SURROGATE'S COURT OF THE STATE OF NEW YORK - COUNTY OF MONROE

JP Morgan Chase Bank, N.A. (Successor by Merger to the Chase Manhattan Bank)(Successor by Merger to Chase Lincoln First Bank, N.A.)(Successor in Interest to Lincoln First Bank, N.A.)(Successor by Consolidation to Lincoln First Bank of Rochester)(Formerly Known As Lincoln Rochester Trust Company) as Trustee Under The Trust Agreement Dated May 23, 1932 by Alvah G. Strong,

DECISION AND ORDER

AND

File No. 2006-1463

Pursuant to the Exercise of the Power of Appointment Under Paragraph Ninth of the Will of Marjorie H. Strong for the Benefit of Marjorie Strong Wehle (Who Died January 8, 2004)

JP Morgan Chase Bank, N.A. (Successor by Merger to the Chase Manhattan Bank)(Successor by Merger to Chase Lincoln First Bank, N.A.)(Successor in Interest to Lincoln First Bank, N.A.)(Successor by Consolidation to Lincoln First Bank of Rochester)(Formerly Known As Lincoln Rochester Trust Company) as Trustee Under Paragraph 22(b)(4) of the Will of Alvah G. Strong for the Benefit of Marjorie Strong Wehle (Who Died January 8, 2004)

File No. 2006-1463/A

JP Morgan Chase Bank, N.A. (Successor by Merger to the Chase Manhattan Bank)(Successor by Merger to Chase Lincoln First Bank, N.A.)(Successor in Interest to Lincoln First Bank, N.A.)(Successor by Consolidation to Lincoln First Bank of Rochester)(Formerly Known As Lincoln Rochester Trust Company) as Trustee Under Paragraph Fourth of the Will of Alvah G. Strong for the Benefit of Marjorie Strong Wehle (Who Died January 8, 2004)

File No. 2006-1463/B

JP Morgan Chase Bank, N.A. (Successor by Merger to the Chase Manhattan Bank)(Successor by Merger to Chase Lincoln First Bank, N.A.)(Successor in Interest to Lincoln First Bank, N.A.)(Successor by Consolidation to Lincoln First Bank of Rochester)(Formerly Known As Lincoln Rochester Trust Company) as Trustee Under Paragraph Tenth of the Will of Marjorie H. Strong for the Benefit of Marjorie Strong Wehle (Who Died January 8, 2004)

File No. 2007- 2911

APPEARANCES

Paul J. Yesawich, Esq. and Laura Smalley, Esq. (*Of Counsel Harris Beach LLP.*) for Petitioner/Movant and Trustee, JP Morgan Chase, N.A. *Mark Grannis, Esq. and Jared Marx, Esq.(Wiltshire & Grannis, LLP.)* for the Objectants/Respondents, Charles Wehle, Henry Wehle, Jonathan Wehle, Wendie Thompson, Heather Degrazia and Jason Wehle.

DECISION

In contested Accounting proceedings for the subject Trusts, Petitioner seeks an order pursuant to CPLR §3124 compelling the discovery of certain materials used by the Objectants to craft their Objections. Specifically, the Petitioner alleges the Objectants have failed to produce or identify the documents impliedly or explicitly referenced, relied upon, related to, or utilized by the Objectants in preparing their verified Objections.

Additionally, the Petitioners seek any and all correspondence and documents referring to or relating to communications relating to the Trusts and/or its investments between and among the Objectants, as beneficiaries of the Trusts, and the Trustee.

The Objectants' original counsel, Mitchell T. Williams, passed away in 2010 and their current attorneys were retained only after his passing. They maintain Mr. Williams did not provide them a list of the documents from which he relied upon when drafting the Objections. The Objectants also state they have either produced all of the documents he may have relied upon or those materials are in the public domain. Furthermore, the Objectants aver that even if a such list existed, in which those documents relied upon are specifically identified, such compilation would be privileged as attorney work product.

Broad discretion is given to the Court over the discovery process. *Baliva v. State Farm Mut. Auto. Ins. Co.*, 275 AD 2d 1030 (4th Dept. 2000). CPLR 3101(c) renders attorney work product unobtainable and completely immune from discovery. Attorney work product is reflected "in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." *Hickman v. Taylor*, 329 US 495, 511 (1947). In the course of zealously representing a client, the lawyer must be allowed to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Id*. A lawyer must work on a client's behalf "with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman*, 329 US at 510-51; as quoted in *Charter One Bank, F.S.B. v. Midtown Rochester, L..L.C.,* 191 Misc. 2d 154 (Sup. Ct. Monroe Co. 2002).

However, CPLR §3101(d) establishes a qualified privilege for materials prepared in anticipation of litigation in which those materials may be disclosed upon showing that the party seeking the discovery has a substantial need for the materials in their own preparation and is unable without undue hardship to obtain the substantial equivalent by other means. CPLR§3101(d)(2). The burden of showing whether the information sought to be disclosed is privileged is upon the party asserting the privilege and the simple characterization of the material, be it a statement, document or other form of communication, as "privileged" will not suffice. *Civil Serv. Emples. Ass'n v. Ontario County Health Facility,* 103 A.D. 2d 1000 (4th Dept. 1984).

As a practical matter, Mr. Williams is no longer available and no one can divine what he referred to when he drafted the pleadings. Petitioner mentions in its moving papers that it made its initial discovery demand more than three years prior to Mr. Williams passing. The Court can only speculate as to what would have been produced had they made their motion then, instead of waiting five years later when the person who conceptualized the Objections has passed away. Simply put, the Objectants cannot produce what they do not have.

The Objectants state they cannot identify with confidence what documents Mr. Williams used to prepare the Objections and that their own layman's basis for their position is readily apparent within the Accounting itself, (i.e., the alleged unreasonable concentration of Kodak stock in the subject Trusts). Furthermore, they argue that there is nothing to suggest that Mr. Williams referred to any documents that the Petitioner does not either already possess or that is publicly accessible.

Even if such a compilation existed, it would be privileged under either CPLR §3101(d)(2) or §3101 (c). Whatever Mr. Williams used to formulate the Objections, it would reflect his unique learning and professional skills, including his legal research, conclusions, legal theory and strategy. *Brooklyn Union Gas Co. v. American Home Assur. Co.* 23 AD 3d 190 (1st Dept. 2005). How an attorney breaks down an issue, his impressions and analysis are the very essence of what is protected under the statute, "[otherwise,] much of what is now put down in writing would remain unwritten." *Hickman v Taylor*, 329 US 495, 511 (1947). In this case, no one can be certain if anything was ever committed to paper. Furthermore, the Petitioners have failed to show a substantial need for the compilation in preparation of their case without undue hardship

to overcome the privilege of CPLR 3101(d)(2). *DiMichel v. South Buffalo Ry. Co.*, 80 NY 2d 184 (1992).

Petitioner also demanded that the Objectants produce any and all correspondence and documents referring or relating to communications relating to the Trust and/or its investments between the Objectants individually and the Trustee's representatives. The Objectants assert that they have responded to the demands and have provided all non-privileged communications. However, the Petitioner is incredulous that so little has been produced and believes responsive documents (i.e., correspondence among the individual Objectants or their notes reflecting communication with the Petitioner's representatives) may have been withheld as privileged and seek a privilege log under CPLR 3122(b).

The Objectants maintain they withheld no documents from the Accounting period as privileged. They further maintain that their objection to the production of all documents originated after the Accounting period has not been challenged by the Petitioner and therefore a privilege log for those documents is unwarranted.

CPLR 3101(a) states that there shall be full disclosure of all matter material and necessary to the prosecution or defense of an action. This standard was further edified by the Court of Appeals in *Allen v. Crowell-Collier Publishing, Co.*, finding that the statute must be "interpreted liberally to require disclosure upon request, of any facts bearing on the controversy which will assist in the preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v. Crowell-Collier Publishing, Co.,* 21 NY 2d 403, 406 (1968). As the Fourth Department stated "' [if] there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered 'evidence material in the prosecution or defense.'" *In re Genesee Valley Union Trust Co.,* 21 AD 2d 843 (4th Dept. 1964). However, this generous disclosure standard is not without limits. CPLR § 3103(a) provides that the Court may on its own initiative deny, limit, condition or regulate the use of any disclosure device to prevent annoyance, expenses, embarrassment, disadvantage, or other prejudice to any person or the courts.

Before an assessment as to whether the post-accounting material sought by the Petitioner is privileged, it must first be alleged that the material sought has probative value and serve to narrow the controversy. CPLR §3101; *Hunter v. Trybinski,* 278 AD 2d 844 (4th Dept. 2000). The Petitioner's papers are devoid of any explanation as to how the documents sought suit that purpose. The Petitioners have failed to properly specify the documents sought with sufficient particularity. *Weiss v. Meiselman*, 155 AD2d 533 (2nd Dept. 1989). The request for material spanning more than eight years is both over broad and onerous. *Pucik v. Cornell Univ.,* 4 AD 3d 686 (3rd Dept. 2004). *Petraglia v. Laiacona*, 86 AD 2d 747 (4th Dept. 1982).

Furthermore, the documents sought, to the extent that the Objectants have declared them privileged, would require a herculean effort by the Objectants in creating a privilege log which would then require an exhaustive in camera review. Based upon what is presented, this Court is unwilling to devote its precious time and resources to pore over a privilege log spanning eight years which presumably includes not only every piece of attorney work product, but also

hundreds of internal e-mails and correspondence. The Petitioner has not sufficiently alleged that the material sought that postdates the accounting period is "material and necessary" to the issues raised in the Objections. *Van Horn v. Thompson & Johnson Equip. Co.,* 291 AD 2d 885 (4th Dept. 2002).

Based on the foregoing, Petitioner's motion is denied. This constitutes the Decision and Order of the Court.

Dated: November 28, 2012
Rochester, New York

Edmund A. Calvaruso

Hon. Edmund A. Calvaruso
Monroe County Surrogate

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