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CLERK OF THE SUPERIOR COURT
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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ALAMEDA

11 IRVIN MUCHNICK,

12 Petitioner,

13 vs.

14 UNIVERSITY OF CALIFORNIA, BOARD OF
15 REGENTS,

16 Respondent.

) Case No. RG17857115

) HAYWARD DIVISION

) PETITIONER'S REPLY MEMORANDUM
) IN SUPPORT OF MOTION RE PRIVILEGE

) RESERVATION NUMBER R-2126941

21 Hearing Date: December 5, 2019

22 Time: 9:00 a.m.

23 Judge: Hon. Jeffrey Brand

24 Dep't: 511

25 Petition Filed: April 18, 2017

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TABLE OF AUTHORITIES

CASES

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- Costco Wholesale v. Superior Court*, (2009) 47 Cal 4th 725
- D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal 2d 723
- D.P. Pham LLC v. Cheadle* (2016) 246 Cal App 4th 653
- Great Lake Properties v. City of El Segundo* (1977) 19 Cal 3d 152
- Holmes v. Petrovich Develoment. Company, LLC* (2011) 191 Cal App 4th, 1047
- Insurance Company of North America v. Superior Court* (1980) 108 Cal. App.3d 758
- McAdam v. State National*, 15 Supp. 3d 1009 (S.D. Cal. 2014)
- McDermott Will & Emery v. Superior Court* (2017) (10 Cal App 5th 1083
- McKesson HBOC v. Superior Court*, (2004), 115 Cal. App. 4th 1229
- OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874
- Roush v. Seagate, LLC* (2007) 150 Cal App 3d 210
- State Compensation Insurance. Fund v. WPS, Inc.* (1999) 70 Cal. App.4th 644
- State Farm Fire and Casualty v. Superior Court*, (1997) 54 Cal. App. 4th 625
- Venture Law Group v. Superior Court* (2004) 118 Cal App 4th 96
- Zurich American Insurance Company v. Superior Court*, (2007)155 Cal App 4th 1485

STATUTES

- California Evidence Code § 912
- California Evidence Code § 917
- California Evidence Code § 951
- California Evidence Code § 954

1 I. Introduction and Summary

2 Respondent has not rebutted any aspect of Petitioner’s primary Evidence Code Section 954 argument
3 on privilege. This can be stated unequivocally because Respondent has declined to even try to rebut
4 the argument. Notwithstanding, Petitioner will provide further case law directly supporting
5 Petitioner’s main Section 954 argument and will further describe how Respondent has ignored the
6 relevant California law on privilege in the corporate context as applied to situations involving
7 communications, and opted instead to graft an irrelevant Federal approach onto the required analysis
8 under the California statutes and California cases. Separately, Respondent has made some valid
9 points relative to Petitioner’s alternative and secondary Evidence Code Section 912 argument on
10 waiver of the privilege, but, even there, Petitioner has the stronger position, namely that the actions
11 of Respondent’s executive employee waived the privilege under Section 912 because Fulp is a
12 responsible adult who acted voluntarily and intentionally. The sending of the message to Dad was
13 not “inadvertent”.

12 II. Section 954 Governs under the Facts of this Case

13 *OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874 and other cases cited
14 in Petitioner’s opening Memorandum make clear that in California the privilege analysis begins
15 under Evidence Code Section 954. In this case, it also ends under Section 954 for the many reasons
16 set forth in the opening Memorandum. Respondent’s failure to rebut is especially damaging because
17 Respondent has the burden of proof, as noted from Petitioner’s citations about burden under Section
18 954, whose holdings Respondent did not even attempt to rebut, jumping instead directly to Section
19 912 and disingenuously proclaiming that Petitioner has the burden of proof.

19 Another case cited for a different legal proposition in the opening Memorandum, *State*
20 *Compensation, Insurance. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 relied on the approach of
21 determining privilege status of the subject communication under Section 954 before undertaking a
22 Section 912 analysis.

23 III. Respondent Has Ignored the “Landmark” California Case Addressing Attorney Client Privilege
24 Issues in the Corporate Context

24 According to *Zurich American Insurance Company v. Superior Court*, 155 Cal App 4th 1485
25 (2007), *D. Chadbourne* is “...the landmark California case on corporate attorney client privilege”
26 and Petitioner’s Memorandum heavily relied on its reasoning. Respondent declined to address the
27 holdings of *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal 2d 723 and its progeny, like
28 *Zurich*, that are directly applicable to the facts of this case. The *Zurich* decision has an illuminating

1 analysis of the relevant statutory provisions to be applied in the instant case. Contrary to the elaborate
2 and irrelevant Ninth Circuit construct espoused by Respondent as controlling privilege claims in the
3 institutional context of the instant case, there is no such complicated analysis under California
4 evidence statutes related to “authority” and “who is the client”. Federal law on attorney client
5 privilege is very different and incorporates “common law principles” *Roush v. Seagate, LLC*, (2007)
6 150 Cal App 3d 210, citing *OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th
7 874

8 As plainly stated in *Zurich*, “[W]here, as here, there was not a direct chain of communication, we
9 must ask ourselves to what extent the corporation should be allowed to disseminate the ‘privileged’
10 information and still claim confidentiality.” (*Chadbourne, supra*, 60 Cal.2d at p. 735.)

11 Thus, the extensive discussion in *Zurich* of whether certain communications in the corporate context
12 are entitled to be considered *ipso facto* privileged rests on analyses very different from what
13 Respondent has proffered. For example, citing Evidence Code Section 952 (confidentiality), the
14 *Zurich* court stated:

15 “The *INA* court reasoned that involvement of third persons to whom disclosure is reasonably
16 necessary to further the purpose of the legal consultation does not destroy the confidentiality of the
17 communication.[citations, including *Chadbourne* and Section 952 re confidentiality]” *A fortiori*, if
18 the disclosure is made to someone to whom disclosure is not reasonably necessary or is not for a
19 purpose of legal consultation, then the requisite confidentiality of Sections 952 and 954 fails, and the
20 communication is not privileged. There is no analysis, as Respondent would have it, of the authority
21 of the corporate employee involved, or the intent of the individual employee, or the intent of the
22 corporation, as may or may not be called for under Section 912. (See Section VIII. *infra*) However,
23 the Court does not need to reach Section 912.

24 Thus, California courts see no need to analyze “intent” when determining whether privilege attaches
25 to communications made by employees to outside persons, but rather should look to those factors
26 described at length in *Zurich*.

27 In *McAdam v. State National*, 15 Supp. 3d 1009 (S.D. Cal. 2014), the Federal court sitting in diversity
28 and applying California law first looked to see if communications between corporations were
29 “confidential disclosures ‘reasonably necessary for the transmission of the information or the
30 accomplishment of the purpose for which the lawyer is consulted.’ Cal. Evid. Code Section 952.”

31 This is the identical approach endorsed in *Costco Wholesale v. Superior Court*, (2009) 47 Cal 4th 725,
32 733, and also Justice George’s concurrence at page 742.

1 There was no reference to the authorization (or lack thereof), or the status of the person
2 communicating with the attorney, or any of the fabricated hurdles that Respondent has tried to import
3 from the Federal cases and insert into the straightforward types of inquiries set forth in *McAdam*,
4 *Costco*, *Chadbourne*, or any of the other cases interpreting Section 954. Again, the Federal cases
5 interpreting the Federal law on privilege are irrelevant to the required statutory analysis in California.

6 IV. Respondent Relies on Irrelevant Federal Case Law in a Futile Attempt to Demonstrate that Fulp's
7 Purportedly "Rogue" Act Does Not Extinguish the Privilege

8 The merits of this Motion should be decided under California statutory law because "...[t]he
9 privileges set out in the Evidence Code are legislative creations; the courts of this state have no power
10 to expand them." *Behunin v. Superior Court* (2017) 9 Cal App 5th 833, 845. Respondent's brief on
11 pages 6-7 quotes from Federal cases to the effect that a non-corporate officer, like Fulp, cannot waive
12 the privilege. Respondent then extrapolates that these principles are part of California law because
13 *Venture Law Group v. Superior Court* (2004) 118 Cal App 4th 96 relied to some limited extent on
14 these Federal cases. Despite Respondent's use of "See" in front of the *Venture Law Group* citation,
15 the holding of *Venture Law Group* concerned succession of corporate interests and former managers
16 who were seeking to waive a privilege based on another party's assertion of advice of counsel. There
17 was no application of Section 912 to any facts remotely similar to the facts of the instant case. The
18 analysis contains no reference to the elements of Section 954 and 912, this because the Federal court
19 principles did not rely on the California statutory as part of that court's decision-making process
20 involving facts with no relevance to the situation of this case. To the extent the Court finds that the
21 *Venture Law Group* reasoning has any applicability to the instant case, the case should be considered
22 an outlier.

23 V. Respondent Insinuates that Petitioner Should Be Precluded from Arguing that Section 954 Takes
24 Precedence over Section 912

25 On page 2 of its brief, Respondent introduces references to earlier statements made by Petitioner in
26 meet and confer exchanges and in a Case Management Conference Statement. This irrelevant and
27 improper tactic appears tied to Respondent's refusal to address Petitioner's central arguments related
28 to the application of Section 954 before any analysis of Section 912. Respondent cites no authorities
and could not bring itself to actually explain such a frivolous contention as a justification for its
unwillingness and evident inability to rebut Petitioner's argument on Section 954, but the unspoken
insinuations are unmistakable: a) Petitioner has waived its right to argue that Section 954 is
controlling under the facts of this case; or b) Petitioner is estopped to argue that Section 954 is

1 controlling; or c) Respondent relied to its detriment on the statements in the meet and confer exchange
2 and in the CMC Statement and therefore it is unfair to permit Petitioner to make this argument in this
3 Motion. Such implied contentions, or any similar excuse that Respondent might propound to justify
4 its refusal to even attempt to rebut Petitioner's central argument in this Motion, should be rejected
5 out of hand.

6 As explained in the Supplemental Declaration of Roy S. Gordet being submitted concurrently, the
7 statements in the meet and confer exchange referencing "waiver of the privilege" that eventually
8 were inserted into the CMC Statement filed with the Court were expressly disclaimed as "skeletal
9 and non-argumentative". (Gordet Supp Decl. ¶ 11) Secondly, Petitioner's counsel never agreed that
10 such shorthand characterizations of remaining issues in dispute was intended to be the definitive
11 statement of the dispute or was to set the parameters of this present Motion. . Section 912 is expressly
12 referenced in Section 954; the intertwining is evident. Intuitively, Petitioner proceed to notice a
13 deposition and undertake additional legal research. Moreover, the Court's Order after the CMC stated
14 a "hearing re: privilege", not "re: waiver of privilege." (Gordet Supp Decl. ¶ 16).

15 Furthermore, an email message from Petitioner to Respondent stated that the CMC should not include
16 legal argument and that the parties should seek "input" from the Court relating to issues in dispute.
17 (Gordet Supp Decl. ¶ 15 Notwithstanding, with no case authority or logic in support, Respondent
18 implies that Petitioner's arguments on Section 954 should be dismissed merely because they vary
19 slightly from how these arguments were earlier phrased in discussion with Respondent's counsel.

20 It is self-evident that Petitioner was entitled to develop new approaches to the salient issues deriving
21 from any facts revealed in discovery (as occurred with the subsequent deposition of Solomon Fulp)
22 and based on deeper and more extensive legal research. (Gordet Supp Decl. ¶ 17)

23 Lastly, in support of Petitioner's position set forth above, after receiving the above-referenced CMC
24 Statement and after holding a CMC in Chambers, the Court issued an Order that referred to a "hearing
25 re: privilege" (Gordet Supp Decl. ¶ 16) The Court's Order did not refer to a "hearing re waiver of
26 privilege" or "hearing re: Section 912". Whatever point Respondent was suggesting with irrelevant
27 information related to the email exchange and the CMC Statement, the argument has no merit.

28 VI. Respondent's Counsel's Earlier Language Acknowledges the Validity of Petitioner's Section 954 Approach Preceding a Section 912 Inquiry

In an email message dated June 7, 2019 that was part of an exchange discussing the merits of the parties' respective contentions related to the applicability of the privilege, counsel for Respondent wrote the following:

1 When a client communicates with a lawyer in an email and then forwards that email to someone else
2 in the organization in such a way as to preserve the confidential nature of the communication, none
3 of that, in my experience, waives the attorney-client privilege, or makes the communication itself
4 non-privileged....The email to his dad is not privileged so we did not redact its contents, but the rest
5 of the string is, which is why we redacted it. (He should not have forwarded the string to his dad but
6 he did not have the authority to waive the privilege.)
7 (Gordet Supp Decl. ¶ 18)

8 The underlined language, written well in advance of the filing of this Motion, demonstrates that the
9 parties were discussing months in advance of the filing of this Motion that whether or not the
10 communication from Fulp to Dad should be considered inherently confidential and privileged, or not.
11 This passage by Respondent's counsel himself underscores the primacy of Section 954 and how its
12 factors precede any consideration of a waiver. Further, the Fulp to Dad message was unitary; there is
13 no basis for breaking it up into parts and installing a bogus privilege.

14 VII. McKesson HBOC Demonstrates that Intent to Waive Is Not a Requirement Under Section 912

15 Respondent's attempt to imbue Section 912 with an intent component that does not exist is
16 undermined by the facts and holding of *McKesson HBOC v. Superior Court*, (2004), 115 Cal App
17 4th 1229, 1238, cited in Petitioner's opening memorandum for a different legal proposition. In
18 *McKesson*, the claimant of the privilege engaged an outside law firm to conduct an audit. The
19 claimant shared the audit report with the government. There clearly was no intention by the holder
20 of the purported privilege to waive the privilege. The court nonetheless found that the privilege was
21 waived because the purpose of the disclosure was not for a justifiable legal purpose. As is obvious,
22 there was no legal purpose for Fulp's disclosure of the entire message to Dad.

23 VIII. Under the Facts of the Instant Case, Intent Is Not Relevant or Required, and There Was Also
24 No Waiver of the Privilege Under Section 912

25 Furthermore, the cases cited by Respondent do not withstand scrutiny on the issue of "intent". As
26 pointed out in the opening Memorandum, cases have held that the voluntary forwarding of privileged
27 documents can act as a waiver of the privilege. *See Holmes v. Petrovich Development Company, LLC*
28 (2011) 191 Cal App 4th, 1047, 1067. Other cases, like *McDermott Will & Emery v. Superior Court*
(2017) (10 Cal App 5th 1083 cited extensively by Respondent, have held that there must be some
form of "knowing" waiver or "intent" to waive in those scenarios where the holder claims that the
transmission was made inadvertently. In *McDermott* the person who sent the email message that did
not waive the privilege (because it was found to have been inadvertently, had multiple sclerosis and
dexterity problems using the keyboard, resulting in the "inadvertent" forwarding of a message with
no indication that the sender intended to send the message to that recipient. *Id.* at 1094

1 In response to this line of cases, first of all Petitioner points out that Section 912 does not include any
2 language referencing “intent” or “knowledge”. In other words, Section 912 on waiver does not have
3 language to the effect that intent is a pre-requisite to finding a waiver. The overlapping and
4 intersecting Evidence Code Sections on attorney client privilege and on the waiver of the privilege
5 are unambiguous and do not have language about “intent”. It is axiomatic that a court should look to
6 the plain meaning of a statute when applying a statute’s principles. *Great Lake Properties v. City of*

7 *El Segundo*, (1977) 19 Cal 3d 152, 155-156
8 *McDermott, Will & Emery* is readily distinguishable from the facts of the instant case. Superficially,
9 it gives cover to a claim that California courts require “intent” before finding waiver. However, the
10 communication at issue in *McDermott* was merely forwarded without any authored text by the
11 forwarder and the forwarder testified that he did not intend to forward the specific message to the
12 specific person who received it. Indeed, the forwarder testified that the message was sent
13 “inadvertently” *Id.* at 1091 (See Sections IX. and X *infra*) In the instant case, Fulp wrote “See below”
14 in his message to Dad and there is no testimony from Fulp as to whether or not there was an intention
15 to send the message, only self-serving after the fact testimony that there was no intent to waive the
16 privilege. These “intentions” are two horses of a different color.

17 The holding of *D.P.Pham LLC v. Cheadle*, (2016) 246 Cal App 4th 653 cited by Respondent is
18 similarly flawed for providing guidance relative to the facts of this case. Its holding that intent is
19 relevant must be seen in the light of the facts of that case: outside agents used documents in their
20 possession and filed them without authorization with a court. This is not a corporate context raising
21 the issues presented before the Court. Notably, the *Pham* court used the approach advocated by
22 Petitioner: the court first determined if the original transmission to outside agents was inherently
23 privileged. After finding that the transmission had a legal purpose and the transmission was therefore
24 privileged, it then analyzed the waiver issue. It is self-evident that a third party cannot cause the
25 holder of a privilege to lose its privilege when the further transmission by a third party was without
26 authorization. Lack of “intent” of the true holder is but a by-product and is not the essential question
27 in *Pham*. The court’s reference to “intent” goes way beyond what it needed to hold that there was no
28 waiver of the privilege, which the *Pham* court found was due to “inadvertence”. Again, the language
of Section 912 does not require an express intent to waive by the holder before finding a waiver.

As pointed out in the opening Memorandum, the voluntary sharing of attorney client privileged
documents has been interpreted by courts as demonstrating the requisite intent that a handful of cases,
such as *Pham*, have implied, perhaps unjustifiably or unnecessarily, as an element of a waiver under

1 Section 912. .

2 IX. The Intentional Sending of the Entire Message to Fulp's Dad Was Not Inadvertent

3 As noted in the opening Memorandum and in Respondent's Response, California courts have
4 generally held that the "inadvertent" sharing of attorney client privileged documents does not act as
5 a waiver of the attorney client. However, Fulp's sending of the 17-page message was not inadvertent.
6 Petitioner requests that the Court take judicial notice of the relevant definition of "inadvertent error",
7 according to 15 USCS Appx 12 CFR Section 202.21: "Inadvertent error means a mechanical,
8 electronic, or clerical error that a creditor demonstrates was not intentional and occurred
9 notwithstanding the maintenance of procedures reasonably adapted to avoid such errors." (Exhibit 7,
submitted per a request for Judicial Notice)

10 As emphasized and explained at length by Respondent at page 14 of its Response, Fulp has scant
11 understanding of the attorney client privilege and has no knowledge of procedures in place at the
12 University of California concerning preserving the attorney client privilege in communications. Thus,
based on the legal definition, it is impossible for Fulp to have sent the message "inadvertently".

13 Of equal importance, Fulp's Declaration and deposition testimony, as affirmed in various ways by
14 Respondent, demonstrates that Fulp has no recollection of sending the message. It necessarily
15 follows that he does not know at this time why he sent the message and indeed he offered no
16 testimony as to why he sent it. But he expressly does not deny that he sent it. (Fulp 2019 Deposition,
17 Exhibit 4, page 13) Respondent makes murmurs at page 2, line 5 of the Charles F. Robinson
18 ("Robinson") Declaration and page 2, line 6 of the Fulp Declaration, that possibly the message was
19 never sent. That makes no sense and is spurious. Most notably, Fulp nowhere avers that he sent the
20 message "inadvertently". If he does not remember sending it, it follows that he can't remember
21 whether he sent it "inadvertently" as that term was used to describe the act of the physically
challenged sender of a message in the *McDermott* case.

22 The only purported evidence that the message was sent "inadvertently" is Paragraph 2, line 6 in the
23 Robinson Declaration. Deploying blatant hearsay, Respondent's lead counsel of record tries to sell
24 his "understanding" of Fulp's inadvertence. Fulp actually said no such thing at his deposition. As
25 noted in a separate "Petitioner's Objections to Evidence", Petitioner objects to this purported
evidence. There is no other testimony or evidence that Fulp sent the 17 pages "inadvertently".

26 Accordingly, with no admissible evidence, it is impossible for Respondent to prevail on its argument
27 under the cases cited by Respondent that communicating allegedly privileged documents
28 "inadvertently" does not waive the privilege. For purposes of Section 912, Respondent cannot meet

1 its burden of proof that the privilege was not waived.

2 X. There Is No Admissible Evidence that Fulp's Message Was Not Widely Disseminated

3 Fulp does not deny sending the message to his father. The only person who knows what Dad did with
4 that message is Dad. But Respondent has provided no testimony from Dad. Thus, the extent of the
5 dissemination is unknown, and, based on testimony of Respondent's counsel, notice about the
6 purported sensitive nature of the communication to Mr. Fulp senior and indeed to Mr. Solomon Fulp
7 himself, did not occur until four years after Exhibit 1 was sent by Fulp to Mr. Fulp senior. Fulp
8 deemed this information not sufficiently sensitive that it could not be shared with persons outside the
9 University of California. In this regard, Respondent misconstrues the reason Petitioner emphasized
10 Fulp's executive level, his many and significant university responsibilities etc.: it was not to prove
11 that necessarily he was expressly authorized (although Petitioner contends that express authorization
12 was not required before Fulp could be found to have extinguished the privilege by his actions) –
13 rather it was to demonstrate that Fulp had been entrusted by Respondent to routinely make many
14 much more significant decisions as part of his job responsibilities and for this very reason Fulp was
15 involved with the email thread and was assumed by Respondent to have the requisite knowledge,
16 experience and authority to appropriately handle such communications. It must be assumed that in
17 Fulp's judgment, this communication was not so sensitive that it was improper for him to send the
18 message to someone outside the university. Respondent consciously assumed the risk of sharing
19 sensitive information with Fulp and must live with the consequences.

20 There is nothing like a warning "Attorney Client Privileged Communication" to be found in Exhibit
21 1 which would have alerted Fulp's father or Fulp to have believed there was any restriction on the
22 dissemination of this entire message, and part of that blame must fall to Respondent, through its
23 employees involved in the message. Respondent had no such procedure in place based on Fulp's
24 testimony.

25 XI. Corporations and Institutions Are Entitled to the Same Right to Privileges, But Not Greater Rights

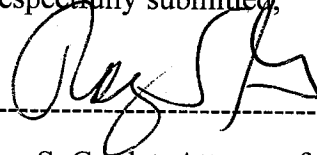
26 Fulp met with General Counsel Patti one on one in the course of his employment and in connection
27 with the Agu situation (Fulp 2015 Deposition, Exhibit 3, page 29, pages 56-57 and Fulp 2019
28 Deposition, Exhibit 4, page 17) He should be treated as a client per the definition of Evidence Code
Section 952 as to whatever actions related to the subject matter of the discussion in Exhibit 1.
According to *Chadbourn*, although corporations are entitled to the same protections as individuals
when it comes to attorney client privilege, corporations are not entitled to greater protection.
Chadbourn, supra at 736. Respondent contends that the Federal approach should be applied in this

1 case, and describes a complex institutional hierarchy that purportedly controls the decision making
2 concerning how and when the Regents will waive the attorney client privilege. What the Robinson
3 Declaration describes is a fantasy world where ostensibly a corporation or an institution like
4 Respondent can never be caught in a situation similar to the situation in *Behunin* or *McKesson HBOC*
5 where courts found a waiver despite the claimant's lack of intention to waive the privilege.
6 Respondent's construct for how a court should evaluate claims of privilege in a situation where
7 through fault of the (corporate) privilege holder the transmission has been made public is impractical,
8 illogical and heavily biased in favor of corporations and institutions with the ability to create such
9 unwieldy schemes with the purpose of shielding themselves against the waiver of privileged
10 communications. This construct is not available to individuals and small businesses. As explained in
11 this Motion, the proper application of California's statutory evidentiary scheme rightfully denies an
12 institution like Respondent an impermissible shelter from transparency by the creation of by-laws
13 etc. that Respondent here seeks to use as a sword to avoid the consequences of the acts of one of its
14 executives that has resulted in the bringing of this Motion. Corporations and institutions in California
15 are not permitted to construct an artificial fortress under the Federal law on privilege that would
16 ostensibly immunize them from the conduct that under California law extinguished the attorney client
17 privilege for Respondent under the specific facts of this case.

16 XII. Conclusion

17 Petitioner submits that the people of California should have the same access to the unredacted 17-
18 page message as did Ian Fulp, a retiree in Alaska with no connection to the University of California
19 or the events described related to the Agu case. The Court should grant this Motion and order the
20 disclosure of the unredacted unitary 17-page document.

21 Respectfully submitted,

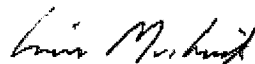
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24 Roy S. Gordet, Attorney for Petitioner Irvin Muchnick

1 16. In the response to the instant Motion, Respondent submitted evidentiary challenges to my
2 declaration in support of the opening brief. This is an action under the California Public Records
3 Act, and I am the investigative journalist seeking relief under it. Accordingly, I shared with the
4 Court aspects of the disputed and almost fully redacted email from Solly Fulp to his father Ian Fulp
5 that plausibly have great bearing on my work and the relief sought in the instant Motion and in this
6 Petition generally. Since I am in the dark as to the exact contents of the email, absent a favorable
7 ruling on this Motion, I am not in position to address the strength of the disputed email, but I
8 should be permitted to provide the conclusions I perceived or extrapolated based on the contents
9 that I was able to view. For the consideration of the Court, I provided the grounds for my
10 conclusions based on experience as a journalist, and, more specifically based on my review of
11 hundreds of pages of documents and email messages related to the underlying facts of the Agu
12 death and its aftermath. consideration.

13 17. At paragraph 14 of my previous declaration submitted with the original Motion, I omitted what
14 I called Exhibit 5. This should have been identified as Exhibit 6. Exhibit 6 was not submitted with
15 the Motion and Exhibit 6 is being submitted with Petitioner's Reply. On June 1, 2018, Respondent
16 produced Bates page numbers UC0085-UC0090, consisting of a copy of the entire 2016 settlement
17 agreement in the Agu family's wrongful death lawsuit against Respondent. True and correct copies
18 of the first two pages of that document showing the Section 1542 waivers by both parties are
19 submitted as Exhibit 6 and consists of Bates page numbers UC0085-UC0086, As noted, the
20 settlement agreement in that lawsuit included Section 1542 waivers.

21 Executed at Berkeley, California on November 21, 2019

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1
2 10. Respondent, as part of reports to the Court, in the past has submitted extensive email
3 correspondence between counsel when reporting to the Court at different times in the course of this
4 lawsuit. That practice created more confusion and distraction than illumination. For whatever
5 purpose Respondent decided unilaterally to submit the extensive correspondence rather than
6 summarizing the specific point that ostensibly was revealed in the extensive correspondence. This
7 practice of Respondent has continued with this Motion

8 11. In correspondence with Respondent's counsel leading up to the preparation of a CMC Form
9 filed with the Court on August 5, 2019, I shared what I was led to believe by Respondent would be
10 Petitioner's portion of what Respondent's counsel had previously informed me was going to be a
11 joint CMC Statement until Respondent's counsel made that impractical. A portion of Petitioner's
12 CMC Statement filed with the Court states the following, part of which was quoted in Respondent's
13 brief:

14 "After discussions and the eventual resolution of certain disputed issues, the parties are left with
15 the following unresolved issues, here presented in skeletal and non-argumentative form:

- 16 1. Whether or not there has been a waiver of the attorney client privilege of a certain thread of
17 email communications where the Regents contends there has been no waiver and the
18 Regents therefore further contends the communications must not be disclosed under
19 the PRA?
- 20 2. As to the preceding issue, whether it is appropriate for Petitioner to have some limited
21 discovery concerning this issue?" (emphasis added)

22 12. Thus, in this verbatim excerpt above from Petitioner's CMC Statement, I specifically cautioned
23 that a) this was not a final statement of what needed to be resolved and it was intended to not
24 include arguments and b) there was an intention to take discovery which it was anticipated would
25 shed additional light on the facts and the legal issues. If discovery was to be taken, the proposed
26 facts and issues at the time of the meet and confer and the preparation of the CMC Statement could
27 not yet have been finalized.

28 13. As noted from the opening memorandum and accompanying declarations, the deposition of
Solomon Fulp took place subsequently, was heavily relied on by Petitioner in this Motion, and had
a major impact on the substance of this present Motion.

14. In a related email of July 23, 2019 to counsel for Respondent, and also before the deposition of
Solomon Fulp, I also wrote:

1 “By no means am I suggesting that the CMC Statement include any legal argument. Rather, I am
2 suggesting that the Statement briefly bring these above-enumerated issues to the Court’s attention
for some input from the Court as to how the parties should proceed as we attempt to wrap this up.”

3 Thus there was still another disclaimer, unreported by Respondent to the Court, about the general
4 notice quality of the short-hand description of the remaining issues,

5
6 16. Following the Case Management in the Court’s Chambers on August 12, 2019, on that same
7 date the Court entered an Order that stated in part “Parties may reserve a hearing re privilege...”
8 The Court did not refer to a hearing on a motion re “waiver of privilege.”

9 17. I never intended and I never agreed that shorthand references to any of remaining issues in
10 dispute was intended to be the definitive statement of the dispute or was to set the parameters of
11 this present Motion.

12 18. Before actually filing this present Motion, but subsequent to the preparation of the above-referenced
13 CMC Statement, I did a significant amount of additional legal research on the issue of attorney client
14 privilege under California law.

15 19. In an email message dated June 7, 2019 related to meet and confer, counsel for Respondent
16 wrote the following excerpt to Petitioner’s counsel:

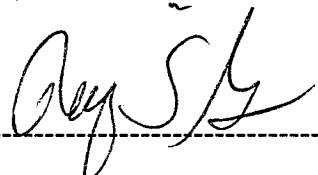
17 VI. Privilege Claims for Communications Not Including Legal Counsel

18 When a client communicates with a lawyer in an email and then forwards that email to someone
19 else in the organization in such a way as to preserve the confidential nature of the communication,
20 none of that, in my experience, waives the attorney-client privilege, or makes the communication
21 itself non-privileged. It is unnecessary to continue to “cc” the attorney throughout the entire email
22 chain to preserve the privilege when the intention is to make sure that the later recipient is aware
23 that the attorney was consulted or to follow up on a communication that involved the attorney. If
24 you have authority to the contrary, I would be interested in seeing it. If there are specific emails
25 where an attorney was not cc’d, please let me know which ones they are and I can examine the
26 emails themselves to confirm that the description I have provided you above is accurate as to them.
27 For example, as you will see on UC 0450-UC451, Solly Fulp forwarded a string to his dad. The
28 email to his dad is not privileged so we did not redact its contents, but the rest of the string is,
which is why we redacted it. (He should not have forwarded the string to his dad but he did not
have the authority to waive the privilege.) (emphasis added)

19. Submitted as Exhibit 7 is a page from USLegal that I found pursuant to an Internet search
showing a legal definition of “inadvertent error” based on the US Code/CFR

1 I declare under penalty of perjury under the laws of the State of California that the foregoing is true
2 and correct.

3 Executed at Daly City, California on November 21, 2019.

4 
5 _____
6 Roy S. Gordet

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8 Attorney for Petitioner Irvin Muchnick

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ALAMEDA

11 IRVIN MUCHNICK,

12 Petitioner,

13 vs.

14 UNIVERSITY OF CALIFORNIA, BOARD OF
15 REGENTS,

16 Respondent.

) Case No. RG17857115

) HAYWARD DIVISION

) PETITIONER'S OBJECTIONS TO
) RESPONDENT'S EVIDENCE - MOTION RE
) PRIVILEGE

) RESERVATION NUMBER R-2126941

21 Hearing Date: December 5, 2019

22 Time: 9:00 a.m.

23 Judge: Hon. Jeffrey Brand

24 Dep't: 511

25 Petition Filed: April 18, 2017

26 Objections to Parts of Testimony of Charles F. Robinson

27 Petitioner objects to the entire paragraph 2 of the Declaration of Charles F. Robinson ("Robinson")
28 Robinson avers that he has "general knowledge" and that he "understands the evidence
demonstrates..." Robinson thereby admits that he lacks firsthand knowledge and is unclear on
what he is basing his knowledge. His testimony in paragraph 2 therefor lacks a foundation in

1 | contravention of Evidence Code Section 801. It is also hearsay as it is based on information
2 | provided by another declarant, Solomon Fulp and therefore contravenes Evidence Code Section
3 | 1200. The statements of paragraph 2 draw legal conclusions which are prohibited as legal
4 | conclusions are for the Court to draw. *See Amtowar v. Photon Dynamics, Inc.* (2008) 158 Cal. App.
5 | 4th 1582, 1500 the domain of the Court. Although Robinson is an attorney, he is not qualified as an
6 | expert on these matters and, in any case, expert opinion on a legal matter is the province of the
7 | Court. *Summers v. A.L. Gilbert Co.*, (1999) 69 Cal App. 4th 1155, 1179-1180

7 | Petitioner objects to paragraph 9.

8 | Statements of paragraph 9 draw legal conclusions, for example, about who is deemed to hold the
9 | privilege in a corporate context. Legal conclusions which are prohibited as legal conclusions are for
10 | the Court to draw. *See Amtowar v. Photon Dynamics, Inc.* (2008) 158 Cal. App. 4th 1582, 1500 the
11 | domain of the Court. Although Robinson is an attorney, he is not qualified as an expert on these
12 | matters and, in any case, expert opinion on a legal matter is the province of the Court. *Summers v.*
13 | *A.L. Gilbert Co.*, (1999) 69 Cal App. 4th 1155, 1179-1180

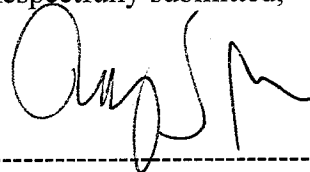
13 | Petitioner further objects to paragraph 9 because it is legal argument with no foundation and
14 | misstates the law on privilege in the corporate context.

15 | Objections to Parts of Declaration of Solly Fulp

16 | Petitioner objects to paragraph 5 in its entirety because it is hearsay in violation of Evidence Code
17 | Section 1200. It recounts statements of another person.

19 | November 21, 2019

Respectfully submitted,



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11 IRVIN MUCHNICK,

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14 UNIVERSITY OF CALIFORNIA, BOARD OF
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16 Respondent.

) Case No. RG17857115

) HAYWARD DIVISION

) PETITIONER'S RESPONSE TO
) RESPONDNET'S OBJECTIONS TO
) DECLARATION OF IRVIN MUCHNICK -
) MOTION RE PRIVILEGE

) RESERVATION NUMBER R-2126941

21 Hearing Date: December 5, 2019

22 Time: 9:00 a.m.

23 Judge: Hon. Jeffrey Brand

24 Dep't: 511

25 Petition Filed: April 18, 2017

26 Petitioner generally takes issue with the harassing nature of Respondent's Objections to the
27 Declaration of Irvin Muchnick.
28

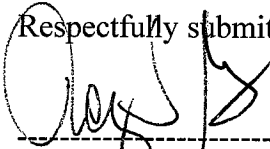
1 It is not practical with the short amount of time provided by the briefing schedule for Petitioner to
2 address the many picayune objections, many of which appear to be without basis and without
3 consequence to the important issues presented by Petitioner's Motion re Privilege.

4 Generally, the purpose of Muchnick's statements was to establish the importance of the 17-page
5 message that is the subject of this Motion, not to state definitively whether the conclusions he has
6 reached based on his journalistic investigation are true. Thus, the statements about what he has
7 uncovered were not intended to prove that his conclusions are necessarily true, and therefore the
8 statements do not run afoul of the hearsay rule because they are not intended to prove the truth of
9 the matters about the Agu caset.

10 As for the remaining objections, Petitioner does not concede their correctness, but reserves the
11 right to address any issues at the hearing on the Motion before the Court.

12 November 21, 2019

Respectfully submitted,



13
14 Roy S. Gordet