 degrading, insulting, and patronizing comments, as well as ongoing hostile treatment.”  
19 (*Id.*) Plaintiff alleges the Corporate Defendants failed to conduct an adequate investigation  
20 into her complaint. (*Id.* at ¶ 31.)

21 Shortly after lodging her complaints, Plaintiff claims she was falsely accused “of  
22 withholding and concealing information that was allegedly material to issuing a policy for  
23 coverage on a potential account,” and thereafter unlawfully terminated as a result. (*Id.* at  
24 ¶ 32.) She further alleges the Corporate Defendants already possessed the substance of the  
25 information they accused Plaintiff of withholding and concealing. (*Id.*) In addition,  
26 Plaintiff alleges the information was not material to the issuance of the policy for coverage,  
27 as the Corporate Defendants “issued the policy even with the allegedly ‘absent’  
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1 information” and “have collected premiums and will, more likely than not, significantly  
2 profit from this account as a result of Plaintiff’s efforts.” (*Id.*)

3 In this action, Plaintiff brings the following claims related to her employment with  
4 the Corporate Defendants: (1) age discrimination; (2) general discrimination; (3) hostile  
5 work environment; (4) wrongful termination; (5) retaliation; (6) breach of express and  
6 implied-in-fact contracts not to terminate employment without good cause; (7) defamation  
7 and compelled self-defamation; (8) failure to provide accurate itemized wage statements;  
8 and (9) penalties under the Private Attorney General Act of 2004.

## 9 **II. LEGAL STANDARD**

10 In a federal action based on diversity of citizenship jurisdiction, such as this, state  
11 law governs attorney-client privilege claims. *See* Fed. R. Evid. 501 (“[I]n a civil case, state  
12 law governs privilege regarding a claim or defense for which state law supplies the rule of  
13 decision.”); *Star Editorial, Inc. v. U.S. D. for the Cent. Dist. Of Cal. (Dangerfield)*, 7 F.3d  
14 856, 859 (9th Cir. 1993) (citing Fed. R. Evid. 501); *KL Grp. v. Case, Kay & Lynch*, 829  
15 F.2d 909, 918 (9th Cir. 1987) (citing Fed. R. Evid. 501).

16 Under California law, “evidentiary privileges such as the attorney-client privilege  
17 are governed by statute.” *HLC Props., Ltd. v. Super. Ct.*, 35 Cal. 4th 54, 59 (2005) (citing  
18 *Moeller v. Super. Ct.*, 16 Cal. 4th 1124, 1129 (1997); Cal. Evid. Code § 911). California  
19 Evidence Code sections 950 through 962 provide for the “lawyer-client privilege,” which  
20 attaches to “confidential communication between client and lawyer” during the course of  
21 the attorney-client relationship. Cal. Evid. Code §§ 950-962; *Moeller*, 16 Cal. 4th at 1130;  
22 *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 371 (1993). “Confidential communications  
23 include information transmitted between attorney and client, and ‘a legal opinion formed  
24 and the advice given by the lawyer in the course of that relationship.’” *Calvert v. State Bar*,  
25 54 Cal. 3d 765, 779 (1991) (quoting Cal. Evid. Code § 952); *Roberts*, 5 Cal. 4th at 371.

26 “The client may assert the privilege and refuse to disclose confidential  
27 communications as long as the client is the holder of the privilege.” *Moeller*, 16 Cal.4th at  
28 1130 (citing Cal. Evid. Code § 954); *HLC Props., Ltd.*, 35 Cal. 4th at 60–61. The client is

1 “a person who, directly or through an authorized representative, consults a lawyer for the  
2 purpose of retaining a lawyer or securing legal service or advice from him in his  
3 professional capacity. . . .” Cal. Evid. Code § 951; *see also Hyon v. Selten*, 152 Cal. App.  
4 4th 463, 469 (2007) (“By including ‘authorized representative’ in the definition of ‘client,’  
5 the statute extends the [attorney-client] privilege to cover not only communications directly  
6 between the client and the attorney but also communications between the client’s agents  
7 and the attorney.”). “A corporation is a person whose confidential communications with  
8 its attorney are protected by the attorney-client privilege.” *Venture Law Grp. v. Super. Ct.*,  
9 118 Cal. App. 4th 96, 102 (2004) (citations omitted); *see also Costco Wholesale Corp. v.*  
10 *Super. Ct.*, 47 Cal. 4th 725, 733 (2009).

11 “The party claiming the privilege has the burden of establishing the preliminary facts  
12 necessary to support its exercise, i.e., a communication made in the course of the attorney-  
13 client relationship.” *Costco Wholesale Corp.*, 47 Cal. 4th at 733; *see also Venture Law*  
14 *Grp.*, 118 Cal. App. 4th at 102. “Once that party establishes facts necessary to support a  
15 prima facie claim of privilege, the communication is presumed to have been made in  
16 confidence and the opponent of the claim of privilege has the burden of proof to establish  
17 the communication was not confidential or that the privilege does not for other reasons  
18 apply.” *Costco Wholesale Corp.*, 47 Cal. 4th at 733 (citing Cal. Evid. Code § 917(a); *see*  
19 *also Wellpoint Health Networks, Inc. v. Super. Ct.*, 59 Cal. App. 4th 110, 123 (1997)).

20 If a communication serves a “dual purpose, one for transmittal to an attorney in the  
21 course of professional employment and one not related to that purpose, the question is  
22 which purpose predominates.” *McAdam v. State Nat. Ins. Co.*, 15 F. Supp. 3d 1009, 1014  
23 (2014) (citing *Costco Wholesale Corp.*, 47 Cal. 4th at 739-40; *2,022 Ranch L.L.C. v. Super.*  
24 *Ct.*, 113 Cal. App. 4th 1377, 1398 (2003)). “In determining whether a communication is  
25 privileged, the Court looks to the dominant purpose of the attorney’s work.” *Id.* at 1015.  
26 The privilege does not apply where an attorney merely gives business advice. *Id.* (citing  
27 *Clark v. Super. Ct.*, 196 Cal. App. 4th 37, 37 (2011)). The predominant purpose test is not  
28 applied on a document-by-document basis. *Id.* “[I]t is not the dominant purpose of a

1 particular communication that dictates whether the attorney-client privilege is applicable;  
2 rather the issue is what *was the dominant purpose of the relationship.*” *Id.* (quoting *Cason*  
3 *v. Federated Life Ins. Co.*, No. 10-cv-0792, 2011 WL 1807427, at \*2 (N.D. Cal. Oct. 17,  
4 2011)); *see also Costco Wholesale Corp.*, 47 Cal. 4th at 739-40; *Clark*, 196 Cal. App. 4th  
5 at 51; *Umpqua Bank v. First Am. Title Ins. Co.*, No. CIV S-09-3208 WBS EFB, 2011 WL  
6 997212, at \*7, n. 1 (E.D. Cal. Mar. 17, 2011)). “If the dominant purpose of the relationship  
7 was attorney-client at the time of the communications, they are privileged.” *Id.* “If not,  
8 they are generally discoverable, though the producing party may request an *in camera*  
9 inspection of a particular communication to support a claim that it should be protected  
10 nonetheless.” *Id.*; *see also Costco Wholesale Corp.*, 47 Cal. 4th at 739-40.

### 11 **III. ANALYSIS**

12 In the Joint Motion for Determination of Discovery Dispute Regarding Privileged  
13 Information, Defendants seek an order requiring Plaintiff to destroy allegedly privileged  
14 information currently in her possession. (ECF No. 68.) Initially, three documents were  
15 relevant to the present dispute: (1) an October 9, 2014 email from Plaintiff to Thomas  
16 Bittner, Tom Costello, Joseph McKee, and Sandra Alba; and (2) two copies of an April 14,  
17 2014 email from Plaintiff to Ms. Bodmer and Defendant Manning. (ECF No. 68 at pp. 2-  
18 3.)<sup>1</sup> Plaintiff does not challenge Defendants’ claim the April 14, 2014 emails were  
19 inadvertently produced. (*Id.* at p. 5, lines 25-28.) Therefore, as to those emails, the Court  
20 **GRANTS** Defendants’ request to order Plaintiff to destroy all copies of the emails. As to  
21 the remaining email, Plaintiff challenges Defendants’ designation of the email as attorney-  
22 client privileged. (*Id.* at p. 5.)

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26 <sup>1</sup> Defendants’ filed a Motion to File under Seal Exhibits A through C attached  
27 to the Declaration of Giancarlo Urey (ECF No. 68-1) filed in support of the Joint Motion.  
28 (ECF No. 69.) Defendants contend the exhibits “contain documents that seek or reflect  
advise [sic] from Julie Bodmer, Symetra Life’s Associated General Counsel.” (*Id.* at p. 1.)  
Good cause appearing, the Court **GRANTS** the motion.

1 The email at issue was sent from Plaintiff to Thomas Bittner, Tom Costello, Joseph  
2 McKee, and Sandra Alba on October 9, 2014.<sup>2</sup> (ECF No. 68-1 (“Urey Decl.”) at ¶ 2, Exh.  
3 A.) The email is the last in a chain. (*Id.*) The prior email, also sent October 9, 2014,  
4 appears to be from a third party, and asks Plaintiff a business question. (*Id.*) Plaintiff  
5 thereafter cut-and-pasted the response of Julie Bodmer into the email at issue sent to Mr.  
6 Bittner, Mr. Costello, Mr. McKee and Ms. Alba. When Defendants terminated Plaintiff  
7 from her position, she maintained a copy of this email in her possession, and thereafter  
8 produced a copy during discovery. (ECF No. 68 at p. 2; Urey Decl. at ¶ 5, Exh. D.)

9 Defendants argue that because Ms. Bodmer is Defendant Symetra Life Insurance  
10 Company’s Associate General Counsel, the email is privileged under California law, and  
11 therefore must be destroyed. Defendants also claim that Plaintiff was required to return  
12 the email when she was terminated pursuant to the employee handbook, which requires  
13 employees to safeguard confidential information and not divulge it to outside parties. (*See*  
14 *Urey Decl. at Exh. H.*)

15 Defendants bear the burden of establishing an attorney-client relationship between  
16 Plaintiff and Ms. Bodmer. *See Costco Wholesale Grp.*, 47 Cal. 4th at 740. In support of  
17 the present motion, Defendants submit a declaration from their outside counsel stating that  
18 Ms. Bodmer is Defendant Symetra Life Insurance Company’s Associate General Counsel.  
19 (*Urey Decl. at ¶ 2.*) Previously in this litigation, however, Defendants submitted a  
20 declaration from the Senior Vice President of Human Resources and Administration for  
21 Defendant Symetra Life Insurance Company attesting that Ms. Bodmer is a Vice President,  
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24 <sup>2</sup> According to documents previously filed by Defendants in this case, as of  
25 August 2015, Julie Bodmer was a Vice President, Associate General Counsel, and  
26 Assistant Secretary of the Corporate Defendants. (ECF No. 30-1 (“Holmes Decl.”) at ¶¶  
27 3-4, Exhs. 2, 4.) In addition, Mr. Costello was the Vice President of Stop Loss Sales for  
28 Defendant Symetra Life Insurance Company, Mr. Bittner was the Regional Vice President  
of Stop Loss, and Joseph McKee was a regional manager. (*Holmes Decl. at ¶ 4, Exhs. 3,*  
4.) Defendants have provided no information about Ms. Alba.

1 Associate General Counsel, and Assistant Secretary for the Corporate Defendants. (See  
2 Holmes Decl. at ¶¶ 1, 3-4, Exhs. 2, 4.) Plaintiff asserts that Ms. Bodmer also represents on  
3 her “LinkedIn” page that she is both a Vice President and Assistant General Counsel. (ECF  
4 No. 68 at p. 5.)

5 Based on this information, the Court finds that it does not have sufficient information  
6 to determine the dominate purpose of the relationship between Ms. Bodmer and Plaintiff.  
7 Cf. *Clark*, 196 Cal. App. 4th at 49 (finding that a party made a substantial showing that  
8 communications were made in the course of an attorney-client relationship where the  
9 party’s counsel “provided a declaration stating the identities of the parties to each of the  
10 sets of communications (one of whom was invariably either an in-house attorney or outside  
11 counsel) and the general nature of the purpose of the communication (all of which involved  
12 obtaining legal advice on a variety of subjects)”); *Gotham City Online, LLC v. Art.com,*  
13 *Inc.*, No. C 14-00991 JSW, 2014 WL 1025120, at \*4 (N.D. Cal. Mar. 13, 2014) (finding a  
14 party made a prima facie claim of privilege where the party’s in-house counsel attested that  
15 he and other members of the party’s legal department were parties to the communications,  
16 he described the general nature of the communications, and he attested the communications  
17 were made for the purpose of obtaining or receiving legal advice). This position is  
18 supported by the fact the October 9, 2014 email does not appear to be a legal  
19 communication. Ms. Bodmer’s response does not contain any legal analysis and is in  
20 response to an apparent non-legal question. The email appears to be solely a business-  
21 related communication, thus leading the Court to question whether the dominant purpose  
22 of the relationship between Plaintiff and Ms. Bodmer was a business one, with Ms. Bodmer  
23 acting primarily in her capacity as Vice President.

24 While Plaintiff argues the question before the Court is whether the October 9, 2014  
25 email is a privileged communication, the real issue is the relationship between Ms. Bodmer  
26 and Plaintiff. See *Clark*, 196 Cal. App. 4th at 52 (“The relevant inquiry is not the content  
27 of the communication but is instead the *relationship* of the communicators.”). As the Court  
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1 has insufficient information to determine that relationship, the Court **DENIES WITHOUT**  
2 **PREJUDICE** Defendants' request to order Plaintiff to destroy the October 9, 2014 email.

3 The parties, if they so choose, may address the issues raised by the Court in a Second  
4 Joint Motion for Determination of Discovery Dispute. Such motion must be filed within  
5 ten (10) days of the date of this Order.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART**  
8 the Joint Motion. (ECF No. 68.) The Court **GRANTS** Defendants' request as to the April  
9 14, 2014 email. Plaintiff must destroy all paper and electronic copies within five (5) days.  
10 However, for the reasons stated above, the Court **DENIES WITHOUT PREJUDICE**  
11 Defendants' request to have Plaintiff to destroy any copies in her possession of the October  
12 9, 2014 email. The Court further **GRANTS** Defendants' Motion to File Documents Under  
13 Seal (ECF No. 69) the documents lodged at ECF No. 70.

14 IT IS SO ORDERED.

15 Dated: November 14, 2016

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17 LOUISA S PORTER  
18 United States Magistrate Judge  
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