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**

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S MOTION TO COMPEL AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR A PROTECTIVE ORDER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules and Other Authorities

PRELIMINARY STATEMENT

Defendants' Opposition Memo ("Opp.") fails to sustain Defendants' claims of privilege for any of the documents and communications at issue. Instead, Defendants misapply the law and make numerous representations that are contradicted by the evidence or not credible.

First, Defendants cannot dispute that Eric was a director of Celia Construction, Inc. ("Celia Construction")—within the cone of privilege—until June 2, 2020. Defendants' attempts to claim Eric was uninvolved as a director are legally irrelevant and demonstrably false from their own documents and testimony showing Eric's attempts to fulfill his fiduciary duties.

Second, Defendants cannot distinguish the binding precedent of *Hoopes v. Carota*, 142 A.D.2d 906, 909-10 (3d Dept. 1988)—applying the fiduciary exception to require the disclosure of communications between a company's general counsel and its officer in an action for breach of fiduciary duty for related-party transactions.

Third, Defendants cannot sustain their burden of demonstrating any privilege over communications and documents sent to, or received from, Victoria Celia—Defendants long-time accountant. Defendants have no contemporaneous evidence of a Kovel agreement, the Kovel doctrine does not even apply to the Questions and documents at issue, and Defendants are only claiming it was entered into after the relevant time for the Questions at issue.

Fourth, Defendants do not—and cannot—dispute that they subpoenaed Peter Karl and put his discussions with Defendants at issue in this litigation, thereby waiving any privilege.

Fifth, Defendants have not sustained their burden of showing that their production of over 366 documents that they now claim are privileged was inadvertent and they took reasonable steps to prevent disclosure. Instead Defendants misrepresent the math and attempt to improperly shift the burden to Plaintiff to identify the documents that Defendants are asserting privilege over—thereby demonstrating that Defendants do not even know what they produced.

ARGUMENT

I. AS A MATTER OF LAW NO PRIVILEGE CAN EXIST AGAINST ERIC FOR THE TIME ERIC WAS A DIRECTOR OF CELIA CONSTRUCTION

Defendants do not—and cannot—dispute that Eric was entitled to view any communications and work product of Evans related to Celia Construction at the time that Eric was a director of Celia Construction as an "absolute, unqualified right." *Cohen v. Cocoline Prod.*, 127 N.E.2d 906, 907–08 (N.Y. 1955). As such, Defendants cannot use attorney-client privilege as a shield against Eric's discovery of Evans' communications and documents from that time period.

Defendants argue (Opp. at 14) that once Defendants removed Eric as a director, Eric lost his absolute director's right to review documents, including privileged documents. Defendants' argument misses the point. Eric is not arguing for access to these documents and communications as a former director entitled to review books and records but as litigant for whom these documents are material and necessary under CPLR §3101(a). Since—as a director—Eric was part of Celia Construction and entitled to review Evans' communications and work product for Celia Construction at the time, Eric is within the cone of privilege as to those documents and communications and Defendants cannot now wield attorney-client privilege against him. *See Fochetta v. Schlackman*, 257 A.D.2d 546, 546 (1st Dep't 1999) (holding that "attorney-client privilege was not properly invoked by defendants to deny" former shareholder and manager "access to otherwise privileged" documents); *accord Getman v. Petro*, 266 A.D.2d 688, 690 (3d Dep't 1999) (overturning trial court and requiring the production of attorney's "communications and correspondence with potential expert witnesses" where plaintiff was the attorney's client at that time); *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 689 N.E.2d 879, 882–83 (N.Y. 1997) (rejecting claim of attorney work product against former client of the attorney for work done on that client's case).

Evans also asserts that Eric was "a director in name only and he was disinterested and uninvolved in the business affairs of Celia Construction"—apparently as a justification for not providing Eric with documents and removing him. (Opp. at 3; Evans Aff. ¶11.) Evans adds that "for the last three of Celia Construction's shareholder and director meetings, Plaintiff did not bother to physically attend." (Evans Aff. ¶11.)

As an initial matter, a "disinterested" director is one who has not received or is not entitled to receive a personal financial benefit from a challenged transaction. *Sec. Police & Fire Pros. of Am. Ret. Fund v. Mack*, 30 Misc. 3d 663, 671 (Sup. Ct. N.Y. Cnty. 2010). Disinterested directors involved in examining and approving transactions is a good thing, not a bad thing. *Wilson v. Tully*, 243 A.D.2d 229, 232 (1998). It is certainly not a legal basis for asserting privilege and denying a director access to documents and communications.

To the extent Evans is using the term "disinterested director" in a non-legal fashion, Evans characterization is irrelevant. Whether Evans believed Eric was adequately performing his director duties is irrelevant to the determination of whether Eric was allowed to view privileged information while a director. Indeed, Evans cites to no legal authority otherwise. Nor do Defendants cite to any evidence whatsoever that they ever expressed to Eric that he was not adequately performing his director duties. On the contrary, when Defendants removed Eric as a director, they refused to provide any reason. (Ex. M[1] at 2.)

But even if Eric's interest and involvement as a director was relevant, Eric was certainly interested and involved as a director of Celia Construction. *First*, Eric repeatedly tried to get access to more information about Celia Construction but was rebuffed by Sam and Dom. (*See,*

[1] All Exhibits are to the Hutman Affirmation filed concurrently with this Reply or the Hutman Affirmation filed concurrently with Plaintiff's Opening Memo. Exhibit lettering is continuing from Plaintiff's Opening Memo.

e.g. Ex. F (Eric requesting documents from Sam in advance of directors' meeting and saying "[a]fter several calls, text, and email I have not received a response of any kind"); Ex. B at 3 (Eric asking for "past 3 years of financial statements" and to schedule a time to discuss "ongoing contracts … overall logistics" and more); Ex. N at 2 (Eric asking for "Last 5 years" of financial statements and tax returns as well information about ongoing projects).). Sam's only excuse for not providing these documents to Eric was that Eric was communicating in writing instead of calling. (Ex. O, Sam Tr. at 298:7-301:5, 303:5-16.)[2] Of course, Eric had tried to call and text Sam and to set up an in person "chat" but to no avail. (*E.g.* Ex. F; Ex. B at 3; Ex. P.) In reality, it was Evans that advised Sam not to give Eric the documents Eric was asking for—despite Eric's status as a director—and instead give only one year's financial statements as a "fig leaf." (Ex. B at 2.)

Second, Eric repeatedly expressed to his brothers that he wanted to get more involved in the day-to-day operations of the business. (Ex. Q at 1; Ex. R; Ex. P.) And Evans certainly knows that Eric was not disinterested and wanted to increase his involvement because in response to a request from Eric to discuss with Sam Eric's "fit in the organization to support success," Evans himself wrote to Sam: "Do you want Eric more involved? **He certainly wants to be** but the choice is yours …." (Ex. B, Exhibit 63, at 2-3.)

Finally, Eric only participated in one meeting remotely where in-person was feasible before Defendants removed him. Eric attended in person the first shareholder and director meeting that Evans attended as general counsel in December of 2018. (Ex. S at 1.) Between that time and when Defendants removed Eric as a director there was only one shareholder and director meeting, in which Eric participated by phone. (Ex. T at 1.) And Evans appears to forget that the two meetings

[2] Dom's only excuse for not providing Eric with the requested documents over December 2018 through January of 2019 was that he had an outpatient surgery for three hours one day during that time period. (Ex. U, Dom Tr. at 227:19-229:11.)

in 2020—including the one after Eric's books and records demand, in which Defendants removed Eric—were remote for everyone because of the Covid-19 pandemic. (Ex. V.) The idea that Eric participated by phone because he was disinterested is laughable. Evans certainly knows that Eric was an enthusiastic director trying to be as involved as possible. Evans is trying to mislead this Court and should be sanctioned.

Indeed, Defendants cannot even keep their story straight because they also claim that in December 2018—roughly around the time of the 2018 Shareholder and Directors' meeting—Eric "changed from disinterested to adverse to Celia Construction." (Opp. at 3.) What is Defendants' basis for characterizing Eric as "adverse"? That Eric "suspiciously said he wanted Celia Construction's books and records to meet his fiduciary duties." (*Id.* at 3-4; *accord* Ex. W, Evans Tr. at 183:20-185:5 (testifying that Eric "asking for financial statements and information about the company to fulfill his duty as a director" was "evidence of antagonism").) Defendants apparently view a director being interested in fulfilling his fiduciary duty as "suspicious." Eric—and the law—view a director fulfilling his fiduciary duty as obligatory.

II. THE FIDUCIARY EXCEPTION APPLIES TO DEFENDANTS' ASSERTIONS OF ATTORNEY-CLIENT PRIVILEGE UNDER *HOOPES* TO DETERMINE WHETHER DEFENDANTS' BREACHED THEIR FIDUCIARY DUTIES

A. This Case is Indistinguishable from Hoopes, Eric Has Shown Good Cause for Discovery of Evans' Communications with Sam and Dom to Show They Were Working for Their Personal Interests Instead of Celia Construction's Interests

In the Opening Memo (at 14-16), Eric showed that the fiduciary exception applied to Sam and Dom's communications with Evans as corporate counsel just as in *Hoopes v. Carota*, 142 A.D.2d 906, 909-10 (3d Dept. 1988), *aff'd*, 543 N.E.2d 73 (N.Y. 1989).

In *Hoopes*, the plaintiffs alleged that the defendant—a trustee and officer of the corporation—breached his fiduciary duties to the trust and the corporation by "self-dealing and other misconduct in which he acted with a conflict of interest." 142 A.D.2d at 907. Here too, Eric

has alleged that Sam and Dom have "engaged in extensive self-dealing and looting of the Company's assets" in breach of their fiduciary duties to Celia Construction and in oppression of Eric as a minority shareholder. (Am. Compl. ¶119; ¶¶38-46, 51, 163-166.)

The Third Department in *Hoopes*, held there was "good cause for disclosure" of the privileged communications because "the information sought is highly relevant to … whether defendant's actions respecting the relevant transactions … were in furtherance of 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." 142 A.D.2d at 910. The same "good cause" exists here for Plaintiff to ask about Evans advice to Sam in connection with (i) withholding information from Eric, (ii) Sam and Dom paying themselves exorbitant salaries, (iii) paying Celia Builders, Inc. and Bardal, LLC (iv) removing Eric as a director, and (iv) in creating Trackside Apartments and fraudulently transferring Trackside LP's assets to it. (Am. Compl. ¶¶38-46, 51, 163-166, 203-210, 216-218.)

Defendants (Opp. at 15-20) do not even attempt to distinguish this case from the facts in *Hoopes* but rather try to use the framework created by a First Department case, *NAMA Holdings, LLC v. Greenberg Traurig LLP*, 133 A.D.3d 46, 52 (1st Dept. 2015) to argue that the fiduciary exception should not apply. Defendants' primary argument is that "Plaintiff does not need the privileged information." (Opp. at 17-18.) But Plaintiff needs the information for the same reason the plaintiffs in *Hoopes* needed it—to get evidence that Sam and Dom were acting in their own personal interests in their self-dealing, withholding documents from Eric, and removing of Eric as a director and not acting in furtherance of the interest of the company and all shareholders. This information is at the core of Eric's claim for breach of fiduciary duty. (Am. Compl., Count III.)

Indeed, the reason Defendants withheld information from Eric was because they did not want him to find out how much money they were looting from Celia Construction through related-party transactions. For example, Sam and Dom caused Celia Construction to build the most recent four buildings of Trackside LP at a net loss year-over-year. (Ex. X, Bonfardeci Tr. at 93:22-94:18, 108:6-109:9, 122:2-7, 174:15-175:20.) Similarly, Sam and Dom caused Celia Construction to pay hundreds of thousands of dollars every year for decades to Celia Builders, Inc.—an entity Sam and Dom own—solely to give themselves, their families, and one Celia Construction project manager extra salary and health insurance. (Ex. O, Sam Tr. at 21:7-18, 61:17-63:13, 67:3-68:19, 69:14-70:9.) And Sam and Dom were paying themselves huge salaries year after year—far in excess of the median income for executives in the residential construction field.[3] (*Compare* highest median total cash compensation in Ex. Y, at 3, 6 (PX44) of $341,663 for COO and $472,975 for CEO, *with* Ex. Z at DAP522, 527, showing Dom's and Sam's actual salaries of $853,288 and $862,845 respectively.) These examples of self-dealing and looting of corporate assets are clear breaches of fiduciary duty since they are not in the best interests of Celia Construction and only served the interests of Sam, Dom, and their families. *See Adirondack Cap. Mgmt., Inc. v. Ruberti, Girvin & Ferlazzo, P.C.*, 43 A.D.3d 1211, 1215 (3d Dep't 2007) ("As a fiduciary to plaintiff, Corvetti was prohibited from profiting personally at the expense of the corporation or promoting personal interests which were incompatible with the superior interests of the corporation."); *Matter of Greenberg*, 206 A.D.2d 963, 964 (4th Dep't 1994) ("An officer or director is not permitted to derive a personal profit at the expense of the corporation. Furthermore, his dealings with respect to corporate assets are subject to close scrutiny and must be characterized by absolute good faith").

[3] Plaintiff does not believe that the compensation tables provided by Defendants in Ex. Y are appropriate for the actual jobs that Dom and Sam did. But even assuming arguendo that they are appropriate, Sam and Dom were still paying themselves grossly excessive salaries.

Similarly, Eric's claim for judicial dissolution is strengthened if Eric can show that Sam and Dom oppressed him as a minority shareholder. Evans' communications with Sam and Dom will likely show that Sam and Dom withheld information from Eric, amended the corporate by-laws, and removed him as a director "to prevent Eric from observing and interfering with their unlawful and wasteful activity" (Am. Compl. at Count VIII, ¶¶166-67), further strengthening Eric's claim for judicial dissolution. *See Twin Bay v. Kasian*, 153 A.D.3d 998, 1000–04 (3d Dep't 2017) (finding oppressive conduct and affirming judicial dissolution where fiduciaries "looted corporate assets" and "amended the corporate bylaws" to harm the minority shareholder). Defendants also asserted in the Answer that Plaintiff failed to "establish that they have been oppressed as a matter of law" (Am. Answer ¶134), making access to such communications all the more important.

Finally, Eric's claim for fraudulent transfer includes a claim of actual intent "to shield Trackside's assets from Eric." (Am. Compl., Count XVIII, ¶209.) Evans advice to Sam and Dom to create Trackside Apartments, transfer Trackside LP's assets to Trackside Apartments, and cancel Trackside LP may be the only direct evidence on Defendants' actual intent in making, or attempting to make, the transfer.

Defendants also invoke three factors from *Nama Holdings*, that they assert weigh against finding the fiduciary exception: Eric's share of Celia Construction, Eric's not needing the information, and that Evans' communications at issue were "on the subject of this litigation." (Opp. at 19.) None of these are correct. *First*, the purpose of the factor looking at Eric's percentage of Celia Construction is for determining "adversity" and here "the derivative nature of a shareholder's claim tends to support a finding of good cause." *Nama Holdings*, 133, A.3d at 58. Because Eric is the one trying to recover on behalf of the corporation and Defendants were the

ones self-dealing to enrich themselves at Celia Construction's expense—this factor supports the fiduciary exception. *Second*, as explained above, the communications at issue are quite important for multiple claims.

Finally, Defendants' claim that the communications were "legal advice on the subject of this litigation" are not credible because Defendants and Evans have repeatedly contradicted themselves about whether they anticipated litigation at that time. For example Defendants claim that Evans "regarded Plaintiff as a risk to commence litigation and antagonistic to the whole corporate governance process" when Eric asked for financial statements "to meet his fiduciary duties" in "December 2018." (Opp. at 3-4.) But earlier Defendants claimed that this entire lawsuit as Eric being upset at being disinherited" by his father, Santo Celia. (Opp. at 1-2.) Santo Celia passed away in June of 2019 and Eric did not receive any documents pertaining to his father's estate until sometime in 2020 after the estate documents were filed in probate. (Ex. AA, Karl I Tr. at 149:10-150:6.) Defendants do not explain how communications in November-December of 2018 and January-February of 2019 were "on the subject of this litigation" when the catalyst for the litigation according to Defendants' own theory did not take place until early 2020.

Moreover, Evans claim that he was anticipating litigation already in December of 2018 was a sudden about-face at his deposition after his attorney, Mr. Krouner, took a break to talk to Evans while a question was pending. When first asked whether he "anticipate[d] any litigation" at the time he communicated with Sam, Dom, and Victoria in December 2018, Evans twice answered "No." (Ex. W, Evans Tr. at 149:10-150:22; 142:4-20.) Mr. Krouner immediately asked a leading question to Evans to get him to assert that Eric "had taken a position adverse to the company." (*Id*. at 150:23-151:3.) After Plaintiff's counsel objected to this improper interruption

and blatant coaching of the witness, Mr. Krouner took Evans out of the room.[4] (*Id.* at 151:4-156:16.) On return, suddenly Evans testimony changed to claiming he did "consider litigation." (*Id.* at 158:4-24.) This change in testimony after gross intervention by counsel is not credible.

Other *Nama Holdings* factors that support applying the fiduciary exception are:

- Eric's claims are obviously colorable. Defendants have not moved to dismiss and Eric has already successfully moved for TRO. (NYSCEF No. 109)
- The communications at issue were about past and prospective actions that Sam and Dom should take with respect to Celia Construction and Trackside. (*See* Ex. B, Exhibit 63 (Evans telling Sam whether he needed to provide Eric with basic corporate documents.)) Critically, Eric is not asking for access to Evans' legal advice about this actual litigation, filed on September 18, 2020.
- The communications at issue are identified and precise—the Questions Marked for Ruling in Eric's Opening Memo (at 2-4) and the documents already produced by Defendants—this is not a party "blindly fishing." *Nama Holdings*, 133 A.D.3d at 55, n. 8.

Defendants have failed to explain how this action is different than the binding precedent of *Hoopes*. The fiduciary exception must be applied.

B. Sam and Dom Owed Eric a Fiduciary Duty in Connection With Trackside—Defendants Are Estopped From Claiming Eric Was Not a Partner

Defendants argue that the fiduciary exception only applies to "an owner" of an entity and therefore it cannot apply to Evans' communications with Sam and Dom about Trackside LP based on Defendants' assertion that Eric was "never an owner of Trackside" (Opp. at 15-16.) Defendants are wrong on both counts. *First*, the fiduciary exception applies any time there is a fiduciary relationship—not just by virtue of someone being an owner of an entity. *See, e.g., In re Bank of New York Mellon*, 977 N.Y.S.2d 560, 565, 568 (N.Y. Sup. N.Y. Cnty. 2013) (applying fiduciary

[4] Mr. Krouner's behavior was grossly improper. *See, e.g., Adams v. Rizzo*, 13 Misc. 3d 1235(A), 831 N.Y.S.2d 351 (Sup. Ct. Onandaga Cnty. 2006) (ordering new deposition of witness and instructing that counsel defending that deposition "shall not, and has no right to, interrupt defense counsels' questioning and begin questioning of his own" and counsel "is not to coach the witness, rephrase defense counsels' questions, ask for clarification of a question, or insert information").

exception to communications between "indenture trustee" and counsel on motion brought by "three members of the Steering Committee"). Indeed, in *Hoopes*, the plaintiffs were "income beneficiaries" and "remaindermen" of a trust that held stock in a corporation—none of them were present owners of the stock—but the fiduciary exception applied because the defendant owed them fiduciary duties. 142 A.D.2d at 907, 910-911. Therefore, even if Eric's partnership interest in Trackside LP was limited to a share of the profits, as Defendants assert, the fiduciary exception would still apply. *See Whalen v. Gerzof*, 564 N.E.2d 656, 657 (N.Y. 1990) (reversing dismissal "of the causes of action which arise out of plaintiff['s] … derivative fiduciary relationship" where plaintiff was "entitled to earnings from the [defendant's] partnership interest above the threshold $50,000 payment").

Second, Defendants are estopped from claiming that Eric was not a partner in Trackside LP because the tax documents they gave to Eric—filed by Trackside LP with the IRS and which Eric relied upon for his own tax filings—state that he was a partner.

A party "is estopped from taking a position in this proceeding contrary to the position taken in its tax returns." *In re Tehan*, 144 A.D.3d 1530, 1532–33 (4th Dep't 2016); *Mahoney-Buntzman v. Buntzman*, 909 N.E.2d 62, 66 (N.Y. 2009) ("A party to litigation may not take a position contrary to a position taken in an income tax return."). This applies to "tax returns" "providing a Schedule K-1 reporting [a party] as a shareholder"—"[Defendant] cannot take a position in this proceeding contrary to the position taken on its tax returns." *Coven v. Neptune Equities, Inc.*, 198 A.D.3d 643, 646 (2d Dep't 2021).

For every tax year from 2009 through 2018, Trackside—controlled by Defendants—sent Eric a K-1 which expressly identified him as a "Domestic partner" and "Limited partner" with a "capital account." (*See, e.g.*, Ex. BB at 3, 10, 13.) Each year, Eric relied on the K-1 he received

from Trackside to declare his income from Trackside as "partnership … income." (Ex. CC at EC-015528, EC-015534.) Defendants, therefore, cannot take a position in this litigation contrary to the K-1s they provided Eric over the years.

Moreover, Defendants cannot use the purported Trackside Partnership Agreement because they never showed the agreement to Eric—despite his requests to see it.[5] (Ex. U, Dom Tr. at 213:5-214:8, 216:24-217:12; Ex. O, Sam Tr. at 137:8-25.) Eric's rights cannot be limited by "terms of [a] … contract that he did not possess and terms of which he was not aware." *In re Hartford Fire Ins. Co. (Fell)*, 53 A.D.3d 760, 761 (3d Dep't 2008); *accord Eshaghpour v. Zepsa Indus., Inc.*, 174 A.D.3d 440, 440 (1st Dep't 2019) (holding that the plaintiff could not be bound by certain contract terms where "it is undisputed that plaintiff never saw the Terms and Conditions").

But even if the Trackside Partnership Agreement was enforceable against Eric, it too provides that Eric has an "interest" in the partnership. (Defs. Ex. D at §23.) There are only two types of interests in a partnership: a general partnership interest and a limited partnership interest. If Eric was not a general partner under the partnership agreement, he was a limited partner just with profits and losses allocated to him differently than Sam and Dom. Indeed if Eric did not have a partnership interest, there would have been no reason to mention him in the Trackside Partnership Agreement altogether.

Eric was and still is a partner of Trackside LP and is entitled to investigate Evans' communications—as general counsel for Trackside LP—with Sam and Dom regarding the cancellation and transfer, or attempted transfer, of Trackside LP's assets.

[5] Peter Karl testified that Santo Celia had instructed him and Sam to "ignore" Eric's request for the Trackside Partnership Agreement. (Ex. AA, Karl I Tr. at 153:24-154:14.)

C. The Fiduciary Exception Applies to CPLR §3101(c)'s Attorney Work Product that was Not Created in Anticipation of Litigation

Defendants also argue that the fiduciary exception does not apply to attorney work product under CPLR §3101(c). (Opp. at 15.) Defendants are confusing attorney work product under CPLR §3101(c) with attorney material prepared in anticipation of litigation under CPLR §3101(d) and Rule 26(b)(3) of the Federal Rules of Civil Procedure.

Attorney work product under CPLR §3101(c) is not necessarily limited to work in preparation for litigation[6] and New York Courts have held that it is subject to the fiduciary exception just like attorney-client communications under CPLR §3101(b). *See Zurich Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 137 A.D.2d 401, 402 (1st Dep't 1988) (holding that "[w]here it is alleged that the insurer has breached" a "fiduciary obligation" "the insurer may not use the attorney-client or work product privilege as a shield to prevent disclosure which is relevant to the insured's bad faith action").

Defendants cite to a footnote in *Nama Holdings*, which states that "it may also be necessary to inspect some of the documents to determine whether they were prepared in anticipation of litigation" because "the fiduciary exception does not apply to attorney work product." 133 A.D.3d at 60 n.13. In context, it is clear that the First Department was referring to attorney materials that were prepared in anticipation of litigation, not any work product of an attorney covered by CPLR

[6] *See People v. Kozlowski*, 898 N.E.2d 891, 904 (N.Y. 2008) (distinguishing between attorney work product and materials prepared in anticipation of litigation); *Gilbert v. Off. of the Governor*, 170 A.D.3d 1404, 1406 (3d Dep't 2019) (applying "attorney work product" protection to draft letters unconnected to litigation); *but see Mahoney v. Staffa*, 184 A.D.2d 886, 887 (3d Dep't 1992) (holding that attorney work product protection did not apply to investigation documents where withholding party "submitted no evidence that litigation was contemplated during the course thereof"). To the extent the Court holds the attorney work product doctrine does not apply to documents created prior to anticipation of litigation, CPLR §3101(c) does not apply to any of the Questions Marked for Ruling as explained in Section II(A), *supra*.

§3101(b). Indeed, the First Department cited to a federal claims court for this proposition, and federal courts clearly limit this principle to "once litigation against the company is anticipated." *See Pearlstein v. BlackBerry Ltd.*, 2019 WL 1259382, at *11 (S.D.N.Y. Mar. 19, 2019) (collecting cases). Therefore, to the extent Defendants are asserting attorney work product protection over any documents or communications from prior to Defendants anticipating litigation, the fiduciary exception applies.

III. DEFENDANTS LATE ASSERTION OF A KOVEL AGREEMENT IS NOT CREDIBLE AND EVEN IF SUCH AN ARRANGEMENT EXISTED, IT WOULD NOT COVER THE QUESTIONS AND DOCUMENTS AT ISSUE

A. Evans' and Victoria's Initial Testimony Prove No Kovel Agreement Existed and Defendants Have Not Provided any Contemporaneous Evidence of a Kovel Agreement

Defendants' recent recollection of a Kovel agreement between Evans and Victoria is not credible and not sufficient to sustain their burden of proof because (i) Evans and Victoria changed their testimony about the existence of any such agreement after interruptions by their counsel, (ii) Evans and Victoria produced numerous such documents without asserting privilege, (iii) Defendants have produced no contemporaneous evidence of such an agreement, and (iv) Victoria had been working as an accountant for Celia Construction long before Evans became general counsel and there is no evidence her role changed.

The party "who asserts the privilege"—including the Kovel exception to waiver of attorney client privilege—"has the burden of establishing that all the requisites for the privilege are present." *Gavin v. New York State Bar Ass'n*, 39 A.D.2d 626, 628 (3d Dep't 1972); *United States v. Adlman*, 68 F.3d 1495, 1500 (2d Cir. 1995) (holding that defendant "failed to sustain its burden of showing that the facts come within the principle of *Kovel*"); *United States v. Kovel*, 296 F.2d 918, 923 (2d Cir. 1961) (holding that "Kovel" had the "[t]he burden … of going forward with evidence supporting the claim of privilege"). Defendants' bare assertions of the existence of a

Kovel agreement between Evans and Victoria are not credible and contradict Evans' and Victoria's deposition testimony.

At his deposition, Evans testified that he did not enter into a written agreement with Victoria or Celia & Allen between 2018 and 2022 and did not have any recollection of what services Victoria or Celia & Allen provided to his firm or even if they were in connection to Celia Construction or this case. (Ex. W, Evans Tr. at 33:3-37:19, 42:3-9, 65:21-66:17.) Suddenly now, in his affirmation (¶12), Evans recalls the specific existence of an agreement and the specific date, March 19, 2020, and scope of that agreement. Evans' sudden improvement in recall is not credible.

Victoria's initial deposition testimony is also evidence against the existence of a Kovel agreement. Victoria testified that she is been paid by Celia Construction on a "retainer" "basically based on $1,000 a month," that was the only way she was paid, and "this payment arrangement" had not "changed any time in the past 10 years." (Ex. DD, Victoria Tr. at 20:9-21:18.) So Victoria was not paid by Celia Construction for any special legal-based work. Similarly, after describing her accounting duties for Trackside LP, Victoria answered "no" when asked if her "duties ever changed with respect to Trackside Limited Partnership." (*Id.* at 36:16-37:8.) So Victoria never did any special legal-based work for Trackside LP. Finally, when asked if she was ever paid or billed Evans for work on Celia Construction, Trackside LP, or Trackside Apartments, Victoria answered "No." (*Id.* at 39:14-25.)

Indeed, it was only upon returning after her counsel called for a break, that Victoria suddenly recalled doing work "for David Evans" on the relevant entities. (*Id.* at 40:19-41:18.) But when asked if she ever billed Evans for this "work," Victoria was forced to admit that she had not done so. (*Id.* at 41:19-21.) Defendants are now asserting (Opp. at 4; Evans Aff. ¶12) that Victoria entered into a *Kovel* agreement with Evans on March 19, 2020. It strains credulity to believe that

Victoria worked for Evans for two years without payment, bills, or any writing affirming their agreement.[7] Or that she suddenly recalled the claimed "Kovel" arrangement only after the opportunity to consult with her counsel at a break.

Nor did Victoria or Evans ever object or withhold any documents in their original production pursuant to a *Kovel* privilege—despite two such documents being publicly filed on January 24, 2022. (NYSCEF Nos. 104, 106.) Indeed, the entire claim that Victoria was acting under a *Kovel* agreement in her communications with the Defendants and Evans was never referenced prior to Eric's request to the Court to compel Sam—and later Evans—to answer questions related to communications with Victoria. (NYSCEF Nos. 151, 174-75.)[8]

The Second Circuit Court of Appeals—the creator of the *Kovel* exception—held that where (a) an accountant was "regularly employed by [the company] to furnish … accounting and advisory services" and (b) "[t]here is virtually no contemporaneous documentation supporting the view that [accountant], in this task alone, was working under a different arrangement from that which governed the rest of its work," the defendant could not assert the protections of the *Kovel* exception. *Adlman*, 68 F.3d at, 1500; *see Barry v. Clermont York Associates LLC*, 2014 WL 7208657, at *3 (N.Y. Sup. Ct. N.Y. Cnty. Dec. 19, 2014) (holding that to support "the *Kovel* exception" the asserting party "must produce contemporaneous proof of a '*Kovel* agreement,' such as a separate retention agreement or separate billing").

Defendants have attached no contemporaneous documentation of a *Kovel* agreement between Evans and Victoria. No written agreement, no bills or invoices sent by Victoria to Evans.

[7] Ironically, when commenting and Eric' Oral Agreement with his brothers, Defendants are very quick to dismiss the credibility of an oral promise—despite having issued Eric 10 years of K-1s showing him to be a partner of Trackside.

[8] Oddly, Defendants accuse Plaintiff's Motion of "entirely ignor[ing]" *Kovel*. (Opp. at 10.) Plaintiff's Motion was filed on April 18, 2022. Neither Defendants nor Victoria ever asserted the existence of a *Kovel* relationship prior to April 20, 2022.

No separate bills for legal work sent by Victoria to Celia Construction, no checks written by Evans to Victoria for help in legal work. Nothing. Moreover, Victoria testified that no such documents exist. (Ex. DD, Victoria Tr. at 39:14-25.)

Finally, Victoria worked as an accountant for Celia Construction, Trackside LP, and Trackside Apartments for over a decade without any evidence of change. Under *Adlman*, Defendants need to show some contemporaneous documentation of a change in Victoria's role—not just "litigation affidavits prepared by interested persons … years after the fact." 68 F.3d at 1500. They have not done so, and, therefore Defendants have not, and cannot, sustain their burden to prove the existence of privilege over any documents or communications sent to, or received from, Victoria.

B. Kovel is a Narrow Exception for Accountants Acting to Facilitate Attorney-Client Communications and Does Not Apply to the Documents at Issue.

Even if Evans had a *Kovel* agreement with Victoria it would not cover the information that Defendants are seeking to withhold because the Third Department limits the application of *Kovel* privilege to documents and communications with the accountant made "to facilitate or clarify communications between [a party] and his attorneys." *Galasso v. Cobleskill Stone Prod., Inc.*, 169 A.D.3d 1344, 1346–47 (3d Dep't 2019) (rejecting the application of *Kovel* to a valuation report prepared pursuant to an agreement with counsel because "the purpose of the report was not to facilitate or clarify communications"); *Gottwald v. Sebert*, 63 N.Y.S.3d 818, 823 (N.Y. Sup. Ct. 2017), *aff'd,* 161 A.D.3d 679 (1st Dep't 2018) (holding that in order for *Kovel* exception "to apply, the communications disclosed to a third party must be necessary to facilitate attorney-client communications … merely helpful" is not enough"); *United States v. Ackert*, 169 F.3d 136, 139–40 (2d Cir. 1999) (rejecting application of *Kovel* where "[non-attorney's] role was not as a translator or interpreter of client communications").

In Defendants' Opposition (at 9-10) they assert attorney-client privilege under the *Kovel* doctrine for questions regarding "why Mr. Evans copied Victoria on an email sending Celia Construction shareholder meeting minutes and new by-laws" and "the meaning of a draft letter Evans wrote [addressed to Eric] that he sent to Sam, Dominick and Victoria." None of the questions Defendants are refusing to answer on the basis of the *Kovel* exception have anything to do with accounting complexities, such that Victoria's expertise would be necessary to facilitate communication. (*See* Plaintiff's Memo at 2-4 (Question 2 to Sam, Questions 4, 8 to Evans).)

Similarly, during Victoria's deposition Defendants repeatedly asserted attorney-client privilege on documents and communications sent to, or received from, Victoria that had nothing to do with facilitating communications with Defendants. For example, Victoria was asked if Evans asked her "to transfer assets from Trackside Limited Partnership to Trackside Apartments, LLC?" (Ex. DD, Victoria Tr. at 191:17-20.) Defendants asserted attorney-client privilege and Victoria refused to answer, even though the question had nothing to do with facilitating communications with Sam or Dom. (*Id.* at 193:19-195:3.) Similarly, Victoria refused to answer a whole slew of questions related to email exchanges between her and David Evans about the filing of Trackside LP's federal tax returns—in which none of the Defendants were involved in the communications. (*Id.* at 225:7-230:10, 261:22-270:14; Ex. EE; Ex. FF.) Defendants cannot legitimately assert privilege to prevent Victoria or Evans from answering any of these questions. Nor can Defendants claim that these exchanges about Trackside LP's 2019 tax return are protected as attorney-work product or materials prepared in anticipation of litigation because Victoria is not an attorney and these materials were prepared for the purposes of filings taxes—"a business purpose[] and not solely for litigation." *Nyahsa Servs., Inc., Self-Ins. Tr. v. People Care Inc.*, 155 A.D.3d 1208, 1211-12 (3d Dep't 2017) (emphasis added).

Galasso is binding precedent. Defendants cannot use a *Kovel* agreement—even if one existed—to shield Sam, Evans, and Victoria from answering the Questions Marked for a Ruling or any other questions that are not narrowly within the category of facilitating communications between Defendants and their attorneys. Any expectation of privilege Defendants had for their communications or documents sent to, or from, Victoria, was legally unreasonable.

C. Defendants do Not Even Claim There was a Kovel Agreement Between Evans and Victoria Prior to March 19, 2020 But Are Still Trying to Restrict Testimony about Prior Communications

Defendants only assert that Victoria entered into a *Kovel* agreement with Evans on March 19, 2020. (Evans Aff. ¶12; Opp. at 4.) The questions and documents including Victoria at issue in Plaintiff's Motion all date from prior to March 19, 2020.[9] Therefore Defendants cannot use the purported *Kovel* agreement to avoid being compelled to answer these questions.

IV. DEFENDANTS DO NOT DISPUTE THAT THEY WAIVED ANY CLAIM OF PRIVILEGE WITH RESPECT TO PETER KARL WHEN THEY SUBPOENAED AND QUESTIONED HIM ABOUT HIS DISCUSSIONS WITH DEFENDANTS

In the Opening Memo (at 10-11), Plaintiff argued that communications between Evans and Peter Karl ("Karl"), or Defendants and Karl, were not privileged for two reasons. *First*, Karl did not represent the Defendants and so the communications were not "confidential" under *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 35 (N.Y. 2016). *See, also Lebedev v. Blavatnik,* 2017 WL 11614287, at *12 (N.Y. Sup. Ct. Nov. 15, 2017) (holding that communications between two law firms "representing different clients … with respect to the joint ventures" were not privileged). *Second*, Defendants placed communications with Karl at issue—and thereby waived any privilege—when they subpoenaed him and elicited his testimony about

[9] Plaintiff's questions pertained to: (i) Plaintiff's Deposition Exhibit 62, dated December 11, 2018; (ii) Evans sending Victoria a copy of Celia Construction draft meeting minutes on December 15, 2018; and (iii) Evans sending Victoria, Sam and Dom a draft letter addressed to Eric in February of 2019. (Opening Memo at 2-4, Sam Question No. 2 and Evans Questions Nos. 4 and 8.)

what he "advised" Sam and Dom (Opening Br. at 11). *See Orco Bank, N.V. v. Proteinas Del Pacifico, S.A.*, 179 A.D.2d 390, 390 (1st Dep't 1992) (holding that party that testified about some aspects of legal advice he received "waived the attorney-client privilege by placing the subject matter of counsel's advice in issue and by making selective disclosure of such advice").

Defendants responded to Plaintiff's first argument by asserting—without citing any case law—that Defendants "had a reasonable expectation of confidentiality" in communications with Karl because "Karl was necessary and helpful for Mr. Evans to adequately advise Defendants." (Opp. at 11.)

But Defendants did not—because they could not—respond to Plaintiff's second argument at all. Defendants made a strategic choice to try to use Karl's testimony about his drafting of documents, his discussions with Santo Celia, and his discussions with Sam and Dom. (*E.g.*, Ex. AA, Karl I Tr. at 52:3-17, 54:17-55:22, 108:20-25, 110:4-14.) Having "affirmatively place[d] the subject matter" of Karl's "communication at issue in litigation," Defendants "ha[ve] waived the attorney client privilege." *Van Ryn v. Goland*, 189 A.D.3d 1749, 1753 (3d Dep't 2020). Defendants failed to respond to this argument, thereby conceding that it defeats their claims of privilege with respect to communications and documents sent to, or received from, Karl.

V. DEFENDANTS HAVE NOT REBUTTED THEIR CLEAR WAIVER OF PRIVILEGE

A. Defendants' Fuzzy Math Cannot Rescue Their Production of Hundreds of Supposedly Privileged Documents

As noted in the Eric's Opening Memo, 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). And it is well-settled that disclosure of privileged documents 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). Defendants have not satisfied their burden with respect to any documents.

Defendants produced at least 366 emails—not including the attachments to those emails—that they are now asserting are privileged or work product. (NYSCEF No. 176, Hutman Aff. I ¶¶4-6.) In an attempt to minimize this obvious waiver of privilege, Defendants attempt to compare the ratio of "privileged documents" to the 20,000 pages they claim to have produced.[10] (Opp. at 4-6, 20-23.) Defendants describe this as an "infinitesimally small" "error rate" "between 0.24% and 0.6%." (*Id.* at 6.) To achieve these numbers Defendants make three basic errors. *First*, Defendants only use the number of emails (120) that do not include Victoria and Karl—but Defendants are asserting privilege over the latter communications as well. (Opp. at 9-11.) *Second*, Defendants compare the number of documents produced to the *pages* they produced. Of course, most documents have multiple pages. In reality, through November 30, 2021 (the date by which document production was represented as complete), Defendants produced 6,786 documents and Evans separately produced 1,587 documents for a total of 8,373 documents.[11] (Hutman Aff. II ¶5.) Comparing these two numbers shows that Defendants are trying to claw-back 4.37% of the documents produced—approximately 1 out of every 23 documents. That is not infinitesimal.

Third, and most important, the comparison of the total number of documents produced to the number of privileged documents is the wrong question to ask in evaluating whether privilege

[10] Plaintiff cannot confirm the number of pages Defendants produced because they failed to Bates-stamp many of their productions.

[11] The 8,373 includes numerous duplicates. Large numbers of documents were produced twice—sometimes three times. (Hutman Aff. II ¶5.) Defendants also made a production in early 2021 in .pdf form without metadata. After Plaintiff objected, Defendants reproduced them in the proper form. The reproduction is included in the 8,373. (*Id.*)

was inadvertent and whether Defendants "took reasonable steps to prevent its disclosure." *AFA Protective Sys.*, 13 A.D.3d at 565. After all, Defendants may not have withheld any documents for privilege in the categories at issue—demonstrating that they did not intend to maintain a claim for privilege—but those documents are simply 4.37% of Defendants' total responsive documents. Rather we need to compare the 366 documents produced with the number of documents Defendants withheld for privilege from the period prior to Eric filing this action. Unfortunately, we cannot make such a comparison because Defendants never produced a privilege log—a necessity to allow assessment of a privilege claim—further demonstrating Defendants did not take reasonable steps to review and withhold the documents they are now claiming privilege. *See In re Subpoena Duces Tecum to Jane Doe, Esq.*, 787 N.E.2d 618, 623 (N.Y. 2003) ("[W]e recommend that a party seeking to protect documents from disclosure compile a privilege log in order to aid the court in its assessment of a privilege claim and enable it to undertake in camera review.").

Nor are 8,373 documents or 20,000 pages some extraordinary large production for two corporate officers, general counsel, a sizable corporation, and a valuable partnership—Eric as a lone individual produced 3,872 documents totaling 15,929 pages (Hutman Aff. II ¶6)—such that Defendants could have taken reasonable steps to prevent disclosure and still ended up producing these documents. The more reasonable explanation for Defendants' production of these 366 emails—plus attachments—is Defendants did not consider them privileged at the time.

Finally, Evans' description of the steps he took to review documents for privilege (Evans Aff. ¶¶13-15; Opp. at 22)—if true—only further demonstrates that it was only recently that Defendants decided to consider pre-litigation communications with corporate counsel and/or Victoria or Karl as privileged. Evans did not withhold these documents because at the time Defendants did not believe them to be privileged.

B. Defendants Failed to Promptly Claw Back Documents Even After They Were Filed Publicly—Demonstrating They Did Not Believed Them Privileged

In the Opening Memo (at 17-20), Eric showed that Plaintiff's Exhibit 63 ("Exhibit 63") and other documents over which Defendants are now asserting privilege were publicly filed for weeks and months before Defendants first claimed they were privileged.

In response, Defendants argue that any waiver should be limited to Exhibit 63 because that was the only document they failed to promptly claw-back. (Opp. at 22-23.) Defendants are again missing the mark. Defendants' failure to assert privilege and claw-back Exhibit 63 and the multiple emails sent between Evans and Victoria which were publicly filed on March 15, 2022 and January 24, 2022, respectively—or go back and inspect their productions for similar documents—is not just a waiver of privilege with respect to those documents. It is evidence that Defendants did not consider those documents to be privileged in the first place and their production was, therefore, not inadvertent.

C. Defendants' Cross-Motion Demonstrates that Defendants Did Not Take Reasonable Steps to Prevent Disclosure—They Cannot Keep Track of What They Produced

Defendants' cross-motion for a protective order asks the Court to order Eric to identify, return, and/or destroy the documents that Defendants are asserting are privileged under Rule 4.4(b) of the Rules of Professional Conduct. (NYSCEF No. 189 at 2; Opp. at 23-24.) Obviously, Eric is arguing that these documents are not privileged. Moreover, it is Defendants' burden, not Eric's, to locate and assess which documents Defendants believe are privileged. *See Caruso v. Ne. Emergency Med. Assocs., P.C.*, 85 A.D.3d 1502, 1505 (3d Dep't 2011) ("The party claiming that privilege bears that burden of identifying the particular material with respect to which the privilege is asserted.") (internal quotation removed). But the fact that Defendants need Eric to

identify the documents they are asserting are privileged is further evidence that Defendants did not set up a reasonable system to review and produce documents.

Defendants do not know what documents they produced and have no way of determining what they are. This demonstrates that to the extent these documents were privileged, Defendants "utilize[ed] … a screening procedure which was not reasonably designed or executed so as to prevent the inadvertent disclosure [which] supports a finding of waiver." *Bras v. Atlas Const. Corp.*, 545 N.Y.S.2d 723, 725 (2d Dep't 1989); *see Koramblyum v. Medvedovsky*, 19 A.D.3d 651, 652 (2d Dep't 2005) ("Moreover, assuming that such a privilege existed, it was waived by the defendants' lack of due diligence.").

CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiff's moving papers, Plaintiff's Motion to Compel should be granted in its entirety, Defendants' Cross-Motion for a Protective Order should be denied, and Plaintiff should be awarded costs and attorney fees.

Dated: New York, NY
May 11, 2022

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