No. _____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAN GROSZKRUGER, DOREEN SANDERSON, and ROBERT WARDWELL
Plaintiffs and Respondents,

v.

ROSEMARIE RENO, CHARLENE ANDERSON, GEORGE COULTER, LARRY ANDERSON, and TRI-CITY HEALTHCARE DISTRICT,
Defendants and Petitioners.

FROM A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
HONORABLE THOMAS J. WHELAN • CASE NO. 3:09-CV-01594-W-BGS

PETITION FOR PERMISSION TO APPEAL

HORVITZ & LEVY LLP
DAVID S. ETTINGER
JEREMY B. ROSEN
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157

HOOPER LUNDY & BOOKMAN, P.C.
JAY N. HARTZ
1875 CENTURY PARK EAST, SUITE 1600
LOS ANGELES, CALIFORNIA 90067
(310) 551-8111 • FAX: (310) 551-8181

HOOPER LUNDY & BOOKMAN, P.C.
GREGORY DANIELS
JOSEPH R. LAMAGNA
101 WEST BROADWAY, SUITE 1200
SAN DIEGO, CALIFORNIA 92101-3890
(619) 744-7303 • FAX: (619) 230-0987

ATTORNEYS FOR DEFENDANTS AND PETITIONERS
ROSEMARIE RENO, CHARLENE ANDERSON, GEORGE COULTER, LARRY ANDERSON, AND TRI-CITY HEALTHCARE DISTRICT

CERTIFICATE OF INTERESTED PARTIES

Affected Court Action

The District Court Action from which this petition arises is entitled: Coleman et al v. Sterling et al., pending in the United States District Court for the Southern District of California, District Court No. 3:09-cv-01594-W-BGS, the Honorable Thomas J. Whelan, presiding.

Defendants and Petitioners

Petitioners are Defendants Rosemarie Reno, Charlene Anderson, George Coulter, and Larry Anderson, and Defendant and Counterclaimant Tri-City Healthcare District. Petitioners are represented by:

David S. Ettinger (Bar No. 93800)
HORVITZ & LEVY LLP
15760 Ventura Boulevard, 18th Floor
Encino, California 91436-3000
Telephone: 818-995-0800
Facsimile: 818-995-3157
E-mail: dettinger@horvitzlevy.com

Jeremy B. Rosen (Bar No. 192473)
HORVITZ & LEVY LLP
15760 Ventura Boulevard, 18th Floor
Encino, California 91436-3000
Telephone: 818-995-0800
Facsimile: 818-995-3157
E-mail: jrosen@horvitzlevy.com

Jay N. Hartz (Bar No. 57242)
HOOPER LUNDY & BOOKMAN, P.C.
1875 Century Park East, Suite 1600
Los Angeles, California 90067
Telephone: (310) 551-8111
Facsimile: (310) 551-8181
E-mail: jhartz@health-law.com

Gregory Daniels (Bar No. 217718)
HOOPER LUNDY & BOOKMAN, P.C.
101 West Broadway, Suite 1200
San Diego, California 92101-3890
Telephone: (619) 744-7300
Facsimile: (619) 230-0987
E-mail: gdaniels@health-law.com

Joseph R. LaMagna (Bar No. 246850)
HOOPER LUNDY & BOOKMAN, P.C.
101 West Broadway, Suite 1200
San Diego, California 92101-3890
Telephone: (619) 744-7300
Facsimile: (619) 230-0987
E-mail: jlamagna@health-law.com

Plaintiffs and Respondents

Respondents are Plaintiffs Dan Groszkruger, Doreen Sanderson, and Robert Wardwell. Respondents are represented by:

Ray J. Artiano (Bar No. 88916)
Stutz Artiano Shinoff and Holtz
2488 Historic Decatur Road, Suite 200
San Diego, California 92106-6113
Telephone: (619) 232-3122
Facsimile: (619) 232-3264
E-mail: ratiano@stutzartiano.com

Robert M. Mahlowitz (Bar No.160125)
Stutz Artiano Shinoff and Holtz
2488 Historic Decatur Road, Suite 200
San Diego, California 92106-6113
Telephone: (619) 232-3122
Facsimile: (619) 232-3264
E-mail: rmahlowitz@stutzartiano.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Miscellaneous

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAN GROSZKRUGER, DOREEN SANDERSON, and ROBERT WARDWELL
Plaintiffs and Respondents,

v.

ROSEMARIE RENO, CHARLENE ANDERSON, GEORGE COULTER, LARRY ANDERSON, and TRI-CITY HEALTHCARE DISTRICT,
Defendants and Petitioners.

PETITION FOR PERMISSION TO APPEAL

INTRODUCTION

The district court has certified for interlocutory appeal its order requiring publicly elected directors of a California healthcare district to testify at deposition about their conversations at a November 2008 meeting with a lawyer. A magistrate judge in this case had concluded that the conversations are protected from disclosure by the attorney-client privilege and not subject to the crime-fraud exception. However, the district court overruled the magistrate, finding the meeting constituted a misdemeanor violation of California's open meeting law, the Brown Act, and that the crime-fraud exception to the privilege thus applied.

In *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 607 (2009), the Supreme Court noted that "litigants confronted with a particularly injurious or novel privilege ruling . . . may ask the district court to certify, and the court of appeals to accept, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The preconditions for § 1292(b) review. . .are most likely to be satisfied when a privilege ruling involves a new legal question or is of special consequence, and district courts should not hesitate to certify an interlocutory appeal in such cases."

Here, the district court looked to *Mohawk* and certified its discovery order under each of the section 1292(b) factors. First, there is a controlling question of law because an erroneous order to disclose attorney-client privileged information can prejudice the outcome of the entire case. Second, given the conflicting conclusions reached by the magistrate and the district court on the question whether the crime-fraud exception applies and the first impression issue whether the Brown Act was even violated, there are substantial grounds for differences of opinion. Third, given a likely appeal after judgment, it would materially advance this litigation to have a ruling on the privilege issue before trial.

This court recently reiterated that "'an appeal after disclosure of the privileged communication is an inadequate remedy' for the 'irreparable harm a party likely will suffer if erroneously required to disclose privileged materials or communications.'" *Hernandez v. Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010). Accordingly, this Court should grant defendants' petition for an interlocutory appeal.

QUESTIONS PRESENTED

(1) Assuming that a meeting between a lawyer and some publicly elected district directors violated California's open meetings law (it did not), did the district court err in applying the crime-fraud exception to void the attorney-client privilege for communications at the meeting simply because the meeting itself was a Brown Act violation even though the lawyer did not give advice that facilitated the violation?

(2) In applying the crime-fraud exception to the attorney-client privilege, did the district court err in ruling that the meeting between the directors and a lawyer constituted a criminal violation of the open meetings law?

RELIEF AND JURISDICTION

Under rule 5 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1292(b), petitioners seek permission for an interlocutory appeal on the questions presented. Section 1292(b) authorizes interlocutory relief from an order which the district court has certified as a controlling and debatable question for which an immediate appeal would advance the termination of the case. As required, this petition is made within ten days of the district court's certification order.

ORDER APPEALED FROM

Attached as exhibit A is the July 18, 2011 order by the magistrate judge finding that the defendants' conversations with their attorney are protected by the attorney-client privilege. Attached as exhibit B is the order appealed from: the November 28, 2011 district court order reversing the magistrate. Attached as exhibit C is the district court's February 21, 2012 order certifying its November 28, 2011 order for interlocutory appeal.

STATEMENT OF FACTS

A. Two Tri-City Board members-elect discuss legal issues at a restaurant with existing board members and an attorney.

Tri-City Health Care District is a public entity that operates a hospital and is governed by a seven-member elected board. (Ex. B, at 14, 23.) On November 4, 2008, elections were held for two of the positions. (*Id.* at 14.) On November 20, one member-elect who had been elected but not yet sworn in (Charlene Anderson) and another member-elect who was unaware he had been elected because the vote count was not completed (George Coulter) met with sitting board members Rosemarie Reno and Kathleen Sterling, and attorney Julie Biggs at a Coco's Restaurant. (*Id.*)

As the district court described the meeting, the members-elect and the sitting directors consulted with Biggs about "'her and her firm's interest in serving as the Hospital's new General Counsel" and "discussed several issues the hospital was then facing and the types of issues that Ms. Biggs and her firm may be asked to handle if [Biggs' firm] was retained." (Ex. B, at 25.) All present believed this conversation would remain confidential. (Ex. A, at 7-9.)

B. Plaintiffs sue after being placed on leave and terminated.

Coulter and Anderson were sworn in as board members on December 5, 2008. (Ex. B, at 14.) At a December 18, 2008 board meeting, Biggs's firm was formally retained as general counsel and existing counsel was terminated. (*Id.* at 25.) The next day, Tri-City placed plaintiffs, Tri-City healthcare executives, on administrative leave and on April 23, 2009, terminated them after an investigation. (*Id.* at 14.)

Plaintiffs sued Tri-City in state court for violating the Brown Act at its December 18 meeting. (Ex. B, at 21 fn. 6.) During the case, the superior court found that the defendants' conversation with Biggs at the November meeting was protected by the attorney-client privilege. (Ex. A, at 11.) The parties then resolved the state court action and this federal lawsuit challenging plaintiffs' termination followed. (Ex. B, at 14, 21.)

C. The magistrate finds the restaurant meeting is protected by the attorney-client privilege. The district court disagrees.

The magistrate rejected plaintiffs' demand for deposition testimony about what was discussed at the November meeting, finding inapplicable the crime-fraud exception to the federal law attorney-client privilege:

> Even if the Coco's meeting was in violation of the Brown Act's provisions regarding meetings of a majority of board members,

> Plaintiffs have not shown how the directors' communications with Biggs were seeking advice to further the alleged criminal scheme to hold such an illegal meeting nor that the communications were sufficiently related to and made in furtherance of that scheme. Plaintiffs have presented no evidence that the directors sought Biggs's advice on how to secretly plan [Tri-City] affairs in violation of the Brown Act, including how to secretly plan placing Plaintiffs on administrative leave.

(Ex. A, at 11-12.)

The district court disagreed. It ruled that the November meeting violated the Brown Act's requirement that special notice be given before a majority of the Board meets and takes action. (Ex. B, at 23-26.) The court found the crime-fraud exception negated the attorney-client privilege because the communications between Biggs and the board members were "a necessary element of the criminal activity." (*Id.* at 26-30.)

D. The district court grants Tri-City's motion for certification of an interlocutory appeal.

The district court certified its attorney-client privilege order for interlocutory appeal. (Ex. C.) First, the court found that its order presented a "controlling question of law" because "[t]he persisting prejudice that may result from an erroneous privilege ruling 'is quite likely

to affect the further course of litigation,' and could even 'materially affect [its] outcome.' Moreover, the likelihood of this prejudice increases substantially when the privilege ruling requires the district court to interpret issues of first impression or questions for which the present state of the law is unclear." (*Id.* at 36-37) (citations omitted).

Second, the court found that two questions presented

> 'substantial ground for difference of opinion.' First is the scope of the crime-fraud exception. This Court interpreted the crime-fraud exception to cover a broader range of communications between an attorney and her client than did [Magistrate] Judge Skomal. But, the Court recognizes that Judge Skomal's reading is also supported by language in relevant case law. The issue is further complicated by the unique circumstances of the instant matter. Unlike most applications of the crime-fraud exception, where the attorney-client communications are distinct from the actual criminal conduct, here the attorney-client communications *were* the relevant criminal conduct. At this point in the case, two reasonable jurists have already disagreed on this question, and the Court recognizes room for further disagreement. Second, this court was presented with a 'novel and difficult' question of first impression regarding California's Brown Act. The issue was whether the addition of elected members of a public agency board of directors causes the total size of that board to increase commensurately for purposes of computing a 'majority.' Considering the purpose of the Brown Act, the Court held that it did not. However, the Court recognizes that a purely textual reading of the statute could result in a different conclusion. Interpretation of the

> statute in these circumstances is complicated by the fact that the California Legislature did not address this question when drafting or amending the Brown Act.

(Ex. C, at 38) (citations omitted).

Third, the court found that given the litigious nature of this suit

> and the significance of the questions raised by the parties in this discovery dispute, . . . post-judgment appeal on this point is highly probable. Resolving this issue now, before trial, may ultimately serve the interests of efficiency for Plaintiffs because it would confirm the finality of any award they may receive at trial. Moreover, this case is not so close to trial that interlocutory appeal would only cause delay. . . [T]he Court concludes that immediate appeal 'may materially advance the ultimate termination of the litigation.'

(Ex. C, at 39.)

LEGAL DISCUSSION

I. THIS COURT SHOULD ACCEPT THE INTERLOCUTORY APPEAL UNDER SECTION 1292(B).

A. The attorney-client privilege question is a controlling question of law.

To seek an interlocutory appeal under section 1292(b), a party must show "(1) that there [is] a controlling question of law, (2) that there [are] substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982).

Discovery orders requiring production of evidence potentially protected by the attorney-client privilege are subject to interlocutory appeal. *See Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 607 (2009); *In re Boileau*, 736 F.2d 503, 504-05 (9th Cir. 1984); *Tennenbaum v. Deloitte & Touche,* 77 F.3d 337, 339 (9th Cir. 1996); *Transamerica Computer Co., Inc. v. Int'l Bus. Machs. Corp.*, 573 F.2d 646, 647-48 (9th Cir. 1978); *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277, 278 (8th Cir. 1984); *Shelton v. Am. Motors Corp.,* 805 F.2d 1323, 1326 (8th Cir. 1986); *Simon v. G.D. Searle & Co.,* 816 F.2d 397, 398 (8th Cir. 1987); *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1395 (11th Cir. 1994). We now explain that the three factors are present here.

"[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement*, 673 F.2d at 1026; *see also United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959) ("[W]e do not hold that a question brought here on interlocutory appeal must be dispositive of the lawsuit in order to be regarded as controlling."); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) ("'[I]ssues collateral to the merits' may be the proper subject of an interlocutory appeal.");

Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc., 86 F.3d 656, 659 (7th Cir. 1996) ("A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so.").

A question on discoverability of evidence potentially subject to the attorney-client privilege can be controlling. *Mohawk Indus.*, 130 S. Ct. at 607; *Union Cnty., Iowa v. Piper Jaffray & Co., Inc.*, 525 F.3d 643, 646 (8th Cir. 2008); *Garner v. Wolfinbarger*, 430 F.2d 1093, 1096-97 (5th Cir. 1970).

Here, the district court, relying on *Bittaker v. Woodford*, 331 F.3d 715, 717-18 (9th Cir. 2003), properly found its discovery order presents a controlling issue of law. (Ex. C, at 35-37.) In particular, the district court noted that as in *Bittaker*, defendants could suffer substantial prejudice for the remainder of the litigation if they are erroneously required to divulge the contents of conversations protected by the attorney-client privilege. (*Id.* at 36-37); *see also Bittaker*, 331 F.3d at 717-18 ("If petitioner relies on the protective order by releasing privileged materials and it turns out to be invalid, he will suffer serious prejudice during any retrial. [ ] 'Appeal after final judgment cannot remedy the breach in confidentiality occasioned by erroneous disclosure of protected materials.... [T]he cat is already out of

the bag.... 'Once the Report was released, any error in releasing it would be impossible to correct.'[ ] . . . [B]ecause [information], once revealed, could not again be concealed, review following a decision on the merits would come too late.'" (citations omitted)).

B. Substantial grounds for difference of opinion exist regarding the novel issues raised by the district court's order.

1. The district court and magistrate applied conflicting approaches to the scope of the crime-fraud exception in a novel factual setting of great importance to all publicly elected Boards in California.

This court has explained that a difference of opinion exists where: "reasonable jurists might disagree on an issue's resolution, not merely where they have already disagreed. Stated another way, when novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may be certified for interlocutory appeal without first awaiting development of contradictory precedent." *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011); *see also Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010).

The magistrate found that the crime-fraud exception did not apply to the November meeting even if the meeting violated the Brown Act because "[p]laintiffs have not shown how the directors' communications with Biggs

were seeking advice to further the alleged criminal scheme to hold such an illegal meeting nor that the communications were sufficiently related to and made in furtherance of that scheme." (Ex. A, at 11-12.) By contrast, the district court reached the opposite conclusion, finding that "[d]efendants' communications with Biggs are sufficiently related to [d]efendants' criminal violation of the Brown Act . . . because they occurred during, and were instrumental to, the meeting itself." (Ex. B, at 28.) In short, the magistrate read the crime-fraud authorities as requiring a nexus between the advice given by the attorney and the alleged crime (i.e., the Brown Act violation), whereas the district court found that any advice the lawyer gave on any subject was subject to the crime-fraud exception so long as it occurred during a meeting held in violation of the Brown Act.

The conflicting decisions are based on different interpretations of the same general rules about the crime-fraud exception. The party seeking to vitiate the privilege must show: (1) "'the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme'" and (2) "the attorney-client communications for which production is sought are 'sufficiently related to' and were made '*in*

furtherance of [the] intended, or present, continuing illegality.'" *In re Napster, Inc.*, 479 F.3d 1078, 1090 (9th Cir. 2007).

> We must always keep in mind that the purpose of the crime-fraud exception is to assure that the 'seal of secrecy' between lawyer and client does not extend to communications from the *lawyer* to the client made by the *lawyer* for the purpose of giving advice for the commission of a fraud or crime. The seal is broken when the lawyer's communication is meant to facilitate future wrongdoing by the client. Where the client commits a fraud or crime for reasons completely independent of legitimate advice communicated by the lawyer, the seal is not broken, for the advice is, as the logicians explain, *non causa pro causa*. The communication condemned and unprotected by the attorney-client privilege is advice that is illicit because it gives direction for the commission of future fraud or crime. The advice must relate to future illicit conduct by the client.

Haines v. Liggett Grp. Inc., 975 F.2d 81, 90 (3d Cir. 1992); *see also In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986) ("The crime/fraud exception. . .cannot be successfully invoked merely upon a showing that the client communicated with counsel while the client was engaged in criminal activity. The exception applies only when there is probable cause to believe that the communications with counsel were intended in some way to facilitate or to conceal the criminal activity.").

Here, the district court acknowledges that it "interpreted the crime-fraud exception to cover a broader range of communications between an attorney and her client than did [Magistrate] Judge Skomal" and that "Judge Skomal's reading is also supported by language in relevant case law." (Ex. C, at 38.) The district court correctly concluded that this is an issue where "two reasonable jurists have already disagreed. . .and the Court recognizes room for further disagreement." (*Id.* at 38.)[1] This court should provide necessary guidance on this question.

2. Whether the November meeting violated the Brown Act is a novel question of first impression that affects all publicly elected Boards in California.

Under the Brown Act, "[a]ll meetings of [a] legislative body. . .shall be open and public." Cal. Gov't Code § 54953(a) (West 2010). Advance notice and an agenda must be publically provided before action can be taken. *Id.* §§ 54954.2(a)(1), 54954.5, 54956. The Act is violated when a

---

[1] Whether a Brown Act violation is a serious crime that supports application of the crime-fraud exception is also an issue where there is substantial ground for disagreement. *See, e.g., Laser Indus., Ltd. v. Reliant Techs., Inc.*, 167 F.R.D. 417, 423 n.9 (N.D. Cal. 1996) ("[t]he privilege cannot be penetrated on a showing of offense to just any legal norm; rather, the showing must be of 'an offense serious enough to defeat the privilege.'").

majority of members meet or act without notice. *Id.* § 54952.2(b)(1). The Act applies to "[a]ny person elected to serve as a member of a legislative body who has not yet assumed the duties of office." *Id.* § 54952.1.

For the November meeting to violate the Brown Act, the two members and two members-elect who attended must have constituted a "majority of the members of" the Tri-City Board. Cal. Gov't Code § 54952.2(a) (West 2010). It is unclear whether the four was a majority. At that time, the Board had seven duly sworn existing members and two newly elected members who were treated "as if [they] ha[d] already assumed office." *Id.* § 54952.1. Thus, during the post-election/pre-swearing-in period of time when the meeting occurred, there was uncertainty as to whether the "majority" required for compliance under the Brown Act meant that there were seven or nine members of the Board. There is no California authority on point. The district court determined that based upon the "purpose of the Brown Act" there were still only seven members, but recognized that this issue presents a "'novel and difficult' question of first impression" and "a purely textual reading of the statute

could result in a different conclusion." (Ex. C, at 38.)[2] Given the lack of a clear answer to this question, all public bodies in California run the risk of being found in violation of the Brown Act (and losing the protections afforded by the attorney-client privilege) until guidance is provided.

C. An immediate appeal will materially advance the ultimate termination of the litigation.

"[N]either § 1292(b)'s literal text nor controlling precedent requires that the interlocutory appeal have a final, dispositive effect on the litigation, only that it 'may materially advance' the litigation." *Reese,* 643 F.3d at 688. "Reversal on appeal of a 'controlling question' may advance the termination of the suit in three ways: By leading directly to the entry of final judgment (or voluntary dismissal) upon remand, by preventing a reversible error which would require an entire new trial, or by preventing

---

[2] Whether Coulter had the specific intent to violate the Brown Act when he did not know he had been elected is also an issue where there is substantial ground for disagreement. See e.g., Cal. Gov't Code § 54959 (West 2010) (to be guilty of a criminal violation of the Brown Act one must "intend[] to deprive the public of information to which the member know[s] or has reason to know the public is entitled"); *Sacramento Newspaper Guild v. Sacramento Cnty. Bd. of Supervisors*, 263 Cal. App. 2d 41, 48 (1968) (criminal provision of Brown Act is narrow because of "the prospect of criminal prosecutions against public officials who make the wrong guess when confronted with an ambiguous situation").

error which, while not reversible, protracts the litigation." *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 Yale L.J. 333, 343 (1959); see also *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (certification appropriate where it "might avoid protracted and expensive litigation").

Resolution of the question of whether certain testimony is subject to the attorney-client privilege "'may materially advance the ultimate termination of the litigation.'" *Mohawk Indus.*, 130 S. Ct. at 607; *Garner*, 430 F.2d at 1097. Here, the district court found that "[b]ased on the highly-litigious nature of this suit, and the significance of the questions raised by the parties in this discovery dispute, . . . post-judgment appeal on this point is highly probable. Resolving this issue now, before trial, may ultimately serve the interests of efficiency for Plaintiffs because it would confirm the finality of any award they may achieve at trial." (Ex. C, at 39.) The court also found that "this case is not so close to trial that interlocutory appeal would only cause delay." (*Id.* at 39.)[3] Given these findings, interlocutory review is appropriate.

---

[3] No trial date has been set. (See Ex. C, at p. 39.)

II. TRI-CITY WILL BE IRREPARABLY HARMED ABSENT AN INTERLOCUTORY APPEAL.

In addition to raising issues of importance to all public bodies in California, this interlocutory appeal is necessary to prevent irreparable harm to Tri-City. "'[A]n appeal after disclosure of the privileged communication is an inadequate remedy' for the 'irreparable harm a party likely will suffer if erroneously required to disclose privileged materials or communications." *Hernandez*, 604 F.3d at 1101; see also *Barton v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 410 F.3d 1104, 1109 (9th Cir. 2005) (once the privileged information has been disclosed "the disclosure cannot be undone, by appeal or otherwise"); *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Ariz.*, 881 F.2d 1486, 1488-89, 1491 (9th Cir. 1989) (disclosure of privileged material before appellate review is "irreparable harm")[4].

Although Tri-City's Board members could disobey the discovery order and appeal from a subsequent sanction or contempt order, it is not reasonable to require public officials to willfully violate a district court order to preserve appellate review of the privilege question. *See In re*

---

[4] If for some reason this court determines this case does not meet the requirements for interlocutory appeal under section 1292(b), defendants intend to file a petition for writ of mandamus, given the lack of appellate remedies to protect against irreparable harm.

FDIC, 58 F.3d 1055, 1060 n.7 (5th Cir. 1995) ("We hold that the FDIC has no other adequate means of obtaining relief. . . . [R]equiring a government official 'to incur a contempt sanction would have serious repercussions'"); *In re United States*, 985 F.2d 510, 513 (11th Cir. 1993) (same); *In re The City of New York*, 607 F.3d 923, 934 (2d Cir. 2010) (same).

CONCLUSION

For the above reasons, this court should accept the district court's certification of its discovery order for interlocutory appeal.

March 1, 2012

HORVITZ & LEVY LLP
DAVID S. ETTINGER
JEREMY B. ROSEN

By: s/ Jeremy B. Rosen

Attorneys for Defendants and Petitioners
ROSEMARIE RENO, CHARLENE ANDERSON, GEORGE COULTER, LARRY ANDERSON, and TRI-CITY HEALTHCARE DISTRICT

STATEMENT OF RELATED CASES

There are no pending related appeals.

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS [FED R. APP. P. 5]

1. This brief complies with the type-volume limitation of Fed. R. App. P. 5(c) because this brief does not exceed 20 pages

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS-Word in 14-point Century Schoolbook font type, or

March 1, 2012 By: s/ Jeremy B. Rosen

EXHIBIT A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALLEN COLEMAN; *et al.*,

Plaintiffs,

v.

KATHLEEN STERLING; *et al.*,

Defendants,

AND RELATED CLAIMS.

Civil No. 09-CV-1594-W (BGS)

ORDER REGARDING JOINT DISCOVERY MOTION NO. 3 IN RE PLAINTIFFS' REQUEST FOR DEPOSITION TESTIMONY CONCERNING DISCUSSIONS AT NOVEMBER 20, 2008 MEETING AT A COCO'S RESTAURANT

The parties to this action filed a joint discovery motion regarding Plaintiffs' request for the deposition testimony of Defendants Kathleen Sterling[1], Rosemarie Reno, George Coulter and Charlene Anderson concerning discussions that occurred at a November 20, 2008 meeting with Julie Biggs, Esq., at a Coco's restaurant in Vista, CA. (Doc. No. 57.) Defendants have refused to testify on the subject on the grounds that (1) the discussions are protected by the attorney-client privilege, and (2) this issue has been previously decided by a state court precluding discovery under the doctrine of collateral estoppel.

The Court, pursuant to its discretion under Civ.L.R. 7.1(d)(1), determines that the parties' joint discovery motion no. 3 is suitable for resolution without oral argument and submits it on the

[1] Defendant Kathleen Sterling as been dismissed from this case with prejudice. (Doc. No. 121.)

papers. For the reasons set forth below, the Court denies Plaintiffs' request for deposition testimony.

Dispute Background

Plaintiffs are former healthcare executives of Defendant Tri-City Healthcare District ("TCHD"). TCHD placed Plaintiffs on paid administrative leave on December 18, 2008 and terminated Plaintiffs on April 23, 2009. Plaintiffs brought this action against Defendants for wrongful termination, age discrimination in violation of FEHA, breach of the implied covenant of good faith and fair dealing, a writ of mandate, declaratory relief, defamation per se, denial of a liberty interest and due process under 42 U.S.C. §1983, California Labor Code violations, and intentional infliction of emotional distress.

Defendants Kathleen Sterling, Rosemarie Reno, Charlene Anderson and George Coulter ("the directors") are publicly elected members of the Board of Directors of TCHD. Sterling and Reno were veteran members of the Board in November 2008. Anderson and Coulter were newly elected to the Board on November 4, 2008, and were to be sworn in on December 5, 2008. On November 20, 2008, these four directors met at a Coco's restaurant along with an attorney, Julie Biggs, of Burke, Williams and Sorensen (""BWS"). Defendants claim that these directors met with Biggs to discuss issues relating to the hospital, which included the potential of replacing TCHD's general counsel. Defendants assert that the directors considered the information exchanged during the November 20 conversation to have been transmitted in confidence and that there is no evidence that the directors revealed the substance of their conversations to any non-participant. (Doc. No. 57 at 2.) Therefore, Defendants argue that the testimony sought by Plaintiffs is protected by the attorney-client privilege.

Plaintiffs believe that the plan to wrongfully terminate Plaintiffs began at the Coco's meeting. Plaintiffs were all placed on administrative leave the day after a December 18, 2008 special meeting, which special meeting was allegedly plotted during the Coco's meeting. Therefore, Plaintiffs believe information about what took place at the Coco's meeting is highly relevant. Plaintiffs assert that the Coco's meeting with a four-member majority of the seven-member TCHD Board to plan agency actions was held in violation of California's open meeting laws (the Brown Act). Plaintiffs also assert that two of the directors, Coulter and Anderson, did not know that Sterling had invited an attorney to the meeting, only attended the meeting at the request of Sterling, and did not seek legal

advice. Plaintiffs argue that no attorney-client privilege attached to the meeting, and if any did, the communications are subject to the crime-fraud exception because the meeting was held in violation of California's Brown Act. (Doc. No. 57 at 10-11.)

In addition to the parties' positions with respect to the merits of the application of the attorney-client privilege, the parties also dispute the effect of a prior state court ruling in the case of *Sanderson, et al. v. Tri-City Healthcare District* on the issue at hand. Defendants assert that Plaintiffs may not relitigate whether the attorney-client privilege applies to the November 20, 2008 meeting because the exact same issue was fully briefed and litigated by the parties in *Sanderson*. Plaintiffs[2] filed the *Sanderson* action in San Diego Superior Court on February 24, 2009 against TCHD's Board of Directors, Reno, Sterling, Anderson, and Coulter asserting violations of California's Brown Act. (Doc. No. 93-25, Ex. Y at 246-47.) Defendants contend that in *Sanderson*, Plaintiffs litigated and lost the identical issue they seek to relitigate in this action: whether the discussions held at Coco's on November 20, 2008 are protected by the attorney-client privilege.

In *Sanderson*, Plaintiffs filed a motion to compel further deposition testimony of Reno, Sterling, Anderson, Coulter, and third-party Michael Williams on July 7, 2009. (Doc. No. 93-12, Ex. L at 24-32.) The motion to compel stated that the directors and Williams had refused to testify about the events leading up to the December 18, 2008 special meeting of the Board based upon an assertion of the attorney-client privilege. The attorney-client privilege objections rested upon the fact that the directors' actions involved attorney Biggs. (*Id.*)

Judge Nugent issued a minute order on September 28, 2009, ruling as follows:

> Petitioners' motion to compel further deposition testimony is denied. The Court finds that the attorney client privilege attached as to Respondents Kathleen Sterling, Rosemarie Reno, Charlene Anderson and George Coulter. The motion is also denied as to third party Michael Williams for failure to personally serve him with the motion. CRC §3.1[3]46.

(Doc. No. 93-11, Ex. K.) Following a settlement of the *Sanderson* action, Plaintiffs filed a request for dismissal with prejudice of the entire state court action on February 22, 2010, which was entered

---

[2] Former healthcare executive Art Gonzalez was a party to the state court action. (*See* Doc. No. 93-25, Ex. Y at 246.) He is not a named plaintiff in the instant case. All other named Plaintiffs in the instant case were a party to the state court action. (*Id.*)

on February 23, 2010. (Doc. No. 55-3, Exs. 12 & 13.) Plaintiffs argue that the decision in *Sanderson* has no preclusive effect on this Court reaching the merits of this motion.

Discussion

I. Applicable Privilege Law

Under the Federal Rules of Civil Procedure, parties may obtain discovery regarding any matter that is "not privileged" and "relevant to the subject matter involved in the pending action." See Fed.R.Civ.P. 26(b)(1). Furthermore, "[t]he information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* A relevant matter is "any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

Plaintiffs in this case have asserted a federal claims pursuant to 42 U.S.C. § 1983 for denial of due process, as well as several California state law claims. (*See* Doc. No. 34.) "Where there are federal question claims and pendent state law claims present, the federal law of privilege applies." *Agster v. Maricopa County*, 422 F.3d 836, 839 (9th Cir. 2005). Therefore, the Court analyzes Defendants' claim of attorney-client privilege under federal law.

II. Collateral Estoppel

Defendants first argue that Plaintiffs are collaterally estopped from relitigating whether communications from the Coco's meeting are privileged because the exact same issue was fully briefed and litigated by the parties in Plaintiffs' prior state court action, *Sanderson,* before the Hon. Timothy P. Nugent. "Assuming a full and fair opportunity to litigate, ... federal courts must accord preclusive effect to state court judgments." *Marquez v. Guttierez*, 51 F.Supp.2d 1020, 1026 (E.D.Cal.1999); *see also* 28 U.S.C. § 1738. When determining the preclusive effect of a decision or judgment of the state court, a federal court must apply the state's collateral estoppel rule. *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 481-82 (1982) ("Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgment emerged would do so." (citations omitted)). Here, because the earlier decision was rendered by a California state court, the Court employs the state's collateral estoppel rule. In

California, to apply the doctrine of collateral estoppel (otherwise known as issue preclusion) to preclude relitigation of an issue: "(1) the issue must be identical to that decided in the prior proceeding; (2) the issue must have been actually litigated in the prior proceeding; (3) the issue must have been necessarily decided in the prior proceeding; (4) the decision must have been final and on the merits; and (5) preclusion must be sought against a person who was a party or in privity with a party to the prior proceeding." *Alvarez v. May Dept. Stores Co.*, 143 Cal.App.4th 1223, 1233 (2006) (citations omitted). "The party asserting collateral estoppel bears the burden of establishing these requirements." *Pacific Lumber v. SWRCB*, 126 P.3d 1040, 1054 (Cal. 2006).

Even where the "minimal requirements" for collateral estoppel are satisfied, "the doctrine should not be applied if considerations of policy or fairness outweigh the doctrine's purposes as applied in a particular case." *Bostick v. Flex Equipment Co.*, 147 Cal.App.4th 80, 97 (2007). Accordingly, "[i]n deciding whether the doctrine is applicable in a particular situation a court must balance the need to limit litigation against the right of a fair adversary proceeding in which a party may fully present his case." *Id.*

The parties do not dispute that Defendants have established the requirement of collateral estoppel that the party (Plaintiffs) against whom the plea is asserted was a party to the previous state court action. Rather, the parties mainly dispute whether the issues are identical and whether there was a final judgment on the merits.

The Court concludes that the issue presented in the instant motion is not identical to that decided in *Sanderson*. The issue decided in *Sanderson* was whether under California privilege law, the attorney-client privilege attached to the directors' communications with Biggs. The issue presented in the instant case is whether under *federal* privilege law, the attorney-client privilege attaches to the Coco's meeting with Biggs. *See Agster*, 422 F.3d at 839. While the facts presented in *Sanderson* and in this case may be identical regarding what occurred at the Coco's meeting, the law to be applied to those facts varies. "It is ... well established that when the proceeding in which issue preclusion is currently sought involves different substantive law than the previous proceeding, collateral estoppel does not apply." *California Hosp. Ass'n v. Maxwell-Jolly*, 188 Cal.App.4th 559, 572 (2010) (quotation and citation omitted). The attorney-client privilege is a matter of substantive

law. *See, e.g., Bronsink v. Allied Property and Cas. Ins.*, 2010 WL 786016 *1 (W.D.Wash. Mar. 4, 2010) (discussing, based on *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), that attorney-client privilege is a matter of substantive law, while attorney work product is procedural).

Under California Evidence Code §917(a), "[i]f 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." As noted by the Ninth Circuit, California's view of the privilege is liberal and is one "that conflicts with the strict view applied under federal common law." *U.S. v. Ruehle*, 583 F.3d 600, 608-09 (9th Cir. 2009) (citation omitted). Under federal common law, the burden of proving that the attorney-client privilege applies rests not with the party contesting the privilege, but with the party asserting it. *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 25 (9th Cir. 2005). Therefore, the burden of proof applicable under federal law was inverted in *Sanderson*, where Plaintiffs had to overcome the presumption that communications with Biggs were subject to the privilege. Accordingly, the Court finds that the issue raised in the instant case differs from that in *Sanderson*, where the applicability of California privilege law was analyzed.

The Court, therefore, finds that the decision in *Sanderson* does not preclude Plaintiffs' motion to compel further deposition testimony of the directors in this case. Because Defendants fail to meet their burden of establishing an essential requirement for the application of the doctrine of collateral estoppel, the Court will not reach the other elements and will analyze the application of the attorney-client privilege to the Coco's meeting under federal privilege law.

III. Attorney-Client Privilege

Defendants assert that the directors' discussions with Biggs at the Coco's meeting are privileged under federal common law. As discussed above, the burden of proving that the attorney-client privilege applies rests not with the party contesting the privilege, but with the party asserting it. *Weil*, 647 F.2d at 25. The Ninth Circuit typically applies an eight part test to determine whether material is protected by the attorney-client privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made

> in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.

In re Grand Jury Investigation, 974 F.2d 1068, 1071 n. 2 (9th Cir.1992) *(quoting United States v. Margolis (In re Fischer)*, 557 F.2d 209, 211 (9th Cir.1977)). "The privilege is limited to 'only those disclosures-necessary to obtain informed legal advice-which might not have been made absent the privilege.'" Id. at 1070 (*quoting Fisher v. United States*, 425 U.S. 391, 403 (1976)). "The attorney-client privilege [also protects] an attorney's advice in response" to a client's request for legal advice. *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir.1997) (citation omitted).

Defendants assert that the directors did seek and obtain legal advice at the Coco's meeting, where they discussed with Biggs issues relating to the hospital, including the potential of replacing TCHD's general counsel. (Doc. No. 57 at 2.)

Sterling:

Director Sterling testified in her deposition that she first spoke with Biggs on November 17, 2008 after Biggs had been identified by another attorney as an attorney who believed in open government. (Doc. No. 93-25, Ex. Y, Sterling Depo. at 258:23-259:11.) Sterling testified that her intent once she identified an attorney who believed in government transparency was to speak with the lawyer with the potential for eventually changing the legal counsel which was then acting as general counsel for TCHD. (*Id.* at 260:13-23.) Sterling further testified that she understood she had an attorney-client relationship with Biggs prior to November 20, 2008 because she had spoken with her. (Doc. No. 93-25, Ex. Y, Sterling Depo. at 265:2-7.) Sterling also testified that she did not have a written fee agreement with Biggs, did not represent to Biggs that she would be paid for her time, and did not believe as of November 20, 2008 when they had the Coco's meeting that Sterling would be discussing confidential information. (*Id.* at 265:8-25.) In her declaration submitted in the *Sanderson* case, Sterling avers that in November 2008 she consulted with attorney Biggs with regard to open governance in TCHD, including but not limited to the potential for Biggs's firm, Burke, Williams and Sorensen, LLP, to be retained in the future by TCHD to serve as general and labor counsel. (Doc. No. 93-23, Ex. W, Sterling D. ¶2.) Sterling also avers that at the time of the consultations she intended and believed that all information and advice transmitted with Biggs on November 20, 2008 was

transmitted in confidence and that these communications were and are confidential communications between attorney and client. (*Id.* ¶3.)

Reno:

Director Reno avers in her declaration submitted in the *Sanderson* case that she met with Biggs at Coco's on November 20, 2008 along with Sterling, Coulter and Anderson. (Doc. No. 93-18, Ex. R, Reno Decl. ¶2.) Reno states that at this meeting, the directors met with Biggs about her and her firm's interest in serving as the Hospital's new General Counsel. (*Id.* ¶3.) According to Reno, they discussed several issues the Hospital was then facing and the types of issues Biggs and her firm may be asked to handle if BWS was retained. (*Id.* ¶3.) Reno also avers that she consulted with Biggs concerning Hospital matters that could impact Reno personally. (*Id.* ¶3.) Reno states that it was her understanding during the Coco's meeting that the discussions the directors had with Biggs were confidential and would not be shared with anyone who was not present other than Biggs's partner, Tim Davis, and possibly, a forensic financial investigator. (*Id.* ¶4.)

Anderson:

Director Anderson testified in her deposition taken in connection with the *Sanderson* case that prior to the Coco's meeting she had never met Biggs, that prior to the meeting she had never heard Biggs's name come up, and that she did not know as of November 20, 2008 whether Biggs was representing her. (Doc. No. 55-2, Ex. 9, Anderson Depo. at 45:25-46:1-6; 46:21-23.) Anderson avers in her declaration submitted in the *Sanderson* case that she met with Biggs at Coco's on November 20, 2008 along with Sterling, Reno and Coulter. (Doc. No. 93-19, Ex. S, Anderson Decl. ¶2.) Anderson states that at this meeting the directors consulted with Biggs about her and her firm's interest in serving as the Hospital's new General Counsel, several issues the Hospital was then facing, and the types of issues that Biggs and her firm may be asked to handle if BWS was retained. (*Id.* ¶3.) Anderson declares that she also consulted with Biggs concerning Hospital matters that could impact her personally. (*Id.* ¶3.) Anderson states that it was her understanding during the Coco's meeting that the discussions the directors had with Biggs were confidential and would not be shared with anyone who was not present other than Biggs's partner, Tim Davis, and possibly, a forensic financial investigator. (*Id.* ¶4.)

Coulter:

Director Coulter testified in his deposition taken in connection with the *Sanderson* case that prior to the Coco's meeting he had no idea what the purpose of the meeting was going to be, that he did not know who Biggs was when he first arrived at Coco's, that he did not have any understanding prior to attending the meeting that there was going to be an attorney present, and that Biggs was not representing him at the Coco's meeting. (Doc. No. 55-3, Ex. 11, Coulter Depo. at 35:15-21; 36:16-23.) In Coulter's declaration submitted in the *Sanderson* case, he states that he met with Biggs at Coco's on November 20, 2008 with Sterling, Reno and Anderson. (Doc. No. 93-20, Ex. T, Coulter Decl. ¶2.) Coulter also states that at the time he had not yet been elected to the Board because it remained unclear whether he received enough votes from the November 6 election, but that he was a Hospital employee and had personal knowledge concerning several issues the Hospital was then facing. (*Id.*) Coulter's election win was certified on December 2, 2008. (Doc. No. 55-3, Ex. 11, Coulter Depo. at 13:12-14.) Similar to Reno and Anderson, Coulter avers that at this meeting the directors consulted with Biggs about her and her firm's interest in serving as the Hospital's new General Counsel, several issues the Hospital was then facing, and the types of issues that Biggs and her firm may be asked to handle if BWS was retained. (Doc. No. 93-20, Ex. T, Coulter Decl.¶3.) Coulter also states that he also consulted with Biggs concerning Hospital matters that could impact him, personally. (*Id.* ¶3.) Coulter states that it was his understanding during the Coco's meeting that the discussions the directors had with Biggs were confidential and would not be shared with anyone who was not present other than Biggs's partner, Tim Davis, and possibly, a forensic financial investigator. (*Id.* ¶4.)

A. Analysis

In reviewing the evidence submitted, the Court finds that Defendants have met their burden of showing that the directors, as representatives of the client TCHD[3], sought legal advice from an attorney, Biggs, concerning her potential representation of TCHD as general counsel and that those communications were made in confidence. *See United States v. Chen*, 99 F.3d 1495, 1502 (9th

---

[3] "For purposes of the attorney-client privilege, an agency is a 'client' under federal law." *Galarza v. United States*, 179 F.R.D. 291, 295 (S.D.Cal.1998) (*citing Maricopa Audubon Society v. United States Forest Service*, 108 F.3d 1089, 1092 (9th Cir.1997)).

Cir.1996) ("The attorney-client privilege applies to communications between corporate employees and counsel, made at the direction of corporate superiors in order to secure legal advice."). Plaintiffs' argument that Defendants have not met their burden because Anderson and Coulter did not know they would be meeting with an attorney and did not know the purpose of the meeting before they arrived does not change the Court's analysis. Although Anderson and Coulter testified that they did not have knowledge prior to the Coco's meeting that Biggs would be there and did not know why they were meeting, they both declared under penalty of perjury that once at the meeting they, along with the other directors, discussed with Biggs TCHD's possible retention of her and her firm as well as issues the Hospital was currently facing and the types of issues Biggs and her firm may be asked to handle. "The [] relationship existing between a lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result" and communications made in the course of the preliminary consultation are privileged. *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 & n.12 (7th Cir.1978); *see also Fisher v. United States*, 425 U.S. 391, 403 (1976). Plaintiffs have not put forth any evidence to establish that the directors' statements that they consulted with Biggs on these matters are inaccurate or untruthful. Therefore, the Court finds Defendants have met their burden that the directors consulted with Biggs concerning legal advice on behalf of TCHD.

However, the Court finds that to the extent Reno, Anderson, and Coulter sought legal advice from Biggs in their individual capacities regarding Hospital matters that could impact them personally, the Defendants have not met their burden of proving all essential elements for them to assert the privilege in their individual capacities. Individual officers or employees seeking to assert a personal claim of attorney-client privilege, must show:

> (1) he approached the attorneys for the purpose of seeking legal advice; (2) when he did so, he made it clear to the attorneys that he was seeking legal advice in his individual rather than in his representative capacity; (3) the attorneys saw fit to represent him personally, knowing a conflict could arise; (4) his conversations with the attorneys were in confidence; and (5) "the substance of [his] conversations with [the attorneys] did not concern matters within [TCHD] or the general affairs of [TCHD].

United States v. Graf, 610 F.3d 1148, 1161 (9th Cir. 2010) (quoting *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir.1986)). Most notably, any communications Reno,

Anderson and Coulter had with Biggs regarding personal matters were not made in confidence, as all three of these directors aver that they met with Biggs and the other directors at the Coco's meeting. Defendants have submitted no evidence that Reno, Anderson, and Coulter separately and individually met with Biggs to discuss their personal matters outside the presence of the other directors. Furthermore, Anderson and Coulter testified that they did not believe at the time of the Coco's meeting that Biggs was representing them, and therefore there is no evidence that they made it clear to Biggs that they were seeking legal advice in their individual capacities. Additionally, the directors' averred that they consulted with Biggs on "Hospital matters that could impact [them], personally." The directors, therefore, have not met their burden of establishing that the substance of those conversations did not concern matters within TCHD or the general affairs of TCHD. Accordingly, the Court finds that the directors may not claim on their own behalf that any communications with Biggs at the Coco's meeting regarding their personal matters are privileged, as the directors have not met their burden of establishing that they consulted with Biggs as individuals rather than in their capacities as representatives of TCHD.

B. Crime-Fraud Exception

Plaintiffs argue that the meeting at Coco's was a criminal act in violation the Brown Act and therefore any advice the directors sought from Biggs at the meeting about how to secretly plan TCHD affairs was a crime and vitiates any possible asserted privileges. (Doc. No. 57 at 12-14.) Under the crime-fraud exception, communications are not privileged if the client seeks the advice of counsel to further a criminal or fraudulent scheme and the communications are sufficiently related to and made in furtherance of that scheme. *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1090 (9th Cir. 2007), abrogated on other grounds by *Mohawk Indus., Inc. v. Carpenter*, --- U.S. ----, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009) (citations omitted). In a civil case, the "preponderance of the evidence" standard is required for outright disclosure of communications pursuant to this exception. *In re Napster*, 478 F.3d at 1094-95.

The Court finds the crime-fraud exception inapplicable to the facts of the Coco's meeting. Even if the Coco's meeting was in violation of the Brown Act's provisions regarding meetings of a majority of board members, Plaintiffs have not shown how the directors' communications with Biggs

were seeking advice to further the alleged criminal scheme to hold such an illegal meeting nor that the communications were sufficiently related to and made in furtherance of that scheme. Plaintiffs have presented no evidence that the directors sought Biggs's advice on how to secretly plan TCHD affairs in violation of the Brown Act, including how to secretly plan placing Plaintiffs on administrative leave. Plaintiffs' only citation in support of the crime-fraud exception is to Anderson's deposition where she testified that her understanding of the purpose of the December 18, 2008 special TCHD board meeting was to talk about changing attorneys and that her understanding came from the November 20th Coco's meeting. (Doc. No. 55-2, Ex. 9, Anderson Depo. at 63:15-64:5.) Contrary to Plaintiffs' inference in the joint motion, Anderson testified that when she received a phone call advising her of the December 18 meeting, she had no understanding that there was going to be any discussion concerning placing members of the administration on leave at the December 18 meeting. (*Id.* at 64:5-10; c.f. Doc. No. 57 at 14.) Without deciding whether a Brown Act violation occurred[4], the Court finds that Plaintiffs have not met their burden of showing by a preponderance of the evidence that the directors sought legal advice in furtherance of a criminal scheme. Therefore, the Court finds the Coco's discussions with Biggs protected by the attorney-client privilege.

Conclusion

For the reasons set forth above, the Court denies Plaintiffs' request for the deposition testimony of Kathleen Sterling, Rosemarie Reno, George Coulter and Charlene Anderson concerning discussions that occurred at a November 20, 2008 meeting with Julie Biggs, Esq., at a Coco's restaurant in Vista, CA.

IT IS SO ORDERED.

DATED: July 18, 2011

BERNARD G. SKOMAL
United States Magistrate Judge

[4] Defendants argue that Plaintiffs are precluded from arguing any violation of the Brown Act based upon the settlement agreement in *Sanderson*. Because the Court need not reach whether a Brown Act violation actually occurred, the Court does not address Defendants' argument concerning the effect of a prior state court action settlement agreement.

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALLEN COLEMAN, SUELLYN ELLERBE, DAN GROSZKRUGER, TERRY HOWELL, ONDREA LABELLA, DOREEN SANDERSON, and ROBERT WARDWELL,

Plaintiffs,

vs.

KATHLEEN STERLING, ROSEMARIE RENO, CHARLENE ANDERSON, GEORGE COULTER, LARRY ANDERSON, TRI-CITY HEALTHCARE DISTRICT, and DOES 1 through 100, inclusive,

Defendants.

CASE 09-CV-1594 W (BGS)

ORDER SUSTAINING-IN-PART AND OVERRULING-IN-PART PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE'S JULY 18, 2011 DISCOVERY ORDER [DOC. 143]

Pending before the Court are Plaintiffs' objections to Magistrate Judge Bernard G. Skomal's July 18, 2011 discovery order. Judge Skomal denied Plaintiffs' requests for the deposition testimony of Defendants Kathleen Sterling,[1] Rosemary Reno, George Coulter and Charlene Anderson concerning discussions that occurred at a November 20, 2008 meeting with Julie Biggs, Esq., at Coco's Restaurant in Vista, California.

The Court decides the matter on the papers submitted and without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons discussed below, the Court **SUSTAINS-IN-PART** and **OVERRULES-IN-PART** Plaintiffs' objections. (Doc. 143.)

[1] Defendant Kathleen Sterling was dismissed from this case with prejudice. (Doc. 121.)

I. BACKGROUND

On November 20, 2008, Defendants Sterling, Reno, Coulter, and Anderson (collectively "Defendants") met with an attorney, Julie Biggs, Esq. ("Biggs"), at Coco's Restaurant in Vista, California ("the Coco's Meeting"). (*Mag.'s Order* 2 [Doc. 137].)[2] At the time Sterling and Reno were veteran members of the Board of Directors of Defendant Tri-City Healthcare District ("TCHD"), a public agency subject to the open meeting requirements of California's Brown Act, California Government Code §§ 54950, *et seq.* (*Id.*; *Pls.' Obj.* 6-7.) Coulter and Anderson were newly elected to the TCHD Board on November 4, 2008, to be sworn in on December 5, 2008. (*Mag.'s Order* 2.) However, on November 20th it was unclear whether Coulter received sufficient votes in the November 4th election to be seated on the TCHD Board. (*Id.* at 9.) Coulter's victory was ultimately certified on December 2, 2008. (*Pls.' Obj.* 17.) Andersons' election, on the other hand, was certified prior to the Coco's Meeting. (*Id.*)

On December 18, 2008, following the swearing in of Coulter and Anderson, Defendants attended a special meeting of the TCHD Board. (*Mag.'s Order* 2.) The next day, TCHD placed Plaintiffs, former healthcare executives at TCHD, on administrative leave. (*Id.*) On April 23, 2009, TCHD terminated Plaintiffs' leave and employment, giving rise to Plaintiffs' present causes of action for, among other claims, wrongful termination, age discrimination, defamation per se, and denial of a liberty interest under 42 U.S.C. § 1983. (*Id.*) Plaintiffs allege that during the Coco's Meeting Defendants developed a plan to wrongfully terminate Plaintiffs, which was effectuated after Coulter and Anderson joined the TCHD Board in December. (*Id.*) Consequently, Plaintiffs argue that the substance of Defendants' communications with Biggs at the Coco's Meeting is highly relevant and discoverable in the present litigation. (*Id.*)

---

[2] All facts appearing in this section and cited to Judge Skomal's July 18, 2011 discovery order are undisputed. (*See Pls.' Obj.* [Doc. 143]; *Defs.' Opp'n* [Doc. 146]; *Pls.' Reply* [Doc. 147].)

Defendants oppose Plaintiffs' discovery requests on the basis of the attorney-client privilege. Defendants contend that they met with Biggs at Coco's to discuss legal issues related to TCHD, including the prospect of replacing TCHD's general and labor counsel with Biggs' firm. (*Mag.'s Order* 2, 7.) Moreover, Defendants assert that each director (or soon-to-be director) believed the content of their conversation with Biggs to be confidential, and that no evidence exists to suggest that the substance of the communications with Biggs was revealed to any non-participant of the Coco's Meeting. (*Id.* at 2.) Accordingly, Defendants argue, the deposition testimony sought by Plaintiffs is protected by the attorney-client privilege. (*Id.*)

On October 29, 2010, the parties filed a joint discovery motion regarding Plaintiffs' request for deposition testimony concerning discussions at the Coco's Meeting. (*See J. Mot.* [Doc. 57].)[3] In opposition to Defendants' claims of attorney-client privilege, Plaintiffs' argued that no privilege could attach because Defendants violated criminal provisions of California's Brown Act by meeting at Coco's as a majority of directors without public notice, thus placing the communications with Biggs within the federal crime-fraud exception. (*Id.* at 3-5.) In response, Defendants denied that their conversations with Biggs were sought "in furtherance of any intended or present illegality; rather, [Defendants] consulted with her regarding hospital issues and retention of services." (*Id.* at 7.)[4]

Judge Skomal issued his discovery order on July 18, 2011, denying Plaintiffs' request for Defendants' deposition testimony regarding communications at the Coco's Meeting. (*Mag.'s Order* 12). Judge Skomal found that Defendants, as representative

---

[3] Because the October 29, 2010 joint discovery motion is not consecutively paginated, the Court cites to pages in the joint motion in the order they appear in the CM/ECF electronic docketing system.

[4] Defendants also argued for attorney-client privilege by collateral estoppel based on a holding in a related California state case, Sanderson v. Tri-City Healthcare District. (*J. Mot.*, 3-7.) Judge Skomal rejected Defendants' collateral estoppel argument in his discovery order. (*Mag.'s Order*, 4-6.) Because neither party objected to Judge Skomal's decision on that ground, this Court need not reconsider the merits of Defendants' argument. See Fed. R. Civ. P. 72(a) ("A party may not assign as error a defect in the order not timely objected to.").

agents of TCHD, "sought legal advice from Biggs regarding her potential representation of TCHD as general counsel and that those communications were made in confidence." (*Id.* at 9.) Consequently, Defendants' communications with Biggs regarding TCHD at the Coco's Meeting were protected by the attorney-client privilege under federal law. (*Id.*) At the same time, any advice sought by the individual Defendants on their own behalf was not privileged, because the existence of additional Defendants at the Coco's Meeting destroyed any expectation of personal confidentiality. (*Id.* at 10-11.)

Judge Skomal also concluded that Plaintiffs did not meet their burden in establishing the crime-fraud exception to attorney-client privilege. (*Id.* at 11-12.) According to Judge Skomal, even if Defendants violated California's Brown Act by meeting as a majority of directors of a public agency without public notice, Plaintiffs did not demonstrate how Biggs' advice was sought "in furtherance of" that violation, i.e. "how to secretly plan TCHD affairs in violation of the Brown Act, including how to secretly plan placing Plaintiffs on administrative leave." (*Id.*) Absent a showing by the preponderance of evidence that Defendants sought advice "in furtherance of" a Brown Act violation, Defendants' communications with Biggs continue to merit the protection of the attorney-client privilege. (*Id.* at 12.)

On August 4, 2011, Plaintiffs filed their objections to Judge Skomal's discovery order. (*See Pls.' Obj.*) Defendants opposed Plaintiffs' objections on September 2, 2011. (*See Defs.' Opp'n.*) On September 12, 2011, Plaintiffs replied. (*Pls.' Reply.*) On October 5, 2011, the Court sought additional briefing from the parties regarding application of the federal crime-fraud exception to the Coco's Meeting. (Doc. 155.) Both parties timely responded. (*See Pls.' Resp. to* OSC [Doc. 160]; *Defs.' Resp. to* OSC [Doc. 163].)

II. STANDARD OF REVIEW

A party may object to a non-dispositive pretrial order of a U.S. Magistrate Judge within fourteen days after service of the order. See Fed. R. Civ. P. 72(a). The magistrate judge's order will be upheld unless it is "clearly erroneous or contrary to law." Id.; 28 U.S.C. § 636(b)(1)(A). The "clearly erroneous" standard applies to the magistrate judge's

factual determinations and discretionary decisions, including an order imposing discovery sanctions. Maisonville v. F2 America, Inc., 902 F.2d 746, 748 (9th Cir. 1990) (holding that factual determinations made in connection with non-dispositive sanction award are reviewed for clear error). "[R]eview under the clearly erroneous standard is significantly deferential, requiring a definite and firm conviction that a mistake has been committed." Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 623 (1993) (internal quotation marks omitted). The "contrary to law" standard, on the other hand, permits independent review of purely legal determinations by a magistrate judge. Haines v. Liggett Group, Inc., 975 F.2d 81, 91 (3d Cir. 1992) ("[T]he phrase 'contrary to law' indicates plenary review as to matters of law."); Gandee v. Glaser, 785 F.Supp. 684, 686 (S.D. Ohio 1992) ("[The district court] must exercise its independent judgment with respect to a magistrate judge's legal conclusions."), *aff'd*, 19 F.3d 1432 (6th Cir. 1994) (unpublished table decision).

III. DISCUSSION

Plaintiffs object to Judge Skomal's discovery order on three grounds. First, Plaintiffs argue that Judge Skomal erred as a matter of law by not enforcing the restrictions of the attorney-client privilege provision of California's Brown Act on the Coco's Meeting. (*Pls.' Obj.* 2.) Second, Plaintiffs argue that Judge Skomal erred as a matter of law by not applying the federal crime-fraud exception to Defendants' claim of attorney-client privilege. (*Id.* at 3.) And third, Plaintiffs argue that Judge Skomal's factual findings regarding the content of Defendants' communications at the Coco's Meeting were clearly erroneous. (*Id.* at 9.)

A. The Brown Act's Attorney-Client Privilege Provision

Plaintiffs contend that Judge Skomal erred by failing to apply the attorney-client provision of the Brown Act to the Coco's Meeting. (*Pls.' Obj.* 11-18.) According to Plaintiffs, the Coco's Meeting constituted a meeting of the TCHD Board for purposes of the Brown Act, and Defendants' failure to provide public notice of the meeting voids any attorney-client privilege asserted by Defendants. (*Id.* at 16.)

The parties do not dispute that TCHD is a local public agency subject to the open meeting laws of California's Brown Act, and that the TCHD Board is the legislative body of TCHD. With limited exceptions, the Brown Act requires that "[a]ll meetings of the legislative body of a local agency . . . be open and public" and subject to certain public notice requirements. See, e.g., Cal. Gov. Code §§ 54953, 54954.2. The Brown Act defines a "meeting" as "any congregation of a majority of the members of a legislative body at the same time and location . . . to hear, discuss, deliberate, or take any action on any item that is within the subject matter jurisdiction of the legislative body." Cal. Gov. Code § 54952.2. Membership in a legislative body includes not only seated members, but also "any person elected to serve as a member of a legislative body who has not yet assumed the duties of office." Cal. Gov. Code § 54952.1.

The Brown Act provides an exception to its general public meeting rule for closed communications with an attorney regarding pending litigation. Cal. Gov. Code § 54956.9. Under § 54956.9, "nothing in [the Brown Act] shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation." Id. But, a closed session conducted pursuant to § 54956.9 must still be accompanied by public notice of the meeting and identification of the Brown Act provision authorizing non-public communications of the agency with its attorneys. Id. Importantly, in order for a public agency's members to later claim the attorney-client privilege over communications related to the agency's affairs, the attorney-client communications must have occurred in accordance with § 54956.9 of the Brown Act. Id. ("[A]ll expressions of the attorney-client privilege other than those provided in this section are hereby abrogated.").

Plaintiffs contend that the presence of two standing members (Sterling and Reno) and two elected members (Coulter and Anderson) of the seven-member TCHD Board constituted a majority meeting of the TCHD Board, and therefore subjected the Coco's Meeting to the restrictions of the Brown Act. (*Pls.' Obj.* 2.) Plaintiffs further contend that Defendants provided no notice of the Coco's Meeting to the public in accordance

with § 54956.9. (*Id.*) Thus, Plaintiffs argue, any attorney-client privilege asserted over communications relating to TCHD affairs is abrogated by the same section of the Brown Act. (*Id.*) The Court disagrees.

As a matter of law, the Brown Act is inapplicable to questions of federal privilege. See North Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d 1118, 1118 (N.D. Cal. 2003) ("The Brown Act is not a privilege recognized under federal law."); Kaufman v. Board of Trustees, 168 F.R.D. 278, 280 (C.D. Cal. 1996). Judge Skomal recognized, and Plaintiffs do not dispute, that the *federal* law of privilege applies to the instant case. (*See Magistrate's Order*, 4:12-16; *Pls.' Objections*, 12:13-24); Agster v. Maricopa County, 422 F.3d 836, 839 (9th Cir. 2005) ("Where there are federal question claims and pendent state law claims present, the federal law of privilege applies."). Thus, "federal law must be used to determine the existence and scope of any claimed privilege." Kaufman v. Board of Trustees, 168 F.R.D. 278, 280 (C.D. Cal. 1996) (citing Kerr v. District Court, 511 F.2d 192, 197 (9th Cir. 1975)). As fellow district courts have noted, privileges created by the Brown Act are not recognized under federal law. See North Pacifica, 274 F. Supp. 2d at 1118 (N.D. Cal. 2003); Kaufman, 168 F.R.D. at 280. And if the Brown Act cannot create privilege in federal law, then the Court finds no reason (nor do Plaintiffs provide one) to hold that the Brown Act can destroy, or "abrogate," a federal privilege as historical as that between an attorney and his client. See Cal. Gov. Code § 54956.9; see also United States v. Zolin, 491 U.S. 554, 562 (1989) ("We have recognized the attorney-client privilege under federal law, as the 'oldest of the privileges for confidential communications known to the common law.'") (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

Thus, § 54956.9 of the Brown Act is inapplicable and cannot serve to destroy the federal attorney-client privilege in cases raising federal question claims. By applying federal attorney-client privilege law without regard to § 54956.9 of the Brown Act, Judge

Skomal did not err as a matter of law.[5] Plaintiffs' objection is therefore **OVERRULED**.

B. The Federal Crime-Fraud Exception

Plaintiffs also argue that Judge Skomal erred as a matter of law by holding the federal crime-fraud exception inapplicable to Defendants' communications with Biggs at the Coco's Meeting. (*Pls.' Obj.* 3.) Judge Skomal concluded that the crime-fraud exception does not apply, because "Plaintiffs have presented no evidence that [Defendants] sought Biggs' advice on how to secretly plan TCHD affairs in violation of the Brown Act, including how to secretly plan placing Plaintiffs on administrative leave." (*Mag. Order* 12.) Thus, Judge Skomal reasoned, regardless of whether the Coco's Meeting actually violated the Brown Act, Defendants' communications with Biggs were not "in furtherance of" the underlying illegality. (*Id.* at 11-12.)

The attorney-client privilege exists to promote "full and frank communication between attorneys and their clients" and to protect client disclosure of *past* wrongdoings. Zolin, 491 U.S. at 562 (quoting Upjohn Co. v. United States, 449 U.S. 383 389 (1981)). The privilege ceases to apply, however, when the client abuses the attorney-client relationship by consulting an attorney for legal assistance that will "serve" the client in the commission of a *present* or *future* illegality. Clark v. United States, 289 U.S. 1, 15 (1933); In re Napster, Inc. Copyright Litig., 479 F.3d 1078, 1090 (9th Cir. 2007), *abrogated on other grounds by* Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599 (2009). To invoke the crime-fraud exception to the attorney client privilege, the party seeking disclosure must satisfy a two-prong test. Id. First, the party must show that "the client was engaged in or

---

[5] Plaintiffs' only objection to Judge Skomal's actual application of the federal attorney-client privilege relates to the confidentiality of Defendants' communications with Biggs. (*Pls.' Obj.* 2.) But this objection is predicated on a finding that Anderson and Coulter were not "elected" members of the TCHD Board at the time of the Coco's meeting. (*Id.*) According to Plaintiffs, Anderson's and Coulter's unelected status made them "stranger[s]" to the Coco's meeting, and therefore the remaining Defendants could have no expectation of confidentiality when discussing TCHD matters with Biggs. (*Id.*) But, Coulter and Anderson's "elected" status is no longer at issue before this Court. Both parties now agree that Coulter and Anderson were "elected" to the TCHD Board at the time of the Coco's Meeting. (*Pls.' Resp. to* OSC 1-2; *Defs.' Resp. to* OSC 2.) Thus, Plaintiffs objection has no basis in fact.

planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme." Id. (quoting In re Grand Jury Proceedings, 87 F.3d 377, 381 (9th Cir. 1996)); United States v. Chen, 99 F.3d 1495, 1503 (9th Cir. 1996). Second, the party must show that the attorney-client communications in question were "sufficiently related to" and made "in furtherance of" the present or intended illegality. Napster, 479 F.3d at 1090 (quoting In re Grand Jury, 97 F.3d at 382-83). In civil cases, the party seeking outright disclosure of attorney-client communications must demonstrate both prongs of the crime-fraud test by a preponderance of the evidence. Id. at 1094-95.

1. Present or Future Criminal Scheme

Plaintiffs contend that Defendants sought Biggs' legal assistance at the Coco's Meeting during an ongoing criminal violation of the Brown Act. (*Pls.' Obj.* 3.) According to Plaintiffs, the underlying criminal violation was the Coco's Meeting itself. (*Id.*) The Court agrees.[6]

---

[6] A separate issue raised by Defendants in the joint discovery motion is the preclusive effect of the parties' prior state court settlement on Plaintiffs' crime-fraud argument. (*See Jt. Mot.* 5.) In an earlier state action, Plaintiffs sought a Writ of Mandate against Defendants on the basis that Defendants violated the Brown Act in connection with the special meeting of the TCHD Board on December 18, 2008. (*Defs.' Resp. to OSC Ex. 1.*) The parties entered into a settlement agreement that purports to limit Plaintiffs' right to raise claims under the Brown Act in the instant federal action. (*See id.*) Defendants contend that the state court settlement prohibits Plaintiffs from alleging a violation of the Brown Act in this federal action, even though the Brown Act violation is only raised as a predicate to the crime-fraud exception. (*Jt. Mot.* 5; *Defs.' Resp. to OSC* 7-10.)

There are two ways to consider the effect the state court settlement. First is as a contractual limitation: Does the settlement agreement restrain Plaintiffs' position in this action as a matter of contract? (*See Pls.' Resp. to OSC* 8-10.) The second is under the doctrine of modified *res judicata*: Does the settlement agreement preclude litigation of the Brown Act issue in this action as a matter of law? (*See Defs.' Resp. to OSC* 7-10.) The Court finds that neither analysis bars Plaintiffs' crime-fraud argument, because the language of the settlement agreement clearly expresses the parties' intent to enforce the terms of the agreement outside of this federal action. (*See Defs.' Resp. to OSC Ex. 1.*) The settlement agreement states:

> "Neither this Agreement nor any of the terms of this Agreement shall be admissible into evidence in the *Coleman* Action [09-cv-1594-W-POR]. The Parties

The Brown Act requires generally that "[a]ll meetings of the legislative body of a local agency . . . be open and public," and subject to certain public notice requirements. See, e.g., Cal. Gov. Code §§ 54953, 54954.2. The Brown Act's criminal provision, § 54959, provides:

> Each member of a legislative body who attends a *meeting* of that legislative body where *action is taken* in violation of any provision of this chapter, and where the member *intends to deprive the public of information* to which the member *knows or has reason to know the public is entitled* under this chapter, is guilty of a misdemeanor.

Cal. Gov. Code § 54959 (emphasis added). Thus, a member commits a criminal violation of Brown Act if (1) the member attends a "meeting" of the legislative body, (2) the legislative body takes "action" at that meeting in violation of the Brown Act, and (3) in attending the meeting, the member intended to deprive the public of information to which the member knew or had reason to know the public was entitled. Id.; see also Sacramento Newspaper Guild v. Sacramento Cnty. Bd. of Supervisors, 263 Cal. App. 2d 41, 48 (1968) (explaining that the Brown Act's criminal provision applies only to meetings "*where action is taken*") (emphasis added).

> acknowledge and agree that this Agreement and the terms of this Agreement are not relevant to the *Coleman* action. [Defendants] shall not attempt to use this Agreement or the settlement of this Action as a defense in the *Coleman* Action."

(*Id.*) If the parties did not intend the settlement agreement to be admitted into evidence in this action, then they could not intend the agreement to have any contractual effect in this action.

Moreover, the Court declines to apply the doctrine of modified *res judicata* to preclude Plaintiffs' crime-fraud argument. As the Eleventh Circuit noted, and Defendants recognize, "[t]he express intent of the parties is . . . the determining factor in whether a consent-based judgment is given collateral estoppel effect." Norfolk S. Corp. v. Chevron, U.S.A., Inc., 371 F.3d 1285, 1288 (11th Cir. 2004). Here, the express intent of the parties, as demonstrated by the language of the settlement agreement above, was to ensure that the earlier state settlement had no direct application in this federal action. (*See Defs.' Resp. to* OSC *Ex. 1.*) Thus, Plaintiffs are not precluded by the settlement agreement from asserting an underlying Brown Act violation as the basis for the federal crime-fraud exception.

a. Attendance at a Meeting

First, Plaintiffs have shown by a preponderance of evidence that the Coco's Meeting constituted a "meeting" of the TCHD Board under the Brown Act. See Cal. Gov. Code § 54952.2. The Brown Act defines a "meeting" as "any congregation of a majority of the members of a legislative body at the same time and location . . . to hear, discuss, deliberate, or take any action on any item that is within the subject matter jurisdiction of the legislative body." Cal. Gov. Code § 54952.2. It is undisputed that Defendants met at the same place and time to discuss matters within the subject matter jurisdiction of the TCHD Board: replacing the existing general and labor counsel with Biggs' law firm. (*See Mag. Order* 7-9.)

Moreover, it is also undisputed that on November 20, 2008, Sterling and Reno were veteran members of the TCHD Board, and Anderson and Coulter were "elected" members of the TCHD Board for purposes of the Brown Act. (*Mag. Order* 2; *Pls.' Resp. to* OSC 1; *Defs.' Resp. to* OSC 2.) The Brown Act treats "elected" persons, even if they have not yet assumed board duties, as members of the legislative body. Cal. Gov. Code § 54952.1. Thus, for the purposes of the Brown Act, a four-member majority of the seven-member TCHD Board attended the Coco's Meeting.

Although they concede that Anderson and Coulter were "elected" to the TCHD Board during the Coco's Meeting, Defendants dispute that Sterling, Reno, Anderson, and Coulter constituted a majority of the TCHD Board at the time of the Coco's Meeting. (*Defs.' Resp. to* OSC 2; *Defs.' Opp'n* 3-5.) According to Defendants, because the Brown Act treats "elected" persons the same as seated members, and Anderson and Coulter had not yet replaced the TCHD Board members voted out, the actual size of the TCHD Board after the election of Anderson and Coulter was nine, not seven. (*Defs.' Opp'n* 3-5.) Thus, without a majority present, the Coco's Meeting was not a "meeting" subject to Brown Act requirements. (*Id.* at 5.) But this reasoning, without any support in the statutory language, contradicts the purpose of the Brown Act.

The Brown Act is designed to ensure that the legislative bodies of local agencies

deliberate and act in an open, public manner. See Cal. Gov. Code § 54950. As the California legislature noted, "The people insist on remaining informed so that they may retain control over the instruments they have created." Id. To this end, the Brown Act demands that any meeting of an agency's legislative body where a majority makes a collective decision, or commits to make a future collective decision, be open to the public and subject to public notice. Cal. Gov. Code §§ 54952.2, 54952.6. By treating "elected" persons as members of the legislative body, the Brown Act also prevents *future* majorities from gathering privately to make collective commitments affecting the future of the local agency without public input. See Cal. Gov. Code §§ 54952.1, 54952.6; see also 216 Sutter Bay Associates v. County of Sutter, 58 Cal. App. 4th 860 (1997). Thus, the Brown Act recognizes that collective commitments to future decisions made secretly are just as harmful as actual votes taken secretly. See Cal. Gov. Code § 54952.6.

With this purpose in mind, the Court cannot accept Defendants' argument. According to Defendants' rationale, future majorities can secretly meet and commit to future actions without public notice, thus eliminating any utility in treating elected persons the same as seated members. See Cal. Gov. Code 54952.2. Additionally, as Plaintiffs recognize, Defendants' reasoning would permit a *present* majority of four seated members of the TCHD Board to meet and make decisions without public notice, just because newly elected persons have not yet replaced lame-duck members. (*Pls.' Reply* 5.) The legislature clearly could not have intended a result so inconsistent with the Brown Act's goal. See Cal. Gov. Code § 54950. Defendants constituted a majority of the TCHD Board at the time of the Coco's Meeting, and consequently the Coco's Meeting was a "meeting" under the Brown Act.

b. Action Taken in Violation of the Brown Act

Second, Plaintiffs have also shown by a preponderance of the evidence that Defendants took action in violation of the Brown Act at the Coco's Meeting. See Cal. Gov. Code § 54959. The Brown Act defines "action taken" as "a collective decision[,] . . . a collective commitment or promise[,] . . . or an actual vote by the majority of the

members of a legislative body." Cal. Gov. Code § 54952.6. Here, Plaintiffs have presented evidence that Defendants collectively committed to replacing TCHD's existing general and labor counsel with Biggs' law firm during the Coco's Meeting. (*See Pls.' Obj.* 8-9.) Furthermore, Plaintiffs allege, and Defendants do not dispute, that Defendants provided no public notice of the Coco's Meeting in violation of the Brown Act. (*Pls.' Obj.* 2); see Cal. Gov. Code § 54954.2.

According to Reno's, Anderson's, and Coulter's sworn declarations, Defendants met at Coco's with Biggs to discuss "her and her firm's interest in serving as the Hospital's new General Counsel. [Defendants and Biggs] discussed several issues that the Hospital was then facing and the types of issues that Ms. Biggs and her firm may be asked to handle if [Biggs' firm] was retained." (*Pls.' Obj.* 8; Doc. 93-18 at 2; Doc. 93-19 at 2; Doc. 93-20 at 2.) According to Plaintiffs, the next time Defendants collectively discussed retention of Biggs' firm was at a special meeting of the TCHD Board on December 18, 2008. (*Pls.' Obj.* 7-8.) Also present at this special meeting were Biggs and Tim Davis, Esq., a fellow attorney from Biggs' firm. (Doc. 93-25 at 36.) Not coincidentally, Biggs came prepared to this meeting with notices of administrative leave for Plaintiffs—a task she was instructed to perform beforehand by the TCHD Board. (Doc. 55-3 at 39-41.)

Five minutes after commencing the special meeting, at which time only Defendants were present as TCHD Board members, Defendants adjourned to a closed session to perform a "[p]erformance evaluation and contract review" of TCHD's general and labor counsel. (*Id.*) Within the next hour and fifteen minutes, Defendants voted unanimously to terminate the existing general and labor counsel and to replace them with Biggs' firm. (*Pls.' Obj.* 8; Doc. 93-25 at 36-38.) After announcing the Board's action to the special meeting audience, Defendants almost immediately adjourned to another closed session to discuss litigation matters with TCHD's new legal counsel. (Doc. 93-25 at 38.) When asked about these events in a subsequent deposition, Anderson testified that she understood, based on Defendants' discussions at the Coco's Meeting, that Defendants would be discussing removal of TCHD's general and labor counsel at the special meeting. (*Pls.' Obj.* 9; Doc. 55-2 at 100-01.)

Considering this evidence as a whole, Plaintiffs have made a strong showing that Defendants collectively committed to replace TCHD's general and labor counsel with Biggs' firm at the Coco's Meeting. Anderson's deposition testimony demonstrates that Defendants at least discussed these actions with Biggs at the Coco's Meeting. (Doc. 55-2 at 100-01.) Additionally, Biggs' attendance at the special meeting, combined with the rapid succession of events resulting in TCHD's hiring of Biggs' firm as general and labor counsel, indicates that Defendants' actions on December 18, 2008, were previously deliberated and committed to. (*Pls.' Obj.* 8; Doc. 93-25 at 36-38.) Finally, Biggs' preparation of administrative leave notices for Plaintiffs before the special meeting shows a prior commitment by the TCHD Board to engage Biggs' services as TCHD counsel, which, according to Plaintiffs, could not have occurred at any other time than the Coco's Meeting. (*Pls.' Obj.* 10; Doc. 55-3 at 39-41.) Because Defendants argue no facts or evidence to the contrary—i.e., that no collective commitment was made at the Coco's Meeting, or that a collective commitment was made some other time—nor do they contend that public notice was provided for the Coco's Meeting, the Court finds that Plaintiffs have demonstrated by a preponderance of the evidence that Defendants took action at the Coco's Meeting in violation of the Brown Act.[7]

c. Intent to Deprive the Public of Information to Which It is Entitled

Third, Plaintiffs have demonstrated by a preponderance of evidence that Defendants intended to deprive the public of information to which Defendants knew or had reason to know the public was entitled to. The Brown Act does not define exactly

[7] The Court recognizes that some legislative action regarding retention of employees and independent contractors is appropriate in private "closed" sessions. See Cal. Gov. Code § 54957(b). However, even if Defendants argued that the Coco's Meeting was a closed session, the action taken in this case would still be in violation of the Brown Act. The Brown Act requires that closed sessions of this type occur "during a regular or special meeting." Id. Moreover, any action taken during a closed session must be reported in the corresponding general or special meeting. Cal. Gov. Code § 54957.1. Neither of these requirements is satisfied here.

what information the public is entitled to; however, it is clear from the purpose of the Act and its provisions that, absent some limited statutory exception, the public is at least entitled to information discussed by a local agency's legislative body during a majority meeting. See Cal. Gov. Code §§ 54950, 54953. Here, Defendants met as a majority of the TCHD Board, discussed matters within the subject matter of the TCHD Board, and appear to have come to a collective commitment to replace the existing general and labor counsel with Biggs' firm. Because the public was entitled to notice of the Coco's Meeting, it was also entitled to the information communicated therein. See Cal. Gov. Code §§ 54953; 54954.2.

Public entitlement does not end the inquiry, however. In order to violate the criminal provisions of the Brown Act, Defendants must have known or had reason to know that the public was entitled to this information. Cal. Gov. Code § 54959. Under California law, this element requires only that Defendants were aware of the facts that would give rise to the public's entitlement to this information. People v. Calban, 65 Cal. App. 3d 578, 584 (1976). In response to this Court's order to show cause, Defendants conceded that they knew or had reason to know that the public was entitled to information discussed at the Coco's Meeting. (*Defs.' Resp. to* OSC 3.)

Defendants must also have had the specific intent to the deprive the public of this information. Cal. Gov. Code § 54959. Specific intent is "rarely susceptible of direct proof," and therefore "must usually be inferred from all the facts and circumstances disclosed by the evidence." People v. Falck, 52 Cal. App. 4th 287, 299 (1997). Here, Plaintiffs have submitted adequate circumstantial evidence demonstrating Defendants' intent to conceal the information discussed in the Coco's Meeting from the public. (*See Pls.' Obj.* 21-22.) First, and most significantly, Defendants did not provide public notice of the Coco's Meeting in accordance with the Brown Act. (*See Defs.' Resp. to* OSC 3.) Second, deposition testimony of Coulter, Sterling, and Reno shows that Defendants believed they could conduct the Coco's Meeting in secret because Coulter's election had not been certified yet. (*Defs.' Obj.* 21-22.) It is irrelevant that Defendants did not intend to violate the Brown Act; it is only important that Defendants intended to conduct the

Coco's Meeting in secret, and thereby deprive the public of information to which it was entitled. See Cal. Gov. Code § 54959.

Although they do not dispute the evidence proffered by Plaintiffs on this point, Defendants contend generally that Plaintiffs have nevertheless failed to satisfy their burden of demonstrating specific intent by a preponderance of the evidence. (*Defs.' Resp. to* OSC 4.) More specifically, Defendants contend that Plaintiffs offer no proof of specific intent by any Defendant. (*Id.* at 5.) As the preceding paragraph makes clear, this argument is inaccurate. Moreover, because Defendants have proffered no evidence to dispute Plaintiffs' showing of specific intent, the Plaintiffs have carried their burden of demonstrating by a preponderance of the evidence that Defendants intended to deprive the public of information to which it was entitled.

Thus, Plaintiffs have met their burden of showing that Defendants were engaged in a present criminal act or scheme when they sought the legal assistance of Biggs.

2. Related to and in Furtherance of the Coco's Meeting

Finally, Plaintiffs have shown by a preponderance of evidence that Defendants' communications with Biggs at the Coco's Meeting were sufficiently related to and sought in furtherance of the underlying crime. See Napster, 479 F.3d at 1090. There is no question that Defendants' communications with Biggs are sufficiently related to Defendants' criminal violation of the Brown Act. Relatedness, as defined by Webster's, requires only some established connection between two objects. Webster's Third New Int'l Dictionary 1916 (1993). Here, Defendants' communications with Biggs are connected to the Coco's Meeting because they occurred during, and were instrumental to, the meeting itself. See supra Section III(B).

Moreover, Plaintiffs have demonstrated that Defendants sought Biggs' legal assistance in furtherance of the Coco's Meeting. The "in furtherance of" requirement of the crime-fraud exception is the major bone of contention in this discovery dispute. In his discovery order Judge Skomal concluded that, whether or not the Coco's Meeting constituted a criminal violation of the Brown Act, Defendants communications with

Biggs were not in furtherance of any crime because there is no evidence that Defendants sought advice on "how" to commit a violation of the Brown Act. (*Mag. Order* 11-12.)

But, the crime-fraud exception does not require the moving party to show that the client sought advice from his attorney on "how" to commit a crime or fraud. The communications need only promote or facilitate the illicit act in some way. See Napster, 479 F.3d at 1090; In re Grand Jury Subpoena Duces Tecum, 798 F.2d 32, 34 (2d Cir. 1986) ("The exception applies only when . . . the communications with counsel were intended *in some way* to facilitate or to conceal the criminal activity.") (emphasis added). Various courts have defined the "in furtherance of" connection differently; however, neither the Supreme Court nor the Ninth Circuit has limited the exception to situations where an attorney gives advice on how to commit a crime.[8]

In Clark v. United States, the Supreme Court described the crime-fraud exception as follows: "A client who consults an attorney for advice that will *serve* him in the commission of a crime or fraud will have no help from the law." 289 U.S. 1, 15 (1993) (emphasis added). More recently, the Supreme Court reiterated that the purpose of the crime-fraud exception is to "assure that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice *for* the commission of a crime." Zolin, 491 U.S. at 563 (quoting the seminal O'Rourke v. Darbishire, [1920] A.C. 581, 604 (P.C.)) (internal citations and quotations omitted) (emphasis added). And in the Ninth Circuit, the "in furtherance of" requirement is met more generally when "a client consults an attorney for legal assistance *to* carry out a contemplated [or present] crime." In re Grand Jury, 867 F.2d at 541 (emphasis added). Thus, while an attorney's advice on how to commit a crime would certainly establish the "in furtherance of" requirement, the crime-fraud exception also embraces a broader range of legal assistance that can be used "in some way" by the client to further his crime. In re Grand Jury Subpoena Duces Tecum, 798 F.2d at 34.

---

[8] But see Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir. 1992) ("The communication condemned and unprotected by the attorney-client privilege is advice that is illicit because it *gives direction* for the commission of future fraud or crime.") (emphasis added).

In this case, Defendant's communications with Biggs were sought in furtherance of the Brown Act violation, because they were a necessary element of the criminal activity. The criminal act of the Brown Act's misdemeanor provision is attendance at a "meeting." Cal Gov. Code § 54959. But, a meeting is only a "meeting" under the Brown Act if the legislative body engaged in discussion, deliberation, or action. Cal. Gov. Code § 54952.2(a). Absent some discussion at the Coco's Meeting, there could be no deliberation or action taken, and a Brown Act violation would not have occurred. Thus, Defendants did not only seek legal assistance "for" the commission of a crime, the very act of seeking and obtaining legal assistance was essential to the crime. See Zolin, 491 U.S. at 563. Considering this *sine qua non* relationship, the Court concludes that Defendants' discussions with Biggs necessarily furthered the Brown Act violation. See Clark, 289 U.S. 15; In re Grand Jury Subpoena Duces Tecum, 798 F.2d at 34.

Thus, Plaintiffs have demonstrated by a preponderance of evidence that Defendants sought legal assistance from Biggs in furtherance of a present criminal act. The crime-fraud exception applies, and Defendants cannot refuse deposition testimony regarding the Coco's Meeting on the basis of the attorney-client privilege. Plaintiffs' objection is therefore **SUSTAINED**.

C. Errors of Fact

Plaintiffs also contend that Judge Skomal's findings of fact supporting his discovery order were clearly erroneous. (*Pls. Obj.* 9.) Specifically, Plaintiffs object to Judge Skomal's conclusion that Defendants only discussed matters related to Biggs' potential representation of TCHD and legal issues related to the hospital. (*Id.*) In their objections, Plaintiffs identify evidence suggesting that Defendants also discussed and collectively committed to a plan of action for terminating Plaintiffs after Anderson and Coulter joined the TCHD Board. (*Id.* at 9-10.) This may be, but the Court finds it unnecessary to resolve these factual disputes.

If Defendants collectively committed to terminating Plaintiffs at the Coco's Meeting, then this would only demonstrate further that Defendants took action at the

Coco's Meeting—a necessary element of the Brown Act criminal violation. See Cal. Gov. Code § 54959. But the Plaintiffs' showing that Defendants collectively committed to replacing TCHD's general and labor counsel with Biggs' firm is sufficient by itself to make all communications at the Coco's Meeting subject to the crime-fraud exception. See supra Section III(B)(1)(b). The requirement that action be taken at the Coco's Meeting is only a qualification on the underlying criminal act: attendance at a "meeting." See Cal. Gov. Code § 54959; Sacramento Newspaper Guild, 263 Cal. App. 2d at 48 (noting that, in contrast to the broad coverage of the Brown Act's civil provisions, criminal liability is limited to meetings "*where* action is taken") (emphasis added). Thus, Plaintiffs are not limited to discovery only on communications related to termination and retention of TCHD's general and labor counsel. All communications with Biggs furthered the underlying "meeting," and therefore all communications are subject to discovery. See Cal. Gov. Code § 54952.2(a).

Because the Court need not resolve Plaintiffs' factual objections to Judge Skomal's order at this time, those objections are **OVERRULED WITHOUT PREJUDICE.**

IV. CONCLUSION

For the reasons stated above, Plaintiffs' objections are **SUSTAINED-IN-PART** and **OVERRULED-IN-PART**. Because Plaintiffs are entitled to Defendants' deposition testimony regarding communications with Biggs at the Coco's Meeting, the Court **SETS ASIDE** Judge Skomal's discovery order under Federal Rule of Civil Procedure 72(a).

IT IS SO ORDERED.

DATED: November 28, 2011

Hon. Thomas J. Whelan
United States District Judge

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALLEN COLEMAN, SUELLYN ELLERBE, DAN GROSZKRUGER, TERRY HOWELL, ONDREA LABELLA, DOREEN SANDERSON, and ROBERT WARDWELL,

Plaintiffs,

vs.

KATHLEEN STERLING, ROSEMARIE RENO, CHARLENE ANDERSON, GEORGE COULTER, LARRY ANDERSON, TRI-CITY HEALTHCARE DISTRICT, and DOES 1 through 100, inclusive,

Defendants.

CASE 09-CV-1594 W (BGS)

ORDER GRANTING DEFENDANTS' MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL [DOC. 179]

Pending before the Court is Defendants' motion for certification of interlocutory appeal under 28 U.S.C. § 1292(b). (*Defs.' Mot.* [Doc. 179].) In their motion, Defendants ask this Court to certify its November 28, 2011 order regarding the federal crime-fraud exception for immediate review by the Ninth Circuit Court of Appeals. (*Order* [Doc. 174].) Plaintiffs oppose. (*Pls.' Opp'n* [Doc. 187].) The Court decides the matter on the papers submitted and without oral argument. See Civ. L. R. 7.1(d.1). For the reasons discussed below, the Court **GRANTS** Defendants' motion to certify and **STAYS** the instant matter pending resolution of the interlocutory appeal.

I. BACKGROUND

Defendants' motion arises out of a dispute over the scope of the attorney-client privilege and the effect of the crime-fraud exception under federal law.[1] (*See Order.*) On October 29, 2010, the parties filed a joint discovery motion before Magistrate Judge Bernard G. Skomal regarding Plaintiffs' efforts to obtain deposition testimony concerning discussions between Defendants and an attorney, Julie Biggs, Esq., at a Coco's Restaurant in Vista, California. (*See Order* 3.) Defendants argued that their communications with Biggs were protected by the attorney-client privilege. (*Id.*) In opposition, Plaintiffs contended that no privilege could attach to Defendants' conversations because the underlying meeting violated the criminal provision of California's Brown Act, thereby implicating the federal crime-fraud exception. (*Id.*)

On July 18, 2011, Judge Skomal issued his discovery order, denying Plaintiffs' deposition requests on the basis of the attorney-client privilege. (*See Mag. Order* [Doc. 137].) Judge Skomal also held the crime-fraud exception inapplicable, because Plaintiffs failed to demonstrate by a preponderance of evidence that Defendants' conversations with Biggs were sought "in furtherance of any intended or present illegality." (*Id.* at 7.)

On August 4, 2011, Plaintiffs filed objections to Judge Skomal's crime-fraud analysis. (*See Order* 4.) The Court received briefing from both parties, and on November 28, 2011, granted-in-part and sustained-in-part Plaintiffs' objections. (*See id.*) Specifically, the Court affirmed Judge Skomal's holding that the attorney-client privilege attached to Defendants' conversations with Biggs, but reversed on the applicability of the crime-fraud exception. (*Id.*) The Court found that Plaintiffs had provided sufficient evidence to demonstrate not only an underlying violation of California's Brown Act, but that Defendants' discussions with Biggs were substantially related to and in furtherance of that violation. (*Id.* at 8-18.) In conclusion, the Court held that Plaintiffs were entitled to the discovery sought. (*Id.* at 18.)

---

[1] A complete discussion of the underlying facts can be found in this Court's November 28, 2011 order. (*See Order* 2-4.)

On December 16, 2011, Defendants moved this Court to certify its November 28, 2011 order for interlocutory appeal under 28 U.S.C. § 1292(b). (*See Defs.' Mot.*) Plaintiffs opposed, and Defendants filed a reply. (*Pls.' Opp'n*; *Defs.' Reply* [Doc. 188].)

II. LEGAL STANDARD

Under 28 U.S.C. § 1292(b), a party may move a district court to certify an "otherwise unappealable" order for interlocutory review. In order to certify the order, the court must find that "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The moving party bears the burden of demonstrating these prerequisites. Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010).

More than just discretionary factors, §1292(b)'s requirements are jurisdictional, and reflect a legislative intent to limit interlocutory review to "exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." Id.; In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir. 1982). If the court determines the order to be appealable, the moving party must then file an application with the appropriate court of appeals. 28 U.S.C. § 1292(b). The court of appeals may, in its discretion, accept or decline to hear the appeal. Id. Although interlocutory review does not automatically stay the underlying proceedings, the district court may order a stay pending resolution of the appeal. Id.

III. DISCUSSION

In order to certify its November 28, 2011 order for immediate review, the Court must determine if that order presents (1) a controlling question of law, (2) over which there is substantial ground for difference of opinion, and (3) resolution of which could materially advance the ultimate termination of litigation. 28 U.S.C. § 1292(b). In doing so, the Court is mindful of the Supreme Court's recent discussion of interlocutory appeal in the context of attorney-client privilege issues. In Mohawk Industries, Inc. v.

Carpenter, the Court recognized that the prerequisites for immediate appeal "are most likely to be satisfied when a privilege ruling involves a new legal question or is of special consequence." 130 S. Ct. 599, 607 (2009). In these circumstances, "district courts should not hesitate to certify an interlocutory appeal."[2] Id.

A. Controlling Question of Law

The first requirement for interlocutory appeal is that the district court's order present a "controlling question of law." 28 U.S.C. § 1292(b). In order to be controlling, the question of law need not be dispositive, or one which could result in reversible error on appeal; rather, it need only be one that "could materially affect the outcome of the litigation in the district court." Cement Antitrust Litig., 673 F.2d at 1026; United States v. Woodbury, 263 F.2d 784, 787 (9th Cir. 1959). Stated another way, "[a] question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc., 86 F.3d 656, 659 (7th Cir. 1996) (Posner, J.). Absent "exceptional circumstances," those questions that are "collateral" to the basic issues of the lawsuit, or have no effect on ability of the district court to render a binding decision, are generally not controlling. Cement Antitrust Litig., 673 F.2d at 1027, 1027 n.5.

The effect of this Court's November 28, 2011 order is to permit Plaintiffs to seek additional evidence on their claims that would otherwise be protected by the attorney-client privilege. The Court proffered no opinion on the legal or factual merits of the case, or on the Court's own ability to enter a binding judgment in the matter. It is clear then that the Court's order decides only issues "collateral" to the merits of the suit. See Woodbury, 263 F.2d at 788. Nevertheless, the Court finds that the questions therein

---

[2] The Court does not, however, read the quoted material from Carpenter to imply that *all* novel questions of privilege law are subject to interlocutory appeal. See 130 S. Ct. at 607. The Court must still consider each prerequisite of § 1292 in light of existing precedent. See Couch, 611 F.3d at 633 ("Certification under § 1292(b) requires the district court to expressly find in writing that all three § 1292(b) requirements are met.").

present "exceptional circumstances" which warrant immediate review.[3] Cement Antitrsut Litig., 673 F.2d at 1027.

In Bittaker v. Woodford, now-Chief Judge Kozinski explained why immediate review of adverse attorney-client privilege rulings is appropriate. 331 F.3d 715, 717-18 (9th Cir. 2003) (en banc). Like most orders, a court's ruling on attorney-client privilege is reviewable after final judgment, and may in fact become irrelevant if the disclosure of privileged communications was harmless. Id. at 717. But, final-judgment review does not account for the "significant strategic decisions" that arise out of such orders, and "may therefore come too late." Id. at 717-18. Thus, "[e]ven if a new trial were ordered at which the material found to be privileged was not admissible, it might be impossible to undo the effects of disclosure with regard to the information in [the seeking party's] hands and its effect on [his or her] trial strategy." Agster v. Maricopa Cnty., 422 F.3d 836, 839 (9th Cir. 2005) (relying on Bittaker). As Defendants observe, even if this Court's November 28, 2011 order is reversed on post-judgment appeal, the "taint[ ]" of improperly piercing the attorney-client privilege may survive.[4] (*Defs.*' Mot. 5.)

Although the Supreme Court's decision in Carpenter eliminated collateral-order review of attorney-client privilege rulings, such as those in Bittaker and Agster, the Court continues to find the reasoning in these latter cases applicable to considerations under § 1292(b). See 130 S. Ct. at 603. The persisting prejudice that may result from an erroneous privilege ruling "is quite likely to affect the further course of litigation," and

---

[3] The Court is also mindful of Woodbury, where the Ninth Circuit held that an adverse attorney-client privilege order did not present a "controlling question of law." 263 F.2d at 787-88. But, Woodbury cannot be read as a categorical ban against interlocutory review of privilege rulings. In fact, the Ninth Circuit has reviewed at least two adverse privilege rulings under § 1292(b) since it decided that case. See Tennenbaum v. Deloitte & Touche, 77 F.3d 337 (9th Cir. 1996); In re Boileau, 736 F.2d 503 (9th Cir. 1984). And, the Supreme Court has explicitly endorsed interlocutory review of privilege orders in special circumstances. See Carpenter, 130 S. Ct. at 607.

[4] As another circuit court has put it, "there is no way to unscramble the egg scrambled by the disclosure." In re Ford Motor Co., 110 F.3d 954, 963 (3d Cir. 1997), also abrogated by Carpenter, 130 S. Ct. 599.

could even "materially affect [its] outcome." Sokaogon Gaming, 86 F.3d at 659; Cement Antitrust Litig., 673 F.2d at 1026. Moreover, the likelihood of this prejudice increases substantially when the privilege ruling requires the district court to interpret issues of first impression or questions for which the present state of the law is unclear.[5]

But, that is not to say that all adverse privilege orders are immediately reviewable, thus "swallow[ing] the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." Carpenter, 130 S. Ct. at 605 (citations omitted). As the Supreme Court recognized in Carpenter, "[m]ost district court rulings on these matters involve the routine application of settled principles." 130 S. Ct. at 607. In those cases, interlocutory certification is likely to fail because there is little ground for difference of opinion. See 28 U.S.C. § 1292(b). On the other hand, when the ruling "involves a new legal question or is of special consequence," the other prerequisites of § 1292(b) are "most likely to be satisfied" as well. Carpenter, 130 S. Ct. at 607.

Therefore, the Court concludes that its November 28, 2011 order involves a "controlling question of law" for purposes of § 1292(b) certification.

B. Substantial Ground for Difference of Opinion

"To determine if a 'substantial ground for difference of opinion' exists under § 1292(b), courts must examine to what extent the controlling law is unclear." Couch, 611 F.3d at 633. A party's disagreement with the court's ruling is an expected consequence of litigation, and does not establish sufficient grounds for interlocutory certification. See id. Certification is appropriate, however, when "the appeal involves an issue over which reasonable judges might differ," or presents "novel and difficult questions of first impression." Reese v. BP Exploration (Alaska) Inc., 643 F.3d 681, 688 (9th Cir. 2011).

---

[5] By saying this, the Court does not intend to conflate the "controlling question of law" and "substantial grounds for disagreement" prerequisites of § 1292(b). The Court merely recognizes that the likelihood of an erroneous privilege ruling having a material adverse effect on further litigation is increased when it involves novel or unresolved issues of law.

Here, there are at least two questions in the Court's November 28, 2011 order for which there is "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). First is the scope of the crime-fraud exception. This Court interpreted the crime-fraud exception to cover a broader range of communications between an attorney and her client than did Judge Skomal. (*See Order* 17-18.) But, the Court recognizes that Judge Skomal's reading is also supported by language in relevant case law. (*Id.* at 17 n.8) (citing Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir. 1992).) The issue is further complicated by the unique circumstances of the instant matter. Unlike most applications of the crime-fraud exception, where the attorney-client communications are distinct from the actual criminal conduct, here the attorney-client communications *were* the relevant criminal conduct. (*See id.* at 18.) At this point in the case, two reasonable jurists have already disagreed on this question, and the Court recognizes room for further disagreement. See Reese, 643 F.3d at 688.

Second, this Court was presented with a "novel and difficult" question of first impression regarding California's Brown Act. (*See Order* 11-12.) The issue was whether the addition of elected members of a public agency board of directors causes the total size of that board to increase commensurately for purposes of computing a "majority." (*Id.*) Considering the purpose of the Brown Act, the Court held that it did not. (*Id.*) However, the Court also recognizes that a purely textual reading of the statute could result in a different conclusion. Interpretation of the statute in these circumstances is complicated by the fact that the California legislature did not address this question when drafting or amending the Brown Act. See Cal. Gov. Code § 54950, *et seq.*

Thus, the Court concludes that its November 28, 2011 order involves questions over which there is "substantial grounds for disagreement" under § 1292(b).

C. Material Advancement of the Litigation

The final prerequisite of § 1292(b) certification is that immediate appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). In

considering this requirement, courts must keep in mind that the ultimate purpose of interlocutory appeal is to "avoid protracted and expensive litigation." See U.S. Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966).

As Plaintiffs recognize in their opposition, fact discovery in this case concluded last July, and the pre-trial conference is scheduled for April 30, 2012. (*Pls.' Opp'n* 16.) Thus, Plaintiffs contend, trial is "rapidly approaching," and interlocutory appeal would only "derail and delay" the termination of this action. (*Id.*) While potential delay of trial is certainly a consideration for this Court, it need not be the only one. See Shurance v. Planning Control Int'l, Inc., 839 F.2d 1347, 1348 (9th Cir. 1988); Solis v. Washington, 2010 WL 1186184, at *3 (W.D. Wash. 2010). Post-judgment appeal and potential remand for a new trial can significantly extend litigation and greatly increase the total cost of suit to the litigants. Based on the highly-litigious nature of this suit, and the significance of the questions raised by the parties in this discovery dispute, the Court finds that post-judgment appeal on this point is highly probable. Resolving this issue now, before trial, may ultimately serve the interests of efficiency for Plaintiffs because it would confirm the finality of any award they may achieve at trial.

Moreover, this case is not so close to trial that interlocutory appeal would only cause delay. Based on the April 30, 2012 pre-trial conference date, trial is likely several months out. And this does not account for the time it would take to address any summary judgment motions filed by the parties. In short, this case is not at a stage, like Solis, where interlocutory review and post-judgment appeal would occur on essentially the same timeline, thereby eliminating any value in interlocutory appeal. See 2010 WL 1186184, at *3 ("[A]n appeal would only delay this litigation as discovery has ended and trial is two months away.').

In conclusion, the Court concludes that immediate appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

//

//

IV. CONCLUSION

Because the Court finds all prerequisites of § 1292(b) satisfied, Defendants' motion to certify for interlocutory appeal is **GRANTED**. Additionally, because the only fact discovery remaining in this case pertains to the attorney-client communications at issue, the Court finds that a stay of the present proceedings is appropriate. If the Ninth Circuit chooses to accept this matter for immediate appeal, the parties may return to this Court upon completion of that appeal and take up the case where it presently stands. On the other hand, if the Ninth Circuit declines to consider this appeal, the Court will lift the stay and proceed with the litigation expeditiously. Therefore, the Court **STAYS** this matter pending resolution of this appeal.

IT IS SO ORDERED.

DATED: February 21, 2012

Hon. Thomas J. Whelan
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2012, I caused to be served, by U.S. Mail, one (1) copy of **PETITION FOR PERMISSION TO APPEAL.**

Ray J. Artiano
Robert M. Mahlowitz
Stutz Artiano Shinoff & Holtz, APC
2488 Historic Decatur Road
Suite 200
San Diego, CA 92106
Telephone: 619-232-3122
Facsimile: 619-232-3264
E-mail: rartiano@stutzartiano.com

Attorneys for Plaintiffs and Respondents

DAN GROSZKRUGER, DOREEN SANDERSON, and ROBERT WARDWELL

VIA: ELECTRONIC MAIL AND U.S. MAIL

Hon. Thomas J. Whelan
United States District Judge
United States District Court
Southern District of California
880 Front Street, Room 4290
San Diego, California 92101-8900

Trial Judge
Case No. 3:09-cv-01594-W-BGS

VIA: U.S. MAIL ONLY

I declare under penalty of perjury under the laws of the United States of America and of the State of California that the foregoing is true and correct.

Executed on March 1, 2012 at Encino, California.

Signature: s/ Connie Christopher