SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY, Plaintiff/Petitioner, vs. METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA, et al. Defendants/Respondents.	Case No. CFP-10-510830 Case No. CFP-12-512466 ORDER ON OUTSTANDING DISCOVERY ISSUES PRESENTED BY METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA AND SAN DIEGO COUNTY WATER AUTHORITY

The parties have agreed to submit discovery disputes to the court following my proposal for a less expensive and less formal procedure.[1]

There are four issues.

1.

Metropolitan's assertion of privilege re : Raftelis documents. Although the parties have agreed to streamlined procedures described in note 1, the court still requires *evidence* in support of claims of privilege. The burden of establishing the application of the privilege, with that evidence, rests on the proponent, here Metropolitan. *Zimmerman v. Superior Court (People),* __Cal.App.4th__, 13 C.D.O.S. 11266 (No. D064531, October 8, 2013) ("When a party asserts the attorney-client

[1] Specifically the parties conferred on the issues and created a single joint submission (here titled by the parties a "Joint Statement") which (i) grouped the issues (ii) included the relevant text of the disputed demands (here, deposition notices) (iii) succinctly presented the parties' argument. This single document dated October 3, 2013 was then filed and served, as well as exhibits 1-12 and A-G.

privilege, it is incumbent upon that party to prove the preliminary fact that a privilege exists"). As *Zimmerman* notes it not enough to just cite case law. ("We are unaware of any situation where the mere citing of case law to support the existence of a preliminary fact ... is sufficient to establish a *prima facie* claim of attorney-client privilege.")

Metropolitan points me to no evidence on the issue, and hence I cannot determine if the documents at issue were part of an attorney client communication, or transmitted at the behest of an attorney for the purposes of giving legal advice, or any other relevant purpose. As San Diego notes, the mere fact that an attorney has been copied on a document does not imbue it with privilege. While it might be enough to detect privilege to know that a document was transmitted solely between an attorney and a client,[2] none of the documents at issue here falls into that category. They were all shared with others, i.e., Raftelis, and there is no evidence that Raftelis was e.g., an agent of counsel or that, as Metropolitan argues, disclosure to third parties was necessary to further the purposes for which an attorney was acting. Thus on this record sharing documents with Raftelis constitutes waiver, if privilege there was.[3]

The privilege assertion is overruled.

2.

Privilege on billing procedure documents. The same rationale as above applies here: Metropolitan provides no evidence to support its argument that e.g., Kightlinger provided legal

---

[2] It's probably not enough; the document has to be transmitted for the purposes for which the lawyer was retained. Sending a client a note about sandwich preferences wouldn't qualify even if no one else saw it.

[3] I decline San Diego's suggestion of an *in camera* review not only because on this record it's not necessary, but because I can't force that sort of review. Evidence Code § 915 does not allow "in camera disclosure of information alleged to be protected by the attorney-client privilege. [citations]." *Costco Wholesale Corp. v. Superior Court* (2009) 47 C4th 725, 736-37 & note 4. As *Zimmerman* has so recently noted, "a court may not require disclosure of information claimed to be privileged to rule on a claim of privilege. (Evid. Code, § 915; Gordon v. Superior Court (1997) 55 Cal.App.4th 1546, 1557 ["[T]he privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case."].) "

advice in the documents. The fact that he was copied on some of the documents at issue is not enough, especially as the documents were sent to non-legal personnel by non-legal personnel.

The privilege assertion is overruled.

3.

Clawback of inadvertently produced documents. There is no remaining dispute here: The parties agree that they may dispute new issue raised by Metropolitans October 2 letter. But in an effort to bring discovery disputes to a close, a remaining dispute must be presented to me not later than October 24.

4.

Sufficiency of San Diego's productions (videos). The dispute here devolves to whether it is enough for San Diego to point to the location of potentially responsive material (a website) instead of isolating responsive items and producing those. I issued a May 13, 2013 order on this issue and as I noted there, San Diego did not brief that particular dispute. I overruled the objection and directed the discovery. While I would have been open in May to the suggestion that the burden of reviewing videos is the same for Metropolitan as it is for San Diego[4] and on that basis countenance San Diego's simply pointing to a website, it is too late now to bow out of the obligation to produce the material Metropolitan asked for months ago and for which it secured a court order. San Diego should inform Metropolitan which videos are responsive.

Dated: October 10, 2013

Curtis E.A. Karnow
Judge Of The Superior Court

[4] I do not know this is true. San Diego may have access to notes or other data that makes it easier for it to locate the pertinent videos.