

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

**Civil Division**

Central District, Spring Street Courthouse, Department 12

**JCCP4861**  
**SOUTHERN CALIFORNIA GAS LEAK CASES**

August 15, 2019  
9:54 AM

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

CSR: None  
ERM: None  
Deputy Sheriff: None

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**APPEARANCES:**

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

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**NATURE OF PROCEEDINGS:** Ruling on Submitted Matter

The Court, having taken the matter under submission on 08/14/2019 for Hearing on Motion for Protective Order on case BC601844, now rules as follows:

Defendant Southern California Gas Company's Motion for Protective Order

The court orders that all of the documents that are the subject of the motion be produced with the exception of documents 316, 317, 359, 364, 376 and 388. Except as to these documents, the motion is denied. The documents shall be produced within 10 days of the date of this Order. The court awards \$6,500.00 in sanctions jointly against SoCalGas and defense counsel, payable to Plaintiffs' counsel within 20 days.

As the court has already noted, the purpose of SoCalGas' current motion is not to relitigate that which was already decided in this case by then-Judge Wiley; rather, the court is tasked with determining whether SoCalGas has met its burden of showing that the withheld documents fit into one or more of the following four categories:

- 1) Documents that AECOM authored at the request of a SoCalGas lawyer;
- 2) Documents that SoCalGas lawyers gave to AECOM for review and comment regarding technical expertise that would assist the lawyers in developing legal strategy;
- 3) Documents containing legal opinions that SoCalGas lawyers gave to AECOM for the purpose of evaluating whether technical information in the document was accurate;
- 4) Communications with SoCalGas' retained (but not testifying) experts.

Introduction

On this motion, SoCalGas bears the initial burden of showing that the documents in the privilege log fit into one or more of the four categories as privileged or work product documents. (Nativi

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v. Deutsche Bank National Trust Co. (2014) 223 Cal.App.4th 261, 318 (Nativi).) The burden of proof here requires that SoCalGas show that the interactions were between lawyers for SoCalGas and AECOM for the purposes defined by Judge Wiley. As Judge Wiley noted in his October 2018 order, “AECOM performed an enormous, even bewildering, array of tasks” for SoCalGas over several years. (Creed Decl., Ex. A (listing the various types of engineering work performed by AECOM for SoCalGas, which generally included designing, building, supervising, and monitoring “things and activities” for SoCalGas).) It was because of the scope of the tasks performed by AECOM that Judge Wiley ordered production of AECOM’s documents subject only to four, specific exceptions.

SoCalGas’ only evidence filed with its motion to justify the withholding of certain documents or portions thereof consists of the declarations of attorneys Michelle Park Chiu, Robert A. Wyman and Albert J. Garcia. Given that SoCalGas is withholding 174 documents, and that the relationship between AECOM and SoCalGas went far beyond the exchange of privileged attorney-client or work product documents, these declarations are remarkably short. (See Nativi, supra, 223 Cal.App.4th at p. 318 (denying motion for protective order where declaration submitted in support thereof “was entirely conclusory and lacked any factual specificity”).) More importantly, as will be discussed, they largely fail to provide evidentiary support sufficient to allow the court to find that SoCalGas has met its burden of establishing privilege by demonstrating that the documents fall within the categories earlier defined by Judge Wiley.

#### Chiu Declaration

The declaration of Michelle Park Chiu asserts that “SoCalGas prepared a privilege log” which initially identified “approximately 771 documents over which SoCalGas asserted claims of attorney-client privilege and/or attorney work product protection.” (Chiu Decl., ¶ 4.) No person is identified as having prepared or reviewed the privilege log or as being responsible for its preparation under such person’s supervision, direction, or control.

The declaration further states that following meet and confer efforts, the number of documents as to which privilege is being claimed has been reduced to 174. In this respect the declaration states: “Attached hereto as Exhibit 6, is the revised AECOM privilege log, which identifies approximately 174 documents that fall into one of the four categories from the AECOM order and over which SoCalGas asserts attorney-client privilege and/or attorney work product claims.” (Id., ¶ 12.) Chiu does not testify that she has reviewed the documents on the privilege log, that it was prepared under her direction or control or that the descriptions of the documents on the privilege log are correct. The Chiu declaration merely authenticates the privilege log prepared by an unnamed person at SoCalGas as the document attached at Exhibit 6.

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Wyman Declaration The Wyman declaration is just 8 paragraphs long. Mr. Wyman identifies himself as a “partner in the Los Angeles and Washington, D.C. offices of the law firm of Latham & Watkins LLP (“Latham”).” (Wyman Decl., ¶2.) Wyman explains that he is a member of a team of lawyers from Latham that was hired in late October 2015 to provide legal strategy and legal advice to SoCalGas in connection with the gas leak that occurred from October 23, 2015 to February 11, 2016. (Id. ¶ 3.)

With respect to authentication of the privilege log and the privileges claimed, Mr. Wyman states that “Latham has analyzed the documents (including redactions to documents) identified on the most recent version of the AECOM Log relating to work that involved Latham.” (Id. ¶ 6.) Wyman does not say who at Latham performed this work; or that the work was done under his direction, supervision or control; or that he reviewed the work that was done. Nevertheless, Wyman opines that such documents “generally fall into one of” the four categories listed in Judge Wiley’s October 2018 order. (Id. ¶ 6.)

In Paragraph 7 of his declaration, Wyman states that “certain of the documents on the AECOM Log” meet descriptions articulated by Wyman. He states that certain communications “that include Latham and AECOM” “were made to obtain or transmit technical information about Aliso Canyon from AECOM and allowed Latham to properly develop legal advice to SoCalGas regarding the specific positions to take in the SCAQMD abatement order proceedings . . . .” (Id. ¶ 7, lines 3-4, 8-10.) He states that “[i]n other cases, AECOM was provided documents to provide comment regarding technical expertise that AECOM possessed which assisted Latham in developing legal strategy.” (Id. ¶ 7, lines 11-13.) Further, he states in general terms that “Latham also discussed with AECOM legal opinions to ensure that those opinions were consistent with AECOM’s technical understanding.” (Id. ¶ 7, lines 14-15.) He concludes this paragraph of his declaration by stating: “The documents on the AECOM Log that pertain to this this [sic] category are identified in Exhibit A attached hereto.” (Id. ¶ 7, lines 17-18.) By this statement Wyman groups the descriptive characteristics he sets forth in Paragraph 7 of his declaration into a single category (“this category”). His statement is curious, because Exhibit A places documents, by number (referencing the privilege log identifying numbers), into four categories, not one.

It may be inferred that Wyman is referencing Judge Wiley’s four categories, because he states that he reviewed Judge Wiley’s Order. (Id. ¶ 5.) Moreover, Paragraph 8 of his declaration appears to reference Judge Wiley’s fourth category, documents that “pertain to or are communications with litigation consultants who were retained by counsel for SoCalGas who have not yet been designated as testifying experts.” (Id. ¶ 8.) However, it cannot be determined

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from the Wyman declaration how he distinguishes among Categories 1, 2 and 3 of Exhibit A to his declaration. Moreover, Paragraph 7 of the declaration includes descriptions of document categories that do not map onto, and are broader than, Judge Wiley's categories. (See *id.* ¶ 7, lines 8-10 (describing communications made "to obtain or transmit" from AECOM technical information to allow Latham to provide legal advice, but omitting the requirement of Judge Wiley's category 1 that such documents provided by AECOM be authored at the request of a SoCalGas lawyer).)

Wyman does not identify specific documents—except by referencing the table in Exhibit A. Nor does Wyman give specific facts establishing that the documents fit the four categories, such as the identity of SoCalGas' lawyers, when requests were made by Latham for specific documents, when or why certain specific documents were generated by AECOM and whether they were relied upon by Latham lawyers, which documents authored by AECOM were authored at the request of Latham, which documents sent by Latham lawyers to AECOM contained legal opinions for the purpose of evaluating whether technical information was accurate, which specific documents pertain to "litigation consultants," or what Mr. Wyman understands the term "litigation consultant" to mean.

#### Garcia Declaration

The Garcia declaration, which is offered to justify the withholding of nearly 120 documents (or redactions thereto), is a mere 15 paragraphs long. Garcia explains that he is Senior Counsel to SoCalGas, and that "AECOM was retained by SoCalGas as early as 2009 to provide a variety of services relating to the Aliso Canyon Turbine Replacement Project (ACTR Project). (Garcia Decl., ¶¶ 2-3.) Garcia states that "AECOM provided technical information that was necessary for me to properly prepare legal strategy and positions for SoCalGas in connection with the ACTR Project before the State of California Public Utilities Commission ("CPUC"), and to review statements and submissions SoCalGas submitted to ensure that such statements and submissions were in accordance with SoCalGas' legal strategy and risk assessment provisions." (*Id.* ¶ 4.) In responding to CPUC's request for comments on a draft environmental impact report (EIR), Garcia "and non-attorney SoCalGas employees directed information and documents to AECOM for review ... that would assist [Garcia] in developing the legal strategy for SoCalGas' final response to the CPUC." (*Id.* ¶ 7.) Garcia states that in certain instances he communicated directly with AECOM to request information, but that in other instances he asked non-attorney SoCalGas employees to communicate with AECOM to obtain technical assistance that Garcia needed to develop a legal strategy and provide legal advice regarding the ACTR Project. (*Id.* ¶ 10.) However, he does not identify any other SoCalGas lawyers or those non-attorney SoCalGas employers who were asked to obtain information from AECOM for the purpose of Mr. Garcia's

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legal work.

Importantly, Garcia declares that he “analyzed the communications identified on the most recent version of the AECOM privilege log regarding specific projects relating to the ACTR Project and its EIR on a document-by-document basis.” (Id. ¶ 12.) Thus, unlike the Wyman declaration, the Garcia declaration is based on personal knowledge. Nevertheless, as with the Wyman declaration, the Garcia declaration contains no specific information as to any particular withheld document.

Based on his personal review, Garcia states that: “The communications and documents on the revised AECOM privilege log all pertain to documents and information relating to the ACTR Project that were created by AECOM to enable me to properly develop legal advice for SoCalGas or reflect documents and information that AECOM reviewed and commented upon to assist in my development of legal strategy for SoCalGas.” (Id. ¶ 14 (emphasis added).) He further states that the communications and documents were to assist him in his task of ensuring the responses to CPUC were consistent with SoCalGas’ “overall legal risk analysis and strategy” and to enable him to have an accurate understanding of “highly technical matters for which I required expert assistance.” (Id. ¶ 14.)

Finally, Garcia testifies that the “documents on the revised AECOM privilege log that fall within the categories above are identified hereto in Exhibit A to my declaration.” (Id. ¶ 15.) Exhibit A to the Garcia declaration lists documents identified as “Category 1” or “Category 2.” Although neither the declaration nor its Exhibit A specifies a definition for “Category 1” or “Category 2,” one may infer that these categories refer, respectively, to the first two bases for privilege described by Judge Wiley.

#### Analysis – Documents Identified in Exhibit A to the Wyman Declaration

Plaintiffs object to the Wyman declaration on the ground that he lacks personal knowledge and that the declaration provides no proof that the documents meet the requirements of the categories defined by Judge Wiley. Plaintiffs also object on the ground that the Wyman declaration does not lay a foundation for the statements about the documents listed in Exhibit A. Finally, Plaintiffs argue that, because there is no foundation for the statements in the declaration, those statements are conclusions not supported by law or fact.

Plaintiffs’ evidentiary objections are well-taken. As stated above, SoCalGas bears the burden of showing that the documents listed on the privilege log fit into one or more of the four categories of privilege defined in Judge Wiley’s prior order. It must prove the elements of the privilege by

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competent evidence. In *League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, for example, the proponent of privilege failed to provide competent evidence (as opposed to arguments of counsel) as to who was the attorney and who was the client in the communications, that the communications were confidential communications between an attorney and a client, or that a purported legal assistant who sent e-mails was acting as an attorney's agent in sending the emails. (Id. at pp. 991-992.)

SoCalGas cannot rely on the descriptions set forth in the privilege log that is Exhibit 6 to the Chiu declaration as a basis for establishing the elements of the privilege or the requirements of the four categories of privileged documents defined in Judge Wiley's order. As discussed above, the Chiu declaration is incompetent to authenticate the content of the privilege log.

The Wyman declaration does not establish personal knowledge of any fact stated in the declaration with respect to the documents listed in Exhibit A to that declaration. Wyman states only that "Latham" analyzed the documents. He does not say that the analysis was done under his direction, supervision or control or that he has any understanding of the basis for the conclusions expressed by the categorizations expressed in Exhibit A. Indeed, the declaration itself is contradictory. It appears that Categories 1, 2 and 3 of Exhibit A are referred to as "this category," of "documents on the AECOM Log" in Paragraph 7 of the Wyman declaration. Even if there were a foundation for Wyman's testimony concerning the documents on the privilege log (which there is not), the declaration provides no basis for understanding how the first three categories set forth in Exhibit A are differentiated by the declarant.

Even if the Wyman declaration provided admissible evidence, the documents purportedly described in his declaration do not necessarily fit into the four categories identified by Judge Wiley. Wyman states that certain documents are communications "that include Latham and AECOM," and that these communications were made to obtain or transmit technical information about Aliso Canyon from AECOM which later allowed Latham to offer legal advice and services. (Wyman Decl., ¶ 7.) This description could thus apply to documents that AECOM had produced without a prior request from Latham, but which AECOM subsequently sent to Latham. As Mr. Wyman explains in his declaration, AECOM had certain knowledge because it performed work related to the gas leak; it is thus entirely possible (indeed, likely) that AECOM originally authored documents concerning the gas leak without being specifically prompted to do so by Latham for the purposes of Latham's representation of SoCalGas. Such documents would not be excluded from production by Judge Wiley's order.

The Wyman declaration also states that "[i]n other cases, AECOM was provided documents to provide comment regarding technical expertise that AECOM possessed which assisted Latham

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in developing legal strategy.” (Id. ¶ 7, lines 11-13.) The passive voice used in this statement elides the requirement that, in order to meet the second category of privilege defined by Judge Wiley, a document must be provided to AECOM by SoCalGas lawyers or at their direction to assist in the lawyers’ work for SoCalGas. Again, even if the Wyman declaration’s categorization of documents constituted admissible evidence, the description of documents does not meet all the requirements of the privilege.

The court denies the protective order as to the documents listed on Exhibit A of the Wyman declaration and orders their production.

Analysis – Documents Identified in Exhibit A to the Garcia Declaration

The Garcia declaration provides a foundation for the statements made in the declaration about the documents included in Exhibit A to that declaration. Garcia affirms that he was involved in the activities that are the subject matter of the documents, viz., the representation of SoCalGas in connection with the ACTR Project before the CPUC and interactions with AECOM with respect to this representation of SoCalGas. He states that he analyzed the communications identified on the privilege log relating to this representation “on a document-by-document basis.” (Garcia Decl., ¶ 12.) The court finds that the descriptions on the privilege log that is Exhibit 6 to the Chiu declaration have been authenticated as correct by the Garcia declaration as to documents listed on Exhibit A to the Garcia declaration.

However, the documents described in general terms by the Garcia declaration are broader than the four categories identified by Judge Wiley’s order. Garcia testifies that the documents all pertain to (1) information created by AECOM “to enable me to properly develop legal advice for SoCalGas” or (2) are information AECOM reviewed and commented upon to assist in development of legal strategy. (Id. ¶ 14.) The first category omits a critical element necessary to establish the privilege: the requirement of Judge Wiley’s first category that the documents be authored at the request of a SoCalGas lawyer. The second category likewise omits a critical element: the requirement of Judge Wiley’s second category that the documents be given to AECOM for review and comment by SoCalGas lawyers.

Review of the document descriptions in the privilege log attached as Exhibit 6 to the Chiu declaration (which the court has found to be adequately attested to by Garcia for those documents listed in Exhibit A to the Garcia declaration) in most cases does not provide the additional evidence needed to support the privileges claimed for the documents listed in Exhibit A to the Garcia declaration, as discussed below.

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Exhibit A to the Garcia declaration claims that Document numbers 391-414 meet the requirements of Category 1 of Judge Wiley's order. To meet this category, the documents must be ones that AECOM authored at the request of a SoCalGas lawyer. Mr. Garcia is copied on some, but not all, of these documents. The documents all are described as "information that AECOM assisted in preparing to enable and inform SoCalGas response and comments." However, nothing in the description or in the Garcia declaration states that the documents were authored at the request of a SoCalGas lawyer. It is not enough that someone thought to copy Mr. Garcia (in the several instances in which he was copied). There must be evidence that the documents were authored by AECOM at the request of a SoCalGas lawyer. Because this element of the privilege is missing, the court denies the protective order as to Document numbers 391-414 and the court orders their production.

Exhibit A to the Garcia Declaration claims that Document numbers 316, 317, 319-331, 334-341 and 343-414 meet the requirements of Category 2 of Judge Wiley's order. To meet the requirements of this category, the documents must be ones that SoCalGas lawyers gave to AECOM for review and comment in order to provide technical expertise to assist the lawyers in developing legal strategy.

The descriptions provided in the privilege log do not satisfy this category of privilege as to the following documents:

319-331

334-341,

343-358

360-363

365-375

377-387

389-414

All of these documents are described as either "communications with AECOM and team that entail technical write up that goes into document that AL creates to go to the CPUC," or "information that AECOM assisted in preparing to enable and inform SoCalGas response and comments." None of these documents are authored by Mr. Garcia or any other person who is identified as a lawyer or a lawyer assistant. Mr. Garcia is copied on some but not all of these documents. The email subject field for the documents are designations such as "ACTR-Master Comment Table and Supporting Attachments" or "ACTR DEIR Comments." There is no indication that any document bears a contemporaneous legend such as "attorney client privilege" or "attorney work product."

SoCalGas has not met its burden of proving that these documents meet the requirements of the

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second category of Judge Wiley's order. As noted above, the Garcia declaration does not assert that documents were given to AECOM for technical comment by a lawyer. The document descriptions do not support an inference that a SoCalGas lawyer gave the documents to AECOM requesting their review and comment. Therefore, Defendants have not met their burden of proof, the motion for protective order is denied and the following documents shall be produced: 319-331, 334-341, 343-358, 360-363, 365-375, 377-387, and 389-414.

The court concludes that Defendants have met their burden to establish privilege with respect to several documents, and the motion for protective order is granted as to the following documents: 316, 317, 359, 364, 376 and 388. As to the first two documents, 316 and 317, the document description states: "communications among AECOM and SoCalGas legal team, circulating and editing proposed technical write-up directed to AECOM for comment to support Al Garcia in advising SoCalGas on statements to the CPUC." The court draws an inference from this description, authenticated as correct by the Garcia declaration, that the documents were directed to AECOM by counsel to obtain support for Mr. Garcia's preparation of comments for the CPUC. As to the other documents, because they were authored by Mr. Garcia, the court infers that he was requesting technical comment from AECOM.

Any other documents listed in the privilege log but not listed in Exhibit A to Garcia's declaration are also ordered produced, as there is no factual basis upon which SoCalGas can claim a privilege. For example, Document 485 was not listed in either of the two Exhibits attached to the Wyman and Garcia declarations, respectively.

#### Supplemental Submissions by SoCalGas

With the Reply Brief, on August 8, 2019, SoCalGas submitted an "updated version of the AECOM Log" that purported to contain "additional information regarding the documents" listed in the log. The court has not considered this "updated version" of the log because it was not timely filed and Plaintiff did not have an opportunity to address and respond to that supplemental evidence. Further, the declaration filed on August 8 with the "updated version" of the log did not state that the declarant had personal knowledge of the documents purportedly described in the log and therefore the supplemental submission did not cure the evidentiary problems detailed above.

The court's tentative ruling on this Motion was served on counsel by the e-service provider the evening before argument on the Motion. On the day of hearing (August 14, 2019), SoCalGas submitted a second Supplemental Declaration dated August 14, 2019. The August 14 declaration by Ms. Chiu states that the information in the privilege log filed with the Reply Brief was

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prepared by an attorney of the Morgan Lewis firm under her direction and supervision and that the description in the documents were based on “review of the documents themselves, as well as conversations with Albert Garcia . . . and attorneys at Latham & Watkins . . . .” Plaintiffs also have not had an opportunity to respond to this late-filed document and it is inappropriate and prejudicial to Plaintiffs to consider it in deciding this Motion. This is the second motion addressing these privileged documents, and there is no excuse as to why the August 14 declaration could not have been considered earlier.

Moreover, even if the court did consider the new privilege log as authenticated by the declaration, the court would reach the same conclusions on this Motion. As discussed above, with respect to the documents listed in the Exhibit to the declaration of attorney Wyman, it cannot be determined on what basis the documents were categorized and the documents purportedly described in the declaration do not necessarily fit into the four categories identified by Judge Wiley. With respect to the documents listed in the Exhibit to the declaration of Garcia, there still is no evidence that the documents were authored at the request of an attorney or that the documents were given to AECOM for comment by SoCalGas lawyers.

#### Sanctions

Sanctions should be imposed where a discovery motion is brought without substantial justification. For the reasons stated above, there was not a colorable claim of privilege supported by this motion as to the vast majority of the documents at issue. This is the second litigated motion concerning these documents and Plaintiffs are entitled to their fees for opposing the motion. Although the declaration of Plaintiffs’ counsel Jesse Creed did not provide a number of hours and hourly rate in support of the Plaintiffs’ request for \$6500 in sanctions, at the hearing on the Motion Mr. Creed asserted a reasonable number of hours and an hourly rate in support of the request. Moreover, in awarding sanctions, a court may take into account its own knowledge of reasonable hourly rates and the amount of time required to produce legal work. Opposition to this Motion was time-consuming, particularly because Plaintiffs’ counsel produced a commentary on the privilege log (Exhibit J to the Creed declaration) that indicated whether or not a person listed as an author or recipient of each document was a lawyer (information omitted by Defendants from their log and from their papers) and that individually addressed Plaintiffs’ basis for contesting the claimed privilege. Sanctions of \$6500 are reasonable in light of the work done by Plaintiffs.

The Clerk provides notice on Case Anywhere.

A copy of this minute order will append to the following coordinated case under JCCP4861:

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