

1 The Plaintiff is entitled to an unequivocal statement that all documents responsive to
2 the demand are being produced. C.C.P. Section 2031.220 sets forth the requirements for a
3 “statement of compliance” to a document demand.

4 A statement that the party to whom an inspection demand has been
5 directed will comply with the particular demand **shall state** that the
6 production, inspection, and related activity demanded will be allowed either
7 in whole or in part, and that **all documents** or things in the demanded
8 category that are in the possession, custody, or control of that party and to
9 which no objection is being made will be included in the production.

10 The Defendant’s conditional response is completely non-compliant with the Code.
11 Instead of stating that “all” documents will be produced, the Response unilaterally sets
12 conditions or limits on what is being produced.

13 The Defendant’s Response first indicates that the Defendant has unilaterally decided
14 what is a “relevant” document. The Response means that documents are being withheld that
15 the Defendant has decided are “not relevant”. That is unacceptable under the Code.

16 The Response further indicates that only “non-privileged documents” will be produced.
17 That is an improper response unless a privilege log was served as part of the response.
18 Otherwise, there is no identification of the particular documents that are being withheld from
19 production, and there is no identification of the particular privilege that is being invoked.
20 Those failures are violations of the Code. The objections have been waived by this non-
21 compliance with C.C.P. § 2031.240(b).

22 *California Judges Benchbook: Civil Proceedings--Discovery* (Cal CJER 1994, Update
23 2006), §15.25, p. 188, describes the requirement for a privilege log as follows (in part):

24 All such documents must be listed and described in what is
25 commonly referred to as a **privilege log**. This description **must be**
26 **sufficiently specific to enable the judge to evaluate the claim.** CCP
27 §2031.240(b) (formerly CCP §2031(g)(3)).

28 In his “meet and confer” letter reply of September 6, 2007, defense counsel berates
29 Plaintiffs’ counsel about the existence of a “privilege log”. See Motion Exhibit “E”, hereto.
30 However, the August 21 privilege log is not compliant with the Code because it is not a
31 sufficiently specific description of *any document*. Instead, it provides 3 descriptions of

1 categories. No documents are described, e.g., with dates, authors, recipients, etc. And, the
2 "descriptions" are designed to obtain the applications of privileges. That is not a real privilege
3 log at all, and defense counsel surely is aware it is not Code-compliant.

4 The basic test for an adequate privilege log is set forth in *Kaiser Foundation Hospitals*
5 v. *Superior Court* (1998) 66 Cal.App.4th 1217, 1228:

6 The law attempts to find a balance between these competing interests in
7 discovery and the assertion of privilege by requiring a party objecting to
8 document production to "identify with particularity" any document as to
9 which it makes an objection, and "set forth clearly the extent of, and the
10 specific ground for, the objection," in accordance with Code of Civil
11 Procedure section 2031, subdivision (f)(3). Here, Kaiser has already produced
12 a privilege log specifying the documents as to which it has withheld
13 production on a claim of attorney-client privilege or work product doctrine
14 protection. **The trial court must review Kaiser's privilege log to determine
15 whether the specified documents as to which Kaiser claims the
16 protection of either the privilege or the work product doctrine are in fact
17 so protected. For this purpose, the information in Kaiser's log must be
18 sufficiently specific to permit the trial court to determine whether each
19 withheld document is or is not privileged. Should the trial court find the
20 information in the privilege log insufficiently specific to allow such a
21 determination, it may order Kaiser to prepare a new privilege log
22 containing more particularized information about the nature of each
23 document as to which the attorney-client privilege is claimed.**

24 [Emphasis added.]

25 Specific identification of the *document* is required for a real privilege log.

26 A party claiming privilege in response to an inspection demand should
27 provide a "privilege log" that **identifies each document for which a
28 privilege is claimed, its author, recipients, date of preparation, and the
specific privilege claimed.**

[Cal. Practice Guide: Civ. Proc. Before Trial (TRG 2004), § 8:1474.5
(emphasis added); and see also, *In re Grand Jury Investigation*, 974 F.2d
1068, 1071 (9th Cir.1992).]

In *OXY Resources California v. Superior Court* (2004) 115 Cal.App.4th 874, 883, the
need to give some indication of the content of the communication was demonstrated.

In response to document requests served by Calpine, OXY and EOG withheld
certain documents and provided Calpine with privilege logs identifying the
withheld documents. Among the documents withheld were 204 documents
exchanged between OXY and EOG at various times before and after the close
of the transaction on December 31, 1999.

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withheld documents exchanged between OXY and EOG is either a
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1 combination of joint defense, attorney work product, and attorney-client
2 privilege. EOG's description of each withheld document on its privilege
3 log gives some indication of the content of the communication. For
4 example, EOG described one document as "1- page e-mail, re: Attached
5 draft consent request letter for EOG properties."

6 OXY's privilege log is less revealing than EOG's. Although the document
7 description in OXY's privilege log identifies the document's senders and
8 recipients as well as the type of communication (e.g., letter, e-mail, or
9 facsimile cover sheet), the description gives no indication of the purpose
10 or content of the communication. The privilege claimed as to the withheld
11 documents exchanged between OXY and EOG is either just "JDA," referring
12 to the Joint Defense Agreement, or the Joint Defense Agreement combined
13 with the attorney-client privilege and/or the work product doctrine. Roughly
14 70 of the documents on OXY's privilege log were withheld solely on the
15 ground of the Joint Defense Agreement, without reference to any underlying
16 privilege, privacy claim, or claim of work product protection.
17 Calpine ultimately filed a motion to compel the production of the 204
18 withheld documents that had been exchanged between EOG and OXY.

19 [Emphasis added.]

20 The contents are not necessarily privileged because mere transmission to an attorney
21 does not render the communication protected under the attorney-client privilege. *Green &*
22 *Shinee v. Superior Court* (2001) 88 Cal.App.4th 532, 537.

23 At a minimum, there must be an *in camera* inspection for these documents.

24 *OXY Resources California v. Superior Court* (2004) 115 Cal.App.4th 874, 895:

25 Even OXY acknowledges the interests of EOG and OXY in the transaction
26 were "adversarial, common, and at times, a blend of the two." Yet, OXY
27 **apparently expects the court to rely entirely on the conclusory Peterson
28 and Stevens declarations, which simply state in general terms that EOG
and OXY had a common interest in finalizing their transaction and in
responding to Calpine's inquiries about the Elkhorn Slough. Neither the
privilege log nor the declarations reveal the content of any of the
communications, so it would be impossible for Calpine to offer evidence
refuting OXY's claims that all of the withheld communication involve
matters of common interest. Indeed, without more information about the
disputed documents, Calpine cannot demonstrate that each
communication between OXY and EOG was not reasonably necessary to
accomplish **640 the purpose for which a lawyer was consulted.**

As a practical matter, it is impossible to know whether any of the disclosures
of purportedly privileged information between OXY and EOG were
reasonably necessary to accomplish the purpose for which a lawyer was
consulted without knowing in at least a general sense the communication's
content. OXY correctly notes that a privilege claimant is not obliged to reveal
the subject matter of a communication to establish a claim of privilege. (See
Evid.Code, § 917, Comment of Assembly Committee on Judiciary.) The
issue here, however, is not whether the documents contain privileged
information. Rather, it is whether any privileges were waived because of
disclosure to a third party. Moreover, we do not suggest that OXY must
amend its privilege log to describe the content of each document. Instead, **an**

1 in camera review of the documents would permit the court to determine
2 whether the disclosures were reasonably necessary to accomplish the
3 lawyer's role in the consultation. OXY argues that the inviolability of the
communications at issue here. We disagree.

4 [Emphasis added.]

5
6 Finally, in this instance, there is no connection between the "privilege log" and the
7 Defendant's written Response to the Plaintiffs' Document Demands. There is no assurance
8 that documents are not being withheld. There is no assurance that if documents are being
9 withheld, that they would only be included in the purported "privilege log". Hence, both the
10 Response and the "privilege log" are patently inadequate, and further response is warranted.
11 The need for a further, straightforward response is demonstrated by the conditional, ambiguous
12 nature of the Response itself.

13 An article published in the San Francisco Daily Journal on September 6, 2007, and
14 authored by Richard M. Coleman, Esq., who is "a full-time neutral with Alternative Resolution
15 Centers, as well as a discovery referee" in the Los Angeles area, finds that these types of
16 purported responses that are made with and subject to objections do not comply with the Code.

17 1. After stating objections in general terms, the respondent
18 concluded with the following language: "Without waiving these objections
19 and subject to them, and specifically excluding any communications between
20 attorney and client, defendant responses as follows: Defendant will produce
all responsive documents."

21 **Did the respondent comply with the statutes? No.** The response
22 "specifically" excludes attorney-client documents, but does not state whether
any in fact exist. If there are privileged documents, they must be identified
with particularity.

23 C.C.P. Section 2031.240(b)(1) provides that the respondent: Identify
with particularity any document ... to which an objection is being made.

24 [Emphasis added.]

25 The response is also ambiguous: "**Without waiving these objections
and subject to them.**"

26 **What does that mean?** The documents will be produced but
objections made to them are preserved? Or, any documents to which
objection has been made are being withheld?

27 **The movant is entitled to an unequivocal statement that all the
documents responsive to the request are being produced.** If withheld
based on objection, as with claims of privilege, the documents must be
identified with particularity.

28 [Italics in original; bold added.]

1 Also very recently, the 9th Circuit Court of Appeals ruled that a responding party must
2 state unequivocally that no documents are being withheld.

3 In *Merrick v. Paul Revere Life Ins. Co.*, --- F.3d ---, 2007 WL 2458503 (August 31,
4 2007), a case venued in Nevada Federal Court, the 9th Circuit Court upheld a trial court judge
5 order *in limine* which barred the defendant from introducing evidence at trial where the
6 documents were withheld during discovery.

7 The insurers also challenge the district court's order suppressing
8 certain evidence placed in the claim file after litigation commenced. The
9 district court granted this motion upon finding that the insurers withheld
10 evidence that they were ordered to produce regarding their post-litigation
11 treatment of Merrick's claim. The insurers argue that the court erred in finding
12 that they had withheld any evidence. "Courts need not tolerate flagrant abuses
13 of the discovery process" and have "inherent power" to exclude evidence as a
14 sanction for such abuses. *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27
15 (9th Cir.1980). We review the imposition of discovery sanctions for abuse of
16 discretion and the underlying factual determinations for clear error. *Valley*
17 *Eng'rs Inc. v. Elec. Eng'g Co.*, 158 F.3d 1051, 1052 (9th Cir.1998). Based
18 upon the record, we cannot conclude that the district court's finding that the
19 insurers withheld evidence is clearly erroneous. The insurers' pretrial
20 behavior gives rise to such an inference. **The insurers invoked the privilege
21 in response to a specific document production request, and continued to
22 do so even after the magistrate judge instructed them not to invoke the
23 privilege unless the privilege was actually shielding documents. Their
24 responses expressly objected on the basis of privilege and attested that
25 "subject to these objections," their production was complete. FN3 Only
26 after the magistrate ordered the privileges waived (in response to
27 Merrick's assertion that defendants were withholding evidence), and
28 Merrick brought his motion in limine, did the insurers state
unequivocally that no documents were withheld on the basis of privilege.**
FN4 Even then, counsel's statement at the hearing could be understood as
admitting the existence of withheld documents.

[*Id.*, at p. 5; bold added.]

21 The 9th Circuit Court of Appeals further held that the paucity of documents actually
22 produced supports an inference that documents are being withheld.

23 In addition, **the existence of withheld documents may be inferred from the
24 paucity of material actually produced.** Although the insurers received over
25 3000 pages of documents pertaining to Merrick's claim after litigation began,
26 it produced only three short memos analyzing this material, none of which
was generated by the attorneys who were actively managing the case file after
Merrick filed his complaint. FN5

27 Against these facts, the defendants offer only their sworn statement that
28 documents were not withheld. While proving a negative is difficult, **the
defendants' pre-trial conduct and the dearth of documents actually**

1 **produced support an inference that the defendants withheld documents**
2 in violation of the magistrate's order. Given the district court's superior
3 position to adjudge the insurers' culpability, we conclude that the district
4 court did not clearly err in so finding, and did not abuse its discretion in
5 granting Merrick's motion in limine.

6 [Id., at p. 6; bold added.]

7 The Mexican Catholic Church Defendants have produced **93 pages of documents for a**
8 **priest who was ordained in Mexico in 1970**, and worked as a priest in Mexico except for the
9 time period of March 1987 to January 1988 when he was in California, until perhaps the
10 present day. The "paltry" production of documents about Father Aguilar is unbelievable. The
11 lack of credibility to the documents produced thus far supports an inference that documents are
12 being withheld by these highly evasive "compliance statements".

13 Plaintiff requests a court order requiring a further response by Defendant that is not
14 "conditioned" in any manner, and an unequivocal statement that *all* documents have been
15 produced. Absent such a court order, the concealment of relevant information and documents
16 by the Mexican Catholic Church authorities will continue, and will deny justice to the Plaintiff.

17 **DOCUMENT DEMAND NO. 19 :**

18 All DOCUMENTS CONCERNING the incardination of Father Nicolas Aguilar (aka
19 Nicolas Aguilar Rivera) from Mexico to the Archdiocese of Los Angeles.

20 **RESPONSE:**

21 The Diocese incorporates by reference its General Objections set forth above. The
22 Diocese further objects to this Request because the term "incardination" is vague and
23 ambiguous and, as such, the Request does not designate the requested documents with
24 reasonable particularity as required by California Code of Civil Procedure § 2025.220(a)(4).

25 Subject to and without waiving its objections, the Diocese responds as follows:

26 The Diocese will produce such relevant, responsive and non-privileged documents as
27 are in its possession, custody or control, which documents have not been produced previously
28 by the Defendants.

1 LEGAL AND FACTUAL REASONS FOR COMPELLING FURTHER RESPONSE:

2 A. Good Cause For Discovery

3 Code of Civil Procedure Section 2017.010 provides that:

4 Unless otherwise limited by order of the court in accordance with this
5 title, **any party may obtain discovery regarding any matter, not**
6 **privileged, that is relevant to the subject matter involved in the pending**
7 **action or to the determination of any motion made in that action, if the**
8 **matter either is itself admissible in evidence or appears reasonably**
9 **calculated to lead to the discovery of admissible evidence. Discovery may**
10 **relate to the claim or defense of the party seeking discovery or of any**
11 **other party to the action. Discovery may be obtained of the identity and**
12 **location of persons having knowledge of any discoverable matter, as well**
13 **as of the existence, description, nature, custody, condition, and location**
14 **of any document, tangible thing, or land or other property.**

15 Here, all documents regarding the transfer of Father Aguilar from Mexico to the United
16 States is clearly within the scope of the “jurisdictional” issue pending before the Court.

17 Certainly, documents regarding Father Aguilar cannot be considered “privileged”
18 unless they are restricted to communications between the Defendants and their attorneys.

19 B. Objections

20 The objections made to this document demand are *too general and/or meritless* and/or
21 frivolous, warranting sanctions.

22 The Defendant’s use of “General Objections” are improper.

23 C.C.P. § 2031.210(a)(3) and § 2031.240(b), require *separate* objections to document
24 demands, including identification “with particularity” of each document “to which an objection
25 is being made”, and further, a clear statement of the “specific grounds” for the objection,
26 including but not limited to any privilege.

27 The dual failures of the Defendant to either defend those “General Objections” and
28 withdraw them during the “meet and confer” process, means the Defendant both conceded they
29 are improper, and it was a bad faith to waste of everyone’s time on such “objections”.

30 “Vague and ambiguous” is not a valid objection to an inspection demand unless “the
31 ambiguity precludes an intelligent reply.” *California Judges Benchbook: Civil Proceedings--*
32 *Discovery* (Cal CJER 1994), §15.25, p. 241, citing *Cembrook v. Superior Court* (1961) 56

1 Cal.2d 423, 430 (requests for admissions), and *Standon Co. v. Superior Court* (1990) 225
2 Cal.App.3d 898, 901 (an objection to a request for “any and all bills ... evidencing expenses ...
3 incurred” based on the ground that the request was “vague, ambiguous, and unintelligible”
4 would be untenable and subject to sanction). Also see *Deyo v. Kilbourne* (1978) 84
5 Cal.App.3d 771, 783 (an interrogatory must be answered “if the nature of the information
6 sought is apparent.”).

7 In this instance, incardination comes from , “to incardinate”. The Defendant knows
8 what the word means. Plaintiff’s Special Interrogatory No. 89 to the Defendant stated: “The
9 term ‘incardinate’ means to transfer a Roman Catholic priest to a new district under the
10 authority of a different bishop.”

11 All of the objections are patently meritless, and should be overruled.

12 Additionally, the objections were frivolous, warranting sanctions.

13 Accordingly, the Court is requested to overrule all objections, and make a finding that
14 Defendant’s refusal to produce the documents, dilatory tactics, and failure to “meet and confer”
15 in good faith constitute discovery misuse, and award sanctions.

16
17 C. Substantive Response

18 As to the Defendant’s “substantive” response, it is *evasive*.

19 Again, the Response very ambiguously and conditionally states: “The Diocese will
20 produce such relevant, responsive and non-privileged documents as are in its possession,
21 custody or control, which documents have not been produced previously by the Defendants.”

22 The Plaintiff is entitled to an unequivocal statement that all documents responsive to
23 the demand are being produced. C.C.P. Section 2031.220 sets forth the requirements for a
24 “statement of compliance” to a document demand.

25 A statement that the party to whom an inspection demand has been
26 directed will comply with the particular demand **shall state** that the
27 production, inspection, and related activity demanded will be allowed either
28 in whole or in part, and that **all documents** or things in the demanded
category that are in the possession, custody, or control of that party and to
which no objection is being made will be included in the production.

1 The Defendant's conditional response is completely non-compliant with the Code.
2 Instead of stating that "all" documents will be produced, the Response unilaterally sets
3 conditions or limits on what is being produced.

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5 what is a "relevant" document. The Response means that documents are being withheld that
6 the Defendant has decided are "not relevant". That is unacceptable under the Code.

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8 That is an improper response unless a privilege log was served as part of the response.
9 Otherwise, there is no identification of the particular documents that are being withheld from
10 production, and there is no identification of the particular privilege that is being invoked.
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12 compliance with C.C.P. § 2031.240(b).

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14 2006), §15.25, p. 188, describes the requirement for a privilege log as follows (in part):

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16 commonly referred to as a **privilege log**. This description **must be**
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19 Plaintiffs' counsel about the existence of a "privilege log". See Motion Exhibit "E", hereto.
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21 sufficiently specific description of *any document*. Instead, it provides 3 descriptions of
22 *categories*. No *documents* are described, e.g., with dates, authors, recipients, etc. And, the
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3 Procedure section 2031, subdivision (f)(3). Here, Kaiser has already produced
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7 whether the specified documents as to which Kaiser claims the
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10 sufficiently specific to permit the trial court to determine whether each
11 withheld document is or is not privileged. Should the trial court find the
12 information in the privilege log insufficiently specific to allow such a
13 determination, it may order Kaiser to prepare a new privilege log
14 containing more particularized information about the nature of each
15 document as to which the attorney-client privilege is claimed.**

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32 issue here, however, is not whether the documents contain privileged
33 information. Rather, it is whether any privileges were waived because of
34 disclosure to a third party. Moreover, we do not suggest that OXY must
35 amend its privilege log to describe the content of each document. Instead, **an**
36 **in camera review of the documents would permit the court to determine**
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38 **lawyer's role in the consultation. OXY argues that the inviolability of the**
39 **attorney-client privilege prohibits even an in camera review of the**
40 **communications at issue here. We disagree.**

41 [Emphasis added.]

42 Finally, in this instance, there is no connection between the "privilege log" and the
43 Defendant's written Response to the Plaintiffs' Document Demands. There is no assurance
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14 behavior gives rise to such an inference. **The insurers invoked the privilege
15 in response to a specific document production request, and continued to
16 do so even after the magistrate judge instructed them not to invoke the
17 privilege unless the privilege was actually shielding documents. Their
18 responses expressly objected on the basis of privilege and attested that
19 "subject to these objections," their production was complete. FN3 Only
20 after the magistrate ordered the privileges waived (in response to
21 Merrick's assertion that defendants were withholding evidence), and
22 Merrick brought his motion in limine, did the insurers state
23 unequivocally that no documents were withheld on the basis of privilege.**
24 FN4 Even then, counsel's statement at the hearing could be understood as
25 admitting the existence of withheld documents.

26 [Id., at p. 5; bold added.]

27 The 9th Circuit Court of Appeals further held that the paucity of documents actually
28 produced supports an inference that documents are being withheld.

In addition, **the existence of withheld documents may be inferred from the
paucity of material actually produced.** Although the insurers received over
3000 pages of documents pertaining to Merrick's claim after litigation began,
it produced only three short memos analyzing this material, none of which
was generated by the attorneys who were actively managing the case file after
Merrick filed his complaint. FN5

Against these facts, the defendants offer only their sworn statement that
documents were not withheld. While proving a negative is difficult, **the
defendants' pre-trial conduct and the dearth of documents actually
produced support an inference that the defendants withheld documents**
in violation of the magistrate's order. Given the district court's superior
position to adjudge the insurers' culpability, we conclude that the district
court did not clearly err in so finding, and did not abuse its discretion in
granting Merrick's motion in limine.

[Id., at p. 6; bold added.]

The Mexican Catholic Church Defendants have produced **93 pages of documents for a
priest who was ordained in Mexico in 1970**, and worked as a priest in Mexico except for the

1 time period of March 1987 to January 1988 when he was in California, until perhaps the
2 present day. The "paltry" production of documents about Father Aguilar is unbelievable. The
3 lack of credibility to the documents produced thus far supports an inference that documents are
4 being withheld by these highly evasive "compliance statements". The Plaintiff and the Court
5 must be assured that every single piece of paper involving Father Aguilar's transfer from
6 Mexico to California has been produced in order for a ruling on the merits can be made about
7 the jurisdictional issue.

8 Plaintiff requests a court order requiring a further response by Defendant that is not
9 "conditioned" in any manner, and an unequivocal statement that *all* documents have been
10 produced. Absent such a court order, the concealment of relevant information and documents
11 by the Mexican Catholic Church authorities will continue, and will deny justice to the Plaintiff.

12
13
14 **DOCUMENT DEMAND NO. 20 :**

15 All DOCUMENTS CONCERNING the incardination of Father Nicolas Aguilar (aka
16 Nicolas Aguilar Rivera) from the Archdiocese of Los Angeles to Mexico.

17 **RESPONSE:**

18 The Diocese incorporates by reference its General Objections set forth above. The
19 Diocese further objects to this Request because the term "ordination" is vague and ambiguous
20 as is the phrase "incardination ... from the Archdiocese of Los Angeles to Mexico;" and, as
21 such, the Request does not designate the requested documents with reasonable particularity as
22 required by California Code of Civil Procedure § 2025.220(a)(4). Subject to and without
23 waiving its objections, the Diocese responds as follows:

24 The Diocese will produce such relevant, responsive and non-privileged documents as
25 are in its possession, custody or control, which documents have not been produced previously
26 by the Defendants.

27 **LEGAL AND FACTUAL REASONS FOR COMPELLING FURTHER RESPONSE:**

28 A. Good Cause For Discovery

1 Code of Civil Procedure Section 2017.010 provides that:

2 Unless otherwise limited by order of the court in accordance with this
3 title, **any party may obtain discovery regarding any matter, not**
4 **privileged, that is relevant to the subject matter involved in the pending**
5 **action or to the determination of any motion made in that action, if the**
6 **matter either is itself admissible in evidence or appears reasonably**
7 **calculated to lead to the discovery of admissible evidence. Discovery may**
8 **relate to the claim or defense of the party seeking discovery or of any**
9 **other party to the action. Discovery may be obtained of the identity and**
10 **location of persons having knowledge of any discoverable matter, as well**
11 **as of the existence, description, nature, custody, condition, and location**
12 **of any document, tangible thing, or land or other property.**

13 Here, all documents regarding the transfer of Father Aguilar from California back to
14 Mexico is clearly within the scope of the “jurisdictional” issue pending before the Court.

15 Certainly, documents regarding Father Aguilar cannot be considered “privileged”
16 unless they are restricted to communications between the Defendants and their attorneys.

17 B. Objections

18 The objections made to this document demand are *too general and/or meritless* and/or
19 frivolous, warranting sanctions.

20 The Defendant’s use of “General Objections” are improper.

21 C.C.P. § 2031.210(a)(3) and § 2031.240(b), require *separate* objections to document
22 demands, including identification “with particularity” of each document “to which an objection
23 is being made”, and further, a clear statement of the “specific grounds” for the objection,
24 including but not limited to any privilege.

25 The dual failures of the Defendant to either defend those “General Objections” and
26 withdraw them during the “meet and confer” process, means the Defendant both conceded they
27 are improper, and it was a bad faith to waste of everyone’s time on such “objections”.

28 “Vague and ambiguous” is not a valid objection to an inspection demand unless “the
ambiguity precludes an intelligent reply.” *California Judges Benchbook: Civil Proceedings--*
Discovery (Cal CJER 1994), §15.25, p. 241, citing *Cembrook v. Superior Court* (1961) 56
Cal.2d 423, 430 (requests for admissions), and *Standon Co. v. Superior Court* (1990) 225
Cal.App.3d 898, 901 (an objection to a request for “any and all bills ... evidencing expenses ...

1 incurred” based on the ground that the request was “vague, ambiguous, and unintelligible”
2 would be untenable and subject to sanction). Also see *Deyo v. Kilbourne* (1978) 84
3 Cal.App.3d 771, 783 (an interrogatory must be answered “if the nature of the information
4 sought is apparent.”).

5 In this instance, incardination comes from , “to incardinate”. The Defendant knows
6 what the word means. Plaintiff’s Special Interrogatory No. 89 to the Defendant stated: “The
7 term ‘incardinate’ means to transfer a Roman Catholic priest to a new district under the
8 authority of a different bishop.”

9 All of the objections are patently meritless, and should be overruled.

10 Additionally, the objections were frivolous, warranting sanctions.

11 Accordingly, the Court is requested to overrule all objections, and make a finding that
12 Defendant’s refusal to produce the documents, dilatory tactics, and failure to “meet and confer”
13 in good faith constitute discovery misuse, and award sanctions.

14

15 C. Substantive Response

16 As to the Defendant’s “substantive” response, it is *evasive*.

17 Again, the Response very ambiguously and conditionally states: “The Diocese will
18 produce such relevant, responsive and non-privileged documents as are in its possession,
19 custody or control, which documents have not been produced previously by the Defendants.”

20 The Plaintiff is entitled to an unequivocal statement that all documents responsive to
21 the demand are being produced. C.C.P. Section 2031.220 sets forth the requirements for a
22 “statement of compliance” to a document demand.

23 A statement that the party to whom an inspection demand has been
24 directed will comply with the particular demand **shall state** that the
25 production, inspection, and related activity demanded will be allowed either
26 in whole or in part, and that **all documents** or things in the demanded
27 category that are in the possession, custody, or control of that party and to
28 which no objection is being made will be included in the production.

27 The Defendant’s conditional response is completely non-compliant with the Code.
28 Instead of stating that “all” documents will be produced, the Response unilaterally sets

1 conditions or limits on what is being produced.

2 The Defendant's Response first indicates that the Defendant has unilaterally decided
3 what is a "relevant" document. The Response means that documents are being withheld that
4 the Defendant has decided are "not relevant". That is unacceptable under the Code.

5 The Response further indicates that only "non-privileged documents" will be produced.
6 That is an improper response unless a privilege log was served as part of the response.
7 Otherwise, there is no identification of the particular documents that are being withheld from
8 production, and there is no identification of the particular privilege that is being invoked.
9 Those failures are violations of the Code. The objections have been waived by this non-
10 compliance with C.C.P. § 2031.240(b).

11 *California Judges Benchbook: Civil Proceedings--Discovery* (Cal CJER 1994, Update
12 2006), §15.25, p. 188, describes the requirement for a privilege log as follows (in part):

13 All such documents must be listed and described in what is
14 commonly referred to as a **privilege log**. This description **must be**
15 **sufficiently specific to enable the judge to evaluate the claim.** CCP
§2031.240(b) (formerly CCP §2031(g)(3)).

16 In his "meet and confer" letter reply of September 6, 2007, defense counsel berates
17 Plaintiffs' counsel about the existence of a "privilege log". See Motion Exhibit "E", hereto.
18 However, the August 21 privilege log is not compliant with the Code because it is not a
19 sufficiently specific description of *any document*. Instead, it provides 3 descriptions of
20 *categories*. No *documents* are described, e.g., with dates, authors, recipients, etc. And, the
21 "descriptions" are designed to obtain the applications of privileges. That is not a real privilege
22 log at all, and defense counsel surely is aware it is not Code-compliant.

23 The basic test for an adequate privilege log is set forth in *Kaiser Foundation Hospitals*
24 *v. Superior Court* (1998) 66 Cal.App.4th 1217, 1228:

25 The law attempts to find a balance between these competing interests in
26 discovery and the assertion of privilege by requiring a party objecting to
27 document production to "identify with particularity" any document as to
28 which it makes an objection, and "set forth clearly the extent of, and the
specific ground for, the objection," in accordance with Code of Civil
Procedure section 2031, subdivision (f)(3). Here, Kaiser has already produced
a privilege log specifying the documents as to which it has withheld

1 production on a claim of attorney-client privilege or work product doctrine
2 protection. **The trial court must review Kaiser's privilege log to determine**
3 **whether the specified documents as to which Kaiser claims the**
4 **protection of either the privilege or the work product doctrine are in fact**
5 **so protected. For this purpose, the information in Kaiser's log must be**
6 **sufficiently specific to permit the trial court to determine whether each**
7 **withheld document is or is not privileged. Should the trial court find the**
8 **information in the privilege log insufficiently specific to allow such a**
9 **determination, it may order Kaiser to prepare a new privilege log**
10 **containing more particularized information about the nature of each**
11 **document as to which the attorney-client privilege is claimed.**

12 [Emphasis added.]

13 Specific identification of the *document* is required for a real privilege log.

14 A party claiming privilege in response to an inspection demand should
15 provide a "privilege log" that **identifies each document for which a**
16 **privilege is claimed, its author, recipients, date of preparation, and the**
17 **specific privilege claimed.**

18 [Cal. Practice Guide: Civ. Proc. Before Trial (TRG 2004), § 8:1474.5
19 (emphasis added); and see also, *In re Grand Jury Investigation*, 974 F.2d
20 1068, 1071 (9th Cir.1992).]

21 In *OXY Resources California v. Superior Court* (2004) 115 Cal.App.4th 874, 883, the
22 need to give some indication of the content of the communication was demonstrated.

23 In response to document requests served by Calpine, OXY and EOG withheld
24 certain documents and provided Calpine with privilege logs identifying the
25 withheld documents. Among the documents withheld were 204 documents
26 exchanged between OXY and EOG at various times before and after the close
27 of the transaction on December 31, 1999.

28 ****630 As reflected in EOG's privilege log, the privilege claimed as to the**
29 **withheld documents exchanged between OXY and EOG is either a**
30 **combination of joint defense and attorney work product, or a**
31 **combination of joint defense, attorney work product, and attorney-client**
32 **privilege. EOG's description of each withheld document on its privilege**
33 **log gives some indication of the content of the communication. For**
34 **example, EOG described one document as "1- page e-mail, re: Attached**
35 **draft consent request letter for EOG properties."**

36 **OXY's privilege log is less revealing than EOG's. Although the document**
37 **description in OXY's privilege log identifies the document's senders and**
38 **recipients as well as the type of communication (e.g., letter, e-mail, or**
39 **facsimile cover sheet), the description gives no indication of the purpose**
40 **or content of the communication. The privilege claimed as to the withheld**
41 **documents exchanged between OXY and EOG is either just "JDA," referring**
42 **to the Joint Defense Agreement, or the Joint Defense Agreement combined**
43 **with the attorney-client privilege and/or the work product doctrine. Roughly**
44 **70 of the documents on OXY's privilege log were withheld solely on the**
45 **ground of the Joint Defense Agreement, without reference to any underlying**
46 **privilege, privacy claim, or claim of work product protection.**

47 Calpine ultimately filed a motion to compel the production of the 204

1 withheld documents that had been exchanged between EOG and OXY.

2 [Emphasis added.]

3 The contents are not necessarily privileged because mere transmission to an attorney
4 does not render the communication protected under the attorney-client privilege. *Green &*
5 *Shinee v. Superior Court* (2001) 88 Cal.App.4th 532, 537.

6 At a minimum, there must be an *in camera* inspection for these documents.

7 *OXY Resources California v. Superior Court* (2004) 115 Cal.App.4th 874, 895:

8 Even OXY acknowledges the interests of EOG and OXY in the transaction
9 were "adversarial, common, and at times, a blend of the two." Yet, **OXY**
10 **apparently expects the court to rely entirely on the conclusory Peterson**
11 **and Stevens declarations, which simply state in general terms that EOG**
12 **and OXY had a common interest in finalizing their transaction and in**
13 **responding to Calpine's inquiries about the Elkhorn Slough. Neither the**
14 **privilege log nor the declarations reveal the content of any of the**
15 **communications, so it would be impossible for Calpine to offer evidence**
16 **refuting OXY's claims that all of the withheld communication involve**
17 **matters of common interest. Indeed, without more information about the**
18 **disputed documents, Calpine cannot demonstrate that each**
19 **communication between OXY and EOG was not reasonably necessary to**
20 **accomplish **640 the purpose for which a lawyer was consulted.**

21 As a practical matter, it is impossible to know whether any of the disclosures
22 of purportedly privileged information between OXY and EOG were
23 reasonably necessary to accomplish the purpose for which a lawyer was
24 consulted without knowing in at least a general sense the communication's
25 content. OXY correctly notes that a privilege claimant is not obliged to reveal
26 the subject matter of a communication to establish a claim of privilege. (See
27 Evid.Code, § 917, Comment of Assembly Committee on Judiciary.) The
28 issue here, however, is not whether the documents contain privileged
information. Rather, it is whether any privileges were waived because of
disclosure to a third party. Moreover, we do not suggest that OXY must
amend its privilege log to describe the content of each document. Instead, **an**
in camera review of the documents would permit the court to determine
whether the disclosures were reasonably necessary to accomplish the
lawyer's role in the consultation. OXY argues that the inviolability of the
attorney-client privilege prohibits even an in camera review of the
communications at issue here. We disagree.

23 [Emphasis added.]

24 Finally, in this instance, there is no connection between the "privilege log" and the
25 Defendant's written Response to the Plaintiffs' Document Demands. There is no assurance
26 that documents are not being withheld. There is no assurance that if documents are being
27 withheld, that they would only be included in the purported "privilege log". Hence, both the
28

1 Response and the "privilege log" are patently inadequate, and further response is warranted.
2 The need for a further, straightforward response is demonstrated by the conditional, ambiguous
3 nature of the Response itself.

4 An article published in the San Francisco Daily Journal on September 6, 2007, and
5 authored by Richard M. Coleman, Esq., who is "a full-time neutral with Alternative Resolution
6 Centers, as well as a discovery referee" in the Los Angeles area, finds that these types of
7 purported responses that are made with and subject to objections do not comply with the Code.

8 1. After stating objections in general terms, the respondent
9 concluded with the following language: "Without waiving these objections
10 and subject to them, and specifically excluding any communications between
11 attorney and client, defendant responses as follows: Defendant will produce
12 all responsive documents."

13 **Did the respondent comply with the statutes? No.** The response
14 "specifically" excludes attorney-client documents, but does not state whether
15 any in fact exist. If there are privileged documents, they must be identified
16 with particularity.

17 C.C.P. Section 2031.240(b)(1) provides that the respondent: Identify
18 *with particularity* any document ... to which an objection is being made.
19 [Emphasis added.]

20 The response is also ambiguous: "**Without waiving these objections
21 and subject to them.**"

22 **What does that mean?** The documents will be produced but
23 objections made to them are preserved? Or, any documents to which
24 objection has been made are being withheld?

25 **The movant is entitled to an unequivocal statement that all the
26 documents responsive to the request are being produced.** If withheld
27 based on objection, as with claims of privilege, the documents must be
28 identified with particularity.

[Italics in original; bold added.]

Also very recently, the 9th Circuit Court of Appeals ruled that a responding party must
state unequivocally that no documents are being withheld.

In *Merrick v. Paul Revere Life Ins. Co.*, --- F.3d ----, 2007 WL 2458503 (August 31,
2007), a case venued in Nevada Federal Court, the 9th Circuit Court upheld a trial court judge
order *in limine* which barred the defendant from introducing evidence at trial where the
documents were withheld during discovery.

The insurers also challenge the district court's order suppressing
certain evidence placed in the claim file after litigation commenced. The
district court granted this motion upon finding that the insurers withheld
evidence that they were ordered to produce regarding their post-litigation