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MEMORANDUM OF LAW

Paul Ceglia has been concealing for months a document that confirms his fraud: a letter from his former lawyers to co-counsel in which **Ceglia's lawyers**

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On April 13, 2011, Ceglia's lawyers at the New York-based law firm of Kasowitz, Benson, Torres & Friedman LLP sent a letter (the "Kasowitz Letter") to their co-counsel at DLA Piper LLP and Lippes Mathias Wexler Friedman LLP. The Kasowitz Letter

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and DLA

Piper and Lippes Mathias have since withdrawn from the case as well.

Ceglia has been concealing the existence of the Kasowitz Letter for months. Only after this Court overruled his baseless privilege objections did Ceglia produce the email transmitting the Kasowitz Letter. But Ceglia—knowing full well the explosive nature of its contents—still stubbornly refuses to produce the Kasowitz Letter itself.

This Court should order the **immediate** production of the Kasowitz Letter. It is an attachment to an email (Item 379) that Ceglia has already produced pursuant to this Court's order. It is plainly improper for Ceglia to produce the email but refuse to produce the attached document that the email transmitted. Moreover, the Kasowitz Letter contains

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; it therefore falls squarely within

categories of documents this Court has ordered Ceglia to produce. Nor can Ceglia conceal the Letter on grounds of privilege: it is an attachment to an email (Item 379) this Court has already held is not privileged, and Ceglia has waived any privilege by failing to identify the Kasowitz

Letter on a privilege log at any point in this case. At a bare minimum, this Court should direct Ceglia to produce the Kasowitz Letter (and attachments) for *in camera* inspection before crediting his unfounded privilege claims.

BACKGROUND

This is the sixth motion to compel necessitated by Ceglia's refusal to comply with this Court's discovery orders. *See* Doc. Nos. 95, 129, 155, 245, 295. This Court granted each of Defendants' five previous motions to compel. *See* Doc. Nos. 107, 117, 152, 208, 272, 317, 357. The Court has also sanctioned Ceglia for his obstinate refusal to comply, ordering Ceglia to pay both a \$5,000 fine for "obstruction" and Defendants' attorney's fees totaling \$92,627.79. *See* Doc. Nos. 283, 292, 370, 371. When the Court compelled Ceglia to produce Item 379 from his privilege log in granting Defendants' Fifth Motion to Compel, Defendants discovered that Ceglia had been concealing the very existence of the bombshell Kasowitz Letter.

Item 379 is a lengthy compilation of emails, the majority of which include third-party, non-lawyer Jason Holmberg, a wood-pellet salesman. *See* Doc. No. 361 at 4. Item 379 was discovered by Defendants' digital forensics expert Stroz Friedberg from the recently-acquired preserved image of Ceglia's Gmail account, which was obtained only after multiple motions to compel filed by Defendants. Pursuant to the Electronic Assets Inspection Protocol (Doc. No. 85), on February 1, 2012 Stroz Friedberg produced to Plaintiff Item 379 among other presumed relevant materials. Plaintiff withheld Item 379 as privileged on a privilege log dated February 9, 2012 (*see* Doc. No. 296-1), and on February 21, 2012 Defendants moved to compel, *inter alia*, the *in camera* inspection of that document because Ceglia's privilege designation was unsupported and improper (*see* Doc. No. 295).

On March 27, 2012, the Court ordered that Item 379 and other challenged documents be produced for *in camera* review (Doc. No. 317). After reviewing the document, on April 19, 2012 the Court overruled Ceglia's designation of Item 379 as privileged and required it to be produced within 10 days, by April 30, 2012 (Doc. No. 357). Ceglia filed first a "motion for clarification" of the April 19 Order (Doc. No. 358) and then a motion to stay the April 19 Order (Doc. No. 362), both of which were denied (Doc. Nos. 361, 365). Ceglia produced Item 379, along with the three other items the Court ordered produced, on April 30, 2012. That same day, Ceglia filed objections to the April 19 Order before Judge Arcara, which remain pending. Doc. No. 367.

Upon review of Item 379, it became clear to Defendants that there was a critical document missing from the production: the Kasowitz Letter, which was an attachment to an April 13, 2011 email from Kasowitz to Ceglia's then-counsel that was produced, and which was located at page 14 of Item 379. *See* Southwell Decl. Ex. A at 14. Accordingly, on May 3, 2011, Defendants sent Ceglia's counsel a letter demanding the production of the Kasowitz Letter, which should have been previously produced in response to this Court's expedited discovery orders. *See* Southwell Decl. Ex. B. On May 7, 2012, Ceglia's counsel responded, refusing to produce the Kasowitz Letter on the basis that the Court's orders did not call for its production, and on the ground that it is protected from disclosure by the attorney-client privilege. *See* Southwell Decl. Ex. D. In a May 9, 2012 telephone conversation with Plaintiff's counsel Sanford Dumain, Orin Snyder and Alexander H. Southwell reiterated Defendants' request that the Kasowitz Letter be produced. Dumain indicated that he would take the request under advisement. *See* Southwell Decl., ¶ 7. On May 14, 2012, Dumain informed Snyder that Ceglia would not produce the Kasowitz Letter. *See* Southwell Decl., ¶ 8.

ARGUMENT

I. Ceglia Improperly Omitted The Kasowitz Letter From His Production

Ceglia produced Item 379, which includes the April 13, 2011 transmittal email indicating the Kasowitz Letter is attached along with REDACTED

See Southwell Decl., Ex. A at 14. Ceglia has not, however, produced the Kasowitz Letter, and has produced only one of the documents it references (discussed in greater detail below). It is established practice that the full document — an email and all of its attachments — should be produced where the email or any of the attachments are responsive. See *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 2011 WL 3738979 at *4-5 (S.D.N.Y. Aug 18, 2011) (noting, in ordering that certain email attachments be produced, that review of the case law indicates that “there is an implication that attachments must be produced with emails,” and that “prevailing practice . . . is for parties to produce any non-privileged attachment to an email if the email is determined to be relevant, and to produce the email if any of the attachments are determined to be relevant”); see also *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, 2007 WL 2687670, at *12 (N.D.N.Y. Sept. 7, 2007) (“Without question, attachments should have been produced with their corresponding emails as such are kept in the usual course of business.”); *CP Solutions PTE, Ltd. v. General Electric Co.*, 2006 WL 1272615, at *4 (D.Conn., Feb. 6, 2006) (“Defendants chose to provide the documents in the manner in which they were kept in the ordinary course of business. Attachments should have been produced with their corresponding e-mails”); *U & I Corp. v. Advanced Med. Design, Inc.*, 251 F.R.D. 667, 675 n. 14 (M.D.Fla.2008) (“The dubious practice of producing e-mails without attachments in federal discovery has not gone unnoticed by other courts.”).

The Kasowitz letter is part and parcel of Item 379, which the Court has directed Ceglia to produce and which contains an email REDACTED

Ceglia continues to conceal critical evidence of his fraud on this Court, **REDACTED**

. Accordingly, Defendants respectfully request that this Court order Ceglia to produce the full Kasowitz Letter, with all attachments and/or embedded images. This is exactly the approach this Court has followed with regard to similar compendium documents. *See, e.g.*, March 22, 2012 Order (Doc. No. 317) (holding that an entire compendium document, the “Lawsuit Overview,” containing copies of a responsive document falls within the scope of the Court’s orders and must be produced).

II. The Kasowitz Letter Is Responsive To This Court’s Expedited Discovery Orders.

Even if the Kasowitz Letter had not been included in Item 379, it would be responsive standing alone and should have been produced many months ago. This Court’s August 18, 2011 Order directed Ceglia to identify and produce “all electronic copies or images of the purported contract,” “all electronic versions or purported versions of any contract,” and “all electronic versions of any emails or purported emails” among the relevant parties. *See* Doc. No. 117 ¶¶ 2-3. The Kasowitz Letter falls within all of these categories.

First, the Kasowitz Letter contains emails that are responsive to the Court’s orders. Ceglia himself has conceded that the Kasowitz Letter is responsive by producing these attached emails to Defendants earlier this year. On February 28, 2012, in response to the Court’s expedited discovery orders and after much delay, Ceglia’s former counsel Lake APC produced a PDF document entitled “Scanned StreetFax Emails attached to Letter from Marks to Vacco 041311.” *See* Southwell Decl. Ex. E. Plaintiff did not designate this PDF, which discloses publicly the existence of a letter from Mr. Marks to Mr. Vacco, dated April 13, 2011, as confidential. This document is an attachment to the Kasowitz Letter, and contains emails by and among Zuckerberg, Ceglia, and/or other persons associated with StreetFax. The emails in this document contain handwritten notations, presumably from a Kasowitz attorney. *See* Southwell

Decl. Ex. E at 1, 4-6. Specifically, those notations are asterisks calling attention to emails between Zuckerberg and Ceglia regarding the payment terms of the agreement between them. The payment terms discussed in these emails are consistent with the authentic StreetFAX Contract, and inconsistent with the fraudulent Work for Hire Document, a point Defendants noted in moving to dismiss. *See* Doc. No. 319 at 35-38 (discussing contemporaneous emails referencing payment terms of the contract between the parties, which provides further evidence that the StreetFAX Contract is authentic and the Work for Hire Document is a forgery). The Kasowitz firm appears to have **REDACTED** By producing the email collection that had been attached to the Kasowitz Letter in response to the Court's orders, Ceglia has acknowledged that the Kasowitz Letter is itself responsive to this Court's orders.

Second, it is evident from the context surrounding the April 13, 2011 email by which Aaron Marks of Kasowitz transmitted the Kasowitz Letter that it contained or included copies, **REDACTED** In addition to containing this April 13 transmittal email, Item 379 contains numerous emails that **REDACTED**

See Southwell Decl. Ex. A at 4-5, 19-20. The emails establish **REDACTED**

The emails in Item 379 tell the following story. On March 29, 2011, **REDACTED**

REDACTED *See* Southwell Decl. Ex. A at 22.
REDACTED on March 30, 2011 at 4:16 p.m.,

Marks received an email from Brian Halpin of Capsicum Group with the subject REDACTED

The body of the email message says

REDACTED

. *Id.* at 11-12. Subsequently, the Kasowitz firm
writing in an email:

REDACTED

REDACTED

Id. at 19-20 (emphasis added). In short, after

REDACTED

See N.Y. Rules of Professional Conduct, Rule 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent”); Rule 8.4 (b)-(d) (“A lawyer or law firm shall not . . . engage in illegal conduct . . . ; engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] engage in conduct that is prejudicial to the administration of justice.”).

DLA Piper and Lippes Mathias did not notice appearances in this case until April 11, 2011 (*see* Doc. No. 38), the same day they filed the Amended Complaint (Doc. No. 39). Two days later, on April 13, 2011 at 9:50 a.m., Marks emailed the Kasowitz Letter to DLA Piper, Lippes Mathias, and Paul Argentieri along with the documents referenced in the letter. *See* Southwell Decl. Ex. A at 14. Later that day, Dennis Vacco of Lippes Mathias responded via email,

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REDACTED

Id. at 13-14. Given this context, the Kasowitz Letter

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Because the Kasowitz Letter includes copies of both emails responsive to this Court's orders and should have been produced in its entirety long ago, Defendants respectfully request that this Court order Ceglia to produce immediately the complete Kasowitz Letter, with all attachments and/or embedded images.

III. The Kasowitz Letter Is Not Privileged.

Ceglia has a well-established history of asserting unsustainable and improper privilege designations in attempt to hide damaging evidence of his fraud from this Court, Defendants, and the public. *See* Doc. Nos. 208, ¶¶ 14–15 (overruling privilege designations), 107, 357. His assertion that the Kasowitz Letter is “protected from disclosure by the attorney client privilege” follows this established pattern and is baseless. *See* Southwell Decl. Ex. D.

First, this Court has already ruled that the communication contained in the email transmitting the Kasowitz Letter, which by implication includes its attachments, is not privileged. Doc. No. 357. After having briefed this issue before the Court and having had his arguments rejected by the Court, Ceglia cannot be heard to now assert that the Kasowitz Letter attached to the non-privileged email is privileged.

¹ It should be noted that DLA Piper and Lippes Mathias filed the Amended Complaint notwithstanding the
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Southwell Decl. Ex. A at 19-20. And, of course, the Milberg firm
and Dean Boland continue to represent Ceglia notwithstanding the
REDACTED

Second, Ceglia did not disclose the Kasowitz Letter on any privilege log accompanying his various productions under the Court's expedited discovery orders. *See* Southwell Decl., ¶ 10. His first assertion of privilege over the Kasowitz Letter occurs in a May 7, 2012 letter to Defendants' counsel. *See* Southwell Decl., ¶ 10 and Ex. D. This assertion occurred after Ceglia was ordered to produce all responsive images and emails and provide access to his webmail accounts, after Ceglia submitted the false and inaccurate August 29, 2011 Declaration, after Defendants filed five successful motions to compel Ceglia's compliance with the expedited discovery orders, after Defendants' forensic expert Stroz Friedberg searched the preserved webmail accounts from the webmail providers, after Stroz Friedberg uncovered Item 379 containing emails revealing the very existence of this document, after Stroz Friedberg produced Item 379 to Plaintiff for review pursuant to the Electronic Assets Inspection Protocol, after Defendants challenged Ceglia's improper privilege assertions over Item 379, after the Court overruled those improper assertions, after the Court denied a motion for reconsideration and a motion to stay, and after Ceglia finally produced Item 379 which included the emails containing references to the Kasowitz Letter.

Ceglia has concealed the existence of this document for months. His attempt to assert privilege over this responsive document only after he has been caught red-handed trying to hide it should not be countenanced. Because he failed to provide a privilege log listing that responsive document as required by Local Civil Rule 26(e) and Federal Rule of Civil Procedure 26(b)(5), Ceglia has waived any privilege claims over the Kasowitz Letter. *See* Doc. No. 357 at 10 (holding that failure to timely assert privilege in a privilege log waives the privilege) (*citing* *Brown v. Department of Correctional Services*, 2011 WL 2182775, at *15 (W.D.N.Y. June 2, 2011)); *C.T. v. Liberal School Dist.*, 2008 WL 217203, at *9 (D.Kan. Jan. 25, 2008) (finding

privilege waived for attachments to emails that were not separately logged with the allegedly privileged email communication and ordering responsive attachments to be produced); *see also In re Application of Chevron Corp.*, 749 F. Supp.2d 135, 140 (S.D.N.Y. 2010) (finding claims of privilege waived where party failed to provide a privilege log pursuant to local and federal rules); *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 166 (2d Cir. 1992) (finding that the failure to provide a privilege log may result in a finding that the privilege has been waived).

Third, even assuming that at some point the Kasowitz Letter was protected by the attorney-client privilege and the work product doctrine, the protection has been waived by the disclosure of the subject matter of the information to Holmberg, a third-party non-lawyer. *See* Doc. No. 357 at 10-11; Doc. No. 361 at 4-5. This Court has already determined that information to which Holmberg was privy is not privileged: “even if Holmberg was neither a direct nor indirect recipient of any specific email,” there has been a subject-matter waiver because “Holmberg was nevertheless privy to the information contained therein.” *See* Doc. No. 361 at 4; *see also Robbins & Myers, Inc. v. J.M. Huber Corp.*, 274 F.R.D. 63, 95-96 (W.D.N.Y. 2011) (citing cases for proposition that subject matter waiver occurs where holder of the privilege discloses a significant part of the matter of the communication). The Court therefore found Ceglia’s privilege assertions with regard to Item 379 containing the transmittal email unsubstantiated and ordered it produced. Doc. No. 361. Ceglia has already produced several emails on the topic of **REDACTED**, including the email transmitting the Kasowitz Letter. Thus, there is a general subject matter waiver on the subject of **REDACTED**. *See also* Doc. No. 361 (finding that Ceglia has waived any privilege that existed on the subject of communications involving the participation of attorneys in this lawsuit

“until Plaintiff retained DLA Piper LLP as counsel”). Ceglia cannot now be heard to claim privilege over a communication that is at the heart of **REDACTED** the subject matter over which the Court has already found a privilege waiver.

Because there is no valid privilege claim over the Kasowitz Letter, the Court should order Ceglia to produce immediately the Kasowitz Letter and all attachments and/or embedded images to Defendants. Alternatively, because Ceglia, as “the party asserting” the privilege bears the “burden of establishing [its] existence,” *United States v. Int’l Bhd. of Teamsters*, 119 F.3d 210, 214 (2d Cir. 1997), the Court should order Ceglia to produce immediately the Kasowitz Letter (and all attachments to the Letter) for *in camera* inspection and file with the Court evidentiary support justifying his privilege claims with a copy of any such filing served on Defendants.

CONCLUSION

For the foregoing reasons, this Court should enter an order requiring Ceglia to produce the Kasowitz Letter to Defendants, along with all attachments and/or embedded images. Alternatively, the Court should inspect *in camera* the Kasowitz Letter and its attachments and/or embedded images over which Ceglia claims privilege, and require Ceglia to bear his burden of justifying his privilege claims by competent evidence. This Court should also award Defendants their attorneys' fees and costs, and all other relief to which they may be entitled.

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