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9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
11 SOUTHERN DIVISION

12 JOSEPH COOK, an Individual, )  
13 LIRVANEETHZA COOK, an Individual, )

14 Plaintiffs, )

15 v. )

16 FULLERTON SUPPORTIVE HOUSING, )  
17 L.P., A California Limited Partnership; THE )  
18 JOHN STEWART COMPANY, A California )  
19 Corporation; and DOES 1 through 10, )  
20 Inclusive, )

21 Defendants )

No. 8:19cv00383 PSG (ADSx)

**DISCOVERY MATTER**

**NOTICE OF MOTION; MOTION OF  
PLAINTIFFS TO COMPEL  
DEFENDANTS TO PROVIDE  
SUPPLEMENTAL RESPONSES FOR  
THE DEPOSITIONS OF MELISSA  
BAYLES AND JESSICA  
RODRIGUEZ; JOINT  
STIPULATION RE DISCOVERY  
ISSUES IN DISPUTE;  
DECLARATION OF CRAIG P.  
FAGAN; DECLARATION OF STEVE  
MCELROY**

21 Date: November 6, 2019  
22 Time: 10:00 a.m.  
23 Judge: Hon. Autumn D. Spaeth  
24 Ctroom: 6B  
25 Trial: TBA

26 This motion is made following informal  
27 telephonic discovery conference with  
28 Judge Autumn D. Spaeth, which took  
place on September 9, 2019

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2  
3 **YOU ARE HEREBY NOTIFIED THAT** at 10:00 a.m., on November 6, 2019, or as soon  
4 thereafter as the matter can be heard before the Honorable Autumn D. Spaeth, in Courtroom 6B of the  
5 United States District Court, Central District, Southern Division, located at 411 W. Fourth Street, Santa  
6 Ana, CA 92701, Plaintiffs Joseph Cook and Lir Cook will and hereby do move this Court for an order  
7 compelling Defendant The John Stewart Company to require witnesses Melissa Bayles and Jessica  
8 Gutierrez to provide responses to deposition questions.

9  
10 This motion is made on the ground that Defendant had no legal basis to instruct these witnesses to  
11 refuse to answer questions at their depositions. This motion is based on this notice, the memorandum of  
12 points and authorities set forth below, the attached declaration of Craig P. Fagan, the complete files and  
13 records in this action, and such other and further evidence as may be presented at the hearing on this matter.  
14 Counsel for both parties met and conferred with Judge Autumn Spaeth on September 9, 2019, to discuss  
15 the issues raised herein [Decl. Craig P. Fagan ¶2]. In addition, counsel for both parties met and conferred  
16 twice about the issues raised in the current motion, before this motion was filed [Decl. Craig P. Fagan ¶2]

17  
18 Dated: September 27, 2019

LAW OFFICES OF CRAIG P. FAGAN

19  
20 By: /s/Craig P. Fagan  
21 Craig P. Fagan  
22 Attorneys for Plaintiffs  
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**I.****PLAINTIFF'S INTRODUCTORY STATEMENT**

On September 9, 2019, attorneys for all parties held a telephonic conference with Judge Autumn Spaeth, as an informal pre-motion conference to determine if the parties could resolve the issues in the current motion without the need for a motion [Decl. Craig P. Fagan ¶2]. During the conference, Her Honor expressed that she felt that an informal telephone call between the Court and counsel, to discuss these issues, was not the proper vehicle by which to approach the current matter [Decl. Craig P. Fagan ¶2]. She recommended the current motion [Decl. Craig P. Fagan ¶2]. Prior to filing the current motion, Plaintiffs' counsel twice met and conferred with Defense counsel, Tony Cheng, to discuss the issues raised in this motion, but no resolution could be had [Decl. Craig P. Fagan ¶2].

Plaintiffs Joseph & Lir Cook were homeless before they moved into the Fullerton Heights Apartments, in Fullerton, CA. Mr. Cook is African-American, and Mrs. Cook is Hispanic. They live at the property with their children.

Shortly after moving in, a cousin of Mr. Cook's, a woman name Jillian Kwon (who is African-American), came to visit. During one night, Ms. Kwon and Ms. Cook went outside at night, so that Ms. Kwon could smoke in the designated smoking area that was outside, near the parking lot. The two of them chatted quietly, as it was late. As they were chatting, a Caucasian tenant named Susan Gurrola sat down to smoke in the same area. A few moments later, Ms. Gurrola got angry at Ms. Kwon and Ms. Cook, as she inexplicably believed they were talking about her. Ms. Kwon and Ms. Cook were surprised by Ms. Gurrola's hostility, and asked whether she was talking to them. At this point, Ms. Kwon said she felt something was wrong with Ms. Gurrola, so she began to video tape her with her phone. Upon seeing the phone, Ms. Gurrola angrily blurted out, "“Uh huh, fucking nigger. Yeah, take a fucking picture, bitch. How many fucking baby daddies? I have one, bitch.” [Complaint ¶22]. Nobody disputes that this statement was made by Ms. Gurrola.

The remainder of the incident was ugly, as Ms. Gurrola physically tried to fight Ms. Kwon. After a security guard came, Ms. Kwon and Ms. Cook were able to leave safely.

1 The next day, Plaintiffs showed the videotape to Defendant. Thereafter, Defendant did  
2 nothing to stop Ms. Gurrola from harassing Plaintiffs, other than on one occasion telling her to stop.

3 For the next five months, Ms. Gurrola continued to make racial slurs against the Cooks,  
4 making such comments as “nappy headed kids” or “mixed babies” or “nigger shit.” In February 2019,  
5 Ms. Kwon came back to the property to visit. Upon passing Ms. Gurrola in the hall, Ms. Gurrola promptly  
6 stated to Ms. Kwon, “Fucking nigger.”

7 During the five-month period, Plaintiffs pleaded with Defendant to intervene, and stop Ms.  
8 Gurrola’s conduct. Defendant virtually did nothing. It wasn’t until the day before this current lawsuit was  
9 filed (something Defendant had been warned about), that Defendant had their attorney send Ms. Gurrola a  
10 letter on February 25, 2019, which letter instructed both Ms. Gurrola to stop harassing the Cooks [This  
11 particular letter was marked as **Exhibit No. 1** and shown to witnesses at their depositions. This particular  
12 **Exhibit No. 1** is referenced in the disputed deposition questions below].

13 During the deposition of the resident manager, Jessica Gutierrez, she testified that she was  
14 authorized to issue 3-Day Notices to Perform or Quit if a tenant broke rules, and that she could issue such  
15 notices without consulting with her supervisor [Jessica Gutierrez 7:9-12 & 7:23-8:11]. She testified that she  
16 never sent such a notice to Susan Gurrola, asking her to stop racially harassing Plaintiffs. When she was  
17 asked *why* she had never issued such a notice to Susan Gurrola, Defense counsel refused to allow  
18 questioning, claiming attorney-client privilege. Ms. Gutierrez’s supervisor, Melissa Bayles also testified  
19 that she was authorized to issue Notices to Perform on her own. When asked why she never gave Ms.  
20 Gurrrola such a notice, to stop her from racially harassing Plaintiffs, Defense counsel refused to allow  
21 questioning about this issue, too.

22 As to its 24<sup>th</sup> affirmative defense, Defendant asserted that, “[Defendant’s] activities are  
23 privileged as they were exercising certain legal rights and/or protecting their economic interests, that such  
24 activities/conduct were lawful and consistent with community standards, and they had a good faith belief  
25 that they had a legal right to engage in their conduct.” Herein, Defendant repeatedly refused to allow Ms.  
26 Gutierrez and Ms. Bayles to answer why they had not taken steps to stop Susan Gurrrola from racially  
27 harassing Plaintiffs. Such objections were entirely inappropriate, as their own affirmative defense asserts  
28

1 that they acted legally.

2  
3 **II.**

4 **DEFENDANTS' INTRODUCTORY STATEMENT**

5  
6 Plaintiffs' arguments are legally and factually faulty as they are based on the fundamental  
7 misunderstanding that Ms. Melissa Bayles and/or Ms. Jessica Gutierrez were acting as individuals, rather  
8 than employees of a corporate entity. More specifically, Plaintiffs argue that they should be allowed to ask  
9 Ms. Bayles and Ms. Gutierrez as to the reasoning of *why* their employer, defendant THE JOHN STEWART  
10 COMPANY, did or did not take certain legal actions with respect to a particular tenant. Not only are Ms.  
11 Bayles and Ms. Gutierrez not authorized to speak for the corporation, as they are not persons most  
12 knowledgeable or managing agents, such questioning improperly invades the attorney-client privilege held  
13 by the corporate employer as to *why* certain legal actions were or were not taken.

14 The Supreme Court has long held that the attorney-client privilege "applies to  
15 communications by any corporate employee, regardless of position, when the communications concern  
16 matters within the scope of the employee's corporate duties and the employee is aware that the information  
17 is being furnished to enable the attorney to provide legal advice to the corporation" (Admiral Ins. Co. v.  
18 United States District Court (King Ranch Properties), 881 F.2d 1486, 1492 (9th Cir. 1989); see also Upjohn  
19 v. United States, 449 U.S. 383, 394 (1981)). The 9th Circuit Court of Appeal further elaborated that

20 Although an expansive application of the attorney-client privilege to  
21 corporations may impose severe burdens on discovery and create a  
22 broad "zone of silence" over corporate affairs...effective  
23 representation by counsel "depends upon the lawyer being fully  
24 informed by the client." Upjohn stands for the proposition that the  
25 advantages of preserving the privilege outweigh the inescapable  
26 disadvantages of the resultant secrecy. (Admiral Ins. Co., *supra*, 881  
27 F.2d. at 1492 [*quoting Upjohn*, *supra*, 449 U.S. at 389].)

1 With respect to the scope of protection, the Supreme Court expressly held that attorney-client  
2 privilege can extend beyond the “control group” of a corporation as “[m]iddle-level - and indeed lower-level  
3 - employees can, by actions within the scope of their employment, embroil the corporation in serious legal  
4 difficulties, and it is only natural that these employees would have the relevant information needed by  
5 corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.”  
6 (Upjohn, supra, 449 U.S. at 391).

7 Furthermore, multiple federal courts have found that attorney-client privilege extends to  
8 “communications relaying legal advice provided by corporate counsel among nonattorney corporate  
9 employees who share responsibility 'for the subject matter underlying the consultation.” (Moffatt v. Wazana  
10 Brothers International, Civ. A. No. 14-1881, 2014 U.S. Dist. LEXIS 151326, at \*4 (E.D. Pa. Oct. 24, 2014);  
11 see also United States v. Veolia Env’t N. Am. Operations, Inc., Civ. No. 13-mc-03-LPS, 2014 U.S. Dist.  
12 LEXIS 154717, at \*22 (D. Del. Oct. 31, 2014); Crabtree v. Experian Information Solutions, Inc., No. 1:16-  
13 cv-10706, 2017 U.S. Dist. LEXIS 173905, at \*4 (N.D. Ill. Oct. 20, 2017)[defendant corporation  
14 "appropriately designated as privileged the communications between its non-lawyer employees"])

15 Thus, the information and testimony sought by Plaintiffs would be protected by attorney-  
16 client privilege and not subject to disclosure. The objections asserted and instructions not to answer were  
17 proper and valid and Plaintiffs’ request for further questioning should be denied.

18  
19 **III.**

20 **DISCOVERY REQUESTS IN DISPUTE**

21  
22 The parties, by and through their respective counsel, hereby stipulate that the following  
23 discovery requests remain in dispute.

24  
25 \* \* \*

26 \* \* \*

27 \* \* \*



1 **1. DEPOSITION QUESTIONS POSED TO MELISSA BAYLES**

2  
3 **DEPOSITION QUESTIONS NO. 1:**

4 Q: At any time before the February 25th letter of Exhibit Number 1 sent to Ms. Gurrola, did  
5 the John Stewart Company ever send a 60-day notice to Ms. Gurrola trying to cancel her  
6 lease because of the action she'd taken against my clients?

7 A: No.

8 Q: Why not?

9 Mr. Cheng: Objection to the extent it calls for attorney-client privilege . . . It's an  
10 attorney-client privilege. And I'm telling you there's attorneys involved in  
11 this case determining actions that were taken and weren't taken. [Melissa  
12 Bayles 108:3-25]

13  
14 **PLAINTIFF'S CONTENTIONS AS TO DEPOSITION QUESTION NO. 1:**

15 Both sides agree that inquiries about discussions between an attorney and their client is  
16 protected. Nobody disputes that. Rather, Defense counsel, Mr. Cheng, seemed to follow the logic that,  
17 if any fact was discussed with an attorney, then that fact could not be inquired about.

18 24 C.F.R. 100.7(iii) holds that a landlord can be held responsible for the discriminatory  
19 conduct of other tenants if the landlord knew or should have known of the conduct and had the power to stop  
20 it. 42 U.S.C. §3617 declares that "it shall be unlawful to coerce, intimidate, threaten, or interfere with any  
21 person in the exercise or enjoyment" of their right to fair housing.

22 In *Francis v. Kings Park Manor, Inc.*, 917 F.3d 109 (2d Cir. 2019), a New York court ruled  
23 that a community could be liable under the Fair Housing Act (FHA) for an alleged campaign of racial  
24 harassment against an African-American resident by his neighbor. The resident claimed that his next-door  
25 neighbor began a relentless campaign of racial harassment, abuse, and threats directed toward him. *Id.* at  
26 114-115. The resident said he feared for his personal safety, so he contacted the police and the site  
27 management to complain. Management took no action. *Id.* at 115. The resident sued the building owner,  
28

1 accusing the owner and manager of violating fair housing law by failing to take action to address a racially  
2 hostile housing environment created by his neighbor. The Court ruled:

3  
4 “The main question before us is whether a landlord may be liable under the FHA for failing  
5 to take prompt action to address a racially hostile housing environment created by one tenant  
6 targeting another, where the landlord knew of the discriminatory conduct and had the power  
7 to correct it. In holding that a landlord may be liable in those limited circumstances, we  
8 adhere to the FHA’s broad language and remedial scope and agree with the views of the  
9 United States Department of Housing and Urban Development ("HUD"), the agency tasked  
10 with administering the FHA.” *Id.* at 114.

11  
12 The *Francis* court went on to hold that the owner and manager engaged in intentional racial  
13 discrimination by tolerating and/or facilitating a hostile environment, even though they had authority to  
14 “counsel, discipline, or evict the neighbor due to his continued harassment of the resident.” *Id.* at 124. *See*  
15 also *Shadley v. Horace Heidt Agency Co.*, USDC Court of California, Case No. CV15-8137 FMO (AJWx),  
16 where the court denied a demurrer, finding that a landlord could be found liable if it refused to intervene to  
17 stop other tenants from discriminating against children in a complex (“If plaintiffs succeed on the merits of  
18 their claims, a reasonable jury may find that at the very least, defendant’s indifference to the rights of  
19 plaintiffs, or its ‘knowledgeable inaction’ in the fact of discriminatory conduct, is sufficient for a punitive  
20 damages award.” *Id.* at pages 13-14).

21 In short, Defendant had a legal duty to intervene and stop Ms. Gurrola’s conduct. It failed  
22 to so. It is now being asked why it failed to fulfill that duty. Defendant’s response has essentially been,  
23 “Our lawyer told us not to do anything.” That is not a legal defense to the allegations in this case.  
24 Defendant has no right to refuse to disclose facts, even if it discussed those facts with their attorney.

25 In the United States Supreme Court case of *Upjohn Co. v. United States*, 449 U.S. 383, 395,  
26 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981), the Court distinctly held that, "The privilege only protects  
27  
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1 disclosure of [the] communications [themselves]; it does not protect disclosure of the underlying facts," so  
2 long as the underlying facts can be proven without resort to the privileged materials."

3           The California Supreme Court, in *Costco v. Superior Court*, 47 Cal. 4th 725 (Cal. 2009), held  
4 that the attorney client privilege "does not extend to subject matter otherwise unprivileged merely because  
5 that subject matter has been communicated to the attorney." It is also established that a communication  
6 which was not privileged to begin with may not be made so by subsequent delivery to the attorney. *D.I.*  
7 *Chadbourne, Inc. v. Superior Court*, 60 Cal.2d 723, 732-733 (1964) Nonetheless, Defense counsel  
8 repeatedly refused to allow both witness to discuss fact issues, simply because they may have first told their  
9 attorneys about these facts. That was improper.

10           The implication is that Defendant's previous eviction lawyers *may have* given Defendant  
11 advice about whether they could or could not send warning notices to Susan Gurrola, or terminate her  
12 tenancy, who, in turn, passed this advice along to Ms. Gutierrez and Ms. Bayles. Apparently, based upon  
13 this advice, Ms. Gutierrez and Ms. Bayles may have refused to send notices to Susan Gurrola, telling her  
14 to stop using racial slurs against Plaintiffs.

15           Ms. Bayles may very well have testified, "We didn't think it was a big deal, so we didn't send  
16 a notice." Or, she might have testified, "I was Ms. Gutierrez's supervisor, and I made the decision not to  
17 send the notice since I felt it was a petty dispute." The party claiming the privilege has the burden of  
18 establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course  
19 of an attorney-client relationship. ( *D. I. Chadbourne, Inc.*, at p. 729; *Wellpoint Health Networks, Inc. v.*  
20 *Superior Court* (1997) 59 Cal.App.4th 110, 123 [ 68 Cal.Rptr.2d 844].)

21           Unfortunately, we don't know the basis for Ms. Bayle's inaction, since the witness was not  
22 allowed to answer. Moreover, even if Ms. Bayles was given legal advice, the question asks for a fact reason  
23 as to why the Notice was not sent. Indeed, the question is no different from a contention interrogatory  
24 which typically asks a Defendant to "state all reasons" why it performed or failed to perform certain acts.

25           Yes, attorneys may be involved, but the ultimate facts at issue cannot be hidden simply because they were  
26 discussed with a lawyer.

1 In addition, as noted above, Defendant had an affirmative duty to act, to stop Ms. Gurrola  
2 from racially harassing Plaintiffs, but failed to adequately do so. Plaintiffs may certainly ask Defendant why  
3 it failed to act. Ultimately, if the Court were to adopt Defendant's position, namely, that it did not have to  
4 answer the question, then *Defendant* would be precluded from offering any explanation at trial to explain  
5 why they never made a genuine effort to stop Susan Gurrola from racially harassing Plaintiffs. That  
6 certainly is not a position that the Court wants to promote.

7  
8 **DEFENDANTS' CONTENTION AS TO DEPOSITION QUESTION NO. 1:**

9 Plaintiffs' argument fails for the simple reason that their counsel seeks the reason as to *why*  
10 a corporate entity, i.e. defendant THE JOHN STEWART COMPANY, did or did not take serious legal actions  
11 against one of its tenants in the form of a 60-day eviction notice. The reasons why such an act was or was  
12 not taken required substantial involvement of collection of facts and legal analysis by in-house and outside  
13 counsel on whether such actions are legally proper. In fact, Plaintiffs concede that THE JOHN STEWART  
14 COMPANY had outside counsel handle the dispute between Ms. Gurrola and Plaintiffs, which included the  
15 racial complaints made by the Plaintiffs. Any responses that could be provided in response to the question  
16 posed by Plaintiffs' counsel would invariable result in the disclosure of attorney-client privilege and work  
17 product privilege. (See Declaration of Steve McElroy in Support of Defendant's Response ("McElroy  
18 Decl."), Paras. 1-6.)

19 Plaintiffs' citation of Upjohn, *supra*, mischaracterizes the central holdings of the case. As  
20 noted above, Upjohn stands for "the proposition that the advantages of preserving the privilege outweigh  
21 the inescapable disadvantages of the resultant secrecy." (Admiral Ins. Co., *supra*, 881 F.2d. at 1492.) In  
22 fact, the Supreme Court expressly rejects the narrow application of attorney-client privilege as advocated  
23 by Plaintiffs by explicitly holding that:

24 "Middle-level - and indeed lower-level - employees can, by actions within the  
25 scope of their employment, embroil the corporation in serious legal  
26 difficulties, and it is only natural that these employees would have the  
27 relevant information needed by corporate counsel if he is adequately to advise  
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1 the client with respect to such actual or potential difficulties.” (Upjohn,  
2 supra, 449 U.S. at 391.)

3 Thus, contrary to Plaintiffs’ assertion, attorney-client privilege protects not only direct  
4 conversations between attorneys and the managing members of a corporation, but also those from lower-  
5 level employees, such as Ms. Bayles and Ms. Gutierrez, regarding legally-sensitive issues.

6 Nor is Plaintiff’s citations to Costco v. Superior Court, 47 Cal. 4th 725 (Cal. 2009) and D.I.  
7 Chadbourne, Inc. v. Superior Court, 60 Cal.2d 723 (Cal. 1964) availing.

8  
9 On the contrary, those cases bolster the properness of the objections to protected  
10 communications between Ms. Bayles and Ms. Gutierrez and other employees at THE JOHN STEWART  
11 COMPANY, including in-house and outside counsel, that are protected by attorney-client privilege and/or  
12 constitute work-product.

13 More specifically, the California Supreme Court in Costco expressly held that:

14  
15 “...the corporation’ dominant purpose in requiring the employee to make a statement  
16 is the confidential transmittal to the corporation’s attorney of information emanating from  
17 the corporation, the communication is privileged. And as we have explained, because the  
18 privilege protects the transmission of information, if the communication is privileged, it does  
19 not become unprivileged simply because it contains material that could be discovered by  
20 some other means” (Costco, supra, 47 Cal.4th at 741-742).

21 In fact, the Costco court held that a trial court is not even allowed to order the disclosure of  
22 the document/information at issue to determine whether such document/information is in fact privileged.  
23 *Id* at 742.

24 Similarly, the court in D.I. Chadbourne, Inc., supra, set forth an expansive view of the  
25 application of attorney-client privilege with respect to statements and information transmits by its employees  
26 to their employers. Amongst the scenario in which attorney-client privilege would apply include:  
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1) “Where the employee's connection with the matter grows out of his employment to the extent that his report or statement is required in the ordinary course of the corporation's business...”

2) “...if the employer directs the making of the report for confidential transmittal to its attorney, the communication may be privileged...” and

3) “When the corporate employer has more than one purpose in directing such an employee to make such report or statement, the dominant purpose will control, unless the secondary use is such that confidentiality has been waived...” (Id at 737.)

Finally “...a communication does not lose its privilege merely because it was obtained, with the knowledge and consent of the employer, by an agent of the employer acting under such agency...” (Id.)

Thus, contrary to Plaintiff's assertions, the attorney-client privilege covers both the information provided to and from an employer by an employee regarding legally sensitive issues, such as whether notices and eviction notices should or should not be sent. (McElroy Decl., Paras. 1-6.)

Additionally, it is improper for Plaintiff's counsel to pose such a question to an employee, such as Melissa Bayles, who was deposed in her individual capacity and not authorized to speak on behalf of her employer and as to why the employer did or did not take certain legal action.

As such, the question posed is improper and the objections raised were proper.

---

**DEPOSITION QUESTION NO. 2:**

Q Let me ask you this, ma'am. At any time did you ever make an independent decision that you needed to terminate Ms. Gurrola's tenancy because of the way she was behaving toward my client?

Mr. Cheng: And I'm going to tell her to not answer on the grounds that it's attorney-client privilege.

[Melissa Bayles 109:3-111:18].

**PLAINTIFF’S CONTENTIONS AS TO DEPOSITION QUESTION NO. 2:**

This particular question asked whether Ms. Bayles *independently* made a decision to terminate the tenancy of the lady making racial slurs, Ms. Gurrola. The very question avoids any attorney-client privilege.

**DEFENDANTS’ CONTENTION AS TO DEPOSITION QUESTION NO. 2:**

Once again, Plaintiffs’ counsel is seeking to inquire about whether legal decisions to terminate a tenant’s tenancy were made. Ms. Bayles has no independent power to terminate any tenant’s tenancy. Rather, any decisions to terminate tenancy would have been made by Ms. Bayles’ employer, who was the management company for the property at issue. Such decisions can only be made after consultation of counsel as to the legal propriety of any actions taken or not taken. (McElroy Decl., Paras. 1-6.) To inquire as to why certain legal acts were or were not made by Ms. Bayles in her capacity as an employee of a corporate entity, would invariably implicate attorney-client privilege and work product.

-----  
**DEPOSITION QUESTION NO. 3:**

Q Let me ask you this. Why didn't you ever send any written communication to Ms. Gurrola telling her to stop treating the Cooks the way she was treating them? [113:10-12]

Mr. Cheng All I’m saying to you is to the extent that I’m still going to instruct her not to answer that question on the grounds that it violates attorney-client privilege.  
[Melissa Bayles 114:6-9]

1 Q Ma'am, why did you never send a letter to Ms. Gurrola telling her to stop harassing my  
2 clients?

3 Mr. Cheng Same Objection. Same instruction.  
4

5 Q And after you left that meeting, did you send a note to Ms. Gurrola in writing, be it text,  
6 electronic form, written form, indicating that you did not want her living at the property any  
7 longer?

8 Mr. Cheng Craig, I'm asserting the attorney-client privilege and I'm instructing her not  
9 to answer. [Melissa Bayles 120:19-20]  
10

11 **PLAINTIFF'S CONTENTIONS AS TO DEPOSITION QUESTION NO. 3:**

12 Once again, the party claiming the privilege has the burden of establishing the preliminary  
13 facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client  
14 relationship. ( D. I. Chadbourne, Inc., at p. 729; Wellpoint Health Networks, Inc. v. Superior Court (1997)  
15 59 Cal.App.4th 110, 123 [ 68 Cal.Rptr.2d 844].). Defendant must explain the basis for its inaction.  
16  
17

18 **DEFENDANTS' CONTENTION AS TO DEPOSITION QUESTION NO. 3:**

19 As above, Plaintiffs' counsel is seeking to obtain information and grounds as to why legal  
20 decisions such as the sending of warning notices/correspondence were or were not made by a corporate  
21 entity. Any correspondences sent by Ms. Bayles in response to tenants relating legal issues, such as  
22 allegation of harassment or abuse toward another tenant, would invariably result in the consultation of her  
23 employer and legal counsel. Certainly the reasons why certain legal actions were or were not taken would  
24 implicate information and analysis protected by attorney-client privilege and work product. (McElroy Decl.,  
25 Paras. 1-6.)  
26

27 Similarly, decisions as to why certain actions, including the sending of communication,  
28



1 relating to the tenancy of a tenant were or were not taken by Ms. Bayles' employer would involve the  
2 transmission information and legal analysis that are protected by attorney-client privilege and work product.  
3 (McElroy Decl., Paras. 1-6.) To seek disclosure of such information and analysis is improper and the  
4 objections asserted to protect such disclosure were sound.

5  
6  
7 **DEPOSITION QUESTION NO. 4:**

8 Q Ma'am, at any time before you talked to your lawyers about this whole dispute, did you ever  
9 decide on your own that you wanted to ask Ms. Gurrola to move from the property because  
10 of the way she was treating my clients? [Melissa Bayles 116:8-12]

11  
12 Mr. Cheng: Now we get into attorney-client privilege, so I'm going to instruct her not to answer  
13 [Melissa Bayles 118:1-2].

14 **PLAINTIFF'S CONTENTIONS AS TO DEPOSITION QUESTION NO. 4:**

15 Yet again, the witness is asked if she made any decisions independently. It is hard to  
16 conceive how any such testimony could violate the attorney-client privilege.

17  
18 **DEFENDANTS' CONTENTION AS TO DEPOSITION QUESTION NO. 4:**

19 Plaintiffs once again seek to obtain information that is directly related to whether certain legal  
20 actions would or would not be taken by Ms. Bayles' employer. Any correspondences sent by Ms. Bayles  
21 in response to tenants that relate to legal issues, such as allegations of harassment or abuse toward another  
22 tenant, would invariably result in the consultation of her employer and legal counsel. Certainly the reasons  
23 why certain legal actions were or were not taken would implicate information and analysis protected by  
24 attorney-client privilege and work product. (McElroy Decl., Paras. 1-6.)

25  
26 Plaintiffs' attempt to qualify the question to "any time before" Ms. Bayles spoke to any  
27 lawyer is irrelevant because Ms. Bayles' only authority to act was through her employer and thus any  
28

1 decisions that were to be made necessarily in anticipation of legal proceedings, thus protected by attorney-  
2 client privilege. (McElroy Decl., Paras. 1-6.)

3  
4  
5 **DEPOSITION QUESTION NO. 5:**

6 Q After this Exhibit 1 was sent to Ms. Gurrola, did Ms. Gurrola attempt to contact you in any  
7 manner?

8 A No.

9  
10 Q After this note was sent to Ms. Gurrola, did you try to contact Ms. Gurrola about the contents  
11 of it?

12 A No.

13  
14 Q Was there any particular final event that took place in your mind that you decided you no  
15 longer wanted Ms. Gurrola living there?

16 A Yes.

17  
18 Q What event was that?

19 A I can't tell you.

20  
21 Q Why not?

22 A Because that would breach attorney-client privilege. [Melissa Bayles 121:11-25]

23  
24 Q Was there something she did at the complex that caused you to reach that decision?

25 MR. CHENG: I'm going to assert the attorney-client privilege on that one, too. [Melissa  
26 Bayles 122:18-21]

1 **PLAINTIFF’S CONTENTIONS AS TO DEPOSITION QUESTION NO. 5:**

2 As noted above, **Exhibit No. 1** was a letter from Defendant’s attorney to Ms. Gurrola. It’s  
3 hard to comprehend how it would violate the attorney-client privilege for this witness to ask if she followed  
4 up on this matter, after the company lawyer sent a letter to Ms. Gurrola.  
5

6  
7 **DEFENDANTS’ CONTENTION AS TO DEPOSITION QUESTION NO. 5:**

8 Plaintiffs misrepresent both the factual and legal matters at issue. First, the questions at issue  
9 are not related to “Exhibit 1,” but rather seek to obtain the factual and legal basis as to whether Ms. Bayles’  
10 employer would seek to remove a tenant from the property. Once again, the only authority Ms. Bayles has  
11 to act is through her employer. Any decisions regarding whether a tenant should or should not be removed  
12 would invariably require significant involvement by legal counsel and, based upon information and analysis,  
13 is protected by attorney-client privilege. (McElroy Decl., Paras. 1-6.)  
14

15 Even assuming that the questions at issue does relate to “Exhibit 1,” that exhibit is a letter sent by  
16 Defendant’s outside counsel to Ms. Gurrola regarding the disputes at issue. To ask Ms. Bayles as to the  
17 legal and factual basis for that correspondence would clearly violate attorney-client privilege and attorney  
18 work product. (McElroy Decl., Paras. 1-6.)  
19  
20

21 \* \* \*

22 \* \* \*

23 \* \* \*

24 \* \* \*

25 \* \* \*

26 \* \* \*

1 **2. DEPOSITION QUESTIONS POSED TO JESSICA GUTIERREZ**

2  
3  
4 **DEPOSITION QUESTION NO. 1:**

5 Q What did you and Ms. -- what else did you and Ms. Gurrola speak about during this meeting?

6 A That's all we spoke about. She got really upset and she ended up leaving the office.

7  
8 Q At any time after this meeting, did you ever independently issue a three-day notice to perform  
9 or quit to Ms. Gurrola telling her that it would be inappropriate for her to continue using  
10 racial slurs toward the Cooks?

11 A No, I did not.

12 Q Why not?

13  
14 MR. CHENG: Objection to the extent that it calls for attorney-client privilege.  
15 [Jessica Gutierrez 20:14-21:1]  
16  
17

18 **PLAINTIFF'S CONTENTIONS AS TO DEPOSITION QUESTION NO. 1:**

19  
20 Ms. Gutierrez testified that her duties as resident manager allowed her to issue a 3-Day Notice  
21 to Perform or Quit [Jessica Gutierrez 7:9-12], and that she was not required to consult with her supervisor  
22 before issuing such a notice [Jessica Gutierrez 7:23-8:11]. As such, when she was asked whether she  
23 independently issue a 3-Day Notice to Perform or Quit to Susan Gurrola, there was no invasion of the  
24 attorney-client privilege, as she was being queried about independent decisions that fell within her job duties.  
25  
26  
27  
28

1 **DEFENDANTS' CONTENTION AS TO DEPOSITION QUESTION NO. 1:**

2 Plaintiffs' argument fails for the simple reason that their counsel seeks the reason as to *why*  
3 a corporate entity, i.e. defendant THE JOHN STEWART COMPANY, did or did not take serious legal actions  
4 against one of its tenants in the form of a 3-day eviction notice. The reasons as to why such an act was or  
5 was not taken required substantial involvement of collection of facts and legal analysis by in-house and  
6 outside counsel on whether such actions are legally proper. (McElroy Decl., Paras. 1-6.) In fact, Plaintiffs  
7 concede that THE JOHN STEWART COMPANY had outside counsel handle the dispute between Ms. Gurrola  
8 and Plaintiffs, which included the racial complaints made by Plaintiffs. Any responses that could be  
9 provided in response to the question posed by Plaintiff's counsel would invariably result in the disclosure  
10 of attorney-client privilege and work product privilege. (Id.)

11  
12 While Ms. Gutierrez could issue a 3-day notice without explicit need to consult with her  
13 supervisor, such propositions do not mean that she did not in fact consult her supervisor and/or employer  
14 in this particular instance. There can be no dispute that any such consultation by Ms. Gutierrez about  
15 whether or not to take certain legal actions, such as the issuance of a three-day notice, would be protected  
16 by attorney-client privilege.

17 Furthermore, Ms. Gutierrez specifically stated that she did not "independently issue" such  
18 a three-day notice and thus removing her personal judgment from the matter.

19  
20 -----  
21 **DEPOSITION QUESTION NO. 2:**

22 Q Was there any specific reason why you didn't send a three-day notice to perform to  
23 Ms. Gurrola asking her to stop using racial slurs against the Cooks?

24  
25 MR. CHENG: Okay. I'm going to object and tell her not to answer that question  
26 on the grounds it violates attorney-client privilege [Jessica Gutierrez  
27 22:3-8].  
28

1 **PLAINTIFF’S CONTENTIONS AS TO DEPOSITION QUESTION NO. 2:**

2 Ms. Gutierrez testified that that her duties as resident manager allowed her to issue a 3-Day  
3 Notice to Perform or Quit [Jessica Gutierrez 7:9-12], and that she was not required to consult with her  
4 supervisor before issuing such a notice [Jessica Gutierrez 7:23-8:11]. As such, when she was asked why  
5 she didn’t do so there was no invasion of the attorney-client privilege, as she was being queried about her  
6 failure to fulfill her job duties.  
7

8  
9 **DEFENDANTS’ CONTENTION AS TO DEPOSITION QUESTION NO. 2:**

10 Plaintiffs’ argument fails for the simple reason that their counsel seeks the reason as to why  
11 a corporate entity, i.e. Defendant THE JOHN STEWART COMPANY, did or did not take serious legal actions  
12 against one of its tenants in the form of a 3-day eviction notice. The reasons as to why such an act was or  
13 was not taken required substantial involvement of collection of facts and legal analysis by in-house and  
14 outside counsel on whether such actions are legally proper. (McElroy Decl., Paras. 1-6.) In fact, Plaintiffs  
15 concede that THE JOHN STEWART COMPANY had outside counsel handle the dispute between Ms. Gurrola  
16 and Plaintiffs, which included the racial complaints made by Plaintiffs. Any responses that could be  
17 provided in response to the question posed by Plaintiff’s counsel would invariably result in the disclosure  
18 of attorney-client privilege and work product privilege. (Id.)  
19

20 While Ms. Gutierrez could issue a 3-day notice without explicit need to consult with her  
21 supervisor, such propositions do not mean that she did not in fact consult her supervisor and/or employer  
22 in this particular instance. There can be no dispute that any such consultation by Ms. Gutierrez about  
23 whether or not to take certain legal actions, such as the issuance of a three-day notice, would be protected  
24 by attorney-client privilege.  
25  
26

1 **DEPOSITION QUESTION NO. 3:**

2 Q At any time did you independently consider issuing a 60-day notice to Ms. Gurrola because  
3 you felt it was inappropriate for her to be making racial comments to the Cooks?  
4

5 MR. CHENG: Same objection as to only if there's something that you decided to do or not  
6 do on your own. Just answer the question.

7 BY MR. FAGAN:

8 Q You can answer.  
9

10 A No.

11 Q Why not?  
12

13 MR. CHENG: Objection to the extent that it calls for attorney-client privilege. And I'm  
14 instructing her not to answer that question [Jessica Gutierrez 24:12-25:1]  
15  
16

17 **PLAINTIFF'S CONTENTIONS AS TO DEPOSITION QUESTION NO. 3:**

18 Yet again, the witness is asked if she made any decisions independently. It is hard to  
19 conceive how any such testimony could violate the attorney-client privilege.  
20

21 **DEFENDANTS' CONTENTION AS TO DEPOSITION QUESTION NO. 3:**

22 Plaintiffs' argument fails for the simple reason that their counsel seeks the reason as to *why*  
23 a corporate entity, i.e. defendant THE JOHN STEWART COMPANY, did or did not take serious legal actions  
24 against one of its tenants in the form of a 60-day eviction notice. The reasons as to why such an act was  
25 or was not taken required substantial involvement of collection of facts and legal analysis by in-house and  
26 outside counsel on whether such actions are legally proper. (McElroy Decl., Paras. 1-6.) In fact, Plaintiffs  
27 concede that THE JOHN STEWART COMPANY had outside counsel handle the dispute between Ms. Gurrola  
28

1 and Plaintiffs, which included the racial complaints made by Plaintiffs. Any responses that could be  
2 provided in response to the question posed by Plaintiffs' counsel would invariably result in the disclosure  
3 of attorney-client privilege and work product privilege. (McElroy Decl., Paras. 1-6.)

4 Furthermore, Plaintiffs fail to establish that Ms. Gutierrez could in fact independently issue  
5 60-day notices. On the contrary, issuance of any such notice would require the involvement of counsel.  
6 (McElroy Decl., Paras. 1-6.)  
7

8 -----  
9 **DEPOSITION QUESTION NO. 4:**

10  
11 Q And at the bottom of the first page of Exhibit 5, there's an e-mail from Ms. Cook  
12 where she says,

13 "On the date of February 24 approximately between the hours of  
14 6:00 and 7:00 after returning home from being gone all day, my guest  
15 asked if she could go downstairs and have a cigarette in the assigned  
16 area. While heading down, she crossed paths with Susan, who  
17 proceeded to under her breath call her a fucking nigger. My guest turns around  
18 baffled and comes to tell me."  
19  
20

21 Did I read that correctly?

22  
23 A Yes.

24 Q And after you forwarded it to Melissa, did she tell you to speak to Ms. Gurrola about  
25 this?

26 MR. CHENG: Object to the extent that it calls for attorney-client privilege.  
27  
28



Instruct her not to answer. [Jessica Gutierrez 45:15-46:5 & 46:17-21]

**PLAINTIFF’S CONTENTIONS AS TO DEPOSITION QUESTION NO. 4:**

Once again, the resident manager is asked why she took no steps to stop the racial harassment, even though she had a legal duty to do so. This is not a question that is covered by the attorney-client privilege.

**DEFENDANTS’ CONTENTION AS TO DEPOSITION QUESTION NO. 4:**

Plaintiffs are seeking information regarding the instruction and transmissions of information between Defendant’s employees on how to respond or act in connection with legal issues, i.e. allegations of harassment and abuse by a tenant toward another tenant, for which Plaintiffs concede that Defendant had retained outside counsel for. (McElroy Decl., Paras. 1-6.) In fact, outside counsel issued letters to both Plaintiffs and Ms. Gurrola the following day addressing such issue. To inquire as to what instruction and information were given between two employees in such a scenario would necessarily result in the disclosure of legal analysis and instructions provided by Defendant’s counsel. (Id.) Such information and/or instructions are protected by attorney-client privilege. *See, e.g.,* Moffatt v. Wazana Brothers International, Civ. A. No. 14-1881, 2014 U.S. Dist. LEXIS 151326, at \*4 (E.D. Pa. Oct. 24, 2014); United States v. Veolia Env’t N. Am. Operations, Inc., Civ. No. 13-mc-03-LPS, 2014 U.S. Dist. LEXIS 154717, at \*22 (D. Del. Oct. 31, 2014); Crabtree v. Experian Information Solutions, Inc., No. 1:16-cv-10706, 2017 U.S. Dist. LEXIS 173905, at \*4 (N.D. Ill. Oct. 20, 2017)[defendant corporation "appropriately designated as privileged the communications between its non-lawyer employees"].

\* \* \*

\* \* \*

\* \* \*

1 Dated: September 27, 2019

LAW OFFICES OF CRAIG P. FAGAN

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By: /s/Craig P. Fagan

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Craig P. Fagan

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Attorneys for all Plaintiffs

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7 Dated: September 27, 2019

THE LEE LAW GROUP, PC

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By: /s/Ted Lee

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Ted Lee

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Attorneys for Defendant

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The John Stewart Company

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