UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG, Individually, and FACEBOOK, INC.

Defendants.

Civil Action No. : 1:10-cv-00569-RJA

PLAINTIFF'S OBJECTION TO MAGISTRATE'S ORDER REGARDING SEVENTH MOTION TO COMPEL AND SANCTIONS ON PLAINTIFF AND PLAINTIFF'S COUNSEL

Respectfully submitted,

/s/ Paul Argentieri

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PRELIMINARY STATEMENT

Item 379 of the Stroz Friedberg relevant materials log and the so-called Kasowitz Letter, have been the subject of three motions to compel by Defendants. Doc. No. 294, Fifth Motion to Compel, Doc. No. 381, Sixth Motion to Compel, Doc. No. 461, Seventh Motion to Compel.

Each of these motions and their corresponding orders were based on the following **false premises** advanced by Defendants and adopted by the Magistrate:

1. Item 379, a single email between Plaintiff's counsel and Plaintiff, was disclosed to Jason Holmberg - provably not true; and
2. The Kasowitz Letter was attached to the email that is Item 379 - provably not true; and
3. The email to which the Kasowitz Letter was attached, was disclosed to Jason Holmberg - provably not true; and
4. The Kasowitz Letter's privilege was waived because Plaintiff failed to designate it as privileged on a privilege log during expedited discovery - provably not true.

Throughout the hearings in this matter involving technology issues, the Magistrate has relied on Mr. Pat Healy, in court, to advise the court about technology disputes between the parties. e.g. Hearing Transcript, 11-2-11 at 3. Plaintiff specifically requests a hearing on this matter before the District Court Judge including the presence of Mr. Healy to advise the District Court Judge about the issues inherent in the Magistrate's improper sanction of Plaintiff and Plaintiff's counsel as well as his finding of the Kasowitz Letter and Item 379 having lost privilege as noted in the Magistrate's orders on this issue. Although this court has affirmed one of the Magistrate's Rulings regarding privilege and Item 379, the reasoning behind the analysis of Item 379 is at the foundation of all of the Magistrate's errors following on from that reasoning.

As this objection will conclusively demonstrate, Defendants' have exploited the Magistrate's unfamiliarity with the technology issues inherent in emails, attachments, etc. to confuse the court into believing things about Item 379 and the Kasowitz Letter which are

indisputably and provably not true. Throughout this brief, Plaintiff openly challenges Defendants to bring their experts from Stroz Friedberg to attend a hearing on this matter or at least supply a declaration contradicting any of the claims about Item 379 and the Kasowitz Letter Plaintiff makes in this objection. Defendants' computer experts, Stroz Friedberg, will not testify about these issues in any way supportive of the truthfulness of the four listed premises advanced by Defendants' lawyers and upon which the Magistrate based his rulings on the Fifth, Sixth and Seventh motions to compel.

DEFENDANT'S INTENTIONALLY FALSE DESCRIPTION OF THE KASOWITZ LETTER

The Magistrate erred because of his reliance on Defendants' blatantly, intentionally false description of the Kasowitz Letter:

> "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." Defendants' Memorandum of Law In Support of their Sixth Motion to Compel, Doc. No. 382 at 4. Emphasis added.

The court's order granting Defendants Sixth Motion to Compel plainly adopts Defendants' intentionally false description of the Kasowitz Letter:

"The Kasowitz Letter was an attachment to an email, identified in Plaintiff's privilege log as Item 379 ("Item 379")...." Doc. No. 457 at 8.

The court mistakenly believed that the Kasowitz Letter was an attachment to Item 379 based upon Defendants' representations in their Memorandum. As is noted in Plaintiff's experts' declaration (see Grant Declaration) and **Stroz's description of Item 379** (See Exhibit A,

attached) in their own relevant materials log, Defendants' description adopted by the Magistrate, is false. In fact, Defendants' own experts detailed **each of the attachments to Item 379** in the relevant materials log, Exhibit A, and none of those items is the Kasowitz Letter.

ITEM 379 WAS NOT DISCLOSED TO JASON HOLMBERG

Item 379 was not disclosed to Jason Holmberg. See Declaration of Jerry Grant and Declaration of Jason Holmberg.

What appears evident from the Magistrate's Orders on this issue is that he is adopting Defendants' description of Item 379. Unfortunately, Defendants' description of Item 379 is at times misleading and at other times, false. Item 379 first appears in any motion by Defendants in Doc. No. 295, Defendants Fifth Motion to Compel.

The first reference in their Fifth Motion to Compel is as follows:

> **"First, Ceglia asserts privilege over communications with Jessica Ceglia and Jason Holmberg — third-party non-attorneys. See Southwell Decl., Ex. A, Item Nos. 337, 360, 379."** Id. at 10.

Item 379 is a single email that was not communicated to Jason Holmberg. Exhibit A, Grant Decl. at ¶10, and Holmberg Decl. at ¶8. Defendants' conflating of item 379 with a claim of communications with Jason Holmberg is false and misleading. Defendants knew then and know now that Item 379 was never sent to Jason Holmberg. Defendants double down in their Fifth Motion to Compel by again falsely describing or conflating their description of other items, with item 379:

> **"Ceglia's assertion of privilege over emails sent to Holmberg is also improper. Southwell Decl., Ex. A, Item Nos. 360, 379."** Id. at 11.

Here again, Defendants equate "emails sent to Jason Holmberg" with Item "379." Id. Item 379, never being sent to or copied to any third party, including Jason Holmberg, is thereby conflated with other items and Defendants succeed in confusing the Magistrate that Item 379 is an item communicated to Jason Holmberg.

That conflation of disparate items is completed in this third reference to Item 379 within Defendants' Fifth Motion to Compel:

> **Ceglia's assertions of privilege over Item Nos. 360 (March 17, 2011 email from plaintiff to Holmberg) and 379 (email from Argentieri to plaintiff containing emails with, inter alia, Holmberg) should be rejected.** Id. at 11.

Item 379 does not contain emails **with** Jason Holmberg, it contains emails **sent to or received from Jason Holmberg**. Item 379 also contains emails **never sent to or received from Jason Holmberg**. Defendants succeeded in confusing the court that **all** emails embedded in the body of the single email that is Item 379 were communicated to Jason Holmberg. They were not and Defendants and their experts knew that fact before Defendants filed their Fifth, Sixth and Seventh Motions to Compel.

Once the Magistrate adopted this false understanding of the nature of Item 379, Defendants ran with it seeking an ever wider swath of Plaintiff's privileged communication. Item 379 is an email from Plaintiff's counsel to Plaintiff. Exhibit A and Grant Decl. at ¶10. There are no other recipients of that email. Id. Within the body of that email, are embedded emails between various parties. Id. at ¶15. Some of those embedded emails involve Jason Holmberg as a sender or recipient. Id. at ¶19-20. Some of those emails are exclusively between lawyers working for plaintiff or considering working for plaintiff. Id. Some of those emails are between Plaintiff and lawyers. The reprinting of various emails between various parties **within**

item 379 which was sent only between Plaintiff's counsel and Plaintiff does not sensibly mean that the embedded items within that email were sent to persons other than to whom those emails were sent as evident by their header information.

Defendants confused the Magistrate into thinking that Item 379 should lose its privileged status because it was shared with Jason Holmberg, when Item 379 as provably not shared with him. Exhibit A and Grant Decl. at ¶10. Defendants' also confused the Magistrate into reasoning that the embedded email messages in Item 379 that were not sent to, received by or otherwise copied to Jason Holmberg were somehow disclosed to Jason Holmberg.

Below is a graphic that contains the actual header information from Item 379 and the first three emails embedded in the body of the single email from Plaintiff's counsel Argentieri to Plaintiff.

As is obvious from this one page, the first two emails embedded in the body of Item 379 are emails that were **not disclosed** to Jason Holmberg or any third party. The third email embedded in the body of Item 379 was sent from Jason Holmberg to Aaron Marks, a lawyer at the Kasowitz law firm. The rest of Item 379 proceeds similarly with some emails being sent to or received from Jason Holmberg and others **never disclosed to any third party including not to Jason Holmberg**.

The only supportable factual conclusion from reviewing the embedded emails within the body of Item 379 is that any emails sent to, received from or copied to Jason Holmberg, were disclosed to Jason Holmberg. Likewise, any emails embedded in Item 379 that **were not** sent to, received from or copied to Jason Holmberg, were **not disclosed to Jason Holmberg**. Mr. Holmberg has filed a declaration, under oath and the penalties of perjury, that he did not receive a copy of Item 379 as it has been described in public filings. Holmberg Decl. at ¶8. If Defendants had a contrary argument, supported by a declaration from Stroz disputing Mr. Holmberg's declaration, their response to this objection is the time to file it. They will file no such thing because the evidence of what Item 379 is cannot be contradicted. Instead, they will argue that since the court has already found various things about Item 379 and Jason Holmberg, all completely at odds with the indisputable facts, the District Court should not consider those matters further. The evidence of what is embedded within Item 379 also cannot be disputed from what Plaintiff has correctly identified it to be.

The court granted in part Defendants Fifth Motion to Compel by describing Item 379 as follows:

"Item 379 is 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."

This description is error. Item 379 is a single email. In the body of Item 379 are the embedded header information and email body content of other emails. Grant Decl. at ¶15. Some of those embedded emails involve Jason Holmberg as the sender or recipient, therefore, he obviously had those disclosed to him. Others of the emails embedded in the body of 379 do not

include Jason Holmberg as the sender or recipient. Therefore, Jason Holmberg never saw those emails nor their attachments and they were never disclosed to him resulting in any privilege waiver.

The court's order, Doc. No. 357, regarding Defendants' Fifth Motion to Compel reads as follows regarding Item 379:

"[T]he information contained in the emails comprising Item 379 were also circulated to Holmberg...." Id. at 10. This statement is error.

The information contained in **some of the emails** in item 379 were circulated to Holmberg. That is, the emails in which he is a sender or recipient were obviously circulated to him or originated with him. However, as is inarguable, Item 379 contains items that **were never** circulated to Jason Holmberg. Holmberg Decl. at ¶ 9-12 and Grant Decl. at ¶20. One of those emails **never disclosed or circulated to Jason Holmberg** is the April 13, 2011 email to which the Kasowitz Letter was attached. Holmberg Decl. at ¶9-12 and Grant Decl. at ¶19. Therefore, that email and its attachment are not subject to any privilege waiver resulting from their disclosure to any non-lawyer, including Jason Holmberg. Any contrary assertion is divorced from the facts contained in Item 379. Defendants' experts, Stroz Friedberg, will not offer a declaration claiming that the evidence in Item 379 supports the Defendants' lawyers claims, adopted by the Magistrate, that Jason Holmberg was a recipient of the April 13, 2011 email to which a letter from Kasowitz was attached.

"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..." Id. at 11.

The court's basis for finding privilege waiver as to Item 379 is factually incorrect, and indisputably so. Both Mr. Holmberg himself, under penalty of perjury, has declared he never received the April 13, 2011 email to which the Kasowitz letter was attached and the email evidence itself proves, indisputably, that no other person, including Jason Holmberg received Item 379 nor the April 13, 2011 email embedded within Item 379. See Grant Decl. at ¶19 and Holmberg Decl. at ¶6, ¶9-12. Even a subject matter waiver fails. There is no evidence that the subject matter of the April 13, 2011 email was ever communicated or disclosed to Jason Holmberg or any third party.

Once the Magistrate adopted Defendants' intentionally false description of Item 379 (i.e. that it was an email disclosed to Jason Holmberg that had attached to it the Kasowitz Letter) everything that followed in the Magistrate's analysis compounded the error.

THE KASOWITZ LETTER WAS NOT ATTACHED TO THE EMAIL THAT IS ITEM 379

The Kasowitz Letter was not an attachment to Item 379. See Declaration of Jerry Grant; Relevant Materials Log of Stroz Friedberg (Exhibit A).

Item 379 was a single email with six attachments. Exhibit A and Grant Decl. at ¶11. It was assigned the number Item 379 by Stroz in their relevant materials log. Exhibit A. The Magistrate incorrectly describes this the listing of Item 379 as being on "Plaintiff's privilege log." E.g. Doc. No. 457 at 8. However, the Magistrate's own order, the Electronic Asset Protocol, Doc. No. 85, required Defendants' experts to produce a relevant materials log, in which **Defendants' experts** numbered the presumed relevant items and then submitted that log to Plaintiff for review and designation of appropriate documents as privileged. Item 379 was numbered and described by Stroz in that relevant materials log. Exhibit A. The six attachments

to Item 379 were numbered and described by Stroz in that log. Id. None of those items are describing the so-called Kasowitz Letter. Id. Therefore, Stroz Friedberg alone proves that the Kasowitz Letter **was not an attachment to Item 379**.

Plaintiff's expert Jerry Grant reviewed the native format email (aka .msg file) that is Item 379 and found that Item 379 was a single email. Grant Decl. at ¶10. Stroz's relevant materials log also identifies Item 379 as a single email between Plaintiff's counsel and Plaintiff, i.e. privileged. Exhibit A. Item 379 contained six attachments. See Exhibit A and Id. at ¶11. This is entirely consistent with the relevant materials log produced by Stroz consistent with this court's order in the Electronic Asset Protocol. Id. at ¶12. See Doc. No. 85. Also consistent with the Stroz relevant materials log, Exhibit A, Grant found that the Kasowitz Letter **was not an attachment to Item 379**. Exhibit A and Id at ¶14. Consistent with the description of Item 379 in the Stroz relevant materials log, Exhibit A, Grant found that the single email that is Item 379 **was not disclosed to Jason Holmberg or any third party**. Id at ¶10.

While Defendants and Plaintiff's computer experts, along with Plaintiff and Plaintiff's counsel, all concur on what Item 379 is, to whom it was and was not disclosed and what attachments it contained, Defendants' lawyers and the Magistrate stand in opposition.

April 13, 2011 EMAIL TO WHICH A KASOWITZ LETTER WAS ATTACHED WAS NOT DISCLOSED TO JASON HOLMBERG NOR ANY THIRD PARTY

Grant also reviewed Item 379 for its content. Within Item 379 there is an email dated April 13, 2011, 9:50 AM, which was sent from Aaron Marks, a Kasowitz lawyer, to Dennis Vacco, then counsel for Plaintiff. Id at ¶16. Several other persons were copied on that email, all lawyers for Plaintiff. Id. That embedded email did not contain any attachments as part of Item 379. Id. at ¶18. That embedded email, when it was sent by Aaron Marks to Dennis Vacco,

contained one attachment, the so-called Kasowitz Letter. That attachment, the Kasowitz Letter, was not an attachment to Item 379. Exhibit A and Grant Decl. at ¶11. That embedded email was not sent or disclosed to Jason Holmberg nor any other non-lawyer third party. Id. at ¶19. Many other email messages, embedded within the single email that is Item 379 were also not sent or disclosed to Jason Holmberg. Id. at ¶20. Therefore, Jason Holmberg did not receive a copy of or have any knowledge of the Kasowitz letter. Id. at ¶22 and Holmberg Decl. at ¶10.

THE KASOWITZ LETTER

The court's order in response to the Sixth Motion to Compel evidences its confusion, induced intentionally by Defendants, regarding what was and what was not attached to the single email that is Item 379. It is undisputable that the six items attached to the single email that is Item 379 do not include the Kasowitz Letter.

The files attached to the single email that is Item 379 are as follows:

1. Scan0002.tif - page one of the StreetFax digital images
2. Scan0001.tif - page two of the StreetFax digital images
3. Lawsuit Overview.pdf
4. Ceglia Fee Proposal.xls
5. Decision and Order denying Plaintiff's motion to remand signed by Judge Arcara
6. "Terms of Engagement Letter" in MS Word format addressed to Paul Ceglia from Aaron Marks at the Kasowitz Law Firm. Exhibit A and Grant Decl. at ¶11.

Defendants' experts, Stroz Friedberg, and Plaintiff's expert, Jerry Grant concur on the fact that the Kasowitz Letter was not attached to Item 379. Id.

The above facts regarding these attachments are indisputable. All of these attachments to Item 379 were produced to Defendants following the Magistrate's order in Doc. No. 457, after plaintiff's motion for clarification was denied. Defendants cannot and will not dispute that these six attachments were timely produced following this court's order They will also not dispute that the Kasowitz Letter was not then and never was discovered to be, attached to the single email that is Item 379.

Therefore, the Magistrate erred finding the Kasowitz Letter was an attachment to 379 and that error is proven by Exhibit A and the Grant Declaration.

So, at this point in the analysis, the single email that is Item 379 is clearly a privileged communication between Mr. Argentieri and Mr. Ceglia. It is without doubt that the single email that is Item 379 was **never disclosed to Jason Holmberg nor any third party** and Defendants will not offer a declaration from their computer experts to the contrary of that statement. Exhibit A and Grant Decl. at ¶10. There is no basis for a finding that Item 379 is not privileged.

The Magistrate's premises, therefore, for finding the privilege inherent in the single email that is Item 379 was waived, are factually unsupportable and the Defendants' own experts will not offer a declaration supporting the accuracy of the Magistrate's findings. Moreover, at a hearing on this matter, Mr. Pat Healy will also confirm what Plaintiff's have proven regarding the facts of Item 379 and its attachments and the indisputable fact that Item 379 was not disclosed to Jason Holmberg.

The attachments to the single email that is Item 379 are also, therefore, privileged, although each of them have already been produced to Defendants complying with the Magistrate's previous order. How then, do Defendants seek and obtain an order compelling

disclosure of the privileged Kasowitz Letter when it was not an attachment to the single email that is Item 379? They victimize the Magistrate with further subterfuge.

PLAINTIFF DID NOT FAIL TO DESIGNATE THE KASOWITZ LETTER OR THE EMAIL TO WHICH IT WAS ATTACHED AS PRIVILEGED

COMPARISON OF ELECTRONIC DISCOVERY APPROACHES

The court erred in finding that Plaintiff failed to designate the Kasowitz letter as privileged.

Typical Electronic Discovery - i.e .what was NOT ordered in this case

The typical handling of electronic asset discovery during regular discovery involves parties serving discovery requests on each other for data potentially available on the opposing side's electronic assets. Each side **uses its own computer experts** to search their own electronic assets. The results of that search are then compiled into a relevant materials log to be provided to the opposing side. That log lists all files that are relevant to the opposing side's discovery requests. The log also provides a column for the producing party to designate some of those listed relevant files from the electronic assets as privileged. These relevant materials logs are exchanged along with the production of all non-privileged documents. Thereafter, arguments can be raised by either party objecting to those privilege designations made by each party on their own log which resulting from each party searching its own electronic assets.

Had this been the protocol ordered by the court Plaintiff would have had an independent duty to mark items as privileged on a log before he sent the list of relevant items to Defendants pursuant to their discovery requests. However, as Doc. No. 85 makes clear, this was **not** the protocol the Magistrate ordered in this case.

Obviously, in using this typical electronic discovery protocol, Plaintiff would have had the responsibility to mark for privilege any items that **his computer expert** had listed on a relevant materials log before producing that log to Defendants along with any non-privileged, discoverable items. The case law cited by the Magistrate for the proposition that Plaintiff was responsible to place items on a privilege log are cases involving typical electronic discovery, i.e. not what the Magistrate ordered in this case.

Electronic Discover Actually Ordered And Followed In This Case:

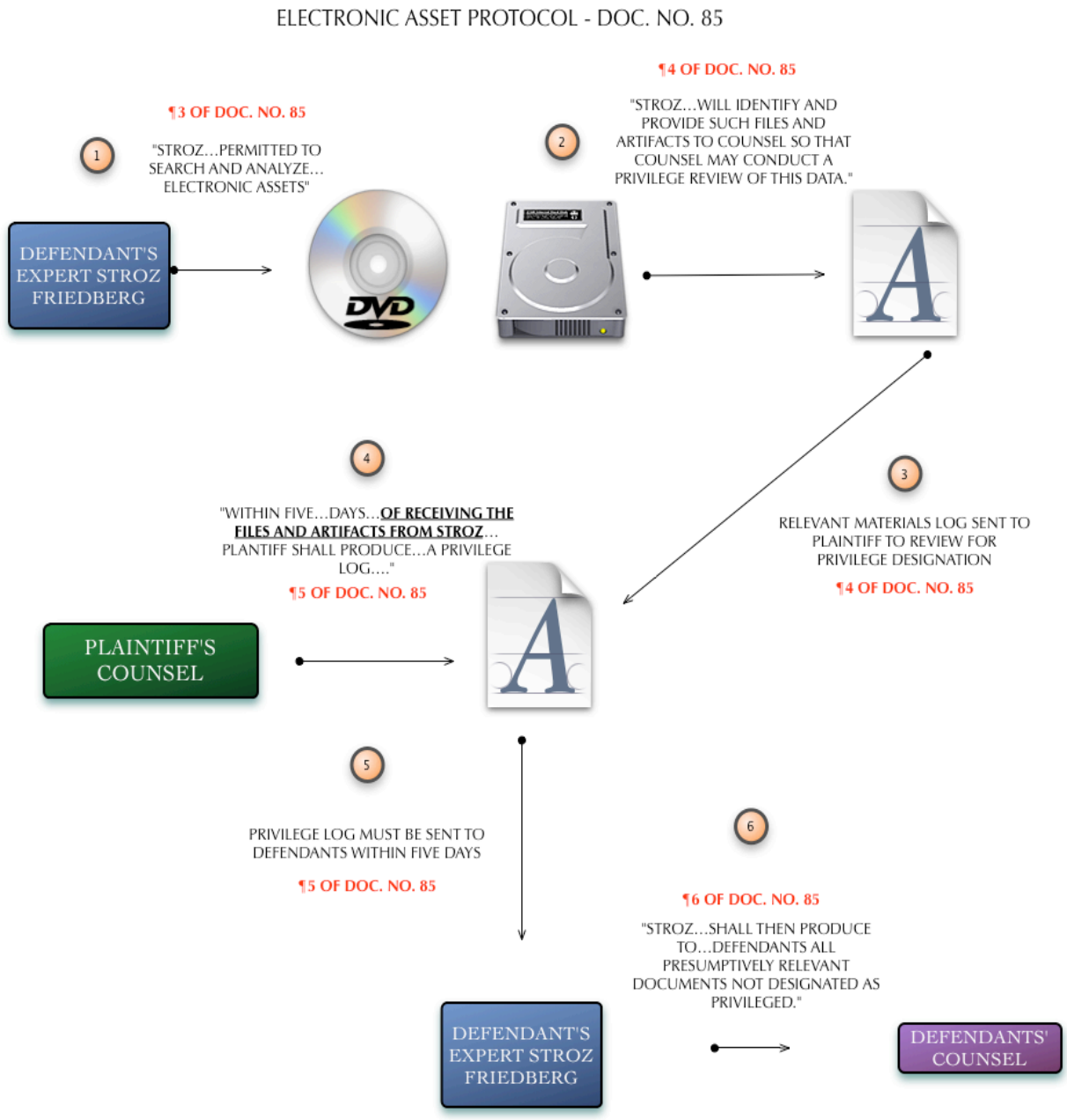
The court ordered the parties to submit a protocol, either agreed or competing protocols, which the court would use to arrive at an order for managing the one-sided Electronic Asset discovery. That order is reflected in Doc. No. 85. That order applied to Defendants examination of Plaintiff's electronic assets.

The Electronic Asset Protocol, Doc. No. 85, set forth the court ordered procedure by which Plaintiff's Electronic Assets would be examined. **Unlike** the typical electronic discovery (described above), **Plaintiff's** computer expert **did not** examine **Plaintiff's** electronic assets and then produce a relevant materials log to Defendants with relevant, but privileged documents, noted as privileged. That did not happen.

Instead, the court ordered in Doc. No. 85, that **Defendants'** computer expert would examine Plaintiff's electronic assets and that **Defendants' expert** (Stroz Friedberg in this case) **would produce a relevant materials log to Plaintiff**. Then, as the order clearly stated, Plaintiff had five days to designate as privileged any documents on **Defendants's** relevant materials log. Doc. No. at ¶5. Plaintiff was to review a log created by Defendants and then mark items on that log privileged as appropriate. Therefore, if Defendants' experts failed to list an item of evidence

on their relevant materials log, Plaintiff was prevented from designating it privileged. The order did not permit Plaintiff to examine his own electronic assets, determine relevant items thereon and produce his own relevant materials log and privilege log and submit that to Defendants. See Doc. No. 85, Electronic Asset Protocol. The parties followed the court's order and Defendants' experts Stroz Friedberg produced several relevant materials logs throughout the one-sided discovery.

A graphical representation of the required steps of the court's order, the Electronic Asset Protocol, Doc. No. 85 is as follows:



It is plain to see from this description that nowhere in the Magistrate's order was Plaintiff permitted or required to produce a privilege log **independent of reviewing Stroz's relevant**

materials log and marking items listed therein as privileged. Doc. No. 85 at ¶5. The Magistrate's order did not permit Plaintiff to insert his own privilege log into the protocol other than by the procedure the court ordered. The Magistrate is simply wrong that the operative protocol of one-sided discovery placed a burden on Plaintiff to independently produce a privilege log. The privilege log only arose **in response to a list of files and artifacts that Stroz was ordered to provide to Plaintiff** for a privilege review. Id.

It is impossible for Plaintiff to have failed to designate an item as privileged, under the court ordered protocol, **unless that document was first listed by Defendants' experts** on their relevant materials log. Doc. No. 85. The Magistrate's order cited to cases involving privilege waiver which were rulings based upon a protocol not operative in this case.

Therefore, the only items that Plaintiff could have failed to designate as privileged, under the Doc. No. 85, Electronic Asset Protocol, were those that Stroz listed on a relevant materials log and that Plaintiff failed to designate as privileged. The Kasowitz Letter was **never placed on any relevant materials log** from Stroz. The email to which the Kasowitz Letter was attached was **never listed as an Item on any relevant materials log** from Stroz. Stroz, if questioned at a hearing of this matter, will concede this point. Once Defendants submit a response to this objection without a declaration from Stroz supporting the Magistrate's findings about Item 379, its disclosure to Jason Holmberg and it having the Kasowitz letter attached to it, this court will clearly understand how Defendants misled the Magistrate into the conclusions he reached in his orders on this issue.

The proof of these facts which Stroz will not and cannot truthfully dispute is that Defendants never received the Kasowitz Letter from Stroz pursuant to the Electronic Asset

Protocol. If the email to which the Kasowitz letter was attached or the Kasowitz letter itself had been listed by Stroz on a relevant materials log and Plaintiff failed to designate it as privileged, **it would have been produced to Defendants obviating their need to pursue the document with either the Sixth or Seventh motions to compel.** Doc. no. 85. The fact that Defendants sought the Kasowitz Letter by motion is **absolute proof** that the item was never listed on a relevant materials log by Stroz and that Plaintiff **never failed to designate it as privileged**.

It is without doubt that the Magistrate erred in finding that Plaintiff failed to designate the **Kasowitz letter** as privileged. It never appeared on a relevant materials log and, therefore, could not have been designated privileged under the court ordered protocol. No facts support this finding by the Magistrate. It is without doubt that the Magistrate erred in finding that Plaintiff failed to designate as privileged **the email** to which the Kasowitz letter was attached. A review of the court's own order mandates a finding of error that the Magistrate found that Plaintiff had an independent duty to review his own electronic assets and produce a privilege log.

The following facts are, therefore, undisputed relative to Item 379 and the Kasowitz Letter:

1. The April 13, 2011 email from Aaron Marks to Dennis Vacco, **was not copied to Jason Holmberg**; and
2. The April 13, 2011 email from Aaron Marks to Dennis Vacco, **was not copied to any other third party**; and
3. Before the filing of the Seventh Motion to Compel, the April 13, 2011 email **was not listed by Stroz Friedberg as an item on any Relevant Materials Log**; and

4. Before the filing of the Seventh Motion to Compel, the April 13, 2011 attachment to the email referenced in Number 3 **was not listed by Stroz Friedberg** as an item on any Relevant Materials Log; and

5. **Plaintiff never failed to designate this item as privileged** as it never appeared on any Relevant Materials log produced by Stroz Friedberg.

Defendants experts, Stroz Friedberg, were in possession of all documents they identified on their relevant materials logs and then produced to Defendants whatever items were not designated privileged. In response to the Court's order on the Sixth Motion to Compel, as was the practice consistent with the court's ordered protocol, Plaintiff's counsel immediately directed Stroz Friedberg to produce the Kasowitz Letter as described in the court's order, Doc. No. 457.

Plaintiff's counsel emailed Bryan Rose of Stroz Friedberg, with whom Plaintiff's counsel had worked throughout this case in producing documents in response to Mr. Rose's production of various relevant materials logs, and directed him to produce "The Kasowitz Letter which was an attachment to an email, identified in Plaintiff's privilege log as Item 379 ('Item379')" which was verbatim the court's description of the item to be produced in Doc. No. 457 at 8. Defense counsel, Mr. Southwell, responded to that direction by demanding that Plaintiff's counsel produce the Kasowitz Letter which was an attachment to Item 379. Plaintiff's counsel responded by correctly pointing out that all the attachments to Item 379 had previously been produced, but the court's order indicated they should be produced again because one of them was the Kasowitz Letter and so, Plaintiff was complying. Plaintiff's counsel realized that none of the attachments to the single email that is Item 379 included any letter by Kasowitz regarding the authenticity of the FB Contract and the confusion of compliance with the court's order was evident.

Obviously, the parties had a difference of opinion as to what the court intended to be produced and by whom from reviewing its order following the Sixth Motion to Compel. To eliminate that confusion efficiently, Plaintiff's counsel took the **proactive step** of seeking a brief phone conference to resolve the matter:

REDACT

SANCTIONS AGAINST PLAINTIFF AND PLAINTIFF'S COUNSEL

Rule 37 Rule 37(b) (2) provides a non-exclusive list of sanctions that the court may, in its discretion, impose on a party who "fails to obey an order to provide or permit discovery . . . ."

"**Provided that there is a clearly articulated order** of the court requiring specified discovery, the district court has the authority to impose Rule 37(b) sanctions for noncompliance with that order." *Daval Steel Products v. M/V Fakredine*, 951 F.2d 1357, 1363 (2d Cir. 1991) (citing *Salahuddin v. Harris*, 782 F.2d 1127, 1131 (2d Cir. 1986)). Emphasis added.

The ruling on this motion including the sanction against Plaintiff and Plaintiff's counsel is error and a personal insult to Plaintiff's counsel. Plaintiff's counsel has been a practicing lawyer in state and federal courts across the country for years. He is a former prosecutor and

now in private practice having worked on high profile cases both within government and without. He has taught seminars to lawyers, judges and members of the public for years across the country including those involving ethical rules governing the conduct of lawyers. He has argued cases at state and federal courts of appeals in multiple locations across the country as well. In short, he has interacted with judges, prosecutors and other lawyers in a wide variety of environments, including contentious criminal and civil cases, with a consistently professional demeanor and deference to courts. He has never been threatened with much less had sanctions imposed for failing to follow a court's order or showing any disrespect to any court.

The court's Sixth Motion to Compel described the Kasowitz Letter it ordered produced to Defendants in two ways that were contradictory:

> **Defendants seek a court order compelling Plaintiff to produce a [1] copy of a letter dated April 13, 2011, from attorneys at the New York law firm of Kasowitz, Benson, Torres & Friedman LLP to co-counsel at DLA Piper LLP and Lippes Mathias Wexler Friedman LLP ("the Kasowitz Letter"). [2] The Kasowitz Letter was an attachment to an email, identified in Plaintiff's privilege log as Item 379 ("Item 379"), which the undersigned reviewed in camera and, upon determining that any attorney-client privilege or work product doctrine protection that may have attached to Item 379 had been waived by Plaintiff's disclosure of Item 379 to a third party, Holmberg...."** Doc. No. 457 at 8.

Following review of the court's order, Doc. No. 457, Plaintiff directed Stroz Friedberg to produce all attachments to Item 379 to Defendants. The court's order defined the Kasowitz Letter as "an attachment to an email, identified in Plaintiff's privilege log as Item 379..." Id. Stroz responded by sending to Plaintiff, for privilege review, a wide variety of items including a one page letter dated April 13, 2011 meeting the description in number 1 above, but not comporting with the court's description in number 2 above. Hence, the confusion of the Magistrate's order making sanctions improper. The item Stroz produced to Plaintiff that it

indicated it intended to produce to Defendants within five days **was not a document that was an attachment to Item 379**, therefore, not meeting the court's description in number 2 above, although it was an April 13, 2011 letter roughly meeting the description in number 1 above.

Plaintiff has an ethical duty to guard Plaintiff's attorney client privilege. In the face of this confusion, Plaintiff's counsel had a duty to insure that any letter that Stroz or Plaintiff's counsel intended to produce to Defendants was precisely the letter the court ordered be produced. To leave that matter open to interpretation risked Plaintiff's counsel waiving attorney client privilege by inadvertent disclosure of a document that may later be found to not be the document the court intended by its order. To prove that this was not merely gamesmanship by Plaintiff, Plaintiff's counsel sought an immediate phone conference with the court. At that phone conference, Plaintiff would have described the confusion and simply asked the court if he wanted the April 13, 2011 letter produced despite the fact that it did not meet the court's description in number 2 above. This would have been less than a 30 minute phone conference. And, Plaintiff would have complied with whatever the court directed following the description of that confusion. Instead, Defendants sent a contentious email to the court rejecting the request for a phone conference and refusing to participate in a phone conference and in that email, selectively quoted Doc. No. 457 by indicating the court's description of the item to be produced was solely number 1 above when it clearly was not the entire description. Defendants chose to avoid the efficient resolution of this confusion and file another harassing motion to compel and now are entitled to obtain attorneys fees for filing that motion to be paid by Plaintiff who sought, instead, a 30 minute or less phone conference to resolve the matter.

RESPONSE TO SEVENTH MOTION TO COMPEL

The Magistrate entered a scheduling order for responses to Defendants' Seventh Motion to Compel containing the following language:

> **Plaintiff's response, shall include as an exhibit a copy of Privilege Log Item 379 and all attachments that Plaintiff was ordered to produce to Defendants, including, as referenced on page 12 of Item 379, as an attachment to an April 13, 2011 email from Aaron Marks of the law firm of Kasowitz, Benson, Torres & Friedman LLP to Plaintiffs attorneys, "a letter responding to Mr. Vacco's communication of last evening and certain documents that are referenced in the letter," and all attachment to such letter, i.e., the "certain documents that are referenced in the letter.** Doc. No. 464. Emphasis added.

This Magistrate's description of what Plaintiff was to attach to his response created more confusion. "Privilege Log Item 379 and all attachments" (Id.) does not include any April 13, 2011 letter involving Kasowitz. See Exhibit A and Grant Decl. at ¶11. The April 13, 2011 letter, in turn, was not an attachment to Item 379. Id. The email to which the April 13, 2011 letter was attached was never disclosed to Jason Holmberg. Grant Decl. at ¶19. Holmberg Decl. at 10. The wording of this order is more evidence of the legitimacy of Plaintiff's confusion. In response to the court's order, Doc. No. 464, Plaintiff provided to the court only, an April 13, 2011 letter which may or may not have been the letter the court was referring to in Doc. No. 464. To have merely attached the April 13, 2011 letter (a privileged communication related to Plaintiff's case), while guessing amidst confusion that this was the letter to which the court's order in Doc. No. 464 referred, would be unethical and arguably malpractice. This is because, the item provided to the court only in Plaintiff's response to Doc. No. 464, **was never attached to Item 379**. See, Exhibit A and Grant Decl. at ¶11. It was **never disclosed to Jason Holmberg**. Holmberg Decl. at 10. In fact, long before the Sixth and Seventh Motions to Compel were even filed, Plaintiff had provided Item 379 to Defendants along with all six attachments to Item 379 as described in Defendants' experts' relevant materials log, Exhibit A, and confirmed as the only

attachments to Item 379 by Plaintiff's expert. See Grant Decl. ¶11. Therefore, submitting the letter to the court with his response Plaintiff protected the privilege of that communication while communicating to the court, again, the confusion in the language of the court's order.

The Magistrate proved his misunderstanding of the facts in his latest order:

> **"Significantly, that an unredacted copy of the Kasowitz letter was delivered, contrary to the court's direction, to the court, but not provided to Defendants, confirms <u>the Kasowitz letter was the attachment to Item 379 sought by Defendants</u>."** Doc. No. 478 at 7. Emphasis added.

The Magistrate interpreted the providing of this document to him alone, and not to Defendants, as a blatant violation of his order, Doc. No. 464.

Doc. No. 464 ordered the following:

Plaintiff's response to the motion shall be filed not later than July 20, 2012, and shall include as an exhibit a copy of Privilege Log Item 379 and all attachments that Plaintiff was ordered to produce to Defendants, including, as referenced on page 12 of Item 379, as an attachment to an April 13, 2011 email from Aaron Marks of the law firm of Kasowitz, Benson, Torres & Friedman LLP to Plaintiffs attorneys, "a letter responding to Mr. Vacco's communication of last evening and certain documents that are referenced in the letter," and all attachment to such letter, i.e., the "certain documents that are referenced in the letter. Doc. No. 464.

It is this requirement above which the Magistrate found was clear, and not complied with and "beyond disrespect" for Plaintiff to instead, send an April 13, 2011 letter to the court for its review and not to Defendants. Doc. No. 478.

The Magistrate's statement that "the Kasowitz letter was the attachment to Item 379 sought by Defendants" is error and both parties experts concur on this point. See Exhibit A and Grant Decl. at ¶11. Exhibit A is Defendants' experts' (Stroz) relevant materials log listing Item 379 and all of the attachments to 379. None of those six attachments is the April 13, 2011 letter

at issue in this objection. Therefore, neither Defendants nor Plaintiff experts agree that "the Kasowitz letter was an attachment to Item 379."

Plaintiff and Plaintiff's counsel should not be sanctioned for failure to produce a letter that was never attached to Item 379. They should not be sanctioned for submitting to the court an April 13, 2011 privileged communication that did not meet the description of what the court ordered Plaintiff to produce in Doc. No. 464. They should not be sanctioned for attempting to resolve this matter efficiently via phone conference with the court, only to have Defendants reject that efficient solution amid their deception and generate needless attorneys fees filing a Seventh Motion to Compel.

The Magistrate's palpable outrage is misdirected. Rather than being directed at Plaintiff for failing to produce the Kasowitz Letter under its varying and contradictory descriptions, it should be directed at Defendants for willfully and purposefully misleading the Magistrate into believing:

1. Item 379, a single email between Plaintiff's counsel and Plaintiff, was disclosed to Jason Holmberg; provably not true; and
2. The Kasowitz Letter was attached to the email that is Item 379; provably not true; and
3. The email to which the Kasowitz Letter was attached, was disclosed to Jason Holmberg; provably not true; and
4. The Kasowitz Letter's privilege was waived because Plaintiff failed to designate it as privileged on a privilege log during expedited discovery - provably not true.

CONCLUSION

Plaintiff respectfully requests this court schedule a hearing on this objection to clearly outline the facts stated herein. The court's ruling on Defendants' Seventh Motion to Compel is in error from every angle of the Magistrate's description of Item 379, the attachments to Item 379, the error in claiming that Item 379 was disclosed to Jason Holmberg, the error in claiming that

the April 13, 2011 email was disclosd to Jason Holmberg, etc. Plaintiff and Plaintiff's counsel made every professional attempt to efficiently resolve the obvious confusion in the language of the Magistrate's order. The Defendants rejected comity and cooperation and immediately filed a motion to compel misleading the Magistrate, including perversely making the court believe that Plaintiff and Plaintiff's counsel was disrespectfully refusing to comply with its clear orders. The sanction and accompanying attorney fee award ordered by the Magistrate is a serious matter meriting a hearing for Plaintiff and Plaintiff's counsel. At that hearing, Plaintiff's and Defendants' experts, along with Mr. Healy, will all agree that Item 379 was not disclosed to Jason Holmberg, it did not have the Kasowitz Letter attached, that letter was not disclosed to Jason Holmberg and Plaintiff never failed to designate the Kasowitz Letter as privileged.

Respectfully submitted,

/s/ Paul Argentieri

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