

1 AMY L. BOMSE (No. 218669)  
2 SHARON D. MAYO (No. 150469)  
3 JULIE KENT (No. 302213)  
4 ARNOLD & PORTER KAYE SCHOLER LLP  
5 Three Embarcadero Center, 10th Floor  
6 San Francisco, California 94111-4024  
7 Telephone: (415) 471-3100  
8 Facsimile: (415) 471-3400  
9 Email: amy.bomse@arnoldporter.com  
10 sharon.mayo@arnoldporter.com  
11 julie.kent@arnoldporter.com

12 DIANA STERK (admitted *pro hac vice*)  
13 ARNOLD & PORTER KAYE SCHOLER LLP  
14 250 West 55th Street  
15 New York, NY 10019-9710  
16 Telephone: (212) 836-8000  
17 Email: diana.sterk@arnoldporter.com

18 *Attorneys for Plaintiffs*

BETH H. PARKER (No. 104773)  
PLANNED PARENTHOOD NORTHERN  
CALIFORNIA  
2185 Pacheco Street  
Concord, California 94520  
Telephone: (415) 531-1791  
Email: beth.parker@ppnorcal.org

HELENE T. KRASNOFF  
(admitted *pro hac vice*)  
PLANNED PARENTHOOD FEDERATION OF  
AMERICA  
1110 Vermont Avenue, NW, Suite 300  
Washington, DC 20005-6300  
Telephone: (202) 973-4800  
Email: helene.krasnoff@ppfa.org

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

19 PLANNED PARENTHOOD FEDERATION OF  
20 AMERICA, INC., et al.,  
21 Plaintiffs,  
22 v.  
23 CENTER FOR MEDICAL PROGRESS, et al.,  
24 Defendants.

Case No. 3:16-cv-00236-WHO

**PLAINTIFFS' MOTION FOR *IN*  
CAMERA REVIEW OF DOCUMENTS  
WITHHELD FROM DISCOVERY BY  
DEFENDANT CENTER FOR  
MEDICAL PROGRESS AS ATTORNEY-  
CLIENT PRIVILEGED**

**UNREDACTED FILED  
CONDITIONALLY UNDER SEAL**

Judge: Hon. Donna M. Ryu

**TABLE OF CONTENTS**

**Page**

1

2

3 NOTICE OF MOTION ..... IV

4 MEMORANDUM OF POINTS AND AUTHORITIES ..... 1

5 I. INTRODUCTION ..... 1

6 II. FACTUAL BACKGROUND AND MEET-AND-CONFER HISTORY ..... 1

7 III. LEGAL STANDARDS..... 3

8 A. Attorney-Client Privilege ..... 3

9 B. The Crime-Fraud Exception to the Attorney-Client Privilege ..... 3

10 C. Seeking *In Camera* Review of Documents Withheld as Privileged ..... 3

11 IV. CMP HAS FAILED TO ESTABLISH THAT CERTAIN

12 COMMUNICATIONS ARE WITHIN THE SCOPE OF ANY

13 ATTORNEY-CLIENT PRIVILEGE ..... 4

14 A. “CMP Attorneys” and “Law Firm Staff” ..... 4

15 B. “CMP Personnel” and Other Third Parties ..... 7

16 V. CMP’S COMMUNICATIONS WITH MS. SHORT ARE

17 DISCOVERABLE UNDER THE CRIME-FRAUD EXCEPTION; AT

18 THE VERY LEAST *IN CAMERA* REVIEW IS WARRANTED. .... 9

19 VI. CONCLUSION ..... 11

20

21

22

23

24

25

26

27

28

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

1

2

3

4 *Apple Inc. v. Samsung Electronics Co.*,

5 306 F.R.D. 234 (N.D. Cal. 2015) ..... 4

6 *Burlington N. Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. Of Mont.*,

7 408 F.3d 1142 (9th Cir. 2005)..... 3, 4

8 *Clark v. United States*,

9 289 U.S. 1 (1933)..... 3

10 *In re Grand Jury Investigation*,

11 810 F.3d 1110 (9th Cir. 2016)..... 3

12 *In re Grand Jury Investigation*,

13 974 F.2d 1068 (9th Cir. 1992)..... 3, 4

14 *In re High-Tech Employee Antitrust Litig.*,

15 No. 11-CV-2509-LHK-PSG, 2013 WL 772668 (N.D. Cal. Feb. 28, 2013) ..... 3

16 *Nat’l Abortion Fed’n, NAF v. Ctr. for Med. Progress*,

17 685 F. App’x 623 (9th Cir. 2017) ..... 10

18 *Nat’l Abortion Fed’n v. Ctr. for Med. Progress*,

19 No. 15-CV-03522-WHO, 2016 WL 454082 (N.D. Cal. Feb. 5, 2016)..... 9

20 *Nidec Corp. v. Victor Co. of Japan*,

21 249 F.R.D. 575 (N.D. Cal. 2007)..... 7

22 *United States v. Graf*,

23 610 F.3d 1148 (9th Cir. 2010)..... 3, 8

24 *United States v. Lonich*,

25 No. 14-CR-00139-SI-1, 2016 WL 1733633 (N.D. Cal. May 2, 2016) ..... 8

26 *United States v. Martin*,

27 278 F.3d 988 (9th Cir. 2002), *as amended* (Mar. 13, 2002) ..... *passim*

28 *United States v. Ruehle*,

583 F.3d 600 (9th Cir. 2009)..... 9

*United States v. Zolin*,

491 U.S. 554 (1989)..... 4, 10

*Vieste, LLC v. Hill Redwood Dev.*,

No. C-09-04024 JSW DMR, 2011 WL 588145 (N.D. Cal. Feb. 10, 2011)..... 7

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

*Weil v. Inv./Indicators, Research & Mgmt.*,  
647 F.2d 18 (9th Cir. 1981)..... 3

**Other Authorities**

Cal. Rule of Professional Conduct 1.2.1 ..... 10

**NOTICE OF MOTION**

TO DEFENDANTS AND THEIR ATTORNEY(S) OF RECORD:

PLEASE TAKE NOTICE THAT Plaintiffs Planned Parenthood Federation of America (“PPFA”), Planned Parenthood: Shasta-Diablo dba Planned Parenthood Northern California (“PPNC”), Planned Parenthood Mar Monte (“PPMM”), Planned Parenthood of the Pacific Southwest (“PPPSW”), Planned Parenthood Los Angeles (“PPLA”), Planned Parenthood/Orange and San Bernardino Counties (“PPOSBC”), Planned Parenthood Central Coast California (“PPCCC”), Planned Parenthood Pasadena and San Gabriel Valley (“PPPSGV”), Planned Parenthood of the Rocky Mountains (“PPRM”), Planned Parenthood Gulf Coast (“PPGC”), and Planned Parenthood Center for Choice (“PPCFC”) (collectively “Plaintiffs”) will and hereby do move this Court for an order compelling Defendant Center for Medical Progress (“CMP”) to produce certain responsive documents withheld by CMP on the basis of attorney-client privilege for the purpose of an *in camera* review to determine whether such documents were properly withheld from Plaintiffs during discovery.

This motion is made on the following grounds. First, Defendants have already conceded that the documents that have been challenged by Plaintiffs are relevant to the subject matter of this action and are responsive to the document requests that have been propounded by Plaintiffs. Second, there is a factual basis sufficient to support Plaintiffs’ reasonable, good faith belief that *in camera* inspection will confirm that the information withheld is not protected under the attorney-client privilege, or else is ineligible for protection under the attorney-client privilege due to the applicability of the crime-fraud exception.

This motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith, the concurrently filed Declaration of Sharon D. Mayo (“Mayo Decl.”), and the exhibits attached thereto.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant CMP refuses to produce hundreds of highly relevant communications with third-  
4 party individuals scattered across a vast network of anti-abortion activists, claiming that somehow  
5 they are all protected under CMP's attorney-client privilege. To justify their privilege assertions,  
6 CMP provides only the barest information about the documents it has withheld—*e.g.*, describing an  
7 email as “providing legal communication with counsel regarding legal planning”—and asks the  
8 Court to believe that dozens of third-party individuals from other organizations were regularly  
9 providing legal advice to, or receiving legal advice on behalf of, CMP. For a small organization  
10 allegedly doing the work of “investigative journalism,” this claim is simply not credible. Rather,  
11 the evidence suggests that CMP has taken substantial liberties in asserting privilege over  
12 communications highly unlikely to involve legal matters in an effort to shield them from discovery.  
13 The law is clear; to assert privilege, a party has the burden to establish, *first*, that an attorney-client  
14 relationship actually exists, and *second*, that the withheld communications are within the scope of  
15 that privilege. Three months after Plaintiffs first raised their concerns, CMP still has done neither.

16 Plaintiffs also challenge CMP's privilege claims over communications involving Catherine  
17 Short. Discovery has revealed substantial evidence that Defendants committed fraud and several  
18 crimes when they infiltrated Plaintiffs' conferences and clinics under false pretenses. The evidence  
19 further shows that Ms. Short facilitated this scheme, and communicated regularly with Defendants  
20 in furtherance of it. Such communications are not protected under the attorney-client privilege.

21 For the foregoing reasons, Plaintiffs seek *in camera* review of the documents withheld by CMP  
22 to determine whether CMP's assertion of privilege was proper. Although CMP's entire privilege  
23 log is deficient and unsupported, this motion focuses only on the most problematic entries.  
24 Plaintiffs are further willing to select for review a sample of documents from each of the challenged  
25 categories to reduce the burden on the Court.

26 **II. FACTUAL BACKGROUND AND MEET-AND-CONFERENCE HISTORY**

27 On July 6, 2018, CMP served a privilege log containing entries for 2,516 documents—more  
28 than half the number of documents that CMP has produced in this case—which CMP withheld on

1 the basis of attorney-client privilege. Mayo Decl. ¶2, Ex. A. After carefully reviewing the log,  
 2 Plaintiffs sent CMP a letter on October 5 that identified numerous deficiencies, such as CMP’s  
 3 failure to even identify which of the 60 individuals in the log were attorneys or how they were  
 4 affiliated with CMP. *Id.* ¶3, Ex. B.

5 CMP waited nearly three weeks to respond, eventually providing a chart that purported to name  
 6 *over 30 individuals* as either as “CMP Attorneys” or “Law firm staff,” and *twelve* third parties as  
 7 “CMP Personnel.” *Id.* ¶¶4-7, Ex. C, at 18-19. Except for a handful of communications for which  
 8 there was no conceivable claim of privilege, CMP doubled down on its privilege assertions and  
 9 declared its log sufficient, refusing to produce or even re-review the documents therein. *Id.* ¶¶6, 8,  
 10 Ex. C. The parties exchanged several more communications before conferring telephonically on  
 11 November 29. *Id.* ¶¶13-21, Exs. E, F. On that call, CMP refused to reconsider its position, and the  
 12 parties agreed that judicial intervention was necessary. *Id.* ¶21. While Plaintiffs were drafting their  
 13 portion of a joint discovery letter, CMP asked to delay the briefing so that it could re-review the  
 14 2,500+ documents in its log. *Id.* ¶22. CMP had no excuse for waiting months to begin such a  
 15 review. Given the December 31 written discovery cut-off and CMP’s repeated delaying tactics,  
 16 Plaintiffs could not agree to further delay, but offered to modify or forego the discovery letter if any  
 17 issues could be resolved as a result of CMP’s review. *Id.* Rather than focus on its review, CMP  
 18 decided to file its own discovery letters on three new issues. ECF Nos. 360-362.

19 This Court ordered the parties to meet-and-confer to try to resolve the issues raised in the  
 20 discovery letters. ECF No. 372. The parties did so by telephone on December 17, and exchanged  
 21 revised privilege logs on the afternoon of December 19. Mayo Decl. ¶¶27, 29. CMP’s revised log  
 22 confirms that it will not be withdrawing its privilege assertions for the vast majority of the  
 23 documents Plaintiffs have challenged.<sup>1</sup> *Id.* ¶¶ 29-30, Exs. H, I. This motion followed.

---

24  
 25 <sup>1</sup> CMP did “strike” a number of entries, but most correspond to non-privileged attachments which  
 26 CMP conceded in October should not have been withheld in the first place. (They have not yet  
 27 been produced.) Mayo Decl. ¶29. CMP also removed certain emails from the log, but later clarified  
 28 that they would be produced *with redactions*—suggesting CMP might still intend to assert privilege  
 over those documents. *Id.* ¶29, Ex. J. CMP has not made this production yet either, so Plaintiffs  
 have been unable to assess whether CMP has materially changed its position as to privilege.

1 **III. LEGAL STANDARDS**

2 **A. Attorney-Client Privilege**

3 “Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly  
4 construed.” *Weil v. Inv./Indicators, Research & Mgmt.*, 647 F.2d 18, 24 (9th Cir. 1981). The party  
5 asserting the privilege bears the burden of proving the following elements:

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

9 *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002), *as amended* (Mar. 13, 2002). “A party  
10 asserting the attorney-client privilege has the burden of establishing the existence of an attorney-  
11 client relationship *and* the privileged nature of the communication.” *In re High-Tech Employee*  
12 *Antitrust Litig.*, No. 11-CV-2509-LHK-PSG, 2013 WL 772668, at \*1 (N.D. Cal. Feb. 28, 2013)  
13 (quoting *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010)). Accordingly, a party’s  
14 privilege log must “provide sufficient information to enable other parties to evaluate the  
15 applicability of the claimed privilege.” *Burlington N. Santa Fe Ry. Co. v. U.S. Dist. Court for Dist.*  
16 *Of Mont.*, 408 F.3d 1142, 1148 (9th Cir. 2005).

17 **B. The Crime-Fraud Exception to the Attorney-Client Privilege**

18 “[T]he attorney-client privilege does not extend to attorney-client communications which solicit  
19 or offer advice for the commission of a crime or fraud.” *See In re Grand Jury Investigation*, 974  
20 F.2d 1068, 1071 (9th Cir. 1992) (citing *Clark v. United States*, 289 U.S. 1, 15 (1933)). *See also*  
21 *Martin*, 278 F.3d at 1001 (no privilege for communications “made to a lawyer to further a criminal  
22 purpose”). The exception applies when there is “reasonable cause to believe that the attorney’s  
23 services were utilized in furtherance of the ongoing unlawful scheme.” *Id.* If the challenging party  
24 can show (1) that “the client was engaged in or planning a criminal or fraudulent scheme when it  
25 sought the advice of counsel” and (2) that their communications are “sufficiently related to” and  
26 were made “in furtherance of” the scheme, outright disclosure is warranted. *See In re Grand Jury*  
27 *Investigation*, 810 F.3d 1110, 1113 (9th Cir. 2016).

28 **C. Seeking *In Camera* Review of Documents Withheld as Privileged**



1 Where a party seeks *in camera* review to challenge an assertion of privilege, the party “need  
 2 only show a factual basis sufficient to support a reasonable, good faith belief that *in*  
 3 *camera* inspection may reveal evidence that information in the materials is not privileged.” *In re*  
 4 *Grand Jury Investigation*, 974 F.2d at 1075. This standard derives from *United States v. Zolin*, 491  
 5 U.S. 554, 565 (1989), a case which arose in the context of the crime-fraud exception. There, the  
 6 Supreme Court clarified that only a minimal evidentiary showing is necessary: because “*in camera*  
 7 inspection . . . is a smaller intrusion upon the confidentiality of the attorney-client relationship than  
 8 is public disclosure,” the “threshold we set . . . need not be a stringent one.” *Id.* at 572. *See also*  
 9 *Grand Jury Investigation*, 974 F.2d at 1073 (the *Zolin* standard—designed only to prevent  
 10 “groundless fishing expeditions”—does not require a *prima facie* showing of crime-fraud; district  
 11 court erred in requiring a factual showing that the crime-fraud exception applies).

#### 12 **IV. CMP HAS FAILED TO ESTABLISH THAT CERTAIN COMMUNICATIONS** 13 **ARE WITHIN THE SCOPE OF ANY ATTORNEY-CLIENT PRIVILEGE**

14 CMP’s revised log still includes hundreds of communications which Plaintiffs have reason to  
 15 doubt actually concern privileged legal advice. It is CMP’s burden to show that an attorney-client  
 16 relationship exists, and that each and every logged communication was for the purpose of seeking  
 17 legal advice from an attorney acting in their capacity as such. *See Martin*, 278 F.3d at 999. As to  
 18 CMP’s communications with many third parties vaguely characterized by CMP as “CMP  
 19 Attorneys” (or “Law firm staff”), “CMP Personnel,” “CMP Donors” and others, CMP falls  
 20 woefully short of meeting this burden.<sup>2</sup>

##### 21 **A. “CMP Attorneys” and “Law Firm Staff”**

22 CMP claims that it was regularly seeking legal advice from dozens of attorneys (and their staff)  
 23 across five different law firms and advocacy groups, as well as from individuals “not associated

---

24 <sup>2</sup> Plaintiffs also seek *in camera* review on the ground that CMP has not provided sufficient detail  
 25 about the emails’ contents to enable Plaintiffs “to evaluate the applicability of the claimed  
 26 privilege.” *Burlington*, 408 F.3d at 1148. The revised log still uses generic descriptions of the sort  
 27 that courts repeatedly find lacking. *Compare* Mayo Decl. Ex. H, at #1864-66 (“Confidential email  
 28 providing legal communication with counsel regarding legal strategy, arrangements”) with *Apple*  
*Inc. v. Samsung Electronics Co.*, 306 F.R.D. 234, 239-40 (N.D. Cal. 2015) (ordering *in camera*  
 review of documents with inadequate privilege log entries, such as “email reflecting legal advice  
 regarding licensing, prepared at the direction of counsel in anticipation of litigation”).

1 with a law firm.” See ECF No. 368, Daleiden Decl. Under Seal (“Daleiden Decl.”) ¶¶ 6-14. The  
 2 sheer number of attorneys CMP claims it needed for its “investigative journalism” operation—more  
 3 like a major corporation than “a new nonprofit” (*id.* ¶ 3)—is reason enough to question CMP’s  
 4 claims of privilege. The following individuals and organizations are especially problematic.

5 **Americans United For Life (AUL).** CMP was communicating with at least 16 individuals  
 6 affiliated with AUL. See Mayo Decl. Ex.I; Daleiden Decl. ¶9. Entries from these individuals  
 7 account for more than 300 separate communications—the vast majority involving AUL’s Ovide  
 8 Lamontagne. But as AUL’s General Counsel at the time, he could not have had an attorney-client  
 9 relationship with CMP. See *Martin*, 278 F.3d at 1000 (because general counsel’s client was the  
 10 corporation, no attorney-client relationship between counsel and defendant in individual capacity;  
 11 communications not privileged). Nor is it plausible that CMP would have been communicating  
 12 privileged legal advice with Jeanneane Maxon (former VP of External Affairs) and Charmaine  
 13 Yoest (former CEO and President), who also appear frequently on CMP’s revised log, given their  
 14 high-ranking *non-legal* positions in the organization.<sup>3</sup> CMP cannot sweep non-attorneys like Ms.  
 15 Yoest into the scope of privilege by calling them “law firm staff,” because it is not plausible that a  
 16 CEO was performing the work of a law firm staff member. The declaration from AUL’s current  
 17 General Counsel reflects the tenuousness of CMP’s privilege assertion; he states that, separate from  
 18 any “legal counsel,” AUL provided “strategic assistance relating to the proposed investigations.”  
 19 ECF No. 368, Steven Aden Decl. Under Seal ¶2. This is consistent with Plaintiffs’ understanding  
 20 that AUL was substantially involved in *non-legal* CMP activities, such as fundraising. Nor does the  
 21 log provide any detail showing CMP’s emails with AUL were within the scope of any attorney-  
 22 client relationship. See, e.g., Mayo Decl. Ex. I, at #1805-07 (3 of over 40 AUL-related entries  
 23 stating “Confidential email providing legal communication with counsel regarding arrangements”).

24 **Life Legal Defense Foundation (LLDF).** CMP has withheld 80+ communications involving  
 25 LLDF representatives, including with Dana Cody (LLDF’s former Executive Director), Mary Riley

26  
 27 <sup>3</sup> CMP’s log includes several other AUL representatives who are unlikely to have been involved in  
 28 privileged communications, such as Kristi Hamrick (former Media Consultant and “spokesperson”),  
 and Twanna Spurgeon (former assistant to President, VP of Operations).

1 (LLDF’s VP of Operations), and Marcella Ketelhut (formerly on LLDF’s Board of Directors)—  
 2 whom, again, Mr. Daleiden unconvincingly refers to in his declaration as mere “staff.” *See* Daleiden  
 3 Decl. ¶12. CMP provides no declaration from LLDF or other evidence corroborating CMP’s claim  
 4 of an attorney-client relationship at the relevant times. Indeed, when CMP was asked to provide  
 5 such evidence, CMP pointed to a memo LLDF prepared for “interested parties” which explicitly  
 6 states that it “should not be construed as legal advice.” *See* Mayo Decl. Ex. F (CMP’s counsel  
 7 pointing to CM15649-50); Ex. D at CM15649-50. Regardless, the vague descriptions in CMP’s log  
 8 do not support privilege. *See, e.g., id.* Ex. I, at #172 (“Confidential email regarding seeking  
 9 attorney-client legal representation.”), #2514-16 (“Confidential email containing client information  
 10 for counsel to provide legal advice regarding nonprofit corporations.”).

11 **Leonard Leo and Jonathan Bunch.** Plaintiffs are similarly skeptical of the 35 entries that  
 12 involve Leonard Leo and Jonathan Bunch, supposed “CMP Attorneys.” *See id.* Ex. I (also  
 13 identifying Mr. Bunch as a “Claude Allen Attorney”). Neither CMP nor Mr. Daleiden have  
 14 provided *any* information to explain CMP’s relationship with these individuals—both of whom are  
 15 well-known leaders of the Federalist Society, an organization far more likely to have been involved  
 16 with CMP’s fundraising efforts than legal representation. And here, too, the descriptions in CMP’s  
 17 log are too deficient to be of use. *See, e.g., id.* Ex. I, at #2500-01 (“Confidential email providing  
 18 legal communication with counsel regarding legal planning”), #2488-89 (“Confidential email  
 19 providing legal communication with counsel regarding pertinent facts or information”).

20 **Claude Allen.** Plaintiffs challenge CMP’s withholding of nearly 200 emails with Claude Allen,  
 21 an attorney for CMP donor Ray Ruddy, whom CMP says is also a “CMP Attorney.” *Id.* Exs. C, at  
 22 9; F, at 4; I, at 74. Plaintiffs believe these communications more likely were efforts to get money  
 23 from Mr. Ruddy than about any legal advice. And Mr. Allen’s representation of Mr. Ruddy  
 24 presents a potential conflict-of-interest, especially in emails where the three of them appear.<sup>4</sup> The

25 \_\_\_\_\_  
 26 <sup>4</sup> CMP attempts to sidestep conflict issues by claiming a “common interest” privilege. CMP,  
 27 however, has never identified any *common legal interest* that existed between it and Ruddy. The  
 28 exchange of legal-related information to facilitate a *non-legal* business decision—*e.g.*, whether to  
 donate money to an organization—*does not* give rise to a common legal interest. *See Nidex Corp.*  
 (footnote continued)

1 vagueness, and in some cases logistical nature, of CMP’s privilege log entries involving Mr. Allen  
 2 suggest that those communications were more likely directed at business decisions than legal  
 3 counsel. *See, e.g., id.* Ex. I, at #91-100 (“Confidential email providing legal communication with  
 4 counsel regarding arrangements”); #128-131 (“Confidential email containing client information for  
 5 counsel to provide legal advice regarding nonprofit law and collaboration”).

6 The fact that an individual is an attorney, or worked for an organization that does some legal  
 7 work is not enough. *See Martin*, 278 F.3d at 999. *See also Vieste, LLC v. Hill Redwood Dev.*, No.  
 8 C-09-04024 JSW DMR, 2011 WL 588145, at \*3 (N.D. Cal. Feb. 10, 2011) (no privilege between  
 9 defendant and attorney employee of another company, especially where the emails contained no  
 10 legal advice whatsoever; imposing sanctions). For the above individuals, Defendants seem to be  
 11 doing just that. Instead, CMP must present “sufficient evidence of an attorney-client relationship”  
 12 and further to show that the withheld communications concern legal advice *within the scope of that*  
 13 *relationship*. *Martin*, 278 F.3d at 999-1000. CMP has made no effort to satisfy this burden with  
 14 respect to the above individuals, and Plaintiffs have serious doubts that CMP ever can.

#### 15 B. “CMP Personnel” and Other Third Parties

16 Also problematic is CMP’s attempt to claim privilege over hundreds of communications with  
 17 various *non-attorney* third parties. These include emails with individuals initially characterized as  
 18 “CMP Personnel”: Andy Moore, Annamarie Bettisworth, Brianna Baxter, Greg Mueller, Justin  
 19 Dugyon, Kate Bryan, and Ryan Gonzalez. When CMP did not provide any evidence of an  
 20 employment relationship, Plaintiffs were forced to serve interrogatories to collect more information  
 21 about their roles at CMP. Mayo Decl. ¶12, 14. CMP’s responses, which it delayed serving until  
 22 after the parties’ joint discovery letters were due, revealed *no information* that would justify  
 23 extending CMP’s attorney-client privilege to those individuals. *Id.* ¶28, Ex. G. According to CMP,  
 24 these roles were: website and IT work (Mr. Moore), undercover investigator and fundraising  
 25 program manager (Ms. Bettisworth), undercover investigator (Ms. Baxter), communications and PR

26 \_\_\_\_\_  
 27 *v. Victor Co. of Japan*, 249 F.R.D. 575, 579–80 (N.D. Cal. 2007) (no common interest privilege  
 28 where company discussed ongoing litigation strategy with potential investor to facilitate a decision  
 about whether to invest in the company; the parties “if anything, have opposing interests”).

1 consultant (Mr. Mueller, and his associate Peter Robbio, who also appears in CMP’s revised  
2 privilege log), research assistant and administrative assistant (Mr. Dugyon), communications  
3 consultant (Ms. Bryan), and video/media production contractor (Mr. Gonzalez). *See id.* Exs. G; I, at  
4 74-75; Daleiden Decl. ¶3. None of them were hired as employees, but rather “on a project basis as  
5 independent contractors.” Daleiden Decl. ¶3.

6 To extend its attorney-client privilege to non-employees, CMP must present evidence that they  
7 were “functional employees” communicating with counsel. *See United States v. Lonich*, No. 14-  
8 CR-00139-SI-1, 2016 WL 1733633, at \*6 (N.D. Cal. May 2, 2016) (citing *Graf*, 610 F.3d at 1159).  
9 In *Lonich*, the court listed facts that would support such a finding—such as managing employees,  
10 acting as the “voice” of the company in communications with counsel, and generally being  
11 “empowered to act on behalf of” the organization—but ultimately found that the defendant had not  
12 met his burden of proof because he offered “little information” about the individuals and their roles  
13 in the organization. *Id.* Here, CMP does not explain the roles those individuals played in  
14 communicating with CMP’s claimed counsel. And nothing in the above descriptions suggests that  
15 they would have had any place in an otherwise privileged conversation. To the contrary, their work  
16 appears to have been limited to low-level, non-managerial roles covering day-to-day operations.  
17 CMP’s communications with these individuals are not privileged.<sup>5</sup>

18 CMP has also improperly withheld communications that involve Mr. Daleiden’s personal  
19 “Spiritual Director” Father Claude Williams (Mayo Decl. Ex. C, at 9)—whom CMP now claims as  
20 its own (*id.* Ex. I, at 74), by extension—as well as a “mental health counselor” whose name is  
21 redacted from CMP’s log. With few exceptions, these individuals appear on CMP’s privilege log  
22 where Mr. Daleiden has sent them a “blind copy” of a particular email. However, by voluntarily  
23 disclosing its communications to these third parties, CMP waived any attorney-client privilege that  
24 might have otherwise attached. *United States v. Ruehle*, 583 F.3d 600, 612 (9th Cir. 2009).

---

25  
26 <sup>5</sup> Plaintiffs also challenge CMP’s withholding of nearly 100 communications voluntarily shared  
27 with CMP’s third-party donors including Mr. Ruddy, Jim Holman, and Elizabeth Shearer. CMP  
28 attempted to justify this by citing stale authority extending privilege to corporate partners and  
investors, and then began calling its donors “investors” as if that would magically make its authority  
apply. It doesn’t; corporate investors are not the same as a nonprofit organization’s donors.

1 Plaintiffs concern that CMP has over-asserted privilege is well-founded. A recent production of  
 2 documents initially withheld on privilege grounds shows that CMP has taken substantial liberties in  
 3 making privilege determinations. These documents include: (1) emails updating donors about  
 4 CMP's undercover operations (Mayo Decl. Ex. D, at CM15643-44); (2) an email sharing a  
 5 transcript from one of CMP's surreptitious recordings (*id.* at CM15645-46); and (3) an email from  
 6 Mr. Daleiden introducing himself to Mr. Ruddy and asking "how we may be able to partner" on  
 7 CMP's project. (*id.* at CM15657). None of these is a close call with respect to privilege. And, CMP  
 8 has admitted that its decision to produce these documents was based on the document *recipients*—  
 9 not content. *Id.* ¶8. It seems likely, then, that CMP has withheld other emails with similar content.

10 Here, the sheer number of documents withheld by CMP on the basis of privilege—combined  
 11 with CMP's inadequate privilege log entries, revelations about the non-legal roles of the third-party  
 12 individuals on CMP's revised log, and CMP's apparent history of asserting privilege over  
 13 documents that should never have been withheld in the first place—provide a sufficient factual  
 14 basis to justify Plaintiffs' request for *in camera* review of the foregoing documents.

15 **V. CMP'S COMMUNICATIONS WITH MS. SHORT ARE DISCOVERABLE**  
 16 **UNDER THE CRIME-FRAUD EXCEPTION; AT THE VERY LEAST IN**  
 17 **CAMERA REVIEW IS WARRANTED.**

18 CMP is withholding at least 30 documents involving attorney Katie Short on the basis of  
 19 attorney-client privilege. Plaintiffs believe that *all* of these communications are discoverable under  
 20 the crime-fraud exception.

21 Plaintiffs have set forth detailed allegations chronicling an elaborate scheme by CMP and its  
 22 members to defraud, gain illegal access to, and ultimately harm Planned Parenthood. ECF No. 1 ¶¶  
 23 53-144 (alleging facts constituting fraud and violations of state and federal wiretapping law). As  
 24 this Court has observed, discovery has confirmed the veracity of those allegations. *Nat'l Abortion*  
 25 *Fed'n v. Ctr. for Med. Progress*, No. 15-CV-03522-WHO, 2016 WL 454082, at \*1 (N.D. Cal. Feb.  
 26 5, 2016). The Court has stated that Defendants' scheme amounts to fraud. *Id.* at \*24 ("Defendants  
 27 engaged in *repeated instances of fraud*, including the manufacture of fake documents, the creation  
 28 and registration with the state of California of a fake company, and repeated false statements to a  
 numerous NAF representatives and NAF members in order to infiltrate NAF and implement their



1 Human Capital Project.”). The Ninth Circuit similarly noted that Defendants never denied that they  
2 engaged in misrepresentation in an effort to defraud Plaintiffs. *See Nat’l Abortion Fed’n, NAF v.*  
3 *Ctr. for Med. Progress*, 685 F. App’x 623, 626-27 (9th Cir. 2017). And the videos that Defendants  
4 produced are themselves further evidence that Defendants violated federal and state *criminal law*.

5 Plaintiffs also have strong reasons to believe that Defendants used Ms. Short’s services in  
6 furtherance of their fraudulent and criminal scheme. Documents confirm that Ms. Short was  
7 substantially involved in setting up the sham “BioMax” company and understood Defendants’  
8 intent to use BioMax to defraud. *See, e.g., Mayo Decl. Ex. K, at PC00012* (Ms. Short: “**David &**  
9 **Co. don’t expect there to be anything served, because their corporation is not actually going to be**  
10 **conducting any business**. They are going to *toy with conducting business*, but stop well short of  
11 signing any contracts or the like.”). And entries in CMP’s privilege log make clear that many, if not  
12 all, of its emails with Ms. Short concern Defendants’ fraudulent scheme, which CMP  
13 euphemistically calls “investigative journalism.” *See, e.g. Mayo Decl. Ex. I, at # 1451-53, 1456-60*  
14 (“legal advice of counsel regarding investigative journalism methods”); #1369 (“legal  
15 communication with counsel reflecting legal planning”). The fact that these communications  
16 related to CMP’s “investigative journalism *methods*” confirms that CMP was seeking advice from  
17 Ms. Short as to *how* it would be gaining access to Plaintiffs’ employees and confidential  
18 conferences and employees.<sup>6</sup> This squarely relates to CMP’s fraudulent and criminal conduct.

19 This evidence is sufficient to establish a *prima facie* case for the applicability of the crime-fraud  
20 exception to Ms. Short’s communications with CMP. *See Martin*, 278 F.3d at 1001 (*prima facie*  
21 case existed where defendant had used its attorney to set up a sham copycat company to defraud  
22 legitimate businesses). At the very least, it furnishes a good faith, factual basis to believe that *in*  
23 *camera* review would reveal evidence that the exception should apply. *See Zolin*, 491 U.S. at 565.  
24 Plaintiffs therefore request that this Court exercise its discretion to conduct *in camera* review of  
25 CMP’s communications with Ms. Short, or some sampling thereof.

---

26  
27 <sup>6</sup> While a lawyer may advise on the legal consequences of a proposed course of action, documents  
28 and Ms. Short’s own statements raise a substantial question as to whether her role was properly  
limited. Cal. Rule of Professional Conduct 1.2.1 (Advising or Assisting the Violation of Law).

1 **VI. CONCLUSION**

2 For all of the above reasons, Plaintiffs respectfully requests that the Court grant their motion  
3 for *in camera* review.

4  
5 Dated: December 24, 2018

Respectfully submitted,

6 ARNOLD & PORTER LLP

7  
8 By: /s/ Amy L. Bomse

Amy L. Bomse

9 Attorney for Plaintiffs