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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 SKYLINE WESLEYAN CHURCH,
12 Plaintiff,

13 v.

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15 CALIFORNIA DEPARTMENT OF
16 MANAGED HEALTH CARE, et al.,
17 Defendants.

Case No.: 16-cv-00501-H (DHB)

ORDER:

**(1) REGARDING JOINT MOTIONS
FOR DETERMINATION OF
DISCOVERY DISPUTE (ECF NOS.
47, 55); AND**

**(2) GRANTING MOTION TO FILE
DOCUMENTS UNDER SEAL (ECF
NO. 56)**

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20 On April 24, 2017, Plaintiff Skyline Wesleyan Church (“Plaintiff”) and Defendants
21 California Department of Managed Health Care (“DMHC”) and Michelle Rouillard, in her
22 official capacity as Director of the DMHC, (collectively “Defendants”), filed a Joint
23 Motion for Determination of Discovery Dispute. (ECF No. 47.) On May 1, 2017, the
24 Court issued an Order instructing the parties to engage in further meet and confer efforts
25 regarding all issues raised by the pending Joint Motion. (ECF No. 50.) On June 5, 2017,
26 the parties filed an Amended Joint Motion for Determination of Discovery Dispute,
27 narrowing the set of issues raised in the prior motion. (ECF No. 55.) Defendants also filed
28

1 a Motion to Seal certain exhibits filed in support of the Amended Joint Motion. (ECF No.
2 56.)

3 Having considered the Amended Joint Motion and the parties' submissions and
4 supporting exhibits, the Court hereby **DENIES** Plaintiff's motion to compel, as outlined
5 below. The Court further **GRANTS** Defendants' Motion to Seal.

6 **I. BACKGROUND**

7 **A. Complaint**

8 On February 4, 2016, Plaintiff filed a complaint against Defendants for declaratory
9 and injunctive relief and nominal damages in San Diego County Superior Court. (ECF No.
10 1 at 9-29 ("Compl.")). The complaint challenges Defendants' requirement that group
11 health insurance plans provide coverage for all legal abortions. (*Id.* at ¶ 1.) On February
12 26, 2016, Defendants removed the action to this court pursuant to 28 U.S.C. § 1441 on the
13 basis of federal question jurisdiction under 28 U.S.C. § 1331 and supplemental jurisdiction
14 under 28 U.S.C. § 1367. (ECF No. 1 at 1-3.)

15 In the complaint, Plaintiff alleges Defendant DMHC is an executive agency of the
16 State of California responsible for enforcing California law and regulations regarding
17 health service plans. (Compl. at ¶ 17.) As part of its regulatory responsibilities, Defendant
18 DMHC is charged with ensuring that health plans in California comply with the Knox-
19 Keene Health Care Service Plan Act of 1975 ("Knox Keene Act"). (*Id.*) Defendant
20 Rouillard is the Director of Defendant DMHC. (*Id.* at ¶ 18.)

21 On August 22, 2014, Defendants sent letters to group health plans that did not
22 provide coverage for all legal abortions and required that the plans begin offering such
23 coverage. (*Id.* at ¶¶ 1-2, Exh. 1.) As authority for imposing this requirement, Defendants
24 cited the Knox Keene Act's provision that health plans must cover "basic health care
25 services." (*Id.* at ¶ 3, Exh. 1.) Plaintiff alleges that, prior to announcing the coverage
26 requirement, Defendants had not interpreted the term "basic health care services" to include
27 voluntary and elective abortions. (*Id.* at ¶ 4.)

1 Plaintiff is an Internal Revenue Code Section 501(c)(3) non-profit, Christian church
2 located in La Mesa, California. (*Id.* at ¶ 14.) Plaintiff alleges that it believes and teaches
3 that participation in, facilitation of, or payment for an elective or voluntary abortion is a
4 grave sin. (*Id.* at ¶ 23.) Plaintiff states that, based on its religious beliefs, it seeks to offer
5 health insurance to its employees in a way that does not cause it to pay for abortions. (*Id.*
6 at ¶ 29.) Plaintiff also alleges that the coverage requirement prevents Plaintiff from
7 obtaining a group health care plan that is consistent with Plaintiff’s religious beliefs. (*Id.*
8 at ¶ 7.)

9 Following Defendants’ motion to dismiss, the following claims remain against
10 Defendants: (1) violation of the California Administrative Procedure Act, California
11 Government Code § 11340, *et seq.*; (2) violation of the Free Exercise Clause of the First
12 Amendment of the U.S. Constitution; (3) violation of the Free Exercise Clause of Article
13 I, Section 4 of the California Constitution; (4) violation of the Establishment Clause of
14 the First Amendment of the U.S. Constitution; and (5) violation of the Establishment
15 Clause of Article I, Section 4 of the California Constitution. (ECF No. 28.)

16 **B. Discovery**

17 On October 28, 2016, Plaintiff issued its first set of requests for production and
18 interrogatories to Defendants. (ECF No. 55-1, Declaration of Jeremiah Galus (“Galus
19 Decl.”), at ¶ 3; ECF No. 55-2, Declaration of Karli Eisenberg (“Eisenberg Decl.”), at ¶ 2.)
20 On December 28, 2016, Defendants served their written responses to Plaintiff’s first set of
21 discovery requests. (Galus Decl. at ¶ 4, Exh. 1.) Defendants objected to certain document
22 requests based on the attorney-client privilege, attorney work product privilege, official
23 information privilege, and deliberative process privilege, but nonetheless agreed to produce
24 responsive, non-privileged documents. (*Id.*)

25 Defendants initially produced documents on January 11, 2017. (Galus Decl. at ¶ 5.)
26 This production comprised 1,846 documents, including over thirty (30) non-privileged
27 emails to/from Defendants’ General Counsel Gabriel Ravel. (Eisenberg Decl. at ¶ 3.)
28 Defendants provided Plaintiff with a privilege log in connection with this production. (*Id.*)

1 On January 30, 2017, Defendants produced an additional thirteen (13) documents
2 and served their first supplemental responses to Plaintiff's first set of requests for
3 production. (Eisenberg Decl. at ¶ 4; Galus Decl. at ¶ 5, Exh. 2.) The newly produced
4 documents were removed from Defendants' initial privilege log, and Defendants' provided
5 Plaintiff with a First Supplemental Privilege Log. (Galus Decl. at ¶ 6, Exh. 3; Eisenberg
6 Decl. at ¶ 4.) The parties met and conferred about Plaintiff's issues with Defendants' First
7 Supplemental Privilege Log in February 2017. (Galus Decl. at ¶¶ 7-8, Exhs. 4-5; Eisenberg
8 Decl. at ¶¶ 5-11.)

9 On March 10, 2017, Defendants provided Plaintiff with a Second Amended
10 Privilege Log. (Galus Decl. at ¶ 9; Eisenberg Decl. at ¶ 12.) On the same date, Defendants
11 also served their first supplemental response to Plaintiff's first set of interrogatories.
12 (Galus Decl. at ¶ 10, Exh. 6; Eisenberg Decl. at ¶ 12.) The parties met and conferred about
13 Plaintiff's issues with Defendants' amended privilege log. (Galus Decl. at ¶¶ 11-12, Exh.
14 7; Eisenberg Decl. at ¶¶ 13-20, Exh. B-F.) Defendants provided Plaintiff with a Third
15 Amended Privilege log on April 12, 2017, as well as forty-eight (48) additional documents.
16 (Galus Decl. at ¶¶ 13-14; Eisenberg Decl. at ¶¶ 21-23, Exh. G.) Included in this production
17 were thirty-eight (38) emails either to/from Defendants' General Counsel Gabriel Ravel.
18 (Eisenberg Decl. at ¶ 23.)

19 On April 24, 2017, the parties filed a Joint Motion for Determination of Discovery
20 Dispute. (ECF No. 47.) After reviewing the motion, the Court issued an Order noting that
21 "prior meet and confer efforts have been productive" and directing the parties "to engage
22 in further meet and confer efforts about all issues raised by the pending Joint Motion."
23 (ECF No. 50.)

24 The parties met and conferred by telephone on May 9, 2017 about the privilege log
25 issues raised in the Joint Motion. (Galus Decl. at ¶ 16; Eisenberg Decl. at ¶ 34.) Prior to
26 the call, Plaintiff provided Defendants with a list of 329 documents from Defendants' Third
27 Amended Privilege Log that Plaintiff believes have been improperly withheld. (Galus
28 Decl. at ¶ 17, Exh. 8 ("TAPL"); Eisenberg Decl. at ¶ 32.) During the May 9, 2017 call,

1 Defendants maintained that all of the documents listed in the Third Amended Privilege Log
2 are privileged and do not have to be produced. (Galus Decl. at ¶ 18.) The parties filed an
3 Amended Joint Motion for Determination of Discovery Dispute related only to these 329
4 documents on June 5, 2017. (ECF No. 55.)

5 **C. Defendants’ Third Amended Privilege Log**

6 1. Attorney-Client Privilege

7 Defendants assert the attorney-client privilege over 261 of the 329 documents listed
8 in the excerpted Third Amended Privilege Log.¹ Gabriel Ravel, the Deputy Director and
9 General Counsel for Defendant DMHC,² was either the sender, recipient, or copied on all
10 of the emails designated as attorney-client privileged. (ECF No. 55-3, Declaration of
11 Gabriel Ravel (“Ravel Decl.”), at ¶ 1; TAPL.)

12 The other parties on the emails include: (1) Defendant Michelle Rouillard; (2)
13 Sandra Gallardo, counsel for DMHC; (3) DMHC OPL counsel; (4) various employees of
14 the DMHC; (5) various employees of the CHHS; and (6) various employees of the
15 Governor’s Office. (TAPL.) Defendants also assert the attorney-client privilege over
16 certain attachments to the privileged emails. (*Id.*)

17 a. *On or Before August 22, 2014*

18 The earliest documents are emails dating back to July 3, 2014. (*Id.* at p. 1.) Sixty-
19 eight (68) of the claimed attorney-client communications are dated prior to August 22,
20 2014, when the DMHC issued letters to seven group health plans stating they were not
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23 ¹ On June 5, 2017, Defendants filed a Motion to Seal Exhibits 8, O, and P filed
24 in support of the Amended Joint Motion for Determination of Discovery Dispute. (ECF
25 No. 56.) No opposition was filed. Good cause appearing, the motion is hereby
26 **GRANTED.**

27 ² In his capacity as the Deputy Director and General Counsel for DMHC, Mr.
28 Ravel also serves as the direct counsel for Defendant Rouillard, and counsel for the
California Health & Human Services Agency (“CHHS”) and Office of Governor Edmund
G. Brown (“Governor’s Office”) on legal matters that arise out of or relate to the DMHC.
(Ravel Decl. at ¶¶ 2-3.)

1 compliant with the Knox Keene Act. (Ravel Decl. at ¶ 4, Exh. L; TAPL at pp. 1-11.) Mr.
2 Ravel, Ms. Gallardo, Defendant Rouillard, and various employees of the DMHC and
3 CHHS are the only individuals on these communications. (TAPL at pp. 1-11.) Defendants
4 cited one or more of the following as the basis for the privilege of these emails:

- 5 (1) client request for legal advice and/or attorney review regarding
6 issuance of letter or legal memorandum or legal research;
- 7 (2) attorney response to client request for legal advice regarding issuance
8 of letter or legal memorandum or legal research;
- 9 (3) deliberations between: (i) client and attorney(s) regarding issuance of
10 August 22, 2014 letters; (ii) attorneys regarding issuance of August 22,
11 2014 letters; (iii) client and attorney(s); or (iv) attorneys;
- 12 (4) draft legal memorandum or legal letter prepared by or under the
13 direction of counsel; or
- 14 (5) deliberations and comments by attorney regarding attached draft.

15 (*Id.*)

16 The “Description” of the emails includes the following: Email re: (1) Grievances
17 Data; (2) Restrictive abortion coverage; (3) Abortion Coverage; (4) GAO Request: QHP
18 Coverage of Abortion Services; (5) GAO Request—QHP Coverage of Abortion Services;
19 (6) abortion coverage and compliance with APA; (7) abortion coverage and medical
20 necessity of abortion; (8) GAO follow-up questions regarding abortion; (9) GAO-Abortion
21 Point of Contact; (10) Abortion Language in EOCs, DF’s; (11) Kaiser Benchmark EOC
22 and ABC’s QHP EOC; (12) QHP filing re abortion; (13) Abortion-response to GAO; (14)
23 California Lawyer—Cover Story; (15) Legal Memorandum Documents re AC and
24 proposed letter; (16) Letter re: DMHC and abortion coverage; (17) medical
25 Necessity/abortion; (18) Legal memorandum re abortion coverage; (19) Aetna request re:
26 abortion language; (20) AC letter; (21) Draft AC letter; (22) WAR for REVIEW; and (23)
27 Talking Points and Q&A. (*Id.*)
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1 There were also attachments to the emails entitled: (1) Response_Grove v2.docx
2 (draft legal letter prepared by or under the direction of counsel);³ (2) Open Filings With
3 Abortion Language (7-10-14 Revision 1).xlsx (draft legal memorandum prepared by or
4 under the direction of counsel); (3) Memorandum (draft) re Health Plans' Limitation on
5 Enrollee Access to Abortion; (4) SFGate.xps (attached to Email re: Californian Lawyer:
6 Cover Story); (5) Draft Abortion Survey Chart.docx (draft legal memorandum prepared by
7 or under the direction of counsel); (6) Medical Necessity Definitions.docx (draft legal
8 memorandum prepared by or under the direction of counsel); (7) Legal Memorandum re
9 Abortion Coverage.doc; (8) Legal Chart.pptx (draft legal memorandum prepared by or
10 under the direction of counsel); (9) AC Draft Plan 8.14.14.docx (draft legal memorandum
11 prepared by or under the direction of counsel); (10) Week Ahead Report – Confidential
12 Significant Litigation – Litigation Status and Strategy; and (11) AC Plan FINAL (draft
13 legal memorandum prepared by or under the direction of counsel). (*Id.*)

14 b. *Between August 22, 2014 and September 8, 2014*

15 Immediately after the DMHC issued the letters on August 22, 2014, the DMHC
16 received a letter from the Legal Director of Life Legal Defense Foundation, Catherine
17 Short, asserting that the DMHC violated the Weldon Amendment by issuing the August
18 22, 2014 letters, and that she intended to file complaints with the Office of Civil Rights
19 (“OCR”) in the Federal Department of Health & Human Services (“DHHS”), if the DMHC
20 did not reverse its position. (Ravel Decl. at ¶ 6.) Mr. Ravel states that after conducting
21 confidential internal discussions, developing recommendations, and further deliberating
22 regarding how to respond to these legal accusations, the DMHC issued a response on
23 September 8, 2014. (*Id.* at ¶ 7, Exh. M.) The response, which stated that the DMHC will
24 not reverse its position, was signed by Defendant Rouillard. (*Id.*)

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27 ³ Mr. Ravel states “[t]hose documents described as relating to ‘Grove’ concern
28 the confidential internal deliberations of DMHC regarding how to respond to the legal
accusations from State Assemblymember Shannon Grove.” (Ravel Decl. at ¶ 41.)

1 Dated on and after August 22, 2014, and until September 8, 2014, Defendants
2 deemed thirty-two (32) documents attorney-client privileged communications. (TAPL at
3 pp. 11-15.) Mr. Ravel, Ms. Gallardo, Defendant Rouillard, and various employees of the
4 DMHC, CHHS, and Governor’s Office are the only individuals on these communications.
5 (*Id.*) Defendants cited one or more of the following as the basis for the privilege of these
6 emails:

- 7 (1) client request for legal advice and/or attorney review regarding legal
8 memorandum or legal research;
- 9 (2) attorney response to client request for legal advice regarding issuance
10 of letter or legal memorandum or legal research;
- 11 (3) deliberations between: (i) client and attorney(s) regarding issuance of
12 August 22, 2014 letters; (ii) client and attorney(s); or (iii) attorneys;
- 13 (4) draft legal memorandum prepared by or under the direction of counsel;
- 14 (5) deliberations and comments by attorney regarding attached draft; or
- 15 (6) request to attorney for meeting.

16 (*Id.*)

17 The “Description” of the emails includes the following: Email re: (1) Weldon
18 Amendment complaint in response to letters; (2) DMHC decision re abortion coverage; (3)
19 August 22 letters; (4) State reverses abortion decision at 2 Catholic colleges; (5) SCU
20 outreach re abortion coverage; (6) August 22, 2014 letters; (7) follow-up with SCU re
21 health plans’ abortion coverage; (8) inquiry from San Francisco Chronicle;⁴ (9) For What’s
22 New Section; (10) Abortion Comment/Memorandum; (11) Open Filings With Abortion
23 Language; (12) Questions from the public; (13) Member questions; (14) Termination of
24 Pregnancy Language; (15) “religiously sponsored health carrier”; (16) call from Consumer
25 re August 22, 2014 letter and discussion on how to respond; and (17) Call from Consumer
26 re August 22, 2014 letter. (*Id.*)

27 ⁴ According to Mr. Ravel, after the issuance of the August 22, 2014 letters, the
28 DMHC received additional media and public inquiries. (Ravel Decl. at ¶ 22.) As a result,
Mr. Ravel states that several entries on the Third Amended Privilege Log “concern
confidential internal predecisional deliberations regarding how to respond to outside media
and public inquiries in light of pending litigation.” (*Id.* at ¶ 23.)

1 There were also attachments to the emails entitled: (1) Legal Abortion
2 Comment/Memorandum Open&Non-Filed-8-25-14.docx (draft legal memorandum
3 prepared by or under the direction of counsel); and (2) Open Filings With Abortion
4 Language.xlsx (draft legal memorandum prepared by or under the direction of counsel).
5 (*Id.* at pp. 12-13.)

6 c. *Between September 9, 2014 and January 20, 2015*

7 On October 9, 2014, the Life Legal Defense Foundation and Alliance Defending
8 Freedom, representing Plaintiff, Foothill Church, and several other religious entities, filed
9 a “Complaint for Discrimination in Violation of Federal Conscience Protections,” with the
10 OCR of the DHHS. (Ravel Decl. at ¶ 8, Exh. N.) Mr. Ravel states that the lodging of this
11 complaint initiated an investigation by the OCR, requiring that the DMHC respond to the
12 legal allegations in the complaint. (*Id.* at ¶ 9, Exh. O.) Following confidential internal
13 deliberations regarding how to respond to the complaint, including conversations with the
14 California Attorney’s General Office, of which Mr. Ravel was materially involved, the
15 DMHC issued a final response legal letter on January 20, 2015, signed by Mr. Ravel. (*Id.*
16 at ¶ 10, Exh. P.)

17 On November 17, 2014, Commissioner Peter Kirsanow of the U.S. Commission on
18 Civil Rights issued a letter to the DMHC, alleging that the DMHC violated the Weldon
19 Amendment by issuing the August 22, 2014 letters. (*Id.* at ¶ 13.) After confidential internal
20 deliberations, including among counsel and Mr. Ravel, the DMHC responded to these legal
21 allegations on December 18, 2014. (*Id.* at ¶ 14, Exh. R.)

22 Dated between September 9, 2014 and January 20, 2015, there are an additional one
23 hundred and twelve (112) documents on Defendants’ privilege log. (TAPL at pp. 15-25.)
24 Of these documents, ninety (90) are deemed attorney-client privileged communications.
25 (*Id.*) Mr. Ravel, Ms. Gallardo, Defendant Rouillard, and various employees of the DMHC,
26 CHHS, and Governor’s Office are the only individuals on these communications. (*Id.*)
27 Defendants cited one or more of the following as the basis for the privilege of these emails:
28

- 1 (1) client request for legal advice and/or attorney review regarding legal memorandum or legal research;
- 2 (2) attorney response to client request for legal advice regarding issuance
- 3 of letter or legal memorandum or legal research;
- 4 (3) deliberations between: (i) client and attorney(s) regarding issuance of
- 5 August 22, 2014 letters; (ii) client and attorney(s); or (iii) attorneys;
- 6 (4) draft legal memorandum or legal letter prepared by or under the
- 7 direction of counsel; or
- 8 (5) deliberations and comments by attorney regarding attached draft.

9 (*Id.*)

10 The “Description” of the emails includes the following: Email re: (1) AC article; (2)

11 “religiously sponsored health carrier”; (3) health plan changes at Santa Clara and Loyola

12 Marymount Univ.; (4) enforcing the Aug 22 letter on abortion coverage; (5) Abortion

13 Article; (6) Catholic Bishops File Federal Complaint Against State of California;

14 Department of Managed Health Care Accused of Serious Civil Rights Violations; (7) Aug

15 22 2014 letter; (8) Questions from Trust Woman Advocacy; (9) August 22, 2014 letter

16 inquiry from Church State Council; (10) MSP and Abortion; (11) abortion coverage; (12)

17 abortion coverage in Covered California plans; (13) PRA – Abortion Coverage documents;

18 (14) Shelley, please rescind the abortion mandate; (15) Question re Multi-State Plans; (16)

19 Pre-Filing Conference Call Regarding Termination of Pregnancy; (17) Conference Call

20 Regarding Termination of Pregnancy; (18) UnitedHealthcare (Abortion Language); (19)

21 Status of Abortion Filings from 7 Plans (Director’s Letter of August 22, 2014); (20)

22 DMHC/Religious Liberties; (21) The short version of California’s Weldon amendment

23 justification; (22) Meeting Follow-Up (Abortion Language); (23) NHeLP Request re

24 abortion; (24) Request for General Information re abortion coverage; (25) Santa Clara

25 University – Request for Conference Call; (26) Document EOC Review re limiting

26 language; (27) DMHC abortion exclusion & meeting follow up; (28) 2014 plan enrollment

27 charts; (29) Health Net EOC Documents for Production; (30) AGO Comments on Draft

28

1 Response to HHS/OCR;⁵ (31) Footnote language; (32) California Lawyer Abortion article;
2 (33) Edits to draft documents/OCR letter; (34) OCR Response Letter; and (35) updated
3 draft OCR Response Letter. (*Id.*)

4 There were also attachments to the emails entitled: (1) Abortion Language Status-
5 11-14-14.docx (draft legal memorandum prepared by or under the direction of counsel);
6 (2) Abortion Language Status-11-20-14.docx (draft legal memorandum prepared by or
7 under the direction of counsel); (3) Abortion Language Status-11-26-14.docx (draft legal
8 memorandum prepared by or under the direction of counsel); (4) The short version of
9 California’s Weldon amendment justification.docx (draft legal memorandum prepared by
10 or under the direction of counsel); (5) 2014 abortion enrollment data.docx (draft legal
11 memorandum prepared by or under the direction of counsel); (6) DMHC and Plan Contact
12 Sheet.docx (draft legal memorandum prepared by or under the direction of counsel); and
13 (7) California Lawyer June 2014.pdf. (*Id.*)

14 d. *Between January 21, 2015 and November 9, 2015*

15 On January 28, 2015, the California Catholic Conference, by and through Mr. James
16 Sweeney, Esq., filed an Underground Regulation Petition with the California Office of
17 Administrative Law (“OAL”), alleging that the DMHC violated the California
18 Administrative Procedures Act in issuing the August 22, 2014 letters. (Ravel Decl. at ¶
19 15.) After confidential internal deliberations, including among counsel and Mr. Ravel, the
20 DMHC responded to these allegations on March 20, 2015. (*Id.* at ¶ 16, Exh. S.) The
21 DMHC’s six-page response letter, which includes extensive legal analysis, was signed by
22 Mr. Ravel. (*Id.*) On March 30, 2015, the OAL issued a letter stating that it “declines to
23 accept” the Catholic Conference’s petition, and advised the Catholic Conference that its
24 decision did not restrict the Catholic Conference’s right or ability to pursue the matter
25

26
27 ⁵ According to Mr. Ravel, “those documents described as relating to ‘OCR’
28 concern the confidential internal deliberations of DMHC regarding how to respond to the
Weldon Complaint.” (Ravel Decl. at ¶ 39.)

1 directly with the DMHC or the court. (*Id.* at ¶ 17, Exh. T.) The same counsel who pursued
2 the petition, thereafter filed a lawsuit in Sacramento Superior Court, *Missionary*
3 *Guadalupanas of the Holy Spirit, Inc. v. Michelle Rouillard*, Case No. 34-2015-80002226.
4 (*Id.* at ¶ 18, Exh. U.) The Superior Court denied the petition for writ of mandate and
5 complaint for injunctive and declaratory relief and a motion for new trial in August and
6 September 2016, respectively. (*Id.* at ¶ 19, Exh. U.) The petitioner appealed to the
7 California Court of Appeal for the Third Appellate District, *Missionary Guadalupanas v.*
8 *Rouillard*, Appellate Case No. C083232, and the appeal remained pending as of the date
9 of the Amended Joint Motion. (*Id.* at ¶ 20.)

10 On October 16, 2015, several churches, including those that filed the OCR
11 complaint, represented by Alliance Defending Freedom, filed a lawsuit in United States
12 District Court for the Eastern District of California, alleging, among other things, that the
13 August 22, 2014 letters violate the Free Exercise Clause and the Establishment Clause of
14 the United States Constitution. (*Id.* at ¶ 21; *see also Foothill Church, et al. v. Rouillard*,
15 Case No. 2:15-cv-02165-KJM-EFB (E.D. Cal.)). The case remains pending. (*Id.*)

16 On June 16, 2016, the OCR concluded that the DMHC did not violate the Weldon
17 Amendment. (Ravel Decl. at ¶ 11, Exh. Q.) However, on March 2, 2017, Congressman
18 Kevin McCarthy requested that the OCR review and reopen its investigation into whether
19 the August 22, 2014 letters violate the Weldon Amendment. (*Id.* at ¶ 12.)

20 Dated between January 21, 2015 and November 9, 2015, the date of the last entry
21 on the privilege log, there are an additional seventy-one (71) documents deemed attorney-
22 client privileged communications on Defendants' privilege log.⁶ (TAPL at pp. 25-33.) Mr.
23

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26 ⁶ This includes two undated documents entitled "Abortion Survey Chart" and
27 "AbortionCommentOPenNo n-Filed-8-25-14 (2).docx." (*See* TAPL at p. 33.) In its
28 analysis below, the Court will consider the "Abortion Survey Chart" related to documents
bates-stamped PRIV000363-365, 5132-5133, which are dated August 11, 2014. (*Id.* at p.
8.) The Court will further consider the "AbortionCommentOPenNo n-Filed-8-25-14

1 Ravel, Ms. Gallardo, Defendant Rouillard, and various employees of the DMHC, CHHS,
2 and Governor’s Office are the only individuals on these communications. (*Id.*) Defendants
3 cited one or more of the following as the basis for the privilege of these emails:

- 4 (1) client request for legal advice and/or attorney review regarding legal
5 memorandum or legal research;
- 6 (2) attorney response to client request for legal advice regarding (i)
7 issuance of letter; (ii) legal memorandum; or (iii) legal research;
- 8 (3) deliberations between: (i) client and attorney(s) regarding issuance of
9 August 22, 2014 letters; (ii) attorney(s) regarding issuance of August
10 22, 2014 letters; (iii) client and attorney(s); (iv) attorneys; (v) attorneys
11 regarding potential “religious employer” exemption to August 22, 2014
12 letters; or (vi) client and attorney(s) regarding potential “religious
13 employer” exemption to August 22, 2014 letters;
- 14 (4) draft legal memorandum prepared by or under the direction of counsel;
15 or
- 16 (5) deliberations and comments by attorney regarding attached draft.

17 (*Id.*)

18 The “Description” of the emails includes the following: Email re: (1) Abortion-
19 Related Documents; (2) Meeting Follow-Up re Abortion Language; (3) Secretary Buwell
20 appearance at Congressional panels discussing August 2014 letters; (4) HHS Investigation
21 Clips; (5) Women’s Health bulletin points; (6) Women’s Health; (7) Abortion Pricing
22 Discrimination Issue; (8) Proposal from Kevin Eckery; (9) Catholic Conference’s position
23 on DMHC’s action; (10) All Counsel Forum Agenda; (11) Edits to OLS All Counsel Forum
24 Presentation; (12) OLS PowerPoint Draft; (13) August 22, 2014 Letters on the Website;
25 (14) EHBs and Abortion Coverage; (15) abortion coverage; (16) August 22, 2014 letter re
26 abortion; (17) August 22, 2014 letter/Weldon Amendment; (18) Question regarding
27 abortion coverage; (19) Sen. Joel Anderson, et al.⁷ / Elective abortion services and funding

28 (2).docx.” document related to the document bates-stamped PRIV005894, which is dated
August 25, 2014. (*Id.* at p. 13.)

⁷ According to Mr. Ravel, “[t]hose documents described as relating to the ‘Sen.
Joel Anderson’ concern the confidential internal deliberations of DMHC regarding how to

1 site health care programs; (20) health plans with limiting language re abortion coverage;
2 (21) Religious Employer Exemption; and (22) abortion services coverage. (*Id.*)

3 There were also attachments to the emails entitled: (1) 2013 Annual Report for
4 Office of Legal Services (OLS) FINAL 04.30.14.doc (draft legal memorandum prepared
5 by or under the direction of counsel); (2) Summary of open PRA requests.xlsx (draft legal
6 memorandum prepared by or under the direction of counsel); (3) Summary of open PRA
7 requests (3.6.15).xlsx (draft legal memorandum prepared by or under the direction of
8 counsel); PRAs regarding abortion coverage.docx (draft legal memorandum prepared by
9 or under the direction of counsel); (4) OLS All Counsel Fo[ru]m-Draft jp 5.5.15.pptx (draft
10 legal memorandum prepared by or under the direction of counsel); (5) OLS All Counsel
11 Forum-Draft.pptx (draft legal memorandum prepared by or under the direction of counsel)
12 (6) OLS All Counsel Forum-Draft.pptx ((two drafts of a legal memorandum prepared by
13 or under the direction of counsel); (7) OLS Program Issue PowerPoint.pptx (draft legal
14 memorandum prepared by or under the direction of counsel); (8) OLS Program Issue
15 PowerPoint, outlining legal issues pending in DMHC, including status of litigation related
16 to August 22, 2014 letters.pptx (draft legal memorandum prepared by or under the direction
17 of counsel); (9) Abortion Survey Chart.docx; and (10) Abortion Comment Open No n-
18 filed-8.25.14 (2).docx. (*Id.*)

19 2. Attorney Work Product Privilege

20 For all but two (2) documents deemed attorney-client privileged (PRIV003032,
21 PRIV006005), Defendants also assert the attorney work product privilege. (TAPL at pp.
22 11, 12.) Defendants also assert the attorney work product privilege over an additional
23 sixty-four (64) documents. (*Id.*) The only parties on the emails, which comprise all but
24 four (4) of the sixty-four (64) additional documents, are Mr. Ravel, Ms. Gallardo, and
25 various employees of the DMHC. (*Id.*)

26 _____
27
28 respond to the legal accusations from California State Senator Joel Anderson.” (Ravel
Decl. at ¶ 42.)

1 3. Official Information Privilege and Deliberative Process Privilege

2 For the remaining four documents (PRIV006037-83, PRIV002949, PRIV002950-
3 95, PRIV004196-242), Defendants only assert the deliberative process privilege and
4 official information privilege. (TAPL at p. 28.)

5 **II. LEGAL STANDARD**

6 **A. Motion to Compel**

7 Under Federal Rule of Civil Procedure 26(b)(1), the scope of discovery includes
8 “any nonprivileged matter that is relevant to any party’s claim or defense and proportional
9 to the needs of the case.” Fed. R. Civ. P. 26(b)(1). A party may withhold “information
10 otherwise discoverable by claiming that the information is privileged.” Fed. R. Civ. P.
11 26(b)(5). In order to withhold this material, a party must “expressly make the claim” and
12 “describe the nature of the documents, communications or tangible things not produced or
13 disclosed—and do so in a manner that, without revealing information itself privileged or
14 protected, will enable other parties to assess the claim.” Fed. R. Civ. P. 26(b)(5)(A)(i)-(ii).

15 Pursuant to Federal Rule of Civil Procedure 37, a party may move the Court for an
16 order compelling disclosure or discovery responses. Fed. R. Civ. P. 37(a)(1). The motion
17 must include certification that the moving party “in good faith conferred or attempted to
18 confer” with opposing counsel in an effort to obtain discovery before resorting to court
19 action. *Id.*

20 **III. DISCUSSION**

21 **A. Attorney-Client Privilege**

22 1. Legal Standard

23 The attorney-client privilege is intended “to encourage clients to make full
24 disclosure to their attorneys,” recognizing that sound advice “depends upon the lawyer’s
25 being fully informed by the client.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)
26 (internal quotation marks and citations omitted). “[T]he privilege exists to protect not only
27 the giving of professional advice to those who can act on it but also the giving of
28 information to the lawyer to enable him to give sound and informed advice.” *Id.* at 390

1 (citations omitted); *see also In re Grand Jury Investigation (Corp.)*, 974 F.2d 1068, 1070
2 (9th Cir. 1992) (“The attorney-client privilege protects confidential disclosures made by a
3 client to an attorney in order to obtain legal advice, . . . as well as an attorney’s advice in
4 response to such disclosures.” (internal citations omitted)). “The attorney-client privilege
5 applies to communications between lawyers and their clients when the lawyers act in a
6 counseling and planning role, as well as when lawyers represent their clients in litigation.”
7 *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996).

8 Because the attorney-client privilege withholds relevant information from the fact-
9 finder, it should apply “only when necessary to effectuate its limited purpose of
10 encouraging complete disclosure by the client.” *Tornay v. United States*, 840 F.2d 1424,
11 1428 (9th Cir. 1988) (citing *United States v. Osborn*, 561 F.2d 1334, 1339 (9th Cir. 1977)).
12 In the Ninth Circuit, the following eight-part test typically determines whether information
13 is covered by the attorney-client privilege:

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

18 *In re Grand Jury Investigation (Corp.)*, 974 F.2d at 1071 n. 2 (quoting *United States v.*
19 *Margolis (In re Fischel)*, 557 F.2d 209, 211 (9th Cir. 1977)); *see also United States v.*
20 *Ruehle*, 583 F.3d 600, 607-08 (9th Cir. 2009).

21 “The party asserting an evidentiary privilege has the burden to demonstrate that the
22 privilege applies to the information in question.” *Tornay*, 840 F.2d at 1426 (citing *United*
23 *States v. Hirsch*, 803 F.2d 493, 496 (9th Cir. 1986)). To meet this burden, the party must
24 demonstrate that its documents adhere to the “essential elements” of the attorney-client
25 privilege adopted by the Ninth Circuit. *In re Grand Jury Investigation (Corp.)*, 974 F.2d
26 at 1070-71 (citing *In re Fischel*, 557 F.2d at 211). “In essence, the party asserting the
27 privilege must make a *prima facie* showing that the privilege protects the information the
28 party intends to withhold.” *Id.* at 1071.

1 One way to sufficiently establish the privilege is the production of a privilege log.
2 *Id.*; *see also* Fed. R. Civ. P. 26(b)(5)(A). A privilege log which identifies the following is
3 sufficient to establish the attorney-client privilege:

4 (a) the attorney and client involved, (b) the nature of the document, (c) all
5 persons or entities shown on the document to have received or sent the
6 document, (d) all persons or entities known to have been furnished the
7 document or informed of its substance, and (e) the date the document was
generated, prepared, or dated.

8 *Id.* (citing *Dole v. Milonas*, 889 F.2d 885, 888, n.3, 890 (9th Cir. 1989)).⁸ A privilege log
9 may be supplemented by affidavits of the attorneys responsible for preparing the
10 documents. *Id.* (finding that any questions the privilege log leaves open may be answered
11 by affidavits from the attorneys responsible for preparing the documents).

12 2. Analysis

13 To make their *prima facie* showing that the attorney-client privilege applies to the
14 261 documents discussed above over which Defendants claim the attorney-client privilege,
15 Defendants submitted a privilege log and a declaration from their counsel, Mr. Ravel,
16 regarding the confidential nature of the documents. The Third Amended Privilege Log
17 contains the following categories: (1) Bates Beg[in]; (2) Bates End; (3) Date Sent; (4)
18 Email To; (5) Email From; (6) Email CC; (7) Email BCC; (8) Description; (9) Privileged
19 Designation; and (10) Basis for Privilege. (TAPL.) After careful review of the Third
20 Amended Privilege Log and the declaration of Mr. Ravel, the Court finds that Defendants
21 have made a *prima facie* showing that the attorney-client privilege applies to the 261
22 documents designated as such.

23
24
25 ⁸ Alternatively, the Ninth Circuit has found a privilege log which identifies the
26 following to be sufficient to establish the attorney-client privilege: (1) the attorney and
27 client involved; (2) the nature of the document; (3) all persons or entities shown on the
28 document to have received or sent the document; (4) the date the document was generated,
prepared, or dated; and (5) the subject matter of each document. *In re Grand Jury
Investigation (Corp.)*, 974 F.2d at 1071.

1 In the Amended Joint Motion, Plaintiff does not dispute that Mr. Ravel is listed as
2 either an author or recipient of every document listed on the Third Amended Privilege Log.
3 (ECF No. 55 at p. 9.) Plaintiff further does not argue that the categories of information
4 provided in the Third Amended Privilege Log are insufficient, or that the communications
5 were not kept confidential between counsel and client(s). Rather, Plaintiff argues that
6 Defendants have improperly asserted the attorney-client privilege “over internal
7 communications that were not made primarily to obtain legal advice.” (*Id.* at p. 10.) In
8 making this argument, Plaintiff only cites specifically to documents bates-stamped
9 PRIV006005 and PRIV005052-54 as examples of communications that were not made
10 primarily to obtain legal advice. (*Id.*) Otherwise, Plaintiff more generally argues that
11 “[a]lthough Defendants very well may have sought legal advice before issuing the August
12 22 letters, that does not automatically convert every communication about the abortion
13 coverage requirement into a privileged one.” (*Id.*) Plaintiff’s primary concern seems to be
14 that Defendants did not produce any internal e-mail communications related to the
15 imposition or implementation of the abortion coverage requirement, and Plaintiff simply
16 does not find it plausible that all such e-mails are privileged. (*Id.* at pp. 9-10.)

17 The document bates-stamped PRIV006005 is an email dated August 22, 2014 and
18 entitled “State reverses abortion decision at 2 Catholic colleges.” (TAPL at p. 12.) The
19 email was sent from Diana Dooley (CHHS) to Defendant Rouillard, Mr. Ravel and various
20 employees of the DMHC, CHHS, and Governor’s Office. (*Id.*) Mr. Ravel states that the
21 email was sent from Secretary Diana Dooley “to her attorneys and those entities with a
22 common interest, concerning the immediate press coverage of the August 22, 2014 letters.”
23 (Ravel Decl. at ¶ 30.) He further states that the email “contains a confidential discussion
24 regarding anticipated litigation.” (*Id.*)

25 The document bates-stamped PRIV005052-54 is an email dated August 22, 2014 –
26 the same day the letters at issue were issued – entitled “For What’s New Section.” (TAPL
27 at p. 12.) The email was sent from the DMHC Webmaster to Rodger Butler (DMHC),
28 copying Mr. Ravel. (*Id.*) Mr. Ravel states this was a “confidential email” from one of his

1 clients, the DMHC Webmaster, “discussing [Mr. Ravel’s] legal review of the at-issue
2 letters before they [were] posted on the public website.” (Ravel Decl. at ¶ 31.)

3 Based on the information provided in the Third Amended Privilege Log and Mr.
4 Ravel’s declaration providing further information as to these two documents, the Court
5 finds that Defendants have sufficiently established they are privileged. Plaintiff’s mere
6 speculation, without more, that these two emails may not be privileged is insufficient to
7 overrule the assertion of privilege or persuade the Court that it needs to review these
8 documents *in camera*.

9 Moreover, the Court does not find Plaintiff’s more general argument that Defendants
10 have improperly designated as privileged internal documents relating to the imposition or
11 implementation of the abortion coverage requirement to be persuasive. Plaintiff’s
12 contention is premised on its speculation that Defendants *must* have relevant, non-
13 privileged internal emails related to the imposition or implementation of the abortion
14 coverage requirement. However, the August 22, 2014 letters, which are at the heart of this
15 case, are legal in nature. They set forth a legal determination by Defendants that coverage
16 for all legal abortions is required by the Knox Keene Act. As such, the complaints,
17 petitions, and lawsuits that have followed, including this one, relate to the DMHC’s legal
18 interpretation of that requirement. Given the pending and anticipated litigation related to
19 this interpretation, Defendants assertion that their responses to health plan inquiries require
20 legal review and advice is credible. (*See, e.g.*, Ravel Decl. at ¶ 34.) For these reasons, the
21 Court does not find Plaintiff’s presumptive contention persuasive.

22 Plaintiff further argues that Mr. Ravel acts in a dual role in his position as counsel
23 for Defendants. (ECF No. 55 at pp. 9-10.) The Court acknowledges that the fact “a person
24 is a lawyer does not, ipso facto, make all communications with that person privileged.
25 [Rather, t]he privilege applies only when legal advice is sought ‘from a professional legal
26 advisor *in his capacity as such.*’” *Chen*, 99 F.3d at 1501 (citation omitted). However,
27 while it may be true that Mr. Ravel works in a dual capacity in his position, based on Mr.
28 Ravel’s declaration, the circumstances of this case, and the documents before the Court,

1 the Court finds that Defendants have established that Mr. Ravel was working on this matter
2 in his legal capacity and that the primary purpose of the communications was to secure
3 legal advice. *See N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1127 (N. D.
4 Cal. 2003) (“In general, legal advice is implicated if the nonlegal aspects of the consultation
5 are integral to the legal assistance given and the legal assistance is the *primary purpose* of
6 the consultation.”); *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 628 (D. Nev. 2013)
7 (“[W]hen dealing with communications to or from in-house counsel, many courts have
8 found that in order for a communication that pertains to both business and legal advice to
9 be considered privileged, the primary purpose must be to obtain or give legal advice.”).

10 Mr. Ravel states in his declaration that prior to the issuance of the letters, the DMHC
11 anticipated litigation in response to the letters, and therefore undertook several legal
12 analyses and discussions for potential litigation. (Ravel Decl. at ¶ 32.) Mr. Ravel further
13 states that he provided confidential legal analysis and recommendations as to why the
14 August 22, 2014 letters should be issued. (*See, e.g., id.* at ¶¶ 31, 32.) Beginning on the
15 day the letters were issued, Defendants undisputedly faced legal challenges, which are
16 ongoing and remain pending to this day. Mr. Ravel states that he was materially involved
17 in the responses to these challenges, and in fact, Mr. Ravel signed at least two of the legal
18 letters served by the DMHC. (*See, e.g., id.* at ¶¶ 7, 10, 14, 16, 24, Exhs. P, S.)

19 Accordingly, based on the foregoing, the Court denies Plaintiff’s motion to overrule
20 the privilege as to all documents on the Third Amended Privilege Log deemed attorney-
21 client communications and compel their production.

22 **B. Attorney Work Product Privilege**

23 1. Legal Standard

24 The attorney work product privilege is a “qualified privilege” that protects “certain
25 materials prepared by an attorney ‘acting for his client in anticipation of litigation.’” *United*
26 *States v. Nobles*, 422 U.S. 225, 237-38 (1975) (quoting *Hickman v. Taylor*, 329 U.S. 495,
27 508 (1947)). “The primary purpose of the work product rule is to ‘prevent exploitation of
28 a party’s efforts in preparing for litigation.’” *Holmgren v. State Farm Mut. Auto. Ins. Co.*,

1 976 F.2d 573, 576 (9th Cir. 1992) (quoting *Admiral Ins. Co. v. U.S. D. Ct.*, 881 F.2d 1486,
2 1494 (9th Cir. 1989)).

3 The attorney work product privilege, codified in Federal Rule of Civil Procedure
4 26(b)(3), provides that “[o]rdinarily, a party may not discover documents and tangible
5 things that are prepared in anticipation of litigation or for trial by or for another party or its
6 representative (including the other party’s attorney, consultant, surety, indemnitor, insurer,
7 or agent).” Fed. R. Civ. P. 26(b)(3)(A). When a party withholds information otherwise
8 discoverable by claiming that the information is protected by the work product privilege,
9 the party must “(i) expressly make the claim; and (ii) describe the nature of the documents,
10 communications, or tangible things not produced or disclosed—and do so in a manner that,
11 without revealing information itself privileged or protected, will enable other parties to
12 assess the claim.” Fed. R. Civ. P. 26(b)(5)(A).

13 To qualify for work product protection, documents and tangible things must: (1) be
14 “prepared in anticipation of litigation or for trial” and (2) be prepared “by or for another
15 party or by or for that other party’s representative.” *United States v. Richey*, 632 F.3d 559,
16 567 (9th Cir. 2011) (citing *In re Grand Jury Subpoena, Mark Torf/Torf Envtl. Mgmt. (Torf)*,
17 357 F.3d 900, 907 (9th Cir. 2004)); *see also* Fed. R. Civ. P. 26(b)(3). The scope of the
18 attorney work product privilege is limited to documents and tangible things, not the
19 underlying facts. *See Callwave Commc’ns, LLC v. Wavemarket, Inc.*, No. C 14-80112
20 JSW (LB), 2015 WL 831539, at *2 (N.D. Cal. Feb. 23, 2015); *Garcia v. City of El Centro*,
21 214 F.R.D. 587, 591 (S.D. Cal. 2003).

22 “In circumstances where a document serves a dual purpose, that is, where it was not
23 prepared exclusively for litigation, then the ‘because of’ test is used.” *Richey*, 632 F.3d at
24 567-68 (citing *Torf*, 357 F.3d at 907). The “because of” test is defined as follows:

25 Dual purpose documents are deemed prepared because of litigation if “in light
26 of the nature of the document and the factual situation in the particular case,
27 the document can be fairly said to have been prepared or obtained because of
28 the prospect of litigation.” [*Torf*, 357 F.3d at 907] In applying the “because
of” standard, courts must consider the totality of the circumstances and

1 determine whether the “document was created because of anticipated
2 litigation, and would not have been created in substantially similar form but
3 for the prospect of litigation.” *Id.* at 908 (quoting *United States v. Adlman*,
134 F.3d 1194 (2d Cir. 1998)).

4 *Richey*, 632 F.3d at 568.

5 The attorney work product privilege is not absolute. *United States v. Christensen*,
6 828 F.3d 763, 805 (9th Cir. 2015). Even where the attorney work product privilege
7 “facially applies, it may be overridden if the party that seeks the otherwise protected
8 materials establish[es] adequate reasons to justify production.” *Id.* (citing *Hickman*, 329
9 U.S. 495 at 512 (internal quotations omitted); Fed. R. Civ. P. 26(b)(3)(A)(ii)). Pursuant to
10 Federal Rule of Civil Procedure 26(b)(3)(A), a party may obtain discovery of trial
11 preparation materials if they are otherwise discoverable and the party shows that it has a
12 “substantial need” for the materials and “cannot, without undue hardship, obtain their
13 substantial equivalent by other means.” *Republic of Ecuador v. Mackay*, 742 F.3d 860,
14 866 (9th Cir. 2014) (quoting Fed. R. Civ. P. 26(b)(3)(A)). To the extent that a court orders
15 discovery of any trial preparation materials under the rule, “it must protect against
16 disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s
17 attorney or other representative concerning the litigation.” *Id.* (quoting Fed. R. Civ. P.
18 26(b)(3)(B)). However, even this so-called “opinion work product” may be discoverable
19 “when mental impressions are at issue in a case and the need for the material is
20 compelling.” *Holmgren*, 976 F.2d at 577.

21 The party asserting the privilege has the initial burden of establishing that it applies
22 to each document. *See Skynet Elec. Co., Ltd. v. Flextronics Int’l, Ltd.*, No. C 12–06317
23 WHA, 2013 WL 6623874, at *2 (N.D. Cal. Dec. 16, 2013).

24 2. Analysis

25 Defendants assert the attorney work product privilege on sixty-four (64) documents
26 over which they did not assert the attorney-client privilege. (TAPL.) The only parties on
27 the emails, which comprise all but four (4) of these additional documents, are Mr. Ravel,
28 Ms. Gallardo, and various employees of the DMHC. (*Id.*)

1 The first attorney work product privileged document is an email dated July 8, 2014
2 and entitled “Email re: Legal Memorandum.” (*Id.* at p. 2.) On July 10, 2014, additional
3 emails were circulated and entitled: “Legal Memorandum re Health Plans’ Limitation of
4 Abortion Coverage;” “abortion memorandum;” “Final Legal Memorandum;” and “Final
5 Memorandum.” (*Id.* at pp. 2-3.) On July 16, 2014, Mr. Ravel and Ms. Gallardo engaged
6 in deliberations in a series of emails regarding abortion coverage and the medical necessity
7 of abortion. (*Id.* at p. 3.) Additional emails regarding “Memorandum redlines” and an
8 “Abortion memo” were exchanged between Mr. Ravel and Ms. Gallardo on July 17, 2014
9 and July 21, 2014, respectively. (*Id.* at p. 5.) On August 7 and 8, 2014, Mr. Ravel and Ms.
10 Gallardo circulated “edits” to the draft letter to “health plans re limitations or exclusions of
11 abortion services,” an email regarding the “Draft Memorandum re Health Plans’ Limitation
12 of Abortion Coverage,” and emails regarding “Memorandum and Attachments Final,” and
13 “question re TPL.” (*Id.* at pp. 7-8.) On August 11, 2014, Mr. Ravel sent Ms. Gallardo an
14 email regarding “Abortion Survey Data.” (*Id.* at p. 8.) Thereafter, on August 22, 2014,
15 the date the letters were issued, Ms. Gallardo and Mr. Ravel exchanged emails regarding
16 the “DMHC decision re abortion coverage.” (*Id.* at pp. 11-12.) Defendants designated the
17 emails as two or more of the following: an attorney response to a client request for legal
18 advice regarding the legal memorandum or legal research or issuance of letter,
19 deliberations between attorneys regarding the August 22, 2014 letters, deliberations
20 between attorneys, draft legal memorandum or legal letter prepared by or under the
21 direction of counsel, or deliberations and comments by attorney regarding attached draft.
22 (*Id.* at pp. 2-12.)

23 After the issuance of the August 22, 2014 letters, Defendants claim attorney work
24 product protection over several additional documents. (TAPL at pp. 15-33.) These
25 documents are dated from September 5, 2014 through April 13, 2015. (*Id.*) The documents
26 include emails regarding calls from consumers and how to respond to consumer questions,
27 a Weldon Amendment complaint, health plan changes at Catholic universities, a call from
28 the AG’s office, multi-state plans and abortion, a request for general information regarding

1 abortion coverage, the Health & Safety Code, the OCR response and contact list, the
2 DMHC and Plan contact sheet, the OCR response letter, an underground “reg petition,”⁹
3 Secretary Burwell/HHS and the August 22, 2014 letters, final rule for multistate plans,
4 Anthem Blue Cross coverage, Mattox article re: the August 22, 2014 letters, OCR
5 transactions, an all counsel meeting update, and an HHS OCR abortion call. (*Id.*)
6 Defendants cited two or more of the following as the basis for the privilege of these
7 documents:

- 8 (1) client request for legal advice and/or attorney review regarding legal
9 memorandum;
- 10 (2) attorney response to client request for legal advice regarding (i)
11 issuance of letter, (ii) legal memorandum, or (iii) legal research;
- 12 (3) deliberations between: (i) attorneys regarding issuance of August 22,
13 2014 letters; (ii) client and attorney(s); or (iii) attorneys;
- 14 (4) draft legal memorandum prepared by or under the direction of counsel;
15 or
- 16 (5) deliberations and comments by attorney regarding attached draft.

17 (*Id.*)

18 Based on the foregoing, the Court finds that Defendants have established a *prima*
19 *facie* case that these documents are covered by the attorney work product privilege. As
20 discussed above, the DMHC anticipated litigation in connection with the issuance of the
21 letters, and undertook several legal analyses and discussions for potential litigation. (Ravel
22 Decl. at ¶ 32.) Given the nature of the letters, there was more than a remote possibility of
23 litigation. Moreover, the immediate and sustained nature of the response to the letters
24 demonstrates that Defendants’ anticipation of litigation was not unfounded speculation.

25 Plaintiff argues that the attorney work product privilege does not apply here because
26 it only applies to material generated in anticipation of litigation, and not information
27

28 ⁹ Per Mr. Ravel, “those documents described as relating to the ‘underground
reg petition’ concern the confidential internal deliberations of DMHC regarding how to
respond to the initial underground regulation petition which led to the filing of the
Missionary Guadalupanas lawsuit, which remains pending in the California Court of
Appeal.” (Ravel Decl. at ¶ 40.)

1 collected or communications made in the ordinary course of business. (ECF No. 55 at p.
2 10.) Applying the “because of” standard, Plaintiff argues that the privilege cannot apply
3 to all documents generated before the August 22, 2014 letters were issued. (*Id.* at p. 11.)
4 Plaintiff cites to the following pre-August 22, 2014 emails as examples of emails that
5 should not be covered by the attorney work product privilege: PRIV004620-31 and
6 PRIV005182-93. (*Id.* at p. 11.)

7 Plaintiff further argues that Defendants have invoked the privilege over documents
8 that were generated in the normal course of business both before and after August 22, 2014,
9 which are separate and distinct from any anticipated or pending litigation. (*Id.*) Plaintiff
10 cites to the following documents as examples of documents generated in the normal course
11 of business: PRIV000363 and PRIV000221-22.

12 In his declaration, Mr. Ravel states that documents bates-stamped PRIV004620-31
13 are a series of emails, entitled “abortion memorandum” and dated July 10, 2014, which
14 “concern confidential communications between DMHC attorneys regarding responsive
15 information and data relevant to the issuance of the August 22, 2014 letters.” (Ravel Decl.
16 at ¶ 32.) Mr. Ravel adds that these “emails discuss and include confidential analysis and
17 recommendations as to why the August 22, 2014 letters should be issued,” and “stem from
18 a client request for legal advice concerning abortion coverage in licensed health plans.”
19 (*Id.*) Mr. Ravel further states that prior to the issuance of the letters, the DMHC was
20 anticipating litigation, and therefore was undertaking several legal analyses and
21 discussions regarding potential litigation. (*Id.*)

22 According to Mr. Ravel, documents bates-stamped PRIV005182-93 are a series of
23 emails, entitled “coverage and medical necessity of abortion” and dated July 16, 2014,
24 between Mr. Ravel and another DMHC attorney, Ms. Gallardo, in which they engage in
25 “legal analysis regarding abortion and ‘medical necessity.’” (*Id.* at ¶ 35.) This legal
26 analysis, according to Mr. Ravel, was undertaken in response to a client request, in
27 preparation for issuance of the August 22, 2014 letters. (*Id.*) Mr. Ravel adds that this legal
28 analysis has been utilized in the subsequent litigation in state and federal court. (*Id.*)

1 As to the document bates-stamped PRIV000363, it is an email dated August 11,
2 2014 and entitled “abortion survey data.” (*Id.* at ¶ 33.) According to Mr. Ravel, the email
3 and its attachment,¹⁰ which is deemed attorney-client privileged, contains “confidential
4 internal predecisional deliberations and a draft memorandum regarding the issuance of the
5 August 22, 2014 letters.” (*Id.*) Mr. Ravel states that the email and its attachment are “the
6 result of a client request for legal advice concerning abortion coverage in licensed health
7 plans.” (*Id.*)

8 Lastly, as to the document bates-stamped PRIV000221-22, which is an email from
9 Mr. Ravel’s client, Kristene Mapile, to Ms. Gallardo, Mr. Ravel, and other DMHC
10 employees, entitled “Anthem Blue Cross (ABC) abortion coverage” and dated March 5,
11 2015, Mr. Ravel states that it “includes a confidential draft response to the health plan’s
12 inquiry and seeks legal input and approval.” (*Id.* at ¶ 34.) Given the pending underground
13 regulation petition and the pending OCR investigation, Mr. Ravel states that “it was
14 important to the clients that counsel be consulted in responding to the health plan’s
15 inquiry.” (*Id.*)

16 Based on the information provided in the Third Amended Privilege Log and Mr.
17 Ravel’s declaration, the Court finds that Defendants have sufficiently demonstrated that
18 these documents were prepared in anticipation of litigation. Although Plaintiff claims
19 certain documents served a dual purpose, in light of the nature of these documents and the
20 facts of this particular case, the Court finds the documents can fairly be said to have been
21 prepared “because of” the prospect of litigation related to the August 22, 2014 letters. *See*
22 *In re Grand Jury Subpoena*, 357 F.3d at 908. In making this determination, the Court has
23 considered the totality of the circumstances, and finds that they would not have been
24 created in substantially similar form but for the prospect of litigation. *See id.* For example,
25
26
27

28 ¹⁰ *See also* TAPL at p. 33 (PRIV000001-2).

1 in responding to health plan inquiries, counsel was consulted because of pending litigation,
2 when it may not have been under a different set of circumstances.

3 **C. Deliberative Process Privilege and Official Information Privilege**

4 Defendants assert only the deliberative process privilege and official information
5 privilege over the four (4) remaining documents, which are dated April 1, 2015 and April
6 3, 2015.¹¹ (TAPL at p. 28.) All of the documents – an email and three PowerPoint
7 presentations – relate to a confidential draft slideshow “UCD” presentation created by Mr.
8 Ravel and another DMHC attorney. (*Id.*; see also Ravel Decl. at ¶ 29.)

9 1. Legal Standard

10 a. *Deliberative Process Privilege*

11 The deliberative process privilege cover “documents reflecting advisory opinions,
12 recommendations and deliberations comprising part of a process by which governmental
13 decisions and policies are formulated.” *Dep’t. of Interior v. Klamath Water Users*
14 *Protective Ass’n*, 532 U.S. 1, 8 (2001) (quoting *N.L.R.B. v. Sears, Roebuck & Co.*, 421
15 U.S. 132, 150 (1975)); see also *F.T.C. v. Warner Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th
16 Cir. 1984). “The deliberative process privilege rests on the obvious realization that
17 officials will not communicate candidly among themselves if each remark is a potential
18 item of discovery and front page news, and its object is to enhance the quality of agency
19 decisions, by protecting open and frank discussion among those who make them within the
20 Government.” *Id.* at 8-9 (internal citations and quotations omitted). The Supreme Court
21 has expressly recognized the privilege with respect to the decision-making processes of
22 government agencies. *North Pacifica, LLC*, 274 F. Supp. 2d at 1121 (citing *N.L.R.B.*, 421
23 U.S. at 148-53)).

24 “A document must meet two requirements for the deliberative process privilege to
25 apply. First, the document must be predecisional—it must have been generated before the
26

27
28 ¹¹ The documents are bates-stamped PRIV006037-6083, PRIV002949,
PRIV002950-2995, and PRIV004196-4242.

1 adoption of an agency’s policy or decision.” *F.T.C.*, 742 F.2d at 1156. “Second, the
2 document must be deliberative in nature, containing opinions, recommendations, or advice
3 about agency policies.” *Id.* “Purely factual material that does not reflect deliberative
4 processes is not protected”; however, factual material that “is so interwoven with the
5 deliberative material that it is not severable” is protected. *Id.*; *see also Sanchez v. Johnson*,
6 No. C–00–1593 CW (JCS), 2001 WL 1870308, at *5 (N.D. Cal. Nov. 19, 2001) (“[T]he
7 fact/opinion distinction should not be applied mechanically. Rather, the relevant inquiry is
8 whether ‘revealing the information exposes the deliberative process.’”). The burden of
9 establishing the privilege is on the party asserting it. *North Pacifica, LLC*, 274 F. Supp. 2d
10 at 1122.

11 However, the deliberative process privilege is a qualified one. *F.T.C.*, 742 F.2d at
12 1156. Thus, even if the privilege is established, a “litigant may obtain deliberative
13 materials if his or her need for the materials and the need for accurate fact-finding override
14 the government’s interest in non-disclosure.” *Id.*; *see also North Pacifica, LLC*, 274 F.
15 Supp. 2d at 1122. “Among the factors to be considered in making this determination are:
16 1) the relevance of the evidence; 2) the availability of other evidence; 3) the government’s
17 role in the litigation; and 4) the extent to which disclosure would hinder frank and
18 independent discussion regarding contemplated policies and decisions.” *Id.* Other factors
19 that a court may consider include: 5) the interest of the litigant, and ultimately society, in
20 accurate judicial fact finding, 6) the seriousness of the litigation and the issues involved, 7)
21 the presence of issues concerning alleged governmental misconduct, and 8) the federal
22 interest in the enforcement of federal law. *North Pacifica, LLC*, 274 F. Supp. 2d at 1122
23 (citing *United States v. Irvin*, 127 F.R.D. 169, 173 (C.D. Cal. 1989)).

24 b. *Official Information Privilege*

25 Federal common law also recognizes a qualified privilege for official information.
26 *Kerr v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 511 F.2d 192, 198 (9th Cir. 1975). In
27 determining what level of protection should be afforded by this privilege, courts conduct a
28 case by case balancing analysis, in which the interests of the party seeking discovery are

1 weighed against the interests of the governmental entity asserting the privilege. *Soto v.*
2 *City of Concord*, 162 F.R.D. 603, 613-14 (N.D. Cal. 1995); *see also Sanchez v. City of*
3 *Santa Ana*, 936 F.2d 1027, 1033-34 (9th Cir.1990); *Kelly v. City of San Jose*, 114 F.R.D.
4 653, 660 (N.D. Cal. 1987); *Miller v. Pancucci*, 141 F.R.D. 292, 300 (C.D. Cal. 1992);
5 *Hampton v. City of San Diego*, 147 F.R.D. 227, 230-31 (S.D. Cal. 1993).

6 However, before a court will engage in this balancing of interests, the party asserting
7 the privilege must properly invoke the privilege by making a “substantial threshold
8 showing.” *Soto*, 162 F.R.D. at 669. In order to fulfill the threshold requirement, the party
9 asserting the privilege must submit a declaration or affidavit from a responsible official
10 with personal knowledge of the matters to be attested to in the affidavit. *Id.* The affidavit
11 must include: “(1) an affirmation that the agency generated or collected the material in
12 issue and has maintained its confidentiality; (2) a statement that the official has personally
13 reviewed the material in question; (3) a specific identification of the governmental or
14 privacy interests that would be threatened by disclosure of the material to plaintiff and/or
15 his lawyer; (4) a description of how disclosure subject to a carefully crafted protective order
16 would create a substantial risk of harm to significant governmental or privacy interests,
17 and (5) a projection of how much harm would be done to the threatened interests if
18 disclosure were made.” *Id.* at 670; *see also Chism v. Cnty. of San Bernardino*, 159 F.R.D.
19 531, 533 (C.D. Cal. 1994); *Hampton*, 147 F.R.D. at 230–31; *Miller*, 141 F.R.D. at 301. A
20 strong affidavit would also describe how the plaintiff could acquire information of
21 equivalent value from other sources without undue economic burden. *Kelly*, 114 F.R.D. at
22 670.

23 If the court concludes that a defendant’s submissions are not sufficient to meet the
24 threshold burden, it will order disclosure of the documents in issue. If a defendant meets
25 the threshold requirements, the court will order an in camera review of the material and
26 balance each party’s interests. *Id.* at 671; *Chism*, 159 F.R.D. at 533–34; *Hampton*, 147
27 F.R.D. at 231; *Miller*, 141 F.R.D. at 301.

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1 2. Analysis

2 The four documents at issue, dated April 1, 2015 and April 3, 2015, are not
3 predecisional with regard to the August 22, 2014 letters. A predecisional document is one
4 “prepared in order to assist an agency decisionmaker in arriving at his decision” and may
5 include “recommendations, draft documents, proposals, suggestions, and other subjective
6 documents which reflect the personal opinions of the writer rather than the policy of the
7 agency.” *Assembly of Cal. v. U.S. Dep’t of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992)
8 (citations omitted). Defendants, who bear the burden of establishing the privilege, do not
9 identify which other policy or decision relate to these documents. Accordingly, based on
10 the information before the Court, Defendants have failed to establish that the deliberative
11 process privilege applies to these documents.

12 To establish the official information privilege, Mr. Ravel submitted a declaration
13 stating that these four documents contain a confidential draft slideshow presentation
14 created by Mr. Ravel and another DMHC attorney. (Ravel Decl. at ¶ 29.) Mr. Ravel states
15 that these documents have been maintained confidentially and “[r]equiring DMHC to
16 disclose these documents would threaten several governmental interests.” (Ravel Decl. at
17 ¶¶ 43-44.) According to Mr. Ravel,

18 [d]isclosing the documents related to the post-August 22, 2014 documents,
19 including documents regarding how to respond to the OCR complaints and
20 investigations, how to respond to the underground regulation petition, how to
21 respond to the pending state and federal lawsuits, how to respond to the media
22 inquiries, and how to respond to inquiries from other officials, would threaten
23 the government interest and privacy interest of sensitive internal legal
24 deliberations and strategy in ongoing pending litigation. These confidential
25 documents reflect the Department’s legal responses to inquiries taken after the
26 issuance of the August 22, 2014 letters, including in matters that remain
27 pending.

28 (Ravel Decl. at ¶ 46.) Mr. Ravel further states that disclosing these documents under a
carefully crafted protective order would create a substantial risk of harm to significant
governmental or privacy interests because there are several ongoing legal actions to which

1 the DMHC has to respond, and the DMHC’s position in these actions would be prejudiced.
2 (Ravel Decl. at ¶¶ 47-48.)

3 Based on the foregoing, the Court finds that Defendants have met their threshold
4 burden of establishing that these documents fall under the official information privilege.
5 The documents at issue were drafted by, and circulated among, DMHC attorneys, who kept
6 them confidential, and they purportedly contain sensitive internal legal deliberations and
7 strategy in ongoing litigation. Plaintiff argues that Defendants have not met their burden,
8 but does not address these four documents in particular. Accordingly, the Court ORDERS
9 that these documents be submitted for *in camera* review so that the Court may balance each
10 party’s interests.

11 **D. Interrogatories**

12 In Defendants’ initial response to Plaintiff’s interrogatories asking who participated
13 in the research, analysis, drafting, preparation, and decision to issue the August 22, 2014
14 letters, including their role or task, title, employer, and current address and telephone
15 number, Defendants objected to the interrogatories on the basis of the attorney-client
16 privilege, attorney work product privilege, official information privilege, and deliberative
17 process privilege. (Galus Decl. at ¶ 10, Exh. 6, Interrogs. No. 3 & 4.) Defendants further
18 responded that “legal counsel for the Department was relied upon prior to issuance of the
19 letters.” (*Id.*) In their supplemental responses, served on March 10, 2017, Defendants
20 maintained their privilege objections and “refer[red] Plaintiff, pursuant to Federal Rules of
21 Civil Procedure, Rule 33(d), to the privilege log, and the names therein” and provided
22 contact information at the California Office of the Attorney General. (*Id.*)

23 Plaintiff now argues that the privilege log, “which names over 100 individuals
24 spanning several state agencies, does not plainly indicate who was involved with the
25 August 22, letters, nor does it explain what each individual’s role or task may have been.”
26 (ECF No. 55 at p. 11.) Because Plaintiff contends the requested information can only be
27 discerned from the content of the withheld documents, Plaintiff argues the Court should
28 overturn the privilege and compel disclosure. (*Id.*) In response, Defendants argue Plaintiff

1 waived this argument because it failed to raise the dispute within the Court’s 45-day
2 deadline, as set forth in its Civil Chambers Rules, the Civil Local Rules, and the Court’s
3 Scheduling Order. (*Id.* at pp. 21-22.) Defendants do not further address Plaintiff’s
4 argument.

5 In Plaintiff’s email responses to Defendants following the production of their
6 supplemental responses to Plaintiff’s interrogatories, beginning on March 21, 2017,
7 Plaintiff did not raise any issues with Defendants’ interrogatory responses. (*See Galus*
8 *Decl.* at ¶ 11, Exh. 7.) Defendants maintain Plaintiff did not raise the issue until the initial
9 Joint Motion for Determination of Discovery Dispute. (*See Eisenberg Decl.* at ¶ 13; ECF
10 No. 47-11 at 6, ¶ 25.) Plaintiff does not contend otherwise. Moreover, there is no
11 suggestion the parties met and conferred on the issue prior to filing their Amended Joint
12 Motion. (*See Galus Decl.* at ¶¶ 15-18; *Eisenberg Decl.* at ¶¶ 32-36.) Therefore, the parties
13 have not met and conferred on this issue. Accordingly, pursuant to the Scheduling Order,¹²
14 Civil Rule 26.1(a),¹³ the Court’s Civil Chambers Rule (IV)(A), and Rule 37(a)(1), the Court
15 finds Plaintiff has waived the issue.

16 **IV. CONCLUSION**

17 Based on the foregoing, the Court ORDERS as follows:

18 1. Plaintiff’s motion to compel production of the documents listed in the
19 excerpted Third Amended Privilege Log is **DENIED**. However, Defendants shall lodge
20 documents bates-stamped PRIV006037-6083, PRIV002949, PRIV002950-2995, and
21 PRIV004196-4242 with the Court no later than **September 26, 2017** for *in camera* review,
22 so that the Court may engage in a balancing analysis to determine whether the Official
23 Information Privilege applies.

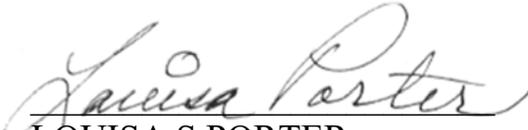
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25 ¹² *See* ECF No. 39 at ¶ 5 (requiring counsel to “promptly and in good faith meet
26 and confer with regard to all discovery disputes in compliance with Local Rule 26.1(a)”))

27 ¹³ *See* Civ. L.R. 26.1(a) (“The court will entertain no motion pursuant to Rules
28 26 through 37, Fed. R. Civ. P., unless counsel will have previously met and conferred
concerning all disputed issues.”)

1 2. Defendants Motion to Seal (ECF No. 56) is **GRANTED**. Accordingly, the
2 documents lodged at ECF No. 57 shall be filed under seal.

3 IT IS SO ORDERED.

4 Dated: September 22, 2017


LOUISA S PORTER
United States Magistrate Judge

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