SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CANDACE CARMEL BARASCH,

Petitioner,

- against -

WILLIAMS REAL ESTATE CO., INC., WILLIAMS CORPORATE REALTY SERVICES, LTD., WILLIAMS INTERNATIONAL REALTY SERVICES, LTD., WILLIAMS PM, INC., WILLIAMS MANAGEMENT REALTY CORP., WILLIAMS U.S.A. REALTY SERVICES, INC., REALTY PROGRAMS CORPORATION, MICHAEL T. COHEN, ROBERT L. FREEDMAN, ANDREW H. ROOS, FIRSTSERVICE CORPORATION and FS WILLIAMS ACQUISITION CO., LLC,

Respondents.

Index No. 600053/09
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Part 60 (Fried, J.)
Mot. Seq. # 004

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION TO COMPEL COMPLIANCE WITH THIS COURT'S DECISION AND FOR SANCTIONS AND COSTS

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PRELIMINARY STATEMENT

Petitioner Candace Carmel Barasch respectfully submits this memorandum of law in support of her motion (i) compelling Respondents to comply with this Court's April 15, 2010 decision and order (the "Decision" or "Order") which held that Respondents could not assert the attorney-client privilege with respect to communications with its corporate counsel, Moses & Singer, LLP ("M&S"); (ii) directing Respondents not to assert such a privilege at any deposition in this proceeding; (iii) directing Respondents to turn over communications with M&S and other M&S documents which Respondents have continued to withhold in violation of the Order; and (iv) for sanctions and costs for their blatant violation of the Order.

As the Court may recall, this proceeding concerns whether Petitioner has appraisal rights ("Appraisal Rights") -- the right to receive fair value for her shares in Respondent Williams Real Estate Co., Inc. ("Williams") and the six other corporate Respondents which were affiliates of Williams (the "Satellite Companies") -- arising out of a transaction (the "Transaction") which Respondents entered into in October 2008 with FirstService Corporation ("FirstService").

After Respondents' motion to dismiss was denied and discovery was ordered, Respondents stonewalled discovery. They refused, for example, to produce a single email concerning the Transaction, Petitioner's Appraisal Rights or the value of her shares claiming, that they were "irrelevant." Even though Ms. Barasch was a director of Williams, they also refused to produce any communications with Respondents' corporate counsel on the Transaction, M&S, on privilege grounds, arguing that Ms. Barasch had an "adversarial relationship" with the Respondents.

Petitioner was forced to make a motion to compel in which Petitioner sought, among other things, "all documents sent to and received by Moses & Singer concerning the

Transaction." The Court granted Petitioner's motion, squarely rejecting Respondents' privilege argument. The Court held that "a corporate director has an absolute, unqualified right, with roots in the common law to inspect the corporate books and records." This Court ordered Respondent to produce the M&S documents and specifically rejected Respondents' claim that the supposed adversarial relationship between Petitioner and Respondents was grounds to withhold them.

Respondents did not appeal the Decision. Instead, it attempted to reargue the Court's Decision by claiming that Ms. Barasch was removed as a director and therefore not entitled to see documents concerning the Transaction. When Ms. Barasch submitted incontrovertible documents and evidence that this position was completely fraudulent and that even the Transaction documents themselves showed that Ms. Barasch was a director, Respondents withdrew their bogus application. Respondents did not challenge the Court's finding that there was no adversarial relationship.

Respondents and M&S each produced some of M&S's communications with Respondents. Not surprisingly, far from being "irrelevant," these documents destroyed the disingenuous and meritless positions which Respondents have taken in this proceeding. While Respondents now maintain that Petitioner does not have Appraisal Rights, the M&S emails show that M&S unambiguously and clearly advised Williams that Ms. Barasch had this right. The emails are just as devastating with respect to valuation. While Respondents submitted an affidavit to the Court that the fair value of Williams was only $11,019,900 and the value of Ms. Barasch's stock was only $1,138,000, Williams and its counsel were valuing the Company, days before the closing of the Transaction, at $37,909,018.

M&S has still failed to turnover hundreds of documents on privilege grounds. Further, when Respondents' in-house counsel, Jack Siegel, was deposed last month and questioned about

M&S's advice, Respondents' counsel in this proceeding, Peter Wang of Foley & Lardner, LLP, directed him not to answer questions on privilege grounds. Repeating the same failed argument his firm made in opposition to Petitioner's motion to compel, counsel argued, that because Ms. Barasch began having an adversarial relationship with Petitioner in September 2008, subsequent communications were privileged. Not letting the facts stand in the way of a potential argument, Mr. Wang also maintained that the release of hundreds if not thousands of M&S emails, on multiple occasions, was "inadvertent."

This Court has already unambiguously rejected Respondents' "adversarial relationship" argument and Respondents should be ordered, again, not to assert the privilege. But just as importantly, Respondents should not get off scot free for their latest instance of outrageous conduct, which is part and parcel of their ongoing practice of taking completely disingenuous positions and preventing discovery from proceeding. Respondents have previously (i) argued that internal documents concerning Petitioner's Appraisal Rights and the value of her shares were irrelevant; (ii) refused to produce a single email concerning the Transaction until ordered by the Court to do so; (iii) falsely claimed that Ms. Barasch was not a director, despite incontrovertible documentary evidence to the contrary; (iv) claimed no Appraisal Rights exist even though they notified Petitioner that she had those rights and their own counsel advised them that she had those rights; and (v) claimed that the value of Williams was $11,000,000 when internally they valued Williams at 300% to 400% higher.

Respondents' conduct has also made a mockery of the statutory protections and protocols provided for in the Business Corporation Law. BCL § 623(g) required Respondents to make a written offer to pay Petitioner fair value for her shares and to make an advance payment equal to eighty percent (80%) of the amount of that offer within fifteen (15) days of the closing of the

Transaction. Respondents failed to do this. By virtue of their failure to make an offer, Section 623(h) also required the Company to initiate a special proceeding to establish fair value within twenty (20) days, which Respondents also failed to do.

Instead, they continue to hold more than $1,000,000 which Petitioner is entitled to receive regardless of how this case turns out. Respondents are allegedly holding in "reserve" for Petitioner's benefit $1.1 million, the amount which is allegedly her share of the first payment made by FirstService. If Respondents prevail, she is entitled to these funds. If Petitioner prevails, Respondent would be entitled by their own calculation to approximately the same amount. Yet Respondents continue to hold this money.

BCL § 623 was designed to allow a dissenting shareholder to have immediate access to funds to litigate the issue of valuation. Here, Respondents are not only denying Petitioner access to funds she needs to fund this litigation, but has taken one bogus position after another to drive up her legal costs. The Court should sanction Respondents and order Respondents to pay Petitioner's costs with respect to this motion and her prior motion to compel.

STATEMENT OF FACTS

The following facts are set forth in the accompanying affirmation of John H. Reichman, dated October 7, 2010 ("Reichman Aff."), and the exhibits annexed thereto including the verified petition.

A. The Transaction

Ms. Barasch owned 10.33% of Williams and the Williams Satellites. (Reichman Aff., Ex. B, ¶ 2). On March 6, 2008, Williams entered into a letter of intent ("LOI") with FirstService. (*Id.*, ¶ 24). Even though Petitioner was a Director of Williams, she was not told of the LOI. (*Id.*, ¶ 25). In August 2008, when Petitioner was first told about the Transaction, Williams offered to pay Petitioner $2.21 million for her shares and to keep a small interest in the new entity and

Williams. (*Id.*, ¶ 27). Respondents subsequently withdrew this offer (*Id.*), and as detailed below, offered to redeem her entire interest for $1.1 million,[1] which Ms. Barasch believed, and what internal Williams documents confirmed, was a pittance of its fair value. (Reichman Aff., ¶ 8). Accordingly, Ms. Barasch elected to exercise her Appraisal Rights.

B. Petitioner Exercises Her Appraisal Rights

Respondents were well aware that Ms. Barasch could elect to exercise her Appraisal Rights and so advised her. By notices dated September 24, 2008, the Company scheduled a Board of Directors meeting for September 29, 2008 to consider the Transaction which Respondents described as involving the "authorization and ratification of the proposed disposition of substantially all of the assets of the Company" (emphasis added) (the "Asset Transfer"), and the merger of Williams, the Satellite Companies and six other limited liability companies (the "Merger"). (Reichman Aff., Ex. B, ¶ 28, Ex. A). The sale of substantially all assets and a merger are each triggering events for the election of Appraisal Rights under BCL §§ 623 and 910.

On or about September 29, 2008, Petitioner received Notices of a Special Meeting of Shareholders for the Satellite Companies to be held on October 8, 2008 (the "Satellite Notices"). (Reichman Aff., Ex. B, ¶ 30). The Satellite Notices again stated that the purpose of the meeting was to authorize "the proposed disposition of substantially all of the assets of the Company" and the Merger. Each of the Satellite Notices advised Petitioner of her dissenter rights under BCL § 623, a statutory requirement. (*Id.*).

On October 7, 2008 Petitioner received a Notice of Special Meeting of Shareholders for Williams to be held the following day, October 8, 2008. (*Id.*, ¶ 30). The stated purpose, once

[1] Respondents never made a written offer to purchase Petitioner's shares as required by BCL Section 623(g). (Petition, ¶ 27).

again, was to authorize "the proposed disposition of substantially all of the assets of the Company" and the Merger. (Reichman Aff., Ex. B, ¶ 31, Ex. C).[2]

After the other shareholders of Williams and the Satellite Companies approved the Transaction at the October 8, 2008 meeting (*Id.*, ¶ 32), Petitioner notified Respondents that she was electing to exercise her Appraisal Rights. (*Id.*, ¶ 59). Until they submitted their motion to dismiss the Petition, Respondents never denied that she had those rights. Indeed, Schedule A of the purchase agreement with FirstService (the "Purchase Agreement") acknowledges that Petitioner "may agree to be redeemed, or may elect to exercise her statutory appraisal rights." (*Id.*, ¶ 57, Ex. E).

C. The Petition and the Answer

Petitioner commenced this action on or about January 9, 2009 by filing a Verified Petition seeking an order (i) directing Respondents to pay her the fair value of her shares in Williams; (ii) directing Respondents to turn over to Petitioner all information and documents concerning the Transaction; and (iii) awarding Petitioner her costs and expenses, including attorneys' fees, incurred in connection with this matter, pursuant to BCL § 623(h)(7). (Reichman Aff., Ex. B).

On or about February 13, 2009, Respondents, rather than answering, moved to dismiss the Petition, arguing that Petitioner had no Appraisal Rights. This is the first time that Respondents denied that Petitioner had Appraisal Rights. (Reichman Aff., ¶ 14).

The Court denied the motion to dismiss and ordered discovery to proceed. (Reichman Aff., ¶ 15).

[2] While this Notice implicitly recognized Petitioner's right to dissent under BCL § 623, Williams violated BCL § 605 by not providing notice of her rights under BCL § 623 as it had properly done in the Satellite Notices.

D. The Prior Motion to Compel

On January 6, 2010, Petitioner served her first request for the production of documents. Respondents' responses were palpably improper. These are the some highlights (or low lights):

(i) Respondents asserted that each and every request, including those seeking documents concerning Appraisal Rights and valuation, were irrelevant;

(ii) Respondents refused to produce any emails;

(iii) Respondents falsely claimed that documents concerning Petitioner's Appraisal Rights did not exist.

Respondents also refused to provide any documents to or from M&S, Respondents' corporate counsel on the Transaction, on the grounds of privilege. (Reichman Aff., ¶ 16).

On March 2, 2010, Petitioner moved to compel Respondents to produce among other things, all documents sent to and received by Moses & Singer concerning the Transaction. Petitioner argued that Respondents could not assert the privilege against Ms. Barasch because she was a director of Williams and she had the same rights as the other directors to see documents concerning the Transaction. Petitioner also argued that even as a shareholder she had the right to see documents under the fiduciary exception to the attorney-client privilege. Respondents opposed the motion, arguing that because Ms. Barasch had an "adversarial relationship" to the Transaction, the privilege applied. (Reichman Aff., ¶¶ 17-19).

The Court granted Petitioner's motion in its April 15, 2010 Order (the "Order"). The Court specifically found, among other things, that "a corporate director has an absolute, unqualified right, with roots in the common law to inspect the corporate books and records." It rejected Respondents' "adversarial relationship" argument and ordered Respondents to produce the M&S documents. (Reichman Aff., Ex. A).

The Court did not rule upon Petitioner's fiduciary exception argument.

Instead of immediately complying with the Order or appealing the Order, Respondents submitted a letter brief to the Court seeking to reverse the Court's decision on the grounds that Petitioner had purportedly been removed as a director at the October 2008 shareholder meeting. (Reichman Aff., Ex. D). Simply stated, this position was fraudulent. Ms. Barasch has never been removed as a director and could not be removed under the Williams shareholders agreement unless she ceases to be a shareholder. The Purchase Agreement even refers to her as a director. (Reichman Aff., Ex. E). Respondents only withdrew their application after Petitioner demonstrated their position was completely bogus. But Respondents still got what they wanted – to delay the proceeding and to increase Petitioner's legal costs. (Reichman Aff., ¶ 21).

E. Respondents' Production

Respondents well knew and understood that the Court's Order required them and their corporate counsel, M&S, to produce all communications concerning the Transaction. In mid-May 2010, Petitioners began receiving documents produced by M&S, which included numerous communications between Respondents and M&S. Respondents' counsel received copies of M&S's production as well. (Reichman Aff., ¶ 24).

Respondents also knowingly produced the same emails. As the Court may recall, Respondents claimed that the vast majority of their documents were located only on backup tapes, which contained all of Respondents' emails. This included, as Respondents knew, emails sent to and received by M&S. The tapes could only be read and searched if they were converted to a readable format at a cost of thousands of dollars. Instead of reviewing the tapes themselves, and removing any privileged documents, Respondents chose to handover the tapes without review so that Petitioner would bear the time and expense of converting and reviewing them. Respondents knew that they were producing M&S communications. (Reichman Aff., ¶ 25).

After some of the tapes were converted to readable form, a word search for Moses & Singer in the documents came back with over 4,000 hits. (Reichman Aff., ¶ 26). There was nothing the slightest bit inadvertent about the Respondents' production of the M&S documents.

F. The Siegel Deposition

Despite this Court's unambiguous rejection of Respondents' privilege claim, Respondents still asserted it at the deposition of Jack Siegel. During Mr. Siegel's September 17th deposition, Petitioner questioned Mr. Siegel concerning his communications with M&S. This included presenting Mr. Siegel with several emails contained in both M&S's document production and Respondents' own document production. (Reichman Aff., ¶ 27).

One such email, from M&S to Williams, written immediately after Ms. Barasch exercised her Appraisal Rights, stated:

> If she elected appraisal she doesn't keep stock. She has right to get from companies (inc and satellite subs) the fair value of her shares as determined by a court.

(Reichman Aff., Ex. F).

Respondents' counsel, Mr. Wang, took the position that the Court's decision did not govern these emails because they were written after the relationship with Ms. Barasch became "hostile" and the Decision only concerned communications before then. When Mr. Siegel was asked when there was actually a dispute between the parties regarding Ms. Barasch's Appraisal Rights, Mr. Wang directed Mr. Siegel not to even answer that question, even though this was the factual predicate for his position. (Reichman Aff., ¶ 28).

In fact, as this Court already held, Ms. Barasch was not "hostile" to the Transaction. Ms. Barasch merely rejected a low ball offer to redeem her shares. Based upon the promise that Petitioner could receive fair value for her shares, Petitioner did nothing to interfere with or block the Transaction, which she could have done. The Transaction violated Ms. Barasch's rights and

the Shareholders' Agreement in at least two material respects. Under the Shareholders' Agreement, Ms. Barasch had the right to purchase the additional Williams stock issued as part of the Transaction. The other principals of Williams were also prohibited from going to work for FirstService, a crucial term of the Transaction, under Section 12 of the Shareholders' Agreement. (Reichman Aff., Ex. K). Ms. Barasch ignored these breaches because she was entitled to receive, and was notified that she would receive, fair value for her stock. (Reichman Aff., ¶ 38). The relationship only turned "hostile" and "adversarial" when Respondents refused to comply with the terms set out in their own notices.

ARGUMENT

POINT I

THE COURT SHOULD CONFIRM ITS PRIOR RULING

This Court should affirm its prior ruling and direct Respondents' counsel not to assert the attorney-client privilege with respect to communications with M&S. This Court not only previously decided this issue, but also specifically rejected the very argument Respondents are raising once again.

In attempting to preclude their witnesses from having to testify about the devastating M&S emails, Respondents argued in their September 22, 2010 letter that this Court "held" that Petitioner was only entitled to view communications when she did not have an adversarial relationship with her co-directors, and that this "implies" that she should not have access to communications after September 24, 2008 (a completely arbitrary date).

This interpretation of the Court's order could not be more disingenuous. Respondents ignore the Court's actual holding that corporate directors, such as Ms. Barasch, had an "absolute, unqualified right" to inspect corporate books and records. This is not just the law, but an

essential tenet of corporate governance. Directors who must consider and vote on corporate transactions are entitled to see documents and be given information about it. It is thus with good reason that courts have long held that directors have an absolute unqualified right to inspect and examine corporate books and records. *See Cohen v. Cocoline Products, Inc.*, 309 N.Y. 119, 123, 127 N.E.2d 906, 908 (1955); *Berkowitz v. Astro Moving & Storage*, 240 A.D.2d 450, 451, 658 N.Y.S.2d 425, 428 (2d Dep't 1997); *Lau v. DSI Enterprises, Inc.*, 102 A.D.2d 794, 477 N.Y.S.2d 151 (1st Dep't 1984). Yet, under Respondents' self-serving theory, any director who opposes a transaction, would be denied access to documents and information which other directors receive.

Accordingly, this Court then went on to specifically reject the same "adversarial relationship" argument which Respondents are currently making. As now, they previously argued in opposition to Petitioner's motion to compel that Ms. Barasch was adversarial to Williams. They argued:

> It is well established that a shareholder or director of a corporation is not entitled to access privileged information where, as here, she "is in an adversarial position to the corporation." In re Estate of Weinberg, 509 N.Y.S.2d 240, 242 (Sur. Ct., N.Y. County, 1986), aff'd sub nom., In re Beiny, 517 N.Y.S.2d 474 (1st Dep't 1987).

(Resp. Br. at 7).

This Court explicitly rejected Respondents' factual and legal arguments holding that (i) there was no adversarial relationship at the time of the Transaction; and (ii) Ms. Barasch had an absolute right to get the same information as the other directors were receiving about the Transaction, the value of her stock and her Appraisal Rights.

> While Barasch is now in an adversarial relationship with her co-directors and with Williams, concerning her challenge to the valuation of her shares, she was not in an adversarial relationship during the time in question; indeed, she was a director and thus a corporate insider. During the time in question, her co-directors cannot reasonably have expected to exclude her from their

> attorney-client communications concerning the valuation of her shares. Consequently, Petitioner is entitled to see attorney-client communications that are relevant to her claim for an appraisal.

(Ex. A, p. 2).

The Decision also is completely consistent with the long standing rule that a director has the right to inspect corporate documents, including privileged documents necessary to protect her interests. *See Fochetta v. Schlackman*, 257 A.D.2d 546, 685 N.Y.S.2d 22 (1st Dep't 1999) ("Given the extent of plaintiff's ownership interest and managerial involvement in defendant corporations prior to the disputed stock surrender, the motion court properly determined that the attorney-client privilege was not properly invoked by defendants to deny plaintiff access to otherwise privileged pre-surrender materials essential to the proof of his claims"); *see also People v. Greenberg*, 50 A.D.3d 195, 201, 851 N.Y.S.2d 196 (1st Dep't 2008) (allowing former director access to privileged corporate documents). In short, a director is entitled to privileged material when it is relevant to the proof or defense of the claims in a litigation. *Id.*

This Court also rejected the absurd notion that the *Weinberg* case, cited by Respondents, supports Respondents' position:

> To the extent that Matter of Estate of Weinberg, 133 Misc.2d 950 (Sur. Ct. 1986), mod. on other grounds, Matter of Beiny, 129 A.D.2d 126 (1st Dept. 1987), suggests a different result, *I am unpersuaded by it.*

(Ex. A, p. 2) (emphasis added).

The Court should again direct Respondents not to assert the privilege at depositions with respect to any M&S communications. It should also order, again, that all M&S documents concerning the Transaction be turned over. Respondents, of course, control the privilege. Id. Presumably at Respondents' direction, M&S has improperly withheld hundreds of documents on the grounds of privilege. These included such things as (i) August 20 and 21, 2008 emails,

written months before the closing whose subjects are purportedly "various issues from a call I was on with Jack" and "Things to do" (Ex. H, at 2); (ii) the revised Purchase Agreement and revised operating agreements (id. at 1); (iii) post-closing schedules (id. at 3); (iv) reorganization memos (id. at 4); (v) Transaction summaries (id.); (vi) revised reorganization memos concerning the Transaction (id. at 5); and (vii) the final closing statement, which we have repeatedly requested from Respondents and which they have never been provided (id. at 10). This is basic information about the Transaction.

Countless other documents on the privilege log could not be identified in any meaningful way. M&S described the subjects of the emails as "GVA Williams" or "FirstService" or "response." (Id. at 7-9).

Other than the few documents which involved communication with litigation counsel (and even the invocation of the privilege there is highly suspect given that M&S should have been neutral and could not represent the interest of some shareholders over the interest of others), all of the M&S documents should be produced.

POINT II

PETITIONER IS ENTITLED TO THE M&S DOCUMENTS UNDER THE FIDUCIARY EXCEPTION

Assuming that the Court somehow decides to revisit and reverse its prior holdings that (i) as a director, Petitioner had an unqualified right to review corporate documents; (ii) an alleged adversarial relationship is not an exception to this rule; and (iii) and there was no adversarial relationship, the Court should still find that Petitioner is entitled to the M&S documents under the fiduciary exception to the attorney-client privilege. As noted above, the Court did not have to reach this issue in its prior Order.

The fiduciary exception applies where there is a fiduciary relationship between the party obtaining the advice and the party who is seeking it, and that advice directly affects the latter party's rights. *See Stenovich v. Wachtel, Lipton, Rosen & Katz*, 195 Misc.2d 99, 111, 756 N.Y.S.2d 367, 380 (N.Y. Co. Sup. 2003) (permitting shareholders access to privileged documents of a corporation in an action alleging that the board breached their fiduciary duty by committing to a merger for an inadequate price); *see also Hoopes v. Carota*, 74 N.Y.2d 716, 718, 544 N.Y.S.2d 808, 809 (1989) (affirming Appellate Division's holding that "good cause" existed for shareholders to obtain access to privileged documents where the defendant consulted attorneys in his capacity as trustee of the trust of which plaintiffs are beneficiaries).

In *Stenovich*, the petitioner brought a class action alleging that First Security's board of directors breached their fiduciary duties to the class by committing the company to a merger with Wells Fargo for an inadequate price. *Id.* 195 Misc.2d at 100. Wachtel Lipton acted as First Security's counsel during the negotiations with Wells Fargo. *Id.* at 101. The Court held that the petitioner was entitled to review the communications between First Security and Wachtel Lipton because "petitioner and others were undoubtedly directly affected by any decision that First Security's Board of Directors made. ... The information sought is highly relevant and specific and may be the only evidence available that would address whether Respondents were acting in furtherance of their own benefit as petitioner alleges." *Id.* at 114-15.

Here, it is indisputable that Williams' principals acted as fiduciaries to Petitioner. As in *Stenovich*, Petitioner was directly affected by Williams' decision to enter into the Transaction and to offer, or not offer, Appraisal Rights. Indeed, Jack Siegel, Williams's in-house counsel who was heavily involved in the Transaction, testified that he owed a fiduciary duty to all of the directors and shareholders of Williams and an obligation to be neutral to the extent that there

were any conflicts between the directors. (Reichman Aff., Ex. J, Tr. 14-16). Thus, Petitioner is entitled to know the advice which Williams' other directors received from counsel regarding Petitioner's Appraisal Rights and the value of her stock.

POINT III

RESPONDENTS WAIVED ANY PRIVILEGE THEY HAD

Respondents have also waived any privilege that might have existed through their repeated and knowing production of the M&S communications. While Respondents now argue that there was no waiver because their production was "inadvertent," Respondents both understood that the order required their production and knowingly produced them. Their claim that the production of the emails was "inadvertent" is yet another example of the meritless and completely disingenuous positions they have taken throughout this litigation.

The first M&S communications were produced by M&S more than four months ago after Respondents' current counsel, Foley & Lardner, LLP ("Foley"), reviewed or had an opportunity to review the documents being produced. Indeed, as noted above, M&S provided the parties and Respondents with a 25 page privilege log, consisting of several hundred documents which were withheld as purportedly privileged. Foley was involved in and authorized the release of the other documents. (Reichman Aff., Ex. I).

Respondents themselves produced these documents when they produced the backup tapes two months ago. Instead of producing a hard copies, or even an electronic version in standard form, Respondents elected to produce backup tapes knowing that contained emails between them and M&S. Respondents could have taken the time and effort to review the tapes for privileged communications. Instead, they made no attempt to review the tapes prior to producing them.

This Court addressed an analogous situation in *Current Medical Directions LLC v. Salomone*, 907 N.Y.S.2d 99, 2010 WL 724686 (N.Y. Co. Sup. Feb. 2, 2010) (Fried J.). In *Salomone*, the dispute concerned attorney-client emails which Salomone, a corporate president and majority shareholder, had sent to his attorney from his corporate email address and kept on his corporation's email server. Salomone subsequently sold substantially all the assets of his company including the email server. In a subsequent suit by the buyer against Salomone relating to the transaction, the buyer sought to utilize the emails between Salomone and his counsel.

The Court found that Salomone had waived the privilege. It first noted the applicable standard that,

> [g]enerally, disclosure of an otherwise privileged communication results in waiver of the privilege unless the party seeking the privilege proves the following: (1) it intended to maintain confidentiality and took reasonable steps to prevent its disclosure; (2) it promptly sought to remedy the situation after learning of the disclosure; and (3) the party in possession of the materials will not suffer undue prejudice if a protective order is granted.

Id. at *10 (internal quotations omitted).

The Court rejected Salomone's argument that the disclosure of the emails was inadvertent. It noted that the email server was sold by Salomone and at no time prior to or after the transaction did Salomone attempt to delete the emails. *Id.*

The Court further noted that the buyer had produced the emails to Salomone in response to Salomone's document request, but that Salomone did not diligently review those documents that were produced to him and did not assert any privilege or seek a protective order until the buyer attempted to use the emails in the litigation. *Id.*

Finally, the Court concluded, the emails "appear to support [the buyer's] claims in certain respects, and any preclusion of their use may cause [buyer] undue prejudice." *Id.* at *11.

The same sound reasoning applies here because even assuming, *arguendo*, that there was a privilege, Respondents cannot prove even one of the three conditions for asserting the privilege after privileged communications were disclosed.

First, there is no indication that Respondents intended to maintain confidentiality nor did they take reasonable steps taken to prevent disclosure. Respondents produced the backup tapes – which they knew contained communications between Respondents and M&S – without any review whatsoever. This is comparable to the email server which Salomone sold without any attempt to delete the privileged communications.

Second, Respondents have not been diligent in seeking the return of the documents. The M&S communications were produced by M&S to Respondents' counsel months ago and at no time prior to Mr. Siegel's deposition did Respondents claim that privileged communications had inadvertently been produced. Here, too, *Salomone* is comparable; Salomone received copies of the emails in response to his document demands, but failed to assert any privilege or seek a protective order until the buyer sought to use the emails.

Third, similar to the buyer in *Salomone*, Petitioner will clearly be unduly prejudiced should a protective order be issued as these communications go to the heart of the issues in this case, including whether Respondents acted in bad faith, an element that is directly relevant to Petitioner's claims for attorneys fees in this proceeding. *See also AFA Protective Systems, Inc. v. City of New York*, 13 A.D.3d 564, 788 N.Y.S.2d 128 (2d Dep't 2004) (reversing the trial court's issuance of a protective order and holding there was a waiver because, *inter alia*, the document in question contained information relevant to the claims in the case and prohibiting its use would be unduly prejudicial).

It is the burden of the proponent of the privilege to prove that the privilege was not waived. *N.Y. Times Newspaper Div. of N.Y. Times Co. v. Lehrer McGovern Bovis, Inc.*, 300 A.D.2d 169, 172, 752 N.Y.S.2d 642, 646 (1st Dep't 2002). Respondents cannot come close to satisfying that burden. Accordingly, to the extent any privilege existed, Respondents have waived it.

POINT IV

RESPONDENTS SHOULD BE SANCTIONED AND ORDERED TO PAY PETITIONER'S LEGAL FEES AND COSTS

Respondents should be sanctioned and ordered to pay Petitioner's costs because of their disregard of the Court's Decision and their persistence in taking disingenuous and unsupportable positions.

This Court has authority pursuant to 22 N.Y.C.R.R. § 130-1 to award costs or impose sanctions, or both, when a party engages in frivolous conduct. *See Solow v. Wellner*, 162 Misc.2d 565, 618 N.Y.S.2d 845 (App. Term 1st Dep't 1994) (sanctioning attorney whose frivolous conduct, which included refusal to adhere to the court's prior orders, prolonged proceedings); *Yenom Corp. v. 155 Wooster Street, Inc.*, 33 A.D.3d 67, 818 N.Y.S.2d 210 (1st Dep't 2006) (affirming lower court's attorney fee award against party and attorney for frivolous conduct).

Conduct is frivolous if it is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." 22 N.Y.C.R.R. § 130-1.1(c). This describes Respondents' conduct to a tee.

As described above, Respondents have willfully and repeatedly failed to comply with their discovery obligations and have taken outrageous and disingenuous positions, including refusing to comply with this Court's Decision, which have required Petitioner to file two

discovery motions and which have resulted in an inordinate delay of the conclusion of this special proceeding as well as an unnecessary and unfair increase in Petitioner's legal fees.

Further, pursuant to CPLR § 3126, this Court also has discretion to impose sanctions including striking a party's pleading for the willful failure to obey an order of disclosure. *CPLR* § 3126. This authority is separate and distinct from a court's authority to sanction a party for frivolous conduct. *Mazarakis v. Bronxville Glen I Ass'n*, 226 A.D.2d 661, 644 N.Y.S.2d 793 (3d Dep't 1996). Under this authority as well Respondents should be sanctioned.

As set forth above, this Court's previously rejected Respondents' privilege claim and held that Ms. Barasch, had an absolute, unqualified right to view the M&S documents. Respondents' refusal to comply with the Decision and their stubborn persistence in arguing the existence of a privilege in the face of the Court's contrary decision is clearly willful and contumacious. Moreover, even if it were not, a monetary sanction would still be appropriate because of the delay and motion practice brought on by Respondents' dilatory conduct. *See Elias v. City of New York*, 71 A.D.3d 506, 896 N.Y.S.2d 343 (1st Dept 2010) ($7500 penalty payable to plaintiff is appropriate where defendant repeatedly delayed progress and refused to comply with discovery orders); *Garan v. Don & Walt Sutton Builders, Inc.*, 27 A.D.3d 521, 813 N.Y.S.2d 123 (2d Dep't 2006) (finding that plaintiff's failure to comply with disclosure was not willful or contumacious and nevertheless sanctioning plaintiff's counsel for conduct which required motion practice); *Negro v. St. Charles Hosp. & Rehab. Ctr.*, 44 A.D.3d 727, 843 N.Y.S.2d 178 (2d Dep't 2007) (affirming a monetary sanction of $5000 for failure to comply with discovery orders which resulted in delays and required judicial intervention to secure disclosure, even where most of the voluminous disclosure demanded had been produced); *Adzer v. Rudin Mgm't Co., Inc.*, 50 A.D.3d 1070, 1072, 856 N.Y.S.2d 674, 676 (2d Dep't 2008)

(awarding sanction for conduct which was not willful or contumacious but which "unnecessarily required successive motions in an effort to obtain the discovery").

Accordingly, the Court should award Petitioner her fees and costs incurred in connection with this and the prior motion and should issue an order conditionally striking Respondents' Answer unless they (i) immediately produce the improperly withheld documents; and (ii) cease asserting a non-existent privilege.

CONCLUSION

The Court should grant Petitioner's motion in its entirety including (i) ordering Respondents' witnesses to answer all questions concerning their communications with M&S; (ii) ordering Respondents and their corporate counsel to turnover all communications concerning the Transaction, Petitioner's Appraisal Rights and the value of her stock as the Court previously ordered; and (iii) imposing sanctions on Respondents including having Respondents pay Petitioner's legal fees in bringing this motion and her prior motion to compel.

Dated: New York, New York
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