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BEFORE THE OREGON PUBLIC UTILITY COMMISSION

PUBLIC UTILITY COMMISSION OF OREGON,

Complainant,

v.

VCI COMPANY f/k/a STAN EFFERDING and STANLEY JOHNSON d/b/a VILAIRE, and VCI COMPANY, a Washington corporation,

Defendants.

Docket No. UM 1288

DEFENDANTS' REPLY IN SUPPORT OF ITS MOTION FOR DISCLOSURE OF EX PARTE COMMUNICATIONS

Defendants file this Reply pursuant to the Order in this docket allowing a Reply entered November 15, 2007.

Defendants have moved pursuant to OAR 860-012-0015(1) for the disclosure of *ex parte* communications between the complainant and the authority adjudicating this contested case (referred to here as the "Commission"). In complainant's Response to the Motion, Complainant admits that there were at least two instances of communication between those prosecuting the claim and the Commission that were outside the presence of defendants or their counsel. Complainant also admits that these communications were made without notice to the defendants. *See* OAR 860-012-005(1)(a).

The first instance involved communications between those prosecuting the claim and the Commission regarding the shortening of the period of time for defendants to filed their Answer from 20 days as provided in OAR 860-013-0050(1)(a) to 10 days. *See Response* at p. 3. The second incident involved the presentation to the Commission by the complainant of a motion and order for default. *Id.* at p. 3-4.

1 In both instances, complainant asserts that these communications are not subject to
2 disclosure because they were not improper *ex parte* communications. Defendants, however, take
3 exception to complainant's characterization of the communications, and noting the degree of
4 prejudice inflicted upon the defendants as a result of the communications, defendants reiterate
5 their request to require disclosure and to properly identify those parties involved in this case and
6 their respective roles, either in prosecution or adjudication.

7
8 **1. A Motion and Order to Shorten the Time Period to File an Answer Effects the
"Merits" of a Contested Case.**

9 The first communication involves the request and decision to shorten the time period for
10 defendants to file their Answer. Under the Commission's rules, defendants had 20 days to file
11 their Answer. OAR 860-013-0050(1)(a). The rules allow the Commission or an Administrative
12 Law Judge to modify this time limit. OAR 860-013-0050(1). In its Response to the present
13 motion, complainant states that "[c]ounsel for the Commission certainly did receive directions
14 from the Commission that Defendants were to be given 10 days to answer the Complaint."
15 *Response* p. 3. From the very nature of the grammar employed in this sentence, complainant
16 demonstrates that it has made no distinction, and there has been no proper separation, between
17 the functions of the Commission as both the adjudicator and the prosecutor of the claim. As
18 explained in defendants' Motion at some length, the failure to separate these two functions is a
19 violation of due process.

20 Furthermore, complainant's admission, while not providing the nature of the
21 communications in detail, discloses that at least two adjudicative steps were take without notice
22 to defendants or with the ability for defendants to participate. First, there would need to be a
23 request to shorten the time period. This would be a "motion," either raised *sua sponte* by the
24 Commission or by the complainant. ORCP 14A defines a "motion" as "[a]n application for an
25 order" Second, the granting of the motion, the act of shortening the time, requires an
26

1 “order.” ORS 183.310(6)(a) defines an agency “order” as “any agency action expressed orally or
2 in writing directed to a named person or named persons, other than employees, officers or
3 members of any agency. ‘Order’ includes any agency determination or decision issued in
4 connection with a contested case proceeding.” It is undisputed that defendants were not
5 present, nor did they have any notice, of either the motion or the order shortening time until the
6 issuance of the order was mentioned in the prayer of the Complaint filed solely under the
7 signature of complainant’s attorney.

8 Complainants’ contention, however, is that the motion and order were merely
9 “procedural” and did not “relate to the merits of the case” and therefore the communications
10 were not *ex parte* subject to disclosure under OAR 860-012-0015(8)(a), which provides that:

- 11 (8) The provisions of this rule do not apply to communications that:
 - 12 (a) Address procedural issues, such as scheduling or status inquires, or requests
13 for information having no bearing on the merits of the case;

14 *Id.* Complainant, however, cites to no authority for the proposition that a motion and order
15 shortening the time period to file an Answer is “merely procedural” and has “no bearing on the
16 merits of the case.” In fact, the authorities are express, and to the contrary. The law pertaining
17 to what relates to the merits of a case or what is merely procedural in the context of *ex parte*
18 communications has been well-developed in the area of attorney disciplinary proceedings. “An
19 *ex parte* contact is considered ‘on the merits’ if it ‘affects any legal right or duty of the parties.’”
20 *In re Merkle*, 341 Or. 142, 147, 138 P.3d 847 (2006) (quoting *In re Smith*, 295 Or. 755, 760, 670
21 P.2d 1018 (1983)). The purpose of the rule prohibiting *ex parte* communications is “to prevent
22 the effect or...the appearance of granting undue advantage to one party.” *In re Smith*, 295 Or.
23 755, 759, 670 P.2d 1018 (1983).

24 It is beyond any reasonable argument that the cutting in half of the time to file an
25 Answer, with the consequence being default without any further notice (as is complainant’s
26 position), affected the legal rights and duties of the defendants. The motion and order directly

1 and with severe consequences affected defendants' legal rights, and therefore related to the
2 merits and should never have been undertaken *ex parte*.

3 A comparison of the facts and holdings in *In re Merkle* and another disciplinary case *In*
4 *re Dugger*, 334 Or. 602, 54 P.3d 595 (2002), provide an example of the distinction between what
5 is and is not "on the merits" for purposes of *ex parte* communication. In *In re Merkle*, the
6 attorney was accused of *ex parte* communications with an arbitrator for talking with the
7 arbitrator, without the opposing counsel present, about the arbitrator's policy for telephone
8 testimony and if the arbitrator had a speaker phone upon which to take telephone testimony. *Id.*
9 at 145. The Bar contended that such communication was on the merits because it interfered with
10 the opposing party's ability to object to the presentation of telephone testimony. *Id.* at 147. The
11 Oregon Supreme Court, however, disagreed and categorized such communication as not on the
12 merits because it did appear that the communication sought to influence a decision from the
13 arbitrator on whether the testimony was admissible, but merely inquired upon whether such
14 testimony was technically possible and reserved the issue of admissibility to a hearing involving
15 both parties. *Id.*, at 147-8.

16 In *In re Dugger*, however, an attorney presented a preliminary injunction motion and
17 order to a court *ex parte*, without providing notice to the opposing party or the opposing party's
18 attorney. The Oregon Supreme Court ruled that such communication with the court was "on the
19 merits" and a violation of the prohibition against *ex parte* communications and that even if the
20 attorney had a reason to believe that the rules might allow such contact, given the policy against
21 the appearance of undue influence, that the attorney's actual knowledge of the wrongfulness of
22 the communication is not a prerequisite to the occurrence of a violation.

23 In the present case, the complainant had *ex parte* communications with the Commission and
24 obtained an order directly adverse to the interests of defendants just as in *In re Dugger*. The
25 purpose of complainant's communications was not merely "procedural," such as in *In re Merkle*.
26 If the communications were merely a question about what was the applicable time period to file

1 an Answer, or concerned the procedure for filing a motion to shorten the period of time, those
2 would be proper “procedural” inquiries, and thus the reason for the exception. However, a
3 motion and order to shorten the period of time to file an Answer, with the consequences of
4 default, so squarely relates to the merits of a case, that a contrary holding would lead to ludicrous
5 results. If complainant’s argument had merit, then defendants could likewise move for any
6 scheduling order without serving complainant with the motion, hold a one-sided hearing on the
7 motion and be the sole recipient of the resulting order from the Commission, and then decide
8 how and when to notify complainant of the schedule. That is not how contested cases work, and
9 complainant should be required to disclose the full context and text of the communications that
10 led to the issuance of the “order” shortening defendants’ time to Answer.

11 **2. Submission of Order of Default Was Ex Parte Communication by a Party and**
12 **Should Have Been Simultaneously Presented to the Other Parties.**

13 The second communication giving rise to a claim of improper *ex parte* communication
14 involves the presentation of the default order for action by the Commission. Complainant does
15 not contend that such a presentation was merely “procedural,” but contends that the rules allow
16 for such an order to be taken *ex parte* and without any further notice under OAR 860-013-0070.
17 Complainant, however, again confuses the dual roles of the Commission, and distorts the role of
18 the complainant in a contested case. Just because the complainant is also the Commission in this
19 particular case, it does not mean that the complainant has special privileges in the proceeding.
20 The complainant must still comply with the rules that would apply to any party appearing before
21 the Commission in a contested case.

22 There is no provision in the rules that would allow the *complainant* to move for default
23 without providing notice of that motion to the opposing counsel and there is no provision in the
24 rules that would allow the *complainant* to communicate directly with the Commissioners and
25 advocate the entry of default *ex parte*. The default came about in one of two different ways,
26 either at the suggestion of the complainant, through a motion, or *sua sponte* by the adjudicating

1 body on its own initiative. Defendants' Motion specifically requested disclosure of the
2 communications between the complainant and the Commission that resulted in the default.
3 Complainant, in its Response, does not dispute that the default order was drafted and presented
4 to the Commissioners by someone engaged in the prosecution of the claim, as opposed to
5 someone adjudicating the claim. *Response* at 3-4. Thus, the entry of default was by motion and
6 advocacy of the complainant and not *sua sponte* by the Commission and it is that communication
7 – the presentation of the order for action and the advocacy for the entry of default – that was
8 improper *ex parte* communication, not the action of the Commission approving the order.

9 OAR 860-013-0055 (1) provides that “if a party fails to plead or otherwise appear
10 The proceeding may be disposed of without further notice to the defaulting party.” This
11 provision does not conflict or modify or provide an exception to the Commission’s *ex parte* rules
12 or the rules of attorney ethics. It allows the Commission to dispose of a defaulting party who
13 “has not otherwise appeared”¹ without further notice; that is, the Commission can enter an order
14 after default without further warning to the defaulting party. It does not authorize the opposing
15 party to communicate with the Commission *ex parte* and move for a default or advocate for a
16 default without including the other party in those communications. If a party chooses to
17 communicate on the merits of a case with the Commission as the adjudicating authority and
18 advocate for the entry of a default, those communications cannot be *ex parte*. OAR 860-012-
19 0015(1); *In re Dugger*, 334 Or. at 621; Oregon Rules of Professional Conduct 3.5 (b) (“A lawyer
20 shall not . . . communicate *ex parte* on the merits of a cause with such a person [judge] during the
21 proceeding unless authorized to do so by law or court order). That is what apparently happened
22 in this case and those communications must be disclosed.

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25 ¹ Defendants dispute that they had not made a prior appearance in this matter. On
26 December 1, 2006, defendants made their first appearance in this matter and, through counsel,
filed their objections to the investigation. *Motion to Set Aside Default* (Sept. 28, 2007),
Declaration of William J. Ohle, ¶ 2, Exhibit A.

