

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

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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
ACQUISITIONCO, LLC.,

Respondents.

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Index No. 600053/09
I.A.S. Part 60
(Fried, J.)
Mot. Seq. # 004
E-Filed

**MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO COMPEL AND IN
SUPPORT OF CROSS-MOTION FOR PROTECTIVE ORDER**

FOLEY & LARDNER LLP
90 Park Avenue
New York, NY 10016
Telephone: 212-682-7474
Fax: 212-687-2329

Attorneys for Respondents

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Respondents 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., and Realty Programs Corporation (collectively, “Williams” or “Respondents”),¹ submit this brief in opposition to the Motion to Compel Pursuant to CPLR 3124 submitted by Petitioner Candace Carmel Barasch (“Petitioner”) on October 7, 2010 (the “Motion”) and in support of Williams’ cross-motion (the “Cross-Motion”) for a protective order under CPLR 3103.

PRELIMINARY STATEMENT

Although it is obscured within pages and pages of false charges wholly irrelevant to her Motion, the fundamental and dispositive question before the Court on Petitioner’s Motion is whether, under New York law, Williams is permitted to maintain attorney-client privilege against Petitioner with respect to attorney-client communications regarding matters on which Petitioner and Williams were, at the time of the communication, clearly and dramatically adverse. Reduced to that elemental issue, it is easy to understand why Petitioner’s Motion strains so obviously to distract the Court with other matters. After all, the Court of Appeals, in Tekni-plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123 (1996), and this Court, in an earlier order in this case, have both held unequivocally that a corporation has an absolute right to exclude an adverse director from such attorney-client communications. Incredibly, in the 21 pages of her Memorandum of Law (the “Moving Memo” or “MM”), in which she cites no fewer than 17 cases, Petitioner never once addresses, attempts to distinguish, or even acknowledges the existence of Tekni-plex or this aspect of the Court’s prior order. Even more incredibly,

¹ The remaining named respondents listed in the caption were dismissed pursuant to the Court’s Decision and Order of October 27, 2009.

Petitioner's Motion culminates in a request that Williams be *sanctioned* for its *adherence* to Tekni-Plex and this Court's prior order.

Moreover, compounding the meritlessness of her Motion, Petitioner has, in support of her Motion, publicly filed a number of Williams' privileged documents. These are documents she only received during discovery on the basis of her argument that, as a director,² she is within the scope of Williams' privilege. She has never argued that the documents themselves are not privileged – only that, as a director, she is entitled to view them. Yet, after receiving privileged documents on that basis, she promptly turned around and disclosed them to the public – to advantage herself and disadvantage the corporations to which she, as a director, would bear an undivided duty of loyalty and care. Needless to say, these actions serve to underline the adverse interests of the parties and the resulting propriety of excluding her from Williams' privileged attorney-client communications. But the more pressing concern at this point is that Petitioner's actions create the substantial danger that Williams' privilege over these documents will be waived. Accordingly, to protect against that substantial harm, about which this putative fiduciary evidently cared not at all, Williams requests in its Cross-Motion that the Court order that these documents be sealed immediately.³

Finally, the Cross-Motion also requests that the Court order Petitioner to return certain privileged documents Williams inadvertently produced. On the basis of the arguments contained herein, there is no question that Petitioner is properly excluded from Williams' privilege with respect to these documents, and that they should, therefore, be returned.

² As the Court is aware, Williams maintains that Petitioner is not, in fact, a director of the relevant Williams entities. Nevertheless, since that is a disputed issue of fact wholly irrelevant to the merits of her current Motion, we will, for purposes of the Motion only, assume *arguendo* that she is.

³ Although Williams has not, at this time, brought an action against Petitioner for her flagrant violations of her fiduciary duties, Williams reserves the right to do so.

RELEVANT BACKGROUND

As noted above, Petitioner's Memorandum of Law in support of the Motion is devoted largely to arguments and allegations that have no bearing on the merits of her Motion. Among the more notable examples of this burdensome and inappropriate tactic is Petitioner's funhouse mirror distortion of the facts and law that underlie the ultimate merits of this special proceeding. Although it is tempting, in response, to recite all the ways in which discovery in this case has thus far confirmed that Petitioner does not have appraisal rights and that the fair value of her shares, in any event, is substantially lower than what she claims, Respondents will spare the Court this unnecessary burden and instead focus on the facts that are relevant to the Motion and Cross-Motion.

A. Discovery Preceding The Current Dispute

Despite the fact that this is merely a statutory appraisal proceeding – and therefore focused solely on (i) whether a series of corporate transactions undertaken by Williams triggered Petitioner's statutory appraisal rights as a shareholder and (ii), if so, a determination of the fair value of her shares – on January 6, 2010, Petitioner served discovery demands seeking a broad array of documents having no detectable bearing on those narrow issues. For example, Petitioner's discovery demands sought "[a]ll documents concerning internal communications ... concerning Petitioner." See Affirmation of Jeremy Wallison (the "Wallison Aff.") Ex. 1 at Request No. 6. Moreover, relying on her purported status as a director of Williams, Petitioner sought access to Williams' privileged communications with its transaction counsel, Moses & Singer, LLP, both by document demands issued to Williams and by Subpoena to Moses & Singer. Wallison Aff., ¶ 3.

Williams objected. Nevertheless, in its response to Petitioner's document requests, Williams agreed to produce thousands of pages of non-privileged documents responsive to the few appropriate requests on the condition that that the Petitioner first execute the Court's standard form confidentiality order. Inexplicably, Petitioner refused to execute the confidentiality agreement until the Court directed Petitioner to do so, needlessly delaying her receipt of Williams' production. Ibid.

Moreover, upon receiving Williams' objections to her document requests, Petitioner's counsel, without in any way attempting to comply with New York's meet and confer obligations, peremptorily threatened to bring a motion to compel and for sanctions unless Williams immediately turned over all requested documents. Williams' counsel responded to this inappropriate threat by suggesting that the parties meet and confer, and see if some compromise could be reached, rather than burdening the Court and the parties with needless motion practice. Although Petitioner's counsel did subsequently agree to meet and confer, Petitioner's counsel, during those discussions, would not agree to narrow Petitioner's requests in any way. Instead, shortly thereafter, Petitioner's counsel moved to compel – and, as is Petitioner's habit, also sought sanctions in the motion. Wallison Aff. ¶¶ 4-5.

By order dated April 15, 2010 (the "Order"), the Court granted the motion in part and denied it in part, ruling, among other things, that Williams need not produce documents called for by certain of Petitioner's document demands. Wallison Aff. Ex. 3. As relevant here, however, the Court also found, on the basis of Petitioner's purported status as a director, that, up until the time she became adverse to Williams, Petitioner was within Williams' privilege and therefore entitled to discover privileged communications made during that period. Specifically, the Court held:

Here, petitioner seeks evidence that her co-directors paid her less than fair value for her shares. *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 appraisal.*

Order at 2 (emphasis added). In other words, the Court held that Petitioner was entitled to view *only* those attorney-client communications made during the time she was *not* in an adversarial relationship with her co-directors and Williams because, *during that time*, her co-directors could not reasonably have expected to exclude her from any such communications.

Notably, in so holding, the Court explicitly relied on Tekni-Plex, Inc. v. Meyner and Landis, 89 N.Y.2d 123 (1996), a Court of Appeals decision making clear that current directors of a corporation are not entitled to view the corporation's attorney-client communications regarding matters on which, at the time of the communications, the directors and the corporation were adverse. See Order at 2 (citing Tekni-Plex for this proposition).

Based on the Court's ruling, and its clear distinction between the period before Petitioner became adverse to Williams and the period after she became adverse, Williams' counsel began the process of reviewing Moses & Singer's paper and e-mail file prior to its production to Petitioner. Wallison Aff. ¶ 7. At the time, Williams, based on recollections of the details of events that occurred over two years prior, believed that Petitioner became adverse to Williams on October 8, 2008 – the date she served Williams with her purported dissent from the corporate transactions that she claims triggered a right to be paid the fair value of her shares in Williams. Ibid. Accordingly, in their review, Williams' counsel sought to insure that all privileged documents dated before that point be produced and that all privileged documents

dated after that point be withheld – with the limited exception of certain privileged documents, dated through October 31, 2008, that related solely to the mechanics of the underlying transaction and had no bearing on the matters about which Petitioner and Williams were in conflict. Ibid. Williams at all times intended to maintain the confidentiality of its communications with counsel and to exclude Petitioner from viewing any documents with respect to which she was outside of Williams' privilege. Wallison Aff. ¶¶ 7, 18, 19.

In that regard, Williams' attorneys reviewed each and every document in Moses & Singer's paper files. Wallison Aff. ¶ 8. Williams' attorneys also reviewed the 32,000 plus e-mails Moses & Singer eventually produced. Critically, however, Williams' attorneys were given access to those electronic documents only two and a half days before Moses & Singer, without consulting with Williams' counsel, had committed to producing them to Petitioner. Wallison Aff. ¶ 9.

In total, Moses & Singer produced over 6,000 pages of hard copy documents, and 32,385 electronic documents. Wallison Aff. ¶10.

The production of responsive documents from Williams' own files presented an added burden and complexity because Williams' e-mail from the relevant time frame was stored only on backup tapes. Wallison Aff. ¶ 11. Accordingly, to do a thorough privilege review of these documents would have required spending hundreds of thousands of dollars merely to reconstitute the relevant documents – and that is before the many hours of attorney time necessary to comb through the documents for privilege. Ibid. However, given the Court's ruling that Petitioner was within the privilege up until the time she became adverse to Williams, and Williams' counsel's already-completed review of Moses & Singer's copies of Williams' communications with that firm, in May 2010 Williams offered to produce the relevant backup

tapes (through October 31, 2008), in their entirety, to Petitioner. Wallison Aff. ¶ 11.

Furthermore, Williams made sure to preserve the privilege with respect to the documents on the backup tapes by including, in its responses and objections to Petitioner's document request, an explicit reservation of the right to clawback any inadvertently produced privileged documents.

Ibid.

After a delay of several weeks, counsel for Petitioner agreed to accept the backup tapes as Williams' production. Almost immediately after expressing that agreement, however, Petitioner filed a motion seeking to sanction Williams (again) by shifting the costs of reconstituting the backup tapes to Williams. Williams opposed, noting that clear Court of Appeals precedent, in this case Zegarelli v. Hughes, 3 N.Y.3d 64, 69 (2004), required Petitioner to bear the cost of production, and that Petitioner was relying on cases from other jurisdictions that had the opposite rule. When pressed by the Court, Petitioner had no response, and the Court denied the motion for cost shifting based on the clear and directly contrary New York law.

Wallison Aff. ¶ 12.

Williams produced the backup tapes shortly thereafter. Ibid.

B. The Current Discovery Dispute

Following the resolution of the foregoing disputes and the production of what now amounted to hundreds of thousands of documents, Petitioner, incredibly, continued to press for still more.

First, beginning in early August, Petitioner's counsel demanded that Moses & Singer produce privileged documents generated after Petitioner unquestionably became adverse to Williams – including even after Petitioner commenced this special proceeding. Wallison Aff. ¶ 13. Despite the clear Court of Appeals precedent cited by the Court in its Order, Petitioner's

counsel took the position that “the law in this state is that the existence of an adversarial or hostile relationship between a corporation and one of its directors does not obviate [sic] the common law and statutory right of inspection which a director enjoys.” See Wallison Aff. Ex. 4 (emphasis in original). Based on the Court’s Order and the Court of Appeals’ decision in Tekni-plex, Williams refused to authorize the release of the demanded documents. Wallison Aff. ¶ 13.

Second, on September 17, 2010, Petitioner deposed Williams’ in-house counsel, Jack Siegel. Wallison Aff. ¶ 14. At that deposition, Petitioner produced as an exhibit a September 24, 2008 e-mail, which Williams had not caught in its review, and attempted to question Mr. Siegel with respect to it. Wallison Aff. ¶¶ 14, 18. Because that e-mail, on its face, clearly demonstrated that Petitioner became adverse to Williams by September 24, 2008 at the latest,⁴ Williams’ counsel promptly and properly asserted the privilege, demanded the document’s return as inadvertently produced, and directed Mr. Siegel not to answer questions calling for privileged information relating to the matters on which Williams and Petitioner were, at the time of the communications, adverse. Wallison Aff. ¶ 14. Williams’ counsel also followed up on that oral demand with a written demand that Petitioner return the relevant documents. Wallison Aff. Ex. 5.

⁴ The September 24, 2008 e-mail was among the more than 32,000 pieces of Moses & Singer e-mail that Williams’ counsel reviewed during the two-and-a-half day period prior to their production. Wallison Aff. ¶ 16. The e-mail was sent by Robert Kern (of Moses & Singer) to Mr. Siegel, Bill Barrett (Williams’ chief businessperson on the transaction), and others.

[REDACTED]

This e-mail demonstrates that by September 24, 2008, Petitioner had retained separate counsel and was “hostile” to the transaction. Indeed, in that e-mail Williams’ counsel was offering Williams legal advice with respect to ways in which Petitioner might seek to block the transaction.

[REDACTED]

On October 7, 2008, Petitioner filed the instant Motion seeking to compel the production of Williams' privileged communications without regard to whether Petitioner was adverse to Williams at the time of the communication and seeking, on the same basis, to compel Mr. Siegel to give oral testimony regarding privileged communications. And, of course, despite predicated her Motion on a willful omission of the controlling case law, Petitioner, as always, seeks sanctions.

ARGUMENT

POINT I

TEKNI-PLEX AND ITS PROGENY, INCLUDING THIS COURT'S ORDER, ARE FULLY DISPOSITIVE OF PETITIONER'S PRIVILEGE ARGUMENT

Petitioner asks the Court to reverse itself on an issue it has already addressed and to rule, contrary to settled New York law, that a director may obtain privileged corporate communications in discovery even when those communications were generated after, and regard matters on which, the director and the corporation had become adverse to one another. As noted, Petitioner's Motion fails to so much as acknowledge the Court of Appeals' controlling and dispositive ruling in Tekni-plex, Inc. v. Meyner and Landis, 89 N.Y.2d 123 (1996), which held that an adverse director is *not* entitled to such documents, or the fact that the Court, in the Order, reached the same conclusion. Needless to say, the Motion provides no reason to depart from that settled law.

A. **Tekni-plex and its Progeny Hold That Petitioner May Not Access Privileged Communications, Regarding Matters on Which She Was Adverse to Williams, Made After She Became Adverse to Williams**

As discussed above, and noted by the Court in its Order, Tekni-plex is controlling and dispositive Court of Appeals precedent directly on point. In March 1994, Tekni-plex, Inc. ("Tekni-plex") and its sole shareholder and director, Tom Y.C. Tang, entered into a merger

agreement with TP Acquisition Company, a special purpose entity formed to acquire Tekni-plex. Tekni-plex, 89 N.Y.2d at 128. Tekni-plex merged into the acquisition company, and the new company (“New Tekni-plex”) proceeded with Tekni-plex’s business. Id. at 128, 134. Three months later, New Tekni-plex brought an arbitration against Tang, alleging breach of representations and warranties in the merger agreement. Id. at 128. Tang retained his old attorneys, Meyner & Landis, who had also served as attorneys for Tekni-plex while he was its sole shareholder, to represent him in the arbitration. 89 N.Y.2d at 129. New Tekni-plex brought an action in New York Supreme Court seeking an order barring the law firm from representing Tang, barring the firm from disclosing any of old Tekni-plex’s information to Tang, and directing the firm to provide New Tekni-plex with all of its files relating to old Tekni-plex. Ibid.

In ruling on New Tekni-plex’s claim, the Court of Appeals squarely reached the question at the heart of Petitioner’s Motion – namely, whether a director can be denied access to privileged communications of a corporation made at the time, and regarding matters on which, that director was adverse to the corporation. On that issue, the Court of Appeals could not have been more clear: even though current management controlled old Tekni-plex’s privilege, and even though, as a result, current management could access the privileged attorney-client communications of old Tekni-plex on other subjects, current management could *not* access the attorney-client communications of old Tekni-plex regarding matters on which current management and old Tekni-plex were, at the time, adverse. 89 N.Y.2d at 138-139.

Petitioner has not cited in her Motion a single case inconsistent with that holding. For example, Fochetta v. Schlackman, 257 A.D.2d 546 (1st Dep’t 1999), confirms a director’s access only to pre-hostility attorney-client communications, holding, in a case involving a challenge to the validity of a stock surrender executed by the plaintiff (a former corporate

director), that the plaintiff was entitled only to production of privileged corporate documents *that predated the disputed stock surrender*. *Id.* at 546 (“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”) (emphasis added).⁵

Simply put, the law is clear: a director may not access privileged attorney-client communication regarding matters on which the director and corporation were, at the time of the communication, adverse.

B. The Court’s Order Also so Held

Moreover, the Court has already ruled on this issue. As noted above, the Order expressly adopted and followed the Court of Appeals’ ruling in Tekni-plex. See Order at 2 (ruling Petitioner was within the privilege because she was not adverse at the time in question, and thus “her co-directors cannot reasonably have expected to exclude her from their attorney-client communications”). Thus, Petitioner’s argument that she is entitled to all privileged communications including, presumably, communications between Williams and its litigation counsel regarding the preparation of this Memorandum of Law, is not only contradicted by dispositive precedent, but ignores the Court’s Order, and would more appropriately be made in

⁵ The remainder of the cases cited by Petitioner are not on point at all, as they do not involve directors seeking access to a corporation’s privileged communications regarding matters on which the directors and the corporation were adverse. In Matter of Cohen v. Cocoline Prods., Inc., 309 N.Y. 119 (1955), cited by Petitioner, the director did not seek access to privileged documents at all, and was not adverse to the corporation. See 309 N.Y. at 122 (director sought access to books and records to investigate possible misuse of corporate funds). Nor were privileged documents sought in Berkowitz v. Astro Moving & Storage Co., 658 N.Y.S.2d 425 (2d Dep’t 1997) (director sought inspection of financial records to evaluate buy-out offer), and Lau v. DSI Enters., Inc., 477 N.Y.S.2d 151 (1st Dep’t 1984) (allowing inspection of sales documents and financial records). In People v. Greenberg, 851 N.Y.S.2d 196 (1st Dep’t 2008), the former directors were not adverse to the corporation, but were defendants in a criminal case, and sought only documents generated while they were serving as non-adverse directors. *Id.* at 200-201. None stand for the proposition that a current director may obtain access to privileged communications generated while she is adverse to the corporation, regarding matters on which the director and corporation were adverse.

the context of a motion for reconsideration.⁶ In any event, there is no basis on which to reconsider the Order, as Petitioner has identified no new case law and has made no argument distinguishing Tekni-plex, or for extending or modifying it, and the Court should not deviate from its prior ruling.

POINT II

PETITIONER BECAME ADVERSE TO WILLIAMS BY NO LATER THAN SEPTEMBER 24, 2008

While the Court of Appeals' decision in Tekni-plex did not define when a director becomes sufficiently adverse to justify his or her exclusion from the corporation's privileged communications regarding the matters on which the corporation and director are adverse, the context of the Court's holding indicates that "adverseness" for this purpose should be measured under the same standard by which a court would measure whether an attorney may ethically represent both the corporation and one of its directors.

As discussed above, the Court of Appeals in Tekni-plex was also faced with a question of whether to disqualify the former director's chosen counsel in the arbitration between the former director and New Tekni-plex, Tekni-plex. 89 N.Y.2d at 129. In deciding that issue, the Court of Appeals used the same "adverseness" standard it used to determine when a director could be appropriately denied access to privileged communications. 89 N.Y.2d at 135-136 (ruling that interests of the former director were "materially adverse" to the interests of New Tekni-plex and, on that basis, disqualifying law firm from representing the former director).

⁶ Perhaps to avoid the high standards on a motion for reconsideration, Petitioner repeatedly misrepresents the Court's April 15 decision as holding that her adversarial relationship with Williams is irrelevant. See MM at 7 (claiming that the Court "rejected Respondents' 'adversarial relationship' argument"), 11 ("this Court then went on to specifically reject the same 'adversarial relationship' argument which Respondents are currently making"), 13 (claiming that the Court held that "an alleged adversarial relationship is not an exception to [the] rule" allowing directors access to privileged corporate documents).

Other conflict of interest cases also use similar language. See Schmidt v. Magnetic Head Corp., 97 A.D.2d 151, 163 (2d Dep't 1983) (disqualification motion properly denied where director and corporation were not "adverse"); Dukas v. Davis Aircraft Products Co., 129 Misc. 2d 846, 849-50 (Sup. Ct., Special Term, Suffolk County 1985) (disqualifying counsel where the interest of the corporation was "adverse to that of the individual [directors]"). Indeed, it is sensible to find that a corporation and its directors become "adverse" for privilege purposes once the director and the corporation are "adverse" for conflicts purposes, particularly given that a corporate director owes the corporation an undivided duty of loyalty, Howard v. Carr, 222 A.D.2d 843, 846 (3d Dep't 1995), and directors may not "place [their] private interests in conflict with those of the corporation." Fender v. Prescott, 101 A.D.2d 418, 422 (1st Dep't 1984). See also Foley v D'Agostino, 21 AD2d 60, 66-67 (1st Dep't 1964).⁷

On that standard, it is clear that Petitioner and Williams were adverse by no later than September 24, 2008. By that date, Barasch had already retained separate counsel and made her opposition to the transaction known. Indeed, her opposition was so vehement that, as reflected in the September 24 e-mail, Williams' counsel was advising the corporation as to potential legal challenges Barasch might make in an attempt to block the sale. Wallison Aff. ¶ 17, Ex. 6. Moreover, Barasch and Williams had already begun negotiating a potential redemption of her shares, and

REDACTED

⁷ Notably, this standard obviates Petitioner's purported policy concern that directors could not oppose corporate transactions without finding themselves excluded from receiving needed corporate documents. MM at 11. Not all directors that oppose corporate transactions are "adverse" to the corporation. Only those directors whose opposition renders them "adverse" for conflicts purposes should be so barred, and those directors would only be excluded from accessing the corporation's attorney-client communications with respect to the matters on which they are adverse. Indeed, failing to adopt that standard would mean that corporations could never seek privileged legal advice for dealing with a dissident director whose interests were adverse to the corporation – precisely what the Court of Appeals was determined to avoid in Tekni-plex. 89 N.Y.2d at 139 (noting its concern that allowing access would "chill" corporate communications with counsel).

REDACTED

Accordingly, there can be no

dispute that, by September 24, 2008 at the latest, Moses & Singer would have been ethically unable to represent both Barasch and Williams. Cf. Greene v. Greene, 47 N.Y.2d 447, 452 (1979) (parties with conflicting business interests are sufficiently “adverse” that a lawyer may not simultaneously represent both).

POINT III

THE “FIDUCIARY EXCEPTION” PROVIDES NO BASIS FOR ALLOWING BARASCH ACCESS TO PRIVILEGED DOCUMENTS

Perhaps recognizing but refusing to explicitly acknowledge the fully dispositive effect of Tekni-plex and this Court’s Order, Petitioner stages a strategic retreat to an argument the Court implicitly rejected on her prior motion to compel – namely that the “fiduciary exception” entitles her to discovery of privileged communications even if those communications regard matters on which she and Williams were adverse at the time of the communications. That contention is unavailing for two reasons.

First, the fiduciary exception requires that the party seeking discovery was the ultimate intended beneficiary of the advice sought by the fiduciary. See Estate of Barbano v. White, 800 N.Y.S.2d 345 (Sup. Ct., Chenango County, 2004) (holding that, upon a showing of “good cause” for disclosure, “the fiduciary exception . . . bars an individual who consults an attorney in a fiduciary capacity from later invoking the privilege to shield those communications from the beneficiary *on whose behalf he or she was purportedly seeking advice or assistance*”) (emphasis added), citing Hoopes v. Carota, 142 A.D.2d 906, 910 (3d Dep’t 1988). By definition,

if Petitioner was adverse to Williams, then the advice in question was not sought for her benefit, and the fiduciary exception simply does not apply to those communications.⁸

Second, the fiduciary exception only applies upon a showing of “good cause,” which Barasch cannot make. Good cause is typically found only where (i) the *conduct* of the corporation is in issue (such as where shareholders challenge a corporate act as *ultra vires* or as a breach of management’s fiduciary duty), and (ii) the privileged documents are the only means of establishing the claims or defenses raised in the action. The cases relied upon by Petitioner stand for no more than that. See e.g. Hoopes v. Carota, 142 A.D.2d 906, 910 (3d Dep’t 1988) (exception to privilege applied where plaintiffs alleged breach of fiduciary duty, and the information sought was “highly relevant to and may be the only evidence available on” whether the defendant had breached his fiduciary duty); Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99 (Sup. Ct., N.Y. County 2003) (where shareholders alleged breach of fiduciary duty, shareholders could obtain privileged documents essential to determining whether the board had breached its fiduciary duty). Here, a statutory appraisal proceeding, Williams’ conduct, and that of its officers and directors, is not at issue. Moreover, Barasch has already been provided access to volumes of privileged communications regarding those matters on which her interests and Williams’ interests did not diverge. Barasch has not even made the beginnings of an attempt to suggest that the remaining privileged documents are uniquely critical to the narrow issues in this case.

⁸ Mr. Siegel’s deposition testimony that he had a fiduciary duty to each of the shareholders is both irrelevant (as mere testimony of his legal opinion) and a correct statement of the law *in general*. Typically, the interests of a corporation and its shareholders are aligned (what benefits the corporation benefits the shareholders), and the corporation’s officers and directors can be said to have a duty to the shareholders through the corporation. It is only where (as here) a shareholder’s interest becomes inimical to the corporation’s interest that an officer or director does not have a fiduciary duty to that shareholder. Indeed, were that not the case, Mr. Siegel would have had irreconcilably conflicting fiduciary duties: a duty to the corporation to negotiate a fair price for Barasch’s shares, and a contradictory duty to Barasch to maximize the amount Williams paid for those shares.

POINT IV

PETITIONER'S WAIVER ARGUMENT DOES NOT ENTITLE PETITIONER TO THE RELIEF SHE SEEKS

Left with no other basis for her Motion, Petitioner finally falls back on the argument that, although she would not have otherwise been entitled to discovery of privileged communications regarding the matters on which she was adverse to Williams, Williams has now, by virtue of producing some attorney-client communications that should have been withheld,⁹ (i) waived privilege with respect to the documents produced, and (ii) waived privilege with respect to *all* documents and communications made up through and including today. These arguments are yet another example of Petitioner burdening the Court with arguments that run directly counter to settled law.

⁹ Petitioner's waiver argument is unclear, at best, with regard to which documents form the basis of her waiver argument. In the Moving Memo, Petitioner states that Williams waived its privilege through its "repeated and knowing production of the M&S communications," and claims that Williams' production was not inadvertent because Williams "understood that the order required [the documents'] production and knowingly produced them." MM at 15. This suggests that Petitioner's position is, in fact, that Williams waived privilege by producing any attorney-client communications at all. That this is her position is also suggested by Petitioner's assertion that Williams waived its privilege by producing backup tapes that "contained e-mails between them and M&S." *Ibid.* See also MM at 8-9 (noting, apparently in reference to the *entire* production, that "Respondents also knowingly produced the same e-mails" Petitioner received from Moses & Singer and that a word search of some unspecified backup tapes identified "over 4,000 hits" on the words "Moses & Singer"). To the extent that is Petitioner's argument, however, it is, of course, entirely frivolous. The documents were produced under an order from the Court directing their production. As such, their production cannot, under the law, be deemed a waiver of privilege. See *People v. McHugh*, 124 Misc. 2d 823, 827-828 (Sup. Ct., Bronx County, 1984) ("a privilege is not waived if the disclosure was by court order subject to a limitation as to its use"); *Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985) (privilege was not waived by allowing witness to answer deposition questions as to privileged communications where such answers were required by a prior court order). Moreover, the Court's Order ruled that Petitioner was *within* the privilege with respect to communications not involving the matters on which Petitioner and Williams were adverse, and the disclosure of such communications to her therefore cannot waive the privilege. *In re Estate of Weinberg*, 133 Misc. 2d 950, 952 (Surr. Ct., N.Y. County, 1986) (presence of daughter of client during communication with attorney did not waive privilege where daughter was within the privilege as agent of corporation), *aff'd sub nom In re Beiny*, 129 A.D.2d 126 (1st Dep't 1987).

A. Williams Did Not Waive its Privilege With Respect to the Documents it Inadvertently Produced

To the extent that Petitioner argues that Williams waived privilege with respect to the produced documents that reflect attorney-client privileged communications regarding matters on which Petitioner and Williams were adverse, and cannot now demand their return, she is simply wrong.

Waiver cannot be found where the production of privileged documents was inadvertent, reasonable steps were taken to prevent disclosure, and the party who obtained the document will not be unduly prejudiced if a protective order is issued. See N.Y. Times Newspaper Div. v. Lehrer McGovern Bovis, Inc., 300 A.D.2d 169, 172 (1st Dep't 2002); Long Island Lighting Co. v. Allianz Underwriters Ins. Co., 301 A.D.2d 23, 32-33 (1st Dep't 2002). Williams has met each of these requirements.

First, the production was inadvertent. As discussed above, Williams, under incredibly tight time pressures, approached the production of its attorney-client communications on the mistaken recollection (of events two years prior) that Petitioner only became adverse on, and so could only be excluded from privileged communications after, October 8, 2008. Wallison Aff. ¶¶ 7, 9. As a result, Williams simply missed in its privilege review the September 24, 2008 e-mail conclusively establishing September 24, 2008 as the absolute latest date on which Petitioner became adverse. Wallison Aff. ¶¶ 16, 18. Indeed, it was not until Petitioner produced that e-mail as an exhibit at Mr. Siegel's deposition, that Williams realized that the earlier date was more accurate – and immediately demanded, both orally at the deposition and shortly thereafter in writing, that the e-mail and others like it be returned. Wallison Aff. ¶¶ 14, 16, 18.

Second, Williams' review efforts were reasonable. Williams' counsel reviewed the Moses & Singer documents before they were produced, including reviewing more than

32,000 e-mails in less than three days. Wallison Aff. ¶¶ 7-9. As the Appellate Division has held, “[d]isclosure caused by an error of a competent screener ... does not evidence a lack of precautions” sufficient to waive privilege. Mfrs. & Traders Trust Co., v. Servotronics, Inc., 132 A.D.2d 392, 400 (4th Dep’t 1987). While Petitioner argues that Williams failed to review the documents produced on the backup tapes, she acknowledges that those documents were simply the same universe of documents produced by Moses & Singer. MM at 8. Obviously, Williams had no need to duplicate its work by again screening its own copies of communications already reviewed in the context of Moses & Singer’s production.¹⁰

Finally, there will be no prejudice to Petitioner if she is required to return the documents. Williams promptly sought the return of the documents, no testimony regarding these documents has been elicited and Petitioner has not relied on the documents in support of her merits case. See Servotronics, 132 A.D.2d at 400.¹¹ Petitioner will be in no worse position after returning the documents than if the documents had never been produced.

¹⁰ Williams’ review of the privileged communications in that context distinguishes the present case from Current Medical Directions LLC v. Salomone, 907 N.Y.S.2d 99, 2010 WL 724686 (Sup. Ct., N.Y. County Feb. 2, 2010), in which the party claiming privilege had *never* reviewed the documents in any form prior to turning them over.

¹¹ Petitioner’s reliance on AFA Protective Sys. V. City of N.Y., 13 A.D.3d 564 (2d Dep’t 2004), purportedly for the principle that Petitioner will be prejudiced because the communications “go to the heart of the issues in this case,” MM at 17, is yet another example of Petitioner’s citation of cases in support of points for which they simply do not stand. First, in AFA, the defendant had been aware, for *four years* prior to taking any action to retrieve the document, that the document in question had been disseminated to third parties. 13 A.D.2d at 565-566. Moreover, the plaintiff gave the defendant notice of its intent to use the privileged document in support of its case on the merits, but the defendant did not promptly move for a protective order. Id. at 564-565. Rather, it was only *another four years* after receiving plaintiff’s notice, and after plaintiff had *actually relied on the privileged memorandum in support of its summary judgment motion*, that the defendant moved for a protective order. Id. at 565-566. On those facts, the Court found that the defendant had not diligently preserved its privilege and that grant of a protective order would prejudice the plaintiff. To say that AFA is not remotely comparable to this case would be a vast understatement.

B. Even Had The Privilege Been Waived As To The Documents Actually Produced, There Was No Subject Matter Waiver

Even had Williams waived the privilege with respect to the documents produced, Petitioner in her Motion is not merely demanding that she be entitled to retain those documents – she is also claiming that Williams’ inadvertent production effected a subject matter waiver entitling her to (i) ask Mr. Siegel further questions based on the produced documents and (ii) demand the production of still further privileged documents (including privilege documents generated even after she commenced her suit). Needless to say, this eccentric theory has no support in the law.

The law on subject matter waiver clearly establishes that the mere disclosure of some privileged information does not automatically waive the privilege with respect to other privileged communications – even privileged communications on the same subject matter. See U.S. Fidelity & Guar. Co. v. Excess Casualty Reins. Assoc., 68 A.D.3d 481, 482 (1st Dep’t 2009) (answer at deposition disclosing communications between corporate officer and in-house counsel waived privilege as to the specific communications with in-house counsel, but not to communications with other attorneys on same subject matter); Am. Reins. Co. v. U.S. Fidelity & Guar. Co., 40 A.D.3d 486, 494 (1st Dep’t 2007) (answer at deposition disclosing privileged communications did not support broad subject matter waiver), citing Kirschner v. Klemons, No. 99 Civ. 4824, 2001 U.S. Dist. LEXIS 17863, *10-12 (S.D.N.Y. Oct. 31, 2001) (where deponent testified to receiving specific advice from counsel, but did not intend to raise advice of counsel as a defense, court allowed discovery relating only to specific conversation disclosed at deposition). As one court explained:

Subject matter waiver applies where the privilege holder puts the privileged communications in issue by virtue of his claims or defenses and prejudices the opposing party, in other words, seeks to use the privilege as both a “sword” and a “shield”; whereas a

more limited waiver applies if the holder releases only communications or portions of communications favorable to his litigating position, while withholding any unfavorable ones, and the opposing party is not prejudiced.

EEOC v. Johnson & Higgins, Inc., No. 93 Civ. 5481, 1998 WL 778369, at *8 (S.D.N.Y. Nov. 6, 1998).

Here, Williams has neither put the privileged communications in issue nor engaged in the “selective release” of privileged communications described in Johnson & Higgins as a basis for a more limited waiver. Rather, Williams has knowingly produced only the documents it has been ordered to by the Court, on the basis that those documents were not privileged as against Petitioner.

Thus, even had the production of privileged documents to Petitioner waived Williams’ privilege in those documents, the waiver would go no further, and Petitioner would have no right to demand production of additional documents or to ask witnesses to disclose additional privileged communications at deposition, whether about the produced documents or otherwise.

POINT V

WILLIAMS’ CROSS MOTION SHOULD BE GRANTED

Williams’ Cross-Motion seeks two forms of relief: first, that the indisputably privileged documents Petitioner has filed in support of her Motion be sealed; and, second, that Petitioner return to Williams all copies of privileged communications that implicate the issues with respect to which Petitioner and Williams were, at the time the document was generated, adverse.

The former should be uncontroversial. There is no claim that these documents are not privileged. Accordingly, it is vital that they not continue to be filed publicly.

Moreover, in light of the arguments above, the latter requested relief also should be uncontroversial. The law is clear that, following an inadvertent production of privileged material, the producing party is entitled to a protective order directing the return of the inadvertently produced material. See, e.g., Lehrer McGovern Bovis, Inc., 300 A.D.2d at 172 (reversing denial of motion for protective order seeking return of inadvertently produced documents).

CONCLUSION

In sum, Petitioner's Motion is an entirely frivolous continuation of her scorched-earth litigation strategy. Petitioner (not for the first time in this case) has ignored controlling Court of Appeals case law as well as this Court's prior Order. As shown herein, those authorities and others demand that the Motion be denied and that the Cross-Motion be granted.

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New York, New York

FOLEY & LARDNER LLP



Peter N. Wang, Esq.
Jeremy L. Wallison, Esq.
Akiva M. Cohen, Esq.

90 Park Avenue
New York, NY 10016
Telephone: 212-682-7474
Fax: 212-687-2329

Attorneys for Respondents