

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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PAUL D. CEGLIA,

Plaintiff,

v.

MARK ELLIOT ZUCKERBERG and  
FACEBOOK, INC.,

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

**DEFENDANTS' RESPONSE TO CEGLIA'S OBJECTIONS  
TO JUDGE FOSCHIO'S ORDER GRANTING  
DEFENDANTS' SEVENTH MOTION TO COMPEL AND FOR SANCTIONS**

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September 11, 2012

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## PRELIMINARY STATEMENT

Plaintiff Paul Ceglia’s Objections to Judge Foschio’s order granting Defendants’ Seventh Motion to Compel (“Objections”) are his latest attempt to obstruct the expedited discovery process ordered more than fourteen months ago and to cover up damning evidence of Ceglia’s fraud on this Court. Judge Foschio ordered Ceglia to produce an April 13 letter from his *own* former attorneys explaining that they had concluded

**REDACTED**

*See*

Doc. 513-1 at 1 (emphasis added). Ceglia’s Objections are a baseless, last-ditch effort to claw back this smoking-gun letter, which he produced only after repeated, bad-faith stonewalling that forced Defendants to file three motions to compel—all of which were granted by Judge Foschio, and one of which was affirmed by this Court.

Ceglia’s Objections to Judge Foschio’s order ignore critical facts and rely on false accusations—for example, that Defendants “exploited the Magistrate’s unfamiliarity with the technology issues” and provided a “blatantly, intentionally false description” of the letter at issue. Doc. No. 506 at 2–3. In reality, Judge Foschio’s order was based on an entirely accurate understanding of the letter—indeed, Judge Foschio had reviewed the letter *in camera*—and he correctly determined that Ceglia had an obligation to produce the letter to Defendants under his expedited discovery orders. Judge Foschio also correctly ruled that Ceglia waived any claim of privilege by communicating the subject matter of the letter to a non-lawyer. Moreover, Ceglia failed to include the letter on any privilege log in a timely manner, which likewise waived any claim of privilege and constitutes an independent basis on which to sustain Judge Foschio’s

decision. Finally, Judge Foschio's sanctions order was well-supported by law and warranted. Ceglia's Objections should be rejected.

### **FACTUAL BACKGROUND**

#### **1. The April 13 Kasowitz Letter**

Ceglia's Objections concern his duty to produce an April 13 letter from his former attorneys at the New York law firm of Kasowitz, Benson, Torres & Friedman LLP to his former attorneys at DLA Piper LLP and Lippes Mathias Wexler Friedman LLP (the "April 13 Kasowitz Letter"). That letter, which was attached to one of the many emails contained in a document designated as Item 379 on Ceglia's privilege log,

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On April 11, DLA Piper and Lippes Mathias replaced Connors & Vilaro as Ceglia's counsel of record and filed his Amended Complaint. REDACTED

## **2. Procedural Background**

Over the course of expedited discovery, Ceglia has repeatedly attempted to conceal the April 13 Kasowitz Letter from Defendants. He initially tried to prevent Defendants from learning of the letter's existence altogether by designating as privileged a document known as Item 379. That document is an email to Ceglia from his counsel Paul Argentieri that is a

compendium of numerous other emails. *See* Doc. No. 295 at 9. Although Defendants did not know it at the time—because Ceglia’s privilege log did not mention the April 13 Kasowitz Letter—one of the underlying emails in Item 379 referred to the April 13 Kasowitz Letter and included it as an attachment.

After it became apparent to Defendants that Ceglia’s designation of Item 379 as privileged was improper, Defendants requested that Judge Foschio order Ceglia to produce Item 379 in their Fifth Motion to Compel. Judge Foschio conducted an *in camera* review and granted Defendants’ motion to compel as to Item 379. He ruled that Ceglia had waived any claim of privilege with respect to the subject matter of the emails in Item 379 because many of those emails were received by a non-lawyer named Jason Holmberg. “[R]eview of Item 379 established,” Judge Foschio explained, “that Holmberg had access to the majority of the emails contained within the document, having received the emails either as the intended recipient to whom the email was addressed, or indirectly, with the email having been forwarded to Holmberg from another email account,” and that “Holmberg was . . . privy to the information contained” in those emails. Doc. No. 361 at 3–4.

Ceglia continued his efforts to conceal the Kasowitz Letter’s existence. He filed a purported “motion for clarification,” requesting Judge Foschio’s permission to redact those portions of Item 379 that were purportedly not provided to Holmberg—which likely would have included the email referencing the Kasowitz Letter. *See* Doc. No. 358. Judge Foschio denied that motion and ruled that Ceglia had waived any claim of privilege with respect to Item 379 in its entirety. Judge Foschio explained that Ceglia himself previously referred to Item 379 as a “communication[] to which Jason Holmberg was a party,” Doc. No. 310, and that *in camera* inspection demonstrated that Holmberg had “access to the majority of the emails contained

within the document” and was “privy to the information contained” even in the emails that he had not directly received. Doc. No. 361 at 3–4. Judge Foschio concluded that Ceglia’s failure “to provide any affidavit from Holmberg establishing either that Holmberg was not privy to the discussions referenced in the emails . . . or that Holmberg did not receive any of the particular emails comprising Item 379” was fatal to Ceglia’s belated assertion of privilege. Doc. No. 369 at 5.

Ceglia persisted in attempting to prevent the production of Item 379 and hide the existence of the Kasowitz Letter by filing objections to Judge Foschio’s order in this Court. After “carefully consider[ing] Magistrate Judge Foschio’s Decision and Order,” however, this Court rejected those Objections and affirmed Judge Foschio’s order, concluding that “absent information . . . that Argentieri sought Holmberg’s secretarial assistance with respect to Items 360 and 379, the attorney-client privilege did not apply” and that “Judge Foschio’s Decision and Order was neither clearly erroneous nor contrary to law.” Doc. No. 480 at 1, 2, 4.

At that point, Ceglia had no choice but to produce Item 379 to Defendants. But he continued to conceal the April 13 Kasowitz Letter by failing to include the letter in his production—even though it was an attachment to an email contained in the document that the Court ordered him to produce. Because that email referred to the April 13 Kasowitz Letter as an attachment, however, Defendants learned from Ceglia’s production that the letter existed, and that Ceglia had failed to satisfy his obligation to produce it.

Defendants therefore filed their Sixth Motion to Compel, specifically seeking the production of the April 13 Kasowitz Letter. In response, Ceglia argued that the letter was protected by the attorney-client privilege. But Ceglia failed to address the reasoning in the orders of this Court and Judge Foschio compelling him to produce Item 379—*i.e.*, that he had

waived his assertion of privilege over Item 379 because the subject matter of the emails in that document had been disclosed to Holmberg—and did not provide an affidavit from Holmberg asserting that the subject matter of the April 13 Kasowitz Letter had not been disclosed to him.

On June 28, Judge Foschio ruled that Ceglia had waived any claim of privilege with respect to the April 13 Kasowitz Letter and ordered Ceglia to produce it. Judge Foschio found that Ceglia had waived his privilege assertion because he failed to list the April 13 Kasowitz Letter on a privilege log. *See* Doc. No. 457 at 10–11. Based on that ruling, Judge Foschio determined that he need not reach Defendants’ additional arguments in support of their motion to compel—including the argument of waiver based on disclosure of the subject matter of the letter to Holmberg. *Id.* at 11. Judge Foschio unequivocally ordered the production of the April 13 Kasowitz Letter by July 8 “[b]ecause it is so clear that Plaintiff failed to preserve any privilege that attached” to it. *Id.*

Ceglia continued to stonewall. On the evening of July 8, he re-produced Item 379, but again failed to produce the April 13 Kasowitz Letter. Because that failure directly violated Judge Foschio’s orders, Defendants filed, on July 11, their Seventh Motion to Compel, again seeking production of the April 13 Kasowitz Letter. *See* Doc. No. 461. In a text order entered the same day, Judge Foschio directed Ceglia to file a copy of the April 13 Kasowitz Letter with his opposition to Defendants’ motion. *See* Doc. No. 464. In another blatant violation of Judge Foschio’s orders, Ceglia filed his response and, instead of filing a copy of the April 13 Kasowitz Letter, submitted it for *in camera* inspection. *See* Doc. No. 478 (“August 15 Order”) at 3. In his response, Ceglia argued for the first time that he had not waived his claim of privilege because he was not obligated to include any document on his privilege log if that document had not been identified by Stroz Friedberg pursuant to Judge Foschio’s Electronic Asset Inspection Protocol



(Doc. No. 85).<sup>1</sup> See Doc. No. 466 at 4. Ceglia again failed to file an affidavit from Holmberg attesting that the subject matter of the April 13 Kasowitz Letter was never disclosed to him.

Judge Foschio granted Defendants’ motion. After reviewing the April 13 Kasowitz Letter based on Ceglia’s unsolicited *in camera* submission, Judge Foschio found that “the letter only serves to corroborate the court’s earlier determination, i.e., that the Kasowitz letter is relevant to the genuineness of the dispute[d] contract . . . and, as such, either should have been produced to Defendants or included in a privilege log.” Doc. No. 478 at 4. Failure to do so, Judge Foschio held, resulted in a waiver of any privilege that may have attached to the April 13 Kasowitz Letter. *Id.* at 4–5.

In addition, executing the “wide discretion in sanctioning litigants appearing” before district courts for “fail[ure] to obey an order to provide or permit discovery,” Judge Foschio sanctioned Ceglia and his counsel Dean Boland in the amount of \$1,000 each for disobeying the “clearly articulated order of the court requiring specified discovery.” Doc. 478 at 5–6, 8 (internal quotation marks omitted). Judge Foschio found that the fact “[t]hat the Kasowitz letter was never disclosed in a privilege log, given its obvious relevance to the issue of whether the contract at the heart of this litigation is genuine, is beyond cavil.” *Id.* at 7. Judge Foschio also found that Ceglia’s “attempt to goad the court into further review” through his unsolicited submission of the

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<sup>1</sup> Pursuant to the Electronic Asset Inspection Protocol, Stroz Friedberg is authorized to search and analyze Ceglia’s “Electronic Assets”—defined as “all computers and electronic media in Plaintiff’s possession, custody, or control”—for data and information Stroz Friedberg “deems forensically relevant to the issues in this case.” Doc. No. 85 at 1-2. Any relevant data, called the “Presumed Relevant Materials,” are then produced to Ceglia’s counsel prior to production to Defendants, so that Ceglia’s counsel may conduct a privilege review of the data. *Id.* ¶ 4. Ceglia has five days to assert any privilege, after which Stroz Friedberg produces to Defendants’ counsel all Presumed Relevant Materials not designated as privileged by Plaintiff. *Id.* ¶¶ 5-6.

Kasowitz Letter for *in camera* inspection “only served to further delay compliance with this court’s orders” and was “beyond disrespect and will not be countenanced.” *Id.* at 8.

In sum, after Ceglia made three failed attempts to conceal the damning evidence of fraud contained in the April 13 Kasowitz Letter and committed three direct violations of this Court’s orders, Judge Foschio ordered Ceglia—once again—to produce the April 13 Kasowitz Letter, and sanctioned Ceglia and Boland for their contumacious violations of this Court’s edicts. Ceglia filed these Objections appealing Judge Foschio’s order granting Defendants’ Seventh Motion to Compel and for sanctions.

### **ARGUMENT**

This Court reviews a magistrate judge’s discovery rulings under a highly deferential standard: a discovery order may be set aside only if it is “clearly erroneous” or “contrary to law.” 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a) (same); *see also George v. City of Buffalo*, 2011 WL 2259690, at \*1 (W.D.N.Y. June 3, 2011) (Arcara, J.). Judge Foschio’s August 15 Order was well within his broad discretion. This Court should overrule Ceglia’s untimely and meritless Objections, affirm Judge Foschio’s order, and award Defendants their reasonable costs and fees.

#### **I. Judge Foschio’s Order Compelling Production of the April 13 Kasowitz Letter Is Unambiguous.**

In opposing Judge Foschio’s decision to compel production of the April 13 Kasowitz Letter, Ceglia asserts that “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.” Doc. No. 506 at 2–3. Ceglia argues that Defendants misrepresented to Judge Foschio that “[t]he Kasowitz

Letter was attached to the email that is Item 379,” and that Judge Foschio relied on this supposed misrepresentation in ordering the production of the Kasowitz Letter. *Id.* at 1.

These accusations are completely unfounded. Defendants did not misrepresent the nature of Item 379 or the April 13 Kasowitz Letter to the Court, and Ceglia’s claim that Judge Foschio was somehow hoodwinked into granting Defendants’ motions to compel is preposterous. In their Fifth Motion to Compel, Defendants accurately described Item 379 as an “email from Argentieri to plaintiff containing emails with, *inter alia*, Holmberg.” Doc. No. 295 at 9. This is, in fact, a more accurate description than the one in Ceglia’s own opposition to Defendants’ Fifth Motion to Compel: “Documents 360 and 379 are communications to which Jason Holmberg was a party.” Doc. 310 at 6. Judge Foschio similarly described Item 379 with more clarity than Ceglia in his order granting Defendants’ Fifth Motion to Compel, accurately identifying Item 379 as “an April 19, 2011 email from Argentieri to Plaintiff . . . and containing emails with . . . jason.holmberg@papellets.com with attachments.” Doc. No. 357 at 8. In affirming that order, this Court held that Ceglia had failed to sufficiently demonstrate “why or how Argentieri required Holmberg’s services in relation to Item[] . . . 379,” Doc. No. 480 at 4, which the Court accurately described as “an email dated April 19, 2011, from . . . Argentieri . . . to Plaintiff . . . including copies of email correspondence with four persons, including Holmberg,” *id.* at 2–3. Thus, Defendants, Judge Foschio, this Court, and Ceglia are all in agreement: “Item 379 is a composite of numerous emails,” Doc. No. 358 at 2, and “Holmberg was a party” to several of those emails, Doc. No. 310 at 6.

Defendants also accurately defined the April 13 Kasowitz Letter in their Sixth Motion to Compel, identifying it as a letter from “Ceglia’s lawyers at the New York-based law firm of Kasowitz, Benson, Torres & Friedman LLP . . . to their co-counsel at DLA Piper LLP and

Lippes Mathias Wexler Friedman LLP,” Doc. No. 382 at 1, 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,” *id.* at 3. In granting Defendants’ Sixth Motion to Compel, Judge Foschio was equally clear: his order compelled the production of a “letter dated April 13, 2011, from attorneys at the New York law firm of Kasowitz, Benson, Torres & Friedman LLP to their co-counsel at DLA Piper LLP and Lippes Mathias Wexler Friedman LLP” which was “an attachment to an email” in Item 379. Doc. No. 457 at 8.

In their Seventh Motion to Compel, necessitated when Ceglia flouted Judge Foschio’s order compelling the production of the April 13 Kasowitz Letter, Defendants again accurately described the April 13 Kasowitz Letter: they identified it as a letter from Kasowitz to their then-co-counsel that was attached to the “April 13, 2011 e-mail . . . contained within Item 379 at page 14.” Doc. No. 461 at 2. The Court again compelled production of the April 13 Kasowitz Letter in its order granting Defendants’ Seventh Motion to Compel, and again identified it in unambiguous fashion as a letter “from the New York law firm of Kasowitz, Benson, Torres & Friedman LLP (‘Kasowitz’) to DLA Piper LLP (‘DLA Piper’) and Lippes Mathias Wexler Friedman LLP (‘Lippes Mathias’).” Doc. No. 478.

In all of these motions and orders, the April 13 Kasowitz Letter was consistently described as a letter from Kasowitz to its then-co-counsel, which was attached to an email in Item 379. Accordingly, the allegation that Defendants sought to “victimize the Magistrate with further subterfuge,” Doc. No. 506 at 14, is simply false.

Moreover, Ceglia’s claim that Judge Foschio was confused by Defendants’ descriptions of Item 379 and the April 13 Kasowitz Letter is both ludicrous and insulting. Judge Foschio reviewed the entirety of Item 379 *in camera*. He was well aware of the context surrounding the

“composition” of the emails within Item 379 and was able to examine for himself the senders and recipients of each email, as well as every attachment to each email. In fact, Judge Foschio had no need to rely on *any* of Defendants’ descriptions of Item 379 or the April 13 Kasowitz Letter: he reviewed the April 13 Kasowitz Letter himself after Ceglia’s improper and unsolicited *in camera* submission. Ultimately, Judge Foschio’s decisions granting Defendants’ motions to compel were clear, deliberate, consistent, and factually correct. Ceglia’s contrary allegations are outrageous and certainly do not establish that Judge Foschio’s rulings were “clearly erroneous.”

## **II. Ceglia Waived Any Claim Of Privilege With Respect To The April 13 Kasowitz Letter.**

Ceglia also opposes Judge Foschio’s order on the ground that the April 13 Kasowitz Letter is protected by the attorney-client privilege. But Ceglia’s claims that Item 379 and the April 13 Kasowitz Letter are privileged fail on two separate and independent grounds that Ceglia has failed to refute: First, Holmberg is a non-lawyer third-party without a need to know the subject matter of Item 379 and the Kasowitz Letter, but Ceglia nevertheless disclosed key information about the subject matter of Kasowitz’s retention to Holmberg, which Holmberg does not deny. Second, Ceglia failed to include the Kasowitz Letter on any privilege log despite its obvious relevance to this case. Accordingly, Judge Foschio’s ruling that Ceglia waived any claim of privilege over the Kasowitz Letter was well within his broad discretion and should be affirmed.

### **A. Ceglia Ignores His Privilege Waiver Over the Subject Matter of the April 13 Kasowitz Letter.**

Judge Foschio correctly found that Ceglia waived any potential assertion of privilege as to the subject matter of the Kasowitz firm’s withdrawal from this case. Ceglia virtually ignores this amply supported judicial finding in his Objections. Instead, he chooses to rely on the inconsequential assertion that Holmberg did not receive the April 19, 2011 email from Argentieri

to Ceglia containing a composite of other emails (Item 379) or the April 13 Kasowitz Letter itself. That assertion is immaterial because Judge Foschio found that Ceglia's disclosure of the subject matter of those communications to a non-lawyer, Holmberg, waived any potential privilege.

"The attorney-client privilege is waived if the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication." *Bowne of New York City, Inc. v. Ambase Corp.*, 150 F.R.D. 465, 478 (S.D.N.Y. 1993). Such disclosure of a privileged communication "waives the privilege for all other communications relating to the same subject matter," *id.* at 485, particularly when disclosure of such information to persons whose "need-to-know" the information is not established, *Robbins & Meyers, Inc.*, 274 F.R.D. 63, 93–94 (W.D.N.Y. 2011). Holmberg was not Ceglia's attorney, and instead was a non-lawyer third-party without a need to know the subject matter of many communications between Argentieri and Ceglia concerning Kasowitz's retention and representation. Because the subject matter of those communications was nevertheless disclosed to Holmberg, including through many of the emails in Item 379, Ceglia's claim of privilege has been waived with respect to the entire subject matter of Kasowitz's retention, representation, and withdrawal.

Whether Holmberg was a direct recipient of some of the emails in Item 379 is irrelevant. In compelling production of Item 379, Judge Foschio found, and this Court affirmed, that "the record is completely devoid of any explanation as to . . . why the information contained in the emails comprising Item 379 were also circulated to Holmberg, much less that Holmberg had a need to know the information contained therein," that Holmberg's services were not retained in connection with Item 379, and that Ceglia had therefore waived any privilege over Item 379 in its entirety. Doc. No. 357 at 9–10; *see also* Doc. No. 480 at 4–5 (affirming that "Judge Foschio

correctly concluded that absent information indicating Argentieri employed Holmberg consistently as a legal assistant or secretary, or that Argentieri sought Holmberg's secretarial assistance with respect to Items 360 and 379, the attorney-client privilege does not apply."). At no point during Ceglia's briefing of (1) his motion for clarification of Judge Foschio's order granting Defendants' Fifth Motion to Compel, (2) his Rule 72 Objections to Judge Foschio's order granting Defendants' Fifth Motion to Compel, (3) his opposition to Defendants' Sixth Motion to Compel, (4) his opposition to Defendants' Seventh Motion to Compel, or (5) his Rule 72 Objections to Judge Foschio's order granting Defendants' Seventh Motion to Compel did Ceglia provide evidence that Holmberg "need[ed] to know the information contained" in Item 379 or that Holmberg's services were retained in connection with Item 379. Therefore, Ceglia waived any claim that communications regarding the retention and withdrawal of Kasowitz are privileged.

Ceglia's untimely attempts to demonstrate that information relating to Kasowitz's retention and withdrawal was not made known to Holmberg cannot be credited. This Court relied on Ceglia's failure "to provide any affidavit from Holmberg establishing either that Holmberg was not privy to the discussions referenced in the emails . . . or that Holmberg did not receive any of the particular emails comprising Item 379," in finding that Ceglia waived any privilege that may have existed. Doc. No. 369 at 5. It was not until Ceglia filed these Objections to Judge Foschio's order granting Defendants' Seventh Motion to Compel that Ceglia provided an affidavit from Holmberg purporting to describe his knowledge of the information contained in Item 379. That belated attempt to cure his earlier failures should be rejected.

In any event, even had Ceglia filed Holmberg's declaration in a timely fashion, that declaration still would be inapposite because it does not dispute a key factual finding made by

Judge Foschio in ruling that Ceglia waived any privilege over the April 13 Kasowitz Letter: that “Holmberg had access to the majority of the emails contained within [Item 379] . . . [and] was privy to the information contained therein.” Doc. No. 371 at 4. Holmberg does not contest that he had access to the *information* contained within Item 379 pertaining to the subject matter of Kasowitz’s withdrawal—which was the basis for Judge Foschio’s ruling of subject-matter waiver. That is not surprising, “given that the emails pertain to Plaintiff’s attempts to retain legal counsel with litigation experience similar to the instant action, a task with which Holmberg assisted not only in preparing the Lawsuit Overview, but by arranging and attending meetings with several attorneys whose services plaintiff contemplated retaining.” *Id.* at 4–5. Holmberg’s declaration does not dispute this finding either and does not establish that Judge Foschio’s findings are contrary to law or clearly erroneous.

**B. Ceglia Ignores His Continued Independent Obligation to Produce Documents.**

Judge Foschio also correctly held that Ceglia waived any claim of privilege with respect to the April 13 Kasowitz Letter by failing to include it in any privilege log. This conclusion provides an independent basis for affirming Judge Foschio’s decision.

Ceglia insists in his Objections that he did not waive his privilege claim by omitting the Kasowitz Letter from his privilege log because Stroz Friedberg did not identify the letter as potentially relevant, and because “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. 506 at 17–18. That is false. At least *two* standing orders in this case required Ceglia to produce documents—the July 1 Order granting Defendants’ motion for expedited discovery, and the August 18 Order granting Defendants’ cross-motion to compel Ceglia’s compliance with the July 1 Order, both of which Ceglia



conveniently fails to mention. Under both of those orders, documents withheld based on a claim privilege were required to be listed in a privilege log.

The July 1 Order explicitly required Ceglia to produce “the original, native electronic files consisting of or containing the purported emails described in the Amended Complaint and all electronic copies of the purported emails.” Doc. No. 83 at 2. **REDACTED**

*See* Doc. No.

383-1 at 13, 196–97. Similarly and independently, the August 18 Order, which was necessitated by Ceglia’s failure to properly produce hard-copy and electronic assets in accordance with the July 1 Order, required that Ceglia’s production of assets “shall be conducted pursuant to the Electronic Asset Inspection Protocol . . . *except that . . . Plaintiff shall produce directly to Defendants* all electronic copies or images of any Contract in the possession, custody, or control of Plaintiff’s attorneys or other agents.” Doc. No. 117, ¶ 3. This order also clearly required the production of the attachments to the April 13 Kasowitz Letter. Even if Ceglia were confused by the direct instructions of the July 1 Order, the August 18 Order unequivocally created an independent obligation for Ceglia to produce certain documents regardless of their identification by Stroz Friedberg.

Ceglia also had a corresponding obligation, under those orders and the Federal Rules of Civil Procedure and Local Rules for the Western District of New York,<sup>2</sup> to identify responsive

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<sup>2</sup> As Judge Foschio correctly observed, “[w]hen a party withholds relevant information that is discoverable, pursuant to Fed. R. Civ. P. 26(b)(1), on the grounds of privilege, a party is obligated to promptly provide the adverse party with notice of the claimed privilege by preparing and serving a privilege log sufficiently describing the withheld information to enable the adverse party to assess the validity of the asserted privilege. Fed. R. Civ. P. 26(b)(5)(A); *see also*

[Footnote continued on next page]

documents on a privilege log if he decided to withhold them based on a claim of privilege. In other words, Ceglia was not free, as he claims now, simply to conceal the very existence of responsive and allegedly privileged documents by failing to include them on a log. Indeed, Ceglia's conduct bears this out. On August 29, Ceglia produced documents to Defendants, *see* Doc. No. 117, and produced a privilege log describing a total of 55 documents—11 of which were the subjects of Defendants' Fifth Motion to Compel. But nowhere on this privilege log did Ceglia include the April 13 Kasowitz Letter. By failing to include the April 13 Kasowitz Letter on any privilege log—including but not limited to his August 29, 2011 privilege log, which Ceglia conveniently never mentions in his Objections—Ceglia waived his claim of privilege. *See United States v. Construction Prod. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (failure to provide adequately detailed court-ordered privilege log waives privilege). Judge Foschio therefore correctly granted Defendants' Seventh Motion to Compel based, in part, on Ceglia's failure to include the April 13 Kasowitz Letter in his privilege log.

### **III. Judge Foschio's Sanctions Order Was Appropriate And Well-Supported By Law.**

Finally, Ceglia challenges Judge Foschio's decision to impose sanctions against Ceglia and Boland. But that decision was not an abuse of discretion or contrary to law. "It is well settled that district courts enjoy wide discretion in sanctioning litigants appearing before them," *Novak v. Wolpoff & Abramson, LLP*, 536 F.3d 175, 177 (2d Cir. 2008), particularly parties that "fail[] to obey an order to provide or permit discovery," Fed. R. Civ. P. 37(b)(2). Judge Foschio

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[Footnote continued from previous page]

W.D.N.Y. Local R. Civ. P. 26(e)(2) (requiring assertion of privilege 'be furnished in writing when the party responds to such discovery or disclosure'). A failure to comply with this requirement results in a waiver of the asserted privilege in the withheld information." Doc. No. 457 at 10–11.

ordered sanctions in this case for Ceglia’s failure to obey—twice—orders to produce the April 13 Kasowitz Letter. In his order granting Defendants’ Sixth Motion to Compel, Judge Foschio ordered Ceglia to produce “within ten (10) days of this Decision and Order” “an attachment consisting of a letter from Kasowitz to DLA Piper and Lippes, advising of Kasowitz’s decisions to withdraw as Plaintiff’s co-counsel.” Doc. No. 457 at 23, 5. After Ceglia refused to provide the April 13 Kasowitz Letter, necessitating Defendants’ Seventh Motion to Compel, Judge Foschio, in a text order, directed Ceglia to file with his opposition to Defendants’ Seventh Motion to Compel a copy of the Kasowitz Letter. Again, Ceglia failed to do so, but instead merely filed the Kasowitz Letter *in camera*. It was only after both of these brazen and willful acts of disobedience of Judge Foschio’s clear directives that Judge Foschio sanctioned Ceglia and his attorney for their obvious and clear misconduct. In that Decision and Order, Judge Foschio found that Ceglia’s conduct was “beyond cavil,” “beyond disrespect,” and “will not be countenanced.” Doc. No. 478 at 7–8. Judge Foschio was well within the boundaries of discretion under Rule 37 in ordering sanctions against Ceglia for his contemptuous behavior.

## CONCLUSION

This Court should overrule Ceglia's objections, affirm Judge Foschio's order, and award Defendants their reasonable fees and costs resulting from Ceglia's obstructionist misconduct.

Dated: New York, New York  
September 11, 2012

Respectfully submitted,

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