UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA, Plaintiff, v. MARK ELLIOT ZUCKERBERG and FACEBOOK, INC., Defendants.	:	Civil Action No. 1:10-cv-00569-RJA

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO CEGLIA'S OBJECTION TO THE MAGISTRATE JUDGE'S APRIL 19, 2012 ORDER

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PRELIMINARY STATEMENT

Plaintiff Paul Ceglia contends that two documents that his lawyer shared with Jason Holmberg — a wood pellet salesman from Pennsylvania who is not a lawyer — are protected by the attorney-client privilege because Holmberg was purportedly serving as a legal secretary or providing unspecified "consulting" services. Judge Foschio was entirely correct in rejecting this preposterous claim — the latest in Ceglia's egregious abuses of the discovery process. *See, e.g.*, Doc. No. 283 at 22 (sanctioning Ceglia for demonstrating "a plain lack of respect" for court orders "which cannot be countenanced").

This entire lawsuit is a fraud built upon a forged "contract" and "emails" manufactured by Ceglia, as set forth in detail in Defendants' motion to dismiss. *See* Doc. No. 319. Indeed, one of the very documents at issue in Ceglia's objections reveals REDACTED

The order that is currently before this Court arises from Defendants' fifth motion to compel Ceglia's production of documents that further establish the fraud (all five of which have been granted). After conducting a careful *in camera* review of the documents in question, Judge Foschio concluded that Ceglia had failed to carry his burden of establishing that they were protected by the attorney-client privilege.

That conclusion is plainly correct and well within Judge Foschio's broad discretion under Rule 72(a). Holmberg is not an attorney; he is not a consultant; and he is not a legal secretary. He is a seller of wood pellets that Ceglia enlisted to help shop his fraudulent lawsuit to firms willing to help him try to extort a settlement from Defendants.[1] Ceglia failed to introduce any

[1] Ceglia also is a former wood pellet salesman, although his career in that field ended when he faced criminal and civil charges brought by the Allegany County District Attorney's Office and the New York Attorney

evidence demonstrating that Holmberg was functioning as a legal secretary or consultant in connection with the two documents at issue — Items 360 and 379 — and any such claim would be absurd on its face. This is simply a case where the privilege was waived because Ceglia shared the documents with a third party, and his after-the-fact fiction that the third party was a "legal secretary" or "consultant" are too little, too late. Judge Foschio's order should be affirmed.

FACTS

1. In July 2011, based on Defendants' substantial showing of fraud, Judge Foschio ordered limited, targeted discovery to allow Defendants to assemble evidence that the purported Work for Hire contract referred to in Ceglia's Amended Complaint, and the purported emails excerpted therein, were forgeries that Ceglia was using to perpetrate a massive fraud on this Court. Doc. No. 83. Expedited discovery confirmed the fraud. Among other things, Defendants found two identical copies of the authentic contract between Ceglia and Zuckerberg: one on Ceglia's hard drive, and another on the email servers of the international law firm Sidley Austin, where Ceglia had emailed it to a former Sidley Austin lawyer in 2004. That authentic contract does not mention Facebook. Rather, consistent with Zuckerberg's declaration explaining his limited interactions with Ceglia, Doc. No. 46, it concerns only programming work that Zuckerberg agreed to do for Ceglia on a now-defunct website called StreetFax. This and other objective scientific and forensic evidence — which establishes Ceglia's fraud beyond any conceivable doubt — is described in detail in the memorandum of law in support of Defendants' pending motion to dismiss. *See* Doc. No. 319 at 1–20, 28–51.

General's Office for defrauding citizens in upstate New York through a scam involving the sale of wood pellets used to heat homes. *See* Doc. No. 45 at 15.

But that evidence was not obtained easily. Ceglia stonewalled and obstructed discovery for over ten months at every turn. His bad-faith litigation misconduct was so egregious that two of his lawyers withdrew from the case, attesting in sworn declarations that Ceglia had instructed them not to comply with court orders. *See id.* at 20. The Court sanctioned Ceglia for his contumacious misconduct; it fined him $5,000 and ordered him to pay nearly $93,000 of Defendants' attorney's fees, *see* Doc. Nos. 283, 292, 370, 371, after finding that Ceglia had demonstrated "a plain lack of respect" for court orders "which cannot be countenanced," Doc. No. 283 at 22. Ceglia's extensive record of willful, bad-faith litigation misconduct is cataloged in Defendants' memorandum of law supporting their motion to dismiss. *See* Doc. No. 319 at 51–66.

2. Ceglia's repeated, flagrant refusals to comply with the Court's expedited discovery orders required Defendants to file five motions to compel. Doc. Nos. 95, 128, 154, 243, 294. The Court granted all of those motions. Doc. Nos. 107, 117, 152, 208, 272, 317, 357. The issue here relates to part of the order granting Defendants' fifth motion to compel.

As relevant, Defendants' fifth motion challenged Ceglia's assertion of attorney-client privilege over eleven documents that Ceglia withheld from a February 2012 production of documents from his web-based email accounts. *See* Doc. No. 295 at 1–2, 4–6, 8. Defendants later discovered that one of those emails REDACTED

Privilege Log Item 379 at 19-20 (emphasis added). REDACTED Ceglia has refused to produce the REDACTED so Defendants do not know its contents. But the surrounding context suggests REDACTED

Because Defendants had not yet seen that email when they filed their motion, they noted Ceglia's history of improperly designating documents as privileged and this Court's prior orders overruling those improper privilege designations. *See id.* at 8 (citing Doc. Nos. 208, ¶¶ 14–15; 107). In opposing Defendants' fifth motion, Ceglia dropped his privilege assertion over one of those eleven documents. He also stated that he "does not oppose this Court's in camera review of" the ten remaining "documents to evaluate such designations." *See* Doc. No. 310 at 8. The Court thus ordered Ceglia to produce the remaining documents for *in camera* review. Doc. No. 317 at 2.

3. Following its thorough *in camera* inspection, the Court granted in part Defendants' request to overrule Ceglia's privilege assertions. Doc. No. 357 ("Waiver Order"). The Waiver Order began by carefully analyzing the applicable case law on the attorney-client privilege. It stated that "[a] party invoking the attorney-client privilege must demonstrate three essential elements, including (1) a communication between a client and counsel, (2) intended to be and kept confidential, and (3) made for the purpose of obtaining or providing legal advice or services." *Id.* at 4 (citing *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (other citations omitted)). The Waiver Order also stated that "[t]he burden of establishing each element of the privilege, including the absence of any waiver, is upon the party

asserting the privilege." *Id.* at 4–5 (citing *United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210, 214 (2d Cir. 1997) (other citations omitted)). And it quoted the well-established principle that "[w]hen information that is otherwise protected by the attorney-client privilege is disclosed to third parties, the element of confidentiality is destroyed, and the privilege is waived." *Id.* at 5 (citing *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973) (other citations omitted)).

Applying those established legal principles, Judge Foschio held that six of the ten challenged documents were privileged, and need not be produced; one of the ten was privileged in part, and should be produced in redacted form; and three of the ten were not privileged and must be produced in full. *See id.* at 6. Ceglia's objections here concern only two of the documents that the Court held must be produced in full — privilege log Items 360 and 379.

Judge Foschio carefully analyzed Ceglia's privilege claims over Items 360 and 379. *See id.* at 8–11. He described Item 360 as "an email dated March 17, 2011, from Plaintiff to one Jason Holmberg ('Holmberg'), whom Plaintiff asserted is Plaintiff's attorney's agent, the subject of which email is 'file for DLA' with two files attached." *Id.* at 8. And he described Item 379 as "an April 19, 2011 email from Argentieri to Plaintiff with the subject 'Fwd: Follow-up' and containing emails with Kcross@lippes.com, Amarks@kasowitz.com, Jerry.Trippitelli@dlapiper.com, and jason.holmberg@papellets.com with attachments." *Id.*

The Waiver Order summarized the parties' arguments on whether Items 360 and 379 were privileged. It noted Defendants' contention that any attorney-client privilege over Items 360 and 379 was waived when those documents were disclosed to Holmberg, a non-lawyer. *Id.* at 9. It also expressly acknowledged Ceglia's contention that disclosing those items to Holmberg did not waive any privilege because "his counsel, Argentieri, retained Holmberg as a consultant and agent with regard to the instant litigation." *Id.* at 8–9. And it cited Defendants' argument

that there was no evidence before the Court establishing Holmberg's role as Argentieri's agent in connection with Items 360 and 379, and no "indication Holmberg prepared Item 360 or 379 at Argentieri's request." *Id.* at 9.

After summarizing the parties' arguments, Judge Foschio recognized Second Circuit case law establishing that "[t]he attorney-client privilege may protect 'communications made to agents of an attorney . . . hired to assist in the rendition of legal services.'" *Id.* (quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (other citations omitted)). "As such, 'the attorney-client privilege can attach to reports of third parties made at the request of the attorney or the client where the purpose of the report was to put in usable form information obtained from the client.'" *Id.* (quoting *Occidental Chem. Corp. v. OHM Remediation Servs. Corp.*, 175 F.R.D. 431, 436 (W.D.N.Y. 1997) (internal quotation marks and citation omitted)). But Judge Foschio correctly concluded that Ceglia had failed to carry his burden of introducing evidence showing that Holmberg played such a role with regard to Items 360 and 379:

> [T]he record is completely devoid of any explanation as to why Holmberg's services were retained in connection with the two documents attached to the March 17, 2011 email submitted as Item 360, or why the information contained in the emails comprising Item 379 were also circulated to Holmberg, much less that Holmberg had any "need to know" the information disclosed therein.

Id. at 10 (quoting *Robbins & Meyers, Inc. v. J.M. Huber Corp.*, 274 F.R.D. 63, 93–94 (W.D.N.Y. 2011)).

The Court also held that Ceglia had waived any claim that Items 360 and 379 were protected by the attorney work product doctrine because he had failed to assert such protection in his original privilege log. *Id.* "Accordingly, even if Items 360 and 379 were ever protected by the attorney-client privilege and work product doctrine, the protection has been waived by the disclosure of the information to a third party, Holmberg, without establishing Holmberg had any

need to know the information or had been retained to render professional services with regard to the documents." *Id.* at 10–11 (emphasis added).

Ceglia filed a one-page motion seeking "clarification" of the Waiver Order. Doc. No. 358. Ceglia asked the Court to "clarify" that he could redact from Item 379 certain emails that he claimed had not been provided to Holmberg. *See id.* at 2. The Court construed Ceglia's motion as one for reconsideration; it denied the motion, finding that "Plaintiff has failed to meet his heavy burden of establishing reconsideration is needed 'to correct clear error or prevent manifest injustice.'" Doc. No. 361 ("Reconsideration Order") at 5 (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)).

4. Ceglia's objections followed. *See* Doc. No. 367. He challenges only the Waiver Order's conclusion that Items 360 and 379 are not protected by the attorney-client privilege; he does not object to Judge Foschio's holding that he waived any work product protection that may have attached to those two documents. *See id.*

STANDARD OF REVIEW

This Court reviews the Waiver Order under the familiar "'clearly erroneous or contrary to law'" standard. *See Arnold v. Krause, Inc.*, 233 F.R.D. 126, 129 (W.D.N.Y. 2005) (citing 28 U.S.C. § 626(b)(1); Fed. R. Civ. P. 72(a)) (Arcara, J.). "A magistrate judge's order is 'clearly erroneous' where 'on the entire evidence, the [district court] is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (other internal quotation marks omitted)). "Pursuant to this 'highly deferential' standard of review, 'magistrates are afforded broad discretion in resolving nondispositive disputes and reversal is appropriate only if their discretion is abused.'" *Id.* (quoting *Flaherty v. Filardi*, 388 F. Supp. 2d 274, 283 (S.D.N.Y. 2005)); *see also Rubin v. Valicenti Advisory Servs.,*

Inc., 471 F. Supp. 2d 329, 333 (W.D.N.Y. 2007) ("Under the 'clearly erroneous' standard of review of Rule 72(a), the magistrate judge's findings should not be rejected merely because the court would have decided the matter differently."). Ceglia's objections do not satisfy those exacting standards.

ARGUMENT

The party asserting the attorney-client privilege bears the burden of establishing — by competent evidence — both the existence of each element of the privilege, and that the privilege has not been waived. *See, e.g.*, *Allied Irish Banks, P.L.C. v. Bank of Am., N.A.*, 252 F.R.D. 168, 168–69 (S.D.N.Y. 2008). Although the privilege extends to communications between a client and an attorney's agent in certain circumstances, *see, e.g.*, *Schwimmer*, 892 F.2d at 243, disclosure of privileged material to most third parties waives the privilege. *See, e.g.*, *U.S. Postal Serv. v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 162 (E.D.N.Y. 1994) ("[T]he fact [that] the document is sent to a third party ordinarily removes the cloak of confidentiality necessary for protection under the attorney-client privilege."). And whether the attorney-client privilege attaches to a communication, or whether any privilege has been waived, must be determined on a document-by-document basis. *See, e.g.*, *Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 75 (S.D.N.Y. 2010); *NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 131 (N.D.N.Y. 2007).

Judge Foschio applied those settled, straightforward legal principles in resolving Defendants' fifth motion to compel. Accordingly, there is no basis to overturn the Waiver Order as "contrary to law." Fed. R. Civ. P. 72(a). *See Lavigna v. State Farm Mut. Auto. Ins. Co.*, 736 F. Supp. 2d 504, 509-10 (N.D.N.Y. 2010) ("Under a contrary to law standard, a district court can reverse a magistrate judge's order only if the order fails to apply the relevant law.").

I. The Waiver Order Is Not Clearly Erroneous.

Instead of challenging Judge Foschio's application of the legal principles outlined above, Ceglia's objects to Judge Foschio's determination that "'the evidentiary record is completely devoid of any explanation as to why Holmberg's services were retained in connection with the two documents attached to the March 17, 2011 email submitted as Item 360, or why the information contained in the emails comprising Item 379 were also circulated to Holmberg.'" Doc. No. 367 at 7 (quoting Waiver Order at 10) (emphases added). Ceglia contends that this finding overlooks two pieces of evidence: a declaration from Argentieri attesting that he hired Holmberg "as a consultant and/or at times, to perform executive secretarial duties," Argentieri Decl. ¶ 3 [Doc. No. 311], and a declaration from Holmberg attesting that Argentieri "retained [Holmberg's] services as a consultant to assist [Argentieri] in prosecuting Paul Ceglia's lawsuit." Holmberg Decl. ¶ 2 [Doc. No. 341]; *see* Doc. No. 367 at 9–10.

Ceglia is mistaken. The Court expressly acknowledged Ceglia's argument and quoted from Argentieri's declaration. Waiver Order at 8–9. Thus, any contention that the Waiver Order must be overruled because Judge Foschio somehow missed record evidence is factually incorrect; Judge Foschio specifically cited the only evidence upon which Ceglia bases his objections.

Judge Foschio reasonably and correctly ruled that those two statements in Holmberg's and Argentieri's declarations are insufficient to justify Ceglia's privilege assertions over Items 360 and 379. Ceglia disagrees, arguing that the Waiver Order's view of those two declarations is inconsistent with *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). *See* Doc. No. 367 at 9–10.

In *Kovel*, the Second Circuit held that when a client sought tax advice from a tax lawyer, the client's confidential communications to an accountant at the lawyer's direction would be covered by the attorney-client privilege if the accountant was "then to interpret [the

communications] so that the lawyer may better give legal advice." 296 F.2d at 922. The Court emphasized: "What is vital to the privilege is that the communication" to the non-attorney agent "be made in confidence for the purpose of obtaining legal advice from the lawyer." *Id.*

Later cases — that Ceglia does not cite — have clarified *Kovel*'s scope. In *United States v. Ackert*, 169 F.3d 136 (2d Cir. 1999), tax counsel for Paramount Pictures (Meyers) had several conversations with an investment banker (Ackert) "to gain information and to better advise his client" concerning the tax consequences of an investment proposal that Ackert had pitched to Paramount. *Id.* at 139. When the IRS later subpoenaed Ackert in connection with an audit of Paramount, Paramount asserted attorney-client privilege over the conversations between Meyers and Ackert. *See id.* at 138. The Second Circuit rejected Paramount's privilege assertion, stating that "a communication between an attorney and a third party does not become shielded by the attorney-client privilege solely because the communication proves important to the attorney's ability to represent a client." *Id.* at 139. It held that the communications between Meyers and Ackert were not privileged under *Kovel* — even though Meyers had consulted with Ackert to obtain "information Paramount did not have about the proposed transaction and its tax consequences" for his client's benefit — because "Ackert's role was not as a translator or interpreter of client communications." *Id.* at 139–40.

A recent district court decision applied *Ackert* in factual circumstances materially indistinguishable from those here. *See In re Refco Secs. Litig.*, — F.R.D. —, 2011 WL 4527287 (S.D.N.Y. 2011). In *Refco*, the defendants contended that an attorney for some plaintiffs (Ginsberg) had waived the attorney-client privilege by disclosing certain documents to a non-party (Knight). *See id.* at *1. In response, Ginsberg relied on *Kovel* and contended "that Knight

was his 'consultant,' and that the attorney-client privilege was not waived when he shared information with a consultant." *Id.* at *2.

The district court rejected Ginsberg's argument, reasoning that *Ackert* had "expressly limited" *Kovel*'s applicability to circumstances where the attorney relied on the consultant "to 'translate or interpret information given to [the attorney] by his client.'" *Id.* (quoting *Ackert*, 169 F.3d at 138–39). Because "there is no evidence suggesting that Ginsberg relied on Knight to translate or interpret information given to him by his clients," *Refco* held that Ginsberg's disclosure to Knight had waived the privilege claim. *Id.* at *3.

To be sure, the court noted Ginsberg's statements during oral argument and in a declaration suggesting that he "relied on Knight's experience and specialized knowledge." *Id.* But even that did not justify Ginsberg's privilege assertion under *Ackert* because

> [w]hat does not appear . . . is any evidence that there was information Ginsberg could not understand without Knight translating or interpreting the raw data for him. Accordingly, by sharing his client's information with a third party, Ginsberg waived attorney-client privilege for that information.

Id.

The same is true here. The two declaration statements that "describe Mr. Holmberg's role generally," Doc. No. 367 at 13, as a "consultant" do not constitute "evidence suggesting that [Argentieri] relied on [Holmberg] to translate or interpret information given to him by his clients," or "evidence that there was information [Argentieri] could not understand without [Holmberg] translating or interpreting the raw data for him." *Refco*, — F.R.D. —, 2011 WL 4527287, at *3. Indeed, as Judge Foschio reasoned, the Argentieri and Holmberg declarations fail even to explain "why Holmberg's services were retained in connection with" Items 360 and 379, Waiver Order at 10, much less that Holmberg's "consulting" duties included necessary translation or interpretation work in connection with those documents. Accordingly, Judge

Foschio's description of "the evidentiary record" as "completely devoid of any explanation" that warrants application of the privilege under *Ackert* is entirely accurate. *Id.*

Ceglia's after-the-fact claim that Argentieri retained Holmberg to "liaise via email with potential additional representation," Doc. No. 367 at 9, only proves the point. No such description of Holmberg's consulting services with respect to Items 360 and 379 appears in either declaration. As a result, the declarations do not even try to explain how Holmberg's purported "lias[ing] via email with potential additional representation" constituted "translating or interpreting" information that Argentieri "could not understand" without Holmberg's assistance. *Refco*, 2011 WL 4527287, at *3.

Nor does Holmberg's purported role as a "secretary" provide a basis for reversing the Waiver Order. First, the evidence on this issue is conflicting: unlike Argentieri, Holmberg did not describe himself as a "secretary," but instead referred to himself only as a "consultant." Doc. No. 341, ¶ 2. Second, Argentieri's description was itself equivocal: he stated that "Holmberg was hired by me as a consultant and/or at times, to perform executive secretarial duties." Doc. No. 311, ¶ 17 (emphasis added). But no evidence in the record describes whether Holmberg's role in connection with Items 360 and 379 occurred in his one of his "times" acting as a secretary (assuming he ever did), or in his purported role of "consultant."[2]

[2] By personally adopting only the title "consultant," Holmberg has tacitly acknowledged that he was not a legal secretary (Argentieri already had one on staff), a paralegal, or even an "employee" of Argentieri's law firm. Thus, he implicitly excluded himself from the many classes of attorney agents whose role in helping the client "obtain[] legal advice from the lawyer," *Kovel*, 296 F.2d at 922, is self-evident — and who thus may receive confidential client communications without waiving the privilege, even without explaining their roles in detail. Accordingly, Ceglia's argument that the Waiver Order somehow establishes a precedent that an attorney must "explain why his or her secretary, paralegal, or assistant was hired — and why that agent needed access to any given document — in order to support the application of attorney-client privilege," Doc. No. 367 at 10, is inapposite.

Such ambiguity about Holmberg's role further confirms the correctness of Judge Foschio's holding. "Courts that have considered the application of the attorney-client privilege to independent outside consultants have been cautious in extending its application." *U.S. Postal Serv. v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 161 (E.D.N.Y. 1994) (citing *F.T.C. v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980)). Where an evidentiary record allows a court to "conceive of circumstances that might warrant application of an attorney-client privilege," "[b]ut other circumstances, equally plausible from the record . . . , fall outside any reasonable definition of the privilege," the resulting "ambiguity is troublesome and, in the end, is the source of [the court's] resolution of the question." *TRW*, 628 F.2d at 213.

> The burden is on the proponent of the attorney-client privilege to demonstrate is applicability. Where, as here, we have not been provided with sufficient facts to state with reasonable certainty that the privilege applies, this burden is not met. As noted earlier [Ceglia's] claim lies [at best] on the outer and indistinct boundary of the law of attorney-client privilege. Particularly where this is so, it is our responsibility to tread carefully, with as much precision as the facts before us permit. Where, by contrast, no precision is possible where the absence of facts presents a focused analysis a court should be slow to define and to apply new law.

Id. (affirming a refusal to apply the privilege) (citation omitted). Here, the facts provide no precision in assessing Holmberg's role in connection with Items 360 and 379 — whether as a "consultant" or a "secretary." Thus, Argentieri's equivocal description of Holmberg as a "secretary" provides no basis for overruling the Waiver Order.

In sum, Ceglia's *post hoc* characterizations of two pieces of ambiguous, largely vacuous evidence do not undermine Judge Foschio's sound conclusion that the evidentiary record is "completely devoid of any explanation" regarding Holmberg's role as a translator or interpreter in connection with Items 360 and 379. On this record, the Waiver Order would satisfy even *de novo* review; it is thus well within the "broad discretion" afforded to Judge Foschio by Rule 72(a)'s "highly deferential" clear error standard of review. *Arnold*, 233 F.R.D. at 129 (Arcara,

J.) (internal quotation marks omitted). Because "the entire evidence" leaves no basis for "the definite and firm conviction that a mistake has been committed," *id.* (internal quotation marks omitted), this Court should affirm the Waiver Order.

II. Ceglia's Two Remaining Arguments Do Not Support Overruling The Waiver Order.

Ceglia also objects to the Waiver Order on two other grounds. First, he contends that Judge Foschio "improperly applied a 'need to know' standard to Mr. Holmberg." Doc. No. 367 at 11–12. But Judge Foschio merely stated an accurate fact: Ceglia failed to introduce any evidence from which the Court could have concluded that Holmberg had a "need to know" the contents of Items 360 and 379, so those Items could not have been privileged under *Robbins & Meyers, Inc. v. J.M. Huber Corp.*, 274 F.R.D. 63, 83–84 (W.D.N.Y. 2011). In other words, Judge Foschio never held that Ceglia had to prove Holmberg's "need to know" as a prerequisite to establishing the privilege; instead, he concluded that Ceglia had failed to introduce other evidence that might have supported a different basis for asserting the privilege. Hence, the Waiver Order's statement that the record is "completely devoid of any explanation as to why Holmberg's services were retained in connection with" Items 360 and 379, "much less that Holmberg had any 'need to know' the information contained therein." Waiver Order at 10 (emphasis added).

Ceglia also objects because Judge Foschio noted that the Lawsuit Overview document is not privileged when describing Ceglia's failure to justify his privilege assertion over Items 360 and 379. *See* Waiver Order at 9–10. Ceglia claims that Judge Foschio then erred by "not explain[ing] how or why the confidentiality of the Lawsuit Overview document is relevant to assessing whether Privilege Log Items 360 and 379 are privileged." Doc. No. 367 at 13.

Ceglia misreads the Waiver Order. Judge Foschio simply distinguished the record concerning the two documents. Giving Ceglia the benefit of the doubt, Judge Foschio stated that the Holmberg and Argentieri declarations provide some evidence that "Holmberg may have been retained by Argentieri to type the Lawsuit Overview and convert it into a pdf format." Waiver Order at 9–10. In contrast, "the record is completely devoid of any" similar evidence regarding Items 360 and 379 — there was simply "no explanation as to why Holmberg's services Ceglia were retained in connection with" Items 360 and 379. *Id.* at 10. Thus, Judge Foschio never held that Items 360 and 379 could be privileged only if Ceglia had established that the Lawsuit Overview document was confidential or privileged. Rather, he contrasted evidence concerning the Lawsuit Overview document with the (lack of) record evidence concerning Items 360 and 379 when "assess[ing privilege] on a document-by-document basis," Doc. No. 367 at 13 — the very process Ceglia claims the Court should have followed.

CONCLUSION

Defendants respectfully request that this Court affirm Judge Foschio's order requiring the disclosure of privilege log Items 360 and 379. The Waiver Order correctly holds that disclosure of Items 360 and 379 to Holmberg waived the privilege because the record is "completely devoid of any explanation" of Holmberg's role in connection with those two documents. Accordingly, under *Ackert*, Ceglia has failed to introduce evidence sufficient to justify application of the privilege to those two items. In addition, this Court should affirm Judge Foschio's order denying Ceglia's motion for reconsideration (Doc. No. 361); Ceglia's objection brief does not present any legal argument specifically attacking that Reconsideration Order.

Dated: New York, New York
May 16, 2012

Respectfully submitted,

/s/ Orin Snyder

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