SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

ERIC CELIA, individually and derivatively on behalf of Celia Construction, Inc. and Trackside L.P., **Plaintiff,** **- against -** **SAMUEL A. CELIA, DOMINICK S. CELIA, CELIA CONSTRUCTION, INC., TRACKSIDE L.P., and TRACKSIDE APARTMENTS, LLC,** **Defendants,** **and** **CELIA CONSTRUCTION, INC. and TRACKSIDE L.P.,** **Nominal Defendants.**	**Index No. EF20202282**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL

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PRELIMINARY STATEMENT

At the depositions of Defendant Samuel Celia ("Sam") and Celia Construction Inc.'s corporate counsel, David Evans ("Evans"), Defendants' counsel asserted attorney-client privilege and work-product objections and instructed Sam and Evans not to answer various questions. These privileges cannot legitimately be used against Plaintiff Eric Celia ("Eric") with respect to the categories of questions asked and underlying documents for the following reasons:

1. **Questions about the deponent's motivations or meaning in communications that Defendants concede are not privileged**: Sam's or Evans' reasons or intent in writing a non-privileged communication cannot be privileged. Similarly, Sam's *reason* for contacting counsel cannot be privileged because it is not a communication at all.

2. **Communications and documents made or disclosed to non-party accountant Victoria Celia ("Victoria") cannot be privileged:** Victoria was not a shareholder, officer, or director of Celia Construction and therefore any communications or documents sent or received from Victoria were not confidential. Nor did Victoria ever act solely in anticipation of litigation.

3. **Communications and documents made or disclosed to non-party attorney Peter Karl ("Karl") cannot be privileged:** Karl testified he was not counsel for any of the Defendants at the relevant time. Therefore, communications in Karl's presence were not confidential. Moreover, Defendants' themselves subpoenaed testimony from Karl about the same matters.

4. **Communications made between corporate counsel and officers and directors of Celia Construction, Inc. ("Celia Construction") are not privileged against Eric—a director and shareholder**: (a) From 1993 until June 2, 2020 Eric was a director and shareholder of Celia Construction and therefore within the cone of privilege. And (b) even after Sam and Dom removed Eric as a director, they and Evans as corporate counsel owed Eric fiduciary duties as a minority shareholders and Sam's communications with Evans related to those breaches are subject to the fiduciary exception.

5. **All of the documents and communications at issue were produced by Defendants or their counsel in this action and not promptly clawed-back, thereby waiving any claim of privilege**: Defendants or their counsel produced numerous communications between Evans and Victoria, Karl, Sam or Dom from the period prior to the filing of this action and failed to claw them back promptly—despite Eric filing some of them publicly on January 24, February 21, and March 15, 2022. They have thereby waived any privilege.

Defendants' assertions of privilege are invalid—and in some cases knowingly frivolous. In addition, Evans simply refused to answer some questions. The Court should compel Sam and Evans to answer the questions at issue and award Eric attorney's fees in bringing this motion.

QUESTIONS MARKED FOR A RULING

Sam's deposition was conducted on March 31, 2022. The parties reached out to the Court during the deposition twice for rulings on particular questions. After that seven questions, or sequence of questions, were marked for a ruling. An excerpt of the relevant portions of Sam's deposition transcript are attached to the Hutman affirmation as Exhibit A. The seven questions marked for a ruling at Sam's deposition are:

1. Sam was asked why he contacted counsel in reaction to receiving a books and records demand. Mr. Krouner instructed Sam not to answer on the basis of attorney-client privilege. (Ex. A, Sam Tr. 262:8-264:4.) The answer is not privileged as explained in Section I below.

2. Sam was asked why he asked Evans "now what?" in an email copying Victoria, a non-party. Mr. Krouner instructed Sam not to answer on the basis of attorney-client privilege. *Id.* at 282:2-285:24.) The answer is not privileged as explained in Sections I, II, IV & IV, below.

3. Sam was asked what Evans' response was to the "now what?" email question. Mr. Krouner instructed Sam not to answer on the basis of attorney-client privilege. (*Id.* at 286:14-22.) The answer is not privileged as explained in Sections IV & V, below.

4. Sam was asked (i) whether Evans advised him not to give Eric the documents he was requesting in a December 2018 email; (ii) whether he discussed removing Eric as a director with Evans in December of 2018; and (iii) whether they discussed creating new bylaws for Celia Construction to enable removing Eric. Mr. Krouner instructed Sam not to answer on the basis of attorney-client privilege. (*Id.* at 286:25-287:23.) The answers to these questions are not privileged as explained in Section IV, below.

5. Sam was asked if Evans ever advised him not to provide Eric with a copy of Celia Construction's financial statements. Mr. Krouner instructed Sam not to answer on the basis of attorney-client privilege. (*Id.* at 296:20-297:13.) The answer to this question is not privileged as explained in Section IV, below.

6. Sam was asked if he ever asked Evans whether he should give Eric a copy of Celia Construction's financial statements. Mr. Krouner instructed Sam not to answer on the basis of attorney-client privilege. (*Id.* at 297:22-298:5.) The answer to this question is not privileged as explained in Section IV, below.

7. Sam was asked if he asked Evans whether he should give Eric copies of Celia Construction's financial statements and tax returns in January of 2019. Mr. Krouner instructed Sam not to answer on the basis of attorney-client privilege. (*Id.* at 303:17-304:16.) The answer to this question is not privileged as explained in Section IV, below.

In addition, Mr. Krouner objected to Plaintiff's Deposition Exhibit 63 ("Exhibit 63"), annexed hereto as Exhibit B. Mr. Krouner instructed Sam not to answer any questions in connection with Exhibit 63. (*Id.* at 305:7-309:16.) Exhibit 63 is not privileged as explained in Sections IV & V below.

Plaintiff began taking Evans' deposition on April 7, 2022.[1] During the deposition thirteen questions, or sequence of questions, were marked for a ruling of which twelve are subject to this motion. An excerpt of the relevant portions of Evans' deposition transcript are attached to the Hutman affirmation as Exhibit C. The twelve questions are:

1. Evans was asked if he advised Sam to send Eric a copy of the original bylaws in advance of a shareholders vote on whether to adopt new bylaws. Mr. Krouner instructed Evans not to answer on the basis of attorney-client privilege. (Ex. C, Evans Tr. 127:18-128:15.) The answer to this question is not privileged as explained in Section IV, below.

2. Evans was asked if the fact that the new bylaws allowed Eric to be removed as a director would be material for Eric to know in voting on whether to adopt the new bylaws. Mr. Krouner instructed Evans not to answer on the basis of it calling for an opinion, legal conclusion, and speculation. (*Id.* at 130:14-131:24.) None of these objections are a basis for an instruction not to answer.

3. Evans was asked if, in December of 2018, he believed that Eric was entitled to view the financial statements of Celia Construction. Mr. Krouner instructed Evans not to answer on the grounds that the answer required Evans to reveal legal opinion, and infringed on attorney-client privilege and work product. (*Id.* at 137:15-147:4.) Plaintiff does not believe that this question required Mr. Evans to render a legal opinion but even if it did, the answer to this question is not privileged as explained in Section IV below.

4. Evans was asked why he felt he should copy Victoria on an email sending Celia Construction shareholder meeting minutes and new bylaws. Mr. Krouner instructed Evans not to answer on attorney work product grounds. (*Id.* at 149:20-156:23.) The answer to this question is not privileged as explained in Sections II, IV, and V, below.

5. Evans was asked if his statement in Plaintiff's Deposition Exhibit 70 ("Exhibit 70), annexed hereto as Exhibit D, that the proposed new bylaws would permit the removal of Eric was based on the new bylaws not having the minimum number of directors contained in the original bylaws. Mr. Evans claimed not understand the question, delayed, and then refused

[1] Approximately four and one-half hours of deposition time were used. Plaintiff intends to complete Evans' deposition after receiving a ruling on this motion.

to answer the question. (Ex. C. at 176:2-180:10). This is not a valid basis for refusing to answer a deposition question.

6. Evans was asked why he drafted the new bylaws to eliminate the requirement that there not be fewer directors than shareholders. Mr. Krouner instructed Evans not to answer on the basis of the attorney work product doctrine. (*Id.* at 180:13-181:8.) The answer to this question is not privileged as explained in Section IV below.

7. Evans was asked about Exhibit 63. Mr. Krouner instructed Evans not to answer any questions related to Exhibit 63, asserting attorney client privilege and the attorney work product doctrine. (*Id.* at 186:11-187:23.) Exhibit 63 and related questions are not privileged as explained in Sections IV & V, below.

8. Evans was asked about the meaning of a draft letter he wrote that he sent to Sam, Dominick Celia ("Dom") and Victoria in February of 2019. Mr. Krouner instructed Evans not to answer on work product grounds. (*Id.* at 189:6-192:15.) The answers to these questions are not privileged as explained in Sections II, IV, and V, below.

9. Evans was shown and asked about Plaintiff's Deposition Exhibit 73 ("Exhibit 73"), annexed hereto as Exhibit E. Mr. Krouner instructed Evans not to answer any questions related to Exhibit 73, asserting attorney client privilege and the attorney work product doctrine. (*Id.* at 199:14-201:22.) Exhibit 73 and related questions are not privileged as explained in Sections IV & V, below.

10. Evans was asked about the purpose and content of conference call between him, Sam, Dom, and Karl. Mr. Krouner instructed Evans not to answer on attorney-client privilege and attorney work product grounds. (*Id.* at 204:25-208:13.) The answers to these questions are not privileged as explained in Sections III, IV, and V, below.

11. Evans was asked about whether he had instructed Sam and Dom to create Trackside Apartments, LLC ("Trackside Apartments") in order to transfer Trackside LP's assets to Trackside Apartments. Mr. Krouner instructed Evans not to answer on attorney-client privilege and attorney work product grounds. (*Id.* at 222:14-223:9). The answer to this question is not privileged as explained in Section IV below.

12. Evans was asked about whether he had advised Sam and Dom to transfer Trackside LP's assets in order to thwart Eric's claim against Trackside LP. Mr. Krouner instructed Evans not to answer on attorney-client privilege and attorney work product grounds. (*Id.* at 223:12-224:3). The answer to this question is not privileged as explained in Section IV below.

Plaintiff moves to compel Defendants and Defendants' counsel to answer these questions which go to the heart of the transactions at issue.

ARGUMENT

I. SAM CELIA MUST ANSWER QUESTIONS ABOUT WHY HE SAID OR DID SOMETHING THAT DEFENDANTS CONCEDE IS NOT PRIVILEGED

Defendants' internal thought processes and motivations—long before litigation—cannot be protected from deposition questions by the attorney-client privilege—particularly where the questions relate to why Sam wrote a communication that Defendants concede is not privileged.

It is black-letter law that the attorney-client privilege is limited to "communications" made between an attorney and his client either "for the purpose of obtaining legal advice" or "the purpose of facilitating the rendition of legal advice." *Rossi v. Blue Cross & Blue Shield of Greater New York*, 540 N.E.2d 703, 706 (N.Y. 1989). Moreover, "[b]ecause the [attorney-client] privilege shields from disclosure pertinent information and therefore constitutes an obstacle to the truth-finding process, it must be narrowly construed." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 34 (N.Y. 2016) (internal quotations omitted). And "[t]he party asserting the privilege bears the burden of establishing … that the communication is predominantly of a legal character, that the communication was confidential and that the privilege was not waived." *Id.*, 57 N.E.3d at 34-35 (quotations removed and numbering added). It is clear that the privilege does not apply to questions and documents at issue.

First, with respect to Plaintiff's Deposition Exhibit 62 ("Exhibit 62") (annexed hereto as Ex. F), Mr. Hirsch referred to an email written by Sam and asked Sam "Why are you asking David Evans the question, 'Now what?" (Ex. A, Sam Tr. at 282:10-11.) Mr. Krouner instructed Sam not to answer on the basis of privilege. (*Id.* at 282:12-14.) Mr. Krouner maintained this objection despite conceding that"[w]ith respect to Plaintiff's Exhibit 62, there is no argument concerning waiver of privilege where Victoria Celia was copied by Sam Celia in an email to David Evans on December 11, 2018" and the "document has been duly produced." (*Id.* at 284:6-23.) When Mr.

Hirsch again attempted to simply ask Sam "Why did you email to David Evans, 'Now what?'" Mr. Krouner again instructed Sam not to answer that question or any subsequent question about Mr. Evans response to Sam's email. (*Id.* at 285:21-286:22.)

Because Defendants concede that Sam's communication with Mr. Evans in Exhibit 62 was not privileged due to Victoria's presence on the communication, Sam's thought processes about these non-privileged communications cannot be privileged either.

Second, with respect to Plaintiff's February 28, 2020 Books and Records Demand, (the "February Letter"), Sam testified that he contacted Mr. Evans after receiving the February Letter. (*Id.* at 262:8-12.) Mr. Hirsch asked Sam "why did you contact counsel?" and Mr. Krouner instructed Sam not to answer on the basis of attorney-client privilege. (*Id.* at 262:14-264:4.) Here too, the Defendants concede that the fact that Sam contacted Mr. Evans is not privileged. Therefore, the question of why Sam chose to do so cannot be privileged either. Sam's thought processes are not "communications … for the purpose of obtaining legal advice." *Rossi*, 540 N.E.2d at 706.

The Court should order Sam to answer these specific questions marked for a ruling in the deposition transcript. Additionally, we ask the Court to rule that all similar questions as to a witness's motivation or meaning in a non-privileged communication or a non-privileged act is not privileged and must be answered at deposition.

II. COMMUNICATIONS BETWEEN MR. EVANS AND VICTORIA CELIA—THE DEFENDANTS' SISTER AND THE ACCOUNTANT FOR CELIA CONSTRUCTION AND TRACKSIDE—ARE NOT PRIVILEGED

Communications and documents sent to, or received from, Victoria are not privileged—Victoria is not an attorney, shareholder, officer, or director of Celia Construction—and Defendants have no basis for asserting that any such communications or documents are protected by the work product doctrine.

As noted above, two necessary elements that Defendants must prove to assert the attorney-client privilege are "that the communication was confidential and that the privilege was not waived." *Ambac Assur. Corp.*, 57 N.E.3d at 35. "Generally, communications made in the presence of third parties, whose presence is known to the client, are not privileged from disclosure because they are not deemed confidential." *Id.* (internal quotations omitted); *Galasso v. Cobleskill Stone Prod., Inc.*, 169 A.D.3d 1344, 1346–47 (3d Dep't 2019). And it is well-established that "[t]here is no accountant-client privilege in this state. *Peerenboom v. Marvel Ent., LLC*, 148 A.D.3d 531, 532 (1st Dep't 2017).

Victoria performed accounting services for Trackside and, to a lesser extent, Celia Construction. (Ex. A, Sam Tr. at 167:4-10, 207:21-208:9.) At no point was Victoria a shareholder, director, or officer of Celia Construction. (*Id.* at 282:19-24; Ex. C, Evans Tr. at 149:20-150:6.) And Defendants' position is that Victoria was a never a limited partner in Trackside. (Ex. A, Sam Tr. at 159:11-160:11.) As an independent accountant, Victoria was a third-party and any communications between her and Celia Construction's corporate counsel, Evans, or communications between Evans and Sam or Dom in Victoria's presence are not privileged.

Defendants have recently tried to assert that communications and documents sent to or received from Victoria should be protected as "work product."[2] (*E.g.*, Ex. C, Evans Tr. at 189:6-192:15.) This assertion is baseless because Victoria is not an attorney and there is no evidence that Victoria was ever retained by counsel or acted as the agent of Defendants solely in anticipation of litigation.

[2] Defendants did not clarify whether they were asserting a claim of attorney work product under CPLR §3101(c) or materials created by and for a party in anticipation of litigation under CPLR §3101(d)(2).

"The work product of an attorney is a concept which has been very narrowly construed." *Cent. Buffalo Project Corp. v. Rainbow Salads, Inc.*, 530 N.Y.S.2d 346, 347–48 (4th Dep't 1988). "[A]ttorney work product … should be narrowly applied to materials prepared *by an attorney*, acting as an attorney, which contain his or her analysis and trial strategy." *Nyahsa Servs., Inc., Self-Ins. Tr. v. People Care Inc.*, 155 A.D.3d 1208, 1211 (3d Dep't 2017) (emphasis in the original and internal quotations removed). Victoria is not an attorney and any reports or other work she created are not protected under the attorney work product rule of CPLR § 3101(c). Similarly, any documents sent to Victoria by Evans lose any work product protection because they are no longer confidential. *Ambac Assur. Corp.*, 57 N.E.3d at 35.

Nor can Defendants legitimately assert that any of Victoria's communications and documents are protected as non-attorney work product under CPLR §3101(d)(2) because there is no evidence that Victoria was ever retained by Evans or Defendants to do work for the sole purpose of this litigation.

In order to protect documents from disclosure "as material prepared for litigation, [Defendants'] burden was to demonstrate that the report was obtained *solely* for litigation purposes, which cannot be satisfied with wholly conclusory allegations." *Nyahsa Servs. Inc.*, 155 A.D.3d at 1211 (emphasis added and quotations removed). Mixed or multipurpose reports are not free from disclosure. *Id.* (quotation removed); *accord Galasso v. Cobleskill Stone Prod., Inc.*, 169 A.D.3d 1344, 1346–47 (3d Dep't 2019) (holding that even report commissioned by a party's counsel and declared confidential was not protected from disclosure because "the primary purpose of [the] valuation was for estate tax purposes and is not 'of a legal character'"). Here, corporate counsel, Evans, testified that he did not recall hiring Victoria to provide services in connection with Celia Construction or Trackside. (Ex. C, Evans Tr. at 42:3-20.) And in the specific instances

where Defendants' objected to questions regarding communications with Victoria, Evans testified that he was not yet anticipating litigation—let alone asking Victoria to prepare material for litigation on behalf of the Defendants. (*Id.* at 142:18-20, 150:19-22.)

The *Nyahsa Servs.* decision is particularly instructive. In that case the "defendant's counsel" retained a "claims consultant" to undertake a review of defendant's "administration of claims of defendant's employees, in order to resolve the parties' impasse over defendant's unpaid assessments"—the very claims that would eventually be subject of the lawsuit. 155 A.D.3d at 1210. The defendant sought to withhold the claims consultant's report—and related communications—on the grounds of "attorney-client privilege, as attorney work product and as material prepared in anticipation of litigation." *Id.* at 1209. After rejecting the defendant's arguments on attorney-client privilege and attorney work-product—the report was not created by an attorney but a third party consultant—the Third Department also rejected the argument that the report and related communications were "material prepared for litigation." *Id.* at 1210-11. The Third Department acknowledged there was evidence that "defendant's chief executive officer reportedly believed that Cool's demands for payment of the assessment raised the possibility of litigation and that defendant thereafter retained WOH to assess its liability." *Id.* at 1211. Nevertheless, the Third Department noted that there was also evidence that one purpose of the report "was to facilitate negotiations, i.e. 'intelligent conversation,' and come to a resolution over the disputed invoices"—and deemed this "a business purpose[] and not solely for litigation" and therefore not protected from disclosure. *Id.* at 1211-12.

Nyahsa Servs. is binding precedent and should govern here. If a report *solicited by counsel to assess potential claims* is not protected material prepared for litigation under CPLR §3101(d) because it was intended to potentially resolve claims before litigation, there is no basis for asserting

such privilege over documents and communications sent to the Defendants' long-time accountant simply because Evans viewed Eric as "adverse" or "antagonistic to the whole corporate governance process." (Ex. C, Evans Tr. at 150:23-151:3, 157:7-9, 158:12-24.) Evans must be directed to answer questions pertaining to his communications with Victoria and documents he sent Victoria prior to onset of this litigation.

III. COMMUNICATIONS BETWEEN MR. EVANS AND PETER KARL—WHO DOES NOT REPRESENT ANY OF THE NAMED DEFENDANTS AND WHOM DEFENDANTS SUBPOENAED—ARE NOT PRIVILEGED

Communications and documents sent to, or received from, Peter Karl ("Karl") are not privileged. Although Karl is an attorney for the estate of Santo Celia, he was not an attorney for Celia Construction, Trackside, Sam, or Dom at the time of the communications and documents at issue—March 2020 onward. (Ex. G, Karl I Tr. at 119:14-122:1.) Moreover, Defendants themselves subpoenaed (Ex. H, hereto) and questioned Karl about these very same issues thereby waiving any potential claim of privilege. Therefore, Defendants have no basis for asserting that any communications and documents sent to or from Karl are protected by attorney-client privilege or the work product doctrine.

As noted above, two necessary elements that Defendants must prove to assert the attorney-client privilege are "that the communication was confidential and that the privilege was not waived." *Ambac Assur. Corp.*, 57 N.E.3d at 35. Because Karl was not an attorney for any of the Defendants—and indeed this action does not challenge or effect the Estate of Santo Celia—his presence in communications defeats any claim for privilege.

Defendants must know that they cannot legitimately invoke attorney-client privilege and work product protections on communications between Evans or Defendants and Karl. (Ex. C, Evans Tr. at 205:10-208:3). Not only were dozens of communications with Karl produced (Hutman Aff. ¶ 6) and communications with Karl publicly filed months ago on January 24 and

February 21, 2022 (NYSCEF Nos. 104 & 125) without any attempt to draw them back but Defendants themselves solicited testimony from Karl about his communications with Sam and Dom. Defendants subpoenaed Karl to be deposed about "the events and allegations described in Plaintiff's Complaint." (Ex. H at 2.) On February 22, 2022, on Defendants' questions at his first deposition, Karl testified about what he "advised" Sam and Dom what they should do with Trackside in the wake of Santo Celia's death.[3] (Ex. G, Karl I Tr. at 108:20-25.) Having solicited testimony about Karl's communications with Sam and Dom for their own purposes, Defendants cannot now claim that such communications are privileged. *See Am. Re-Ins. Co. v. U.S. Fid. & Guar. Co.*, 40 A.D.3d 486, 492 (1st Dep't 2007) (holding that a party "is deemed to have waived the privilege … where a party, through its affirmative acts, places privileged material at issue and has selectively disclosed the advice"); *accord Farrow v. Allen*, 194 A.D.2d 40, 45–46 (1st Dep't 1993) (holding that party cannot "use this privilege both as a sword and a shield").

Finally, during his second deposition, Karl repeatedly testified about his communications with Evans and/or Sam. (*See, e.g.*, Ex. I, Karl II Tr. at 50:22-51:3, 52:13-16, 56:9-58:17, 68:12-22.) Defendants did not object to these questions on privilege grounds and have therefore waived any claim to privilege of communications between Karl and Evans or Defendants.

IV. COMMUNICATIONS BETWEEN MR. EVANS—AT THE TIME WHEN HE WAS ONLY CORPORATE COUNSEL—AND SAM OR DOM CELIA ARE NOT PRIVILEGED AGAINST ERIC

A. During the Period Eric Celia was Director, He was Within the Circle of Privilege for Communication Between Corporate Counsel and Sam

Defendants also cannot legitimately claim privilege over Exhibit 63 (annexed hereto as Ex. B) and Mr. Krouner improperly directed Sam and Evans not to answer questions about that

[3] Mr. Karl later walked back this testimony in the same deposition saying "they never contacted me in the 60 day period following the death of Santo." (Ex. G, Karl I Tr. at 197:8-13.)

document and attempted to claw the document back. (Ex. A, Sam Tr. at 305:7-309:16; Ex. C, Evans Tr. at 186:11-187:22.) This document is an email exchange between Sam and then corporate counsel, Evans about Eric's request for financial documents in January of 2019—over a year before Eric retained outside counsel and served a formal books and records demand—when Eric was still a director of Celia Construction and Evans was only corporate counsel *and did not represent the Defendants in their individual capacities*. (Ex. J, Dom Tr. at 250:6–252:14.) Defendants cannot assert attorney-client privilege on communications between corporate counsel and an officer/director against Eric, who was also a director.

From 1993 until June 2, 2020—when the Defendants removed him—it is indisputable that Eric Celia was a director of Celia Construction. (Am. Compl. ¶¶ 6, 83, 180; Ex. A, Sam Tr. at 278:14–21; Ex. J, Dom Tr. at 250:6–252:22.) And Eric has been, and still is, a shareholder of Celia Construction. (Am. Compl. ¶¶ 6, 180.) As part of Celia Construction, Eric is within the cone of privilege with respect to communications between corporate counsel and other directors of Celia Construction. *See Tekni-Plex, Inc. v. Meyner & Landis*, 674 N.E.2d 663, 670 (N.Y. 1996) ("[W]here the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other.").

Directors of a corporation "have '**an absolute, unqualified right to inspect their corporate books and records**.'" *Derfner Mgmt., Inc. v. Lenhill Realty Corp.*, 90 A.D.3d 434, 435, 933 N.Y.S.2d 671, 672 (1st Dep't 2011) (emphasis in the original) (quoting *Cohen v. Cocoline Prod.*, 127 N.E.2d 906, 907–08 (1955)). Even after Sam and Dom removed Eric as a director, he maintains "a qualified right to inspect the corporate books and records covering a period of his directorship"—in Eric's case from 1993 through the present—particularly where, "as here, … a

director of long service" is removed "just at a time when he was about to undertake an investigation in his capacity as director." *Cohen v. Cocoline Prod.*, 127 N.E.2d 906, 908 (1955); *accord People ex. rel. Spitzer v. Greenberg*, 50 A.D.3d 195, 199–200 (1st Dep't 2008).

Defendants are claiming privilege over a communication between corporate counsel and Sam regarding the responsibilities of officers and directors of Celia Construction—responsibilities that Eric shared. Defendants' disregard of these responsibilities are central to Eric's claims of shareholder oppression and judicial dissolution. "Given the extent of [Eric's] ownership interest and managerial involvement" prior to making any claims or being adverse to his brothers, "the attorney-client privilege [is] not properly invoked by defendants to deny [P]laintiff access to otherwise privileged pre-[removal] materials essential to the proof of his claims." *Fochetta v. Schlackman*, 257 A.D.2d 546, 546, 685 N.Y.S.2d 22, 22 (1st Dep't 1999); *accord Greenberg*, 50 A.D.3d 195, 201-02 (finding that former directors "are within the circle of persons entitled to view privileged materials without causing a waiver of the attorney-client privilege").

Similarly, Mr. Krouner instructed Sam and Evans not to answer multiple questions about what Mr. Evans had advised—as corporate counsel—with respect to Eric's requests for copies of the bylaws and financial records in 2018 and 2019. (Ex. A, Sam Tr. at 286:15-287:23, 296:20-298:5, 304:8-16; Ex. C, Evans Tr. at 128:3-147:4, 182:3-190:8.) All of these instructions were improper. In 2018, 2019, and 2020—until he was removed as a director—Mr. Evans' communications as corporate counsel with Eric's fellow directors cannot be privileged against Eric.

The Court should order Sam and Evans to answer the specific questions marked for a ruling in their respective deposition transcripts. Additionally, we ask the Court to rule that all similar questions about communications between Evans and the Defendants during the period that Eric

was a director of Celia Construction—and certainly before the February Letter—must be answered at future depositions.

B. Even After Defendants Removed Eric as a Director, Communications Between Evans and Sam are not Privileged Against Eric Under the Fiduciary Exception

Even after the Defendants removed Eric as a director, their communications with Evans as corporate counsel are not privileged because they and Evans—as officers, directors, majority partners, and corporate counsel—owed Eric, Celia Construction, and Trackside LP fiduciary duties of loyalty, care, and good faith. In the corporate context, where a shareholder sues corporate management for breach of fiduciary duty, the fiduciary exception to the attorney-client privilege attaches to communications between management and corporate counsel. *NAMA Holdings, LLC v. Greenberg Traurig LLP*, 133 A.D.3d 46, 52 (1st Dept. 2015).

The basis of the fiduciary exception is to permit a beneficiary of a fiduciary that is accusing the fiduciary—such as a corporate officer or trustee—of wrongdoing against the interests of the beneficiary to discover the full extent of such wrongdoing. As the Third Department declared in *Hoopes v. Carota*, "[t]he salient factor on this issue is that defendant, both in his capacity as a trustee and as a corporate officer and director, was the fiduciary of plaintiffs. In any of these roles, defendant was not entitled to shield absolutely from his beneficiaries the communications between him and his attorneys regarding pertinent affairs of the trust and of the corporation." 142 A.D.2d 906, 909-10 (3d Dept. 1988), *aff'd*, 74 N.Y.2d (1989). In *Hoopes*, the beneficiaries of a trust, which held stock in a corporation, sought the disclosure of communications between an individual defendant, who both managed the trust and was an officer of the corporation, and the trust company's counsel regarding the transactions at issue in the complaint. *Id.* at 909. The complaint in *Hoopes* alleged—as Plaintiff's complaint does here—that the defendant engaged in "self-dealing and other misconduct in which he acted with a conflict of interest, both as trustee and as

chief executive officer and a director of the corporation, all of which was inimical to the interests of the trust beneficiaries." *Hoopes*, 142 A.D.2d at 907. The Court concluded that the defendant: "Cannot subordinate the interests of the beneficiaries, directly affected by the advice sought, to his own private interests under the guise of privilege." *Id*. at 908. Instead, as the Court in *Hoopes* concluded, management judgment must stand on its merits, and not behind a veil of secrecy which prevents it from being questioned by those for whom it is supposed to be exercised. *Id*. at 910.

Here too, Evans was corporate counsel to Celia Construction and Trackside LP advising Sam and Dom on how to use their positions as officers, directors, and controlling shareholders of Celia Construction and majority partners of Trackside act to harm their brother Eric—who as a director, shareholder, and limited partner was a beneficiary to Sam's and Dom's fiduciary duties. For example, in Exhibit 63, Evans advises Sam that as a corporate officer he does not owe any obligations to Eric and does not need to provide him any information—despite Eric being a director and 16% shareholder—and should only give Eric minimal information as a "fig leaf." (Ex. B at 1) This corresponds perfectly to Eric's claim that Sam and Dom oppressed him, in part by refusing to provide him basic financial information about Celia Construction in an attempt to hide their wrongdoing. (Am. Compl. ¶¶ 4, 70-75, 88, 166-67.) Similarly, on March 24, 2020—after receiving Eric's demand letter related to Trackside LP—Mr. Evans created Trackside Apartments on behalf of Sam on Dom (Ex. K) and instructed Victoria Celia to transfer over Trackside LP's bank accounts to Trackside Apartments (Ex. L). But Evans refuses to answer whether he advised Sam and Dom to create Trackside Apartments and to transfer Trackside LP's assets to Trackside Apartments in order to thwart Eric's interest in Trackside LP. (Ex. C, Evan's Tr. at 222:14-223:25). This information is directly relevant to Eric's claim of an intentional fraudulent transfer. (Am. Compl. ¶¶ 65-7, 203-211.)

Like in *Hoopes*, "the information sought is highly relevant to and may be the only evidence available on whether defendant's actions respecting the relevant transactions and proposals were in furtherance of the interests of the beneficiaries … or primarily for his own interests in preserving and promoting the rewards and security of his position as a corporate officer." *Hoopes*, 142 A.D.2d at 910. As such, "good cause for disclosure has been shown." *Id.*; *aff'd Hoopes v. Carota*, 543 N.E.2d 73, 74 (N.Y. 1989) ("We agree with the Appellate Division that "good cause" is present here … Therefore, the communications are not privileged in any event.") *Hoopes* is binding precedent and should govern here.

Consequently, Plaintiff has established the requisite good cause for disclosure, and communications between Evans and Defendants regarding their decisions to (i) withhold information about Celia Construction from Eric, (ii) engage in related party transactions; (iii) remove Eric as a director of Celia Construction; (iv) create Trackside Apartments; and (v) transfer or attempt to transfer Trackside LP's assets to Trackside Apartments, should not be withheld from Plaintiff. *See Stenovich v. Wachtell, Lipton, Rosen & Katz*, 756 N.Y.S.2d 367, 382-83 (Sup. Ct. N.Y. Cty. 2003) (shareholders entitled to communications between board of directors and outside counsel regarding details of merger negotiations pursuant to the fiduciary exception to attorney-client privilege).

The Court should order Sam and Evans to answer the specific questions marked for a ruling in their respective deposition transcripts set forth in this memorandum of law. Additionally, we ask the Court to rule that Evans—whose deposition is only partially completed and will be continued—is required to answer similar questions about communications between himself as corporate counsel and Sam or Dom during the period prior to the initiation of this action.

V. DEFENDANTS HAVE WAIVED ANY CLAIM TO PRIVILEGE BECAUSE THEY PRODUCED THE COMMUNICATIONS AT ISSUE AND FAILED TO CLAIM PRIVILEGE DESPITE BEING ON NOTICE OF THEIR PRODUCTION

A. Defendants Produced Dozens of Communications and Documents Between Evans and Sam or Dom and Never Previously Asserted They Were Privileged—Despite Their Public Filing Two Weeks Before Sam's Deposition

Plaintiff believes that Exhibits 63 and 73—and similar communications produced by Defendants or Mr. Evans—are not privileged. But if they were privileged, Defendants waived the privilege with respect to Plaintiff's Exhibit 63 and similar emails by producing dozens and dozens of them and failing to promptly to claw them back—despite Plaintiff publicly filing Plaintiff's Exhibit 63 more than two weeks before Sam Celia's deposition.

In New York, it is well-settled that disclosure of a privileged document generally operates as a waiver of the privilege unless it is shown that (1) the producing party intended to maintain confidentiality and took reasonable steps to prevent its disclosure; (2) the producing party 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. *AFA Protective Sys., Inc. v. City of New York*, 13 A.D.3d 564, 565 (2d Dep't 2004). The burden is on the proponent of the privilege to prove that the privilege has not been waived. *Parnes v. Parnes,* 80 A.D.3d 948, 950 (3d Dep't 2011). Here, Defendants cannot meet their burden of establishing that the disclosure was inadvertent or otherwise did not operate as a waiver of privilege.

"[R]easonable steps" to prevent inadvertent disclosure require include a showing by counsel that he or she undertook a "diligent and careful" review of the documents. *Current Med. Directions, LLC v. Salomone*, 26 Misc.3d 1229(A), 2010 WL 724686 at *13 (N.Y. Cty. 2010); *accord Bras v. Atlas Const. Corp.*, 545 N.Y.S.2d 723, 725 (2d Dep't 1989) (finding waiver where the appellant's "screening procedure … was not reasonably designed or executed so as to prevent the inadvertent disclosure."). And "[a] party seeking to show that inadvertent disclosure of

privileged material did not waive the privilege must show, among other things, that it tried to remedy such disclosure immediately." *Fischman v. Mitsubishi Chem. Holdings Am., Inc.*, 2019 WL 3034866, at *3 (S.D.N.Y. July 11, 2019) (internal quotation omitted).

Here, Defendants have failed to establish that they intended to maintain confidentiality of Exhibit 63 and similar communications or that they took reasonable steps to prevent disclosure. To the contrary, on March 15, 2022—two weeks before Sam Celia's deposition—Plaintiff publicly filed Exhibit 63 as an exhibit to a letter to the Court. (NYSCEF Doc. No. 149 at 4.) Yet, despite being on notice for over two weeks that they had produced an email they now assert to be privilege, Defendants never claimed it was inadvertently produced, nor did they make any effort to claw it back or review their production for similar documents. Defendants' failure to exercise due diligence in promptly remedying the disclosure weighs heavily in favor of waiver. *See Cypress Partners LLC v. Shawe*, No. 654101/2018, 2021 WL 1379260, at *1 (N.Y. Sup. Ct. Apr. 09, 2021) ("A party seeking to show that inadvertent disclosure of privileged material did not waive the privilege must show, among other things, that it tried to remedy such disclosure immediately.... Where the delay can be measured in weeks or months, as here, courts routinely reject requests to put the proverbial genie back in the bottle.") (*quoting Fischman* 2019 WL 3034866, at *3).

Nor are Exhibits 63 and 73 isolated emails that slipped through the cracks. Defendants' and Evans' productions contained over 120 emails between Sam or Dom and Evans from the period prior to the filing of this action. (Hutman Aff. ¶ 4.) This is further evidence that Defendants did not intend to maintain confidentiality and failed to take reasonable steps to prevent disclosure of these communications.

Finally, Plaintiff will be prejudiced if they are precluded from using the email at issue. In *Salomone,* the court determined that a protective order was not appropriate because certain emails appeared to support the plaintiff's claims and their preclusion would necessarily cause undue prejudice. 26 Misc.3d 1229(A) at *13. The same is true here. Exhibit 63 shows that Defendants were deliberately attempting to keep Eric in the dark about the operation of Celia Construction—despite his position as a director, co-founder, and 16% shareholder—in breach of their fiduciary duties to him.

B. Defendants Produced Hundreds of Communications and Documents Sent Between Evans and Victoria and Never Previously Asserted They Were Protected Work Product—Despite the Public Filing of Some of Them

Defendants are on even weaker ground with respect to their assertion—both in Chambers and during the deposition of Evans—of the work-product privilege on documents and communications that were sent or received from Victoria Celia. (Ex. C, Evans Tr. at 147:14-150:22, 188:20-192:15.)

On January 24, 2021, Plaintiff publicly filed—as an exhibit to Plaintiff's motion for preliminary injunction—a March 24, 2020 email in which Evans told Victoria to transfer over the bank accounts of Trackside LP to Trackside Apartments. (NYSCEF No. 106.) Defendants made no attempt to claw this document back as protective work product. In the same filing Plaintiff also included a March 12, 2020 email from Victoria to Evans—forwarding earlier emails between Victoria and Karl about Trackside. (NYSCEF No. 104.) Defendants made no attempt to claw back that document either. Having known about these documents for over two months without attempting to claw them back, Defendants cannot now claim that they are protected work product. *See Fischman* 2019 WL 3034866, at *3 (holding that "a request for the return or destruction of inadvertently produced privileged materials" normally must take place "*within days* after learning of the disclosure") (emphasis in the original); *S.E.C. v. Cassano,* 189 F.R.D. 83, 86 (S.D.N.Y.

1999) (holding that SEC failed to act promptly when it waited "12 days" to attempt to claw back the privileged documents).

Additionally, Defendants and Evans produced over 150 emails and documents sent between Victoria and Mr. Evans without any indication that they might be privileged. (Hutman Aff. ¶ 5.) Defendants' belated attempt to claim that it was maintaining any sort of privilege or work product protection with respect to the documents created, sent, or received by Victoria is not credible.

The Defendants have demonstrated through their actions that they either did not view the communications and documents at issue as privileged or work product to begin with or they have chosen to waive those barriers to disclosure. Either way, the Court should compel Sam and Evans to answer the questions marked for a ruling and any similar questions during the second part of Evans' deposition.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Compel should be granted in its entirety, Sam and Evans should be ordered to answer the questions marked for a ruling, and Plaintiff should be awarded attorney's fees and costs incurred in bringing this motion.

Dated: New York, NY
April 18, 2022

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