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

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL AND IN SUPPORT OF DEFENDANTS' CROSS MOTION

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INTRODUCTION

Defendants Samuel A. Celia ("Sam"), Dominick S. Celia ("Dominick"), Celia Construction Inc. ("Celia Construction"), Trackside LP ("Trackside"), and Trackside Apartments, LLC ("Trackside Apartments") (collectively, "Defendants"), submit this memorandum of law in opposition to Plaintiff Eric Celia's ("Plaintiff's") motion to compel disclosure of privileged information ("Plaintiff's Motion"). For four reasons, the Court should deny Plaintiff's Motion. First, the information Plaintiff seeks constitutes privileged attorney-client communications between Defendants and their attorney, David Evans, Esq. ("Mr. Evans"), attorney work product, and/or material prepared in anticipation of litigation. Second, third parties did not negate the confidentiality of attorney-client communications where their presence was to facilitate such communications. Third, Defendants did not waive privilege in documents inadvertently disclosed to Plaintiff, which Defendants promptly attempted to claw back. Fourth, Plaintiff failed to meet his burden to show that an exception applies to allow him to pierce Defendants' privileged materials. Consequently, Plaintiff's Motion should be denied, including his request for sanctions against Defendants.

In addition, by notice of cross-motion, Defendants respectfully request the Court grant an order of protection requiring Plaintiff and his counsel to identify, return, and destroy all copies of privileged material inadvertently disclosed by Defendants. Defendants additionally request that Plaintiff be prohibited from hereafter referencing, filing, seeking to admit into evidence, or otherwise using such privileged material. Defendants further request that the Court seal and/or remove any of the privileged material filed by Plaintiff in this case.

BACKGROUND

Plaintiff sued his brothers Sam and Dominick because, after their father Santo Celia

("Santo") had died, Plaintiff felt that he was entitled to have inherited a greater share of the family businesses, Trackside and Celia Construction. Last week, Plaintiff's sister, Victoria Celia ("Victoria"), testified that Plaintiff was aggrieved by his diminished interests in the family's businesses, which Plaintiff had abandoned in favor of the comfort of an engineering career with the State of New York. Victoria testified that she told Plaintiff that he should complain to their father, Santo. See Victoria's deposition transcript ("Victoria Tr."), 134:10-19, a copy of which is annexed to the Affirmation of Mr. Evans (the "Evans Aff.") as **Exhibit A**. For good reason, it does not appear that Plaintiff ever took Victoria's advice. It would not have ended well. Indeed, Santo's estate lawyer, Peter Karl ("Mr. Karl"), previously attempted to mediate a family meeting between Santo and Plaintiff on this topic, which Mr. Karl described as infamous, contentious, and very negative. See Mr. Karl's deposition transcript ("Karl Tr."), 31:22-32:3; 33:22-34:2; 39:16-40:7, a copy of which is annexed to the Evans Aff. as **Exhibit B**.[1]

Consequently, instead of addressing his grievances with his father, Plaintiff waited until his father died to launch his misguided ire, and this litigation, upon his brothers, who had nothing to do with their father's eminently fair, and well-considered, estate plan. Id. at 113:19-116:4.

Unlike Sam and Dominick, Plaintiff was never a partner of Trackside. See Sam's deposition transcript ("Sam Tr."), 158:25-159:10, a copy of which is annexed to the Evans Aff. as **Exhibit C**; see also the 2009 Limited Partnership Agreement of Trackside Limited Partnership's recitals, signature page, and schedule titled "Exhibit B," a copy of which is annexed to the Evans Aff. as **Exhibit D**. Consequently, where Plaintiff had no equity interest in Trackside, notwithstanding his profits interest, Defendants did not owe him any fiduciary duty.

[1] Mr. Karl also testified that Santo justifiably disinherited Plaintiff for two reasons. First, Plaintiff chose to abandon the family businesses, whereas Defendants Sam and Dominick remained with Santo to build it. Second, Santo loathed Plaintiff's wife, Susan Celia, who Santo viewed as a divisive force in the family. Id. at 113:10-116:4.

Thus, Plaintiff has no basis to compel disclosure of privileged material based upon a non-existent fiduciary duty.

Celia Construction's shareholders are Sam, Dominick, and Plaintiff. On or about December 26, 2012, Santo gifted his shares of Celia Construction to Sam and Dominick. See Karl Tr., 95:3-98:9. Since then, Sam and Dominick have held the majority of Celia Construction's shares, 42% each, and Plaintiff has held a minority 16% of Celia Construction's shares. Consequently, where Santo had already given his shares to Sam and Dominick, Plaintiff did not inherit any shares in Celia Construction when Santo died.

Sam, Dominick, and Plaintiff were the directors of Celia Construction. However, Plaintiff was a director in name only and he was disinterested and uninvolved in the business affairs of Celia Construction. See Evans Aff. ¶ 11. Plaintiff was terminated as a director on June 2, 2020.

In or about February of 2018, Plaintiff began demanding copies of Celia Construction's and Trackside's books and records. Initially, the reason Plaintiff provided was so that he could update his estate plan. See Plaintiff's February 24, 2018 Letter, a copy of which is annexed to the Evans Aff. as **Exhibit E**.[2] Plaintiff changed his reason in or about December of 2018, and suspiciously said he wanted Celia Construction's books and records to meet his fiduciary duties and Sam's and Dominick's expectations. See Plaintiff's Motion, p. 12.

In or about December 2018, Plaintiff's actions changed from disinterested to adverse to Celia Construction and its other shareholders and directors. At that time, as corporate counsel to Celia Construction, Mr. Evans regarded Plaintiff as a risk to commence litigation, antagonistic to

[2] Where Plaintiff was never a partner of Trackside, he had no entitlement to its books and records. As for Celia Construction, Plaintiff did not seek its books and records for any reason related to its business affairs or his role as a director. Rather, it was clear that Plaintiff's demands were for his personal purposes.

the whole corporate governance process, and had made passive-aggressive records demands. See Mr. Evans's deposition transcript ("Evans Tr."), 158:4-159:8; 184:13-185:20, a copy of which is annexed to the Evans Aff. as **Exhibit F.** Sometime within the approximate year, Plaintiff retained counsel in this matter. See NYSCEF Doc. No. 35.

On or about March 19, 2020, Defendants' corporate counsel and litigation co-counsel, Mr. Evans, entered into an oral Kovel agreement with Victoria,[3] the certified public accountant for Celia Construction, Trackside, and Trackside Apartments. See Evans Aff. ¶ 12; Victoria Tr. 43:25-45:25.

On September 18, 2020, Plaintiff commenced this lawsuit. See NYSCEF Doc. No 1.

Throughout this litigation, Defendants have produced to Plaintiff over 20,000 pages of documents and email discovery. See Evans Aff. ¶ 13. Defendants, through their counsel, hired a third-party electronic discovery firm (the "e-Discovery Firm") to manage the review and production of electronic data. To avoid inadvertent disclosure of privileged materials, defense counsel instructed the e-Discovery Firm to run electronic search strings across the data to withhold documents that contained terms and actors indicative of privilege, unless a third-party destroyed privilege. Further, defense counsel instructed the e-Discovery Firm to escalate to defense counsel to resolve all questions concerning privilege determinations. Prior to production, defense counsel ran an independent search across the data to sample and review and confirm the privilege determinations made by the e-Discovery Firm on the documents to be disclosed.[4] Id.

[3] Under United States v. Kovel, 296 F.2d 918 (2d Cir. 1961), an agreement between an attorney and an accountant renders the accountant's work for the attorney protected work product, notwithstanding the absence of any accountant-client privilege.

[4] Defense counsel offers this this information solely because it is necessary to oppose Plaintiff's Motion. Defense counsel reserves their attorney work product privilege for all other intents and purposes. Id. ¶ 13.

Due to the sheer volume of data and challenges with the e-Discovery Firm, Defendants' timely production of discovery was delayed, which was the subject of discovery conferences and orders entered by the Court. Id. ¶ 14.

Despite the time pressures that arose from prior discovery challenges, Mr. Evans also produced emails and documents in response to a June 16, 2021 subpoena from Plaintiff. Id. ¶ 15. To avoid inadvertent disclosure of privileged materials, Mr. Evans instructed his associates to review and withhold from production all emails between his office and Sam and/or Dominick, unless a third party was also a recipient. Mr. Evans sampled a portion of the emails to be produced to ensure no confidential correspondence were included in the production. Mr. Evans also reviewed emails and documents to redact attorney work product.[5] Id.

Plaintiff's counsel did not inform defense counsel that any privileged materials were contained in the discovery produced by either Defendants or Mr. Evans. Id. ¶ 16. Rather, Plaintiff's counsel sought to exploit the inadvertent disclosure to their advantage and disclosed it piecemeal.

On March 31, 2022, Sam was deposed. During Sam's deposition, defense counsel objected that Plaintiff's Exhibit 63 were privileged, inadvertently disclosed, and immediately sought to claw them back. See Sam Tr., 305:2-308:17. Further, when Plaintiff's counsel then attempted to read the controverted exhibit into the records, defense counsel moved to strike. Id at 308:11-17. Moreover, defense counsel also repeatedly instructed Sam not to answer questions that called for privileged information beyond Plaintiff's Exhibit 63, evidencing that Defendants did not intend to waive their attorney-client privilege. See, e.g., Id. at p. 9.

On April 5, 2022, two days before the deposition of Mr. Evans, Plaintiff's counsel filed a

[5] Defense counsel offers this this information solely because it is necessary to oppose Plaintiff's Motion. Defense counsel reserves their attorney work product privilege for all other intents and purposes. Id. ¶ 15.

letter motion seeking to compel Sam and Mr. Evans to answer questions about the privileged documents and communications that had been inadvertently disclosed. A copy of Plaintiff's April 5, 2022 Letter is annexed to the Evans Aff. as **Exhibit G**. For the first time, Plaintiff's counsel stated that Defendants had produced "dozens" of privileged emails, which Defendants had not previously known. Other than the vague reference to "dozens," Plaintiff's counsel failed to identify the documents that Defendants had inadvertently disclosed. See Evans Aff. ¶ 9.

By letter dated April 6, 2022, defense counsel responded that privileged materials referenced in Plaintiff's April 5, 2022 letter were inadvertently produced. A copy of Defendants' April 6, 2022 Letter is annexed to the Evans Aff. as **Exhibit H**. Defense counsel wrote that they did not know if other privileged material was inadvertently disclosed. Citing Rule 4.4(b) of the Rules of Professional Conduct, Defense counsel asked Plaintiff's counsel to "honor their professional duty and identify" the disclosed materials that they believed were privileged. Id. As of today, Plaintiff's counsel has still failed to do so.

On April 8, 2022, Plaintiff withdrew his April 5, 2022 letter motion to compel. See NYSCEF Doc. No. 157.

On April 18, 2022, Plaintiff's Motion was filed, which now indicated that 120 privileged attorney-client communications had been disclosed by Defendants. See Plaintiff's Motion, p. 18. However, Plaintiff still did not identify any such inadvertently disclosed documents.

Defendants disclosed more than 20,000 of pages of discovery to Plaintiff. Of that, Plaintiff's counsel vaguely stated that between "dozens" and 120 privileged documents were inadvertently disclosed. If Plaintiff's counsel's representations are correct, the error rate of inadvertently disclosed material is infinitesimally small – somewhere between 0.24% and 0.6%.

ARGUMENT

I. SAM CELIA'S REASONING BEHIND SEEKING THE ADVICE OF COUNSEL IS PRIVILEGED

The CPLR establishes three categories of protected materials: (a) privileged materials, which are absolutely immune from discovery (CPLR 3101(b)); (b) attorney work product, which is also absolutely immune from discovery (CPLR 3101(c)); and (c) material prepared in anticipation of litigation, which are subject to disclosure only on a showing of substantial need and undue hardship for the party seeking it to obtain the substantial equivalent of the materials by other means (CPLR 3101(d)(2)). All of the discovery that Plaintiff asks the Court to compel is protected by one or more of these three categories.

Plaintiff argues that Sam should be compelled to disclose his motivations and meaning behind his communications to Celia Construction's corporate counsel and litigation co-counsel, Mr. Evans. See Plaintiff's Motion, p. 1, No. 1. Plaintiff references the following questions to which he was instructed not to answer:

(a) "Sam was asked why he contacted counsel in reaction to receiving a books and records demand." Id. p. 2, No. 1.

(b) "Sam was asked why he asked [Mr.] Evans 'now what,'" after receipt of Plaintiff's demand for Celia Construction's books and records in Plaintiff's Exhibit 62. Id. p. 2, No. 2.

These questions facially concern privileged communications and Plaintiff is not entitled to answers protected by the attorney-client and litigation privileges.

First, "the attorney-client privilege shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship." Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616, 623 (2016). The privilege "fosters the open dialogue between lawyer and client . . . to ensure that one seeking legal advice will be able to

confide fully and freely in his attorney." Id. The communication must be predominantly of a legal character, confidential, and not waived. Id. at 624.[6]

Second, attorney work product includes information concerning "interviews, statements, memoranda, correspondence, briefs, mental impressions, or personal beliefs that were held, prepared or conducted by the attorney, [which] enjoy the absolute immunity of the attorney work product doctrine." Lichtenberg v. Zinn, 243 A.D.2d 1045, 1048 (3d Dept. 1997) (internal citations and quotations omitted).

Third, materials prepared in anticipation of litigation "by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." CPLR 3101(d)(2).

Even materials that are not themselves privileged attorney-client communications or work product, such as attorney billing records, they may still be shielded by the privilege because their disclosure will provide the requesting party with information tending to reveal the nature or substance of protected communications or legal strategy. See, e.g., Eizenstein & Co. v. Global Trading, LLC, 2021 N.Y. Misc. LEXIS 2201, *5-6 (Sup. Ct. New York Co. 2021), citing De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 (1st Dept. 1994); Restatement 3d of Law Governing Lawyers, § 69 (attorney-client privilege applies if the testimony directly or by reasonable inference would reveal the content of a confidential communication).

Once the party resisting disclosure has shown the material is privileged attorney-client

[6] Defendants address in Section II, infra, Plaintiff's argument challenging confidentiality of attorney-client conversations where Victoria and/or Mr. Karl was present. Defendants address in Section V, infra, Plaintiff's argument that the attorney-client privileged was waived.

communication or litigation material, the burden shifts to the party seeking disclosure to show that an exception applies to allow the privilege to be pierced. See, e.g., NAMA Holdings, LLC v. Greenberg Traurig LLP, 133 A.D.3d 46, 60, n. 3 (1st Dept. 2015); Sullivan v. Smith, 198 A.D.2d 749 (3d Dept. 1993).

Plaintiff argues that he is entitled to ask Sam, "why he contacted counsel in reaction to receiving a books and records demand," because the reason for communicating is not itself a communication. However, the answer to that question necessarily reveals the substance of the confidential communication between Sam and Mr. Evans for purposes of both obtaining and conveying legal advice. Compelling Sam to answer will provide Plaintiff with information tending to reveal the nature or substance of protected communications. Moreover, compelling Sam to answer will allow Plaintiff to infer the Defendants' litigation strategy and Mr. Evans' work product. Plaintiff's non-communication argument would improperly erode the attorney-client privilege. If that were the case, an adversary could dodge the privilege by asking an opposing attorney or party what he had intended to say to the other, to infer the actual words that he spoke moments thereafter.

Plaintiff's Exhibit 63 is clearly privileged where it was an email sent from Mr. Evans to Sam in response to Sam's question of how Sam should respond to Plaintiff's demands. No one else was a recipient. Consequently, on its face, Plaintiff's Exhibit 63 is privileged.

Consequently, Sam should not be compelled to disclose information that reveals the nature or substance of protected communications or trial strategy.

II. COMMUNICATIONS WITH VICTORIA CELIA AND PETER KARL ARE PRIVILEGED BECAUSE THEY FACILITATED ATTORNEY-CLIENT COMMUNICATIONS BETWEEN DAVID EVANS AND DEFENDANTS

Plaintiff improperly seeks to compel Defendants to disclose privileged communications on the ground that Victoria's and Mr. Karl's presence destroyed the element confidentiality. See

Plaintiff's Motion, p. 1, Nos. 2-3. Specifically, Plaintiff takes issue with witnesses being instructed not to answer the following questions:

(a) Why Sam "asked Mr. Evans 'now what?' in an email copying Victoria." Id. p. 2, No. 1.

(b) Why Mr. Evans copied "Victoria on an email sending Celia Construction shareholder meeting minutes and new bylaws." Id. p. 2, No. 4

(c) What was "the meaning of a draft letter [Mr. Evans] wrote that he sent to Sam, Dominick and Victoria." Id. p. 3, No. 8.

(d) What was "the purpose and content of conference call between [Mr. Evans], Sam, Dominick, and Mr. Karl." Id., No. 10.

Plaintiff is not entitled to such discovery where the presence of Victoria and Mr. Karl was necessary to facilitate attorney-client communications between Mr. Evans, Sam, and Dominick.

Notably, Plaintiff's Motion entirely ignores United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). In Kovel, the presence of accountant employed by a law firm did not render attorney-client communications unprivileged. Rather, the Supreme Court reasoned, "the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." Id. at 922.

Indeed, New York has recognized that statements made in the presence of third parties, including accountants, "retain their confidential (and therefore, privileged) character, where the presence of such third parties is deemed necessary to enable the attorney-client communication and the client has a reasonable expectation of confidentiality." Ambac, 27 N.Y.3d at 624; see also People v. Osorio, 75 N.Y.2d 80, 84 (1989) ("communications made to counsel through . . . one serving as an agent of either attorney or client to facilitate communication, generally will be privileged"), citing Kovel, 296 F.2d at 921-922.

The Defendants need not have had a fiduciary or formal agency relationship with Victoria or Mr. Karl; Defendants need only have had a reasonable expectation of confidentiality.

See Osorio, 75 N.Y.2d at 84 ("The scope of the privilege is not defined by the third parties' employment or function, [but] depends on whether the client had a reasonable expectation of confidentiality under the circumstances").

In the case of Victoria, both she and Mr. Evans characterized their relationship as under a "Kovel" agreement. Victoria was necessary and helpful for Mr. Evans to adequately advise his clients, the Defendants, because Victoria was the certified public accountant and tax preparer for Defendants. Victoria had factual knowledge concerning Defendants' finances, and the accounting and tax expertise necessary for Mr. Evans to advise Defendants on transactions and responding to government and shareholder inquiries concerning the same. For the same reasons, Defendants also had a reasonable expectation of confidentiality under the circumstances.

Likewise, Mr. Karl was necessary and helpful for Mr. Evans to adequately advise Defendants concerning Trackside and Celia Construction. Mr. Karl was the scrivener of the incorporating documents for Trackside, and he maintained the stock ledger for Celia Construction. Mr. Karl also drafted the estate plan for Santo. Consequently, confidential communications involving Mr. Karl were necessary and helpful for Mr. Evans to understand and interpret these legal instruments so that Mr. Evans could advise Defendants thereon. Moreover, where Mr. Karl represented Santo's estate, of which Sam and Dominick were the trustees, Defendants also had a reasonable expectation of confidentiality under the circumstances.

Consequently, the presence of Victoria and Mr. Karl for conversations that Mr. Evans had with Defendants did not destroy the attorney-client privilege.

III. DAVID EVANS'S THOUGHT PROCESSES ARE ATTORNEY WORK PRODUCT AND ABSOLUTELY IMMUNE FROM DISCLOSURE

Mr. Evans' attorney's work product is absolutely immune to disclosure. However, Plaintiff improvidently argues that Defendants should be compelled to disclose Mr. Evans's

reasons or intent in materials he prepared or advice he gave. See Plaintiff's Motion, p. 1, No. 1.

Plaintiff takes issue with witnesses being instructed not to answer the following questions, which on their face solicit Mr. Evans's work product:

(a) "What Mr. Evans's response was to the 'now what?' email question" from Sam. Id. p. 2, No. 3.

(b) "Whether Mr. Evans advised Sam not to give [Plaintiff] the documents he was requesting." Id. p. 2, Nos. 4(i) and 5.

(c) Whether Mr. Evans ever "advised Sam to send [Plaintiff] a copy of the original bylaws in advance of a shareholders vote." Id. p. 3, No. 1.

(d) Whether Mr. Evans believed that "the fact that the new bylaws allowed [Plaintiff] to be removed as a director would be material for [Plaintiff] to know." Id. p. 3, No. 2.

(e) Whether Mr. Evans "believed that [Plaintiff] was entitled to view the financial statements of Celia Construction." Id., No. 3.

(f) "Why [Mr. Evans] felt he should copy Victoria on an email sending Celia Construction shareholder meeting minutes and new bylaws." Id., No. 4.

(g) Whether Mr. Evans based his opinion on the removal of Plaintiff as a director of Celia Construction "was based on the new bylaws not having the minimum number of directors contained in the original bylaws." Id., No. 5.

(h) "Why [Mr. Evans] drafted new bylaws." Id., p. 4, No. 6.

(i) What was "the meaning of a draft letter [Mr. Evans] wrote that he sent to Sam Dominick and Victoria." Id., No. 8.

(j) What was "the purpose and content of conference call between [Mr. Evans], Sam, Dominick, and Mr. Karl." Id., No. 10.

(k) Whether advice Mr. Evans gave to Sam and Dominick was given "in order to transfer Trackside's assets to Trackside Apartments." Id., No. 11.

(l) Whether advice Mr. Evans gave to Sam and Dominick was given "in order to thwart [Plaintiff's] claim against Trackside." Id., No. 12.

Plaintiff is not entitled to discovery on what Mr. Evans advised, let alone "why" or for what "purpose" he gave advice, consulted people, or drafted documents, what facts he found material, or what he believed his advice would allow Defendants to accomplish.

Attorney work product, including "interviews, statements, memoranda, correspondence, briefs, mental impressions, or personal beliefs that were held, prepared or conducted by the attorney," are absolutely immune from disclosure. Lichtenberg, 243 A.D.2d at 1048. Indeed,

> [w]ere such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, 329 U.S. 495, 511 (1947).

If Sam and Mr. Evans are compelled to answer these questions, it will reveal Mr. Evans's mental impressions and beliefs about the subject matter of this litigation. Each of these questions call for Mr. Evans's reasoning, beliefs, impressions, feelings, in connection with the legal advice he provided to Defendants. Consequently, neither Sam nor Mr. Evans should be compelled to disclose Mr. Evans's attorney work product.

IV. PLAINTIFF IS NOT ENTITLED TO PIERCE THE ATTORNEY-CLIENT PRIVILEGE FOR COMMUNICATIONS BETWEEN DAVID EVANS AND HIS CLIENTS/DEFENDANTS

Plaintiff improvidently argues that communications between Sam, Dominick, and Celia Construction's corporate counsel, Mr. Evans, are not privileged. See Plaintiff's Motion, p. 1, No. 4. Plaintiff takes issue with Sam, Dominick, and Mr. Evans being instructed not to testify concerning what questions Sam and Dominick asked Mr. Evans, what advice they were given by Mr. Evans, and whether they discussed their prospective actions with Mr. Evans. Id., p. 2, Nos. 1-7; and p. 3, Nos. 1, 4-5, 7-8, 10-12.

Such questions call for information that is facially privileged. Consequently, Plaintiff is not entitled to compel answers to such questions.

A. Plaintiff's Status As A Former Corporate Director Renders Him Impotent To Pierce The Attorney-Client Privilege Between Corporate Counsel And Defendants

Plaintiff incorrectly argues that as a former director of Celia Construction, he has an absolute entitlement to pierce the attorney-client privilege between Mr. Evans, as corporate counsel, and Defendants. Plaintiff is wrong as a matter of fact and law. As a matter of fact, Plaintiff is a former director of Celia Construction. As a matter of law, his own case authority confirms that distinction is fatal to his argument.

First, Plaintiff's own authority confirms that "when a director is removed from office, even if this is done while his suit to compel inspection of the books and records is pending before Special Term, his absolute right to such an inspection terminates forthwith." Cohen v. Cocoline Products, Inc., 309 N.Y. 119, 123-124 (1955); see Plaintiff's Motion, pp. 12-13.

Second, Plaintiff fails to explain why this Court should expand any right he may have had to inspect books and records to additionally include the privileged communications that concerned Plaintiff's request and how to respond.

Third, assuming, arguendo, that Plaintiff had any qualified right of access after he was no longer a director, such would be conditioned on whether the information he seeks is necessary to protect himself from personal liability or to "the interest of the stockholders." Cohen, 309 N.Y. at 124. Plaintiff made no such showing. Rather, Plaintiff seeks this information to harm Celia Construction's other shareholders, Defendants Sam and Dominick, and not to protect himself from personal liability.

Consequently, Plaintiff should not be permitted to pierce Defendants' attorney-client privileged communications merely by virtue of his status as a former director of Celia Construction.

B. The Fiduciary Exception To The Attorney-Client Privilege Does Not Apply To Plaintiff

Plaintiff cannot meet his burden to show that the fiduciary exception applies so as to allow him, as a shareholder, to invade Defendants' attorney-client privileged communications. There are two preliminary issues that vastly narrow the applicable scope of the fiduciary exception to the information that Plaintiff asks this Court to compel.

First, the fiduciary exception does not apply to either the attorney work product privilege or to material prepared in anticipation of litigation. NAMA, 133 A.D.3d at 60, n. 13 (noting fiduciary exception not applicable to attorney work product, advising trial court on remand to consider if material was prepared in anticipation of litigation). Consequently, the fiduciary exception does not allow disclosure of any attorney-client communications that are also attorney work product and/or prepared in anticipation of litigation. See CPLR 3101(b) and (d)(2). Thus, the fiduciary exception cannot allow Plaintiff to pierce attorney-client communications that are also attorney work product and/or material prepared in anticipation of litigation, as established in Sections I and III, supra.

Second, the fiduciary exception does not apply to Defendants' attorney-client privileged communications concerning the business of Trackside or Trackside Apartments. For the exception to apply, there must be a fiduciary duty running from Trackside or Trackside Apartments to Plaintiff by virtue of Plaintiff's status as an owner. See NAMA, 133 A.D.3d at 52. However, it is undisputed that Plaintiff was never an owner of Trackside Apartments. And, Plaintiff's causes of action concerning Trackside rest on the supposed oral promises to make Plaintiff an owner of Trackside in the future, which Sam and Dominick supposedly breached

because they never made Plaintiff an owner.[7] Consequently, where Plaintiff was never an owner of Trackside or Trackside Apartments, he was owed no fiduciary duty with respect thereto.[8] Thus, the fiduciary exception is not applicable.

As for any application to Celia Construction, it is Plaintiff's burden as a shareholder to show the fiduciary exception permits him to invade attorney-client privileged communications between a Sam and Dominick and Celia Construction's counsel. Id. Plaintiff has not shown that there is "good cause . . . on a balancing of the competing factors for and against the privilege present in the individual case." Hoopes v. Carota, 142 A.D.2d 906, 910 (3d Dept. 1988), aff'd, 74 N.Y.2d 716, 717-718 (1989); see also NAMA, 133 A.D.3d at 55 (noting the fiduciary in Hoopes was a trustee but applying the same analysis to a corporate fiduciary).

In balancing, the Court considers a non-exhaustive list of factors that should be considered on a case-by-case basis. NAMA, 133 A.D.3d at 55. The factors include:

(1) the number of shareholders and the percentage of stock they represent;
(2) the bona fides of the shareholders;
(3) the nature of the shareholders' claim and whether it is obviously colorable;
(4) the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources;
(5) whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality;
(6) whether the communication related to past or to prospective actions;
(7) whether the communication is of advice concerning the litigation itself;
(8) the extent to which the communication is identified versus the extent to which the

[7] There is no documentary evidence that such oral promises were ever made, let alone that they constituted contracts. Nonetheless, the thrust of Plaintiff's grievance is that he was never made an owner of Trackside, contrary to the supposed oral promises allegedly made to him.

[8] Moreover, where Plaintiff had no ownership interest in Trackside, his claims concerning the transfer of its assets to Trackside Apartments are meritless. Even if the fiduciary exception analysis were appropriate with respect to Trackside, which it is not, Plaintiff would not be entitled to invade the attorney-client privilege because his claims are not "colorable." See NAMA, 133 A.D.3d at 55, n. 6.

shareholders are blindly fishing; and

(9) the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Id. at 55, n. 6.[9]

The overarching consideration is "focused primarily on the balancing of the requesting party's need for information against the threat to corporate confidentiality." NAMA, 133 A.D.3d at 55. Plaintiff does not need the privileged information that he asks this Court to compel. However, the balance of other factors shows that the threat to corporate confidentiality is great.

1. It is unnecessary for Plaintiff to discover Defendants' privileged communications

This is a "dollars and cents" case. The thrust of the issues to be resolved concerning Celia Construction all relate to whether Plaintiff, derivatively or as an individual minority shareholder, was entitled to a larger share of the money that flowed into and out of Celia Construction. These issues can be resolved by the objective information provided in Celia Construction's financial books and records, including the QuickBooks data files, and the financial statements, general ledger, account statements, bills, invoices, and Defendants' business and personal tax returns, which Plaintiff has already received in the more than 20,000

[9] The Restatement 3d of Law Governing Lawyers § 85, comment c, identifies similar factors:
(1) the extent to which beneficiaries seeking the information have interests that conflict with those of opposing or silent beneficiaries;
(2) the substantiality of the beneficiaries' claim and whether the proceeding was brought for ulterior purpose;
(3) the relevance of the communication to the beneficiaries' claim and the extent to which information it contains is available from nonprivileged sources;
(4) whether the beneficiaries' claim asserts criminal, fraudulent, or similarly illegal acts;
(5) whether the communication relates to future conduct of the organization that could be prejudiced;
(6) whether the communication concerns the very litigation brought by the beneficiaries;
(7) the specificity of the beneficiaries' request;
(8) whether the communication involves trade secrets or other information that has value beyond its character as a client-lawyer communication;
(9) the extent to which the court can employ protective orders to guard against abuse if the communication is revealed; and
(10) whether the determination not to waive the privilege made in behalf of the organization was by a disinterested group of directors or officers.

pages of discovery that Defendants produced to him.

Plaintiff has little need for the privileged communications involving Mr. Evans and Sam and/or Dominick. Plaintiff claims that he wants to force Sam and Mr. Evans to disclose privileged communications to reveal the "motivations or meaning" behind communications with Mr. Evans. See Plaintiff's Motion, p. 1, No. 1. Plaintiff also seeks disclosure of the substance and reasoning behind conversations with and advice given by Mr. Evans concerning Plaintiff's demand for records (see Plaintiff's Motion, p. 2, Nos. 1-3, 4(i), 5-7; and p. 3, Nos. 3, 7-9), the removal of Plaintiff as a director (Id. at p. 2, No. 4(ii); and p. 3, Nos. 2, 5-6), the drafting and distribution of corporate bylaws (Id. at p. 2, No. 4(iii); and p. 3, Nos. 1-2, 4-6), creating Trackside Apartments and transferring Trackside's assets thereto (Id. at p. 3, Nos. 11-12), and the purposes and contents of communications that Mr. Evans, Sam, and Dominick had with Victoria and with Mr. Karl (Id. at p. 3, Nos. 4 and 10).[10]

Plaintiff's purposes all concern the motivations, reasoning and substance of Sam's, Dominick's, and Mr. Evans's communications, and the legal advice that was supplied. However, Plaintiff has not argued that any of the claims or defenses in this case require him to prove or disprove anyone's motivation, reason, or mental state.[11] Moreover, Defendants have not pleaded a reliance on counsel defense. Consequently, the information Plaintiff seeks is immaterial to any burden of proof that must be met for any claim or defense concerning Celia Construction. Thus, Plaintiff does not "need" to discover the motivation or reasoning for soliciting or giving legal advice, nor the substance thereof.

[10] In application, the "good cause" balancing is undertaken on a communication-by-communication basis and will generally require in camera review. See NAMA, 133 A.D.3d at 58-59. However, where Plaintiff styles his arguments for the fiduciary exception in group format, and not communication-by-communication, Defendants respond accordingly.

[11] Even if Plaintiff has the burden to show scienter as an element of Count II, the supposed fraudulent conversion of Santo's shares, none of the questions for which answers are sought relate to Count II.

2. Where the controverted attorney-client privileged communications concerned the adversarial position Plaintiff took that is also the subject of the instant litigation, Plaintiff has not and cannot show good cause to invade the privilege

At least three of the factors outlined in Hoopes and NAMA show that the threat to corporate confidentiality is great in light of the adversarial position that Plaintiff took toward Sam, Dominick, and Celia Construction.

First, Sam and Dominick own 84% of the stock in Celia Construction. They also serve as its officers and directors. Plaintiff merely owns 16% of the stock in Celia Construction. He is neither an officer nor a director. Consequently, Sam and Dominick possess the overwhelming interest in maintaining the confidentiality of the controverted information.

Second, as discussed in Section IV(B)(1), supra, Plaintiff's claims do not impose a burden of proof on him for which the controverted attorney-client privileged communications are probative. Nor are such privileged communications relevant to the defenses alleged by Defendants. Moreover, the actions taken by Sam and Dominick as officers and directors of Celia Construction are abundantly reflected in the more than 20,000 pages of discovery already produced, without having to invade the privileged communications that preceded those actions. Consequently, Plaintiff has no necessity for the information, which is available from alternative non-privileged sources.

Third, the controverted attorney-client privileged communications concerned Defendants' request for and Mr. Evans' provision of legal advice on the subject of this litigation. Indeed, the rendition of legal advice concerned how to respond to the adversarial stance that Plaintiff had taken toward Sam, Dominick, and Celia Construction, for which Plaintiff has sued them.

In NAMA, the Court balanced the fiduciary exception factors with emphasis on whether the shareholder had taken adversarial position against the corporation. 133 A.D.3d at 57-59. The Court in NAMA concluded that "where communications evince an adverse relationship and

contain advice on how corporate management might handle the shareholder, a finding of good cause [to invade the privilege] is less likely." Id. at 59. Here, the controverted communications concerned how Defendants might handle demands by Plaintiff, an adverse, minority shareholder.

Consequently, where the threat to corporate confidentiality outweighs Plaintiff's non-existent need for information, there is not good cause to invade the attorney-client privilege.

V. DEFENDANTS' INADVERTENT DISCLOSURE OF PRIVILEGED DOCUMENTS DOES NOT CONSTITUTE A WAIVER OF THE PRIVILEGE

Plaintiff asks the Court to find a waiver of privilege for discovery that had been inadvertently disclosed by Defendants. See Plaintiff's Motion, p. 1, No. 5. Specifically, Plaintiff argues for the waiver of privilege for the following:

(a) Plaintiff's Exhibit 62, an email wherein Sam asked Mr. Evans "now what?" in response to Plaintiff's demands. Id., pp. 5-6.

(b) Plaintiff's Exhibit 63, an email wherein Mr. Evans provided Sam advice concerning Plaintiff's demands. Id. pp. 179.

(c) Plaintiff's Exhibit 73, an email wherein Mr. Evans provided Sam and Dominick with an opinion on the significance of demands from Plaintiff's counsel. Id.

(d) The unidentified "dozens" of communications between Sam, Dominick, and Mr. Evans, and/or "hundreds" of communications between Sam, Dominick, Mr. Evans, and Victoria. Id. pp. 19-20.

Defendants did not waive any privilege over such documents where they employed reasonable safeguards to prevent inadvertent disclosure of privileged material, despite the fact that a few such privileged materials slipped through these safeguards. Moreover, when Defendants learned that a relatively few number of privileged documents were among the more than 20,000 pages of discovery they had disclosed, they acted promptly to remedy the inadvertent disclosure.

"The fundamental questions in assessing whether waiver of the privilege occurred are, whether the client intended to retain the confidentiality of the privileged materials and whether he took reasonable precautions to prevent disclosure. Manufacturers & Traders Trust Co. v.

Servotronics, Inc., 132 A.D.2d 392, 399 (4th Dept. 1987); accord Curry Rd. v. K-Mart Corp., 191 A.D.2d 905, 909 (3d Dept. 1993) (no waiver where "the document in question was prepared by [defendant's] then-assistant general counsel for the purpose of providing confidential legal advice, the disclosure was inadvertent and a timely objection was made"), citing Servotronics, supra.

The Servotronics Court observed that "the prevalence of corporate litigation involving voluminous discovery material [leads to] the inevitability that some privileged documents will be released." 132 A.D.2d at 398. In declining to find a waiver in such circumstances, the Court reasoned:

> The problem of inadvertent disclosure in large document productions challenges traditional assumptions about the waiver of the attorney-client privilege. Traditionally, courts have held that inadvertent disclosure waives the privilege because the client and attorney possess sufficient means to preserve the secrecy of a communication and because disclosure makes achievement of the benefits of the privilege impossible.
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> * * *
>
> We reject the traditional approach, however, because it rests on the faulty and unrealistic premise that the only interest protected by the attorney-client privilege is secrecy and that an attorney and client can always keep their communications secret if they make sufficient effort. . . . While reasonable precautions might be required to promote appropriate standards of care in document production, there is no reason to apply the harsh traditional approach to a litigant who inadvertently discloses a document, at least prior to the time that remedying an accidental production would cause the adversary any prejudice.

Id.

Intent must be the primary component of any waiver test. Id at 399. The United States Supreme Court has defined waiver as an "intentional relinquishment . . . of a known right." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Neither Defendants nor their counsel intended to waive the privileges of attorney-client communications, attorney work product, or of material prepared in anticipation of litigation. See

Evans Aff. ¶¶ 13-15. As demonstrated in Sections I-IV, supra, the inadvertently disclosed material was privileged. When Sam was first presented with a privileged document at his deposition, Defense counsel immediately objected, demanded the material be returned, and instructed Sam not to answer questions concerning the same.

The precautions taken to safeguard against disclosure are reasonable if the attorney could "be expected to differentiate between privileged and non-privileged documents." Id. at 399 (despite instance of inadequate screening, "the fact that counsel undertook a screening procedure indicates that he took some precaution to avoid disclosure of privileged material").

Defense counsel undertook screening procedures reasonably expected to safeguard against the disclosure of privileged material, despite the proportionally few instances among the voluminous discovery disclosed. Defense counsel established parameters for making privilege designations on documents based on subjects and actors, and the documents to be produced were sampled prior to production to check that privileged material was not inadvertently disclosed. Although some privileged material was missed and inadvertently disclosed, the low error rate shows that the safeguards employed by counsel were reasonable, albeit not perfection.

Moreover, where Plaintiff has received voluminous discovery that is not privileged, and he does not need the privileged material to meet his burden to prove his claims or rebut any defenses, he will not be prejudiced if he is prohibited from using the privileged material – particularly where this matter is a long way off from trial with no trial date set.

Even assuming, arguendo, that the Court found waiver with respect to Exhibit 63 in the mere two weeks that lapsed between its annexation to Plaintiff's papers and Defendants' remediation efforts, there was no waiver of the remainder. Defendants promptly sought to identify and claw back the other inadvertently disclosed privileged materials that Plaintiff's

counsel vaguely referenced, but kept secret, in disregard of his professional responsibility to speak up. See Rule 4.4(b) of the Rules of Professional Conduct ("A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that it was inadvertently sent shall promptly notify the sender"); Delta Fin. Corp. v. Morrison, 12 Misc. 3d 807, 814 (Sup. Ct. Nassau Co. 2006) (on receipt of privileged document, counsel for the receiving party should notify opposing counsel to provide him with an opportunity to move for its return). Moreover, even if the Court found a waiver of privilege for a specific document, Plaintiff fails to explain why that would also operate as a waiver of the independently privileged attorney-client communications or work product concerning that document.

Consequently, the Court should not find that Defendants or their counsel intentionally waived their right to their privileges of attorney-client communications, attorney work product, or of material prepared in anticipation of litigation.

VI. PLAINTIFF SHOULD BE ORDERED TO IDENTIFY, RETURN, AND DESTROY ALL PRIVILEGED MATERIALS THAT WERE INADVERTENTLY DISCLOSED TO HIM

Defendants seek a protective order compelling Plaintiff to identify, return ,and/or destroy all privileged materials Defendants produced to Plaintiff inadvertently. In addition, Defendants seek to preclude Plaintiff from further misuse of such materials. Finally, Defendants seek an order to seal and/or remove any of the privileged material that Plaintiff has filed with the Court.

Under Rule 4.4(b) of the Rules of Professional Conduct, "A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that it was inadvertently sent shall promptly notify the sender." A court may enter an order to require a party to return or destroy a privileged document that was inadvertently disclosed by the opposing party. See, e.g., Delta Fin.

Corp., 12 Misc. 3d at 814.

Plaintiff's counsel has not identified the documents inadvertently disclosed by Defendants, despite Plaintiff's counsel repeated assertions that they believe they are privileged. Consistent with his professional obligations, Plaintiff's counsel should be ordered to identify such documents. Moreover, the foregoing shows that such documents were indeed privileged, inadvertently disclosed, and no exception applies to allow Plaintiff to pierce privilege. Consequently, Defendants respectfully request that the Court order Plaintiff and his counsel to identify all privileged material inadvertently disclosed, return it and/or destroy all copies, forbid the further use, and seal and/or remove such privileged material that Plaintiff has already filed.

VII. PLAINTIFF IS NOT ENTITLED TO AN AWARD OF ATTORNEYS FEES AND COSTS FOR DEFENDANTS' LEGITIMATE ASSERTIONS OF PRIVILEGE

Plaintiff is not entitled to sanctions against Defendants. In order for the Court to award attorney fees and costs against Defendants or their counsel, pursuant to 22 NYCRR 130-1.1, the Court must find that they engaged in "frivolous conduct." Conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by reasonable argument for an extension, modification or reversal of existing law;
(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
(3) it asserts material factual statements that are false.

See 22 NYCRR 130-1.1(c).

As the foregoing demonstrates, Defendants and their counsel asserted legitimate privilege objections and arguments, in good faith, which are grounded in existing law. Furthermore, Defendants and their counsel only recently learned, that despite their reasonable safeguards, a relatively few number of privileged documents had been inadvertently disclosed in the more than 20,000 pages of discovery they produced. Promptly thereafter, Defendants and their counsel sought to claw back the privileged material that had been inadvertently disclosed. Consequently,

especially given the esoteric nature of the arguments in Plaintiff's Motion, and the exceptions he seeks to carve out, sanctions are not appropriate against Defendants.

It is equally true that a motion for sanctions that is frivolous is equally sanctionable. See 22 NYCRR 130-1.1(c) ("Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section"). In Plaintiff's Motion, Plaintiff sought to pierce the attorney-client privilege based on his status as a former director of Celia Construction. His argument was not only frivolous, but also in derogation of his very own case authority. See Plaintiff's Motion, pp. 12-13; Cohen, 309 N.Y. at 23-124 ("when a director is removed from office, even if this is done while his suit to compel inspection of the books and records is pending . . . his absolute right to such an inspection terminates forthwith").

Consequently, if the Court is inclined to entertain costs on this motion, they should be imposed upon Plaintiff for his frivolous conduct.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's motion to compel the disclosure of privileged documents and communications. Defendants further respectfully request that the Court order Plaintiff's counsel to identify all privileged material inadvertently disclosed, return it to defense counsel and/or destroy all copies thereof, or forbid them from hereafter referencing, filing, seeking to admit into evidence, or otherwise using such privileged material. Additionally, Defendants respectfully request that the Court seal and/or remove such privileged material that has already been filed by Plaintiff.

Dated: Troy, New York
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