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File 10835-001

Mr. Arthur Schwarz
17 Glorieta East
Irvine, CA 92620-1849

Re: ***Park Paseo Homeowners Association***

Subject: **Attorney-Client Privileged Communications and ADR Offer**

Dear Mr. Schwarz:

This letter responds to your November 25, 2020, email directed to Lynn Wyatt requesting ADR, which concludes "the proximate cause of this ADR is to receive in writing the legal opinion tendered by the Association attorney, Mr. David E. Cane of Cane, Walker & Hastings (sic) to the Board of the Park Paseo Homeowners Association." For the reasons explained below, the communication you are requesting is privileged and will not be provided to you.

Your statement that the "attorney client privilege protects the attorney not the client" is not correct. The attorney client privilege protects the client, not the attorney. As explained in the California Supreme Court's decision in Southern Calif. Gas Co. v. California Pub. Utilities Commission (1990) 50 Cal.3d 31:

> "The attorney-client privilege, codified in Evidence Code section 954, provides in pertinent 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...." The attorney-client privilege has been a well established part of Anglo-American jurisprudence for over 400 years. (McCormick, Evidence (2d ed.1972) § 87, pp. 175-179.) It has been part of California statutory law in one form or another since 1851. (See Cal.Civil Practice Act, Stats. 1851, ch. 5, §§ 395-399, p. 114.) As this court has previously noted, "the privilege seeks to insure 'the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense.' " (Mitchell v. Superior Court (1984) 37 Cal.3d 591, 599, 208 Cal.Rptr. 886, citing Baird v. Koerner (9th Cir.1960) 279 F.2d 623, 629). If a lawyer could not promise to maintain the confidentiality of his client's secrets, the only advice he or she could provide would be, " 'Don't talk to me.' " (Welfare Rights Organization v. Crison (1983) 33 Cal.3d 766, 771, fn. 3, 190 Cal.Rptr. 919.)

> Application of the privilege will occasionally shield relevant information which may very well create obstacles for the party seeking the privileged information; however, the Legislature and the courts of this state have determined that the party's concern is "outweighed by the importance of preserving confidentiality in the attorney-client relationship." (Mitchell v. Superior Court, supra, 37 Cal.3d at p. 599, 208 Cal.Rptr. 886.)"

Though a party to the protected communication, the client's attorney is not the "holder" of the privilege (Cf. *Evidence Code* Section 953). The holder of the attorney-client privilege is the client. The attorney-client privilege may be claimed by the client, or by the client's lawyer. Indeed, unless otherwise instructed by the client, an attorney who made a communication subject to the privilege "shall claim" the privilege if the attorney is present when the communication is sought to be disclosed. *Evidence Code* Section 955. This is based upon an attorney's ethical obligation "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. *Business and Professions Code* Section 6068(e).

Preserving the confidentiality of communications between attorney and client is fundamental to our legal system. The privilege encourages clients to make full disclosure; and thus protects a client's right to freely and fully confer with and confide in an attorney in order to receive legal advice. See City and County of San Francisco v. Sup. Ct. (1951) 37 Cal.2d 227; Costco Wholesale Corp. v. Sup. Ct. (Randall) (2009) 47 Cal.4th 725; Mitchell v. Sup.Ct. (Shell Oil Co.) (1984) 37 Cal.3d 886.

A client has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the client and its lawyer. Corporations who retain the services of an attorney are "clients" protected by the privilege. *Evidence Code* Sections 175, 951. Obviously, where the client is a corporation, the corporate entity cannot communicate as such with its lawyer; rather, attorney -client communications necessarily must be made through individuals acting for the entity, including directors, officers, and managing agents. See Costco Wholesale Corp. v. Sup. Ct. (Randall), supra, 47 Cal.4th at 734.

Director Aarnes' statement that the Board had requested and received a legal opinion, and Director Aarnes' summary of the conclusions reached do not waive the privilege. The mere disclosure of the fact a privileged communication occurred is not itself a disclosure of the specific content of the communication and thus does not waive the privilege. Mitchell v. Sup.Ct. (Shell Oil Co.), supra, 37 Cal.3d at 602. Likewise, a client does not waive the attorney-client privilege simply by disclosing the lawyer's conclusions without revealing the content of the communications. Southern Calif. Gas Co. v. California Pub. Utilities Commission, supra, 50 Cal.3d 31.

In sum, the requested communication is privileged and will not be provided to you. Your assertions that the communication is not privileged and that the privilege has been waived are not supported by the facts or by the law. The Association therefore demands that you withdraw your ADR offer, because there is simply no point in spending even more time and money on this non-issue.

Should you nevertheless insist on proceeding with an ADR, the Association agrees to submit the issue to a mediation that will be officiated through the Honorable Judge Luis Cardenas (Ret.) at JAMS. Pursuant to *Civil Code* Section 5940(c) you will be financially responsible for one-half of the costs of mediation. Judge Cardenas is on the panel for JAMS' special low cost mediation program for homeowner association related disputes. Your share of the costs of mediation will be approximately $950.00. If you will not agree to withdraw your baseless request for ADR and you wish to proceed with ADR, you may let my office know and we will contact JAMS. JAMS will send an invoice directly to you for payment, and after that invoice has been paid by you, JAMS will be in contact with my office and with you to schedule a Zoom ADR with Judge Cardenas on a mutually agreeable date. You can obtain information regarding JAMS at jamsadr.com.

In your November 25, 2020, email, you also noted that Mr. Aarnes left the IDR before it started. As you know, he left the IDR at your insistence. Mr. Aarnes was on the call with Ms. Wyatt. It was explained that Ms. Wyatt would be taking notes on the IDR to share with the other Directors in her capacity as the Association's general manager. You unreasonably and inexplicably refused to allow both Mr. Aarnes and Ms. Wyatt to be on the call. You insisted that one of them hang up. Mr. Aarnes then volunteered to be the one to hang up so that Ms. Wyatt could take notes, and Mr. Aarnes left the call with your approval. Your assertion that the IDR did not take place because no Board member was present is preposterous.

Very truly yours,

CANE & HARKINS LLP

David E. Cane

DEC:tg

cc: Board of Directors