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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CAPPELLO GROUP, INC. et al., Plaintiffs and Respondents, v. CARY MEADOW et al., Defendants and Appellants.	B284256 (Los Angeles County Super. Ct. No. SC123140)

APPEAL from an order of the Superior Court of Los Angeles County, Lisa Hart Cole, Judge. Affirmed.

Browne George Ross, Peter W. Ross and Keith J. Wesley for Defendants and Appellants.

Manatt, Phelps & Phillips, Robert H. Platt, Benjamin G. Shatz and Neil P. Thakor for Plaintiffs and Respondents.

INTRODUCTION

Defendants Cary Meadow and Channel Investment Advisors, Inc. appeal the trial court's denial of their motion to disqualify counsel for plaintiffs Cappello Group, Inc. and Cappello Capital Corp. from representing defendants in an arbitration pending before the Financial Industry Regulatory Authority based on alleged violation of discovery rules set forth in *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 657 (*State Fund*). Defendants contend the law firm of Manatt, Phelps & Phillips, LLP, which represents plaintiffs, improperly sought to use in the FINRA arbitration pending among the parties five of the 717,760 documents that defendants had electronically produced during discovery. Defendants assert these five documents were privileged under the attorney-client or work product privileges and had been produced inadvertently.

The trial court found that the production of the five documents was not inadvertent as defendants had not taken reasonable measures to protect them; *State Fund* ethical obligations were not triggered; nor was there evidence presented that knowledge of the contents of the five emails presented a genuine likelihood that the outcome of the proceedings was likely to be affected. Accordingly, the motion to disqualify counsel for plaintiffs was denied. We affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Lawsuit Filed and Transferred to Arbitration

Defendant Cary Meadow (Meadow) worked for plaintiff Cappello Group, Inc. (Cappello) from November 2010 to March

2014. While working at Cappello, Meadow allegedly used Cappello's employees and resources to divert business opportunities from Cappello to Meadow's own company, defendant Channel Investment Advisors, Inc. (Channel). Plaintiffs claimed Meadow directed Cappello's employees, junior staff and interns to secretly conduct extensive due diligence and research, and prepare extensive models, materials and analyses for the benefit of Channel and Meadow. Plaintiffs also alleged Meadow used his authority as a managing director of Cappello to require Cappello's personnel to expend substantial resources on defendants' outside business activities at Cappello's expense. These efforts facilitated Meadow's ability to attract and then divert Cappello's prospective and engaged clients.

After discovering these activities, Cappello terminated Meadow's employment in March 2014 and sued Meadow and Channel. Defendants successfully moved to compel arbitration before the Financial Industry Regulatory Authority (FINRA) in 2015 and to stay the superior court action. Plaintiffs' FINRA claim alleged fraud, conversion, breach of fiduciary duty, misappropriation of confidential information, interference with contract and with prospective economic advantage, and other causes of action. Plaintiffs' claims included specific factual allegations concerning six different potential investment banking clients or other business opportunities that Meadow allegedly diverted from plaintiffs to Channel. We describe two that are pertinent to this appeal.

A. *The Claim Regarding WorldLink*

In March 2013, David Stern, a partner at Jeffer Mangels Butler & Mitchell LLP (Jeffer Mangels), who had been a law

school classmate of Cappello's Vice Chairman, Robert Deutschman, sent an email addressed to both Meadow and Deutschman, referring WorldLink as a potential client of Cappello. (The next day, Stern was hired as counsel for WorldLink.)

Meadow became Cappello's point person directly involved in the creation and the terms of the proposed engagement agreement that Cappello communicated to Stern, as counsel for WorldLink. Despite months of negotiation, WorldLink did not enter into an agreement with Cappello. After Cappello terminated Meadow's employment, plaintiffs discovered that at the same time Meadow was representing Cappello in its negotiations with WorldLink, Meadow was also secretly negotiating with Stern an engagement between Channel and WorldLink. Stern was simultaneously representing defendants while also acting as WorldLink's counsel. Channel and WorldLink entered into an investment banking services agreement in November 2013.

B. *The Claim Regarding Wellspring*

In October 2011, while employed by Cappello, Meadow secretly entered into a written consulting agreement to source deal opportunities for Wellspring Capital Management, LLC. Three days after doing so, Channel entered into a nearly identical agreement with Wellspring Capital Partners V, L.P. Meadow told Cappello he had been tasked with sourcing opportunities for Wellspring that would result in Cappello receiving a share of the fees, but concealed that he and Channel had entered into formal agreements with Wellspring. Meadow diverted a $25,000 monthly fee from Cappello to Channel, even though it was

Cappello's employees who were performing the due diligence on potential Wellspring deals and who had sourced, explored and presented various opportunities to Wellspring. One of the potential deals involved Evergreen, a company that was up for sale and a potential investment opportunity for Wellspring. Cappello asked Meadow to explore on behalf of Cappello whether Wellspring was interested in acquiring Evergreen. However, Meadow was shopping the Evergreen deal to Wellspring and others for the benefit of Channel, without Cappello's knowledge.

II. Production of Allegedly Privileged Documents by Defendants

During the arbitration process, plaintiffs served defendants with multiple document production requests. Defendants' then counsel, Jeffer Mangels, conducted a review of documents responsive to those requests, preparing electronic media containing defendants' document production consisting of a hard drive containing 717,760 pages of documents and consuming over 700 gigabytes of data (the electronic document production). Before the electronic document production was delivered to counsel for plaintiffs, defendants retained new counsel, Browne George Ross LLP (BGR). On July 18, 2017, Jeffer Mangels forwarded its electronic document production to BGR, which delivered it to counsel for plaintiffs, Manatt, Phelps & Phillips (Manatt), on July 26, 2016.[1]

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[1] BGR did not conduct an independent review of the electronic document production before forwarding it to plaintiffs' counsel.

BGR produced additional documents following the July 2016 document production. However, the documents at issue on

Plaintiffs divided the responsibility for reviewing the electronic document production. Deutschman, a lawyer, undertook the document review as he was familiar with the transactions and the participants. His review of the document production revealed that "[t]ens of thousands" of the documents were either authored by or received by lawyers, and that many of the documents "contained disclosures regarding attorney-client privilege." For example, within the electronic document production were 1,700 communications to or from attorney Stern, who was involved in the WorldLink deal. Also, 5,300 communications were to or from attorney Sal LaVina, who had simultaneously represented Deutschman, Meadow, and Evergreen during defendants' dealings with Evergreen for the Wellspring deal.

Neil Thakor, an associate at Manatt, determined that over 25,000 documents produced were authored or sent by attorneys. Thakor also determined that "[m]ore than 36,000 documents contained the word 'privileged.' Another 4,000 documents were produced with the words 'attorney-client.'"[2]

Robert Platt, a partner at Manatt, limited his review of the electronic document production to "a small segment" of the

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the motion to disqualify plaintiffs' counsel were those turned over in the July 2016 document production.

[2] Thakor's declaration does not indicate whether the group of documents totaling 36,000 (containing the word privileged) includes any part of the group of 25,000 documents (authored by or sent to attorneys). His declaration also contains additional data on communications either authored or received by named attorneys, but there is no indication if these numbers are included in, or in addition to, the totals of other document counts.

documents which had been culled by Deutchmann from the electronic document production; he did not complete his own review of those documents "until the eve of the arbitration."

III. Plaintiffs' Request To Introduce Documents at Arbitration, and Defendants' Protest Based on Privilege

Arbitration commenced on May 17, 2017. That day, the parties exchanged exhibit lists and copies of exhibits to be offered into evidence during the arbitration. Plaintiffs' exhibit list identified the author, recipient, date, and subject matter of each document. Defendants made no objection that day to any document identified in plaintiffs' exhibit list. In its presentation of evidence "several exhibits which included private communications between Cary Meadow and his lawyers were admitted into evidence without objection from [d]efendants. This included communications between David Stern and Cary Meadow."

One of the exhibits on plaintiffs' exhibit list was Exhibit 1244, a September 30, 2011 email between Meadow and LaVina, that bore the phrase "Atty-client!!"; no other party was indicated in the email. On May 19, 2017, when plaintiffs' attorney Platt began his questioning of Meadow about the Wellspring transaction, Platt told the arbitration panel he wanted "to show an e-mail [Exhibit 1244], but this is an e-mail between two individuals. And [the defendants] may claim attorney-client privilege. We have prepared a brief on some of these e-mails. I would like to ask [the arbitrators] to look at the brief, look at the e-mail and tell me whether or not you believe the e-mail falls within the crime-fraud exception to the attorney-client privilege,

because I don't think I can just show it or use it. And obviously, they produced it to us. It was something that they produced in their document production to us; so I don't want to do something that is improper."

Defense counsel objected to the arbitrators reviewing the email. Plaintiffs' counsel reiterated that he did not want to do anything improper, and that "I understand that it might have been an inadvertent production, and I can't dispute that because I wasn't involved on the production."

The parties went off the record so that defense counsel and defendants could confer. Defense counsel then advised the arbitration panel that in his view the email was protected by the attorney-client privilege and defendants intended to move to disqualify plaintiffs' counsel. The arbitrators postponed the next arbitration session so that defendants would have an opportunity to raise the disqualification issue with the trial court.

IV. Defendants' Disqualification Motion in the Trial Court

Defendants filed a motion in the trial court to disqualify Manatt as plaintiffs' counsel. The motion asserted that, among the 717,760 documents that were electronically produced, plaintiffs should have recognized that four of them (Exhibits 1232, 1241, 1243, and 1244) were protected by the attorney-client privilege and the fifth (Exhibit 1242) was protected both by that privilege and as attorney work product.[3]

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[3] The five documents are the following. Exhibit 1244 is the email between Meadow and his lawyer containing the phrase "Atty-client!!" Exhibit 1232 is a February 7, 2011 engagement agreement between lawyer and client (which is statutorily

These five documents, which had been among defendants' July 2016 electronic document production, were listed on plaintiffs' 2017 arbitration exhibit list, and plaintiffs had given copies of them to defendants on the first day of the arbitration.

To support their motion to disqualify the Manatt firm, defendants submitted three declarations. Meadow stated in his declaration that he had been a member of the California bar since 1994 and understood the importance of preserving the attorney-client privilege. He had retained LaVina as his lawyer in 2011, and had not disclosed any of his communications with LaVina to third parties. Meadow and Channel retained Jeffer Mangels in 2014, after they were sued by plaintiffs. Meadow provided Jeffer Mangels with all of his emails and electronic files as part of discovery in the arbitration, and understood that Jeffer Mangels "conducted reviews . . . in order to isolate documents . . . that were . . . privileged." He had never authorized anyone to disclose privileged documents, and he has never disclosed any of the documents as to which he was asserting a privilege.

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privileged by Bus. & Prof. Code, § 6149). Exhibit 1243 is a February 17, 2011 communication among Meadow, his business associate and the lawyer, LaVina. Exhibit 1241 is an October 4, 2011 email from LaVina to Meadow entitled "Confidential—Svsc Arrangement," containing LaVina's legal analysis and suggestions regarding a draft agreement. Exhibit 1242 is attached to Exhibit 1241 and contains LaVina's handwritten suggested edits. (Appellants describe this exhibit as subject to both the attorney-client privilege and the work product privilege; with respect to the latter, they do not explain whether they claim the absolute or conditional work product privilege. Because they also claim this email is protected by the attorney-client privilege, we discuss it in that context only.)

Stanley Gibson, a partner at Jeffer Mangels, submitted a declaration stating he had represented defendants in the lawsuit and arbitration. Defendants had provided "voluminous" electronic files to his firm in response to document requests propounded by plaintiffs. There were more than 725,000 separate files, comprising over 700 gigabytes of electronic data. "The large volume of the materials made a page-by-page privilege review time and cost-prohibitive." According to Gibson, his office "utilized keyword searches on the data, using the names of attorneys whom we were aware at that time had represented [d]efendants, to locate potentially privileged documents. Documents that were identified as privileged were separately logged and were excluded from the set of materials being compiled for production." On July 18, 2016, his office provided defendants' new counsel, BGR, a hard drive containing documents his office had compiled for production. According to Gibson, privileged communications between Meadow and LaVina "were not produced intentionally but were included in the production inadvertently."

Keith Wesley, a BGR partner, declared that his firm was retained by defendants in May 2016. He understood that Jeffer Mangels then "was in the process of conducting a review of . . . emails and electronic files for purposes of identifying . . . privileged documents." Once his firm was provided with the "electronic copies of the non-privileged . . . documents" after Jeffer Mangels attorneys "completed their document review," it served the electronic document production on plaintiffs. BGR attorneys took no part in the document review and were unaware of the nature of the document review utilized to identify privileged documents conducted by the Jeffer Mangels firm.

In opposing the motion, Manatt attorney Platt testified in his declaration that during the arbitration, Meadow advanced an "advice of counsel" defense, and that exhibits consisting of communications between Meadow and his lawyers were submitted into evidence without objection. It was when Platt advised the arbitration panel that he wished to show Exhibit 1244 between Meadow and his lawyer (LaVina) that Meadow's attorney objected to its introduction and the issue was joined. The partial transcript of proceedings before the arbitrators shows that, in the discussion that ensued, Platt asked for a privilege log and defense counsel refused to produce such a log during trial.[4]

Declarations of Deutschman and Thakor, discussed above, were also presented in opposition to the motion.

Defendants' motion was heard in the trial court on July 21, 2017. The trial court cogently stated the issue before it as whether the moving parties had met their burden to establish that the disclosure of the five documents constituted "reasonable inadvertence." The only evidence as to the manner of document review was that presented in the declaration of Jeffer Mangels partner Stan Gibson. His declaration described the voluminous nature of the documents reviewed, as described above, and

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[4] The record indicates that, at some point prior to the date arbitration commenced, counsel for plaintiffs produced a privilege log but that then defense counsel (Jeffer Mangels) had declined a request from plaintiffs to do so. Defendants' counsel at the arbitration (BGR) was unaware of the earlier request. When the issue arose during the arbitration and one of the arbitrators asked that both sides produce privilege logs to the arbitrators, plaintiffs' counsel agreed to do so but defense counsel declined, stating that he had never done so during a trial.

continued: "The large volume of the materials made a page-by-page privilege review time and cost-prohibitive. [¶] . . . Instead, my office utilized keyword searches on the data, using the names of attorneys whom we were aware at that time had represented [d]efendants, to locate potentially privileged documents. Documents that were identified as privileged were separately logged and were excluded from the set of materials being compiled for production."

The trial court described the Gibson declaration as "very vague. I don't know which attorneys they searched. I don't know who performed [the document] search. I don't know whether that person was supervised. I don't know if Mr. Gibson had anything to do with it. It was a very vague declaration . . . ." The trial court then asked defendants' counsel whether he had any additional information. In response to his proffer that there had been 725,000 documents produced "and the most anybody has been able to identify of inadvertently produced privileged documents is five documents," the trial court stated "That's not correct. The allegation is that 25,000 documents of the 700[thousand]-plus documents say 'attorney-client' privilege on them."

Defense counsel argued that once the existence of potentially privileged documents was apparent, the receiving party had an obligation to stop reading them and notify the producing party that there might be an issue. "Once they settled upon a document that they wanted to review and potentially use out of the 700-whatever thousand that they requested . . . [t]hey come to a document that obviously appears to be privileged with no indication that there's a waiver. *State Fund* tells us what they

have to do. Review it only insofar as necessary to determine that it appears [to be] privileged and then let us know."

Defense counsel made clear that privilege was being asserted only as to the five documents and that defendants wanted these five documents returned. (There is no record of the defense asking for return of any documents during the proceedings before the arbitrators.)

Responding to the defense argument, the trial court indicated it was difficult to distinguish the five documents as to which privilege was being claimed "from the multitude of documents that would potentially fall into attorney/client privilege." Defendants' counsel then argued that plaintiffs' counsel knew by the way the latter had approached the matter at the arbitration—telling the arbitrators that Exhibit 1242 might be privileged, and having a brief prepared on the issue—that the circumstances of the electronic document disclosure presented an issue of significance under *State Farm*.

The trial court ultimately denied the motion, setting out the following findings, among others, in its minute order: "Defendants took no reasonable steps . . . to prevent the production of privileged documents, therefore Plaintiffs' counsel's *State Fund* ethical obligations were never triggered; nor had defendants met their burden as moving parties to "'persuasively' demonstrate . . . inadverten[ce];" nor had they established that plaintiffs' possession and knowledge of the five documents presented a genuine likelihood that the outcome of the proceeding had been or would be affected.

This timely appeal followed.

DISCUSSION

I. Legal Principles

"A trial court's authority to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.' [Citations.]" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145.) We review the trial court's factual findings in this regard for substantial evidence. (*Id.* at pp. 1143-1144.) "When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion." (*Id.* at p. 1444; see also *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 819.)

State Fund established these now-settled principles. "When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified." (*State Fund*, *supra*, 70 Cal.App.4th at pp. 656-657.)

State Fund requires that it be "reasonably apparent that the materials were provided or made available through inadvertence" before its ethical mandates are triggered. (*State Fund*, *supra*, 70 Cal.App.4th at p. 656; see also *Rico v. Mitsubishi Motors Corp.*, *supra*, 42 Cal.4th at p. 817.) That is because inadvertent disclosure of privileged materials by counsel does not waive privilege. (*State Fund*, *supra*, at p. 654.) Nevertheless, "it is the holder of the privilege . . . who may waive the privilege, either by disclosing a significant part of the communication or by manifesting through words or conduct consent that the communication may be disclosed by another." (*Id.* at p. 652.)

"A trial court called upon to determine whether inadvertent disclosure of privileged information constitutes waiver of the privilege must examine both the subjective intent of the holder of the privilege and the relevant surrounding circumstances for any manifestation of the holder's consent to disclose the information." (*State Fund, supra,* 70 Cal.App.4th at pp. 652-653.) "[T]he final determination of whether an assertion of the attorney-client privilege will be upheld in an inadvertent disclosure context depends upon whether the client either expressly or impliedly waived the privilege.' [Citation.]" (*Id.* at p. 652, fn. 2.)

"The privilege holder's characterization of his or her intent in disclosing a privileged communication" is not dispositive in determining whether the holder waived the privilege, but is an important consideration. (*McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1101 (*McDermott*).) In addition to determining whether an inadvertent disclosure waived the attorney-client privilege by examining both the subjective intent of the privilege holder and any manifestation of the holder's intent to disclose the information, the trial court

must weigh "[o]ther relevant considerations" which "include the precautions the holder took to maintain the privilege and the promptness with which the holder sought return of the inadvertently disclosed document. [Citations.]" (*Id*. at p. 1102.) "[W]hen privileged documents have been disclosed . . . inadvertently in the course of civil discovery, no waiver of the privilege will occur if the holder of the privilege has taken reasonable steps under the circumstances to prevent disclosure." (*Regents of University of California v. Superior Court* (2008) 165 Cal.App.4th 672, 683.) Therefore, "'an underling's slip-up in a document production'" does not compel a finding of waiver. (*Ibid*.)

"'"'"When the facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it . . . ."'"' (*McDermott*, *supra*, 10 Cal.App.5th at p. 1102.)

The party seeking disqualification of opposing counsel bears the burden of demonstrating that the disclosure of privileged information was inadvertent. Indeed, "whenever a lawyer seeks to hold another lawyer accountable for misuse of inadvertently received confidential materials, the burden must rest on the complaining lawyer to persuasively demonstrate inadvertence. Otherwise, a lawyer might attempt to gain an advantage over his or her opponent by intentionally sending confidential material and then bringing a motion to disqualify the receiving lawyer. 'Mere exposure to the confidences of an adversary does not, standing alone, warrant disqualification.

Protecting the integrity of judicial proceedings does not require so draconian a rule. Such a rule would nullify a party's right to representation by chosen counsel any time inadvertence or devious design put an adversary's confidences in an attorney's mailbox. Nonetheless, we consider the means and sources of breaches of attorney-client confidentiality to be important considerations.' (*In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 589 . . . .) Having so noted, however, we do not rule out the possibility that in an appropriate case, disqualification might be justified if an attorney inadvertently receives confidential materials and fails to conduct himself or herself in the manner specified above, assuming other factors compel disqualification." (*State Fund*, *supra*, 70 Cal.App.4th at p. 657.)

II. The Trial Court Did Not Abuse Its Discretion

The trial court specifically found that "the production at issue was not inadvertent because [d]efendants failed to adopt reasonable measures to prevent disclosure of privileged documents." The trial court also found that "[b]ecause the documents were not inadvertently produced, the *State Fund* ethical obligation[] to refrain from reviewing or using the documents and to inform the responding party of the production of privileged documents was never triggered."

Substantial evidence supports these findings. As the trial court explained, both at the conclusion of the hearing on defendants' motion to disqualify and in its minute order denying that motion, defendants did not meet their burden to establish that the disclosure had been inadvertent. Failing to meet its burden to establish that the disclosures had been inadvertent,

the claim of privilege could not be sustained. (*State Fund*, *supra*, 70 Cal.App.4th at p. 652, fn. 2.)

The only evidence as to the manner of the document review—avowedly to remove privileged material from the documents ultimately produced—is contained in the Gibson declaration. That declaration does not qualify Gibson as knowledgeable or proficient in performing or supervising electronic document reviews, whether in ascertaining or use of terms in performing such a document review, or in verifying the efficacy of the keywords selected or of the search conducted. There is no indication of any quality control measures having been applied to verify the stated objective of inspecting the data base for and removing from it documents subject to a claim of privilege. Nor is there any indication that any term other than lawyers' names was used in the search. Gibson only refers—without specificity—to "his office" having utilized as keywords the names of attorneys of whom his firm was then aware who had represented the defendants. He does not state that any search was made using the key phrase "attorney client" or the word "privileged," or any other term.

While Gibson states that the documents identified in the search were removed before the remaining documents were produced and that the documents removed were "separately logged" before being excluded from the materials produced, no such log has ever been produced. Nor does he indicate that any document identified in the search that was performed was further examined to determine if it was in fact privileged. (The mere appearance of a particular lawyer's name in a document is not an assurance that the document actually is privileged.) And it is undisputed that tens of thousands of documents were

produced which were communications between attorneys and client or which bore the term "privileged" in their text. Thus, this declaration cannot have accurately stated the nature of the review conducted.[5] The trial court quite reasonably so concluded. And the fact that so many documents were produced that might be privileged does not suggest the conclusion that the receiving party was placed on notice that the production had been in error. Rather, such an extensive document production suggests that nothing in it contains privileged material. At a minimum, as the trial court found, it established that "[d]efendants failed to adopted reasonable measures to prevent disclosure of privileged documents."[6]

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[5] We acknowledge that plaintiffs have presented arguments to counter those presented by defendants. However, because the burden of going forward on the motion to disqualify is on defendants (before the plaintiffs need present any evidence to counter the defendants-moving parties' evidence), we focus on this initial burden of the moving party. Because we conclude that defendants have not met their initial burden, we do not address plaintiffs' countervailing evidence (Evid. Code, §§ 110 ["'Burden of producing evidence' means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue"]; 500, 550, subd. (b) ["The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact"]), and as we conclude the defendants have not met this burden, we do not consider counter-arguments advanced by plaintiffs.

[6] As plaintiffs' counsel stated at oral argument in this matter, the very nature of the transactions in which the plaintiffs and defendants were engaged required the participation of their lawyers and the exchange of documents among parties including counsel for adverse parties, each such exchange waving privilege.

We also consider the actions of defendant Meadow in connection with the document production and the defendants' claim of privilege. Meadow, the holder of the privileges at issue in this case, testified in his declaration that he never waived it or authorized anyone else to waive it. While his declaration is important in considering whether there was waiver, it is not dispositive. (*McDermott*, *supra*, 10 Cal.App.5th at p. 1101; accord, *State Fund*, *supra*, 70 Cal.App.4th at p. 652, fn. 2.) Instead, his declared intention is to be considered in the overall context of the circumstances surrounding the document production. (*McDermott, supra,* at pp. 1101-1102; *State Fund, supra*, at p. 652, fn. 2.) Meadow is a sophisticated business person with legal training who understands the importance of preserving the attorney-client privilege. Meadow stated in his declaration that he was the person who provided the files to Jeffer Mangels for review in responding to the plaintiffs' request for production of documents. Thus, he was aware that there were thousands of attorney-client communications among the documents to be reviewed by his counsel prior to production to plaintiffs and that careful review was critical to carrying out his stated intention of preserving his privilege claims. However, Gibson, a partner at the firm representing the defendants and performing the final document review, testified that cost and time pressures prevented a more extensive review of the documents. The inescapable conclusion from the facts in evidence is that a conscious decision was made, for cost-saving or some other reason, to produce the documents without a proper privilege review.

We conclude that the trial court was well within its discretion to find waiver based on the manner in which counsel

handled the production, and to give little weight to Meadow's post-production stated intention. Thus, there is substantial evidence supporting the trial court's determinations that defendants had not taken reasonable steps to protect the five documents from disclosure.

We turn to consider other arguments advanced by the defendants. Defendants contend we should presume that the manner in which plaintiffs' counsel raised the issue of use of Exhibit 1242 during the arbitration constituted an admission by that counsel of merit in defendants' claim that this exhibit had been inadvertently disclosed. This argument presumes, however, that defendants have met their burden to establish that the document review had been conducted appropriately, i.e., that the disclosure of that document (and the others in issue) had been inadvertent. The argument also ignores defendants' burden on their motion to disqualify—both of going forward and of proof, however. The circumstances that occurred during the arbitration do not obviate the obligation of the moving party on a motion to disqualify opposing counsel to meet its evidentiary burden.

Further, even assuming, arguendo, that defendants had established that their production of the five documents was inadvertent, to prevail on the motion to disqualify plaintiffs' counsel from further representation defendants must also establish that the outcome of the arbitration proceeding has been or would be adversely affected by the inadvertent production. As the Court of Appeal held in *McDermott*, "A trial court . . . may not order disqualification "'simply to punish a dereliction that will likely have no substantial continuing effect on future judicial proceedings.'" (*Oaks Management Corporation v. Superior Court* (2006) 145 Cal.App.4th 453, 467 . . . (*Oaks Management*), quoting

Gregori v. Bank of America (1989) 207 Cal.App.3d 291, 309 . . . (*Gregori*).)

"'[T]he significant question is whether there exists a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court. Thus, disqualification is proper where, as a result of a prior representation or through improper means, there is a *reasonable probability counsel has obtained information the court believes would likely be used advantageously against an adverse party during the course of the litigation*. . . .' (*Gregori*, *supra*, 207 Cal.App.3d at p. 309; see *Oaks Management*, *supra*, 145 Cal.App.4th at p. 467.)" (*McDermott*, *supra*, 10 Cal.App.5th at p. 1120, italics added; accord, *In re Complex Asbestos Litigation*, *supra*, 232 Cal.App.3d at p. 589.)

The record in the present case contains no such indication. As *McDermott* holds, it is not sufficient that arguably privileged materials were disclosed; there must "exist[] a genuine likelihood that the [disclosure] will affect the outcome of the proceedings before the court." (*McDermott*, *supra*, 10 Cal.App.5th at p. 1120.) The trial court concluded that there was no such likelihood in the present case. After listing the documents placed in issue, the trial court determined that "Mr. LaVina was also counsel for the [p]laintiff[s] while Meadow was working for the [p]laintiff[s]. In addition, [p]laintiff[s] and Meadow were working together on a deal with 'Wellspring' which Meadow was allegedly working on for his own benefit as well. Given the overlap of LaVina's representation of both [p]laintiff[s] and Meadow, as well as overlap of issues involving Wellspring, it has not been shown that

[the] use of these documents would affect the outcome of the proceedings."[7]

As we have noted, the burden of going forward is on the defendants as moving parties, both with respect to inadvertent disclosure of claimed privileged information and on whether any disclosure would affect the outcome of the proceedings pending before the arbitrators. These are burdens moving parties did not meet.

Even where there is conflicting evidence whether the holder of the privilege intended to waive the attorney-client privilege, and competing inferences may be drawn from the evidence, substantial evidence is the controlling standard of review. (*McDermott*, *supra*, 10 Cal.App.5th at pp. 1101-1102.) Indeed, "we may not reverse a trial court's ruling unless the appellant shows the evidence *required* the trial court to reach a different conclusion." (*Id.* at p. 1106.) That is not the case here. Instead, there is substantial evidence that any privilege was waived, if indeed it existed with respect to the five documents at issue. Further, even if not waived, there is no evidence of a genuine likelihood that the disclosure of these documents will affect the outcome of the proceedings before the arbitrators.

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[7] Defendants make no argument that would suggest any different result as to the other four documents.

DISPOSITION

We affirm the order. Plaintiffs are awarded costs on appeal.

GOODMAN, J.*

We concur:

BIGELOW, P. J.

GRIMES, J.

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* Retired Judge of the Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.