SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Spring Street Courthouse, Department 12

JCCP4861 August 3, 2020
SOUTHERN CALIFORNIA GAS LEAK CASES 1:13 PM

Judge: Honorable Carolyn B. Kuhl
Judicial Assistant: L. M'Greené
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Court Order: Ruling on Submitted Matter

The Court, having taken the matter under submission on 7/22/2020 on Motion of Private Plaintiffs for Issue, Evidence, and Monetary Sanctions, and Other Remedies, now rules as follows:

Motion of Private Plaintiffs for Issue, Evidence, and Monetary Sanctions, and Other Remedies

Court's Ruling: For the reasons stated below, the court continues this Motion until a date after the completion of non-expert discovery in order to be able to determine the extent to which this court's prior sanctions orders are providing an adequate remedy for the detriment to Plaintiffs from the discovery abuses committed by Defendants as described below. The court reserves for future determination whether issue or evidentiary sanctions or a curative jury instruction are appropriate. The court does not impose further monetary sanctions at this time. The court does not award any sanctions to Developer Plaintiffs.

Procedural Posture of the Current Motion

Plaintiffs, in their original Motion for Sanctions filed March 4, 2020, sought the following sanctions for Defendants' repeated discovery abuses:
(a) An order striking service of Defendants' February Privilege Logs on the basis that they are unreliable and requiring Defendants to re-serve privilege logs accompanied by a declaration from trial counsel made under penalty of perjury that all assertions of privilege were made in good faith and the information contained in the privilege logs accurately describes the documents at issue;
(b) An order requiring Defendants and their counsel of record, Morgan, Lewis & Bockius, LLP, to pay $50,000 for each day from February 11, 2020 to the date they re-serve the privilege logs

with the declarations described above, see Lopez v. Watchtower Bible & Tract Soc'y of New York, Inc., 246 Cal. App. 4th 566, 605 (2016) (A court is permitted to 'impose[] a significant monetary penalty . . . for each day the responsive documents were not produced");
(c) Issue sanctions designating the following facts to be established:
Issue Sanction # 1 – SoCalGas and Sempra Energy formed a joint enterprise in responding to the SS-25 Blowout.
Issue Sanction # 2 – SoCalGas was and is Sempra's agent in operating the Aliso Canyon facility and responding to the SS-25 Blowout.
Issue Sanction # 3 – Sempra and SoCalGas knew of the risk of a well failure like SS-25 Blowout before the SS-25 Blowout and knew the consequences of such a well failure would be severe, but failed to take timely action to address those risks.
Issue Sanction # 4 – SoCalGas knew emissions from SS-25 were capable of causing and did in fact cause symptoms associated with exposure to mercaptans by the Porter Ranch community.
Issue Sanction # 5 – SoCalGas knew at the time of the SS-25 Blowout that it was industry custom and practice to have a storage well integrity program and to use Vertilog inspection tools to predict casing integrity
(d) Evidence/issue sanctions precluding Defendants from doing the following with respect to their presentation of evidence at trial:
Evidence Sanction # 1 – Defendants should be precluded from using any documents produced after November 1, 2019 and from questioning witnesses regarding the same.
Evidence/Issue Sanctions # 2 to 6 – Defendants should be precluded from introducing any evidence regarding the issue sanction topics noted above.
(e) A suppression-of-evidence jury instruction against Defendants, as follows:
Jury Instruction No. 1: "Counsel for both Parties will have an opportunity to examine witnesses regarding documents in this case. In the course of such examination, you may hear counsel for the Plaintiffs describe how Defendants failed to produce certain documents to Plaintiffs during the period for discovery. Those documents have been marked with a red sticker. You may consider whether Defendants intended to conceal those documents. If you decide that Defendants did so, you may decide that the documents would have been damaging to Defendants."
(f) A monetary sanction of $29,250 against Defendants and their counsel of record, Morgan, Lewis & Bockius, LLP for amounts associated with bringing the Motion.

Developer Plaintiffs filed a Joinder to the motion on March 5, 2020.

Plaintiffs filed an ex parte application to have the March 4, 2020 motion for sanctions heard earlier. The court granted that request only with respect to the Motion's request for relief designed to ensure compliance with discovery; the court did not allow expedited consideration of issue, evidence and jury instruction sanctions. (Minute Order, Mar. 5, 2020, at p. 1; Minute

Order, March 20, 2020, p. 2.)

On March 20, 2020, the court granted the relief requested in (a) and (f) above and partially granted the relief requested in (b) above. The court struck service of Defendants' February 11, 2020 privilege logs on the basis that they were unreliable; Defendants were required to re-serve privilege logs within 30 days, accompanied by a declaration from trial counsel made under penalty of perjury that all assertions of privilege are made in good faith and the information in the logs accurately describes the documents at issue. (Minute Order, Mar. 20, 2020, at p. 2.) The court further stated as follows: "If the revised privilege logs and declarations are not served within 30 days of this date, a daily sanction of $50,000 is imposed jointly and severally against Defendants and their counsel until such time as Defendants comply with this Order." (Id.) The court awarded $46,800 in sanctions jointly against Defendants and their counsel. (Id.) The court continued for further consideration the other relief requested.

On May 26, 2020, Plaintiffs filed an "Amended" Motion for Sanctions, along with a "Supplemental Brief" meant to update the court on events since March 20, 2020. Plaintiffs state that Defendants have continued to abuse the discovery process and defy this court's previous discovery orders. The issue, evidence, and jury instructions sanctions requested are identical to those in the original motion, with one addition: "Private Plaintiffs request that the Court enter an order under Section 2019.020(b) of the Code of Civil Procedure and its inherent power over case management sequencing the depositions of experts such that the depositions of Defendants' experts precede the depositions of Plaintiffs' experts." (Pls' Am. Mot., at p. 8.) Plaintiffs also seek new monetary sanctions.

On May 29, 2020, Developer Plaintiffs Toll Brothers, Inc. and Porter Ranch Development Company filed their "Joinder to Amended Motion of Private Plaintiffs for Issue, Evidence, and Monetary sanctions, and Other Remedies." On June 3, 2020, Developer Plaintiffs TF Hidden Creeks, L.P., Forestar Chatsworth, LLC, and Shappell Liberty Investment Properties filed their "Joinder to Private Plaintiffs' Amended Motion for Issue, Evidence, and Monetary Sanctions, and Other Remedies."

On June 8, 2020 Defendants filed their Opposition to the Amended Motion. On June 12, 2020 Plaintiffs filed their Reply. The court issued a tentative decision on the motion on June 24, 2020 and heard argument the next day. The court's tentative ruling is recorded in the Minute Order for June 25, 2020. At the June 25, 2020 hearing, the court allowed the parties to submit supplemental briefing after Plaintiffs asserted at oral argument that they could show how the prejudice caused by Defendants' discovery abuse would be remedied by the requested sanctions. Plaintiffs filed their Supplemental Brief on July 6, 2020; Defendants filed their Supplemental

Opposition on July 13, 2020. Although the court only allowed supplemental briefing from Plaintiffs and Defendants, Developer Plaintiffs chose to file supplemental briefing on July 17, 2020.

Defendants' and Defense Counsel's Long History of Abuse

As recently stated in Siry Investment, L.P. v. Farkhondehpour (2020) 45 Cal.App.5th 1098, 1118 (Siry), in considering sanctions for discovery misconduct, a court must consider whether the party's non-compliance is the latest chapter in a longer "history of abuse," and must look to "the number of formal and informal attempts to obtain the discovery" as well as whether prior court orders compelling discovery have gone unheeded.

The appropriate place to begin the history of Defendants' discovery abuse is a motion brought by Plaintiffs against a third-party contractor named AECOM on August 1, 2018 to compel production of all unprivileged documents withheld from AECOM's production at the direction of SoCalGas. Then-judge John S. Wiley granted the motion in part on October 17, 2018, holding that there was no proper assertion of privilege or attorney work product over hundreds of documents except as to four specific categories of documents:
One: Documents that AECOM authored at the request of a Company lawyer.
Two: Documents Company lawyers gave to AECOM for review and comment regarding technical expertise that would assist the lawyers in developing legal strategy.
Three: Documents containing legal opinions that Company lawyers gave to AECOM for the purpose of evaluating whether technical information in the document was accurate.
Four: Documents that are communications with the Company's retained (but not testifying) experts.
(Minute Order, Oct. 17, 2018, at p. 3.)

Unfortunately, Judge Wiley's ruling on the AECOM documents did not definitively resolve the dispute. Plaintiffs later claimed that Defendants failed to produce AECOM documents not included in one of Judge Wiley's four categories and this court agreed that SoCalGas had failed to offer a basis for withholding AECOM documents. (See Minute Order, Aug. 15, 2019.) Ruling on SoCalGas' motion for protective order, this court ordered that 168 of the 174 AECOM documents at issue be produced; the court also awarded $6,500 in sanctions jointly against SoCalGas and defense counsel. (Id. at p. 1.) In what was to become a pattern in this case, SoCalGas simply "fail[ed] to provide evidentiary support sufficient to allow the court to find that SoCalGas ha[d] met its burden of establishing privilege by demonstrating that the documents fall within the categories earlier defined by Judge Wiley." (Id. at p. 2.) In order to justify the withholding of 174 documents, SoCalGas chose to submit as evidence only three "remarkably

short" declarations. (Id.) Not willing to stand by its own AECOM privilege log, SoCalGas even filed an "updated version of the AECOM [privilege] Log" with its Reply brief. (Id. at p. 9.) Defendants' eleventh-hour abandonment of their prior privilege logs is something to which this court and Plaintiffs have become painfully accustomed.

It is also worth noting that, prior to Plaintiffs' challenge to the withholding of AECOM documents, SoCalGas asserted that approximately 771 AECOM documents were privileged, only to later withdraw those claims and limit its assertions of privilege to 174 documents. (Id. at p. 2.) This practice of abandoning their own initial privilege assertions when challenged, as will be shown below, has come to be a defining aspect of Defendants' discovery practice in this litigation. Though Defendants claim that they have willingly removed documents from privilege logs in an effort to reduce disputes and seek compromise, this court has concluded that Defendants have instead engaged in a practice of making broad and unjustified assertions of privilege over large swathes of documents, only to back down when met with motion practice (or threat thereof) by Plaintiffs. In sum then, of the supposedly privileged 771 AECOM documents, Defendants' claims of privilege were sustained as to a mere 6 documents.

On the same day as the hearing on the AECOM documents, the court heard discussion as to documents related to a separate third-party contractor named Sitrick. With respect to documents prepared by or exchanged with public relations consultants, the court ruled as follows:
The Court orders that within 20 days of today's date (9/3/19), counsel for So Cal Gas who has appeared before the Court this date, shall review all documents with respect to such privilege claims and shall provide to plaintiff's [sic] counsel and file a declaration stating that counsel has personally reviewed the documents in this category as to which privilege continues to be claimed, that counsel is familiar with the relevant case law and statutes pertaining to privilege concerning such documents and that there is a good faith basis for withholding such documents on the basis of privilege.
(Minute Order, Aug. 14, 2019, at p. 12.) As this court has explained before, this order was unprecedented in this court's 24 years of experience on the bench, and was the result of the court's concern over the good faith basis for Defendants' privilege claims. The court's level of concern with respect to Defendants' good faith in claiming privilege was heightened when it became clear that Defendants had continued to assert privilege over 700 AECOM documents after Judge Wiley's order, only to reduce those claims to 174 documents when Plaintiffs threatened motion practice.

On September 3, 2019, Defendants communicated that, of the 358 public relations consultant documents originally claimed to be privileged in a log served on July 19, 2019, Defendants continued to assert claims of privilege only as to 32 documents. (See Declaration of James J.

Dragna Regarding SoCalGas' PR Documents, filed Sept. 3, 2019, ¶¶ 3-5.) In other words, when asked to file a declaration as to the good-faith basis of their claims, Defendants chose to abandon over 90 percent of those claims.

At a subsequent status conference, the court ordered Defense counsel to report at a September 18, 2019 status conference as to how they proposed to address the problems of Defendants' over-designation of documents as privileged. (Minute Order, Sept. 11, 2019, at p. 7.) On September 18, 2019, the court held the "Status Conference re: Defendant's privilege claim." (Minute Order, Sept. 18, 2019, at p. 1.) After hearing the parties' positions as to discovery propounded on Sempra and "Defendants' over-designation of privileged documents," the court ruled as follows:
• Within 45 days defense counsel shall review all previously produced privilege logs and shall produce, on a rolling basis, all documents as to which privilege is not legally supportable. Defense counsel shall correct and re-serve the privilege logs previously produced so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable.
• Before the September 25, 2019 status conference, defense counsel shall produce to plaintiffs all "data request" documents as to which privilege is not legally supportable and shall re-serve the privilege log previously produced for this category of documents so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable. To the extent any document is redacted to protect a legally supportable privilege, the redacted document shall be produced to plaintiffs. Defense counsel shall bring to the September 25, 2019 status conference all documents in the "data request" category that have been fully or partially withheld on the basis of privilege.
• Counsel shall meet and confer with respect to the deadline(s) for defendants to prepare and serve additional legally supportable privilege logs for documents that have been and will be produced in the future.
(Id. at pp. 1-2 (emphasis added).) Defendants did not claim that they needed more time to serve accurate and legally sufficient privilege logs by the court's deadline.

At a subsequent status conference on September 25, 2019, Defendants reported that, of the more than 4,000 original claims of privilege for "data request" documents, only 176 "data request" documents remained on Defendants' privilege log. Moreover, Defendants chose to produce the updated privilege log at 6:00 p.m. the prior evening, robbing Plaintiffs' counsel of adequate time to prepare to discuss the updated log with the court at the status conference.

On November 1, 2019, Defendants served privilege logs on Plaintiffs, claiming privilege over 150,527 of the documents otherwise subject to production by SoCalGas, and over 5,912 of the documents otherwise subject to production by Sempra (the November 2019 Logs). (Minute

Order, Jan. 14, 2020, at p. 2.)

On December 19, 2019, Plaintiffs filed a motion to compel production of 136,204 of the SoCalGas documents, and of 5,459 of the Sempra documents. (Id.) True to form, Defendants, when presented with a formal challenge to their privilege claims, chose to drop their claims of privilege for thousands of documents. (Id. at p. 3.) Moreover, Defendants tellingly chose not to stand by the original November 2019 logs, instead providing substitute privilege logs with their opposition briefs. (Id.) The court explained this repeated tactic by Defendants:
… with their Opposition Briefs, Defendants nevertheless filed and served a substitute privilege log, dropping their claims of privilege for thousands of documents and providing additional information as to claims of privilege for some of the documents for which privilege continues to be asserted. SoCalGas' supposedly privileged documents have, in the span of two months, dropped from 150,527 to 116,740; Sempra's documents on its log have gone from 5,912 to 4,362. … Defendants have repeatedly retreated from initial claims of privilege and have a history of filing "new" privilege logs in a time frame that gives Plaintiffs insufficient time to respond before a court hearing. Indeed, as described below, in every instance that has been the subject of a court order, over 90 percent of Defendants' initial claims of privilege have been determined to be unsupportable and/or withdrawn.
(Id.) The new privilege logs (the January 2020 Logs) reflected the fact that Defendants had dropped privilege claims made in the November 2019 privilege logs as to 22 percent of the SoCalGas documents, and as to 26 percent of the Sempra documents.

The court held that the November 2019 Logs were deficient. (Minute Order, Jan. 14, 2020, at pp. 10-12.) The November 2019 Logs "employ[ed] generic macros that fail to offer a sufficiently detailed explanation of the basis for withholding individual documents." (Id. at p. 10.) Defendants failed to offer factual information to indicate the purpose of a supposedly privileged communication; in fact, Defendants even failed to identify all of the attorneys who were allegedly involved in the assertedly privileged communications or who purportedly generated the work product. The court found that the failure even to properly identify attorneys was "emblematic of Defendants' approach to dealing with their burden of asserting privilege in a manner that allows evaluation by opposing counsel and the court." (Id. at p. 12.) As the court explained, "[i]n a variety of ways, Defendants' numerous and vague claims of privilege attempt to shift the burden to Private Plaintiffs and the court to sort through an unreasonable number of privilege claims as to which, in the end, there is no legal basis to support the vast majority of the claims." (Id.)

The court then ordered Defendants to provide by February 11, 2020 a new, legally-compliant set of privilege logs that would "comply with the prior rulings of this court (including the prior

rulings of Judge Wiley), shall be sufficient under the law set forth [in the court's January 14, 2020 Minute Order], and shall be accompanied by a declaration of trial counsel that there is a good faith basis for the assertion of the privileges claimed." (Minute Order, Jan. 14, 2020, at p. 17.) The court noted that "Defendants' conduct to this point will be the subject of [Plaintiffs'] Motion for Sanctions, and this court expresses no view on the outcome of that Motion at this time." (Id.) While the court had hoped that Defendants would comply with the February 11, 2020 date to produce all non-privileged documents, it should be noted here that Defendants produced at least 3,961 documents after the February 11, 2020 deadline but before the March 20, 2020 Minute Order. (Blair Decl., ¶ 52.)

The court also ordered Defendants to produce all documents listed on the January 2020 Logs that were claimed to be privileged solely on the basis that they were attachments to a privileged communication. (Minute Order, Jan. 14, 2020, at pp. 12-15.) Defendants sought review of this court's ruling on the attachments, bringing the dispute the Second District Court of Appeal and then to the California Supreme Court. With the exception of a single document, this court's ruling on the attachments was allowed to stand.

A few days before the court issued the above ruling, Plaintiffs filed a motion for discovery sanctions. (Motion of Private Plaintiffs for Monetary, Evidentiary, and Issue Sanctions and an Adverse-Inference Jury Instruction, filed Jan. 10, 2020.) The court granted that motion in part:
… the court awards monetary sanctions of $525,610 against Defendant and defense counsel jointly, payable within 20 days. The court also orders that Private Plaintiffs are allowed to reopen any deposition at the expense of Defendants up until the date of the final status conference, so long as Plaintiffs have a colorable claim that a document that was withheld under a claim of privilege, but then produced after November 1, 2019, will be the subject of the deposition. Defendants are ordered to pay both the costs and attorneys' fees for any such depositions. Plaintiffs may submit an accounting of such reasonable costs and fees to the court, to be accompanied by briefing if necessary. The court also imposes the following issue sanctions: (1) all documents on Defendants' privilege logs that were produced after November 1, 2019 shall be deemed authenticated; and (2) all documents on Defendants' privilege logs that were produced after November 1, 2019 shall be deemed admissible under the business records exception to the hearsay rule (but Defendants may object to a hearsay statement within such documents). (Minute Order, Feb. 20, 2020, at p. 1.)

The court found that (1) Defendants' abusive misconduct in discovery; (2) repeated unmeritorious objections to discovery by assertion of unsubstantiated claims of privilege; (3) repeated failure to provide opposing counsel and the court with legally required information to permit opposing counsel and the court to evaluate Defendants' claims of privilege; and (4)

willful violation of court orders addressing these issues, when taken together, warranted the imposition of sanctions. (Id. at p. 10.)

The court determined that Defendants had engaged in a practice of providing documents only after extraordinary efforts by Plaintiffs' counsel and by the court to force defense counsel to abandon unreasonable claims of privilege. (Id.) The court found that Defendants made unmeritorious objections to discovery in order to delay Plaintiffs' right to discover relevant documents. (Id.) The court thus concluded that the record did not support Defendants' contention that its initial claims of privilege had been made in good faith. (Id.)

The court explained that Defendants had repeatedly provided legally inadequate privilege logs in this litigation. (Id. at pp. 13-15.) The court also concluded that Defendants' conduct prejudiced Plaintiffs:

> The undue burden and expense caused to Private Plaintiffs by Defendants' insufficient privilege logs is obvious. The chronology set forth above details Private Plaintiffs' repeated attempts to challenge Defendants' claims of privilege and to find a way to overcome the disadvantage of privilege logs that were manifestly inadequate to allow Plaintiffs or the court to evaluate the claims of privilege. Defendants further manipulated the vague claims of privilege to present a moving target as they backed off substantial numbers of claims of privilege tardily and only when challenged. Such behavior continued even as Plaintiffs' Motions to Compel were being litigated in December 2019 and January 2020. … The undue burden and expense caused to Private Plaintiffs was substantially magnified by the fact that Plaintiffs were deprived of documents to which they were entitled during periods of intense litigation activity while the majority of Defendants' current and former employees were deposed.
> (Id. at p. 15.)

Critically, the court found that Defendants' misconduct was both willful and in violation of prior court orders. (Id. at pp. 15-19.) Defendants failed to comply with Judge Wiley's original AECOM order: "The failure to produce these documents during the 10-month period following Judge Wiley's ruling was without substantial justification and constituted a violation of Judge Wiley's order." (Id. at p. 16.) The court also determined that, because the court found the November 2019 Logs to be legally inadequate, the inadequate November 2019 Logs constituted a violation of the court's September 18, 2019 Minute Order to "prepare and serve additional legally supportable privilege logs … ." (Id. at p. 16.) The court explained: "The clear and widespread deficiencies in the [November 2019 Logs] demonstrate that Defendants' noncompliance with the September 18, 2019 order was not in good faith but rather was part of a continuing effort to delay production of documents to which Plaintiffs were entitled while critical depositions proceeded." (Id. at p. 17.)

To aid in the understanding of this court's conclusions regarding Defendants' discovery misconduct, it is worth quoting at length from the February 20, 2020 Minute Order:
Defendants have repeatedly failed to stand by their initial privilege claims. The court, after viewing the conduct of Defendants and defense counsel over the course of the proceedings, determines that Defendants make blanket, unsupported claims of privilege, which then force Plaintiffs to dedicate hours reviewing deficient privilege logs and bringing privilege issues to this court's attention. Pushed to offer basic justifications for the withholding of documents, Defendants either make unsupported statements to try to deter Plaintiffs from pursuing assistance from the court or hand over some documents and further edit the privilege logs. The sheer number of privilege assertions that ultimately were unsupportable is evidence that Defendants' conduct is the result of a concerted policy, and not the hapless mistakes of a few document review attorneys.

The court already has discussed and rejected Defendants' excuse that the work was burdensome and that a document-by-document review should not be expected. The court has merely required that Defendants meet their most basic obligations under the discovery rules: namely, that an assertion of privilege be made in good faith and supported by sufficient factual information so that it can be evaluated by Plaintiffs and by this court; anything less would allow a party to hide relevant, non-privileged documents from its opponent, thereby undermining the entire litigation process. Plaintiffs and the court cannot be subjected to an infinite process wherein Defendants' logs are reviewed, challenged, and then ordered to be re-served with greater detail to justify the privileges. [California case law] offers the imposition of sanctions as Plaintiffs' only way out of such an impasse.
(Id. at p. 20.)

The court did not impose all of the sanctions requested by Plaintiffs in their January 2020 sanctions motion. For example, the court determined that it was not yet appropriate to impose Plaintiffs' requested jury instruction sanction. (Id. at p. 27.) However, the court limited the imposition of sanctions in the hope that Defendants would cease their pattern of discovery abuse and the court threatened further sanctions might be imposed in the event Defendants did not correct their behavior:
The sanctions imposed herein are made under the assumption that Defendants will keep their promise that "Plaintiffs have received or will receive by the deadline set by this Court's January 14, 2020 order every document to which they are entitled." (Defs' Opp., at p. 22.) If Defendants fail to keep their promise to abide by this court's January 14, 2020 order, then the court will allow further briefing and consider stricter additional evidentiary and issue sanctions, as well as a jury instruction under Evidence Code section 413. The court also may permit Private Plaintiffs to

seek additional sanctions based on information about withheld documents that have only recently been disclosed to them.
(Id. at p. 27.) Defendants did not move to have the court reconsider the February 20, 2020 Minute Order.

Nine days before the court's February 20, 2020 Minute Order, Defendants served revised privilege logs (February 2020 Logs) that were meant to comply with the court's January 14, 2020 Minute Order. As already noted above, Plaintiffs found the February 2020 Logs deficient and, on March 4, 2020, filed the "Motion of Private Plaintiffs for Issue, Evidence, and Monetary Sanctions, and Other Remedies," which is the current motion before the court.

On March 20, 2020, as indicated above, the court issued a ruling on a portion of the current Motion, but did not consider issue or evidentiary sanctions. The court struck the February 2020 privilege log and awarded monetary sanctions.

The court awards $46,800 in sanctions jointly against Defendants and their counsel, payable to Private Plaintiffs' counsel within 10 days. The court also strikes service of Defendants' February 11, 2020 privilege logs on the basis that they are unreliable and requires Defendants to re-serve privilege logs within 30 days, accompanied by a declaration from trial counsel made under penalty of perjury that all assertions of privilege are made in good faith and the information contained in the privilege logs accurately describes the documents at issue.
If the revised privilege logs and declarations are not served within 30 days of this date, a daily sanction of $50,000 is imposed jointly and severally against Defendants and their counsel until such time as Defendants comply with this Order. The court will make a further Order regarding the method and timing of payment of the $50,000 daily sanction.

It is further ordered that as soon as Defendants identify documents that previously were claimed to be privileged, but which will not be listed on the privilege log that complies with this Order, Defendants shall produce those documents to Plaintiffs forthwith.
(Id. at pp. 2-3.)

The court's findings in its Minute Order of March 20, 2020 are equally relevant to the remainder of the Motion for Sanctions, which remains pending. The court found that there were "clear misstatements of fact" in the February 2020 Logs. (Id. at p. 3.) The court also found that "[d]efense counsel [did] not acknowledge and apologize for the misrepresentations, [did] not state they [were] concerned about how or why the misrepresentations were made, [did] not attempt to explain how or why the misrepresentations happened and [did] not describe what steps [were] being taken to ensure there [were] no other misrepresentations and to correct any that

[were] found." (Id. at p. 3-4.) The clear misrepresentations in the February 2020 Logs were of grave concern to the court: "It follows [from California law] that when a party through counsel provides an untrue description of a document in a privilege log, the party and its counsel make a misrepresentation not only to opposing counsel, but also to the court. A court cannot take that dissembling lightly." (Id. at p. 4.)

The court surveyed multiple examples of Defendants' mischaracterization of documents in the February 2020 Logs. (See id. at pp. 5-9.) The court noted that any claim that Defendants had provided good-faith descriptions of withheld documents was undermined by the existence of plainly incorrect descriptions. (Id. at p. 5.) When presented with the fact that a certain document was mischaracterized in the February 2020 Logs, Defendants sometimes offered little to no argument to refute Plaintiffs' position: "Tellingly, Defendants do not now claim that the redacted message is privileged; nor do they offer any evidence to support the view that the redacted material is privileged. Instead, Defendants state that the 'redactions of that communication are at least arguably appropriate.' (Opp., at pp. 7-8.) Most importantly, Defendants' Opposition does not attempt to defend the privilege log description of the communication, which, again, states that the communication is one in which in-house counsel 'provides legal advice . . . .' " (Id. at pp. 6-7.) The court also found that the document descriptions in the February 2020 Logs were "not 'errors,' but rather amount[ed] to factually incorrect and misleading descriptions of documents (or portions of documents) withheld." (Id. at p. 9.)

The court explained that Plaintiffs had once again been prejudiced by Defendants' discovery abuse:

> The prejudice to the Plaintiffs is that they believe they cannot trust the accuracy of Defendants' description of the basis for Defendants' claims of privilege. As discussed above, Plaintiffs and the court are entitled to a complete and accurate privilege log that not only allows the opposing party to assess the claims of privilege, but also permits a judicial evaluation of the claim of privilege.

(Id. at pp. 9-10.)

Defendants' decision to serve the February 2020 Logs with false and misleading descriptions of documents was a violation of the January 14, 2020 Minute Order. With that in mind, the court offered yet another warning to Defendants:

> … as stated in previous rulings, the court cannot ignore the disadvantages caused Plaintiffs by delayed production of documents to which they are entitled and the consequential effects in developing the factual record in this case. Therefore, the court may be forced to impose issue or monetary sanctions or draft an appropriate jury instruction regarding effective spoliation; but that determination cannot be made until the further briefing to which both sides are entitled on those

aspects of Plaintiffs' current Motion for Sanctions. Defendants' compliance, or lack thereof, with this court's current Order will bear upon whether or not the court imposes issue or evidentiary sanctions and the nature of any such sanctions.
(Id. at p. 11.)

Discovery Abuses Since the March 20 Minute Order

Instances of Privilege Log Non-Compliance

Though Defendants stood before this court and defended the accuracy of the February 2020 Logs, after further court-ordered review, and after trial counsel was asked to yet again submit declarations as to the good faith assertions of privilege, Defendants themselves admit that they subsequently produced 34,530 documents listed on the February 2020 Logs. (Blair Decl., ¶ 47.) And Plaintiffs claim that the real number of documents produced since March 20, 2020 is 41,561. (Creed Decl. 5/26, ¶ 3.) To be sure, 25,419 of these documents were attachments ordered to be produced by the court in the January 14, 2020 Minute Order. But even after excluding the attachment documents, at least around 9,000 other documents on the February 2020 Logs were removed by Defendants before the filing of new logs on April 20, 2020 (April 2020 Logs). These 9,000 documents would have remained on the logs were it not for Plaintiffs' extreme efforts to compel Defendants to meet their most basic discovery obligations.

The April 2020 Logs list 55,785 documents, which means that Defendants have removed 100,400 documents from their November 2019 Logs, which listed 156,185 supposedly privileged documents. (Blair Decl., ¶ 55.) In other words, even though this court ordered on September 18, 2019 that Defendants produce all non-privileged documents by November 1, 2019, Defendants' April 2020 Logs show that Defendants have now produced around two-thirds of the documents listed on the November 2019 Logs. Again, Defendants were ordered to "correct and re-serve the privilege logs previously produced so as to accurately describe and designate as privileged only documents as to which a privilege is legally supportable" by November 1, 2019. (Minute Order, Sept. 18, 2019, at p. 2 (emphasis added).)

As the court has previously concluded, the production of 100,400 documents since November 2019 simply would not have happened had Plaintiffs not brought a series of discovery motions. Moreover, such a large number of documents (constituting two-thirds of those listed on the November 2019 Logs) cannot, as Defendants claim, be ascribed to simple good-faith human error: Defendants have, time and again, clearly failed to meet their most basic discovery obligations.

Lamentably, the court is unable to conclude that Defendants have entirely ceased their pattern of discovery abuse. Plaintiffs, in their "Amended Motion" filed May 26, 2020, attack the accuracy of the April 2020 Logs by examining 6 log entries. Plaintiffs argue that the April 2020 Logs mischaracterize these documents and that Defendants continue to withhold unprivileged documents. In their Opposition, filed June 5, 2020, Defendants state that they do not intend to assert privilege over five of these six entries; in Defendants' words "[t]he erroneous inclusion of these documents on the logs confirms, that despite Defendants' good faith efforts, perfection is simply not attainable on a review of this scale and under these unprecedented circumstances." (Defs' Opp. 6/5, at p. 36.)

Considering the history outlined above, it is surprising that Defendants merely shrug off yet another faulty set of privilege log entries as a small human error. Plaintiffs have succeeded in showing that the five entries in the April 2020 Logs were made in error. In response, Defendants do not explain why this error occurred or whether similar errors might currently exist in the April 2020 Logs with respect to other documents. The court again concludes that these particular five entries would have remained on the log had Plaintiffs not filed the Amended Motion.

Log Entry 5458 contains a mischaracterization of the redacted portions of a document. Defendants describe the privilege redactions as follows on the SoCalGas April 2020 Log: "Redactions of confidential email communications between SoCalGas personnel and J. Dave (in-house counsel) to facilitate the attorney-client relationship and the provision of legal advice regarding a draft letter to SoCalGas customers explaining the facts surrounding the Aliso Canyon gas leak." The two privilege redactions are from an email from Javier Mendoza, a media relations executive, to nine businesspeople, copying one lawyer. (Creed Decl. 5/26, Ex. 9.) Mr. Mendoza notes in the redacted portion that he is sending a "draft customer letter" for the non-lawyers' review, and that Mr. Mendoza will eventually send a final version of the "draft customer letter" to Jamiel Dave for "review once I receive and incorporate your comments." (Id.) Clearly, this email was not a communication between SoCalGas personnel and Mr. Dave, but was instead a communication among SoCalGas personnel in order to draft a "customer letter." Again, this inaccurate description would not have allowed Plaintiffs or the court to assess the true privilege claim over this document.

Moreover, the claims of privilege on the April 2020 log do not in all instances comply with this court's prior orders. Log Entry 28,555 was withheld in its entirety and is described as follows on the log: "Draft supplemental testimony to the CPUC concerning SoCalGas' pipeline safety enhancement plan testimony containing the revisions of M. Thorp." This court has already explained that documents containing attorney work product should be produced in redacted form, with the claimed work product redacted. (See, e.g., Minute Order, Mar. 4, 2020, at p. 11

(ordering a "talking points" document to be produced with the attorney comments redacted).) With respect to Log entry 28,555, Defendants have failed to follow this court's past instructions with regard to documents containing work product in the form of attorney comments to otherwise non-privileged material.

There is a similar problem with the document listed on the SoCalGas April 2020 Log as entry 112,366 and described as "Draft presentation addressing Aliso Canyon's gas storage facilities containing the opinions of J. Egan (in-house counsel)." The document was withheld in its entirety, only to be produced 45 minutes before what Jesse Creed describes as "the relevant deposition of Ms. Sedgwick." (Creed Decl. 6/12, ¶ 11.) Only a very small portion of this 17-page document allegedly contains the opinions of counsel. (See Creed Decl. 6/12, Ex. 9.) The document should have been produced long ago in the current redacted form; tardy production right before a deposition does not inspire confidence in the accuracy of the April 2020 privilege log.

Shortcomings in Compliance by Trial Counsel

Defendants offer no assurances that these are the only mischaracterizations or errors present in the April 2020 Logs. Indeed, the declarations by trial counsel do not explain the process for correcting errors identified by trial counsel during their review of the "privilege review team's" work. It is unclear from the trial counsel declarations just how often the privilege review team's prior work was found to be in error and thus in need of correction; moreover, it does not appear that the identification of such errors led to any systematic change in the directions given to the privilege review team.

Morgan Lewis partner Karen Hourigan, who as a member of the eData Practice Group helped oversee the review process, states as follows:

After the Trial Team Partners provided feedback regarding specific documents that they reviewed, I oversaw the process for implementing any proposed changes for the treatment of a specific document and, if applicable, its description. I instructed a team of Morgan Lewis attorneys to implement the specific changes to the documents in the review database including its description (as applicable), which would then be incorporated into the April Privilege Logs. [¶] To the extent possible, if the specific changes identified on a particular document applied to similar or duplicative documents that the team of Morgan Lewis attorneys was able to identify within the email thread sets identified in the review database (for example, earlier email chains that contained the same information as the specific document reviewed by the Trial Team Partners), I instructed a team of Morgan Lewis attorneys to make similar changes to those

documents in the review database, including (as appropriate) to the documents' descriptions on the April Privilege Log.

(Hourigan Decl., ¶¶ 13-14.) Again, this raises the following question: how often did trial counsel determine that the inclusion of a document on the April 2020 Logs was in error, or that a document description was inaccurate? It appears from Ms. Hourigan's declaration that, while the treatment of individual documents (along with similar or duplicative documents) on the log would be updated after trial counsel gave feedback regarding those documents, the quality and extent of trial counsel's feedback apparently was not used to amend the treatment of other, non-duplicative documents. (See also Blair Decl., ¶ 34.) The court did not expect trial counsel to review each and every document listed on the April 2020 Logs; but if trial counsel's review revealed that a non-negligible amount of documents were receiving improper treatment by the privilege review team, then the trial counsel should have stated what corrective action was taken.

In an effort to show their compliance with this court's orders, Defendants also submit under seal the "new protocol" used to create the April 2020 Logs. It does not appear that Plaintiffs have been served with the new protocol. The court thus finds that the submission of the protocol is an ex parte argument and that it would be improper for the court to review the protocol. The court has not done so.

The court also determines that trial counsel should have allocated more time to the review of documents for which Defendants assert privilege in the April 2020 Logs and should personally have reviewed more documents. For example, it appears that trial counsel spent time reviewing hundreds of documents that the privilege review team had already determined were not privileged. (See, e.g., Schrader Decl. 6/5, ¶ 10 (over 20 percent of the documents reviewed by Mr. Schrader had already been de-designated by the privilege review team).) Given both Defendants' repeated discovery abuses and the deadline to produce reliable log entries, trial counsel should have devoted their time to those documents that were going to be included on the final version of the April 2020 Logs. The court did not impose the requirement of trial counsel declarations so as to add an extra layer of protection for Defendants' overly-broad privilege claims, but rather to protect Plaintiffs by ensuring that Defendants' logs contained only good-faith assertions of privilege.

Moreover, it appears from Plaintiffs' Amended Motion that Defense counsel has spent a great deal of time since the March 20, 2020 Minute Order reviewing previously produced documents to aid Defendants' clawback efforts. On April 7, 2020, while Defense counsel was supposed to be engaged in the task of reviewing documents to create the April 2020 Logs, Mr. Dragna sent a letter to Plaintiffs' counsel stating that Defense counsel had spent time reviewing documents

ordered produced by this court on January 14, 2020, and that Defense counsel requested Plaintiffs to return or destroy all copies of such documents. (Creed Decl. 5/26, Ex. 26.) Mr. Dragna explained:

Our review of the privileged status of the attachments produced in response to the Court's January [1]4 Order is continuing. We expect that this review will be completed at or about the same time as the submission of our updated privilege log, required to be produced pursuant to the Court's March 20, 2020 order. As a result, we anticipate identifying additional documents that are privileged or subject to another legal protection, including attachments that are protected under the attorney work product doctrine, and should therefore be returned as set forth in paragraph 30 of the ESI Order.

(Id.) In other words, even after having failed in the Second District Court of Appeal and in the Supreme Court to overturn this court's January 14, 2020 Minute Order, Defendants are now attempting to claw back the attachment documents already ordered by this court to be produced. Critically for purposes of this Motion, Defense counsel has spent time reviewing these attachments instead of using its time and resources during the thirty-day period to prepare the April 2020 Logs, which have been shown to be at least partially deficient. Defendants' repeated claim that the thirty-day deadline was difficult to meet is undermined by the fact that Defense counsel chose to spend crucial time reviewing documents already ordered produced.

Potential Further Remedial Measures for Defendants' Discovery Abuses

As this court has stated elsewhere, the purpose of discovery sanctions is not to punish the offending or non-compliant party, but to attempt "to level the playing field in light of the discovery abuse." (Minute Order, Feb. 20, 2020, at p. 22.) Yet, it must be admitted, imposing the amount and type of sanctions to strike this balance will almost never be an exact science. The court, like Plaintiffs, will never know just what type of documents plaintiffs might have gained had Defendants not repeatedly abused the discovery process; it is impossible to know how Plaintiffs might have prepared their case had they not been forced to move forward on depositions and trial planning without large swathes of non-privileged documents. The counterfactual of what Plaintiffs might have known, when they might have known it, and exactly how this knowledge would have aided in their preparation of trial will remain shrouded from view.

With this in mind, the court has followed appellate guidance, taking an "incremental approach" to discovery sanctions and favoring sanctions that are more likely to incentivize compliance than to punish Defendants. When attempting to strike the appropriate balance between the imposed

sanctions and Defendants' discovery misconduct, appellate authority directs the court to examine the "totality of the circumstances," which includes the five following inquiries:

(1) whether the party's non-compliance is the latest chapter in a longer "history of abuse," which looks to "the number of formal and informal attempts to obtain the discovery" as well as whether prior court orders compelling discovery have gone unheeded [Citations];
(2) whether the party's non-compliance was "willful" [Citations];
(3) whether the non-compliance persisted despite warnings from the court that greater sanctions might follow [Citation];
(4) whether the non-compliance encompasses all or only some of the issues in the case [Citation]; and
(5) the extent of the "detriment to the propounding party" that flows from the inability to obtain the discovery at issue [Citation.]

(Siry, supra, 45 Cal.App.5th at p. 1118 (internal citations omitted and format altered to clearly enumerate the five inquiries of the "totality of the circumstances standard).) "[W]here a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction [i.e., terminating sanctions]." (Creed-21 v. City of Wildomar (2017) 18 Cal.App.5th 690, 702 (internal citations and quotation marks omitted).)

As for the fifth and final inquiry in Siry, it is important to note that the propounding party (even in the case of terminating sanctions) "need not prove prejudice where, as here, the misconduct relates to discovery the moving party propounded." (Siry, 45 Cal.App.5th at p. 1122.) The soundness of such a rule was explained by the Second District Court of Appeal:
A prejudice requirement would be "difficult," if not "impossible," for a propounding party to meet because a showing of prejudice would likely turn on the significance of the information that the non-compliant party is refusing to disclose. [Citation.] A prejudice requirement would also empower intransigent parties to continue their intransigence on the ground that the documents they were withholding are not that important. As we noted above, such selective lawlessness is still lawlessness.
(Id.)

Of the five inquires under Siry's "totality of the circumstances" standard for imposing serious non-monetary sanctions, it is clear from the extensive discussion above that four of the five inquiries point strongly in favor of imposing sanctions upon Defendants: (1) there has been a long history of abuse; (2) this court has found Defendants' non-compliance to be willful; (3) Defendants persisted despite warnings from the court that greater sanctions might follow; and (4)

the non-compliance encompasses virtually every issue in this case.

The court previously has found that Defendants' sanctionable conduct was willful. The court takes Defendants' offer to pay for a special master to review the remaining withheld documents as a current demonstration of good faith. However, the efforts to create the April 2020 Logs outlined by Defendants in their declarations filed in Opposition to this Motion should have occurred before November 1, 2019 and without the need for Plaintiffs' and this court's exhaustive participation over several months. The use of a special master can only be viewed as a remedy to correct Defendants' own failings in the discovery process. Plaintiffs do not accept Defendants' offer to appoint a discovery referee to review the remaining privileged documents. The court will not force this remedy on Plaintiffs in light of the delay that already has occurred in this case due to Defendants' wrongful conduct and the delay that would be inherent in having one person as special master reviewing over 50,000 documents claimed to be privileged.

Thus, following the Siry court's analysis, the only question remaining is the extent of the detriment to Plaintiffs flowing from Defendants' discovery abuses. Under Siry, Plaintiffs need not necessarily prove prejudice, but they must still argue it. Plaintiffs do not argue that they are prejudiced because Defendants may currently be withholding non-privileged documents that would help Plaintiffs prove (1) Sempra's relationship to SoCalGas or (2) Defendants' knowledge as to the risks of well failure and as to possible health effects of emissions from SS-25.

Rather than claim that there are key, non-privileged documents currently being withheld by Defendants, Plaintiffs list six ways in which they have been prejudiced by Defendants' discovery abuses: (1) Plaintiffs have been left unprepared for trial; (2) Plaintiffs cannot prepare their experts for trial; (3) Plaintiffs cannot do any tag-along discovery into new witnesses and new document requests; (4) many Plaintiffs are entitled to trial-setting preference under the Five-Year Rule; (5) Plaintiffs are unprepared to oppose Defendants' potentially dispositive motions on punitive damages and the liability of Sempra; and (6) delay in production has led to the "fading memories" of witnesses. These claims of prejudice are further explained in the declarations of Plaintiffs' counsel filed with the Reply. After being given a further opportunity in supplemental briefing to explain the prejudice caused by the discovery abuse, Plaintiffs continue to maintain that "the detriment is Plaintiffs' unending inability to turn their efforts to trial preparation and the inability to proceed to trial in the near term." (Pls' Supp. Br. 7/6, at p. 1.)

The court agrees that Defendants' discovery abuse has caused significant prejudice to Plaintiffs: Plaintiffs' case preparation has been needlessly delayed and, in a certain sense, will never be what it might have been had Defendants met their most basic discovery obligations. However, although the prejudice is real and the discovery abuse extensive, the court has awarded a strong

sanction to address the prejudice to the Plaintiffs, with the exception of delay. As stated above, the court has ordered that "Private Plaintiffs are allowed to reopen any deposition at the expense of Defendants up until the date of the final status conference, so long as Plaintiffs have a colorable claim that a document that was withheld under a claim of privilege, but then produced after November 1, 2019, will be the subject of the deposition. Defendants are ordered to pay both the costs and attorneys' fees for any such depositions." (Minute Order, Feb. 20, 2020, at p. 1.)

The question now is whether that sanction will be effective to substantially ameliorate Plaintiffs' prejudice or whether Defendants will act so as to thwart Plaintiffs' efforts to cure their prejudice by exacerbating the delay Plaintiffs already have suffered or by otherwise thwarting Plaintiffs' efforts to repair the damage done to their case. The court is quite concerned about the delays described in Plaintiffs' Motion papers. It is understandable that counsel would have some difficulties in making a transition to remote depositions during the COVID-19 pandemic. However, that does not explain all of the deposition scheduling delays. For example, Mr. Arriola's deposition was delayed by Defendants purportedly on the ground that he is essential to Defendants' operations, only to be followed by the announcement that he is leaving the company and moving out of state.

But the court concludes at this point that the issue and evidence sanctions are likely to work as an incentive for Defendants to quickly schedule depositions. Defendants now state that they will not challenge whether the 55 requested depositions are within the scope of the deposition sanction. (Defs' Supp. Opp. 7/13, at p. 5, fn. 2.) Furthermore, no doubt incentivized by this court's previous comments and sanctions rulings, Defendants now express a desire to quickly move through depositions. (Id. at p. 6.) The extent to which Defendants do not live up to these promises may be relevant to any issue or evidence sanctions ultimately imposed after the close of discovery.

Plaintiffs argue that a trial date for a first phase trial already had been set for late June, 2020 and that they should not be subjected to further delay due to Defendants' misconduct. Plaintiffs undoubtedly have been negatively affected by delay due to Defendants' misconduct; but all discovery misconduct necessarily involves some delay due to the need for the affected party to obtain a court ruling and relief from the misconduct. Delay necessitated by discovery misconduct may be a factor in deciding an appropriate sanction, but delay by itself is not a decisive factor requiring issue or evidence sanctions where other curative sanctions are available. This case is thus different from Siry, supra, where the defendants' failure to answer discovery "left [the plaintiff] with almost no time on the clock before the three-year period for retrial following remand expired." (45 Cal.App.5th at p. 1119.) In Siry, the defendants' misconduct put the affected party up against a timeline that threatened to end the plaintiff's opportunity to recover.

But here, delay, though significant, does not threaten Plaintiffs' ultimate opportunity to recover because Defendants have stipulated to waive the "five year rule" for bringing a case to trial.

The court will postpone a decision on issue and evidentiary sanctions in order to make an overall assessment as to whether the lesser sanctions already awarded will be effective in ameliorating the prejudice Plaintiffs have suffered from Defendants' discovery violations. Let me be clear: delaying decision on issue and evidentiary sanctions and a possible jury instruction is intended to incentivize Defendants to be cooperative in scheduling the discovery to be taken pursuant to this court's prior order and to refrain from any action that obstructs the completion of the discovery. The court therefore will continue its consideration of other sanction options; if the remedy of reopening depositions fails, the court necessarily will have to consider other sanction options.

The court will not award a sanction that changes the order of expert discovery by requiring Defendants' experts to be deposed first. Mr. Boucher states that "much of the preparation necessary for plaintiffs' experts has been put on hold because many of the documents that are emerging are significant and go to the heart of the liability, punitive damage, and Sempra issues in this case." (Boucher Decl. 6/12, ¶ 12.) The court does not doubt that this is so. However, if Plaintiffs' experts are waiting to develop further opinions, it would be a waste of time to depose Defendants' experts. When Plaintiffs' experts offer their opinions, it is inevitable that defense experts will be entitled to supplement their testimony to counter Plaintiffs' opinions. Three rounds of expert depositions – Defense experts, then Plaintiffs' experts, then Defense rebuttal – would inevitably follow. The court believes that this requested sanction would only lead to further delay and additional disputes about reopening depositions.

Deposition Disputes Involving Evidence Code section 771

The court believes, however, that it may be helpful to address the issue of Evidence Code section 771, as it was discussed extensively in both sides' briefs. Plaintiffs note that there is "[a] longstanding dispute in this litigation … whether a witness who reviews a document with counsel in preparation for a deposition is required under Evidence Code Section 771 to produce such a document at the deposition." (Pls' Am. Mot., at p. 15.) According to Plaintiffs, "Defendants have taken the position that Section 771 only requires them to produce documents that 'refreshed the witness's recollection in preparation for his or her deposition.' " (Id.) The court agrees with Defendants' reading of section 771, but with an important qualification.

"[I]f a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the

witness concerning such matter shall be stricken." (Evid. Code, ¶ 771, subd. (a).) Section 771 does not state that all documents reviewed by a witness in preparation for a deposition must be produced at the deposition or hearing. (See International Ins. Co. v. Montrose Chemical Corp. (1991) 231 Cal.App.3d 1367, 1372 (Montrose) ("section 771 requires the production of documents used to refresh [the witness's] memory with respect to any matter about which he testifies, no more and no less").) However, when a witness states that he has used certain documents he reviewed to refresh his memory concerning testimony but cannot recall which document refreshed his recollection, all of the reviewed documents should be produced. (Id. at pp. 1372-1373; see also Cal. Judges Benchbook Civ. Proc. Trial (2019) § 8.66 ("If the witness reviewed several documents before testifying and is unable to state which of these documents actually refreshed his or her recollection, then all must be produced").)

Defense counsel Thomas Lotterman states that he met virtually with David Taylor on May 4, 2020 to prepare for Mr. Taylor's deposition that was scheduled for the following day. (Lotterman Decl. 6/5, ¶ 6.) Mr. Lotterman showed some documents to Mr. Taylor during their meeting, but it was Mr. Lotterman's "express understanding that none of the documents shown to him on May 4 refreshed his recollection." (Lotterman Decl. 6/5, ¶ 7 (emphasis in original).) At the deposition, Mr. Taylor first stated that none of the documents he reviewed had refreshed his memory. (Creed Decl. 5/26, Ex. 23 at p. 322:7-13.) At this point, despite the fact that Mr. Taylor had reviewed documents, there was no obligation under section 771 to produce any such documents.

Mr. Lotterman goes on to state in his declaration that, after being shown some documents by Plaintiffs' counsel during the deposition, "Mr. Taylor indicated that his memory may have been refreshed by reviewing a document entitled '2013 SoCalGas Risk Registry; Version: Final (Sharon's Version).' " (Lotterman Decl. 6/5, ¶ 9.) The transcript states that Mr. Taylor answered in the affirmative to the following question by Plaintiffs' counsel: "In order to refresh your memory for today's deposition, did you review any version of the 2013 registry spreadsheet?" (Weil Decl. 6/12, Ex. B, at p. 355:14-18.) Mr. Lotterman then explains that it was unclear which document actually refreshed Mr. Taylor's memory. (Id.) Plaintiffs' counsel then renewed the request that the reviewed documents be produced, but Mr. Lotterman stated that he would discuss the documents privately with Mr. Taylor during a break and "try to find out what the document is." (Lotterman Decl. 6/5, Ex. 1, at p. 371:7-10.) Mr. Lotterman states that "[d]uring the lunch break, [Mr. Lotterman] conferred with Mr. Taylor, located the document (which was undated and not the document labeled '2013 SoCalGas Risk Registry; Version: Final (Sharon's Version)'), and sent it by email to [Plaintiffs' counsel]." (Lotterman Decl. 6/5, ¶ 10 (emphasis in original).)

The entire deposition transcript is not before the court and the court must thus rely on the

declaration of Mr. Lotterman and the portions of the transcript offered by the parties. Under Mr. Lotterman's presentation of the facts, and pursuant to the rule in Montrose, supra, it appears that all of the documents reviewed by Mr. Taylor to prepare for his deposition should have been produced when Mr. Taylor stated that document review had refreshed his memory but that he was unable to identify which of the reviewed documents helped him refresh his memory. The identification of documents to be produced under section 771 should occur through testimony in the presence of all counsel, not in private with the witness's attorney. This should be the practice going forward

Monetary Sanctions

As the parties well know, Plaintiffs have recovered a large sum of monetary sanctions for costs and fees incurred due to Defendants' repeated discovery abuses. Plaintiffs have received well over half a million dollars in monetary sanctions, which does not include the fact that Defendants must pay for the reopening of depositions due to late-produced documents.

In the Amended Motion, Plaintiffs request two additional categories of monetary sanctions in the sum of $98,198.69. First, Plaintiffs request $83,678.69 in "supplemental fees and costs incurred in combatting Defendants' fruitless efforts to reverse" this court's January 14, 2020 Minute Order in the Second District Court of Appeal and the California Supreme Court. (Pls' Am. Mot., at p. 26.) Second, Plaintiffs request $14,520.00 for the work of Margaret Grignon and Anne Grignon "for drafting this motion." (Pls' Am. Mot., at p. 26; see also Grignon Decl. 6/5, ¶ 6.)

This court will not award monetary sanctions under Code of Civil Procedure section 2023.030 for costs incurred because of representation in the court of appeal and the Supreme Court. "The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." (Code Civ. Proc., § 2023.030, subd. (a).) Thus, to award Plaintiffs $83,678.69, the court would have to conclude that seeking review of this court's orders in a higher court is somehow "discovery abuse." This position does not accord with the language of the Code of Civil Procedure; moreover, Plaintiffs do not offer—and this court has not found—any authority that would support such a position. The appellate courts have the power to award costs to the prevailing party and/or to impose sanctions for frivolous or dilatory writ petitions. (Cal. Rules of Court, rules 8.492, 8.493.) The Second District Court of Appeal did not impose sanctions and specifically refused to award costs for the writ proceedings. ("Order denying petition filed," Feb. 26, 2020, https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc_id=2309926&doc_no=B303675&request_token=NiIwLSEmXkw5WzBBSCM9VEhJUFw6USxXIyIuXz1SICAgC

g%3D%3D.) Any monetary sanctions for costs in the higher courts should have been sought in those fora; they will not be awarded here.

The additional requested monetary sanctions are also improper because they were not included in the Notice of Motion for the Amended Motion. "A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought." (Code Civ. Proc., § 2023.040.) Indeed, Plaintiffs' failure to request the monetary sanctions in their Notice of Motion led to confusion that was no doubt compounded by language in the Amended Motion such as the following heading: "Plaintiffs Are Entitled to $98,198.69 in Monetary Sanctions for Defendants' Unsuccessful Appeals from the Court's Attachments Orders." (Pls' Am. Mot., at p. 25 (underlined and bolded in original).) Defendants were thus not properly notified that $14,520.00 of the total monetary sanctions were not incurred in connection with the appeals process.

Plaintiffs also request fees and costs incurred when preparing the Reply. Plaintiffs do not state in their Reply the amount of requested fees, but merely direct the court to six separate declarations by Plaintiffs' counsel. (See 6/12 Panish Decl. ¶ 34; 6/12 Kelly Decl. ¶¶ 15-16; 6/12 Praglin Decl. ¶ 27; 6/12 Weil Decl. ¶ 42; 6/12 Creed Decl. ¶ 35; 6/12 P. Oliver Decl. ¶ 46.) If one adds up all the hours listed in these declarations (keeping in mind each attorney's claimed hourly billing rate), one arrives at the total sum of $106,647. But again, the Notice of Motion for the Amended Motion did not seek monetary sanctions for attorney's fees incurred in connection with the Amended Motion. Moreover, while the original motion for sanctions sought monetary sanctions in the form of incurred attorney's fees and costs, the court separated the issue of monetary sanctions for earlier determination and awarded Plaintiffs $46,800 in sanctions. (Minute Order, Mar. 20, 2020, at p. 1.) The court will not order further monetary sanctions here.

Joinder by Developer Plaintiffs

Developer Plaintiffs claim that they have been similarly prejudiced by Defendants' discovery abuse and that they are entitled to non-monetary discovery sanctions. Developer Plaintiffs offer no legal authority and little evidence to justify their claim to sanctions. The monumental task of addressing the discovery abuse has fallen to Private Plaintiffs' counsel. The court is not convinced from the short joinder motions that Developer Plaintiffs were forced to deal with the discovery abuse in the same way.

As noted above, this court requested additional briefing from Plaintiffs and Defendants after hearing oral argument. (Minute Order, June 25, 2020, at p. 25.) The court stated that Plaintiffs would file their supplemental brief by July 6, 2020, and that Defendants would file their response

by July 13, 2020; the court did not allow Developer Plaintiffs to file any supplemental briefing. The court thus does not consider the supplemental briefing filed by Defendants on July 17, 2020: no such briefing was authorized by the court; and Defendants were not given a meaningful opportunity to respond to the brief and accompanying declarations filed by Developer Plaintiffs.

A copy of this minute order will append to the following coordinated cases under JCCP4861: 18STCV00854, 18STCV01009, 18STCV01013, 18STCV01838, 18STCV04969, 18STCV05328, 18STCV06820, 18STCV10135, 19CHCV00618, 19STCV02570, 19STCV11792, 19STCV19104, 19STCV20976, 19STCV39324, 19STCV41696, 20STCV01226, 20STCV13797, 20STCV21003, 37-2017-00007459-CU-SL-CTL, BC378875, BC601844, BC602866, BC602973, BC602996, BC603602, BC603747, BC604036, BC604099, BC604247, BC604248, BC604353, BC604414, BC604592, BC604815, BC604816, BC604817, BC605084, BC605085, BC605173, BC605190, BC605406, BC605407, BC605860, BC605892, BC606427, BC606555, BC606736, BC606776, BC606844, BC606941, BC607057, BC607087, BC607347, BC607540, BC607541, BC607542, BC607685, BC607697, BC607839, BC607840, BC607841, BC607923, BC608037, BC608322, BC608377, BC608539, BC608540, BC608575, BC608658, BC608931, BC608950, BC608967, BC609083, BC609189, BC609288, BC609289, BC609329, BC609370, BC609526, BC609535, BC609776, BC609777, BC609820, BC609917, BC610257, BC610280, BC610535, BC610555, BC610621, BC610622, BC610652, BC610826, BC610832, BC610888, BC611106, BC611107, BC611237, BC611319, BC611485, BC611551, BC611552, BC611620, BC611845, BC611846, BC611981, BC612031, BC612034, BC612035, BC612119, BC612185, BC612189, BC612191, BC612258, BC612269, BC612394, BC612458, BC612564, BC612570, BC612613, BC612705, BC612967, BC613100, BC613463, BC613608, BC613657, BC613658, BC613813, BC614029, BC614035, BC614036, BC614410, BC614501, BC615840, BC615877, BC616152, BC616237, BC616450, BC616505, BC616541, BC616543, BC616544, BC616545, BC616859, BC617216, BC617444, BC617490, BC617675, BC617989, BC618330, BC618460, BC619939, BC620226, BC620231, BC620342, BC620550, BC620639, BC620809, BC620843, BC620921, BC621327, BC621401, BC621531, BC621532, BC621546, BC621684, BC621720, BC621876, BC621933, BC621978, BC621979, BC621985, BC621986, BC621995, BC621996, BC621997, BC622393, BC622448, BC622632, BC623031, BC623085, BC624391, BC624550, BC625240, BC625751, BC626200, BC627186, BC627404, BC627639, BC627795, BC628120, BC628301, BC628345, BC628346, BC628467, BC628523, BC628613, BC630021, BC631251, BC631502, BC631929, BC632263, BC633689, BC633690, BC633691, BC633692, BC633971, BC634131, BC634407, BC635684, BC635685, BC635686, BC636231, BC636745, BC637503, BC637538, BC637673, BC638032, BC638075, BC638197, BC638230, BC638284, BC638319, BC638352, BC638624, BC639255, BC639300, BC639302, BC639317, BC639489, BC639614, BC639789, BC639808, BC641734, BC641735, BC641736, BC641737,

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The Judicial Assistant hereby gives notice.

Clerk's Certificate of Service By Electronic Service is attached.