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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 SEVEN

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| MICHAEL PARNESS et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>ABRAMS GARFINKEL MARGOLIS BERGSON, LLP, et al.,<br><br>Defendants and Respondents. | B234762<br><br>(Los Angeles County Super. Ct. No. SC105302) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Jacqueline Connor, Judge. Reversed.

Tesser, Ruttenberg & Grossman, Brandon M. Tesser and Brian M. Grossman for Plaintiffs and Appellants.

Manning & Kass, Ellrod, Ramirez, Trester, Fredric W. Trester, Christopher Kanjo, David M. Gruen and Kevin H. Louth for Defendants and Respondents.

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Michael Parness and Full Glass Capital, LLC sued Michael J. Weiss and his law firm, Abrams Garfinkel Margolis Bergson,[1] for fraud arising out of the financing of the film Gospel Hill. After appointing a referee to evaluate Weiss's contention he could not defend himself without disclosing protected lawyer-client communications and reviewing the referee's report, the trial court dismissed the claims against Weiss. We reverse and remand for a new hearing on Weiss's motion.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *The Loans to Gospel Hill Productions, LLC*[2]

Freddy Braidy, one of the Gospel Hill's producers and a principal of Gospel Hill Productions, LLC, asked Parness in early 2007 for a short-term $500,000 loan. Braidy told Parness the loan would be repaid from the proceeds of a $1 million loan from Cold Fusion Media Group, which Braidy expected to be funded in 10 days. During a series of teleconferences Braidy, Weiss, who was production counsel, and other producers involved with the film told Parness that Gospel Hill Productions had "good 'chain of title'" to the screenplay.

On June 6, 2007 Parness, on one hand, and Braidy and Scott Rosenfelt, both as managing members of Gospel Hill Productions and individually, on the other hand, agreed Parness would make the $500,000 loan, to be repaid by June 18, 2007, in exchange for a fee, interest and executive producer credit. As partial security for the promissory note, Gospel Hill Productions assigned all its rights in the film to Parness.

In mid-June 2007 Michael Roban, a principal of Cold Fusion Media Group, told Parness his company was not ready to make the $1 million loan to Gospel Hill Productions. As a result of this delay, Gospel Hill Productions asked Parness for an

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1 Because there is no need to distinguish between Weiss and the law firm for purposes of the issues on appeal, we refer only to Weiss.

2 Our description of the factual background for Parness and Full Glass Capital's claims is based on the allegations in their second amended complaint, the operative pleading, which we accept as true to determine whether Weiss's motion to dismiss should have been granted. (See *Chang v. Lederman* (2009) 172 Cal.App.4th 67, 72, fn. 1.)

additional loan of $150,000 to prevent the production from shutting down. Parness agreed. The original note was also modified, so both loans were due on June 20, 2007. Soon thereafter, however, Parness learned Cold Fusion Media Group would not make the $1 million loan to Gospel Hill Productions; and Gospel Hill Productions defaulted on the notes.

In mid-July 2007 Gospel Hill Productions told Parness production would have to shut down because it could not meet payroll and other financial obligations. During discussions about the projected revenue for the film, the producers and Weiss told Parness that Gospel Hill Productions had entered into a written distribution agreement with Twentieth Century Fox in which the studio had agreed to pay $1.5 million upon delivery of the movie and guaranteed a theatrical release on at least 350 screens. They also told Parness Samuel L. Jackson was starring in the movie, which would greatly increase its value to distributors, and they had sold the foreign distribution rights for approximately $6.5 million.

Parness agreed to make an additional loan to Gospel Hill Productions to preserve his collateral. Parness then formed Full Glass Capital to be the lending entity and transferred all his rights in the notes and under the various agreements to it. On July 13, 2007 Full Glass Capital loaned Gospel Hill Productions $360,000. This note was also personally guaranteed by Braidy and Rosenfelt.

On August 10, 2007 Full Glass Capital agreed to loan Gospel Hill Productions up to an additional $1,140,000 with a maturity date for the note of December 15, 2007. Gospel Hill Productions borrowed $267,000 of the sum available, bringing the total principal balance to $1,277,000.

2. *The Pleadings*

On October 16, 2009, after Gospel Hill Productions had failed to repay the loans, Parness and Full Glass Capital filed a lawsuit for fraud and breach of contract against Gospel Hill Productions, the producers, Weiss and others. A first amended complaint was filed in March 2010 and the operative second amended complaint on July 19, 2010.

The sixth cause of action alleged Parness and Full Glass Capital had been fraudulently induced to loan money based on Weiss and the producers' misrepresentation they had a good chain of title to the screenplay. It further alleged the producers and Weiss failed to disclose there was no written agreement between the writers of Gospel Hill and Gospel Hill Productions transferring the copyright for the screenplay; the producers and Weiss failed to disclose the writers had not been paid for their screenwriting services; and the producers and Weiss presented Parness with a letter from the writers confirming they had been paid in full while simultaneously sending a letter to the writers from the producers stating, "We the undersigned hereby confirm that we have not paid you for your services as writers for the screenplay 'Gospel Hill.' We will pay all the writers for their services upon all the financing being in place."[3]

The seventh cause of action alleged Weiss and the producers had fraudulently concealed the fact that the $1.5 million Fox paid had been based on Gospel Hill Productions's written representation Samuel L. Jackson would star in the movie. In fact, Jackson only had a "cameo" role and was refusing to permit his name or likeness to be used to promote or advertise the film, thus greatly diminishing its value.

3. *The Motion To Dismiss and Order of Reference*

Relying in large part on *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771 (*Dietz*), on Weiss moved to dismiss the second amended complaint on the ground he could not defend himself without divulging confidential communications between client and lawyer in violation of that privilege and his duty of loyalty. (See *id.* at p. 792 [identifying four factors that must be considered "before a court may dismiss a case on the ground that a defendant attorney's due process right to present a defense would be violated by the defendant's inability to disclose a client's confidential information if the action were allowed to proceed"].) Weiss contended his clients had refused to waive the privilege and argued the court was not permitted to review the privileged documents pursuant to Evidence Code section 915, subdivision (a).

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3 Both letters were attached as exhibits to the second amended complaint.

At the December 7, 2010 hearing on the motion the court indicated it was inclined to appoint a referee to review the purportedly privileged documents because the motion was supported by "a lot of assumptions" the court could not make: Weiss's counsel explained, "We purposely left the motions with a level of uncertainty because to make these any more certain would breach the attorney-client privilege." The court responded, "You need to get a special master or a referee or something to sit down and deal with it because I can't." Specifically, the court indicated it intended to appoint a referee to "go through every single one of those [purportedly privileged documents] . . . . I don't know if you have a hundred or four. . . . We're going to cut through the assumptions and find out what's really there, to see if there's any basis." Counsel for Weiss, as well as counsel for Gospel Hill Productions and Braidy, agreed to the reference after the court clarified, "[The privileged information] will not be revealed. It's just a ruling as to whether or not there truly is something within the attorney-client privilege and if there's anything left." Counsel for Parness and Full Glass Capital, however, resisted the proposal and engaged in the following exchange with the court:

"The Court: You have a better idea?

"Mr. Grossman: Yes, your Honor. That the motion be denied with prejudice.

"The Court: No. Okay, what's Plan B?

"Mr. Grossman: Well, if—

"The Court: They have—I'm going to give them a shot at—

"Mr. Grossman: My concern is this, your Honor.

"The Court: The answer's no. What's Plan B? Give me a Plan B.

"Mr. Grossman: I think Plan B is that we should . . . proceed to trial. If . . . they wish to bring another motion or perhaps a motion for summary judgment, they are certainly permitted to do that.

"The Court: I'm going to go ahead and order the referee."

A written order prepared by Weiss's counsel and signed by the court on December 28, 2010 stated, "The interested parties shall select a mutually agreeable referee to evaluate the relevant documentary and testimonial evidence, and thereafter

make recommendations to the Court for its ruling on Defendants' Motion to Dismiss. Said evaluation may be made by way of offers of proof, in camera review (either directly or through questions to a person most knowledgeable) or some other mechanism the referee may deem appropriate." A status conference was set for February 24, 2011 to review the referee's findings.

4. *The Motion for Leave To File a Third Amended Complaint*

On February 7, 2011 Parness and Full Glass Capital moved to amend the complaint to assert a claim for negligent misrepresentation (eighth cause of action) against Weiss. They explained their discovery had indicated Weiss may not have had the requisite knowledge of falsity to support a claim for intentional fraud and his misrepresentations may have simply been negligent.

5. *The Procedure Followed by the Referee and the Referee's Report*

The parties agreed retired Superior Court Judge John Leo Wagner would serve as referee. On February 4, 2011 counsel for the parties had a teleconference with Judge Wagner during which he stated he wanted to review the allegedly exculpatory privileged documents and use the hearing scheduled for February 16, 2011 to discuss them with Weiss's counsel, as well as to interview Weiss about oral lawyer-client communications that might also be exculpatory. According to Parness and Full Glass Capital, the referee said he did not need any evidence from them or require their participation at the hearing. According to Weiss, the parties mutually agreed to this procedure and further agreed they would provide the referee with briefs regarding the motion to dismiss. Weiss also asserts the parties discussed whether an additional, nonconfidential hearing should be scheduled, but that they all "decided against it."

On February 16, 2011 the referee held the hearing with Weiss and his counsel. The next day Parness and Full Glass Capital sent the referee an email stating, "If you have any questions following yesterday's hearing, and certainly if you are at all inclined to recommend the relief sought by Mr. Weiss, please contact us so that we may offer comment." The referee did not respond. On February 22, 2011 they sent the referee another email stating, "We have not heard anything since the hearing. If there is anything

you need from us in terms of points and authorities, or evidence, please do not hesitate to ask."

On February 23, 2011 the referee sent his report to the parties. Applying the factors articulated in *Dietz*, *supra*, 177 Cal.App.4th 771, the referee found confidential lawyer-client communications were, although not dispositive, highly relevant to Weiss's defense and recommended the trial court dismiss the causes of action against Weiss.[4] The referee explained, "Plaintiffs argue that the representations upon which they predicate their causes of action are not attorney-client communications, but rather representations that were made by Weiss directly to Plaintiffs. While this may on the surface be true, any defense must necessarily be predicated upon what Weiss was (or was not) told by his clients. If attorney-client communications tend to prove that he either 1) did not know the representations he was making were false or 2) he did not intend to have Plaintiffs rely on those misrepresentations to their detriment, because he was himself misled by representations made to him, then such proof could negate the scienter required to make Plaintiffs' case. The proof prohibited as privileged attorney-client communication does not go so much as to what was represented to Plaintiffs, but instead to what was told to (or kept from) Weiss, so as to give rise to those representations. Based on my review, there can be no question but that the communications that the Attorney Defendants would otherwise use are in fact attorney-client communications."

6. *The Hearings To Review the Referee's Report; Further Briefing*

At the February 24, 2011 status conference the court stated it had not yet read the referee's report, which had just been filed. Parness and Full Glass Capital requested permission to respond to the referee's findings in writing, contending they had been excluded from the hearing and not allowed to present any evidence. Over Weiss's

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4 With respect to the negligent misrepresentation cause of action in the proposed third amended complaint, the referee explained he "ha[d] reviewed the proposed Third [Amended Complaint], and the new Eighth Cause of Action [negligent misrepresentation] in it, and has taken into consideration the attorney-client materials that pertain to it." However, he also offered the view Parness and Full Glass Capital had failed to allege any duty by Weiss that would support the cause of action.

objection that Parness and Full Glass Capital had had an opportunity to submit whatever they wanted to the referee, the court ruled further briefing would be permitted and scheduled a hearing for May 4, 2011. A previously scheduled hearing for March 8, 2011 on Parness and Full Glass Capital's motion for leave to file the third amended complaint was left on calendar.

Notwithstanding the court had set May 4, 2011 to consider the referee's report and the motion to dismiss, the court issued a tentative ruling for the March 8, 2011 hearing adopting the referee's findings and approving his recommendations. At the hearing Parness and Full Glass Capital objected on the ground the court had agreed to permit further briefing. Having been reminded, the court again set the matter for May 4, 2011, stating, "[W]e'll expect the same result."

In their supplemental briefs in opposition to the motion to dismiss, Parness and Full Glass Capital contended for the first time the reference was improper because it was not limited to a question of fact (see Code Civ. Proc., § 639, subd. (a)(3)) and the referee usurped judicial responsibility by weighing evidence, applying the legal factors in *Dietz*, *supra*, 177 Cal.App.4th 771, and recommending the outcome on a dispositive motion. They further argued, even if valid, the reference was conducted in a manner that deprived them of their due process right to confront the evidence used against them. They also challenged the referee's conclusion lawyer-client communications were highly relevant to Weiss's defense inasmuch as there was nonprivileged evidence demonstrating that Weiss either knew the alleged misrepresentations were false or, at best, was negligent in making the representations and that he had breached his duty to disclose essential facts to Parness and Full Glass Capital. In support of their supplemental opposition Parness and Full Glass Capital submitted an expert declaration from an attorney who had practiced in the area of motion picture development, production and finance for almost 30 years.

7. *The Trial Court's Order Granting the Motion To Dismiss and Denying the Motion for Leave To File a Third Amended Complaint*

After hearing argument on May 4, 2011 the trial court found the reference was proper and the parties had a full opportunity to meet and confer regarding selection of the referee.[5] The court, stating it had "thoroughly reviewed the detailed analysis set forth in the report by Judge Wagner, who followed the undisputed applicable legal framework set forth in *Dietz*[, *supra*,] 177 Cal.App.4th 771," adopted the referee's findings and dismissed the causes of action against Weiss. The court did not review the materials presented to the referee at the in camera hearing he had conducted.

The court also denied Parness and Full Glass Capital's motion for leave to amend the complaint, finding "a negligent misrepresentation claim still requires proof that the Attorney Defendants made a misrepresentation of a past or existing material fact 'without reasonable grounds for believing it to be true.' In order to defend against this allegation, the Attorney Defendants would have to establish the reverse—that there were reasonable grounds and there is, again, nothing to show that they could do so without disclosing privileged information provided by the Gospel Hill defendants."

## DISCUSSION

1. *Governing Legal Principles*

a. *The lawyer-client privilege*

The lawyer-client privilege authorizes a client to refuse to disclose, and prevent others from disclosing, confidential communications between the client and his or her lawyer. (Evid. Code, § 954.)[6] "'[T]he privilege is absolute and disclosure may not be

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5 In its minute order the court described the scope of the special reference as "to determine whether there was substantive support for the Attorney Defendants' assertion that they could not properly defend against plaintiff[s'] claims without breaching the attorney-client privilege."

6 Business and Professions Code section 6068, subdivision (e)(1), provides an attorney has the duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Similarly, California Rules of Professional Conduct, rule 3-100(A) states, "A member shall not reveal information

ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case.'" (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732 (*Costco*).)

Evidence Code section 915, subdivision (a), with exceptions not applicable here, provides "the presiding officer may not require disclosure of information claimed to be privileged under this division [which includes the lawyer-client privilege] . . . in order to rule on the claim of privilege . . . ." As the Supreme Court explained in *Costco, supra*, 47 Cal.4th at page 736, "Section 915 also prohibits disclosure of information claimed to be privileged work product under Code of Civil Procedure section 2018.030, subdivision (b), but, as to the work product privilege, if the court is unable to rule on the claim of privilege 'without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present.' (Evid. Code, § 915, subd. (b).) *No comparable provision permits in camera disclosure of information alleged to be protected by the attorney-client privilege*." (Italics added.) (Accord, *Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 45, fn. 19 ["[t]here is no statutory or other provision that allows for such inspection of documents allegedly protected by the attorney-client privilege"].)

Although in camera review of documents allegedly protected by the lawyer-client privilege is absolutely prohibited, the court may nevertheless "review[]the facts asserted as the basis for the privilege to determine, for example, whether the attorney-client relationship existed at the time the communication was made, whether the client intended the communication to be confidential, or whether the communication emanated from the client." (*Costco, supra*, 47 Cal.4th at p. 737; see *Cornish v. Superior Court* (1989)

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protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client . . . ."

209 Cal.App.3d 467, 480 ["it is neither customary nor necessary to review the contents of the communication . . . as the court's factual determination does not involve the nature of the communications or the effect of disclosure"].) Once the party claiming the privilege establishes the facts necessary to support a prima facie claim of privilege, "the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply." (*Costco*, at p. 733; see Evid. Code, § 917, subd. (a).)

b. *The factors to be assessed when considering whether to dismiss a third-party lawsuit against an attorney on due process grounds*

In keeping with the strict mandate of the lawyer-client privilege and an attorney's duty of loyalty, the circumstances in which a lawyer can reveal client confidences to defend a lawsuit are limited to fee disputes with the client and claims for breach of duty arising out of the lawyer's professional relationship with the client. (Evid. Code, § 958; see *Dietz, supra*, 177 Cal.App.4th at p. 786.) As a consequence, as we held in *McDermott, Will & Emery v. Superior Court* (2000) 83 Cal.App.4th 378, 385 (*McDermott*), some third party lawsuits against an attorney (that is, cases in which the plaintiff is not the client or former client of the attorney) may not proceed because the attorney's duty to maintain the privilege precludes a meaningful defense. (See *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 218; *Reilly v. Greenwald & Hoffman, LLP* (2011) 196 Cal.App.4th 891, 904-906; *Dietz*, at pp. 792-793; see also *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1169, 1190-1191 [in-house counsel may pursue cause of action in tort for retaliatory discharge provided claim can be established without breaching the lawyer-client privilege].)

In *McDermott, supra*, 83 Cal.App.4th 378, a shareholder derivative action against the corporation's outside counsel, we held, while shareholders "stand in the shoes" of the corporation for most purposes, "the one notable exception is with respect to the attorney client privilege." (*Id*. at p. 383.) Thus, although filing a legal malpractice action normally results in a waiver of the privilege, the derivative action does not; only the

corporation itself can waive the privilege. (*Id.* at pp. 383-384.) To permit the lawsuit to proceed, therefore, would unfairly deprive the defendant attorney of the ability to present a viable defense: "We simply cannot conceive how an attorney is to mount a defense in a shareholder derivative action alleging a breach of duty to the corporate client, where, by the very nature of such an action, the attorney is foreclosed, in the absence of any waiver by the corporation, from disclosing the very communications which are alleged to constitute a breach of that duty." (*Id.* at p. 385; see *Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451, 467 ["because this [professional malpractice] lawsuit 'is incapable of complete resolution without breaching the attorney-client privilege, the suit may not proceed'"].)

In third party suits against attorneys for claims other than legal malpractice, whether privileged lawyer-client communications are essential to the attorney's defense may be less obvious, and the question of dismissal at the pleading stage is closer call. Addressing this problem Division One of the Fourth Appellate District in *Dietz, supra,* 177 Cal.App.4th 771,[7] concluded there are several factors a court must consider under *General Dynamics Corp. v. Superior Court, supra*, 7 Cal.4th 1164,[8] before it "may

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7 *Dietz, supra*, 177 Cal.App.4th 771 involved an attorney who brought an action for breach of contract and fraud against a law firm to whom he had referred a bad faith insurance litigation matter. The attorney alleged the firm had refused to pay the agreed referral fee.

8 In recognizing the right of in-house counsel to pursue tort claims for retaliatory discharge, the Supreme Court in *General Dynamics Corp. v. Superior Court, supra,* 7 Cal.4th 1164, acknowledged the potential impact of such lawsuits on the lawyer-client privilege and cautioned "the contours of the statutory attorney-client privilege should continue to be strictly observed." (*Id.* at p. 1190.) However, the Court also explained, "the trial courts can and should apply an array of ad hoc measures from their equitable arsenal designed to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege. The use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings, are but some of a number of measures that might usefully be explored by the trial courts as circumstances warrant. We are confident that by taking an aggressive managerial role,

dismiss a case on the ground that a defendant attorney's due process right to present a defense would be violated by the defendant's inability to disclose a client's confidential information if the action were allowed to proceed." (*Dietz*, at p. 792.) Specifically, the *Dietz* court held the trial court should determine whether the evidence at issue is the client's confidential information, and the client insists that it remain confidential; whether, given the nature of plaintiff's claim, the confidential information is highly material to the defendant's defenses; whether there are "ad hoc" measures available to avoid dismissal such as "sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings "; and, finally, whether it would be fundamentally unfair to proceed. (*Dietz*, at pp. 792-793; accord, *Reilly v. Greenwald & Hoffman, LLP, supra,* 196 Cal.App.4th at p. 904.) The *Dietz* court described dismissal of "a plaintiff's claim on the ground that an attorney-defendant's due process right to present a defense is compromised by the defendant's inability to present confidential information in support of that defense" as an "extraordinary step" to be used "only in the rarest of cases, after the court has considered all of the factors discussed above." (*Dietz*, at p. 794.)

c. *The statutory scheme governing general and special references*

A general reference pursuant to Code of Civil Procedure section 638 authorizes the trial court, with the agreement of the parties, to refer any or all issues to a referee for trial and determination. (*Ellsworth v. Ellsworth* (1954) 42 Cal.2d 719, 722; *Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 Cal.App.4th 25, 28; *Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, 1522.) "Such agreement of the parties is required to comport with the constitutional prohibition against delegation of judicial power. [Citation.] The findings and determination of the referee upon the whole issue must stand as the finding of the court and judgment may be entered thereon in the same manner as though the matter had been tried by the court." (*Jovine*, at p. 1522.)

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judges can minimize the dangers to the legitimate privilege interests the trial of such cases may present." (*Id.* at p. 1191.)

If the parties do not consent to a general reference, Code of Civil Procedure section 639 permits the court to make a special reference in certain enumerated circumstances provided the court "independently consider[s] the referee's findings before acting." (*Jovine v. FHP, Inc.*, *supra*, 64 Cal.App.4th at p. 1522; Cal. Rules of Court, rule 3.920(a) ["court may order the appointment of a referee under Code of Civil Procedure section 639 only for the purposes specified in that section"].) For example, the court may appoint a referee "[w]hen a question of fact, other than upon the pleadings, arises upon a motion" or "to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon." (Code Civ. Proc., § 639, subd. (a)(3), (5).)

"This statutory scheme carefully preserves the distinction which must be maintained between general and special references in order to comply with the constitutional mandate regarding the delegation of judicial power. '[A] general reference has binding effect, but must be consensual, whereas a special reference may be ordered without consent but is merely advisory, not binding on the . . . court." (*Aetna Life Ins. Co. v. Superior Court* (1986) 182 Cal.App.3d 431, 436; accord, *Jovine*, *supra*, 64 Cal.App.4th at p. 1523.)

2. *The Special Reference Was Improper; the Orders Predicated Upon It Must Be Reversed*[9]

As explained in *Costco*, *supra*, 47 Cal.4th at page 737, the trial court may require the party asserting the lawyer-client privilege "to reveal *some* information to permit the court to evaluate the basis for the claim of privilege"; and it may require those limited disclosures either to itself directly or to a referee appointed pursuant to Code of Civil Procedure section 639 for that purpose. (Cf. *Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 117 ["question whether the attorney-client privilege applies to a particular communication is a question of fact if the evidence is in conflict"].) But the

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9 Contrary to Weiss's contention, Parness and Full Glass Capital did not waive or forfeit their objection to the special reference. The record plainly reflects their objection and argument the court should proceed to decide the motion on the information before it.

court is not "free to ignore [Evidence Code section 915's] prohibition and demand in camera disclosure of the allegedly privileged information itself for this purpose." (*Costco,* at p. 737.)

The trial court here, like the trial court in *Costco,* failed to recognize "the critical distinction between holding a hearing to determine the validity of a claim of privilege and requiring disclosure at the hearing of the very communication claimed to be privileged." (*Costco, supra*, 47 Cal.4th at p. 737.) It impermissibly ordered a reference to inspect documents and other information Weiss claimed was privileged and to evaluate the significance of that information to Weiss's defense. That was error. So long as Weiss established a prima facie claim of privilege, his motion to dismiss must be decided without examination of the contents of the assertedly privileged documents notwithstanding the "assumptions" and "uncertainty" about the nature of the privileged communication that troubled the trial court.[10] Because the trial court's ruling on Weiss's motion to dismiss was unquestionably influenced by "the detailed analysis set forth in the report by Judge Wagner," an analysis that should not have taken place, that order must be reversed. (See *Costco, supra*, 47 Cal.4th at p. 737 [directing issuance of a writ of mandate vacating trial court's order compelling discovery that was "based in large part on the referee's review" of privileged material].)

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10 In disapproving the Court of Appeal's analysis in *2,022 Ranch v. Superior Court* (2003) 113 Cal.App.4th 1377, the *Costco* Court indicated the holder of the lawyer-client privilege could request an in camera review of allegedly privileged communications to aid the trial court in determining whether they were made during the course of an attorney-client relationship. (*Costco, supra*, 47 Cal.4th at p. 740.) That is, although the court could not demand the privilege holder submit the material for in camera review, Evidence Code section 915 does not bar that party from requesting such a review. This suggestion seems inconsistent with the Court's unconditional statement that "section 915 prohibits disclosure of information claimed to be privileged in order to determine if a communication is privileged." (*Ibid*.) However, we need not attempt to reconcile these statements in this appeal. Although counsel for Gospel Hill Productions and Braidy ultimately consented to the special reference and an in camera review of the relevant information after being assured privilege communications would not be revealed, the record clearly reflects it was the trial court that initially indicated it needed such a review to decide the motion and ordered the parties to select a referee for that purpose.

There is a second, related reason for reversing the ruling granting the motion to dismiss and the consequent judgment in favor of Weiss. Although a special reference to evaluate Weiss's claim that protected lawyer-client communications were "highly material" to his defense might have been proper if accomplished without review of the allegedly privileged material, the referee here addressed far more than this limited question. Indeed, the referee made a recommendation on the ultimate legal question presented by the motion—whether application of the *Dietz* factors warranted dismissal of the amended complaint. Nonetheless, as long as the trial court independently reviews the referee's findings, treating the referee's recommendation as purely advisory, any error in the scope of the special reference would likely be harmless. (See Cal. Const., art. VI, § 13 ["[n]o judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"]; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 ["'a "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error'"].) The court, by conducting a de novo review, fulfills its constitutionally mandated judicial responsibility and presumably would come to the same conclusion—albeit perhaps less expeditiously—as it would without the referee's advisory recommendation. The report, in other words, facilitates, but does not replace, the court's own analysis and decision. (See *Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 226 ["in hearing the matter and independently reviewing the referee's order, [the court] did not abdicate [its] judicial responsibility"].)

No such full, independent judicial review occurred here because, although the referee reviewed the information claimed to be privileged, the trial court did not; nor was the court even provided a confidential summary of the referee's in camera evaluation of that material. Thus, the court could not meaningfully assess the referee's recommendation before ruling on the motion to dismiss. By permitting this procedure

(whether based on its misunderstanding of Evidence Code section 915 or daunted by the volume of privileged information that would have to be reviewed), the trial court created a flawed special reference. Accordingly, its orders predicated on the referee's report must be reversed. (*Jovine v. FHP, Inc.*, *supra*, 64 Cal.App.4th at p. 1525 [reversing trial court orders following invalid reference; "it is not at all clear that the court actually conducted a de novo review of the defendants' [dispositive] motions and plaintiff's opposition thereto. Indeed, reading the record as a whole, the inference which we feel compelled to draw is that it did not do so, but rather simply adopted the referee's reports as its own."].)

On remand, if Weiss's clients refuse to waive their privilege, the trial court must decide the motion by weighing the materiality of information, which can only be generally described, on the elements of scienter and intent—elements by their very nature that can be difficult to prove—and drawing conclusions about its significance from other evidence the court is permitted to review. It is not, as Parness and Full Glass Capital argue, categorically clear no attorney-client communications could be "highly material" to Weiss's defense based on the allegations of the operative pleading. In addition, as suggested in *General Dynamics* and *Dietz*, the trial court should consider a full range of ad hoc measures that may obviate the need to dismiss Weiss from the lawsuit. For example, in their brief on appeal, Parness and Full Glass Capital state they "would gladly accept it as a stipulated fact that Gospel Hill LLC told Weiss that Fox's and [Samuel L.] Jackson's positions on advertising were not inconsistent, and/or told Weiss that the Picture's writers had been paid, if such stipulations were necessary to avoid an injustice."

## DISPOSITION

The judgment is reversed, and the matter remanded for further proceedings not inconsistent with this decision. Parness and Full Glass Capital are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.