SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: I.A.S. PART 42

----------x

GENESIS MERCHANT PARTNERS, LP, and GENESIS MERCHANT PARTNERS II, LP,

Plaintiffs,

DECISION AND ORDER

- v -

Index No. 653145/14

GILBRIDE, TUSA, LAST & SPELLANE LLC, JONATHAN WELLS, KENNETH GAMMILL, and CHARLES TUSA,

MOT SEQ 011,012

Defendants.

----------x

**NANCY M. BANNON, J.:**

## I. INTRODUCTION

This is an action to recover damages for, *inter alia*, legal malpractice arising from the defendants' failure to perfect certain security interests created by loan documents they prepared for the plaintiffs. The instant motions concern a discovery dispute between the parties related to a series of intra-firm emails allegedly withheld by the defendants. The defendants have produced the emails to the court for *in camera* review.

The plaintiffs move pursuant to CPLR 3101, 3124, and 3126 to strike the defendants' pleadings for failure to comply with discovery and disclosure, or, in the alternative, (a) to deem the issues to which withheld discovery and disclosure is relevant as resolved in favor of the plaintiffs, or (b) to

compel the defendants to comply with discovery and produce all documents withheld based upon a claim of privilege. The plaintiffs further seek sanctions against the defendants for their failure to provide certain relevant documents or a privilege log disclosing the documents, and to extend the Note of Issue date to permit the plaintiffs to conduct discovery related to any newly disclosed documents arising from this motion (MOT SEQ 011). The defendants oppose the motion and move pursuant to CPLR 3103 for a protective order and pursuant to CPLR 3101 to strike the plaintiffs' demand for discovery to the extent that it seeks privileged materials (MOT SEQ 012).

For the following reasons, the plaintiffs' motion is granted in part and the defendants' motion is granted in part.

## II. BACKGROUND

### A. FACTUAL BACKGROUND

The plaintiffs are two related venture capital firms. Between 2008 and 2011, they agreed to make four loans (the "loans") totaling $4.425 million to non-party Progressive Capital Solutions, LLC ("Progressive"), to finance Progressive's purchase of several portfolios of life insurance policies. The loans were to be secured by the policies themselves, and loan number three was also to be secured by a mortgage on real property in Pennsylvania. Portions of the loan proceeds were

also to be used to purchase additional life insurance policies to collateralize the loans.

In May 2008, the plaintiffs retained the defendant law firm Gilbride, Tusa, Last, & Spellane, LLC ("Gilbride") to represent them in, among other things, structuring and drafting the loan documents and closing on the four loans. It is undisputed that Gilbride drafted the loan documents, including a Collateral Assignment of Contracts and UCC-1 financing statement for each loan. Progressive repaid the first loan but defaulted on the latter three. When the plaintiffs sought to collect on the life insurance policies, however, they were unable to do so because their security interests in the policies were not perfected.

Consequently, the plaintiffs commenced this action against Gilbride and defendants Jonathan M. Wells, Kenneth M. Gammill, Jr., and Charles S. Tusa, who were partners in Gilbride, alleging, *inter alia*, that they committed legal malpractice in failing to perfect the plaintiffs' security interests in the policies securing the second, third, and fourth loans. Specifically, the plaintiffs contend that the defendants only filed the UCC-1 financing statements with the Secretary of State, which is insufficient to perfect security interests on such life insurance policies. They assert that security interests in such policies may only be perfected by possession of the original policies or the delivery, to the underwriters of

the policies, of collateral assignment forms properly executed by Progressive. The plaintiffs further aver that the defendants failed to record the mortgage referable to loan number three, causing them to sustain damages.

B. PROCEDURAL BACKGROUND

The plaintiffs commenced this action on October 15, 2014. An amended complaint, the operative complaint in this matter, was filed on January 14, 2015. The defendants interposed an answer to the amended complaint on February 5, 2015. The parties proceeded to discovery.

In March 2015, the plaintiffs demanded documents from Gilbride, including, *inter alia*, (1) all documents concerning the second, third, and fourth loans, (2) all emails concerning the plaintiffs and Progressive, (3) all documents containing or constituting communication from the plaintiffs, or any other person who instructed any Gilbride attorney concerning the scope of Gilbride's representation in connection with the loans, and (4) all documents containing or constituting the informed consent by the plaintiffs to a limitation of the representation that Gilbride would provide. In May 2015, the defendants made their first document production and response and provided a privilege log (the "First Privilege Log"). The defendants' response did not make any objection based on attorney-client privilege or attorney work-product. The First Privilege Log

likewise did not mention the emails at issue on the instant motions, nor did it invoke intra-firm attorney privilege or attorney work-product doctrine. In February 2016, the defendants served a second privilege log (the "Second Privilege Log") which subsumed and lengthened the First Privilege Log. However, the Second Privilege Log again did not mention any of the documents or privileges now before the court.

Prior to the completion of discovery, the plaintiffs filed a motion for partial summary judgment. By order dated February 27, 2017, the court granted the plaintiffs' motion for summary judgment on the issue of liability on their first cause of action for legal malpractice based on the defendants' failure to perfect the security interests. The court also dismissed the defendants' counterclaims sounding in *quantum meruit* and account stated, which arose from alleged unpaid attorneys' fees. On January 11, 2018, the Appellate Division, First Department, reversed. The First Department held there was a triable issue of fact as to whether Gilbride had a duty to perfect the plaintiffs' security interests in the life insurance policies. Specifically, the First Department found that Gilbride offered evidence indicating that its scope of representation may have been limited to the drafting of the loan documents, and did not extend to perfection.

Following remand, discovery resumed. On October 16 and 17, 2018, the plaintiffs took the deposition of defendant Jonathan Wells. On the second day of Wells' deposition, the plaintiffs' counsel began asking Wells about an August 2012 email, produced by the defendants, from Gilbride partner John Tesei to Wells. After Wells began answering counsel's questions, defense counsel sought a recess to confer with Wells. Upon their return, defense counsel announced that the defendants were "going to take the position that any internal discussions from March 2012 forward are privileged." When the plaintiffs' counsel asked about the identity of the "attorney" for purposes of the defendants' invocation of attorney-client privilege, defense counsel answered in conclusory terms that the communications were "in house." Initially, he did not respond to questions about whether the defendants had a "formal general counsel" at the time. Defense counsel also contended that the August 2012 email was mistakenly produced and demanded its return.

Defense counsel then asked for a second recess to further confer with Wells. Upon their return, defense counsel stated that on or about March 2012, Gilbride appointed its own partner, Bennett Last, to "protect the interest of the firm" in a "general counsel role." Defense counsel further averred that "from that point forward, all internal communications were subject to attorney-client privilege." Defense counsel

maintained that this objection extended to communications not only involving Last, but also among any Gilbride attorneys. Defense counsel refused to allow Wells to disclose any further details as to the appointment of Last.

In a letter dated October 23, 2018, the plaintiffs notified the defendants that they would not return the August 2012 email discussed at the deposition. The plaintiffs further demanded that the defendants "produce each and every document withheld from Defendants' production as called 'intra-firm attorney-client privilege,'" immediately supplement their production to include "any and all documents responsive to Plaintiffs' discovery demands," and produce Wells for a continued deposition. On October 26, 2018, the defendants submitted a letter refusing the plaintiffs' demands. The defendants produced a third privilege log (the "Third Privilege Log") identifying 17 emails as to which the defendants claimed intra-firm attorney-client privilege. The Third Privilege Log included two emails that the defendants had previously produced and demanded that plaintiffs return them. All other emails had never previously been disclosed.

The instant motions ensued. The court directed the defendants to submit all documents withheld from production under a claim of privilege, whether or not they were listed under the Third Privilege Log, for *in camera* review. The

defendants produced 15 documents, consisting of the third through fifteenth items identified in the Third Privilege Log. The first two items of the Third Privilege Log were previously produced to the plaintiffs. Notwithstanding the controversy as to that production, discussed in some of the parties' submissions, neither party presently seeks relief related to those documents.

The 15 documents in the court's possession are briefly described as follows:

- GIL016706 is an email dated March 27, 2012, from Last to Tesei, Wells, and Eric Seltzer, regarding an email update on various litigations that Last had sent to Steven Sands, the plaintiffs' Senior Portfolio Manager.
- GIL016714-16715 is an email dated March 9, 2012, from Wells to Tesei, regarding invoices prepared for work Gilbride performed for the plaintiffs.
- GIL016716-16717 is an email dated March 9, 2012, from Wells to Tesei, regarding the same invoices prepared for work Gilbride performed for the plaintiffs.
- GIL016718-16719 is an email dated May 12, 2012, from Last to Tesei, Wells, Seltzer, and Tom Spellane, regarding Gilbride's representation of the plaintiffs in various litigations.

- GIL016720-16721 is an email dated March 23, 2012,[1] from Last to Tesei, Wells, and Seltzer, regarding the status of litigations related to the Progressive loans.
- GIL016722-16727[2] is an email dated November 5, 2012, from Wells to Nathan Litzenberger, a claim representative with the defendants' malpractice insurance carrier, in connection with an October 31, 2012, letter to Wells from the plaintiffs' new counsel advising of the plaintiffs' impending malpractice claim.
- GIL016728-16752 is an email dated November 8, 2012, from Wells to Last regarding the term sheet connected to the Progressive loans.
- GIL016753 is an email dated July 30, 2012, from Wells to Last, Seltzer, Tesei, and Spellane regarding the replacement of Gilbride as counsel for the plaintiffs in certain Progressive litigations.
- GIL016754-16765 is an email dated November 6, 2012, from Wells to Last attaching a letter Wells wrote to the defendants' insurance carrier describing the plaintiffs' potential malpractice claim.

[1] The defendants misidentify the date of this email in the Third Privilege Log as March 23, 2013.
[2] The defendants have erroneously identified this document as "GIL0167228-16727" in the Third Privilege Log.

- GIL016766-16768 is an email dated November 7, 2012, from Last to Wells, Seltzer, and Spellane, discussing the assignment of Gilbride's insurance policy to a new claim representative.
- GIL016769-16770 is an email dated November 1, 2012, from Tesei[3] to Wells, Spellane, and Seltzer, regarding the October 31, 2012, letter to Wells from the plaintiffs' new counsel advising of the impending malpractice claim.
- GIL016771-16772 is an email dated June 14, 2012, from Wells to Seltzer and Spellane regarding notification of a potential claim to Gilbride's malpractice insurance carrier.
- GIL016773 is an email dated March 22, 2012, from Last to Wells regarding the preparation of descriptive materials in connection with the Progressive litigations.
- GIL016774-16775 is an email dated June 7, 2012, from Wells to Last regarding the replacement of Gilbride as counsel for the plaintiffs in the Progressive litigations.
- GIL016776-16807 is an email dated November 8, 2012, from Wells to Last attaching a memorandum Wells prepared in

[3] The defendants erroneously state that Last was the sender of this email in the Third Privilege Log. However, Last is listed as neither a sender nor a recipient on the email provided to the court.

connection with the plaintiffs' malpractice allegations, as described in their October 31, 2012, letter. Attachments to the memorandum include documents related to the loans and email correspondence between attorneys at Gilbride and Progressive representatives regarding delivery of a mortgage and clear title in connection with the loans.

## III. LEGAL STANDARD

CPLR 3101 provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." Nonetheless, the Legislature and the courts have articulated numerous privileges immunizing from disclosure otherwise discoverable communications that constitute evidence admissible in a judicial proceeding, or are likely to lead to the discovery of such evidence. These include, *inter alia*, the attorney-client privilege, (see CPLR 4503), the attorney work-product privilege, (see CPLR 3101[c]; Matter of New York City Asbestos Litigation, 109 AD3d 7, 12 [1st Dept. 2013]), and the conditional privilege conferred on materials "prepared in anticipation of litigation," (see CPLR 3101[d][2]).

"[S]tatutes bestowing an evidentiary privilege should be construed in furtherance of their 'policy to encourage

uninhibited communication between persons standing in a relation of confidence and trust.'" Matter of Keenan v Gigante, 47 NY2d 160, 167 (1979), quoting People v Shapiro, 308 NY 453, 458 (1955). Despite the social utility of such privileges, they are in "[o]bvious tension" with the policy of this State favoring liberal discovery, as articulated in CPLR 3101(a)(1). Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 377 (1991). Since privileges shield from disclosure pertinent information, and therefore constitute obstacles to the truth-finding process, they must be narrowly construed. See Matter of Jacqueline F., 47 NY2d 215, 219 (1979); see also Madden v Creative Servs., 84 NY2d 738, 745 (1995); Spectrum Sys. Intl. Corp. v Chemical Bank, supra, at 377. The person challenging disclosure by asserting a privilege bears the burden of establishing that the information sought is immune from disclosure. See Spectrum Sys. Intl. Corp. v Chemical Bank, supra, at 376-377; Ambac Assur. Corp. v DLJ Mtge. Capital, Inc., 92 AD3d 451, 452 (1st Dept 2012).

## IV. DISCUSSION

### A. APPLICABILITY OF ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is "the oldest of the privileges for confidential communications known to common law." Upjohn Co. v United States, 449 U.S. 383, 389 (1981). "Its

purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Id. In New York, the attorney-client privilege is codified at CPLR 4503, which provides in relevant part that, absent waiver,

> an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing[.]

For the privilege to apply, the communication must be made "for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." Rossi v Blue Cross & Blue Shield of Greater N.Y., 73 NY2d 588, 593 (1989). The communication itself must be "primarily or predominantly of a legal character." Id. at 594. "The critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client." Spectrum Sys. Intl. Corp. v Chemical Bank, supra at 379.

"A corporation's communications with counsel … are encompassed within the legislative purposes of CPLR 4503. Rossi v Blue Cross & Blue Shield of Greater N.Y., supra at 592

(citations omitted). The privilege applies to communications between corporate agents or employees and attorneys, "whether corporate staff counsel or outside counsel." Id. (citation omitted). However, the Court of Appeals has recognized that staff attorneys, or in-house counsel, have "mixed business-legal responsibility" such that "their day-to-day involvements in their employers' affairs may blur the line between legal and nonlegal communications." Id. Accordingly, the "need to apply [attorney-client privilege] cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure." Id. at 593 (citations omitted).

The Appellate Division, First Department, which is the only appellate court in New York to weigh in on the matter thus far, has confirmed that, like business corporations, law firms may invoke CPLR 4503 to protect the confidentiality of certain intra-firm communications between an attorney and the firm's in-house counsel. See Stock v Schnader Harrison Segal & Lewis LLP, 142 AD3d 210 (1st Dept. 2016); accord Hertzog, Calamari & Gleason v Prudential Ins. Co. of Am., 850 F Supp 255 (S.D.N.Y. 1994). Since both parties' arguments as to the applicability of attorney-client privilege in this matter turn almost exclusively

on their respective interpretations of Stock, further discussion of the First Department's holding in that case is warranted.

In Stock, the defendant law firm, Schnader Harrison Segal & Lewis, LLP ("Schnader Harrison"), had represented the plaintiff, Keith Stock, in the negotiation of a separation agreement from the plaintiff's former employer. Unbeknownst to Stock, as a result of the negotiation, Stock's stock options worth more than $5,000,000 expired. Stock subsequently initiated federal litigation and arbitration proceedings against his former employer to recover the value of the options, again hiring Schnader Harrison to represent him. Stock's former employer took the position in these proceedings that Schnader Harrison's representation was responsible for Stock's injuries. At the arbitration, Stock's former employer sought to call an attorney from Schnader Harrison as a fact witness in order to prove this theory. This development prompted Schnader Harrison attorneys working on Stock's case to seek legal advice from the firm's in-house general counsel, Wilbur Kipnes, Esq., regarding the firm's ethical obligations under the lawyer-as-witness rule. Kipnes never worked on any matter for Stock, and Stock was not billed for any of the time devoted to the ethical consultation.

Approximately two years later, Stock commenced an action in the Supreme Court, New York County, against Schnader Harrison and his individual attorneys, alleging that they committed

malpractice in failing to advise him of the expiration of his vested stock options under the separation agreement. In response to Stock's disclosure demands, Schnader Harrison produced a privilege log, claiming that a series of emails that had been exchanged among Schnader Harrison attorneys and Kipnes were protected by the attorney-client privilege. The emails had been created in connection with the consultation between Schnader Harrison attorneys and Kipnes described above. Stock sought to compel Schnader Harrison to disclose the emails.

The trial court granted Stock's application and directed Schnader Harrison to produce the emails. In reaching its conclusion, the trial court relied on the fiduciary exception to attorney-client privilege recognized in Hoopes v Carota, 142 AD2d 906 (3rd Dept. 1988). The fiduciary exception, which developed as a principle of English trust law, generally provides that a fiduciary cannot withhold communications with an attorney from trust or estate beneficiaries when the legal services were related to trust or estate administration and the fiduciary used trust or estate funds to pay for the legal services. See United States v Jicarilla Apache Nation, 564 US 162, 170-71 (2011). The trial court held that because Schnader Harrison, as Stock's law firm, was a fiduciary with special obligations to Stock, Stock "had a right to disclosure from his fiduciaries of communications that directly correlate to his

claims of self-dealing and conflict of interest." Stock v Schnader Harrison Segal & Lewis LLP, 2014 WL 6879923, at *1 (Sup Ct, NY Cty, Dec. 8, 2014).

On appeal, the First Department unanimously reversed, holding, *inter alia*, that the fiduciary exception did not apply and that the emails were privileged. The appellate court relied on the "real client" analysis previously embraced by the Delaware Chancery Court in Riggs National Bank of Washington v. Zimmer, 355 A2d 709 (Del. Chanc. Ct. 1976), to reach its conclusion. The appellate court stated,

> Because the applicability of the fiduciary exception depends on whether the 'real client' of the attorney rendering counsel was the fiduciary in his or her individual capacity or, on the other hand, the beneficiaries to whom the fiduciary duty was owed, the fiduciary exception does not apply to the attorney-client communications of a fiduciary who seeks legal advice to protect his or her own individual interests, rather than to guide the fiduciary in the performance of his or her duties to the beneficiary.

Stock v Schnader Harrison Segal & Lewis LLP, 142 AD3d 210, 219-220 (1st Dept. 2016).

Applying that principle to the facts presented, the appellate court found that Schnader Harrison and its attorneys "were the 'real clients' for purposes of these attorneys' consultation with Kipnes, the firm's in-house general counsel." Id. at 222. The appellate court emphasized that (1) Kipnes' time spent on the consultation was not billed to Stock, (2)

Kipnes never worked on any matter for Stock, (3) the Schnader Harrison attorneys who sought Kipnes' advice had their own reasons, apart from any duty owed to Stock, for seeking legal guidance, and (4) any benefit to Stock from his attorneys' adherence to their ethical obligations as a result of their consultation with in-house counsel would have been indirect or incidental. Id. at 222-23. The court expressly noted that its "conclusion would be only reinforced by an assumption that the consultation with [Schnader Harrison's] in-house counsel extended to consideration of the firm's potential malpractice liability." Id. at 225.

Further, the appellate court declined to adopt the "current client exception" to the attorney-client privilege to permit the disclosure of the emails. The current client exception "holds that a law firm cannot invoke attorney-client privilege to withhold from a client evidence of any internal communications within the firm relating to the client's representation, including consultations with the firm's in-house counsel, that occurred while the representation was ongoing." Id. at 227. The appellate court noted that the rationale for the current client exception was the idea that when a lawyer at a firm consults in-house counsel about his or her obligations to a client, a conflict of interest necessarily develops between the lawyer and the client, such that any claim to privilege should

be overridden. The appellate court disagreed with this rationale, concluding that a conflict of interest between a law firm and an outside client would "not result in the abrogation of an otherwise valid evidentiary privilege attaching to the consultation." Id. at 231-32.

Finally, the appellate court rejected Stock's argument that the subject emails could not be protected by attorney-client privilege because the relationship between Stock and his attorneys had not yet reached the stage of actual hostility at the time of those communications. Id.

The court also dismissed Stock's concern "that affording the protection of the attorney-client privilege to consultations between lawyers and their firm's in-house counsel, without an exception for the client to whose matter the consultation related, will enable lawyers 'to forever shield from their own clients' evidence of the firm's malpractice or other misconduct." Id. at 239. The court noted that legal malpractice plaintiffs would still have "access to every communication between the client and the firm and to every communication made by the lawyer, whether within the firm or outside of it, that reflects how the lawyer was carrying out the client's business." Id. at 239. Significantly, Schnader Harrison was asserting privilege with respect to "only about two dozen email communications that were exchanged over a nine-day

period," and Stock had access to "[e]very other document" that Schnader Harrison generated in the course of its representation of Stock.

In sum, Stock confirms that the attorney-client privilege between the lawyers at a firm and the firm's in-house counsel is not subject to a fiduciary or current-client exception in certain cases where the privileged communications were made to protect the firm's interests in connection with its representation of a current client. Notably, there was no dispute in Stock that a law firm could claim attorney-client privilege for communications with in-house counsel in the first place, in the same manner that business corporations can.

The parties to this action repeatedly conflate Stock's treatment of exceptions to the intra-firm attorney-client privilege with the question of whether privilege should attach at all to certain communications between law firm attorneys and in-house counsel. For example, the plaintiffs aver, citing Stock, that "New York recognizes a limited intra-firm privilege for the sole purpose of (1) seeking ethical advice (2) from a stand-alone internal general counsel." This statement and others like it are plainly incorrect. To the extent the parties dispute the applicability of attorney-client privilege to the emails at issue, the controlling question is not necessarily whether "ethical advice" was sought or whether the plaintiffs

were billed for the emails, but whether the emails were created "for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship" between Gilbride and Last. Rossi v Blue Cross & Blue Shield of Greater N.Y., supra at 593.

The court has serious concerns as to the existence of an appropriate "attorney-client" relationship between Last and Gilbride. Wells testified at his deposition, apparently after substantial consideration and discussion with his counsel, that Gilbride appointed Last to act as general counsel to the firm on or about March 2012. The defendants offer no other admissible evidence of Last's appointment.

Contrary to the plaintiffs' semantic argument, the fact that Last was appointed to act as general counsel in the absence of a formal, standalone "general counsel" position, does not automatically defeat the defendants' claim that an attorney-client relationship was created. However, a number of other factors cast that claim into doubt. The plaintiffs present significant evidence that between January and August 2012, Last billed hundreds of hours for his litigation efforts on the plaintiffs' behalf. Some of the litigation matters for which Last billed, the work Last did, and Last's communications with the plaintiffs as their counsel are described in the emails submitted for *in camera* review.

Furthermore, in the emails submitted for *in camera* review, which were created over a span of eight months, there is no indication that the Gilbride attorneys were seeking legal advice from Last, or that Last was providing any advice in his role as counsel to Gilbride. In the email chain marked GIL016718-016719, for example, Last appears to be asking other Gilbride attorneys what *he* should do in connection with his ongoing representation of the plaintiffs in certain litigations. Other emails simply provide updates as to Last's communications with the plaintiffs, the status of the litigations in which Gilbride represented the plaintiffs, and general information about such matters as the identity of Gilbride's malpractice claim representative and the plaintiffs' replacement of Gilbride with new counsel. Even after Gilbride received notice of the plaintiffs' intention to bring a malpractice claim, emails exchanged in November 2012 between Last and other Gilbride attorneys do not reflect that Last was providing legal advice. If anything, Wells, not Last, appears to have taken the lead in corresponding with Gilbride's malpractice claim representative, preparing memoranda, and contacting other Gilbride attorneys.

Some of the emails submitted do not even list Last as a sender or recipient. These include a June 2012 email with information regarding notification of a potential malpractice claim to Gilbride's malpractice insurance carrier and a November

2012 email attaching the letter from the plaintiffs' new counsel advising Gilbride of the malpractice claim. It is not clear why the firm's purported in-house counsel would not be included on emails of obvious relevance to a claim against the firm.

The foregoing facts are in stark contrast with Stock, where the appellate court repeatedly emphasized that the defendant law firm's general counsel had not performed any work for the plaintiff, did not bill any time to the plaintiff, and was not a participant in the underlying events, and where privilege was claimed as to a series of emails spanning only about one week. See also Hertzog, Calamari & Gleason v Prudential Ins. Co. of Am., supra at 255 ("The [attorney-client] privilege attaches to communications with in-house counsel if the individual in question is acting as an attorney, rather than as a participant in the underlying events."). They are also at odds with the general principle that communications with in-house counsel are only privileged to the extent made for the purpose of obtaining legal advice for the corporate client. See Rossi v Blue Cross and Blue Shield of Greater N.Y., supra. As the highest court in Georgia, cited favorably in Stock, explains: "In the law firm in-house counsel context, these principles require that the communications be made between the in-house counsel in its capacity as firm counsel and the firm's attorneys in their capacity as representatives of the client, the law firm,

regarding matters within the scope of the attorneys' employment with the firm." St. Simons Waterfront, LLC v Hunter, Maclean, Exley & Dunn, P.C., 293 Ga 419, 426 (2013). It is not at all clear that this is what occurred.

Accordingly, the court concludes that the defendants have not met their burden of establishing that the emails identified in the Third Privilege Log are protected by the attorney-client privilege because they have not demonstrated that Last acted as counsel to Gilbride in the context of the emails. However, two of the documents the defendants withheld are protected by the qualified privilege conferred to materials prepared in anticipation of litigation. See CPLR 3101(d)(2).

"The party asserting the privilege provided by CPLR 3101(d)[(2)] bears the burden of demonstrating that the material it seeks to withhold is immune from discovery by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation." Bombard v Amica Mut. Ins. Co., 11 AD3d 647, 648 (2nd Dept. 2004); see Geffner v Mercy Medical Center, 125 AD3d 802 (2nd Dept. 2015); MBIA Ins. Corp. v Countrywide Home Loans, Inc., 93 AD3d 574 (1st Dept. 2012). Although the defendants assert this privilege with respect to every document in the Third Privilege Log and provide scant justification for such assertions in their moving papers,

the court's *in camera* review of the documents submitted reveals that the documents labelled GIL016754-16765 and GIL016776-16807 are indeed subject to qualified immunity from discovery. They contain detailed legal memoranda and correspondence prepared exclusively to assess Gilbride's legal exposure on the plaintiffs' recently-threatened malpractice claim. The plaintiffs do not make any attempt to show that they have a "substantial need" of these materials or that they have been "unable without undue hardship" to duplicate them. See CPLR 3101(d)(2).

Therefore, the plaintiffs' discovery demands are stricken to the limited extent that they seek disclosure of the privileged materials marked as GIL016754-16765 and GIL016776-16807. The court notes, however, that the exhibits to the memorandum included under GIL016776-16807, are not privileged insofar as they consist of emails and loan documents produced in the course of Gilbride's representation of the plaintiffs. These exhibits are subject to disclosure, to the extent they have not already been produced. The defendants shall deliver all other non-privileged documents identified in the Third Privilege Log to the plaintiffs on or before February 12, 2021.

B. CPLR 3126

The plaintiffs seek sanctions against the defendants for their failure to produce the documents identified in the Third

Privilege Log, or even to identify them, for nearly four years following the plaintiffs' service of discovery demands.

Pursuant to CPLR 3126, a court may sanction a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed." Sanctions may include striking of the party's pleadings, preclusion, or an adverse inference directive. It is well-settled that monetary sanctions or costs and attorneys' fees, as set by the court, are also a fair penalty for a party who has evaded its disclosure obligations. See, e.g., Maxim, Inc. v Feifer, 161 AD3d 551 (1st Dept. 2018) (discovery abuses warranted imposition of $10,000 monetary sanction pursuant to CPLR 3126); Knoch v City of New York, 109 AD3d 459 (2nd Dept. 2013).

In March 2015, the plaintiffs served discovery demands, described above, that plainly included the emails in the Third Privilege Log in their scope. CPLR 3122(b) states,

> Whenever a person is required pursuant to such a notice, subpoena duces tecum or order to produce documents for inspection, and where such person withholds one or more documents that appear to be within the category of the documents required by the notice, subpoena duces tecum or order to be produced, such person shall give notice to the party seeking the production and inspection of the documents that one or more such documents are being withheld. This notice shall indicate the legal ground for withholding each such document, and shall provide the following information as to each such document, unless the party withholding the document states that divulgence of

> such information would cause disclosure of the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum.

The requirement that a party withholding disclosure produce a privilege log in accordance with CPLR 3122(b) has been routinely upheld by the appellate courts. See Anonymous v High School for Environmental Studies, 32 AD3d 353 (1st Dept. 2006) (failure to set out objections to disclosure in detailed privilege log rendered objections insufficient as a matter of law and warranted sanctions); Stephen v State, 117 AD3d 820 (2nd Dept. 2014) (appropriate remedy for failure to produce adequate privilege log was to allow party to produce an adequate log and review documents *in camera*). Nonetheless, the defendants neither objected to the plaintiffs' demands on the basis of attorney-client privilege nor identified the subject documents in a privilege log until October 2018.

The defendants claim that the requirement of a privilege log does not apply to privileged attorney-client communications. Specifically, the defendants aver that "[a]ttorney-client communications are immune from discovery, are not subject to disclosure, and do not require identification on a privilege log." The defendants produce no legal basis for this assertion, which contradicts the plain language of CPLR 3122(b) and the

caselaw identified above. Nor is there any merit to the defendants' strained argument that because the attorneys presently representing them in this litigation do not need to disclose their privileged communications regarding this matter, *any* past communications between the defendants arguably subject to attorney-client privilege can properly be hidden, even if they are responsive to the plaintiffs' discovery demands.

The defendants' failure to identify the documents in the Third Privilege Log until almost four years after the plaintiffs demanded them, and after protracted discovery, litigation, and appellate practice in this matter, is categorically unreasonable behavior that evidences an egregious disregard for the rules of discovery. Therefore, the defendants are directed to pay to the plaintiffs the reasonable attorneys' fees and costs the plaintiffs expended in order to obtain the disclosure identified herein, including the costs of this motion. The plaintiffs shall submit to the court within 60 days documentation of that amount, and, if that is done, the court will thereafter issue an order requiring the defendants to pay the plaintiffs a fixed sum within 30 days. Failure to timely pay the sum fixed by the court will result in further sanctions against the defendants, including striking of the answer.

## V. CONCLUSION

Accordingly, it is

ORDERED that the plaintiffs' motion (SEQ 011) is granted to the extent that (1) the defendants shall produce all documents identified in the Third Privilege Log, except for the privileged documents identified under GIL016754-16765 and GIL016776-16807, to the plaintiffs on or before February 12, 2021, (2) the Note of Issue deadline is extended until April 19, 2021, to permit further discovery limited to issues relevant to the newly disclosed documents, and (3) the defendants shall pay to the plaintiffs the reasonable attorneys' fees and costs of obtaining the disclosure identified herein, in an amount to be fixed by the court upon the plaintiffs' submission of supporting documentation within 60 days, and the motion is otherwise denied; and it is further,

ORDERED that the defendants' motion (SEQ 012) is granted to the extent that the plaintiffs' discovery demands are stricken to the limited extent that they seek the privileged materials prepared in anticipation of litigation identified in the Third Privilege Log under GIL016754-16765 and GIL016776-16807, and the motion is otherwise denied; and it is further,

ORDERED that the parties shall appear for a telephonic status conference on March 18, 2021, at 11:00 a.m.

This constitutes the Decision and Order of the Court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

**Dated: January 28, 2021**