BEFORE THE
COMMISSION ON COMMON OWNERSHIP COMMUNITIES
FOR MONTGOMERY COUNTY, MARYLAND

LOUIS OFFEN	)	
Complainant	)	
v.	)	Case No. 08-09
	)	February 15, 2011
GROSVENOR PARK I CONDOMINIUM COUNCIL OF CO-OWNERS, INC.	)	(Panel: Fleischer, Alkon, Whelan)
Respondent	)	

DECISION AND ORDER

The above-captioned case came before the Commission on Common Ownership Communities for Montgomery County, Maryland for hearing on December 9, 2010, pursuant to Chapter 10B of the Montgomery County Code. Based on the parties' submissions and argument and the record herein, the Hearing Panel finds, concludes and orders as follows.

I. BACKGROUND

Complainant Louis Offen ("Complainant" or "Dr. Offen"), a unit owner in Respondent Grosvenor Park I Condominium Council of Co-Owners, Inc. ("Respondent" or "GPI"), filed a complaint with the Commission in February 2009 to require Respondent to allow him to inspect and copy "records of all legal expenses incurred by GPI from January 1, 2005 to the present." As discussed more fully below, the Maryland Condominium Act and the Montgomery County Code give unit owners a statutory right, with certain exceptions, to examine, inspect and copy a condominium association's books and records.

Dr. Offen is a lawyer as well as a physician. Ironically, he has had a direct role in GPI's incurrence of legal expenses: he sued GPI in Circuit Court, which resulted in a settlement in Dr. Offen's favor; he represented a former GPI employee in an unemployment insurance claim; and of course he has brought GPI before the Commission in this case.

Respondent produced numerous law firm invoices covering the period December 2004 through January 2010, some of them heavily redacted, along with a privilege log to support the redactions. Complainant objected that the production was incomplete, that discrepancies existed which needed to be explained, and that the redactions were unwarranted.

Because factual issues remained relating to the possible existence of additional responsive documents and possible waiver of the privileges on which some of the redactions were based, the Panel issued a series of orders relating to discovery. By Order dated December 28, 2009, the Panel invited the parties to request discovery,

> including interrogatories and depositions, limited to the following issues: (a) the existence, identity and custodian of specific documents showing legal expenses incurred by Respondent from January 1, 2005 to the present, *other than* documents identified in the Privilege Log; (b) whether privilege or other grounds exist to deny inspection of any disputed documents; and (c) whether such privilege or other grounds have been waived. [1]

Respondent did not request any discovery. Complainant proposed interrogatories, which in the Panel's view were objectionable, both in scope and number. Accordingly, by Order dated January 27, 2010, the Panel limited Complainant's interrogatories and directed Respondent to answer them as thus limited.

With Respondent's answers to the interrogatories in hand, Complainant filed a motion to compel with respect to certain of the answers. By Order dated March 3, 2010, the Panel granted the motion in part and denied it in part. Also, in light of Complainant's assertion that a discrepancy existed between the amount of legal fees shown in documents produced by Respondent and fees posted by Respondent's management company, the Panel re-invited the parties to request depositions. Neither party did so.

At the Panel's direction, Respondent furnished the Panel with both redacted and unredacted copies of the invoices for *in camera* inspection, so that the Panel could determine whether and to what extent the redactions should be allowed. The invoices (both redacted and unredacted) were Bates-numbered 35-518 and 876-921.

The Panel members, each of whom is a Maryland lawyer in active practice, compared the redacted and unredacted versions of each document against Respondent's privilege log. Based on that initial review, the Panel issued a proposed decision on September 16, 2010, which would have permitted some of the redactions

[1] COMCOR 10B.06.01.04(c) permits interrogatories in disputed Commission matter only with approval of the Panel Chair and it limits the number of interrogatories to 10. Subpart (d) of the Regulation allows the Panel Chair to order depositions upon a showing of good cause.

and prohibited others. The Panel invited the parties to comment in writing on the proposed decision, stating that the Panel would hear legal argument later on the proposed decision and, if necessary, would hear evidence as well. Both parties submitted written comments, which are part of the record and which have been considered by the Panel.

The Panel then set the matter for hearing.

II. THE HEARING

At the outset of the hearing, the Panel proposed to place in evidence Commission Exhibit 1 ("CX 1"), consisting of the Commission's entire administrative record in this case. Without objection, CX 1 was received in evidence. Dr. Offen pointed out that his written comments on the Panel's proposed decision had not been included in CX 1. The Panel agreed that the record would remain open for addition of that document. The document has since been made part of CX 1.

Dr. Offen called three witnesses in his case-in-chief: Howard Goldklang, Tom Willis, and Martin Wilens. Dr. Offen did not testify himself. [2]

Howard Goldklang identified himself as a certified public accountant specializing in condominium and homeowner association accounting and tax matters. He is the founder of Goldklang Group, a certified public accounting firm. His firm has served as GPI's outside accountant and auditor for many years.

Mr. Goldklang testified that, in the auditing process, an accountant in his firm starts with the year-end financials prepared by GPI's property management company, Zalco Realty, Inc. ("Zalco"). The accountant then tests or samples various transactions to satisfy himself that the Zalco financial statements are accurate and that appropriate internal controls are in place. Based upon the audit, the accountant may propose adjusting journal entries. After any proposed adjustments are resolved, a final audit report is issued. Mr. Goldklang explained that although he personally did not do the audits for GPI, he was familiar with the process and with specific financial and audit documents in this case.

Mr. Goldklang identified, and Dr. Offen offered in evidence, the following exhibits:

[2] Dr. Offen requested the Commission to subpoena a Robert First, and he sought a continuance of the hearing when the Commission determined that Mr. First was temporarily out of the area and could not be subpoenaed. In denying Dr. Offen's continuance request, the Panel stated that if, at the conclusion of the hearing, Dr. Offen believed Mr. First's testimony remained essential, he could move to present Mr. First's testimony at a later date. Order dated Dec. 6, 2010. Dr. Offen rested his case without raising any issue of Mr. First's testimony. The Panel considers the matter waived.

Cmplt. Ex. 1 – Zalco Financial Report dated Dec. 2007

Cmplt. Ex. 2 – Zalco Financial Report dated Dec. 2008

Cmplt. Ex. 3 – Goldklang Management Letter dated 6-17-09

Cmplt. Ex. 4 – Goldklang Independent Auditor's Report (excerpts) dated 7-22-09

Cmplt. Ex. 5 – Goldklang Management Letter dated 7-21-08

Cmplt. Ex. 6 – Goldklang Independent Auditor's Report dated 9-17-08

Cmplt. Ex. 1 and 2 were admitted subject to being properly identified by a later witness. They were in fact later identified by Brian Jordan. Cmplt. Ex. 4 was admitted with the understanding that it was not a complete document.

Dr. Offen pointed out that Zalco's 2007 financial report (Cmplt. Ex. 1) showed legal expenses of $64,039, whereas Mr. Goldklang's audit report for that same period (Cmplt. Ex. 4 and 6) showed legal, audit and tax preparation expenses of $101,352. Dr. Offen asked Mr. Goldklang to explain the discrepancy.

Mr. Goldklang disagreed with the term "discrepancy." He explained that Zalco accounts on what he described as a "modified accrual" basis, whereas the audit reports are on a strict accrual basis, as required by Generally Accepted Accounting Principles (GAAP). Zalco prepares and posts on line its financial statements as soon after the close of the calendar year as possible, before all invoices for expenses incurred in the calendar year have been received. In this case, an invoice of approximately $8,000, relating to legal expenses incurred during calendar year 2007, had not been received when Zalco posted its financial statements, but it was received by the time of the Goldklang audit.

According to Mr. Goldklang, a further difference was that a $25,000 settlement payment was reclassified as a legal expense.

Finally, the audit report line item covers not only legal but also audit and tax expenses, but the Zalco line item is limited to legal expenses.

Mr. Goldklang said that he suggested to GPI's Board, via email, that it make adjusting journal entries to reflect the $8,000 and $25,000 changes, and the Board agreed. He said that in preparing to testify he reviewed his firm's trial balances that reflected the proposed adjusting journal entries. He said that backup work papers, which are in storage, were not reviewed.

Tom Willis identified himself as Vice President of Zalco. He said that Zalco has managed GPI for a number of years. Although he has only had the GPI account for a short time, he familiarized himself with the documents and accounting practices involved in this case.

Mr. Willis testified that the difference between the Zalco financial report for 2007 and the Goldklang audit report for that same year is accounted for by three items: $4,175 for the audit report; $8,137 for a previously unrecognized liability incurred in December 2007; and a $25,000 reclassification from a capital account to "operating-legal". Mr. Willis did not know what the $25,000 amount was for.

Martin Wilens is a long-time unit owner and resident at GPI. He testified that a Dottie Mannix, a former front desk clerk for GPI, was fired in 2007 and that a Board member publicly announced that she was fired for "seriously endangering the building." He also testified that a former Board member named Robert First, while still on the Board, discussed legal expenses generally with Mr. Wilens, although Mr. First did not discuss specific legal expenses items.

Dr. Offen then rested.

Respondent called one witness in its direct case, Brian Jordan. Mr. Jordan testified that he is the current President of GPI, having served in that capacity for about two years, and having served on GPI's Board for some three years.

Mr. Jordan testified that GPI consists of 399 units. He said that Dr. Offen, a long-time unit owner at GPI, is currently a non-resident.

Mr. Jordan said that the $25,000 reclassification that accounted for a portion of the difference between Zalco's and Mr. Goldklang's 2007 reports was a settlement payment by GPI to Dr. Offen in connection with an unrelated lawsuit brought by Dr. Offen. Mr. Jordan referenced CX 1, which includes a copy of a $25,000 check at page 359.

Mr. Jordan testified that GPI has incurred more than $24,000 in legal expenses in connection with this case. GPI's attorney then offered in evidence her affidavit (Rspt. Ex. 1) showing that 108.5 hours of attorney time had been devoted to this case, resulting in $24,232.50 in legal fees, based on hourly rates varying between $100 and $300.

GPI then rested.

Dr. Offen did not present any rebuttal evidence.

III. FINDINGS OF FACT

Based on the foregoing testimony and documentary evidence, the Panel finds the following facts:

1. GPI is a "condominium" within the meaning of the Maryland Condominium Act, Md. Code, Real Prop. § 11-101, *et seq*. (the "Condo Act"). [3]

2. GPI is a "common ownership community" within the meaning of Mont. Cnty. Code, Chapter10B ("Chapter 10B"). [4]

3. Dr. Offen is a "unit owner" within the meaning of the Condo Act and an "owner" within the meaning of Chapter 10B.

4. There was a $37,313 difference in the amount of legal expenses as reported by GPI's property management firm for 2007 and as reported by GPI's auditing firm for the same period.

5. GPI has furnished Dr. Offen with redacted invoices for legal services rendered by GPI's attorneys during the period December 2004 through January 2010, Bates-numbered 35-518 and 876-921.

6. The following additional documents responsive to Dr. Offen's complaint existed at one time: (a) Goldklang work papers identifying possible adjusting journal entries regarding legal expenses incurred by GPI during 2007; and (b) an email from Mr. Goldklang to GPI proposing adjusting journal entries to reflect those legal expenses.

7. There was no evidence that additional responsive documents exist or have ever existed for the time period in question, December 2004 – January 2010.

8. The only evidence presented regarding possible waiver of the attorney-client or work-product privileges was the testimony of Mr. Wilens.

9. GPI incurred attorneys' fees of some $24,232.50 in this case.

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[3] References to the Condo Act are to the Act as amended effective October 1, 2009. An amendment to § 11-116 of the Condo Act is potentially material to the issues in this case. For reasons explained below, the Panel will apply the Condo Act as amended, rather than as in force on the date the complaint was filed.

[4] Chapter 10B was also amended after the complaint in this case was filed, but the amendments are not material to the issues in this case. For convenience, references to Chapter 10B are to that chapter as it currently exists.

10. Dr. Offen appeared *pro se* in this case. He offered no evidence as to the amount of time he personally devoted to prosecution of this case.

11. Dr. Offen paid the Commission's $50 filing fee when he initiated this case.

IV. CONCLUSIONS AND DISCUSSION

Complainant claims that the invoices showing Respondent's legal expenses are "books and records" as that term is used in Condo Act § 11-116 and Chapter10B-8(4)(B)(vi). Therefore, according to Claimant, Respondent is obligated by the Condo Act and Chapter 10B to make those invoices available to him for inspection, examination and copying.

Although Respondent does not dispute that the invoices are "books and records," Respondent claims that it is entitled – even obligated – to redact portions of the invoices on a variety of grounds: Condo Act § 11-116, which sets forth specific exceptions to the public inspection obligation; the attorney-client privilege; the work-product doctrine; and the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*. ("FDCPA"), which restricts a debt collector from communicating with a third party in connection with the collection of a debt.

Also at issue in this case are the Goldklang work papers identifying proposed adjusting journal entries regarding legal expenses incurred by GPI during 2007, and an email from Mr. Goldklang to GPI suggesting that GPI make the adjusting journal entries. Respondent has not explicitly asserted any privileges or exceptions regarding production of those accounting documents, but has instead characterized them as irrelevant. See Resp. Obj. to Compl. Req. for Witness Subpoenas, filed Dec. 11, 2009, at 3-4. Further, Respondent's counsel represented at the hearing that those accounting documents may no longer exist.

While neither the Condo Act nor Chapter 10B expressly defines "books and records," the term is used expansively in both provisions. Section 116, for example, requires that books and records be kept "in accordance with good accounting practices." Documentation of legal expenses would necessarily be part of a condominium association's accounting. Similarly, the exceptions in § 116 indicate that virtually any document generated by or furnished to a condominium association as part of its operation falls within the meaning of "books and records."

The Panel concludes that both the invoices and the accounting documents are "books and records" as those terms are used in the Condo Act and Chapter 10B. Therefore, the question is whether and to what extent any exceptions apply to Complainant's inspection right.

A. Condo Act § 11-116 Exceptions

Condo Act § 116 in effect at the time the complaint was filed contained the following relevant provision:

> (2) Books and records kept by or on behalf of a council of unit owners may be withheld from public inspection to the extent that they concern:
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> (i) Personnel records;
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> (ii) An individual's medical records;
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> (iii) An individual's financial records;
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> (iv) Records relating to business transactions that are currently in negotiation;
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> (v) The written advice of legal counsel; or
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> (vi) Minutes of a closed meeting of the board of directors or other governing body of the council of unit owners.

Md. Code, Real Prop. § 11-116 (West 2002).

The provision was amended effective October 1, 2009. It now reads in pertinent part:

> (3) Books and records kept by or on behalf of a council of unit owners may be withheld from public inspection, except for inspection by the person who is the subject of the record or the person's designee or guardian, to the extent that they concern:
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> (i) Personnel records, not including information on individual salaries, wages, bonuses, and other compensation paid to employees;
>
> (ii) An individual's medical records;
>
> (iii) An individual's personal financial records, including assets, income, liabilities, net worth, bank balances, financial history or activities, and creditworthiness;
>
> (iv) Records relating to business transactions that are currently in negotiation;

(v) The written advice of legal counsel; or

(vi) Minutes of a closed meeting of the board of directors or other governing body of the council of unit owners, unless a majority of a quorum of the board of directors or governing body that held the meeting approves unsealing the minutes or a recording of the minutes for public inspection.

Md. Code, Real Prop. § 11-116 (West 2002, 2010 Pkt. Pt.) (underscoring supplied to show statutory additions).

The Panel concludes that the statute as amended should apply retroactively here, since the amendments involve remedial or procedural matters only, not affecting vested rights. *Thompson v. State*, 985 A.2d 32, 40-42 (Md. 2009) ("Legislative enactments that have remedial effect and do not impair vested rights . . . are given retrospective application. Generally, remedial statutes are those which provide a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries") (internal quotation marks and citation omitted).

The Panel expressed this same view in its proposed decision. Respondent disagreed, arguing that the earlier version of the statute should apply. See Rspt. Obj. to Proposed Order dated Sept. 30, 2010. Having considered Respondent's argument, the Panel remains of the view that amended § 116 of the Condo Act should apply here.

Respondent appears to have relied on exception (i) (personnel records) and exception (iii) (individual personal financial records) for some of its redactions. Based on the amended statute, the Panel will not allow Respondent to redact invoices of which Dr. Offen is the subject, nor will the Panel allow redaction of records showing compensation paid to Respondent's employees.

Respondent also relied on exception (v) (written advice of legal counsel) for a number of redactions. The attorney-client privilege and the work-product doctrine are discussed in the following two sections.

B. Attorney-Client Privilege

As pointed out above, one of the exceptions to the public inspection requirement of § 116 is "written advice of legal counsel." In the absence of any indication to the contrary, either in the Condo Act itself or in relevant case law, the Panel interprets this exception as co-extensive with the attorney-client privilege.

Maryland recognizes the attorney-client privilege. Md. Code, Cts. & Jud. Proc. § 9-108 ("A person may not be compelled to testify in violation of the attorney-client privilege"); *Newman v. State*, 845 A.2d 71, 85-86 (Md.App. 2003), *rev'd*, 863 A.2d 321 (Md. 2004) ("The purpose of the privilege is to encourage the free flow of

communication between client and attorney without fear of disclosure"). The County's Administrative Procedures Act also prohibits an administrative agency from infringing upon the attorney-client privilege. Mont. Cnty. Code § 2A-7(b)(3).

Maryland's courts have adopted Wigmore's definition of the attorney-client privilege:

> (1) Where legal advice of [any] kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection [may] be waived.

Newman, 845 A.2d at 85 (citation omitted; text alteration indicators in original). According to another leading treatise, the attorney-client privilege does not protect the existence of an attorney-client relationship, the identity of the client, the general nature of the legal services the attorney was engaged to perform, or the terms and conditions of the attorney's engagement. Edna Salan Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE, 4th Ed. 2001 (hereinafter cited as Epstein) at 44, 64-65. With respect to attorney invoices, Epstein says:

> Because the amount of fees paid to an attorney is not privileged, it generally follows that the billing statements that attorneys submit to clients are equally discoverable. They are documents produced in the ordinary course of business, like the invoices of any other business, with one exception. Indeed the requested production of time sheets has become increasingly frequent. The defense that the production of the documents will necessarily reveal client confidences, however, is not usually accepted by the courts or, if accepted, redactions will be ordered to protect the privileged material while allowing discovery of the nonprivileged material.

Epstein at 72.

Maryland courts take a similar approach. M*axima Corp. v. 6933 Arlington Devel. LP*, 641 A.2d 977 (Md. App. 1994), involved a landlord's successful suit for rent. The landlord then asked for fees under a fee-shifting provision in the lease. In support, the landlord submitted summaries of its attorney's hours and hourly rates and it also filed *in camera* the details of the services involved. The trial court's refusal to allow the tenant to inspect the detailed records was ruled error:

> Attorneys' bills are generally not protected by the attorney-client privilege . . ..
>
> * * *

> The overwhelming weight of authority holds that the attorney-client privilege is generally not violated by requiring disclosure of the payment of attorney's fees and expenses. Fee arrangements usually fall outside the scope of the privilege simply because such information ordinarily reveals no confidential professional communication between attorney and client, and not because such information may not be incriminating.
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> * * *
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> The only exception to the general rule here pertinent is where disclosure of the client's identity or the existence of a fee arrangement would reveal information that is tantamount to a confidential professional communication.
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> * * *
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> The identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege. However, correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of the law, fall within the privilege.

Maxima, 641 A.2d at 983-84 (internal quotation marks, citations and text alteration indicators omitted). See *In re Criminal Investigation No. 1/242Q*, 602 A.2d 1220, 1222 (Md. 1992) ("The overwhelming weight of authority holds that the attorney-client privilege is generally not violated by requiring disclosure of the payment of attorney's fees and expenses"). See, generally, Md. Rule 2-510 (e) ("[A] a claim that information is privileged or subject to protection as work product materials shall be supported by a description of the nature of each item that is sufficient to enable the demanding party to evaluate the claim").

The Panel concludes that, in general, the invoices are not privileged. The Panel will allow redaction on attorney-client privilege grounds only to the extent an invoice entry contains legal advice or information on which legal advice was being sought.

C. Work-Product Doctrine

Condo Act § 116 does not explicitly except attorney work-product. This may be because, while the attorney-client privilege is held by the client, the work-product doctrine is for the protection of the attorney. *Blair v. State*, 747 A.2d 702, 720 (Md.App.

2000). Since § 116 focuses only on a *condominium association's* disclosure obligations, not the disclosure obligations of its *attorneys*, it is not surprising that § 116 is silent with respect to the attorney work-product. The Panel therefore concludes that while GPI may not invoke the work-product doctrine, its attorneys may.

The work product doctrine protects from discovery the work of an attorney done in anticipation of litigation or in readiness for trial. *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc*., 718 A.2d 1129, 1134 (Md. 1998). The protection is qualified, in the sense that the adversary may obtain discovery on showing sufficient need for the material in preparing his or her case. However, the attorney's thinking – theories, analyses, mental impressions, beliefs, etc. – receive the greatest, if not absolute, protection. Epstein at 481; *E.I. du Pont*, 718 A.2d at 1135 ("Fact work product can only be discovered when 'substantial need' and 'undue hardship' are shown, but opinion work product is almost always completely protected from disclosure").

The assumption underlying the work-product doctrine is that an attorney cannot provide full and adequate representation unless certain matters are kept beyond the knowledge of adversaries. Epstein at 477. In Circuit Court cases, the Maryland Rules protect work-product from discovery. Md. Rule 2-402(c). The County's Administrative Procedures Act prohibits an administrative agency from infringing upon the work-product of counsel. Mont. Cnty. Code § 2A-7(b)(3).

According to Epstein, the doctrine continues to protect work-product from discovery in subsequent litigation, even if the original and the subsequent cases are unrelated. Epstein at 537–44. That appears to be the rule in Maryland as well. *See Prince George's Cnty. v. Washington Post Co.*, 815 A.2d 859, 886 (Md. App. 2003).

Dr. Offen has not made any showing of substantial need or undue hardship to overcome the attorneys' work-product protection. Indeed, Dr. Offen has never explained why he seeks GPI legal expenses records in the first place. While his reasons are not relevant to his statutory right of access, they are relevant in his efforts to overcome the work-product doctrine.

Consistent with the foregoing, the Panel will allow redaction under the work-product doctrine to the extent an invoice entry reflects Respondent's attorneys' theories, analyses, mental impressions, beliefs and the like – whether about this case itself or about other cases being handled by the attorneys.

D. FDCPA

Some of Respondent's redactions were based on the FDCPA in that the invoices reflected identifying information about delinquent unit owners. The FDCPA prohibits a debt collector from

> communicat[ing], in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

15 U.S.C. § 1692c(b). The FDCPA defines "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." § 1692a(6). The FDCPA does not apply to creditors themselves. 15 U.S.C. § 1691a(4); *Russell-Allgood v. Resurgent Capital Services, L.P.*, 515 F.Supp.2d 1307, 1310 (N.D.Ga. 515). But it does apply to attorneys who regularly engage in collection activities. *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995).

The Panel's proposed decision would have upheld Respondent's FDCPA redactions. In his comments on the proposed decision, and at the hearing, Dr. Offen argued that the FDCPA is inapplicable because it is not listed as one of the exceptions in § 116. This argument ignores the U.S. Constitution's Supremacy Clause, U.S. CONST. art. VI, cl. 2, which gives preemptive effect to federal law over inconsistent state law. *Hill v. Knapp,* 914 A.2d 1193, 1199 (Md. 2007).

Dr. Offen also argued that since he sought books and records from the *Respondent* (the creditor), not the Respondent's *attorneys* (the debt collectors), the FDCPA is inapplicable.

The Panel has been unable to find any authority on the question whether disclosure by a creditor (GPI), to a third party (Dr. Offen), of the invoice of a debt collector (GPI's attorneys), which identifies a debtor whose account is in collection, constitutes a "communication" in violation of the FDCPA. Nor do general principles applicable to the FDCPA provide much guidance. On the one hand, the FDCPA was designed to eliminate "abusive, deceptive, and unfair debt collection practices." 15 U.S.C. § 1692(a); *Rutyna v. Collection Accounts Terminal, Inc*., 478 F.Supp. 980, 981 (N.D.Ill. 1979). On the other hand, the FDCPA seeks to protect against "invasions of individual privacy," 15 U.S.C. § 1692(a), and it is a "strict liability statute" with a "broad remedial purpose" that "is not concerned with the intent of the debt collector." *Wiener v. Bloomfield*, 901 F.Supp. 771, 777 (S.D.N.Y. 1995).

Here, of course, the sought-after disclosure is wholly unrelated to any debt-collection efforts. Yet the documents to be disclosed were prepared by a debt collector and, depending on Dr. Offen's intended use of the documents, could result in an invasion of debtor privacy. Although it is a close question, the Panel concludes that the FDCPA does apply. For that reason, the Panel will allow redactions, limited however to

the names and unit numbers of owners who are the subject of pending or contemplated collection efforts. [5]

To the extent GPI claims that all references to units and unit owners should be rejected, the only apparent basis is the FDCPA. But that statute deals only with debt collection matters. Where a unit owner is identified in connection with some dispute *other than* collection of a debt, neither the FDCPA nor any other ground apparent to the Panel justifies redaction.

E. Accountant-Client Privilege

With certain exceptions, Md. Code, Cts. & Jud. Proc. § 9-110 prohibits a "licensed certified public accountant or [CPA] firm" from disclosing:

> (1) The contents of any communication made to the licensed certified public accountant or firm by a client who employs the licensed certified public accountant or firm to audit, examine, or report on any account, book, record, or statement of the client;
>
> (2) Any information that the licensed certified public accountant or firm, in rendering professional service, derives from: (i) A client who employs the licensed certified public accountant or firm; or (ii) The material of the client.

Respondent has never raised the accountant-client privilege as a ground for withholding any documents. Instead, Respondent characterized accounting documents as irrelevant. See Rspt. Obj. to Cmplt. Req. for Witness Subpoenas, filed Dec. 11, 2009, at 3-4. Furthermore, GPI did not object when Dr. Offen offered Mr. Goldklang's audit report and management letters in evidence and when Mr. Goldklang described the audit process, thus waiving any privilege that might otherwise apply. [6]

To the extent such documents exist and are in the possession, custody or control of GPI, the Panel will therefore allow inspection and copying of the Goldklang work papers identifying proposed adjusting journal entries regarding legal expenses incurred by GPI during 2007, and an email from Mr. Goldklang to GPI suggesting that GPI make the adjusting journal entries.

F. Inconsistencies in Proposed Decision

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[5] This ruling is based on the unique facts of this case, namely that the debtor information is contained in attorney invoices. The Panel expresses no opinion whether, on proper request, a unit owner would be entitled to his or her community's delinquency records.

[6] Management letters have been ordered produced by another Commission panel, notwithstanding a privilege claim. See Mem. Decision & Order dated Jan. 11, 2005 in *Kelly v. Willoughby of Chevy Chase Condo.*, No. 03-677 (McCabe, Panel Chair).

In response to the Panel's proposed decision, GPI argued that the Panel had not consistently applied its legal conclusions in ruling on specific redactions. See Rspt. Obj. to Proposed Order dated Sept. 30, 2010. GPI identified some 48 alleged inconsistencies.

In a handful of instances, the Panel agrees and has modified the Table of Redaction Rulings attached hereto. In addition, in two instances the Panel denied redactions that it had previously proposed to permit. The changes are shown as stricken or underscored text. In most cases, however, the Panel concluded that the alleged inconsistencies were attributable to GPI's own redaction methodology, not to the Panel's rulings. For example, GPI now asks the Panel to redact names on CCOC 37, 40, 50, 143, 148 and 161, yet GPI did not seek any redactions to those documents in the first place. As another example, Respondent redacted names in time entries on CCOC 56 and 72, yet the names appear unredacted in the subject lines of the invoices.

The Panel is not about to search for additional items to redact that GPI overlooked. Since the redacted documents have already been produced to Complainant, the Panel concludes that any right GPI might have to impose additional redactions now has been waived.

G. Costs and Sanctions

Dr. Offen requested an award of his $50 filing fee. In addition, each party asked the Panel to impose sanctions on the other party in the form of an award of attorneys' fees.

The $50 filing fee is customarily awarded to a complainant who prevails at the hearing. While the Panel has rejected many of GPI's redactions and ordered production of certain accounting materials not previously produced, the Panel has also upheld numerous other redactions. Neither party can rightfully claim to be the prevailing party, so an award of the $50 filing fee will be denied.

Chapter 10B-13(d) permits the award of reasonable attorneys' fees in two instances: where the association's documents require such an award; and where a party has acted frivolously or without good faith, has unreasonably refused to participate in mediation, or has substantially delayed or hindered dispute resolution without good cause. Since neither party called the Panel's attention to any fee award requirement in GPI's documents, the only issue is possible bad faith litigation.

The Panel finds neither party's conduct to be wholly exemplary. GPI's redactions were aggressive, to say the least. At the same time, Dr. Offen burdened the Commission staff and the Panel with extended and repetitive arguments over issues that had little, if any, relevance.

The driving issue in this case appears to have been the $37,313 difference in the amount of legal expenses as reported by GPI's property management firm for 2007 and as reported by GPI's auditing firm for the same period. *That difference could have and should have been explained long before the hearing in this case*. Several witnesses did exactly that in just minutes at the hearing. But the Panel has been unable to determine whether Dr. Offen was at fault for failing, months ago, to ask the right questions, or whether GPI was at fault for failing, months ago, to provide the right answers.

The Panel will deny sanctions to both parties.

VI. ORDER

Accordingly, it is, this 15th day of February, 2011, ORDERED as follows:

1. Respondent must, within 30 days after entry of this Order, furnish to Complainant copies of the invoices Bates-numbered 35 – 518 and 876 – 921, redacted only to the extent permitted in the attached Table of Redaction Rulings.

2. Respondent must, within 30 days after entry of this Order, furnish to Complainant copies of the Goldklang work papers identifying proposed adjusting journal entries regarding legal expenses incurred by GPI during 2007, and an e-mail from Mr. Goldklang to GPI suggesting that GPI make the adjusting journal entries, to the extent such documents exist and are in the possession, custody or control of GPI. The Panel considers any document in the possession of GPI's accountant to be under GPI's control.

3. To the extent GPI is unable to produce the documents described in ordering paragraph 2 above, GPI must provide to Dr. Offen a written statement, certified as true by an officer of GPI or by GPI's attorney, explaining why GPI was unable to produce such documents and describing the efforts made by or on behalf of GPI to locate such documents.

4. The parties' respective requests for sanctions are DENIED.

5. Complainant's request for an award of his $50.00 filing fee is DENIED.

6. All other relief requested in this proceeding is DENIED.

Panel members Mitchell Alkon and Helen M. Whelan concur in this Decision and Order.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court for Montgomery County, Maryland within thirty days after this Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.

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Charles H. Fleischer, Panel Chair
Commission on Common Ownership Communities