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19 GOOGLE INC.

20 UNITED STATES DISTRICT COURT
21 NORTHERN DISTRICT OF CALIFORNIA
22 SAN FRANCISCO DIVISION

23 GOOGLE INC.,
24
25 Petitioner,
26
27 v.
28
29 ORRICK, HERRINGTON & SUTCLIFFE
30 LLP,
31
32 Respondent.

CASE NO.: 15-mc-80208
CASE IN OTHER COURT:
No. 3:14-cv-00981-HTW-LRA (S.D.
Miss.)

**GOOGLE INC.'S NOTICE OF
MOTION AND MOTION TO
COMPEL COMPLIANCE WITH
SUBPOENA AND MEMORAN-
DUM OF POINTS AND AUTHOR-
ITIES**

Date: TBD
Time: TBD
Judge: TBD

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that as soon as the matter may be heard at the United States District Court, Northern District of California, San Francisco Division, 450 Golden Gate Avenue, San Francisco, California, Petitioner Google Inc. (“Google”) will, and hereby does, move the Court for an order compelling Respondent to produce documents pursuant to a subpoena issued by Google out of the United States District Court for the Southern District of Mississippi. This motion is made pursuant to Rule 45 of the Federal Rules of Civil Procedure. Pursuant to Civil Local Rule 37-1, counsel met and conferred on June 26, 2015 and were unable to resolve the issues that are the subject of this motion.

This motion is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, the accompanying Declaration of Michael H. Rubin and attached exhibits, a proposed order, any papers submitted in reply to any opposition to this Motion, facts of which this Court may take judicial notice, the record in the underlying action in the United States District Court for the Southern District of Mississippi, Case No. 3:14-cv-00981-HTW-LRA, arguments of counsel if any, and any other matters as may properly come before this Court.

STATEMENT OF THE ISSUES

1. Should Respondent be compelled to produce documents responsive to Google’s subpoena?

INTRODUCTION

1
2 Google Inc. (“Google”) respectfully seeks the assistance of this Court to compel compli-
3 ance with a subpoena issued in connection with litigation in the Southern District of Mississippi,
4 where Google sued Mississippi Attorney General Jim Hood (“AG Hood”). That Mississippi
5 court has already issued a preliminary injunction prohibiting AG Hood from violating Google’s
6 constitutional and federal statutory rights, and Google now seeks evidence to prove its claims on
7 the merits.

8 For the past two years, AG Hood has repeatedly threatened Google, demanding it remove
9 content from its online services that he and a group of powerful special interests deem objection-
10 able. When Google refused his ultimate demands citing the protections of federal law, AG Hood
11 retaliated with a vexatious 79-page Civil Investigative Demand (“CID”).¹ In March of this year,
12 with the benefit of a substantial evidentiary record, the Honorable Henry Wingate of the South-
13 ern District of Mississippi concluded there was “significant evidence” that AG Hood’s CID was
14 issued in “bad faith” with retaliatory intent and that there is a “substantial likelihood” that
15 Google will prevail on its claims that AG Hood was violating Google’s First and Fourth
16 Amendment rights.² The court therefore enjoined AG Hood from enforcing his CID, filing
17 charges against Google merely for making third-party content accessible to Internet users, or
18 otherwise taking further action against Google pending a final decision on its claims.³ Judge
19 Wingate also set an expedited case schedule, allowing a very limited time for discovery.⁴

20
21 ¹ The document is formally titled “Administrative Subpoena” rather than “Civil Investigative
22 Demand.” It contains 141 document requests and 62 interrogatories, demanding the production
23 of an extraordinarily broad array of information. It is so large that it includes a table of contents.

24 ² Declaration of Michael H. Rubin in Support of Google Inc.’s Rule 45 Motion to Compel Com-
25 pliance with Subpoena (“Rubin Decl.”), Exhibit (“Exh”) 30, Exh. 31 at 14 (March 2 Order grant-
26 ing Google’s Motion for Temporary Restraining Order and Preliminary Injunction and March 27
27 PI Order elaborating on that ruling).

28 ³ Rubin Decl., Exh. 31 at 22 (“PI Order”).

⁴ Rubin Decl., Exh. 30 at 4. After AG Hood represented that his office was unable to timely
produce documents that Google requested because a member of his staff was ill, Judge Wingate
recently extended the discovery period by 30 days. Dkt. 133, *Google Inc. v. Hood*, Case No.
3:14-cv-00981-HTW-LRA (S.D. Miss. Dec. 19, 2014) (discovery now closing in the underlying
(continued...))

1 Although Google’s lawsuit is against AG Hood, discovery to date has revealed that a coa-
 2 lition of anti-Google special interests were responsible for setting his agenda and for driving his
 3 illicit campaign. This group included the Motion Picture Association of America (the “MPAA”)
 4 and its member movie studios, and appears to also include Microsoft Corporation (“Microsoft”),
 5 operating through its lobbyists at Orrick, Herrington & Sutcliffe LLP (“Orrick”). Together, this
 6 group exercised remarkable influence in Mississippi.⁵ Documents already produced by AG
 7 Hood and other non-parties—as well as documents uncovered by reporters—reveal that they
 8 formulated a list of demands for AG Hood to send to Google; ghost wrote letters to Google that
 9 AG Hood sent; dictated the timing of his investigative escalations; tried to recruit others gov-
 10 ernment officials to support him; and even helped prepare the 79-page CID at the center of this
 11 case.⁶

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 16 (...continued from previous page)
 case on August 10, 2015). All citations herein to “MS Dkt.” refer to the docket in the underlying
 action pending before Judge Wingate.

17 ⁵ See Rubin Decl. ¶ 2; Russell Brandom, “Project Goliath: Inside Hollywood’s Secret War
 18 Against Google,” *The Verge*, (Dec. 12, 2014), *available at*
 <<http://www.theverge.com/2014/12/12/7382287/project-goliath>> (hereafter “Brandom Article”).

19 ⁶ The CID was sent as a final step when various other measures failed to pressure Google into
 20 silencing speech as AG Hood and his allies sought. At that point, “word came down” from the
 21 MPAA’s main lobbyist “that ‘the time for letter writing is over’ and that ‘it is time to move to
 actually form an investigation.’” He declared:

22 Some subset of AGs (3-5, but Hood alone if necessary) should move toward issuing
 23 CIDs [and] [i]n terms of outreach and action by us, I think we should: a. Shore up
 24 Hood and try to get a small group . . . focused on a clear timetable for CIDs[;] b.
 25 Draft the CIDs[; and] c. Research state law to determine the best state to pursue liti-
 26 gation and communicate that to Hood so that he can try to get the right AGs on
 27 board.

28 See Joe Mullin, “Hollywood v. Goliath: Inside the Aggressive Studio Effort to Bring Google to
 Heel,” *Ars Technica* (Dec. 19, 2014), *available at* <[http://arstechnica.com/tech-policy/2014/12/
 how-hollywood-spurned-by-congress-pressures-states-to-attack-google/](http://arstechnica.com/tech-policy/2014/12/how-hollywood-spurned-by-congress-pressures-states-to-attack-google/)> (hereafter “Mullin Ar-
 ticle”). It is not clear from the limited documents Google has seen whether Orrick was on this
 email, though they were clearly involved in the lead up to it.

1 Orrick was intimately involved in these efforts, helping to set strategy,⁷ crafting responses to communications from Google,⁸ reaching out to other state Attorneys General on AG Hood's behalf,⁹ and choreographing his presentations.¹⁰ Given Orrick's key role, Google subpoenaed it for information about the behind-the-scenes maneuvering that fostered AG Hood's violations of Google's Constitutional and federal rights.

6 The subpoena at issue here seeks targeted information from Orrick that is directly related to AG Hood's actions. This includes the lobbyists' direct correspondence with AG Hood, as well as communications among themselves and their cohorts that reference both AG Hood and Google. Google also seeks information relating to Orrick's campaign donations to AG Hood and other assistance it provided, such as advocacy pieces, ghost written documents, research, and solicitations of others to the cause.

12 To date, Orrick has refused to produce anything. It has withheld all responsive documents, objecting that they are irrelevant or protected by some unsubstantiated privilege.

14 The relevance objections are meritless. As Judge Wingate has already held, there is substantial evidence that AG Hood's actions against Google were undertaken in bad faith and for a retaliatory purpose. The requested documents will provide further support for that finding at trial. Google expects the documents will show that AG Hood, and those interest groups animating him, understood that his actions invaded the exclusive province of federal law. More fundamentally, the documents are likely to show that AG Hood's investigation was intended not to uncov-

21 ⁷ Rubin Decl., Exh. 12, JB_00000546 (January 15, 2014 email from Orrick's Brian Moran to Hood staffers, Orrick's Rob McKenna, and others in which Moran says he will draft a "one page strategy paper").

23 ⁸ Rubin Decl., Exh. 20, MPAA00001998 (January 20, 2014 email in which AG Hood asks Rob McKenna to "please help me refute or explain" items in Google letter.).

25 ⁹ Rubin Decl., Exh. 13, JB_00000400 (June 4, 2014 email exchange regarding overtures by AG Hood to the Connecticut attorney general regarding Google in which Orrick reports having briefed him the month before and "providing our research to him in person.").

27 ¹⁰ New Decl., Exh. 14, JB_00000014-16. (January 16-17, 2014 email exchange in which Orrick's Rob McKenna and the MPAA's lobbyist, Tom Perrelli, discuss the substance and logistics of AG Hood's presentation to other state attorneys general in Denver).

1 er supposed violations of Mississippi law, but instead to actively coerce Google into censoring
2 protected speech (such as search results, user-generated content and advertising), at the behest of
3 special interest groups, in violation of Google’s constitutional rights and federal law. Orrick’s
4 relevance objections cannot stand.

5 Its privilege assertions are similarly misplaced. As a general matter, the communications
6 at issue do not fall under the purview of any privilege because Orrick was engaged in lobbying
7 government officials, not the provision of legal services. The assertions of individual privileges
8 fare no better. Orrick invokes “work product protection” but cannot identify any litigation it
9 contemplated at the time the requested documents were created because none was. It claims
10 there is a “law enforcement” privilege shielding its activities from discovery, but no such privi-
11 lege applies here. And it asserts “common and joint interest privileges” but cannot articulate any
12 valid “interest” that creates or preserves a privilege. While *some* responsive documents *might*
13 theoretically be subject to the attorney-client privilege, Orrick has not even collected or reviewed
14 such documents, let alone provided a privilege log for them.

15 Given the expedited discovery schedule set in this case, Google can wait no longer. It re-
16 spectfully requests that Orrick be ordered to produce the documents responsive to the subpoena
17 immediately.¹¹

18 **BACKGROUND**

19 **A. Special Interest Groups and AG Hood**

20 In late 2014, the *New York Times* reported that a collection of special interests had been
21 engaged in an extensive and secret anti-Google lobbying campaign with state attorneys general.¹²
22

23 ¹¹ This motion is not brought in isolation. Google seeks similar orders against six other entities,
24 each of which has asserted the same relevance objection and similar privilege objections. In the
25 interests of judicial economy, and to avoid potential inconsistencies in fact-finding or outcomes,
26 Google will promptly submit a motion under Rule 45(f) to transfer this motion to the Southern
District of Mississippi. Google’s other motions to compel have already been transferred to Mis-
sissippi. Rubin Decl., Exhs. 2-5.

27 ¹² Nick Wingfield and Eric Lipton, *Google’s Detractors take Their Fight to the States*, The New
28 York Times (Dec. 16, 2014), available at <[http://www.nytimes.com/2014/12/17/technology/
google-critics-enlist-state-attorneys-general-in-their-fight.html](http://www.nytimes.com/2014/12/17/technology/google-critics-enlist-state-attorneys-general-in-their-fight.html)>. In its reporting, the Times

(continued...)

1 Having failed to gain federal support for their positions, this group, which included Orrick's cli-
2 ent Microsoft, hoped state officials could be more easily convinced to pressure Google to modify
3 its online services and restrict both its own speech and the speech of its users. By the fall of
4 2012, the group had the vanguard for their anti-Google agenda in Mississippi's Attorney Gen-
5 eral, Jim Hood.

6 Although Google has been hamstrung in discovery thus far, the few documents it has re-
7 ceived reveal an insidious plot, hatched by AG Hood and these parties, to pressure Google to
8 censor speech. That plan included, among other things, a concerted PR "attack" on Google using
9 the media properties of motion picture conglomerates, the manipulation of Google's stock price,
10 and a trumped up SEC filing. *See* Rubin Decl., Exh. 24, D000904-908 (email and document dis-
11 cussing AG Hood's overall plan for going after Google). As a "final step," if none of those tac-
12 tics worked, the plan called for AG Hood to seek to coerce Google's compliance by sending it a
13 civil investigative demand. *Id.*

14 Together with other lobbyists, Orrick, principally through former Washington Attorney
15 General, Rob McKenna, played a key role in implementing this overall plan. Orrick helped AG
16 Hood find outlets for press pieces smearing Google. *See* Rubin Decl., Exh. 25, D001319-1323
17 (June 22-July 9, 2013 email chain among Rob McKenna, Jack Evans and John Kelly of Mi-
18 crosoft, AG Hood, and others regarding the potential placement of an Op-Ed piece titled
19 "Google: The Search Engine for Illegal Drugs" by AG Hood).¹³ It devised a strategy for enlist-
20 ing the support of other state attorneys general,¹⁴ and it reached out directly to many of them on

21 _____
22 (...continued from previous page)
23 drew upon documents obtained through public records requests and from an industry insider fol-
24 lowing the well-publicized revelation of a cache of emails from Sony Entertainment after a re-
25 ported hack.

24 ¹³ In the thread, Orrick's McKenna wrote, "General Hood could use some help finding an outlet
25 for the op-ed below. Ideas for how we could help?" McKenna further offered "to discuss
26 placement strategy with [Hood], if that would be helpful." *Id.*

26 ¹⁴ Rubin Decl., Exh. 12, JB_00000546. (January 15, 2014 email from Brian Moran to Jenner at-
27 torneys, Hood staffers, and McKenna detailing the division of labor and providing a to-do list in
28 advance of the National Association of Attorneys General meeting in January 2014; listing
which states' attorneys general Orrick "have provided detailed briefings to" about Google; and

(continued...)

1 AG Hood’s behalf. *See, e.g.*, Rubin Decl., Exh. 15, JB_00000555 (Orrick writing to AG Hood’s
 2 special deputy Mike Moore, who was simultaneously lobbying AG Hood for another party on
 3 this same issue, asking which attorney generals he wanted to call, and proposing to divide up re-
 4 sponsibility for calling them).¹⁵ AG Hood’s office actively sought Orrick’s help in formulating
 5 his positions on Google and responding to Google’s rebuttals,¹⁶ and Orrick voluntarily reached
 6 out to AG Hood to provide “extensive research” regarding what Orrick called “Google’s practic-
 7 es.” Rubin Decl., Exh. 26, D001641-1645 (email from Orrick lobbyists to AG Hood stating
 8 “[we] would like to brief your staff and you on extensive research we have been doing on the
 9 issues you have been raising about Google’s practices.”).

10 All of these efforts, along with a large campaign fundraiser co-hosted by Orrick,¹⁷ bore
 11 fruit, as AG Hood amped up pressure on Google. Following a November 2012 meeting of states
 12 attorneys general, AG Hood sent Google a letter suggesting steps it should take “to eliminate or
 13 significantly reduce infringing activities.” AG Hood was later clear about what would happen if
 14 Google did not “voluntarily” capitulate:

15 [I]f you don’t ... work with us to make some of these changes that we’ve been sug-
 16 gesting since November, then I’m going to call on my colleagues to issue civil in-
 17 vestigatory demands or subpoenas....

18
 19 _____
 20 (...continued from previous page)
 21 stating that Moran will draft a “one page strategy paper,” and Orrick and Jenner “will collaborate
 22 on sample screen shots for the AGs to consider employing.”).

23 ¹⁵*See also* Rubin Decl., Exh. 16, JB_00000399 (June 4, 2014 email in which AG Hood asked
 24 McKenna and Perrelli to “sen[d] your research memo on Connecticut law to George Jepsen... If
 25 I don’t talk him into issuing a CID to Google by Thursday, I will advise my colleagues that I in-
 26 tend to send ours in a couple of weeks.”); *id.*, Exh. 13, JB_00000400 (June 4, 2014 email in
 27 which McKenna responds to AG Hood that Orrick had briefed Connecticut attorney general
 28 Jepsen the month before, “providing our research to him in person.”).

¹⁶ Rubin Decl., Exh. 17, JB_00000333-34 (February 21, 2014 request from Hood’s office to Or-
 rick and the MPAA for “feedback [and] suggestions” on letter from Google); *id.*, Exh. 20,
 MPAA00001998 (AG Hood asking McKenna to “please help me refute or explain” items in a
 Google letter).

¹⁷ Rubin Decl., Exh. 21, MPAA00001576.

1 Rubin Decl., Exh. 33 at 8:8-13 (transcript from June 2013 meeting of National Association of
2 Attorneys General). Google responded that its operations were consistent with and protected by
3 federal law, that it would continue to work to address legitimate concerns, and that the threats
4 from AG Hood were improper.

5 In January 2014, Orrick's McKenna, along with the MPAA's lead lobbyist, Tom Perrelli,
6 flew to Denver and prepared AG Hood the day before a meeting he scheduled with Google and
7 other states' attorney general.¹⁸ That meeting produced similar demands, largely focused on fed-
8 eral intellectual property issues, and threats from AG Hood to Google which continued over the
9 next several months. When those failed to yield the changes he wanted, on October 27, 2014,
10 AG Hood took the "final step" outlined in his plan months earlier: he served Google with a 79-
11 page CID that Orrick appears to have helped to draft.¹⁹

12 **B. Google's Complaint and the Preliminary Injunction**

13 On December 19, 2014, Google filed a Complaint for Declaratory and Injunctive Relief
14 in the Southern District of Mississippi alleging, among other things, that the Mississippi Attor-
15 ney General violated Google's rights under the First, Fourth, and Fourteenth Amendments by
16 pursuing a retaliatory and overbroad investigation aimed at silencing Google's protected speech
17 and the speech of others. MS Dkt. 1 (Complaint). Google sought a Preliminary Injunction (the
18 "Injunction Motion") based on a substantial evidentiary record. MS Dkt. 2, 3. On March 2,
19 2015, Judge Wingate granted Google's motion preliminarily enjoining AG Hood from, among
20 others things, enforcing the CID.

23 ¹⁸ See Rubin Decl., Exh. 27, D001338-1339 (January 20, 2014 email from McKenna to Hood in
24 which McKenna writes, "Looking forward to discussing this with you, Jim. I have some ideas.
25 Can you meet with Tom and me at 4:00 today at the Sheraton?"). Perrelli reported back to the
MPAA, specifically mentioning McKenna and how "helpful" he had been in preparing the state
attorneys general, noting that Orrick and Microsoft "see the bigger picture." See Mullin Article.

26 ¹⁹ See Rubin Decl., Exh. 16, JB_00000399 (June 4, 2014 email in which Hood asked McKenna
27 and Perrelli to "Please give me your final suggestions on our draft CID."). AG Hood listed a
28 draft of the CID in a privilege log he provided to Google. *Id.*, Exh. 22. That claim of privilege is
currently under review by Judge Wingate in Mississippi.

1 Judge Wingate detailed his reasoning in a March 27 Opinion. Rubin Decl., Exh. 31 (PI
2 Order). He held that Google had demonstrated a “substantial likelihood” that AG Hood “has
3 violated Google’s First Amendment rights by: regulating Google’s speech based on its content;
4 by retaliating against Google for its protected speech (e.g., issuing the subpoena); and by seeking
5 to place unconstitutional limits on the public’s access to information.” *Id.* at 18. According to
6 Judge Wingate, “[t]he Attorney General’s interference with Google’s judgment” through “threats
7 of legal action and an unduly burdensome subpoena” is likely to “produce a chilling effect on
8 Google’s protected speech.” *Id.* at 19. That finding was based on “competent evidence showing
9 that the Attorney General issued the subpoena in retaliation for Google’s likely protected speech,
10 namely its publication of content created by third-parties.” *Id.*; *see also id.* at 14 (“Google has
11 presented significant evidence of bad faith, allegedly showing that Attorney General Hood’s in-
12 vestigation and issuance of the subpoena represented an effort to coerce Google to comply with
13 his requests regarding content removal.”). Judge Wingate also found “substantial merit” in
14 Google’s Fourth Amendment claims given the “overbreadth of the subpoena in question.” He
15 explained that “Attorney General Hood’s subpoena must comport with the requirements of the
16 Fourth Amendment and not wage an unduly burdensome fishing expedition into Google’s opera-
17 tions.” *Id.* at 19-21 (concluding the CID demanded information regarding copyright issues and
18 content that AG Hood knew was outside his enforcement purview).

19 C. Google’s Discovery to Date

20 To support its case against AG Hood and shed more light on his illicit motives, Google
21 has sought discovery from the parties most closely involved in AG’s Hood’s anti-Google cam-
22 paign. Google requested documents from *inter alia* the MPAA, its lobbyists at Jenner & Block,
23 and its member movie studios, relating to their multi-year effort to incite and direct AG Hood’s
24 actions. Rubin Decl. ¶ 2. Like Orrick, the other subpoenaed parties initially refused to produce
25 any documents at all. *Id.* ¶¶ 5, 8. But *unlike* Orrick, they ultimately agreed to produce their
26 communications directly with AG Hood, maintaining their objections as to everything else. *Id.* ¶
27 5.

28

1 Google filed motions to compel against the movie studios in the Southern District of New
 2 York, and against the MPAA, Jenner and a third party in Washington D.C. Dkt. No. 1, *Google*
 3 *Inc. v. Twenty-First Century Fox, Inc., et. al.*, Case No. 15-misc-150 (S.D.N.Y. June 1, 2015)
 4 (“NY Dkt.”); Dkt. Nos. 1, 4, 5, *Google Inc. v. Digital Citizens Alliance, et. al.*, Case No. 1:15-
 5 mc-00707-JEB-DAR (D.D.C. June 1, 2015) (“DC Dkt.”). On July 29, the Honorable Judge Lor-
 6 na Schofield of the Southern District of New York transferred Google’s motion to compel to
 7 Judge Wingate in Mississippi, and on July 31, the Honorable Magistrate Judge Deborah Robin-
 8 son of the District for the District of Columbia did the same for the motion there. Rubin Decl. ¶¶
 9 10-11, Exhs. 2-5.

10 **D. Google’s Subpoena to Orrick and Orrick’s Refusal to Produce Any Information**

11 The subpoena that Google sent to Orrick on May 21, 2015, contained eight, highly-
 12 targeted requests for documents:

- 13 • Documents relating or referring to Google and AG Hood, and/or his investigation into
 14 Google, including communications between or among Orrick, AG Hood, and other par-
 15 ties identified in published news reports as participating in the anti-Google lobbying ef-
 16 fort (Requests No. 1, 2, 3, 8);
- 17 • Documents referencing code names for the efforts by Orrick and allied parties to influ-
 18 ence AG Hood and other state Attorneys General to take action against Google, position
 19 papers that they developed in support of that effort, and other documents such as draft le-
 20 gal process and research connected to the effort that have been described in the news re-
 21 ports (Requests No. 5, 6, 7, 8);
- 22 • Documents relating or referring to support, financial or otherwise, provided directly by
 23 Orrick to AG Hood or his proxies (Request No. 4).

24 Rubin Decl., Exh. 1.

25 After Google extended Orrick’s time to respond to the subpoena, Orrick served objec-
 26 tions stating that it would produce nothing at all.²⁰ It claimed that all communications between
 27 Orrick and AG Hood were somehow protected by the work-product, attorney-client, and/or law
 28 enforcement privileges. Rubin Decl., Exh. 7. It also said that any communications it had with

²⁰ The subpoena listed a compliance date of June 8, 2015. Orrick requested an extension until June 15, 2015, to which Google agreed.

1 parties other than AG Hood were not relevant to the case and that complying with the subpoena
2 would be an undue burden. *Id.*

3 In a June 26 Google meet-and-confer, Orrick explained that its communications with AG
4 Hood were allegedly privileged because they came in response to requests from AG Hood. Ru-
5 bin Decl. ¶ 13. In correspondence after the meet-and-confer, Orrick said that the subpoena was
6 unduly burdensome because a preliminary search had identified 18,000 potentially responsive
7 documents. Rubin Decl., Exh. 8. Further discussions yielded no progress on these issues. To
8 date, Google has not received a single document or privilege log from Orrick and the parties are
9 at an impasse. Rubin Decl. ¶¶ 17-18. Google thus seeks the Court's assistance to break that im-
10 passe or, as set forth in the Rule 45(f) motion to be filed shortly, to transfer this dispute to Mis-
11 sissippi.

12 ARGUMENT

13 **I. Google Seeks Plainly Relevant Information Regarding Orrick's Role In AG** 14 **Hood's Illicit Conduct.**

15 One of the principal issues in Google's case against AG Hood is the question of what mo-
16 tivated his demands and threats to Google, culminating with a retaliatory and burdensome CID.
17 Was he actually investigating some supposed violation of Mississippi law, or was he engaged in
18 coercive tactics, at the behest of Orrick, the MPAA, and other benefactors, to force Google to
19 restrict constitutionally-protected speech. Judge Wingate has already made clear his views. On
20 the record before him, he found Google likely to succeed on its claim that AG Hood's tactics
21 were in retaliation for Google's refusal to "voluntarily" censor its speech (*e.g.* Google's search
22 results), and thus violated Google's rights. When the case is ultimately tried, Google expects
23 that the evidence it uncovers through the subpoena at issue here will strongly support its claims.

24 Based on just the handful of documents that have come to light in discovery and through
25 press accounts, there is little doubt that Orrick, along with other interested groups, actually di-
26 rected the misconduct at issue in this case. Over a nearly two-year period prior to Google's law-
27 suit, it was these corporate interest groups who determined AG Hood's demands, these corporate
28

1 interest groups who devised the strategy for enlisting the help of other state attorneys general,
2 and these corporate interest groups who drafted the CID that AG Hood sent. Throughout that
3 time, Orrick communicated extensively with AG Hood’s office and with its allies to plot their
4 “Project Goliath” strategy. Google’s requests for documents relating to that effort will undoubt-
5 edly shed further light on AG Hood’s thinking. They may further show, for example, that AG
6 Hood and Orrick expressly discussed use of the CID as a retaliatory measure—a weapon to be
7 used if Google did not capitulate in their demands. The documents are also likely to demonstrate
8 that AG Hood and Orrick knew just how oppressive and burdensome the 79-page CID was, and
9 that it was intentionally drafted that way in the hopes of increasing its coercive effect. In short,
10 Google’s requests that Orrick produce documents discussing AG Hood and his investigation of
11 Google are not only reasonably calculated to lead to the discovery of admissible evidence regard-
12 ing AG Hood’s motives, but they are likely to uncover some of the most relevant information in
13 the case.

14 The requested documents are similarly relevant to AG Hood’s affirmative defense based
15 on the *Younger* abstention doctrine. *See Younger v. Harris*, 401 U.S. 37 (1971). AG Hood con-
16 tends that despite the impact of his CID on Google’s constitutional rights, Judge Wingate should
17 have abstained in favor of resolution in Mississippi state courts. MS Dkt. 93 (AG Hood’s An-
18 swer); *see also* MS Dkt. 32 (AG Hood’s Motion to Dismiss). But *Younger* is inapplicable where
19 a state official’s conduct is improperly motivated or undertaken in bad faith. *See, e.g., Wilson v.*
20 *Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979). And as Judge Wingate held, Google has al-
21 ready adduced “significant evidence of bad faith” in AG Hood’s treatment of Google. Orrick’s
22 documents should reveal considerably more such evidence, showing that it was the desires and
23 contributions of his corporate benefactors, rather than concerns about Mississippi law, that
24 moved AG Hood to act against Google.

25 Orrick’s documents also bear directly on Google’s claim that AG Hood’s investigation,
26 and specifically the CID, were intentionally overbroad and burdensome and thus constitute an
27 unreasonable search and seizure in violation of Google’s 4th Amendment rights. Compl. ¶ 103.
28 Judge Wingate preliminarily concluded that the CID’s scope exceeds AG Hood’s powers in sev-

1 eral respects. For one, a large number of the CID’s requests for information relate to alleged
2 copyright infringement taking place through Google’s service. As Judge Wingate noted, “[i]t is
3 well-established that state attorneys [general] lack the authority to enforce the Copyright Act.”
4 Rubin Decl., Exh. 31 (PI Order) at 20. It appears that AG Hood demanded this information for
5 an illegitimate purpose (presumably to appease special interests for whom copyright is a para-
6 mount concern). The CID similarly demands extensive information to support AG Hood’s
7 threats to hold Google responsible for third-party content published on Google’s services. *See*
8 MS Dkt. 17, Exh. 30 (CID). But, as Judge Wingate recognized, Section 230 of the Communica-
9 tions Decency Act, 47 U.S.C. § 230, immunizes Google from claims based on such content. Ru-
10 bin Decl., Exh. 31 (PI Order) at 16-17 (citing *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir.
11 2008) (“Courts have construed the immunity provisions in § 230 broadly in all cases arising from
12 the publication of user-generated content.”)). Given that, it appears that here again, AG Hood
13 demanded information not for any legitimate purpose, but instead to unduly burden and harass
14 Google as a means of pressuring it to censor speech on the Internet. In light of its role in re-
15 searching and preparing the CID, it is quite likely that Orrick discussed the CID’s impermissible
16 overbreadth and obvious burden in communications with AG Hood, other government officials,
17 and other interested parties. Documents reflecting those communications—indeed, any docu-
18 ments relating to the scope and burden of AG Hood’s investigation of Google—are directly rele-
19 vant to Google’s Fourth Amendment claim.

20 Finally, the documents that Google seeks will bear on AG Hood’s credibility. In his an-
21 swer in this case, for example, AG Hood denies coordinating with third parties and lobbyists re-
22 garding Google. *See, e.g.*, MS Dkt. 93 (Def.’s Answer), ¶ 64. Given what Google already has
23 seen, that cannot withstand scrutiny. The documents Google seeks, such as Orrick’s meeting
24 notes, agendas, action lists, and reports on verbal conversations will show extraordinary coordi-
25 nation between AG Hood, Orrick, and other lobbyists and third parties, thereby undermining AG
26 Hood’s averments.

27 Unlike its allies, Orrick has refused to produce *any* documents in response to the subpoe-
28 na. It is withholding all communications with AG Hood’s office under dubious assertions of

1 privilege, even though AG Hood has already produced documents constituting his communica-
2 tions with Orrick. There is no basis to continuing withholding these documents.

3 Orrick claims that all other documents—such as those in which Orrick planned or re-
4 counted meetings and conversations with AG Hood—are irrelevant, simply because AG Hood
5 never saw them. That is specious. Indeed, Judge Schofield recognized as much in her comments
6 regarding Google’s motion to transfer in the Southern District of New York:

7 [I]t seems to me that there are all sorts of documents that Attorney General Hood
8 never saw that are conceivably relevant. Certain kinds of e-mail communications
9 internally of your client that might relate to the subject for example. Those could be
highly relevant.

10 Rubin Decl., Ex. 33, at 15:6-15:11 (July 29, 2015 Hearing Transcript). Judge Schofield, of
11 course, is correct—several of the most damning documents surfaced to date are not direct corre-
12 spondence between the special interests and AG Hood, but rather their communications amongst
13 themselves. *See e.g.*, Mullin Article (quoting email where Mr. Perrelli writes to MPAA and oth-
14 ers about getting Hood focused on “key issues and the asks”); Brandom Article (quoting email
15 where MPAA lobbyist states that “it is time to move to actually form an investigation.”)²¹ It is
16 in these internal communications, rather than in documents Orrick presumably knew would be
17 subject to public records requirements, where the true nature of AG Hood’s actions is most likely
18 to be revealed.

19 II. Orrick Has Not Validly Asserted Any Privilege

20 Orrick has also invoked various privileges to block any discovery into its involvement in
21 AG Hood’s investigation. Orrick contends that all of the documents Google seeks are protected
22 under the work product doctrine, a “law enforcement” privilege, the common interest doctrine, or
23

24 ²¹ Internal documents also reveal communications from other state attorneys general declining to
25 join AG Hood’s efforts or sign his letters to Google, *See* Rubin Decl., Exh. 23, D000069 (email
26 from Vans Stevenson of the MPAA to AG Hood asking, “[h]ow are you coming with AGs sign-
27 ing on to the sign-on letter? As we talked about, let me know if you need help motivating any of
28 your colleagues.”); *see also* Mullin Article (quoting Feb. 27, 2014 email from Perrelli saying
“some subset of AGs (3-5, but Hood alone if necessary) should move toward issuing CIDs be-
fore mid-May.”).

1 the attorney-client privilege. When Google pressed for support of these assertions, Orrick of-
2 fered nothing but conclusory statements.²² That is insufficient. *In re Santa Fe Int'l Corp.*, 272
3 F.3d 705, 710 n.7 (5th Cir. 2001) (“Fifth Circuit cases clearly hold that the privilege claimant’s
4 burden extends to proof of preliminary facts showing that the matter is eligible for protection.”);
5 *see also United States v. Martin*, 278 F.3d 988, 999-1000 (9th Cir. 2002) (“The burden is on the
6 party asserting the privilege to establish all the elements of the privilege.”).

7 Orrick’s inability to substantiate its privilege assertions is no surprise. To begin with, it
8 has not even collected responsive documents and thus could not possibly know whether any priv-
9 ilege applies to them. More fundamentally, the notion that its lobbying activities can be cloaked
10 in privilege is untenable. Orrick worked hand-in-hand with a government official, with whom it
11 has no attorney-client relationship.²³ In an attempt to further AG Hood’s actions against Google,
12 Orrick advised AG Hood on what to say to Google and other state attorneys general,²⁴ developed
13 and guided AG Hood’s overall strategy,²⁵ and helped coordinate AG Hood’s PR attack plan.²⁶
14 That conduct is the very definition of lobbying. *See* Miss. Code Ann. § 5-8-3(k) (“‘Lobbying’
15 means: (i) Influencing or attempting to influence legislative or executive action through oral or
16 written communication; or (ii) Solicitation of others to influence legislative or executive action;
17 or (iii) Paying or promising to pay anything of value directly or indirectly related to legislative or
18 executive action.”).

19
20 ²² Rubin Decl. ¶ 13.

21 ²³ Rubin Decl. ¶ 13.

22 ²⁴ Rubin Decl., Exh. 14, JB_0000014-16 (Rob McKenna gives specific advice to AG Hood about
23 structuring AG Hood upcoming presentation at the NAAG meeting in Denver, including recom-
24 mending the use of printouts of screenshots rather than a live demo.).

25 ²⁵ Rubin Decl., Exh. 12, JB_00000547 (Brian Moran tells AG Hood’s staffers and third parties
26 that he will “take lead on the one page strategy paper.”).

27 ²⁶ Rubin Decl., Exh. 24, D000907-908 (AG Hood’s proposed plan for pursuing Google, which
28 included “working with a PR firm to create an attack on Google” and “plac[ing] an editorial in
the [Wall Street Journal] emphasizing that Google’s stock will lose value in the face of a sus-
tained attack by AGs.”); *id.*, Exh. 25, D001319-1323 (McKenna contacts third parties about
“finding an outlet” for AG Hood’s anti-Google op-ed, and offers “to discuss placement strategy”
with AG Hood).

1 Orrick and the third parties they worked with clearly hoped that by using lawyers to
2 spearhead their lobbying activity they could cloak their entire effort in privilege. But that posi-
3 tion finds no support in the law. Orrick could not have had an expectation that such communica-
4 tions could be kept confidential—particularly in light of Mississippi’s freedom of information
5 law.²⁷ And absent an expectation of confidentiality, there can be no privilege. *See United States*
6 *v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir. 1982) (“The need to cloak [privileged] communica-
7 tions with secrecy, however, ends when the secrets pass through the client’s lips to others. Thus,
8 a breach of confidentiality forfeits the client's right to claim the privilege.”) (citation omitted);
9 *see also In re Oracle Sec. Litig.*, No. C-01-0988 MJJ, 2005 U.S. Dist. LEXIS 46931, at *34
10 (N.D. Cal. Aug. 5, 2005) (“Voluntary disclosure to a third party waives the attorney-client privi-
11 lege even if the third party agrees not to disclose the communications to anyone else.”) (citation
12 omitted).

13 Courts have applied this basic principle to reject attempts to cloak lobbying efforts in se-
14 crecy through privilege invocations. In *Baricuatro v. Industrial Personnel & Management Ser-*
15 *vices, Inc.*, for example, the court considered a claim of work product privilege asserted over
16 documents a party had voluntarily submitted to Federal agencies with the hope of securing an
17 advantage against an adversary. No. 11-2777, 2013 U.S. Dist. LEXIS 96413, at *36-38 (E.D. La.
18 July 5, 2013). The court concluded that the documents had been offered up “with the primary
19 purpose of provoking or assisting in the government’s criminal or administrative investigations.”
20 *Id.* at *37. As the court recognized, the voluntary submission of documents waived any work
21 product privilege over the documents. *Id.* Similarly, in *Bank of America, N.A. v. Terra Nova*
22 *Insurance Co.*, the court considered materials disclosed by a private party during meetings with
23 state and Federal law enforcement agencies where the party hoped to induce action against an
24 adversary. 212 F.R.D. 166, 172-74 (S.D.N.Y. 2002). As the court pointed out, there was “a
25 strong potential that the material may ultimately become public and thus available to an adver-

27
28 ²⁷ *See* Mississippi Public Records Act, Miss. Code Ann. § 25-61-1 *et. seq.*

1 sary.” *Id.* at 172-73 (“Disclosing information to governmental authorities in the hope that they
2 will attack an adversary, however, cannot be said to be done in the pursuit of trial prepara-
3 tion. Thus, disclosure in such a situation results in a waiver of the work product protection.”)
4 (internal quotation omitted); *see also Cante v. Baker*, No. 07-CV-1716 (RK), 2008 U.S. Dist.
5 LEXIS 38091, at *2 (E.D.N.Y. May 9, 2008) (rejecting privilege claims over materials submitted
6 to a government agency to induce beneficial action). In other words, when a party makes a “vol-
7 untary submission of material to a government agency to incite it to attack the informant's adver-
8 sary,” that party cannot then go on to claim privilege over those materials. *Info. Res. v. Dun &*
9 *Bradstreet Corp.*, 999 F. Supp. 591, 593 (S.D.N.Y. 1998); *see also Three Crown Ltd. P’ship v.*
10 *Salomon Bros.*, No. 92 Civ. 3142 (RPP), 1993 U.S. Dist. LEXIS 9995, at *6 (S.D.N.Y. July 21,
11 1993) (“[T]he Court will allow liberal discovery of statements made or documents submitted to a
12 governmental agency prior to the initiation of an investigation of any defendant in this litigation
13 concerning the subject matter of this litigation.”).

14 a. Work Product

15 Orrick also invokes work product protection over all of its communications with AG
16 Hood, claiming that the privilege automatically attaches merely because AG Hood supposedly
17 “initiated” those conversations. But Google has already received documents from other parties
18 that show that Orrick was frequently the one who initiated contact with AG Hood’s office, not
19 the other way around.²⁸ And even if Orrick were right, the “work product doctrine focuses only
20 on materials assembled and brought into being in anticipation of litigation.” *El Paso*, 682 F.2d at
21 542 (“The work product doctrine is not an umbrella that shades all materials prepared by a law-
22 yer”); *see also United States v. Torf (In re Grand Jury Subpoena)*, 357 F.3d 900, 907 (9th Cir.
23 2003) (for work product protection to apply, documents “must be prepared in anticipation of liti-
24 gation or for trial.”) (quotations omitted). In the parties’ meet and confer discussion, Orrick was

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26 ²⁸ *See, e.g.*, Rubin Decl., Exh. 12, JB_00000546-547 (Brian Moran of Orrick writes to Hood
27 staffers and Jenner attorneys to “divide up” state Attorneys General in order to maximize “out-
28 reach time” at an upcoming NAAG meeting in Denver, saying that he is “happy to assign” who
will reach out to whom.).

1 unable or unwilling to identify any supposed litigation it contemplated. Rubin Decl. ¶ 13. This
2 absence of actual or anticipated litigation dooms any claim to work product protection, even put-
3 ting aside: (i) Orrick’s failure to specify the documents over which the protection is claimed; (ii)
4 their failure to substantiate the claim when asked; and (iii) the forfeiture of any hypothetical pro-
5 tection over documents by virtue of sharing them with AG Hood or others.

6 **b. The “Law Enforcement” Privilege**

7 Orrick’s assertion of a “law enforcement” privilege is similarly misplaced. “The law en-
8 forcement/investigatory files privilege is a privilege that is exclusive to the government.” *United*
9 *States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 687 (S.D. Cal. 1996); *see also Unit-*
10 *ed States v. McGraw-Hill Cos.*, No. CV-13-779-DOC, 2014 U.S. Dist. LEXIS 59408, at *18-19
11 (C.D. Cal. Apr. 15, 2014) (privilege invoked via “a formal claim ... by the head of the depart-
12 ment having control over the requested information” based upon “actual personal consideration
13 by that official[]” and requiring a specific identification of the privileged material, including “an
14 explanation why it properly falls within the scope of the privilege.”)²⁹ When applying the privi-
15 lege, courts “balance the need for disclosure with the government’s legitimate need to acquire
16 and maintain confidential information for sensitive activities.” *Doyle v. Gonzales*, No. S-11-0066
17 GEB, 2011 U.S. Dist. LEXIS 100639, at *14 (E.D. Cal. Sept. 6, 2011); *cf. Coughlin v. Lee*, 946
18 F.2d 1152, 1159 (5th Cir. 1991) (noting that the law enforcement privilege is “a *qualified* privi-
19 lege protecting investigative files in an ongoing criminal investigation or information which
20 would reveal the identity of confidential informants” (emphasis added)); *Ibrahim v. Dep’t of*
21 *Homeland Sec.*, No. C-06-00545 WHA, 2013 U.S. Dist. LEXIS 56663, at *15 (N.D. Cal. Apr.

22
23 ²⁹ *See also Hayslett v. City of San Diego*, No. 13-CV-1605-W, 2014 U.S. Dist. LEXIS 37738, at
24 *5-6 (S.D. Cal. Mar. 21, 2014) (“the party invoking the privilege must at the outset make a sub-
25 stantial threshold showing by way of a declaration or affidavit from a responsible official with
26 personal knowledge of the matters to be attested to in the affidavit”) (citations and internal quo-
27 tations omitted); *McGraw-Hill Cos.*, 2014 U.S. Dist. LEXIS 59408, at *21 (“the Court will not
28 protect those documents until the claiming official has seen and considered the contents of the
documents and states with specificity the rationale of the claimed privilege. In short, the Gov-
ernment cannot escape its duty to disclose documents by merely brandishing a general claim of
privilege.”) (citations and internal quotations omitted).

1 19, 2013) (privilege exists to protect witness and law enforcement personnel, privacy, and “oth-
2 erwise to prevent interference with an investigation”) (citation omitted).

3 Because Orrick is not itself a government entity, it cannot hide documents behind the
4 privilege here. Moreover, AG Hood has produced a host of communications with Orrick, further
5 establishing the inapplicability of the privilege. That production and those by other parties also
6 eliminate any “legitimate need” to keep these communications confidential. Finally, Orrick has
7 not carried its burden of showing the privilege could somehow be applicable as it has not even
8 attempted to explain how its documents could expose any investigative files or reveal the identity
9 of confidential sources. For all of these reasons, Orrick’s assertion of the law enforcement privi-
10 lege is untenable.

11 **c. “Common Interest Doctrine”**

12 Although occasionally termed a privilege itself, “[t]he common-interest is, essentially, an
13 exception to the waiver rule of the attorney-client privilege.” *Integrated Global Concepts, Inc. v.*
14 *j2 Global, Inc.*, No. 5:12-CV-034340RMW, 2014 U.S. Dist. LEXIS 7294, at *4 (N.D. Cal. Jan.
15 21, 2014). The doctrine prevents the loss of privileged status “if a privileged communication is
16 shared with a third person who has a common legal interest with respect to the subject matter of
17 the communication.” *In re Santa Fe*, 272 F.3d at 711 (citation omitted). To invoke the doctrine,
18 parties must be under a “palpable threat of litigation at the time of the communication.” *See id.*;
19 *Integrated Global Concepts*, 2014 U.S. Dist. LEXIS 7294, at *5 (the common interest doctrine
20 “generally applies where allied lawyers and clients work together in prosecuting or defending a
21 lawsuit so that they may exchange information among themselves without waving [sic] the privi-
22 lege, although it may, in rare cases, be extended to situations where there is anticipated joint liti-
23 gation, but nothing pending imminently.”) (internal quotations omitted). The fact that parties
24 may share commercial interests or business objectives is not sufficient to justify invocation of the
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1 common interest doctrine.³⁰ Disclosure of privileged communications to other parties in that set-
2 ting waives the privilege.

3 Orrick cannot claim the protections of the common interest doctrine with respect to doc-
4 uments regarding Google or AG Hood’s investigation that were shared with AG Hood or other
5 parties.³¹ See *Baricuatro*, 2013 U.S. Dist. LEXIS 96413, at *37 (no possible commonality of
6 interest between lobbyists and government agency that might provide basis for maintaining privi-
7 lege). Orrick was unable during the parties’ meet and confer to identify any litigation that was
8 contemplated at the time when these documents were created and/or shared, instead only insist-
9 ing that their client Microsoft somehow had a common interest with other third parties in re-
10 sponding to AG Hood’s requests. Rubin Decl. ¶ 13. But a “common” desire to hide their
11 backroom anti-Google lobbying is not what the common interest doctrine protects. Neither Or-
12 rick nor Microsoft are co-defendants with AG Hood or any other relevant third party, and the
13 documents produced to date make it clear that the efforts to attack Google had far more to do
14 with dirty tricks than with litigation. See, e.g., Rubin Decl., Exh. 18, JB_00000391 (email be-
15 tween movie studios, Orrick, Jenner & Block, and others discussing the possibility of using a
16 New York Times article in a media campaign against Google). Orrick’s invocation of the com-
17 mon interest doctrine is meritless.

18
19 ³⁰ See *Ferko v. NASCAR*, 219 F.R.D. 403, 406 n.1 (E.D. Tex. 2003) (“A commercial interest,
20 however, does not trigger the common interest doctrine.”); *Nidec Corp. v. Victor Co.*, 249 F.R.D.
21 575, 579 (N.D. Cal. 2007) (stating that “the basic requirement of the common interest exception
22 [is] that the parties must have a common legal, as opposed to commercial, interest. . . . [T]he dis-
23 closures which concern the instant litigation, to be protected, must be made in the course of for-
24 mulating a *common legal strategy*.” (emphasis in original) (internal quotations and citations
25 omitted); *Elan Microelectronics Corp. v. Apple, Inc.*, No. C-09-01531-RW, 2011 U.S. Dist.
LEXIS 87989, at *9 (N.D. Cal. Aug. 8, 2011) (common interest exception “does not extend to
communications about a joint business strategy that happens to include a concern about litiga-
tion.”).

26 ³¹ See, e.g., Rubin Decl., Exh. 19, JB_00000457 (email between Orrick, staffers at Hood’s office,
27 Tom Perrelli, Mike Moore and his assistant, Tom Galvin of the Digital Citizens Alliance, Patrick
28 Lynch, and others regarding a future meeting with AG Hood); *id.*, Exh. 15, JB_00000555-557
(email sent from Rob McKenna of Orrick to Hood staffers, Mike Moore, and multiple people at
Jenner & Block).

1 **d. The Attorney Client Privilege**

2 Lawyers at Orrick helped lead the charge in the effort to lobby AG Hood. But the mere
3 involvement of lawyers does not cloak the entire enterprise in the attorney-client privilege. Doc-
4 uments in which lawyers discuss campaign contributions, ghostwrite materials for government
5 officials, plan media campaigns, and devise strategies to influence public policy are not commu-
6 nications made for the purpose of obtaining legal advice, and are not privileged. *See In re Grand*
7 *Jury Subpoenas Dated March 9, 2001*, 179 F. Supp. 2d 270, 289-91 (S.D.N.Y. 2001) (no privi-
8 lege for communications between lawyer and client on whose behalf he was lobbying for a pres-
9 idential pardon: “Communications about non-legal issues such as public relations, the sollicita-
10 tion of prominent individuals or persons with access to the White House ... to support the Peti-
11 tion, and strategies for persuading the President to grant the petition are not privileged.”); *In re*
12 *Chevron Corp.*, 749 F. Supp. 2d 141, 165-66 (S.D.N.Y. 2010) (privileges are “not intended,
13 however, to obscure what is essentially a lobbying and political effort, even one undertaken by a
14 lawyer. . . . [M]atters conveyed to the attorney for the purpose of having the attorney fulfill the
15 lobbyist role do not become privileged by virtue of the fact that the lobbyist has a law degree or
16 may under other circumstances give legal advice to the client.”) (citation and internal quotations
17 omitted); *cf. North Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1127 (N.D. Cal.
18 2003) (“[L]egal advice must predominate for the communication to be protected,” and “when
19 the legal advice is merely incidental to business advice, the privilege does not apply”) (internal
20 quotations and citations omitted); *United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065,
21 1076 (N.D. Cal. 2002) (“The privilege does not protect an attorney’s business advice. Corpora-
22 tions may not conduct their business affairs in private simply by staffing a transaction with attor-
23 neys.”). Beyond that, as noted, the sharing of a document with AG Hood and other third parties
24 waives any attorney-client privilege that would otherwise attach to a document. *See supra*, p.
25 18-20; *El Paso*, 682 F.2d at 539.

26 But even if there are documents over which a claim of attorney-client privilege might be
27 defensible, Orrick must substantiate that claim in a privilege log, something it has refused to do.
28 Orrick’s complaints about burden are unavailing—if they withhold documents on the basis of

1 privilege, they must explain the basis of the privilege or risk waiver. *Felham Enters. (Cayman)*
2 *Ltd. v. Certain Underwriters at Lloyds*, No. Civ. A. 02-3588, 2004 WL 2360159, at *3 (E.D. La.
3 Oct. 19, 2004) (finding a waiver where defendant failed to produce a timely privilege log and the
4 log it ultimately produced failed to sufficiently describe the withheld documents); *see also Bur-*
5 *lington Northern & Santa Fe Ry. v. United States Dist. Court*, 408 F.3d 1142, 1149 (9th Cir.
6 2005) (holding that “boilerplate objections or blanket refusals” were insufficient to assert a privi-
7 lege and courts should consider the level of detail provided and the timeliness of that information
8 in determining if a party had waived the privilege). It is well-established that failure to provide a
9 privilege log prior to the return date of a subpoena results in waiver of “any privilege.” *In re*
10 *Chevron Corp.*, 749 F. Supp. 2d 170, 180 (S.D.N.Y. 2010) (Rule 45 requires parties to “serve
11 either written objections or move to quash within the earlier of the time fixed for compliance or
12 fourteen days after service and, if withholding subpoenaed material on the grounds of privilege,
13 [they] must provide a privilege log.”); *see also Burns v. Imagine Films Entm’t, Inc.*, 164 F.R.D.
14 589, 594 (W.D.N.Y. 1996) (finding Defendant waived privilege by taking position that it would
15 not create a privilege log until after the court ruled on its overbreadth and burden objections).³²

16 **e. The Requests Are Not Unduly Burdensome**

17 Orrick cannot carry its burden of showing the requests are unduly burdensome. *See Hel-*
18 *ler v. City of Dallas*, 303 F.R.D. 466, 490 (N.D. Tex. 2014) (“A party resisting discovery must
19

20 ³² *See also* Charles Wright & Arthur Miller, Fed. Prac. & Proc., § 2464 (“[Federal] Courts con-
21 sistently have held that such a party is required to produce a document index or privilege log, and
22 that the failure to produce a log of sufficient detail constitutes a waiver of the underlying privi-
23 lege or work product claim.”); *see also Blackard v. Hercules, Inc.*, No. 2:12-CV-175-KS-MTP,
24 2014 U.S. Dist. LEXIS 75934, at *14-15 (S.D. Miss. June 4, 2014) (“It is well within this
25 Court[’s] discretion to find a waiver of the asserted privileges for failing to timely produce a
26 privilege log.” (citations omitted)); *Vieste, LLC v. Hill Redwood Dev.*, No. C-09-04024-JSW,
27 2010 U.S. Dist. LEXIS 126607, at *24-25 n.3 (N.D. Cal. Nov. 18, 2010) (“This Court’s standing
28 order regarding discovery provides that when a party ‘withholds information that is responsive to
a discovery request by claiming that it is privileged or otherwise protected from discovery, that
party shall promptly prepare and provide a privilege log that is sufficiently detailed and informa-
tive to justify the privilege.’ . . . The order further specifies that any party’s ‘[f]ailure to furnish
this information promptly may be deemed a waiver of the privilege or protection.’”) (citations
omitted).

1 show specifically how each interrogatory or document request is overly broad, unduly burden-
2 some, or oppressive . . . by submitting affidavits or offering evidence revealing the nature of the
3 burden. Failing to do so, as a general matter, makes such an unsupported objection nothing more
4 than unsustainable boilerplate.”) (citations omitted); *In re ATM Fee Antitrust Litig.*, 233 F.R.D.
5 542, 545 (N.D. Cal. 2005) (party failed to substantiate its claim of undue burden where it offered
6 only “a blanket objection without specifics sufficient to justify denying discovery.”) (citations
7 omitted).

8 Google’s requests are quite narrow and targeted. They seek only (1) documents that spe-
9 cifically reference both Google and AG Hood; (2) documents leading up to AG Hood’s investi-
10 gation of and CID to Google, including those concerning the investigation itself and those using
11 the specific code names for the projects run by the special interest groups; and (3) documents
12 concerning the special interests groups’ campaign contributions and other assistance to AG
13 Hood. These are categories of documents that are specific, directly focused on issues relevant to
14 this case, and lend themselves to targeted keyword searches. They are also limited in time, seek-
15 ing only documents from the last three years, the period cabining what the interested parties
16 called “Project Goliath.” *See supra* n.5.

17 According to Orrick, at its outer limit, Google’s subpoena would call upon it to review
18 18,000 documents. Rubin Decl. ¶ 14. If that truly is the number of potentially responsive docu-
19 ments, there is nothing shocking about it, except what it reflects about the extent of Orrick’s role
20 in AG Hood’s unconstitutional efforts to censor Google’s speech.³³ Having helped orchestrate
21 AG Hood’s three-year campaign, and having worked with a disparate group of special interests,

22
23 ³³ *See e.g., Assured Guar. Mun. Corp. v. UBS Real Estate Secs., Inc.*, No. 12-CIV-1579 (HB),
24 2013 U.S. Dist. LEXIS 41785, at *17 (S.D.N.Y. Mar. 25, 2013) (review of three quarters of a
25 million documents “by itself, does not warrant curtailing discovery.”); *Tiger Capital, LLC v.*
26 *PHL Variable Ins. Co.*, No. 12-CIV-2939 (CM), 2013 U.S. Dist. LEXIS 121395, at *13-14
27 (S.D.N.Y. Aug. 26, 2013) (compelling production of responsive documents from set of two mil-
28 lion documents collected); *Viacom Int’l, Inc. v. YouTube, Inc.*, No. C-08-80211, 2009 U.S. Dist.
LEXIS 4220, at *15 (N.D. Cal. Jan. 14, 2009) (compelling review of more than one million docu-
ments where subpoena target had acted as plaintiff’s agent).

1 their lobbyists, the press, and other government officials, it is no surprise that Orrick accumulat-
2 ed a raft of relevant documents. To the extent there is burden associated with the process of re-
3 viewing those documents, it is by no means undue. It is simply the natural result of Orrick hav-
4 ing voluntarily involved itself so intimately in AG Hood's unlawful conduct in the hopes of serv-
5 ing the interests of its client, Microsoft.

6 **CONCLUSION**

7 For the foregoing reasons, Google respectfully requests an order compelling Orrick im-
8 mediately to produce all documents responsive to Google's requests.

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10 Dated: August 3, 2015

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

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By: /s/ David H. Kramer
David H. Kramer

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Attorneys for Petitioner
GOOGLE INC.

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ATTESTATION

I, David H. Kramer, am the ECF User whose identification and password are being used to file this **NOTICE OF MOTION AND MOTION TO COMPEL COMPLIANCE WITH SUBPOENA** and supporting papers. In compliance with Civil L.R. 5-1, I hereby attest that Michael H. Rubin has concurred in this filing.

Dated: August 3, 2015

By: /s/ David H. Kramer
David H. Kramer

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