

**BEFORE THE AMERICAN ARBITRATION ASSOCIATION
Commercial Tribunal**

Melissa Merson)	
)	
Claimant)	
)	
v.)	AAA No. 01-14-0001-6464
)	
USA Triathlon)	Order on Respondent's
)	Motion to Exclude Exhibit W
Respondent)	From Claimant's Motion to
)	Dismiss

To: Michael Straubel (michael.straubel@valpo.edu)
Valparaiso University Law Clinic
510 Freeman Street
Heritage Hall
Valparaiso, IN 46383-7897

Steve Smith (steve.smith@hro.com)
Holme Roberts & Owen
90 South Cascade Avenue
Suite 1300
Colorado Springs, CO 80903

cc: Gary Johansen (gary.johansen@usoc.org)
United States Olympic Committee
1 Olympic Plaza
Colorado Springs, CO 80909-5780

Jennifer Nilmeier (JenNilmeier@adr.org)
Manager of ADR Services
American Arbitration Association
Western Case Management Center
6795 North Palm Ave, 2nd Floor
Fresno, CA 93704

On February 23, 2015, Respondent USA Triathlon (sometimes "USAT" or "Respondent") filed a Motion to Exclude Exhibit W to Claimant Melissa Merson's Motion to Dismiss for Failure to State a Claim on Which Relief Can Be Granted. Claimant Melissa Merson (sometimes "Claimant" or "Merson") opposed that motion. The Motion to Exclude is denied without prejudice to a future motion or objection by Respondent.

1. Exhibit W is comprised of a series of emails dated between October 2, 2012 and October 14, 2012. The subject matter of the emails involves whether or not to hold meetings of the Respondent's Board of Directors during a transition period between its status as a California corporation and a Colorado corporation.
2. Without discussing them specifically here, the content of the emails all appear to relate to the subject matter addressed in the first arbitration between Respondent and Complainant, which took place on September 20-21, 2012. ("First Arbitration"). For the reasons set out in the Order denying in part and granting in part Ms. Merson's Motion to Dismiss for Failure to State a Claim, those documents appear irrelevant to the issue of liability of Ms. Merson under the disciplinary complaint made against her in this matter, by the Charging Letter of January 16, 2015.
3. While Respondent argues that Ms. Merson "...is not authorized to possess these documents..." (Motion at 10) it remains that she does possess them. The basis of that claim is that they were confidential and provided solely to the members of the Board of Directors and that Ms. Merson was not a member at the time that the documents were "produced." (Motion at 1-2). In addition, Respondent argues that many of the documents are subject to an Attorney Client Privilege. (Motion at 2).
4. With respect to the arguments about confidentiality, it appears from the record before the Arbitrator that Ms. Merson was, in fact, a member of the Board of Directors between October 2 and October 14, 2012, since the election of Executive Board Members of the International Triathlon Union ("ITU") did not take place until October 23, 2012. (See Motion to Dismiss, Exhibit K). In addition, to the extent that Claimant was provided a copy of the documents by another Board member, then even if she were not considered a Board member (but see, *supra*), it would appear that the Respondent's issues lie with its Board members and not with Claimant. It would be incumbent on Respondent to establish that Ms. Merson came into possession of the documents improperly, such as by misappropriation. No such showing has been made. To the contrary, the tenor of the Respondent's motion is that certain Board members have supported the Claimant and have been assisting her.
5. The claim of Attorney Client privilege for some of the parts of Exhibit W refers to pages 4-6 of the Exhibit, which appear to reflect a request for legal advice or the provision of legal advice with respect to various issues, including Ms. Merson's status. While Respondent is correct that a Board Member generally is not empowered to waive the legal privilege of the corporation for the benefit of a person other than the corporation,¹ it would appear that Ms. Merson was entitled to have the documents in her possession by virtue of her position on the Board until October 23, 2012. There is no claim that the privileged documents were circulated to a limited control group of the Respondent (albeit they are about the Claimant in large part), but

¹ *Nat'l Football League Properties, Inc. v. Superior Court*, 65 Cal. App. 4th 100 (1998), states that California law applies when resolving attorney-client privilege issues for California corporations. *Id.* at 107. In this case, the Oakland Raiders sued the NFLP, and the Court granted the Raiders access to NFLP's privileged documents based on the belief that "the Raiders club is a member, director, and shareholder of NFLP, which gives it the right to examine privileged documents." *Id.* at 106. The appellate court disagreed, however, pointing out that "the Raiders' representative on NFLP's board of directors, stated in his declaration that, 'I assert the Raiders' right to inspect the documents at issue....'" *Id.* at 109. This statement made it clear that the director had not sued the NFLP in his capacity as a director, so he could not "put on his director's hat and request privileged corporate documents which he intends to pass on to a shareholder, the Raiders, for use in litigation against the corporation." *Id.* at 109-110.

were apparently supplied to all the Board members. Since they are documents of which Respondent already had knowledge, Claimant including them in the exchange of documents this matter would not appear to constitute a waiver of the privilege.

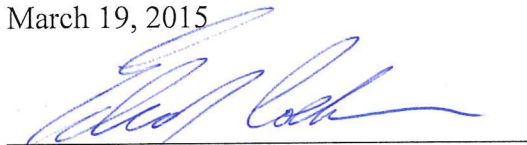
6. Moreover, equity would call for caution before excluding evidence in connection with a claim that sounds in equity. *See* Cal. Evid. Code § 956 (“There is no [attorney-client] privilege . . . if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud”); *see also In re Uehling*, No. 1:13-MC-00022, 2013 WL 3283212, at *8 (E.D. Cal. June 27, 2013) (“The crime-fraud exception applies to communications by Uehling's attorneys directing Uehling to take certain actions. . . . The questions posed . . . inquired if Uehling's attorneys instructed Uehling to take potentially unlawful actions. . . . Thus, there is a reasonable relationship between the crime or fraud and the attorney-client communication and such communications would not be protected”).

7. Finally, the subject matter of those privileged documents appears directly related to the Memorandum of October 9, 2012 (see Motion to Dismiss, Exhibit K), which, while clearly a legal opinion rendered to the Respondent, is neither designated as confidential nor privileged. However, in light of the decision on the motion, it is unnecessary at this time to decide whether production of that document dealing with legal advice constitutes a waiver of privilege as to all documents on the same subject. *See, e.g., Swift Spindrift, Ltd.*, 2013 WL 3815970, at *4-5 (evaluating whether disclosure of some privileged documents constituted subject matter waiver of all privileged documents).

8. Pursuant to the Order of March 17, 2015, denying in part and granting in part the Motion to Dismiss, it would appear that the records in question are, in any event, irrelevant to the issues in this arbitration and so admission into the record at the hearing may well not become an issue. However, the Arbitrator will reserve decision with respect to any renewal of this motion should the documents be offered at that time.

9. Respondent is reminded of the Order herein of February 25, 2015, in which the Parties are advised to provide to the Arbitrator a form of Confidential Protective Order permitting them to designate confidential documents (including ones which may be privileged).

March 19, 2015



Edward T. Colbert
Kenyon & Kenyon
1500 K Street, N.W.
Washington, D.C. 20005