

1 Kelly Aviles (SBN 257168)
kaviles@opengovlaw.com
2 **LAW OFFICES OF KELLY AVILES**
1502 Foothill Blvd., Suite 103-140
3 La Verne, CA 91750
Tel: (909) 991-7560
4 Fax: (909) 991-7594

5 Jerry Flanagan (SBN 271272)
jerry@consumerwatchdog.org
6 Benjamin Powell (SBN 311624)
ben@consumerwatchdog.org
7 **CONSUMER WATCHDOG**
8 6330 San Vicente Blvd., Suite 250
Los Angeles, CA 90048
9 Tel: (310) 392-0522
10 Fax: (310) 392-8874

11 **Attorneys for Petitioner/Plaintiff**
12 **CONSUMER WATCHDOG**

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **FOR THE COUNTY OF LOS ANGELES**

15 **CONSUMER WATCHDOG, a non-profit**)
16 **organization,**)
17 **Petitioner/Plaintiff,**)
18 **v.**)
19 **RICARDO LARA, in his official capacity**)
20 **as the Insurance Commissioner of the State**)
21 **of California; CALIFORNIA**)
22 **DEPARTMENT OF INSURANCE; and**)
23 **DOES 1-50,**)

Case No.: 20STCP00664
Assigned to the Hon. Mitchell L. Beckloff
**NOTICE OF MOTION AND MOTION TO
COMPEL FURTHER PRODUCTION OF
DOCUMENTS AND ENFORCE THE
COURT'S OCT. 4, 2021 ORDER, OR IN
THE ALTERNATIVE, REQUEST FOR
EVIDENTIARY SANCTIONS;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
KELLY AVILES; EXHIBITS A-Q**

24 **Respondents/Defendants.**)

Date: April 27, 2022
Time: 9:30 a.m.
Dept.: 86

25 *[Filed Concurrently with Separate Statement]*

26 Action Filed: February 18, 2020
Opening Brief Due: TBD
27 Hearing Date: TBD

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

2 PLEASE TAKE NOTICE that on April 27, 2022, at 9:30 a.m. or as soon thereafter as counsel
3 may be heard, in Department 86 of the above-entitled court located at 111 N. Hill Street, Los Angeles,
4 California 90012, Petitioner CONSUMER WATCHDOG will and hereby does move this Court to:
5 compel Respondents to provide a further production of documents in response to Request for
6 Production of Documents, Set One, No. 3, or, in the alternative, grant Petitioner's request for
7 evidentiary sanctions.

8 This Motion is made pursuant to the Civil Discovery Act, including Code of Civil Procedure
9 sections 2031.010, 2031.210, 2031.220, 2031.230, 2031.240, 2031.310, and 2031.320, on the
10 grounds that Petitioner previously moved to compel production of various discovery responses,
11 including further responses to Petitioner's Request for Production of Documents, Set One, No. 3. On
12 two occasions, this Court previously granted such motions, ordering Respondents to provide full and
13 complete responses and a privilege log of any documents withheld under a claim of privilege.
14 However, Respondents have failed to fully comply with the Court's prior Orders and Respondents'
15 claims of privilege and exemption are without merit and/or Respondents' claims of privilege and
16 exemption lack the information necessary to properly evaluate the claims. As set forth in the
17 accompanying Declaration of Kelly Aviles, this Motion is made after good faith attempts to meet and
18 confer and settle the dispute.

19 This Motion is based on this Notice, the pleadings and documents filed in this action, the
20 Memorandum of Points and Authorities filed concurrently, the Declaration of Kelly Aviles, other
21 documents in the Court's files, and upon such evidence and argument, oral or documentary, as may
22 be introduced at or before the hearing on these Motions.

23 DATED: December 19, 2021

CONSUMER WATCHDOG

24 By: _____

Benjamin Powell
25 Benjamin Powell
26 Attorneys for Plaintiff/Petitioner
27 CONSUMER WATCHDOG
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
MEMORANDUM OF POINTS AND AUTHORITIES	1
I. INTRODUCTION	1
II. BACKGROUND AND PRIOR DISCOVERY EFFORTS	1
III. ARGUMENT	2
A. Respondents Have Once Again Failed Produce an Adequate Privilege Log in Violation of This Court’s Orders	3
B. Respondents Fail to Establish the Work-Product Privilege	4
C. Newly Produced Documents Further Demonstrate Respondents’ Misunderstanding of Claimed Privileges	5
D. Respondents Have Not Met Their Burden to Demonstrate That the Withheld Communications Are Privileged	5
E. The Multiple Roles of Government Agency Attorneys Require Additional Scrutiny When a Claim of Privilege Arises	7
F. Communications Involving Special Counsel Bryant Henley Require Additional Scrutiny	12
G. Alternatively, the Court Should Issue an Evidentiary Sanction Prohibiting Respondents from Introducing Any Documents Reflected in the Privilege Log	14
III. CONCLUSION	15
DECLARATION OF KELLY AVILES	16

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Cases

2,022 Ranch, L.L.C. v. Sup. Ct.
(2003) 113 Cal.App.4th 1377 8

ACLU v. Sup. Ct.
(2011) 202 Cal.App.4th 55 3, 6

ACLU Found. v. Deukmejian
(1982) 32 Cal.3d 440 7

Animal Welfare Inst. v. Nat’l Oceanic & Atmospheric Admin.
(D.D.C. 2019) 370 F.Supp.3d 116 7

BP Alaska Expl., Inc. v. Sup. Ct.
(1988) 199 Cal.App.3d 1240 13

Catalina Island Yacht Club v. Sup. Ct.
(2015) 242 Cal.App.4th 1116 3

Chi. Title Ins. Co. v. Sup. Ct.
(1985) 174 Cal.App.3d 1142 8

City of Los Angeles v. Sup. Ct.
(2017) 9 Cal.App.5th 272 7

City of Petaluma v. Sup. Ct.
(2016) 248 Cal.App.4th 1023 4

Costco Wholesale Corp. v. Sup. Ct.
(2009) 47 Cal.4th 725 *passim*

Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns
(1992) 7 Cal.App.4th 27 14

Doe 2 v. Sup. Ct.
(2005) 132 Cal.App.4th 1504 5

Dwyer v. Crocker Nat’l Bank
(1987) 194 Cal.App.3d 1418 14

In re Lindsey
(D.C. Cir. 1998) 148 F.3d 1100 7

Laguna Beach Cty. Water Dist. v. Sup. Ct.
(2004) 124 Cal.App.4th 1453 5

League of Cal. Cities v. Sup. Ct.
(2015) 241 Cal.App.4th 976 4, 7, 13

Lion Raisins, Inc. v. United States Dep’t of Agric.
(E.D. Cal. 2009) 636 F.Supp.2d 1081 12

Los Angeles Cty. Bd. of Supervisors v. Sup. Ct.
(2016) 2 Cal.5th 282 10, 11

Rojas v. Sup. Ct.
(2004) 33 Cal.4th 407 4

1	<i>Rugiero v. United States Dep’t of Justice</i>	
	(6th Cir. 2001) 257 F.3d 534	13
2	<i>Sacramento Newspaper Guild v. Sacramento Cty. Bd. of Supervisors</i>	
3	(1968) 263 Cal.App.2d 41	6
4	<i>Schaff v. Sup. Ct.</i>	
	(1983) 146 Cal.App.3d 921	5
5	<i>Steiny & Co., Inc. v. Cal. Elec. Supply Co.</i>	
6	(2000) 79 Cal.App.4th 285	14
7	<i>Uber Techs., Inc. v. Google LLC</i>	
	(2018) 27 Cal.App.5th 953	4, 9
8	<i>Vallbona v. Springer</i>	
9	(1996) 43 Cal.App.4th 1525	14
10	California Authorities	
11	Code Civ. Pro. § 2018.030	4
12	Code Civ. Pro. § 2031.240	3
13	Evid. Code § 413	14
14	Evid. Code § 452	14
15	Evid. Code § 952	5
16	Evid. Code § 956	13
17	Evid. Code § 1060	13
18	Gov. Code § 6253.1	6
19	Other Authorities	
20	2 CA Pretrial Civil Procedure: The Wagstaffe Group § 40-IV(C)(4) (2021)	4
21	36 Ops.Cal.Atty.Gen. 175 (1960)	6
22	71 Ops.Cal.Atty.Gen 96 (1988)	6
23	Cal. Dep’t of Ins., Gov’t Law Bureau, http://www.insurance.ca.gov/0500-about-us/02-department/050-lgc/GovLaw.cfm	11
24	Cal. Dep’t of Ins., Office of the Special Counsel, http://www.insurance.ca.gov/0500-about-us/02-department/080-scc/	14
25	Jeff McDonald, <i>State’s Top Insurance Regulator Accepted Tens Of Thousands Of Dollars</i>	
26	<i>From Industry Executives, Records Show</i> , San Diego Union Tribune (July 7, 2019),	
27	https://www.sandiegouniontribune.com/news/watchdog/story/2019-07-05/states-top-insurance-regulator-accepted-tens-of-thousands-of-dollars-from-industry-executives-records-show	11
28	Law Revision Comm’n Comments on Evid. Code § 1060	13

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Respondents have engaged in systematic discovery abuse in refusing to disclose
4 communications regarding Petitioner’s California Public Records Act (“CPRA”) Requests,
5 communications that this Court has already deemed to be relevant to key issues in the litigation.
6 Petitioner’s Request for Production, Set One, No. 3 (“RFP No. 3”) was originally served more than
7 18 months ago. Respondents’ most recently produced privilege log fails once again to meet their
8 burden to establish that the attorney-client or attorney work product privileges apply to the withheld
9 documents.

10 Moreover, significant new evidence presented with this Motion regarding communications
11 between individuals representing Applied Underwriters, Inc. and Bryant Henley, who led the
12 Department of Insurance’s response to the CPRA Requests, raises significant questions about the
13 propriety of Respondents’ decision to withhold the communications under claims of privilege. More
14 than one-third of the email communications in the privilege log are “to” or “from” Mr. Henley.

15 Petitioner respectfully requests the Court order Respondents to produce all the withheld
16 documents, or in the alternative, prohibit Respondents from later introducing any evidence or
17 testimony for which they claimed privilege.

18 **II. BACKGROUND AND PRIOR DISCOVERY EFFORTS**

19 In the wake of unprecedented public attention to a pay-to-play scandal involving Respondent
20 Insurance Commissioner Ricardo Lara, Petitioner submitted the CPRA Requests for records of
21 meetings and communications with individuals “employed by or representing” the insurance
22 companies involved in the scandal. A key issue in this case is whether Respondents adequately
23 searched for and produced all disclosable records. (See Petition [“Pet.”] ¶¶ 9, 10, 46, 51, 61.)
24 Following the filing of the Petition, Petitioner served discovery on March 13, 2020. That discovery
25 included RFP No. 3, which sought all “communications between [Respondents] and any person
26 concerning the PRA Requests.” Communications regarding Petitioner’s CPRA Requests are highly
27 relevant to Petitioner’s contention that Respondents violated the CPRA by failing to adequately
28 search for or produce public records.

1 After an initial round of insufficient responses in which Respondents merely listed three
2 broad categories of the withheld documents, on May 12, 2021 this Court granted Petitioner’s initial
3 motion to compel and ordered Respondents to provide full and complete responses to a number of
4 discovery requests, including RFP No. 3. In doing so, this Court overruled Respondents’ objections,
5 finding that RFP No. 3 “is relevant and sufficiently unambiguous for Respondent to provide a
6 response.” (Aviles Decl., Ex. A.) Following the Court’s May 12, 2021 Order¹ Respondents’ First
7 Further Response disclosed, for the first time, that they were withholding “approximately 400 internal
8 documents that contain communications regarding the PRA Requests” (Aviles Decl., Ex. B.)²

9 Following the parties’ informal discovery conference (“IDC”) with the Court on July 1, 2021,
10 Respondents agreed to provide an additional further response addressing the withheld
11 communications and other documents, which was ultimately served on July 30, 2021. (Aviles Decl.,
12 Ex. C.) The Second Further Response segregated the documents into nine broad categories, again
13 failing to establish that the claimed privileges apply. After further unsuccessful meet and confer
14 efforts, on August 23, 2021, Petitioner filed a second motion to compel. On October 4, 2021, the
15 Court ordered Respondents to produce a fulsome privilege log of the communications and other
16 documents Respondents withheld under the attorney-client and work product privileges. (Aviles
17 Decl., Ex. E.)

18 Respondents produced the latest privilege log on October 29, 2021, as well as an additional
19 29 email communications previously withheld under claims of privilege. The privilege log provided
20 only broad, boilerplate descriptions of the withheld communications and clearly fails to meet
21 Respondents’ burden to establish that the claimed privileges apply to the withheld documents.
22 Additionally, the 29 newly-produced email communications are clearly *not* privileged—raising
23 further global questions about the propriety of Respondents’ assertions of privilege regarding the
24 other withheld documents. (Aviles Decl., Ex. F.)

25 The parties stipulated to an extension to December 20, 2021 to bring this Motion. As
26 Petitioner represented to this Court at the status conference on December 10, 2021, Petitioner believes

27 _____
28 ¹ While Exhibit A is a “tentative” Order, the Court adopted it at the hearing.

² Respondents later advised the Court and Petitioner that due to duplication of records the correct number of withheld communications and other documents was approximately 200. The time period of the withheld documents—June 4, 2019 to October 31, 2019—occurred prior to the filing of the Petition.

1 this Motion may become unnecessary, or significantly limited in scope, if the Court orders the
2 deposition of Roberta Potter (a decision on which was previously deferred and set to be reheard on
3 March 4, 2022.) Therefore, Petitioner sought an additional extension to file this Motion. Respondents
4 refused that request, necessitating Petitioner to file this Motion before the Court’s determination on
5 whether the Potter deposition may proceed. (Aviles Decl., ¶¶ 15–18.)

6 **III. ARGUMENT**

7 **A. Respondents Have Once Again Failed Produce an Adequate Privilege Log in**
8 **Violation of This Court’s Orders**

9 The hallmark of a privilege log is a sufficiently detailed description of each withheld record
10 to allow Petitioner and the Court to determine whether Respondents’ claimed privileges and
11 exemptions actually apply to the withheld records. With their latest privilege log, Respondents once
12 again fail in this task. (*Catalina Island Yacht Club v. Sup. Ct.* (2015) 242 Cal.App.4th 1116, 1130
13 [*“A privilege log must identify with particularity each document the responding party claims is*
14 *protected from disclosure by a privilege and provide sufficient factual information for the*
15 *propounding party and court to evaluate whether the claim has merit.”*] (emphasis added); Code
16 Civ. Pro. § 2031.240(c)(1); *see also ACLU v. Sup. Ct.* (2011) 202 Cal.App.4th 55, 83.) “[A] privilege
17 log typically should provide . . . *a brief description of the document and its contents or subject*
18 *matter sufficient to determine whether the privilege applies, and the precise privilege or protection*
19 *asserted.”* (*Catalina Island Yacht Club*, 242 Cal.App.4th at 1130.)

20 First, Respondents’ privilege log fails to individually identify each document. Twenty-nine
21 emails³ are grouped in the same privilege log line-item with a letter or other document (for example,
22 a spreadsheet) identified as an attachment to the email. The entire line item is then identified as a
23 group indicating the privileges that allegedly apply—for example “A/C” and “WP” (for attorney-
24 client and work product)—with no information about whether both privileges are claimed for each
25 document, or whether certain privileges apply to only certain documents.

26
27 _____
28 ³ Email communications Nos. 2–3, 6–9, 11, 14–18, 21–22, 25, 27, 33, 43, 57–60, 72, 74–75, 93, 99–
100, 125. The email communication numbers identified in this memorandum refer to the privilege
log attached as Ex. G to the Aviles Decl. This log is the same as that produced by Respondents but
adds a left-hand column individually numbering each withheld email, as Respondents’ privilege log
failed to do so. The log reflects 170 emails and 29 attachments.

1 Second, as detailed below, Respondents fail to provide sufficient description of the withheld
2 documents to meet their burden to establish that the claimed privileges actually apply.

3 **B. Respondents Fail to Establish the Work-Product Privilege**

4 California law establishes two types of attorney work product protections: qualified and
5 absolute. (Code Civ. Pro. § 2018.030.) “General work product” is entitled only to “conditional or
6 qualified protection,” while writings that contain an “attorney’s impressions, conclusions, opinions,
7 or legal research or theories” are “absolutely protected.” (*League of Cal. Cities v. Sup. Ct.* (2015) 241
8 Cal.App.4th 976, 993, internal citations omitted.) Absolute work product protection does not apply
9 to the results of a factual investigation by an attorney unless the results were filtered through an
10 attorney’s “impressions, conclusions, opinions or legal theories.” (*Uber Techs., Inc. v. Google LLC*
11 (2018) 27 Cal.App.5th 953, 969.) Nor does it apply to information collected through attorney
12 investigations unless the investigation “constituted the provision of legal services.” (*City of*
13 *Petaluma v. Sup. Ct.* (2016) 248 Cal.App.4th 1023, 1035.) When work product is entitled to only
14 qualified protection, it will be subject to discovery where “denial of discovery will unfairly prejudice
15 the party seeking discovery in preparing that party’s claim or defense or will result in an injustice,”
16 Code Civ. Pro. § 2018.030(b), i.e., the party must show “good cause.” (*See Rojas v. Sup. Ct.* (2004)
17 33 Cal.4th 407, 423.) And, “[d]ocuments created by an attorney while performing duties that can be
18 performed by non-attorneys are not attorney work product.” (2 CA Pretrial Civil Procedure: The
19 Wagstaffe Group § 40-IV[C][4] (2021).)

20 Here, for example, Respondents’ privilege log contains one email communication (No. 125)
21 involving Department IT Staff Specialist Ronald Nooner “attach[ing] IT search terms.” Another
22 email communication involving Nooner “attach[es] IT Reports” (see Doc. 18). Four entries (Nos. 11,
23 33, 58, 60) concern emails with an attached spreadsheet. The descriptions for those entries are
24 factually insufficient to establish that any work product protection should apply. Despite stating that
25 the spreadsheets were “drafted and generated by an attorney and reflect[] an attorney’s conclusions
26 and opinions,” the only author listed for all four spreadsheet entries is Debbie De Guzman, a non-
27 attorney. Additionally, given the ministerial nature of responding to CPRA Requests, these
28 spreadsheets, even if “generated by an attorney,” likely were not produced pursuant to the attorney’s
role as a legal advisor.

1 **C. Newly Produced Documents Further Demonstrate Respondents’**
2 **Misunderstanding of Claimed Privileges**

3 Only confidential communications between a client and lawyer in the course of the lawyer-
4 client relationship are privileged. (*See Schaff v. Sup. Ct.* (1983) 146 Cal.App.3d 921, 924.) As defined
5 by Evidence Code section 952, a “confidential communication” means “information transmitted
6 between a client and his or her lawyer in the course of that relationship and in confidence” for the
7 purpose of obtaining a legal opinion and/or legal advice. The party claiming a privilege has the
8 “burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication
9 made in the course of an attorney-client relationship.” (*Costco Wholesale Corp. v. Sup. Ct.* (2009) 47
10 Cal.4th 725, 733; *see also Doe 2 v. Sup. Ct.* (2005) 132 Cal.App.4th 1504, 1522.) Here, the twenty-
11 nine documents newly produced by Respondents are clearly not privileged, and the fact that
12 Respondents continue to “maintain[] that the previously withheld 29 communications . . . fall within
13 the privileges and protections afforded attorney-client communication” calls into question their
14 claims of privilege generally. (Aviles Decl., Ex. D.) For example, the first two emails produced in
15 Respondents’ Third Further Response to RFP No. 3—Bates 000396–000398—are requests by non-
16 lawyer legal analysts to various Department staffers to search for records responsive to Petitioner’s
17 CPRA Requests. (Aviles Decl., Ex. F.) This is clearly an administrative task not subject to any
18 privilege, and the communications were not made by an attorney, nor do they reflect any legal advice
19 or services, nor any attorney’s opinions, research, or conclusions. All the other emails produced by
20 Respondents concern either requests to search made by legal analysts, or responses to the requests by
21 staffers. The responses are clearly administrative, not subject to any privilege, and they do not reflect
22 any legal advice or services, nor any attorney’s opinions, research, or conclusions.

23 **D. Respondents Have Not Met Their Burden to Demonstrate That the Withheld**
24 **Communications Are Privileged**

25 Application of the attorney-client privilege to public records is the exception, not the rule.
26 As the majority opinion in *Costco* confirms, the privilege “is not applicable when the attorney [for
27 example] acts merely as a negotiator for the client or is providing business advice [citation]; in that
28 case, the relationship between the parties to the communication is not one of attorney-client.” (*Costco*,
47 Cal.4th at 735.) Similarly, no privilege is created by the attorney’s mere review of information or
because records were transmitted to an attorney. (*See Laguna Beach Cty. Water Dist. v. Sup. Ct.*

1 (2004) 124 Cal.App.4th 1453, 1458 [documents not originally protected by the attorney-client and
2 work product privileges do not become so merely by being provided to or transmitted by an
3 attorney].)

4 Careful application of the attorney-client privilege is particularly critical in cases like this
5 one that involve public agencies where the public has a strong interest in transparency. By analogy,
6 the Brown Act and the protections of attorney-client privilege “are capable of concurrent operation
7 if the lawyer-client privilege is not overblown beyond its true dimensions.” (*Sacramento Newspaper*
8 *Guild v. Sacramento Cty. Bd. of Supervisors* (1968) 263 Cal.App.2d 41, 58.) “Private clients,
9 relatively free of regulation, may set relatively wide limits on confidentiality. Public board members,
10 sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose
11 of deflating the spread of the public meeting law. Neither the attorney’s presence nor the
12 happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose
13 revelation will not injure the public interest.” (*Sacramento Newspaper Guild*, 263 Cal.App.2d at 58;
14 *see also* 36 Ops.Cal.Atty.Gen. 175 (1960).) While the Attorney General has recognized that although
15 public proceedings “may eventually be subject to judicial review . . . this mere possibility in our
16 opinion would not satisfy [an exemption]” to the rule that agency proceedings are open to the public,
17 explaining that “to conclude that an exception would exist because there is always the possibility of
18 judicial review of a board’s decision would be tantamount to saying that any legislative body of a
19 local agency may meet in private on any matter, since, if they do not proceed in the manner required
20 by law, or somehow abuse their discretion in so doing, they are subject to a lawsuit to correct their
21 action.” (71 Ops.Cal.Atty.Gen 96 (1988) at *8–9.)

22 Here, the CPRA requires public agencies to produce public records and Petitioner has a
23 right to inquire as to whether the search to identify responsive records was adequate. (*See, e.g.,* Gov.
24 Code § 6253.1; *ACLU v. Sup. Ct.* (2011) 202 Cal.App.4th 55, 82.) If the attorney-client privilege
25 covered all communications which evidenced the steps public agencies took in response to a CPRA
26 request, no petitioner would be able to adequately challenge an agency’s failure to produce records.
27
28

1 **E. The Multiple Roles of Government Agency Attorneys Require Additional**
2 **Scrutiny When a Claim of Privilege Arises**

3 Courts have repeatedly rejected the Respondents’ position that communications drafted or
4 received by in-house counsel are *per se* privileged. *Costco* recognized that communications and
5 documents are not protected by attorney-client privilege or the attorney-work product doctrine if the
6 “dominant purpose” for which they were made “was something other than [] provid[ing] the client
7 with a legal opinion or legal advice.” (47 Cal.4th at 735.) In the context of the CPRA, “[t]o evaluate
8 whether the party claiming the privilege has made a prima facie showing, the focus is on the *purpose*
9 *of the relationship* between the parties to a communication.” (*League of Cal. Cities v. Sup. Ct.* (2015)
10 241 Cal.App.4th 976, 989, emphasis in original, *citing Costco*, 47 Cal.4th 725 at 739–740.) The
11 importance of determining the purpose of a communication is at its zenith for cases involving in-
12 house or government counsel, because, unlike the usual paradigm of a client seeking out an attorney
13 for help with a specific legal issue, in-house and government counsel perform a range of functions,
14 some in the furtherance of an attorney-client relationship, some related to the day-to-day operations
15 of a public agency. (*See Animal Welfare Inst. v. Nat’l Oceanic & Atmospheric Admin.* (D.D.C. 2019)
16 370 F.Supp.3d 116, 130–31 (*quoting In re Lindsey* (D.C. Cir. 1998) 148 F.3d 1100, 1106 (per curiam)
17 [A “government attorney’s ‘advice on political, strategic, or policy issues, valuable as it may [be],
18 would not be shielded from disclosure by the attorney-client privilege.’”]).⁴ Thus, it is insufficient
19 for Respondents to state that all communications or documents produced by or sent to government
20 lawyers are presumptively privileged, because not all communications or documents produced by or
21 sent to government lawyers were made in the course of a relationship with the dominant purpose of
22 providing a client with a legal opinion or legal advice. Here, Respondents’ descriptions of the
23 withheld documents fail to establish that the communications are in fact subject to the attorney-client
24 or attorney work-product privileges.

25
26 _____
27 ⁴ “The CPRA was modeled on the [] Freedom of Information Act (FOIA) . . . and was enacted for
28 the purpose of increasing freedom of information by giving members of the public access to
information in the possession of public agencies.” (*City of Los Angeles v. Sup. Ct.* (2017) 9
Cal.App.5th 272, 282). The legislative history and judicial construction of FOIA “serve to illuminate
the interpretation of its California counterpart,” the CRPA. (*ACLU Found. v. Deukmejian* (1982) 32
Cal.3d 440, 447.)

1 For example, email communications Nos. 13, 35, 42, 96–98, 140, 143–147, 154–156, 159,
2 161, 163–164, 166–168, and 170 are broadly described as follows:

3 The email transmits information between an attorney and Legal Analyst concerning
4 the PRA Requests as necessary to accomplish the purpose for which the Legal
Branch was consulted.

5 Twelve variations on this description provide no additional insight into the purpose of the
6 communications.⁵

7 One aspect of the “dominant purpose” analysis is whether the in-house or government
8 counsel “performed functions which are not typically those of either outside counsel or house
9 corporate [government] counsel.” (2,022 Ranch v. Sup. Ct. (2003) 113 Cal.App.4th 1377, 1393
10 [disapproved of on other grounds in Costco, 47 Cal.4th at 739–740, quoting Chi. Title Ins. Co. v. Sup.
11 Ct. (1985) 174 Cal.App.3d 1142, 1151].) If the function of the communication or other activity is not
12 one typical of outside or corporate counsel operating in an attorney-client role, no privilege applies.
13 As Chief Justice George noted in his concurring opinion in Costco, “it long had been established that,
14 in order to be privileged, it was necessary that ***the communication be made for the purpose of the***
15 ***attorney’s professional representation, and not for some unrelated purpose.***” (47 Cal.4th at 742,
16 citations omitted, emphasis added.) “As discussed, communications between persons who stand in
17 an attorney-client relationship are not privileged in every instance, because it sometimes occurs that
18 an attorney-client relationship exists, but that the attorney also acts in another capacity for the client,
19 as, for example, the client’s agent in a business transaction.” (*Id.* at 744.) As explained in 2,022
20 Ranch, “[t]his ‘dominant purpose’ test not only looks to the dominant purpose for the communication,
21 but also to the dominant purpose of the attorney’s *work*.” (113 Cal.App.4th at 1390–91, emphasis in
22 original.) In essence, the type of relationship between government attorneys and agencies varies
23 depending on the context of the work the attorneys perform—that is, the posture of government
24 attorneys vis-à-vis a public agency is not immutably one of attorney and client. Here, no information
25 has been provided regarding “the purpose for which the Legal Branch was consulted”—the opaque
26 description begs the question regarding the dominant purpose of the communications.
27
28

⁵ Email communications Nos. 4–5, 93, 100, 118, 152–153, 158, 160, 162, 165, 169.

1 Similarly, email communications Nos. 1–3, 21, 30, 34, 37–41, 49, 51–52, 80, 84, 86–88, 94–
2 95, 139 are described as follows:

3 The email [and draft letter] transmit[s] information concerning the Department’s
4 response to the PRA Requests in the context of providing legal advice and
5 representation to [the Department and to] the Commissioner and his staff.

6 Thirty variations on this description provide no additional insight of the context of these emails.⁶

7 To the extent that Respondents seek to justify these documents on the basis of the insertion
8 of “in the context of providing legal advice and representation,” that statement is a wholly conclusory
9 statement. These communications are not presumptively attorney-client in nature because they tend
10 to reflect the ministerial duties of a public agency, and there is no additional factual support indicating
11 why or how the communications were attorney-client in nature. (*See, e.g., Uber Techs., Inc. v. Google*
12 *LLC* (2018) 27 Cal.App.5th 953, 968 [claim that communications ““were made for the purpose of
13 seeking legal advice’ to ‘assess the potential litigation threats faced”” rejected because facts showed
14 that the “need for legal advice or to assess potential litigation threat did not drive” the
15 communications].)

16 Stating that a communication was made “in the context of providing...representation to the
17 Department and to the Commissioner and his staff,”⁷ or that a communication was made
18 “related/relating to the legal representation of the Department [and of the Commissioner and his
19 staff],”⁸ is also insufficient. In light of the multiple roles government attorneys play, simply stating
20 that they were “providing representation” does not sufficiently support a claim that the attorneys were
21 providing the client with a legal opinion or advice. Government attorneys within an agency are
22 ostensibly “representing” that agency in some manner of speaking no matter what they are doing on
23 the job—if one of the attorneys responded to a non-attorney client inquiry from a different agency
24 lawyer or non-lawyer legal analysts, it would still be correct to say the attorney was “representing”
25 the Department in that response, but the response would not be privileged. Similarly, stating that a
26 communication “relates to legal representation” begs the question of whether the communication was

27 ⁶ Document Nos. 19–20, 28, 31–32, 45–48, 50, 53, 56, 58, 66, 71–72, 81–83, 85, 91–92, 126–127,
138, 142, 149–151, 157.

28 ⁷ Document Nos. 1–3, 18–21, 28, 30–32, 34, 37–41, 45–53, 56, 58, 66, 71–72, 80–89, 91–92, 94–95,
117, 119–127, 138–139, 142, 149–151, 157.

⁸ Document Nos. 7–11, 14–17, 22, 24–27, 33, 43–44, 47–48, 54–55, 57, 60–65, 69–70, 73–74, 76–
77, 93, 99–116, 128–137, 141, 148.

1 made pursuant to an attorney-client relationship for the dominant purpose of providing legal advice
2 or opinion. Thus, rather than conclusory assertions, Respondents must provide sufficient factual
3 support for their privilege claims in order to establish that the communications were made in the
4 course of a relationship with the dominant purpose of providing the client with a legal opinion or
5 advice. Respondents' position appears to be that CPRA requests are "legal matters," and hence
6 privileged. However, the relevant issue is whether responding to a CPRA request and performing a
7 search for records constitutes the provision of legal advice or opinion within the context of an
8 attorney-client relationship. For example, a contract is also a "legal matter," but it is undisputed that
9 a lawyer acting as a negotiator for a client is not engaged in legal work for the client, such that the
10 attorney-client privilege would apply. (*Costco*, 47 Cal.4th at 735.)

11 Furthermore, typically, government agency counsel is not involved in the process of
12 responding to routine CPRA or FOIA requests, at least not in the initial stages. While obviously a
13 lawsuit over a CPRA request implicates attorney-client work, here all the withheld documents
14 occurred long before the Petition was filed on February 18, 2020. The mere process of searching for
15 documents and responding to the request is primarily administrative in nature and should not be
16 withheld under claims of attorney-client or attorney work-product privileges. In other words, where,
17 as here, senior government counsel like Bryant Henley and Deputy Commissioners are immediately
18 involved in responding to a CPRA request, these communications are not presumptively attorney-
19 client privileged because the "dominant purpose" of communications related to a CPRA request is
20 ministerial, not attorney-client. The California Supreme Court reaffirmed this principle in *Los*
21 *Angeles Cty. Bd. of Supervisors v. Sup. Ct.* (2016) 2 Cal.5th 282, 296, a case which looked at the
22 interplay between the CPRA and the attorney/client privilege. The Court, relying in part on Chief
23 Justice George's concurring opinion in *Costco*, recognized that "[i]n order for a communication to be
24 privileged, it must be made for the purpose of the legal consultation, rather than some unrelated or
25 ancillary purpose." (*Id.* at 297.) The Court found that the inquiry turns on "the link between the
26 content of the communication and the types of communication that the attorney-client privilege was
27 designed to keep confidential," and whether disclosure of public records would come "close enough
28 to [the] heartland [of the attorney-client privilege] to threaten the confidentiality of information

1 directly relevant to the attorney’s distinctive professional role.” (*Id.*) Here, 37⁹ email communications
2 occurred between June 4, 2019, when the initial draft of Petitioner’s first CPRA request was
3 submitted to the Department, and July 7, 2019, when the first media report was published regarding
4 the pay-to-pay scandal.¹⁰ The Court should order those records to be produced, because
5 notwithstanding other objections raised in this Motion, prior to July 7, 2019 the response to the CPRA
6 Requests should have been purely ministerial.

7 Additionally, many entries refer to an email sent by Chao Lor, or another attorney in the
8 Government Legal Bureau (“GLB”), that was apparently made “in the context of providing legal
9 advice and representation to [the Department and to] the Commissioner and his staff.”¹¹ However,
10 according to the Department’s website GLB staff perform many tasks that are not subject to any
11 privilege:

12 The Government Law Bureau (GLB) in the Legal Branch is responsible for legal
13 support to the Legislative Office, is the Custodian of Records for the Department
14 and is responsible for the Department’s rulemaking program. GLB staff also serve
15 as the Department’s Agent for Service of Process and provide legal services relating
to requests for records. In addition, GLB handles insurance subjects relating to
Seniors, Workers’ Compensation and Catastrophe related matters.

16 (Cal. Dep’t of Ins., Gov’t Law Bureau, [http://www.insurance.ca.gov/0500-about-us/02-](http://www.insurance.ca.gov/0500-about-us/02-department/050-lgc/GovLaw.cfm)
17 [department/050-lgc/GovLaw.cfm](http://www.insurance.ca.gov/0500-about-us/02-department/050-lgc/GovLaw.cfm), a true and correct copy of which is attached to the Aviles Decl. as
18 Ex. I.) Like in-house corporate lawyers, the in-house government lawyers in this case provide a broad
19 range of services to their clients that may extend beyond privileged legal counseling, including
20 political advice and performing the purely ministerial duties of responding to CPRA requests,
21 including searching for responsive documents. Thus, the mere fact that a CPRA request was handled
22 by in-house counsel cannot, alone, support a finding of privilege. If such were the case, then a public
23 agency would be able to hide all communications and all sorts of documents, such as minutes,
24 agendas, ordinances, and requests for proposals, simply by using attorneys to conduct routine agency
25 business. This would subvert disclosure of its routine functions and, in turn, fundamentally undermine

26 _____
27 ⁹ Document Nos. 132–133, 136–170.

28 ¹⁰ Jeff McDonald, *State’s Top Insurance Regulator Accepted Tens Of Thousands Of Dollars From Industry Executives, Records Show*, San Diego Union Tribune (July 7, 2019), <https://www.sandiegouniontribune.com/news/watchdog/story/2019-07-05/states-top-insurance-regulator-accepted-tens-of-thousands-of-dollars-from-industry-executives-records-show>.

¹¹ Document Nos. 1–3, 28, 31, 34, 47, 66, 80, 82, 124–125, 150, 157.

1 the CPRA. The failure to adequately describe the precise contours of the attorney-client relationship
2 is not limited to the privilege log entries identified above, but rather permeates the entire log.

3 **F. Communications Involving Special Counsel Bryant Henley Require Additional**
4 **Scrutiny**

5 Seventy-three email communications and one calendar entry¹² listed in Respondents'
6 privilege log were authored by or received by Department Special Counsel Bryant Henley, who
7 headed Respondents' search for records in response to Petitioner's CPRA Requests.

8 A declaration submitted with this Motion from Rusty Areias, a former legislator turned
9 lobbyist, now confirms that Mr. Areias and Fabian Núñez, former Speaker of the California Assembly
10 turned lobbyist, communicated with Respondent Ricardo Lara and Bryant Henley on behalf of
11 Applied. (Aviles Decl., Ex. H.) Mr. Areias had multiple conversations with Mr. Henley and at least
12 one other Department staffer, Lazlo Komjathy. "In these calls I informed Henley and Komjathy,
13 among other things, that I was representing [California Insurance Company] and Applied
14 Underwriters." (*Id.*) Remarkably, despite Mr. Henley's knowledge that Areias and Núñez were
15 representing Applied Underwriters, Inc., neither Núñez's nor Areias's name appears among the
16 search terms that Respondents used to identify records of meetings and conferences with individuals
17 "employed by or representing" Applied and the other companies identified in the CPRA Requests.¹³
18 Apparently, Mr. Henley failed to disclose these communications to Department staff responsible for
19 searching for public records in response to the CPRA Requests.

20 In the FOIA context, when evidence of bad faith undermines an agency's claims, courts
21 routinely engage in additional scrutiny of withheld records. (*Lion Raisins, Inc. v. United States Dep't*
22 *of Agric.* (E.D. Cal. 2009) 636 F.Supp.2d 1081, 1106–07.) Likewise, when the subject matter of a
23 public records search "involves activities which, if disclosed, would *publicly embarrass* the agency
24 or that a so-called 'cover up' is presented," the government is not allowed a presumption of good

25 _____
26 ¹² Thirty-five emails were received by Mr. Henley: Nos. 1–3, 12, 24, 26, 28–29, 31, 34, 36–38, 46,
27 51, 53, 56, 58, 67, 75, 79–80, 82, 84, 88, 90, 119, 122, 124–126, 129, 138, 148, 157. Thirty-six emails
28 were sent by Henley: Nos. 6, 19, 21, 23, 25, 30, 32, 45, 50, 52, 57, 59, 68, 78, 81, 83, 85, 89, 91–95,
100–101, 118, 120–121, 123, 127, 139, 149, 151–153, 158. Two emails copied Mr. Henley: Nos. 71,
150. In addition, document No. 131 is a calendar entry authored by Mr. Henley.

¹³ Nor were any records (meeting notes, phone call logs, etc.) of the communications between
Núñez/Areias and Lara/Henley produced or even identified by Respondents though such records
would be clearly responsive to the CPRA Requests.

1 faith. (*Rugiero v. United States Dep't of Justice* (6th Cir. 2001) 257 F.3d 534, 546, emphasis in
2 original.) Moreover, it is verboten to allow a claim of privilege to “conceal fraud or otherwise work
3 injustice.” (*See, e.g., Evid. Code § 1060.*) “Recognizing the privilege in such cases would amount to
4 a legally sanctioned license to commit the wrongs complained of, for the wrongdoer would be
5 privileged to withhold his wrongful conduct from legal scrutiny.” (Law Revision Comm’n Comments
6 on Evid. Code § 1060; *see also* Evid. Code § 956 and its crime-fraud exception to attorney-client
7 privilege.) Where a privileged communication reflects a fraudulent or criminal scheme that “evolved
8 from” an attorney’s advice, the crime-fraud exception to attorney-client privilege applies. (*BP Alaska*
9 *Expl., Inc. v. Sup. Ct.* (1988) 199 Cal.App.3d 1240, 1268–69.) Here, the underlying records sought
10 by the CPRA Requests regarding communications and meetings with companies involved in the pay-
11 to-play scandal are potentially embarrassing to the agency, and the new evidence raises troubling
12 questions about Respondents’ search for records. The withheld communications regarding the CPRA
13 Requests will likely shed new light on what Respondents did and did not do to search for records.
14 Respondents should not be allowed to shield these documents under claims of privilege.

15 Additionally, Respondents’ privilege log fails to establish “who was the attorney and who
16 was the client in these communications” involving Mr. Henley. (*League of Cal. Cities v. Sup. Ct.*
17 (2015) 241 Cal.App.4th 976, 991.) This failure undermines Respondents’ refusal to produce the
18 documents as “[t]he attorney-client privilege . . . confers a privilege on the *client* ‘to refuse to disclose,
19 and to prevent another from disclosing, a confidential communication between *client* and lawyer
20’” (*Costco*, 47 Cal.4th at 732, citing Evid. Code § 954, emphasis added.) For example, according
21 to the Respondents’ First Further Response,

22 . . . Bryant Henley serves as Special Counsel to the *Commissioner and his staff* and
23 provides legal advice on various issues including litigation, adjudicatory
24 proceedings, and other legal matters.

25 (Aviles Decl., Ex. B, emphasis added.)

26 However, according to the Department’s website, the Special Counsel’s legal representation
27 is limited to the Commissioner *himself*, not his “staff,” or as implied in Respondents’ Second Further
28 Responses, Deputy Commissioners and other Executive Office staff.

 The Special Counsel provides *independent legal advice directly to the Insurance
Commissioner*, provides oversight of Department Rule-making Projects and
Regulations, directs the interaction with the National Association of Insurance

1 Commissioners (NAIC), and manages various special projects and Commissioner-
2 initiatives.

3 (Cal. Dep't of Ins., Office of the Special Counsel, emphasis added,
4 <http://www.insurance.ca.gov/0500-about-us/02-department/080-scc/>, a true and correct copy of
5 which is attached to the Aviles Decl. as Ex. I.)¹⁴ In other words, the role of the Special Counsel
6 creates an attorney-client relationship with only Respondent Lara. A single email (No. 6) is solely
7 between Mr. Henley and Respondent Lara. Two other emails are between Henley and Lara and a
8 Deputy Commissioner, a Senior Deputy Commissioner, and the Chief Deputy Commissioner. (Nos.
9 94 and 95). Even if the Deputy Commissioners were “clients” of Mr. Henley, something Respondents
10 failed to establish, any other communications Mr. Henley had with Department employees for the
11 purpose of responding to the CPRA Requests are not privileged. (*See Costco*, 47 Cal.4th at 735–736).
12 Moreover, the email communications in the privilege log involving Special Counsel Bryant Henley
13 raise the same issues addressed above regarding the dominant purpose of the withheld
14 communications and concerns about shielding routine agency actions behind the guise of attorney-
15 client privilege.

16 **G. Alternately, the Court Should Issue an Evidentiary Sanction Prohibiting**
17 **Respondents from Introducing Any Documents Reflected in the Privilege Log**

18 It is clearly established that a party may not later introduce evidence or testimony on subjects
19 for which it claimed privilege. (*See, e.g., Steiny & Co., Inc. v. Cal. Elec. Supply Co.* (2000) 79
20 Cal.App.4th 285, 292 [by invoking trade secrets privilege to avoid disclosing proprietary information
21 relevant to its damage calculations, plaintiff was barred from proceeding with damages claims];
22 *Dwyer v. Crocker Nat'l Bank* (1987) 194 Cal.App.3d 1418, 1432–1433 [court could order dismissal
23 of lawsuit against insurance company where plaintiff invoked Fifth Amendment privilege to preclude
24 questioning as to whether he started fire]; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1544–
25 1546 [allowing party to testify about various information not previously produced would permit that
26 party to benefit from his withholding of discovery by forcing plaintiffs to proceed to trial without the
27 benefit of the discovery on those issues]; *Do It Urself Moving & Storage, Inc. v. Brown, Leifer,*
28 *Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36 [the court issued evidence sanctions against plaintiffs,

¹⁴ Petitioner respectfully requests judicial notice of Exhibit I, which are true copies of official Department webpages, pursuant to, *inter alia*, Evid. Code § 452, subsections (c), (g), and (h).

1 which prevented them from offering accounting evidence at trial because the plaintiff failed to
2 produce an audit report and supporting documentation that defendants had requested].) The Court
3 may also draw inferences from a party's suppression of evidence or its failure to explain evidence or
4 facts in the case against that party. (Evid. Code § 413.)

5 Here, Respondents claim that communications about Petitioner's CPRA Requests are subject
6 to attorney-client privilege. However, in support of their previous Motion for Protective Order,
7 Respondents introduced testimony in the form of declarations from one of the Department's attorneys
8 as well as a Senior Legal Analyst arguing that their search was reasonable. Respondents should not
9 be allowed to selectively introduce testimony to support their position while simultaneously hiding
10 evidence of how the Department responded to the CPRA Requests behind tenuous claims of
11 privilege.

12 **IV. CONCLUSION**

13 For the reasons set forth above, Petitioner respectfully requests that this Court issue an order
14 compelling Respondents to produce the withheld documents or in the alternative, issue an evidentiary
15 sanction prohibiting Respondents from later introducing evidence or testimony on the question of
16 how the Department searched for responsive records.

17 DATED: December 19, 2021

Respectfully submitted,

18 **CONSUMER WATCHDOG**

19
20 By:  _____
21 Jerry Flanagan

22 **LAW OFFICES OF KELLY AVILES**

23
24 By:  _____
25 Kelly Aviles

26 *Attorneys for Plaintiff/Petitioner*
27 **CONSUMER WATCHDOG**

DECLARATION OF KELLY AVILES

I, Kelly Aviles, declare and state as follows:

1. I am an attorney duly licensed to practice law before all of the courts of the State of California, and I am counsel for Petitioner CONSUMER WATCHDOG in the above-entitled action. The facts stated in this Declaration are true and correct of my own personal knowledge. If called as a witness, I could and would competently testify thereto.

2. A true and correct copy of this Court’s May 12, 2021 order is attached as Exhibit A.

3. A true and correct copy of Respondents’ First Further Response to RFP No. 3 is attached hereto as Exhibit B.

4. A true and correct copy of Respondents’ Second Further Response to RFP No. 3 is attached hereto as Exhibit C.

5. A true and correct copy of Respondents’ Third Further Response to RFP No. 3 is attached hereto as Exhibit D.

6. Petitioner filed a Motion to Compel Further Responses to Request for Production, Set One, No. 3 on August 23, 2021. Following a hearing, on October 4, 2021 the Court ordered Respondents to produce a fulsome privilege log of the internal communications and other documents Respondents withheld under the attorney-client privilege. A true and correct copy of the Court’s order is attached hereto as Exhibit E.

7. A true and correct copy of the 29 email communications newly produced on October 29, 2021 is attached hereto as Exhibit F.

8. Respondents produced a privilege log on October 29, 2021. A copy of this privilege log is attached hereto as Exhibit G. This log is the same as that produced by Respondents but adds a left-hand column individually numbering each withheld email as Respondents’ privilege log failed to do so.

9. A true and correct copy of a declaration from Rusty Areias is submitted with this Motion and is attached hereto as Exhibit H.

10. A true and correct copy of the Government Law Bureau and Special Counsel web pages taken from the California Department of Insurance’s website are attached hereto as Exhibit I.

1 11. On November 4, 2021, Petitioner sent meet and confer correspondence to
2 Respondents indicating it was Petitioner’s view that the privilege log produced by Respondents was
3 insufficient to carry the burden required to assert the privileges in question. The letter further
4 indicated Petitioner’s willingness to forego this Motion to Compel provided that the Department
5 agree to a four-hour deposition of Scheduling Director Roberta Potter. A true and correct copy of the
6 meet and confer letter is attached hereto as Exhibit J.

7 12. Counsel for Respondents responded via email on November 11, 2021, declining
8 Petitioner’s offer to forego a further motion to compel in exchange for agreeing to a deposition of
9 Roberta Potter. A true and correct copy of this email is attached hereto as Exhibit K.

10 13. On November 23, 2021, Petitioner sent Respondents an additional meet and confer
11 letter. The letter discussed further the importance of the deposition of Roberta Potter as well as a
12 discussion of the reasons Petitioner believed the privilege log produced by Respondents on
13 October 29, 2021 was legally deficient. The letter concluded by requesting a one-week extension to
14 the deadline for Petitioner to file this Motion from December 13, three days after a scheduled status
15 conference on December 10, to December 20. A true and correct copy of this letter is attached hereto
16 as Exhibit L.

17 14. Counsel for Respondents emailed counsel for Petitioner on November 29, 2021,
18 agreeing to the above extension on the condition that any hearing be set far enough out so that
19 Respondents would not be required to brief an opposition to the motion over the impending holidays.
20 A true and correct copy of this email is attached hereto as Exhibit M.

21 15. After the December 10, 2021 trial setting conference, counsel for Petitioner
22 telephoned counsel for Respondents to request a further extension of time to move to compel further
23 responses to RFP No. 3. Respondents sent an email to counsel for Petitioner on December 13
24 indicating that counsel for Respondents would not grant the further extension of time, citing the desire
25 to have the Court hear the motion to compel and the pending motion to lift a protective order at the
26 same time for “the sake of efficiency.” A true and correct copy of this email correspondence is
27 attached hereto as Exhibit N.

28 16. Counsel for Petitioner responded via email on December 14. The email clarified that
only this anticipated Motion to compel further responses to RFP No. 3 was subject to a deadline. The

1 email conveyed Petitioner’s belief that the limited deposition of Scheduling Director Roberta Potter
2 may obviate the need to file this Motion to compel further responses to RFP No. 3, and as such for
3 the sake of keeping costs down, Petitioner would prefer to have a decision from the Court on the
4 motion to lift the protective order regarding depositions first. A true and correct copy of this email
5 correspondence is attached hereto as Exhibit O.

6 17. Counsel for Respondents responded via email December 15, refusing to grant a
7 further extension of time to file this Motion. A true and correct copy of this email correspondence is
8 attached hereto as Exhibit P.

9 18. Counsel for Petitioner responded the same day, pointing out that “denying the further
10 extension will have absolutely no effect on when this matter is heard,” as the Court already set a date
11 of March 4, 2022, and that the next available date for this Motion to Compel Further Responses to
12 RFP No. 3 was April 27, 2021. Counsel also reiterated that the Court did not deny Petitioner’s request
13 for the Potter deposition, but only deferred ruling on the motion until Respondents’ document
14 production was complete. A true and correct copy of this email correspondence is attached hereto as
15 Exhibit Q.

16
17 I declare under penalty of perjury under the laws of the State of California that the foregoing
18 is true and correct and that this Declaration was executed on December 19, 2021, at Los Angeles,
19 CA.

20 
21 KELLY AVILES
22
23
24
25
26
27
28

EXHIBIT H

1 Jerry Flanagan (SBN 271272)
2 jerry@consumerwatchdog.org
3 Benjamin Powell (SBN 311624)
4 ben@consumerwatchdog.org
5 **CONSUMER WATCHDOG**
6 6330 San Vicente Blvd., Suite 250
7 Los Angeles, CA 90048
8 Tel: (310) 392-0522
9 Fax: (310) 392-8874

7 Kelly Aviles (SBN 257168)
8 kaviles@opengovlaw.com
9 **LAW OFFICES OF KELLY AVILES**
10 1502 Foothill Blvd., Suite 103-140
11 La Verne, CA 91750
12 Tel: (909) 991-7560
13 Fax: (909) 991-7594

12 **Attorneys for Petitioner/Plaintiff**
13 **CONSUMER WATCHDOG**

14
15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **FOR THE COUNTY OF LOS ANGELES**
17

18 **CONSUMER WATCHDOG, a non-profit**
19 **organization,**

20 **Petitioner/Plaintiff,**

21 **v.**

23 **RICARDO LARA, in his official capacity as the**
24 **Insurance Commissioner of the State of**
25 **California; CALIFORNIA DEPARTMENT OF**
26 **INSURANCE; and DOES 1-50,**

27 **Respondents/Defendants.**
28

Case No. 20STCP00664

Assigned to Hon. Mitchell L. Beckloff

DECLARATION OF RUSTY AREIAS

Action Filed: February 27, 2020
Hearing Date: December 10, 2021

1 I, Rusty Areias, declare as follows:

2
3 1. I am a former member of the California State Assembly and at all times relevant to this declaration
4 was a partner in California Strategies, a public affairs firm. The facts stated in this Declaration are true and correct of
5 my own personal knowledge.

6 2. I have been asked in this declaration at the request of Consumer Watchdog to provide responses to
7 some questions relevant to the above captioned lawsuit. This is not intended, nor does it constitute, a complete or
8 detailed description of all of the work that I undertook on behalf of Applied Underwriters in connection with its efforts
9 related to domesticating CIC in California or saving the Berkshire deposit from being forfeited.

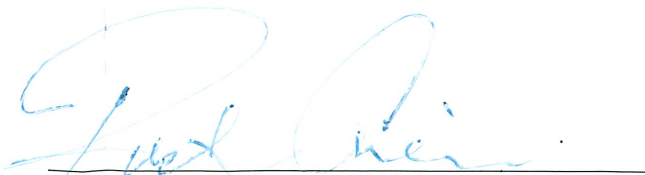
10 3. At some time between approximately February and June 2019, Fabian Nunez and I had a brief
11 conversation with California Insurance Commissioner Ricardo Lara wherein Fabian Nunez informed Commissioner
12 Lara that we might be or were about to be representing Applied Underwriters and might reach out to him in the future
13 in this regard.

14 4. In June 2019, I phoned into a meeting between Fabian Nunez and Steve Menzies to discuss strategy
15 for obtaining approval by the California Department of Insurance ("CDI") of California Insurance Company's
16 ("CIC") FORM-A application, which broadly related to the transfer of ownership of CIC to Mr. Menzies. We
17 agreed to the material terms of the consulting agreement on June 26, 2019 to get CIC's application approved by CDI
18 and began work immediately. The contract was formally signed on July 9, 2019. Steven Menzies is the president of
19 Applied Underwriters.
20

21 5. During the course of assisting the clients on this matter, I had multiple phone calls with Bryant
22 Henley at CDI regarding CIC and Applied Underwriters. In our telephonic conversations Lazlo Komjathy at CDI
23 was always on the line but never said anything. In these calls I informed Henley and Komjathy, among other things,
24 that I was representing CIC and Applied Underwriters. I cannot recall the dates on these calls.

25 6. I do not recall having any other communications with Commissioner Lara about this matter.

26
27 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and
28 correct and that this Declaration was executed on 12/10/21 at San Francisco.



RUSTY AREIAS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28