CHARLES F. ROBINSON #113197
charles.robinson@ucop.edu
MARGARET L. WU #184167
margaret.wu@ucop.edu
MICHAEL R. GOLDSTEIN #129848
michael.goldstein@ucop.edu
University of California
Office of the General Counsel
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200
Telephone: 510-987-9800
Facsimile: 510-987-9757

Attorneys for Respondent
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Fee Exempt – Gov. Code § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

IRVIN MUCHNICK, Petitioner, v. UNIVERSITY OF CALIFORNIA, BOARD OF REGENTS, Respondent.	Hayward Hall of Justice CASE NO. RG17857115 **OPPOSITION BY RESPONDENT THE REGENTS OF THE UNIVERSITY OF CALIFORNIA TO PETITIONER'S MOTION RE PRIVILEGE** Hearing Date: December 5, 2019 Time: 9:00 a.m. Judge: Hon. Jeffrey Brand Dep't: 511 Petition Filed: April 18, 2017

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

PROCEDURAL BACKGROUND....1

ARGUMENT....2

I. PETITIONER HAS THE BURDEN OF PROOF ON HIS MOTION....3

II. THE EMAIL STRING (EXCEPT FOR SOLLY FULP'S EMAIL TO HIS FATHER) WAS PRIVILEGED....3

III. SOLLY FULP'S EMAIL TO HIS FATHER DID NOT DEFEAT THE CONFIDENTIALITY OF THE REST OF THE EMAIL STRING....4

IV. SOLLY FULP DID NOT HAVE THE AUTHORITY TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE....6

A. IN A CORPORATE CONTEXT, THE ENTITY ITSELF HOLDS THE PRIVILEGE AND FEW HAVE THE AUTHORITY TO WAIVE ON ITS BEHALF....6

B. MR. FULP DID NOT HAVE THE AUTHORITY TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE....7

V. EVEN IF MR. FULP HAD THE AUTHORITY TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE, HIS DISCLOSURE WAS INADVERTENT....12

A. THE INADVERTENT DISCLOSURE OF AN ATTORNEY-CLIENT PRIVILEGED COMMUNICATION DOES NOT WAIVE THE PRIVILEGE....12

B. MR. FULP'S DISCLOSURE WAS INADVERTENT....13

TABLE OF AUTHORITIES

Cases

Behunin v. Superior Court (2017) 9 Cal.App.5th 833 4-5

Berman v. Regents of University of California (2014) 229 Cal.App.4th 1265 .... 8, 9

Campbell v. Regents of the Univ. of Cal. (2005) 35 Cal.4th 311 8

Dynamic Ind. Co. v. City of Long Beach (1958) 159 Cal.App.2d 194 9

In re Work Uniform Cases v. State of Cal. (2005) 133 Cal.App.4th 328 8

Lundeen Coatings Corp. v. Dept. of Water & Power (1991) 232 Cal.App.3d 816 9

McDermott Will & Emery LLP v. Superior Court (2017) 10 Cal.App.5th 1083..... 3, 4, 6, 7, 12-13

Miller v. McKinnon (1942) 20 Cal.2d 83 9

Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26 11

Regents of University of California v. City of Santa Monica (1978) 77 Cal.App.3d 130 8

Seahaus La Jolla Owners Assn. v. Superior Court (2014) 224 Cal.App.4th 754 5

Seymour v. Cal. (1984) 156 Cal.App.3d 200 9

United States v. Chen (9th Cir. 1996) 99 F.3d 1495 6-7

Venture Law Group v. Superior Court (2004) 118 Cal.App.4th 96 .... 3, 7

Statutes

Evidence Code § 912(d) 4, 6

Evidence Code § 917(a) 3

Evidence Code § 952 .... 1, 4, 6

Evidence Code § 954 6

Evidence Code § 954(a) 6

Evidence Code § 954(b) 6

Rules

Rules Prof. Conduct, rule 1.13(a) 7

By this motion, on which Petitioner has the burden of proof, Petitioner seeks an order (1) finding that Solly Fulp's email, dated April 23, 2014, forwarding an attorney-client privileged email string to his father, defeated any claim that the string was privileged and that, even if the string he forwarded were privileged, his email waived the privilege, and (2) ordering that The Regents release an unredacted copy of the record in its entirety.

The Motion is without merit. With the exception of Mr. Fulp's email to his father, the email string, involving the UC Berkeley Chief Campus Counsel and campus employees who were "present to further the interest of the client in the consultation or . . . to whom disclosure [wa]s reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer [wa]s consulted" – [Evid. Code, § 952] – was privileged and the presumption of confidentiality applies. Petitioner cannot meet his burden of defeating that privilege, by proving either that it was not a confidential communication or that Mr. Fulp's conduct in forwarding it to his father waived the privilege.

Mr. Fulp's email forwarding the string to his father did not make his father "present for a communication between attorney and client," thereby rebutting the presumption of confidentiality. Furthermore, he was not the "holder" of the attorney-client privilege and therefore he did not have the authority to waive it and, even if he had such authority, the disclosure was inadvertent; for either of these reasons, there was no waiver.

Accordingly, The Regents respectfully requests that the Court deny the Motion.

PROCEDURAL BACKGROUND

On September 6, 2018, The Regents released to Petitioner a large volume of records that were redacted, in whole or part, on the basis of the attorney-client privilege. (Declaration of Michael R. Goldstein ("Goldstein Dec."), ¶ 2.) Petitioner objected to, or raised questions concerning, a number of the documents, as well as the adequacy of The Regents' privilege log. (*Id.*, ¶ 3.) Petitioner ultimately abandoned his objections about all but one of the documents, a 17-page email string consisting of a number of forwarded emails between April 21, 2014, and April 23, 2014. (*Id.*, ¶ 4.) The Motion is based on that document.

Prior to bringing the Motion, Petitioner challenged The Regents' decision to withhold the

email string solely on the grounds that Mr. Fulp had waived the attorney-client privilege by forwarding it to his father. His July 23, 2019, email abandoning all other objections vis-à-vis the records withheld as privileged clearly limits his argument to "waiver." (Goldstein Dec., Exh. C ["[I]t appears that we have narrowed it to one issue in contention, namely whether or not the attorney client privilege was waived when Solly Fulp forwarded a string of email messages to someone who was not an employee and to our knowledge did not have a need to know the contents. I searched for case authority related to your argument about an institutional client and executive authority, and did not find anything. If you have any support for your argument, I would again request that you provide that to me. Otherwise, from our perspective, it was a voluntary disclosure that waived the privilege, and we again request that you produce those email messages."].) Similarly, in his CM-110 form dated August 5, 2019, he stated (Attachment 1): "Since the Court's last ruling filed on February 26, 2019, the parties have been working towards resolving any remaining issues in dispute in order that the Petition may proceed to its conclusion. [¶] After email exchanges and the eventual resolution of certain disputed issues, Petitioner submits that the parties are left with the following unresolved issues, here presented in skeletal and non-argumentative form: [¶] 1. Whether or not there has been a waiver of the attorney-client privilege of a specific thread of email communications comprising approximately 17 pages such that the Regents should be required to disclose the communications under the PRA?"

In the Motion, Petitioner devotes only two pages to the waiver argument. (Memo. at pp. 12-13 [argument heading VIII] ["Thus, in the unlikely event that the Court finds that the original communication from Fulp to Dad was 'confidential', any confidentiality or privilege was waived under the express language of Section 912 and those cases interpreting it."].) The bulk of his argument is now that the email from Mr. Fulp to his father defeated any claim that the email string in its entirety was privileged to begin with because it was not confidential.

ARGUMENT

Petitioner has the burden of proof on the Motion and he cannot sustain it. There is a presumption of privilege in the string he forwarded, a series of communications including Christopher Patti, formerly Chief Campus Counsel at UC Berkeley (his signature block is on page

12 [Goldstein Dec., Exh. D, depo. Exhibit 3 at **UC 0461**]). Mr. Fulp's father was not a "third party participant" in the string. Mr. Fulp was not the "holder" of the privilege so did not have the authority to waive it. Even if he had such authority, his disclosure of the privileged document to his father was inadvertent. It was a privileged communication and there was no waiver.

I. PETITIONER HAS THE BURDEN OF PROOF ON HIS MOTION

Petitioner has the burden of rebutting the presumption of confidentiality and the claim of privilege, either by proving the communication was not confidential or by establishing there was a waiver of the attorney-client privilege. (Evid. Code, § 917(a) ["If a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client . . . relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential."]; *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1101 ["Once the proponent makes a prima facie showing of a confidential attorney-client communication, it is presumed the communication is privileged and the burden shifts to the opponent to establish waiver, an exception, or that the privilege does not for some other reason apply."]; *Venture Law Group v. Superior Court* (2004) 118 Cal.App.4th 96, 102.) Petitioner's claim that The Regents has the burden on the Motion – [Memo. at 7:23-28] – blurs this distinction and is therefore without any merit.

II. THE EMAIL STRING (EXCEPT FOR SOLLY FULP'S EMAIL TO HIS FATHER) WAS PRIVILEGED

The email string Mr. Fulp forwarded to his father was privileged. It consisted of a series of communications between Christopher Patti and a number of individuals involved in some aspect of the Ted Agu incident. At the time, Mr. Patti was Chief Campus Counsel at UC Berkeley. His signature block is on page 12 of the string. (Goldstein Dec., Exh. D, depo. Exhibit 3 at **UC 0461**.) The subject line establishes that the communication concerned an aspect of the Ted Agu incident: "Ted Agu – Cause of Death (Statement, Talking Points and Q&A)." Mr. Patti was included in the communication from the first to the last (again, excepting the final email, consisting of Mr. Fulp's email to his father): The initial email was from Marc DeCoulode. (**UC 0461**) Mr. Patti replied,

demonstrating he was one of the recipients. (**UC 0460**) He weighed in again later in the communication. (**UC 0455**) His email address appears in all of the emails in which the recipients are displayed, including the final email. (**UC 0450**) All of the email addresses in the privileged string contain "berkeley.edu." Given this "prima facie showing of a confidential attorney-client communication, it is presumed the communication is privileged." (*McDermott Will & Emery LLP v. Superior Court*, *supra*, 10 Cal.App.5th at p. 1101.)

The Regents has never claimed that the final email – the single email from Mr. Fulp to his father – was privileged. It was produced to Petitioner in unredacted form. (**UC 0450**)

III. SOLLY FULP'S EMAIL TO HIS FATHER DID NOT DEFEAT THE CONFIDENTIALITY OF THE REST OF THE EMAIL STRING

Section 912(d) provides, in pertinent part, that

> "[a] disclosure in confidence of a communication that is protected by a privilege provided by Section 954 (lawyer-client privilege) . . . when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted, is not a waiver of the privilege."

Section 952 defines a "confidential communication between client and lawyer" as

> "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."

Relying on cases interpreting these statutes, Petitioner challenges the presumption of confidentiality for the email string (excepting Mr. Fulp's email to his father). His argument is without merit.

One of the cases Petitioner cites is *Behunin v. Superior Court* (2017) 9 Cal.App.5th 833. In

Behunin, the inclusion of a public relations firm in the communications between the client and the lawyer was held to defeat the privilege because the inclusion of the public relations firm was not "reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted." (*Id*. at p. 837.) Based on similar reasoning, in another case Petitioner cites– *Seahaus La Jolla Owners Assn. v. Superior Court* (2014) 224 Cal.App.4th 754 – the court came to the opposite conclusion. In *Seahaus*, the court faced the same issue and the question was whether the attendance at an informational litigation update meeting of individual homeowners who were not the actual clients of a homeowners Association's retained counsel likewise defeated the privilege and the court held that it did not, so the privilege was preserved. (*Id*. at p. 762.)

Petitioner's reliance on these cases, as well as others based on these same statutory principles, is misplaced. Mr. Fulp's father was not "present" in the communication created by the email string (excepting Mr. Fulp's email to his father). Neither the lawyer – Mr. Patti – nor the client – the holder of the privilege – was aware of Mr. Fulp's father and therefore had no expectation that he would be included, nor the ability to prevent or consent to it.

Mr. Fulp's email forwarding the string to his father is, instead, addressed by a different portion of the *Seahaus* case, where the court expressly considered the argument "that any confidentiality of communications at the meetings was initially waived through several different sets of circumstances . . . [including] a few homeowners later discussed issues raised at the meetings with their relatives and friends." There was no waiver. (*Seahaus La Jolla Owners Assn. v. Superior Court*, *supra*, 224 Cal.App.4th at pp. 774-775.) As the court explained, "it is essential that participants in an exchange have a reasonable expectation that information disclosed will remain confidential. If a disclosing party does not have a reasonable expectation that a third party will preserve the confidentiality of the information, then the applicable privileges are waived." (*Id*. at p. 770.) Again, there is no evidence that any of the participants in the email string had any belief that Mr. Fulp would fail to keep the communication confidential. Accordingly, the string itself (except for the top communication between Mr. Fulp and his dad) was privileged.

Petitioner tries to portray Mr. Fulp as the "client" in an effort to defeat the presumption of confidentiality. As explained below, while Mr. Fulp was a necessary third party under sections

912(d) and 952, he was not the "client." Petitioner's claim that Mr. Fulp was a senior campus official worthy of "client" status is without merit, as explained below.

IV. SOLLY FULP DID NOT HAVE THE AUTHORITY TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege can only be waived by the "holder" of the privilege. Mr. Fulp did not "hold" the attorney-client privilege which protected the email string (and, for the same reason, he could not defeat the presumption of confidentiality by bringing his father into the communication). Therefore, the email string did not lose its privileged character by virtue of Mr. Fulp's email at the top forwarding the privileged communications to his father. The privilege is held by The Regents, and can only be waived by someone who is duly authorized by The Regents to make the decision to waive the privilege.

A. IN A CORPORATE CONTEXT, THE ENTITY ITSELF HOLDS THE PRIVILEGE AND FEW HAVE THE AUTHORITY TO WAIVE ON ITS BEHALF

The "holder" of the privilege determines whether or not to disclose an attorney-client privileged communication. Evidence Code section 954 provides, in part:

"Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

(a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege." (Evid. Code, § 954(a) & (b); *see McDermott Will & Emery LLP v. Superior Court*, *supra*, 10 Cal.App.5th at p. 1101 ["The attorney-client privilege may be waived, but only by the holder of the privilege."].)

This principle governs both Federal and California law. (*See United States v. Chen* (9th Cir. 1996) 99 F.3d 1495, 1502 [" 'The power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors.' *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348, 85 L. Ed. 2d 372, 105 S.

Ct. 1986 (1985). 'When control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well.' *Id*. at 349. It follows a fortiori that *since a corporate employee cannot waive the corporation's privilege*, that same individual as an ex-employee cannot do so."].) (Emphasis added.) (See *Venture Law Group v. Superior Court*, *supra*, 118 Cal.App.4th at pp. 104-105 [citing and quoting *Commodity Futures Trading Comm'n v. Weintraub*, *supra*, 471 U.S. at p. 348].) *Mere employees cannot waive.*

From the perspective of Mr. Patti, those with the authority to waive the privilege were limited to a narrow circle of individuals: "A lawyer employed or retained by an organization shall conform his or her representation to the concept that the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement." (Rules Prof. Conduct, rule 1.13(a).)

California courts generally require that the waiver of the attorney-client privilege be manifested through the demonstration of a specific intent to waive. The Fourth District declined to find a waiver of the attorney-client privilege where an elderly client forwarded a privileged email to a relative from a smartphone. (*McDermott Will & Emery LLP v. Superior Court, supra,* 10 Cal.App.5th at p. 1109.) The court held that the party who forwarded it did so inadvertently (so that was not a waiver) and the recipient who forwarded it further was not the holder of the privilege (so that was not a waiver either). As the court explained, "[t]he attorney-client privilege may be waived, but only by the *holder* of the privilege. . . . A waiver results when the *holder*, without coercion, (1) has disclosed a significant part of the communication, or (2) has consented to the disclosure made by anyone else." (*Id*. at p. 1101; *see also id*. at p. 1104 ["Ninetta's disclosure of the Blaskey e-mail to Gavin, and Gavin's disclosure to Rick, Cox, Pellizzon, and Lurie, cannot support a waiver of the privilege because Ninetta and Gavin are not *holders* of the privilege. (Evid. Code, § 912, subd. (a); *Pham, supra*, 246 Cal.App.4th at p. 668 [only privilege *holder* may waive privilege].)"].) (Emphasis added.) (Citations omitted.)

B. MR. FULP DID NOT HAVE THE AUTHORITY TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE

As explained in the Declaration of Charles F. Robinson, General Counsel to The Regents,

filed with this Opposition, Mr. Fulp had no such authority. (Declaration of Charles F. Robinson, ¶¶ 3-9.) He was not the "holder of the privilege." The delegation of authority by The Regents among the constituent elements of leadership, beginning at the top with the Board itself and disseminated down from there throughout the University of California system, is codified in policy, including Standing Orders and Bylaws of The Regents. (*Id.* at ¶¶ 3-7.) As the Fourth District articulated in *Berman v. Regents of University of California*, The Regents has "virtual autonomy in self-governance:"

> ""[t]he California Constitution (art. IX, § 9, subd. (a)) grants [the Regents] ' " 'broad powers to organize and govern the university and limits the Legislature's power to regulate either the university or the [R]egents.' " ' " (*Goldbaum v. Regents of University of California* (2011) 191 Cal.App.4th 703, 706 [119 Cal. Rptr. 3d 664] (*Goldbaum*).) The Constitution provides the Board of Regents with "all the powers necessary or convenient for the effective administration of its trust, including the power … to delegate to its committees or to the faculty of the university, or to others, such authority or functions as it may deem wise." (Cal. Const., art. IX, § 9, subd. (f).) "The [Board of] Regents 'function in some ways like an independent sovereign, retaining a degree of control over the terms and scope of its own liability.' " (*Goldbaum, supra*, 191 Cal.App.4th at p. 706.) "[A]s ' " 'a constitutionally created arm of the state [it has] virtual autonomy in self-governance.' " ' " (*Do, supra*, 216 Cal.App.4th at p. 1487.)" (*Berman v. Regents of University of California* (2014) 229 Cal.App.4th 1265, 1272.)

By virtue of this Constitutionally-created autonomy, the Standing Orders and Bylaws The Regents has promulgated as matters of internal regulation enjoy a status equivalent to that of State statutes. (*See Campbell v. Regents of the Univ. of Cal.* (2005) 35 Cal.4th 311, 320 [*superseded by statute on other grounds*]; *In re Work Uniform Cases v. State of Cal.* (2005) 133 Cal.App.4th 328, 343.) "[P]olicies established by the Regents as matters of internal regulation may enjoy a status equivalent to that of state statutes." (*Regents of University of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130, 135.) For this reason, courts accord The Regents' interpretation of its

policies "great weight." (*Berman v. Regents of University of California*, *supra*, 229 Cal.App.4th at p. 1272.) In its assessment of the testimony of The Regents' General Counsel, the Court should do the same here.

In the realm of contracting, The Regents' policies define the scope of its employees' authority. In the case of public entities, such as The Regents, "where the statute provides the only mode by which the power to contract shall be exercised, the mode is the measure of the power." (*Dynamic Ind. Co. v. City of Long Beach* (1958) 159 Cal.App.2d 194, 198-199; *accord Miller v. McKinnon* (1942) 20 Cal.2d 83, 87 ["the mode of contracting as prescribed by the municipal charter is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable"].) So robust are these restrictions that, "[a]s a general rule, a public entity cannot be sued on an implied-in-law or quasi-contract theory, because such theory is based on quantum meruit or restitution considerations which are outweighed by the need to protect and limit a public entity's contractual obligations." (*Lundeen Coatings Corp. v. Dept. of Water & Power* (1991) 232 Cal.App.3d 816, 831 fn.9.) To the same end, no liability to pay upon "quantum meruit" may exist where a statute governs the mode of contracting. (*Seymour v. Cal.* (1984) 156 Cal.App.3d 200, 205.) Without delegated authority, Mr. Fulp had no authority.

Both at his October 3, 2019, deposition and in a declaration filed in connection with, and in support of, this Opposition, Mr. Fulp has provided ample evidence demonstrating that he did not have, nor ever believe that he had, the authority to waive the attorney-client privilege. During the time period covered by the email string (April 21-24, 2014), Mr. Fulp was the Deputy Director of Athletics and Chief Operating Officer of that unit. (32:5-7)[1] He held the position from 2011 to 2015. (Depo, Exh. 4.)

When initially asked at his deposition whether he signed any contracts on behalf of the Athletics Department during his tenure as Deputy Director of Athletics and Chief Operating Officer, he testified that he could not recall. (37:16-38:6) He did not recall ever seeking

[1] Unless indicated otherwise, all citations in this section are to the reporter's transcript of Mr. Fulp's deposition, October 3, 2019. A true and correct copy of the entire transcript is attached as Exhibit D to the Declaration of Michael R. Goldstein, filed in connection with, and in support of, this Opposition ("Goldstein Dec."). Mr. Fulp executed his declaration (located on page 61 of the transcript) without making any changes to the transcript. (Goldstein Dec., ¶ 7 & Exh. E.)

authorization at any time for signing any contracts on behalf of the University, nor whether he was required to seek authorization at any time from anyone before signing any contracts on behalf of the University. (46:3-19) Later in the deposition, he clarified that he "did not have authorization to sign any contracts." He also clarified that he never signed any contracts on behalf of UC Berkeley. Nor did he recall if he ever negotiated any contracts on behalf of the campus. *For those situations in which he was involved in a contract involving the campus, he explained, either the University's attorney or the Procurement Office had the authorization to sign those contracts.* Furthermore, he confirmed that he did not recall ever seeking authorization to sign any contracts on behalf of the campus. (57:20-58:25)

Mr. Fulp did not recall doing work on any specific projects related to the Agu incident. He did not recall working on any "specific projects" or "tasks" on behalf of the University or the Athletics Department regarding the incident or its aftermath, or meeting with the family. (47:16-48:8) In his declaration, he explains that his involvement in the Agu incident was limited to communicating with Mr. Agu's teammates about the incident and ensuring the welfare of the team in light of the tragedy, as well as handling the administrative aspects of communications on the campus about it. (Declaration of Solly Fulp, ¶ 7.) According to this evidence, he played no special, if any, role, in the campus's response to the Agu incident other than his normal administrative responsibilities as Deputy Director of Athletics and Chief Operating Officer.

Based on this evidence, there is no support for Petitioner's claim that Mr. Fulp had the authority to waive the attorney-client privilege which protected the April 2014 email string. Nothing in the policies or practices at the University or the Berkeley campus, and nothing in Mr. Fulp's job description, his actual duties, or his conduct while employed at UC Berkeley during the relevant time period, or before or after, supports a claim that Mr. Fulp had such authority.

Petitioner tries to elevate Mr. Fulp's status by highlighting certain aspects of his employment but none of these arguments has merit. First, Petitioner points to Mr. Fulp's classification as "in the Managers and Senior Professionals ["MSP"] group." (Memo. at pp. 5-6.) The MSP group "is composed of managers and senior professionals who provide leadership and professional expertise to University units, programs, or fields of work, and are accountable for

their areas of responsibility. Positions at this level are responsible for identifying objectives, formulating strategy, directing programs, managing resources, and functioning effectively with a high degree of autonomy." (https://hr.berkeley.edu/compensation-benefits/compensation/job-classification/non-represented)[2] Nothing about holding or waiving the attorney-client privilege. At UC Berkeley alone, in April 2019, among non-academic employees, there were 1,430 employees, out of a total of 14,237, in the "MSP" classification – (https://www.universityofcalifornia.edu/infocenter/uc-employee-headcount) – and systemwide, there were 15,717 out of 165,541. (https://www.universityofcalifornia.edu/infocenter/uc-employee-headcount) This sizable group *cannot* be "the client" or "the holder" of the privilege.

Second, Petitioner characterizes Mr. Fulp's entries in his CV as "extensive and high-level responsibilities and accomplishments." (Memo. at p. 5.) He also highlights Mr. Fulp's salary. (*Ibid*.) According to the CV, Petitioner claims, he was "a corporate officer and director." (Memo at p. 6.) He was no such thing. He was an "Executive Director" in his final position on the CV – not a "corporate officer and director." (Goldstein Dec., Exh. D, depo. Exhibit 4.) None of this speaks to whether he had delegated authority to hold or waive the privilege.

Third, Petitioner observes that "Fulp had so many employees directly reporting to him that Fulp was unable to recall or even estimate how many persons reported to him." (Memo at pp. 5-6.) Equally likely, in a deposition conducted some five years after Mr. Fulp held the position, he was uncomfortable providing even an estimate. Not size, just too long ago. All speculation on Petitioner's part in any event.

Finally, Petitioner highlights Mr. Fulp's participation in a meeting about another football player, Mr. Mahalic. (Memo. at p. 6.) Mr. Fulp's 2015 testimony on this topic reveals nothing extraordinary about it in the way of elevating Mr. Fulp's status. (Goldstein Dec., Exh. F, 29-30.)

Mr. Fulp was not the "holder," as explained above, and there is no evidence that the "holder" consented to the disclosure. Mr. Fulp did not have the authority to waive the privilege.

---

[2] "A request for judicial notice of published material is unnecessary. Citation to the material is sufficient." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 45 fn. 9.) Should the Court so request, The Regents will provide copies of these materials to the Court and to Petitioner.

Petitioner cannot meet his burden of proving otherwise.

V. EVEN IF MR. FULP HAD THE AUTHORITY TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE, HIS DISCLOSURE WAS INADVERTENT

Even if Mr. Fulp had the authority to waive the attorney-client privilege (as explained above, he had no such authority), there is no evidence that it was "voluntary" or "intentional" or "knowing." Petitioner cannot meet his burden of disproving it was an inadvertent disclosure.

A. THE INADVERTENT DISCLOSURE OF AN ATTORNEY-CLIENT PRIVILEGED COMMUNICATION DOES NOT WAIVE THE PRIVILEGE

The inadvertent disclosure of an attorney-client communication by the holder of the privilege does not create a waiver:

> "The attorney-client privilege may be waived, but only by the holder of the privilege. (*Pham, supra*, 246 Cal.App.4th at p. 668.) A waiver results when the holder, without coercion, (1) has disclosed a significant part of the communication, or (2) has consented to the disclosure made by anyone else. (Evid. Code, § 912, subd. (a); *State Fund, supra*, 70 Cal.App.4th at p. 652.) Under the second method of waiver, "Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has legal standing and the opportunity to claim the privilege." (Evid. Code, § 912, subd. (a).)
>
> "Despite the statute's declaration that any uncoerced 'disclosure' creates a waiver, courts have consistently held that inadvertent disclosures do not." (*Newark Unified School Dist. v. Superior Court* (2015) 245 Cal.App.4th 887, 900 [190 Cal.Rptr.3d 721] (*Newark*).) As the Supreme Court explains, "the disclosure contemplated in Evidence Code section 912 involves some measure of choice and deliberation on the part of the privilege holder." (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1188 [199 Cal.Rptr.3d 743, 366 P.3d 996] (*Ardon*); *see id*. at p. 1189 [Evid. Code, § 912, subd. (a), requires "a voluntary and knowing

disclosure" to waive privilege].) Similarly, in *State Fund*, the Court of Appeal concluded a waiver of the attorney-client privilege occurs only when there is an "intention to voluntarily relinquish a known right." *(State Fund*, *supra*, 70 Cal.App.4th at p. 653; *see Newark*, at p. 900 [*State Fund* "read into the statute the requirement that a disclosure be '[]intentional,' notwithstanding the failure of section 912 to distinguish between intentional and inadvertent disclosures.... This is consistent with the long-standing principle that a privilege is not waived in the absence of a manifest intent to waive"].)" (*McDermott Will & Emery LLP v. Superior Court*, *supra*, 10 Cal.App.5th at p. 1101.)

B. MR. FULP'S DISCLOSURE WAS INADVERTENT

Both at his deposition and in his declaration, Mr. Fulp has provided ample evidence demonstrating that he may not have sent the email to his father after all but, even if he had done so, he did not send it with the understanding that he was conveying an attorney-client privileged communication, much less that he was doing so not only with the knowledge, but also with the intention, of waiving the privilege. If he sent it, then he did so inadvertently.

At his deposition, Mr. Fulp testified as follows:

1. He does not recall sending it to his father. (13:2-4)[3]
2. He never asked his father to destroy the email, nor did his father indicate that he destroyed it. (20:10-15)
3. He does not recall saying anything to his father about keeping the message confidential. (21:13-16)
4. He does not know why he sent it, he does not recall discussing the Ted Agu case with his father, until he reached out to him a month before the deposition[4] to ask his father if he recalled receiving the email and his father told him he had no such recollection. (13:18-14:8, 21:17-22:5)

[3] All citations in this section are to the reporter's transcript of Mr. Fulp's deposition, October 3, 2019. A true and correct copy of the entire transcript is attached as Exhibit D to the Declaration of Michael R. Goldstein, filed in connection with, and in support of, this Opposition. Mr. Fulp executed his declaration (located on page 61 of the transcript) without making any changes to the transcript. (Goldstein Dec., ¶ 7 & Exh. E.)

[4] It could have even been two months before the deposition. (See Declaration of Michael R. Goldstein, ¶ 5.)

5. He does not recall receiving the email, he is not sure if he ever received the entire string, or having any conversations with any of the email recipients noted in the emails, even with Campus Counsel (the late Christopher Patti). (15:11-14, 16:2-19:20)
6. He does not recall anyone at the University of California or any other employer expressly advising him not to forward documents that are labelled attorney-client privileged. (20:16-24)
7. He was asked (but could not answer because the questions sought information about communications protected by the attorney-client privilege): when anyone at UC Berkeley first became aware of the fact that he had forwarded the email thread to his father; whether it was appropriate for him to send it to his father; or that he did not have authorization to forward it. (24:4-25:17)
8. He never told anyone at UC Berkeley about his having forwarded it to his father. (25:7-9)
9. He cannot recall whether, prior to receiving the subpoena, he was ever instructed by anyone at UC Berkeley that he was not authorized to forward the email thread or that he was not authorized to send any of the communications about the Agu situation to anyone outside the university. (25:19-26:4)
10. He does not recall whether he is aware of any policies at UC Berkeley about attorney-client privileged documents, or about any policies at UC Berkeley about waiver of the attorney-client privilege, or cannot answer such questions based on the attorney-client privilege and, outside communications with the undersigned, he does not recall whether, prior to receiving the subpoena, he was aware of any policies at UC Berkeley about attorney-client privileged documents. (27:15-28:15, 29:14-25)
11. He does not recall if he is aware today of any policies about maintaining documents at UC Berkeley in order that they not be subject to the Public Records Act, or about any policies about the Act. (28:16-29:21)

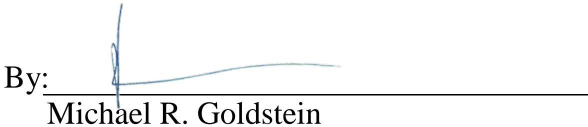
12. During the deposition, he supplemented his testimony by clarifying that he does not know of any policies concerning the Act at UC Berkeley. (39:9-13)
13. He does not recall if he was ever informed at UC Berkeley of any policy to include an attorney as a "cc" in email to assert the attorney-client privilege. (30:1-10)
14. Finally, he does not recall if he was ever trained in general protocols for handling potentially attorney-client privileged materials, or specific instructions for handling material in which Campus Counsel was a sender or recipient or "cc" or whether he ever sent a message to anyone at the University of California and "cc'd" an attorney at the University's Office of the General Counsel without knowing whether it was truly attorney-client privileged. (30:12-32:4)

The Regents did not learn about the 2014 email string until four years later, in the fall of 2018, in connection with The Regents' disclosure of a privilege log and redacted versions of attorney-client privileged documents to Petitioner. As soon as it was deemed appropriate to do so, The Regents investigated the matter and ensured that the string was not forwarded to any non-Regental employees without a need to see it and that any such recipients had not forwarded it further and destroyed any copies in their possession. As Mr. Fulp confirmed, his father did not have a copy of the email. (Goldstein Dec., ¶ 2.)

There are additional indicia that Mr. Fulp never sent the email to his father or, if he did send it, that he was unaware he was forwarding a string containing privileged communications, much less that he intended, by sending it, to waive the privilege. These indicia are enumerated in his declaration filed with this Opposition. (See Declaration of Solly Fulp, ¶¶ 2-6.)

Dated: November 14, 2019

UNIVERSITY OF CALIFORNIA
OFFICE OF THE GENERAL COUNSEL



By: ______________________
Michael R. Goldstein

Attorneys for Respondent
THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA