Case No: S111585

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

GENOVEVA ROJAS, et al.,

Petitioners,

vs.

**SUPERIOR COURT FOR THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES,**

Respondent,

**JULIE COFFIN, Trustee of the 1979
Ehrlich Investment Trust, and RICHARD EHRLICH, et. al.**

Real Parties in Interest,

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SEVEN
Case No. B158391

PETITIONER'S RESPONSE TO AMICUS BRIEF

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LEGAL DISCUSSION

I.

INTRODUCTION

Presumptive in the arguments presented by the Southern California Mediation Association is the misconception that the interests of justice would be thwarted without a judicial construct to qualify the statutory privilege for materials prepared specifically for mediation. The Southern California Mediation Association's brief is predicated upon the unfounded premise that both "unscrupulous parties" and "unscrupulous lawyers" would partake in "gamesmenship" and "corruption of the mediation," by misusing the mediation privilege. Further implicit in the Southern California Mediation Association's position is its acceptance of misinformation imparted in petitioner's answer brief, none of which is well taken as discussed in Deco Construction's reply brief on the merits.[1]

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[1] In this regard, the Southern California Mediation Association's amicus brief assumes that petitioners never had any chance to see the raw evidence. [See Amicus brief at p. 3.] The numerous assertions set forth in the petitioners' answer brief in this regard are unsupported and are simply untrue, including all of the following:

(a) That defendants purportedly possess raw and/or otherwise inaccessible evidence of "ultra-dangerous molds";

(b) That such evidence demonstrates conditions that constituted a health hazard to petitioners;

(c) That much if not all of the purportedly "key evidence" necessary to show the purported hazards to which petitioners were allegedly previously exposed was eliminated during remediation; and

(d) That due to the nature of the alleged mold illness, eradication of the subject evidence prevented petitioners from gathering information critical to diagnosis or treatment by their alleged health care providers.

Contrary to the arguments presented by the Southern California Mediation Association, there is simply no evidence or facts to support the notion that the mediation privilege was used to shield any "raw" evidence or materials in this or any other case from either the parties in this or the prior lawsuit. While forced to concede that the mediation privilege is intended to protect evidence prepared for mediation from discovery and use at trial by other parties, the Southern California Mediation Association simply argues that this "anomaly flies in the face of work product jurisprudence" and accordingly should be limited by construct. [Amicus Brief at p. 2.][2] ***Following the Southern California Mediation***

Each of these assertions has been dispelled in Coffin and Deco's reply briefs which are hereby incorporated by references as though fully set forth herein. [See Deco's Reply Brief at footnotes 3 and 4.] It is simply noted here that petitioners had access to any and all raw evidence to support their mold claims at all relevant times. It appears that petitioners attempted to misuse and abuse the discovery process in an effort to gain leverage in their settlement posture. Petitioners' attempt to pierce the privilege violates the very policy and purpose for which Evidence Code § 1119 *et. seq.* was enacted by the Legislature.

[2] ***Thus, the fact that information may be shared with the adverse party during mediation is not relevant to the issues presented, as the work product doctrine is acknowledged by the Southern California Mediation Association to be a separate and distinct statutory basis for protection from the statutory protection afforded by the mediation privilege***. Furthermore, the parties understood and agreed that the disclosure of these materials at mediation would in no manner be construed as a waiver of the mediation privilege and that the materials for which the privilege was asserted could not be used by any party had the matter not resolved at meditation. Moreover, the Southern California Mediation Association's brief appropriately recognizes that which has been expressly rejected by this court, namely that information imparted at mediation does not constitute a waiver of the privilege. (See *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 4, 14 ["[T]he purpose of confidentiality is to promote 'a candid and informal exchange regarding events in the past . . . . ***This frank exchange is achieved only if the***

Association's logic, there would be no need for a statutory mediation privilege, as such could simply be incorporated under the work product doctrine. Clearly if such were the Legislature's intent, it would have simply incorporated such a protection into Code of Civil Procedure § 2018. The Legislature did not. Instead, it specifically created a separate privilege, under the Evidence Code § 1119, to absolutely and unqualifiedly protect mediation communications and evidence.

II.

AN ABSOLUTE AND UNQUALIFIED MEDIATION PRIVILEGE REMAINS CRITICAL TO PROTECT PARTIES ENGAGED IN GOOD FAITH EFFORTS TO RESOLVE MATTERS VIA MEDIATION

As set forth in Deco's opening brief on the merits, the absence of an absolute and unqualified privilege in place at mediation, would result in the abridgement of an important public right, related to every action which involves the potential for mediation. The very heart of a successful mediation forum is its facilitation of the opportunity for litigants to lay all of their cards on the table, without fear of repercussion. This entails use of facts, evidence, and theories developed by the parties, ***for the sole purpose of resolving the matter at mediation.*** Relying on *Foxgate Homeowners Association v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, the Court of Appeal has recently observed that the confidentiality rule of Evidence Code § 1119 "sweep broadly," baring discovery and evidence of anything said, "not merely 'in the course of' mediation, but 'for the purposes of … or

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participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes...."].)

pursuant to mediation.' Only certain communications made after the end of mediation or falling under other ***enumerated exception*s**, escape its reach." (*Eisendrath v. Superior Court (Rogers)* (June 3, 2003) 2003 Daily Journal D.A.R. 5849, 5851; Docket No. B164245.) Thus, the courts have again affirmed that the unambiguous language of the Statute has broad sweeping applications which are subject only to express exception.

Implicit in the mediation process is the understanding and expectation, based on the protections established by the mediation privilege, that nothing developed by the parties that is specifically intended for use at mediation, can or will be used against them, should the matter not resolve. ***Indeed, as acknowledged in the Southern California Mediation Association's amicus brief, "a mediator who becomes a tattletale destroys trust and loses impartiality."*** [Amicus Brief at p. 6.]

Mediation would become nothing more than another discovery tool, if materials and evidence presented at mediation were subject to an unlegislated qualified privileged as suggested in the amicus brief. Thus, the mediation process, if not the mediator, would serve as the very "tattletale" mechanism that would destroy the trust which remains essential for effective resolution by mediation, if judicial constructs were put in place counter to the express intent of the Statute.

All parties to the mediation process would be extremely reluctant to develop, for mediation, any evidence that may be potentially adverse, but of critical assistance in resolving cases. Moreover, parties would be inclined to opt out of mediation proceedings, as an alternative means of dispute resolution, since meditation will become a far less effective tool, in the absence of an absolute mediation privilege. ***This point is never addressed in the Southern California Mediation Association's amicus brief*.**

It remains undisputed that the subject materials would not have been prepared had the parties understood that the absolute protections afforded by the express language of mediation privilege statute were not in place to protect the parties. [See Petition Exhibit D at 120-121; 180-185 and Petition Exhibit H at 11:11-20; and 13:18-26; see also, Answer to Court of Appeal Petition at page 39, footnote 33 and Return in opposition to Petition at 7, footnote 4, 9 at ¶12; 20.]

Any wavering as to the nature of the unqualified privilege for communications, testimony, and evidence prepared for the specific purpose of mediation of civil matters, would not only be devastating to the mediation process itself, but it would also create serious question as to the efficacy of private as well as court ordered mediation as an alternative means of conflict resolution in the State of California.

Of genuine concern to litigants, their counsel, and those involved in the mediation process, throughout the State, is that mediation would simply become an improper discovery tool or mechanism for those not genuinely interested in mediating in good faith. ***This could be routinely achieved, as is the case here, by merely arguing that the materials brought to the mediation table should be characterized as "purely factual in nature," "raw evidence," or alternatively, are of a "qualifiedly privileged" or "derivative" nature, which "in balance" should be subject to discovery, in light of its relevance or present availability.***

The scope of the dangers created by such misuse would be massive in nature, as both participants and non participants in the mediation process could engage in discovery and make use of materials and evidence which was specifically prepared for meditation with a reasonable expectation that their materials and evidence would be protected should the mater not

resolve at mediation, as was the case here. Misuse and abuse in this regard would include those who decided to take little or no action to properly develop facts, evidence or theories on their own, but were savvy enough to craft arguments regarding what materials others may have brought to mediation and may be subject to discovery. The cost of arguing what materials are and what materials are not subject to the mediation privilege would become prohibitively expensive and costly to those earnestly interested in engaging in the mediation process.

Thus, the very purpose of mediation, as a tool for potential avoidance of large expenditures of time and resources required of litigation, would be essentially become pointless, as parties coming to mediation would do so virtually empty handed, fearing that anything brought to the mediation table could potentially become a weapon to be used against them, in the future, either by the adverse party, should the matter not resolve, or by unknown individuals, in some other matter, regardless of whether the matter resolves at mediation. ***These points are also never addressed in the Southern California Mediation Association's amicus brief***.

III.

ADEQUATE PROTECTIONS ALREADY EXIST TO PROTECT AGAINST POTENTIAL MISUSE OF THE MEDIATION PRIVILEGE

Adequate protections from the "evils" perceived (including potential misuse of mediation privilege to shield "otherwise" admissible evidence) already exist, including, but not limited to, evidence and issue preclusion sanctions, ***and stipulations regarding use of evidence presented for purposes of mediation***.

In this regard, the Southern California Mediation Association's erroneous conclusions concerning the applicability of the Case Management Order ("CMO") in this case conveniently overlooks the provision which provided that should mediation efforts fail, then disclosure of a final defect list report and cost of repair would have further been required to be disclosed pursuant to discovery. The Southern California Mediation Association's amicus brief also fails to address the fact that the parties can always opt out of the mediation privilege if they have any concerns related to its misuse, as is statutorily provided for. This is yet another protection built into the legislative enactment to protect against any concerns for misuse. Additionally, defendant Coffin's offer at mediation to make its mediation binder available to other counsel for the costs of replication as well as the disclosure and production by the parties of literally thousands of documents which were deposited in the document depository in the underlying case only further dispel arguments that the mediation privilege was intended to be used as either a "pretext for secreting evidence crucial to proving petitioners' case" or a "pretext to shield materials from disclosure." These in addition to other points raised in footnotes 1 and 2 above, demonstrate the flaws in the amicus brief related to concerns of misuse and the "dangers" inherent in early mediation.[3]

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[3] The "heads I win tails, you lose" approach to mediation, referenced in the amicus brief, appears more apropos a description of the dangers created by parties such as Rojas who could only stand to win by using mediation as a discovery tool. Such would be facilitated if the mediation privilege were eroded by a judicially construct such as a qualified privilege, or the scheme proposed by the Southern California Mediation Association, which would be counter to the express language of the Statue.

Moreover, the Legislature has already considered any potential dangers related to possible misuse of the privilege and has weighed and balanced such concerns with the interests of justice and economic benefits of early case resolution (as occurred with respect to the matter presented in the mediation in this instance), when it enacted the subject statute. Justice Perluss' strong dissent, in the subject decision, cogently and perceptively recognizes the very dangers presented by the majority's attempt to read and interpret into the mediation privilege statute that which does not exist.

The Southern California Mediation Association's proposal that a mediation materials privilege log be presented prior to mediation in order to assure that only those materials actually prepared for mediation are protected similarly simply lacks any legal footing. While this proposal would further constitute an impermissible judicial construct, ***nothing prevents the Southern California Mediation Association from submitting their proposal to the California Legislature, amongst other proposed global revisions to the statutes offered by lobbyists***.

This real party in interest further fails to see how the Southern California Mediation Association's proposal for a mediation materials privilege log would protect the parties from any perceived risks of secreting or shielding information via the mediation privilege, even if this Court were to consider such a construct. How, for example, would the disclosure of the identity of the materials to be used at mediation demonstrate whether or not the materials were prepared solely for mediation rather than litigation? What would happen if there were concerns over the classification of materials identified in a mediation material privilege log?

Whittling away at the absolute and unqualified nature of the mediation privilege would simply compromise the very purpose, integrity,

and effectiveness of the statute. It would further undermine the integrity and effectiveness of mediation as an alternative dispute resolution mechanism.[4] It would also open a Pandora's Box for a host of new

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[4] The Southern California Mediation Association essentially argues the same points as petitioners with respect to its understanding of the legislative intent of the mediation privilege Statute, as well as the alleged concerns regarding use of the privilege as a shield from discovery and avoidance of truth. Somewhat astonishing is the fact that as an impartial mediation service provider, it makes no effort to discuss or analyze the dangers of allowing parties to challenge the confidential nature of materials prepared for the mediation, or discuss the importance of protections against use of mediation as a discovery mechanism by the present attempt to limit the application of the mediation privilege, which remains a critically important tool for this alternative means for dispute resolution.

The Southern California Mediation Association goes so far as to present arguments never raised or preserved by petitioners for consideration here, and which are therefore not appropriately presented. This includes the assertion that Section 1119 would not apply because the mediation in the underlying action was, in its view, not a true mediation in light of specific language set forth in the CMO. Without waiving its objections to those improper arguments presented, Deco notes as follows:

(1) All parties agreed to be bound by the CMO, which included the express provision that the mediation privilege would apply at the mediation where the subject materials were presented;

(2) The fact that the CMO stated that mediation would also be deemed a mandatory settlement conference did not negate the fact that a mediation occurred in compliance with and pursuant to Evidence Code § 1115 (which defines mediation), contrary to the erroneously suggestion of the Southern California Mediation Association; which lacks any evidentiary support;

(3) No party to the mediation was coerced into settling or has sought to be released from the settlement or the terms of the CMO, which simply required the parties to attend the mediation and deal in good faith, as well as to abide by the mediation privilege where materials and evidence were prepared and/or presented exclusively for mediation;

problems, regarding the quality, quantity, nature and extent of materials protected by the mediation privilege.

However, this defendant would agree with the premise set forth by the Southern California Mediation Association that a declaration setting forth that all materials prepared solely for mediation should serve to conclusively preclude discovery and use of those mediation materials and evidence by either side during litigation. Naturally, should such materials or evidence be disclosed in response to discovery, such materials could then be used by either and/or both sides. Accordingly, any purported concern that either party to could be precluded from presenting their own evidence in a case unresolved following mediation is simply unfounded.

In sum, while no basis in fact or law has been presented to suggest that judicial construct is appropriate and necessary, in order to protect the parties to mediation from the statutorily codified absolute and unqualified mediation privilege, real and serious dangers exist as to any proposed judicial constructs, as is born out by facts and evidence presented in this very case, as elaborated upon above.

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(4) Nothing in any of the provisions or rules referenced in the Southern California Mediation Association states that the parties were not bound to the mediation privilege set forth in a CMO, which was never declared void or invalid; and lastly in this regard,

(5) The Southern California Mediation Association presents nothing which would suggest that a nonparty to the CMO and mediation pursuant thereto retains any right to waive, avoid or circumvent any provision of the CMO, including the mediation privilege provision.

Accordingly, the Southern California Mediation Association's efforts to delimit the strength of the mediation privilege statute in this and future cases are fatally flawed.

IV.

CONCLUSION

Based on the forgoing, it is respectfully requested that this Court overturn the Court of Appeal decision, on each of the issues presented, reaffirm the public's statutory rights, as provided under the Evidence Code, to the absolute, unqualified, and unabridged protections afforded by the mediation privilege, as such constitutes an important pubic right for dispute resolution through this State, a right which the Legislature enacted for the benefit of the public at large.

Respectfully Submitted,

DATED: June 10, 2003

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CERTIFICATE OF WORD COUNT

Counsel hereby certifies that the forgoing brief contains 2,923 words according to the computer word processing program.

By______________________________
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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 55 South Lake Avenue, Suite 220, Pasadena, California 91101.

On June 10, 2003, I served the foregoing document described as **PETITIONER'S RESPONSE TO AMICUS BRIEF** on the parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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Executed on June 10, 2003, at Pasadena, California.

____
JANICE McCROSKEY

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Case Number: BC 214521

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