AMERICAN BANKRUPTCY INSTITUTE

2019 Winter Leadership Conference

CONCURRENT SESSION

Mediating with a Higher Power: Mediation of Disputes with Governments and Governmental Agencies

Hosted by the Mediation and the Commercial and Regulatory Law Committees

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FEDERAL MEDIATION PRIVILEGE

The extent of privilege that applies to mediation has been discussed in case law. Courts generally recognize confidentiality as of importance in mediation.[1]

PARTIES: Private Counsel contrasted with Government Counsel

Clarifying roles and responsibilities is fundamental to mediation between or among actions where government is a party.[2]

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[1] *In re Teligent, Inc.*, 640 F.3d 53 (2d Cir. 2011)(The Second Circuit noted that the mediation at issue between the debtor and its former CEO was "voluntary" as opposed to court-ordered. The Second Circuit Court of Appeals opinion recognizes that confidentiality "promotes the free flow of information" necessary to help settle disputes. It adopted a 3-part test requiring a party seeking disclosure of confidential mediation communications to demonstrate: (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality);*Rocky Aspen Management 204 LLC v. Hanford Holdings, LLC*, 2019 WL 3852234 (S.D.N.Y. Aug. 16, 2019) (Plaintiffs sued the defendant over a failed restaurant venture. The defendant claimed it was entitled to obtain communications concerning the settlement of a prior litigation involving the plaintiffs. The settlement agreement was never made part of a court order, and the settlement discussions between the parties were not governed by any court order. Accordingly, Magistrate Judge Gorenstein held that *Teligent*'s 3-part test only "applies to situations in which there has been a prior *court* promise of confidentiality — not to discussions between parties without court involvement and not to a settlement agreement with a private promise to maintain its confidentiality.")

[2] "Mediating with Municipalities: Effective Use of ADR to Resolve Employment and Public Policy Disputes," Westchester Bar Journal, 33 Westchester B.J. 19 (Spring/Summer, 2006)("…practical differences in settling a case with a governmental defendant, since line counsel may well have less authority to agree to relief than their private employer counterparts. Not infrequently, higher officials in the Department of Justice, Corporation Counsel, or Attorney General's office must also agree to any settlement. This makes it important to clarify early on the precise scope of the authority of negotiating counsel, both to avoid frustration and unproductive expenditure of time. Plaintiffs' counsel (and the court) should also look out for the "no-authority" ploy; that is, a government counsel claiming that the initial offer made is all that he/she is authorized to make, and that if not taken there can be no bargain. In cases against the government, unfortunately, there is no defendant watching the clock tick on its *own* attorneys' fees. There may thus be little incentive to settle on equitable terms until the very eve of trial. Mediation may be of particular value in such cases, as may pressure from a knowledgeable judge. On the other hand, public officials may need to have cases settled for political reasons; that is, they may not wish to be seen condoning discrimination of any kind. Thus, strategies aimed at bringing the case to the attention of those governmental officials sensitive to such political considerations may well be necessary. These could include deposing the head of the agency involved and/or alerting the press and electronic media to particularly egregious facts."); *See also* Advocacy in Mediation with the Government, 61-JAN Disp. Resol. J. 50 Dispute Resolution Journal (November, 2006-January 2007); "Mediating Government Contract Claims: How it is Different", Public Contract Law Journal, 32 Pub. Cont. L.J. 63 (Fall 2002); "Mediating with Florida's Local Government Tips for the Private Practitioner," Florida Bar Journal, 72-NOV Fla. B.J. 59 (November 1998).

American Bankruptcy Institute 2019 Winter Leadership Conference

Mediating with a Higher Power — Mediation of Disputes with Governments and Governmental Agencies

Selected California Statutory Provisions Regarding Settlement

Payment of Claims and Judgments Against the State, Cal. Gov. Code, § 965 et seq.

Cal. Gov. Code, § 948:

(a) The head of the state agency concerned, upon recommendation of the Attorney General or other attorney authorized to represent the state, may settle, adjust, or compromise any pending action where the Director of Finance certifies that a sufficient appropriation for the payment of claims exists. Claims arising out of the activities of the State Department of Transportation may be paid if either the Director of Transportation or the Director of Finance certifies that a sufficient appropriation for the payment of the claim exists.

(b) If no funds or insufficient funds for the payment exist, the head of the state agency concerned, upon recommendation of the Attorney General or other attorney authorized to represent the state, may settle, adjust or compromise any pending action with the approval of the Department of Finance.

(c) As used in this section, "state agency" means any office, officer, department, division, bureau, board, commission or agency of the state claims against which are paid by warrants drawn by the Controller, but does not mean any "judicial branch entity" as defined in Section 940.3 or any judge thereof.

Cal. Gov. Code, § 965

(a) Upon the allowance by the Department of General Services of all or part of a claim for which the Director of Finance certifies that a sufficient appropriation for the payment of the claim exists, and the execution and presentation of documents the department may require that discharge the state of all liability under the claim, the department shall designate the fund from which the claim is to be paid, and the state agency concerned shall pay the claim from that fund. If there is no sufficient appropriation for the payment available, the department shall report to the Legislature in accordance with Section 912.8. Claims arising out of the activities of the State Department of Transportation may be paid if either the Director of Transportation or the Director of Finance certifies that a sufficient appropriation for the payment of the claim exists.

(b) Notwithstanding subdivision (a), if there is no sufficient appropriation for the payment of claims, settlements, or judgments against the state arising from an action in which the state is represented by the Attorney General, the Attorney General shall report the claims, settlements, and judgments to the chairperson of either the Senate Committee on Appropriations or the Assembly Committee on Appropriations, who shall cause to be introduced legislation appropriating funds for the payment of the claims, settlements, or judgments.

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Cal. Gov. Code, § 965.2

(a) The Controller shall draw a warrant for the payment of any final judgment or settlement against the state whenever the Director of Finance certifies that a sufficient appropriation for the payment of the judgment or settlement exists. Claims upon those judgments and settlements are exempt from Section 925.6. Claims arising out of the activities of the State Department of Transportation may be paid if either the Director of Transportation or the Director of Finance certifies that a sufficient appropriation for the payment of the claim exists.

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California Public Records Act, Cal. Gov. Code § 6250 et seq.

Gov. Code, § 6253:

(a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

(b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.

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Gov. Code, § 6254:

[T]his chapter does not require the disclosure of any of the following records:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810), *until the pending litigation or claim has been finally adjudicated or otherwise settled*.

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Bagley-Keene Act, Gov. Code § 11120, et seq.

Gov. Code § 11126

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(e) (1) Nothing in this article shall be construed to prevent a state body, based on the advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the state body in the litigation.

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158 Cal.App.3d 893, 205 Cal.Rptr. 92

REGISTER DIVISION OF FREEDOM NEWSPAPERS, INC., Plaintiff and Respondent,
v.
COUNTY OF ORANGE, Defendant and Appellant.

Civ. No. 30293.
Court of Appeal, Fourth District, Division 3, California.
Jul 31, 1984.

SUMMARY

In an action by a newspaper against a county, the trial court entered an order requiring the county to disclose certain documents regarding a secret settlement agreement reached between the county and a jail inmate injured in a jailhouse assault. The newspaper's petition was based on the California Public Records Act (Gov. Code, § 6250 et seq.) and on the alleged constitutional right of public access to the records. The trial court's order was based on both constitutional and statutory grounds. (Superior Court of Orange County, No. 395046, William R. Sheffield, Judge.)

The Court of Appeal affirmed and remanded with directions, holding the county must allow the newspaper access to all the settlement documents contained in the settlement file with the exception of a crime report and rough notes made by the county's risk management staff, and directed the trial court to conduct further proceedings regarding accessibility of those documents. The court held the trial court's disclosure order was erroneous to the extent it was based on constitutional considerations, but further held that the documents relating to the settlement of the personal injury claim constituted public records which are subject to public inspection and disclosure under the act. It rejected the county's claims of exemption and held, with the exception of the crime report and rough notes, the trial court did not abuse its discretion in failing to conduct an *in camera* inspection of the settlement documents prior to ordering their disclosure. (Opinion by Trotter, P. J., with Wallin, J., concurring. Separate dissenting opinion by Crosby, J.) ***894**

HEADNOTES

Classified to California Digest of Official Reports

([1])
Constitutional Law § 57--First Amendment and Other Fundamental Rights of Citizens--Scope and Nature--Freedom of the Press--Access to Public Records.
In an action by a newspaper against a county for disclosure of certain documents regarding a secret settlement of a tort claim by a jail inmate, the trial court erred in ruling that the newspaper had a constitutional (U.S. Const., 1st Amend.) right of access to such records. No state or federal decision has ever attributed accessibility to public records on First Amendment freedoms of speech or press.

([2])
Records and Recording Laws § 12--Inspection of Public Records--Purpose of Statute.
The California Public Records Act (Gov. Code, §§ 6250-6265) was intended to safeguard the accountability of government to the public. The general policy of the act favors disclosure and support for a claim of nondisclosure must be found, if at all, among the specific exceptions to the general policy that are enumerated in the act.

([3])
Records and Recording Laws § 12.5--Inspection of Public Records--Tort Claim Settlement Agreement.
Under the California Public Records Act defining public records as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency" (Gov. Code, § 652, subd. (d)), and defining local agency to include a county, a county's claim settlement committee was a "local agency" and documents relating to the settlement of a private personal injury claim with public funds constituted "writings" containing information regarding "the conduct of the public business," subject to public inspection and disclosure under the act.

[See **Cal.Jur.3d,** Records and Recording Laws, § 7; **Am.Jur.2d,** Records and Recording Laws, § 12.]

([4])
Records and Recording Laws § 12--Inspection of Public Records-- Exception.
To determine a claim of exemption from the California

Public Records Act's disclosure provisions (Gov. Code, §§ 6250-6265), a court may but is not required to examine the disputed records *in camera*. Gov. Code, § 6259, provides the court shall decide the case after examining the record *in camera* if permitted by Evid. Code, § 915, subd. (b). However, the *in camera* hearing provisions of § 915, ***895** subd. (b), are permissive. Thus under § 6259*in camera* inspection of the record in question is not required as a matter of law, but is trusted to the sound discretion of the trial court.

([5])
Records and Recording Laws § 12.5--Inspection of Public Records--Tort Settlement Agreement--Medical Records.
Medical records of a tort claimant appended to a letter sent to a county requesting settlement of the claim were not exempt from disclosure under Gov. Code, § 6254, subd. (c) (California Public Records Act), intended to protect information of a highly personal nature on file with a public agency. By making the claim, the claimant placed his alleged physical injuries and medical records substantiating them in issue and tacitly waived any expectation of privacy regarding the medical records. Because the county utilized the supporting medical records in arriving at its decision to settle the claim, it could not hide behind the claimant's privacy to justify its concealment of the records from public scrutiny.

([6])
Records and Recording Laws § 12.5--Inspection of Public Records--Tort Settlement Agreement--Sheriff's Investigation Report.
A sheriff's investigation report undertaken at the county's instance to determine the validity of a jail inmate's tort liability claim based on a jailhouse assault was not protected from disclosure by Gov. Code, § 6254, subd. (f) (California Public Records Act), which exempts from disclosure records of complaints or investigations conducted for correctional, law enforcement or licensing purposes. Even if the sheriff's report had law enforcement implications, the exemption is applicable only when the prospect of law enforcement is "concrete and definite."

([7])
Records and Recording Laws § 12.5--Inspection of Public Records--Tort Settlement Agreement--Crime Report.
In an action by a newspaper against a county for disclosure under the California Public Records Act (Gov. Code, §§ 6250-6265) of certain documents regarding a settlement of a jail inmate's tort claim arising out of a jailhouse assault, the trial court erred in not holding an *in camera* inspection of a crime report of the incident before requiring its disclosure. It was necessary to determine whether disclosure would endanger the safety of an investigator or hamper completion of the investigation or one related to it. (Gov. Code, § 6254, subd. (f)).

([8])
Records and Recording Laws § 12--Inspection of Public Records-- Privilege.
Evid. Code, § 1040, represents the exclusive means by ***896** which a public entity may assert a claim of governmental privilege against disclosure of information based on the necessity for secrecy. It essentially establishes two different privileges, an absolute privilege if disclosure is forbidden by a federal or state statute and a conditional privilege in all other cases pursuant to which privilege attaches when a court determines, in accordance with precise statutory standards, that disclosure is against the public interest. Moreover, either privilege is applicable only to information acquired in confidence.

([9])
Records and Recording Laws § 12.5--Inspection of Public Records--Tort Settlement Agreement--Crime Report--Privilege.
Under the California Public Records Act (Gov. Code, § 6500 et seq.), exemptions from disclosure of records of complaints or investigations conducted for correctional or law enforcement purposes (Gov. Code, § 6254, subd. (f)) are permissive, not mandatory. Thus, § 6254 did not forbid disclosure of investigation reports of an assault on a jail inmate undertaken in connection with a tort claim, and, since disclosure was not forbidden by state law, the absolute privilege of Evid. Code, § 1040, subd. (b)(1), granting governmental entities a privilege against disclosure of information if disclosure is forbidden by a federal or state statute, was not applicable in an action by a newspaper against the county for disclosure of the reports.

([10])
Records and Recording Laws § 12.5--Inspection of Public Records-- Minutes of Closed Meeting.
Minutes containing the deliberations of a county claim settlement committee as to a tort claim by a jail inmate were not exempt from disclosure under Gov. Code, § 54957.2, a provision of the Brown Act, where, while the minutes were taken in a session closed to the public, and such minutes are exempt from disclosure, the closed meeting itself was a violation of the act. Moreover, the mere presence of the county counsel at the meeting did not turn deliberations regarding the settlement of a tort claim into a "confidential" attorney-client

communication. The minutes were therefore not exempt from disclosure under the attorney-client privilege.

([11])
Records and Recording Laws § 12.5--Inspection of Public Records-- County Claim Settlement Procedures.
County documents regarding a secret settlement of a tort claim by a jail inmate arising out of a jailhouse assault were not protected from disclosure under the California Public Records Act (Gov. Code, § 6250 et seq.), on the ground of the necessity of keeping secret the county's settlement policy and decisions, where, although the county's concern with the potential ***897** for escalating tort claims against it was genuine, that interest was outweighed by the public interest in finding out how decisions to spend public funds were formulated and in insuring governmental processes remain open and subject to public scrutiny. Moreover, the fact the settlement agreement was entered into with the expectation its provisions would remain confidential was insufficient to justify withholding pertinent public information and inadequate to transform what was a public record into a private one.

([12])
Records and Recording Laws § 12--Inspection of Public Records-- Determination of Exemption.
In an action by a newspaper against a county for disclosure under the California Public Records Act (Gov. Code, § 6250 et seq.) of certain documents regarding a settlement of a tort claim by a jail inmate, the trial court properly exercised its discretion not to conduct an *in camera* inspection of certain documents prior to ordering their disclosure, where it was able to adequately balance the competing interests for and against disclosure without such a hearing.

COUNSEL
Adrian Kuyper, County Counsel, and Daniel J. Didier, Deputy County Counsel, for Defendant and Appellant.
Helsing & Rockwell, Inc., Duffern H. Helsing and Peter C. Freeman for Plaintiff and Respondent.

TROTTER, P. J.

County of Orange (County) appeals an order requiring it to disclose to The Register Division of Freedom Newspapers, Inc. (The Register), certain documents regarding a secret settlement agreement reached between the County and Michael T. Clemens, a tort claimant.

I

Clemens filed a claim against the County in accordance with section 945.4 of the Government Code.[1] He alleged his throat was slashed by a fellow ***898** inmate while incarcerated at the Orange County Jail. Clemens, a convicted child molester, charged the County negligently transferred him from his protective custody cell into a cellblock with other inmates where it was likely he would be harmed. County counsel referred his claim to the county administrative office's risk management staff who in turn asked the sheriff to investigate the claim. In September of 1982, Clemens' attorney wrote to the County requesting settlement, and attached copies of Clemens' medical records. Upon completion of the investigation, the claim was referred to the County's claims settlement committee[2] which discussed and approved the settlement offer at a secret meeting held on October 11, 1982. Subsequently, several warrant stubs were issued to Clemens by the county controller's office. On October 22, 1982, Clemens signed a document releasing the County of "all claims" against it.

In January of 1983, The Register requested access to the settlement documents, but was refused. It then petitioned the superior court for an order compelling disclosure of the records pursuant to the California Public Records Act (hereafter CPRA). (§§ 6250-6265.) The petition also asked the court to declare a constitutional right of public access to the records based on First and Fourteenth Amendment grounds.

The court ordered the County to provide The Register with copies of each of the documents contained in the settlement file, as described in the County's response.[3] The disclosure order was based on *both* constitutional (***899** U.S. Const., 1st and 14th Amends.) and statutory grounds. (CPRA and Brown Act.).[4]

County argues the trial court erroneously relied upon constitutional grounds and ignored statutory exemptions from disclosure under section 6254[5] for certain documents: The sheriff investigation and crime reports (docs. 5 & 6, § 6254, subds. (f) and (k)); Clemens' medical records enclosed with his attorney's settlement request letter (doc. 8, § 6254, subd. ***900** (c)); and the rough undated notes made by risk management staff (doc. 16, § 6254, subd. (a)). County further asserts the minutes of the claims settlement committee meeting (doc. 10) are exempt from disclosure under section 54957.2 of the Brown Act,[6] while the remaining settlement documents-pertaining to the annuity policy (docs. 7, 9 & 15), request for warrants and warrant stubs (docs. 11 &

13), and confirmation of settlement and settlement agreement (docs. 12 & 14)-are exempt from disclosure under section 6255[7] since the public interest in disclosure is outweighed by the public interest in nondisclosure.

Lastly, County argues the trial court failed to inspect all the settlement documents *in camera* prior to ordering their disclosure and thus abused its discretion under the provisions of section 6259.[8]

II

()We find that a newspaper has no special constitutional right of access to the settlement records of the County. No Caslifornia or federal judicial decision has ever attributed accessibility to public records upon First Amendment freedoms of speech or press. (*San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 774 [192 Cal.Rptr. 415]; see also *Estate of Hearst* (1977) 67 Cal.App.3d 777, 785-786 [136 Cal.Rptr. 821]; Accord, *Houchins v. KQED, Inc*, (1978) 438 U.S. 1, 15 [57 L.Ed.2d 553, 565].) Thus, to the extent the lower court's disclosure order was grounded on First Amendment considerations, it was erroneous. The court, however, also based its ruling on the CPRA and Brown Act. We now turn to these statutory provisions. ***901**

()The CPRA, enacted in 1968, was intended to safeguard the accountability of government to the public. (*San Gabriel Tribune v. Superior Court*, *supra.*, 143 Cal.App.3d at p. 771.) Section 6250 of the act declares: "[i]n enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." The general policy of the CPRA favors disclosure. (*Cook v. Craig* (1976) 55 Cal.App.3d 773, 781 [127 Cal.Rptr. 712].) Accordingly, support for a claim of nondisclosure "must be found, if at all, among the specific exceptions to the general policy that are enumerated in the Act." (*State of California* ex rel. *Division of Industrial Safety v. Superior Court* (1974) 43 Cal.App.3d 778, 783 [117 Cal.Rptr. 726].)

()The CPRA defines "public records" as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (§ 6252, subd. (d).) "Local agency" is defined to include "a county; city ... ; political subdivision; or any board, commission or agency thereof; ...." (§ 6252, subd. (b).) Thus, the County's claims settlement committee is a "local agency" under the CPRA and the documents relating to settlement of a private personal injury claim with public funds constitute "writings" containing information regarding "the conduct of the public business," subject to public inspection and disclosure under the CPRA. (§§ 6253, 6256.)

III

()To determine a claim of exemption from the CPRA's disclosure provisions, the court may but is *not* required to examine the disputed records *in camera*. Section 6259 provides the "court shall decide the case after examining the record *in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code*, papers filed by the parties and such oral argument and additional evidence as the court may allow." (Italics added.) However, the *in camera* hearing provisions of Evidence Code section 915, subdivision (b) are permissive.[9] (*People v. Superior Court (Biggs)* (1971) 19 Cal.App.3d 522, 531 [97 Cal.Rptr. 118].) Thus, under section 6259 "*in camera* inspection of the record in question is not required as a matter of law, but is trusted to the sound discretion of the trial court." (*Yarish v. Nelson* (1972) 27 Cal.App.3d 893, 904 [104 Cal.Rptr. 205].) Guided by ***902** these principles, we examine each of County's exemption claims and whether the court's failure to conduct an *in camera* inspection of each of the disputed settlement documents constituted an abuse of discretion.

A. *Medical Records*

Clemens' medical records were appended to a letter written by Clemens' attorney to the County requesting settlement of the claim (doc. 8). () County claims they are exempt from disclosure under subdivision (c) of section 6254 (fn. 5, *ante*), since they were submitted to substantiate Clemens' personal injury claim and not for the purpose of making them public. Thus disclosure of these records would constitute "an unwarranted invasion of personal privacy" within the meaning of section 6254, subdivision (c). We disagree.

CPRA provisions evidence legislative concern with "two fundamental if somewhat competing societal concerns-prevention of secrecy in government and protection of individual privacy." (*Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 651 [117 Cal.Rptr. 106]; see § 6250.) While the "right to know" is centered

upon the need for openness in the management of governmental affairs, "[s]ocietal concern for privacy focuses on minimum exposure of personal information collected for governmental purposes." (*Ibid.*) The purpose of the exemption for private records embodied in subdivision (c) of section 6254 is to "... 'protect information of a highly personal nature which is on file with a public agency ... [to] typically apply to public employee's personnel folders or sensitive personal information which individuals *must* submit to government.'" (*San Gabriel Tribune v. Superior Court*, *supra.*, 143 Cal.App.3d at p. 777, citing A Final Rep. Cal. Statewide Information Policy Com. Rep. (Mar. 1970) pp. 9-10, 1 Appen. to J. of the Assem. (1970, Reg. Sess.), italics added.)

The medical records enclosed in Clemens' letter requesting settlement, although private in nature, were *voluntarily* submitted to substantiate Clemens' personal injury claim. Their disclosure was to further his private interest, to settle the case, not to accomplish any governmental purpose or goal. By making his personal injury claim, Clemens placed his alleged physical injuries, and medical records substantiating the same, in issue. Furthermore, by voluntarily submitting these records to the County for the purpose of reaching a settlement on his claim, Clemens tacitly *waived* any expectation of privacy regarding these medical records. Similarly, the County utilized these supporting medical records in arriving at its decision to settle the claim. It cannot now hide behind Clemens' "privacy" claim to justify its concealment of these records from public scrutiny. (Cf. ***903** *San Gabriel Tribune v. Superior Court*, *supra.*, 143 Cal.App.3d 762, 778, holding section 6254, subdivision (k) inapplicable to private utility company's financial data serving as the basis for governmental decision to approve a rate increase benefiting the company.)

We hold the "medical records" exemption under section 6254, subdivision (c) does not apply. In so holding we note the trial court did not abuse its discretion by failing to examine these records *in camera*, since it was uncontroverted the records related only to Clemens' allegations of personal injury stemming from the jail incident.[10]

B. *Investigation Reports*

County claims two documents prepared by the sheriff's office (docs. 5 & 6) are protected from disclosure under subdivisions (f) and (k) of section 6254. (Fn. 5, *ante*.) One contains the sheriff's investigation report regarding the throat slashing incident requested by the County's risk management office; the other document is a crime report of attempted homicide on the incident. We first address County's exemption claim under subdivision (f).

Subdivision (f) exempts from disclosure records of complaints or investigations conducted "for correctional, law enforcement or licensing purposes." It also provides, however, exceptions *allowing* disclosure of specific information contained in investigative files as follows: (1) Specified information from records of incidents involving bodily injury, property damage or loss must be disclosed to the victims (or their authorized representative), to an insurance carrier against whom a claim is made, and to any person suffering the resulting injury; (2) specified information regarding every arrest made by law enforcement agencies; (3) specified information regarding all "complaints or requests for assistance" received by these agencies. Disclosure under these exceptions is *not* required, however, if it "would endanger the safety of a person involved in the investigation, or ... the successful completion of the investigation or a related investigation ...." Moreover, "disclosure of that portion of ... investigative files which reflect the analysis or conclusions of the investigating officer" is not allowed. (§ 6254, subds. (f), (1)(2); see 65 Ops. Cal.Atty.Gen. 563, 566-567 (1982).)

()The Register claims the sheriff's investigation report does not fall within subdivision (f)'s exemption because it was *not* conducted for "correctional, ***904** law enforcement or licensing purposes," but was instead conducted at the request of the County's risk management office primarily for the purpose of ascertaining the facts in much the same way investigations are undertaken by insurance company claim adjustors. Thus, the sheriff's investigation was not for law enforcement purposes, but rather to discover the facts upon which to determine the County's civil liability stemming from the incident.

We agree. The record reflects the sheriff's investigation *was* undertaken at the County's instance to determine the validity of Clemens' tort liability claim. Thus, the sheriff's report does *not* fall within the "correctional, law enforcement or licensing" exemption under subdivision (f). Moreover, even assuming arguendo the sheriff's report *might* have law enforcement implications, subdivision (f) is applicable *only* when the prospect of law enforcement is "concrete and definite." (*Uribe v. Howie* (1971) 19 Cal.App.3d 194, 212, 213 [96 Cal.Rptr. 493]; see also *State of California* ex rel. *Division of Industrial Safety v. Superior Court*, *supra.*, 43 Cal.App.3d at p. 784.) No such showing was made below.

()We now turn to subdivision (f)'s applicability to the disputed crime report of attempted homicide. While this report falls within subsection (f)'s "law enforcement" exempted category, it, however, also falls within one of subdivision (f)'s enumerated exceptions, requiring disclosure of information regarding "complaints or requests for assistance ... to the extent such information regarding crimes alleged or committed ... is recorded ...." (§ 6254, subd. (f)(2).) Thus the crime report should be made public insofar as it contains the specified crime information listed in subdivision (f)(2)[11] provided disclosure does not "endanger the safety of a person involved in [the] investigation or ... endanger the successful completion of the investigation or a related investigation." (§ 6254, subd. (f).)

The trial court ordered the crime report disclosed without first determining whether disclosure would endanger the safety of an investigator or hamper completion of the instant or a related investigation. We find *in camera* inspection of the disputed crime report is necessary in order to make this determination. Accordingly, we remand for such a factual determination.

County additionally argues the disputed sheriff and crime reports are exempted from disclosure under subdivision (k) of section 6254 which protects ***905** disclosure of records already exempted under federal or state law, including records privileged under the Evidence Code. (Fn. 5, *ante*.) County specifically claims the investigation reports contained in the settlement file fall within the "official information" privilege provided by section 1040 of the Evidence Code.[12] It maintains the reports are either absolutely privileged under section 1040, subdivision (b)(1), or conditionally privileged under section 1040, subdivision (b)(2).

()Preliminarily, we note section 1040 of the Evidence Code "represents the *exclusive means* by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy." (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 540 [113 Cal.Rptr. 897, 522 P.2d 305], italics added.) "It essentially establishes two different privileges-an absolute privilege if disclosure is forbidden by a federal or state statute (subd. (b)(1)), and a conditional privilege in all other cases pursuant to which privilege attaches when the court determines, in accordance with precise statutory standards, that disclosure is against the public interest (subd. (b)(2).)" (*Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 123 [130 Cal.Rptr. 257, 550 P.2d 161].) Moreover, either privilege is applicable only to "information acquired in confidence." (Evid. Code, § 1040, subd. (a).)

County's claim of absolute privilege is based on its view section 6254, subdivision (f) of the CPRA (fn. 5, *ante*) constitutes a statutory enactment forbidding disclosure of the investigation report. We disagree. ()The exemptions from disclosure provided by section 6254 are "permissive, *not* mandatory; they permit nondisclosure but do not prohibit disclosure." (*Black Panther Party v. Kehoe*, *supra.*, 42 Cal.App.3d at p. 656, italics added.) The permissive nature of section 6254's exemptions is clearly evidenced ***906** by its last paragraph which states: "Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law." We hold section 6254 of the CPRA does *not forbid* disclosure of the subject investigation reports. Since disclosure is not otherwise forbidden by any state or federal laws, subsection (b)(1)'s absolute privilege is unavailable to the County.

County claims the necessity for preserving the confidentiality of the investigation reports outweighs the necessity for disclosure. It asserts confidentiality is necessary to insure cooperation by public employees with similar internal investigations in the future. However, we find disclosure of the sheriff's investigation reports to be necessary in evaluating the County's decision to settle the claim with public funds. Further, in determining whether disclosure of the reports is against public interest the interest of the public entity as a party in the outcome may not be considered. (Evid. Code, § 1040, subd. (b)(2).)

County argues since it has the burden to show the "official information" privilege (Evid. Code, § 1040) to be applicable, and an *in camera* hearing pursuant to Evidence Code section 915, subdivision (b) is the *only* means available to it to meet its burden, failure to hold such a hearing constitutes an abuse of discretion. (*Johnson v. Winter* (1982) 127 Cal.App.3d 435, 440 [179 Cal.Rptr. 585]; see also *In re Muszalski* (1975) 52 Cal.App.3d 475, 483 [125 Cal.Rptr. 286].) We are not persuaded that an *in camera* hearing was the *only* means by which County could meet its burden. The record shows the trial court was sufficiently apprised of the County's reasons for claiming the privilege; an *in camera* inspection of the investigation reports would have appraised the court of the reports' actual contents but would *not* have changed the County's reasons for claiming the privilege. The instant case does *not* involve a claim of privilege otherwise inarticulable without actual disclosure of the privileged information. Accordingly, County's arguments in this regard are without merit.

C. *Minutes of the Claims Settlement Committee Meeting*

()County next claims that the minutes containing the deliberations of the claims settlement committee meeting held on October 11, 1982, are exempt from disclosure under section 54957.2 of the Brown Act. (Fn. 6, *ante*, see §§ 54950-54961.) We disagree.

The Brown Act, enacted in 1953, insured actions taken and deliberations conducted by local legislative bodies be openly performed. Section 54950 ***907** declares: "The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

Section 54953 of the Brown Act provides: "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." Legislative bodies within the meaning of the act include "permanent boards or commissions of a local agency." (§ 54952.5.) Thus, the county's claims settlement committee is a "legislative body" under the act. Closed sessions of local legislative bodies are allowed *only* in the following instances: meetings called for the purpose of deciding whether to grant or renew a license to an applicant with a criminal record (§ 54956.7), and meetings called for the purpose of discussing public security matters or regarding "... appointment, employment, evaluation of performance, or dismissal ... or to hear ... charges brought against ..." a public employee. (§ 5495 7.) It also provides minutes taken of closed sessions under the act do not constitute a public record under the CPRA and are to be kept confidential. (§ 54957.5.)

The County's claims settlement committee discussed the Clemens' settlement in a session closed to the public. The Brown Act does not, however, authorize the holding of closed sessions by legislative bodies for the purpose of discussing settlement claims. Thus, the committee's secret meeting was in clear violation of the Brown Act. County's argument that the closed session minutes are exempt under section 54957.5 is also unfounded as that section does *not* apply to closed sessions held in violation of the act.

County further argues the minutes of the claim's settlement committee meeting should be protected from disclosure by attorney-client privileges because county counsel was present as both legal counsel and committee member. While the Brown Act has been interpreted to allow closed sessions for the purpose of confidential attorney-client consultation (*Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs*. (1968) 263 Cal.App.2d 41, 58 [69 Cal.Rptr. 480]), the mere presence of county counsel at a meeting will *not* turn deliberations regarding the settlement of a tort claim into "confidential" attorney-client communications. As stated in the *Sacramento Newspaper Guild* case, "Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest." ***908** (*Id.*, at p. 58.) We conclude the minutes of the October 11, 1982, meeting are not exempt from disclosure under the attorney-client privilege.

County lastly contends the minutes of the committee's meeting should not be disclosed because "confidential" records were discussed during the meeting, citing a California Attorney General opinion indicating holding of a closed session is justifiable where independently privileged records are discussed. (62 Ops.Cal.Atty.Gen. 150, 159 (1979).) However, County has failed to establish *any* of the records contained in the Clemens' settlement file, which were presumably discussed at the secret meeting, is in fact independently privileged from disclosure. This last contention is therefore also devoid of merit.

D. *Rough Notes*

County claims the rough undated notes made by risk management staff, contained in a document entitled "action and memo sheet" (doc. 16), are exempt from disclosure under subdivision (a) of section 6254. This subdivision protects "[p]reliminary drafts, notes, or interagency or intraagency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure."

There is no indication in the record regarding the contents of these notes; moreover, there is no indication whether the notes are of the type "not retained by the public agency in the ordinary course of business." Thus, we cannot ascertain whether subdivision (a)'s exemption provisions are applicable to these notes. Even assuming the exemption is applicable, the record is silent regarding the competing considerations in balancing disclosure

versus nondisclosure interests.

We therefore remand the determination of this issue to the trial court with directions to inspect the undated rough notes *in camera* to determine whether they constitute notes not retained by the County in the ordinary course of business under the meaning of subsection (a) and, if so, whether the public interest in disclosure is outweighed by the public interest in nondisclosure.

E. *Remaining Settlement Records*

()The remaining documents in Clemens' settlement file (those dealing with the annuity policy (docs. 7, 9 & 15), those pertaining to the warrants issued to Clemens (docs. 11 & 13), and those regarding the settlement ***909** agreement itself (docs. 12 & 14)) County argues should be protected from disclosure under section 6255 (fn. 7, *ante*) since "the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." (§ 6255.)

The County claims it is in the public interest to keep secret its settlement policy and decisions, for if known to the public it would result in frivolous tort claims filed against the County. It further argues public scrutiny of the County's settlement procedures would have an adverse impact upon the County's economic ability to sustain itself as a tort defendant, especially in those cases where it is more economically feasible to pay "nuisance value" in the settlement of a claim than to continue to litigate.

Against this interest must be measured the public interest in finding out how decisions to spend public funds are formulated and in insuring governmental processes remain open and subject to public scrutiny. We find these considerations clearly outweigh any public interest served by conducting settlement of tort claims in secret, especially in light of the policies of disclosure and openness in governmental affairs fostered by both the CPRA and Brown Act. While County's concern with the potential for escalating tort claims against it is genuine, opening up the County's settlement process to public scrutiny will, nevertheless, put prospective claimants on notice that only meritorious claims will ultimately be settled with public funds. This in turn will strengthen public confidence in the ability of governmental entities to efficiently administer the public purse.[13]

County argues the settlement agreement should remain confidential because it was entered into with the expectation its provisions would remain confidential. We disagree. "[A]ssurances of confidentiality are insufficient in themselves to justify withholding pertinent public information from the public." (*San Gabriel Tribune v. Superior Court*, *supra.*, 143 Cal.App.3d 762, 776.) As we have already held, the documents relating to the settlement of Clemens' claim constitute "public records" within the meaning of section 6252, subdivision (d). We conclude that assurances of confidentiality by the County regarding the settlement agreement are inadequate to transform what was a public record into a private one. (Cf. *San Gabriel Tribune v. Superior Court*, *supra.*, 143 Cal.App.3d at pp. 774, 775 where assurances of confidentiality similarly made by a public entity to a utility company regarding financial data utilized in granting the company a rate increase were held ***910** insufficient to convert the data, deemed a public record, into a private record.)

()Lastly, we hold the court properly exercised its discretion *not* to conduct an *in camera* inspection of the remaining, nonexempt documents as it was able to adequately balance the competing interests for and against disclosure without such a hearing.

We hold the County must allow The Register access to all the settlement documents contained in the Clemens' settlement file with the exception of the crime report (doc. 6) and the rough undated notes made by Risk Management staff (doc. 16). The cause is remanded to the trial court for further proceedings regarding accessibility to these two documents not inconsistent with the views expressed in this opinion.

The court is also directed to award The Register court costs and reasonable attorneys fees incurred as the prevailing plaintiff in litigation pursued under the CPRA, in accordance with section 6259. The order is affirmed and the cause is remanded with directions.

Wallin, J., concurred.

CROSBY, J.

I respectfully dissent. I would reach none of the issues raised by the parties and addressed by the majority. The settlement document prepared by the county and signed by Clemens and his attorney contains, we are told, a nondisclosure clause similar to the following: "It is understood and agreed that the terms of this settlement

shall remain confidential, and disclosure by the respective parties shall act to make this settlement void." When questioned about this provision at oral argument, counsel for The Register made the remarkable admission that the newspaper not only desires to publish the details of the settlement, it hopes its action will void the agreement.

In its First Amendment fervor to publish Clemens' medical and psychiatric records and zeal to destroy his recovery, The Register has forgotten another part of our Constitution, due process of law. Michael T. Clemens has never been named as a party to this proceeding. He has received no legal notice of the action nor any proper opportunity to be heard.

At the hearing below, Clemens' absence was raised by the court at the very outset: "I think that some notice should be given of the hearing to the individuals [*sic*] involved there." The deputy county counsel agreed: "I think the court does point out a very valid point that there are privacy ***911** interests of the individual who is part of the settlement with the county. The court is well aware that's a constitutional right of privacy, and I think it would be well taken to have those individuals to be present to be heard in this regard. [¶] The attorney who is representing the individual who is part of the settlement [agreement] has expressed interest to do that. I thought he would be here this morning."

Later the following colloquy occurred: "[County Counsel]: I would also indicate, too, that the settlement agreement would be similar to those, but it's also confidential in the terms that it is confidential by contract, and there is an expectation of privacy there, but our major argument-[¶] The Court: Who wanted privacy, the county or the individual? [¶] [County Counsel]: It's generally asserted by the county, but there was an interest conveyed to me by the claimant's attorney that they also wanted it confidential, because not only as you put forward all his medical and psychiatric records to expedite and to make sure there is a settlement here, but this gentleman is also in a vulnerable position being the subject of institutionalization. And I believe his argument would be if he were here, what is conveyed to me was that he is locked up, there are other people who would like to get his money, possibly extort money from him, and he doesn't want them to know that he has this money, and the money that he got from this settlement is a result of damages that he sustained. Just because he was alleged to be a child molester, I don't think it makes him any different from anybody else who sustained damages at the hands of the county. That is why he doesn't want this settlement agreement to be public. He doesn't want anybody to know he has money because he might have a lot of problems when they know he has money. [¶] The Court: I can appreciate that. Certainly that's an interest to be considered."

The Register's counsel responded, "the reason that it's unnecessary is that what we are dealing with here is a public file, in the sense that it's in the risk management office of the County of Orange. When a person files a claim, that is the first step in a procedure for taking action against a public entity. When that claim is filed-as a matter of fact, counsel, I believe, has admitted or at least advised us the claim is a public document -that exposes the claimant to the issue involving all of those things that are involved in his action against the county in this case. Therefore, he has put into issue his damages, the means by which he was in this case attacked, I guess, and the issues involving the tort, and frankly the medical issues, because somebody has to assess all of that and make a decision about it. That's the only way that it can be resolved. [¶] Therefore, his reasons for personal privacy have been waived to the extent that these matters are being used in a civil action." The court apparently accepted this argument, for it did not refer ***912** to Clemens' absence again and announced an intent to issue a ruling later the same day.

An individual does not waive the con stitutional right of privacy by filing a claim or a lawsuit, except to the extent necessary to the particular action. (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 859 [143 Cal.Rptr. 695, 574 P.2d 766]; *GT, Inc. v. Superior Court* (1984) 151 Cal.App.3d 748, 753 [198 Cal.Rptr. 892]; see art. I, § 1, Cal. Const.) Clemens should be afforded a proper opportunity to argue the parameters of his own waiver, if any, and the effect of the nondisclosure clause.[1]

It is an established principle that "[w]here the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined, that third person is an indispensable party. [Citation.]" (*Sierra Club, Inc. v. California Coastal Com.* (1979) 95 Cal.App.3d 495, 501 [157 Cal.Rptr. 190].) Although the court retains jurisdiction to act despite the absence of an indispensable party, "for reasons of equity and convenience ... the court should not proceed with a case where it determines that an 'indispensable' party is absent and cannot be joined. [Citation.]" (*Id.*, at p. 500.)

Also, it has long been the law that "[t]he objection being so fundamental, it need not be raised by the parties themselves; the court may, of its own motion, dismiss the proceedings, or refuse to proceed, until ... indispensable parties are brought in. [Citations.]" (*Bank of California v. Superior Court* (1940) 16 Cal.2d 516, 522 [106 Cal.Rptr.

879].) In fact the objection may be made at any time by a trial or appellate court. (*Hartman Ranch Co. v. Associated Oil Co*. (1937) 10 Cal.2d 232, 265 [73 P.2d 1163].)

We should raise the objection. Clemens remains a prisoner with impaired access to the legal process. His lawyer has advised the county counsel Clemens desires to maintain the confidentiality of his medical and psychiatric records and fears for his safety if the settlement is disclosed. It is not for us to cast aside these fears lightly. Clemens is a convicted child molester who has already had his throat slashed once by another inmate. Part of the settlement was a nondisclosure provision which both sides bargained for. ***913** Moreover, The Register is not just trying to sell newspapers, its counsel admits it wants to derail Clemens' recovery.[2] The record reveals no information as to why Clemens' counsel failed to appear at the hearing-perhaps he reasonably believed he lacked standing until Clemens was actually joined. Perhaps he was not retained for that purpose. Whatever the reason, it is clear Clemens has been denied the fundamental right to proper notice and an opportunity to be heard.

It is the strength of the Republic that the Constitution protects the pariah with the same blind devotion it does the popular and the powerful. The majority should not yield to The Register's hypocritical invocation of our fundamental law at the expense of this principle. I would dismiss or abate the proceedings pending Clemens' joinder as an indispensable party. (Code Civ. Proc., § 389.)

A petition for a rehearing was denied August 28, 1984, and appellant's petition for a hearing by the Supreme Court was denied October 19, 1984. ***914**

Footnotes

1 All statutory references are to the Government Code unless otherwise specified.
Section 945.4 provides in relevant part: "... no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required ... until a written claim therefor has been presented to the public entity ...."

2 Pursuant to section 935.2, the Orange County Board of Supervisors has delegated to the claims settlement committee authority to settle all nonhospital or medical malpractice claims filed against the county exceeding $20,000. (Orange County Bd. of Supervisors Res. No. 82-1364, 9/14/82.) The county's claim settlement committee is ordinarily composed of three members representing the general services agency, the county counsel and the county administrative office. A representative of the agency or department against whom the claim is directed is also required to be present during committee meetings but is not entitled voting privileges regarding the settlement. Present at the October 11, 1982 meeting were the committee members and representatives from the sheriff and risk management offices.

3 The following is the list of settlement documents submitted to the court by the County:
1. "Claim against County, dated August 13, 1982."
2. "Letter to Claimant's attorney from County Counsel that Claim had been received, dated August 23, 1982."
3. "Letter to Risk Management Services from County Counsel that Claim had been filed, and to investigate, dated August 3, 1982."
4. "Memorandum from Risk Management Services to Sheriff to investigate Claim, dated August 26, 1982."
5. "Memorandum from Sheriff containing requested investigation, dated September 8, 1982."
6. "Crime Report #664/187 relating to May 28, 1982 incident in Orange County Jail."
7. "Letter from insurance company as to Annuity Plan, dated September 21, 1982."
8. "Letter from Claimant's attorney, requesting settlement, with attached medical records, dated September 28, 1982."
9. "Letter from insurance company as to Annuity Plan, dated October 1, 1982."
10. "Minutes of Claims Settlement Committee, dated October 11, 1982."
11. "Request for warrants to Auditor/Controller and cover memorandum from Risk Management Services, all dated October 13, 1982."
12. "Confirming letter of settlement to Claimant's attorney, dated October 13, 1982."
13. "Warrant stubs (2) dated October 15, 1982 and October 19, 1982."
14. "Document entitled Release of all Claims, signed by Claimant and his attorney and cover letter from Claimant's attorney dated October 22, 1982."
15. "Annuity Policy and cover letter from insurance company, dated December 7, 1982."
16. "Action and memo sheet (rough notes by Risk Management Staff) not dated."
At the hearing held on The Register's petition, County agreed to allow The Register access to documents 1-4. Accordingly, this opinion only deals with accessibility to the remaining 14 documents.

4 In its nine page order the court stated the County's failure to disclose the settlement documents "flies directly in the face of constitutional and statutory guarantees." Citing *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555 [65 L.Ed.2d 973, 100 S.Ct. 2814], the court stated the press' right to know how public money is being spent can only be blocked if the government shows "an overriding interest," which the County had not satisfied. Thus, the court concluded: "[t]he County's asserted exemption under both the PRA and the Brown Act must be considered not only in the context of those acts, but like all other such legislation be juxtaposed with the constitution. The Court is convinced that when so considered, especially in light of a strong public policy favoring disclosure, production or access is mandated."

5 Section 6254 provides in relevant part: "Except as provided in Section 6254.7, nothing in this chapter shall be construed to require disclosure of records that are any of the following:
"(a) Preliminary drafts, notes, or interagency or intraagency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure.
"
. . . . .
"(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.
"
. . . . .
"(f) Records of complaints to or investigations conducted by ... any state or local police agency ... for correctional, law enforcement or licensing purposes ....
"
. . . . .
"(k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.
"
. . . . .
"Nothing in this section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law."

6 Section 54957.2 of the Brown Act provides in pertinent part: "(a) The legislative body of a local agency may ... designate a clerk or other ... employee ... who shall then attend each closed session of the legislative body and keep and enter in a minute book a record of topics discussed and decisions made at the meeting. The minute book made pursuant to this section is not a public record subject to inspection pursuant to the California Public Records Act ... , and shall be kept confidential ...."

7 Section 6255 provides as follows: "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."

8 Section 6259 provides in material part: "Whenever it is made to appear by verified petition to the superior court of the county where the records ... are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he should not do so. The court shall decide the case after examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and such oral argument and additional evidence as the court may allow."

9 Evidence Code section 915, subdivision (b) provides in relevant part: "When a court is ruling on a claim of privileged ... and is unable to do so without requiring disclose of the information claimed to be privileged, the court *may* require the person from whom disclosure is sought ... to disclose the information in chambers ...."

10 We note County does not argue nor does the record support a contrary inference. No allegation has been made that the disputed medical records deal with a separate or unrelated medical condition.

11 The specific information subject to disclosure under subdivision (f)(2) includes: "... the time, date and location of occurrence, the time and date of the report, the name, age and current address of the victim ... the factual circumstances surrounding the crime or incident, and a general description of any injuries, property or weapons involved."

12 Section 1040 of the Evidence Code provides in full: "(a) As used in this section, 'official information' means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.
"(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:
"(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or
"(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered."

13 Plaintiff does not claim, nor do we hold, every discussion regarding settlement of an actual or potential case against the county should be made public. We limit the reach of our holding to the actual discussions and actions of the claims settlement committee.

1 In a similar vein, see *Seattle Times Co. v. Rhinehart* (1984) ___ U.S. ___ [81 L.Ed.2d 17, 104 S.Ct. 2199] where the Supreme Court noted, "A litigant has no First Amendment right of access to information made available only for purposes of trying his suit .... [¶] Moreover, pretrial depositions and interrogatories are not public components of a civil trial. [Fn. omitted.] ... Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." (*Id.*, ___ U.S. at p. ___ [81 L.Ed.2d at pp. 26-27].)

2 Although the county counsel has forgotten his superior court argument concerning the need to join Clemens here, this record presents no current evidence of collusion between the county and The Register to defeat the agreement. Nevertheless, the result may be the same as if there were. The Register apparently believes once the claims settlement committee's bargain with Clemens is exposed in the newspaper, a public outcry against the settlement may stampede the county board of supervisors to seek to disavow it, perhaps by means of the nondisclosure provision which the county itself suggested.

End of Document

Using Mediation to Resolve Consumer Privacy Disputes

David Peress, Executive Vice President, Hilco Streambank

Background

On February 5, 2015, RadioShack Corporation and several affiliated companies commenced Chapter 11 bankruptcy cases in the District of Delaware. The announced intention of the Debtors was to use the Chapter 11 process to effectuate a sale or sales of substantially all of their assets. Among those assets were various databases containing information relating to millions of RadioShack's customers (the "Customer Data") that had been collected over many decades by RadioShack. Certain of the Customer Data such as consumers' names, physical addresses and email addresses, constituted Personally Identifiable Information ("PII") as set forth in 11 U.S.C. §101(41A).

Shortly after commencing the bankruptcy cases, the Debtors filed a Motion under §363 to sell substantially all of their assets including the Customer Data (the "Sale Motion"). Led by the Attorney General for the State of Texas (the "Texas AG"), the Attorneys General and Consumer Protection Offices of at least 40 states either filed formal objections or other letters and pleadings setting forth their concern that the sale of the Customer Data would result in the transfer of PII in violation of the RadioShack Customer Privacy Policy and applicable consumer protection laws.

Proceedings in connection with the Sale Motion took various twists and turns over the three months following its filing. On March 12, 2015, a Consumer Privacy Ombudsman ("CPO") was appointed by the Bankruptcy Court to provide her recommendations concerning the potential sale of PII in accordance with 11 U.S.C. §363(b)(1)(B) and 11 U.S.C. §332. And on April 1, 2015, the Texas AG filed a Motion seeking the entry of a Case Management Order (the "Case Management Motion") to govern the litigation over the sale of PII.

Following the filing of the Case Management Motion, the Debtors and the Texas AG commenced a discussion to see whether a consensual resolution of the objections to the contemplated sale of PII could be achieved. Among the ideas discussed was the submission of the dispute to a mediator. Ultimately, an Agreement to Mediate was entered into by the Debtors, the Texas AG and 16 other Attorneys General. The terms of the Agreement to Mediate were confidential and not filed with the Bankruptcy Court.

The mediation was scheduled to take place after the auction for the Consumer Data and related intellectual property. Following the auction, the winning bidder, General Wireless Operations ("GWO") also agreed to enter into the Agreement to Mediate. Although not a party to the Agreement to Mediate, counsel to the Federal Trade Commission provided its views on the appropriate standards to evaluate the permissibility of a sale of the RadioShack PII, which views were memorialized in a letter to the CPO on May 16, 2015. See Report of Consumer Privacy Ombudsman, May 16, 2015 (In re RadioShack Corporation, et al., Case No. 15-10197 (BLS), D.I. 2148) (Exhibit D) (attached).

The mediation took place in Ft. Worth, Texas on May 14, 2015. Present at the mediation were representatives of the Texas AG and, in person or on the phone, representatives of the other attorneys general that had entered into the Agreement to Mediate, the Debtors, Hilco Streambank in its capacity

as intellectual property advisor to certain secured lenders, GWO and the CPO. In advance of the mediation, the Texas AG submitted a pleading setting forth the consumer protection statutes and regulations which it alleged the sale of PII would violate. During the mediation, GWO explained what elements of the customer data it needed in order to get the "benefit of its bargain" with the Debtors and different proposals were made by the parties in order to limit the types and amount of data that would be transferred, what type of consumer consent was required to any transfer, and what constraints on the subsequent use and assignment of the data were appropriate. Ultimately, with the mediator's assistance, a Term Sheet was agreed to which resolved the dispute by setting forth conditions to the sale of the PII that were incorporated into the Sale Order. See Notice of Agreement Regarding Sale of Personally Identifiable Information, May 20, 2015 (In re RadioShack Corporation, et al., Case No. 15-10197 (BLS), D.I. 2187).

Statutory Framework

11 U.S.C §363(b)(1) provides in relevant part that a debtor cannot sell PII where the debtor's privacy policy prohibits the transfer of such PII unless:

(A) such sale is consistent with such policy; or
(B) after appointment of a CPO under section 332 of the Bankruptcy Code, and after notice and a hearing, the court approves such sale –
    i. giving due consideration to the facts, circumstances, and conditions of such sale; and
    ii. finding that no showing was made that such sale would violate applicable nonbankruptcy law.

These provision of section 363, and section 332 to which it refers, were added to the Bankruptcy Code by Congress in response to litigation that took place in the Toysmart.com bankruptcy case. Toysmart.com was an online toy store that sold educational games and toys. It collapsed when its sponsors withdrew their support in the midst of the "dot bomb" market correction in 2000.

Following the liquidation of its inventory, the debtor sought to sell its "intellectual property" assets including its customer data notwithstanding its privacy policy that said it would not sell such data. The FTC intervened by filing an Adversary Proceeding seeking to enjoin the sale of customer data on the basis that the sale of customer data would violate the debtor's privacy policy and therefore constituted a "deceptive act or practice" in violation of section 5(a) of the FTC Act (15 U.S.C §45). In re Toysmart.com, LLC, Civil Action No. 00-13995-CJK (Bankr. E.D. Mass. 2000). The Adversary Proceeding was ultimately resolved by a stipulation between the Debtors and the FTC which created the concept of a "qualified buyer" of the customer data, and set forth a number of conditions which a "qualified buyer" would need to satisfy in order purchase the PII. See Report of Consumer Privacy Ombudsman, May 16, 2015 (In re RadioShack Corporation, et al., Case No. 15-10197 (BLS)), D.I. 2148 (Exhibit A) (attached).

Following the enactment of Sections 332 and 363(b), CPOs have been appointed in dozens of cases where debtors seek to sell PII in a manner that may be inconsistent with their published privacy policies. The CPO acts as a disinterested third party to review the debtor's proposed sale of PII and to provide his or her recommendations concerning the appropriateness of the PII sale, and any conditions that should be imposed in connection therewith. 11 U.S.C. §332(b). In practice, the debtor and prospective purchasers of PII will work together with the CPO to fashion reasonable conditions to the transfer and

subsequent use of the PII, and such conditions are often incorporated into the sale order or asset purchase agreement.

Mediation as a Tool to Resolve Complex Privacy Issues

Section 363(b)(1) reflects an effort to balance the privacy interests of consumers against the Bankruptcy Code's policy of maximizing estate recoveries in asset sales. The RadioShack mediation provided a valuable forum for the illumination of these competing interests in the presence of the key stakeholders and interested parties. Key to its ultimate success in generating a resolution was a mediator who had significant experience as a former Bankruptcy Judge and significant credibility among all of the litigants. In addition, it was important that there was a Bankruptcy Court approved disinterested expert in the room in the person of the CPO. Throughout the case, the CPO maintained an ongoing dialogue with the FTC, the Texas AG and the Debtors which helped focus attention on what assets were actually implicated in the sale and the business drivers that made them more or less important to potential purchasers. One would think that a similar role could be played by a Patient Care Ombudsman appointed under Section 333 of the Bankruptcy Code, or an Examiner appointed under Section 1104(c) of the Bankruptcy Code.

It seems likely that in the future, litigation over consumer privacy issues is going to increase. Like many other provisions of the Bankruptcy Code, Section 363(b) creates a conflict between the exercise of federal powers granted under Article 1 of the Constitution and the valid exercise of State police powers to protect consumers. The statute endeavors to address this potential conflict in section 363(b)(1)(B)(ii) by requiring the Bankruptcy Court make a finding that the sale of PII would not violate applicable nonbankruptcy law. Because the police power at issue in these cases is the enforcement of prohibitions on unfair and deceptive trade practices, and not a specific prohibition on the transfer of PII, Bankruptcy Courts have tended to pay little attention to whether or not this subsection is implicated in 363 sales involving a transfer of PII.

These circumstances are, however, about to change. On January 1, 2020, the California Consumer Privacy Act ("CCPA") will become effective. The CCPA is the first comprehensive statute in this country to set forth rules governing the collection, use and transfer of PII. Among other things, the CCPA sets forth the types of disclosures that must be made to consumers by a company that wishes to collect PII, creates a new "right to be forgotten", requires the "consent" of consumers in connection with the transfer of their PII, and creates a private right of action in the event of a data breach. The California Attorney General's Office is required to promulgate regulations that provide guidance on the process to be followed by consumers and companies that collect data, and what constitutes "consent" to a collection and sale of data by July 1, 2020.

It seems likely that data breaches that implicate data of California residents will lead to class actions and add an additional set of parties with an interest in a proposed sale of PII. In the RadioShack case, the cooperation among the state attorneys general in the mediation, and the willingness of the FTC to work with the CPO to protect its interests, allowed the parties to reach a consensual resolution of issues that the Bankruptcy Court most assuredly did not wish to wade into. As a result, the sale moved forward, and a useful standard for evaluating sales of PII was established. It remains to be seen whether in the wake of the CPPA this standard is re-evaluated, and whether mediation will remain a useful tool for playing out that process.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	Chapter 11
RADIOSHACK CORPORATION, *et al.*,[1]	Case No. 15-10197 (BLS)
Debtors.	(Jointly Administered)
	Related Docket No.: 1768

NOTICE OF AGREEMENT REGARDING SALE OF CERTAIN PERSONALLY IDENTIFIABLE INFORMATION

PLEASE TAKE NOTICE that on April 10, 2015, the Debtors filed the *Debtors' Combined Motion for Entry of Orders: (I) Establishing Bidding and Sale Procedures; (II) Approving the Sale of Certain IP and Related Assets; and (III) Granting Related Relief* [Docket No. 1768] (the "IP Sale Motion").[2]

PLEASE TAKE FURTHER NOTICE that the Debtors received objections (the "Objections") to the IP Sale Motion from certain states' Attorneys General (collectively, the "State AGs"), objecting to the Debtors' sale of certain Personally Identifiable Information ("PII") pursuant to the IP Sale Motion.

PLEASE TAKE FURTHER NOTICE that the Debtors, the State AGs, and General Wireless Operations Inc., as the proposed purchaser of the PII (the "Purchaser" and

[1] The Debtors are the following eighteen entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): RadioShack Corporation (7710); Atlantic Retail Ventures, Inc. (6816); Ignition L.P. (3231); ITC Services, Inc. (1930); Merchandising Support Services, Inc. (4887); RadioShack Customer Service LLC (8866); RadioShack Global Sourcing Corporation (0233); RadioShack Global Sourcing Limited Partnership (8723); RadioShack Global Sourcing, Inc. (3960); RS Ig Holdings Incorporated (8924); RSIgnite, LLC (0543); SCK, Inc. (9220); Tandy Finance Corporation (5470); Tandy Holdings, Inc. (1789); Tandy International Corporation (9940); TE Electronics LP (9965); Trade and Save LLC (3850); and TRS Quality, Inc. (5417). The address of each of the Debtors is 300 RadioShack Circle, Fort Worth, Texas 76102.

[2] Capitalized terms not otherwise defined herein shall have the meanings given to them in the IP Sale Motion.

together with the Debtors and the State AGs, the "Parties"), participated in a mediation (the "Mediation") commencing May 14, 2015 in an attempt to resolve the Objections.

PLEASE TAKE FURTHER NOTICE that at the Mediation the Parties reached an agreement (the "Agreement") resolving the Objections.

PLEASE TAKE FURTHER NOTICE that the agreement between the Parties memorializing the terms of the Agreement is attached hereto as **Exhibit A**.

Dated: May 20, 2015
Wilmington, Delaware

PEPPER HAMILTON LLP

/s/ Evelyn J. Meltzer

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ATTORNEYS FOR DEBTORS AND
DEBTORS IN POSSESSION

EXHIBIT A

Mediation Term Sheet
In re Radio Shack Corp., et al.
Bankr. Case No. 15-10197

This Term Sheet is subject to mediation confidentiality pursuant to the terms of the Agreement to Mediation, to which all parties are signatory, and to all other protections as may be applicable under the Local Rules for the U.S Bankruptcy Court for the District of Delaware, the Federal Rules of Evidence, and such orders as have been entered by the court in this bankruptcy case.

The Parties (as described below) entered into a mediation commencing May 14, 2015 to resolve certain objections raised by various States' Attorneys' General to the sale by the Debtor(s) of certain Personally Identifiable Information to the Purchaser. The mediation was continued through May 16, 2015. This document memorializes the essential terms of the agreement of the Parties. It is understood that

- All parties are bound by the terms set out herein, save that the AG's are only bound by the final decision of the respective Attorneys General, as that decision may be made pursuant to the official policies of each respective office. Confirmation of such final decision must be furnished to the Debtors and the Purchaser, through their respective counsel, by no later than 7:30 p.m ET, May 19, 2015. Confirmation shall be via email to Gregg Galardi (gregg.galardi@dlapiper.com), counsel for the Purchaser and to Paul Green (pmgreen@JonesDay.com), counsel for the Debtors, with a copy to the mediator (lmclark@leifmclark.com).
- All parties bound are obligated to affirmatively support these terms and their effectuation in all *fora*, including in the U.S. Bankruptcy Court for the District of Delaware, where this bankruptcy case is pending.
- All parties agree to cooperate in the preparation of such other and further documentation as is required to memorialize, effectuate and/or accomplish the essential terms set out in this Term Sheet.

Parties[1]

- Debtor(s)-in-Possession ("Debtor")
- General Wireless Operations Inc.("Purchaser")[2]
- States' Attorneys' General ("AG")
    - Texas
    - Tennessee
    - Georgia
    - Missouri

[1] For purposes of this Term Sheet, "Parties" shall include the named parties, together with their agents, attorneys, successors, and assigns. While the Consumer Privacy Ombudsman ("CPO") is not a party to this mediated settlement, the CPO did actively participate in the mediation itself.

[2] The Purchaser was the acquirer of the Store and other assets, which sale was consummated on April 2, 2015 and may designate and assign its right to the intellectual property assets, including but not limited to the PII that is the subject of this Term Sheet, to a wholly owned subsidiary of the Purchaser.

- Nebraska
- Oregon
- Connecticut
- Massachusetts
- Virginia
- West Virginia
- Pennsylvania
- New York
- Idaho
- Wisconsin
- Maine
- Hawaii[3]
- North Carolina

The AG have raised objections to the sale by the Debtor of Personally Identifiable Information ("PII"). At mediation, the Purchaser, the Debtor and the AG agreed upon the following conditions, on the satisfaction of which the AG will withdraw their objections to the sale of PII to the Purchaser by the Debtor.

1. PII, for purposes of this Term Sheet, is certain customer records held by the Debtors, and containing complete customer name and physical address files as well as email addresses, in certain cases. It is agreed that the sale of PII by the Debtors to the Purchaser is described as follows:
    a. Over the course of many years, the Debtors collected customer information through a variety of sources, and as of the petition date, the Debtors' databases contained approximately 117 million customer records (including consumer and commercial customers). The records included over 170 data categories.
    b. In connection with the sale of the Debtors' intellectual property and related assets, the Debtors proposed to sell a subset of their customer records, which subset was identified in an Exhibit filed with the Bankruptcy Court [Docket # 2017].
    c. Specifically, the Debtors offered what they considered to be the most relevant data—approximately 67 million complete customer name and physical address files, of which approximately 8.3 million records also included an e-mail address.[4]
    d. The records offered for sale were limited to one or more of the following categories: (a) first and last name; (b) physical mailing

[3] Hawaii is represented on this matter by its Office of Consumer Protection, an agency which is not part of the State Attorney General's Office, but which is statutorily authorized to undertake consumer protection functions, including legal representation of the State of Hawaii. For simplicity purposes, the entire group will be referred to as the "Attorneys General" or "AGs" and these designations, as they pertain to Hawaii, refer to the Executive Director of the State of Hawaii's Office of Consumer Protection.

[4] The Debtors also offered to sell approximately 200,000 e-mail addresses that were not associated with a physical mailing address.

address; (c) e-mail address; (d) phone number; and (e) 21 fields of transaction data.

e. As a result of the mediation, the Debtors and the Purchaser have agreed to limit the information to be transferred to the Purchaser pursuant to the proposed sale.
    i. The Purchaser has agreed to only buy customer e-mail addresses that were active within the two-year period prior to the petition date.
    ii. In addition, the Purchaser has agreed to only buy the following seven fields of transaction data collected by the Debtors within the five-year period prior to the petition date:
        1. store number,
        2. ticket date/time,
        3. SKU number,
        4. SKU description,
        5. SKU selling price
        6. tender type and
        7. tender amount.

f. As a result of the mediation, the Debtors will not sell: (a) e-mail addresses that were active more than two years prior to the petition date, (b) customer telephone numbers, (c) the 14 transaction data fields that were previously marked for sale, or (d) any other customer data not included in subsection (e) above.[5]

g. In addition, the Debtors will not sell any credit or debit card numbers or any transaction data not included in seven categories set forth in subsection (e) above.

[5] These consist of the following:

Store Name
Store Address
Store Phone Number
Register Number
Transaction Number
Ticket Number
Operator Initials
Sales Associate Initials
Ticket SubTotal
Ticket Tax Percentage
Ticket Tax Amount
Ticket Total
Questions/Answers (if attached to SKU)
Transaction Specific Legalese Text

h. As previously disclosed, the Debtors' databases do not contain sensitive information, such as social security numbers or other governmental identification numbers unique to each customer. Such data, although at one time collected in connection with signing up customers for wireless service, was not maintained by the Debtors and therefore no longer exists. Thus such information is not, and could not be, sold or transferred, as it does not exist in the Debtor's records.

2. The order of sale will contain a recitation that the correct standard of review applicable to the sale of PII is that set out in 11 U.S.C. § 363(b)(1)(B), as enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The recitation will not contain a reference to *In re Toysmart.com, LLC*, Bankr. Case No. 00-13995, Stipulation and Order (Bankr.D.Del. July 20, 2000).
3. With respect to PII for which email addresses are available, the Purchaser will arrange for an email communication to be sent to those persons prior to the transfer of this PII by the Debtor to the Purchaser. Purchaser shall send such email communication no later than 60 days following the Closing.
    a. The communication shall contain a clear and conspicuous notification advising the recipients that the Purchaser has purchased the operating assets of Radio Shack, and providing an opt-out opportunity for such recipients.
    b. The recipients will have 7 days within which to exercise the option.[6]
    c. With respect to a person exercising the opt-out pursuant to these conditions, the PII with respect to that person shall not be transferred.
    d. In the event that the email is returned undeliverable, the PII with respect to that person shall not be transferred.
    e. Unless the conditions specified subsections (c) or (d) obtain, then, at the conclusion of the 7 day period, the Debtor will transfer the PII with respect to those persons to the Purchaser. With respect to PII that is not transferred, such PII shall not be transferred or sold by the Debtor[7] and such PII shall be destroyed in accordance with standard industry practice, unless it is subject to the litigation hold, in which event the PII shall be destroyed at such time when it is no longer subject to the litigation hold.
    f. The Debtor shall execute an initial certification of compliance to the effect that PII has been transferred or not transferred as provided herein, and such initial certification shall be filed by the Debtor with the Bankruptcy Court. All later certifications of destruction (including specifically with respect to PII retained pursuant to the litigation hold) shall be delivered by the relevant successor in interest of the Debtor to the CPO.

[6] Notwithstanding, customers whose PII is transferred will, in accordance with applicable law, have available to them the option to opt-out at any time subsequent to the transfer.
[7] This prohibition does not apply to "technical transfers" required by law or pursuant to court order.

4. With respect to PII for which there is no available email address, but for whom there is a physical mailing address, at such time as the Purchaser elects to make a postal mailing to such persons, the communication shall contain a clear and conspicuous notification that
    a. The Purchaser has purchased the operational assets of Radio Shack, and
    b. The recipient has an opt-out opportunity, which may be exercised by contacting a toll-free number provided in the notification.
    c. In the event that the recipient does not exercise this option within 30 days,[8] the recipient's PII will be retained by the Purchaser.
    d. Any person exercising the opt-out pursuant to these conditions shall continue to be subject to the pre-existing privacy policy of Radio Shack, the pre-petition debtor.
    e. With regard to any person to whom mail is returned undeliverable, that person's PII shall be destroyed in accordance with standard industry practice..
    f. The Purchaser shall execute a certification of destruction with respect to PII destroyed pursuant to subsection (e), and such certification shall be delivered to the CPO.
    g. The foregoing conditions shall only apply to mailings if a mailing is made within 2 years of the closing of the sale transaction.
    h. The Purchaser is under no obligation, to make any such mailing.
5. The Purchaser agrees that it will provide an opt-out option at the website for Radio Shack, and that such option shall include both an on-line opt-out option and a toll-free telephone number to call in order to exercise the option.
6. The Parties agree that notice by publication is unnecessary.
7. The Purchaser agrees that it is bound by existing Radio Shack privacy policy with regard to customers listed in the purchased PII, and acknowledges that such privacy policy prohibits the further sale or transfer of such information to third parties. The Parties agree that customers may be bound by material changes to this privacy policy, but only on condition that the Purchaser provides such customers with opt in option, and on the further condition that the customer affirmatively exercises this option.
8. The order will contain a recitation that tracks the language used in the Debtor's motion to sell, to the effect that the Debtor is not selling and the Purchaser is not purchasing sensitive information [*e.g.*, credit card numbers, dates of birth], and such information will never be disseminated by any of the Parties to anyone.
9. Data that is subject to a litigation hold will nonetheless be available to the Purchaser (by way of a duplicate). The Purchaser will be under no obligation to either retain or collect data for the benefit of the litigation in question. Any

[8] Notwithstanding, customers will still, in accordance with applicable law, have available to them the option to opt-out at any subsequent time.

data to which the Purchaser has such access will be subject to the other provisions of this Term Sheet.

ORIGINAL

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	Chapter 11
INSYS THERAPEUTICS, INC., *et al.*,	Case No. 19-11292 (KG)
Debtors.[1]	Jointly Administered
INSYS THERAPEUTICS, INC., *et al.*,	Adv. Pro. No. 19-50261 (KG)
Plaintiffs,	Re: Doc. No. 2
-- against --	
STATE OF ARIZONA, *ex. rel.* Mark Brnovich, Attorney General; STATE OF FLORIDA, Office of the Attorney General, Department of Legal Affairs; COMMONWEALTH OF KENTUCKY, *ex rel.* Andy Beshear, Attorney General; *et al.*	
Government Defendants.	

AGREED ORDER REGARDING ESTIMATION MOTION, PI MOTION AND APPROVING CASE PROCEDURES

Upon the representations of counsel to the Debtors, the Official Committee of Unsecured Creditors ("**UCC**") and certain State Attorneys General, (the "**State AGs**" and, together with the Debtors and the UCC, the "**Parties**") on the record at a hearing held July 2, 2019 (the "**Statements**") in which the Debtors indicated that they would withdraw the *Motion of Debtors for (I) Entry of Orders Pursuant to 11 U.S.C. §§ 105(a) and 502(c) (A) Establishing Procedures and*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are: Insys Therapeutics, Inc. (7886); IC Operations, LLC (9659); Insys Development Company, Inc. (3020); Insys Manufacturing, LLC (0789); Insys Pharma, Inc. (9410); IPSC, LLC (6577); and IPT 355, LLC (0155). The Debtors' mailing address is 410 S. Benson Lane, Chandler, Arizona 85224.

Schedule for Estimation Proceedings and (B) Estimating Debtors' Aggregate Liability for Certain Categories of Claims, (II) Entry of Protective Order, and (III) Subordination of Certain Penalty Claims [Doc. 29][2] (the "**Estimation Motion**") and hold in abeyance the *Debtors' Motion for a Preliminary Injunction Pursuant to 11 U.S.C. § 105(a)* [Adv. Pro. Doc. 2] (the "**PI Motion**"), subject to entry of an order by the Court (i) approving and implementing certain case procedures, (ii) staying the Government Actions[3] as to the Debtors (other than those Government Actions subject to a separate stipulation with the Debtors filed on the docket as of the date hereof), and (iii) granting such other and further relief as the Court deems just and proper; and the Court having jurisdiction to consider the relief requested pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and consideration of this matter and the requested relief being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409; and upon the record at the hearing; and the Court having determined that the legal and factual bases set forth at the hearing establish just cause for the relief granted herein; and it appearing that the relief requested is in the best interests of the Debtors, their estates, creditors, and all parties in interest; and upon all of the proceedings had before the Court and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The protocol attached to this Order as **Exhibit A** (the "**Case Protocol**") is approved.

2. The PI Motion is hereby abated in accordance with the terms set forth in the Case Protocol.

---

[2] References to "[Doc. __]" refer to the docket in the Chapter 11 Cases. References to "[Adv. Pro. Doc. __] refer to the docket in the above-captioned Adversary Proceeding No. 19-50261 (KG) (the "**Adversary Proceeding**").

[3] The "Government Actions" are those actions set forth on Appendix A to the Complaint [Adv. Pro. Doc. 1] initiating the Adversary Proceeding.

3. The Estimation Motion is hereby withdrawn by the Debtors.

4. The Government Actions that are not otherwise the subject of a stipulation with the Debtors are stayed as to the Debtors in furtherance of and in accordance with the Case Protocol.

5. Nothing in this Order shall constitute an admission by any party that the Governmental Actions stayed hereunder are or are not subject to the automatic stay under 11 U.S.C. § 362 or that the Debtors are entitled to any injunctive relief pursuant to 11 U.S.C. § 105(a).

6. For the avoidance of doubt, nothing in this Order shall constitute a finding of fact or substantive ruling on the PI Motion or any other matter in the Chapter 11 Cases or the Adversary Proceeding and all parties' rights with respect to the foregoing are expressly preserved.

7. The Debtors are authorized to take all actions necessary to implement the relief granted in this Order.

8. The Parties will appear for a status conference regarding the Case Procedures on July 24, 2019 at 9:30 a.m. (prevailing Eastern time).

9. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

Dated: July 2, 2019
Wilmington, Delaware

THE HONORABLE KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT A

Insys Therapeutics: Multi-Pronged Case Protocol

Set forth below is a multi-prong case protocol from the Official Committee of Unsecured Creditors (the "UCC"), the Debtors and the State AG Group (as defined below) with regard to various case items, including the *Motion of Debtors for (I) Entry of Orders Pursuant to 11 U.S.C. §§ 105(a) and 502(c) (A) Establishing Procedures and Schedule for Estimation Proceedings and (B) Estimating Debtors' Aggregate Liability for Certain Categories of Claims, (II) Entry of Protective Order, and (III) Subordination of Certain Claims* (the "Estimation Motion") and the Debtors' *Motion for a Preliminary injunction Pursuant to 11 U.S.C. § 105(a)* (the "PI Motion"). The Debtors and the State AG Group recognize that the UCC is a fiduciary to all unsecured creditors and a neutral party and can thus play an important role in working with the Debtors, and negotiating with other creditors, to determine the amount of claims in different categories, as described herein. The Debtors, the UCC, and the State AG Group recognize that a process that maximizes value by encouraging settlement and expedites a resolution of claims categories, the confirmation of a chapter 11 plan, and a distribution to creditors is in the best interest of the Debtors' estates and all creditors.

In lieu of the Debtors' current proposed schedule with regard to estimation and the PI Motion, the following shall occur:

Current Date thru July 23:

1. UCC will undertake investigation and analysis with regard to all unsecured claims against Debtors, including all litigation claims.
2. The Debtors and UCC, separately or together, as appropriate, will engage with professionals representing the State AG Group, the MDL Executive Committee,[1] and any other constituency suggested to them or that they can identify in their analysis.
3. Debtors will provide information and analysis regarding claims to professionals representing the UCC, the State AG Group, and the MDL Executive Committee (including, subject to the negotiation of a confidentiality agreement reasonably acceptable to the Debtors, all materials relied upon by Nathan and Associates in its estimation work, and a copy of the then-current draft Nathan and Associates report (at a time decided at the sole discretion of the Debtors) on professional-eyes only basis). The Debtors may, at their discretion, but upon consultation with the UCC, provide other claimants or groups of claimants with information related to their particular category of claims or other categories of claims, subject to an appropriate confidentiality agreement. None of the UCC, the State AG Group, the MDL Executive Committee, or any other party receiving information will share any information provided by the Debtors without consent.
4. Formal discovery will not be conducted, but State AG Group and the MDL Executive Committee will provide data supporting claims on an informal basis to the UCC and the Debtors.
5. The Debtors, the UCC, the State AG Group, and the MDL Executive Committee (each a "Party," and collectively, the "Parties") will consider views of every constituency with regard to every topic, including strength and weakness of claims, rights to specific estate value, timeline of case (including available cash), and any other issue deemed appropriate.

[1] For the avoidance of doubt, the MDL Executive Committee has not yet agreed to this Case Protocol.

6. To the extent reasonably practicable, Parties will encourage each unsecured creditor category to identify a small group or groups to be its representative(s) in this process, and when identified the small group or groups will become Parties under these procedures.
7. Parties can meet separately or as groups or in any other configuration to discuss and try to resolve any issues involved in the case, including claim amounts, allocation, plan issues, etc., at any time during this process.

July 23

1. UCC to meet with Debtors to provide its view with regard to proper allocation, by unsecured creditor category, of estate proceeds. Other Parties may meet and provide views as well.
2. It is currently contemplated that the categories will consist of, among others, the following: (1) DOJ; (2) Municipality Plaintiffs (as defined in the Estimation Motion); (3) State Attorneys General; (4) Insurance Carrier and Self-Funded Insurance Plan Plaintiffs; (5) Personal Injury Plaintiffs; (6) Trade creditors (including service providers); (7) Persons with Indemnification Claims; (8) Hospitals; and (9) Other (including purported class of purchasers of insurance). Categories are subject to change, including, without limitation, to adjust for types of claims, rather than where such claims are being litigated.
3. At the same time, to the extent not previously delivered, Debtors to provide to UCC their view of same.

July 24 Status Conference required under Agreed PI Order.

July 23-August 5

1. Debtors will negotiate with UCC and any other Party in the Debtors' discretion to reach an "agreed to" allocation, by unsecured creditor category, of estate proceeds (i.e percent allocation to each category).
2. It is anticipated that these negotiations will include agreeing to a mechanic/procedure to go forward with a plan of liquidation.
3. Topics will include: (1) Retention of estate causes of action; (2) Establishment of post-effective date trust or similar mechanic for all proceeds and causes of action/mini-trusts or some other structure to govern each creditor category; (3) Appropriate separation of unsecured creditors into voting classes; (4) Voting procedures; (5) Confidentiality/protective order relating to confirmation proceedings; (6) Timing of distributions; (7) Substantive Consolidation; (8) Appropriate earmarking (if any) of estate value; and (9) Potential subordination (if any) of claims.

*****Note: Subject to Entry of Bid Procedures Order, Auction to occur August 5, which will provide visibility on company cash/inform timing*****

August 6-August 20:

1. It is anticipated that prior to August 6, the Debtors will reach an agreed-to construct with, at the very least, the UCC.
2. Regardless of whether an agreed-to construct has been reached with the UCC, the Debtors to invite all Parties and other case constituents (subject to appropriate confidentiality restrictions)

to negotiations/"mediation" where the Debtors (and, to the extent an agreement has been reached, the UCC) will present their agreed-to construct.

3. The Debtors and the UCC will act as co-mediators, to negotiate proper allocation of estate value by unsecured creditor category, if parties dispute the construct that is presented.
4. These negotiations/mediation sessions will also include discussions regarding proper mechanic for implementing plan of liquidation and post-effective date trust(s).

August 21-August 30:

1. Based on results of negotiation/mediation, the Debtors, with the input of the construct proponents (and all other parties that reach agreement), will document plan of liquidation.

On or before September 2:

1. If not previously filed, Debtors will file Disclosure Statement/Plan of Liquidation, which may or may not include an agreement with any Party or Parties; provided, however, that nothing herein or otherwise, waives or affects the Debtors' right to exclusivity and right to seek extension of exclusivity.
2. If the Debtors file a non-consensual Plan, then any party that objected to the PI Motion on or before June 28, 2019 and did not resolve such objection through a stipulation or other voluntary agreement to stay may file with the Court a Notice of Scheduling Conference, which conference will be scheduled on at least 3 business days' notice, to set a hearing date on the PI Motion solely with respect to such noticing party.
3. If parties have an objection to Disclosure Statement/Plan of Liquidation, they may bring objections on any grounds other than (a) Expedited timing; and (b) Failure to estimate claims.

October 7 (approx):	Disclosure Statement Hearing
November 12 (approx):	Confirmation Hearing
November 22 (approx):	Effective Date

*All timing may be accelerated with the agreement of the Debtors and the UCC.

APPENDIX

Mediating with a Higher Power — Mediation of Disputes with Governments and Governmental Agencies

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The People of the State of California

ENDORSED
FILED
San Francisco County Superior Court
APR 12 2017
CLERK OF THE COURT
BY: FELICIA M. GREEN
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

THE WESTERN UNION COMPANY, a Delaware corporation,

Defendant

Case No. CGC-17-558132

~~[PROPOSED]~~ FINAL JUDGMENT AND PERMANENT INJUNCTION

Plaintiff, the People of the State of California ("the People" or "Plaintiff"), through its attorney, Xavier Becerra, Attorney General of the State of California, by Deputy Attorney General Daniel A. Osborn, and Defendant The Western Union Company ("Western Union" or "Defendant"), appearing through its attorneys, Latham & Watkins LLP, by Hilary H. Mattis, having stipulated and consented to the entry of this Final Judgment and Permanent Injunction ("Judgment") without the taking of proof and without trial or adjudication of any fact or law, without this Judgment constituting evidence of or an admission by Defendants regarding any

issue of law or fact alleged in the Complaint on file, and without Defendants admitting any liability; with all parties having waived their right to appeal; and the Court having considered the matter and good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

I. PARTIES AND JURISDICTION

1. The Court has jurisdiction over the subject matter of this action, jurisdiction over the parties to this action, and venue is proper in this Court.

2. Defendant, at all relevant times, has transacted business in the State of California, including, but not limited to, San Francisco County.

3. This Judgment is entered pursuant to and subject to California Business and Professions Code sections 17200 et seq.

II. DEFINITIONS

4. The following definitions apply to this Judgment:

a. "Cash-to-cash money transfer" means the transfer of the value of cash from one person in one location to a recipient (payee) in another location that is received in the form of cash.

b. "Cash reload money transfer" means the transfer of the value of cash from one person in one location to a recipient (payee) in another location that is received in a form that makes it possible for a person to convert the cash into an electronic form that can be used to add funds to a general-use prepaid card or an account with a payment intermediary.

c. "Consumer" means any person, worldwide, who initiates or sends a money transfer.

d. "Effective Date" means the date upon which this Judgment entered by the Court.

e. "Elevated fraud countries" means any country in which the principal amount of money transfers that are the subject of fraud complaints, received by Defendant from any source, represents one (1) percent or more of the principal amount of fraud complaints worldwide received by Defendant, for either money transfers sent or received in that country,

determined on a quarterly basis, provided that once a country is determined to be one of the elevated fraud countries, it shall continue to be treated as such for purposes of this Judgment.

f. "Elevated fraud risk agent location" means any Western Union agent location that has processed payouts of money transfers associated with:

i. Five (5) or more fraud complaints for such agent location, received by Defendant from any source, during the previous sixty (60) day period, based on a review of complaints on a monthly basis; and fraud complaints, received by Defendant from any source, totaling five (5) percent or more of the total payouts for such agent location in numbers or dollars in a sixty (60) day period, calculated on a monthly basis; or

ii. Fifteen (15) or more fraud complaints for such agent location, received by Defendant from any source, during the previous sixty (60) day period, based on a review of complaints on a monthly basis.

g. "Executive Committee" refers to the following Attorneys Generals' offices: Illinois, Kentucky, Louisiana, Massachusetts, New Jersey, North Carolina, Ohio, Texas and Vermont.

h. "Fraud-induced money transfer" includes any money transfer that was induced by, initiated, or sent as a result of, unfair or deceptive acts or practices and/or deceptive or abusive telemarketing acts or practices.

i. "Front line associate" means the employee of the Western Union agent responsible for handling a transaction at the point of sale for a consumer or a recipient (payee) of a money transfer, including by initiating, sending, or paying out the money transfer.

j. "FTC Action" refers to the case styled Federal Trade Commission v. The Western Union Company, Civil Action No. 1:17-cv-00110-CCC, in the United States District Court for the Middle District of Pennsylvania.

k. "Money transfer" means the sending of money (in cash or any other form, unless otherwise stated) between a consumer in one location to a recipient (payee) in another location using Defendant's money transfer service, and shall include transfers initiated or sent in person, online, over the telephone, using a mobile app, or through whatever platform or means made available. The term "money transfer" does not include Defendant's bill or loan payment services, or purchases of foreign currency conversions or options contracts from Defendant.

l. "Person" includes a natural person, an organization or other legal entity, including a corporation, partnership, sole proprietorship, limited liability company, association, cooperative, or any other group or combination acting as an entity.

m. "Seller" means any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services in exchange for consideration.

n. "Telemarketer" means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer.

o. "Telemarketing" means any plan, program, or campaign which is conducted to induce the purchase of goods or services by use of one or more telephones, and which involves a telephone call, whether or not covered by the Telemarketing Sales Rule, 16 CFR Part 310.

p. "Western Union agent" means any network agent, master agent, representative, authorized delegate, independent agent, super-agent, national account agent, key account agent, strategic account agent, sub-representative, subagent, or any location, worldwide, authorized by Defendant to offer or provide any of its money transfer products or services.

III. INJUNCTION

5. Nothing in this Judgment alters the requirements of federal or state law to the extent they offer greater protection to consumers.

6. Under Business and Professions Code section 17203, Defendant, Defendant's officers, agents, and employees, and all other persons in active concert or participation with any of them, who receive actual notice of this Judgment, whether acting directly or indirectly, in

connection with promoting, offering for sale, or providing money transfer services, are permanently restrained and enjoined from:

A. Transmitting a money transfer that Defendant knows or reasonably should know is a fraud-induced money transfer, or paying out a money transfer to any person that Defendant knows or reasonably should know is using its system to obtain funds from a consumer, directly or indirectly, as a result of fraud;

B. Providing substantial assistance or support to any seller or telemarketer that Defendant knows or reasonably should know is accepting from a U.S. consumer, directly or indirectly, a money transfer as payment for goods or services offered or sold through telemarketing;

C. Failing to do any of the following in connection with money transfers initiated by consumers:

1. Interdict recipients that have been the subject of any complaints about fraud-induced money transfers based on information provided to, or that becomes known by, Defendant;

2. Identify, prevent, and stop cash-to-cash money transfers and cash reload money transfers initiated or received in the U.S. from being used as a form of payment by sellers or telemarketers, including, but not limited to, by:

a. Asking all U.S. consumers whether the money transfer is a payment for goods or services offered or sold through telemarketing;

b. Declining to process money transfers from U.S. consumers where the money transfer is a payment for goods or services offered or sold through telemarketing; and

c. Interdicting known sellers and telemarketers accepting money transfers as payments for goods or services offered through telemarketing;

3. Provide a clear, concise, conspicuous and uncontradicted consumer fraud warning on the front page of all money transfer forms, paper or electronic, utilized by

consumers in elevated fraud countries (based on money transfers sent from those countries) to initiate money transfers using Defendant's system that includes, but is not limited to:

a. A list of the most common types of scams that utilize Defendant's money transfer system;

b. A warning that it is illegal for any seller or telemarketer to accept payments from U.S. consumers through money transfers for goods or services offered or sold through telemarketing;

c. A notice to consumers that the money transfer can be paid out to the recipient within a short time, and that after the money is paid out, consumers may not be able to obtain a refund from Defendant, even if the transfer was the result of fraud, except under limited circumstances; and

d. A toll-free or local number and a website for Defendant, subject to the timing requirements set forth in Subsection III.6.C.4 of this Judgment, that consumers may call or visit to obtain assistance and file a complaint if their money transfer was procured through fraud;

4. Make available in all countries in which Defendant offers money transfer services a website that consumers may visit to obtain assistance and file a complaint if they claim their money transfer was procured through fraud, provided that websites that are not yet available shall be made available in accordance with the following schedule: (i) for countries determined to be elevated fraud countries, within six (6) months of entry of the Stipulated Order For Permanent Injunction and Final Judgment in the FTC Action (the "Stipulated Order"); and (ii) for all other countries, within two (2) years of entry of the Stipulated Order;

5. Provide consumers who initiate or send money transfers via the Internet, telephone, mobile app, or any other platform that is not in-person, with substantially the same clear, concise, conspicuous and uncontradicted fraud warning required by Subsection III.6.C.3 of this Judgment, provided that the warning may be abbreviated to accommodate the specific characteristics of the media or platform;

6. Provide the required warning to consumers in the language used on the send form or other media type or platform used for the money transfer, in a form appropriate for the media or platform;

7. Review and update the consumer warning as necessary to ensure its effectiveness in preventing fraud-induced money transfers; and

8. Submit modifications to the warning, if any, to the Executive Committee for review no less than ten (10) business days before any modified warning is disseminated to Western Union agents; provided that nothing herein shall prohibit Defendant from changing the nature or form of its service, send forms, or media or platform for offering money transfer services or from seeking to replace its send forms with an electronic form or entry system of some type in the future. In the event such changes are made, Defendant shall provide a consumer fraud warning substantially similar to that outlined in Subsection III.6.C.3 of this Judgment in a form appropriate to the media or platform;

D. Failing to reimburse the principal amount of a consumer's money transfer and any associated transfer fees whenever a consumer or his or her authorized representative reasonably claims that the transfer was fraudulently induced and:

1. The consumer or his or her authorized representative asks Defendant, the sending agent, or front line associates to reverse the transfer before the transferred funds have been picked up; or

2. Defendant, after reviewing information and data relating to the money transfer, determines that Defendant, its agents, or the front line associates failed to comply with any of Defendant's policies and procedures relating to detecting and preventing fraud-induced money transfers when sending or paying out the money transfer by failing to: provide the required consumer fraud warnings; comply with Defendant's interdiction or callback programs; verify the recipient's identification; or accurately record the recipient's identification(s) and other required biographical data;

E. Failing to promptly provide information to a consumer, or his or her authorized representative, who reports being a victim of fraud to Defendant, about the name of

the recipient of the consumer's money transfer and the location where it was paid out, when such information is reasonably requested;

F. Failing to establish and implement, and thereafter maintain, a comprehensive anti-fraud program that is reasonably designed to protect consumers by detecting and preventing fraud-induced money transfers worldwide and to avoid installing and doing business with Western Union agents who appear to be involved or complicit in processing fraud-induced money transfers or fail to comply with Defendant's policies and procedures to detect and prevent fraud (hereinafter referred to as "Defendant's Anti-Fraud Program"). As ordered in the FTC Action, Defendant is required to provide the FTC with a written copy of such program, which shall include at least the following requirements:

1. Performance of due diligence on all prospective Western Union agents and existing Western Union agents whose contracts are up for renewal;

2. Designation of an employee or employees to coordinate and be accountable for Defendant's Anti-Fraud Program;

3. Appropriate and adequate education and training on consumer fraud for Western Union agents and front line associates;

4. Appropriate and adequate monitoring of Western Union agent and front line associate activity relevant to the prevention of fraud-induced money transfers;

5. Prompt disciplinary action against Western Union agent locations where reasonably necessary to prevent fraud-induced money transfers;

6. Adequate systematic controls to detect and prevent fraud-induced money transfers, including, but not limited to:

a. Imposing more stringent identification requirements for money transfers sent to, or paid out in, elevated fraud countries;

b. Holding suspicious money transfers at certain dollar thresholds to elevated fraud countries until Defendant has confirmed with the sender that they are not fraud-induced or has refunded the money to the sender;

c. Ensuring that Western Union agent locations are recording all required information about recipients required by Defendant's policies or procedures or by law, including, but not limited to, their names, addresses, telephone numbers, and identifications, before paying out money transfers; and

7. Periodic evaluation and adjustment of Defendant's Anti-Fraud Program in light of:

a. The results of the monitoring required by Subsection III.6.F.4 and Subsections III.6.M. III.6.N., III.6.O, and III.6.P of this Judgment;

b. Any material changes to Defendant's operations or business arrangements; or

c. Any other circumstances that Defendant knows or reasonably should know may have a material impact on the effectiveness of Defendant's Anti-Fraud Program. As ordered in the FTC Action, Defendant is required to notify the FTC in writing of adjustments to its Anti-Fraud Program. Defendant is also required to notify the Executive Committee that it has sent the FTC such a notice of adjustments;

G. Failing to conduct thorough due diligence on all persons applying to become, or renewing their contracts as, Western Union agents, including any sub-representative or subagent, to avoid installing Western Union agents worldwide who may become elevated fraud risk agent locations, including, but not limited to, by:

1. Verifying government-issued identification;

2. Conducting all reasonably necessary background checks (criminal, employment, or otherwise) where permissible under local law;

3. Determining whether information or statements made during the agent application process are false or inconsistent with the results of Defendant's background checks or other due diligence;

4. Taking reasonable steps to ascertain whether the prospective agent formerly owned, operated, had been a front line associate of, or had a familial, beneficial, or straw relationship with any location of any money services business that was suspended or terminated

for fraud-related reasons, as permitted by applicable laws and regulations (including foreign laws and regulations) and with the required cooperation from other money transfer companies;

5. Ascertaining whether the prospective agent had previously been interdicted by Defendant for suspicious activities or had been reported to Defendant as a recipient of fraud-induced money transfers;

6. Conducting an individualized assessment of the particular risk factors involved with each Western Union agent application and conducting all reasonably necessary investigative steps consistent with those risks; and

7. Maintaining information about Defendant's due diligence, including, but not limited to, information about the identities of the owners, their government-issued identifications, and the background check(s) conducted;

H. Failing to reject applications where Defendant becomes aware or reasonably should have become aware based upon its due diligence that the applicant, or any of the applicant's sub- representatives or subagents, presents a material risk of becoming an elevated fraud risk;

I. Failing to ensure that the written agreements entered into with all new Western Union agents require them to comply with Subsection III.6.C.2 of this Judgment;

J. Failing to ensure that all new Western Union agents have effective policies and procedures in place at each of the agent's locations to detect and prevent fraud-induced money transfers and other acts or practices that violate Subsections III.6.A through III.6.F of this Judgment;

K. Failing to take reasonable steps to confirm that Western Union agents whose contracts are up for renewal are complying with the terms of their agreements with Defendant, including, but not limited to, by having effective policies and procedures in place to detect and prevent fraud- induced money transfers;

L. Failing to require all new Western Union agents, and existing Western Union agents, to: (i) disclose and update the identities of any sub-representative or subagent; and

(ii) maintain records on the identities of any front line associates at their sub-representatives' or subagents' locations;

M. Failing to provide appropriate and adequate ongoing education and training on consumer fraud for all Western Union agents, and other appropriate Western Union personnel, including, but not limited to, education and training on detecting, investigating, preventing, reporting, and otherwise handling suspicious transactions and fraud-induced money transfers, and ensuring that all Western Union agents and front line associates are notified of their obligations to comply with Defendant's policies and procedures and to implement and maintain policies and procedures to detect and prevent fraud-induced money transfers or other acts or practices that violate Subsections III.6.A – III.6.F of this Judgment;

N. Failing to take all reasonable steps necessary to monitor and investigate Western Union agent location activity to detect and prevent fraud-induced money transfers, including, but not limited to:

1. Developing, implementing, adequately staffing, and continuously operating and maintaining a system to receive and retain all complaints and data received from any source, anywhere in the world, involving alleged fraud-induced money transfers, and taking all reasonable steps to obtain, record, retain, and make easily accessible to Defendant and, upon reasonable request and to the extent the information is not accessible via FTC's Consumer Sentinel Network ("Consumer Sentinel"), the Executive Committee, all relevant information regarding all complaints related to alleged fraud-induced money transfers, including, but not limited to:

a. The consumer's name, address, and telephone number;

b. The substance of the complaint, including the fraud type and fraud method, and the name of any person referenced;

c. The reference number, or Money Transfer Control Number, for each money transfer related to the complaint;

d. The name, agent identification number, telephone number, and address of the sending agent(s);

e. The date of each money transfer;

f. The amount of each money transfer;

g. The money transfer fee for each money transfer;

h. The date each money transfer is received;

i. The name, agent identification number, telephone number, and address of the receiving agent(s);

j. The name, address and telephone number of the recipient, as provided by the recipient, of each money transfer;

k. The identification, if any, presented by the recipient, and recorded, for each money transfer;

l. All transactions conducted by the consumer bearing any relationship to the complaint; and

m. To the extent there is any investigation concerning, and/or resolution of, the complaint:

1) The nature and result of any investigation conducted concerning the complaint;

2) Any response to the complaint and the date of such response to the complaint;

3) The final resolution of the complaint, the date of such resolution, and an explanation for the resolution; and

4) If the resolution does not include the issuance of a refund, the reason for the denial of a refund;

2. Taking all reasonable steps to identify Western Union agents or front line associates involved or complicit in fraud;

3. Routinely reviewing and analyzing data regarding the activities of Western Union agent locations in order to identify the following:

a. Agent locations that have processed transactions associated with two (2) or more complaints about alleged fraud-induced money transfers, received by Defendant from any source, during a thirty (30) day period;

b. Elevated fraud risk agent locations, as defined above; and

4. For agent locations identified pursuant to Subsection III.6.N.3 of this Judgment, fully investigate the agent location by reviewing transaction data and conducting analyses to determine if the agent location displayed any unusual or suspicious money transfer activity that cannot reasonably be explained or justified, including, but not limited to:

a. Data integrity issues, including, but not limited to, invalid, illegible, incomplete, missing, or conflicting biographical data for consumers or recipients of money transfers;

b. Significant changes in the transaction patterns experienced at the agent location;

c. Significant differences in the transaction patterns experienced at an agent location relative to the patterns experienced at other agent locations in the same country;

d. Unusual demographic activity;

e. Irregular concentrations of send and/or pay activity between the agent and one or more other Western Union agent locations;

f. Irregular concentrations of send and/or pay activity between the agent and one or more geographical areas that have been identified as high risk for fraud;

g. Unusual transaction patterns by senders or recipients;

h. Flipping patterns;

i. Suspicious structuring or splitting of money transfers; or

j. Suspicious surfing patterns;

O. Failing to take the following actions to prevent further fraud-induced money transfers, including, but not limited to, by:

1. Suspending Western Union agent locations, as follows, pending further investigation to determine whether the Western Union agent locations can continue operating consistent with this Judgment's requirements:

a. For agent locations identified pursuant to Subsection III.6.N.3.a of this Judgment, if the investigation of the agent location required by Subsection III.6.N.4 of this Judgment is not completed within fourteen (14) days after the agent location is identified, suspending the Western Union agent location's ability to conduct further money transfers until the investigation is completed; and

b. For elevated fraud risk agent locations, immediately suspending the Western Union agent's ability to conduct further money transfers until the review required by Subsection III.6.N.4 of this Judgment is completed, except that, for a Western Union agent that is a bank or bank branch and otherwise subject to this immediate suspension requirement by virtue of fraud complaints about money transfers that are transferred directly into its account holders' bank accounts, Western Union shall comply with Subsection III.O.1.a and also permanently block, or request that the Western Union agent block, all further money transfers to bank accounts for which Western Union has received any fraud complaint;

2. Upon completion of the investigation, terminating, suspending, or restricting Western Union agent locations as follows:

a. Terminating or suspending the Western Union agent location, or restricting the agent location's ability to send and/or receive certain money transfers, if the findings indicate that the Western Union agent location is not, or has not been, complying with Defendant's Anti-Fraud Program and other policies and procedures relating to detecting and preventing fraud-induced money transfers, including, but not limited to, by failing to collect and record required and accurate biographical information about, and government-issued identifications for, the recipients of money transfers; and

b. Terminating the Western Union agent location if the findings indicate that the Western Union agent location or any of its front line associates is, or may be, complicit in the fraud-induced money transfers, has failed to comply with Subsection

III.7, or has repeatedly failed to comply with Defendant's Anti-Fraud and other policies and procedures relating to detecting and preventing fraud-induced money transfers;

3. On at least a monthly basis, providing notice to all Western Union agents in elevated fraud countries the substance of any complaints Defendant received involving transactions processed by the agents' locations; and

4. Ensuring that all Western Union agents are enforcing effective policies and procedures to detect and prevent fraud-induced money transfers, or other acts or practices that violate Subsections III.6.A through III.6.F of this Judgment; and

P. Failing to establish adequate controls to ensure that, prior to paying out money transfers, Western Union agent locations are recording all required information about the recipients of money transfers, including, but not limited to, the recipients' names, addresses, telephone numbers, and identifications, and are taking reasonable steps to verify the identification presented by the recipients or, for money transfers that are directed to bank accounts, the identities of the account holders.

7. Under Business and Professions Code section 17203, Defendant, Defendant's officers, agents, and employees, and all other persons in active concert or participation with any of them, who receive actual notice of this Judgment, whether acting directly or indirectly, in connection with promoting, offering for sale, or providing money transfer services, shall require and ensure that all elevated fraud risk agent locations that are still operating do the following for one (1) year from the date that Defendant identifies the agent as an elevated fraud risk agent location under the terms of this Judgment:

A. For money transfers that are not transferred directly into a recipient's bank account, photocopy or scan the identification documents or biometric information presented by the recipient and retain the photocopies or images, along with the receive forms, for a period of five (5) years; and

B. Demonstrate during compliance reviews or mystery shops, which Defendant shall conduct on at least a quarterly basis, that the agent location is complying with the requirements in Subsection III.7 of this Judgment.

Provided, however, that if Defendant reasonably believes that complying with Subsection III.7.A of this Judgment for money transfers received by an elevated fraud agent location in a particular foreign jurisdiction would violate that jurisdiction's laws, Defendant may instead, upon notice to FTC staff, block all money transfers from the United States to that elevated fraud risk agent location or, with the agreement of FTC staff, take other appropriate action at that location to protect consumers from fraud.

8. Under Business and Professions Code section 17203, Defendant, Defendant's officers, agents, and employees, and all other persons in active concert or participation with any of them, who receive actual notice of this Judgment, whether acting directly or indirectly, shall, in addition to, or as a modification of, any other policy or practice that the Defendant may have, including Defendant's ongoing submission of information to the FTC for inclusion in Consumer Sentinel:

A. Provide notice to the consumer, or his or her authorized representative, at the time the Defendant is contacted with a complaint about alleged fraudulent activity associated with a money transfer, that (i) Defendant's practice is to share information regarding the consumer's money transfer and complaint with a database used by law enforcement authorities in the United States and other countries; and (ii) if the consumer does not want his or her name, address, and identification shared with law enforcement, Defendant will honor that request unless applicable law permits or requires Defendant to provide that information; and

B. Regularly, but no more than every thirty (30) days, submit electronically to the FTC, or its designated agent, for inclusion in Consumer Sentinel, all relevant information Defendant possesses regarding complaints received from consumers, their authorized representatives, or any other source, anywhere worldwide, about alleged fraud-induced money transfers and regarding the underlying transfer itself, including, but not limited to, the information set forth in Subsections III.6.N.1.a through III.6.N.1.l of this Judgment. *Provided, however*, if Defendant receives a request from a consumer or the consumer's authorized representative, which is documented by Defendant, stating that the consumer does not want the information shared with the database, or if Defendant received the complaint from a source other than the consumer or the

consumer's authorized representative, Defendant shall submit to the FTC an anonymized complaint with the consumer's name, address, and telephone number redacted. *Provided further*, that Defendant shall cooperate with the FTC in order to facilitate compliance with this Section.

IV. MONETARY PROVISIONS

9. Defendant shall pay a total of five million dollars ($5,000,000) to State Attorneys General to resolve the allegations raised in this action (the "Settlement Fund"), as memorialized in an Assurance of Voluntary Compliance executed on January 26, 2017. Within fifteen (15) days of the Effective Date of this Judgment, Defendant shall direct the appropriate representative from the Vermont Attorney General's Office to make payment to the California Attorney General from the Settlement Fund in the amount agreed to by the participating states. Said payment shall be used by the California Attorney General for attorneys' fees and other costs of investigation and litigation; used to defray costs of the inquiry leading to this Final Judgment; or used for the California Attorney General's enforcement of California's consumer protection laws, at the sole discretion of the California Attorney General.

10. The California Attorney General and Defendant recognize that, in addition to the payment provided under Subsection IV.9, Defendant has agreed that redress for consumers shall be made available through the Stipulated Order for Permanent Injunction and Final Judgment entered in Federal Trade Commission v. The Western Union Company, Civil Action No. 1:17-cv-00110-CCC, in the United States District Court for the Middle District of Pennsylvania, which requires that Defendant pay Five Hundred Eighty-Six Million Dollars ($586,000,000) and that such funds be deposited into a fund to be used to compensate fraud victims as detailed in Section VII of the Stipulated Order.

V. RELEASE

11. Effective upon full payment of the amount due under Subsection IV.9, the California Attorney General releases and discharges Western Union, its parents, affiliates, subsidiaries, employees, officers, and directors (collectively, the "Released Parties"), from the following: any and all civil and administrative actions, claims, and causes of action that were or could have been asserted against the Released Parties by the California Attorney General under

California Business and Professions Code section 17200 et seq., or any amendments thereto, resulting from the conduct complained of in the complaint filed in this action and/or the matters addressed in this Judgment, up to and including the effective date of this Judgment (collectively, the "Released Claims").

12. Nothing in this Judgment or in this release shall be construed to alter, waive, or limit any private right of action specifically provided by state law.

13. Notwithstanding any term of this Judgment, any and all of the following forms of liability are specifically reserved and excluded from the Released Claims:

A. Any criminal liability that any person or entity, including Western Union, has or may have in California;

B. Any civil or administrative liability that any person or entity, including Western Union, has or may have to California under any statute, regulation or rule not expressly covered by the release in this Section, including but not limited to, any money laundering claims and any and all of the following claims:

i. state or federal antitrust violations,

ii. state or federal securities violations, and

iii. state or federal tax claims.

VI. GENERAL PROVISIONS

14. As ordered in *Federal Trade Commission v. The Western Union Company,* Civil Action No. 1:17-cv-00110-CCC, in the United States District Court for the Middle District of Pennsylvania (FTC Judgment), an independent compliance auditor shall be appointed to further ensure compliance with Sections I through V of the Stipulated Order.

15. As ordered in the FTC Action, Defendant is required to submit compliance reports to the FTC, as detailed in Section IX of the Stipulated Order.

16. As ordered in the FTC Action, Defendant is required to monitor its compliance with the Stipulated Order and may be required to submit additional compliance reports or requested information to the FTC, as detailed in Section XI of the Stipulated Order.

17. The settlement negotiations resulting in this Judgment have been undertaken by the parties in good faith and for settlement purposes only, and the parties agree that no evidence of negotiations or communications underlying this Judgment shall be offered or received in evidence in any action or proceeding for any purpose.

18. No modification of the terms of this Judgment shall be valid or binding unless made in writing, signed by the parties, and approved by the Court, and then only to the extent specifically set forth in the Court's Order. The Parties may agree in writing, through counsel, to an extension of any time period in this Judgment without a court order.

19. Nothing in this Judgment shall be construed as relieving Defendant of its obligation to comply with all state and federal laws, regulations or rules, or as granting permission to engage in any acts or practices prohibited by such law, regulation or rule.

20. This Judgment does not constitute an approval by the California Attorney General of any of Defendant's past, present or future business acts and practices.

21. If any portion of this Judgment is held invalid by operation of law, the remaining terms of this Judgment shall not be affected and shall remain in full force and effect.

22. Nothing in this Judgment shall be construed to waive, limit, or expand any claim of sovereign immunity the California Attorney General may have in any action or proceeding.

23. This Judgment may be enforced only by the Parties hereto. Nothing in this Judgment shall provide any rights or permit any person or entity not a party hereto to enforce any provision of this Judgment.

24. Plaintiff will provide Defendant with written notice if it believes that Defendant is in violation of any of its obligations under this Judgment ("Notice"). Defendant shall have 30 business days after the date of receipt of the Notice to demonstrate to the Plaintiff's satisfaction that:

A. Defendant is in compliance with the obligations of this Judgment cited by Plaintiff as being violated;

B. the violation has been addressed, including, but not limited to, by remedial actions having been taken against an employee for actions inconsistent with this Judgment; or

C. the alleged violation cannot be addressed within the 30 business day period, but that: (a) Defendant has begun to take action to address the violation; (b) Defendant is pursuing such action with due diligence; and (c) Defendant has provided a reasonable timetable for addressing the violation.

25. Nothing shall prevent Plaintiff from agreeing in writing to provide Defendant with additional time beyond the 30 business days to respond to the notice.

26. No person, entity or official not a signatory hereto is a third-party beneficiary of this Judgment. Nothing in this Judgment shall be construed to affect, limit, alter or assist any private right of action that a consumer may hold against Defendant, nor shall anything in this Judgment confer upon any consumer standing to pursue any private right of action against Defendant.

THE CLERK IS ORDERED TO ENTER THIS JUDGMENT FORTHWITH.

DATED: APR 12 2017

HAROLD KAHN

JUDGE OF THE SUPERIOR COURT

ENDORSED
FILED
San Francisco County Superior Court
MAY 23 2017
CLERK OF THE COURT
BY: FELICIA M. GREEN
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. **TARGET CORPORATION, a corporation,** Defendant.	Case No. CGC-17-559105 **FINAL JUDGMENT AND PERMANENT INJUNCTION**

Plaintiff, the People of the State of California, appearing through its attorney, Xavier Becerra, Attorney General of the State of California, by Yen P. Nguyen, Deputy Attorney General, (hereinafter collectively "the People" or "Plaintiff"), and Defendant Target Corporation, a corporation (hereinafter referred to as "Target" or "Defendant"), appearing through its attorney, Nathan D. Taylor of Morrison & Foerster LLP, having stipulated to the entry of this Final Judgment and Permanent Injunction ("Judgment") by the Court without the taking of proof and without trial or adjudication of any fact or law, without this Judgment constituting evidence of or an admission by Target regarding any issue of law or fact alleged in the Complaint on file, and without Target admitting any liability, and with all parties having waived their right to appeal, and the Court having considered the matter and good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

I. PARTIES AND JURISDICTION

1. The People of the State of California is the Plaintiff in this case.

2. Target Corporation is the Defendant in this case.

3. The Court has jurisdiction over the subject matter of this action, jurisdiction over the parties to this action, and venue is proper in this Court.

4. Defendant, at all relevant times, has transacted business in the State of California, including, but not limited to, San Francisco County.

5. This Judgment is entered pursuant to and subject to California Business and Professions Code section 17200 et seq.

II. DEFINITIONS

6. For the purposes of this Judgment, the following definitions shall apply:

a. "Cardholder Data Environment" shall mean TARGET's technologies that store, process, or transmit payment card authentication data, consistent with the Payment Card Industry Data Security Standard ("PCI DSS").

b. "Consumer" shall mean any individual who initiates a purchase of or purchases goods from a TARGET retail location; any individual who returns merchandise to a TARGET retail location; or any individual who otherwise provides Personal Information to TARGET in connection with any other retail transaction at a TARGET retail location.

c. "Unfair Competition Law" shall mean California Business and Professions Code section 17200 et seq.

d. "Effective Date" shall be the date on which this Judgment is entered by the Court.

e. "Personal Information" shall mean the following:

i. The data elements in the definition of personal information as set forth in the Reasonable Data Security Law;

ii. For purposes of Paragraph 8.m, the first name or first initial and last name of a Consumer residing in California in combination with any one or more of the following

data elements that relate to such individual: (a) Social Security number; (b) driver's license number; (c) state-issued identification card number; or (d) financial account number, credit or debit card number, in combination with any required security code, access code or password that would permit access to the Consumer's financial account.

f. "Reasonable Data Security Law" shall mean California Civil Code section 1798.81.5.

g. "Data Breach Notification Law" shall mean California Civil Code section 1798.82.

h. "TARGET" shall mean Target Corporation, its affiliates, subsidiaries and divisions, successors and assigns doing business in the United States.

i. "Security Event" shall mean any potential compromise to the confidentiality, integrity, or availability of a TARGET information asset that includes Personal Information.

j. "Intrusion" shall mean a data breach, publically announced by TARGET on December 19, 2013 and January 10, 2014, in which a person or persons gained unauthorized access to portions of TARGET's computer systems that process payment card transactions at TARGET's retail stores and to portions of TARGET's computer systems that store TARGET customer contact information.

III. PERMANENT INJUNCTIVE RELIEF

7. The duties, responsibilities, burdens, and obligations undertaken in connection with this Judgment shall apply to TARGET, its affiliates, subsidiaries, successors and assigns, and its officers and employees.

8. In accordance with section 17203 of the California Business and Professions Code, Defendant shall comply with the following conduct requirements:

a. TARGET shall comply with the Unfair Competition Law and the Reasonable Data Security Law in connection with its collection, maintenance, and safeguarding of Personal Information.

b. TARGET shall not misrepresent the extent to which TARGET maintains and protects the privacy, security, confidentiality, or integrity of any Personal Information collected from or about Consumers.

c. TARGET shall comply with the Data Breach Notification Law.

Information Security Program

d. TARGET shall, within one hundred and eighty (180) days after the Effective Date of this Judgment, develop, implement, and maintain a comprehensive information security program ("Information Security Program") that is reasonably designed to protect the security, integrity, and confidentiality of Personal Information it collects or obtains from Consumers.

e. TARGET's Information Security Program shall be written and shall contain administrative, technical, and physical safeguards appropriate to:

i. The size and complexity of TARGET's operations;

ii. The nature and scope of TARGET's activities; and

iii. The sensitivity of the Personal Information that TARGET maintains.

f. TARGET may satisfy the implementation and maintenance of the Information Security Program and the safeguards required by this Judgment through review, maintenance, and, if necessary, updating, of an existing information security program or existing safeguards, provided that such existing information security program and existing safeguards meet the requirements set forth herein.

g. TARGET shall employ an executive or officer with appropriate background or experience in information security who shall be responsible for implementing and maintaining the Information Security Program.

h. TARGET shall ensure that the role of the designated executive or officer, referenced in Paragraph 8.g, includes advising the Chief Executive Officer and the Board of Directors of TARGET's security posture, security risks faced by TARGET, and security implications of TARGET's decisions.

i. TARGET shall ensure that its Information Security Program receives the resources and support reasonably necessary to ensure that the Information Security Program functions as intended by this Judgment.

Administrative Safeguards

j. TARGET shall develop, implement, and revise as necessary written, risk-based policies and procedures for auditing vendor compliance with TARGET's Information Security Program.

k. TARGET's Information Security Program shall be designed and implemented to ensure the appropriate handling and investigation of Security Events involving Personal Information.

l. TARGET shall make reasonable efforts to maintain and support the software on its networks, taking into consideration the impact an update will have on data security in the context of TARGET's overall network and its ongoing business and network operations, and the scope of the resources required to address an end-of-life software issue.

m. TARGET shall maintain encryption protocols and related policies that are reasonably designed to encrypt Personal Information identified in Paragraph 6.e.ii that TARGET stores on desktops located within the Cardholder Data Environment, and shall encrypt the data elements of Personal Information identified in Paragraph 6.e.ii, as well as any other data elements required by state law to be so encrypted, that are:

i. Stored on laptops or other portable devices; or

ii. Transmitted wirelessly or across public networks.

n. TARGET shall comply with the Payment Card Industry Data Security Standard ("PCI DSS") with respect to its Cardholder Data Environment, as defined in this Judgment, and any TARGET system component the compromise of which TARGET should reasonably believe would impact the security of the Cardholder Data Environment.

Specific Safeguards

o. Segmentation: