

1 JUDGE GARY L. TAYLOR, RETIRED
2 JAMS, Inc.
3 500 N. State College Blvd.
4 14th Floor
5 Orange, CA 92868
6 Telephone: 714-939-1300
7 Facsimile: 714-939-0869

8 ARBITRATOR

9 IN THE MATTER OF THE ARBITRATION
10 BETWEEN

11 TOYOTA MOTOR SALES, U.S.A., INC.

JAMS Ref. No. 1220040045

12 and

ARBITRATOR'S FINAL AWARD

13 DIMITRIOS P. BILLER
14

15
16 Pursuant to the parties' agreement, this matter was submitted for arbitration by the
17 Honorable Gary L. Taylor (Ret.), selected Arbitrator. The hearing was conducted, evidence was
18 received and considered, the parties argued the matter, and the matter was submitted. The
19 Arbitrator now makes the following Final Award for Toyota, and a brief statement of reasons
20 supporting the award.

21 I. BACKGROUND

22 Dimitrios P. Biller, a licensed California attorney, was employed by Toyota Motor
23 Sales, U.S.A., Inc. (referred to as "Toyota") from April 2003 to September 2007 as a Managing
24 Counsel in the Product Liability Group of the Legal Services Group, in charge of the "National
25 Rollover Program" to manage rollover cases, particularly concerning discovery matters.
26 Through his employment, Mr. Biller acquired confidential business information, including
27 attorney-client material.
28

1 Disagreements arose, and, in June 2007, Mr. Biller submitted through his attorney an
2 offer to negotiate a solution in lieu of a lawsuit revealing Mr. Biller's contentions on numerous
3 confidential matters. Following an August 2007 mediation, Mr. Biller's employment ended
4 with a September 2007 Severance Agreement. A further dispute arose and, in January 2008, Mr.
5 Biller threatened to sue for \$75 million in damages. After an April 2008 further mediation, Mr.
6 Biller made a June 2008 Confidential Settlement Agreement and Release with Toyota. In late
7 2008, Toyota sued Mr. Biller for violating contractual confidentiality, and Mr. Biller responded
8 with a counter-suit of his own, resulting in this consolidated arbitration.

9 By agreement, the parties bifurcated and tried first the issue of validity of the Severance
10 Agreement. In a March 2010 Arbitrator's Partial Final Award the Arbitrator concluded the
11 Severance Agreement is valid and enforceable. In this concluding portion of the arbitration,
12 Toyota contends Mr. Biller is liable for breach of several contracts, conversion of its
13 confidential materials, and statutory computer fraud. Mr. Biller responds with his remaining
14 claims that Toyota is liable for defamation as well as fraud and/or false promises.

15 II. PRELIMINARY MATTERS

16 a. During the arbitration hearing, Mr. Biller withdrew his claims for unfair competition
17 and intentional economic interference.

18 b. In previous Orders during this arbitration matter, it was assumed for the purpose of
19 the discussion that most of the documents involved in this case are attorney-client privileged.
20 Although it is not necessary for this Award to determine which items are attorney-client
21 privileged, the Arbitrator now finds that most of the documents fall within that category.

22 c. The state computer fraud statute provides potential recovery of attorney fees.
23 California Penal Code Section 502(e)(2). During the arbitration hearing, Toyota elected to not
24 seek fees under this provision. Therefore, no issue is present for recovery of attorney fees.

25 d. At the beginning of the arbitration hearing, both sides stated they were satisfied with
26 the time allocation and division set for the hearing. The Arbitrator finds each side had
27 satisfactory time and opportunity to fully present and argue their case.

28 \\\

1 III. TOYOTA'S CLAIMS

2 Toyota asserts claims against Mr. Biller for contract breach, conversion, and statutory
3 computer fraud. The Arbitrator finds these claims are supported by the evidence.

4 A. Breach of Contract

5 Mr. Biller is liable for breach of contract.

6 1. The Contracts

7 Mr. Biller was bound by three contracts creating an obligation of confidentiality: a 2003
8 Non-Disclosure Agreement made when he joined Toyota, a 2007 Confidential Severance
9 Agreement made when he left Toyota, and a 2008 Confidential Settlement Agreement and
10 Release resolving additional matters. These agreements were made in exchange for employment
11 at the outset, \$3.7 million on the Severance Agreement, and a recommendation letter plus
12 reimbursed attorney fees on the Settlement Agreement. In return, Mr. Biller obligated himself to
13 give up rights to confidential and privileged information and documents, not disclose Toyota's
14 confidential information, and, upon separation from Toyota, return or destroy and not copy any
15 confidential Toyota material.

16 Mr. Biller contended that the 2003 Non-Disclosure Agreement was a mere "form", not
17 applicable to him, and unenforcably vague. The Arbitrator finds the Agreement is specific,
18 directly applicable to Mr. Biller, and reconfirmed by Mr. Biller in his 2007 Severance
19 Agreement. Mr. Biller also contends Toyota is estopped from asserting the 2003 Non-
20 Disclosure Agreement because Toyota didn't rely on that Agreement before the Arbitration
21 proceeding. The Arbitrator finds no estoppel: the Non-Disclosure Agreement is a valid
22 contract, properly asserted in this proceeding.

23 It is not well-taken by Mr. Biller that the "confidential information" protected by his
24 agreements requires a communication, similar to the attorney-client privilege. Even if this
25 distinction were made, the agreements would be actionable. However, the law does not call for
26 such a distinction: confidential information can be communicated to, or otherwise acquired by,
27 Mr. Biller.

28 \\\

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2. Breach

The evidence showed that Mr. Biller took and kept thousands of Toyota's confidential documents, and made public disclosure of Toyota's confidential information, in breach of his contract obligations. He contends that Toyota's laudatory letter of recommendation was authorization to make at least some of the questioned disclosures. While the letter contemplates disclosure of the generalized information it contains, it was not a broad authorization to disclose the additional specific and detailed information Mr. Biller revealed about his client's policies, practices and tactics and Mr. Biller is correct that his own attorney work-product is not protected, but a protection against disclosure arises when his work-product is combined with Toyota confidential information so that disclosure reveals Toyota's thinking, policies, and information.

The evidence showed multiple instances of unauthorized public disclosure. The major disclosure instances were the following: Mr. Biller's website "credentials" section revealed specific facts and figures concerning Toyota settlements and litigation costs, settlement policies and tactics, and conversations with the client. A public seminar conducted by Mr. Biller discussed specific details about cases, Toyota strategies and examples, litigation costs and payment to outside counsel, and discussions with the client about discovery practices. Thousands of confidential documents were sent to a Texas court without a request, subpoena, or legal compulsion. Mr. Biller used confidential material in multiple media appearances discussing the "value" of the documents he had taken, certain documents by name, whether discovery had been properly done, claimed instructions from a supervisor, and in-house discussions and positions taken. Without seeking sealing or other protection, in publicly-available court filings Mr. Biller attached and thereby published numerous Toyota documents as part of his RICO complaint, filings of his Severance Agreement, and unsealed declarations disclosing numerous confidential matters. The unprotected court filings were not appropriate under the litigation privilege when the subject information was confidential and Mr. Biller had a duty to take steps to protect it.

In summary, the evidence showed multiple breaches of contract by Mr. Biller.

1 3. Harm

2 The evidence showed that Toyota suffered, and will continue to suffer, multiple harms
3 from Mr. Biller's contract breaches. By disclosure of its confidential business affairs, Toyota
4 has incurred economic disadvantage, world-wide harm to its reputation, and undermining of its
5 legal staff in pending matters. It is impossible to quantify the scope and extent of the harms, but
6 the harm is real and it is extensive.

7 B. Conversion

8 Mr. Biller is liable on Toyota's conversion claim.

9 The evidence is undisputed that Mr. Biller copied and kept thousands of Toyota's
10 confidential documents. Toyota had a right to that property and Mr. Biller did not: Mr. Biller
11 had agreed to return all such material to Toyota and not copy Toyota materials. However, Mr.
12 Biller acknowledges that he did not intend to perform that obligation, and retained the materials
13 instead. He converted the materials to his own use by retaining them, and using or distributing
14 them as he determined.

15 The full harm for his conversion will likely remain unknown. However, it is known that
16 Toyota incurred \$1.2 million in attorney fees to deal with Mr. Biller's volunteering thousands of
17 documents to the Texas court.

18 C. Unauthorized Computer Access

19 Mr. Biller is liable for multiple instances of statutory unauthorized computer access.

20 Under both state and federal law, a civil claim commonly called "computer fraud" arises
21 for damages from accessing a computer in excess of authorized access to obtain protected
22 information. 18 U.S.C. §1030; California Penal Code §502. During his employment, Mr. Biller
23 had authority to access Toyota's computers for legitimate purposes. However, on June 20,
24 2007, his relationship with Toyota became adverse upon his attorney's letter threatening suit and
25 requesting negotiations with Toyota.

26 The analysis of Mr. Bhatia, Toyota's forensic computer expert, showed that Mr. Biller
27 accessed Toyota's computers many times following that letter to obtain protected information.
28 Mr. Biller freely admitted accessing Toyota's computers and taking a large volume of Toyota

1 records and documents. These materials included attorney-client privileged documents,
2 engineering and trade secret documents, and work product of other attorneys.

3 Under the applicable statutes, Toyota is entitled to injunctive relief and appropriate
4 damages.

5 D. Remedies

6 The Arbitrator finds it is appropriate to award liquidated damages and punitive damages,
7 and order a permanent injunction.

8 1. Liquidated damages

9 The parties' Severance Agreement contains two liquidated damages clauses – one in the
10 confidentiality provision covering facts leading to the Agreement and the Agreement itself
11 (Section 4.3), and the other concerning nondisclosure of Toyota's confidential information and
12 compliance with the earlier Nondisclosure Agreement (Section 4.5). Both provisions contain
13 the same liquidated damages clause: "As the damages [Toyota] would suffer if this provision
14 were violated would be difficult to calculate, [Mr. Biller] promises to pay [Toyota] Two
15 Hundred Fifty Thousand and No Cents (\$250,000.00) for each violation."

16 California Civil Code Section 1671(b) provides that, with an exception not applicable
17 here, "a provision in a contract liquidating the damages for the breach of the contract is valid
18 unless the party seeking to invalidate the provision establishes that the provision was
19 unreasonable under the circumstances existing at the time the contract was made."

20 Mr. Biller brought a summary adjudication motion challenging the validity of the
21 liquidated damages agreement. The Arbitrator denied that motion in November 2010. The
22 Arbitrator held there were bona fide triable issues whether the liquidated damages figure of
23 \$250,000 per violation bore a reasonable relationship to the range of damages that were
24 reasonable to anticipate, and whether there was a reasonable endeavor to select a reasonable
25 damages figure in light of the reasonable anticipated harm.

26 The arbitrator now finds that the evidence at the arbitration hearing supports the validity
27 of the liquidated damages provision. Mr. Carlson, draftsman of the provision, testified about the
28 endeavor to select a liquidated damages figure. When drafting the provision, he reasoned

1 through the damages Toyota would likely incur, and the inability to calculate their full nature
2 and evaluation. He considered the potential injury to Toyota's core business, the value of the
3 commercial information and attorney-client information that would be comprised, and the fact
4 that Mr. Biller had already threatened to disclose the information. He determined that disclosure
5 would likely lead to other litigation at an unknown cost. He concluded that \$250,000 per
6 violation appeared to be a reasonable approximation of a calculation that could not be more
7 accurately made.

8 Suggesting the \$250,000 figure is not an endeavor at reasonableness, but merely
9 punitive, Mr. Biller points out that, after his determination, Mr. Carlson told Mr. Biller's
10 attorney in justifying the number, "We're paying him a lot of money." This comment on the
11 obvious does not undercut the reasonableness of the endeavor to select an appropriate figure.
12 Mr. Biller was being paid a lot of money, and Toyota reasonably expected the risk of paying
13 liquidated damages would insure Mr. Biller's performance of his agreement.

14 In his hearing testimony, Mr. Carlson added factors he claims to have considered to
15 those factors stated at his deposition. This might ordinarily raise a question whether he had
16 really gone through the reasoning thought process he described. However, his version is
17 corroborated by the facts that (1) the factors he lists are self-evident in Toyota's situation, and
18 (2) Ms. Ogilvie, Toyota's general counsel at the time, testified Mr. Carlson discussed the factors
19 with her. The preponderance of the evidence supports Mr. Carlson's analysis process.

20 Mr. Biller argues the liquidated damages figure has a potential for abuse as a penalty, if
21 multiplied by all the website hits and persons seeing his disclosures, yielding a figure in the
22 multi-millions. In the Arbitrator's view, the potential for abuse does not render the liquidated
23 damages provision invalid. It is the role of the factfinder, particularly in an arbitration, to apply
24 a liquidated damages clause in a reasonable way so as to preserve the validity of the contract
25 provision the parties have agreed upon, rather than invalidate it.

26 The Arbitrator finds that the selected liquidated damages amount is a reasonable estimate
27 of a fair average damages compensation, and the provision was reasonable under the
28 circumstances existing at the time the contract was made.

1 Mr. Biller acknowledged multiple disclosures. Toyota does not attempt to claim a
2 \$250,000 violation for each website hit, each person seeing a media disclosure, or other vast
3 multiplier of the damages amount. Instead, Toyota has conservatively claimed damages for
4 selected broad disclosure categories and specific events. Toyota claims liquidated damages for
5 fourteen disclosure violations:

- 6 1 website violation
- 7 2 seminar violations
- 8 1 documents delivery to Texas
- 9 3 media interviews
- 10 1 RICO claim disclosures
- 11 3 Severance Agreement declaration filings
- 12 3 declarations stating multiple disclosures

13 Toyota has made an appropriate effort to not unduly multiply the violations it is
14 asserting. The Arbitrator finds that the violation claims are appropriate except for three
15 instances. Mr. McKenzie, the witness who attended Mr. Biller's seminars, testified to specific
16 disclosures made at the October 25, 2008 seminar, but was vague concerning specific
17 disclosures at the other seminar; the Arbitrator finds only one seminar violation. Of the three
18 claimed media interview violations, specific evidence was presented concerning only two of
19 them; the Arbitrator finds only two violations. Of the three declarations attaching the Severance
20 Agreement, the first declaration made the "disclosure" (i.e., revelation, bringing into view,
21 uncovering), and is a single violation; once disclosed, later declarations attached a previously-
22 disclosed document.

23 The Arbitrator finds ten liquidated damage disclosure violations, justifying liquidated
24 damages of \$2,500,000.

25 Toyota does not seek additional damages for its conversion claim, acknowledging that
26 such damages would be a duplication of what is remedied by liquidated damages. The
27 Arbitrator finds the same reasoning applies to the computer fraud claim, so no separate award
28 will be made on that claim.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2. Punitive damages

Toyota seeks punitive damages on its conversion claim. Such damages may be appropriate on a showing by clear and convincing evidence that Mr. Biller promised falsely to return Toyota materials, but never intended to perform his promise and converted the materials to his own use.

Mr. Biller acknowledged that he lacked the intent to perform his agreed obligations, and actually intended to not perform them. He signed the Nondisclosure Agreement at the time of hiring with the state of mind that the agreement did not apply to him and he need not be concerned with it. He testified that, when he signed the Severance Agreement promising to return documents, he didn't intend to comply. He acknowledged that he took documents when he left Toyota, and, when asked at the hearing if he intended to return them, he replied "Never".

Mr. Biller contends that "I kept the documents because I knew Toyota would destroy them." Such a concern would not justify unilateral action in dishonestly promising the contrary and accepting \$3.7 million with the intent to not perform. Clear and convincing evidence of entitlement to punitive damages is shown.

Toyota conservatively suggests \$100,000 for punitive damages. This amount is appropriate under the circumstances.

3. Permanent injunction

Injunctive relief is available under both the state and federal versions of the computer fraud statutes. The evidence shows that injunctive relief is appropriate. Toyota has been, and is threatened to be, irreparably harmed by Mr. Biller's actions, and the balance of hardships favors Toyota.

Toyota has submitted a proposed Permanent Injunction. By his November 9, 2010 Opposition, and at the arbitration hearing, Mr. Biller has objected to the entry of an injunction, and to various terms in the proposed injunction. Certain of the format objections are well-taken, and the Arbitrator has modified the injunction terms accordingly.

\\

\\

1 Authorization for a forensic search of Mr. Biller's computers and electronic hardware
2 would only be ordered in extraordinary circumstances. Mr. Biller's conduct and potential for
3 withholding documents make such an order appropriate here. The Arbitrator has carefully
4 considered all the evidence and equitable considerations bearing on such an authorization, and
5 finds such relief is reasonable, equitable, and necessary.

6 The Arbitrator finds it is appropriate to issue a permanent injunction in the form attached
7 to this Final Award as Attachment 1.

8 IV. MR. BILLER'S CLAIMS

9 Mr. Biller's claims for RICO violation and for intentional infliction of
10 emotional distress were concluded by summary judgment in the Arbitrator's October 2010
11 Order. That ruling is attached to this Final Award as Attachment 2, is incorporated by this
12 reference, and is now reaffirmed by the Arbitrator. Mr. Biller asserts remaining claims for
13 defamation and fraud and/or false promises. The Arbitrator finds these remaining claims are not
14 supported by the evidence.

15 A. Defamation

16 Mr. Biller's main defamation complaint concerns Toyota's September 10, 2009 press
17 release (Exhibit 92), repeated on several occasions, that was issued following Mr. Biller's cross-
18 complaint against Toyota asserting improper conduct. Mr. Biller does not claim specific
19 damages, but claims defamation per se. The Arbitrator finds the preponderance of the evidence
20 is that the press release is not false and is not defamatory in context, and there is no evidence of
21 malice.

22 When read as a whole, the press release is not false. It is, in large part, a non-actionable
23 statement of opinion by Toyota, framed as an advocate's response to contested litigation.

24 Mr. Biller's main contention concerns Toyota's statement that "Mr. Biller did not
25 resign...because of ethical concerns." He insists the resignation was for ethical concerns. It is
26 difficult to see any per se defamation potential. In any event, the question is not whether Mr.
27 Biller had ethics concerns, but whether that was the reason he resigned. Toyota cannot be
28 expected to know any unstated reasons Mr. Biller had, and the evidence shows ethics concerns

1 were not his stated reason. In Mr. Biller's attorney's June 20, 2007 letter to Toyota (Exhibit
2 2022), Mr. Biller specifically declined to resign on those grounds. Mr. Biller told his close
3 colleague Mr. Kern that he was resigning over job stress, its toll on his family, and not
4 advancing within the company, with no mention of ethical concerns. In context, there is nothing
5 false about Toyota's statement.

6 The statement that "Toyota...did not respond directly to NHTSA" was apparently
7 inaccurate. However, this demonstrates no per se defamation of Mr. Biller.

8 It is arguably defamatory if Mr. Biller was said to have taken no action in the face of
9 ethical violations. But, in the context that resignation would be the proper response, Toyota's
10 statement was not false that, while managing his cases, Mr. Biller "did not take any action at the
11 time that would be consistent with his concerns."

12 Even if part of Toyota's press release can be viewed as being false, there has been no
13 showing of malice. Mr. Biller was a "limited purpose" public figure, having placed himself into
14 a public controversy, thereby becoming a public figure for a limited range of issues. The
15 Arbitrator is unable to find that Toyota made its press release with the required malice - - that is,
16 with knowledge of falsity or with reckless disregard for whether it was false or not.

17 Mr. Hester's March 12, 2010 letter to Congress (Exhibit 821) is also asserted as
18 defamation per se, although it was only sparsely referred to at the arbitration hearing or in
19 argument. The Arbitrator finds the letter is a non-sham protected petition within the Noerr-
20 Pennington Doctrine, and is not actionable.

21 In summary, the evidence does not support a defamation claim.

22 B. Fraud and/or False Promises

23 Mr. Biller contends Toyota is liable for fraud and making false promises to him in their
24 settlement arrangements by using those agreements improperly or illegally.

25 He argues Toyota never intended to let him use the recommendation letter. The
26 evidence, however, shows that Mr. Biller did use the recommendation letter for business
27 promotion, as it was intended. Toyota correctly opposed Mr. Biller going beyond the
28

1 information in the recommendation letter, and disclosing additional details of Toyota's
2 confidential reasoning, tactics, and communications.

3 Mr. Biller contends Toyota was fraudulent in misrepresentation of the confidentiality
4 clause. On the contrary, Toyota appropriately sought to enforce the confidentiality agreement
5 for which it had paid a high price, and Mr. Biller admittedly never intended to comply with his
6 obligation.

7 Mr. Biller asserts Toyota misused the confidentiality clause by attempting to block Mr.
8 Biller's use of his own work product. The evidence shows Toyota acknowledges Mr. Biller can
9 use his own work product, but Toyota justifiably complains about use of information which
10 combines Mr. Biller's work product with Toyota confidential or attorney-client information.

11 The Arbitrator finds there was no false use of the parties' settlement agreement by
12 Toyota. Toyota did not use the settlement improperly or illegally. The evidence does not
13 support a claim for fraud and/or false promises.

14 V. CLOSING MATTERS

15 A. Individual Cross-Defendants

16 In addition to his cross-claims against Toyota, Mr. Biller also asserted the cross-claims
17 against individuals Mr. Reynolds, Ms. Howard-Martin, Mr. Taira, Ms. Ogilvie, and Ms.
18 McAndrews. There appears to be no evidentiary basis for having joined these individuals as
19 parties.

20 B. Crime-Fraud Evidentiary Ruling

21 As stated in the Arbitrator's September 9, 2010 ruling on the crime-fraud exception to
22 the attorney-client privilege, such ruling was not a determination that improper conduct had
23 occurred, was not an invalidation of Toyota's rights, and did not authorize public disclosure of
24 Toyota confidential materials. It was merely an evidentiary ruling that such materials could be
25 referred to in Mr. Biller's case. The ruling anticipated that it might be necessary to decide at the
26 arbitration hearing whether discovery misconduct took place, but, particularly with the removal
27 of the RICO claim, the development of the arbitration hearing did not require such a ruling.
28

1 As a result of Mr. Biller's conduct, Toyota may have to respond to lawful subpoenas and
2 legitimate government inquiries to defend its attorney-client and confidentiality rights. In such
3 event, this Arbitrator's "crime-fraud" evidentiary ruling was intended to be a confidential part of
4 this private arbitration proceeding, and should not be taken as controlling or precedent by any
5 court or agency in any other case. The evidentiary ruling was based on the unique facts of this
6 case, including the unusual circumstance that, because of their relationship as client and
7 attorney, most of the subject documents were already known to both parties.

8 C. Disclosure Of This Award

9 It would ordinarily be expected that the parties would keep confidential these arbitration
10 proceedings and Award. However, during the course of this arbitration process, there have been
11 unauthorized public disclosures of the nature of this proceeding, its pleadings, and its rulings,
12 with the danger that the significance of arbitration rulings will be incorrectly interpreted. Those
13 disclosures appear to have been one-sided, with prejudice to Toyota. In order to neutralize any
14 such effect, and to prevent intentional or accidental misinterpretation of the arbitration result to
15 the public, the Arbitrator will authorize, at Toyota's sole option and choice, public disclosure by
16 Toyota of this Arbitrator's Final Award, either with or without either or both of its attachments.

17 D. Attorney's Duty

18 During an era of new rules and new debates about e-discovery obligations, Mr. Biller, a
19 talented attorney, tried to shape Toyota's e-discovery program according to his concept of proper
20 compliance. When Toyota didn't embrace his concept, Mr. Biller became highly frustrated and
21 left the company with a large severance payment.

22 As an attorney, Mr. Biller had an ethical, statutory, and contractual duty to safeguard
23 Toyota's confidential information and preserve Toyota's secrets, maintaining the confidence
24 inviolate at every peril to himself. California Business & Professions Code section 6068;
25 California State Bar Rules of Professional Conduct, Rule 3-100. Instead, Mr. Biller did the
26 professionally unthinkable: he betrayed the confidences of his client. He intentionally and
27 repeatedly disclosed confidential information and documents in violation of ethical, statutory,
28 and contractual prohibitions, as well as court and arbitration injunctions.

1 Mr. Biller seeks to justify his disclosures as a necessity to speak out on a matter of public
2 concern to protect the public and the courts. His claimed public-spirited motive is undermined
3 by his actions. He accepted \$3.7 million to not make disclosures, and waited almost two years
4 before making disclosures until Toyota sued him, acknowledging (November 8, 2010 arbitration
5 hearing brief) that he would not have made disclosures if Toyota hadn't sued him and impugned
6 his honesty and credibility.

7 Even if Mr. Biller's claimed motive is accurate, it does not justify his unprecedented
8 ethical violations. With a few exceptions not shown to be applicable here, an attorney may not
9 reveal the client's confidences. This is the hallmark of the client-lawyer relationship. A lawyer
10 acting as a "whistleblower" cannot simply decide to reveal a client's confidential information.
11 Rutter, California Practice Guide: Professional Responsibility, section 7: 27.1, citing 84
12 Ops.Cal.Atty.Gen. 71, discussing public agency attorneys but noting application to private sector
13 attorneys. In such a situation, the duty to protect the client's confidences lies at the core of the
14 fiduciary relationship of attorney and client and of our legal system. Except in the rare instance
15 when disclosure is explicitly permitted or mandated by an ethics code or statute, it is never the
16 business of the lawyer to disclose publicly the secrets of the client. General Dynamics Corp., v.
17 Superior Court, 7 Cal. 4th 1164, 1190 (1994).

18 Mr. Biller's reliance on the crime-fraud exception to the attorney-client privilege,
19 California Evidence Code section 956, does not provide justification for his disclosures. The
20 exception has not been adjudicated. But, even if Toyota's attorney-client privilege protection
21 were to be lost under that evidence rule exception, Mr. Biller is still bound by a greater rule: the
22 attorney's underlying fundamental duty to safeguard his client's confidences, attorney-client
23 privileged or not. Mr. Biller has no justification to breach that duty.

24 VI. FINAL AWARD

25 1. Toyota Motor Sales, U.S.A., Inc. ("Toyota") shall recover from Dimitrios P. Biller
26 ("Mr. Biller") liquidated damages of \$2,500,000 and punitive damages of \$100,000.

27 2. The Arbitrator declares that Mr. Biller is under a continuing duty to safeguard and
28 not disclose Toyota's confidential information.

1 3. A permanent injunction shall issue contemporaneous with the signing of this Final
2 Award in the form attached as Attachment 1.

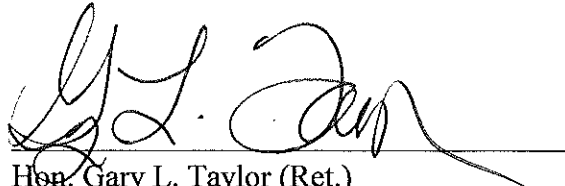
3 4. Mr. Biller shall have no recovery on his cross-claims as against Toyota, Toyota
4 Motor Corporation, Christopher Reynolds, Jane Howard-Martin, Eric Taira, Dian Ogilvie, or
5 Alicia McAndrews.

6 5. At Toyota's sole option and choice, this Arbitrator's Final Award (with or without
7 either or both of its attachments) may be publicly disclosed. In all other respects, the testimony,
8 documents, and Orders that are a part of this arbitration proceeding shall remain confidential
9 within this arbitration without public disclosure except by a written order from a court or
10 government agency of competent jurisdiction issued before the disclosure.

11 6. Under the parties' arbitration agreement, the parties shall pay their own costs and
12 attorneys fees.

13 7. This Final Award resolves all claims between the parties submitted for decision in
14 this proceeding.

15
16 DATED: January 4, 2011


17 Hon. Gary L. Taylor (Ret.)
18 Arbitrator
19
20
21
22
23
24
25
26
27
28