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17 PUBLISHER OF SACRAMENTO NEWS & REVIEW

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

15 NATIONAL CONFERENCE OF BLACK
16 MAYORS, a Georgia not-for-profit corporation;
17 SACRAMENTO MAYOR KEVIN M.
18 JOHNSON, in his official capacity as the former
19 President of the National Conference of Black
20 Mayors; and EDWIN K. PALMER, in his
21 official capacity as Chapter 7 Trustee for the
22 National Conference of Black Mayors

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Petitioners,

vs.

21 CITY OF SACRAMENTO, SACRAMENTO
22 CITY ATTORNEY'S OFFICE; CHICO
23 COMMUNITY PUBLISHING, INC. a/k/a
24 SACRAMENTO NEWS & REVIEW, a
25 California corporation; and DOES 1 through 20
26 inclusive

27
28
Respondents.

Case No. **34-2015-80002124-CU-WM-GDS**
Assigned to the Hon. Christopher Krueger

**NOTICE OF MOTION AND MOTION
REQUESTING *IN CAMERA* REVIEW OF
WITHHELD PUBLIC RECORDS;
MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF
NICK MILLER WITH EXHIBITS A-B;
DECLARATION OF THOMAS R. BURKE
WITH EXHIBITS C-O**

Hearing Date: April 22, 2016
Time: 10:30 a.m.
Dept.: 44

Action Filed: July 1, 2015

26 Pursuant to the Court's July 10, 2015 Order, Respondent Chico Community Publishing,
27 Inc., publisher of Sacramento News & Review ("SN&R"), respectfully submits this Motion for *In*
28 *Camera* Review of the requested public records to evaluate Petitioners' claim of privilege.

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on April 22, 2016, at 10:30 a.m., or as soon thereafter as
3 counsel can be heard, in Department 44 of the above-entitled Court located at 720 9th Street,
4 Sacramento, CA 95814, Respondent Chico Community Publishing, Inc., publisher of Sacramento
5 News & Review ("SN&R"), pursuant to the Court's July 10 Order, will and hereby does move this
6 Court for an Order directing that the City submit for *in camera* review all documents identified in
7 Petitioners' Privilege Log that are currently being withheld from public disclosure, and that the
8 Court order that any documents that it independently determines are not exempt under the attorney-
9 client privilege and/or work product doctrine be immediately produced to SN&R under the
10 California Public Records Act ("CPRA").

11 This Motion is made on the grounds that Petitioners have not met their threshold burden of
12 proving the existence of the asserted privilege with respect to any of the withheld communications.
13 See Memorandum, Section III.A.

14 Moreover, to the extent that any such privilege may have existed, evidence produced by
15 Petitioners strongly suggests that it has been waived through the knowing and broad disclosure of
16 the purportedly confidential communications to third parties, including disclosure to the
17 Sacramento City Attorney's Office before this lawsuit was filed. See Memorandum, Section III.B.

18 Consequently, it is appropriate for this Court to conduct an *in camera* review of the
19 withheld communications to evaluate Petitioners' claim of privilege and determine if these records
20 should be disclosed to SN&R under the CPRA.

21 The Motion is based on this Notice; the attached Memorandum of Points and Authorities;
22 SN&R's concurrent request that the City provide the Court with copies of each of the emails and
23 attached documents identified in Petitioners' Privilege Log that are currently being withheld from
24 the public; the concurrently-filed Declaration of Nick Miller with Exhibits A-B; Declaration of
25 Thomas R. Burke with Exhibits C-O; the complete files and records of this action; any matters of

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1 | which this Court may take judicial notice; and such further evidence or argument as the Court may
2 | consider at the hearing on this Motion.

3 | DATED: October 7, 2015

DAVIS WRIGHT TREMAINE LLP
THOMAS R. BURKE
DAN LAIDMAN

5 | By: Thomas R. Burke '13
6 | Thomas R. Burke

7 | Attorneys for Respondent
8 | SACRAMENTO NEWS & REVIEW

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

This is an extraordinary lawsuit – brought by the Mayor of Sacramento against the City of Sacramento and the Sacramento News & Review (“SN&R”) – to keep from the public emails subject to the California Public Records Act (“CPRA”). Mayor Johnson claims the emails are excepted from disclosure under the CPRA because they are attorney-client privileged pursuant to a private law firm’s representation of the National Conference of Black Mayors (“NCBM”). That law firm, Ballard Spahr LLP, represented the Mayor in his litigation to establish that he was validly elected president of NCBM. Concurrent with the litigation to prove he was president of NCBM, the Mayor engaged Ballard Spahr to investigate NCBM. The investigation led the Mayor to declare NCBM bankrupt. The day after filing for bankruptcy, the Mayor announced the formation of a new organization that would be in direct competition with NCBM, the African American Mayors Association (“AAMA”). Ballard Spahr represents the AAMA. Ballard Spahr also represents the bankrupt NCBM entity. The bankruptcy is contested by NCBM members, and those members disavow any notion of an attorney-client privilege between NCBM and Ballard Spahr. The purported bankruptcy representation also began after the time period when the emails at issue were sent. In short, it is clear that the Mayor is not positioned to assert NCBM confidentiality concerns and that any involvement by Ballard Spahr was pursuant to the Mayor’s personal and political agenda, not the legal interests of NCBM.

Even if there could be a valid attorney-client relationship between Ballard Spahr and NCBM, it does not cover the emails in question. The Privilege Log reveals that the emails were sent between staff and volunteers of the *Mayor’s* office and the Mayor’s education policy non-profit. There is not a single email in which it appears that a communication was sent between persons acting on behalf of NCBM. The titles of the emails also do not sound like they convey confidential attorney-client communications. Last, were there any privilege covering the emails at issue, it was waived by inclusion on each email of non-NCBM parties and/or because the emails were all voluntarily disclosed to the City Attorney, who is a third-party to any NCBM privilege.

Petitioners failed to substantively address the litany of apparent facial flaws with their privilege claim before filing suit, or in their Petition, or at the conference with the Court, or in the meet-and-confer process leading to this motion. Petitioners' strategy has instead been to avoid review of their claim. After SN&R made its public records request, a Ballard Spahr attorney contacted the reporter and said he would be named in a lawsuit unless he agreed that the City did not have to produce requested emails. When SN&R "stubbornly refused" to withdraw its request (Pet. ¶ 17), the Mayor sued it, making good on his attorney's word and turning the CPRA on its head. When SN&R continued to pursue the records, Petitioners admitted that a "majority" of the emails claimed as privileged were not in fact privileged, but it would not disclose the rest. Rather, Petitioners attempted to unilaterally close the meet-and-confer process ordered by the Court, stating they would "deem [SN&R] to have admitted that all privilege designations are appropriate, and to have waived any further right to challenge the privilege log." (Ex. D, Sept. 11, 2015 ltr.) It is clear that the parties will not be able to reach an informal resolution envisioned by the Court.

Pursuant to the Court's July 10, 2015 Order, SN&R respectfully asks that the Court review the emails *in camera* to determine if any could be attorney-client privileged, while considering the matters raised herein with respect to the purported attorney-client relationship and waiver. SN&R requests that, if there are instances in which the privilege might hinge on the role of email senders or recipients, it be permitted limited discovery to aid in the determination. Otherwise, SN&R requests a Court determination of privilege in order to bring a final resolution to this matter.

II. FACTUAL BACKGROUND & PROCEDURAL HISTORY

A. Mayor Johnson's Involvement With The National Conference Of Black Mayors.

While serving as Mayor of the City of Sacramento, Petitioner Kevin M. Johnson had a short and adversarial involvement with the National Conference of Black Mayors. By Petitioners' own account, Mayor Johnson was elected president of NCBM on May 30, 2013, and that same day he engaged Ballard Spahr for representation adverse to other leaders of the organization. *See* Pet. ¶¶ 10-11. The validity of Johnson's presidential election was challenged and "extensive litigation" ensued, for which Ballard Spahr represented Mayor Johnson's interests. *Id.* ¶ 10. After the conclusion of that "protracted litigation," on April 30, 2014, Mayor Johnson declared bankruptcy

1 for NCBM. *Id.* ¶¶ 10-12. The next day, May 1, 2014, he launched a competing organization,
2 AAMA, which Ballard Spahr also concurrently represents. *See* Miller Decl. ¶ 3, Ex. B. Mayor
3 Johnson resigned from his position with NCBM that same month. *See* Ex. J.

4 Since June 2013, Mayor Johnson has been pursuing a lawsuit against NCBM officials in
5 Georgia, represented by Ballard Spahr. *See* Petition ¶¶ 10-11, Pet. Ex. A. The firm also purports to
6 represent NCBM as Mayor Johnson’s co-Plaintiff in the case, and also in the bankruptcy
7 proceedings in U.S. Bankruptcy Court for the Northern District of Georgia. *Id.* ¶ 12. But in both
8 actions, Mayor Johnson’s opponents have also claimed to control NCBM, and assert that litigation
9 was brought on NCBM’s behalf without proper authorization. *See* Petition, Ex. A; Burke Decl. ¶
10 15, Ex. N. NCBM has moved to disqualify Ballard Spahr in the bankruptcy case, arguing that the
11 firm “holds or represents an interest adverse to the estate” based on its relationship with Mayor
12 Johnson and AAMA. *See* Ex. O (Mot. at 13). The current leadership of NCBM also maintains that
13 the organization has been improperly named as a Petitioner in this action. *See* Exs. J, N.

14 **B. SN&R’s Reporting About The Mayor And California Public Records Act Request**

15 On March 12, 2015, SN&R reporter Cosmo Garvin submitted a request to the City under
16 the CPRA, seeking all emails sent to and from the “omkj@gmail.com” email account over a two-
17 year period. *See* Ex. C, Garvin Decl. ¶¶ 2-3; Petition at ¶¶ 9-18. While the account – which
18 apparently is an acronym for “Office of Mayor Kevin Johnson” – is a private one maintained by
19 Mayor Johnson, Petitioners’ counsel has explained that it “was set up to handle nonspecific city
20 business.” *See* Ex. D (7/2/15 Tr. at 5:11-12). Between March and June 2015, the City responded to
21 Mr. Garvin’s request in batches, producing hundreds of pages of responsive records. *See* Ex. C,
22 Garvin Decl. ¶ 5. On April 23, 2015, SN&R published an article about the Mayor and his City Hall
23 staffers’ use of private email accounts to conduct City business. *See* Ex. A. The article noted that,
24 in response to SN&R’s request for the “omkj@gmail.com” emails, the “city clerk’s office asked for
25 and acquired 371 pages of emails from the mayor’s staff and turned them over to SN&R.” *Id.*

26 On May 28, 2015, and June 5, 2015, the website Deadspin published articles examining
27 Mayor Johnson’s involvement with NCBM, and his related use of public resources. *See* Ex. J.
28 Deadspin based much of its reporting on court records from the Georgia litigation, which “allege

1 that Johnson covertly organized a public/private consortium to launch what he called a ‘coup’
2 against the NCBM,” using “three public-sector PR firms plus his own mayoral communications
3 staff, a law firm that boasts about its prominent role in the charter school industry, and his wife, the
4 charter-school activist Michelle Rhee.” *Id.* SN&R published a related piece on June 9, 2015,
5 reporting that “court documents show Sacramento city employees’ coordinated strategy for taking
6 over NCBM, using Johnson’s network of quasi-public ‘OMKJ’ Gmail accounts.” Ex. A.¹

7 **C. Petitioners’ Lawsuit Against SN&R And The City Of Sacramento**

8 After receiving SN&R’s CPRA request, the City alerted the Mayor’s counsel at Ballard
9 Spahr, and then relied on the firm’s legal advice to extend the City’s deadline to produce certain
10 records responsive to SN&R’s request. *See* Miller Decl. ¶ 3, Ex. B.² On June 23, 2015, a Ballard
11 Spahr attorney contacted Mr. Garvin, explaining that the City Attorney’s Office had informed him
12 that some responsive emails might be covered by the attorney-client privilege. *See* Ex. C, Garvin
13 Decl. ¶ 7. The attorney subsequently told Mr. Garvin that he would name him in a lawsuit if he did
14 not agree that the City should not disclose these records; Mr. Garvin responded that he did not
15 believe it was his responsibility to make such a determination. *Id.* ¶ 9. An official in the City
16 Attorney’s office later told Mr. Garvin that he had reviewed the records and identified “about 96”
17 emails that might have been covered by the attorney-client privilege, but the City could not
18 withhold the emails on that basis, and the official considered them to be public records. *Id.* ¶ 11.

19 On July 1, 2015, Petitioners filed a Petition for Writ of Mandate seeking to enjoin the City
20 from disclosing any communications between Petitioners and Ballard Spahr that are subject to the
21 attorney-client and work product privileges. *See* Petition at 8. On July 2, 2015, Petitioners brought
22 an *ex parte* application for a temporary restraining order. At the July 2 hearing, counsel for the
23

24 ¹ While SN&R and Deadspin broke the news, the Mayor’s controversial involvement with
25 NCBM has since been widely covered in the media. For example, the *Sacramento Bee* reported on
26 June 8, 2015, that the Mayor “relied on city staff and nonprofit volunteers to help him become
president of the National Conference of Black Mayors,” and that “Johnson went to great lengths to
take control of NCBM in one of the most vivid examples of his national ambitions.” Ex. K.

27 ² A month before this litigation was filed, in a May 29, 2015, email, the Mayor personally
28 introduced Ballard Spahr’s Housing and Public Finance Practice Group to other City officials,
acknowledging the firm’s already close ties with Mayor Johnson and his initiatives. Ex. B.

1 City represented that it had the emails at issue in its possession, and that in light of the litigation it
2 would withhold from disclosure approximately 102 documents that contained potentially privileged
3 information. *See* Ex. D (7/2/15 Tr. at 8:16-21). The Court directed the parties to meet-and-confer
4 on a process for resolving the dispute. On July 10, 2015, the Court entered an Order pursuant to a
5 Stipulation of the parties (the “July 10 Order”), under which Petitioners would create a Privilege
6 Log with certain information regarding the records Petitioners claim is exempt from disclosure
7 under the CPRA, and setting forth a procedure for SN&R to make any challenges.

8 Pursuant to the July 10 Order, Petitioners’ counsel circulated a Privilege Log to the parties
9 on July 29, 2015, along with a Glossary containing information about individuals identified in the
10 Privilege Log. *See* Burke Decl. ¶ 5, Ex. F. The same day, Petitioners’ counsel admitted in a cover
11 email that “we determined after careful examination that a majority of the potentially privileged
12 documents flagged by the City Attorney’s Office were not in fact privileged. Any non-privileged
13 documents are being returned to the City Attorney’s Office for production to SNR pursuant to its
14 CPRA request.” *Id.* The City subsequently disclosed more than 400 emails that Petitioners
15 previously claimed were privileged, and which had, in part, formed the basis for this action for
16 injunctive relief. *See* Miller Decl. ¶ 4. However, pursuant to Petitioners’ claim of privilege, the
17 City is still withholding approximately 158 emails and associated documents. *See* Ex. F.

18 **D. SN&R’s Efforts To Resolve This Matter Informally**

19 SN&R’s counsel began the meet-and-confer process on August 6, 2015, by addressing the
20 threshold issue of Deadspin’s request to intervene in the matter. *See* Burke Decl. ¶ 6, Ex. G. As
21 Deadspin had submitted its own CPRA request seeking the same records at issue in the Privilege
22 Log, SN&R and Deadspin believed it would be most efficient for Deadspin to join in the process
23 created by the July 10 Order, rather than initiate a separate litigation. *Id.*

24 On August 10, 2015, Petitioners’ counsel responded that he was “inclined to stipulate that
25 other news organizations who request it may ‘sign on’ to our existing stipulation,” and suggested
26 that SN&R’s counsel prepare a stipulation. *Id.* ¶ 7, Ex. G. On August 12, SN&R’s counsel
27 circulated the requested stipulation, and also separately contacted Petitioners’ counsel to schedule a
28 meet-and-confer call regarding the Privilege Log. *Id.* On August 18, the parties held a lengthy

1 meet-and-confer telephone call, during which counsel for Petitioners and the City both indicated
2 that they would refuse to stipulate to Deadspin's limited intervention in the action. *Id.* ¶ 8. During
3 this August 10 call, SN&R's counsel attempted to raise issues related to the Privilege Log, but
4 Petitioners' counsel responded that they were not prepared to discuss those matters. *Id.*³

5 On September 4, 2015, SN&R's counsel sent a detailed meet-and-confer correspondence to
6 Petitioners' counsel stating that SN&R still hoped to resolve the parties' dispute without motion
7 practice, but required additional information to evaluate Petitioners' claim of privilege. *Id.* ¶ 10,
8 Ex. I. Petitioners' counsel responded with a short letter on September 11, 2015. *Id.* On September
9 15, 2015, SN&R's counsel sent a letter detailing the reasons why SN&R believed that Petitioners
10 still had not substantiated their claim of privilege with respect to any of the emails identified in the
11 Privilege Log. *Id.* Petitioners' counsel responded by letter on September 18, 2015. *Id.* Because
12 Petitioners have provided no information that establishes the existence or applicability of the
13 attorney-client privilege or work product doctrine with respect to the documents in the Privilege
14 Log, SN&R brings this motion pursuant to the July 10 Order to ask that the Court review these
15 records *in camera* and order them released.

16 **III. THE COURT SHOULD REVIEW THE WITHHELD RECORDS *IN CAMERA* TO**
17 **DETERMINE WHETHER THEY MUST BE DISCLOSED.**

18 Pursuant to the July 10 Order, SN&R respectfully requests that this Court review *in camera*
19 each of the communications identified in the Privilege Log to evaluate Petitioners' claim that these
20 records are privileged. An independent review would be justified solely on the basis of Petitioners'
21 admission that they initiated this litigation based on a significantly overbroad assertion of privilege,
22 and only subsequently determined that "a majority of the potentially privileged documents flagged

23 ³ In an effort to address Petitioners' and the City's concerns, SN&R's counsel circulated a
24 revised stipulation regarding Deadspin's limited intervention. Petitioners and the City ignored the
25 revised stipulation and counsel's follow-up requests for a response. *See* Burke Decl. ¶ 9, Ex. H.
26 On September 9, 2015, counsel requested that the Court join Deadspin as a real party in interest *sua*
27 *sponte* in light of the City's apparent abdication of its duty to represent the interest of the public
28 records requester in a "reverse-CPRA" action (*see Marken v. Santa Monica-Malibu Unified School*
Dist., 202 Cal. App. 4th 1250, 1268 (2012)), as well as its possible violation of the CPRA's
prohibition on agencies allowing "another party to control the disclosure of information," Gov't
Code § 6253.3. *See* Burke Decl. ¶ 9, Ex. H. The Court declined to address these issues by letter,
but stated that Deadspin can still bring a noticed motion to intervene. Ex. H.

1 by the City Attorney's Office were not in fact privileged." See Burke Decl. ¶ 5, Ex. F. *In camera*
2 review is also necessary because Petitioners have not met their burden of proving that the privilege
3 exists under the circumstances, and evidence suggests that any privilege has been waived.

4 **A. Petitioners Have Failed To Meet Their Threshold Burden Of Establishing The**
5 **Existence Of The Claimed Attorney-Client Privilege.**

6 "When a party asserts the attorney-client privilege, it is incumbent upon that party to prove
7 the preliminary fact that a privilege exists." *Zimmerman v. Superior Court*, 220 Cal. App. 4th 389,
8 397 (2013); *Citizens for Ceres v. Superior Court*, 217 Cal. App. 4th 889, 911 (2013). Among other
9 requirements, the party must prove that communications that it seeks to withhold contain
10 "information transmitted between a client and his or her lawyer in the course of that relationship
11 and in confidence," and were not disclosed to third parties outside the relationship. Evid. Code §
12 952. It is not enough to show that "issues touching upon legal matters are discussed with an
13 attorney." *People v. Gionis*, 9 Cal. 4th 1196, 1210 (1995). Rather, "a communication is not
14 privileged, even though it may involve a legal matter, if it has no relation to any professional
15 relationship of the attorney with the client." *Id.* Petitioners have failed to make this showing.

16 *First*, Petitioners have provided no evidence to support their claim that an attorney-client
17 relationship existed between Ballard Spahr and NCBM and President Johnson when the emails at
18 issue in the Privilege Log were sent. The "party claiming the attorney-client privilege must prove
19 the attorney-client relationship existed at the time the requested information was communicated."
20 *Gonzalez v. Superior Court*, 33 Cal. App. 4th 1539, 1549 (1995). During the meet-and-confer
21 process, SN&R specifically and repeatedly requested that Petitioners provide such evidence. See
22 Ex. I. Petitioners merely responded that they believe their "representation is sufficient," and
23 attached several items, none of which meets their burden. See Ex. I (9/18/15 Letter at 2).

24 • Petitioners rely primarily on the minutes of a May 31, 2013 NCBM meeting reflecting
25 that the Board of Directors at the time voted to allow a "Special Task Force" to engage Ballard
26 Spahr "to begin the process to ensure timely efficient execution of [an] audit" of NCBM's
27 operations, finances, and management. See Ex. I (9/18/05 Letter at 2, Ex. 1 at 2). This vote to
28 allow a task force to engage Ballard Spahr to pursue an audit does not support the existence of the

1 much broader attorney-client relationship being asserted. Petitioners claim that “Mayor Johnson
2 thereafter executed an engagement letter with Ballard Spahr.” *Id.* (9/18/05 Letter at 2). But they
3 did not disclose any terms of this agreement or information about its scope (and they refuse to
4 produce the letter itself), nor do they claim that NCBM executed such an agreement. *Id.*

5 • Petitioners next claim that the attorney-client relationship was “confirmed” by an order in
6 the Georgia litigation. *Id.* But in the identified order, the court did not purport to make any finding
7 regarding the existence or scope of any attorney-client or work product privilege, and it limited its
8 holding to the issues that it explicitly decided, noting that it declined to address “the question of
9 who are qualified members of the NCBM board.” *Id.* (Ex. 2 at 9).

10 • Finally, Petitioners rely on various documents reflecting Ballard Spahr’s representation of
11 NCBM in the bankruptcy proceedings. *See Id.* (9/18/05 Letter, Exs. 3-5). But the bankruptcy
12 proceedings commenced on April 30, 2014, long after the communications at issue in the Privilege
13 Log from July 2013 to January 2014. *See* Pet. ¶ 1; Ex. F.

14 Notably, Petitioners have not provided any declarations or other such sworn testimony from
15 Mayor Johnson, NCBM leadership, or the bankruptcy trustee attesting to the existence and scope of
16 the asserted attorney-client relationships, either in support of the Petition, the *Ex Parte* Application
17 for a Temporary Restraining Order, or during the meet-and-confer process. In the absence of such
18 evidence, courts have held that parties have failed to meet their threshold burden of establishing the
19 attorney-client relationship needed to support the privilege. *See Edwards Wildman Palmer LLP v.*
20 *Superior Court*, 231 Cal. App. 4th 1214, 1236 (2014) (holding that “petitioners failed to establish
21 preliminary facts showing an attorney-client relationship existed between” two attorneys where
22 neither one submitted a declaration attesting to the relationship).

23 *Second*, perhaps revealing of why Petitioners have failed to meet their burden of
24 establishing the privilege, the present action is prosecuted by persons in antagonistic relationships
25 with NCBM claiming here to represent the interests of NCBM. Petitioners acknowledge that
26 Ballard Spahr has represented Mayor Johnson in litigation adverse to other leaders of NCBM since
27 June 2013. *See* Petition at ¶¶ 10-12. Mayor Johnson’s affiliation with NCBM ended in May 2014,
28 and the group’s current leadership has disavowed any connection to this litigation, and called for

1 Ballard Spahr's disqualification in the bankruptcy proceedings. *See* Exs. N, O. Meanwhile,
2 Ballard Spahr also concurrently represents the AAMA, the group that Mayor Johnson created
3 immediately upon leading NCBM into bankruptcy, which competes for the same corporate
4 sponsors as NCBM and has largely sought to supplant the organization. *See* Exs. B, N, O.
5 Petitioners have not produced any evidence to show how Ballard Spahr could concurrently
6 represent each of these parties given the apparent conflicts of interest, let alone evidence that it was
7 ever representing the interests of NCBM and not solely the personal agenda of Mayor Johnson.

8 *Third*, contrary to Petitioners' implausible account, the record supports the inference that
9 the emails at issue were sent for purposes of political strategizing rather than legal representation.
10 As discussed in more detail below in Section III.B, the majority of the emails were sent or received
11 by the Mayor's political appointees and volunteers. *See* Ex. F (Privilege Log & Glossary). And
12 while the "Description" column of the Privilege Log has been prepared after-the-fact to portray the
13 communications as being primarily legal in nature, the "Title" column often suggests that the
14 emails addressed policy issues related to Mayor Johnson's takeover of NCBM and other related
15 political activities. For example, a September 10, 2013 email (with three attachments) was titled,
16 "Agenda for 09/10/2013 Birmingham Prep." Ex. F (Privilege Log at 1). This appears to be a
17 reference to Mayor Johnson's trip to Birmingham, Alabama in September 2013 for the U.S.
18 Conference of Mayors and for an education policy event hosted by his wife. *See* Ex. M. Numerous
19 other emails appear to forward news articles or discuss press releases, rather than issues related to
20 legal representation of NCBM. *E.g.*, Ex. F (Privilege Log at 1, 6-9).

21 Courts have found the privilege inapplicable under analogous circumstances. For example,
22 in *Montebello Rose Co. v. Agricultural Labor Relations Bd.*, 119 Cal. App. 3d 1 (1981), the court
23 rejected the claim that all communications with an attorney were privileged, concluding that since
24 the labor negotiations at issue "could have been conducted by a nonattorney, it is self-evident that
25 communications with [the lawyer] relating to the conduct of those negotiations were not privileged
26 unless the dominant purpose of the particular communication was to secure or render legal service
27 or advice," and the "fact that some of the communications involved strategy decisions regarding
28 conduct of the negotiations which may have had 'legal significance' ... does not mean that the

1 dominant purpose of these communications was of a legal nature.” *Id.* at 33. Likewise, here, the
2 fact that the political and policy communications at issue “may have had ‘legal significance’ does
3 not mean that the dominant purpose of these communications was of a legal nature.” *Id.* See also
4 *Watt Industries, Inc. v. Superior Court*, 115 Cal. App. 3d 802, 804 (1981) (“work-product
5 ‘privilege’ does not apply to notes made while the attorney acts as the business agent for a client”).

6 Because Petitioners have not met their threshold burden of showing that the privilege exists,
7 and the facts in the record raise an inference that the communications are not privileged, *in camera*
8 review of the withheld emails is warranted to evaluate Petitioners’ claim. See *Montebello Rose*
9 *Co.*, 119 Cal. App. 3d at 31 (privilege determination followed *in camera* review).

10 **B. Petitioners’ Evidence Shows That Any Attorney-Client Privilege That May**
11 **Have Existed Was Waived With Respect To The Withheld Communications.**

12 The “attorney-client privilege is lost ... when the holder of the privilege has ‘disclosed a
13 significant part of the communication or has consented to disclosure made by anyone.’” *DeLuca v.*
14 *State Fish Co., Inc.*, 217 Cal. App. 4th 671, 687 (2013) (quoting Evid. Code § 912). Work product
15 protection can be waived “under the same set of circumstances as waiver of the attorney-client
16 privilege—by failing to assert the protection, by tendering certain issues, and by conduct
17 inconsistent with claiming the protection.” *Id.* at 688 (quotation omitted). *In camera* review is
18 further warranted here because Petitioners’ own evidence suggests that any privileges that may
19 have existed with respect to the withheld emails have been waived.

20 *First*, Petitioners’ Privilege Log suggests that most, if not all, of the communications were
21 disclosed to numerous third parties, waiving any claim of attorney-client privilege at the time of the
22 emails. See *McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 1236 (2004)
23 (attorney-client privilege “is waived with respect to a communication protected by the privilege if
24 any holder of the privilege, without coercion, has disclosed a significant part of the communication
25 or has consented to disclosure made by anyone”). Mayor Johnson purports to bring this action
26 “solely in his official capacity as the former President elect of the NCBM and not as the Mayor of
27 the City of Sacramento.” Petition ¶ 2. Accordingly, Petitioners assert the privilege with respect to
28 communications between Ballard Spahr and NCBM and *President* Johnson “and his agents”. *E.g.*,

1 *id.* ¶ 13, Prayer ¶ 1. But virtually all of the emails were sent and/or received by individuals
2 working in political capacities for the City and/or for an education policy group affiliated with the
3 Mayor, with no indication that they had any role with NCBM, or any legitimate reason to be
4 included on attorney-client communications “on behalf of the NCBM” (Pet. ¶ 13). *See* Exs. F, L.

5 Petitioners provided a Glossary with affiliations of individuals identified in the Privilege
6 Log. *See* Ex. F. It identifies 21 members of “Mayor Johnson’s Staff” (notably, not purported
7 members of *President* Johnson’s staff) who sent or received withheld emails. *Id.* Of these 21
8 people, 20 are identified only by their political positions with the Mayor’s Office or the Mayor’s
9 “Stand Up for Sacramento Schools” group, with no affiliation with NCBM. *Id.* Only one person is
10 identified as being an “Executive Assistant to NCBM Board Member.” This individual is listed as
11 having received a single withheld email that is facially not subject to the privilege – it was titled
12 “NCBM Board E-mail” and was sent from an advisor to the *Mayor* to the “executive assistant to
13 NCBM Board Member.” *Id.*; Ex. F (Privilege Log at 10, Record No. REL0000003302). The
14 Glossary also identifies five other individuals with the label “Public Relations.” Ex. F.

15 The Glossary separately lists another five individuals (Aisha Lowe, Stephanie Mash, Tracy
16 Stigler, Aaron Anderson, and Mariah Sheriff) with the label “NCBM Litigation,” but fails to
17 provide any information about how or why they were involved in any NCBM legal
18 communications. *Id.* To the contrary, other portions of the Glossary identify the same five people
19 as political volunteers and employees with the Mayor’s Stand Up educational nonprofit and the
20 City. *Id.* Likewise, the Glossary identifies those same five individuals, plus Nicole West and
21 Astrid Mirazo, with the label “OMKJNCBM,” with no explanation for the acronym, or how or why
22 they would be involved in any NCBM legal efforts. *Id.* Like the others discussed above, Ms. West
23 and Ms. Mirazo are also separately identified on the Glossary as being employees of the City. *Id.*

24 Publicly available biographical information about the individuals listed on the Privilege Log
25 independently suggests that any privilege was waived through excessive disclosure. For example,
26 more than 50 records were sent or received by Mariah Sheriff, identified in the Glossary as a
27 volunteer for the Stand Up education group. *Id.* According to Ms. Sheriff’s LinkedIn page, she
28 served as Director of Governmental Affairs and Education in the Office of Mayor Kevin Johnson at

1 the City of Sacramento from July 2012 to April 2014 (which covers the time period for the emails
2 at issue), and later served as the Mayor's Deputy Chief of Staff. *See* Burke Decl. ¶ 13(B), Ex. L.
3 More than 40 records were sent or received by Aisha Lowe, who served as the Executive Director
4 of the Stand Up education group from November 2011 to October 2013. *Id.* ¶ 13(C), Ex. L.
5 Numerous other emails include municipal employees such as the Mayor's chief of staff (Daniel
6 Conway), press secretary (Ben Sosenko), administrative coordinator (Astrid Mirazo Gonzalez),
7 advisors (Cassandra Jennings, Patti Bisharat, Helen Hewitt), and assistants (Nicole West, Adrienne
8 Hall), as well as political volunteers. *Id.* ¶ 13, Ex. L. Thirty records were sent or received by Alex
9 Brakebill, who apparently spent three months as a Summer Fellow in the Office of Mayor Johnson
10 while attending graduate school. *Id.* ¶ 13(E), Ex. L.

11 Petitioners' Glossary and the individuals' biographical information contradicts Petitioners'
12 assertion that "[a]ll persons identified in the privilege log who received the e-mails worked for the
13 NCBM, whether in a volunteer, pro bono capacity, or otherwise, when they were receiving the
14 emails." Ex. I (9/18/15 Letter at 4). To the contrary, the only reasonable inference is that these
15 individuals were working or volunteering on political and educational policy issues for the Mayor
16 and the Stand Up nonprofit, and that they sent or received the communications at issue for such
17 purposes, not to further any legal representation of NCBM. Notably, counsel for Petitioners
18 declined SN&R's request for the email addresses on the logged emails – information that is not
19 privileged but would apparently further reveal that no one on the supposedly NCBM-privileged
20 emails was using an NCBM email address.

21 Courts consistently have held that such disclosures waive the attorney-client privilege. For
22 example, in *McKesson*, the court determined that the plaintiff waived the privilege by providing
23 certain materials to the government, rejecting the arguments that disclosure was "'reasonably
24 necessary for the accomplishment of the purpose' for which the lawyer was consulted," and that
25 "providing the documents to the government furthered a common interest or purpose it shared with
26 the government—investigating and rooting out the source of accounting improprieties at" plaintiff's
27 subsidiary. 115 Cal. App. 4th at 1237. The court reasoned that the privilege permits "sharing of
28

1 privileged information when it furthers the attorney-client relationship; not simply when two or
2 more parties might have overlapping interests.” *Id.*

3 The Northern District of California’s decision in *Sony Computer Entm’t Am., Inc. v. Great*
4 *Am. Ins. Co.*, 2005 U.S. Dist. LEXIS 18733 (N.D. Cal. Aug. 9, 2005), is also instructive. That
5 court applied California law to hold that the plaintiff waived the attorney-client privilege with
6 respect to communications made in the presence of its insurance broker. *Id.* at *3. The court
7 explained that “[w]here a third party is present, no presumption of confidentiality obtains, and the
8 usual allocation of burden of proof, resting with the proponent of the privilege, applies in
9 determining whether confidentiality was preserved under § 952.” *Id.* at *5 (quoting *Raytheon Co.*
10 *v. Superior Court*, 208 Cal. App. 3d 683, 688 (1989)). The plaintiff “provided no evidentiary
11 support for its claim that [the broker] was ... someone to whom disclosure was reasonably
12 necessary to accomplish the purpose for which the lawyer was consulted.” *Id.* at *7. The plaintiff
13 “did not, for example, provide a declaration from [the broker] or even from [plaintiff’s counsel]
14 regarding [the broker’s] role with respect to [plaintiff’s] insurance claim. Thus, [plaintiff] failed to
15 carry its burden of proving the privilege.” *Id.* This case is squarely on-point: despite repeated
16 requests, Petitioners have provided no evidentiary support regarding the role of the many political
17 appointees and volunteers identified in the privilege log that would explain why disclosure to these
18 individuals was “necessary.” *Id.* Indeed, Petitioners have offered only the bare assertion that
19 everyone affiliated with the City and Stand Up included on the emails was acting as an “agent” of
20 President Johnson. *E.g.*, Petition ¶ 13. In *Zimmerman*, the court rejected a claim of privilege based
21 on agency, explaining that the proponent “must offer some facts to support her claim of privilege.
22 This is especially true when the claim of privilege rests on the existence of agency. Without
23 offering any facts to prove agency, she faces the strong probability that the court will not find the
24 existence of the privilege established.” 220 Cal. App. 4th at 402 (citation omitted).⁴

25
26 ⁴ The only published authority Petitioners cited on this point in their meet-and-confer
27 letters, *Zurich American Ins. Co. v. Superior Court*, 155 Cal. App. 4th 1485 (2007), is not to the
28 contrary. There, the court recognized the general principle that “[w]hile involvement of an
unnecessary third person in attorney-client communications destroys confidentiality, involvement of
third persons to whom disclosure is reasonably necessary to further the purpose of the legal
consultation preserves confidentiality of communication.” Id. at 1496 (original emphasis).

1 Because Petitioners have not met their “burden to prove the existence and scope of the
2 agency with actual facts,” the Court should conduct an *in camera* review of the withheld emails,
3 and order the disclosure of any communications sent or received by unnecessary third parties. *Id.*
4 *See also Sony Computer*, 2005 U.S. Dist. LEXIS 18733, at *6-7. Alternatively, SN&R requests
5 that it be permitted to conduct limited discovery regarding the roles of the individuals identified on
6 the Privilege Log as being affiliated with the Mayor’s Office or Stand Up, in order to properly
7 evaluate Petitioners’ claim that these individuals are within the privilege for NCBM.

8 *Second*, separate from the initial waiver that apparently occurred when these emails were
9 sent and received by third parties at the outset, any privilege that may have existed was waived a
10 second time when Petitioners permitted the Sacramento City Attorney’s Office to review the emails
11 at issue. There is no question that the City of Sacramento is not within the asserted attorney-client
12 privilege, and that it has had no role or involvement in the NCBM-related litigation. *See* Ex. D
13 (7/2/15 Tr. at 7:28-8:1) (City Attorney acknowledging City “did not have standing to assert” the
14 privilege “on behalf of a third-party attorney in a non-city related matter”). Petitioners therefore
15 waived any privilege by voluntarily allowing the City to view these communications before they
16 filed this suit. *See McKesson*, 115 Cal. App. 4th at 1237; *Citizens for Ceres*, 217 Cal. App. 4th at
17 922 (city and developer waived privilege by disclosures to each other before approval of project).⁵

18 It remains unclear exactly how all of the emails were transferred to the City, although there
19 is no dispute that the City lacks access to Mayor Johnson’s private gmail account. *See* Ex. D
20 (7/2/15 Tr. at 10:15-16). There is evidence that the Mayor’s staff provided the City Clerk with at
21 least 371 pages of emails in response to SN&R’s CPRA request for correspondence from the
22 “OMKJ” account. *See* Ex. A(a). Other emails may have been sent or received by individuals with
23 municipal email accounts that are maintained by the City (*see* Ex. D (7/2/15 Tr. at 10:20-22)), the
24

25 ⁵ The Third Appellate District has held that where a CPRA action seeks disclosure of emails
26 from a public official’s private account which are not in the agency’s possession, the action must be
27 directed against the individual official. *See Tracy Press, Inc. v. Superior Court*, 164 Cal. App. 4th
28 1290, 1293-94 (2008). Thus if Petitioners had wished to maintain the alleged attorney-client
privilege, they should have refused to provide the emails to the City Attorney’s Office at the outset,
rather than allow the City to review the records and expect it to assert a privilege it does not hold.

contents of which are well-known to be subject to public disclosure under the CPRA. *See Bertoli v. City of Sebastopol*, 233 Cal. App. 4th 353, 374 (2015) (“it appears beyond dispute that the e-mails of City employees located on public computers constitute public records under the PRA”).

Regardless of how the City obtained the emails, Petitioners voluntarily allowed the City Attorney to review them, and never invoked the very specific procedures that must be followed when privileged communications are inadvertently disclosed to an outside attorney. *Cf. State Comp. Ins. Fund v. WPS, Inc.*, 70 Cal. App. 4th 644, 657 (1999). At no point have Petitioners claimed that any emails were involuntarily disclosed, and, to the contrary, evidence shows that Petitioners knew that the City Attorney had reviewed them when they worked closely together to direct the response to SN&R's CPRA request before this litigation was filed. Ex. B. Such voluntary disclosure to a party outside the privilege constituted a second waiver.

IV. CONCLUSION

For all of these reasons, SN&R respectfully requests that this Court conduct an *in camera* review of the records identified in the Privilege Log to determine whether they are privileged, and that any emails, attachments, or portions thereof that are subject to disclosure under the CPRA be promptly produced to SN&R. *See* Gov't Code § 6253(a) (“[a]ny reasonably segregable portion of a record shall be available for inspection ... after deletion of the portions that are exempted by law”). To the extent that the Court determines that Petitioners’ claim of privilege depends on whether the individuals identified in the Privilege Log were in fact acting as the Mayor’s agents, then SN&R requests that it be permitted to conduct limited discovery on this issue.

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