UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**2:20-cv-09893-JGB-SHK**	Date:	April 2, 2024
Title:	***Immigrant Defenders Law Center v. Mayorkas***		

Present: The Honorable	Shashi H. Kewalramani, United States Magistrate Judge

D. Castellanos	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings (IN CHAMBERS): ORDER RE: PLAINTIFFS' MOTION TO COMPEL DISCOVERY [ECF No. 292] AND SECOND MOTION TO COMPEL DISCOVERY [ECF No. 297]

Before the Court are Plaintiffs' Motion to Compel Discovery ("MTC") and Second Motion to Compel Discovery ("Second MTC," collectively with MTC, the "MTCs"). Electronic Case Filing Number ("ECF No.") 292, MTC; 297 Second MTC. For the reasons set forth in this Order, the MTCs are **GRANTED IN PART** and **DENIED IN PART** with a further hearing to be conducted with the Magistrate Judge to address the scope of the discovery that is to be produced.

I. BACKGROUND

A. Procedural History and Relevant Background

On October 28, 2020, plaintiffs the Immigration Defenders Law Center and Jewish Family Service of San Diego (together, the "Organizational Plaintiffs"), and eight individuals filed a complaint ("Complaint" or "Compl.") challenging the implementation of the Migrant Protection Protocol ("MPP" or "MPP 1.0"[1]). ECF No. 1, Compl. Defendants included the Department of Homeland Security ("DHS") and its Acting Secretary; the United States ("U.S.") Customs and Border Protection ("CBP") and its Acting Commissioner; Executive Assistant Commissioner of the Office of Field Operations ("OFO"); Chief of U.S. Border Patrol; and U.S. Immigration and Customs Enforcement ("ICE") and its Acting Director (collectively,

[1] Prior filings in this matter refer to two stages of the MPP policy, MPP 1.0 and MPP 2.0. MPP 2.0 is no longer at issue, and thus references to MPP or MPP 1.0 refer to the MPP policy.

"Defendants"). Id. at ¶¶ 14-20. The individual plaintiffs in the Complaint, and in subsequent amended complaints, are individuals who were made to wait in Mexico while their asylum applications were pending in the United States under the MPP. See id. at ¶ 10.

On December 22, 2021, Organizational Plaintiffs and twelve[2] individuals (the "Individual Plaintiffs") filed a Second Amended Complaint ("SAC").[3] ECF No. 175, SAC. In the SAC, Plaintiffs assert the following claims for relief against Defendants: (1) violation of the Administrative Procedure Act ("APA") based on the deprivation of the right to apply for asylum; (2) violation of the APA premised on a lack of access to counsel; (3) violation of the Fifth Amendment Due Process Clause right to a full and fair hearing ("Due Process Claim"); (4) violation of the APA premised on the termination of the MPP wind-down by the Biden Administration; (5) violation of the First Amendment on behalf of the Individual Plaintiffs (the "Individual Plaintiffs' First Amendment Claim"); and (6) violation of the First Amendment on behalf of the Organization Plaintiffs (the "Organizational Plaintiffs' First Amendment Claim") (together with Individual Plaintiffs' First Amendment Claim, the "First Amendment Claims"). Id. at ¶¶ 329-91.

In early 2022, the parties briefed both Defendants' Motion to Dismiss the SAC ("MTD"), ECF Nos. 189, 207, 208; and Plaintiffs' Motion to Certify the Class ("Class Certification Motion"), ECF Nos. 205, 210, 216; as well as supplemental briefing on the impact of the Supreme Court's decision in Texas v. Biden, 587 U.S. 785 (2022) on the pending MTD and Class Certification Motion, ECF Nos. 240, 243. On March 15, 2023, the Court entered an order on the MTD and Class Certification Motion ("MTD Order"), dismissing certain of Plaintiffs' claims and granting class certification. ECF No. 261, MTD Order.

The claims that remained were: (1) the APA claim for the right to apply for asylum; (2) the APA claim for right to access counsel; (3) the Due Process Claim; (4) the Individual Plaintiffs' First Amendment Claim; and (5) the Organizational Plaintiffs' First Amendment Claim. Id. at 35, 38, 41, 48, 49. The Court certified the class of "[a]ll individuals subjected to MPP 1.0 prior to June 1, 2021, who remain outside the United States and whose cases are not currently active due to termination of proceedings or a final removal order" (the "Inactive MPP 1.0 Class"), and included three subclasses: (1) the Terminated Case Subclass, which consisted of those class members that "remain outside of the United States and whose MPP proceedings were terminated and remain inactive"; (2) In Absentia Subclass, which consisted of those class members that "remain outside the United States, received an in absentia order of removal in MPP proceedings, and whose cases have not been reopened and are not currently pending review before a federal circuit court of appeals"; and (3) the Final Order Subclass, which consisted of those class members "who remain outside of the United States, received a final order of removal for reasons other than failure to appear for an immigration court hearing, and whose cases have

[2] One Plaintiff named in the SAC, Rodrigo Doe, filed a notice of voluntary dismissal of individual claims, ECF No. 255, while a previously named Plaintiff, Yessenia Doe, later filed a notice of case reopening, EFC No. 258.

[3] Plaintiffs previously filed a First Amended Complaint ("FAC") and Defendants moved to dismiss it. See ECF Nos. 143; 167. The Court denied the Motion to Dismiss as moot in light of the SAC. ECF No. 193.

not been reopened and are not currently pending review before a federal circuit court of appeals." Id. at 49-50.

On April 12, 2023, Defendants filed an answer to the SAC ("Answer"). ECF No. 264, Answer. On August 15, 2023, Defendants produced a Certified Administrative Record ("CAR"). ECF No. 274, CAR. On September 7, 2023, Plaintiffs filed a Motion to Compel the Completion of the Administrative Record and Privilege Log ("Motion to Compel re CAR"). ECF No. 277, Motion to Compel re CAR. On October 19, 2023, the Court ordered ("Order re CAR") Defendants to search and produce certain categories of documents to supplement the CAR and produce a privilege log for any withheld documents by December 1, 2023. ECF No. 290, Order re CAR at 16.

On November 3, 2023, Plaintiffs filed the MTC, which sought a response to Plaintiffs' Interrogatory ("ROG") No. 2 and Plaintiffs' Requests for Production ("RFPs") Nos. 1 and 2. ECF No. 292, MTC. On December 1, 2023, Defendants filed an Opposition to Plaintiffs' MTC ("Opposition" or "Opp'n"). ECF No. 293. On December 15, 2023, Plaintiffs filed a Reply In Support of the MTC ("Reply"). ECF No. 296. On December 21, 2023, Plaintiffs filed their Second MTC, seeking responses to Plaintiffs' RFPs Nos. 3-36. ECF No. 297. On January 17, 2024, Defendants filed an Opposition re: Second Motion to Compel ("Second Opposition" or "Second Opp'n"). ECF No. 301. On January 26, 2024, Plaintiffs filed a Reply in Support of Second Motion to Compel ("Second Reply"). ECF No. 304.

The discovery cut-off in this matter is May 20, 2024. See ECF No. 278, Civil Trial Scheduling Order.

B. The Disputed Discovery

1. MTC

According to Plaintiffs, "[a]t issue in this discovery dispute is Defendants' failure to respond to [ROG No.] 2 and [RFP Nos.] 1 and 2." ECF No. 292, MTC at 1. "ROG No. 2 seeks a further breakdown of the total MPP enrollment numbers provided in response to [ROG No. 1], asking Defendants to provide the numbers of individuals for whom Defendants have records or knowledge of their entering the United States after their initial placement in MPP (other than to attend an MPP hearing)." Id. at 1-2. "RFPs Nos. 1 and 2 seek communications and documents utilized by Defendants in reaching their responses to ROG Nos. 1 and 2, respectively." Id. at 2.

2. Second MTC

"At issue in [the Second MTC] dispute is Defendants' refusal to Plaintiffs' [RFP Nos.] 3 to 36, which[, Plaintiffs claim,] seek discovery that is necessary for Plaintiffs to litigate their freestanding constitutional claims." ECF No. 297, Second MTC at 1.

C. The Parties' Arguments

1. The First Motion to Compel

a. Plaintiffs' Motion

First, Plaintiffs assert that they are not limited to the administrative record because the requests "seek information regarding the certified class," and not "the review of agency action." ECF NO. 292, MTC at 2 (citing Beasley v. Del Toro, No. 22-cv-667 (CRC), 2023 WL 6312398, at *16 (D.D.C. Sept. 28, 2023)).

Second, Plaintiffs argue the discovery sought is relevant to approximating the size of the certified class because Defendants do not have "records of individuals in MPP 1.0 who remain outside the [U.S.]—i.e., the individuals who are members of the certified class." Id. at 3. Therefore, providing records of those present in the U.S. would allow Plaintiffs to subtract that number from "the total number of individuals in MPP 1.0" to "produce a reasonable estimate of the number of individuals who remain outside of the [U.S.] and are therefore class members." Id.

Third, Plaintiffs argue that the requested searches are not unduly burdensome because: (1) the CAR indicates that ICE and DHS "have the capacity to compile aggregate data relating to individuals who were placed on MPP" and thus would not need to conduct a "manual review"; and (2) it is expected that Defendants will bear the burden of producing class-related information because they are the only party with access to such information. Id. at 4.

Finally, Plaintiffs argue the information sought in the RFPs is not privileged and do not constitute "impermissible 'discovery-on-discovery' [regarding] 'another party's discovery process.'" Id. at 5 (citations omitted). Plaintiffs further assert that even if the requests are discovery-on-discovery, they have provided a sufficient basis to question the adequacy of Defendants' discovery because there are discrepancies in Defendants' data and figures regarding the MPP. Id.

b. Defendants' Opposition

First, Defendants argue that discovery in an APA case is limited to the CAR, and Plaintiffs have not made the requisite showing to warrant their "extra-record discovery" requests. ECF No. 293, Opp'n at 2-3. Defendants assert that "[w]hile Plaintiffs seek to distinguish this [APA] case on the ground that they also assert constitutional claims, their constitutional claims are co-extensive with their second APA claim." Id. at 4. Defendants argue Plaintiffs must "first move[] to supplement the administrative record to include the information requested" and that "they have not even argued . . . that one of the four Lands Council [v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005)] exceptions" apply. Id.

As to ROG No. 2, Defendants contend that discovery "concerning the size of the class" is not relevant because: (1) "information [that] may be relevant for settlement negotiations" is not relevant "to any party's claim or defense"; (2) the "scope of any relief . . . only becomes relevant if and when Plaintiff prevail on the merits"; (3) ROG No. 2 seeks numbers of class members, not

contact information, and therefore is not relevant to class outreach; and (4) "class size discovery is simply not necessary in the case of a certified class." Id. at 5. Regarding the burden of production and proportionality of ROG No. 2, Defendants argue: (1) "compiling the numbers requested would require manual review, a vast diversion of government resources" because CBP's Border Patrol and OFO subagencies "have separate systems" and each would "need to conduct its own review of all of the approximately 28,000 individuals identified" in ROG No. 1; (2) the information sought would not estimate the class size because those individuals who returned in to the U.S. *"may or may not currently be* in the [U.S.] and thus *may or may not be* part of the class"; and (3) "class size could only become relevant if and when" the Court determines "the proper scope of injunctive or declaratory relief[.]" Id. at 5-6.

As to RFP No. 1, Defendants state that they "queried a database to provide the requested data" and did not use any documents in answering ROG No. 1. Id. at 6-7. Defendants are willing to provide "an Excel spreadsheet containing data from the database that it utilized in responding to Interrogatory No.1." Id. at 7. Defendants argue communications concerning responding to ROG No. 1 are protected by the attorney-client privilege and work product doctrine. Id.

As to RFP No. 2, Defendants assert that the MTC regarding RFP No. 2 is premature because "Plaintiffs merely assume that (a) the Court will order a response to [ROG No. 2] and (b) such a response to [ROG No. 2] will be inadequate." Id. Further, Defendants argue: (1) the sufficiency of Defendants' response to ROG No. 2 is not relevant to a claim or defense in this matter; (2) "Plaintiffs' vehicle for challenging the accuracy or sufficiency of an interrogatory response is to request supplementation . . . and, if unsuccessful, move to compel an amended response—not seek discovery-on-discovery"; and (3) "disclosure of any 'documents or communications' that were 'considered or utilized' in responding to [ROG No. 2] would necessarily invade attorney-client privilege and attorney work product doctrine." Id. at 8.

c. Plaintiffs' Reply

Plaintiffs first respond that the Federal Rule of Civil Procedure ("Rule" or "Fed. R. Civ. P.") 26(b)(1) relevance standard is not strictly limited to information relevant to a "claim or defense," and "many 'types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raise,'" including to "facilitate settlement." ECF No. 296, Reply at 2 (citations omitted). Plaintiffs further argue the discovery sought is not premature because "class size is relevant for many post-certification reasons," particularly class relief and negotiations. Id. at 2-3.

Plaintiffs then assert that ROG No. 2 is not unduly burdensome because: (1) "Defendant fail to present competent evidence to show that finding the information requested would be burdensome for" DHS; (2) CBP's declarations as to burden "do not speak to DHS's ability to find the information requested"; (3) "DHS data produced elsewhere," such as in the Mayorkas Termination Memo and "administrative record produced in Texas v. Biden," also "indicate[s] that Defendants have . . . capacity to search for the requested information"; and (4) even if Defendants establish undue burden, "the information sought in ROG No. 2 is essential to

Plaintiffs' counsel's ability to meet their ethical obligations to the certified class" and "the requested information is not available" elsewhere. Id. at 3-4.

Next, Plaintiffs argue that even if the Court does not compel a response to ROG No. 2, it should compel a production of "individual case narratives in accordance with" RFP No. 2. Id. at 4-5. As to Defendants' "prematurity and nullity" arguments regarding RFP No. 2, Plaintiffs respond that "[t]o wait until Defendants comply with discovery to then litigate any objections to the RFP . . . *objections Defendants have already raised*—would be inefficient and unnecessary." Id. at 5 (emphasis in original). Moreover, Plaintiffs argue RFP No. 2 does not seek "discovery on discovery" nor challenges "the sufficiency of Defendants' response," but "requests documents to better understand the nature of the class, and the data that Defendants have on class members." Id. at 7.

As to Defendants' offer to produce a spreadsheet to satisfy RFP No. 1, Plaintiffs state that "[i]t is unclear what categories of data Defendants intend to include in the spreadsheet, without which Plaintiffs are unable to determine whether the spreadsheet will adequately contextualize Defendants answer to ROG No. 1 and the discrepancies . . . as to the numbers of people in MPP 1.0." Id.

Regarding Defendants' privilege objections, Plaintiffs argue "[d]ocuments created for DHS's internal purposes would not be confidential communications between attorney and client—even if those documents were later shared with counsel" and are not protected as work product because they were not created in anticipation of litigation. Id. at 6.

2. The Second Motion to Compel

a. Plaintiffs' Motion

First, Plaintiffs argue that discovery on their constitutional claims may proceed before Defendants produce the CAR because their constitutional claims are independent of their APA claims, and thus the CAR would not shed any light on those claims. ECF No. 297, Second MTC at 2.

Second, Plaintiffs argue that production of RFP Nos. 3 to 36 should move forward because of the timeline in this case. Id. at 2. Specifically, Plaintiffs contend that Defendants have delayed production of the complete administrative record since March 2023 by producing an incomplete record in August 2023, failing to produce additional records in December 2023

according to the Court's Order re CAR, and requesting an extension to February 2024, a few months prior to discovery cut-off in this matter. Id. at 3.

Finally, Plaintiffs assert that further delay of discovery on their constitutional claims, while waiting for Defendants to produce the CAR, will "prejudice class members who continue to suffer harm outside of the United States due to Defendants' actions." Id.

b. Defendants' Opposition

Defendants first argue that Plaintiffs' constitutional claims are coextensive with their APA claims and, thus, discovery is limited to the administrative record. ECF No. 301, Second Opp'n at 2, 4. Specifically, Defendants assert that Plaintiffs' Due Process Claim concerns the lack of "meaningful access to legal representation and inability to collect evidence, communicate with potential witnesses and experts, and prepare and present their cases," while the APA claims also concern "class members' lack of access to all components of the U.S. asylum system as a result of a lack of access to counsel and the Organizational Plaintiffs' ability to deliver meaningful legal assistance." Id. at 3 (citations and internal quotation marks omitted). Further, Defendants point out that Plaintiffs' "First Amendment claims concerning the right to hire and consult attorneys" are also "the gravamen of the [SAC] as a whole" and "an allegation central to Plaintiffs' APA claims." Id.

Defendants next argue that the "extra-record discovery in an APA case is not appropriate before the administrative record is" complete. Id. at 4. Defendants assert that the authority cited by Plaintiffs regarding extra record discovery is inapposite because: (1) they do not involve "the question of whether extra-record discovery was premature prior to completion of the administrative record"; (2) in two cases, either the plaintiffs also moved to supplement the administrative record or the court "reserve[d] ruling on whether discovery . . . should be stayed temporarily . . . until the magistrate judge [determined] whether the administrative record was complete"; (3) where the courts did allow extra-record discovery it was for claims that were "completely distinct theories from the APA claim" or "challenged something else entirely"; and (4) two of the cases predate the Supreme Court's decision in Dep't of Com. v. New York, 139 S. Ct. 2551, 2574 (2019). Id. at 4-5.

As to relevance, Defendants further argue that "Plaintiffs do not cite any authority demonstrating that the legal standard applicable to their three constitutional claims is materially distinguishable from the APA standard . . . such that it would require them to present extra-record evidence to prevail on their claims." Id. at 6. Defendants assert that the "individualized inquiries Plaintiffs generally seek" are not necessary because "this case is a *class action* challenging a *national policy*" such that the questions presented are "common legal question[s] that can be answered based on review of the policies, not by factual inquiries into what happened in individual cases." Id. (emphasis in original),

As to undue burden and proportionality, Defendants argue that Plaintiffs' thirty-four requests seek "'all documents and communications' . . . without any temporal, hierarchical, or geographic limitation" while Plaintiffs may obtain some of the information they seek "through their own stories," "absent class members," and "reviews or studies on MPP 1.0 enrollees

experiences in communicating with counsel." Id. at 8. Defendants also point out that complying with the Court's order to supplement the CAR with "five narrower categories of documents has proven to be a highly burdensome undertaking." Id. at 8-9.

Finally, Defendants object to Plaintiffs' privilege log request because they "have not currently 'withheld' any documents. Discussion of a privilege log would be ripe only if and after (1) Defendants are ordered to conduct searches in response to certain requests, (2) Defendants locate potentially privileged documents . . . [,] (3) Defendants determine to withhold certain responsive documents from the production [.]" Id. at 10.

c. Plaintiffs' Reply

In the Reply, Plaintiffs reject Defendants' contention that their constitutional claims are co-extensive with their APA claims, arguing that: (1) in the MTD Order, Judge Bernal rejected Defendants' argument that Plaintiffs' Due Process Claim and APA access-to-counsel claims are identical, and upheld their First Amendment Claims, "which require[ed] Plaintiffs to show that Defendants violated the specific legal standards of the First Amendment," ECF No. 304, Second Reply at 3; (2) "[i]n support of their [Due Process Claim], Plaintiffs allege a broad range of due process violations extending beyond access to counsel," which "rely on evidence concerning 'the day-to-day effectuations of MPP 1.0'" and "fall[s] outside the CAR," id.; (3) allegations regarding the "specific time, place, and manner restraints on Plaintiffs' communications within the attorney-client relationship[] do not overlap with the allegations required to sustain Plaintiffs' APA claims," id.; (4) "discovery is warranted where, as here, Plaintiffs' constitutional claims challenge something beyond the decision to adopt final agency action," id. at 4; and (5) even if the claims overlap, discovery is "necessary to effectively adjudicate" how "the day-to-day implementation of MPP 1.0" impacted the Individual and Organizational Plaintiffs' rights, id.

Plaintiffs argue that their claims are proportionate and not unduly burdensome. Id. at 7. Plaintiffs contend the APA "does not *further* limit the scope of discovery, as long as the propounded requests seek documents 'directly relevant' to the Constitutional Claims and in the 'time periods at issue.'" Id. (emphasis in the original). Plaintiffs point out their requests are limited to the period of when the MPP 1.0 policy was in place "beginning in January 2019" and to "particular field offices at the Southwest border." Id. at 9. Additionally, Plaintiffs argue Defendants "have not presented any facts delineating what the 'extreme burden' consists of," and "cannot evade their discovery obligations . . . by pointing to 'difficulties' that they themselves caused." Id.

Finally, Plaintiffs posit that Defendants "cannot use their privilege objections as a shield to avoid searching for, and producing, responsive non-privileged documents" and Plaintiffs simply request "that the Court order Defendants to produce a privilege log at the time they serve their document productions." Id.

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II. LEGAL STANDARDS

A. Discovery Legal Standards

Rule 26(b)(2) governs the scope of permissible discovery and provides:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Relevancy, for purposes of discovery, "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Nguyen v. Lotus by Johnny Dung Inc., No. 8:17-cv-01317-JVS-JDE, 2019 WL 3064479, at *1 (C.D. Cal. June 5, 2019) (internal citations and quotation marks omitted). "Generally, the purpose of discovery is to remove surprise from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their dispute." Duran v. Cisco Sys., Inc., 258 F.R.D. 375, 378 (C.D. Cal. 2009) (internal citations and quotation marks omitted).

Because discovery must be both relevant and proportional, the right to discovery, even plainly relevant discovery, is not limitless. See Fed. R. Civ. P. 26(b)(1); Nguyen, 2019 WL 3064479, at *1. Discovery may be denied where: "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C).

"The party seeking to compel discovery has the burden of establishing that its request satisfies the relevancy requirements of Rule 26(b)(1). The party opposing discovery then has the burden of showing that the discovery should be prohibited, and the burden of clarifying, explaining or supporting its objections." Bryant v. Ochoa, No. 07-cv-200 JM (PCL), 2009 WL 1390794 at * 1 (S.D. Cal. May 14, 2009). "The party opposing discovery is 'required to carry a heavy burden of showing' why discovery should be denied." Reece v. Basi, No. 2:11-cv-2712 TLN AC P, 2014 WL 2565986, at *2 (E.D. Cal. June 6, 2014), aff'd, 704 F. App'x 685 (9th Cir. 2017) (quoting Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir.1975)).

"The district court enjoys broad discretion when resolving discovery disputes, which should be exercised by determining the relevance of discovery requests, assessing oppressiveness, and weighing these factors in deciding whether discovery should be compelled." United States ex rel. Brown v. Celgene Corp., No. CV 10-3165 GHK (SS), 2015 WL 12731923, at *2 (C.D. Cal. July 24, 2015) (internal citations and quotation marks omitted).

B. Attorney-Client Privilege and Work Product Doctrine

"The attorney-client privilege protects confidential communications between attorneys and clients, which are made for the purpose of giving legal advice." United States v. Sanmina Corp., 968 F.3d 1107, 1116 (9th Cir. 2020) (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)). "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney[.]" Upjohn, 44 U.S. at 395. Whether information is covered by the attorney-client privilege is determined by an eight-part test:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.

Id. (quoting U.S. v. Graf, 610 F.3d 1148, 1156 (9th Cir. 2010)). A "'party asserting the attorney-client privilege has the burden of establishing the [existence of an attorney-client] relationship and the privileged nature of the communication.'" Graf, 610 F.3d at 1156 (quoting United States v. Ruehle, 583 F.3d 600, 607 (9th Cir. 2009)). This means that the "party asserting the privilege bears the burden of proving each essential element." Id. (citations and internal quotation marks omitted).

The attorney-client privilege "may extend to communications with third parties who have been engaged to assist the attorney in providing legal advice," as well as to communications with third parties "acting as agent" of the client. Id. (citations omitted). While there are contexts in which communications with attorneys for the purpose of non-legal advice are not privileged, generally, if a person hires a lawyer for advice, there is a rebuttable presumption that the lawyer is hired to give legal advice. Id. (citing United States v. Chen, 99 F.3d 1495, 1501 (9th Cir. 1996)).

Relatedly, the "work product doctrine is a qualified protection limiting discovery of 'documents and tangible things' prepared by a party or his or her representative in anticipation of litigation or trial." Jones v. Hernandez, 322 F.R.D. 411, 412 (S.D. Cal. 2017) (citing Admiral Ins. Co. v. U.S. Dist. Court for Dist. Of Ariz., 881 F.2d 1486, 1494 (9th Cir. 1989)). The party claiming work product protection bears the burden of establishing that the work product doctrine applies. United States v. Richey, 632 F.3d 559, 566 (9th Cir. 2011). "A party may obtain discovery of work product only on a showing of 'substantial need' and an inability to obtain equivalent information from other sources." Hernandez, 322 F.R.D. at 412 (quoting Fed. R. Civ. P. 26(b)(3)(A)(ii)). "Even when a court orders disclosure of work product, 'it must protect against disclosure of the mental impressions, conclusion, opinions, or legal theories of a party's attorney or other representative concerning the litigation.'" Id. (quoting Fed. R. Civ. P. 26(b)(3)(B)). These materials—otherwise known as "opinion" work product—represent the "core types of work product" that the doctrine was designed to protect. Id. (citing Republic of Ecuador v. Mackay, 742 F.3d 860, 870 n.3 (9th Cir. 2014)).

C. Scope of Discovery in an APA Case

"The APA provides that a court's arbitrary and capricious review shall be based on the whole record or those parts of it cited by a party." California v. DHS, 612 F. Supp. 3d 875, 881 (N.D. Cal. 2020) (citing 5 U.S.C. § 706). The whole record consists of "everything that was before the agency pertaining to the merits of its decision" and "all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." Id. (citations and internal quotation marks omitted).

"The administrative record submitted by the federal government is entitled to a presumption of completeness, which is rebutted by clear evidence." Id. Courts can consider records outside of the administrative record, otherwise called "extra-record discovery," in the following circumstances: "(1) if necessary to determine 'whether the agency has considered all relevant factors and has explained its decision'[;] (2) 'when the agency has relied on documents not in the record'; [;] or (3) 'when supplementing the record is necessary to explain technical terms or complex subject matter.'" Id. (citing SW. Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996)). Extra-record discovery is also permitted "when a plaintiff demonstrates bad faith by the agency." Id.

Courts are split on whether to permit extra-record discovery in an APA lawsuit when plaintiffs also allege constitutional claims. J.L. v. Cissna, No. 18-CV-04914-NC, 2019 WL 2224851, at *1 (N.D. Cal. Mar. 8, 2019). Given "the lack of controlling authority" on the scope of discovery where both APA and constitutional claims are alleged," courts "usually [apply] a case-by-case approach to discovery" in such cases. California, 612 F. Supp. 3d at 896. "Most courts decline to draw a bright line or categorical rule and instead examine the particular facts of the claims involved and the discovery requested." Id. (citing cases that applied a circumstance-based approach to allowing extra-record discovery on constitutional claims in an APA lawsuit).

Even if extra-record discovery is allowed, however, "allow[ing] broad ranging discovery under Rule 26, beyond the administrative record in every case where a plaintiff alleges a constitutional claim, would be inappropriate and render meaningless the APA's restriction of judicial review of the administrative record." Almaklani v. Trump, 44 F. Supp. 3d 425, 434 (E.D.N.Y. 2020). Thus, "extra-record discovery is generally limited to cases where the constitutional claim does not overlap with the APA claim or the substance of the agency decision." Cissna, 2019 WL 2224851, at * 1 (citing Bellion Spirits, LLC v. U.S., 335 F. Supp. 3d 32, 43-44 (D.D.C. 2018)).

III. ANALYSIS

After careful review of the parties' briefing on the Motions to Compel and relevant law, the Court finds that: (1) the information sought regarding Plaintiffs' constitutional claims falls outside the ambit of the APA; (2) RFP Nos. 3-36 are relevant and proportional to the needs of the case, but must be limited to post-decisional period starting from January 2019; and (3) ROG No. 2 and RFP Nos. 1 and 2 are appropriate discovery requests and the scope of Defendants responses shall be determined subject to the discovery conference which will be scheduled after the issuance of this order.

A. Plaintiffs' RFP Nos. 3-36

The threshold question for both the MTC and Second MTC is whether discovery in this case is limited to the administrative record. The Court holds it is not because the discovery on Plaintiffs' constitutional claims and class size do not relate to the decision to enact the MPP, i.e. the agency decision that is challenged and governed by the extra-record discovery limitation and the APA, but rather to information related to class size and post-enactment of the policy that forms the basis for the constitutional claims.

1. The Information Sought Regarding Plaintiffs' Constitutional Claims Falls Outside of the APA Framework.

"Where 'plaintiffs have a constitutional claim that exists outside of the APA, then the APA's administrative record requirement does not govern the availability of discovery,' and, by extension, to consideration of other extra-record evidence." Rueda Vidal v. U.S. Dep't of Homeland Sec., 536 F. Supp. 3d 604, 612 (C.D. Cal. 2021) (quoting California v. U.S. Dep't of Homeland Sec., 612 F. Supp. 3d 875, 895 (N.D. Cal. 2020)). Consequently, at issue here is not whether any exceptions under the APA applies as it relates to extra-record discovery, but rather, whether Plaintiffs' constitutional claims are independent of the APA framework altogether.[4]

As Plaintiffs explain, they "seek discovery on separate constitutional claims that do not relate to the considerations informing the agency's decision-making process before enacting MPP 1.0," ECF No. 304, Second Reply at 7 (emphasis added), which is governed by the APA framework, "but rather the details of MPP 1.0's subsequent *implementation* and its resulting impact on the legal rights of class members and Organizational Plaintiffs," id. (emphasis in the original). Consequently, there are two separate time periods at issue regarding Plaintiffs' constitutional claims and APA claims: (1) Plaintiffs' APA claims concern what the Defendants considered before enacting the MPP, and (2) Plaintiffs' constitutional claims concern how Defendants carried out MPP after it was enacted.

The undersigned Magistrate finds this temporal distinction most analogous to Vidal v. Duke, 16-CV-4756 (NGG) (JO), 2017 WL 8773110 (E.D.N.Y.). There, the court permitted discovery on the plaintiffs' constitutional claims where they brought APA claims against the defendants' decision to end Deferred Action for Childhood Arrival ("DACA") program alongside due process claims that the defendants failed to "provide individualized notice to

[4] For this reason, Plaintiffs' Motions to Compel are not "premature," as Defendant argue. ECF No. 301, Second Opp'n at 4. Department of Commerce v. New York, 139 S. Ct. 2551 (2019) did not hold that discovery on independent constitutional claims must wait for completion of the administrative record. See ECF No. 301, Second Opp'n at 4 (citing Dep't of Commerce v. New York, 139 S.Ct. 2551 (2019)). Rather, in Department of Commerce, the Supreme Court addressed whether the administrative record must be complete before finding that the narrow bad-faith exception to the limitation on extra-record discovery in APA cases applied. 139 S.Ct. at 2573-74 (citations omitted).

DACA recipients" and "chang[ed] the Government's policy regarding how information derived from DACA applicants would be used for immigration-enforcement purposes." Id. at *2. Here, as in Vidal, Plaintiffs' constitutional claims "do not challenge the decision [to implement the MPP] itself," but challenge "collateral decisions" made by Defendants after the MPP was in place. Id.

Defendants argue that "attorney-client communication barriers are the gravamen of the [SAC] as whole," and thus Plaintiffs' constitutional claims are coextensive with their APA claims. ECF No. 301, Second Opp'n at 3. First, Judge Bernal's MTD Order rejected Defendants' argument that Plaintiffs' Due Process Claim "merely duplicates" Plaintiffs' APA access-to-counsel claim, noting that "[i]t is entirely appropriate for Plaintiffs to bring an independent constitutional claim that overlaps with their APA claim." ECF No. 261, MTD Order at 40 (emphasis added). Second, while general allegations may touch on both the Due Process Claim and APA claims *in nature*, the *substance* required to prove each claim may differ. For example, the allegation regarding the "one hour of consultation with an attorney immediately before a hearing" underpins both Plaintiffs' Due Process Claim and APA access-to-counsel claim. See ECF No. 175, SAC at ¶ 69. But "studies, reports, or benchmarking supporting Defendants' determination" to implement one-hour consultations would speak to pre-decisional conduct by the Defendants, id., while after-the-fact complaints received by Defendants regarding the same could go to the post-implementation violation of due process rights.

Indeed, in the Order re CAR, the Court found that "various 'email guidance' documents," "MPP 1.0 checklists, training materials, and FAQs provided to DHS personnel," and other "casual ad-hoc communications" were not the type of "high-level, top-down guidance" that Defendants relied upon in deciding to implement MPP 1.0, and thus excluded them from the CAR. ECF No. 290, Order re CAR at 14. These "materials bearing on the day-to-day effectuation of the program," id., however, may establish how the "MPP 1.0 precluded individuals from receiving full and fair hearings [through] 'systemic or structural deficiencies impacting Due Process that fell beneath the constitutional floor,'" ECF No. 304, Second Reply at 3 (citing ECF No. 261, MTD Order at 68) (emphasis added).

Moreover, "Plaintiffs alleged a broad range of due process violations extending beyond access to counsel, including individuals' lack of notice of hearings, inability to communicate with experts and witnesses, barriers to collecting and preserving evidence, and lack of access to law libraries and relevant U.S. legal materials." Id. (citing ECF No. 175, SAC at ¶¶ 44, 97, 104, 269, 357-60). To conclude that Plaintiffs' Due Process Claim is only duplicative of their APA access-to-counsel allegations reduces the Due Process right to a "full and fair hearing" to only one's right to seek the advice of counsel, and the Fifth Amendment protects more.

Likewise, Plaintiffs' First Amendment Claims do not "fundamentally overlap" with their APA claims. California, 612 F. Supp. 3d at 896. To sustain their First Amendment Claims, Plaintiffs must "detail specific time, place, and manner restraints on [Individual] Plaintiffs' communications within the attorney-client relationship" and "Organizational Plaintiffs' right to create and disseminate information" that occurred once the MPP was implemented on the ground. ECF No. 304, Second Reply at 3. "These allegations are different than Plaintiffs' APA allegations that the [a]gency promulgated a rule that was contrary to law . . . Ultimately, these

allegations demonstrate the administrative record is limited to the [a]gency's rulemaking process and sheds no light on actions taken by" Defendants after the MPP was in operation. California, 612 F. Supp. 3d at 898.

Accordingly, the Court finds that Plaintiffs' constitutional claims are not only coextensive with their APA claims and, therefore, discovery outside of the administrative record is appropriate.

2. Plaintiffs' RFPs Are Relevant, But Should Be Limited to the Period After the MPP Policy Was Implemented.

Defendants' objections to the relevancy of the RFP Nos. 3-36 reflect their confusion regarding the difference between material used by Defendants in the decision-making process and materials that speak to how MPP was carried out in practice. See ECF No. 301, Second Opp'n at 7 ("[W]hile Plaintiffs construe their own constitutional claims as being focused on *how* MPP 1.0 was implemented in practice, so too are their APA claims in some sense . . . [because] Plaintiffs allege that . . . Defendants failed to consider various problems that ultimately arose during MPP."). Defendants' arguments are unpersuasive, however, because: (1) Plaintiffs' APA claims ultimately involve what materials were before Defendants when considering to implement the MPP and whether those materials appropriately evaluated the concerns that later came to fruition, while Plaintiffs' constitutional claims concern the problems themselves; and (2) Plaintiffs' discovery does not seek "factual inquiries into what happened in individual cases" to prove "specific impacts" on individuals, but examples that establish a pattern of "systemic or structural deficiencies impacting Due Process" and "totality of restrictions imposed by Defendants [that] placed such a burden of their First Amendment rights . . . ," see id. at 6 (citing ECF No. 26, MTD Order at 68).

In fact, Defendants own argument appears to support Plaintiffs' position—"to the extent this request is seeking post-decisional, *after-the-fact discussion* of how MPP 1.0 is working for MPP enrollees in Mexico, it is wholly irrelevant to the constitutionality of the decision to implement MPP 1.0." Id. at 8 (emphasis in original). Defendants are correct; discovery here seeks post-decisional evidence to prove how MPP was carried out violated Plaintiffs' constitutional rights, not just to challenge the decision itself.

As to overbreadth, Plaintiffs assert "[t]his case concerns the implementation of MPP 1.0, a policy that was put in place in January 2019," but "Plaintiffs' RFPs . . . request documents dating to January 2017." ECF No. 304, Second Reply at 9. This Magistrate Judge does not see how documents created pre-enactment of the MPP would prove post-implementation constitutional violations. To the extent the RFPs seek information that was before Defendants during the decision-making period, such information would be subject to the limitations of the APA, and as such, limited to the administrative record.

Therefore, while Plaintiffs' RFPs are relevant and proportional to the needs of the case, they must be temporally limited starting from January 2019 when the MPP 1.0 was implemented. Defendants' other objections, such as the burden of producing the requested documents and the need for a privilege log, would best be addressed through a discovery conference with the

Magistrate Judge. Therefore, the parties are ORDERED to present to the Court, **within 7 days of the date of this Order**, a mutually agreeable date for a discovery conference to be held **no later than 21 days from the date of this Order**.

B. Plaintiffs' ROG No. 2 and RFP Nos. 1 & 2

1. Relevancy.

ROG No. 2 and RFP Nos. 1 and 2, which "are designed to give Plaintiffs an approximate size of the certified class and subclasses," are relevant to understanding "the resources needed to represent the class; the means of gathering information from class members; and the scope of the relief that will remediate their harm," including settlement negotiations. ECF No. 292, MTC at 3.

The Court is unpersuaded by Defendants' arguments to the contrary. First, while Rule 26(b) "describe[s] the scope of party-controlled discovery in terms of matter relevant to the claims or defenses of a party," "[t]he court . . . retains authority to order discovery of any matter relevant to the subject matter involved in the action for good cause." Fed. R. Civ. P. 26(b) advisory committee's notes to 2000 amend. (emphasis added). "The dividing line between information relevant to the claims and defenses and that relevant only to the subject matter of the action cannot be defined with precision." Id. Data regarding class size is relevant to Plaintiffs' claims in that it assists in determining the scope of relief in this case, for settlement negotiations, and preparing to identify class members by "provid[ing] insight into the best approach to reaching out to individual class members[,]" "shap[ing] prospective request for further information about class[,]" and "if the size is large," determining whether "samples of class information" would be necessary. See ECF No. 292, MTC at 3. Even if the information sought is not relevant to a "claim or defense," the Court finds it is at least relevant to "the subject matter of the litigation" and Plaintiffs have sufficiently established good cause for the requests.

2. Burden.

The burden placed on Defendants must be balanced with Plaintiffs' need for the discovery sought. Here, "Defendant[s] ha[ve] nearly all the information that both sides need [regarding potential class members], as well as the knowledge about where the information is kept, how it is stored, and how it can be accessed. The imbalance of access to information reduces the incentive to compromise." Hall, 2021 WL 1906464, at *1. Thus, the Court agrees that the burden outlined by Defendants does not outweigh Plaintiffs' need for "information [that] is necessary to properly represent the certified classes and subclasses." See ECF No. 296, Reply at 4.

The Court is also mindful of the potential burden to Defendants in conducting a "manual review" of "approximately 28,000 individuals[']" files in two different agency systems and cross-referencing those "lists to make sure none of the 28,000 individuals are counted twice." ECF No. 293, Opp'n at 6. However, Plaintiffs point out that Defendants only offer declarations from the Border Patrol and OFO subagencies of CBP, and "[t]hese declarations do not speak to DHS's ability to find the information requested." ECF No. 296, Reply at 3. Plaintiffs

additionally contend "DHS data produced elsewhere indicates that Defendants have at least some capacity to search the requested information." Id. Given the parties' dispute over DHS' capabilities to conduct key word searches and obviate the need for manual review, the Court finds that this disagreement is best resolved by a discovery conference before the Magistrate Judge. Accordingly, as instructed previously, the parties are ORDERED to present to the Court, **within 7 days of the date of this Order**, a mutually agreeable date for a discovery conference to be held **no later than 21 days from the date of this Order**.

3. "Discovery-on-discovery" and Attorney-Client or Work Product Privileges.

With respect to RFP Nos. 1 and 2, Defendants argue that "Plaintiffs' vehicle for challenging the accuracy and sufficiency of an interrogatory response is to request supplementation of that response and, if unsuccessful, move to compel an amended response—not seek discovery-on-discovery," which Defendants add, "necessarily invade[s] the attorney-client privilege and attorney work product doctrine." ECF No. 293, Opp'n at 8. The Court addresses these objections in turn.

First, these requests do not challenge the sufficiency of Defendants' responses but seek "documents to better understand the nature of the class, and the data that Defendants may have on class members," to which Plaintiffs would be entitled. See ECF No. 296, Reply at 7.

Second, Rule 33(d) permits a party responding to an interrogatory that requires "examining, auditing, compiling, abstracting, or summarizing a party's business records" to answer by "specifying the records that must be reviewed" and "giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries." Fed. R. Civ. P. 33(d)(1)-(2). Here, ROG Nos. 1 and 2 require Defendants to cull through its records to compile and summarize the "number of individuals in MPP 1.0 who were ordered removed or who had cases terminated" and "a further breakdown of the total MPP 1.0 enrollment numbers" into "numbers of individuals for whom Defendants have records or knowledge of their entering the United States after their initial placement in MPP." ECF No. 292, MTC at 2-3 & n.1. The Rules specifically contemplate that an appropriate response to an interrogatory requiring the compilation of information contained in a responding party's business records would be to allow the interrogating party to review the records and derive the same information themselves. The Court therefore disagrees with the argument that in this case the requests for production aimed at the same information would constitute inappropriate "discovery-on-discovery."

Third, while it is true that "[u]nder some circumstances, an attorney's compilation of various documents, each of which is itself a proper subject of discovery, constitutes an attorney's opinion work product subject to protection," Shapiro v. U.S. Dep't of Justice, 969 F. Supp. 2d 18, 31 (D.D.C. 2013) (emphasis added), it is also true that "[j]ust as every document prepared by an attorney is not entitled to work product protection, not every compilation by an attorney is protected either," id. at 32. As Defendants' own cited authority makes clear: "A crucial factor in determining whether the work-product doctrine applies to a compilation is whether the attorney's selection of the contents could reveal or provide insights into the 'mental processes of the

attorney' in the analysis and preparation of a client's case." Id. (citations omitted). Here, Defendants offer two declarations explaining the process by which they would compile the information Plaintiff seeks, which indicate that the Border Patrol and OFO subagencies of CBP would have to "manually review subsequent encounters to determine if encounters were related to initial MPP enrollment, or if the individual was processed under a different processing disposition," by "reviewing the narratives of each individual case." See ECF Nos. 293-1, Declaration of Michael Lata at ¶¶ 8-9; 293-2, Declaration of Graham Dudley at ¶¶ 8-9. Defendants do not explain how records, such as case narratives, kept in the ordinary course of these subagencies' operations, that were not prepared in anticipation of litigation, would constitute work product. Defendants also fail to explain how their review of these documents—to compile the number of MPP enrollees that reentered the United States—would reveal "insights into the mental processes of the attorney in the analysis and preparation of a client's case," Shapiro, 969 F. Supp. 2d at 32. Therefore, Defendants' work product objection does not prevent disclosure of the documents sought by RFP Nos. 1 and 2.

Fourth, Plaintiffs clarify that they "do not seek Defendants' 'internal communications' *concerning* responding to" ROG Nos. 1 and 2, but "'communications and documents' used or considered by Defendants when calculating the figures requested in ROG Nos. 1 and 2, such as prior emails, reports, spreadsheets, case narratives[.]" ECF No. 296, Reply at 6 (emphasis in the original). Defendants do not explain how these records kept in the ordinary course constitute "confidential communications made by a client to an attorney to obtain legal services." See id. (citing RG Abrams Ins. V. L. Offs. of C.R. Abrams, 342 F.R.D. 461, 496 (C.D. Cal. 2022)). "The [attorney-client] privilege . . . does not protect disclosure of the underlying facts by those who communicated with the attorney[.]" Upjohn, 44 U.S. at 395 (emphasis added). As such, Defendants' attorney-client privilege objection also fails.

Therefore, Defendants' discovery-on-discovery, work product, and attorney-client privilege objects fail. However, to the extent Defendants find that responsive documents are privileged for reasons other than those rejected in this Order, Defendants must produce a privilege log for any withheld documents.

4. Defendants Must Respond to ROG No. 2 and Produce Documents Responsive to RFP Nos. 1 and 2.

In sum, the undersigned Magistrate **GRANTS** Plaintiffs' Motion to Compel with respect to ROG No. 2 and RFP Nos. 1 and 2, subject to the discovery conference ordered in this Order to determine how to alleviate Defendants' burden in responding to these requests and the scope of the discovery that is to be produced in response to RFP Nos. 1 and 2.

IV. CONCLUSION

For the reasons set forth above, the Court: (1) **GRANTS** Plaintiffs' Motions to Compel regarding ROG No. 2 and RFP Nos. 1 & 2; (2) **GRANTS** Plaintiffs' Motion to Compel regarding RFP Nos. 3-36 for documents or communications dated January 2019 or later; and (3) **DENIES** Plaintiffs' Motion to Compel as to any requests seeking material before January 2019.

The parties are ORDERED to submit to the Court, **within 7 days of the date of this Order**, a mutually agreeable date for a discovery conference with the Magistrate to be held **within 21 days of the date of this Order**.

IT IS SO ORDERED.