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September 21, 2018

VIA HAND DELIVERY

Code No _____
BY ORDER OF THE BD/SUPV _____
Referred To _____

Honorable Mike Maggard, Chairman
Kern County Board of Supervisors
1115 Truxtun Ave.
Bakersfield, CA 93301

Copies Furnished Each Supervisor and 10
County Counsel
Filed by BD Supv 9-24-2018
KATHLEEN KRAUSE
Clerk of the Board of Supervisors
By K Krause

RE: Request for Board of Supervisors to Waive Claimed Privilege of Supervisor Perez Memorandum

Dear Chairman Maggard,

This letter is sent to you at the direction of Mark Nations. The purpose is to request that the Board of Supervisors consider and vote on (in closed-session) my office's prior request that the privilege asserted by Mr. Nations over the memorandum he provided to Supervisor Leticia Perez be waived by the Board. The memorandum concerns Supervisor Perez's potential conflict of interest related to her vote on October 24, 2017, concerning cannabis land use ordinance revisions (the "Cannabis Vote"). The following provides some background to this issue.

On June 1, 2018, I requested by letter that Mr. Nations turn over to our office potential evidence related to our then investigation of Supervisor Perez. Specifically, Supervisor Perez has repeatedly stated in public that Mr. Nations provided to her a legal opinion memorandum clearing her of any conflict of interest related to the Cannabis Vote. As you are aware, my office has since brought misdemeanor criminal charges against Supervisor Perez for violating Government Code §§ 87100 and 87203 in relation to the Cannabis Vote. The memorandum Mr. Nations drafted may contain material evidence pertinent to those charges.

I further requested that if Mr. Nations claimed the memorandum was privileged or confidential, that he present the issue to the full Board of Supervisors for a vote on whether to waive the privilege. Since the privilege belongs to the County, this is the proper procedure when there is an alleged privileged document created by County Counsel. See *Ward v. Superior Court*, 70 Cal.App.3d 23, 32 (1977) (County counsel's *only client* is the County); *Roberts v. City of Palmdale*, 5 Cal.4th 363, 373 (1993) ("We conclude that a local governing body is the holder of the attorney-client privilege *with respect to written legal opinions by the governing body's attorney*,...); *Cal.Eth.Op.* 2001-156, 2001 WL 34029610 (the governmental entity is the client).

By letter dated June 12, 2018, Mr. Nations declined to produce the memorandum and appeared to claim his duty to Supervisor Perez overrode the Board's position on the matter. It also appeared to us that

he had declined to present the issue to the Board of Supervisors for a vote on whether to waive the claimed privilege. My office waited to see if the waiver issue would be presented to the Board over the next few sessions. Because the issue was never presented to the Board and we believed Mr. Nation's position was incorrect as a matter of law, my office made a verbal inquiry to the Clerk of the Board on or around August 20, 2018, concerning the process for my office to request placement of items on the Board's closed-session agenda. The inquiry was not intended to imply that I wished to personally address the Board in closed-session. Rather, we simply inquired to see if there was a process to put an item on a closed-session agenda.

By letter dated August 21, 2018, Mr. Nation's stated that it was his intent to convene a closed-session with the Board no later than September 18, 2018, to consider the waiver issue. Based on our review of the Board's sessions on September 18, it did not appear that the waiver issue was presented to the Board. To confirm that understanding, the Deputy District Attorney handling the case against Supervisor Perez, Christopher Dominguez, telephoned Mr. Nations. Mr. Dominguez left a voice message for Mr. Nations asking whether the waiver issue had been presented to the Board on September 18 as Mr. Nations had previously represented.

Mr. Nations responded to Mr. Dominguez via email on today's date. (See attachment.) Mr. Nation's now states that one or more Board members must direct him to bring the matter to the Board. Accordingly, we are requesting that you or another Board member direct Mr. Nations to bring the matter of waiver to the Board at the earliest possible closed-session. The case against Supervisor Perez is scheduled for an initial hearing on October 5, 2018. It is important that my office receive all pertinent information as soon as possible.

Our position is that Supervisor Perez's repeated invocation through the public media of the memorandum as a defense to the conflict of interest allegations constitutes a waiver of any right of privilege or confidentiality in and of itself. A party implicitly waives the claimed privilege when they use advice of counsel both as a sword to defeat or defend against a claim and as a shield to protect against the disclosure of the very advice of counsel used as a sword. *See Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (9th Cir. 1992) ("The privilege which protects attorney-client communications may not be used both as a sword and a shield.... Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived.")

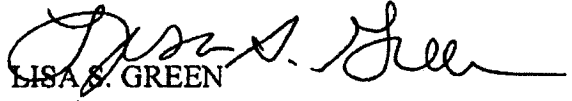
Even though the memorandum cannot act as a defense in the trial of Supervisor Perez, if – as Supervisor Perez claims – the memorandum purportedly clearing her of any potential conflict was provided to her with a complete understanding of all material facts by Mr. Nations, that could prove pertinent to my office's consideration during plea negotiations. It is our understanding, however, that Mr. Nations may not have had all the material facts to consider prior to drafting the memorandum. Presumably this can be confirmed through the memorandum itself.

Accordingly, I again request that this matter be brought before the full Board of Supervisors so that the Board may vote on whether to waive the privilege Mr. Nations claims exists for the memorandum. Though it is not my desire to engage in a public fight, if the issue is not brought to the full Board for a vote in closed-session, my office will be left with no alternative but to seek a court order requiring production of the memorandum. It is my hope that such a procedure will not be necessary.

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Supervisor Mike Maggard
September 21, 2018

I look forward to your anticipated cooperation with this request to bring the issue to a Board vote at the earliest possible meeting (in closed-session) concerning whether to waive the claimed privilege over the memorandum related to Ms. Perez's conflict of interest on voting for cannabis-related matters.

Sincerely,


LISA S. GREEN
District Attorney

Enclosure

cc: Mark L. Nations, County Counsel
Margo A. Raison, Chief County Counsel
Mick Gleason, Supervisor District 1
Zack Scrivner, Supervisor District 2
David Couch, Supervisor District 4