November 17, 2021 Inn Program

Best Practices: A View from the Bench

Co-Chairs: Thomas O'Rourke, Esq., Kevin Schlosser, Esq.

Panelists:

Hon. Stacy D. Bennett

Michael Cardello III, Esq.

Veronica Renta Irwin, Esq.

Hon. Gary F. Knobel

Hon. James M. Wicks

Law Students: Fiza Malik and Noah Yudelson of

The Maurice A. Deane School of Law at Hofstra University

AGENDA

6:00 to 6:05	Greeting by Inn President, Jess Bunschaft
6:05 to 6:10	Kevin Schlosser: Introduction of the Panelists and Pupilage Members.

Question Session

Law Students: Fiza Malik and Noah Yudelson of The Maurice A. Deane School of Law at Hofstra University

6:10 to 6:25	Honorable Gary F. Knobel will Discuss his Procedures and Practices in Part 26 of Nassau Supreme Court
6:25 to 6:40	Honorable James M. Wicks, Magistrate Judge of the Eastern District of New York, will Discuss his Practice Tips and Procedures
6:40 to 6:55	Practices, Procedures and Tips in the Commercial Division of the Nassau County Supreme Court will be Presented by Veronica Renta Irwin, Esq., Law Secretary to the Honorable Sharon M.J. Gianelli

6:55 to 7:10	Honorable Stacy D. Bennett will Discuss her Procedures and Practices in the Matrimonial Part of the Nassau County Supreme Court
7:10 to 7:25	Michael Cardillo, a Court Appointed Discovery Referee and Special Referee, will Discuss his Practices in Handling Discovery, e-discovery and Privilege Issues
7:25 to 7:40	Questions from the Audience

Biography

Judge Bennett has been a distinguished member of the Family Court bench since she was elected in November, 2006. She has served as a Nassau County Family Court Judge from 2007-2011 presiding over cases in the areas of custody, visitation, family offenses, domestic violence, juvenile delinquencies, abuse, neglect, and guardianship proceedings. In 2011 Judge Bennett was appointed Acting Supreme Court Justice and since that time, has been presiding over Matrimonial cases in the Nassau County Supreme Court, Matrimonial Center. Prior to becoming a Judge, she was a partner in the law firm Jaspan Schlesinger LLP, concentrating in the areas of Matrimonial and Family law.

Judge Bennett is admitted to practice in New York, Connecticut, the U.S. District Courts, Southern and Eastern Districts. She received her J.D. degree from Ohio Northern University, College of Law and her Undergraduate degree in economics from Boston University.

In 2007 Judge Bennett was appointed by the NYS Administrative Judge to serve on the New York State Family Court Advisory and Rules Committee. She was appointed by the County Executive to serve on the Nassau County Domestic Violence Task force. She is a member of the NYS Family Court Judges Association, the National Council of Juvenile & Family Court Judges, the Family Court Children's Center Advisory Committee, the We Care Advisory Board, the Nassau County Bar Association, and the Woman's Bar Association. Since 2009 Judge Bennett has volunteered as a lecturer for the Parent Education & Custody Effectiveness Program, (PEACE) program at the Nassau County Supreme Court and is a frequent lecturer for the NYS Bar Association. Judge Bennett also volunteers her time as a coach and Judge of the New York State Mock Trial Program.

HON. JAMES M. WICKS

United States Magistrate Judge
United States District Court for the Eastern District of New York

James M. Wicks was appointed as a United States Magistrate Judge for the Eastern District of New York on April 26, 2021. Prior to his appointment, Judge Wicks spent over 25 years at Farrell Fritz, P.C. in New York, where he was a Partner, served on the Management Committee and later as the firm's first General Counsel. Judge Wicks' practice concentrated in business and commercial litigation, as well as attorney ethics and professionalism issues. Prior to Farrell Fitz, he was an associate with White & Case. While in private practice, Judge Wicks also served as a Receiver and Special Master in various matters, as well as a court-appointed mediator in appellate matters.

Judge Wicks has served as an Adjunct Professor at St. John's University School of Law since 2005. He has served a number of leadership roles in the region, including as Chairs of several not-for-profits, as well as Chair of the E.D.N.Y. Civil Litigation Advisory Committee; member of the State and Federal Judicial Advisory Council; member of the N.Y.S. Judicial Institute of Professionalism; former Chair of the N.Y.S. Bar Association's Commercial & Federal Litigation
Section; and Chair of the Federal Bar Council's Central Islip Courthouse Committee.

Judge Wicks graduated from St. John's University School of Law in 1989 where he was Executive Articles Editor of the Law Review, and received his Bachelor of Arts degree from Wheeling College in 1983, where he was inducted into Alpha Sigma Nu, the Jesuit National Honor Society as well as Psi Chi, the Psychology National Honor Society. Following law school, he served as Law Clerk to the Honorable Arthur D. Spatt in the U.S. District Court for the Eastern District of New York.

BIO 2021

The Hon. Gary F. Knobel was recently elected to the Supreme Court of Nassau County this past November. Justice Knobel had served as a District Court Judge of Nassau County between 2005 and 2017, adjudicating hundreds of civil and criminal cases. In 2011 he was designated an Acting County Court Judge and from 2013 – 2017 he presided in Supreme Court over the majority of pending guardianship cases. He lost his bid for re-election to the District Court bench in 2017 by 120 votes, with over 50,000 votes cast for him. Judge Knobel's record as a jurist for 12 years has been scrutinized by the bi-partisan Judiciary Committee of the Nassau County Bar Association, which unanimously found him to be "well-qualified" for the Supreme Court bench. From 2017-2019 Justice Knobel was the principal law clerk to the Hon. Antonio I. Brandveen in Supreme Court; prior to his ascension to the bench Justice Knobel served as a law clerk for in Nassau County Supreme Court between 1986-2004 for Justices George Murphy and Anthony Parga.

This is Justice Knobel's 19th year teaching New York Civil Practice at Hofstra School of Law. He also has served as an instructor at the Judicial Institute for newly elected and appointed judges. Judge Knobel also served as President of the NYS District Court Judges Association and as a member of the state-wide Special Commission on Fiduciary Matters. He is a former Chair of the Judicial Section of the Nassau County Bar Association and currently the President of the Jewish Lawyers Association of Nassau County. Prior to the Covid -19 pandemic, Judge Knobel delivered food weekly to seniors for 25 years on behalf of Island Harvest and LI Cares. Justice Knobel is married to Ilene Fern, a Principal Law Clerk to Supreme Court Justice Lee Mayersohn in Queens County; they have two children- Laurence who received his BA and MBA from Hofstra and is employed by a national bank, and Lily, an honor student and junior in Oceanside High School.

Kevin Schlosser

Member of the Firm

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Garden City, New York 11530
(516) 592-5709
kschlosser@msek.com

Practice Areas

Litigation & Dispute Resolution

Education

Hofstra University Law School
J.D. with distinction, 1984

John Jay College of Criminal Justice,
City University of New York
B.A., 1981
magna cum laude

Memberships

American Inns of Court Executive Board,
Theodore Roosevelt Chapter,
Past President

National Institute for Trial Advocacy,
Instructor

American Bar Association, Litigation Section

New York State Bar Association, Commercial and Federal Litigation Section

Nassau County Bar Association,
Commercial Litigation Committee

Suffolk County Bar Association, Commercial Division Committee

New York State Bar Foundation Fellow

Admissions

New York State

U.S. Supreme Court

U.S. Court of Appeals for the Second Circuit

U.S. District Court, Eastern and Southern Districts of New York

U.S. District Court, Eastern District of Michigan

U.S. District Court, Eastern District of Wisconsin

Kevin Schlosser is a partner and the Chair of the Litigation and Dispute Resolution Department at Meyer, Suozzi, English & Klein, P.C. located in Garden City, Long Island, N.Y. Mr. Schlosser has been involved in all aspects of state and federal litigation since starting his legal career in 1984. An experienced civil litigator, Mr. Schlosser has engineered the legal strategy for a broad range of cases and arbitrations, including complex commercial matters, corporate and partnership disputes, business torts, fraud, breach of fiduciary duty, breach of contract, business valuations, employment and restrictive covenants, intellectual property, trademarks, copyrights, unfair competition, false and misleading advertising, trade secrets, professional liability and malpractice claims, construction law and mechanics liens, real estate, commercial landlord-tenant disputes, ERISA, health law, Federal Fair Debt Collection Practices Act class actions, products liability, insurance coverage, claims and defense, including disability insurance claims, and the prosecution and defense of other tort-related claims. His clients consist of some of the largest companies in the world, as well as local businesses and individuals, including senior law partners, accountants, doctors and others in the professions. A proven appellate lawyer, he is also an accomplished trial attorney, whose victories include million-dollar recoveries and a record-breaking jury verdict.

Mr. Schlosser also serves as a private neutral arbitrator and party-appointed arbitrator in complex commercial disputes, and as a “Private Judge” pursuant to the CPLR. For more on Meyer Suozzi’s roster of Private Judges, click here.

In addition to his litigation experience, Mr. Schlosser also acts as general outside corporate counsel, advising corporate clients on the full spectrum of legal affairs. Because of his experience in the Commercial Division of the Supreme Court of the State of New York since its inception, Mr. Schlosser is frequently tapped to serve as local Long Island counsel to many other law firms in New York City and out of state, including in Nassau and Suffolk Counties.

Notable experience includes:

- Won a $12.6 million judgment in a jury trial in the Commercial Division, Nassau County, in a breach of contract case involving a stock purchase agreement
- Won at trial in Commercial Division, New York County, defeating $1.2 million commission claim by Trump Securities

Kevin Schlosser

- Appeared as litigation counsel to the National Football League and obtained the immediate vacatur of an injunction through an order of the Appellate Division in Long Island, thereby permitting the NFL to pursue its policy of mandatory drug testing of professional football player
- In a jury trial in the United States District Court for the Eastern District of New York, obtained a verdict entirely rejecting claim for nearly $14 million in alleged lost profits in an international breach of contract case, breaking down plaintiff's financial experts through vigorous cross-examination
- Has appeared as lead counsel in copyright, trademark, Lanham Act, contract and antitrust cases throughout the country, including in United States District Courts in California, Hawaii, Illinois, Michigan, New York, Oklahoma and Wisconsin.
- Successfully defended a $65 million shareholder derivative action alleging breach of fiduciary duties and corporate waste against the former president of a public bank, resulting in the entire action against the president being dismissed with no monetary payment from the president and his counsel fees being reimbursed in their entirety by the bank
- Successfully defended a $25 million action alleging several counts of fraud, breach of contract and business torts against the largest casino operator in the world
- Obtained summary judgment dismissing case and prevailed on appeal to the New York Appellate Division, First Department, and Court of Appeals in an action alleging damages of over $20 million, asserting intentional interference with contract and interference with business relations against largest casino operator in the world
- Prevailed on appeal to the New York Appellate Division, Second Department, to sustain claim of punitive damages in a commercial fraud and breach of fiduciary duty action
- Prevailed in arbitration in dispute between senior law partners concerning the proper method for allocating fees in cases handled by the law firm
- Obtained injunctive relief on behalf of product manufacturer/seller in United States District Court for the Eastern District of New York barring competitors from selling competing, offending product, and prevailed after trial in challenge to the injunction
- Obtained final judgment against large manufacturer's competitor and former employee under restrictive covenants and non-disclosure agreements based upon claims of misappropriation of trade secrets and breach of contract in Commercial Division, Nassau County
- Obtained highest jury award on record for damages in an action for nuisance and interference with real property rights on behalf of property owners in the Supreme Court, Suffolk County
- Obtained jury verdict in Supreme Court, Nassau County, on behalf of international distributor-commercial tenant on the ground of constructive eviction even though tenant continued to remain in the leased premises for lengthy period of time, in which jury awarded tenant significant monetary damages against the landlord and relieved the tenant of any further obligation for rent on remaining lease term after the tenant moved to new space

Mr. Schlosser serves in various teaching capacities: He is a member of the faculty of the National Institute for Trial Advocacy; has chaired the Continuing Legal Education Program on New York Civil Motion Practice at Hofstra Law School; and is a member of the Continuing Legal Education faculty panel of the New York State Bar Association and the Nassau County Bar Association Academy of Law, where he instructs experienced practicing attorneys. He has given CLE seminars and presentations with some of the most prominent judges in the state and federal courts, including Supreme Court Commercial Division Justices Timothy S. Driscoll, Vito M. DeStefano, Stephen Bucaria, Emily Pines, Elizabeth Hazlitt Emerson, Jerry Garguilo, James Hudson, Saliann Scarpulla and Thomas Whelan, Appellate Division Justices Leonard Austin, Karla Moskowitz, Barbara Kapnick and federal judiciary such as U.S. District Court Judges Shira Scheindlin, Richard J. Sullivan and Nicholas G. Garaufis and Magistrate Judges A. Kathleen Tomlinson, Arlene R. Lindsay and William Wall. Many of Mr. Schlosser's activities can be viewed in detail by clicking on the relevant links to the left. Click here to view details from meetings of Nassau County Bar Association's Commercial Litigation Committee, which Mr. Schlosser chaired from 2013-2015. In 2016, Mr. Schlosser served as the President of the Theodore Roosevelt American Inn of Court. Mr. Schlosser is also an active member of the Commercial Division Committee of the Suffolk County Bar Association.

Mr. Schlosser has written extensively on many aspects of the law, publishing numerous articles over thirty years in leading legal publications. He has authored the "Litigation Review" column for the New York Law Journal and served on the Board of Editors of the Nassau Lawyer, which is the official publication of the Nassau County Bar Association. Many of Mr. Schlosser's articles can be viewed by clicking on the "Publications" link to the left. He is also the author of a well-recognized blog, www.nyfraudclaims.com, which covers new developments concerning claims of fraud and misrepresentation under New York law.

Active in charitable organizations, Mr. Schlosser received the 2003 Leadership Award presented by the Long Island Chapter of the National Multiple Sclerosis Society. He has also served as a faculty member of the Construction Management Institute, sponsored by the New York State Chapter of the National Association of Minority Contractors, helping minority-owned contractors enhance their developing businesses.

During law school, Mr. Schlosser was a Member and then Articles Editor of the Hofstra Law Review. In his capacity as Articles Editor, Mr. Schlosser interacted with and edited articles of some of the most prominent and well-respected legal scholars, including law professors, evidence experts and Congressional leaders. He also clerked for the Honorable George C. Pratt, United States Circuit Court Judge, where he drafted several court decisions, including a complex antitrust ruling. He also obtained valuable trial experience while clerking in the Criminal Division of the United States Attorney's Office for the Eastern District of New York, where he assisted in the prosecution of several major felony cases. Mr. Schlosser graduated law school with the highest honors. Additionally, he was a founding officer of a national criminal justice honor society at John Jay College of Criminal Justice of the City University of New York. At the outset of his career, Mr. Schlosser acquired intensive litigation experience, having been trained at two prominent firms based in New York City: Patterson, Belknap, Webb & Tyler, and Chadbourne & Parke. In 1990, he became associated with one of Long Island's largest law firms, where he rose to the level of a managing partner and head of its litigation department, the largest practice group in the firm. After joining Meyer, Suozzi and becoming a partner in 2002, Mr. Schlosser was appointed Co-Chair of the firm's Litigation Department in November 2002. In 2006, Mr. Schlosser became Chair of the firm's Litigation and Dispute Resolution Department and has held that position through the present. He is also a member of the firm's Management Committee. Mr. Schlosser is rated "AV Preeminent" by Martindale-Hubbell, the highest level in professional excellence and ethics. Mr. Schlosser was recognized by Long Island Pulse Magazine in 2010 and 2011 as the region's "Top Legal Eagle for Litigation." Mr. Schlosser has been named to the New York Super Lawyers list as one of the top attorneys in New York from 2012-2020.

Kevin Schlosser Published Articles

THE USE OF PRIVATE JUDGES: NEW WORLD, NEW WAVE?
November 6, 2020
New York Law Journal

RENEWED ALLURE IN HIRING "PRIVATE JUDGES" UNDER THE CPLR
May 28, 2020
The Suffolk Lawyer

LAWYERS' ROLE KEY TO PRESERVING AND PREVENTING FRAUD CLAIMS
December 2, 2016
New York Law Journal

NEW YORK SHOULD CATCH THE FEDERAL ESI WAVE BEFORE IT'S TOO LATE
December 23, 2015
New York Law Journal

READING RESTRICTIVE COVENANT TEA LEAVES FROM STATE'S HIGH COURT
July 24, 2015
New York Law Journal

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GRAPPLING WITH FIDUCIARY DUTIES IN ENFORCING CONTRACTS
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Focus on Commercial Litigations
October 28, 2009
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SECOND CIRCUIT BROADENS DISABILITY INSURANCE REMEDIES - Article by Kevin Schlosser and Robert C. Angelillo
March 7, 2009
New York Law Journal

NEW FEDERAL CASE EXPANDS RIGHTS OF DISABILITY INSURANCE CLAIMANTS
Slupinski v. First Unum Life Insurance 2nd Circuit Attorney Fees and Interest Awarded
February 2, 2009
www.msek.com

LIBERALIZING DISCOVERY IN ERISA DISABILITY INSURANCE CASES
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September 23, 2008
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NEW STATEWIDE UNIFORM RULES FOR COMMERCIAL DIVISION
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HOW TO AVOID LITIGATING DISPUTES IN A FOREIGN, INCONVENIENT FORUM
November 1, 1999
Construction Law

SURETY'S SUBROGATION RIGHTS REJECTED IN COURT'S LATEST DECISION ON LIEN LAW
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HIGH COURT BOLSTERS LIEN LAW TRUST PROTECTIONS
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Kevin Schlosser Seminars

Participates in New York State Bar Association's Panel Discussion
An Evening with the Commercial Division Justices
September 17, 2020

Panelist at the New York State Bar Association's Commercial and Federal Litigation Section
Restrictive Covenants: The Good, the Bad and What the Future Holds
June 17, 2020

Participates in New York State Bar Association's Panel Discussion
An Evening with the Commercial Division Justices
June 14, 2017

Moderator at the New York State Bar Association's Panel Discussion
An Evening with the Commercial Division Justices
June 21, 2016

Speaks at the New York County Lawyers' Association CLE Program
Noncompetition and Confidentiality Provisions in Employment Agreements: Current Status of the Law in New York and State and National Trends
November 4, 2015

Participates in New York State Bar Association's Panel Discussion
An Evening with the Commercial Division Justices
June 8, 2015

Moderates for American Inns of Court
Litigation Overload Facing Federal and State Courts-Trying to Stem the Tide & What Makes a Great Commercial Court
May 27, 2015

Participates in the State Commercial and Federal Court Round-Up Program
June 4, 2014

Participates on Panel for the Hofstra Law's Moot Court Board
March 13, 2014

Moderates NBI Program
As Judges See It: Top Mistakes Lawyers Make in Civil Litigation
June 7, 2013

Speaks at Nassau Academy of Law Program
Advice from the Experts: Successful Strategies for Winning Commercial Cases in New York State Courts
May 9, 2013

Chairs Civil Action Program at the Theodore Roosevelt American Inn of Court
Strategies and Techniques of Direct and Cross Examination of Witnesses at Trial
February 11, 2013

Participates in the Hofstra Law Intramural Competition
January 24, 2013

Serves as Instructor at the Hofstra Trial Techniques Program
The National Institute of Trial Advocacy and the E. David Woycik, Jr. Intensive Trial Advocacy Program
January 4, 2013

Speaks at Suffolk Academy of Law CLE Program
Strategies and practical advice for maximizing the effectiveness of each stage of the litigation
October 11, 2012

Presents in First Ever Joint Seminar for Appellate Division Justices
April 25, 2012

Presents CLE to Suffolk County Bar Association with the Honorable Emily Pines
The CPLR in Everyday Practice
April 19, 2012

Speaks at the Theodore Roosevelt American Inn of Court at the Nassau County Bar Association
A Civil Action - Jury Selection
February 15, 2012

Speaks at the Alexander Hamilton Inn of Court at Touro Law School
Alexander Hamilton Inn of Court Program on Injunctions
January 24, 2012

Kevin Schlosser Seminars

Presents CLE on Expert Witness Discovery at Nassau County Bar Association
June 2, 2011

Speaks at the Nassau County Bar Association
E-Discovery: What the Litigator Needs to Know to Avoid Professional Liability
June 7, 2010

Presents CLE to ACC-GNY Corporate Counsels
June 8, 2011

Achieving 20-20 Hindsight: Practical Solutions to Avoid Rescission, Unenforceability and Misinterpretation of Your Contracts
June 8, 2011

Presents CLE to Inns of Court
April 19, 2010

Presents CLE to Inns of Court
Undoing the Done: Contract? What Contract?
February 3, 2009

Kevin Schlosser Participates as a CLE Instructor at the Annual Meeting at the American Bar Association
Zapped! The New and Complex World of E-Discovery
August 8, 2008

Presents Seminar for the New York State Bonding Initiative
Legal Aspects of Contract Management and Key Issues Regarding Tort Law in the State of New York
May 8, 2008

Lectures at Hofstra Law School
March 20, 2008

Participates at the Federal Civil Practice Update - CLE
May 15, 2007

Speaks at the Theodore Roosevelt American Inn of Court at the NCBA
Inadvertent Waiver of Attorney- Client and Work Product Privileges in the Electronic Age
February 8, 2007

Presents Construction Law Seminar
Construction Management Training Course
July 18, 2006

Presented CLE with the Honorable Leonard B. Austin to the Westchester Women's Bar Association
Electronic Discovery: The New Frontier, An Interactive, Practical Guide to the Latest State and Federal Principles
October 5, 2006

Speaks at First American Title Company
Electronic Evidence in Litigation- the New Frontier
May 17, 2005

Speaks at the Theodore Roosevelt American Inn of Court at the Nassau County Bar Association
Electronic Discovery
May 12, 2005

Speaks at the Nassau Academy of Law, Nassau County Bar Association
Super Sunday Civil Litigation CLE Program Segment on Electronic Discovery
January 11, 2004

Speaks at the Nassau County Bar Association
Electronic Discovery
October 27, 2004

Speaks at the New York State CPA Society
What a savvy litigator looks for in a financial expert witness
November 24, 2003

Speaks at the Nassau Academy of Law, Nassau County Bar Association
Mastering Civil Litigation - Electronic Discovery
December 2, 2003

Moritt Hock & Hamroff LLP
ATTORNEYS AT LAW

Michael Cardello III
Partner
mcardello@moritthock.com

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MICHAEL CARDELLO III

Practice Areas

Commercial Litigation
Dispute Resolution
Bankruptcy

Michael Cardello III has been a partner with the firm where he Co-Chairs the firm's Litigation practice group, is a member of the firm's Dispute Resolution Practice Group, and serves on the firm's Management Committee. Mr. Cardello concentrates his practice in business and commercial litigation. Prior to joining the firm in 1997, he served as a Law Clerk to the Honorable Arthur D. Spatt, United States District Court for the Eastern District of New York.

Mr. Cardello represents large and small businesses, financial institutions and individuals in Federal and State Courts in complex commercial matters. He has a wide-range of experience that includes trials and appellate work in the areas of corporate disputes, shareholder derivative actions, dissolutions, construction disputes, equipment and vehicle leasing disputes and other complex commercial and business disputes.

Mr. Cardello also serves as a Court-Appointed Discovery Referee and Special Referee by various courts to oversee all aspects of the discovery process in complex commercial cases. From 2005 through 2008, Mr. Cardello oversaw all aspects of discovery in Delta Financial Corp. v. Morrison, in which he rendered many written decision related to discovery, e-discovery and privilege issues and presided over sixty-five depositions. From 2009 through 2015, Mr. Cardello served as Special Referee in a very large multi-party construction defect case captioned Archstone v. Tocci Building Corporation of New Jersey. During his appointment, Mr. Cardello issued numerous decisions regarding complex e-discovery issues as well as issuing decisions on other non-dispositive motions. From 2012 to 2016, Mr. Cardello served as the Special Referee in the related insurance coverage action to the Archstone construction defect case, captioned QBE Insurance Corporation v. Adjo Contracting Corporation. During his tenure, Mr. Cardello issued numerous decisions and rulings in order to prepare the case for trial. Mr. Cardello was also involved in the settlement process, which lead to a resolution.

From 2013 to 2016, Mr. Cardello served as the Special Referee to oversee the dissolution of a law firm and the wind up of its affairs. During his appointment, Mr. Cardello dealt with many legal issues and was successful in separating the law firm into two firms. On consent of the parties, he has presided over a trial on one unresolved issue related to the wind up which resulted in a settlement. He is currently appointed to

a number of cases as Discovery Referee and Special Referee by Justices of the Supreme Court for the State of New York.

Mr. Cardello is also approved by the Officer of Court Administration in the State of New York to serve as a Receiver and has been appointed by the Court as Receiver to oversee the dissolution and wind up of the affairs of businesses and for the collection of rents for commercial properties. Mr. Cardello served as a Court Appointed Receiver for a 250,000 square foot office building that was the subject of a commercial foreclosure. He also mediates complex commercial litigation cases pending in the Commercial Division of the Supreme Court of the State of New York.

Mr. Cardello is the former Chair of the Federal Courts Committee and the Commercial Litigation Committee of the Nassau County Bar Association. Mr. Cardello previously served on the Judiciary Committee of the Nassau County Bar Association and is also a member of its Alternative Dispute Resolution Committee. He is also the District Leader for the 10th Judicial District for the Commercial and Federal Section of the NYSBA. In addition, he is a participant at the Sedona Conference and also frequently lectures on mediation, discovery, trial practice, equipment and vehicle leasing issues and e-discovery.

Education

Hofstra University, J.D.
Associate Editor, Hofstra Law Review
Hofstra University, M.B.A. (Finance)
Hofstra University, B.B.A. (Marketing)

Admissions

Mr. Cardello is admitted to practice law in New York. He is also admitted to practice in the Eastern and Southern Districts of New York and the United States Court of Appeals for the Second Circuit.

Affiliations

Mr. Cardello serves on the EDNY Litigation Advisory Committee, as well as on the Nassau County Bar Association's WE CARE Fund Advisory Board. In addition, he also serves as Chair of the Board of Directors for the Metro New York/Connecticut Chapter of the National Vehicle Leasing Association. Mr. Cardello also serves on the Board of Directors of the Catholic Lawyers Guild of Nassau County. Mr. Cardello is the former President (2017-2018) of the Theodore Roosevelt American Inn of Court. He serves as a fellow of the Academy of Court-Appointed Masters and on the Board of Directors for the Long Island Council on Alcoholism and Drug Dependence.

Recognitions

2021-New York Super Lawyers®
2020-New York Super Lawyers®

2019-New York Super Lawyers®
2018-New York Super Lawyers®
2017-New York Super Lawyers®
2016-New York Super Lawyers®

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Thomas A. O'Rourke is a founding partner of the firm Bodner & O'Rourke. Mr. O'Rourke's practice involves all areas of patent, trademark and copyright law. For over thirty years he has been registered to practice before the United States Patent & Trademark Office. Mr. O'Rourke has counseled clients regarding the procurement and enforcement of patents, trademarks, copyrights and trade secrets in a variety of technologies including mechanical, and computer technology. In addition, his practice involves domestic and international technology transfer, acquisition and licensing. He is a member of the bar of the States of New York and California. He has also been admitted to numerous Federal District Courts and Courts of Appeal across the country including, the Court of Appeals for the Federal Circuit.

Mr. O'Rourke has been a member of the Board of Directors of the New York Intellectual Property Law Association. Mr. O'Rourke is Co-Chairman of the Suffolk County Bar Association's Committee on Intellectual Property Law and has been a member of the Advisory Board of the Licensing Journal. He has lectured on Intellectual Property Law at numerous Continuing Legal Education programs, including programs presented by the American Bar Association, the Connecticut Intellectual Property Law Association and the Suffolk County Bar Association. He was also the Editor of the New York Intellectual Property Law Association Bulletin and the author of numerous articles on patents, trademarks and copyrights for the New York Intellectual Property Law

Association. Mr. O’Rourke has also authored monthly articles on intellectual property law licensing, which have appeared in the Licensing Journal. Mr. O’Rourke has also been named as a Super Lawyer.

Mr. O’Rourke has a B.S. degree in Chemistry from Fordham University and obtained his J.D. degree from St. John's University School of Law, where he was a member of the Law Review.

MATRIMONIAL PRELIMINARY CONFERENCE CHECKLIST

Hon. _____ J.S.C. INDEX No. _____

_____ v _____

PLAINTIFF DEFENDANT

Preliminary Conference Date: _____

Parties Present (RT1-SCR6):

Plaintiff YES ☐ NO ☐ **Defendant** YES ☐ NO ☐

Retainer Filed (RT1-SCR3):

Plaintiff YES ☐ NO ☐ **Defendant** YES ☐ NO ☐

Net Worth Statement Filed (RT1-SCR6):

Plaintiff YES ☐ NO ☐ **Defendant** YES ☐ NO ☐

Discovery Completed (RT1-SCR6):

Plaintiff YES ☐ NO ☐ **Defendant** YES ☐ NO ☐

Date Summons Served: _____

Attorneys: **(Name, Address, Phone/Fax Number and E-Mail)**

Plaintiff **Defendant**

(Attach completed form to PC order and send to Judgement Office in MatCenter)

Background Information Sheet-Addendum to P.C. Form

Index: _____

Plaintiff- _____

Defendant- _____

Attorney For Plaintiff

Attorney for Defendant

Date Of Marriage_____

Date Summons Filed _____

Name(s) and Date(s) of Birth of Children

_____ _____ _____ _____

_____ _____ _____ _____

Children reside with:_____

Plaintiff's Address and Age:

Defendant's Address and Age:

_____

Marital Residence? Yes ☐ No ☐

_____

Marital Residence? Yes ☐ No ☐

Nature of Employment:

Nature of Employment:

_____

Plaintiff's Employer and Address

_____

Defendant's Employer and Address

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

Plaintiff,

Index No.:_____

- against -

Part No.:_____

Defendant.

----------X

PRELIMINARY CONFERENCE STIPULATION/ORDER
CONTESTED MATRIMONIAL

PRESIDING: Hon. _____
Justice of the Supreme Court

The parties and counsel have appeared before this Court on _____ at a preliminary conference on this matter held pursuant to 22 NYCRR §202.16.

A. BACKGROUND INFORMATION:

1. Summons: Date filed: _____ Date served: _____

2. Date of Marriage: _____

3. Name(s) and date(s) of birth of child(ren):

Name:_____ DOB:_____
Name:_____ DOB:_____
Name:_____ DOB:_____
Name:_____ DOB:_____

4. Attorneys for Plaintiff: Attorneys for Defendant:

5. The Court has received a copy of: Plaintiff Defendant
(Date Filed ***OR*** To Be Filed)

(a) A sworn statement of net worth as of date of commencement of the action. _____ _____

(b) A signed copy of each party's attorney's retainer agreement. _____ _____

6. An Order of Protection has been issued against:

Plaintiff: ☐ YES ☐ NO **Defendant:** ☐ YES ☐ NO

Issue Date: _____ Issue Date:_____

Issuing Court: _____ Issuing Court: _____

Currently in Effect?
☐ YES ☐ NO

Currently in Effect?
☐ YES ☐ NO

7. Plaintiff/Defendant requests a translator in the _____language.

8. (a) Please identify and state the nature of any Premarital, Marital, Separation or other Agreements and/or Orders which affect the rights of either of the parties in this action.

(b) Plaintiff/Defendant shall challenge the Agreement dated _____ by _____. If no challenge is asserted by that date, it is waived unless good cause is shown.

B. GROUNDS FOR DIVORCE:

1. The Complaint (was) (or will be) served on:_____

2. A Responsive Pleading (was) (or will be) served on:_____

3. Reply to Counterclaim, if any, (was) (or will be) served on:_____

4. The issue of grounds is ☐ **resolved** ☐ **unresolved.**

If the issue of grounds is **resolved**, the parties agree that Plaintiff/Defendant will proceed on an uncontested basis to obtain a divorce on the grounds of DRL § 170(7) and the parties waive the right to serve a Notice to Discontinue pursuant to CPLR 3217(a) unless on consent of the parties.

5. Other:

C. CUSTODY:

1. The issue of parenting time is ☐ **resolved** ☐ **unresolved**.

2. The issues relating to decision-making are ☐ **resolved** ☐ **unresolved.**

(a) If the issues of custody, including parenting time and decision-making, are resolved: The parties are to submit an agreement/stipulation no later than _____.

(b) If the parties do not notify the Court that all issues related to custody are resolved, a conference shall be held on _____ at which time the Court shall determine the need for an Attorney for the Child/Guardian ad Litem and/or a forensic evaluation and set a schedule for resolving all issues relating to custody.

3. ☐ **ATTORNEY FOR CHILD(REN) or GUARDIAN AD LITEM**: Subject to judicial approval, the parties request that the Court appoint an Attorney for the parties' minor child(ren) ("AFC"). The cost of the AFC's services shall be paid as follows: _____ .

☐ **FORENSIC:** Subject to judicial approval, the parties request that the Court appoint a neutral forensic expert to conduct a custody/parental access evaluation of the parties and their child(ren). Subject to Judicial approval, the cost of the forensic evaluation shall be paid as follows:_____.

Any appointment of an Attorney for the Child/Guardian ad Litem or forensic evaluator shall be by separate order which shall designate the individual appointed, the manner of payment, source of funds for payment, and each party's responsibility for such payment.

D. FINANCIAL:

(1) Maintenance is ☐ **resolved** ☐ **unresolved**

(2) Child Support ☐ **resolved** ☐ **unresolved**

(3) Equitable Distribution is ☐ **resolved** ☐ **unresolved**

(4) Counsel Fees are ☐ **resolved** ☐ **unresolved**

List all other causes of action and ancillary relief issues that are **unresolved**.

Any issues not specifically listed in this Order as unresolved may not be raised in this action unless good cause is shown.

E. OTHER:

List all other causes of action and ancillary relief issues that are **unresolved**.

F. *PENDENTE LITE* RELIEF:

See annexed Order _____

See annexed Stipulation _____

G. DISCOVERY:

1. **Preservation of Evidence:**

(a) **Financial Records:** Each party shall maintain all financial records in his or her possession or under his or her control through the date of the entry of a judgment of divorce.

(b) **Electronic Evidence:** For the relevant periods relating to the issues in this litigation, each party shall maintain and preserve all electronic files, other data generated by and/or stored on the party's computer system(s) and storage media (i.e. hard drives, floppy disks, backup tapes), or other electronic data. Such items include, but are not limited to, e-mail and other electronic communications, word processing documents, spreadsheets, data bases, calendars, telephone logs, contact manager information, internet usage files, offline storage or information stored on removable media, information contained on laptops or other portable devices, and network access information.

2. **Document Production:**

(a) No later than ____ days after the date of this Order, the parties shall exchange the following records for the following periods:

Time Period

_____ Federal, state and local tax returns, including all schedules, K-1s, 1099s, W-2s and similar data.

_____ Credit card statements for all credit cards used by a party.

_____ Checking account statements, cancelled checks and check registers for joint and individual accounts.

_____ Brokerage account statements for joint and individual accounts.

_____ Savings account statements for joint and individual accounts.

_____ Other: (specify) [ ]

Absent any specified time period, the records listed above are to be produced for the **three years** prior to the commencement of this action through the present. If a party does not have complete records for the time period, the party shall provide a written authorization to obtain such records directly from the source within five days of presentation.

(b) Service of Notice For Discovery and Inspection:

Plaintiff: _____ Defendant: _____

(c) Responses to Notice for Discovery and Inspection:

Plaintiff:_____ Defendant:_____

(d) Service of Interrogatories:

Plaintiff:_____ Defendant:_____

(e) Response to Interrogatories:

Plaintiff:_____ Defendant:_____

(f) Depositions (date to be held):

Plaintiff:_____ Defendant:_____

(g) Non Party Depositions (date to be held):

Plaintiff:_____ Defendant:_____

Failure to comply with the provisions of this section may result in sanctions, including the award of legal fees, and other penalties.

H. VALUATION/FINANCIAL EXPERTS

1. **Neutral Experts –** The parties request that the Court appoint a neutral expert to value the following:

The cost of the valuations shall be paid (subject to reallocation): _____% Plaintiff and _____% Defendant

(a) Deferred compensation/Retirement assets _____
(b) Business interest _____
(c) Professional practice _____
(d) Real property _____
(e) Stock options, stock plans or other benefit plan _____
(f) Intellectual property _____
(g) Other (identify): _____

The parties agree that the appointment of the neutral expert as specified above, shall be pursuant to a separate order which shall designate the neutral expert, what is to be valued, the manner of payment, the source of funds for payment, and each party's responsibility for such payment if not agreed above.

If the Court does not appoint the neutral expert(s) requested above simultaneously with the signing of this Order, then the parties may suggest names for the Court to consider appointing. Said names shall be submitted by letter no later than _____.

The parties shall notify the Court no later than _____as to whether any other neutral experts are required.

2. **Experts to be Retained by a Party:**

Each party shall select his/her own expert to value _____. The expert shall be identified to the other party by letter with their qualifications and retained no later than _____. If a party requires fees to retain an expert and the parties cannot agree upon the source of the funds, an application for fees shall be made. Any expert retained by a party must represent to the party hiring such expert that he or she is available to proceed promptly with the valuation.

Expert reports are to be exchanged by _____. Absent any date specified, they are to be exchanged 60 days prior to trial or 30 days after receipt of the report of the neutral expert, whichever is later. Reply reports are to be exchanged 30 days after service of an expert report.

3. **Additional Experts:**

If, as of the date of this order, a net worth statement has not been served or a party cannot identify all assets for valuation or cannot identify all issues for an expert, then, upon the parties' becoming aware of such assets or issues, that party promptly shall notify the other party as to any assets for valuation or any issue for which an expert is needed. If the parties cannot agree upon a neutral expert or the retention of individual experts, either party may notify the Court for appropriate action. Timely application shall be made to the Court if assistance is necessary to implement valuation or the retention of an expert.

I. HEALTH INSURANCE COVERAGE NOTICE:

Each party fully understands that upon the entry of a divorce judgment, he/she may no longer be allowed to receive health coverage under his/her former spouse's health insurance plan. Each party understands that he/she may be entitled to purchase health insurance on his/her own through a COBRA option, if available, otherwise he/she may be required to secure his/her own health insurance coverage.

J. AUTOMATIC STATUTORY RESTRAINTS (D.R.L. §236[B][2])

Each party acknowledges that he/she has received a copy of the Automatic Statutory Restraints/Automatic Orders (D.R.L. §236[B][2]). Each party acknowledges that he/she understands that he/she is bound by those Restraints/Orders during the pendency of this action, unless terminated, modified, or amended by order of the Court upon motion of either party or upon written agreement between the parties duly executed and acknowledged.

K. PARENT EDUCATION:

The Court: ☐ has provided information as to parent education.
☐ has taken no action with respect to parent education.
☐ hereby orders the parties to attend parent education.

L. ALTERNATE DISPUTE RESOLUTION/MEDIATION:

The parties ☐ *are* OR ☐ *are not* aware of the existence of mediation, collaborative processes and other alternative dispute resolution methods.

M. NOTICE OF GUIDELINE MAINTENANCE

Each party acknowledges receipt of the following notice from the Court:

If your divorce was commenced on or after January 25, 2016, this Notice is required to be given to you by the Supreme Court of the county where your divorce was filed to comply with the Maintenance Guidelines Law ([S. 5678/A. 7645], Chapter 269, Laws of 2015) because you may not have counsel in this action to advise you**. It does not mean that your spouse is seeking or offering an award of "Maintenance" in this action. Maintenance" means the amount to be paid to the other spouse for his or her support, either during the pendency of the divorce action as temporary maintenance or after the divorce is final as post-divorce maintenance.**

You are hereby given notice that under the Maintenance Guidelines Law (Chapter 269, Laws of 2015), there is an obligation to award the guideline amount of maintenance on income up to $184,000 to be paid by the party with the higher income (the maintenance payor) to the party with the lower income (the maintenance payee) according to a formula, unless the parties agree otherwise or waive this right. Depending on the incomes of the parties, the obligation might fall on either the Plaintiff or Defendant in the action.

There are two formulas to determine the amount of the obligation. If you and your spouse have no children, the higher formula will apply. If there are children of the marriage, the lower formula will apply, but only if the maintenance payor is paying child support to the other spouse who has the children as the custodial parent. Otherwise the higher formula will apply.

Lower Formula

(a) Multiply Maintenance Payor's Income by 20% .

(b) Multiply Maintenance Payee's Income by 25% .

(c) Subtract Line b from Line a: = **Result 1**

(d) Subtract Maintenance Payee's Income from 40 % of Combined Income* = **Result 2**.

(e) Enter the lower of **Result 2** or **Result 1,** but if less than or equal to zero, enter zero.

THIS IS THE CALCULATED GUIDELINE AMOUNT OF MAINTENANCE WITH THE LOWER FORMULA

Higher Formula

(a) Multiply Maintenance Payor's Income by 30%

(b) Multiply Maintenance Payee's Income by 20%

(c) Subtract Line b from Line a= **Result 1**

(d) Subtract Maintenance Payee's Income from 40 % of Combined Income*= **Result 2**

(e) Enter the lower of **Result 2** or **Result 1,** but if less than or equal to zero, enter zero.

THIS IS THE CALCULATED GUIDELINE AMOUNT OF MAINTENANCE WITH THE HIGHER FORMULA

***Combined Income equals Maintenance Payor's Income up to $184,000 plus Maintenance Payee's Income**

The Court is not bound by the Guideline Amount of Maintenance and may deviate therefrom in the Court's discretion as set forth in the statute.

The Court will determine, in its discretion, how long maintenance will be paid in accordance with the statute.

N. 1. The Court directs that the parties and their respective counsel are to appear at a compliance conference to be held on _____ at _____ am ☐ pm ☐ All discovery as set forth herein above is expected to be completed prior to the compliance conference. At the conference, counsel shall also be prepared to discuss settlement.

2. A Note of Issue shall be filed on or before _____. Failure to file a Note of Issue as directed herein may result in dismissal pursuant to CPLR 3216.

THE TRIAL IN THIS MATTER SHALL BE HELD ON:
_____ in part/room _____ at _____ am ☐ pm ☐

All of the above is hereby stipulated to by the parties:

_____	_____
Plaintiff (Signature)	Defendant (Signature)
_____	_____
Plaintiff (Print Name)	Defendant (Print Name)
_____	_____
Plaintiff's Attorney (Signature)	Defendant's Attorney (Signature)
_____	_____
Plaintiff's Attorney (Print Name)	Defendant's Attorney (Print Name)

Dated: _____

SO ORDERED:

_____
Hon.
Justice of the Supreme Court

☐ **There is no addendum to this Preliminary Conference Order.**

☐ **There is an addendum of _____ pages which is attached to this Preliminary Conference Order.**

SUPREME COURT - NASSAU COUNTY-IAS PART 55
PART RULES & PROCEDURES (revised 3/07/17)

Justice: **Hon. Stacy D. Bennett**
Law Clerk: **Martha Haesloop**
Secretary: **Danielle Esposito**
Part Clerk: **Kristine Kehn**
Phone: (516) 493-3436
Courtroom: (516) 493-3439
Fax: (516) 493-3478

I. ADJOURNMENTS

A. Motions and Status Conferences:

1. Applications to adjourn conferences or motions must be on **consent** and received by Chambers via facsimile by **2:00 p.m.** on the business day prior to the conference date or return date of the motion. Applications must include proposed adjourn dates from all attorneys/litigants and attorneys for the child(ren).

   If the application is based on counsel's actual engagement on another matter, an Affirmation of Actual Engagement, in conformity with 22 NYCRR Part 125, must accompany the Request for Adjournment Form.

   The Attorney for the Child(ren) shall be notified of all adjournment requests and must, likewise, consent thereto.

   If the application is granted, a letter confirming same shall be faxed to chambers and all other parties, the same day the application is granted.

2. Letters confirming adjournments shall state that the Court has adjourned the conference or motion on consent of the parties to the specified date, and shall contain the full names of both parties, the index number, a notation indicating the current date the matter is on the Court's calendar and that all parties have been simultaneously copied.

3. Adjournment requests which are left on the Chamber's voice mail shall be disregarded.

4. Adjournments of motions and conferences may be granted if there is **consent of all parties and prior approval of the Court**. No adjournments will be granted without the approval of the Court. If all parties do not consent to the adjournment, an application shall be made by conference call, with all counsel, **no later than 3:00 p.m.** of the day preceding the scheduled conference or the motion. No requests for an adjournment will be entertained without all parties participating in the conference call. Except for applications made in court, upon approval of the adjournment, a letter must immediately be submitted by fax to Chambers confirming same with a copy to all counsel appearing in the matter.

5. Adjournments of motions and conferences may only be sought through **Chambers**. Potential dates, convenient to all parties must be available at the time the adjournment is sought.

B. Preliminary Conference:

1. Adjournments of the Preliminary Conference will not be granted. Counsel are directed to review the provisions of 22 NYCRR § 202.16 (f) concerning conferences.

2. In addition to scheduling Compliance and Certification Conferences as part of the Preliminary Conference Order, the Court may direct that a pre-trial conference also be held at the time of the Certification Conference in which event, the rules concerning pretrial conferences, as hereinafter set forth, shall be applicable.

3. Discovery deadlines, Certification deadlines and Note of Issue deadlines, will be enforced. Deadlines may not be extended, absent prior approval by the Court.

II. MOTIONS

A. Pre-Motion Conferences:

1. Prior to making or filing any motions, counsel for the moving party is urged to communicate with the Court in writing and arrange for a conference call to be held with his/her adversary and the Court to discuss the issues involved and the possible resolutions thereof. The Attorney for the Child(ren) shall also be notified and included in such conference calls. Counsel fully familiar with the matter and with authority to bind their clients should be available to participate in the conference.

2. If the matter cannot be resolved, the Court will set a briefing schedule for the motion which shall be "So Ordered."

3. This rule does not apply to applications for counsel to be relieved.

B. Submission of the Motion:

1. All motions shall be marked "submitted" on the return date.

2. Appearances of all counsel and parties are not required on all motion return dates, unless counsel requests a conference.

3. All exhibits must be clearly tabbed; motions not consistent with this rule will be rejected and returned to counsel.

4. Motions are to be served and filed in conformity with CPLR §2214.

5. No sur-reply, affidavit, affirmation, memorandum of law or letter will be accepted or considered by the Court without leave of the Court.

6. The Court will determine, after submission, whether oral argument is warranted. Upon such determination, counsel for all

parties will be contacted and advised of the new adjourned date for purposes of oral argument.

7. All motions seeking *pendente lite* relief, pursuant to the new mandatory maintenance guidelines effective January 26, 2016, should include a completed temporary maintenance guidelines worksheet, utilizing each party's gross income for the most recent tax year after FICA/Medicare taxes have been deducted.

8. Any motion seeking an award of counsel fees must be supported by a detailed affirmation of services and retainer statement.

C. Application for a Stay or Temporary Restraining Order:

1. Any Order to Show Cause seeking **any** injunctive relief, including a stay or TRO, must be made in accordance with 22 NYCRR 202.7(f). The moving party shall advise the Court as soon as practicable of counsel's intent to make such application.

2. Requests to continue or vacate a stay or TRO beyond the return date of the motion shall be made on the call of the motion calendar. Failure to apply for such extension shall result in the automatic vacatur of the stay or TRO, unless the Order to Show Cause provides otherwise.

3. An "Emergency" Order to Show Cause requires a special affidavit based upon personal knowledge and an affirmation explaining in detail the nature of the emergency. In addition to the foregoing, the movant should be prepared to appear in Court and to make a record before the Court, if the Court requires the same.

D. Interim Partial or Full Settlement:

If all or part of a submitted motion is settled, counsel shall forward the original stipulation of settlement to the Court. Such stipulation shall be accompanied by a letter setting forth the date the motion was submitted, what aspects of the motion have been

settled and what issues remain to be decided. If the motion is resolved in its' entirety, the movant shall indicate same. If the motion is resolved, in whole or part, on the record, counsel shall obtain such transcript so that same can be "so ordered", unless the Court otherwise directs.

Upon submission of a copy of the stipulation of settlement, the attorneys are to return any and all copies of forensic evaluations/reports to the court within 10 business days.

Submission of the Judgment packet may not be adjourned beyond the 60 days assigned by the court. Failure to comply will result in the action being placed on a non-compliance calendar before the Supervising Judge.

Attorneys of record or pro-se litigants are directed to retrieve all trial exhibits from chambers within 90 days of the date of Decision and Order After Trial or Stipulation of Settlement. Non compliance with this rule shall result in the destruction of said exhibits.

III. COURT APPEARANCES

A. All Court appearances, unless otherwise specified or directed by the Court, shall be scheduled for 9:30 a.m. for preliminary, compliance, status, and pre-trial conferences. Counsel may request that the conference be scheduled for 11:00 a.m. or 2:00 p.m.

B. Attorneys and Pro Se litigants must alert the Court Officer or Court Clerk of their presence and complete a sign-in sheet. If counsel must also appear before another Judge, counsel must advise the Part Clerk or Court Officer where counsel can be reached. All counsel and litigants are directed to appear for each and every conference (including preliminary, compliance and certification conferences).

C. All parties and attorneys, are required to appear at all scheduled dates, unless otherwise directed by the Court.

D. All conferences will be held in the order in which **all** attorneys and parties have checked in.

IV. COMMUNICATION WITH CHAMBERS

A. In all communications with chambers by letter, the title of the action, full names of the parties, date matter is next on the Court's calendar and index number shall be set forth, with copies simultaneously delivered to all counsel. *Ex parte* written communications will be disregarded.

B. Copies of correspondence between counsel shall not be sent to the Court. Such copies shall be disregarded and not placed in the Court's file.

C. No out of Court settlement will be recognized or accepted unless counsel submits a letter, on notice to opposing counsel, and, if applicable, the Attorney for the Child(ren), submitting the executed settlement agreement/stipulation or certifying that such agreement/stipulation has, in fact, been executed.

D. The Court will not accept ex parte telephone communications on substantive issues.

V. SANCTIONS

The Court will not consider a sanctions application, unless the moving party first seeks withdrawal or discontinuation of the offending act or action or demands required or necessary action which is refused. Proof of such request must be made a part of the sanctions application.

VI. TRIAL RULES: APPLICABLE TO ALL TRIALS AND HEARINGS

A. A Note of Issue and Certificate of Readiness are to be filed within 30 days after certification, unless otherwise instructed by the Court. A statement of Proposed Disposition shall be filed with proof of service along with the Note of Issue. 22 NYCRR § 202.16 (h)

B. After a matter has been certified as trial-ready, the Court may set a date for a Pre-Trial Conference. Pre-Trial Conferences will be scheduled at least 30 days prior to the trial date. Counsel with knowledge of the case and the parties must attend.

There will be no adjournments without the Court's consent. At the Pre-Trial Conference, the Court shall provide for the submission or scheduling of the following, to the extent not previously ordered:

1. *In limine* applications must be on notice to all parties, returnable at least 10 days prior to the first scheduled trial date.

2. Annotated Statements of Proposed Disposition, in which all of the criteria listed in the statute are provided, and counsel's position stated as to each such criteria for both equitable distribution and maintenance issues.

3. Evaluations: In the event there are any valuations of a business interest or increased earning capacity, a cash flow chart shall be submitted by each side, listing counsel's proposal for payment thereof, as well as any other payments claimed due (such as payor's obligations for maintenance, child support, income taxes, etc.).

4. A list of all expert witnesses, with copies of their reports, must be submitted at least 5 business days prior to trial the court. Expert reports are to be exchanged pursuant to CPLR.

5. Net worth statements MUST BE updated and sworn to within thirty [30] days of the trial date.

6. A statement of stipulated facts. [Parties are encouraged to stipulate to facts and/or exhibits].

7. An accounting of any claimed pendente lite arrears, supported by backup documentation.

8. Copies of life insurance polices and medical and dental policies of insurance in effect as of the date of the commencement of the action and as of the present date.

9. A list of issues to be determined by the Court, including any pretrial motion issues referred to the trial by the Court.

10. Counsel are urged to stipulate that any issue relating to an award of counsel and expert fees be resolved by the Court, without testimony, upon the submission of affirmations and other appropriate documentation from counsel.

11. Counsel are required to stipulate in writing to any and all relevant material facts that are not and should not be in dispute.

12. On the day before the scheduled trial, counsel are directed to contact the Part Clerk or Chambers to confirm the Court's availability.

13. Objections should be stated without argument, except to simply state the ground therefore, e.g., hearsay, relevance, etc. If further argument is appropriate, it will be invited by the Court.

14. Post-trial financial summations may be submitted in writing within thirty (30) days of the conclusion of trial. The right to submit a financial summation shall be deemed waived, if not timely submitted to the Court. A copy of each side's summation shall be served on all other parties, simultaneous with filing with the Court.

15. A Proposed Judgment is to be submitted within thirty (30) days after the receipt of the decision and order after trial.

VII. SUMMATION RULES

A. At the conclusion of the trial, both sides, as well as the attorney for the

child(ren), if any, may submit a written Trial Summation with respect to all issues to be decided by the Court.

B. The date for submission of the Trial Summations will be set by the Court after consultation with all counsel. The right to submit a Trial Summation shall be deemed waived, if not timely submitted to the Court.

C. A copy of each side's and if applicable, the child's or children's Trial Summation shall be served on all other parties, simultaneous with such filing with the Court.

D. Responses to the Trial Summations are prohibited and will not be considered.

VIII. MISCELLANEOUS

A. **CONFERENCES/TRIAL** - If there are any outstanding motions (submitted or pending) at the time of the conference/trial, the Principal Law Clerk and/or Judge must be so informed of same that day; the submission date must be provided by counsel. Copies of such motions should be available to the Court at the time of such conference.

B. **ATTORNEYS OF RECORD** - Attorneys who have appeared in the matter are to make all appearances until they are relieved by the Court or a Consent to Change Attorney(s) has been filed with Part 49 and with the Clerk of the Court. Any outgoing attorney is to return to the court any forensic reports in his/her possession within 10 business days from the date the consent is filed or decision on motion is granted.

C. **STAFF** - The Court functions through the aid and assistance of the courtroom and Chambers staff. They are expected to treat attorneys, litigants and others in a dignified and civil manner, they are also expected to be treated in a civil and dignified manner.

D. **ATTORNEY FOR THE CHILD(REN)** - Counsel and the Attorney for the Child(ren) are reminded that the Attorney for the Child(ren) acts in

the role of counsel for the child(ren). As such, the Attorney for the Child(ren) are bound by the same ethical and procedural rules as counsel for the parties. Ex-parte communications between the Attorney for the Child(ren) and the Court will not be permitted.

E. Failure to appear at any scheduled call of the calendar or at any conference may result in a default and/or a dismissal of the action/sanctions (NYCRR §202.27).

F. All trials and hearings shall continue day-to-day until completed, subject to the Court's availability.

G. It is incumbent upon all counsel and parties appearing before this Court to insure they have this Court's current Part Rules and are in compliance with same.

H. These rules are in addition to the Uniform Rules for New York State Trial Courts and the Local Rules of Court. Failure to comply with any rules or orders of this Court may result in preclusion and/or sanctions without further notice.

HON. STACY D. BENNETT
REQUEST FOR ADJOURNMENT FORM - Part 55

THIS FORM MUST BE FILLED OUT COMPLETELY
INCOMPLETE FORMS WILL BE DISREGARDED

Case Name: _____ Index # _____

RJI Date: _____Date Issue Joined:_____Date PC Held:_____

Date on Calendar:_____ Last Court Appearance:_____

Req'd Adj. Dates(At Least 3): 1)_____2)_____3)_____

Number of prior Adjournment Requests for this Conference:_____

ALL REQUESTS MUST BE ON CONSENT AND ALL REQUESTED ADJOURN DATES MUST BE CONFIRMED WITH YOUR ADVERSARY AND ATTORNEY FOR THE CHILD, IF APPLICABLE, PRIOR TO MAKING THE REQUEST.

Nature of Conference:_____

If Motion, Nature of Relief Sought:_____

Reason for Adjournment (Affirmation of Actual Engagement must be attached if applicable):

_____

_____

_____

Discovery Completed (Y/N): ___ Was N/I filed? ___ Date N/I to be filed:_____

Contact Info:

Attorney contacting Court and party he/she represents: _____

Person Making Call: _____ Phone # _____

Fax # _____

Adversary's name: _____ Phone # _____

Fax # _____

ALL REQUESTS MUST BE RECEIVED VIA FAX (516) 493-3478 BEFORE 2:00 P.M. OF THE BUSINESS DAY PRIOR TO THE CONFERENCE OR MOTION RETURN DATE

PLEASE NOTE: THERE ARE NEW PRELIMINARY CONFERENCE AND INFORMATION FORMS THAT ARE **REQUIRED TO BE COMPLETED PRIOR TO THE PRELIMINARY CONFERENCE.**

FOR YOUR CONVENIENCE, PLEASE VISIT THE NASSAU COUNTY MATRIMONIAL CENTER WEBSITE AT:

http://www.nycourts.gov/courts/10jd/nassau/matrimonial.shtml

AND CLICK ON THE "FORMS" TAB,
OR
THE P.C. FORM MAY BE OBTAINED AT:

http://www.nycourts.gov/courts/10jd/nassau/mat-forms.shtml

PLEASE HAVE THESE FORMS *COMPLETED* AND BE PREPARED TO PROVIDE ALL INFORMATION REQUIRED AT YOUR CONFERENCE WITH THE COURT.

OVED & OVED LLP
ATTORNEYS

THE NOTICE OF EXCEPTION (NYSCEF 648) TO THE SPECIAL REFEREE'S APRIL 28, 2021 DECISION (NYSCEF 649) IS DENIED.

May 13, 2021

SO ORDERED:

Joel M. Cohen, JSC

VIA NYSCEF

Hon. Joel M. Cohen
Justice, Supreme Court
NYS Supreme Court, New York County
60 Centre Street, Room 222
New York, New York 10007

Re: *Homapour v. Harounian et al.*, Index No. 653795/2015

Dear Justice Cohen:

As counsel to non-party Shahriar Homapour ("Shahriar"), we are constrained to briefly write to correct a material misrepresentation made by William Charron, Esq. in his May 11, 2021 letter to the Court on behalf of the Harounian Defendants (Dkt. 661). Specifically, the Harounian Defendants falsely claim that "[i]n his Notice, Shahriar makes another new argument, not raised in opposition to the Harounian Defendants' second motion to compel and upon newly cited authorities, asking Your Honor to reverse the Decision upon a finding that Shahriar did not act with 'unjustified delay, inexcusable conduct, and bad faith." Dkt. 661, pp. 3-4. However, as the Court can plainly see, ***Shahriar twice raised this exact argument to the Special Referee***. First, Shahriar raised this argument in his December 18, 2020 letter to the Special Referee (Dkt. 656, p. 4)[1] and then raised it a second time in his Memorandum of Law in Opposition to the Harounian Defendants' Motion to Compel (Dkt. 658, Argument § 1, p. 10)[2].

Accordingly, as the Harounian Defendants' representation in Mr. Charron's letter is demonstrably false, we respectfully request that the Court disregard such misrepresentation and reverse the Decision.

Respectfully submitted,

s/ *Glen Lenihan*

Glen Lenihan

cc: All counsel of record (via NYSCEF)
Special Referee Michael Cardello, III, Esq. (via email)

[1] "Indeed, it is well-established that "waiver of a privilege is a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 2008 U.S. Dist. LEXIS 86594, at *39 (S.D.N.Y. Oct. 22, 2008) (quoting *United States v. Philip Morris, Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003)). Here, there was no delay, bad faith or inexcusable misconduct – at all times Shahriar has asserted his privileges."

[2] Reiterating the same argument made in Shahriar's December 18, 2020 letter to the Special Referee.

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(917) 921-5569
thestecklerlawfirm@gmail.com

June 19, 2020

BY ECF

Hon. Joel M. Cohen
Justice of the Supreme Court
County of New York
60 Centre Street
New York, New York 10007

Re: Homapour v. 3M Properties, LLC, et al. -- Index No. 653795/2015
United Hay, LLC v. Harounian -- Index No. 657310/2017
Harounian v. Harounian -- Index No. 450615/2019

Dear Judge Cohen:

As you know, we are attorneys for Jacob Harounian ("Jacob") in the referenced matters. We write pursuant to paragraph 9 of the Stipulation and Order Appointing (the "Appointing Order") Michael Cardello III as Special Referee (the "Special Referee"), to raise our notice of exception to the Special Referee's decision and order dated June 9, 2020 (the "June 9 Order"), which granted the application of United Hay, LLC ("United Hay") to proceed immediately with Jacob's deposition solely in the United Hay, LLC v. Harounian action (the "United Hay Action"), notwithstanding the Court's prior decision directing that discovery in all three referenced actions be "coordinated." A copy of the June 9 Order is annexed hereto as Exhibit A.

Pursuant to the process set forth in the Appointing Order, by letter dated May 1, 2020, counsel for United Hay filed a dispute letter ("Dispute Letter No. 2"), with the Special Referee, seeking the immediate depositions of Jacob and Mark Harounian ("Mark") in the United Hay Action. A copy of Dispute Letter No. 2, with exhibits, is annexed here as Exhibit B. Both Jacob and Mehrnaz Nancy Hompapour filed opposition letters to Dispute Letter No. 2. A copy of Jacob's letter and Mehrnaz's letters are annexed hereto as Exhibit C and D, respectively.

By the June 9 Order, the Special Referee partially and conditionally granted the relief sought in Dispute Letter No. 2, directing the immediate deposition of Jacob, subject to Jacob submitting an affidavit as to whether Jacob has WiFi or other internet access in his home and whether Jacob has

an electronic device that has video capability.

Respectfully, the June 9, 2020 Order wholly and improperly rejected this Court's clear and unequivocal order that discovery in all three actions be coordinated. It is difficult to understand how the direction for the immediate deposition of Jacob in the United Hay Action is somehow "coordinated," when there is no doubt that Jacob will also be deposed in the two other actions. The decision to required a 93 year old party to appear for two depositions surely does not assist in judicial efficiency or have any impact on any of the cases moving forward inasmuch as it appears that it will take significant time until document discovery is complete in the other two action and Mark's deposition (which is essential to Jacob's defense in the United Hay Action) can be taken.[1] Rushing to depose Jacob at this time serves absolutely no purpose whatsoever and certainly is not required under any concept of fairness or judicial efficiency.

At two different times during a hearing before the Court on September 9, 2019 determined that discovery would be coordinated, explicitly stating: "You should continue to do discovery as if the cases are going to be together." (Sept. 9, 2019 Tr. 56:24-57:3). This coordination of discovery in all three actions was reiterated by the Court in the Court's December 9, 2019 order, which denied consolidation of the United Hay Action with the two other actions, but again specifically stated: "[t]he Court previously ruled that discovery in the three cases should be coordinated." In fact, the Appointing Order in its first paragraph stated that "these actions have been consolidated for purposes of discovery."

Yet, the Special Referee chose to ignore these clear directions from this Court, instead concluding that because the Court granted United Hay's motion to depose Jacob, that order trumps the Court's subsequent decision and order that discovery be coordinated in all three action. Respectfully, under the Special Referee's reading of this Court's direction, the concept of "coordinated" discovery would have absolutely no meaning whatsoever.

Inasmuch as the immediate deposition of Jacob will do nothing to move the United Hay Action any more quickly than the other two actions will proceed, there is no reason whatsoever for the deposition of Jacob to proceed posthaste.

Yet even if this Court were to interpret its "coordination" order to permit the out of sequence first deposition of Jacob, the current circumstances militate against the immediate deposition of Jacob, both due to health concerns and the inability to prepare Jacob for his deposition or proceed with his deposition in an orderly manner.

Jacob is 93 years old and has been self-isolating since the beginning of the Covid-19

---

[1]There is also outstanding document discovery in the United Hay Action relating to Jacob's tax estoppel defense.

pandemic. Based on available evidence, as an elderly man he is especially susceptible to contracting the corona virus. Thus, the only way to depose Jacob would be remotely, which presents its own set of problems. First, English is Jacob's second language and I can state from my own experience that he has difficulty with the English language, often requiring me to communicate with him in writing for matters which would normally be the subject of a telephone conversation. Additionally, Jacob only occasionally uses e-mail and all document exchanges with Jacob are undertaken using fax transmissions. Because of this, despite the Special Referee's opinion to the contrary, both preparation for his deposition and the deposition itself will be extremely difficult if not impossible. So, the obviously raised question is why proceed with the immediate deposition under these circumstances, when there is no need for the deposition to proceed outside the scope of the coordinated discovery. The obvious answer is that there is no reason for Jacob to be deposed now.

Respectfully, in these complex matters the deposition of Jacob only in the United Hay Action, out of sequence and before document discovery is complete, when he will need to be deposed again in the remaining two action, during a pandemic that makes even the most basic litigation procedures difficult, and almost impossible for the 93 year old non-native English speaker, is not only unnecessary but is unduly burdensome and outright cruel to Jacob.

Based on the foregoing and the previously submitted papers, it is respectfully submitted that the June 9 Order should be reversed and the relief requested in Dispute Letter No. 2 denied.

Thank you for your consideration of this matter.

Respectfully yours,

Todd C. Steckler

Todd C. Steckler

cc: Special Referee and All Counsel of Record (by ECF)

Upon reviewing the record, the Special Master's decision is confirmed. The Court will schedule a hearing solely to determine the logistics for taking the deposition and ensuring compliance with applicable pandemic-related guidelines and reasonable accommodations for the witness.

7/23/2020

Joel M. Cohen, JSC

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART IAS MOTION 3EFM

Justice

----------X

UNITED HAY, LLC INDEX NO. 657310/2017

Plaintiff,

- v -

JACOB HAROUNIAN,

Defendant.

----------X

ORDER REGARDING DEFENDANT'S EXCEPTIONS TO SPECIAL REFEREE DECISION DATED MAY 27, 2021

For the reasons stated on the record after oral argument on July 13, 2021 (transcript to be uploaded by the parties to NYSCEF upon receipt), Defendants' exceptions to the Special Referee Decision dated May 27, 2021 (NYSCEF Doc. Nos. 253, 254) denying his motion to compel discovery are denied.

At the outset, the Court finds that the Special Referee was not bound by principles of judicial estoppel or waiver to deny Defendant's motion to compel. The Court's statements during various prior hearings did not rise to the level of binding orders that prevent the Special Referee from exercising discretion with respect to the scope of particular discovery requests. Nevertheless, the Court agrees with the Special Referee that the existing record did not support the breadth of discovery sought by Defendant.

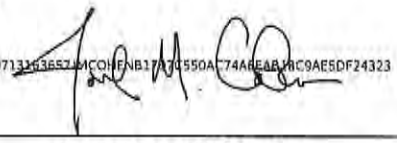
The question whether and to what extent the discovery record in the two related cases – including a case brought by Defendant against Mark Harounian – is relevant to the instant case requires Court resolution of certain threshold legal issues that were not before the Special

OTHER ORDER – NON-MOTION

Referee for decision. Defendant takes the position that all discovery in the related cases with respect to Mark Harounian's purported "malfeasance" with respect to various family-owned LLCs is relevant to his defense of the claims against him in this case. Plaintiff disagrees, arguing that even if Mr. Harounian did engage in such malfeasance (which he denies), it would not, as a matter of law, provide a justification for Defendant's purported withdrawal of funds from United Hay.

Plaintiff is planning to submit a motion to resolve that legal question. The Court's decision on that expected motion may provide greater clarity as to the appropriate scope of future discovery requests in this action. Plaintiff is authorized to bring such motion by order to show cause, setting forth in its papers an agreed-upon briefing schedule.

This constitutes the decision and order of the Court.



DATE: 7/13/2021 **JOEL M. COHEN, JSC**

Check One: ☐ **Case Disposed** ☒ **Non-Final Disposition**

Check if Appropriate: ☐ **Other (Specify** _____ **)**

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MEHRNAZ NANCY HOMAPOUR, et al.,	:	Index No. 653795/2015
Plaintiffs,	:	**DECISION REGARDING PRODUCTION OF TEXT MESSAGES**
-against-	:	
MARK HAROUNIAN, et al.,	:	
Defendants.	:	
JACOB HAROUNIAN, et al.,	:	
Plaintiffs,	:	
-against-	:	
MARK HAROUNIAN, et al.,	:	
Defendants.	:	

This matter is before the undersigned, Michael Cardello III, Esq., as a result of an Order of Reference dated April 22, 2020, signed by the Honorable Joel M. Cohen, appointing him Special Referee pursuant to New York Civil Practice Law and Rules ("CPLR") §§ 3104 and 4301, for the purpose of assisting the Court and the parties in conducting and completing discovery in a timely and efficient manner.

Currently before the Special Referee is plaintiff Mehrnaz Homapour's ("Plaintiff" or "Mehrnaz") application for an order directing defendants Mark Harounian ("Mark"), the Harounian LLCs,[1] and the Family LLCs[2] (collectively, the "Harounian Defendants") to search and

[1] The term "Harounian LLCs" shall refer herein to Jacob NY Holdings LLC, Jacob NY Holdings Ltd., 172 Mulberry Realty LLC, 1007 Lex Ave LLC, and 163 Chrystie Realty LLC.

[2] The term "Family LLCs" shall refer herein to 3M Properties, LLC, Balance Property, LLC, JAM Realty NYC LLC f/k/a JAM Realty Co., United Chelsea, LLC, United East, LLC, United Fifth, LLC, United Flatiron LLC, United Greenwich, LLC, United Hay, LLC, United Nationwide Realty LLC f/k/a United Nationwide Realty, United Prime

produce responsive text messages sent or received by specific custodians, reflecting communications with specific individuals. The Special Referee hereby grants, in part, and denies, in part, Plaintiff's application. As set forth herein, *inter alia*, the Special Referee directs Harounian Defendants to search text messages on the electronic devices[3] of specific custodians (namely, Mark, Nerissa Espiritu, Lawrence Furtzaig, Leny Estipular, Chadwick Estipular, Marco Salazar, Manuel Cifuentes, and Jeffrey Cafone[4]) for communications with specific communicators, identified herein, from November 17, 2009 to present,[5] and to produce responsive, non-privileged communications to Plaintiff or the Special Referee, as directed herein, within forty-five (45) days of the date of this decision.

I. PROCEDURAL BACKGROUND

A. Communications Preceding the Application

Upon appointment to this case, the Special Referee has regularly and consistently instructed the parties to meet and confer with respect to any and all discovery disputes as they may arise. *See, e.g.*, Email dated March 18, 2021, addressing "Rulings from March 17, 2021 Conference." The Special Referee has also regularly informed the parties that if a discovery issue is not resolved through the meet and confer process, the parties should notify him immediately.

Broadway, LLC, United Prime LLC, United Seed LLC, United Square LLC, United Village, LLC, and United West, LLC.

[3] "Electronic devices" in this decision shall include all electronic devices used by the identified custodians, including, but not limited to, work devices and personal devices.

[4] The directed search and production of responsive text messages on Jeffrey Cafone's electronic device(s) is subject to Harounian Defendants' practical ability to access his text messages.

[5] Given that the Complaint in *Homapour v. Harounian, et al.* (Index Number 653795/2015), was filed on November 17, 2015, and the Honorable Joel M. Cohen stated at a hearing held on September 9, 2019, that "I'm going to permit production for the full six year pre-complaint period . . . So, it will go back the full, back to 2009," the relevant time period for the disclosure permitted in this decision shall be November 17, 2009 to present. Transcript of September 9, 2019 Hearing at 88:7-88:12.

Id. The Special Referee has repeatedly reminded the parties not to wait until the eve of a discovery deadline to bring a dispute to his attention. *See id.*

By correspondence dated June 7, 2021, counsel for Plaintiff and counsel for Harounian Defendants jointly advised the Special Referee, *for the first time*, that there was an outstanding dispute concerning the search and production of text messages. Counsel jointly advised the Special Referee that:

> Until now, the parties had not discussed an ESI protocol to be used for collection, search and review of text messages, and the parties' prior-agreed search terms did not cover text messages. Mehrnaz produced certain text messages; the Harounian Defendants did not. The Harounian Defendants are agreeable to producing text messages at this time, but believe such production should be pursuant to an agreed upon protocol, as with other ESI. The parties have agreed to continue conferring about this matter over the coming days.

(emphasis added).

Prior to this time, the Special Referee had been involved in lengthy and detailed discussions with the parties – and issued numerous decisions – regarding searches to be performed by Harounian Defendants to collect electronically stored information ("ESI") in response to Plaintiff's document demands. At no point did the parties inform the Special Referee that there was a discovery related dispute with respect to the demand for the production of text messages. Thus, by correspondence dated June 11, 2021, the Special Referee advised the parties that:

> Notwithstanding the many phone calls and ESI discussions held to date, there has never been a discussion about the production or non-production of text messages. Text messages clearly constitute 'documents' or 'communications' which have been the subject of numerous calls and directives. The deadline for all document production was March 5, 2021 and the deadline to file dispute letters concerning document discovery was June 7, 2021. Notwithstanding the fact that the foregoing deadlines have passed, the Parties shall meet and confer to resolve their issues with respect to text messages. Please note that this does not mean that the deadlines to exchange documents or present document dispute letters have been extended.

By correspondence that same day, Plaintiff's counsel responded as follows:

> . . . we write to provide further information regarding your statement that 'there has never been a discussion about the production or non-production of text messages.' To clarify, counsel for Plaintiff and the Harounian Defendants have had extensive, good faith discussions regarding the production of text messages. We were able to sufficiently resolve the issue such that a dispute letter appeared unnecessary. As the parties have agreed, and in accordance with your direction, we will continue to confer in good faith with the Harounian Defendants regarding this issue, which we anticipate we will be able to satisfactorily resolve.

Thereafter, the Special Referee informed Plaintiff's counsel that while the parties may have had discussions regarding the discovery of text messages among themselves, the underlying dispute was *never* brought to his attention even though the Special Referee dedicated a substantial amount of time and energy to assist the parties with respect to the ESI search terms and parameters. By correspondence dated June 21, 2021, following a telephonic conference call with the parties on June 18, 2021, the Special Referee further advised the parties as follows:

> In accordance with the parties agreed upon arrangement, Mehrnaz Homapour is directed to respond to Harounian Defendants' proposed ESI protocol for text messages by **Monday, June 21, 2021**; Harounian Defendants are directed to respond to the feedback received from Mehrnaz Homapour by **Tuesday, June 22, 2021**. Thereafter, the parties are directed to meet and confer to, ideally, finalize an ESI protocol for text messages by **Thursday, June 24, 2021**; the parties are directed to provide a written update to the Special Referee by **Monday, June 28, 2021** confirming the status of the dispute, any agreed upon protocol, and end date for production of text messages. If any dispute still exists as of June 28, 2021, the Special Referee will address the dispute on a conference call on **Wednesday, June 30, 2021 at 2pm**. As discussed on the June 18th conference call, it is the Special Referee's view that text messages constitute "documents" and "communications" [requested by Plaintiff in her document demands] and therefore this issue should have [been] addressed months ago when ESI was being collected. Moreover, the non-production of texts should have also been addressed with the Special Referee as soon as counsel realized that Harounian Defendants did not produce text messages.

(emphasis in original).

On June 28, 2021, the parties jointly advised the Special Referee that they were unable to resolve a number of disputes concerning the search and production of text messages. Accordingly, the Special Referee directed letter submissions.

B. Plaintiff's Dispute Letter

By letter dated July 21, 2021 ("Dispute Letter"), Plaintiff requested that the Special Referee direct Harounian Defendants to expand the universe of text messages they need to review by: (1) increasing the list of individuals whose phones must be searched (*i.e.* custodians); and (2) reviewing, for responsiveness, text messages that the custodians sent to, or received from, additional identified individuals (*i.e.* communicators).

i. Plaintiff's Contentions Regarding Custodians

Plaintiff represented that Harounian Defendants have only agreed to search one custodian's phone, Mark, for responsive text messages. Plaintiff argued that Harounian Defendants should be directed to search for responsive text messages sent and/or received by the following additional custodians (collectively, the "Proposed Additional Custodians"):

Proposed Additional Custodians	Relationship to Party
1) Nerissa Espiritu[6]	Mark's assistant and Family LLC office staff
2) Lawrence (Larry) Furtzaig	Mark's "agent"
3) Leny Estipular	Mark's assistant and Family LLC office staff
4) Chadwick Estipular	Former employee of Family LLCs
5) Jeffrey Cafone	Former employee of Family LLCs and/or Landmark
6) Marco Salazar	Employee of Family LLCs
7) Manuel Cifuentes	Employee of Family LLCs

Plaintiff asserted that the Proposed Additional Custodians, "except Cafone and Chadwick, were included in the limited production of responsive text messages that the Harounian Defendants

[6] While not asserted in the Dispute Letter, it appears that Nerissa Espiritu may also be known as "Rizza." *See* Dispute Letter, Exhibit O at page 5 (referring to "Riz Espiritu").

produced from Mark's phone thus far." Dispute Letter at p. 4. Plaintiff's Dispute Letter includes, as an exhibit thereto, "[e]xcerpts" from this "limited production" which state, in part:

FAMILY00572876

Rizza:	Yes. I put it in your drawer yesterday along with the envelope (w/ $3000). You did not see this morning?
Dad (owner):	No

***

FAMILY00572878

Rizza:	Is it possible to get my bonus check this week then next week the vacation check?
Dad (owner):	Ok
Dad (owner):	East and village

***

FAMILY00572879

Dad (owner):	I need two checks. Simon tong 1000. Nick 400.

***

FAMILY00572917

WORKER-Marco-219W:	Are they sending you invoice??
WORKER-Marco-219W:	If you are off, am I paying?
Leny new:	Ok. I will leave the cc card info to riza. Pls Tell them to fax cc authorization to the office. Thanks!
Dad (owner):	Kent tell riz what to do

***

FAMILY00572943

Dad (owner):	Hi. How are u ? What's new ? Anything rent? I should be in the city by noon. We need to discuss nick.
Larry Furtzaig:	Finishing break lease replacement at 31e21. Have an inquiry regarding 102 Greenwich. Very lowball. I'll see if can get it into something worth discussing
Dad (owner):	Ok. Be in touch. Also make sure all that accounting stuff is addressed. We also need to discuss management agreement.

***

FAMILY00572957

Dad (owner):	Hi guys. Anything? Anyone look for me? What did you say
Leny new:	Nobody ask. It just Maria said that Jack asking for you because he is waiting for the profit and loss report from the 3company. He told jack its on your desk for approval.
Dad (owner):	Call me later

***

Dad (owner):	Leny. Change to charges of management to repairs.
Dad (owner):	I don't want him to see.
Leny new:	Ok.
Dad (owner):	I don't want him to see I took management.
Leny new:	Got it.

***

FAMILY00572970-72 (Participants: Dad (owner), Rizza, WORKER-Marco-219W, WORKER-Manuel-50TH)

Dad (owner):	Did u add Luis the driver to the payroll ?
WORKER-Marco-219W:	Also the two new Dominican
Rizza:	Not the driver
Rizza:	Ok
Rizza:	How much?
Dad (owner):	OK. Addin the am.
Dad (owner):	I'm coming in around noon
Dad (owner):	Marco?
WORKER-Marco-219W:	420 to the guys
WORKER-Marco-219W:	Manuel? How do they start?
WORKER-Marco-219W:	400?
Dad (owner):	400

***

FAMILY00572973 (Participants: Dad (owner), Rizza, WORKER-Manuel-50TH)

Rizza:	Mark, Manuel gave you $1000. Suppose to be $600 only. Kindly give him back $400 thanks.
Dad (owner):	K

Dispute Letter at Exhibit N.

Moreover, Plaintiff stated that "[b]ased on these interactions, it is highly probable that both Cafone and Chadwick communicated via text about matters at issue in this litigation, including communications seeking or authorizing payments." Dispute Letter at p. 4.

According to Plaintiff, each of the Proposed Additional Custodians "is a current or former employee/agent over whom the Harounian Defendants have control for discovery purposes." *Id.* at p. 4. Plaintiff alleged that "Harounian Defendants pay the cell phone bills for Nerissa, Larry, Marco and Manuel" and "as demonstrated purely from the text messages produced thus far, it is plain that all of the foregoing used their phones to conduct business for Mark and the other Harounian Defendants." *Id.* at p. 5. Plaintiff asserted that "[w]hile it is unclear whether the Harounian Defendants paid Jeffrey Cafone and Larry Furtzaig's cell phone bills, they may still access work-related messages on those phones for discovery purposes." *Id.*

ii. Plaintiff's Contentions Regarding Communicators

Plaintiff represented that Harounian Defendants have only agreed to search Mark's phone for responsive text messages with the following communicators: Jacob Harounian, Nerissa Espiritu, Lawrence Furtzaig, Alexander Seligson, Henry Dellaratta, Mehrnaz Homapour, and Mehrnoosh Piroozian (the "Initial MH Communicators").[7] Plaintiff further contended that Mark's text messages and the Proposed Additional Custodians' text messages should be searched for responsive communications with the Current MH Communicators (defined in Footnote 7 *supra*) and the following additional individuals (the "Proposed Additional Communicators"):

[7] As discussed in Point I(C) *infra*, subsequent to Plaintiff submitting the Dispute Letter, Harounian Defendants further agreed to search Mark's phone for responsive text messages with the following *additional* communicators: Leny Estipular, Manuel Cifuentes, Marco Salazar, Jeffrey Cafone, Alan Winters, Brian Morris, Yong Bai Wu, Lionel Nazarian, and representatives of Baron's Dry Cleaning and DeGrezia Restaurant (all of the foregoing, together with the Initial MH Communicators, the "Current MH Communicators").

Current MH Communicators and Proposed Additional Communicators	Relationship to Party (as described in Dispute Letter at pp. 2-4)	Evidence Cited in Dispute Letter
1) Yong Bai Wu*[8]	Contractor who "oversaw renovation and construction projects for the Harounian Defendants" and "received payments from the Family LLCs."	Ex. C
2) Sharon Kohler	Mark's "mistress[] who received benefits from the Family LLCs."	Ex. C
3) Silviya Phillip	Same as above.	Ex. C
4) Natalie Harounian	Mark's wife "whose personal expenses were paid for by the Family LLCS."	Ex. D
5) Alexandra Harounian	Mark's daughter "whose personal expenses were paid for by the Family LLCS."	Ex. D
6) Mitchell Harounian	Mark's son "whose personal expenses were paid for by the Family LLCs."	Ex. D
7) AJ Sharma	Mark's travel agent "who received payments from the Family LLCs."	Ex. E
8) Lionel Nazarian*	Member of Defendant Orange & Blue who "purportedly performed construction and renovation work for the Family LLCs and Harounian LLCs."	Ex. F
9) Fred Afari	Mark's brother-in-law from "whom he sought advice about the matters underlying this action."	Ex. G
10) Fred, Lisa, Nader, David, and Jonathan Ohebshalom (the "Ohebshaloms")	Mark's cousins and former trustees of trusts that are members of certain Family LLCs "with whom Mark is believed to have communication about the subject of this action."	Ex. G
11) Alan Winters*	Harounian Defendants' and Jacob Harounian's transactional attorney.	Ex. H
12) Immanuel Piroozian	Mehrnoosh Piroozian's husband "believed to have communicated with Mark and his staff."	Ex. I
13) Alex Piroozian	Child of Mehrnoosh and Immanuel Piroozian "believed to have received certain benefits from the Family LLCs" and who received a rent stabilized lease at 12 Fifth Ave.	Ex. J
14) Marc Kalimian	Mark's friend who recommended Mark's retention of Pryor Cashman.	No evidence cited

[8] The Current MH Communicators are identified in the chart with an asterisk.

Current MH Communicators and Proposed Additional Communicators	Relationship to Party (as described in Dispute Letter at pp. 2-4)	Evidence Cited in Dispute Letter
15) Brian Morris*	Member of Brian Morris Gallery d/b/a Alex Harounian Gallery who received payments from the Family LLCs.	Ex. C
16) Stanley Ruchelman and the attorneys/staff in his office ("Ruchelman Staff")	Communicated with Mark and his staff regarding the Family LLCs' tax returns.	Ex. K
17) Drew Benson, Thomas Payne, Adam Venkour, and other accountants/staff at Tarlow & Co. ("Tarlow Staff")	Same as above.	Ex. L
18) Cecilia Chien, Anthony Bracco, Marc Wieder and other accountants/staff at Anchin, Block & Anchin LLP ("Anchin Staff")	Same as above.	Ex. M
19) Leny Estipular, Chadwick Estipular, Jeffrey Cafone,* Marco Salazar,* Manuel Cifuentes,* Andy Torrez, Alex Lopez, Tomas Lopez, and Orlando Miranda ("Family LLC Staff")	Family LLC employees who "requested, received and/or facilitated" the transfer of Family LLC funds.	Ex. N, O
20) Agents of Baron's Dry Cleaning at 230 East 25th Street*	"Believed to have paid . . . rent in cash not reflected on the Family LLCs' Quickbooks, and likely communicated with Mark and his staff regarding these transactions."	No evidence cited
21) Agents of DeFrezia Restaurant at 231 East 50th Street*	Same.	Ex. P

C. Harounian Defendants' Response Letter

By letter dated August 11, 2021, Harounian Defendants responded to the Dispute Letter ("Response Letter"). The Response Letter contained four principal arguments: (1) the Proposed Additional Custodians are "unreasonable"; (2) Plaintiff's request for text messages with the Proposed Additional Communicators is "oppressive, harassing and reflective of a fishing

expedition"; (3) Plaintiff's requests are "inconsistent" with the Special Referee's August 10, 2020 Order; and (4) Plaintiff's requests are unduly burdensome. *Id.* at pp. 2, 5, 7.

First, Harounian Defendants alleged that the Proposed Additional Custodians are "unreasonable" and Plaintiff has not met her burden to demonstrate that records held by the Proposed Additional Custodians are "unique, relevant and noncumulative" and are "being missed in the current search scheme." *Id.* at p. 6. Harounian Defendants contended that Plaintiff cannot meet this burden by citing "just *eight* documents with communications where Mark was not copied" and Plaintiff's "speculation" that the Proposed Additional Custodians "may possess something relevant is not a sufficient legal showing." *Id.* at p. 6 (emphasis in original). Harounian Defendants noted that "[c]ourts generally do not question a party's selected ESI custodians unless the opponent makes an exacting showing that additional custodians are needed" and cited *Mortgage Resolution Servicing, LLC v. JPMorgan Chase Bank, N.A.* for the proposition that the court "should play no role in . . . designating custodians" unless the parties' choice "is manifestly unreasonable or the requesting party demonstrates that the resulting production is deficient." *Id.* at p. 5.

Second, Harounian Defendants noted that while they will agree, at this time, to search Mark's text messages with the Current MH Communicators (*see* Footnote 7 *supra*), the remaining list of Proposed Additional Communicators is "abusive." *Id.* at p. 2. Specifically, Harounian Defendants asserted that:

- Sharon Kohler and Silviya Philip are individuals with whom Mark had "extra-marital relations" and their text messages are being sought to "harass[]" and "embarrass" Mark. *Id.* at p. 4. Plaintiff "has the discovery she needs to show any benefits these women received" so "[t]here is no legitimate need to search texts with them." *Id.*

- Natalie Harounian is Mark's wife and her text messages with Mark are "numerous, overwhelmingly personal and irrelevant, and protected by spousal privilege." *Id.* at p. 3.

- Alexandra and Mitchell Harounian are Mark's children who are "completely uninvolved in this case" and Plaintiff "has not identified a single document involving either of them." *Id.*

- Fred Afari is Mark's brother-in-law who: (1) received an email, forwarded by Mark, in which Mark's lawyers communicated with a rabbi about this case and (2) was included on emails "when Mark was occasionally updating Mr. Afari about this family dispute;" but, "[t]here is nothing that reflects any substantive involvement by Mr. Afari in the events at issue." *Id.*at p. 3.

- AJ Sharma is a purported travel agent who received payments from the Family LLCs but has "*de minimis* information," which is already in Plaintiff's possession, and text messages with him are "not proportional with any genuine discovery needs." *Id.* at p. 4.

- Fred, Lisa, Nader, David, and Jonathan Ohebshalom are Plaintiff's and Mark's uncles and cousins who have tried to help bring "resolution and peace to the family" and, while Fred "has been involved in (unsuccessful) shuttle-diplomacy between Jacob and Mark," and was copied on a mediation-related e-mail, Plaintiff "is unable to point to anything showing that any of the Ohebshaloms was involved in the events about which Mehrnaz has sued." *Id.* at p. 4.

- Immanuel Piroozian is Mark's brother-in-law who participated in the mediation in this case as required by Justice Bransten, and who has been involved in "serial litigation" with Plaintiff for years. *Id.* at p. 3. Harounian Defendants noted that mediation related e-mails have "no evidentiary value under JAMS rules and CPLR 4547" to justify text message discovery. *Id.*

- Alex Piroozian is Plaintiff's and Mark's nephew who Plaintiff alleged "may have gotten a 'free apartment' from the Family LLC," but, Harounian Defendants noted that Plaintiff's children also received a free apartment from the Family LLC. *Id.* at p. 4.

- Marc Kalimian is alleged to be Mark's friend who referred him to Pryor Cashman but that "does not matter to the issues in this case." *Id.* at p. 4.

- Stanley Ruchelman is Harounian Defendants' tax attorney and communications with him and other attorneys and staff in his office "are privileged under CPLR 4503." *Id.* at p. 5.

- Tarlow Staff are the accountants "who substantially assisted Mr. Ruchelman under a *Kovel* engagement and privilege" and Harounian Defendants already

produced "documents involving Tarlow related to its non-*Kovel* work." *Id.* at p. 5.

- Anchin Staff are the accountants "who assisted Pryor Cashman under a *Kovel* engagement and privilege." *Id.* at p. 5.
- Chadwick Estipular is a "low-level worker Mehrnaz included under the mistaken belief that e-mails sent to Leny Estipular (an e-mail custodian) were sent to Mr. Estipular." *Id.* at p. 4.
- Plaintiff "has not met her burden" to obtain text message communications with Andy Torrez, Alex Lopez, Tomas Lopez, and Orlando Miranda (remaining members of the Family LLC Staff) "solely because they assisted with a 2016 office move." *Id.*

Third, Harounian Defendants argued that Plaintiff's request for text message discovery "on phones Harounian Defendants do not own" is "inconsistent" with the Special Referee's August 10, 2020 order which directed Harounian Defendants to search for responsive emails maintained on Lawrence Furtzaig's non-personal email accounts (*i.e.* any accounts used to transmit work-related communications that were established, configured and/or hosted by or on behalf of Harounian Defendants). *Id.* at p. 7.

Finally, Harounian Defendants contended that Plaintiff's request "would involve hundreds of thousands of text messages that would take more than three months to complete at hundreds of attorney hours" and would not only delay the case but cause Harounian Defendants to incur substantial costs. *Id.* Harounian Defendants submit that if the Special Referee grants the requested discovery, Plaintiff should be directed to pay all of the attorneys' fees and costs incurred to comply. *Id.*

II. ANALYSIS AND DETERMINATION

As set forth in greater detail below, the Special Referee finds that Harounian Defendants must: (i) search communications sent and/or received via text message by Mark and all of the Proposed Additional Custodians, on the one hand, and the Current MH Communicators and certain

of the Proposed Additional Communicators identified herein, on the other hand; and (ii) produce responsive communications as directed herein.

A. The Standard

CPLR § 3101(a) 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, by: (1) a party, or the officer, director, member, ***agent or employee of a party***." N.Y.C.P.L.R. 3101(a) (Cons. 2021) (emphasis added). CPLR § 3120 further provides that "any party may serve on any other party a notice . . . (i) to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the ***possession, custody or control of the party*** . . . ." N.Y.C.P.L.R. 3120 (Cons. 2021) (emphasis added). As the Special Referee has previously held in this Action, "possession, custody or control" includes "constructive possession" and requires production where the party has "the practical ability to request from, or influence, another party with the desired discovery documents." *Commonwealth of Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 62-63 (2013).

In the Special Referee's view, the foregoing jurisprudence establishes that an employer is deemed to be in "possession, custody and control" of all communications sent or received by its employees *in connection with their employment*, whether those communications are stored on the employer's device or on an employee's personal device. *See, e.g., Shim-Larkin v. City of New York*, No. 16-CV-6099, 2019 WL 5198792, at *10–12 (S.D.N.Y. Sept. 16, 2019) (sanctioning defendant for failing to preserve an employee's text messages because it was a "reasonable inference that employees communicated with each other via text messages regarding their work activities" based on certain evidence presented and, therefore, defendant had "control" over text messages on the employee's personal device "pertaining to his work-related activities").

In addition, a requesting party must still demonstrate that "the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims." *101CO, LLC v. Sand Land Corp.*, 189 A.D.3d 942, 944 (2d Dep't 2020) (quoting *Crazytown Furniture, Inc. v. Brooklyn Union Gas Co.*, 150 A.D.2d 420, 420 (2d Dep't 1989)). In this regard, "[i]f there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or for cross-examination or in rebuttal, it should be considered [matter] 'material' in the action." *Vargas v. Lee*, 170 A.D.3d 1073, 1075 (2d Dep't 2019). Where the requesting party meets its burden, the responding party must demonstrate that the requested documents are not discoverable because the underlying requests are, for instance, overbroad, burdensome, or otherwise improper. *See* N.Y.C.P.L.R. 3101 (Cons. 2021) (empowering the Court to deny discovery "designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts"); *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 27 Misc. 3d 1061, 1066-67 (Sup. Ct. N.Y. Cnty. 2010) ("the burden of showing that disclosure is improper is upon the party asserting it") (quoting *Roman Catholic Church of Good Shepherd v. Tempco Systems*, 202 A.D.2d 257, 258 (1st Dep't 1994)). *See, e.g. Stepping Stones Assocs., L.P.*, 148 A.D.3d at 855 (denying motion to compel document demands which were "of an overbroad and burdensome nature, and were palpably improper").

B. The Special Referee's Ruling With Respect To Text Message Custodians

In the Special Referee's view, Plaintiff has sufficiently demonstrated that: (1) Mark and Harounian Defendants' employees sent and/or received text messages in connection with their employment;[9] (2) Harounian Defendants are in possession, custody, or control of the text messages

[9] *See* Dispute Letter at Exhibit N and discussion herein regarding same.

sent and/or received by the *current* employees included in the list of the Proposed Additional Custodians, namely, Nerissa Espiritu, Lawrence Furtzaig, Leny Estipular, Chadwick Estipular,[10] Marco Salazar, and Manuel Cifuentes, by virtue of an existing employment relationship; and (3) a search of Mark's and the Proposed Additional Custodian's text messages on their electronic devices "will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims."[11] *101CO, LLC*, 189 A.D.3d at 942. However, in the Special Referee's view, Harounian Defendants may or may not have possession, custody, or control over the text messages sent and/or received by the one *former* employee included in the list of the Proposed Additional Custodians, namely, Jeffrey Cafone.[12]

In the Special Referee's view, directing Harounian Defendants to search and produce responsive text messages from seven text message custodians (*i.e.* Mark plus all of the Proposed

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[10] While Plaintiff stated in the Dispute Letter that Chadwick Estipular is an "ESI custodian and former employee of the Family LLCs and/or 'Mark's rug business,'" Harounian Defendants stated in their Response Letter that "Mr. Estipular is a low-level worker." Dispute Letter at p. 1; Response Letter at p. 4. In this regard, it appears that Chadwick Estipular is a current – not a former – employee of Harounian Defendants. The fact that Chadwick Estipular is a "low-level worker" does not demonstrate that he did not engage in communications bearing on the claims in this action. Moreover, the instant decision, with respect to Chadwick Estipular, is consistent with the Special Referee's decision dated July 2, 2021, which directed Harounian Defendants to expand their ESI search to include documents (not including text messages at that juncture) sent and/or received by Lenny Estipular, Chadwick Estipular, Jeffrey Cafone, Marco Salazar, and Manuel Cifuentes (the "July 2, 2021 Decision").

[11] The Special Referee notes that, contrary to Harounian Defendant's assertion (*see* Response Letter at p. 7), the instant decision is consistent with the Special Referee's decision dated August 10, 2020 (the "August 10, 2020 Decision") which directed Harounian Defendants to search Lawrence Furtzaig's *non-personal* email accounts when responding to discovery demands. The Special Referee distinctly noted in Footnote 4 of the August 10, 2020 Decision that Plaintiff did not distinguish between Mr. Furtzaig's personal and non-personal email accounts or clearly define the email accounts at issue when seeking relief and Plaintiff only specifically identified email accounts directly related to Harounian Defendants (i.e. Mr. Furtzaig's Landmark Resources, LLC email address and/or Mr. Furtzaig's Location3, LLC email address). Accordingly, the Special Referee had no reason or basis to consider the disclosure of work-related emails on any *personal* email account or *personal* device at that time.

[12] While Plaintiff represents that "Jeffrey Cafone has already agreed to allow the Harounian Defendants to access his personal devices," the evidence proffered, an email thread between Pryor Cashman (Harounian Defendants' counsel) and Oved & Oved (Plaintiff's counsel), does not confirm as much. Dispute Letter at p. 5 and Ex. U. While the proffered emails dated July 12, 2021 and July 16, 2021, indicate that Pryor Cashman "contacted Mr. Cafone to request his cooperation and to allow [them] . . . to access his personal devices to search as well" and that "Mr. Cafone has agreed to provide Harounian Defendants with the requested access," the representations were made in the context of searching Mr. Cafone's email addresses, specifically jeff@landmark-nyc.com, jeff@location3ny.com, and jeff@nycapartmentsource.com. *Id.* at Ex. U. The Special Referee cannot confirm, based on the evidence provided, that Mr. Cafone consented to the search and production of text messages on his electronic device(s).

Additional Custodians except for Jeffrey Cafone), and to make a good faith attempt to access, search, and produce responsive text messages from Jeffrey Cafone, is neither unduly burdensome nor disproportionate to the needs of the case.[13] *See, e.g., Capital Records, Inc. v. M-3Tunes, LLC*, 261 F.R.D. 44, 49-54 (S.D.N.Y. 2009) (in response to defendant's request that plaintiff "be required to search the files of their 'current and former senior management and marketing personnel,'" the Court directed plaintiff to search the emails of the "fifteen marketing persons with the most senior titles"); *Blackrock Allocation Target Shares: Series S Portfolio v. Bank of New York Mellon*, No. 14-CV-9372, 2018 WL 2215510 at *8 (S.D.N.Y. May 14, 2018) (directing defendants to search documents maintained by two additional custodians, in addition to the twenty-eight existing custodians, noting that "[b]ased on the exemplar documents inadvertently produced by [defendant] . . . plaintiffs have adequately demonstrated that ESI searches of the custodial files and emails of Hermann and Cerchio [the two additional custodians] is 'reasonably calculated to lead to relevant evidence that might not be captured if they were excluded'"); *Family Wireless #1, LLC v. Automotive Technologies, Inc.*, No. 3:15-CV-01310, 2016 WL 2930887, at *2-3 (D. Conn. May 19, 2016) (agreeing with plaintiffs that "custodians should not be limited to decision-makers" because "lower-level employees may have been 'conduits of relevant information;'" finding that the addition of six custodians to the seven previously-agreed upon custodians would not be unduly burdensome; and finding that "the mere fact that many documents have already been produced is not sufficient to establish that there are no other relevant materials to be found").

[13] The Special Referee notes that, as a general matter, the selection of ESI custodians is and should be left to the parties who are best situated to negotiate the discovery custodians and search terms – a proposition which Harounian Defendants pointed out in their Response Letter and the Special Referee repeatedly vocalized to the parties when adjudicating disputes concerning non-text message ESI. However, where, as here, the parties are unable to resolve their disputes concerning the selection of ESI custodians, the Special Referee's decision is both appropriate and necessary.

In sum, the Special Referee directs Harounian Defendants to search for responsive text messages on the electronic devices of the following custodians: Mark, Nerissa Espiritu, Lawrence Furtzaig, Leny Estipular, Chadwick Estipular, Marco Salazar, Manuel Cifuentes, and Jeffrey Cafone (hereinafter, the "Referee Approved Custodians").[14]

C. The Special Referee's Ruling With Respect To Text Message Communicators

As part of this ruling, the Special Referee must determine whether Plaintiff has met her burden to demonstrate that text messages between the Current MH Communicators and the Proposed Additional Communicators, on the one hand, and the Referee Approved Custodians, on the other hand, will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.

As an initial determination, the Special Referee finds that Harounian Defendants are required to search the Referee Approved Custodians' text messages for responsive communications with the Current MH Communicators. Insofar as Harounian Defendants agreed to search text messages between Mark and the Current MH Communicators, Harounian Defendants arguably recognized that such a search may result in the disclosure of relevant evidence or was reasonably calculated to lead to the discovery of information bearing on the claims. *See* Footnote 7 *supra*. In the Special Referee's view, a search of text messages between the remaining Referee Approved Custodians and the Current MH Communicators may also arguably result in the disclosure of relevant evidence or be reasonably calculated to lead to the discovery of information bearing on the claims.

[14] All references to the "Referee Approved Custodians" herein shall be subject to Footnote 3 *supra* and, therefore, any obligations imposed on Harounian Defendants herein with respect to Jeffrey Cafone shall be contingent upon Harounian Defendant's practical ability to access, search, and produce responsive text messages on Jeffrey Cafone's electronic device(s).

Now, the Special Referee considers each of the Proposed Additional Communicators below.

i. Sharon Kohler and Silviya Philip

With respect to Sharon Kohler and Silviya Philip, individuals with whom Mark had extra-marital relations, the Special Referee notes that to the extent these individuals may have received benefits from the Family LLCs, a review of text messages between each of them and the Referee Approved Custodians is reasonably calculated to lead to the discovery of information bearing on the claims. However, the Special Referee recognizes that text messages between Mark, on the one hand, and Sharon Kohler and/or Silviya Philip, on the other hand, may be particularly sensitive. Accordingly, the Special Referee directs Harounian Defendants to search and produce to Plaintiff responsive text messages between each of the Referee Approved Custodians *except for Mark*, on the one hand, and Sharon Kohler and/or Silviya Philip, on the other hand. The Special Referee directs Harounian Defendants to search and produce responsive text messages between Mark, on the one hand, and Sharon Kohler and/or Silviya Philip, on the other hand, to the Special Referee who will then review the text messages *in camera* before granting or denying further disclosure.

ii. Natalie Harounian

With respect to Natalie Harounian, Mark's wife, the Special Referee finds that Plaintiff has met her burden to demonstrate that a review of text messages between the Referee Approved Custodians – except for Mark – and Natalie Harounian is reasonably calculated to lead to the discovery of information bearing on the claims by proffering (i) emails from Natalie Harounian seeking checks from Leny@Landmark-ny.com; and (ii) emails from Leny@Landmark-ny.com to Natalie Harounian forwarding copies of checks made by United Hay LLC to Party Panache and Stephen Jemison. Dispute Letter, Ex. D. In the Special Referee's view, text messages between Natalie Harounian and Mark may or may not be subject to the spousal/marital communications

privilege as alleged by Harounian Defendants but neither Plaintiff nor Harounian Defendants have sufficiently set forth their positions with respect to the applicability of this privilege.[15] Accordingly, the Special Referee directs Harounian Defendants to search and produce to Plaintiff responsive text messages between each of the Referee Approved Custodians *except for Mark*, on the one hand, and Natalie Harounian, on the other hand. The Special Referee grants leave to Harounian Defendants to file a dispute letter (and leave to United Hay to file a response thereto) solely on the applicability of any spousal/marital communications privilege over text messages between Mark and Natalie Harounian, provided such letter is received within seven days of the date of this decision (and the response thereto is received within seven days thereafter).

iii. Alexandra and Mitchell Harounian

With respect to Alexandra and Mitchell Harounian, Mark's children, the Special Referee finds that Plaintiff has met her burden to demonstrate that a review of text messages between the Referee Approved Custodians, on the one hand, and Alexandra and/or Mitchell Harounian, on the other hand, is reasonably calculated to lead to the discovery of information bearing on the claims by proffering: (1) a check from United Chelsea to Landmark in the amount of $13,558 with a notation indicating that payment was "for Alexandra Harounian"; (2) a lease agreement identifying the "Apartment Community" as "Landmark," the "Resident" as Alexandra Harounian," and a payment requirement of $13,558, for rent and related fees; (3) an American Collegiate Travel

[15] *See Theroux v. Resnicow*, 70 Misc. 3d 1201(A) (Sup. Ct. N.Y. Cnty. 2020) (recognizing that "[w]hen a party is seeking disclosure of materials claimed to be privileged, the party claiming privilege bears the burden of satisfying each element of the privilege"); *People v. K.S.*, 44 Misc. 3d 545, 548 (Sup. Ct. Bronx Cnty. 2014) (quoting *People v. Fediuk*, 66 N.Y.2d 881, 883 (1985) (recognizing that a presumption that communications between spouses are "conducted under the mantle of confidentiality" is "rebuttable"); *In re Rsrv. Fund Sec. & Derivative Litig.*, 275 F.R.D. 154, 158 (S.D.N.Y. 2011) (the party asserting a marital communications privilege "bears the burden of establishing all of the essential elements involved" namely, (i) the existence of a 'valid marriage'; (ii) the communications were 'utterances or expressions intended by one spouse to convey a message to the other'; and (iii) whether the communications 'were made in confidence'"). *See generally* N.Y.C.P.L.R. 4502 (Cons. 2021) ("A husband or wife shall not be required, or, without consent of the other if living, allowed, to disclose a confidential communication made by one to the other during marriage").

itinerary, invoice, and travel payment form for $2,799.62; and (4) a check from United Hay to American Collegiate Travel for $2,799.62 with a bank deposit slip referring to Mitchell Harounian. Dispute Letter, Exhibit D. Accordingly, the Special Referee directs Harounian Defendants to search and produce to Plaintiff responsive text messages between each of the Referee Approved Custodians, on the one hand, and Alexandra Harounian and/or Mitchell Harounian, on the other hand.

iv. AJ Sharma

With respect to AJ Sharma, Mark's travel agent, the Special Referee finds that Plaintiff has met her burden to demonstrate that a review of text messages between the Referee Approved Custodians, on the one hand, and AJ Sharma, on the other hand, is reasonably calculated to lead to the discovery of information bearing on the claims by proffering: (i) a check dated October 11, 2021, from United Nationwide Realty Co. to Ajay Sharma for $4,336; and (ii) email correspondence dated October 11, 2021, between Leny@landmark-nyc.com, mark@landmark-nyc.com, and AJ [genes_1@hotmail.com] bearing the subject line "AA Advantage" and referring to six tickets totaling $4,336 for Mark, Nataly, Alexandra, Mitchell, Russell and Zachary, and a flight itinerary for travel from New York to California. Dispute Letter, Exhibit E. Accordingly, the Special Referee directs Harounian Defendants to search and produce to Plaintiff responsive text messages between each of the Referee Approved Custodians, on the one hand, and AJ Sharma, on the other hand.

v. Fred Afari

With respect to Fred Afari, Mark's brother-in-law, the Special Referee finds that Plaintiff has met her burden to demonstrate that a review of text messages between the Referee Approved Custodians, on the one hand, and Fred Afari, on the other hand, is reasonably calculated to lead to the discovery of information bearing on the claims by proffering an email dated June 29, 2016,

from Mark to Fred Afari forwarding an email thread (bearing the subject line "Homapour/Harounian" and reflecting communication between counsel for Jacob Harounian and counsel for Harounian Defendants regarding mediation) and stating "please read from bottom email to the top...call me." Dispute Letter, Exhibit G. Accordingly, the Special Referee directs Harounian Defendants to search and produce to Plaintiff responsive text messages between each of the Referee Approved Custodians, on the one hand, and Fred Afari, on the other hand.

vi. Fred, Lisa, Nader, David, and Jonathan Ohebshalom

With respect to the Fred, Lisa, Nader, David, and Jonathan Ohebshalom, described by Plaintiff as "Mark's cousins and former trustees" and described by Harounian Defendants as "Mark's uncles and cousins," the Special Referee finds that Plaintiff has met her burden to demonstrate that a review of text messages between the Referee Approved Custodians, on the one hand, and Fred Ohebshalom, on the other hand, is reasonably calculated to lead to the discovery of information bearing on the claims by proffering an email thread dated June 29, 2016, with the subject line "Homapour/Harounian," wherein Mark's Rabbi, communicating with counsel for Jacob Harounian and counsel for Harounian Defendants regarding mediation, states that "I added Fred Ohebshalom to this email because he very much cares for all parties involved and was with me when I discussed these matters with Nazy and Shahriar." Dispute Letter, Exhibit G.

The email proffered, however, does not include or mention Lisa, Nader, David, or Jonathan Ohebshalom and Plaintiff has not provided any basis for the Special Referee to determine that text messages with these individuals will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.

Accordingly, the Special Referee directs Harounian Defendants to search and produce to Plaintiff responsive text messages between each of the Referee Approved Custodians, on the one hand, and Fred Ohebshalom, on the other hand. The Special Referee further finds that Harounian

Defendants neither need search nor produce text messages between each of the Referee Approved Custodians, on the one hand, and the other Ohebshaloms, namely Lisa, Nader, David, and/or Jonathan, on the other hand.

vii. Immanuel Piroozian

With respect to Immanuel Piroozian, Mehrnoosh Piroozian's husband, the Special Referee finds that Plaintiff has met her burden to demonstrate that a review of text messages between the Referee Approved Custodians, on the one hand, and Immanuel Piroozian, on the other hand, is reasonably calculated to lead to the discovery of information bearing on the claims by proffering an email thread wherein (i) "Manny Piroozian" emails counsel at Weinberg Zareh & Geyerhahn LLP regarding the status of mediation and states, among other things, that "[t]here is nothing to settle with Jack . . . nothing can or should be reversed to benefit Homapour," Homapour's "name must be removed and never him or any of his family members to become the trustee," and he wants to meet with Judge Crane to "go over these concern [sic] and set him up in the right direction;" (ii) "Manny Piroozian" forwards the foregoing email thread to Mark; and (iii) Mark emails "Manny Piroozian" back stating "Call me." Dispute Letter, Exhibit I. Accordingly, the Special Referee directs Harounian Defendants to search and produce to Plaintiff responsive text messages between each of the Referee Approved Custodians, on the one hand, and Immanuel "Manny" Piroozian, on the other hand.

viii. Alex Piroozian

With respect to Alex Piroozian, Mehrnoosh and Immanuel Piroozian's child, the Special Referee finds that Plaintiff has met her burden to demonstrate that a review of text messages between the Referee Approved Custodians, on the one hand, and Alex Piroozian, on the other hand, is reasonably calculated to lead to the discovery of information bearing on the claims by proffering an email with the subject line "12 Fifth ave-82," wherein "Larry" from Landmark

Resources LLC informs "Riz 'Sally' Espiritu" that "Mark's nephew Alex will be taking the apt." Dispute Letter, Exhibit J. Accordingly, the Special Referee directs Harounian Defendants to search and produce to Plaintiff responsive text messages between each of the Referee Approved Custodians, on the one hand, and Alex Piroozian, on the other hand.

ix. Mark Kalimian

With respect to Mark Kalimian, the Special Referee finds that Plaintiff has not met her burden to demonstrate that a review of text messages between the Referee Approved Custodians, on the one hand, and Mark Kalimian, on the other hand, will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims merely by stating that Mark Kalimian referred Mark to his current counsel at Pryor Cashman. Therefore, Harounian Defendants neither need search nor produce text messages between each of the Referee Approved Custodians, on the one hand, and Mark Kalimian, on the other hand.

x. Ruchelman Staff

With respect to Ruchelman Staff, Plaintiff's tax attorneys, the Special Referee finds that Plaintiff has met her burden to demonstrate that a review of text messages between the Referee Approved Custodians, on the one hand, and Stanley Ruchelman, on the other hand, is reasonably calculated to lead to the discovery of information bearing on the claims by proffering an October 27, 2017 email thread wherein Mark forwards to Stanley Ruchelman an email from Ben Moosazadeh to Drew Benenson (from Tarlow & Co.), Adam Venokur (from Tarlow & Co.), and Jack Harounian indicating that "Mr. Harounian has great concerns about the accuracy of these amended K-1s" and seeking copies of various returns and supporting documents. Dispute Letter at Ex. K.

The email proffered, however, does not include or mention any other members of Ruchelman Staff and Plaintiff has not provided any basis for the Special Referee to determine that

text messages with any other members of Ruchelman Staff will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.

The Special Referee recognizes that communications between the Referee Approved Custodians and Stanley Ruchelman may be subject to the attorney-client privilege, attorney work product protection, and/or trial preparation privilege. Accordingly, the Special Referee directs Harounian Defendants to search and produce to Plaintiff non-privileged, responsive text messages between each of the Referee Approved Custodians, on the one hand, and Stanley Ruchelman, on the other hand, and to provide a privilege log reflecting all those documents withheld on the basis of any alleged privilege or protection. The Special Referee further finds that Harounian Defendants neither need search nor produce text messages between each of the Referee Approved Custodians, on the one hand, and any other members of Ruchelman Staff, on the other hand.

xi. Tarlow Staff and Anchin Staff

With respect to Tarlow Staff and Anchin Staff, accountants who assisted Stanley Ruchelman and Pryor Cashman "under a *Kovel* engagement and privilege" (Response Letter at p. 5), the Special Referee finds that Plaintiff has met her burden to demonstrate that a review of text messages between the Referee Approved Custodians, on the one hand, and certain members of Tarlow Staff and/or Anchin Staff, on the other hand, is reasonably calculated to lead to the discovery of information bearing on the claims. Regarding Tarlow Staff, Plaintiff proffers an email thread from October 2016 between "Maria" from the "Office of Mark Harounian," Rosemarie Flom Cisneros from DBooks, and "Leny" from the "Office of Mark Harounian," copying Drew Benenson and Adam Venokur from Tarlow as well as several additional people from DBooks, discussing payroll reports and a related meeting. Response Letter at Ex. L. Regarding Anchin Staff, Plaintiff proffers an email thread from September 2015 between Mark and Anthony Bracco and Cecilia Chien from Anchin regarding "access info" to "download the

returns from the portal." Response Letter at Ex. M. The foregoing confirms that Harounian Defendants engaged in communications with certain members of Tarlow Staff, namely, Drew Benenson and Adam Venokur, and certain members of Anchin Staff, namely, Anthony Bracco and Cecilia Chien, regarding their expenses and tax returns. In this regard, Plaintiff has demonstrated that a search for text messages between the Referee Approved Custodians, on the one hand, and Drew Benenson, Adam Venokur, Anthony Bracco, and/or Cecilia Chien, on the other hand, is warranted.

The email proffered, however, does not include or mention any other members of Tarlow Staff or Anchin Staff and Plaintiff has not provided any basis for the Special Referee to determine that text messages with any other members of Tarlow Staff or Anchin Staff will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.

However, the Special Referee recognizes that responsive text messages with Drew Benenson, Adam Venokur, Anthony Bracco, and/or Cecilia Chien may be privileged and entitled to the protection afforded under *United States v. Kovel*. *See Delta Fin. Corp. v. Morrison*, 13 Misc. 3d 441, 445 (Nassau Sup. Ct. 2006) (while "communications to an accountant retained by the law firm for the purpose of assisting the firm in giving legal advice to its client" are privileged, "'if the advice sought is the accountant's rather than the lawyer's, no privilege exists'") (quoting *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961)). Whether or not any identified text messages between the Referee Approved Custodians and Drew Benenson, Adam Venokur, Anthony Bracco, and/or Cecilia Chien are privileged will depend on the content of the exchange. Accordingly, the Special Referee directs Harounian Defendants to search and produce to Plaintiff non-privileged, responsive text messages between each of the Referee Approved Custodians, on the one hand, and

Drew Benenson, Adam Venokur, Anthony Bracco, and/or Cecilia Chien, on the other hand, and to provide a privilege log reflecting all those documents withheld on the basis of any privilege or protection. The Special Referee further finds that Harounian Defendants neither need search nor produce text messages between each of the Referee Approved Custodians, on the one hand, and any other members of Tarlow Staff and/or Anchin Staff, on the other hand.

xii. The Family LLC Staff

With respect to Family LLC Staff members who are also included in the list of Referee Approved Custodians, namely, Leny Estipular, Chadwick Estipular, Jeffrey Cafone, Marco Salazar, and Manuel Cifuentes, the Special Referee finds that these same individuals are also appropriate communicators and that text messages *with them* are discoverable. In this regard, a search of the communications *between*, for instance, Leny Estipular (who is a Referee Approved Custodian) and Chadwick Estipular (who is also a Referee Approved Custodian) is reasonably calculated to lead to the discovery of information bearing on the claims. As another example, a search of the communications *between* Lawrence Furtzaig (who is a Referee Approved Custodian but is not included in the definition of "Family LLC Staff") and Leny Estipular (who is a Referee Approved Custodian and included in the definition of "Family LLC Staff") is reasonably calculated to lead to the discovery of information bearing on the claims. The two foregoing examples are illustrative and should not be construed as an exhaustive list of the searches directed in this order.

With respect to Family LLC Staff members who are not included in the list of Referee Approved Custodians, namely, Andy Torrez, Alex Lopez, Tomas Lopez, and Orlando Miranda, the Special Referee finds that Plaintiff has not met her burden to demonstrate that a review of text messages between the Referee Approved Custodians, on the one hand, and Andy Torrez, Alex Lopez, Tomas Lopez, and/or Orlando Miranda, on the other hand, is reasonably calculated to lead to the discovery of information bearing on the claims. The proffered support for this discovery,

specifically: (i) text messages and emails between "Dad," "Rizza," "Larry Furtzaig," "WORKER-Marco-219W," "Leny new," and/or "WORKER-Manuel-50TH," and (ii) Harounian Defendants' representation, in response to an interrogatory, that Andy Torrez, Alex Lopez, Tomas Lopez, and Orlando Miranda, along with 9 other persons, were present when Mark and his agents "packed or otherwise relocated the contends of the Family Headquarters," does not the requested disclosure.

In sum, as set forth herein and summarized below, the Special Referee grants, in part, and denies, in part, Plaintiff's application. Specifically, the Special Referee holds that:

1. Harounian Defendants shall search for responsive text messages on the electronic devices of the Referee Approved Custodians, namely, Mark, Nerissa Espiritu, Lawrence Furtzaig, Leny Estipular, Chadwick Estipular, Marco Salazar, Manuel Cifuentes, and Jeffrey Cafone; provided, however, the Harounian Defendants' obligations with respect to Jeffrey Cafone are subject to their practical ability to access his text messages;

2. Harounian Defendants shall search and produce to Plaintiff responsive text messages between each of the Referee Approved Custodians (*see* Footnotes 4 and 12), on the one hand, and each of the following communicators, on the other hand: AJ Sharma, Alan Winters, Alex Lopez, Alex Piroozian, Alexander Seligson, Alexandra Harounian, Andy Torrez, Brian Morris, Chadwick Estipular, Fred Afari, Fred Ohebshalom, Henry Dellaratta, Immanuel Piroozian, Jeffrey Cafone, Lawrence Furtzaig, Leny Estipular, Lionel Nazarian, Manuel Cifuentes, Marco Salazar, Mehrnaz Homapour, Mehrnoosh Piroozian, Mitchell Harounian, Nerissa Espiritu, Orlando Miranda, Representatives of Baron's Dry Cleaning, Representatives of DeGrezia Restaurant, and Yong Bai Wu, within 45 days of the date of this decision;

3. Harounian Defendants shall search and produce to Plaintiff responsive text messages between each of the Referee Approved Custodians (*see* Footnotes 4 and 12) except for Mark, on the one hand, and Sharon Kohler and/or Silviya Phillip, on the other hand, within 45 days of the date of this decision;

4. Harounian Defendants shall search and produce to the Special Referee responsive text messages between Mark, on the one hand, and Sharon Kohler and/or Silviya Phillip, on the other hand, within 45 days of the date of this decision, and upon receipt thereof, the Special Referee will conduct an *in camera* review and determine whether further disclosure to Plaintiff is appropriate;

5. Harounian Defendants shall search and produce to Plaintiff responsive text messages between each of the Referee Approved Custodians (*see* Footnotes 4 and 12) except for Mark, on the one hand, and Natalie Harounian, on the other hand, within 45 days of the date of this decision;

6. Harounian Defendants shall be permitted to file a dispute letter based on the alleged spousal/marital communications privilege between Mark and Natalie Harounian within seven days of the date of this decision (to which Plaintiff may file a response letter within seven days of the receipt thereof) and, absent such letter, Harounian Defendants shall be required to produce to Plaintiff responsive text messages between Mark and Natalie Harounian within 45 days of the date of this decision;

7. Harounian Defendants do not need search nor produce responsive text messages between each of the Referee Approved Custodians, on the one hand, and each of the following communicators, on the other hand: Alex Lopez, Andy Torrez, David Ohebshalom, Jonathan Ohebshalom, Lisa Ohebshalom, Mark Kalimian, Nader Ohebshalom, Orlando Miranda, Tomas Lopez, Ruchelman Staff (not including Stanley Ruchelman), Tarlow Staff (not including Drew Benenson or Adam Venokur), or Anchin Staff (not including Anthony Bracco or Cecilia Chien); and

8. Harounian Defendants shall search and produce to Plaintiff responsive, non-privileged text messages between each of the Referee Approved Custodians (*see* Footnotes 4 and 12), on the one hand, and Stanley Ruchelman, Drew Benenson, Adam Venokur, Anthony Bracco, and/or Cecilia Chien, on the other hand, within 45 days of the date of this decision, and shall simultaneously produce a privilege log identifying any text messages withheld on the basis of any privilege or protection.

The Special Referee denies any relief not specifically granted and set forth herein.

Dated: October 6, 2021

SO ORDERED:

Michael Cardello III
MICHAEL CARDELLO III
Court-Appointed Special Referee

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MEHRNAZ NANCY HOMAPOUR, et al.,	:	Index No. 653795/2015
Plaintiffs,	:	**DECISION ON DEFENDANTS' SECOND MOTION TO COMPEL DOCUMENTS FROM NON-PARTY SHAHRIAR HOMAPOUR**
-against-	:	
MARK HAROUNIAN, et al.,	:	
Defendants.	:	
JACOB HAROUNIAN, et al.,	:	Index No. 450615/2019
Plaintiffs,	:	
-against-	:	
MARK HAROUNIAN, et al.,	:	
Defendants.	:	

This matter is before the undersigned, Michael Cardello III, Esq., as a result of an Order of Reference dated April 22, 2020, signed by the Honorable Joel M. Cohen, appointing him Special Referee pursuant to New York Civil Practice Law and Rules ("CPLR") §§ 3104 and 4301, for the purpose of assisting the Court and the parties in conducting and completing discovery in an efficient manner.

Currently before the Special Referee is a motion to compel (the "Second Motion to Compel") filed by defendant Mark Harounian, the Harounian LLCs,[1] the Family LLCs,[2] 360 East 50th Street Associates LLC, and 356 East 50th Street Associates LLC (collectively,

[1] The term "Harounian LLCs" shall refer herein to Jacob NY Holdings LLC, Jacob NY Holdings Ltd., 172 Mulberry Realty LLC, 1007 Lex Ave LLC, and 163 Chrystie Realty LLC.

[2] The term "Family LLCs" shall refer herein to 3M Properties, LLC, Balance Property, LLC, JAM Realty NYC LLC f/k/a JAM Realty Co., United Chelsea, LLC, United East, LLC, United Fifth, LLC, United Flatiron LLC, United Greenwich, LLC, United Hay, LLC, United Nationwide Realty LLC f/k/a United Nationwide Realty, United Prime Broadway, LLC, United Prime LLC, United Seed LLC, United Square LLC, United Village, LLC, and United West, LLC.

"Defendants") seeking an order pursuant to CPLR § 3124 directing subpoenaed non-party Shahriar Homapour ("Shahriar") to "provide complete responses" to a Subpoena Duces Tecum dated May 1, 2019 (the "Subpoena") and to provide "all communications involving" Shahriar, counsel for plaintiff Mehrnaz Homapour ("Mehrnaz"), and Jacob Harounian ("Jacob") in accordance with the Special Referee's August 26, 2020 Decision (defined below).

As set forth in greater detail below, the Special Referee grants the Second Motion to Compel and finds that Shahriar waived those privileges not set forth in opposition to Defendants' First Motion to Compel (defined below) and directs Shahriar to produce all of his documents responsive to the Subpoena (except as set forth in footnote 4 *infra*) without any privilege assertions.

I. PROCEDURAL BACKGROUND

A. The Subpoena

i. Defendants Served Shahriar with the Subpoena Dated May 1, 2019

As set forth in the Subpoena, Shahriar was required, *inter alia*, to produce documents responsive to thirty-three specific requests for discovery and inspection on or before June 10, 2019.

ii. Shahriar Provided Responses and Objections Dated June 12, 2019 to the Subpoena

On or about June 12, 2019, Shahriar provided responses and objections to the Subpoena (the "Responses and Objections"). In the Responses and Objections, Shahriar first asserted boilerplate general objections which included an objection to the Subpoena to the extent it sought documents and information "protected from disclosure by the attorney-client privilege, the work-product doctrine, documents protected as trial preparation materials, or by any other applicable privilege or production." Responses and Objections at p. 3. Shahriar also asserted specific

objections in response to each of the thirty-three demands in the Subpoena. For example, in response to thirty-two of the demands, Shahriar objected that "to the extent this Request call[ed] for the production of privileged and confidential documents, including, but not limited to, documents protected by the spousal privilege, attorney-client privilege, common interest privilege, attorney work product doctrine and as trial preparation materials."[3]

iii. Counsel Meet and Confer on July 26, 2019

According to counsel for both Defendants and Shahriar, the parties engaged in a telephonic meet and confer conference on July 26, 2019, to discuss Shahriar's Responses and Objections to the Subpoena.

B. The Parties Enlist the Court's Assistance to Resolve Disputes in Connection with the Subpoena

i. Defendants' September 13, 2019 Letter to the Court

By letter dated September 13, 2019, Defendants requested a pre-motion conference which sought leave to file a motion to compel as a result of Shahriar's refusal to produce documents demanded in the Subpoena ("Defendants' September 13, 2019 Letter"). In Defendants' September 13, 2019 Letter, Defendants wrote that while "Shahriar assert[ed] the spousal privilege under CPLR 4502(b)," they "are not seeking any communications solely between Shahriar and Mehrnaz" but are "demanding copies of all relevant and responsive communications involving Shahriar where third parties, including but not limited to Mehrnaz's counsel, were present or copied." Defendants' September 13, 2019 Letter at p. 2. Defendants

[3] While the parties both refer to a "common interest privilege," the Special Referee notes that this is a misnomer. The common interest doctrine "is not an evidentiary privilege or an independent basis for the attorney-client privilege;" rather, "it limits the circumstances under which attorneys and clients can disseminate their communications to third parties without waiving the privilege." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 630 (2016)).

further wrote that the "various privileges asserted by Shahriar" do not justify the non-disclosure of other discoverable information. *Id*. at p. 3.

ii. Shahriar's September 23, 2019 Letter to the Court

By letter dated September 23, 2019, Shahriar opposed the relief sought in Defendants' September 13, 2019 Letter ("Shahriar's September 23, 2019 Letter"). Shahriar advised the Court that during the parties' July 26, 2019 meet and confer conference, he agreed to produce documents "not immune from discovery" and informed Defendants that the Subpoena was overbroad and "called for the production of documents protected by the attorney-client privilege, common interest privilege, attorney work product doctrine and as trial preparation materials." Shahriar's September 23, 2019 Letter at pp. 1-2. Shahriar wrote that while he "attempted to confer on other issues, including, the various privileges that attach to many of the documents sought by the Subpoena[]," Defendants' counsel "refused." Shahriar's September 23, 2019 Letter at pp. 1-2.

iii. Stipulation and Order Appointing the Special Referee to, *Inter Alia*, Adjudicate Unresolved Disputes Concerning the Subpoena

By Stipulation and Order dated April 22, 2020, the Honorable Joel M. Cohen appointed the Special Referee, *inter alia*, to hear, resolve, and make rulings on all discovery disputes, including, but not limited to, those concerning the Subpoena.

C. <u>The First Motion to Compel (and Initial Dispute Letter)</u>

i. Defendants' May 5, 2020 Initial Dispute Letter to the Special Referee

In accordance with the Special Referee's dispute resolution protocol, prior to filing the First Motion to Compel, Defendants filed an initial dispute letter dated May 5, 2020 ("Defendants' May 5, 2020 Letter"), contesting Shahriar's "erroneous assertions of privilege" in response to the Subpoena. Defendants' May 5, 2020 Letter at p. 1. In Defendants' May 5, 2020

Letter, Defendants: (1) stated that Shahriar's assertion of spousal privilege was misplaced as counsel was not seeking communications solely between Shahriar and Mehrnaz; (2) rejected Shahriar's new assertion that "communications with Mehrnaz's counsel are protected by an 'agency' theory;" and (3) argued that "Shahriar should be directed to produce all communications involving Mehrnaz where any third party is copied, including but not limited to Mehrnaz's counsel." *Id.* at pp. 2-3.

ii. Shahriar's May 12, 2020 Letter to the Special Referee

By letter dated May 12, 2020 ("Shahriar's May 12, 2020 Letter"), Shahriar responded to Defendants' May 5, 2020 Letter and argued that his presence in or on communications with Mehrnaz's counsel did not vitiate the attorney-client privilege because he is "intimately involved in Plaintiff[] [Mehrnaz's] business and finances, including concerning the Family LLCS" and "has acted as Plaintiff[] [Mehrnaz's] agent in connection with, and leading up to, this litigation." Shahriar's May 12, 2020 Letter at pp. 2-3. In Shahriar's May 12, 2020 Letter, Shahriar argued that "there is no functional difference between [his] . . . role vis-à-vis Plaintiff [Mehrnaz], and a corporate officer's role with a corporate plaintiff" and, as Mehrnaz's agent, "privilege applies." *Id*. at p. 3.

iii. Telephonic Conference with the Special Referee on May 19, 2020

On May 19, 2020, the Special Referee held a telephonic conference with counsel for Defendants and counsel for Shahriar concerning the Subpoena. During this call, Shahriar's counsel confirmed that Shahriar had not provided a privilege log identifying withheld documents primarily because he had not completed his production. Shahriar's counsel explained that Shahriar intended to produce documents and a privilege log in conformity with the stipulated ESI protocol. He further asserted that Shahriar was subject to the stipulated ESI protocol as a non-party because he acted as Mehrnaz's agent at all times with respect to this action.

When the Special Referee expressed concern about engaging in motion practice concerning the Subpoena before Shahriar completed his production and produced a privilege log, Defendants' counsel maintained that the dispute was ripe for adjudication and no *in camera* review of allegedly privileged documents would be necessary because Shahriar intended to withhold all documents pursuant to a blanket privilege where he was included on communications with counsel. Shahriar's counsel distinctly responded that he "shockingly" found himself in agreement with Defendants' counsel. Based on counsels' joint representations, the Special Referee agreed that he would address the dispute prior to Shahriar completing his production of documents and a privilege log. The Special Referee thereafter directed formal briefing on this issue.

iv. Defendants' First Motion to Compel

On June 9, 2020, Defendants filed a motion (the "First Motion to Compel") seeking an order, *inter alia*, to compel Shahriar and subpoenaed, non-party Jeffrey Homapour ("Jeffrey") to "provide complete responses" to the Subpoena. First Motion to Compel, Notice of Motion at p. 1. Defendants asserted that Shahriar is "trying desperately to avoid such discovery through various, meritless assertions of 'privilege'" and his "respective assertions of privilege are baseless." First Motion to Compel, Memorandum of Law at pp. 2-3. Defendants contended that prior to filing the First Motion to Compel, Shahriar had "principally argued" that certain communications were shielded from disclosure under spousal privilege but that Shahriar "recently changed his claim" to center on an "'agency' privilege." *Id*. at p. 8. Defendants argued that neither privilege is legally or factually applicable and, therefore, requested that the Special Referee direct Shahriar to "fully search for and produce" documents responsive to the Subpoena "without any privilege assertions." *Id*. at p. 12.

v. Shahriar's Opposition to the First Motion to Compel

On June 26, 2020, Shahriar filed opposition to the First Motion to Compel, arguing that the Special Referee should deny Defendants' demand for "plainly privileged communications and documents" because "Shahriar, Plaintiff[] [Mehrnaz's] husband and agent, has been authorized to act on behalf of Plaintiff [Mehrnaz] in connection with this action" and his "communications with Plaintiff[] [Mehrnaz's] counsel, including Jeffrey, are privileged." First Motion to Compel, Opposition at pp. 1, 6, 11. Shahriar did not assert spousal privilege, the common interest exception to the attorney-client privilege, or the protections afforded to work product and materials prepared in anticipation of litigation as a defense to the First Motion to Compel.

vi. Defendants' Reply in Support of the First Motion to Compel

On July 10, 2020, Defendants filed a reply in further support of the First Motion to Compel, asserting that Shahriar "initially opposed" the Subpoena based on spousal privilege and only abandoned that argument when Defendants identified case law rendering that privilege inapplicable. First Motion to Compel, Reply at p. 1. According to Defendants, this case law "gave Shahriar another idea: he would assert an 'agency privilege' instead" even though he "never previously asserted such a privilege." *Id.* Defendants argued that "[t]here is no foundation for Shahriar's newly concocted 'agency privilege' argument" – referring to it as a "post hoc contrivance to end-run his inability to support a spousal privilege assertion." *Id*. at pp. 2, 7.

vii. The August 26, 2020 Decision on the First Motion to Compel

By decision dated August 26, 2020, the Special Referee held that Shahriar did not meet his burden to withhold documents in response to the Subpoena pursuant to the agency exception to the attorney-client privilege (the "August 26, 2020 Decision"). August 26, 2020 Decision at

p. 20. The Special Referee further held that while Jeffrey demonstrated the existence of an attorney-client relationship, the applicability of the attorney-client privilege is document-specific and, therefore, Jeffrey was permitted to produce a privilege log memorializing his assertions of attorney-client privilege and that those assertions would be subject to challenge by Defendants.

D. Communications Following the August 26, 2020 Decision and Prior to the Second Motion to Compel

i. Telephonic Conference on October 9, 2020

On October 9, 2020, the Special Referee held a telephonic conference with counsel for Defendants and Shahriar concerning, *inter alia*, Shahriar's demand that Defendants pay his fees before producing documents in accordance with the August 26, 2020 Decision. The Special Referee advised the parties that a dispute over fees cannot impact the production of documents but that he would provide a written decision concerning fees in short order. While counsel for Shahriar ultimately represented that he could produce responsive outstanding documents by November 13, 2020, counsel for Defendants and Shahriar agreed to discuss among themselves a proposed deadline for the production of Jeffrey's privilege log and report back to the Special Referee.

ii. The October 21, 2020 Decision

By Decision dated October 21, 2020, the Special Referee directed: (1) Shahriar to produce documents in response to the Subpoena by November 13, 2020; (2) counsel for Shahriar and Defendants to agree on a specific date by which Jeffrey would produce his privilege log and to advise the Special Referee of this date within seven days; and (3) Defendants to reimburse subpoenaed non-parties, Jeffrey and Shahriar, for their reasonable production expenses and attorney's fees (the "October 21, 2020 Decision").

iii. October 27, 2020 Email

By email dated October 27, 2020, counsel for Shahriar advised the Special Referee that Shahriar and Defendants "have agreed that Shahriar and Jeffrey will produce privilege logs by December 3, 2020."

iv. Telephonic Conference on November 30, 2020

On November 30, 2020, the Special Referee held a telephonic conference with counsel for Defendants and Shahriar on matters unrelated to the August 26, 2020 Decision or October 21, 2020 Decision. When the Special Referee inquired as to the status of Shahriar's document production, counsel for Defendants advised that Shahriar was attempting to assert a common interest privilege to avoid disclosure of documents. Counsel for Defendants stated that the parties litigated assertions of privileges in the First Motion to Compel and any new grounds to withhold documents were inappropriate. Counsel for Shahriar argued that: (1) since July 2019, Shahriar has asserted spousal privilege, attorney-client privilege, common interest privilege, work product privilege, and the protection afforded to trial preparation materials; (2) Shahriar did not pursue spousal privilege in the First Motion to Compel because Defendants confirmed they were not looking for communications solely between husband and wife; and (3) it is of no consequence to Shahriar that Defendants made the decision to litigate certain privileges before they received his privilege log. Given that Shahriar's counsel confirmed he would be producing Shahriar's privilege log by December 3, 2020, the Special Referee scheduled a conference call for December 7, 2020, so that the parties could continue their discussion after reviewing the privilege log.

v. Shahriar Produced a Privilege Log on December 3, 2020

By email dated December 3, 2020, counsel for Shahriar produced a privilege log (the "Privilege Log") reflecting all those documents withheld or redacted by Shahriar on the basis of

the following privileges: attorney-client privilege, work product privilege, trial preparation privilege, common interest privilege, and spousal privilege.

vi. Telephonic Conference on December 7, 2020

On December 7, 2020, the Special Referee held a telephonic conference with counsel for Defendants and Shahriar regarding the Privilege Log. Counsel for Defendants maintained that Shahriar waived the privileges set forth in the Privilege Log. Counsel for Shahriar vehemently disagreed with that position. The Special Referee then directed the parties to provide an initial dispute letter addressing whether or not Shahriar waived those privileges set forth in the Privilege Log.

E. <u>The Second Motion to Compel (and Initial Dispute Letter)</u>

i. Defendants' December 11, 2020 Initial Dispute Letter

Prior to filing the Second Motion to Compel, in accordance with the Special Referee's dispute resolution protocol and specific directive, Defendants submitted an initial dispute letter dated December 11, 2020 ("Defendants' December 11, 2020 Letter"), arguing that Shahriar waived any privileges not asserted in opposition to the First Motion to Compel and that the August 26, 2020 Decision "adjudicated his privilege assertions." Defendants' December 11, 2020 Letter at p. 1. Defendants noted that from June 2019 to April 2020, "Shahriar's argument was always, and singularly about *the spousal privilege*" and that Shahriar "*dropped* his spousal privilege assertion" to rely on a new "agency" theory of privilege, which was not included in his Responses and Objections in May 2020. *Id*. at pp. 3-4 (emphasis in original).

Defendants noted that the Special Referee rejected Shahriar's privilege arguments in the August 26, 2020 Decision and yet Shahriar still refuses to produce documents based on "new and different privilege claims he had never argued" in his Opposition to the First Motion to Compel. *Id.* at p. 5. Defendants contended that Shahriar either: (i) intended to waive these privileges,

deciding they "were not worth actually pressing," or (ii) is acting in bad faith by intentionally engaging in "piecemeal litigation and motion practice." *Id.* at p. 6.

ii. Shahriar's December 18, 2020 Response Letter

By letter dated December 18, 2020 ("Shahriar's December 18, 2020 Letter"), Shahriar responded to Defendants' December 11, 2020 Letter. Shahriar argued that he "repeatedly and consistently" asserted the privileges identified in: (1) the Privilege Log in his Responses and Objections to the Subpoena; (2) Shahriar's September 23, 2019 Letter; and (3) meet and confer conferences held on July 26, 2019 and April 7, 2020. Shahriar's December 18, 2020 Letter at p. 1. Shahriar stated that he did not "drop his spousal privilege assertion," as alleged, but merely did not pursue that privilege because Defendants confirmed they were not seeking communications solely between him and Mehrnaz. *Id.* at p. 3, footnote 2. Shahriar represented that he agreed during the May 19, 2020 conference with the Special Referee that the First Motion to Compel "was ripe for adjudication before the production of a privilege log because of the obvious existence of a dispute over that identified issue" (i.e. the agency exception to the attorney-client privilege) but that this "in no way meant that Shahriar had waived any other privilege." *Id.* at p. 3. Shahriar argued that the fact that Defendants "sought a ruling only as to the spousal privilege and related agency exception does not, and cannot, constitute a waiver by Shahriar of his other asserted privileges" and he was not "required to affirmatively address the application of his common interest privilege" when Defendants did not raise it in the first instance. *Id*. at pp. 3-4.

iii. Telephonic Conference on January 14, 2021

On January 14, 2021, the Special Referee held a telephonic conference with counsel for Defendants and counsel for Shahriar concerning the letter submissions regarding the assertions of privilege in the Privilege Log. On the call, counsel for Defendants argued that Shahriar

waived all privileges in the Privilege Log. Counsel for Defendants noted that the Special Referee initially insisted on the production of a privilege log before the First Motion to Compel was briefed and only agreed to delay the production of a privilege log when Shahriar's counsel confirmed that the only privileges at issue were specific extensions of Mehrnaz's privilege.

Counsel for Shahriar opposed any assertion of waiver and argued that Defendants chose to make the First Motion to Compel before a privilege log was produced. Counsel for Shahriar emphasized that the privileges in the Privilege Log were not new and were preserved in Shahriar's Responses and Objections, during the July 2019 meet and confer conference, and in Shahriar's September 23, 2019 Letter to the Court. The Special Referee advised the parties that a fulsome record must be developed to preserve their rights and, therefore, directed formal briefing regarding any alleged waiver as well as the merits of each assertion of privilege in the Privilege Log.

iv. Defendants' Second Motion to Compel

On February 19, 2021, Defendants filed the Second Motion to Compel which is now before the Special Referee. This motion contains two principle contentions: (1) Shahriar waived the privileges asserted in the Privilege Log, namely, common interest privilege, attorney work product, and trial preparation privilege; and (2) in any event, such privileges are baseless.

Defendants cited an array of case law from the Supreme Court, New York County and the Southern and Eastern District Courts of New York, for the proposition that "[p]arties waive objections, including assertions of privilege, when they fail to pursue them in responses to motions to compel and in preceding good faith meet-and-confers." Second Motion to Compel, Memorandum of Law at p. 15. Defendants contended that the following evidence confirms that Shahriar waived those privileges set forth in the Privilege Log:

(1) Shahriar never asserted independent privileges (as opposed to derivative privileges) in any of the meet and confer conferences or written exchanges between June 2019 and June 2020;

(2) Shahriar never identified independent privileges in pre-motion correspondence to the Court or Special Referee;

(3) Shahriar represented to the Special Referee that the dispute giving rise to the First Motion to Compel was ripe for resolution without a privilege log;

(4) Shahriar's opposition to the First Motion to Compel did not raise the privileges asserted in the Privilege Log and, yet, in the opposition, Shahriar included a "new agency privilege contention, which he had not even expressed in his written Subpoena responses;" and

(5) while Jeffrey asserted "*both* independent and derivative privileges" in response to his subpoena in opposition to the First Motion to Compel, Shahriar did not.

Second Motion to Compel, Memorandum of Law at pp. 13-15 (emphasis in original). Defendants argued that the Special Referee acknowledged that Shahriar had no viable privileges when issuing the October 21, 2020 Decision which directed Shahriar and Jeffrey to complete their document productions by November 13, 2020, but only directed Jeffrey to serve a privilege log. *Id*. at p. 9.

Defendants asserted that Shahriar "had his full and fair opportunity to litigate the issue of privilege" in response to the First Motion to Compel and deliberately limited himself to spousal privilege and the agency exception to attorney-client privilege. *Id*. at p. 17. According to Defendants, Shahriar's newfound reliance on previously abandoned privileges reflects a "*seriatim*" approach to litigation and the endorsement of such tactics "would promote delay, cost and gamesmanship." *Id.* at pp. 16-17 (emphasis in original).

In any event, Defendants argued that Shahriar cannot avoid disclosure of his communications with Mehrnaz's and Jacob's counsel based on the common interest exception to the attorney-client privilege. Based on Defendants' understanding, Shahriar is claiming that his communications are privileged because he has a common interest with Jacob and Mehrnaz as the

trustee for the Jacob Harounian 2012 Family Trust #1 ("Trust #1"), formed for the benefit of Mark and Mark's Children, and the Jacob Harounian 2012 Family Trust #3 ("Trust #3"), formed for the benefit of Mehrnosh and her children, and Mehrnaz's and Jacob's attorney-client communications were shared with him in his trustee capacity. *Id*. at pp. 10, 17.

Defendants contended that the common interest privilege is "between co-defendants, co-plaintiffs or persons who reasonably anticipate that they will become colitigants, because such disclosures are deemed necessary to mount a common claim or defense . . . and their legal interests are sufficiently aligned that the counsel of each [i]s in effect the counsel of all." *Id*. at p. 18 (quoting *Ambac Assur. Corp.*, 27 N.Y.3d at 618) (alteration in original). Defendants highlighted three reasons Shahriar cannot invoke the common interest exception to the attorney-client privilege. First, Trust #1 and Trust #3 (collectively, the "Trusts") are not co-plaintiffs with Mehrnaz and did not reasonably anticipate becoming co-plaintiffs with Mehrnaz. *Id*. at p. 18. Second, Mehrnaz and the Trusts have no common claims. *Id*. at pp. 18-19. According to Defendants, Mehrnaz's claims are actually adverse to the beneficiaries of Trust #1 (Mark and Mark's children) because Mehrnaz is suing Mark and seeking to impose constructive trusts over properties substantially owned by Mark's children. *Id*. at p. 19. Similarly, according to Defendants, Mehrnaz's claims are adverse to the beneficiaries of Trust #3 (Mehrnosh and Mehrnosh's children) because Mehrnosh confirmed her support for Mark and opposition to Mehrnaz in this litigation. *Id*. at pp. 19-20. Third, "there is no basis to deem Mehrnaz's and Jacob's counsel" as the de facto counsel for the Trusts herein given that neither Mehrnaz nor Jacob are aligned with them, as confirmed by the fact that Jacob allegedly converted money from a Family LLC in which the Trusts are members. *Id*. at p. 20.

Defendants further rejected Shahriar's contention that "Mehrnaz's and Jacob's counsel shared their work product and trial preparation materials with him in his role as purported trustee

of Trust #1 and Trust #3, with an expectation that their privilege with Mehrnaz and Jacob would be maintained." *Id*. at p. 20. Defendants maintained that the privilege extended to work product and trial preparation materials is waived when the documents are "disclosed in a manner that materially increases the likelihood that an adversary will obtain the information." *Id*. at p. 21 (quoting *Scott v. Beth Israel Med. Ctr. Inc.*, 17 Misc. 3d 934, 943 (Sup. Ct. N.Y. Cnty. 2007)). Defendants contended that any alleged privilege was waived when Mehrnaz's and Jacob's counsel shared materials with Shahriar in his capacity as trustee of the Trusts, given that the beneficiaries of those trusts are "hostile to Mehrnaz's and Jacob's claims" and, accordingly, "Mehrnaz's and Jacob's counsel could not reasonably have expected to maintain privilege." *Id*. at pp. 21, 24.

v. Shahriar's Opposition to the Second Motion to Compel

On March 12, 2021, Shahriar filed opposition to the Second Motion to Compel ("Opposition"), maintaining that he: (1) never waived his assertion of the common interest privilege; (2) properly withheld documents under the common interest privilege; and (3) properly withheld documents as work product and trial preparation materials.

Shahriar contended that he expressly asserted the common interest privilege in his Responses and Objections to the Subpoena and during the meet and confer conferences held on July 26, 2019 and April 7, 2020. Opposition, Memorandum of Law at pp. 10-11. Shahriar referred to his September 23, 2019 Letter to the Court which memorialized his position that he asserted this privilege during the July 26, 2019 meet and confer conference. *Id*. According to Shahriar, that "Defendants sought a ruling only as to the spousal privilege and the agency exception does not, and cannot, constitute a waiver by Shahriar of his other asserted privileges" and the cases cited by Defendants to argue otherwise are "entirely factually and procedurally distinguishable." *Id*. at pp. 10, 12.

Shahriar further asserted that the withheld documents are protected by the common interest privilege and maintained that "[t]he key inquiry, in addition to whether the underlying communication is privileged, is whether the parties share a common legal interest, and the privilege may even apply 'despite an adversarial relationship between the two parties asserting it.'" *Id*. at p. 15 (quoting *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 55 Misc. 544, 560 (Sup. Ct. N.Y. Cnty. 2016)). Shahriar contended that this privilege applies to those communications and documents set forth in the Privilege Log because: (1) Defendants do not contend that the documents would not be privileged but for their disclosure to Shahriar; and (2) Mehrnaz and the Trusts are all members of the Family LLCs and "have a common legal interest in this litigation, which seeks to have Mark repay to the Family LLCs the millions of dollars that he looted and wasted." *Id*. at p. 16. Shahriar noted that his obligation as trustee is "to preserve and not waste the Trust's assets – which is exactly what Shahriar is doing in supporting Plaintiff[] [Mehrnaz's] efforts" herein. *Id*. at p. 18 (emphasis omitted).

In terms of evidentiary support for this privilege assertion, Shahriar stated in his supporting affidavit sworn to on March 12, 2021 ("Shahriar Aff."), that:

> since my appointment as trustee, my interests have aligned with Plaintiff[] [Mehrnaz's] and we share the common legal interest in this litigation arising out of Plaintiff[] [Mehrnaz's] and the Trusts' membership interests in the Family LLCs. Specifically, to obtain a judgment directing the Harounian defendants to repay the Family LLCs' assets for the benefit of all members, which include the Trusts.

Opposition, Shahriar Aff. at ¶ 16. Mehrnaz similarly asserted in her own supporting affidavit sworn to on March 12, 2021 ("Mehrnaz Aff.") that from the time Shahriar was appointed trustee of the Trusts:

> my interests as Plaintiff on behalf of the Family LLCs have aligned with Shahriar's as trustee and we share the common legal interest in this litigation arising out of the Trusts' membership interests in the Family LLCs. Specifically, to obtain a judgment directing the Harounian Defendants to repay to the Family LLCs the millions of dollars that Mark

> has looted in order to preserve and prevent any waste of the Family LLCs' assets for the benefit of all members.

Mehrnaz Aff. at ¶ 7. Both Shahriar and Mehrnaz asserted in their respective affidavits that they believed their communications between each other and their shared counsel would remain confidential. Shahriar Aff. at ¶ 17; Mehrnaz Aff. at ¶ 8.

Shahriar stated that Defendants' argument that he cannot assert the common interest privilege "because the Trusts never officially joined Plaintiff[] [Mehrnaz's] derivative action is a red herring because non-parties can assert the common-interest privilege provided the documents 'concern pending or reasonably anticipated litigation.'" *Id*. at p. 17 (quoting *Ambac Assur. Corp.*, 27 N.Y.3d at 627).

Shahriar argued that documents that he prepared, as a non-lawyer, are privileged trial preparation materials, and documents that he reviewed are privileged under the work product doctrine. *Id*. at p. 21. Shahriar contended that, as trustee, he has no legal obligation to share legal advice or documents concerning the estate with the beneficiaries of the Trusts; so, his "review or creation" of the documents which are noted in the Privilege Log "cannot waive privilege." *Id*. at p. 23. Shahriar relied on CPLR § 4503(a)(2), and case law post-dating its 2002 enactment, which, according to him, provides that "'the existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself continue or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney' and the fiduciary." *Id*. at 22.

vi. Defendants' Reply in Support of the Second Motion to Compel

On March 19, 2021, Defendants filed a reply in further support of the Second Motion to Compel ("Reply"). Defendants contended that Shahriar's claim (namely, that Shahriar did not set forth the privileges listed in the Privilege Log when opposing the First Motion to Compel

because he "thought the Harounian Defendants had accepted that all of his withheld documents are privileged under other theories") lacks credibility because that would mean Defendants "decided to litigate the issue of spousal/agency privilege as an academic matter (apparently to find out whether that assertion in particular applied)." Reply, Memorandum of Law at p. 1.

Defendants maintained that while Shahriar included "vague, boilerplate privilege assertions" in his Responses and Objections, the meet and confer conferences took place thereafter so that Defendants "could understand Shahriar's actual arguments" and, not once, until losing his agency privilege argument, did Shahriar ever "describe himself as possessing his own common interest, work product or trial preparation privileges in his direct capacity as a trustee." *Id*. at pp. 5-6. Defendants contend that Shahriar's trustee status argument was "concocted after the-fact" and his attempt to relitigate his ability to withhold documents based on grounds "not previously explained" and "held in reserve" "makes for poor policy." *Id*. at p. 7.

In any event, Defendants maintained that it is not a mere "red herring" that Shahriar is not a litigant or anticipated co-litigant who requires cooperation to "mount a common claim or defense." *Id*. at p. 8 (quoting *Ambac Assur. Corp.*, 27 N.Y.3d at 628). Defendants rejected any alleged common claim or defense between Mehrnaz, Jacob, and the Trusts, pointing out that "[t]hese litigations have been proceeding for over five years without the Trusts" and Shahriar has admitted that "the Trusts have been neutral non-parties to the United Hay's action against Jacob for having converted $5 million, even though the Trusts are members of United Hay, LLC." *Id*. at p. 9 (citing Opposition, Memorandum of Law at p. 17, fn. 12). Defendants asserted that while parties may be able to maintain a common interest privilege on a "limited basis" where they are aligned in the underlying lawsuit but adverse on an unrelated matter, they cannot maintain the privilege where they are adverse to one another in the underlying lawsuit, as Shahriar (as trustee), Mehrnaz, and Jacob are here. *Id*. at pp. 9-10.

Defendants contended that Shahriar cannot withhold documents based on the work product doctrine or trial preparation privilege and Shahriar "deliberately" misquotes and mischaracterizes CPLR § 4503(a)(2) to assert otherwise. According to Defendants, a fiduciary must disclose legal communications to the beneficiaries on whose behalf the fiduciary is acting and, therefore, Mehrnaz's and Jacob's counsel could not have had any reasonable expectation that documents or communications shared with Shahriar, as trustee, would remain confidential. *Id*. at p. 11. Defendants alleged that Shahriar mischaracterized CPLR § 4503(a)(2) to "make it sound like Rule 4503(a)(2) shields communications between an attorney and a personal representative who is the mere 'fiduciary' for others" when, in actuality, the rule "expressly requires the personal representative to be 'the client.'" *Id*. According to Defendants, Shahriar's position that he "acts on behalf of the Trusts" when conferring with Mehrnaz's and Jacob's counsel and not on behalf of himself, as the client, renders CPLR § 4503(a)(2) inapplicable. *Id*. at p. 12.

II. LEGAL ANALYSIS AND DECISION

A party preserves objections to a demand for the disclosure of documents by setting forth the legal basis for withholding documents in written responses along with an accompanying privilege log. *See* CPLR 3122(a)(1) (providing that within 20 days of being served with a discovery device, the recipient "shall serve a response which shall state with reasonable particularity the reasons for each objection"); *Theroux v. Resnicow*, 70 Misc. 3d 1201(A) (Sup. Ct. N.Y. Cnty. 2020) ("defendants must produce a proper privilege log for all emails that they claim to be privileged, so that any disagreement about whether particular emails qualify for the attorney-client or spousal privilege can be resolved on a proper record"). *See also Universal Standard Inc. v. Target Corp.*, 331 F.R.D. 80, 85 (S.D.N.Y. 2019) (applying Local Rule 26.2 and

noting that "[w]ithholding privileged materials without including the material in a privilege log 'may be viewed as a waiver of the privilege or protection'").

In this case, however, after Shahriar served his written Responses and Objections to the Subpoena and after Shahriar and Defendants met and conferred with and without the Special Referee regarding these written Responses and Objections, the parties specifically agreed to proceed to motion practice concerning Shahriar's alleged non-compliance with the Subpoena notwithstanding the fact that Shahriar had yet to produce a privilege log. The parties agreed that the dispute was ripe for adjudication without the production of a privilege log, because Shahriar was withholding all documents involving him based on an assertion of privilege and Defendants were contesting that blanket assertion. In light of this procedural history, Shahriar's production of the Privilege Log after the Special Referee's decision on the First Motion to Compel is not determinative of whether Shahriar has preserved the privileges therein.

The issue before the Special Referee then, is whether Shahriar preserved privileges set forth in the Responses and Objections in June 2019, claimed to have been discussed in two meet and confer conferences held in July 2019 and in April 2020, and referenced in a letter to the Court in September 2019, such that he can assert them now, subsequent to the adjudication of the First Motion to Compel. The Special Referee finds, based on the record, Shahriar waived those privileges set forth in the Privilege Log by failing to assert them in the Opposition to Defendants' First Motion to Compel.

In the Special Referee's view, an initial, timely assertion of privilege in response to a discovery demand does not and cannot preserve that privilege indefinitely, particularly when motions to compel are made during the litigation. Meet and confer conferences, motions to compel, and motions for protective orders are all procedural mechanisms that may be utilized to narrow issues or bring material disputes to the forefront for resolution. Accordingly, a party

risks waiving an objection to a discovery device by failing to assert (or re-assert) it in connection with a motion specifically concerning that device. *See Royal Indem. Co. v. Salomon Smith Barney, Inc.*, 4 Misc. 3d 1006(A) (Sup. Ct. N.Y. Cnty. 2004) (finding that even though defendants asserted attorney-client privilege and work product "in their boilerplate responses to plaintiffs' demands to discover settlement-related documents," they "abandoned those objections in, inter alia, their opposition to Royal's motion for sanctions where they refused to produce the requested discovery solely on the ground of settlement-discussion confidentiality"); *Francis v. United States*, No. 09-Civ-4004, 2011 WL 2224509, at *4, fn. 3 (S.D.N.Y. May 31, 2011) ("In its opposition to the plaintiffs' motion to compel, the defendant has not addressed the common interest privilege, which it asserts, in its privilege log, as a basis for withholding the quality assurance documents from disclosure. Thus, the Court deems this asserted privilege to be waived."); *Sovereign Partners Ltd. P'ship v. Rest. Teams Int'l, Inc.*, No. 99-Civ-0564, 1999 WL 993678, at *3 (S.D.N.Y. Nov. 2, 1999) (Subpoenaed non-party "initially objected to the subpoenas at issue on grounds of both privilege and relevance. In its response to the motion to compel, however, it has abandoned any claim of privilege"); *In re In-Store Advert. Sec. Litig.*, 163 F.R.D. 452, 458–59 (S.D.N.Y. 1995) ("Though the Director Defendants asserted attorney-client privilege as to each of the 43 documents listed in its privilege log, they did not claim the privilege in their opposition to plaintiffs' motion to compel. The Court therefore finds that this claim has been waived.").

In this instance, such waiver of privilege makes sense. A party cannot oppose a motion to compel without "putting all of its cards on the table," namely, asserting each and every privilege which would preclude production of responsive documents, without the consequence of waiver. This would lead to piecemeal litigation leaving issues unresolved and prolonging the litigation.

Here, on May 19, 2020, *after* having at least two meet and confer conferences and *after* providing letter submissions to the Court, counsel for Defendants and counsel for Shahriar conferenced with the Special Referee regarding Shahriar's response to the Subpoena. Counsel unanimously agreed that: (1) Shahriar had taken the position that all communications involving him were *per se* privileged and would not be produced; (2) in light of this absolute position, no privilege log was necessary to adjudicate the propriety or impropriety of Shahriar's non-disclosure; and (3) a motion to compel was both timely and appropriate to resolve this non-disclosure. While Shahriar asserted boilerplate objections to the Subpoena based on the "common interest privilege, attorney work product doctrine and as trial preparation materials" in his 2019 Responses and Objections (allegedly reiterated during July 2019 and April 2020 meet and confer conferences among counsel and also reiterated in a September 2019 letter to the Court), Shahriar did not set forth any of these objections when either agreeing to the timing of the First Motion to Compel or when opposing the First Motion to Compel.

The First Motion to Compel addressed Shahriar's alleged non-compliance with the Subpoena and, at no point in connection with that motion did Shahriar ever assert, in any manner, that he was entitled to withhold responsive documents based on the common interest exception to the attorney-client privilege, work product doctrine, protection afforded to trial preparation materials, or any other privilege based on his role as trustee of the Trusts. Objections asserted in response to a subpoena cannot indefinitely preserve those objections throughout the course of the entire litigation. At some point, a party decides whether to pursue an objection or not. The record confirms that Shahriar chose the latter and did not pursue the boilerplate privileges set forth in the Responses and Objections as they were not argued in the Opposition to the First Motion to Compel.

Insofar as Shahriar maintains that he did not waive privileges set forth in the Privilege Log because Defendants "filed a motion that addressed only a separate, discrete privilege," namely, the agency exception to the attorney-client privilege, the Special Referee disagrees. Opposition, Memorandum of Law at p. 12. The First Motion to Compel was filed after counsel agreed the dispute was ripe because Shahriar intended to assert a blanket privilege to withhold all documents involving him. The First Motion to Compel further sought broad relief, namely all documents responsive to the Subpoena without the assertion of privilege, and was not limited to opposing Shahriar's assertion of the agency exception to the attorney-client privilege even though Defendants focused on this privilege. *See* First Motion to Compel, Notice of Motion (seeking "to compel Shahriar . . . to provide complete responses to the [S]ubpoena[]"); Memorandum of Law at p. 2 (asserting that Shahriar is "trying to desperately avoid such discovery through various, meritless assertions of 'privilege[]' and his "privilege assertions should be denied"), at p. 3 (alleging that Shahriar has "thus far stiff-armed . . . [his] responses . . . including making broad 'privilege' assertions."), at p. 4. ("Shahriar and Jeffrey both voluntarily involved themselves in this dispute . . . their communications and dealings are now thoroughly discoverable. Shahriar's and Jeffrey's respective privilege assertions should be denied and they should be directed to search for and produce all of their responsive documents"), at p. 12 (seeking an order directing Shahriar "to fully search for and produce all of . . . [his] documents responsive to the . . . . Subpoena[] . . . without any privilege assertions").

The Special Referee further finds Shahriar's argument, that Defendants "appeared" to have conceded the application of the common interest exception to the attorney-client privilege by only focusing on the agency exception to the attorney-client privilege in the First Motion to Compel, unpersuasive. Second Motion to Compel, Opposition, Memorandum of Law at p. 8. If Defendants had conceded that Shahriar was entitled to withhold all documents involving him

based on the common interest exception to the attorney-client privilege, they would have no reason to litigate Shahriar's right to withhold those same documents based on the agency exception to the attorney-client privilege as the entire First Motion to Compel would have been rendered academic. In the Special Referee's opinion, it is noteworthy that in Shahriar's Opposition to the First Motion to Compel, which detailed Shahriar's role before and during this litigation, Shahriar never suggests that he acted in any fiduciary or trustee capacity vis-a-vis the matters at issue.

In order to ensure the integrity of the judicial process and fairness to litigants, the Special Referee cannot condone piecemeal or seriatim litigation whereby a party raises different arguments at different times concerning the same subject matter in an attempt to get the same relief. To find otherwise would be patently unfair, unjust, and inefficient. *See*, *e.g.*, *Auto. Club of New York, Inc. v. The Port Auth. of New York & New Jersey*, No. 11-Civ-6746, 2015 WL 3404111, at *6 (S.D.N.Y. May 27, 2015) (recognizing plaintiff "may not raise its objections" to the sufficiency of a privilege log or declaration "in a piecemeal fashion"); *McNamee v. Clemens*, No. 09-Civ-1647, 2014 WL 12775660, at *13 (E.D.N.Y. Jan. 30, 2014) (declining to consider privileges identified in a privilege log but not raised in opposition to a motion to compel and finding that "Defendant's failure to address these and other objections until now smacks of piecemeal litigation strategy and suggests possible grounds for sanctions").

The Special Referee therefore finds that Shahriar waived those privileges not set forth in the Opposition to the First Motion to Compel and Shahriar cannot withhold responsive documents pursuant to the attorney-client privilege, the common interest exception to the attorney-client privilege, or protections afforded to attorney work product and materials prepared

in anticipation of litigation.[4] In light of the foregoing, the Special Referee need not reach a finding on the merits with respect to the applicability of any assertions of privilege in the Privilege Log.

III. CONCLUSION

In sum, the Special Referee finds that Shahriar waived the privileges set forth in the Privilege Log (except for his assertion of spousal privilege)[5] by failing to assert them in opposition to the First Motion to Compel. For the foregoing reason, the Special Referee grants Defendants' Second Motion to Compel and directs Shahriar to produce all of his documents responsive to the Subpoena (except as set forth in footnote 4 *infra*) without any privilege assertions.

Dated: April 28, 2021

SO ORDERED:

Michael Cardello III
MICHAEL CARDELLO III
Court-Appointed Special Referee

[4] The Privilege Log indicates that Shahriar is withholding five email communications solely between Shahriar and Mehrnaz based on the spousal exception to the attorney-client privilege (*i.e.* CHomapour_00004085, CHomapour_00004008, CHomapour_00004009, CHomapour_00004112, and CHomapour_00004157). Defendants confirmed, however, that in response to the Subpoena they "are not seeking any communications solely between Shahriar and Mehrnaz." Defendants' September 13, 2019 Letter. Accordingly, the Special Referee finds that Shahriar need not produce these non-responsive documents.

[5] *See* footnote 4 *supra*.

Exhibit 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MEHRNAZ NANCY HOMAPOUR, et al.,	:	Index No. 653795/2015
Plaintiffs,	:	**DECISION REGARDING LAWRENCE FURTZAIG'S EMAIL ACCOUNTS; CERTAIN LEASES; AND CERTAIN RPIE REPORTS AND DHCR FILINGS**
-against-	:	
MARK HAROUNIAN, et al.,	:	
Defendants.	:	
UNITED HAY, LLC,	:	Index No. 657310/2017
Plaintiff,	:	
-against-	:	
JACOB HAROUNIAN,	:	
Defendant.	:	
JACOB HAROUNIAN, et al.,	:	Index No. 450615/2019
Plaintiffs,	:	
-against-	:	
MARK HAROUNIAN, et al.,	:	
Defendants.	:	

This matter is before the undersigned, Michael Cardello III, Esq., as a result of an Order of Reference dated April 22, 2020, signed by the Honorable Joel Cohen, appointing him Special Referee pursuant to New York Civil Practice Law and Rules ("CPLR") §§ 3104 and 4301, for the purpose of assisting the Court and the parties in conducting and completing discovery in an efficient manner.

Currently before the Special Referee is plaintiff Mehrnaz Homapour's ("Plaintiff") motion for, *inter alia*,[1] an order directing defendants Mark Harounian, the Harounian LLCs,[2] and the Family LLCs[3] (collectively, the "Harounian Defendants") to (1) search and produce responsive documents in Lawrence Furtzaig's email accounts[4]; (2) produce the leases for the Family LLC's and the Harounian LLC's properties (collectively, the "Leases"); and (3) produce the Family LLC's and the Harounian LLC's Real Property Income and Expense reports ("RPIE Reports") and filings with the Division of Housing and Community Renewal ("DHCR Filings") (the "Motion").

As set forth in greater detail below, the Special Referee hereby grants, in part, and denies, in part, the relief requested by Plaintiff. Specifically, the Special Referee directs the Harounian

[1] Plaintiff's initial dispute letter dated May 4, 2020 (the "Dispute Letter") raises five distinct issues with the Special Referee. This Decision shall only address Issues 2-4 as set forth and further explained herein. Issues 1 and 5 were addressed, in their own right, in two separate decisions issued by the Special Referee dated July 14, 2020.

[2] The term "Harounian LLCs" shall refer herein to Jacob NY Holdings LLC, Jacob NY Holdings Ltd., 172 Mulberry Realty LLC, 1007 Lex Ave LLC, and 163 Chrystie Realty LLC.

[3] The term "Family LLCs" shall refer herein to 3M Properties, LLC, Balance Property, LLC, JAM Realty NYC LLC f/k/a JAM Realty Co., United Chelsea, LLC, United East, LLC, United Fifth, LLC, United Flatiron LLC, United Greenwich, LLC, United Hay, LLC, United Nationwide Realty LLC f/k/a United Nationwide Realty, United Prime Broadway, LLC, United Prime LLC, United Seed LLC, United Square LLC, United Village, LLC, and United West, LLC.

[4] In the Dispute Letter and the Motion (defined later in this decision), Plaintiff often refers broadly to the disclosure of Mr. Furtzaig's email accounts, without distinguishing between Mr. Furtzaig's personal and work email accounts or clearly defining the email accounts at issue. *See* Dispute Letter ("Furtzaig's e-mail accounts"); Moving Memo (defined later in this decision) at pp. 1, 2, 12, 13 ("Furtzaig's email accounts"); p. 6 ("his email accounts"); and p. 7 ("Furtzaig's email"). However, in several instances, Plaintiff specifically identifies Mr. Furtzaig's Landmark Resources, LLC email address, Larry@landmark-nyc.com, and/or Mr. Furtzaig's Location3, LLC email address, Larry@location3ny.com. *See* Dispute Letter at footnote 4 (referring solely to a Landmark Resources, LLC email address); Moving Memo at p. 8 ("Furtzaig uses a Landmark Resources, LLC . . . email address and a Location3, LLC . . . email address to conduct Family LLC and Harounian LLC business"). At the end of Plaintiff's Moving Memo, Plaintiff states that "the Harounian Defendants must search for and produce responsive documents from [Mr.] Furtzaig's email accounts, including, but not limited to his Landmark and Location3 accounts . . . ." Moving Memo at p. 14. Based on this statement, and the arguments set forth in the briefing provided, the Special Referee has determined that the relief requested by Plaintiff regarding Mr. Furtzaig's email accounts extends to all his non-personal email accounts. For purposes of this decision, a non-personal email account shall include any email account used by Mr. Furtzaig to transmit a work-related communication and was established, configured, and/or hosted by or on behalf of the Harounian Defendants, or any one of them (including any account that was established using a third-party service provider), for Mr. Furtzaig's use. These non-personal email accounts include, but are not limited to, Larry@landmark-nyc.com and Larry@location3ny.com.

Defendants to search and produce responsive documents contained within Mr. Furtzaig's non-personal email accounts (as defined in Footnote 4 *supra*), including, but not limited to, Larry@landmark-nyc.com and Larry@location3ny.com, from November 17, 2009 to present[5]; to produce the leases for the Family LLCs' properties from November 17, 2009 to present, but not for the Harounian LLCs' properties; and to produce the Family LLCs' and the Harounian LLC's RPIE Reports and DHCR Filings from November 17, 2009 to present, within thirty (30) days of the date of this decision.

I. PROCEDURAL BACKGROUND

A. Plaintiff's Dispute Letter

Through the Dispute Letter, Plaintiff sought three categories of documents: (1) responsive documents contained in Mr. Furtzaig's email accounts; (2) Leases; and (3) RPIE Reports and DHCR Filings. Dispute Letter at p. 1. Plaintiff argued that the Harounian Defendants are obligated to search and produce responsive documents in Mr. Furtzaig's email accounts because Mr. Furtzaig is Mark Harounian's "right-hand man"; Mr. Furtzaig is on the payroll, receives health benefits, and receives a "Christmas Bonus" from the Family LLCs; and Mr. Furtzaig uses a Landmark Resources, LLC ("Landmark") email address which "Mark [Harounian] indisputably owns and controls". *Id*. at p. 2 and footnote 4. In addition, Plaintiff contended that the Leases should be produced as they are "plainly relevant and necessary" to confirm the Family LLCs' rent collections (including cash payments) and verify the accuracy of accounting records. *Id.* at p. 3. Moreover, Plaintiff asserted that RPIE Reports and DHCR Filings are discoverable because they "identify work that was purportedly performed on any

[5] Given that the Complaint in *Homapour* v. *Harounian*, et al. (Index Number 653795/2015), was filed on November 17, 2015, and the Honorable Joel M. Cohen stated at a hearing held on September 9, 2019 that "I'm going to permit production for the full six year pre-complaint period . . . So, it will go back the full, back to 2009," the relevant time period for the disclosure permitted in this decision shall be November 17, 2009 to present. Transcript of September 9, 2019 Hearing at 88:7-12.

given apartment units, including to take it out of rent stabilization, and identify the party who paid for such improvements." *Id.*

B. The Harounian Defendants' Response Letter

In response to the Dispute Letter, by correspondence dated May 11, 2020 (the "Response Letter"), the Harounian Defendants asserted that Mr. Furtzaig is an independent contractor and not an employee of the Family LLCs, and therefore, they do not have control over his email accounts. Response Letter at p. 2. Furthermore, the Harounian Defendants characterized the request for copies of the Leases "as duplicative, wholly speculative, and an unduly burdensome witch hunt", pointing out that Plaintiff can review previously produced records to track rental payments made to the Family LLCs. *Id.* In addition, the Harounian Defendants argued that the request for RPIE Reports and DHCR Filings should be denied because Plaintiff did not request them in any prior document demand, renovation-related information is not reflected in RPIE Reports, and Plaintiff failed to provide "any justification for putting Defendants to the undue burden of having to search for and produce all filings by more than 20 companies over 10 years". *Id*. at p. 3.

C. The May 19th Conference Call

On May 19, 2020, the Special Referee held a conference call with the parties concerning the arguments set forth in the Dispute Letter and Response Letter (the "May 19th Conference Call").

During the May 19th Conference Call, counsel for Plaintiff asserted that Plaintiff should not have to enforce the subpoena *duces tecum* served upon Mr. Furtzaig,[6] a non-party, because it

[6] On or around October 3, 2019, Plaintiff served a subpoena *duces tecum* on Mr. Furtzaig (the "Furtzaig Subpoena") and on Location3 (the "Location3 Subpoena"). By letter dated October 11, 2019, the Harounian Defendants' counsel sought a pre-motion conference to address the breadth of the Furtzaig Subpoena (among other subpoenas). By letter dated October 25, 2019, Plaintiff's counsel responded that the contested subpoenas are proper because they

is entitled to receive Mr. Furtzaig's emails directly from the Harounian Defendants, a point on which counsel for the Harounian Defendants disagreed. Counsel for Plaintiff argued that Mark Harounian has control over Mr. Furtzaig's email accounts as the managing member of the Family LLCs, Landmark, and Location3, LLC ("Location3"), and is therefore, obligated to search and produce responsive emails therein.

Counsel for Plaintiff argued that the Leases will confirm the actual rents charged and security deposits collected which are necessary because the books and records are unreliable. Counsel for Plaintiff further argued that the Harounian LLCs' leases, in particular, are relevant to Plaintiff's cause of action for a constructive trust and to get a complete picture of how much money Mark Harounian and the Harounian LLCs diverted from the Family LLCs. Counsel for the Harounian Defendants responded that locating, scanning, and copying the Leases would be an "enormous burden", that Plaintiff's concern about undisclosed cash payments is misplaced given that the Harounian Defendants recorded cash payments on their books and records, and that the Harounian LLC's leases have nothing to do with the claims asserted in these actions.

Counsel for Plaintiff asserted that they sought RPIE Reports and DHCR Filings through their broad request for all books, records, and documents concerning the Family LLCs and the

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"were issued to Mark [Harounian]'s employees, agents or associates that helped Mark [Harounian] carry out his misappropriation of assets, received stolen funds and/or have documents concerning the same." By letter dated October 28, 2019, counsel for Mr. Furtzaig and Location3 wrote to Judge Cohen agreeing with the Harounian Defendants' counsel that the Furtzaig Subpoena and Location3 Subpoena are overbroad. By letter dated May 11, 2020, counsel for Mr. Furtzaig and Location3 sent a similar letter to the Special Referee. Between May and July 2020, counsel for Mr. Furtzaig and Location3 informed the Special Referee that the parties engaged in "meet and confers" and the Harounian Defendants agreed to produce certain Location3 records. Plaintiff's counsel confirmed, by email dated July 31, 2020, that "there are currently no issues regarding the subpoenas to Mr. Furtzaig and Location3."

Nevertheless, Plaintiff stated in its Reply Memorandum of Law, discussed further below, that "Plaintiff served a subpoenas [sic] on [Mr.] Furtzaig and Location3 in 2019, out of an abundance of caution, before any documents had been exchanged between the parties. After discovery revealed [Mr.] Furtzaig's relationship with the Harounian Defendants, that Mark [Harounian] owns and controls Location3, and that the Harounian Defendants have the ability to obtain discovery from [Mr.] Furtzaig and Location3, Plaintiff agreed to hold the subpoenas in abeyance until the end of a meet and confer process with the Harounian Defendants concerning the production of these documents." Reply Memo of Law at p.7, footnote 3.

Harounian LLCs, including payments, transfers, and expenses. Counsel for Plaintiff argued that RPIE Reports identify expenses for repairs, maintenance, lease buyouts, and management fees while DHCR Filings identify all of the renovation expenses incurred (and paid for with the Family LLCs' money) to take apartments out of rent stabilization. Counsel for the Harounian Defendant responded that RPIE Reports do not include the sought-after renovation information and the Harounian Defendants already produced voluminous records regarding renovation work, including bank statements, cancelled checks, and detailed invoices.

Following the May 19th Conference Call, the Special Referee directed the parties to submit formal briefing concerning the above-identified disputes.

D. Plaintiff's Motion

In conformity with the Special Referee's directive, on June 9, 2020, Plaintiff filed the Motion, comprised of an Affirmation by Glen Lenihan, Esq. dated June 9, 2020 ("Lenihan Moving Affirmation") and a Memorandum of Law dated June 9, 2020 ("Moving Memo").

In the Motion, Plaintiff advocated for the disclosure sought in the Dispute Letter. Plaintiff asserted that, based on CPLR §3101(a)(1), which requires a party to disclose material and necessary documents held by "a party or . . . employee of a party", and CPLR §3111, which requires a party to disclose documents in its "control", the Harounian Defendants must search for and produce responsive documents in Mr. Furtzaig's Landmark and Location3 email accounts. Moving Memo at p. 8. *See* footnote 4 *supra*. According to Plaintiff, "it is indisputable that [Lawrence] Furtzaig's email accounts contain documents that will provide evidence of Mark[] [Harounian's] misappropriations and breaches, aid Plaintiff in deciphering Mark [Harounian's] fraudulent booking entries that were designed to mask his looting, and also likely to lead to the discovery of other admissible documents." *Id.* at p. 13.

Plaintiff argued that it is "beyond dispute that [Lawrence] Furtzaig is an employee of the Harounian Defendants" because he "is on the Family LLCs [sic] payroll and they provide him a 'Christmas Bonus,' health insurance and office supplies". *Id.* at p. 13. To substantiate the foregoing, Plaintiff annexed to its Motion a United Healthcare Invoice Summary and Invoice Details; a copy of a check issued by United West, LLC (a Family LLC) to "Larry Furtzaig" for a "Christmas Bonus"; handwritten notes titled "Payroll" referencing "Larry", "Location3", and "$4,500.00"; handwritten notes titled "Larry Offer" referencing a salary, insurance, an office, and certain expenses; Invoice #1-8-151 issued by Location3 to "LMR" for, among other things, "Larry Computer" (and referring, at the bottom, to "Landmark Resources LLC dba Location3"); and copies of checks issued by United Chelsea LLC, United Hay LLC, and United East LLC (all of which are Family LLCs) to Location3 for Invoice #1-8-151. *Id*. at Exhibit B. *See* Point II(A) *infra* discussing the relationship between the Harounian Defendants and Location3/Landmark.

Plaintiff contended that even if Mr. Furtzaig is not deemed an employee of the Harounian Defendants, "he is certainly their agent" within their control. Moving Memo at p. 14. Plaintiff stated that Mr. Furtzaig is "intricately involved in the day-to-day management of the various LLCs, holds himself out as their employee, and is an authorized signatory for the Family LLCs". *Id*. To demonstrate as much, Plaintiff produced an email from Mr. Furtzaig, using his Landmark email address (and including a signature block referring to "United Chelsea LLC Landmark Resources LLC") to a non-party, stating that Mark Harounian referred the non-party's concern to him; and an email thread wherein Mark Harounian provided Mr. Furtzaig with a directive in connection with a check issued by United Flatiron LLC (a Family LLC). *Id.* at Exhibit B – FAMILY00161947 & FAMILY00019421.

Furthermore, as set forth in the Motion, Plaintiff argued that the Leases are "material and necessary to Plaintiff's claims for breach of fiduciary duty, waste, unjust enrichment and constructive trust" and must be produced to "allow Plaintiff to follow the trail of money from collected rents into and out of the Family LLCs and confirm the electronic journal entries." *Id*. at p. 15. Plaintiff argued that it is entitled to the Leases to confirm "fraudulent booking entries" as well as "examine and impeach Mark [Harounian] . . . concerning the glaring discrepancies between his books and records and the underlying source documents (e.g. the [L]eases)." *Id.*

Moreover, Plaintiff contended that RPIE Reports must be disclosed because they "segregate and identify expenses incurred for each property", including management fees and repairs, and therefore are directly relevant to contest Mark Harounian's defense that "misappropriated" money was, in fact, reasonable compensation for his management of the Family LLCs. *Id.* at p. 16. Plaintiff asserted that DHCR Filings must be disclosed as well because they identify apartment renovations, and therefore, can be used to show that Mark Harounian renovated the Harounian LLC's properties using the Family LLCs' money. *Id.*

E. The Harounian Defendants' Opposition

On June 26, 2020, the Harounian Defendants filed opposition to the Motion (the "Opposition"), comprised of an Affirmation by William Charron, Esq. dated June 26, 2020 ("Charron Affirmation"), an Affidavit by Mark Harounian sworn to on June 26, 2020 (the "Harounian Affidavit"), and a Memorandum of Law dated June 26, 2020 ("Opposition Memo").

In their Opposition, the Harounian Defendants asserted that the requested relief must be denied with respect to Mr. Furtzaig's email accounts because they do not have "password access to, or control over" them and Mr. Furtzaig has never given Mark Harounian "permission to access his emails." Opposition Memo at pp. 3-4; Harounian Affidavit at ¶ 2. The Harounian

Defendants also argued that while Mr. Furtzaig helps manage the Family LLCs' and the Harounian LLCs' properties, he is an independent contractor (as confirmed by a Form 1099 issued by United West LLC for the 2015 tax year), "not an employee of Defendants or the type of 'agent' discussed in the cited cases (e.g. attorneys, persons required by contract to turn over records, and so forth)", and "has his own office, offsite from the Family LLCs' central office." Opposition Memo at pp. 3, 6; Harounian Affidavit at ¶ 3 and Exhibit 1.

In addition, the Harounian Defendants argued that Plaintiff is not entitled to the Leases because, *inter alia*: (1) "no document demand comprehends the Harounian LLCs' leases" (Opposition Memo at p. 7); (2) they are neither material nor necessary because the action "concerns money coming into *the Family LLCs* . . . not money coming into *the Harounian LLCs*" (*Id.*, emphasis in original); (3) production would be unduly burdensome given that there are approximately 4,400 Leases from November 2009 to present, pre-2018 Leases are not digitized, and the Leases are "primarily maintained offsite rather than in the Family LLCs' central office" (*Id.* at pp. 4, 7; Harounian Affidavit at ¶ 4); (4) the Leases are "duplicative and cumulative" of documents previously (or currently being) produced, namely, Yardi files, rent rolls, rent sheets, QuickBooks files, and bank statements (Opposition Memo at pp. 7-8; Harounian Affidavit at ¶ 5); and (5) Plaintiff has no basis to believe that rents should have been, but were not, collected (Opposition Memo at pp. 8-9).

The Harounian Defendants opposed disclosure of RPIE Reports and DHCR Filings as cumulative and burdensome, as well as because Plaintiff "did not demand production of such filings in her document requests." Opposition Memo at pp. 9-10. According to the Harounian Defendants, the Division of Housing and Community Renewal (the "DHCR") oversees New York State's low/moderate income housing and requires property owners to complete over thirty

(30) forms, six (6) of which "are apparently obtainable . . . through an online DHCR portal, with the remaining filings obtainable by request to the DHCR for certified copies." Opposition Memo at p. 5; Harounian Affidavit at ¶ 9. The Harounian Defendants asserted that they "did not consistently digitize these kind of filings" and while they "may" have copies of some of these forms offsite, "it would be unduly burdensome . . . to search those files". *Id*. The Harounian Defendants further asserted that "[c]ourts do not compel parties to obtain documents from third parties or agencies to comply with adversarial document demands." Opposition Memo at p. 10. According to the Harounian Defendants, they should not have to retrieve and disclose RPIE Reports which include "property-level income and expense information" filed with the New York City Department of Finance because "the same information . . . has already been produced . . . through the companies' books and records". Opposition Memo at p. 6; Harounian Affidavit at ¶ 10.

F. Plaintiff's Reply

On July 10, 2020, Plaintiff filed a reply in further support of the Motion (the "Reply"), comprised of an Affirmation by Glen Lenihan, Esq. dated July 10, 2020 ("Lenihan Reply Affirmation") and a Memorandum of Law dated July 10, 2020 ("Reply Memo").

In the Reply, Plaintiff asserted that substantial documentary evidence confirms Mr. Furtzaig is an employee or, at minimum, an agent of the Harounian Defendants, and the one 2015 Form 1099 cited in the Opposition does not establish otherwise, especially because (1) "there are many circumstances where an *employer* is required to provide its *employee* with a Form 1099" and (2) the Form 1099, issued by United West LLC (a Family LLC), does not discount the significance of the fact that United Hay LLC (another Family LLC) pays Mr. Furtzaig's salary and United Nationwide Realty LLC (yet another Family LLC) pays Mr.

Furtzaig's health insurance. Reply Memo at pp. 1, 4 (citing Lenihan Moving Affirmation at Exhibit B – FAMILY015317 and FAMILY0272208) (emphasis in original).

Plaintiff noted that the Harounian Defendants' claim that Mr. Furtzaig does not have an office in the Family's LLCs' central location is not only irrelevant but misleading. Plaintiff pointed out that even though Mr. Furtzaig identifies his work address as 235 East 50th Street, New York, New York (Lenihan Moving Affirmation at Exhibit B) – the location of Landmark's "leasing office", Landmark's website indicates that the location of its "management office" is at 224 Fifth Avenue, 5th Floor, New York, New York (Lenihan Reply Affirmation at Exhibit M) – the same location as the Family LLCs' central office.[7] Reply Memo at pp. 4-5. Moreover, Plaintiff rejected the Harounian Defendants' argument that Mr. Furtzaig is "not the 'type' of agent from whom the Harounian Defendants are obligated to produce documents" and noted that "the CPLR does not distinguish between 'types of agents' when requiring a disclosure of material and necessary documents from a party or a party's agent." *Id.* at p. 6.

Plaintiff also argued that the Harounian Defendants' claim that they cannot access Mr. Furtzaig's email is "not only entirely unsupported, but literally incredible" because "Mark [Harounian], through his company, Nature's Loom[,] and his ownership and control over Location3 and Landmark, owns the servers and domain space that host Furtzaig's emails, which hosting services are paid for by the Family LLCs". *Id*. at pp. 2, 6. To demonstrate, Plaintiff produced three documents. First, Plaintiff produced a printout from Location3's website, http:///location3ny.com, which identifies a company by the name of Nature's Loom and states, in

[7] Plaintiff cites a number of documents to demonstrate that the Family LLCs' main office location is located at 224 Fifth Avenue, 5th Floor, New York, New York. *See* Lenihan Reply Affirmation at Exhibit N which includes: (i) a New York Community Bank statement addressed to United Village LLC (a Family LLC), Attention Mark Harounian at 224 Fifth Avenue; (ii) an email from "Mark's office <office@landmark-nyc.com>" bearing a signature block that states "Office of Mark Harounian 224 Fifth Avenue . . ."; and (iii) a New York Department of State, Division of Corporations record indicating United Hay, LLC (a Family LLC) is registered to accept service of process at 224 Fifth Avenue.

relevant part, "Webserver at gdmig-naturesloom.com". Lenihan Reply Affirmation at Exhibit O. Second, Plaintiff produced a printout from Nature's Loom's website referring to "Mark Harounian president and CEO". *Id.* Third, Plaintiff produced an invoice for $9,009.62 from Location3 to "LMR" for a number of expenses including "email domain", and including four rows of handwritten notes on the top right: "UH – $3,003.22✓", "UC - $3,003.20", "UE – $3,003.20✓", and "$9,009.62". Lenihan Moving Affirmation at Exhibit B – FAMILY00154361-62. *See also Id.* at Exhibit B – FAMILY00154363 (copies of checks from United Hay, United Chelsea and United East, all Family LLCs, to Location3, each in the amount of $3,003.20). Plaintiff asserted that "Mark [Harounian] fails to explain why, as the owner of the companies that own, host and use the domain names of Furtzaig's email accounts (i.e. Larry@landmark-nyc.com and Larry@location3ny.com), he does not have administrative access to search these accounts". Reply Memo at p. 7. Plaintiff pointed out that the Harounian Defendants' inability to access these accounts is further belied by the fact that they accessed the work email account held by Landmark's employee, Nerissa Espiritu, in connection with their discovery obligations in this action. *Id*. Plaintiff further noted that "Mark [Harounian] reveals by omission that the Harounian Defendants have not even asked [Mr.] Furtzaig for access and that [Mr.] Furtzaig has not declined to provide access." *Id.*

Plaintiff maintained that the "[t]he leases, RPIE reports, and DHCR filings all provide relevant information that will enable Plaintiff to decipher what is true and false in [the [previously produced] books and records." *Id.* at p. 9. With respect to the Leases, in particular, Plaintiff reiterated that it is not required to rely upon "falsifiable electronic records, *i.e.* the Yardi files and rent roles, instead of the underlying documents on which the manually inputted electronic entries should be based" and it would not be unduly burdensome for the Harounian

Defendants to produce the Leases because "Mark [Harounian] admits that all of the non-digitized leases are stored together in an off-site facility." *Id.* at p. 10.

With respect to RPIE Reports and DHCR Filings, Plaintiff again stated that these documents are "directly related to Plaintiff's claims against Mark [Harounian] and the Harounian LLCs for unjust enrichment and for a constructive trust over their assets". *Id.* at p. 12. Plaintiff contended that the Harounian Defendants "do not claim to not be in possession of the RPIE reports" and admit they can access DHCR Filings via an online portal. *Id.* Plaintiff asserted that if "the Harounian Defendants claim that they somehow cannot access and produce these documents, the Special [Referee] should direct them to provide a detailed affidavit setting forth their good faith search efforts" and "order the Harounian Defendants to execute the appropriate authorizations to allow Plaintiff to directly obtain these documents." *Id*. at pp. 12-13.

As to whether the Leases come within the purview of any specific document demand, Plaintiff argued that its "constructive trust claim had not yet been reinstated when Plaintiff served its First Notice for Discovery and Inspection and believed the Harounian Defendants understood the [Leases] were requested given the extensive meet and confers, and initial dispute letters . . ." but that it "[i]f deemed necessary, Plaintiff [would] serve a supplemental demand specifically requesting the Harounian LLCs' leases." Reply Memo at footnote 4. As to whether RPIE Reports and DHCR Filings come within the purview of any specific document demand, Plaintiff represented that it could "also serve a supplemental demand for the RPIE and DHCR filings, although the parties have similarly met and conferred, and submitted initial dispute letters . . . and Plaintiff believes the documents are responsive to Plaintiff's existing demands, including Requests Nos. 10, 60-62, and 87." *Id*.

II. ANALYSIS AND DETERMINATION

The Special Referee finds that the Harounian Defendants must search and produce responsive documents contained in Mr. Furtzaig's non-personal email accounts, including but not limited to Larry@landmark-nyc.com and Larry@location3ny.com (*see* footnote 4 *supra*); produce the leases for the Family LLCs' properties but not the leases for the Harounian LLCs' properties; and produce the Family LLCs' and the Harounian LLCs' RPIE Reports and DHCR Filings, all of which are subject to the applicable time period of November 17, 2009 to present (*see* Footnote 5 *supra*).

CPLR §3101(a) 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, by: (1) a party, or the officer, director, member, agent or employee of a party". N.Y.C.P.L.R. 3101(a) (Cons. 2019). CPLR §3120 further provides that "any party may serve on any other party a notice . . . (i) to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party. . . ." N.Y.C.P.L.R. 3120 (Cons. 2019).

In the context of document disclosure, "possession, custody or control" includes "constructive possession" and therefore requires production where the party has "the practical ability to request from, or influence, another party with the desired discovery documents." *Commonwealth of Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 62-63 (2013). *See Richard v. Kerwin*, 50 N.Y.S.3d 28 (Sup. Ct. Monroe Cnty. 2016) (discussing the breadth of CPLR §3120 and relying on its federal corollary, Rule 34 of the Federal Rules of Procedure ("Rule 34")); *Bank of N.Y. v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135 (S.D.N.Y. 1997) (discussing the meaning of the phrase "possession, custody or

control" under Rule 34 and recognizing that "'control' does not require that the party have legal ownership or actual physical possession of the documents at issue, rather documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action").

A. Mr. Furtzaig's Non-Personal Email Accounts

In the Special Referee's view, emails sent and received via Mr. Furtzaig's non-personal email accounts are material and necessary to the prosecution of the action given that Mr. Furtzaig assists in the management of the Family LLCs' and the Harounian LLCs' properties, which are at issue in this litigation. The Harounian Defendants do not raise the issue of relevance of Mr. Furtzaig's non-personal emails but assert that they are, nevertheless, not subject to disclosure because Mr. Furtzaig is an independent contractor. Opposition Memo at pp. 3, 6. Specifically, the Harounian Defendants claim that Mr. Furtzaig is "not an employee . . . or the type of 'agent' discussed in the cited cases (e.g. attorneys, persons required by contract to turn over records, and so forth)" and they "have no control over [Mr.] Furtzaig's e-mails". *Id*. In an attempt to support their argument, the Harounian Defendants produce one Form 1099 issued by United West LLC (a Family LLC) to Mr. Furtzaig for the 2015 tax year. Opposition Memo at Exhibit 1. In support of that same argument, the Harounian Defendants claim that Mr. Furtzaig does not maintain an office in the Family LLCs' main location. Harounian Affidavit at ¶ 3.

The Special Referee finds the Harounian Defendants' arguments unconvincing. In the Special Referee's view, Plaintiff has met its burden to show that Mr. Furtzaig is, at a minimum, an agent of the Harounian Defendants, as set forth in CPLR §3101, and the Harounian Defendants have possession, custody, or control over Mr. Furtzaig's non-personal email accounts, as set forth in CPLR §3120.

Documentary evidence submitted to the Special Referee, coupled with the parties' acknowledgment that Mr. Furtzaig assists in the management of the Family LLCs' and the Harounian LLCs' properties, suggests that Mr. Furtzaig is, at a minimum, an agent of one or more of the Harounian Defendants. This documentary evidence includes: (1) a UnitedHealthcare Oxford Invoice Summary issued to United Nationwide Realty (a Family LLC) and identifying Mr. Furtzaig as a beneficiary under the enumerated policy (Lenihan Moving Affirmation at Exhibit B – FAMILY00272206-8); (2) a check from United West, LLC (a Family LLC) to Mr. Furtzaig for a "Christmas Bonus" (*Id*. at FAMILY0002206); (3) a Valley National Bank document identifying Mr. Furtzaig as an "Authorized Signer" of United Seed LLC (a Family LLC; *Id*. at VNB_018386); (4) a handwritten note titled "Larry Offer" and providing a number of terms including "salary minimum $4500 mo plus insurance" and "Larry gets office" (*Id*. at FAMILY00260455); (5) a handwritten note titled "PAYROLL – MAY" and referring to "LARRY – LOCATION3 – $4,500.00 (UH) [arguably referring to United Hay, a Family LLC]" (*Id.* at FAMILY00015317); and (6) an email whereby Mr. Furtzaig responds to a tenant inquiry after it was "referred" to him by Mark Harounian (*Id.* at FAMILY00161947).[8]

[8] The Special Referee notes that by email dated August 4, 2020, Plaintiff's counsel forwarded the Harounian Defendants' Responses and Objections to Plaintiff's Third Set of Interrogatories dated August 3, 2020. Plaintiff's counsel pointed out that in Exhibit A thereto, the Harounian Defendants noted that Mr. Furtzaig and Mark Harounian are the "current signatories" of bank accounts held by the following entities (each of which, except for Landmark and Location3, are Family LLCs): (1) United Seed LLC; (2) United Flatiron LLC; (3) United Square LLC; (4) United Nationwide Realty LLC; (5) United Hay LLC ; (6) United Chelsea LLC; (7) United West LLC; (8) United East LLC; (9) 3M Properties LLC; (10) United Village LLC; (11) Balance Properties LLC; (12) United Fifth LLC; (13) United Prime LLC (3 accounts); (14) United Greenwich LLC'; (15) United Prime Broadway LLC; (16) 360 East 50th Street Associates LLC; (17) Landmark Resources LLC; and (18) Location3. Plaintiff's counsel asserted that the fact that Mr. Furtzaig is an authorized signatory on "at least, ***seventeen*** Family LLC bank accounts" confirms he is "an employee of the Harounian Defendants." Email from Elizabeth Uphaus, Counsel for Plaintiff, to Michael Cardello III, Special Referee (August 4, 2020 at 9:57 am EST) (emphasis in original). By email that same day, the Harounian Defendants' counsel responded that "As previously submitted, Lawrence Furtzaig is not an employee of the Defendants and Defendants have no access to his emails. Mr. Furtzaig's bank signing authority does not change these facts." Email from Lauren Cooperman, Counsel for the Harounian Defendants, to Michael Cardello III, Special Referee (August 4, 2020 at 4:15 pm EST).

While evidence suggests that Mr. Furtzaig is an employee or agent of Location3[9] (which, based on the Special Referee's review of the documentation provided, was formerly known as Landmark)[10], it also suggests that Mark Harounian is a member of Location3 f/k/a Landmark and that the Harounian Defendants, or any one of them, manage and/or control Location3 f/k/a Landmark.

Documentary evidence suggests that Mark Harounian is a member of Location3 f/k/a Landmark, namely: (1) a memorandum from Henry Dellaratta, Certified Public Account, confirming Mark Harounian is a member of Location3 (Lenihan Affirmation at Exhibit D); and (2) a letter from Lauren J. Wachtler, Barclay Damon, Counsel for Mr. Furtzaig, May 11, 2020 (provided to the Special Referee in connection with a separate dispute in this action) stating that "Mr. Furtzaig is Mr. Harounian's property and rental agent who assists the Family LLC properties through a company called Location3 LLC, in which Mr. Harounian is a member".

In addition, documentary evidence suggests that the Harounian Defendants manage and/or have control over Location3 f/k/a Landmark.

For example, United Hay LLC (a Family LLC) appears to pay Mr. Furtzaig's Location3 salary. *See* Lenihan Affirmation at Exhibit B – FAMILY00015317.

Second, several of the Family LLCs, namely, United Hay LLC, United Chelsea LLC and United East LLC, appear to pay Location3 f/k/a Landmark's internet, email domain, and other miscellaneous expenses. *See* Lenihan Moving Affirmation at Exhibit B – FAMILY00154361-62

[9] Lenihan Affirmation at Exhibit A (an email from "Larry / 3 [Larry@location3ny.com]"); *Id*. at Exhibit B – FAMILY00161947 (an email from "Larry / Landmark [mailto:*E.g.* Larry@landmark-nyc.com]"), FAMILY00019421 (an email from "Larry/Landmark [Larry@landmark-nyc.com]"), and FAMILY00015317 (handwritten payroll notes referring to "LARRY – LOCATION3 - $4,500.00"); *Id*. at Exhibit E (confirming the address for process served via the Secretary of State should be sent to "LOCATION3:ATTN LARRY . . .").

[10] *See* Lenihan Moving Affirmation at Exhibit B – FAMILY00154361-2 (an invoice issued by Location3 referring to "Landmark Resources LLC dba Location3") and Exhibit E (the New York State Department of State Division of Corporation's entity information for Location3, revealing that the "actual" name as of June 28, 2004 was "LANDMARK RESOURCES LLC" and the "actual" name as of July 13, 2012 was "LOCATION3, LLC").

(Invoice #1-8-151 for $9,009.62 from Location3 to Landmark for "Itenert [sic] advertizing [sic]", "Faxaway", "email domains", "Bulk Email service", "Internet info management", and other expenses, and bearing notations indicating that payment was made for this invoice by United Hay, United Chelsea, and United East) and FAMILY00154363 (copies of checks from United Hay, United Chelsea, and United East to Location3 for the total amount reflected in Invoice #1-8-151).

Third, Mark Harounian and Location3 f/k/a Landmark have the same phone number. Compare Lenihan Affirmation at Exhibit B – FAMILY00019421 (identifying Mark Harounian's phone number as 212-686-2002) *with* Lenihan Affirmation at Exhibit F (noting on Location3's filing with the New York Occupational Licensing Management System that "HAROUNIAN, MARK" is a related party and identifying Location3's phone number as 212-686-2002) and Lenihan Reply Affirmation at Exhibit M (noting on Landmark's webpage that the phone number for management's office is 212-686-2002).

Fourth, the Family LLCs and Location3 f/k/a Landmark share two addresses – 224 Fifth Avenue, 5th Floor, New York, New York and 235 East 50th Street, New York, New York. *See* Lenihan Affirmation at Exhibit B – FAMILY00161947 (identifying the address for "United Chelsea LLC / Landmark Resources LLC" as 235 East 50th Street, New York, NY 10022). Compare Reply Affirmation at Exhibit N – FAMILY00035264 (a New York Community Bank account summary mailed to "UNITED VILLAGE LLC ATTN MARK HAROUNIAN 224 5TH AVE FL 5 NEW YORK NY 10001-7705"), FAMILY00036032 ("Office of Mark Harounian 224 Fifth Avenue, 5th Floor, New York, NY 10001"), and New York State Department of State record (identifying United Hay, LLC's address for service of process as 224 Fifth Avenue, 5th Floor, New York, New York 10001) *with* Lenihan Reply Affirmation at Exhibit M (noting on

Landmark's webpage that the location for management's office is 224 Fifth Avenue, 5th Floor, New York, New York and the location for the leasing office is at 235 East 50th Street, New York, New York) and Lenihan Affirmation at Exhibit F (noting on Location3's filing with the New York Occupational Licensing Management System that the main address is "235 E 50TH ST NEW YORK, NY").

Fifth, Mark Harounian responds to emails in connection with Location3 business by including a signature block stating: "Office of Mark Harounian 224 Fifth Avenue, 5th Floor, New York, NY 10001". Lenihan Reply Affirmation at Exhibit N – FAMILY00036032.

Sixth, Mark Harounian's entity, Nature's Loom, appears to be associated with Location3 and/or maintain the Location3 website. *Id.* at Exhibit O.

Seventh, documentary evidence suggests that Location3 f/k/a Landmark is doing business as United Chelsea LLC (a Family LLC). *See* Lenihan Moving Affirmation at Exhibit B – FAMILY00161947 (an email sent by Mr. Furtzaig from his Landmark email address and referring, in the signature block, to "United Chelsea LLC / Landmark Resources LLC"). *Compare Id.* (identifying the phone number for "United Chelsea LLC / Landmark Resources LLC" as 212-644-4455 x 106#) with Lenihan Moving Affirmation at Exhibit B – FAMILY00154361 (identifying the phone number for Location3 as 212-644-4455).

In the Special Referee's view, all of the foregoing demonstrates that, at a minimum, Mr. Furtzaig is an agent who is working on behalf of one or more of the Harounian Defendants, receiving compensation and benefits from the Harounian Defendants, and using Location3 and Landmark email addresses. Moreover, it appears that Mark Harounian is a member of Location3 f/k/a Landmark; Location3 f/k/a Landmark maintains its managing office at the Family LLC's central location and is reimbursed for expenses (including for email domain and internet) by the

Harounian Defendants; and Mark Harounian is an officer of another non-party company, Nature's Loom, that appears to be associated with Location3 and/or maintain the Location3 website. In the Special Referee's view, based on the totality of the documentary evidence, Plaintiff has met its burden that the Harounian Defendants have possession, custody, or control over Mr. Furtzaig's non-personal email accounts, including but not limited to those for Landmark and Location3. As such, Mr. Furtzaig's non-personal accounts shall be searched and documents responsive to previously served demands shall be produced to Plaintiff.

B. Leases

In large part, the arguments set forth by both Plaintiff and the Harounian Defendants with regard to the Leases conflate the discoverability of the Harounian LLCs' leases with the discoverability of the Family LLCs' leases. This litigation addresses, in part, allegations that, Mark Harounian "mismanage[ed] the Family LLCs" and the Harounian Defendants "manipulate[d] the Family LLCs' books and records to misappropriate the companies' funds at Plaintiff's expense." Moving Memo at pp. 4, 6. With this in mind, in the Special Referee's opinion, Plaintiff has met its burden to show that the Family LLCs' leases are discoverable but has not met its burden with regard to the Harounian LLCs' leases.

In the Special Referee's view, Plaintiff has met its burden that the Family LLCs' leases are material and necessary to the prosecution of the underlying actions. Plaintiff demonstrated that it is entitled to the source documents used to prepare the Family LLCs' books and records in order to confirm the validity of entries therein. Plaintiff demonstrated that these documents are needed to determine what monies and how much were supposed to be going into the Family LLCs' accounts (as compared with what monies and how much were reported as going into the Family LLCs' accounts). The Special Referee finds that Plaintiff is not required to rely upon the

corporate books and records which were maintained by the Harounian Defendants, the very parties who Plaintiff alleges engaged in misconduct.

The Special Referee rejects the Harounian Defendants' argument that producing the Family LLCs' leases would be unduly burdensome because there are over 4,000 of them and they are stored at an off-site facility. The fact that the Family LLCs' leases are numerous and not digitized is not a proper basis to withhold discoverable documents. The Harounian Defendants chose the manner in which to maintain their files and cannot use their document retention protocol to avoid disclosure.

The Special Referee further rejects the Harounian Defendants' contention that Plaintiff's request for the Family LLCs' leases are improper because they are not encompassed within any existing document demand. Request Number 11 in Plaintiff's First Notice for Inspection and Discovery of Documents dated May 4, 2020 ("First Notice for Documents") specifically seeks "Documents reflecting all of the leases in the Properties owned by the Family LLCS." Charron Affirmation at Exhibit A. In the Special Referee's view, this demand requires, *inter alia*, disclosure of the Family LLCs' leases.

However, in the Special Referee's opinion, Plaintiff has not met its burden to establish that the Harounian LLCs' leases are material and necessary to the prosecution of the underlying actions. Plaintiff's claim for unjust enrichment and constructive trust provides Plaintiff with grounds to obtain documents and information bearing upon whether the Harounian LLCs benefitted from, or at the expense of, the Family LLCs. The Harounian LLCs' leases have no bearing on these allegations. Rental income received (or reported), even incorrectly, pursuant to the Harounian LLCs' leases does not make it more or less likely that the Harounian Defendants

benefited at Plaintiff's or the Family LLCs' expense, or that Plaintiff or the Family LLCs have a claim to these specific Harounian LLCs' funds.

While the Special Referee agrees with the Harounian Defendants that Plaintiff's request for the Harounian LLCs' leases is not encompassed within any specific document demand included in the First Notice for Documents, given the Special Referee's determination that Plaintiff has not met its burden to demonstrate that the Harounian LLCs' leases are subject to disclosure, this objection and the remaining objections to production of the Harounian LLCs' leases need not be addressed.

C. RPIE Reports and DHCR Filings

The Harounian Defendants principally oppose production of the Family LLCs' and the Harounian LLCs' RPIE Reports and DHCR Filings based on an alleged lack of a formal document demand, relevance, duplication of previously produced records, and/or lack of possession, custody, or control. As set forth below, the Special Referee finds that Plaintiff has sufficiently met its burden to warrant production of the Family LLCs' and the Harounian LLCs' RPIE Reports and DHCR Filings.

As a preliminary matter, the Special Referee notes that while Plaintiff did not explicitly request production of the Family LLCs' and the Harounian LLCs' RPIE Reports and DHCR Filings, these documents are sufficiently responsive to the following requests set forth in Plaintiff's First Notice for Documents:

> Request No. 10. All Documents concerning the finances of the Harounian LLCs, including but not limited to capital contributions, loans, deposits, payments, transfers, distributions and withdrawals. Responsive Documents shall include bank statements, cancelled checks, wire transfer confirmations, Quickbooks and other electronic accounting files.

> Request No. 60. All Documents and Communications concerning the assertion in paragraph 33 of Mark [Harounian]'s March 23, 2016 affidavit in the Action that '[Mark Harounian is] entitled to receive, and [Mark Harounian] has received, reasonable compensation from the Family LLCs for Mark[] [Harounian]'s extraordinary investment of time and energy as sole Manager to the Family LLCs and their properties.'
>
> Request No. 61. All Documents and Communications concerning the total amount of Mark[] [Harounian's] 'annual collective compensation' as referred to in paragraph 36 of Mark[] [Harounian's] March 23, 2016 affidavit in the Action.
>
> Request No. 62. All Documents and Communications concerning the assertion in paragraph 33 of Mark[] [Harounian's] March 23, 2016 affidavit in the Action that 'Mark[] [Harounian's] annual collective compensation from the Family LLCs (i.e., as a total of cash and personal goods and services paid for by the Family LLCs) has remained in line with the numerous services [Mark Harounian] provide[s] to the Family LLCs.'

The Special Referee finds that the Family LLCs' and the Harouian LLCs' RPIE Reports are relevant and discoverable. Based on the Special Referee's review of the form RPIE Report provided (*see* Lenihan Affirmation at Exhibit I), property owners must provide extensive information about the underlying property including, *inter alia*, the total square footage unoccupied, unleased, or generating no income; whether the tenant pays maintenance, repair, or utility expenses; whether any of the property is owner-occupied or occupied by a related party; and operating expenses (including repairs and maintenance, management and administration, amortizing tenant improvement costs, and miscellaneous expenses). Where, as here, Plaintiff alleges, in part, that Mark Harounian mismanaged the Family LLCs and the Harounian Defendants wrongfully benefitted at Plaintiff's expense, documents that identify management fees taken by the Harounian Defendants and expenses incurred at the Family LLCs' properties are relevant. Documents that further reflect expenses incurred at the Harounian LLCs' properties may also lead to the discovery of relevant evidence concerning whether the Family LLCs paid

for those expenses. Accordingly, in light of the above, the Special Referee finds that RPIE Reports are material and necessary to the prosecution of the underlying actions.

The Harounian Defendants cannot avoid disclosure of RPIE Reports based on their claim that previously produced books and records, invoices, cancelled checks, and other documents provide the same information. As noted above, Plaintiff is not required to rely on the corporate books and records created and maintained by the Harounian Defendants. Plaintiff is entitled to obtain all documents in the Harounian Defendants' possession, custody, or control that may provide material and necessary information even if, as the Harounian Defendants assert, some of the information can be obtained from entirely different documents. Moreover, the Harounian Defendants do not assert that they do not have, or cannot access, RPIE Reports.

In addition, the Special Referee finds that the Family LLCs' and Harounian LLCs' DHCR Filings are relevant and discoverable. Based on the Special Referee's review of the DHCR Filing form provided (*see* Lenihan Affirmation, Exhibit K), it appears that DHCR Filings require property owners to disclose, *inter alia*, the managing agent; the number of units regulated under the Rent Stabilization Law; tenant information; units that are "owner occupied/employee"; legal regulated rent amounts; actual paid rent amounts; whether a lease is in effect; major capital improvements; rent increases; and reasons for rent increases. All of the foregoing may be material and necessary for Plaintiff to identify renovation expenses incurred at the Harounian LLCs' properties which may assist Plaintiff in determining whether, as it alleges, the Family LLCs paid for those expenses. Moving Memo at p. 16. It may also lead to relevant evidence for Plaintiff to further verify the reported incoming rent amounts for the Family LLCs.

The Harounian Defendants cannot avoid disclosing DHCR Filings because the information therein has allegedly been provided through other documents, as explained above.

The Harounian Defendants further cannot avoid disclosing DHCR Filings because they do not have copies of all of the filings given that some are available via the DHCR's online portal and others can be requested from the DHCR. Documents are within a party's possession, custody, or control where the party has the legal right or practical ability to obtain documents in the possession of another person or entity. *See, e.g. Richard v. Kerwin*, 2016 WL 6781083 (Sup. Ct. Monroe Cnty. 2016) ("In connection with the requested federal and state tax returns, a party is deemed to have control of documents filed with a federal agency as to which the party has or can obtain copies"); *In re Bernfeld*, 990 N.Y.S.2d 436 (Surr. Ct. Nassau Cnty. 2014) ("[d]ocuments under a party's control may include documents as to which the party has 'the legal right, authority or ability to obtain upon demand documents in the possession of another'"). Given that the Harounian Defendants can obtain copies of DHCR Filings by reviewing their hard files, using the DHCR's online portal, or submitting a formal request to the DHCR, they are obligated to produce them.

In sum, as set forth herein, the Special Referee grants, in part, and denies, in part, Plaintiff's Motion. Specifically, the Special Referee:

1. grants Plaintiff's request for the Harounian Defendants to search and produce responsive documents from November 17, 2009 to present contained within Lawrence Furtzaig's non-personal email accounts (as defined in Footnote 4 *supra*), including, but not limited to, Larry@landmark-nyc.com and Larry@location3ny.com;

2. grants Plaintiff's request for the Harounian Defendants to produce the leases for the Family LLCs' properties from November 17, 2009 to present;

3. denies Plaintiff's request for the Harounian Defendants to produce the leases for the Harounian LLCs' properties; and

4. grants Plaintiff's request for the Harounian Defendants to produce the Family LLCs' and Harounian LLCs' RPIE Reports and DHCR Filings from November 17, 2009 to present.

All of the foregoing documents shall be produced by the Harounian Defendants within thirty (30) days of the date of this decision.

Dated: August 10, 2020

SO DIRECTED:

Michael Cardello III
MICHAEL CARDELLO III
Court-Appointed Special Referee

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

UNITED HAY, LLC,	:	Index No. 657310/2017
Plaintiff,	:	**DECISION REGARDING THE CASE MANAGEMENT ORDER FOR THE UNITED HAY MATTER**
-against-	:	
JACOB HAROUNIAN,	:	
Defendant.	:	

This matter is before the undersigned, Michael Cardello III, Esq., as a result of an Order of Reference dated April 22, 2020, signed by the Honorable Joel Cohen, appointing him Special Referee pursuant to New York Civil Practice Law and Rules ("CPLR") §§ 3104 and 4301, for the purpose of assisting the Court and the parties in conducting and completing discovery in an efficient manner.

On the conference call held on November 30, 2020, counsel for Jacob Harounian, Mr. Steckler, and counsel for Mark Harounian (and a number of Harounian entities), Ms. Cooperman, asserted their diverging views as to whether one or separate Case Management Orders should be issued for the United Hay Action and the Consolidated Actions. On this conference call, Mr. Steckler asserted that there is no reason the actions should be on different discovery tracks, stating that even though the issues in the United Hay Action may be narrower than the issues in the Consolidated Actions, they all require discovery on the same facts. Mr. Steckler asserted that the Court kept the United Hay Action and the Consolidated Actions separate for trial purposes only, and this was to avoid jury confusion. By contrast, Ms. Cooperman argued that there is no reason the actions should be on the same discovery track because the United Hay Action is much narrower in scope than the Consolidated Actions. Ms.

Cooperman further stated that the Court previously ruled on the consolidation issue and Jacob Harounian should not be permitted to re-litigate the issue.

Based on my review of, ***inter alia***, (i) the transcript of the Court proceedings held on September 9, 2019 (***see*** United Hay Action at NYSCEF Doc. Nos. 188-193); (ii) the Decision and Order dated October 10, 2019, denying Jacob Harounian's motion for the United Hay Action and the Consolidated Actions to be consolidated (***see*** United Hay Action at NYSCEF Doc. No. 225); (iii) the Special Referee's Decision and Order dated June 9, 2020, directing the deposition of Jacob Harounian to go forward in the United Hay Action (***see*** United Hay Action at NYSCEF Doc. No. 234); and (iv) Justice Cohen's confirmation of the foregoing decision (***see*** United Hay Action at NYSCEF Doc. No.243), it is the Special Referee's view that the United Hay Action and the Consolidated Actions do not need to be, nor should they be, governed by the same Case Management Order or subject to the same discovery deadlines. It is also the Special Referee's view that insofar as both actions require the production of overlapping discovery, such discovery only needs to be produced once. While the Court recognized Jacob Harounian's right to discovery in the United Hay Action may overlap with discovery in the Consolidated Actions, it is the Special Referee's opinion that the Court did not intend to tether the Consolidated Actions and United Hay Action together if to do so would cause unnecessary delay to the United Hay Action.

Dated: December 7, 2020

SO ORDERED:

Michael Cardello III
MICHAEL CARDELLO III
Court-Appointed Special Referee

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Exhibit F

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MEHRNAZ NANCY HOMAPOUR, et al.,	:	Index No. 653795/2015
Plaintiffs,	:	**DECISION ON DEFENDANTS' MOTION TO COMPEL DISCOVERY FROM NON-PARTIES SHAHRIAR HOMAPOUR AND JEFFREY HOMAPOUR**
-against-	:	
MARK HAROUNIAN, et al.,	:	
Defendants.	:	
UNITED HAY, LLC,	:	Index No. 657310/2017
Plaintiff,	:	
-against-	:	
JACOB HAROUNIAN,	:	
Defendant.	:	
JACOB HAROUNIAN, et al.,	:	Index No. 450615/2019
Plaintiffs,	:	
-against-	:	
MARK HAROUNIAN, et al.,	:	
Defendants.	:	

This matter is before the undersigned, Michael Cardello III, Esq., as a result of an Order of Reference dated April 22, 2020, signed by the Honorable Joel Cohen, appointing him Special Referee pursuant to New York Civil Practice Law and Rules ("CPLR") §§ 3104 and 4301, for the purpose of assisting the Court and the parties in conducting and completing discovery in an efficient manner.

Currently before the Special Referee is a motion filed by defendant Mark Harounian, the Harounian LLCs,[1] the Family LLCs,[2] 360 East 50th Street Associates LLC, and 356 East 50th Street Associates LLC (collectively, the "Defendants") for an order pursuant to CPLR 3124 to compel document productions from subpoenaed non-parties Shahriar Homapour ("Shahriar") – plaintiff Mehrnaz Homapour's ("Plaintiff") husband – and Jeffrey Homapour ("Jeffrey") – Plaintiff's son (the "Motion").

As set forth in greater detail below, the Special Referee hereby grants, in part, and denies, in part, the Motion. Specifically, the Special Referee denies the Motion to compel documents from Jeffrey and finds that Jeffrey may withhold documents on the basis of a proper assertion of attorney-client privilege when responding to the subpoenas *duces tecum* and *ad testificandum* dated May 1, 2019 (the "Jeffrey Subpoena"). Notwithstanding the foregoing, the Special Referee acknowledges that the applicability of the attorney-client privilege, as a basis to withhold discovery, is document-specific. Therefore, to the extent documents are withheld on this basis, Jeffrey must produce a privilege log and Defendants may challenge the assertion of privilege to specific documents.

The Special Referee further grants the Motion to compel documents from Shahriar and finds that Shahriar cannot withhold documents on the basis of an agency exception to the general rule regarding attorney-client privilege when responding to the subpoenas *duces tecum* and *ad testificandum* dated May 1, 2019 (the "Shahriar Subpoena").

[1] The term "Harounian LLCs" shall refer herein to Jacob NY Holdings LLC, Jacob NY Holdings Ltd., 172 Mulberry Realty LLC, 1007 Lex Ave LLC, and 163 Chrystie Realty LLC.

[2] The term "Family LLCs" shall refer herein to 3M Properties, LLC, Balance Property, LLC, JAM Realty NYC LLC f/k/a JAM Realty Co., United Chelsea, LLC, United East, LLC, United Fifth, LLC, United Flatiron LLC, United Greenwich, LLC, United Hay, LLC, United Nationwide Realty LLC f/k/a United Nationwide Realty, United Prime Broadway, LLC, United Prime LLC, United Seed LLC, United Square LLC, United Village, LLC, and United West, LLC.

I. PROCEDURAL BACKGROUND

A. Defendants' Dispute Letter

On May 5, 2020, Defendants filed an initial dispute letter with the Special Referee (the "Dispute Letter") with respect to Jeffrey's and Shahriar's assertions of privilege in order to avoid document disclosure under the Jeffrey Subpoena and the Shahriar Subpoena, respectively. Defendants opposed Jeffrey's assertion of attorney-client privilege and an "agency" theory of privilege as well as Shahriar's assertion of spousal privilege and an "agency" theory of privilege.[3] Dispute Letter at pp. 1-3. Defendants argued that the foregoing assertions of privilege are "non-viable" and that Jeffrey and Shahriar "should be directed to respond to the Subpoenas in full." *Id.* at pp. 2-3. More specifically, Defendants asserted that Jeffrey cannot invoke attorney-client privilege because he "is not, and has not been, [Plaintiff's] counsel in this case." *Id*. Defendants contested Shahriar's invocation of spousal privilege because Defendants are not seeking communications "solely between Shahriar and [Plaintiff]" – only communications "where third parties, including but not limited to [Plaintiff's] counsel, were present or copied." *Id.* at p. 2. Defendants argued that Jeffrey and Shahriar cannot avoid disclosure under an agency exception to the attorney-client privilege because, with respect to Jeffrey, "no professional retainer" with Plaintiff exists, and, with respect to both Jeffrey and Shahriar, no showing of incompetency, emotional disability or lack of understanding of the English language by [Plaintiff] has been made." *Id.* at p. 3.

[3] Notwithstanding the arguments asserted by Jeffrey and Shahriar, and opposed by Defendants, there is no specific delineation of an agency privilege in the CPLR. Rather, case law provides that there is an agency exception to the general rule regarding the attorney-client privilege. For the sake of clarity, insofar as Jeffrey, Shahriar or Defendants refer to an "agency" privilege, the Special Referee shall refer to an agency exception to the attorney-client privilege.

B. Jeffrey's and Shahriar's Response Letter

On May 12, 2020, Jeffrey and Shahriar, who are both represented by Plaintiff's counsel, filed a joint submission in response to the Dispute Letter (the "Response Letter"). Jeffrey and Shahriar asserted that "[t]hese unremarkable situations, wherein an attorney-son is providing his mother with legal counsel and her sophisticated husband facilitates communication with her attorneys, should be entirely uncontroversial." Response Letter at p. 1. Jeffrey argued that communications with him are subject to attorney-client privilege because he has provided Plaintiff with legal advice "on a daily basis in this heavily-contested litigation . . . commenting upon judicial submissions, discovery devices and productions, and legal strategy". *Id*. at p. 2. Jeffrey asserted that "Defendants' counsel is aware of [his] role, as [he] extensively participated in the year-long mediation of this action". *Id*. Jeffrey maintained that the fact that he did not file a notice of appearance in the underlying actions or enter into a formal retainer agreement with Plaintiff to render legal services does not vitiate the existence of an attorney-client relationship. Even if the Special Referee determined that Jeffrey is not Plaintiff's counsel, according to Jeffrey, he "has unquestionably acted as Plaintiff's agent in facilitating the communication of legal advice and acting as a litigation consultant." *Id*. at footnote 4.

In addition, Shahriar argued that he is "a sophisticated businessperson" who is "intimately involved in Plaintiff's business and finances" and Shahriar therefore "acted as Plaintiff's agent in connection with, and leading up to, this litigation" by "advis[ing] Plaintiff, help[ing] communicate with her counsel and formulate legal strategy, and creat[ing] trial preparation material." *Id.* at pp. 2-3. Shahriar noted that an agency relationship exists where the client has "a reasonable expectation of confidentiality" and, here, Plaintiff "fully expected that communications made in [his] presence would be confidential." *Id.* at p. 3.

C. The May 19th Conference Call

On May 19, 2020, the Special Referee held a conference call with counsel for Defendants and counsel for Jeffrey and Shahriar concerning the arguments set forth in the Dispute Letter and Response Letter (the "May 19th Conference Call"). During the May 19th Conference Call, counsel for Defendants represented that the issues identified in these letters are ripe for review even though Jeffrey and Shahriar had not produced all documents, or privilege logs, in response to the Jeffrey Subpoena and Shahriar Subpoena. Counsel for Defendants asserted that the Special Referee can adjudicate these issues now because Jeffrey and Shahriar confirmed that they would be withholding voluminous documents based on an "absolutist position" that legal discussions with Jeffrey are privileged via an attorney-client privilege and communications with Shahriar are privileged via the agency exception to the attorney-client privilege. Counsel for Jeffrey and Shahriar agreed with the foregoing.

Following the May 19th Conference Call, the Special Referee informed counsel that formal briefing would be necessary to resolve the disputes at issue.

D. Defendants' Motion

On June 9, 2020, Defendants filed the Motion, comprised of a Notice of Motion, an Affirmation by William Charron, Esq. dated June 9, 2020 ("Charron Moving Affirmation"), an Affidavit by Mark Harounian sworn to on June 9, 2020 ("Harounian Moving Affidavit"), and a Memorandum of Law dated June 9, 2020 ("Moving Memo").

In the Motion, Defendants opposed Jeffrey's assertion of attorney-client privilege and the agency exception to said privilege. Moving Memo at pp. 10-12. Defendants argued that Jeffrey cannot meet the basic requirements to demonstrate an attorney-client relationship because (1) he "has never been [Plaintiff's] attorney of record in this case"; (2) "there is no engagement agreement between Jeffrey and [Plaintiff]"; and (3) Jeffrey is prohibited under New York

Disciplinary Rule 1.7 from forming an attorney-client relationship with Plaintiff. *Id.* at p. 10. In support of the proposition that Jeffrey is prohibited under New York Disciplinary Rule 1.7 from representing Plaintiff, Defendants argued that Jeffrey previously represented Mark Harounian, some of the Family LLCs, and some of the Harounian LLCs in landlord-tenant and regulatory disputes until "at least March 2016" and "never asked . . . or received, a waiver to represent [Plaintiff] against them." *Id*. *See* Harounian Moving Affidavit at ¶¶ at 6, 8 (discussing Jeffrey's prior representation and failure to obtain consent to serve as Plaintiff's counsel). Defendants stated that insofar as Jeffrey "has indicated that, like Shahriar, he may alternatively assert an 'agency' privilege . . . [he] has not supported such a hypothetically alternative assertion". Moving Memo at footnote 2.

Defendants also opposed Shahriar's assertion of spousal privilege and an agency exception to the attorney-client privilege. *Id.* at pp. 7-10. Defendants asserted that under New York law, spousal privilege protects communications between a husband and a wife but not communications where a third party is present, such as where a husband accompanies his wife to speak with her counsel. *Id.* at pp. 3, 7. With regard to the claim that an agency exception to the attorney-client privilege exists, Defendants argued that the exception exists to (1) "protect principals who lack the competence or capacity to communicate with their counsel independently," citing *Nacos v. Naco*s, 124 A.D.3d 462 (1st Dep't 2015), and (2) protect communications with "expressly designated representatives." Moving Memo at pp. 3, 9. Based on this standard, Defendants asserted that Shahriar cannot assert the agency exception to the attorney-client privilege because he "has offered no evidence either of [Plaintiff's] incompetence to deal with her counsel independently, or a formal engagement of [him] as [Plaintiff's] agent and advisor." *Id.* at p. 3. Defendants further pointed out that none of the 1,023 documents produced to date by Shahriar and Jeffrey support claims that Shahriar has been "integrally and

'intimately' involved in the Family LLCs' 'business and finances' on [Plaintiff's] behalf for years as her 'agent.'" *Id.*

E. Jeffrey's and Shahriar's Opposition

On June 26, 2020, Jeffrey and Shahriar filed opposition to the Motion (the "Opposition"), comprised of an Affirmation of Jeffrey dated June 25, 2020 ("Jeffrey Affirmation"), an Affidavit of Shahriar sworn to on June 26, 2020 ("Shahriar Affidavit"), an Affidavit of Plaintiff sworn to on June 26, 2020 ("Plaintiff Affidavit), and a Memorandum of Law dated June 26, 2020 ("Opposition Memo").

In the Opposition, Jeffrey asserted that even though he is Plaintiff's son, he has acted as Plaintiff's attorney and, therefore, communications between Plaintiff and him are privileged. *Id*. at p. 7. According to Jeffrey, in or around November 2014, he began acting as Plaintiff's "personal counsel, providing her with legal advice in connection with pursuing relief for Mark[] [Harounian's] breaches and misconduct" and has "continued to act as Plaintiff's counsel and as part of her legal team, including analyzing, revising, and commenting upon judicial submissions, discovery devices and productions, and legal strategy." Jeffrey Affidavit at ¶¶ 2-3. In the Jeffrey Affidavit, he stated that he identified himself as Plaintiff's counsel during court-ordered mediation, "participated in 'lawyers only' mediation sessions as Plaintiff's counsel", and "appeared at several court conferences on Plaintiff's behalf along with Plaintiff's other counsel", including at a preliminary conference, where he sat at counsel's table with the Court's permission over Defendants' objection. *Id.* at ¶¶ 6-7; Opposition Memo at p. 5. Jeffrey noted that Plaintiff "at all times, has had a reasonable expectation of privacy in her communications with [him]." Opposition Memo at p. 11.

Jeffrey further argued that, contrary to Defendants' claim, case law demonstrates that formal appearances in an action or formal engagement agreements are "irrelevant to the

analysis" of whether an attorney-client privilege exists. *Id*. at p. 9. Moreover, Jeffrey rejected Defendants' claim that he "cannot be Plaintiff's attorney because he is her son" and that he "has somehow been giving legal advice to Plaintiff as her son, rather than her attorney". *Id.* at pp. 2, 8. Furthermore, Jeffrey contended that Defendants' reliance on *Nacos* in this regard is misplaced because unlike there, where the non-party relatives merely helped plaintiff choose counsel and comprehend financial documents, here, "Jeffrey has undertaken actual legal work on behalf of Plaintiff." *Id.* at p. 9. In addition, Jeffrey asserted that Defendants' position that "a purported conflict of interest prevents [him] from acting as Plaintiff's counsel" is a "red herring" because: (1) Defendants never moved to disqualify him and (2) even if he was disqualified, that would not vitiate attorney-client privilege. *Id.* at pp. 7-8.

In the Opposition, Shahriar did not assert spousal privilege as a basis to withhold disclosure but argued that Plaintiff's communications involving [him] and counsel are privileged because he is Plaintiff's agent as all the "hallmarks of an agency relationship" exist here. Opposition Memo at pp. 11-14.

As alleged in the Opposition, Shahriar assumed the role of an agent insofar as he has communicated with Plaintiff's counsel; reviewed, revised, and approved litigation documents and strategies; and "had in-depth involvement in advising [Plaintiff]" during mediation. Shahriar Affidavit at ¶¶ 8, 10-13; Plaintiff Affidavit at ¶¶ 2, 10, 12, 14-17; Opposition Memo at pp. 4, 12. As set forth in the Opposition, Plaintiff further "relied on Shahriar's presence in [her] communications with [her] counsel to keep [her] grounded, focused, and clearheaded while discussing Mark[] [Harounian's] misconduct and this action that has brought such pain to [her] family." Plaintiff Affidavit at ¶ 18. *See* Shahriar Affidavit at ¶ 14 (indicating that Shahriar attempted to "put [Plaintiff] at ease . . . in discussing and reliving [their] discovery, and the effects, of Mark[] [Harounian's] rampant theft of millions of dollars from a family business that

Mark had a duty to preserve and protect"). Whereas Plaintiff stated that she granted Shahriar authority to act on her behalf "in connection with pursuing relief for Mark[] [Harounian's] breaches and misconduct" in November 2014, Plaintiff also indicated that Shahriar has been her agent since the 1990s. Plaintiff Affidavit at ¶¶ 6, 8. Specifically, Plaintiff stated as follows:

> I was not intimately involved in the business or structure of the Family LLCs and, since the early 1990s, I have relied on Shahriar to act as my representative in connection with the Family LLCs. In this role, Shahriar was instrumental in the negotiation and purchase by the Family LLCs of multiple buildings, responded on my behalf to Mark[] [Harounian's] requests for advice concerning the potential acquisition of properties, and has attended a number of Family LLC real estate purchase and mortgage refinancing closings, attended landlord/tenant court appearances with Mark on behalf of the Family LLCs, and discussed my Family LLC tax documents with both Mark's office staff and Mark's accountant, Defendant Henry Dellaratta.

Plaintiff Affidavit at ¶ 6. *See* Shahriar Affidavit at ¶ 3 (confirming same from Shahriar's perspective). As alleged in the Opposition, Plaintiff expected that communications with her counsel in Shahriar's presence would be confidential. Plaintiff Affidavit at ¶ 4. *See* Opposition Memo at p. 12.

Shahriar relied on the following cases, *inter alia*, to demonstrate that the foregoing supports the position that an agency relationship exists between Plaintiff and him: *Spicer v. GardaWorld Consulting (UK) Ltd.*, 120 N.Y.S.3d 34 (1st Dep't 2020), *Gama Aviation Inc. v. Sandton Capital Partners, L.P.*, 99 A.D.3d 423 (1st Dep't 2012), *Deutsche Bank AG v. Sebastian Holdings Inc.*, 2019 N.Y. Misc. LEXIS 93 (Sup. Ct. N.Y. Cnty. Jan. 2, 2019), and *In re Horowitz*, 2007 N.Y. Misc. LEXIS 4709 (Sup. Ct. Nassau Cnty. June 21, 2007). Relying on these cases, Shahriar noted that, contrary to Defendants' claims, courts have recognized that an agency relationship neither requires a party to be incompetent nor requires a formal agency engagement. Opposition Memo at pp. 14-15. Shahriar argued that unlike in *Nacos*, cited by

Defendants, here, the agent (Shahriar) specified exactly how he served as Plaintiff's agent and confirmed his authority to act on Plaintiff's behalf in the underlying action. *Id.* at p. 15.

F. Defendants' Reply

On July 10, 2020, Defendants filed a reply in further support of the Motion (the "Reply"), comprised of an Affirmation by William Charron, Esq. dated July 10, 2020 ("Charron Reply Affirmation"), an Affidavit of Mark Harounian sworn to on July 9, 2020 ("Harounian Reply Affidavit") and a Memorandum of Law dated July 10, 2020 ("Reply Memo").

With respect to Jeffrey, Defendants asserted that they "never contended that Jeffrey *could* not theoretically serve as his mother's attorney in appropriate cases simply because he is her son" but rather` "Jeffrey *has not actually* served as his mother's attorney in this case." *Id.* at p. 7. Defendants reiterated that Jeffrey's prior representation of Defendants "ethically prohibited Jeffrey from serving as [Plaintiff's] counsel . . . in this case" and his attempt to "end-run the ethical prohibition . . . asks the Special Referee to endorse unabashed gamesmanship." *Id*. at pp. 7-8.

Defendants argued that "the concept of 'disqualification' is inapt because there was no actual or purported attorney/client relationship to disqualify." Reply Memo at p. 8. According to Defendants, whenever they asked for evidence of the alleged attorney/client relationship "[Plaintiff] (and Jeffrey) responded with either silence or objections, and with Jeffrey continuing to appear in Court or in the gallery, not at counsel's table." *Id.* at pp. 8-9. Defendants stated that while Jeffrey sat at counsel's table during a preliminary conference, Plaintiff's and Jeffrey's counsel represented that "Jeffrey was attending as [Plaintiff's] 'representative' reaffirming once against that he is not present as her 'counsel'". Charron Reply Affirmation at ¶ 6. According to Defendants, insofar as Jeffrey stated that his disqualification would not vitiate the attorney-client privilege that attached to his communications with Plaintiff, "neither of Jeffrey's two cited

authorities supports his disturbing position that an attorney may offer 'privileged' advice against the interests of another of his clients, and may cloak that advice from disclosure.'" Reply Memo at p. 8.

Defendants further rejected "Jeffrey's new alternative argument" that his communications are subject to an agency exception to the attorney-client privilege, noting that Jeffrey provides "no factual support" for this claim and "made no showing that he served some necessary agency role to facilitate and enable [Plaintiff's] communications with her counsel." *Id.* at p. 11.

With respect to Shahriar, Defendants argued that he "abandoned his prior assertion of spousal privilege" and "has offered his meritless 'agency privilege' theory as a post hoc contrivance to end-run his inability to support a spousal privilege assertion." Reply Memo at p. 7. Defendants stated that in order to demonstrate an agency exception to the attorney-client privilege, the agent must facilitate communications between party and counsel, and Plaintiff's belief that communications amongst herself, her counsel, and Shahriar were confidential is "irrelevant" to this inquiry. *Id.* at p. 4. Defendants asserted that Shahriar cannot invoke an agency exception to the attorney-client privilege because his conclusory statements, unsupported by "a single document", are insufficient to demonstrate that he had a "deep involvement in Family LLC matters for nearly 30 years" as alleged, and therefore, he "would have no material information necessary to 'facilitate' legal advice from [Plaintiff's] counsel". *Id*. at pp. 4, 6-7. Defendants emphasized that "nowhere does [Plaintiff] or Shahriar testify to [Plaintiff's] incompetence, incapacity, linguistic limitation, or other need to have Shahriar facilitate communications between [Plaintiff] and her counsel." *Id*. at p. 7.

II. ANALYSIS AND DETERMINATION

A. *The Applicability of the Attorney-Client Privilege Over Communications Involving Jeffrey and Plaintiff*

The attorney-client privilege, codified by CPLR 4503(a), "shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016)). The party asserting the privilege bears the burden to show that the communication is "[1] between an attorney and a client 'for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship,' [2] that the communication is predominantly of a legal character, [3] that the communication was confidential and [4] that the privilege was not waived." *Id.* (quoting *Rossi v. Blue Cross Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 593-94 (1989).

In the case at bar, Defendants seemingly dispute the first and second elements identified above by principally arguing that Jeffrey was "ethically prohibited" from representing Plaintiff in this case and "Jeffrey involved himself in this case as her son who happens to be a lawyer, not *as* [Plaintiff's] lawyer", as confirmed by Jeffrey's failure to file a notice of appearance or enter into an engagement agreement. Reply Memo at pp. 7-8, 10 (emphasis in original). Jeffrey asserted that, as early as 2014, he acted as Plaintiff's "personal counsel" and provided Plaintiff "with legal advice in connection with pursuing relief for Mark[] [Harounian's] breaches and misconduct, including concerning potential claims." Jeffrey Affidavit at ¶ 2. Jeffrey claimed that, since commencement of the action, he was "part of [Plaintiff's] legal team, including analyzing, revising, and commenting upon judicial submissions, discovery devices and productions, and legal strategy." *Id*. at ¶ 3. Jeffrey alleged that he "was heavily involved in the review and revision of Plaintiff's opposition [to Defendants' motion to dismiss]" as well as

related strategic decisions", identified himself and participated in every mediation session as Plaintiff's counsel, and appeared at several court conferences on Plaintiff's behalf along with Plaintiff's counsel of record. *Id*. at ¶¶ 3-7.

In the Special Referee's view, the fact that Jeffrey did not file a notice of appearance in the underlying actions or produce a formal engagement agreement is not dispositive of whether an attorney-client relationship exists and whether communications are privileged. *See Talansky v. Schulman*, 2 A.D.3d 355, 358 (1st Dep't 2003) (recognizing that "[f]ormality is not essential to create a legal services contract" and "it is necessary to look to the words and actions of the parties to ascertain if an attorney-client relationship was formed") (quoting *C.K. Indus. Corp. v. C.M. Indus. Corp.*, 213 A.D.2d 846 (3d Dep't 1995)); *Bd. of Managers of McCaren Park Mews Condo. v. McCaren Park Mews LLC*, 41 Misc. 3d 1224(A) (Sup. Ct. Kings Cnty. 2013) ("[t]he absence of a formal retainer agreement or whether counsel fees were ultimately paid in connection with [counsel's] representation of [client] . . . is not dispositive of the issue of whether an attorney-client relationship existed in that action").

The work seemingly performed by Jeffrey, in the Special Referee's view, appears to be for the purpose of facilitating the rendition of legal advice or services. The tasks described are not limited to Jeffrey performing non-legal, ministerial work or providing emotional support to Plaintiff, as a family member. They require Jeffrey to utilize his legal skills and acumen. In this regard, Jeffrey has met his burden to demonstrate that he, at least at times, acted as Plaintiff's counsel and communicated with Plaintiff for the purposes of providing legal services.

Notwithstanding that Jeffrey has a familial relationship with Plaintiff and may have provided non-legal advice as well as legal advice – wearing at times different hats – that does not destroy the attorney-client relationship. Jeffrey's dual role merely connotes that some of his communications with Plaintiff may have been legal in nature (and therefore privileged), while

other of his communications with Plaintiff may not have been (and therefore not privileged). The invocation of the attorney-client privilege in this case, as in all cases, is a fact-specific (e.g. document-specific) inquiry. *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 378 (1991).

Even though Plaintiff has other counsel who have formally appeared in the underlying actions, that does not impact whether Jeffrey is acting as Plaintiff's counsel. Parties have the right to choose their own counsel(s) and, in this regard, Plaintiff's retention of multiple attorneys has no bearing on whether Jeffrey acted in his capacity as counsel, at times, as opposed to a concerned family member. *See generally In re Thelen LLP*, 24 N.Y.3d 16, 28 (2014) (referencing "the client's unfettered right to hire and fire counsel"); *Gulino v. Gulino*, 35 A.D.3d 812, 812 (2d Dep't 2006) ("[a] party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted").

Even if, as alleged, Plaintiff violated New York Disciplinary Rules by representing both Plaintiff and Defendants in separate matters from November 2014 to March 2016,[4] this would

[4] The Special Referee notes that Defendants' allegation that Jeffrey cannot be Plaintiff's counsel because his representation of Plaintiff would be an ethical violation under New York Disciplinary Rule 1.7 ("Rule 1.7") is misplaced. Rule 1.7, titled "Conflict of Interest: Current Clients", prohibits representation where the representation will require the attorney to simultaneously represent "differing interests" or "there is a significant risk that the lawyer's professional judgment will be adversely affected by the lawyer's own financial, business, property or other personal interests." While not cited by Defendants, New York Disciplinary Rule 1.9 ("Rule 1.9") governs "Duties to Former Clients" and prohibits an attorney from representing another person "in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent".

Here, Defendants alleged that Jeffrey represented Mark Harounian, some of the Family LLCs, and some of the Harounian LLCs "in a variety of landlord-tenant and New York City regulatory disputes" between "November 2014 and at least March 2016"' which "prohibited Jeffrey from serving as [Plaintiff's] counsel against [them] in this case." Moving Memo at p. 10; Harounian Affidavit at ¶ 6; Reply Memo at p. 8. Jeffrey admitted that he represented Plaintiff as early as November 2014 in connection with Mark Harounian's alleged misconduct. Jeffrey Affirmation at ¶ 2. It is unclear whether, as Defendants alleged, Jeffrey's simultaneous representation of Defendants in select matters, on the one hand, and Plaintiff, on the other hand, from November 2014 to March 2016 violated Rule 1.7. It is equally unclear that Jeffrey is prohibited under Rule 1.9 from representing Plaintiff in this action, subsequent to March 2016, because he formerly represented Defendants.

have no bearing on whether or not an attorney-client relationship existed (or exists) between Plaintiff and Jeffrey and whether certain communications between them are privileged. *See Al–Turki v. Fenn,* Nos. 90 CIV. 4470, 89 CIV. 6217, 1995 WL 231278, at *3 (S.D.N.Y. Apr. 18, 1995) ("Information does not lose its privileged status simply because the attorney-client relationship has terminated").

The Special Referee, therefore, finds that communications between Plaintiff and Jeffrey may be protected by the attorney-client privilege. However, the Special Referee notes that, notwithstanding this determination, whether a particular communication is or is not "protected [by the attorney-client privilege] is necessarily a fact-specific determination most often requiring in camera review" and Defendants are free to challenge specific documents identified on any privilege log. *Spectrum Sys. Int'l Corp.*, 78 N.Y.2d at 378. Because Jeffrey has met his burden to demonstrate the existence of an attorney-client privilege, the Special Referee need not address Jeffrey's argument that communications with Plaintiff are privileged by virtue of an agency exception to a proper assertion of the attorney-client privilege.

B. ***The Applicability of the Agency Exception to the Attorney-Client Privilege Over Communications Between Plaintiff, Plaintiff's Counsel, and Shahriar***

It is well-settled that, as a general rule, communications between an attorney and a client in the known presence of a third party are not privileged because the client does not have a "reasonable expectation that such statements will be used solely for their benefit and remain confidential." *People v. Osorio*, 75 N.Y.2d 80, 84 (1989). In New York, the presence of a client's spouse, like the presence of any other third party, generally negates the confidentiality of communications between an attorney and a client *unless* however the spouse is an agent of the client. *In re Horowitz*, 16 Misc. 3d 1106(A) (Surr. Ct. Nassau Cnty. 2007).

Under the agency exception to the attorney-client privilege, the proponent of the privilege must satisfy a two-pronged test and demonstrate that: (1) the non-party agent's presence was "deemed necessary to enable the attorney-client communication" and (2) the client had a "reasonable expectation" that communications in the presence of the non-party agent were confidential. *Spicer v. GardaWorld Consulting (UK) Ltd.*, 120 N.Y.S.3d 34, 35 (1st Dep't 2020) (quoting *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016)). *See IDX Capital, LLC v. Phoenix Partners Group*, Index No. 102806/2007, 2009 WL 2440286 (Sup. Ct. N.Y. Cnty. Aug. 4, 2009) (confirming this two-pronged test); *Don v. Singer*, 19 Misc. 3d 1139(A) (Sup. Ct. N.Y. Cnty. 2008) (same). The proponent of the agency exception "cannot rely on conclusory assertions but must come forth with 'competent evidence that the claims of privilege are well founded.'" *Don*, 19 Misc. 3d 1139(A).

To satisfy the first prong, the proponent of the agency exception to the attorney-client privilege must show that the non-party's involvement was "more than just useful and convenient but . . . indispensable or serve[d] some specialized purpose in facilitating attorney client communications." *Nat'l Educ. Training Group, Inc. v. Skillsoft Corp.*, No. M8-85, 1999 WL 378337, at *4 (S.D.N.Y. 1999). *See Nacos v. Nacos*, 124 A.D.3d 462, 463 (1st Dep't 2015) (finding the attorney-client privilege was waived, and the agency exception inapplicable, where plaintiff's father and brother "failed to indicate how they facilitated communications with [plaintiff's] prior counsel" and "plaintiff is undisputedly educated and capable of communicating directly with her attorneys"); *People v. Harris*, 34 Misc. 3d 281, 288 (Sup. Ct. Kings Cnty. 2011) (exceptions to the rule that the attorney-client privilege is waived when communications are in the presence of a third party "have been made *only* when the third party is *essential* to the communication, such as an interpreter . . ."") (emphasis added). *See, e.g. IDX Capital, LLC v. Phoenix Partners Group*, Index No. 102806/2007, 2009 WL 2440286 (Sup. Ct. N.Y. Cnty. Aug.

4, 2009) (plaintiff did not satisfy this prong where non-party was not involved "primarily for the purpose of explaining terms and aspects of the deal to further [counsel's] ability to give legal advice" but "was primarily used to facilitate the business end of the [transaction at issue], and not to help . . . counsel form a legal opinion"); *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 431 (S.D.N.Y. 2013) (holding attorney-client privilege waived where plaintiff failed to show that [non-party public relation firm's] involvement "was necessary to facilitate communications *between himself and his counsel*, as in the case of a translator or an accountant clarifying communications" and noting plaintiff's argument that non-party was "contributing legal recommendations, providing next step action plans and weighing strategic considerations . . . does nothing to fulfill the governing standard") (emphasis in original).

This first prong indicates that the agency exception to the attorney-client privilege is narrow – it is not intended to provide a catchall for parties to extend a sacrosanct privilege, unnecessarily, to their relatives, confidants, or friends. *See generally IDX Capital, LLC*, 2009 WL 2440286 (describing this exception as "narrow"); *Ambac Assur. Corp.*, 27 N.Y.3d at 624 (noting that "[because] the privilege shields from disclosure pertinent information and therefore 'constitutes an obstacle to the truth-finding process,' it must be narrowly-construed" and should be "'strictly confined within the narrowest possible limits consistent with the logic of its principle'") (quoting *Matter of Jacqueline F.*, 47 N.Y.2d 215, 219 (1979) and 8 John Henry Wigmore, Evidence §2291 at 554 (McNaughton ed. 1961)).

To satisfy the second prong, the proponent of the agency exception need not demonstrate a "fiduciary or formal agency relationship" but must show that it had a "reasonable expectation" that communications involving the third party would be kept confidential. *Spicer*, 120 N.Y.S.3d at 36. *See Osorio*, 75 N.Y.2d at 84 ("[t]he scope of the privilege is not defined by the third parties' employment or function"). In this regard, "[a] client's subjective belief that an attorney-

client communication will remain confidential is ordinarily necessary to sustain the privilege, but a mere expectation alone is not sufficient." *Nat'l Educ. Training Group, Inc.*, 1999 WL 378337, at *4. *See, e.g., Spicer*, 120 N.Y.S.3d at 36 (upholding attorney-client privilege where "[p]laintiffs' counsel attested that [non-party] promised to keep all such communications confidential" and "the governing Purchase and Sale Agreement also specified that all privileged documents related to the transaction would remain protected from disclosure to defendant"); *IDX Capital, LLC*, 2009 WL 2440286 (upholding attorney-client privilege where non-party agreed "to use all reasonable efforts to keep confidential information confidential").

Here, Shahriar, the proponent of the agency exception, bears the burden to show that his involvement in communications and meetings with Plaintiff and Plaintiff's attorney was necessary, indispensable, and/or essential to enable the attorney-client communications. In an attempt to meet this burden, Shahriar alleged that he "has an in-depth familiarity and has managed Plaintiff's business relationship with Mark [Harounian] and the Family LLCs, as well as years of experience in the real estate industry and managing properties" and, therefore, he "advised Plaintiff, communicated with counsel, approved the filing and service of judicial documents and discovery devices, and helped formulate and approve litigation strategy." Opposition Memo at pp. 12-13.

Shahriar does not allege, let alone establish, that the underlying disputes are so complex that his familiarity and knowledge are essential for Plaintiff's attorneys to understand the facts and to allow counsel to advise Plaintiff. *See Spicer*, 120 A.D.3d at 414 (applying the agency exception to the attorney-client privilege where "unrebutted evidence reflects that [non-party financial advisor] spent some portion of its time helping counsel to understand various aspects of the transaction" for the purpose of providing legal advice); *TC Ravenswood, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh Pennsylvania*, No. 400759/11, 2013 WL 3199817 (Sup. Ct. N.Y.

Cnty. 2013) (non-party broker was specifically hired by plaintiff and its in-house counsel, who "lacked the experience necessary" to file a specific insurance coverage claim, "to explain the complex insurance policies at issue").

Further, Shahriar does not allege, let alone establish, that it was necessary, or that he has the legal experience, to clarify complex legal advice relayed to Plaintiff by Plaintiff's counsel. *See Egiazaryan*, 290 F.R.D. at 431 (finding non-party "was not competent to act as [plaintiff's] attorney and the mere fact that it was inserted in the legal decisionmaking [sic] process does nothing to explain why [non-party's] involvement was necessary to [plaintiff's] obtaining legal advice from his actual attorneys").

In the Special Referee's view, while Shahriar's involvement may have been useful or comforting to Plaintiff, Shahriar has not met his burden to demonstrate that his involvement was necessary to facilitate attorney-client communications.[5] In light of this determination, the Special Referee need not opine on whether Shahriar satisfied the second prong to invoke the agency exception to the attorney-client privilege.

[5] The Appellate Division for the First Department's decision in *Stroh v. General Motors Corp.* does not mandate a contrary determination. In *Stroh v. General Motors Corp.*, an elderly woman lost control of her car which then "jumped the sidewalk curb, hurtled into [Washington Square Park in Manhattan], and injured at least a dozen people," resulting in twelve separate lawsuits seeking damages against the driver and car manufacturer. *Stroh v. General Motors Corp.*, 213 A.D.2d 267 (1st Dep't 1995). The Appellate Division ruled that communications involving counsel, the driver, and the driver's daughter were privileged because the driver was "required to recall, and perhaps relive, what was probably the most traumatic experience of her life" and the daughter chose her mother's counsel, transported her mother to meetings with counsel, put her mother "sufficiently at ease to communicate effectively with counsel" as well as served "as a possible witness to aid the memory of her mother" given that she was a passenger in the vehicle just before the accident occurred. *Id*. at 268. The Appellate Division indicated that the application of the attorney-client privilege is fact-specific and "the circumstances of each case will determine whether a communication by a client to an attorney should be afforded the cloak of privilege." *Id.* In *National Education Training Group, Inc.*, the Southern District of New York suggested that the agency exception to the attorney-client privilege may be applied in *extreme* cases concerning a parent/child such as in *Stoh*, or *Hendrick v. Avis Rent a Car System, Inc.*, 944 F. Supp. 187, 189 (W.D.N.Y. 1996), where plaintiff's mother acted as plaintiff's agent because plaintiff was paralyzed. *Nat'l Educ. Training Group, Inc.*, 1999 WL 378337, at *4-5. Based on the foregoing extreme fact patterns, *Stroh* is factually inapposite to the case at hand. To hold otherwise would substantially expand the attorney-client privilege, and the agency exception thereto.

In sum, as set forth herein, the Special Referee grants, in part, and denies, in part, Defendants' Motion. Specifically, the Special Referee:

1. denies Defendants' Motion with respect to Jeffrey, finding that Jeffrey met his burden to demonstrate that an attorney-client relationship exists with Plaintiff and documents may be withheld when responding to the Jeffrey Subpoena on the basis of an attorney-client privilege;

2. holds that Jeffrey must produce a privilege log to identify all documents withheld pursuant to the attorney-client privilege or any other privilege, and that Defendants may nevertheless challenge an assertion of privilege identified therein if they believe, in good faith, the cited privilege is inapplicable; and

3. grants Defendants' Motion with respect to Shahriar, finding that Shahriar did not meet his burden to invoke the agency exception to the attorney-client privilege in order to withhold documents when responding to the Shahriar Subpoena.

Dated: August 26, 2020

SO ORDERED:

/s/Michael Cardello III
MICHAEL CARDELLO III
Court-Appointed Special Referee

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MEHRNAZ NANCY HOMAPOUR, et al.,	:	Index No. 653795/2015
Plaintiffs,	:	**DECISION AND ORDER REGARDING REQUEST BY UNITED HAY LLC TO DIRECT PARTY DEPOSITIONS TO PROCEED IMMEDIATELY IN THE UNITED HAY MATTER ("DISPUTE NUMBER 2")**
-against-	:	
3M PROPERTIES, LLC, et al.,	:	
Defendants.	:	
UNITED HAY, LLC,	:	Index No. 657310/2017
Plaintiff,	:	
-against-	:	
JACOB HAROUNIAN,	:	
Defendant.	:	
JACOB HAROUNIAN, et al.,	:	Index No. 450615/2019
Plaintiffs,	:	
-against-	:	
MARK HAROUNIAN, et al.,	:	
Defendants.	:	

This matter is before the undersigned, Michael Cardello III, Esq. as a result of an Order of Reference, So Ordered by the Honorable Joel Cohen on April 22, 2020, appointing him as Special Referee (the "Special Referee"), pursuant to New York Civil Practice Laws and Rules Sections 3104 and 4301 (the “Order of Appointment”), to supervise discovery in the above-captioned actions (collectively, the "Actions").

Currently before the Special Referee is the application of United Hay, LLC ("United Hay") requesting that the Special Referee issue a directive in the above-captioned action *United Hay, LLC v. Jacob Harounian*, Index No. 657310/2017 (the "United Hay Action") for party depositions in the United Hay Action to "proceed immediately notwithstanding that depositions of the same persons will proceed in the Consolidated Actions[1] at a later time on different issues". (Pryor Cashman's May 1, 2020 ("Dispute Letter No. 2") Letter at p. 1). For the reasons set forth in detail below, the Special Referee finds the depositions in the United Hay Action need not be conducted at the same time as the depositions of the parties in the Consolidated Actions. Therefore, the Special Referee grants United Hay's application, in part, and directs that party depositions proceed in accordance with the Special Referee's directive, as discussed in detail below. However, prior to the scheduling of any party depositions, the Special Referee directs Jacob Harounian to provide an Affidavit with certain information regarding the feasibility of conducting a remote deposition (as detailed below) to the Special Referee and counsel for United Hay on or before June 24, 2020. Thereafter, the Special Referee directs counsel for the parties to meet and confer regarding the feasibility, logistics, and proposed date and time for the remote deposition of Jacob Harounian on or before July 8, 2020. The Special Referee further directs that in the event there remains a dispute regarding the deposition, the parties are to contact the Special Referee to request a conference to address the issues on or before July 13, 2020.

[1] By Decision and Order Dated September 9, 2019, Justice Cohen consolidated the actions *Mehrnaz Nancy Homapour, et al. v. 3M Properties, LLC, et al.,* assigned Index No. 653795/2015 (the "Homapour Action") and the action *Jacob Harounian, et al. v. Mark Harounian, et al*., and assigned Index No. 450615/2019 (the "Harounian Action") for joint trial. (Homapour Action NYSCEF No. 556). Accordingly, the Homapour Action and the Harounian Action are sometimes referred to together herein as the "Consolidated Actions."

RELEVANT PROCEDURAL HISTORY

For purposes of this Decision, familiarity with the factual background and procedural history is presumed, and will not be stated herein, except as necessary for the rendering of this Decision.

A. The September 9, 2019 Decision and Order on United Hay's Motion to Compel the Deposition of Jacob Harounian

By Decision and Order dated September 9, 2019, United Hay's "Motion to Compel: 1) the deposition of Jacob Harounian; and 2) the production of documents responsive to discovery demands served on Jacob Harounian (Motion Sequence 002) [was] Granted [sic] for the reasons stated on the September 9, 2019 record and transcript." (NYSCEF United Hay Action Doc. Nos 185-187). Other motions filed in the United Hay Action and the Consolidated Actions were also argued and decided during the September 9, 2019 court conference before Justice Cohen. One of those motions was the Motion to Consolidate the Homapour Action with the Harounian Action (Motion Sequence 012 in the Homapour Action). (NYSCEF Homapour Action Doc. Nos. 440-448). However, Motion Sequence 012 in the Homapour Action did not seek consolidation of the Consolidated Actions with the United Hay Action, and as of September 9, 2019, no such motion had been filed with the Court.

The portions of the proceeding before Justice Cohen on September 9, 2019, as are relevant to a rendering of a decision on United Hay's current application, will be referenced below.

B. United Hay's Motion to Consolidate the United Hay Action with the Consolidated Actions and the December 19, 2019 Decision and Order

On October 1, 2019, Jacob Harounian filed a Motion to Consolidate the United Hay Action with the Consolidated Actions (Motion Seq. 005 in the United Hay Action). By Decision

and Order dated December 19, 2019, the Court denied the Motion to Consolidate the United Hay Action with the Consolidated Actions. (NYSCEF United Hay Action Doc. No. 225). The Decision and Order acknowledges that "[t]he Court previously ruled that discovery in the three cases should be coordinated." (NYSCEF United Hay Action Doc. No. 225, at p. 1).

After summarizing Jacob Harounian's arguments in support of the Motion to Consolidate the United Hay Action with the Consolidated Actions, the Court stated that:

> While Defendant's arguments are credible, on balance the Court does not find them persuasive. To begin with, it is not clear whether and to what extent Mark's conduct with respect to other Family LLCs justified Defendant's withdrawal of funds from the United Hay entity, in which he is not a member. Even assuming some evidence relating to Mark's conduct is relevant to this case [the United Hay Action], it is likely that such evidence will be narrower in scope than will be relevant [in] the Harounian and Homapour Actions in which such conduct is front and center. Although it is not required that there be a complete overlap of common issues of fact, in this case the Court believes that the potential downsides of a joint trial outweigh whatever efficiencies might be achieved by such a proceeding.

(NYSCEF United Hay Action Doc. No. 225, at p. 4).

The Court also noted that a joint trial may raise a "substantial risk of confusion, inefficiency, and prejudice" because the Consolidated Actions will be tried before the Court, while "Plaintiff in this case [the United Hay Action] has indicated that it will exercise its right to trial by jury." (NYSCEF United Hay Action Doc. No. 225, at p. 4). Additionally, in response to the Defendants' argument that separate trials may raise inconsistent decisions on common issues of fact, the Court stated that "[t]he instant case [United Hay Action] is focused on the narrow question [of] whether Jacob was justified in withdrawing funds from United Hay, in which he is not a member. While he may seek to defend himself, in part, on the ground that Mark's malfeasance and commingling of funds in other LLCs justified his actions, the Court does not

believe the overlap is sufficient to outweigh the substantial inefficiency and prejudice of trying the cases together." (NYSCEF United Hay Action Doc. No. 225, at p. 5).

C. **The Appointment of the Special Referee**

As set forth above, pursuant to the Order of Appointment dated April 22, 2020, the Special Referee was appointed "for the purpose of assisting the Court and the parties in conducting and completing discovery in an orderly and efficient manner." (NYSCEF United Hay Action Doc. No. 640, NYSCEF Harounian Action Doc. No. 186, NYSCEF Homapour Action Doc. No. 640, at p. 1). Pursuant to Section 2 of the Order of Appointment, the Special Referee has "the duty and the power to regulate all discovery of the parties and non-parties and other designated matters." (*Id*. at ¶ 2). In addition to having the authority to resolve discovery disputes, the Special Referee also has "the authority to assist the Court with case management…" (*Id*.).

D. **The Instant Dispute and the Parties' Submissions**

As set forth above, by letter dated May 1, 2020 ("Dispute Letter No. 2"), counsel for United Hay requested that the Special Referee "direct party depositions in the [United] Hay Action to proceed immediately notwithstanding that depositions of the same parties will proceed in the Consolidated Actions at a later time on different issues. (Dispute Letter No. 2 at p. 1). In sum, United Hay asserts that the issues in the United Hay Action are "considerably more circumscribed and distinct from the issues in the Consolidated Actions." (Dispute Letter No. 2 at p. 1; *see also* pp. 1-2). Counsel also asserts that while "[d]iscovery in the Consolidated Actions is expansive" the "issues and discovery in the [United] Hay Action are extremely limited." (Dispute Letter No. 2 at p. 2).

United Hay also contends that "[d]ocument discovery in the United Hay Action was minimal and concluded in *2018*." (Dispute Letter No. 2 at p. 2 (italics in original). United Hay further asserts that Jacob Harounian's "equitable recoupment/set-off" justification in the United Hay Action is not a reason to delay Jacob Harounian's and Mark Harounian's[2] depositions until they are deposed in the Consolidated Actions, and that such arguments were unsuccessful when Jacob Harounian made them to the Court at the time he sought to consolidate the United Hay Action with the Consolidated Actions. (Dispute Letter No. 2 at pp. 2-3).

Counsel also points to portions of the September 9, 2019 transcript in which the Court noted that "any additional discovery [in the United Hay Action] *should be very narrowly tailored*," and that discovery in the United Hay Action is "narrower in scope" than the Consolidated Actions. (Dispute Letter No. 2 at p. 3; Exhibit A, September 2019 TR at 42:15-19; Exhibit B, December 19, 2019 Decision and Order, pg. 2).[3] Additionally, United Hay's counsel notes that Jacob's prior counsel acknowledged that the parties would proceed with depositions if Jacob Harounian's motion for summary judgment was denied. (Dispute Letter No. 2 at p. 3, Exhibit C, the transcript from June 11, 2019 (the "June 2019 TR") at 8:2-5) In sum, counsel asserts that "[j]udicial economy and party fairness are strongly promoted by directing party depositions in the United Hay Action to proceed immediately." (Dispute Letter No. 2 at p. 3).

In Jacob Harounian's May 8, 2020 Response Letter (the "Response Letter"), Counsel points to two statements during the September 9, 2019 court conference to support his position that: (1) "Mark's counsel raised the issue of deposing Jacob before document discovery was

[2] It should be noted that while Mark Harounian is named as a defendant in the Homapour Action and Harounian Action, he is neither a plaintiff nor a defendant in the United Hay Action. However, the Special Referee presumes that counsel is referring to the deposition of Mark Harounian because he would be the individual expected to testify on behalf of United Hay as its representative.

[3] The September 9, 2019 Transcript shall be referred to herein as the "September 2019 TR". Note that Counsel cites only to the September 2019 TR at 38:9-22, however the language Counsel quotes is found at the September 2019 TR. t 42:15-19 and on pg. 2 of the December 19, 2019 Decision and Order.

complete and was directly rebuffed by the Court"; and (2) that "the Court rejected Counsel's suggestion that Jacob be immediately deposed."[4] (Response Letter at p. 1). Specifically, counsel for Jacob Harounian quotes Justice Cohen's comments reflected in the September 9, 2019 transcript:

> Let me just as a practical question in this labyrinth of litigation we're dealing with now, there is another case in which Mr. Harounian's deposition is going to be taken anyway, right? Jacob has a case against Mark, whether he is going to be deposed in this case or that one, I think trying to slice this that way it's going to be unproductive, so we are not talking about that.
>
> ***
>
> So that's, I mean, obviously we are going to consolidate and coordinate – not consolidate coordinate discovery so that you won't be prejudiced. You should continue to do discovery as if the cases are going to together.[5]

(Jacob Harounian Response Letter at pp. 1-2, *see also* Dispute Letter, Exhibit A, September 2019 TR. 42:23-43-4; 56:24-57:3). Counsel for Jacob Harounian also asserts that document discovery in all three actions is not complete, and thus proceeding with depositions would be prejudicial. (Jacob Harounian Response Letter at p. 2). Jacob Harounian also takes issue with "Mark's attempt by dispute letter to litigate Jacob's defense…" (Jacob Harounian Response Letter at p. 2). Counsel for Jacob Harounian also notes that from a "purely logistical point of view, the immediate deposition of Jacob is impossible" given the current pandemic surrounding COVID-19 and that a "remote video deposition would be impossible." (Jacob Harounian Response Letter at p. 2).

[4] While United Hay's Dispute Letter No. 2 seeks a directive that party depositions proceed immediately, the Response Letter only addresses the deposition of Jacob Harounian.

[5] Counsel for the Plaintiffs in the Homapour Action also submitted a letter dated May 8, 2020, in response to Dispute Letter No. 2. Therein, the Plaintiffs in the Homapour Action also rely upon the same statements by the Court to support the argument that the depositions in the United Hay Action should proceed at the same time as the depositions in the Consolidated Actions.

A conference with the Special Referee took place via WebEx on May 18, 2020 (the "WebEx Conference"), at which time the parties further set forth their positions to the Special Referee.[6] In accordance with the Special Referee Procedures, the Special Referee advised that he would be issuing the instant decision.

THE SPECIAL REFEREE'S ANALYSIS AND DETERMINATION

There can be no dispute that the United Hay Action *has not* been consolidated with the Consolidated Actions. (*See* December 19, 2019 Decision and Order). Thus, the question before the Special Referee is whether Justice Cohen's statements (both on the record on September 9, 2019, and in the December 19, 2019 Decision and Order) that discovery in the United Hay Action would be coordinated with the Consolidated Action means that the parties in the United Hay Action cannot proceed with depositions until the depositions in the Consolidated Actions are ready to proceed. In the Special Referee's view, as discussed in detail below, Justice Cohen's direction that discovery was to be "coordinated" does not prevent the taking of party depositions in the United Hay Action prior to the commencement of depositions in the Consolidated Actions.

A. **The Court Granted United Hay's Motion to Compel the Deposition of Jacob Harounian**

First, as a practical point, there is a Court order clearly granting United Hay the right to depose Jacob Harounian which contains no language restricting United Hay from moving forward with the deposition prior to the depositions taking place in the Consolidated Actions. As set forth above, United Hay moved to compel the deposition of Jacob Harounian in the United Hay Action (Motion Sequence 002), which was granted by the Court. As set forth in the

[6] Any arguments or facts provided during the WebEx Conference that are relevant to the Special Referee's analysis will be discussed *infra*.

Memorandum of Law in Support of United Hay's Motion to depose Jacob Harounian, the Preliminary Conference Order had provided that the deadline for United Hay to depose Jacob Harounian was December 3, 2018. Accordingly, United Hay noticed Jacob Harounian's deposition for November 29, 2018, however, Jacob Harounian did not appear (NYSCEF United Hay Action Doc. No. 67 at pp. 8). Therefore, in accordance with the Court's direction, United Hay moved to compel Jacob Harounian's deposition in the United Hay Action and counsel for United Hay argued that "Jacob should be ordered to sit for his deposition immediately". (*Id*. at pp. 8, 11). By Decision and Order dated September 9, 2019, the Court granted the relief sought in the Motion to Compel. In the Special Referee's view, had the Court intended to qualify its decision and require that the deposition of Jacob Harounian in the United Hay Action await his deposition in connection with the Consolidated Actions, Justice Cohen would have clearly stated as such in his September 9, 2019 Decision and Order.

Additionally, the record of the September 9, 2019 court conference in connection with the Motion to Compel the deposition of Jacob Harounian is clear that United Hay's application was granted without any conditions or modifications. During the September 9, 2019 appearance, the following exchange took place:

> Mr. Charron: One quick clarification, Judge, to your last point. We believe and I think we noted this earlier this morning as well, the issues in United Hay are more circumscribed.
>
> The Court: I understand. We will deal with those other disputes later.
>
> Mr. Charron: I'm not talking about the other disputes. We would like to depose Jacob Harounian.
>
> The Court: That's what I was talking about.
>
> Mr. Charron: I apologize.

> The Court: That is the motion you brought. I'm granting your motion, unless you want to reargue it.
>
> Mr. Charron: Not particularly.
>
> The Court: Okay. Good.

(September 2019 TR 43:9-22). Thus, given that United Hay sought to depose Jacob Harounian in the United Hay Action, and was granted such relief, the Special Referee sees no reason to find that the term "coordinate" discovery means that United Hay may not proceed with the deposition of Jacob Harounian, relief that was already granted.

B. **The Statements Relied Upon By Jacob Harounian In His Response Letter Do Not, In The Special Referee's V**iew, **Support Jacob Harounan's Position That Party Depositions In The United Hay Action Must Await Depositions In The Consolidated Actions**

As set forth above, Jacob Harounian relies upon certain comments made by Justice Cohen that were stated on the record during the September 9, 2019 court conference purportedly in support of counsel's position that "on September 9, 20[19], Mark's counsel raised the issue of deposing Jacob before document discovery was complete and was directly rebuffed by the Court." (Response Letter No. 2, p. 1.). However, upon review of the select portions of the transcript cited by Jacob Harounian, the Special Referee does not agree with counsel's interpretation of Justice Cohen's comments.

First, although quoted consecutively in the Response Letter, the two statements made by the Court that are relied upon by counsel for Jacob Harounian were made by the Court in connection with two different motions, filed in two different actions. The first statement was made in connection with United Hay's Motion to Compel in the United Hay Action (Motion Seq. 002) which sought to compel both the deposition of Jacob Harounian and for Jacob Harounian to produce tax returns. During the argument the following exchange took place between Mr. Charron (counsel for United Hay) and the Court:

> The Court: … Mr. Charron, are you seeking anything in the document side of – the deposition I think is clearly going to happen. Are you seeking something in addition to tax returns?
>
> Mr. Charron: No, Your Honor. And I'm requesting to seek all documents including all communications, not just communications.
>
> The Court: That's what I thought.
>
> Mr. Charron: Your Honor may not have been aware [of] their decision not to seek any further discovery or even to seek a deposition, serve a deposition notice on Mark Harouinan, that was strategic, that was deliberate. Justice Bransten set December 3rd as the deadline for depositions. We had properly noticed it to occur November 29th. They announced before then that they intended to bring this summary judgment motion, and they said they were going to do it by November 30th of last year. We were in court at a compliance conference on November 27th. All of this was discussed. They were specifically invited by us, if no one else, to serve a deposition.
>
> The Court: Let me just as a practical question in this labyrinth of litigation we're dealing with now, there is another case in which Mr. Harounian's deposition is going to be taken anyway, right? Jacob has a case against Mark, whether he is going to be deposed in this case or that one, I think trying to slice this that way it's going to be unproductive, so we are not talking about that. So, Motion Number 2 – I'm sorry.
>
> Mr. Charron: Yes.
>
> The Court: Motion Number 2 is granted with respect to the deposition and the tax returns.

(September 2019 TR at 42:1 – 43:8).

While Jacob Harounian's counsel cites to the Court's statement regarding the "labyrinth of litigation" and that "there is another case in which Mr. Harounian's deposition is going to be taken anyway", when read in the context of the discussion being had on the record, it is clear that the Court was discussing the deposition of *Mark Harounian*, not *Jacob Harounian*, and noting that as a practical matter, even though counsel for Jacob Harounian failed to serve a deposition

notice, Mark Harounian would be sitting for a deposition in the Consolidated Actions. Thus, given the context, it is the Special Referee's view that there is no reasonable interpretation of the Court's statement that would suggest that United Hay could not proceed with the deposition of Jacob Harounian or was somehow restricted from doing so until the parties in the Consolidated Actions were ready to depose Jacob Harounian.

The second statement in the September 9, 2019 record relied upon by Jacob Harounian appears later in the transcript (more than ten pages after), in connection with Motion Sequence 012 filed in the *Homapour* Action, which sought to consolidate the *Homapour* Action with the *Harounian* Action. The relief sought in Motion Sequence 012 in the Homapour Action (and, more importantly, what relief was not sought) was clearly set forth on the record:

> The Court: So this is 657310 of 2015. Welcome back. So now we are going to talk about some pending motions in the 2015 case, that is 653795/2015, Homapour versus Harounian et al. So let's take these in order Motions 12, 13 and 14. Motion 12, I think is, to some extent, logistics that is the motion to consolidate the case, yes. Now at the moment, I think the consolidation request, correct me if I'm wrong, is seeking to consolidate the Nassau County case [Harounian Action] which is now here, with the 2015 case [Homapour Action]. Is that right?
>
> Mr. Charron: That's correct, Your honor.
>
> The Court: I don't know if I heard a little bit from Mr. Ciulla earlier **whether there is also a request to consolidate the United Hay into a single action with the other two.**
>
> Mr. Rosenberg: **There wasn't, Your Honor**, because we had a summary judgment motion pending. … We, obviously, weren't going to make a motion when we thought we should have won the case, take victory and leave. But since that, unfortunately, is not going to be the case for us, we do think that all these matters should be jointly tried.

(September 2019 TR 46:23 – 48:3 (emphasis added)).

Although no motion to consolidate the United Hay Action with the Consolidated Action was before the Court, the Court asked the parties "[d]oes anybody have a strong feeling in favor of full consolidation or does anybody object to the United Hay case being put into a consolidated trial." (September 2019 TR at 48:15-17). Mr. Charron, counsel for United Hay, responded and said that "Your Honor, we believe that the United Hay case is substantially more circumscribed in terms of issue and discovery and can be trial ready quite quickly." (*Id*. at 48:15-21).

When the Court ruled on Motion Sequence 12 in the Homapour Action, the following conversation took place on the record:

> The Court: Here is what I think we should do here right now. Motion Sequence 12 does not envision consolidating with the United Hay case. What I am going to do is consolidate the others for trial and have briefing on, I think that what it would be is Jacob Harounian making a motion to consolidate with the other two. I'd rather not make a snap judgment on this because I think it is kind of deliberate question.
>
> Mr. Rosenberg: When you say "consolidation," you mean joint trial?
>
> The Court: Consolidation of joint trial.
>
> Mr. Rosenberg: Consolidation of discovery for joint trial?
>
> Mr. Soloway: That's what consolidation means.
>
> The Court: I think consolidation for joint trial effectively is just the same thing.
>
> Mr. Rosenberg: Okay, fine.
>
> The Court: You keep two separate docket numbers.

(September 2019 TR at 55:13-56:6).

After discussing timing of the filing for the Motion to Consolidate the United Hay Action with the Consolidated Actions, the Court made the statement that Jacob Harounian is now relying on. The Court's statement was:

> So that's, I mean obviously, we are going to consolidate and coordinate – not consolidate – coordinate discovery so that you won't be prejudiced. You should continue to do discovery as if the cases are going to be together.

(September 2019 TR at 56:24 – 57:3).

While the Court did state that discovery would be coordinated, in the Special Referee's view, this statement does not provide support for Jacob Harounian's position that depositions cannot proceed in the United Hay Action until such time as the parties are ready to conduct depositions in the Consolidated Actions. First, as set forth above, at this juncture of the proceeding, United Hay's motion to depose Jacob Harounian had already been granted without any limitation that the deposition must wait until such time as depositions were ready to proceed in the Consolidated Actions. In the Special Referee's view, it is somewhat misleading for counsel for Jacob Harounian to take a select portion of a statement made by the Court while hearing and ruling on a *different motion* (Motion to Consolidate) in a *different action* in which no relief was sought in connection with the United Hay Action and to find that such statement modifies the Court's ruling regarding Jacob's deposition in the United Hay Action.

Further, even though on September 9, 2019, the Court advised the parties to proceed with "discovery as if the cases are going to be together," the fact remains that the Court ultimately ruled that the United Hay Action *would not* be consolidated with the Homapour and Harounian Actions and would not be tried together. (December 19, 2019 Decision and Order). While arguably *some* factual issues in the United Hay Action may overlap with the issues in the Consolidated Actions (meaning that there may be an overlap in *some* discovery that can be coordinated for efficiency purposes), in light of the fact that the United Hay Action will be tried separately, the Special Referee cannot read the Court's words that discovery would be "coordinated" to mean that party depositions in the United Hay Action should be delayed,

thereby delaying the trial of the United Hay Action, so that depositions can be conducted in the United Hay Action at the same time as the depositions in the Consolidated Actions. This is especially true in light of the fact that as discussed *infra*, Point C, significantly more discovery needs to be completed in the Consolidated Actions as compared to the United Hay Action before depositions can proceed.

Accordingly, the statements in the September 9, 2019 transcript upon which Jacob Harounian relies do not, in the Special Referee's view, support delaying party depositions in the United Hay Action until such time as the parties in the Consolidated Actions are to be deposed.

C. **The Remaining Document Discovery to Be Completed in The United Hay Action Prior to Party Depositions Proceeding is Narrower in Scope Than What Needs To Be Completed in The Consolidated Actions**

As set forth above, the Special Referee was appointed to oversee discovery in the Consolidated Actions as well as in the United Hay Action. Based upon the Special Referee's conversations with counsel and numerous correspondence received, it has become clear that a significant amount of document discovery still needs to be exchanged and reviewed in the Consolidated Actions prior to party depositions proceeding. Additionally, there are several discovery disputes already pending before the Special Referee in connection with the Consolidated Actions, and the Special Referee is aware of several additional disputes that will soon be before him. Thus, the Special Referee agrees with counsel for United Hay's (who is also counsel for Mark Harounian, the Harounian LLCs and the Family LLCs in the Consolidated Actions) statement in Dispute Letter No. 2 that "Discovery in the Consolidated Actions is expansive." (Dispute Letter No. 2 at p. 2). In contrast, based upon both the Court's and prior counsel for Jacob Harounian's statements during the September 9, 2019 appearance before

Justice Cohen, it is clear that discovery in the United Hay Action has progressed significantly further than the discovery in the Consolidated Actions.

During the argument on United Hay's Motion to Compel in the United Hay Action, the Court then asked counsel for Jacob Harounian, "[w]hat discovery happened before the motion for summary judgment? Nothing?" and the following conversation took place on the record:

> Mr. Ciulla: ***We had essentially completed document discovery.*** We had resisted producing the tax returns, Your Honor…"
>
> [***]
>
> The Court: Okay. In terms of their production of documents to you, that was also completed by the deadline?
>
> Mr. Ciulla: ***That was completed*** except that now, Your Honor, when we have these tax estoppel issues, including knowledge, what knowledge Mark Harounian had why these statements were made and so on, we certainly would want additional documents and we want depositions."
>
> [***]
>
> The Court: Did you seek documents about the tax returns in discovery?
>
> Mr. Ciulla: Your Honor, ***document discovery had been completed by the time we moved for summary judgment***.

(September 2019 TR at 35:21-25 (bold emphasis added); 36:7 – 13 (emphasis added); 37:2-5 (emphasis in original)).

Thus, there can be no dispute that counsel for Jacob Harounian admitted, on the record, and made representations to the Court regarding the completion of document discovery in the United Hay Action as of September 9, 2019. However, there also can be no dispute that Defendants were granted leave to serve additional, narrowly-tailored discovery in the United Hay Action, specifically before any deposition of *Plaintiff* in that action proceeded.

After Jacob Harounian's counsel acknowledged that document discovery had been completed prior to the filing of the summary judgment motion, the following exchange took place between counsel and the Court:

> The Court: I'm asking if the stuff you are looking for now, if you asked for it already, why did they object to producing it?
>
> Mr. Ciulla: Your Honor, we did not ask for the accountant's working papers because they didn't make the argument that there was a mistake regarding their amendment to the 2014 tax return until we moved for summary judgment. So, how could we have possibly have asked for those documents? How could we have known that we would want communications between Mr. Harounian and special tax counsel?

(September 2019 TR at 37:6-20). Thereafter, the Court stated the following:

> All right. That motion is not in front of me right now, but I will tell you, I understand the need to, if there was a subsequent event of some relevance, I would say, you have to be able, ***but any additional discovery should be very narrowly tailored. I'm not going to go back and re-open the whole thing. We are, I think we are pretty far down the line here.***

(*Id*. at 38:15-22 (bold emphasis added)).

Thus, given the acknowledgement by counsel for Jacob Harounian that document discovery in the United Hay Action was complete prior to September 9, 2019, and the fact that the Court's clear statements only permitted "additional narrowly tailored discovery," to proceed, it is the Special Referee's view that the Court's statement that discovery should be coordinated could not, under any reasonable interpretation, mean that party depositions in the United Hay Action must await deposition practice in the Consolidated Actions. Such an outcome would be unreasonable, inefficient, and would delay the trial of the United Hay Action.

D. **Outstanding Discovery to Be Completed in The United Hay Action Prior to Party Depositions Taking Place and the Pragmatic Issues That Need to Be Addressed Prior to Scheduling**

In light of the Justice Cohen's directive on the record that additional narrowly tailored discovery could be served by Jacob Harounian regarding the tax estoppel issue, the Special Discovery Master issued an Order on April 9, 2020, memorializing his oral directive during the April 3, 2020 WebEx Conference, that permitted Jacob Harounian to serve Supplemental Document Demands on or before May 4, 2020, and that such Document Demands would be responded to within thirty (30) days. Thus, prior to the deposition of the Plaintiff in the United Hay Action, Jacob Harounian would be entitled to obtain responses to his Supplemental Document Demands.[7] However, the fact that Jacob Harounian may be seeking additional documents from United Hay should not derail United Hay's right to depose Jacob Harounian now.

[7] It should be noted that counsel for Jacob Harounian was substituted on February 21, 2020 and the law firm of The Steckler Law Firm now represents Jacob Harounian in both the United Hay Action and the Harounian Action. (NYSCEF United Hay Doc. No. 230, NYSCEF Harounian Doc. No. 184). Prior to the Special Referee's first WebEx Conference with the parties, he requested that counsel for each party submit a letter to him outlining, in sum, the discovery that had been completed, what was still outstanding, and any anticipated discovery disputes. Mr. Steckler submitted a letter dated March 27, 2020, in which he stated, in part, that since becoming counsel:

> We have attempted to gain an understanding of the various claims in the cases by reviewing the files and meeting with Jacob and prior counsel. While we have made significant progress, we just recently discovered that much of the discovery provided by Mark Haronian ("Mark") was sent as an attachment to a letter to prior counsel. Unfortunately, due to an unintentional oversight, the letter (sent by email), and thus the attachment were not provided to us and we did not become aware of such until such time as we were preparing our response to your request. Thus we are unable to address the specific deficiencies in Mark's response to Jacob's notice of discovery and inspection *in Jacob's action against Mark.*

(Todd Steckler March 27, 2020 Letter at pp. 1-2 (italics emphasis added)). Thereafter, the Special Referee provided Mr. Steckler with additional time to review Mark Harounian's production made in response to Jacob Harounian's demands. Most recently, by email dated May 18, 2020 the Special Referee directed that "If counsel for Jacob Harounian wishes to raise a dispute with the Special Referee with respect to Mark Harounian's responses to Document Demands and/or Interrogatories that have been served to date, then counsel for Jacob Harounian must submit any Initial Dispute Letter(s) on or before June 19, 2020." In the Special Referee's view, counsel's continued review of *Mark Harounian's* production in the Harounian Action, and any potential dispute that may be raised on or before June 19, 2020 with respect to such production, should have no impact on the timing of the deposition of *United Hay* in the *United Hay* Action.

United Hay is seeking to immediately proceed with the deposition of defendant Jacob Harounian in the United Hay Action and, under most circumstances the Special Referee would see no reason to delay the scheduling of Jacob Harounian's deposition. However, as noted in the Response Letter, we are currently "in the midst of a worldwide pandemic…" (Response Letter at p. 1).

Specifically, due to COVID-19, by Executive Order No. 202.8 on March 20, 2020, Governor Cuomo issued an executive order essentially putting New York on "Pause", directing that all employees of businesses not deemed essential to work from home (the "Stay At Home Order"). Most recently, Governor Cuomo extended the Stay At Home Order to May 28, 2020, but outlined seven criteria for different New York Regions to meet before a phased reopening can begin. While New York State is moving toward re-opening, and as of the date of this Decision has entered Phase 2 of Governor Cuomo's reopening plan, it is still neither reasonable nor safe to direct the in-person deposition of Jacob Harounian due to health concerns.

Furthermore, Jacob Harounian's counsel asserts that the "immediate deposition of Jacob is impossible" and states that " [n]ot only would a remote video deposition be impossible since no one could be in Jacob's home, Jacob would be extremely prejudiced by the inability to meet with counsel to properly prepare him for his deposition." (Response Letter at p. 2). Counsel's conclusory and unsupported statements regarding the feasibility of a video deposition of Jacob Harounian are not persuasive.

First, as discussed during the WebEx Conference, technology has made it possible for depositions to proceed both before and during the COVID-19 pandemic via video, without the need for the witness, counsel, or the court reporter to be in the same location. In fact, depositions have proceeded in this manner in litigations across New York (and outside the state) during the

pandemic without the need for anyone to enter a witness's home. Therefore, counsel's conclusory statement that it would be "impossible since no one could be in Jacob's home" is not sufficient to prevent the deposition from proceeding.

However, the Special Referee understands that certain technology must be available to the witness in order to assess whether a remote video deposition is, in, fact feasible. During the WebEx Conference, Mr. Steckler advised the Special Referee that his client uses Facebook, which would suggest that the witness has internet access in his home and a workable computer and/or electronic device. However, Mr. Steckler could not speak to what technology Jacob Harounian has in his home or what can be made available to him safely. Therefore, the Special Referee is directing Jacob Harounian to provide an Affidavit to both the Special Referee and counsel for United Hay on or before June 24, 2020 describing the technology Jacob Harounian has in his home. The Affidavit should include, but is not limited to, detailing: (1) whether Jacob Harounian has WIFI or some other access to internet; and (2) whether Jacob Harounian owns or has access to a computer or smart phone or other electronic device, and if so, whether that computer, smart phone or other electronic device has video capability. Thereafter, the Special Referee directs counsel for United Hay and counsel for Jacob Harounian to meet and confer to discuss the feasibility of a video deposition on or before July 8, 2020. If, after the meet and confer process has concluded, there remains a dispute regarding the video deposition of Jacob Harounian, the Special Referee directs the parties to contact the Special Referee to request a conference to address the issues on or before July 13, 2020.

Additionally, the Special Referee finds counsel's conclusory statement that Jacob Harounian would be prejudiced by the inability to meet with counsel in person to prepare for the deposition to be unpersuasive. While counsel may *prefer* to meet in person with his client, he

has not sufficiently demonstrated that having to speak to his client and prepare for depositions using remote means (such as telephone, video chat, email and/or mailing documents) would rise to the level of prejudice.[8]

CONCLUSION

For the foregoing reasons, United Hay's request to proceed with the depositions of the parties in the United Hay Action prior to the depositions proceeding in the Consolidated Actions is granted as set forth in this Decision and Order. Counsel for Jacob Harounian is to provide an Affidavit, as specified herein, to the Special Referee and counsel for United Hay on or before June 24, 2020 and the parties are to meet and confer regarding Jacob Harounian's deposition on or before July 8, 2020. If the parties are unable to work-out the details related to the date and format of Jacob Harounian's deposition through the meet and confer process, then the parties shall contact the Special Referee to request a conference to address the issues on or before July 13, 2020.

[8] It should be noted that while depositions cannot proceed in-person as of the time of this Decision, it is anticipated that in-person depositions will be available at some point in the future, and possibly in the next few months. In accordance with Governor Cuomo's phased reopening, New York residents will begin to return to their offices with social distancing measures in place. However, the Special Referee appreciates Mr. Steckler's concern for his client's health in light of COVID-19. That being said, the Special Referee does not agree with Mr. Steckler's position during the WebEx Conference that the deposition of Jacob Harounian may need to wait until a COVID-19 vaccine is available. When, if at all, an approved vaccine for COVID-19 will be available is unknown. To suggest that discovery would essentially be stayed until such time that a vaccine is available -- thereby stalling litigation for what can be a year or more – is, in the Special Referee's view, unrealistic. It is the Special Referee's position that it is unreasonable for a litigant to conclusively state that neither an in-person deposition (when such access is available with social distancing measures), nor a video deposition, can take place in an action until such time as a vaccine becomes available. While the Special Referee is willing to provide the parties sufficient time to determine the most appropriate way to proceed with Jacob Harounian's deposition in light of the current situation, the deposition will go forward.

Pursuant to the Stipulation and Order Appointing Michael Cardello III as Special Referee So Ordered on April 22, 2020, any Exceptions to this Decision must be filed with the Court within ten (10) days of the date of this Decision.

SO ORDERED this 9th day of June, 2020.

Michael Cardello III
Michael Cardello III
Special Discovery Master

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

UNITED HAY, LLC,	:	Index No. 657310/2017
Plaintiff,	:	**DECISION REGARDING JACOB'S MOTION COMPELLING PLAINTIFF UNITED HAY, LLC TO PRODUCE DOCUMENTS**
-against-	:	
JACOB HAROUNIAN,	:	
Defendant.	:	

This matter is before the undersigned, Michael Cardello III, Esq., as a result of a Stipulation and Order of Appointment dated April 22, 2020, signed by the Honorable Joel M. Cohen, appointing him Special Referee (the "Appointment Order") pursuant to New York Civil Practice Law and Rules ("CPLR") §§ 3104 and 4301, for the purpose of assisting the Court and the parties in conducting and completing discovery in an efficient manner.

Currently before the Special Referee is defendant Jacob Harounian's ("Jacob") motion for an order pursuant to CPLR § 3124 (the "Motion"), compelling plaintiff United Hay, LLC ("United Hay") to produce documents in the case entitled *United Hay, LLC v. Jacob Harounian*, Index No. 657310/2017 (the "United Hay Action") in response to certain demands for discovery and inspection (the "Consolidated Demands") initially made in the actions entitled *Mehrnaz Nancy Homapour et. al. v. Mark Harounian, et. al.* Index No. 653795/2015 (the "Homapour Action") and *Jacob Harounian, et. al. v. Mark Harounian, et. al.* Index No. 450615/2019 (the "Harounian Action," together with the Homapour Action, the "Consolidated Actions").

As set forth in greater detail below, the Special Referee hereby denies the relief requested by Jacob in the Motion. Specifically, the Special Referee holds that Jacob is subject to the

doctrines of judicial estoppel and waiver, both of which independently preclude him from seeking the discovery sought in the Motion.

I. PROCEDURAL BACKGROUND

The following procedural background, while extensive, is critical insofar as it sets forth a series of events and representations that provide a foundation for the Special Referee's Decision herein.

A. Prior to the Motion

1. The September 9, 2019 Court Conference

On September 9, 2019, a court conference was held to address, in part, United Hay's motion to compel the deposition of Jacob and Jacob's motion for summary judgment, both of which were made in the United Hay Action. At this conference, the Court made the following statements which are relevant to this Decision:

> The Court: What discovery happened before the motion for summary judgment? Nothing?
>
> Mr. Ciulla [Jacob's then-counsel]: **We had essentially completed document discovery…**

Transcript from the September 9, 2019 Court Conference (the "September 9, 2019 Transcript," *see* United Hay Action at NYSCEF Doc. Nos. 188-193) at 35:21-25 (emphasis added).

> The Court: Okay. In terms of their production of documents to you, that was also completed by the deadline.
>
> Mr. Ciulla [Jacob's then-counsel]: That was complete except that now, Your Honor, when we have these tax estoppel issues, including knowledge, what knowledge Mark Harounian had why these amendments were made and so on, we certainly would want additional documents and we want depositions.

Id. at 36:7-13.

> The Court: Did you seek documents about the tax returns in discovery?

> Mr. Ciulla [Jacob's then-counsel]: Your Honor, **document discovery had been completed by the time we moved for summary judgment.**

Id. at 37:2-5 (emphasis added).

> The Court: All right. That motion is not in front of me right now, but I will tell you, I understand the need to, if there was a subsequent event of some relevance, I would say, you have to be able, but **any additional discovery should be very narrowly tailored. I'm not going to go back and re-open the whole thing. We are, I think we are pretty far down the line here.**

Id. at 38:15-22 (emphasis added).

> Mr. Charron [Defendants' counsel]: Your Honor may not have been aware [of] their **decision not to seek any further discovery or even to seek a deposition**, serve a deposition notice on Mark Harouinan, that was strategic, that was deliberate. Justice Bransten set December 3rd as the deadline for depositions. We had properly noticed it to occur November 29th. They announced before then that they intended to bring this summary judgment motion, and they said they were going to do it by November 30th of last year [2018]. We were in court at a compliance conference on November 27th [2018]. All of this was discussed. They were specifically invited by us, if no one else, to serve a deposition [sic].
>
> The Court: Let me just as a practical question in this labyrinth of litigation we're dealing with now, there is another case in which Mr. Harounian's deposition is going to be taken anyway, right? Jacob has a case against Mark, whether he is going to be deposed in this case or that one, I think trying to slice this that way it's going to be unproductive, so we are not talking about that. So, Motion Number 2 – I'm sorry.
>
> Mr. Charron [Defendants' counsel]: Yes.
>
> The Court: Motion Number 2 is granted with respect to the deposition and the tax returns.

Id. at 42:10-43:8 (emphasis added).

> Mr. Charron [Defendants' counsel]: One quick clarification, Judge, to your last point. We believe and I think we noted this earlier this morning as well, **the issues in United Hay are more circumscribed**.

> The Court: **I understand**. We will deal with those other disputes later.
>
> [* * *]
>
> The Court: Okay. Good. I will say that I guess there is not a motion in front of me, but if Jacob Harounian seeks discovery with respect to the post-delivery event of the second amendment of the tax returns, **I think a narrowly tailored discovery request will be permitted.** So, you can object to it if you want. We could go through it again. **It is narrowly tailored**. They are entitled to it.

Id. at 43:9-44:5 (emphasis added).

> The Court: I don't know if I heard a little bit from Mr. Ciulla [Jacob's then-counsel] earlier whether there is also a request to consolidate the United Hay case into a single action with the other two.
>
> Mr. Rosenberg (Jacob's then-counsel): **There wasn't, Your Honor, because we had a summary judgment motion pending.** We think it would be rather inconsistent to ask for – well, we don't oppose joint trial. I don't know if Your honor is using it colloquially, "consolidate." We believe all three cases now have to be jointly put together for the very reasons, for your rationale on the motion for summary judgment . **We, obviously, weren't going to make a motion when we thought we should have won the case, take victory and leave. But since that, unfortunately, is not going to be the case for us, we do think that all these matters should be jointly tried**. I don't believe any of the other parties have any objection. I think Mr. Charron's position, he doesn't care if there is consolidation or joint trial. I think joint trial has to be the case because we have two different plaintiffs, two different pleadings, two different law firms, and it would be impossible to have it consolidated, and you got a misalignment of parties also to boot.
>
> The Court: Yes, I think full consolidation into a single matter might be a little challenging. I think as a practical matter there is not a whole lot of difference between consolidated for joint trial. Does anyone have a strong feeling in favor of full consolidation or does anybody object to the United Hay case being put into a consolidated trial?

Mr. Charron (Defendants' counsel): Your Honor, we believe that the **United case is substantially more circumscribed in terms of issue and discovery and could be trial ready quite quickly.** We also think that is a case that drives a number of considerations for all of the parties and that is going to be substantially slow if that gets folded in all of the other matters.

The Court: I assume one of their defenses is going to be, as I heard earlier, well, the money is all commingled and they took the money because it was being looted from some other place, and don't they necessarily – kind of let me take a step back. Your case against Jacob is very separate. I have a feeling that the way in which they come together is going to be the defense.

Mr. Charron (Defendants' counsel): In the United Hay action, Your Honor, with respect to what you have heard described as commingling, I described it as bailment. That was an issue that was raised in discovery in the United Hay action. They had initially made some document requests for documents showing the sources of where United Hay's money came from. **That issue was presented to the Court, to Justice Bransten in a pre-motion conference call, and the Court indicated that Jacob was unlikely to get that discovery** because the question of where the money came from is legally irrelevant to the claims. Conversion requires possessory interests. I could get into all of that.

The Court: Was that a call with the Judge or her office?

Mr. Charron (Defendants' counsel): With her clerk, Mr. Pioch. Mr. Pioch indicated it was a position of Justice Bransten, he did indicate that the Court cannot stop a party from bringing a motion to compel which was on the table at that time, **but Jacob did not bring a motion to compel that discovery.** I think rightly Justice Bransten observed that discovery was legally immaterial and unnecessary to the United Hay case.

The Court: Judge Bransten did or her clerk?

Mr. Charron (Defendants' counsel): Representing it was the position of Justice Bransten, having read our pre-motion letters as her rules require, but, yes, we spoke with Mr. Pioch, not the Judge herself. **We never got a chance to speak with the Judge herself because Jacob abandoned the argument, abandoned the motion.**

The Court: Now, logistically, it would be, I mean there is a world in which discovery could be coordinated, so that if we did have a

> separate trial, United Hay case, the defense would have every right to dig into these facts that there has been no – well, lets see, Jacob Harounian case which was brought in 2018? That discovery presumably is still nascent, right? It is not?
>
> Mr. Rosenberg (Jacob's then-counsel): No, zero. Your honor, if I could just –
>
> The Court: Logically, I do understand how they could be separate. Whereas the other two cases, I don't see how you could disentangle them. So that is, I understand the practical argument.
>
> Mr. Rosenberg (Jacob's then-counsel): No, no, I want to make – this is a very substantive argument, and it goes to the heart of due process and justice here because, **Your Honor, we believed that we were entitled to win the case on tax estoppel because at the time we made it known we were making that motion, the tax return had it down as a distribution. Okay. So subsequent to that, after discovery closed** and after these other things happened before – after those other things happened, they amended the return and Your Honor just eloquently stated on the record about all the factual issues that we are entitled to be able to prove, which includes the commingling of the other funds of my client.
>
> The Court: I don't disagree with any of that in that you would have the ability to put on, I don't want to make evidentiary rulings now, but conceptually those are all things you can pursue. The only question, do you pursue them in the same trial and is that necessary.

Id. at 47:12-51:21 (emphasis added).

> The Court: . . . I understand it may be more efficient maybe to do it together, but they could be tried separately as long as you had the ability to put on your full defense. And the question I guess is does the $5 million issue cloud anything? I'm not saying you can't put in the evidence you want to put in. The only question is should it happen in two separate proceedings.

Id. at 52:2-10.

> The Court: I think I may understand what you are really getting at. You want the same jury who decides the case against your client to decide the case against Mark. What I was offering you is that you can put all the same facts in front of a different jury and make them your defenses, but why do you –

> Mr. Rosenberg (Jacob's then-counsel): Then we could have inconsistent verdicts, number one.
>
> The Court: Wait a minute. They wouldn't be inconsistent, I don't think.
>
> Mr. Rosenberg (Jacob's then-counsel): We prove that the money that was in United Hay did end up belonging to my client in the other two cases, but the jury in the first case, where it was limited focus, they found that he wasn't entitled to the money, that is inconsistent verdicts as much as I could see. Secondly, in order to be efficient with the discovery we are going to be wanting the same discovery that is going on in the other two cases. How does it make sense?
>
> The Court: Well, that's – don't worry about that. The consolidating for discovery, that is a bunt. Of course, you could get that.
>
> Mr. Rosenberg (Jacob's then-counsel): Okay.
>
> The Court: That's an interesting request. So, back to you, Mr. Charron. I guess the – I think to some extent there is an overlapping issue. Whether or not – one of the defenses may be to loop in the concern about what was being taken out of these companies which would be an issue in both cases.

Id. at 53:2-54:4.

> Mr. Charron (Defendants' counsel):. . .They raised – and that's why I discussed the prior discovery demands that they had made and their abandonment of a motion to compel. They had always taken the position in some iteration or other that Jacob was justified in taking the $5 million. At one point, their position was that the money in United Hay's account was a bailment account for other companies. The reason they took that position is because it was Jacob's idea to do that. That is in our other motion papers. But putting that aside, they had always taken the position that, well, this money might belong to other companies in which Jacob is a member, and so he is entitled to take it. And the reason we oppose that is because self help is not any sort of viable legal argument, and that's why we had letters to the Court by Justice Bransten's clerk that indicated that the Court was not favorably inclined towards that kind of motion to compel because, even if the money was being held by United Hay for interest-bearing benefit for other companies, that doesn't entitle Jacob to go in as a non-member and take it. So the issues really are separate. And so, what counsel is doing now is transmogrifying the theory to try to fit tax estoppel, but it has always been on the table.

It has always been the question, was he justified or not, and that is a very discrete question.

The Court: Here is what I think we should do here right now. Motion Sequence 12 does not envision consolidating with the United Hay case. What I am going to do is consolidate the others for trial and have briefing on, I think that what it would be is Jacob Harounian making a motion to consolidate with the other two. I'd rather not make a snap judgment on this because I think it is kind of deliberate question.

Mr. Rosenberg (Jacob's then-counsel): When you say "consolidation," you mean joint trial?

The Court: Consolidation of joint trial.

Id. at 54:11-55:24.

The Court: So that's, I mean, obviously, we are going to consolidate and coordinate – not consolidate – coordinate discovery so that you won't be prejudiced. You should continue to do discovery as if the cases are going to be together. The consolidation for joint trial only has an actual impact a little bit later on, but don't wait. If their case starts to move quickly, which we will get to in a second, you know, if you are going to be consolidated for joint trial, we will want to know that soon.

Id. at 56:24-57:8.

The Court: I would like to aim toward a consolidated discovery schedule which I think should work even though one of the cases is older than the others because I would like that case scheduled to drive the others. Or let's put it this way, I would like the discovery schedule to work for all the cases and I think it should. Given certainly the Nassau County case is very similar to the 2015 case, so I don't see why they shouldn't go along the same track. And, it sounds like, **frankly, the United Hay case is pretty advanced as compared to the other two.** And the only common overlapping discovery is going to be discovery that you have to do in the other two cases anyway.

Mr. Rosenberg (Jacob's then-counsel): Okay, Your Honor, it is, with all due respect, it is not advanced in the United Hay Case.

The Court: More advanced?

> Mr. Rosenberg (Defendants' counsel): Not even more advanced.
>
> The Court: More advanced than zero?
>
> Mr. Rosenberg (Jacob's then-counsel): It is more advanced than 2018 case. But any case that has any discovery is more advanced than 2018 because we are absolutely zero at the 2018 case. We have no P.C. and no document response.
>
> The Court: Okay. So there is no P.C. order in 2018 case at all?
>
> Mr. Rosenberg (Jacob's then-counsel): Correct, no P.C. order at all, and that was the one reason why the defendants said they didn't have to respond to our discovery demands. **And, the United Hay case was a more limited issue because of the tax estoppel, but now it is intertwined. You can't separate them from the discovery in all the other cases.**
>
> The Court: Okay. Well, look, let's just take a step back, and were going to end here today, leave here today with a schedule that is going to include all the cases, and I'm going to hold people to it . . . The cases have been here long enough . . .

Id. at 61:23-63:13 (emphasis added).

2. The Court's December 19, 2019 Decision

On December 19, 2019 the Court issued a decision denying Jacob's motion to consolidate the United Hay Action with the Consolidated Actions for joint trial ("December 19, 2019 Decision," *see* United Hay Action at NYSCEF Doc. No. 225). The Court explained that even though it "previously ruled that discovery in the three cases should be coordinated," the overlap between the cases is insufficient to outweigh the "substantial inefficiency and prejudice of trying the cases together." December 19, 2019 Decision at pp. 1, 5. The Court determined that while "there are some overlapping issues," between the United Hay Action and the Consolidated Actions, the United Hay Action is "narrower in scope" and "focused on the narrow question whether Jacob was justified in withdrawing funds from United Hay." *Id*. at pp. 2, 5. The Court noted that Mark Harounian's ("Mark") conduct and "the impact of Mark's malfeasance" did not

necessarily "go 'to the heart of Jacob's affirmative defenses of set-off and/or equitable recoupment'" and, therefore, recognized that "it is not clear whether and to what extent Mark's conduct . . . justified Defendant's withdrawal of funds from the United Hay entity, in which he is not a member." *Id*. at p. 4. The Court held that, "[e]ven assuming some evidence relating to Mark's conduct is relevant to this case, it is likely that such evidence will be narrower in scope." *Id.*

3. The Special Referee's June 9, 2020 Decision

By Decision and Order dated September 9, 2019, United Hay's motion to compel, among other things, the deposition of Jacob Harounian was granted for the reasons set forth on the September 9, 2019 Transcript. United Hay Action at NYSCEF Doc. Nos. 185-187. Thereafter, the Special Referee was appointed pursuant to the Appointment Order and United Hay made an application to the Special Referee requesting that party depositions in the United Hay Action proceed immediately.

On June 9, 2020, the Special Referee issued a decision, ruling that "the depositions in the United Hay Action need not be conducted at the same time as the depositions of the parties in the Consolidated Actions" and further granting United Hay's request for party depositions to proceed immediately in the United Hay Action (the "June 9, 2020 Decision," *see* United Hay Action at NYSCEF Doc. No. 234). June 9, 2020 Decision at p. 2. The Special Referee noted "[t]here can be no dispute that the United Hay Action *has not* been consolidated with the Consolidated Actions" and, even before the Court agreed to "coordinate" discovery between the matters, the Court had already granted United Hay's motion to depose Jacob without limitation and irrespective of the status of the Consolidated Actions. *Id*. at pp. 8, 14 (emphasis in original). The Special Referee further noted that "there can be no dispute that counsel for Jacob Harounian admitted, on the record, and made representations to the Court regarding the completion of document discovery in

the United Hay Action as of September 9, 2019," "it is clear that discovery in the United Hay Action has progressed significantly further than the discovery in the Consolidated Actions" and the Court clearly only permitted "additional [discovery that was] narrowly tailored []". *Id*. at pp. 15-17.

Based on counsels' and the Court's statements, the Special Referee concluded that depositions and trial of the United Hay Action should not be delayed based on any developments in the Consolidated Actions and to hold otherwise "would be unreasonable . . . [and] inefficient." *Id*. at p. 17.

4. Jacob Files a Notice of Exception to the June 9, 2020 Decision, Which the Court Denies

On June 19, 2020, pursuant to paragraph 9 of the Appointment Order, Jacob filed a Notice of Exception with Justice Cohen regarding the June 9, 2020 Decision, which directed party depositions to proceed in the United Hay Action (the "June 9 Notice of Exception"). Jacob argued that the June 9, 2020 Decision "wholly and improperly rejected this Court's clear and unequivocal order that discovery in all three actions be coordinated," citing to the September 9, 2019 Transcript and the December 9, 2019 Order. June 9 Notice of Exception at p. 2. Jacob asserted that the Special Referee's ruling rendered the Court's direction for "coordinated" discovery meaningless. *Id.* Jacob further argued that the deposition of Jacob would be "extremely difficult if not impossible" in light of the Covid-19 pandemic and the fact that Jacob is a 93-year-old non-native English speaker. *Id*. at p. 3.

On June 22, 2020, United Hay responded to the June 9 Notice of Exception and asked the Court to affirm the June 9, 2019 Decision. (the "June 9 Notice of Exception Response").

On July 23, 2020, the Court denied the June 9 Notice of Exception and upheld the June 9, 2020 Decision. United Hay Action at NYSCEF Doc. No. 243 at p. 3.

5. The Special Referee Directs the Parties to Submit Proposed Case Management Orders for the United Hay Action and the Consolidated Actions

On November 19, 2020, the Special Referee directed counsel to propose dates for key discovery events and formalize two Case Management Orders, one for the United Hay Action and one for the Consolidated Actions (each, a "CMO" and, together, the "CMOs"). Whereas counsel provided the Special Referee with a joint proposed CMO for the Consolidated Actions, they were unable to agree on whether the United Hay Action should be governed by the same CMO as the Consolidated Actions.

On November 30, 2020, the Special Referee held a telephonic conference with counsel regarding the CMO for the United Hay Action (the "November 30, 2020 Conference Call"). Jacob's counsel advocated in favor of one overarching CMO, citing overlapping facts, reiterating that the Court coordinated all three actions for discovery, and noting that the Court only declined to consolidate all three actions because a joint trial would result in jury confusion. United Hay's counsel advocated in favor of separate CMOs, noting that the issues in the United Hay Action were much narrower than the issues in the Consolidated Actions and that Jacob should not be permitted to re-litigate the meaning of "coordinated" versus "consolidated." Lacking a consensus, the Special Referee advised that he would circulate a decision regarding the underlying dispute in short order.

6. The Special Referee's December 7, 2020 Decision

On December 7, 2020, the Special Referee issued a decision finding that "the United Hay Action and the Consolidated Actions do not need to be, nor should they be, governed by the same Case Management Order or subject to the same discovery deadlines" (the "December 7, 2020 Decision") December 7, 2020 Decision at p. 2. The Special Referee stated "[w]hile the Court recognized Jacob Harounian's right to discovery in the United Hay Action may overlap with

discovery in the Consolidated Actions, it [was] the Special Referee's opinion that the Court did not intend to tether the Consolidated Actions and United Hay Action together if to do so would cause unnecessary delay to the United Hay Action." *Id*. at p. 2. In making this determination, the Special Referee reviewed and considered the September 9 Transcript (discussed in Point I(A)(1) *supra*); the December 19, 2019 Decision (discussed in Point I(A)(2) *supra*);[1] the June 9, 2020 Decision (discussed in Point I(A)(3) *supra*); and Justice Cohen's confirmation of the June 9, 2020 Decision (discussed in Point I(A)(4) *supra*).

7. Jacob Filed a Notice of Exception to the December 7, 2020 Decision, Which the Court Denied

On December 17, 2020, pursuant to paragraph 9 of the Appointment Order, Jacob filed a Notice of Exception with Justice Cohen regarding the December 7, 2020 Decision, which directed that the United Hay Action should not be governed by the same CMO or subject to the same discovery deadlines as the Consolidated Actions (the "December 7 Notice of Exception"). In the December 7 Notice of Exception, Jacob raised four principal contentions.

First, Jacob argued that "the Court made clear at the [September 9, 2019] hearing that discovery in all three actions would be coordinated" and, in doing so, "clearly indicated that Jacob was entitled to discovery in the United Hay [A]ction on the identical issues raised in the Consolidated Actions." *Id.* at pp. 2, 3. Jacob asserted that even though the Court denied his motion to consolidate the United Hay Action and the Consolidated Actions for trial based on a concern about jury confusion, the Court concluded that "[Jacob] may seek to defend itself in part on the

[1] A typographical error in the December 7, 2020 Decision refers to a "Decision and Order dated October 10, 2019" available at United Hay Action, NYSCEF Doc. No. 225 instead of a Decision and Order dated December 19, 2019 available at United Hay Action, NYSCEF Doc. No. 225.

ground that Mark's malfeasance and commingling of funds in other LLCs justified his actions." *Id.* at p. 3.

Jacob contended that the Special Referee's December 7, 2020 Decision improperly relied on the Special Referee's June 9, 2020 Decision and the Court's affirmation thereof. Jacob argued that the June 9, 2020 Decision "solely" addressed "whether the deposition of Jacob should be taken in the United Hay Action out of sequence in the overall discovery in the three actions" and did not extend to broader discovery issues. *Id* at p. 3.

Jacob further argued that his defenses in the United Hay Action are "identical" to the claims in the Consolidated Actions and, therefore, document discovery and depositions concerning "Mark's malfeasance by commingling and looting funds" are "necessary either to prove Mark's malfeasance or to support Jacob's tax estoppel claim." *Id.* at pp. 3, 4.

Lastly, Jacob asserted that "given the current status of the pandemic, there would be no benefit in forcing the United Hay Action to trial more swiftly." *Id*. at p. 4.

Thereafter, on December 23, 2020, United Hay responded to the December 7 Notice of Exception and requested that the Court affirm the December 7, 2020 Decision (the "December 7 Notice of Exception Response"). In its response, United Hay argued that the scope of discovery in the Consolidated Actions is "expansive" (namely, whether Mark was entitled to 'reasonable compensation' from the Family LLCs; how much money Mark took from the Family LLCs in the form of cash and benefits; and whether these sums exceeded any reasonable compensation due), whereas the scope of discovery in the United Hay Action is "extremely limited" (namely, whether Jacob has a legally cognizable defense for taking $5 million from United Hay even though he was not a member). December 7 Notice of Exception Response at pp. 1,2.

Moreover, United Hay asserted that Jacob's counsel repeatedly represented to the Court that discovery in the United Hay Action concluded in 2018 and is "now ignor[ing] all of this inconvenient history." *Id*. at p. 3. United Hay explained that Jacob previously sought the discovery he is currently seeking in October 2018 and the Court (at that time, Justice Bransten) indicated that Jacob "was not entitled to such broad discovery because the issues in the [United] Hay Action are so much more narrow than those presented in the Consolidated Actions." *Id.* at p. 3. United Hay contended that after that time, Jacob "abandoned his broader discovery demands" and "never pursued them or made his threatened motion to compel." *Id*. United Hay noted that, later on, before the Court ruled on Jacob's summary judgment motion, Jacob's counsel "again acknowledged that, were Jacob's summary judgment motion to be denied, then the parties would proceed to deposition discovery and that 'those depositions will deal with very discrete issues, certainly not of the broad scope that involves the other two cases." *Id.* at p. 3.

In response to Jacob's argument that his defenses in the United Hay Action are identical to the claims in the Consolidated Actions, United Hay noted that the Court previously recognized that any success by plaintiffs in the Consolidated Actions against Mark would not excuse any misappropriation by Jacob in the United Hay Action. *Id.* at p. 4. United Hay noted that the "'equitable recoupment/set-off' affirmative defense" asserted by Jacob to delay completion of discovery in the United Hay Action is "illusory" and "is nothing more than code for a non-viable defense of self-help." *Id*. at p. 4.

8. The Court Denies Jacob's Exception to the December 7, 2020 Decision

On January 6, 2021, Justice Cohen heard oral arguments from both Jacob and United Hay concerning the December 7 Notice of Exception.

Jacob reiterated that in defense of United Hay's equitable claims of unjust enrichment and monies had and received he would be raising the same arguments that are asserted in the Consolidated Actions – "that Mark Harounian stole millions of dollars from the Family LLCs, including United Hay." Transcript from the January 6, 2021 Court Conference (the "January 6, 2021 Transcript) at 3:14-22. Because of this, according to Jacob, he "was acting properly when he removed the $5 million from the United Hay Bank account, which he was a signatory for, in protecting that money on behalf of all of LLCs." *Id*. at 3:22-25. Jacob argued that "without being able to put in the evidence of Mark's criminal conduct" and get the same "full discovery" as that permitted in the Consolidated Actions, he "would be prejudiced" and unable to "adequately present [his] defense." *Id*. at 4:2-5; 7:2-6. Jacob alleged that it would inequitable to set two different CMOs because then he would have to incur the expense of two separate expert reports. *Id*. at 16:22-17:25. Lastly, Jacob pointed out that when he stated at the September 9, 2019 conference that he would want the same discovery in the United Hay Action and the Consolidated Actions, Justice Cohen stated "don't worry about that. The consolidating dating [sic] for discovery that's a bunt, a portion of that." *Id*. at 14:18-24.

On the other hand, United Hay argued that Jacob "made a strategic decision to bring a separate case" instead of asserting counterclaims in the Consolidated Actions and chose not to "tether" the Consolidated Actions and the United Hay Action together because "[t]hey are completely different cases . . . very different slates of fact and relevant law." *Id*. at 8:12-21. United Hay reiterated that Jacob's defenses are not "real" and "the only thing that's really left in this case is the deposition of Unite[sic] Hay . . . and non-party discovery concerning the summary judgment argument they raised about tax estoppel, which is very narrow." *Id*. at 8:22-25; 9:1-24. United Hay referenced the Court's statements during the September 9, 2019 conference that any additional

discovery in the United Hay Action should be "very narrowly tailored," the United Hay Action "is narrower in scope than the earlier filed [Consolidated Actions]," and the United Hay Action is "focused on the narrow question of whether Jacob was justified in withdrawing funds from United Hay in which he is not a member." *Id*. at 13:13-25. United Hay reiterated that Jacob's prior counsel made "a number of representations on the record" that discovery in the United Hay Action was "done and that whatever remains is far narrower than the [C]onsolidated [A]ctions." *Id*. at 9:5-14; 14:7-14.

After hearing from counsel, Justice Cohen denied the December 7 Notice of Exception and affirmed the December 7, 2020 Decision and stated that "the parties remain able to debate the scope of any remaining discovery." *Id*. at 20:22-24. Justice Cohen stated that "the substantive point [the parties are] going to need to wrestle [with]…is exactly how far it is appropriate for Jacob to go in expanding his defense to basically require a litigation of the entire Family LLC's story in response to what is a narrower claim." *Id*. at 11:15-23. Justice Cohen recognized that obtaining full discovery in the United Hay Action is not the same as obtaining identical discovery in the Consolidated Actions. *Id*. at 7:7-10. In this vein, Justice Cohen indicated, on the one hand, that he was not sure Jacob needed "absolutely everything" from the Consolidated Action to proceed in the United Hay Action but, on the other hand, "the scope of discovery is broader than relevance at trial" and coordinating all three actions would "seem" to mean that Jacob could access the discovery provided in the Consolidated Actions. *Id*. at 15:18-21, 18:6-15, 20:25-21:1-3.

Justice Cohen further acknowledged that Jacob's prior counsel made representations to the Court concerning the scope of discovery, including that the United Hay Action was "pretty close to the finish line," which "the parties relied on" and that such "history is not irrelevant." *Id*. at 10:24-25; 11:1-4; 23:20-25. Justice Cohen recognized that new lawyers have now come into the

United Hay Action taking a different position than their predecessor counsel and while he "respect[s] new counsel coming in, that doesn't mean everybody has to change what's already been done." *Id*. at 18:11-15. In this regard, Justice Cohen directed the parties to brief the issue so that the Special Referee could address this "difficult problem" and determine "whether the Court will permit that or not." *Id*. at 12:14-17; 18:11.

B. The Motion

On February 22, 2021, Jacob filed the Motion, comprised of an Affirmation by Todd C. Steckler, Esq. dated February 22, 2021 with Exhibits A-S ("Steckler Moving Affirmation") and a Memorandum of Law dated February 22, 2021 ("Moving Memo").

In the Motion, Jacob argued that the documents sought in the Consolidated Actions are "specifically and irrefutably related to Jacob's factual and affirmative defenses in the United Hay action;" "Jacob is not judicially estopped from seeking such disclosure nor has he waived any such discovery;" and "because discovery in the Consolidated Actions and the United Hay [A]ction have been coordinated for all purposes, the Consolidated Demands should be and have been treated as if they were served in all three actions." Moving Memo at p. 2. Jacob asserted that limiting discovery in the United Hay Action would "significantly and seriously prejudice Jacob's ability to prosecute his defense, while resulting in absolutely no prejudice to United Hay." *Id.*

Jacob highlighted the following statements by the Court at the September 9, 2020 conference: "Your case against Jacob is very separate. I have a feeling that the way in which they come together is going to be the defense" and "I mean there is a world in which discovery could be coordinated, so that if we did have a separate trial, United Hay case, the defense would have every right to dig into these facts." *Id.* at p. 7. Jacob reiterated that when he advised the Court at the September 9, 2020 conference that "we are going to be wanting the same discovery that is going on in the other two cases," the Court responded: "Well that's don't worry about that. The

consolidating for discovery, that's a bunt. Of course you could get that." *Id.* Jacob argued that "[w]ith the exception of Jacob's deposition – which was ordered prior to discovery being coordinated – there is nothing in the record to indicate that Jacob would not be afforded full discovery of Mark's malfeasance in the United Hay Action, identical to and coordinated with the discovery in the Consolidated Actions." *Id.* at p. 20.

Jacob noted that while the issues in the United Hay Action were previously "more limited" than the issues in the Consolidated Actions because of the then-pending motion for summary judgment based on tax estoppel, now that summary judgment was denied, the issues in both cases are "'intertwined' and cannot be separated from the discovery in the [Consolidated Actions]." *Id.* at p. 8. Jacob argued that the Special Referee should disregard the statement by prior counsel at the September 9, 2019 conference "that discovery was almost complete in the United Hay Action" because "later at the same hearing" prior counsel "unequivocally stated that not only was additional discovery necessary, but that the discovery required was exactly the same in the United Hay Action as in the other two actions." *Id*. at p. 14.

Jacob rejected any claim that his request for additional discovery set forth in the Consolidated Demands is untimely or barred by judicial estoppel. Jacob argued that until the Special Referee sought a separate CMO for the United Hay Action, he "had no reason to believe that separate discovery demands would be required in the United Hay Action." *Id*. at p. 15. Jacob further asserted that the doctrine of judicial estoppel is inapplicable to the case at bar because "even if Jacob had changed his position with respect to discovery (which he has not), he has never secured a judgment in his favor based on a contrary position." *Id*. at p. 16.

Jacob argued that the issue before the Special Referee is "the scope of discovery" and "[s]uch an inquiry must focus not only on the causes of action asserted by United Hay [namely,

conversion, unjust enrichment, and monies had and received], but also on the defenses to those claims raised by Jacob [namely, estoppel, unclean hands, offset, and equitable recoupment][2]" *Id.* at p. 13. Jacob contended that Justice Cohen previously recognized the following factual issues: (1) the United Hay transaction; (2) justification for Jacob's withdrawal of $5 million from United Hay's account; (3) the amendment of tax returns; (4) ownership of the $5 million; and (5) the impact of Mark's alleged malfeasance on any of the above. *Id*. at pp. 17-18. Jacob noted that despite United Hay's position that his set off defense "does not apply to a claim of conversion," United Hay never moved to dismiss this defense and "[t]hus, Jacob should be free to discover the full extent of Mark's malfeasance." *Id*. at pp. 18-19.

Finally, Jacob argued that since "all of the documents requested in the Consolidated Demands have either been produced, or will be produced before the document production deadline," there is no reason he should be precluded from using those documents to substantiate his defenses in the United Hay Action. *Id*. at pp. 20-21.

C. The Opposition

On March 12, 2021, United Hay filed opposition to the Motion (the "Opposition"), comprised of an Affirmation by William L. Charron, Esq. dated March 12, 2021 with Exhibits 1-36 ("Charron Affirmation") and a Memorandum of Law dated March 12, 2021 ("Opposition Memo"). The Opposition principally argued that the Motion should be denied based on judicial estoppel and because the discovery sought is irrelevant to the United Hay Action.

According to United Hay, the doctrine of judicial estoppel precludes a party from inequitably adopting a position directly contrary or inconsistent with an earlier assumed position

[2] According to Jacob, only four of the five affirmative defenses asserted are relevant to the instant Motion. Moving Memo at p. 13.

in the same proceeding. Opposition Memo at pp. 2-3, 12. United Hay contended that despite Jacob's current assertion that "the United Hay Action cannot be separated from, or decided separately from, the Consolidated Actions," Jacob has previously taken a "*diametrically opposite* position." *Id.* at p. 7 (emphasis in original). To demonstrate as much, United Hay noted that Jacob: (1) commenced the Harounian Action rather than asserting counterclaims in the United Hay Action; (2) never made a motion to compel discovery "into 'how' United Hay received the Converted Funds;" (3) made a motion for summary judgment in the United Hay Action instead of seeking further discovery; (4) initially made a motion to consolidate the Harounian Action and the Homapour Action but did not seek to consolidate those actions with the United Hay Action (until later, at which point the request was denied)[3]; and (5) repeatedly advised the Court that the United Hay Action "is capable of being litigated separately" even stating that depositions therein "will deal with very discrete issues, certainly not of the broad scope" of the Consolidated Actions. *Id*. at pp. 6-9.

United Hay rejected Jacob's argument that judicial estoppel requires a judgment on the underlying issue and argued that judicial estoppel is "routinely applied to prevent a party like Jacob from changing his litigation position within the same case 'based on a reversal of [his] legal fortunes,' or upon 'belatedly discover[ing a stategy] more to [his liking],' or 'simply because his interests have changed,' or 'at [his] convenience.'" *Id.* at p. 12. United Hay alleged that Jacob simply changed his strategy because he lost his motion for summary judgment in the United Hay Action and now insists that the United Hay Action and Consolidated Actions cannot be separated. *Id*. at p. 2, 14.

[3] *See* December 19, 2019 Decision (discussed in Point I(A)(2) *supra*).

United Hay contended that the Court and Special Referee have already recognized that Jacob cannot now change his initial preference to keep the Consolidated Actions and the United Hay Action separate, citing the December 19, 2019 Decision (declining to consolidate the United Hay Action and Consolidated Actions), the June 9, 2020 Decision (compelling Jacob to sit for a deposition in the United Hay Action), and the December 7, 2020 Decision (directing separate CMOs). *Id*. at pp. 1,2, 10, 11.

Moreover, United Hay argued that the Motion should be denied because the Consolidated Demands seek information that is neither material nor necessary to the one issue in the United Hay Action – "whether Jacob was legally justified in taking the Converted Funds." *Id.* at pp. 2, 16. United Hay recognized that Jacob is entitled to "narrowly tailored" discovery to show that he was "*independently entitled* to take $5 million from United Hay's bank account," to explore any tax estoppel theory, and to explore any theory that he is entitled to the Family LLC's property. *Id*. at p. 18.

United Hay asserted that because Jacob's defenses are "inapt on their face," they "do not provide any legitimate basis to expand discovery." *Id.* at p. 19. In this regard, United Hay addressed the applicability of Jacob's asserted defenses (namely, equitable recoupment, setoff, estoppel, and unclean hands) and alleged that even if the Court found that Mark took funds from the Family LLCs or that Jacob "rescued" funds from any alleged "looting," "Jacob's misappropriation . . . would not be excused." *Id*. at pp. 17, 18. United Hay stated that Jacob's equitable recoupment defense is inapplicable because that defense merely permits a defendant to revive a time-barred argument related to a cause of action in a plaintiff's complaint and, here, "Jacob does not plead that United Hay . . . caused him any harm that he did not otherwise timely assert against United Hay." *Id.* at pp. 18-19. United Hay noted that the two scenarios where an

offset/set off defense could arise, namely, where a party seeks a reduction of a damages award based on reimbursement from collateral sources or where a nonsettling defendant seeks to reduce the amount of a verdict based on a co-defendant's settlement with plaintiff, are inapplicable here. *Id*. at p. 19. United Hay asserted that estoppel is also inapplicable because Jacob does not contend that he was misled by United Hay into taking the Converted Funds based on United Hay's words or conduct. United Hay referenced Jacob's own deposition testimony for the true reason why Jacob took such funds *"I'm the father. Everything belong[s] to me I own all – everything my son has belong to me, except his wife." Id*. at p. 20. According to United Hay, Jacob's unclean hands defense could only apply here if United Hay engaged in conduct that injured Jacob but Jacob does not make any such allegation, focusing instead on Mark's individual misconduct. *Id*.

Moreover, United Hay argued that even if United Hay was being used by Mark to hold other Family LLC funds, "Jacob has not offered any authority that a legal or 'equitable' response was for him to take $5 million from United Hay *for himself*." *Id.* at p. 21 (emphasis in original). United Hay also reiterated that to the extent Mark engaged in any wrongdoing, "*Mark* will owe damages to the Family LLCs." *Id*. (emphasis in original).

D. The Reply

On March 19, 2021, Jacob filed a reply in further support of the Motion comprised of a Memorandum of Law dated March 19, 2021 ("Reply Memo").

In the Reply Memo, Jacob reiterated that judicial estoppel requires the existence of a judgment and further contended that the main case cited by United Hay concerning judicial estoppel (namely, *Nestor v. Britt*) is "based off a Third Department case" and has "no precedential value" over a later decided First Department case (namely, *Wells Fargo Bank Nat'l Ass'n v. Webster Bus. Credit Corp.*). *Id*. at pp. 3-5. Moreover, Jacob argued that any other cases cited by United Hay actually support Jacob's analysis of the doctrine. *Id*. Jacob asserted that judicial

estoppel does not apply "based on the prior orders directing Jacob's deposition" or based on any CMO in the United Hay Action because neither constitute a "ruling" which "limits the discovery to which Jacob might be entitled." *Id*. at p. 6. In this regard, Jacob noted that even at the oral argument held on January 6, 2021, Justice Cohen stated that "[i]t did seem to . . . [him] that the coordination would mean that you [Jacob] would be able to participate in discovery and have access to it, but . . . [he'd] rather have that issue decided discretely and actually have an order come out of that." *Id*. at pp. 6-7.

Jacob argued that permissible discovery extends to "any facts bearing on a controversy which will assist in sharpening the issue at trial" and "is thus not limited to evidence directly related to the issues in the pleadings." *Id*. at p. 7. Jacob contended that the discovery sought concerns "Mark's malfeasance" and, therefore, the only issue that remains "is whether Mark's malfeasance is or is a part of a viable Jacob defense to the claims in the United Hay [A]ction." *Id*. at p. 8. Jacob argued that United Hay's claims for unjust enrichment and monies had and received "require an inquiry into whether equity and good conscience favor plaintiff [sic] right to recovery" and "the court must look to the totality of circumstances surrounding Jacob's removal of the funds from United Hay's bank account." *Id*. at p. 9. Jacob further noted that Justice Cohen determined that issues of fact[4] impact whether United Hay has viable causes of action for unjust enrichment and monies had and received and that these same issues of fact are "applicable to Jacob's equitable defenses of estoppel and unclean hands" because "the questions of Mark's malfeasance goes [sic] to the basis and reason for Jacob's action." *Id.* at p. 9.

[4] Jacob asserted that Justice Cohen found six separate questions of fact: "(i) how did the whole transaction happen; (ii) the reasons and justifications for the withdrawal; (iii) the circumstances surrounding the amendment of the tax returns; (iv) whether the $5 million belonged to United Hay; (v) the significance of Mark's prior admissions; and (vi) the impact of Mark's alleged malfeasance." Reply Memo at pp. 8, 9.

Additionally, according to Jacob, it is immaterial whether Mark or United Hay committed the wrongdoing because "courts have consistently held that where an individual exercises complete dominion and control over a company and has acted to perpetrate a wrong or injustice against another, the individual and the company may be held liable for the wrongdoing." *Id*. at pp. 9, 10. Jacob also reiterated that United Hay has never moved to dismiss Jacob's defenses of estoppel, unclean hands or offset/equitable recoupment and therefore "such discovery should be permitted." Reply Memo at p. 10.

II. ANALYSIS AND DETERMINATION

A. The Doctrines of Judicial Estoppel and Waiver

The doctrine of judicial estoppel, sometimes referred to as "estoppel against inconsistent positions," "serves to preserve the integrity of the judicial system by insisting on truth and consistency [] and by discouraging litigants from changing their allegations at their convenience." *Jones v. Smith*, No. 653411/15, 2017 WL 2289320, at *6 (Sup. Ct. New York County May 22, 2017). Moreover, judicial estoppel "is invoked to estop parties from adopting [] contrary positions because the judicial system 'cannot tolerate [] playing fast and loose with the courts'". *Zito v. Zito*, No. 53468/2011, 2014 WL 2776603, at *4 (Sup. Ct. Kings County June 4, 2014).

The doctrine applies: (1) to "preclude[] a party who assumed a certain position in a *prior legal proceeding* . . . from assuming a contrary position *in another action*" and (2) to preclude a party "from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the *same proceeding*." *Wells Fargo Bank Nat. Ass'n v. Webster Bus. Credit Corp*., 113 A.D.3d 513, 516 (1st Dep't 2014) (emphasis added); *Nestor v. Britt*, 270 A.D.2d 192, 193 (1st Dep't 2000) (emphasis added). *See also Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 177 (1st Dep't 1998); *Clifton Country Rd. Assocs. v. Vinciguerra*, 252 A.D.2d 792, 794 (3d Dep't 1998); *United Nat. Funding, LLC v. Volkmann*, 25

Misc. 3d 1233(A), at *7, 906 N.Y.S.2d 776 (Sup. Ct. New York County 2009); *WRG Acquisition, LLC v. Strasser*, 45 Misc. 3d 1010, 994 N.Y.S.2d 827, 832 (Dist. Ct. Nassau County 2014).

In order for judicial estoppel to prevent a party from asserting a position in a *new action* that is contrary to a position he or she asserted in a *prior action*, a judgment must be issued in his or her favor. *Melniker v. Melniker*, 170 A.D.3d 448, 449 (1st Dep't 2019) (holding that judicial estoppel does not apply to an affidavit submitted in another action "because plaintiff did not obtain the relief he requested in the motion supported by the affidavit"); *MPEG LA, LLC v. Samsung Elecs. Co*., 166 A.D.3d 13, 21 (1st Dep't 2018) ("Because defendant did not prevail on its claim in Supreme Court, the doctrine of judicial estoppel does not apply.").

However, "in the context of the *same proceeding,*" judicial estoppel can apply even if the litigant did not "obtain[] relief or a favorable result." *Jones*, 2017 WL 2289320, at *6; *see also Cobenas v. Ginsburg Dev. Companies, LLC*, 133 A.D.3d 812, 813 (2d. Dep't 2015) (applying the doctrine of judicial estoppel to prevent third party defendant from making an argument that is "manifestly at odds with his representations" with respect to his summary judgment motion, even though the motion was denied and therefore third party defendant did not secure a favorable judgment.); *Casper v. Cushman & Wakefield*, 74 A.D.3d 669, 670 (1st Dep't 2010) (holding "Plaintiff was estopped from contending that the ICA had expired after one year since he asserted in his complaint, interrogatory responses and depositions that the ICA was in effect until his termination" and making no mention of Plaintiff securing a favorable judgment.); *Kohilakis v. Town of Smithtown*, 167 A.D.2d 513, 514 (2d. Dep't 1990) (holding that appellants were estopped from objecting to disclosure because "appellants asserted to this court that they did 'not object to the discovery of most of the documents'" and making no mention of appellants securing a favorable judgment.); *Zito*, 2014 WL 2776603, at *4 (holding that "plaintiff will not now be

permitted to change his position and argue that Smiling Pizzeria is solely owned by his father" "…as he has consistently represented throughout this action . . ." and making no mention of Plaintiff securing a favorable judgment.).

The doctrine of waiver is distinct. Waiver occurs when a party voluntarily and intentionally relinquishes a known right. *See e.g. Gilbert Frank Corp. v. Fed. Ins. Co*., 70 N.Y.2d 966, 968 (1988); *Coniber v. Ctr. Point Transfer Station, Inc*., 137 A.D.3d 1604, 1606 (4th Dep't 2016); *Plato Gen. Const. Corp./EMCO Tech Const. Corp. v. Dormitory Auth. of State*, 89 A.D.3d 819, 825 (2d. Dep't 2011). Waiver cannot be "inferred from mere silence" and "is not created by negligence [or] oversight." *Coniber*, 137 A.D.3d at 1606; *Plato Gen. Const. Corp./EMCO Tech Const. Corp.*, 89 A.D.3d at 825. However, "waiver may be accomplished by affirmative conduct or failure to act so as to evince an intent not to claim the purported advantage." *Stassa v. Stassa*, 123 A.D.3d 804, 805 (2d. Dep't 2014).

Moreover, a party cannot avoid the consequences of judicial estoppel or waiver simply by retaining new counsel. In the context of judicial estoppel, newly retained counsel steps into the shoes of prior counsel and cannot contradict positions that were previously made by his or her predecessor. *See Zito*, 2014 WL 2776603, at *4 (holding that plaintiff was judicially estopped from making an argument because he consistently made representations through the action "until he discharged his prior counsel and retained new counsel."); *Hankook Tire America Corp. v. Samsung Fire & Marine Ins. Co. Ltd*, No. 653948/15, 2020 WL 4226874, at *9 (Sup. Ct. New York County July 10, 2020) (sanctioning defendants for discovery misconduct even after defendants retained new counsel stating that "[f]ailures, as well as successes, of predecessor counsel are inherited by incoming counsel."); *Restuccio v. Caffrey*, No. 17304/06, 2013 WL 8718491, at *2 (Sup. Ct. New York County Apr. 16, 2013) (holding that where plaintiff's former

counsel filed a note of issue and plaintiff's incoming counsel submitted a motion for an order seeking leave to serve a second supplemental bill of particulars, plaintiff's incoming counsel failed to demonstrate additional disclosure was justified); *Emamian v. Rockefeller Univ*., 823 F. App'x 40, 43 (2d Cir. 2020) (holding under Federal Rule of Civil Procedure 16(b)(4), that "[t]he desire by new counsel to reopen discovery . . . does not amount to "good cause"). Similarly, in the event that prior counsel waived the rights of his or her client by virtue of "affirmative conduct" and/or a "failure to act," newly retained counsel cannot avoid waiver based solely on his or her retention. *Id*.

B. The Doctrines of Judicial Estoppel and Waiver Both Independently Require Jacob's Motion to be Denied

The Special Referee finds that Jacob has waived and is judicially estopped from seeking the discovery sought in the Motion. Despite Jacob's assertions with respect to the applicability of the doctrine of judicial estoppel, as set forth in Section II(A), *supra*, "in the context of the same proceeding" a litigant does not need to "obtain[] relief or a favorable result" for judicial estoppel to apply. *Jones*, 2017 WL 2289320, at *6. Thus, despite the fact that Jacob has not secured a favorable judgment, judicial estoppel is still applicable to ensure consistency and discourage litigants from changing their litigation position within the same case.

Jacob's Motion must be denied because throughout the course of the United Hay Action, Jacob, through competent counsel, has made strategic decisions and representations to the Court and cannot now be allowed to assert contrary positions in an effort to support his Motion. As illustrated by United Hay:

> "he decided *not* to assert any counterclaims in the [United] Hay Action; he decided *not* to seek to consolidate the [United] Hay Action with his separate action in Nassau County, asserting '[t]hat case has nothing to do with this case,' and insisting that the [United] Hay Action 'involve[s] a single discrete issue (the alleged conversion of $5 million) [that] is irrelevant' to the *Harounian*

> [A]ction; he tried *not* to have his action in Nassau County consolidated with the *Homapour* [A]ction in New York County; he decided *not* to move to compel any broader discovery in the [United] Hay Action after the November 2018 pre-motion conference with the Court; and he repeatedly represented to the Court that discovery in the [United] Hay Action was 'essentially complete' before a single document had ever been exchanged in the Consolidated Actions.

Opposition Memo at p. 13. "[T]here can be no dispute that counsel for Jacob Harounian admitted, on the record, and made representations to the Court regarding the *completion* of document discovery in the United Hay Action." June 9, 2020 Decision at p. 16 (emphasis added). At the September 9, 2019 Court Conference, the Court specifically asked Jacob's prior counsel "What discovery happened before the motion for summary judgment" and Jacob's counsel responded "We had essentially *completed* document discovery." September 9, 2019 Transcript at 35:21-25 (emphasis added). Jacob's counsel made the unqualified representation again stating "Your Honor, document discovery had been *completed* by the time we moved for summary judgment." *Id*. at 37:4-5 (emphasis added). Jacob's representations were not qualified or conditioned based on the fact that a summary judgment motion was made and cannot now be disregarded. Justice Cohen acknowledged so much when he noted that "the parties relied on" Jacob's prior representations to the Court concerning the scope of discovery and such "history is not irrelevant." January 6, 2021 Transcript at 23:20-25. It is the Special Referee's position that the Special Referee cannot simply ignore these decisions and representations even if, as Jacob alleges, they took place prior to Jacob's motion for summary judgment being denied.

Moreover, the issue of whether Jacob could obtain the discovery sought in the Motion was already presented to Justice Bransten back in November 2018 and allegedly the Court indicated to Jacob that although it could not stop Jacob from bringing a motion to compel, Jacob was "unlikely to get that discovery because the question of where the money came from is legally irrelevant to

the claims." September 9, 2019 Transcript at 49:9-21. In the Special Referee's opinion, even if there was a debate about what the Court said during that conference, which there is not, it has been more three years since the issue was presented to Justice Bransten, and more than two years since Jacob's motion for summary judgment was denied yet Jacob has failed to request the documents which are the subject of his Motion.

It is the Special Referee's view that such affirmative conduct and failure to act is sufficient to conclude that Jacob has waived his right to the discovery sought in the Motion. This is not a scenario where "mere silence" or "negligence" is being held against a party but where a party made cognizant decisions to pursue or not to pursue certain strategies and is now attempting at the eleventh hour to change his position.

The fact that Jacob retained new counsel who reviewed the case file and came to a different conclusion on whether such discovery was necessary after said decisions and representations were made to the Court does not change the analysis. *See Zito*, 2014 WL 2776603, at *4; *Hankook Tire America Corp.*, 2020 WL 4226874, at *9; *Restuccio*, 2013 WL 8718491, at *2; *Emamian*, 823 F. App'x at 43. As Justice Cohen stated while he "respect[s] new counsel coming in, that doesn't mean everybody has to change what's already been done." January 6, 2021 Transcript at 18:11-15.

Further, in the Special Referee's opinion, Jacob's Motion is simply another attempt to re-litigate and/or re-argue what Justice Cohen meant when he stated that discovery in the United Hay Action and the Consolidated Actions would be "coordinated." That issue has been litigated and decided multiple times – (1) the December 19, 2019 Decision whereby the Court denied Jacob's motion to consolidate the United Hay Action with the Consolidated Actions for joint trial; (2) the June 9, 2020 Decision whereby the Special Referee granted United Hay's request for party

depositions to proceed immediately in the United Hay Action; (3) the June 9 Notice of Exception which was denied by Justice Cohen and whereby the June 9, 2020 Decision was affirmed; (4) the December 7, 2020 Decision whereby the Special Referee held that the United Hay Action and the Consolidated Actions do not need to be governed by the same CMO or the same discovery deadlines; and (5) the December 7, 2020 Notice of Exception which was denied by Justice Cohen and whereby the December 7, 2020 Decision was affirmed. The Court and the Special Referee made those decisions by reviewing United Hay's procedural posture and by relying on the statements and representations that were made to the Court.

Looking at the totality of the circumstances, the Special Referee holds that the doctrines of judicial estoppel and waiver apply. To decide otherwise would result in the Special Referee permitting litigants to change their positions which would be patently unfair and prejudicial to the adverse party, inefficient and would promote gamesmanship in the judicial process.

C. Even if the Doctrines of Judicial Estoppel and Waiver Did Not Apply, Jacob Is Not Entitled to The Discovery Sought in The Motion

It is the Special Referee's opinion that while "there are some overlapping issues" between the United Hay Action and the Consolidated Actions, the United Hay Action is "narrower in scope" and "focused on the narrow question of whether Jacob was justified in withdrawing funds from United Hay." December 19, 2019 Decision at pp. 2, 5; *see also* June 9, 2020 Decision at pp. 15-17. The Court specifically stated "I think a narrowly tailored discovery request would be permitted," "I'm not going to go back and re-open the whole thing," "We are, I think we are pretty far down the line here." September 9, 2019 Transcript at 41:20-22; 44:2-3.

In acknowledging that the issues in the United Hay Action are more circumscribed as compared to the issues in the Consolidated Actions, the Court stated that Mark's conduct and "the impact of Mark's malfeasance" does not necessarily "go 'to the heart of Jacob's affirmative

defenses of set-off and/or equitable recoupment.'" December 19, 2019 Decision at p. 4. Moreover, Justice Cohen agreed with the Special Referee's view that "discovery in the United Hay Action has progressed significantly further than the discovery in the Consolidated Actions," the Court would only permit "additional [discovery that was] narrowly tailored" and "the United Hay Action and the Consolidated Actions do not need to be, nor should they be, governed by the same Case Management Order or subject to the same discovery deadlines." *See* June 9, 2020 Decision at pp. 15-17 (upheld by the Court on July 23, 2020 *see* United Hay Action at NYSCEF Doc. No. 243 at p. 3); December 7, 2020 Decision at p. 2 (upheld by the Court on January 6, 2021 Oral Argument).

Justice Cohen also recognized that obtaining full discovery in the United Hay Action is not the same as obtaining identical discovery in the Consolidated Actions indicating that he was not sure Jacob needed "absolutely everything" from the Consolidated Actions to proceed in the United Hay Action." January 6, 2021 Transcript at 7:7-10; 18:6-15. However, Jacob's Motion is requesting that United Hay provide documents to each and every request in the Consolidated Demands – a total of 87 document requests. The Consolidated Demands are extremely broad and do not properly target documents which may relate to the limited, more narrow issues in the United Hay Action. Therefore, even in the event that the doctrines of judicial estoppel and waiver did not preclude Jacob from obtaining the discovery he seeks in the Motion (which they do), the Special Referee would nonetheless deny Jacob's Motion on the basis that the discovery sought is entirely too broad given the clear language from the Court that issues in the United Hay Action are narrower in scope and not identical to the issues in the Consolidated Actions.

For the reasons set forth herein, the Special Referee denies the Motion.

Dated: May 27, 2021

SO ORDERED:

Michael Cardello III
MICHAEL CARDELLO III
Court-Appointed Special Referee

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MEHRNAZ NANCY HOMAPOUR, et al.,	:	Index No. 653795/2015
Plaintiffs,	:	**STIPULATION AND ORDER APPOINTING MICHAEL CARDELLO III AS SPECIAL REFEREE**
-against-	:	
3M PROPERTIES, LLC, et al.,	:	
Defendants.	:	
UNITED HAY, LLC,	:	Index No. 657310/2017
Plaintiff,	:	
-against-	:	
JACOB HAROUNIAN,	:	
Defendant.	:	
JACOB HAROUNIAN, et al.,	:	Index No. 450615/2019
Plaintiffs,	:	
-against-	:	
MARK HAROUNIAN, et al.,	:	
Defendants.	:	

Pursuant to Sections 3104 and 4301 and Rule 4311 of the New York Civil Practice Law and Rules, the Court hereby enters this Order of Reference to a Special Referee for the purpose of assisting the Court and the parties in conducting and completing discovery in an orderly and efficient manner.

1. Michael Cardello, III, Esq. ("Special Referee Cardello"), is **HEREBY APPOINTED** Special Referee to supervise all discovery matters and any other matters as

designated by the Court that may arise in these actions that have been coordinated for purposes of discovery.

2. Special Referee Cardello shall have the duty and the power to regulate all discovery of the parties and non-parties and other designated matters as follows:

a. Special Referee Cardello shall have the duty and the power: (i) to resolve discovery disputes; (ii) to resolve disputes during depositions; (iii) to resolve discovery motions filed by the parties or non-parties; and (iv) to rule on all issues relating to privilege logs of all parties which cannot be resolved by the parties.

b. Special Referee Cardello shall have the power to take all measures which are necessary and proper for the performance of these duties.

c. Special Referee Cardello shall have the authority to assist the Court with case management, and to hear and decide such other matters as may be assigned by the Court in accordance with the Court's rules and applicable statutes.

3. Special Referee Cardello shall hear, resolve and make rulings on all disputes regarding discovery (Section 2(a) above) and other designated matters, and when appropriate, enter orders setting forth his rulings. In addition, the Court may refer non-dispositive motions, on a hear and report basis, to Special Referee Cardello pursuant to this Order.

4. Special Referee Cardello shall have the duty and authority to: (i) require the submission of briefs and reports; (ii) hold disclosure conferences; (iii) conduct hearings, including evidentiary hearings; (iv) hold oral arguments on motions; (v) issue orders relating to discovery matters; and (vi) to issue orders relating to other matters designated for his decision by the Court.

5. Special Referee Cardello and the parties shall follow the procedures set forth in Appendix A for disclosure conferences and the handling of discovery disputes (the "Special Referee Procedures"). The Special Referee Procedures may be modified at Special Referee Cardello's discretion without leave of the Court.

6. Special Referee Cardello may hold disclosure conferences either in-person in the County of New York or by telephone conference at his sole discretion.

7. Hearings and oral argument on any motion shall be heard by Special Referee Cardello either in person at a location in the County of New York designated by Special Referee Cardello or by telephone conference at Special Referee Cardello's sole discretion. The moving party shall arrange for a court reporter at all hearings and oral arguments on motions and shall provide Special Referee Cardello with a copy of the transcript of the hearing or oral argument promptly thereafter.

8. All decisions on motions of Special Referee Cardello shall be in writing and shall be accompanied by supporting reasons, except that Special Referee Cardello may state at a hearing, oral argument or deposition that an oral ruling, as reflected in the transcript, shall constitute the decision. Unless a decision or order of Special Referee Cardello modifies a Court Order, the Special Referee's decisions and orders shall not be filed publicly (unless a Notice of Exception is filed in accordance with Section 9 below) but shall be transmitted by email to counsel for all parties. If a decision or order of Special Referee Cardello modifies an Order of the Court, then Special Referee Cardello shall provide such decision or order to the Court so that it can be approved by the Court and publicly filed. The parties shall follow the procedures set forth in the Special Referee Procedures in Appendix A for Motions Heard by Special Referee Cardello.

9. An order of Special Referee Cardello is not an appealable paper as set forth in CPLR § 5512. Exceptions to any decision or order made by Special Referee Cardello may be taken to Honorable Joel M. Cohen. A Notice of Exception and an opening brief in support thereof, not to exceed a total of four (4) pages, together with an appendix containing the record on which Special Referee Cardello's decision was made (e.g., discovery requests, related motions and briefs, transcript of argument and Special Referee Cardello's decision) must be filed electronically and served within ten (10) days of the date of Special Referee Cardello's written decision. If a decision is reflected only in a transcript of a hearing, the time for filing of exceptions shall run from the date of the receipt of the transcript by the excepting party's counsel. An answering brief, which must not exceed four (4) pages, must be filed and served within seven (7) days after receipt of the Notice of Exception. The time for filing exceptions and briefs may be enlarged or shortened only by Special Referee Cardello or the Court. Any party may request oral argument, which shall be held in the discretion of the Court.

10. Review of any order of Special Referee Cardello shall be de novo on the record unless otherwise provided by the Court's rules or by statute.

11. Unless a party files a Notice of Exception pursuant to Section 9 above, any decision or order by Special Referee Cardello shall have the same force and effect as if issued by the Court.

12. Special Referee Cardello may use other persons to provide clerical, secretarial and legal assistance as may be necessary. Such persons shall be under the supervision and control of Special Referee Cardello, who shall take appropriate action to insure that (where applicable) such persons preserve the confidentiality of matters submitted to Special Referee Cardello for review including confidential, trade secret or proprietary information or information subject to a

Court's protective order.

13. Special Referee Cardello shall be compensated as follows:

a. Special Referee Cardello shall be compensated at the hourly rate of $500.00. Other lawyers and paralegals assisting Special Referee Cardello shall be billed at their usual hourly rates, but no more than $450.00 per hour. Special Referee Cardello's fees shall be billed no more often than monthly, for services rendered, and he also shall be reimbursed for all reasonable and necessary expenses and costs.

i. Special Referee Cardello's compensation shall be shared amongst the following parties equally: (a) 3M Properties, LLC; (b) Balance Properties LLC; (c) JAM Realty NYC LLC; (d) United Chelsea LLC; (e) United East LLC; (f) United Fifth LLC; (g) United Flatiron LLC; (h) United Greenwich LLC; (i) United Hay LLC; (j) United Prime Broadway LLC; (k) United Prime LLC; (l) United Seed LLC; (m) United Square LLC; (n) United Village LLC; (o) United West LLC; (p) 360 East 50th Street Associates LLC; and (q) 356 East 50th Street Associates LLC. The aforementioned shall hereinafter be collectively called the "Obligated Parties." Accordingly, each Obligated Party is responsible for 1/17th of Special Referee Cardello's compensation.

ii. The parties have the right to apply to Special Referee Cardello for an allocation other than the fee allocation set forth in Section 13(a)(i) above for particular disputes submitted to Special Referee Cardello.

The allocation of fees may also be adjusted by the direction of the Court.

b. Within five (5) days of the entry of this Order, each of the Obligated Parties shall be required to deposit with Special Referee Cardello an initial retainer in the amount of Four Thousand Dollars and Zero Cents ($4,000.00), for a total retainer of Sixty Eight Thousand Dollars and Zero Cents ($68,000.00) (the "Initial Retainer"). Special Referee Cardello will charge fees and disbursements against the Initial Retainer and credit those fees and disbursements on itemized billing statements. In the event those fees and disbursements exceed the Retainer deposited with Special Referee Cardello, the Obligated Parties will be billed for the excess in accordance with Section 13(c) below. The Special Referee may, with Court approval, request additional retainer deposits.

c. Special Referee Cardello shall submit itemized statements (the "Invoice") to the parties for payment for fees, expenses and costs stating the total amount of time spent and the type of services and work performed during such time. Expenses and costs shall be itemized. Invoices shall be paid within thirty (30) days from the date of any Invoice. The Obligated Parties shall have fifteen (15) days from the date of the Invoice to file with the Court ant objection to an Invoice.

d. Any Obligated Party who does not pay the required amount within sixty (60) days of the date of the Invoice by Special Referee Cardello may be subject to an appropriate Order of Enforcement by this Court.

14. Upon the final disposition of this action, the full amount paid for the services and expenses of Special Referee Cardello may be reallocated amongst the Obligated Parties, as the Court in its discretion shall determine.

15. This Order may be amended by the Court, or for good cause upon application by any party.

***Homapour v. 3M Properties, LLC* (653795/2015)**

Dated: New York, New York
April 16, 2020

OVED & OVED, LLP
Attorneys for Plaintiff Merhnaz Nancy Homapour, individually and derivatively on behalf of 3M Properties, LLC; Balance Property, LLC; Jam Realty NYC LLC; United Chelsea, LLC; United East, LLC; United Fifth, LLC; United Flatiron LLC; United Greenwich, LLC; United Hay, LLC; United Nationwide Realty LLC; United Prime Broadway, LLC; United Seed LLC; United Square LLC; United Village, LLC; and United West, LLC;

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Jacob NY Holdings LLC; Jacob NY Holdings Ltd.; 172 Mulberry Realty LLC; 163 Chrystie Realty LLC; 1007 Lex Ave LLC

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7

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April ____, 2020

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April 16, 2020

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United Hay v. Harounian (657310/2017)

Dated: New York, New York
April 16, 2020

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United Hay v. Harounian (657310/2017)

Dated: New York, New York
April ____, 2020

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Dated: Oceanside, New York
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Harounian v. Harounian (450615/2019)

Dated: Oceanside, New York
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Dated: New York, New York
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PRYOR CASHMAN, LLP
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SO ORDERED.

Dated: April ___, 2020

_____
Hon. Joel M. Cohen
Justice of the Supreme Court
County of New York, Commercial Division

Harounian v. Harounian (450615/2019)

Dated: Oceanside, New York
April ____, 2020

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Dated: New York, New York
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lcooperman@pryorcashman.com

SO ORDERED.

Dated: April 22, 2020

_____
Hon. Joel M. Cohen
Justice of the Supreme Court
County of New York, Commercial Division

APPENDIX A

SPECIAL REFEREE PROCEDURES

I. Disclosure Conferences:

a) Special Referee Cardello may issue oral directives at disclosure conferences.

b) Within five (5) business days of an oral directive during a disclosure conference, the parties shall submit to Special Referee Cardello, a joint proposed order setting forth the resolutions reached and directives issued at the disclosure conference.

c) If the parties are unable to agree upon an appropriate form of proposed order, they shall so advise Special Referee Cardello so that Special Referee Cardello can direct an alternative course of action.

II. Discovery Disputes:

a) When a discovery dispute arises, counsel shall first meet and confer with all other counsel involved in the discovery dispute and attempt to resolve the discovery dispute.

b) If after the meet and confer the discovery dispute is not resolved, a party may submit a letter to Special Referee Cardello detailing the dispute, highlighting the legal and factual issues and stating whether the parties have met and conferred prior to submission of the letter (the "Initial Dispute Letter"). Within five (5) business days of receipt of the Initial Dispute Letter, any other party may submit a letter response (the "Response Letter").[1] Special Referee Cardello may request reply and sur-reply letters. The Discovery Letters shall be no more than three (3) pages in length, but any party may request leave to submit additional pages in

[1] The phrase "Discovery Letters" shall collectively refer to the Initial Dispute Letter, Response Letter(s) and any reply or sur-reply letters requested.

advance of submitting a Discovery Letter. Discovery Letters must be e-mailed to Special Referee Cardello (mcardello@moritthock.com) and all counsel of record.

c) Special Referee Cardello will then schedule a telephonic disclosure conference.

i. If the discovery dispute is resolved during the telephonic disclosure conference, the parties are to follow Special Referee Procedure I (Disclosure Conferences).

ii. If a resolution is not reached during the telephonic disclosure conference:

1. Special Referee Cardello may issue an oral directive, which should be memorialized in accordance with Special Referee Procedure I (Disclosure Conferences).

2. Special Referee Cardello may issue a written decision and order, as soon as practicable after the telephonic disclosure conference, based upon the Discovery Letters. Special Referee Cardello may request additional letters, affidavits and/or other information during or after the telephonic disclosure conference which will aid in the rendering of his decision.

3. Special Referee Cardello may require that the parties formally brief the issue(s) and will set a briefing schedule. The parties are to comport with Special Referee Procedure III (Motions Heard by Special Referee Cardello)

III. Motions Heard by Special Referee Cardello.

a) The form and length of all motion papers must comply with the Rules of the Commercial Division of the Supreme Court and the Honorable Joel Cohen's Rules.

b) Copies of all motion papers shall be mailed via overnight mail to Special Referee Cardello's office: Moritt Hock & Hamroff LLP, Attention Michael Cardello III, 400 Garden City Plaza, Garden City, NY 11530. Copies should also be e-mailed to Special Referee Cardello at (mcardello@moritthock.com) and all counsel of record.

c) Any party may request oral argument and the decision to hold oral argument will be at the sole discretion of Special Referee Cardello.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

HUDSON FERRY CAPITAL II, L.P., by and through its General Partner, HUDSON FERRY CAPITAL II GP, L.P.,

-and-

GEMINI INVESTORS V, L.P., by and through its General Partner, GEMINI GP V LLC,

Plaintiffs,

-against-

JEFFREY PETERSON, MAINSTAY CAPITAL I, L.P., BLITSTEIN, LLC, and SIGN ACQUISITION CORP., d/b/a AMERICAN INTERSTATE SIGNCRAFTERS,

Defendants,

-and-

AMERICAN SIGNCRAFTERS HOLDINGS, LLC,

Nominal Defendants.

Index No. 612560/2018

DECISION REGARDING NON-PARTY WELLS FARGO'S MOTION TO QUASH SUBPOENA AND DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Motion Sequence No. 009 and Motion Sequence No. 010

This matter is before the undersigned, Michael Cardello III, as a result of an Order of Reference issued by the Honorable Timothy S. Driscoll on July 13, 2020 (the "Order of Reference"), appointing him as Special Referee (the "Special Referee"), pursuant to New York Civil Practice Laws and Rules ("CPLR") § 3104, to supervise discovery in the above-captioned matter.

Currently before the Special Referee are two motions which were initially made before the Court prior to the appointment of the Special Referee. *See* NYSCEF Doc. Nos. 306-316, 328-338, 351, and 389 (Motion No. 009) and NYSCEF Doc. Nos. 317-350, 352 (Motion No.

010). The first motion before the Special Referee was filed by non-party Wells Fargo Bank, N.A. ("Wells Fargo") for an order: (i) pursuant to CPLR § 2304, quashing the subpoena *duces tecum* dated June 7, 2019, issued by plaintiffs Hudson Ferry Capital II, L.P., by and through its general partner, Hudson Ferry Capital II GP, L.P., and Gemini Investors V, L.P., by and through its general partner, Gemini GP V LLC (collectively, "Plaintiffs") to Wells Fargo (the "Wells Fargo Subpoena") or, (ii) in the alternative, pursuant to CPLR § 3103(a), denying or limiting the Wells Fargo Subpoena; and (iii) for other appropriate relief under the circumstances ("Motion No. 009").

The second motion before the Special Referee was filed by then-defendant Gerald Blitstein ("Blitstein"), who is the managing member of then-defendant Mainstay Capital I., L.P.'s ("Mainstay") general partner Mainstay Capital GP, LLC, and then-defendant Mainstay, which acquired American Signcrafters Holdings, LLC's ("ASH") secured debt ("Motion No. 010"). In Motion No. 010, Blitstein and ASH "join in the relief sought by Wells Fargo" and further seek a protective order, pursuant to CPLR § 3103, "that this Court extend the relief sought by Wells Fargo to encompass all other Subpoenas" [defined to include the Wells Fargo Subpoena and six other subpoenas served by Plaintiffs on non-party banks (the "Other Bank Subpoenas"[1])] by barring Plaintiffs from serving "similar discovery against any party or non-party until further order of this Court" and making "each of the Non-Parties (and any other recipient of a subpoena) aware of the protective order" ("Motion No. 010"). NYSCEF Doc. No.

[1] The Other Bank Subpoenas include a May 2, 2019 subpoena and June 17, 2019 subpoena served on UBS Financial Services, a June 4, 2019 subpoena served on BankUnited, NA, a June 4, 2019 subpoena served on Capital One, N.A., and a March 25, 2019 subpoena and May 15, 2019 subpoena served on Sterling National Bank.

318 at pp. 3-5; NYSCEF Doc. No. 326 at p. 2. Defendants Jeffrey Petersen ("Petersen"), Sign Acquisition Corporation ("SAC"), and ASH joined Motion No. 010.[2]

I. RELEVANT PROCEDURAL HISTORY

For purposes of this Decision, familiarity with the factual background and procedural history is presumed, and will not be stated herein, except that the Special Referee provides the following recitation of facts which is integral to the rendering of this Decision.

On or about November 26, 2018, Plaintiffs filed a Second Amended Complaint which included eleven (11) causes of action. NYSCEF Doc. No. 110. By Order dated May 7, 2019 (the "May 2019 Order"), the Court dismissed nine (9) of the eleven (11) causes of action and granted Plaintiffs leave to re-plead six (6) of those causes of action in a Third Amended Complaint. NYSCEF Doc. No. 222. After the Court issued the May 2019 Order, but before the Court adjudicated Plaintiffs' motion for leave to file a Third Amended Complaint (which motion was filed May 31, 2018; *see* NYSCEF Doc. Nos. 223-31), Plaintiffs served the Wells Fargo Subpoena and four of the six Other Bank Subpoenas.[3] Thereafter, in August 2019, Wells Fargo filed Motion No. 009 and, in September 2019, Blitstein and Mainstay filed Motion No. 010. *See* Motion No. 009 at NYSCEF Doc. Nos. 306-316, 328-338, 351, and 389, and Motion No. 010 at NYSCEF Doc. Nos. 317-350, 352.

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[2] By letter dated September 12, 2019, counsel for defendant ASH joined Motion No. 010 seeking a protective order "for the reasons articulated therein, and also for the reasons articulated by non-party Wells Fargo . . . in its Motion to Quash [i.e. Motion No. 009]". NYSCEF Doc. No. 327.

By letter dated September 16, 2019, counsel for defendants Petersen and SAC joined "the motion for issuance of a protective order [i.e. Motion No. 010]" and "adopt[ed] all of the arguments by incorporation without further repetition." NYSCEF Doc. No. 342.

The Court recognized that ASH, Petersen, and SAC joined Motion No. 010 in its November 2019 Order (defined herein).

[3] As indicated in footnote 1 *supra*, two of the six Other Bank Subpoenas were served before the Court issued the May 2019 Order.

On October 21, 2019, while Motion No. 009 and Motion No. 010 were *sub judice*, the Court issued an order (the "October 2019 Order") in response to (i) Plaintiffs' motion for leave to file a Third Amended Complaint (NYSCEF Doc. No. 223-31), (ii) Blitstein's and Mainstay's motion to dismiss (NYSCEF Doc. No. 239-76), and (iii) Petersen's and SAC's motion to dismiss (NYSCEF Doc. No. 278-81). In the October 2019 Order, the Court, *inter alia*, permitted Plaintiffs to file "a Third Amended Complaint that contains the following claims: (1) derivative breach of contract against Petersen, (2) derivative breach of contract against BLLC [Blitstein, LLC], (3) UCC 9-625 claim against Mainstay, and (4) declaratory judgment claim against SAC". NYSCEF Doc. No. 355 at pp. 25-26. In accordance with the October 2019 Order, Plaintiffs filed a Third Amended Complaint, dated November 8, 2019, which set forth four causes of action. NYSCEF Doc. No. 361.

On or about June 29, 2020, Plaintiffs entered into a Stipulation of Partial Discontinuance against defendants Blitstein, Mainstay, and Blitstein, LLC, which is Blitstein's company that provided financial and consulting services to ASH, thereby rendering the second and third causes of action set forth in the Third Amended Complaint moot. NYSCEF Doc. No. 416. Accordingly, Plaintiffs currently maintain only two causes of action, the first and fourth causes of action in the Third Amended Complaint.

The first cause of action alleges breach of contract against Petersen – ASH's sole manager, sole director, and majority unitholder – for violating "contractual duties to ASH, including his contractually-imposed fiduciary duties". NYSCEF Doc. No. 361 at ¶107. Specifically, Plaintiffs allege that Petersen, *inter alia*, failed to convene required board meetings, failed to provide "accurate and complete financial statements", recorded fraudulent transactions in ASH's ledger, used ASH's resources for personal reasons, "conspire[ed] with Blitstein to use

the Mainstay secured party sale [i.e. the September 2016 sale of ASH's secured debt to Mainstay] to transfer ASH's assets to himself at a substantial discount," and "willfully breach[ed] his own non-compete and non-solicitation covenants from and after the December 2018 sale [i.e. the December 2018 sale of ASH's assets to SAC]." *Id.*

The fourth cause of action seeks a declaratory judgment that "SAC is liable as successor for ASH's debts" because SAC is "the mere continuation of ASH" whereby Petersen, through his wife, "acting as his straw", is "SAC's owner and de facto controlling officer". *Id.* at ¶¶ 129, 131, 133, 137. Plaintiffs allege that the December 2018 sale of ASH's assets to SAC "represented a de facto merger between SAC and ASH" which was "devised by Petersen and Blitstein to fraudulently avoid, delay, or hinder ASH's creditors" and enabled SAC to purchase "all of the assets of ASH's operating subsidiaries from Mainstay . . . for substantially less than fair value." *Id.* at ¶¶ 131-32.

The determination as to whether the documents sought in the Wells Fargo Subpoena and the Other Bank Subpoenas are material and necessary to the prosecution of the existing causes of action or may lead to the disclosure of admissible proof must be analyzed in the context of the foregoing two causes of action set forth in the Third Amended Complaint, not any causes of action set forth in the Second Amended Complaint, which is now moot.

With respect to Motion No. 009, as discussed in greater detail below, it is the Special Referee's view that: (i) the alleged procedural defects do not warrant the relief requested; and (ii) the documents sought in the Wells Fargo Subpoena are material and necessary to the prosecution of the causes of action set forth in the Third Amended Complaint or may lead to the disclosure of

admissible proof.[4] Accordingly, for the reasons set forth herein, the Special Referee denies Motion No. 009 and orders Wells Fargo to produce the documents sought in the Wells Fargo Subpoena within twenty (20) days of the date hereof.

With respect to Motion No. 010, insofar as it seeks relief concerning the Wells Fargo Subpoena, it is denied pursuant to the decision rendered on Motion No. 009. Insofar as Motion No. 010 seeks additional relief concerning the Other Bank Subpoenas and non-party discovery, it is the Special Referee's view that: (i) the Other Bank Subpoenas are moot because the recipient banks provided the requested disclosure; and (ii) the relief seeking a protective order "barring disclosure beyond the scope of the remaining claims" (NYSCEF Doc. No. 326 at p. 3) and barring Plaintiffs from "serving or continue to pursue any similar discovery against any party or non-party until further order of this Court" is denied as redundant of CPLR § 3101 (NYSCEF Doc. No. 318 at p. 6).

A. Moving Papers

i. Motion No. 009

On August 27, 2019, Wells Fargo filed Motion No. 009, comprised of a Notice of Motion, an Affirmation of John P. Foudy, Esq. dated August 26, 2019 ("Foudy Affirmation") with exhibits, an Affidavit of Barbara Stroud sworn to on August 23, 2019 ("Stroud Affidavit")[5],

[4] The Special Referee rendered this determination after review and consideration of the arguments set forth in Motion No. 009 and Motion No. 010, given that the latter motion joined, in part, the relief sought in the former motion.

[5] The Special Referee notes that the Stroud Affidavit is notarized by a notary public commissioned in California, not New York, and is not accompanied by the requisite certificate of conformity. *See* N.Y.C.P.L.R. 2309(c) ("[a]n oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation"). However, because the omission of a certificate of conformity is not a fatal defect and can be cured, this omission was not a dispositive factor in this decision. *See DTG Operations Inc. v. Big Apple Ortho Med. Supply, Inc.*, No. 110731/2011, 2013 N.Y. Misc. LEXIS 3409 at *4-5 (Sup. Ct. N.Y. Cnty. Aug. 2, 2013) (quoting *Matapos Tech. Ltd. v. Compania Andina de Comercio Ltda*, 68 A.D.3d 672, 673 (1st Dep't 2009)) ("The failure to provide a

and a Memorandum of Law dated August 26, 2019 ("Motion No. 009 Moving Memo"). As set forth in the Motion, as requested in the Wells Fargo Subpoena, Plaintiffs seek the following documents:

1. All communications including e-mail communications, between Wells Fargo and any of the following, from June 1, 2018 to the present:

   a. Peterson[;]
   b. Blistein [sic][;]
   c. ASH or ASH Subsidiaries;
   d. Mainstay; or
   e. SAC.

2. A schedule of any Wells Fargo payment to ASH, Petersen, Mainstay, or SAC from June 1, 2018 to the present.

3. All contracts and agreements between Wells Fargo and ASH or SAC from June 1, 2018 to the present, including the proposed "contract extension" referenced in the attached e-mail communication dated November 28, 2018.

4. All internal Wells Fargo e-mail communications that concern ASH, ASH subsidiaries, or SAC from June 1, 2018 to the present. Please include the following Wells Fargo e-mail accounts within the scope of the search:

   jeanette.skoropowski@wellsfargo.com
   kevin.manion@wellsfargo.com
   kristen.mahoney@wellsfargo.com
   sarah.muenow@wellsfargo.com

Foudy Affirmation, Ex. 1; Motion No. 009 Moving Memo at p. 3.

In the moving papers, Wells Fargo provided a brief summary of the communications that occurred with Plaintiffs' counsel regarding the Wells Fargo Subpoena prior to filing Motion No. 009. By letter dated July 23, 2019, Wells Fargo asserted objections to the Wells Fargo Subpoena, e.g., overly broad and unduly burdensome, but stated that it "intended to comply" and

certificate of conformity for oaths taken out of this state is not a fatal defect and "authentication of the oathgiver's authority can be secured later, and given *nunc pro tunc* effect if necessary").

"is in the process of gathering documents related to the requests". Motion No. 009 Moving Memo at p. 4. Wells Fargo noted that Plaintiffs' counsel responded, by letter dated July 25, 2020, that the Wells Fargo Subpoena "did not go beyond the subject matter of the underlying litigation", as alleged, and that Wells Fargo's objections were untimely. *Id.* That same day, counsel for ASH emailed Wells Fargo stating that the Wells Fargo Subpoena was "palpably improper" and constituted "harassment of our client's business partner and a fishing expedition of the worst kind" – forwarding, *inter alia*, a copy of the Second Amended Complaint and the May 2019 Order. *Id.*

Moreover, in Motion No. 009, Wells Fargo objected to the Wells Fargo Subpoena on two grounds. First, Wells Fargo argued that the Wells Fargo Subpoena is deficient under CPLR § 3101(a)(4) by failing to include a statement concerning the "circumstances or reasons" for the requested disclosure, or copies of the pleadings. *Id.* at p. 5. Second, Wells Fargo objected to the Wells Fargo Subpoena claiming that the documents demanded are irrelevant to the causes of action in the Second Amended Complaint, namely, the first cause of action for breach of contract regarding Petersen's alleged failure to deliver annual financial statements from 2016 to May of 2018, and the tenth cause of action regarding Mainstay's alleged failure to adequately advertise the September 2016 sale of ASH's secured debts. *Id.* at pp. 6-8. Wells Fargo reasoned that the fact that the events at issue took place from 2012 to May of 2018 and the Wells Fargo Subpoena only sought documents from June 1, 2018 to present, confirms "there is no apparent relevance of the material requested . . . to the causes of action asserted." *Id.* at p. 8.

ii. Motion No. 010

After Wells Fargo filed Motion No. 009, on or about September 12, 2019, Blitstein and Mainstay filed Motion No. 010, comprised of a Notice of Motion, an Affirmation of Daniel

Zinman, Esq. dated September 12, 2019 ("Zinman Affirmation") with exhibits, and a Memorandum of Law ("Motion No. 010 Moving Memo").

In Motion No. 010, Blitstein and Mainstay sought relief in the form of a protective order with regard to the Wells Fargo Subpoena; "to extend the relief sought by Wells Fargo" to the Other Bank Subpoenas; and to secure a protective order barring Plaintiffs "from serving or continuing to pursue any similar discovery against any party or non-party until further order of this Court" and directing Plaintiffs to "make each of the Non-Parties (and any other recipient of a subpoena) aware of the protective order . . . ." Zinman Affirmation at p. 6; Motion No. 010 Moving Memo at p. 2. Blitstein and Mainstay argued that the documents sought in the Wells Fargo Subpoena and Other Bank Subpoenas (e.g. concerning Mainstay's finances, "transfers between Mainstay and ASH going back to 2012", and "transfers to and from [SAC] . . . who is not even mentioned in the [Second Amended Complaint]) "far exceed" the "limited scope" of the claims identified in the Second Amended Complaint that survived the May 2019 Order and are part and parcel of an improper "fishing expedition." Zinman Affirmation at p. 3; Motion No. 010 Moving Memo at pp. 1-2.

B. <u>Opposition Papers</u>

i. Opposition to Motion No. 009

On September 13, 2019, Plaintiffs filed opposition to Motion No. 009 ("Opposition to Motion No. 009"), comprised of an Affirmation of Daniel J. Lyne, Esq. dated August 12, 2019[6] ("Lyne Affirmation") with exhibits, and a Memorandum of Law dated September 13, 2019 ("Motion No. 009 Opp. Memo").

[6] The Special Referee presumes that the Lyne Affirmation was intended to be dated and executed as of September 12, 2019, not August 12, 2019, given that Motion No. 009 was not filed until August 27, 2019.

In their Opposition to Motion No. 009, Plaintiffs provided their own summary of the events with regard to the Wells Fargo Subpoena. Plaintiffs noted that on June 7, 2019, they served the Wells Fargo Subpoena and that on or about June 18, 2019, Wells Fargo provided its "first response" to the Wells Fargo Subpoena, stating that it "may" need additional information but nonetheless "signaled the Bank's intent to comply". Motion No. 009 Opp. Memo at pp. 2-3. On July 15, 2019, Plaintiffs learned that the Wells Fargo Subpoena "would be transferred to another division of the Bank for processing". *Id.* at p. 3. On July 22, 2019, Plaintiffs were told that "the Bank was in the process of responding to the [Wells Fargo] Subpoena." *Id.*

According to Plaintiffs, by letter dated July 23, 2019, Wells Fargo asserted objections to the Wells Fargo Subpoena, alleging that it was overly broad, unduly burdensome, and sought "information that appears to go well beyond the subject matter of the underlying lawsuit", but nevertheless indicated a production was forthcoming. *Id.* By letter dated July 25, 2019, Plaintiffs asserted that the Wells Fargo Subpoena was not overly broad and did not go beyond the subject matter of the underlying litigation, and because the response to the Wells Fargo Subpoena was due on July 11, 2019, the objections set forth in Wells Fargo's July 23, 2019 letter were waived. *Id.* (quoting Lyne Affirmation, Ex. 8).

In their Opposition to Motion No. 009, Plaintiffs expanded on the arguments set forth in their July 25, 2019 letter. Specifically, Plaintiffs argued that Motion No. 009 should be denied because Wells Fargo: (i) waived its objections to the Wells Fargo Subpoena by failing to serve timely objections or a timely motion to quash under CPLR §§ 2304 and/or 3122; (ii) failed to ask Plaintiffs to withdraw or modify the Wells Fargo Subpoena under CPLR § 2304; (iii) failed to demonstrate that the subpoenaed information "is utterly irrelevant to any proper inquiry"; and

(iv) failed to demonstrate that Plaintiffs did not satisfy CPLR § 3101(a)(4)'s minimal notice requirement.

With regard to the first point, Plaintiffs asserted that Motion No. 009 must be denied as untimely because, under CPLR §§ 2304 and 3122, a non-party must assert objections to a subpoena with "reasonable particularity" within twenty (20) days of being served and must further file a motion to quash a subpoena within this twenty (20) day period, before the return date of the subpoena at issue. Motion No. 009 Opp. Memo at pp. 5-7. Specifically, Plaintiffs argued that because the Wells Fargo Subpoena, served on June 7, 2019, required a response by July 11, 2019, the objections were waived as they were not asserted until July 23, 2019. *Id.* Therefore, according to Plaintiffs, because Motion No. 009 was not filed until August 27, 2019, Motion No. 009 should be denied. *Id.*

Plaintiffs further argued that Motion No. 009 should be denied because Wells Fargo did not comply with the "mandatory procedures" set forth in CPLR § 2304 by failing to confer with Plaintiffs to request the withdrawal or modification of the Wells Fargo Subpoena before resorting to motion practice. *Id.* at pp. 6-7.

Third, Plaintiffs alleged that Wells Fargo failed to meet its initial burden to demonstrate that the information sought in the Wells Fargo Subpoena is "utterly irrelevant to any proper inquiry." Plaintiffs explained that:

> the information sought by the [Wells Fargo] Subpoena is relevant insofar as the business prospects of the Defendants and Defendant entities, 'with one of [their] largest customers [referring to Wells Fargo] during and after 2019 are highly relevant' because information and communications may very well reveal the Defendants' intention to consummate the secured party sale (i.e. the credit bidding of secured debt) and would almost certainly demonstrate that the Defendants were providing financial information to- or concerning financial transactions with- Wells

> Fargo, without fulfilling their contractual and fiduciary obligations to disclose the same to Plaintiffs." *Id.* at pp. 10-11.

Plaintiffs also stated that "[t]he issue of whether the Defendants failed to disclose material business developments and pertinent financial information to Plaintiffs, as will likely be revealed through Defendants' communications with Wells Fargo, is certainly *reasonably related to the issues* raised in the underlying litigation . . . and bears upon the Plaintiffs' allegations of freeze-out and breaches of contractual and fiduciary duties". *Id.* at p. 11 (emphasis in original).

Finally, Plaintiffs maintained that they met their "minimal obligation" to provide proper notice in the Wells Fargo Subpoena under CPLR § 3101(a)(4) by including the date and time for compliance, the case caption, "relevant information regarding the litigation, including relevant court, New York county, index number, and assigned judge", and stating "there is currently a dispute between the parties as to this action and you may have documents relevant to that dispute." *Id.* Plaintiffs argued that the New York State Unified Court System "provides free electronic access to case dockets and filed documents" and, considering Wells Fargo's "sophistication", it "had all relevant information it might need, and more, at its disposal." *Id.* at pp. 11-12. Plaintiffs contended that even if notice in the Wells Fargo Subpoena was deficient, Plaintiffs have the right to remedy such deficiency at this time and Wells Fargo waived this argument, or any "ability to challenge the [Wells Fargo] Subpoena", when indicating in its June 18, 2019 and July 23, 2019 letters that it intended to comply with the Wells Fargo Subpoena. *Id.* at pp. 12-13.

ii. Opposition to Motion No. 010

On September 18, 2019, Plaintiffs also filed opposition to Motion No. 010 ("Opposition to Motion No. 010"), comprised of an Affirmation of Daniel J. Lyne, Esq. dated August 18,

2019[7] ("Second Lyne Affirmation") with exhibits, and a Memorandum of Law dated September 18, 2019 ("Motion No. 010 Opp. Memo"). In their Opposition to Motion No. 010, Plaintiffs addressed Blitstein's and Mainstay's requested relief for a broad protective order concerning the Other Bank Subpoenas and non-party discovery, and for Wells Fargo's request for an order quashing the Wells Fargo Subpoena.

Plaintiffs stated that Blitstein's and Mainstay's request for a protective order concerning all non-party discovery disregarded the Court's prior ruling that non-party discovery is "not stayed". Second Lyne Affirmation at pp. 2 (emphasis in original removed). Plaintiffs argued that, in any event, Blitstein's and Mainstay's request for a protective order concerning the Other Bank Subpoenas "is moot because disclosure has already been provided." *Id.*; Motion No. 010 Opp. Memo at footnote 3.

Moreover, Plaintiffs argued that insofar as Motion No. 010 challenges the Wells Fargo Subpoena, it should be denied for three principal reasons. Plaintiffs first argued that the Motion is untimely and Blitstein and Mainstay have "no excuse whatsoever . . . for their delay." Opposition to Motion No. 010 at pp. 5. Plaintiffs further asserted that Blitstein and Mainstay do not establish that the information sought is "utterly irrelevant" or "that a protective order is otherwise warranted" given that "subpoenas have already yielded evidence in support of Plaintiffs' existing claims". *Id.* at p. 6. In this regard, Plaintiffs argued that the requests set forth in the Wells Fargo Subpoena are "suitably limited in time and scope" and "relate[] directly to the Plaintiffs' breach of contract and freeze-out claims insofar as they request the production of communications, financial transactions, and business developments (i.e. contracts) between Wells Fargo and the Defendants, which Petersen had a contractual duty to disclose to the

[7] The Special Referee presumes that the Second Lyne Affirmation was intended to be dated and executed as of September 18, 2019, not August 18, 2019, given that Motion No. 010 was not filed until September 12, 2019.

Plaintiffs and/or accurately account for in ASH's periodic financial statements." Second Lyne Affirmation at p. 5. Plaintiffs also contended that the Motion should be denied because it fails to include an affirmation pursuant to 22 N.Y.C.R.R. 202.7(a) that counsel tried to resolve the issues in good faith. Opposition to Motion No. 010 at pp. 4-7.

C. **Reply Papers**

i. Reply in Support of Motion No. 009

On September 19, 2019, Wells Fargo filed a reply to Motion No. 009 ("Reply in Support of Motion No. 009"), comprised of a Reply Memorandum of Law dated September 19, 2019 ("Motion No. 009 Reply Memo"). In its Reply in Support of Motion No. 009, Wells Fargo responded to Plaintiffs' untimeliness argument by stating that Plaintiffs did not provide an affidavit verifying the Wells Fargo Subpoena was served on June 7, 2019, and have not demonstrated that the Wells Fargo Subpoena was properly served on the appropriate office in compliance with the separate entity rule. Motion No. 009 Reply Memo at pp. 2-4. Wells Fargo stated that under the separate entity rule "each branch of a bank is a separate entity" and, while this rule "might not" apply where "the court's general personal jurisdiction over the bank's New York branch permits it to compel that branch to produce any requested information that can be found through electronic means", here, the information sought in the Wells Fargo Subpoena "does not seek the types of documents and information readily available to individual bank branches, such as account information". *Id.* at p. 3. Wells Fargo asserted that the Wells Fargo Subpoena seeks "contracts and internal bank communications concerning the Bank's relationship with one of the Bank's vendors, not customer or bank account holder information" and "[t]here is simply no evidence that service of the [Wells Fargo] Subpoena was properly made on the appropriate Wells Fargo office to avoid application of the separate entity rule." *Id.* at pp. 3-4.

Moreover, Wells Fargo reiterated that insofar as the Second Amended Complaint concerns events that occurred from 2012 to May of 2018, the Wells Fargo Subpoena "seeks documents subsequent to and wholly outside the relevant time period (i.e., from June 1, 2018 to the present)". *Id.* at p. 5. Wells Fargo rejected Plaintiffs' explanation that because Defendants sold ASH's assets to SAC, which is controlled by Petersen, "ASH's and SAC's business prospects with one of its largest customers [i.e. Wells Fargo] during and after 2018 are highly relevant", and pointed out that "none of these allegations are contained in the Second Amended Complaint." *Id.* Wells Fargo stated that while "Defendants' 'business prospects...[]during and after 2018' might be relevant to the satisfaction of any judgment rendered under CPLR Article 52", such information "is wildly premature at this pre-judgment stage." *Id.*

ii. Reply in Support of Motion No. 010

No formal reply papers were submitted by Blitstein and Mainstay in furtherance of Motion No. 010. However, by letter dated September 19, 2019 ("Reply Letter in Support of Motion No. 010"), counsel for Blitstein and Mainstay sought leave to file reply papers in further support of Motion No. 010 or, in the alternative, for the Court to deem this letter and the attached email a reply affirmation. NYSCEF Doc. No. 352.[8] In this letter, counsel noted that Plaintiffs' argument that the Motion failed to include an affirmation of good faith "is made rather carefully, as Plaintiffs never actually assert that a meet and confer did not occur – with good reason", namely, that Plaintiffs' counsel never responded to its September 9, 2019 email bearing the subject line "Hudson Ferry v Petersen – Meet and Confer". *Id.* This email stated, in full: "In light of Wells Fargo's motion to quash [Motion No. 009], will you agree that any other granting, in whole or in part, Wells Fargo's motion will apply to all other subpoenas?" *Id.* The Reply

[8] The Court did not rule on this request.

Letter in Support of Motion No. 010 did not respond to the other arguments set forth in the Opposition to Motion No. 010 including, *inter alia*, that the Other Bank Subpoenas are moot and that Motion No. 010 is untimely.

D. Order Dated November 13, 2019

By order dated November 13, 2019 ("November 2019 Order", NYSCEF Doc. No. 367), Justice Driscoll rejected Plaintiffs' arguments regarding the untimeliness of Motion No. 009 and Motion No. 010 "in the absence of any affidavits of service establishing the date and manner of the service of the Subpoenas." November 2019 Order at p. 11. Justice Driscoll further noted that Motion No. 009 and Motion No. 010 "were fully briefed prior to the issuance of the October 2019 Order permitting Plaintiffs to file a Third Amended Complaint" and, therefore required supplemental briefing "as to the relevance of the Subpoenas with respect to the claims and allegations set forth in the Third Amended Complaint." *Id.*

E. Supplemental Submission by Wells Fargo in Support of Motion No. 009

In its supplemental memorandum of law dated December 11, 2019 ("Wells Fargo Supp."), Wells Fargo noted that the Third Amended Complaint "added four causes of action, and also an additional factual allegation referencing Wells Fargo's alleged contractual relationship with one of the defendants." Wells Fargo Supp. at pp. 2-3. As noted by Wells Fargo, this new factual allegation, in Paragraph 92 of the Third Amended Complaint, states that ". . . Petersen failed to report positive business developments to HFC and Gemini, including a decision by Wells Fargo, ASH's largest customer, not to issue an RFP for future sign business, but to extend ASH's existing contract beyond its scheduled February 2019 expiration date for an additional two years." *Id.* at p. 3. Wells Fargo argued that this new factual allegation "was not contained in the proposed Third Amended Complaint which Plaintiffs annexed to their motion seeking leave

to file that amended pleading" and therefore this allegation "cannot be the basis for the requests made in the [Wells Fargo] Subpoena." *Id.*

Wells Fargo further argued that the Third Amended Complaint "appear[s] to be alleging matters extraneous to the four (4) permitted causes of action" and "Paragraph 92, which references Wells Fargo, seems to have been interposed solely to interject the subject matter of the Wells Fargo Subpoena into the Third Amended Complaint, rather than to support any cause of action allowed by this Court." *Id.* at p. 5.

F. Supplemental Submission by Blitstein and Mainstay in Support of Motion No. 010

Blitstein and Mainstay did not file a supplemental brief as directed by the Court but filed a letter dated December 11, 2019, stating as follows: "To the extent Wells Fargo's argument(s) in its Supplemental Memo results in the reduction of Well Fargo's obligations to produce documents to the Plaintiffs pursuant to the subpoena served on it, the rationale of any such ruling should apply to all other parties that have been subpoenaed in this case." NYSCEF Doc. No. 374.

G. Supplemental Submission by Plaintiffs in Opposition to Motion No. 009 and Motion No. 010

In its supplemental memorandum of law dated January 7, 2020 ("Plaintiffs Supp."), Plaintiffs argued that because Defendants did not preserve any affirmative defenses in their Answer that the allegations and claims in the Third Amended Complaint went beyond the leave granted by the Court, they "waived their respective rights to dispute the scope of the Third Amended Complaint". Plaintiffs Supp. at p. 3. Plaintiffs noted that "[t]he Third Amended Complaint expressly pleads that Sign Acquisition Corp. purchased ASH's assets at less than fair value, and that it continues to operate ASH's business under a new banner" and the subpoenaed

documents "are directly relevant" to these claims. *Id.* at p. 4. Moreover, Plaintiffs maintained that "Wells Fargo agreed to produce the requested documents, and was in the process of collecting them before new counsel appeared" and "[t]he production should be ordered to go forward." *Id.* While not requested by the Court, Plaintiffs annexed the affidavit of service for the Wells Fargo Subpoena to this supplemental submission.

H. Motion No. 009 and Motion No. 10 are Referred to the Special Referee

Subsequent to all of the foregoing briefing, on July 13, 2020, the Court appointed the undersigned as a Special Referee in this action thereby referring all discovery-related matters, including Motion No. 009 and Motion No. 010, to the Special Referee for adjudication. By letter dated August 10, 2020, Plaintiffs advised the Special Referee, *inter alia*, that Motion No. 009 was submitted and the parties were awaiting a determination on the papers.

With respect to Motion No. 010, on September 18, 2020, the Special Referee held a conference call among counsel during which Plaintiffs' counsel maintained that Motion No. 010 is moot because Blitstein and Mainstay are no longer parties to this action. Counsel for Petersen and SAC and counsel for ASH advised that they would take a closer look at Motion No. 010 and report back to the Special Referee as to whether or not they believe it is moot.

On October 1, 2020, the Special Referee held a second conference call among counsel regarding Motion No. 010. On this call, Plaintiffs' counsel asserted another argument, claiming that Motion No. 010 is moot because the allegations therein are based on the Second Amended Complaint, instead of the Third Amended Complaint, and Blitstein, Mainstay, ASH, and Petersen never provided a supplemental submission as directed by the Court to relate their arguments to the Third Amended Complaint. Counsel for ASH represented that ASH joined in

both Motion No. 009 and Motion No. 010[9]. Counsel for Petersen and SAC represented that Petersen and SAC joined Motion No. 010 and that Motion No. 10 was not moot due to either Blitstein's and Mainstay's dismissal from the case or the lack of a supplemental submission following the October 2019 Order. The issues are decided as follows.

II. THE SPECIAL REFEREE'S ANALYSIS AND DETERMINATION

A. Legal Standard

It is well-settled 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, by . . . any other person, upon notice, stating the circumstances or reasons such disclosure is sought or required." N.Y.C.P.L.R. 3101(a). As determined by the New York Court of Appeals, "the words, 'material and necessary', are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y.2d 403, 406 (1968). *See also In re Kapon v. Koch*, 23 N.Y.3d 32, 38 (2014); *JFK Family Ltd. P'ship v. Millbrae Natural Gas Dev. Fund 2005, L.P.*, 132 A.D.3d 731, 733 (2d Dep't 2015). Applying this standard, "pretrial disclosure extends not only to proof that is admissible but also to matters that may lead to the disclosure of admissible proof." *Twenty Four Hour Fuel Oil Corp. v. Hunter Ambulance, Inc.*, 226 A.D.2d 175, 175 (1st Dep't 1996).

Notwithstanding the above, the case law is clear; a subpoena cannot be used by a party to embark on a fishing expedition and must be narrowly tailored to the causes of action and defenses asserted. *Haron v. Azoulay*, 132 A.D.3d 475, 475 (1st Dep't 2015); *Oak Beach Inn Corp. v. Town of Babylon*, 239 A.D.2d 568 (2d Dep't 1997). A non-party may seek relief from

[9] *But see* footnote 2 confirming that ASH joined Motion No. 010 but, to support the relief sought in Motion No. 010, adopted the arguments set forth in Motion No. 009.

an objectionable subpoena under either CPLR §§ 2304 or 3103. CPLR § 2304 provides that "[a] motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable . . . ." N.Y.C.P.L.R. 2304. CPLR § 3103 provides, in relevant part, that "[t]he court may at any time . . . on motion of any party . . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device" to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice . . . ." N.Y.C.P.L.R. 3103.

A motion to quash should be granted "where the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry." *In re Kapon*, 23 N.Y.3d at 38 (internal quotation marks and citations omitted); *Ferolito v. Arizona Beverages USA, LLC,* 119 A.D.3d 642, 643 (2d Dep't 2014). The burden to show that the information sought in the subpoena is improper and therefore "utterly irrelevant" lies with the movant. *In re Kapon*, 23 N.Y.3d at 38; *Bianchi v. Galster Mgt. Corp.*, 131 A.D.3d 558, 559 (2d Dep't 2015). If the movant makes this showing, the burden then shifts to the non-moving party who served the subpoena to establish that the information sought is material and necessary to the prosecution or defense of the action. *See Bianchi v. Galster,* 131 A.D.3d at 559; *Klein Varble & Assoc., P.C. v. DeCrescenzo,* 119 A.D.3d 655, 655 (2d Dep't 2014); *Ferolito*, 119 A.D.3d at 643.

Before addressing the propriety of the Wells Fargo Subpoena or the Other Bank Subpoena under the foregoing standard, the Special Referee must first address Plaintiffs' arguments that Motion No. 009 and Motion No. 010 should be denied based on procedural defects, waiver, and/or mootness.

B. Motion No. 009

1. Procedural Defects and Waiver of Arguments in Motion No. 009

Plaintiffs argue that Motion No. 009 is improper and must be denied because: (1) Wells Fargo did not file Motion No. 009 within twenty days of being served, or even before the return date therein, as required by the CPLR; (2) Wells Fargo waived the right to file Motion No. 009 when indicating, upon receipt of the Wells Fargo Subpoena, that it intended to comply and produce documents; and (3) Wells Fargo did not ask Plaintiffs to withdraw the Wells Fargo Subpoena before filing Motion No. 009, as required by the CPLR.

In the November 2019 Order, Justice Driscoll rejected Plaintiffs' untimeliness argument when stating as follows: "the Court rejects Plaintiffs' arguments regarding the untimeliness of the pending motions [referring to Motion No. 009 and Motion No. 010] in the absence of any affidavit of service establishing the date and manner of the service of the Subpoena[]." November 2019 Order at p. 11. The Court indicated this untimeliness argument was not subject to reconsideration when the Court specifically confined the supplemental briefing to arguments concerning the "relevance of the Subpoena[s] with respect to the claims and allegations set forth in the Third Amended Complaint." *Id.* Had the Court been willing to entertain the untimeliness argument, it would have expanded the scope of the supplemental briefing in this regard. The parties are therefore bound by the Court's November 2019 Order that Motion No. 009 will not be dismissed on grounds of untimeliness.

The Special Referee further rejects Plaintiffs' argument that Wells Fargo waived the right to file Motion No. 009 by expressing its intent in prior correspondence to comply with the Wells Fargo Subpoena. Plaintiffs produced a letter dated June 18, 2019 from Wells Fargo to Plaintiffs' counsel which stated, *inter alia*, "We received your legal order on 6/13/2019 and found that we

may need additional information from you. We also need to discuss an acceptable timeline for providing the records you requested . . . Until we are able to speak with you, we cannot continue researching your request." Lyne Affirmation, Ex. 5. This letter was produced in an attempt to support their argument that Wells Fargo waived the right to file Motion No. 009 and the objections to the Wells Fargo Subpoena therein. Plaintiffs further produced an email dated July 23, 2019 from Wells Fargo to Plaintiffs' counsel which stated "[p]er my conversation with Mr. Rosenberg [one of Plaintiffs' counsel] today, I have attached our objection letter. Currently, I am working on finalizing the records we will produce. You may expect to receive them shortly." *Id.* at Ex. 6. The referenced objection letter states, in part, "Subject to and without waiving objections, as discussed, Wells Fargo is in the process of gathering documents related to the requests in the subpoena. Wells Fargo hopes that the documents to be produced will meet your needs and is willing to work with you to reach a mutually-acceptable resolution of any disputes that may arise related to the production of documents." *Id.* at Ex. 7.

In the Special Referee's view, the foregoing documentary evidence does not support Plaintiffs' position that Wells Fargo waived its right to set forth its arguments in Motion No. 009. In fact, the correspondence identified by Plaintiffs expressly demonstrates that Wells Fargo preserved its right to assert objections. *See Brodsky v. New York Yankees*, 26 Misc. 3d 874, 889 at footnote 89 (Sup. Ct. Albany Cnty. 2009) (respondents did not waive their rights to challenge a subpoena by making a partial production where correspondence indicates they "reserved their rights to object to the subpoena substantively and procedurally upon its issuance").

Finally, the Special Referee finds Plaintiffs' contention that Motion No. 009 must be denied because Wells Fargo did not request that Plaintiffs withdraw the Wells Fargo Subpoena before filing Motion No. 009 unavailing. CPLR § 2304 only requires the subpoenaed party to

ask the subpoenaing party to withdraw or modify the subpoena at issue before filing a motion to quash or modify where the subpoena "is not returnable in a court" – i.e. where "no action or proceeding is yet pending in court." N.Y.C.P.L.R. 2304; *Brooks v. City of New York*, 178 Misc. 2d 104, 105 (Sup. Ct. N.Y. Cnty. 1998). This requirement, which exists to oblige parties to "attempt an amicable resolution before resorting to court", is inapplicable here, as an action is already pending. *Id.*

Accordingly, the Special Referee declines to deny Motion No. 009 on the basis of the foregoing procedural arguments as set forth by Plaintiffs.

2. The Propriety of the Wells Fargo Subpoena

With regard to the substantive arguments, Wells Fargo seeks to quash or modify the Wells Fargo Subpoena on two principal grounds: (1) the Wells Fargo Subpoena fails to include a statement concerning the "circumstances or reasons" for the requested disclosure as required under CPLR § 3101(a)(4); and (2) the requested disclosure is neither material nor necessary to the prosecution of the causes of action asserted.[10]

a. Sufficiency of the Notice Provided in the Wells Fargo Subpoena of the "Circumstances or Reasons" for the Requested Disclosure under CPLR § 3101(a)(4)

Wells Fargo argues that the Wells Fargo Subpoena is facially invalid and must be quashed because it fails to state the circumstances or reasons that Plaintiffs seek the requested

[10] Wells Fargo also asserted that the Subpoena was improperly served based on New York's "separate entity rule". However, this "separate entity rule" argument was only raised in the Reply in Support of Motion No. 009 in response to Plaintiffs' untimeliness argument in the Opposition to Motion No. 009 and, as discussed herein, Justice Driscoll rejected this untimeliness argument. Motion No. 009 Reply Memo at pp. 3-4. The Special Referee declines to consider this argument as a separate ground for Wells Fargo to secure the requested relief. *See Harleysville Ins. Co. v. Rosario*, 17 A.D.3d 677, 677–78 (2d Dep't 2005) (confirming "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" and where the opposing party "did not have the opportunity to oppose the newly-raised claim in a surreply, it was improper for the court to grant the petition based upon that claim") (quoting *TIG Ins. Co. v. Pellegrini*, 258 A.D.2d 658, 658 (2d Dep't 1999)). Had Wells Fargo intended this "separate entity rule" argument to constitute a basis to secure the requested relief, it should have been included in its moving papers.

documents. Motion No. 009 Moving Memo at pp. 4-5. Wells Fargo maintains that the "boilerplate" language in the Wells Fargo Subpoena, namely, that "[t]he circumstances or reasons such disclosure is sought and required is that there is currently a dispute between the parties to this action and you may have documents relevant to that dispute", is insufficient. *Id.* at p. 5. To support this argument, Wells Fargo cites *Phoenix Grantor Trust v. Exclusive Hospitality, LLC*, wherein the New York Supreme Court, Queens County, quashed a subpoena served on non-party Chase Bank because it "vaguely and conclusorily" stated that the requested disclosure was sought because the bank "posess[es] information material and relevant to the dispute between to [sic] the parties concerning the matters set forth on Exhibit A" and Exhibit A merely provided definitions, instructions, and a list of the documents sought. *Phoenix Grantor Tr. v. Exclusive Hosp., LLC*, 59 Misc. 3d 1231(A) (Sup. Ct. Queens Cnty. 2018).

However, there is also case law recognizing that basic disclosure of due dates and case identifying information satisfies the notice requirement under CPLR § 3101(a)(4). As an example, in *Schlosser v. Schlosser*, the Court held that:

> CPLR 3101(a)(4) does not elucidate what "circumstances or reasons" should be included in a subpoena. According to two commonly relied-upon treatises on New York law, a subpoena should include the date and time of the deposition, a statement that the presence of the individual is requested "to testify and give evidence as a witness," and the names of the parties (*see*, Carmody–Wait, New York Prac. with Forms [2d], § 54:5; Bender's Forms for Civ. Prac. [2005], Form CPLR 2301:6). Neither treatise suggests, as [the subpoenaed non-party] argues, that a subpoena must include particularized information concerning the nature of the proceeding or a specific reason for requesting the witness's testimony or documents. It is sufficient that the non-witness is informed that a lawsuit has been commenced by a particular plaintiff against a particular defendant and that the witness is needed to testify and give evidence that is relevant to that proceeding, all of which was done in this instance.

Schlosser v. Schlosser, 7 Misc. 3d 1012(A) (Sup. Ct. N.Y. Cnty. 2005).

Critically, even where the subpoenaing party fails to set forth sufficient circumstances and reasons for the requested disclosure in the body of, or annexed to, the subpoena, case law provides that the subpoenaing party can cure this deficiency and provide this information in opposition to a motion to quash. *See, e.g., Velez v. Hunts Point Multi-Serv. Ctr., Inc.*, 29 A.D.3d 104, 111 (1st Dep't 2006) ("although the better practice, indeed the mandatory requirement of CPLR 3101 (a)(4), is to include the requisite notice on the face of the subpoena or in a notice accompanying it, given the evidence presented by [defendant] in opposition, the motions to quash the subpoenas should have been denied" because "[defendant's] papers articulated the need for the discovery sought" and the trial court recognized that disclosure sought was largely relevant and not unduly burdensome); *Quash Subpoena Ad Testificandum ex rel. Kapon v. Koch*, 37 Misc. 3d 1211(A) (Sup. Ct. N.Y. Cnty. 2012) ("[e]ven assuming that notice was lacking, any such deficiency in the notice has been cured in respondent's papers"); *Helie v. McDermott, Will & Emery*, 18 Misc. 3d 673, 676–77 (Sup. Ct. N.Y. Cnty. 2007) (recognizing that "[a] court may permit the omitted notice [under CPLR § 3101(a)(4)] to be corrected in absence of any apparent prejudice to the nonparty served" and holding that defendants, the subpoenaing parties, "remed[ied] the asserted lack of notice" by clarifying the need for the requested disclosure in their motion to compel and at court conferences).

The Special Referee need not determine whether the Wells Fargo Subpoena provided sufficient circumstances and reasons for the requested disclosure because, in the Special Referee's view, Defendants have provided such information in their Opposition to Motion No. 009 to withstand Wells Fargo's argument. The Special Referee further notes that, notwithstanding any alleged insufficient notice in the first instance, Wells Fargo seemingly had enough notice of what information was being sought to represent to Plaintiffs, by letter dated

July 23, 2019, that the Wells Fargo Subpoena "seeks information that appears to go well beyond the subject matter of the underlying lawsuit" and that Wells Fargo "is in the process of gathering documents related to the request". Lyne Affirmation, Ex. 7.

b. Relevance of the Requested Disclosure

To prevail on Motion No. 009, Wells Fargo, the movant, bears the initial burden to show that the documents sought in the Wells Fargo Subpoena are "utterly irrelevant to any proper inquiry" or demonstrate that the Wells Fargo Subpoena subjects it to unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice. *See* Point II(A) *supra*. Only if Wells Fargo satisfies this showing does the burden shift to Plaintiffs to demonstrate that the requested documents are material and necessary to the prosecution of the action. *Id.* In the Special Referee's opinion, Wells Fargo does not meet its burden.

In the Wells Fargo Supp., rather than discussing the propriety of each of the four contested document demands as they relate to the causes of action in the Third Amended Complaint – as the Court directed – Wells Fargo instead, focuses on how the filed Third Amended Complaint deviates from the proposed Third Amended Complaint set forth in the motion for leave (a procedural argument which concerns Plaintiffs and Defendants). Wells Fargo Supp. at pp. 2-4. In this regard, Wells Fargo acknowledges that the Third Amended Complaint states, in Paragraph 92, that "Petersen failed to report positive business developments to HFC and Gemini, including a decision by Wells Fargo, ASH's largest customer, not to issue an RFP for future sign business, but to extend ASH's existing contract beyond its scheduled February 2019 expiration date for an additional two years". *Id.* at p. 3. However, instead of explaining why the requested disclosure in the Wells Fargo Subpoena is "utterly irrelevant" to this allegation and the two causes of action therein, Wells Fargo states that this allegation was

improperly included in the Third Amended Complaint as it was not part of the proposed Third Amended Complaint and it was only added to connect the documents requested in the Subpoena to an allegation in the Third Amended Complaint. *Id.* at pp. 2-5. Wells Fargo further notes that it "is not able to nor should otherwise be required to substantively address the factual allegations made as to the defendants in the Third Amended Complaint." Wells Fargo Supp. at pp. 2-4.

As the subpoenaed party seeking affirmative relief from the Wells Fargo Subpoena, Wells Fargo needed to show how or why the requested disclosure is futile to the prosecution of the claims in the action. The Special Referee finds that the subpoenaed information is not "utterly irrelevant" given that Plaintiffs allege, *inter alia*, that (i) defendant Petersen breached his contractual duties to ASH by failing to provide accurate financial statements, recording fraudulent transactions, using ASH's resources for his own benefit, conspiring with Blitstein to use the September 2016 sale of ASH's secure debt to transfer ASH's assets to himself at a discount, and breached his restrictive covenants following the December 2018 sale of ASH's assets to SAC; and (ii) SAC is a successor to ASH and is therefore liable for ASH's debts. In the Special Referee's view, the documents requested in the Wells Fargo Subpoena – namely, (i) communications between Wells Fargo, on the one hand, and Petersen, Blitstein, ASH or ASH Subsidiaries, Mainstay, or SAC, on the other hand, (ii) a schedule of payments made to ASH, Petersen, Mainstay, or SAC; (iii) contracts between Wells Fargo and ASH; and (iv) internal communications at Wells Fargo concerning ASH, ASH subsidiaries or SAC – are reasonably related to the claims in the Third Amended Complaint or could reasonably lead to the disclosure of admissible evidence. The requested documents are reasonably related to whether Petersen, ASH, or SAC attempted to conceal any financial information and/or engaged in any financial misconduct (which relates to Plaintiffs' breach of contract claim) as well as whether ASH and

SAC have substantially similar corporate structures, businesses, officers, employees, office locations, and contact information (which relates to Plaintiffs' successor liability claim).

While Wells Fargo alleges in the Wells Fargo Supp., like it did in Motion No. 009 and its Reply in Support of Motion No. 009, that the Wells Fargo Subpoena seeks documents from June 2018 to present and is therefore entirely irrelevant to the causes of action which concern events that took place from 2012 to May of 2018, the Special Referee disagrees with this argument. Given that SAC acquired ASH's assets in a sale that took place in December, 2018, communications in the months leading up to and following that sale could prove relevant to the causes of action asserted.

In light of the foregoing, in the Special Referee's view, Wells Fargo has not satisfied its burden to show that the Wells Fargo Subpoena seeks documents that are "utterly irrelevant" to this action or that the Wells Fargo Subpoena subjects it to unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice. Therefore, the Special Referee denies Motion No. 009 seeking to quash or modify the Wells Fargo Subpoena.

C. Motion No. 010

Plaintiffs argue that Motion No. 010 must be denied because it: (i) is moot, given that the movants, Blitstein and Mainstay, are no longer parties to this action; (ii) is moot, given that the objections to the Wells Fargo Subpoena and Other Bank Subpoenas, as discussed in Motion No. 010, relate to the Second Amended Complaint, instead of the Third Amended Complaint, and ASH, Petersen, and SAC did not submit a supplemental submission to address this issue in accordance with the November 2019 Order; (iii) is untimely; and (iv) fails to include an affirmation of good faith.

In the November 2019 Order, Justice Driscoll specifically recognized that ASH, Petersen, and SAC joined in Motion No. 010. November 2019 Order at p. 2. In this regard, it is the Special Referee's view that Motion No. 010 is not mooted solely because Blitstein and Mainstay are no longer defendants in this action.

Further, in the November 2019 Order, Justice Driscoll specifically invited Blitstein, Mainstay, and Plaintiffs – not ASH, Petersen, and SAC – to submit a supplemental submission concerning the relevance of the requested disclosure based on the allegations in the Third Amended Complaint, instead of the allegations set forth in the Second Amended Complaint. Contrary to Plaintiffs' representation, Blitstein and Mainstay did, in fact, provide a supplemental submission insofar as they filed a letter adopting the arguments set forth in the Wells Fargo Supp. NYSCEF Doc. No. 374. Because ASH, Petersen, and SAC joined Blitstein and Mainstay in Motion No. 010, their joinder includes an adoption of the arguments advanced in the Wells Fargo Supp. Therefore, the Special Referee finds that Motion No. 010 is not moot because ASH, Petersen, and SAC did not file a supplemental submission pursuant to the November 2019 Order.

The Special Referee further determines that Motion No. 010 should not be denied as a result of being untimely because, as discussed in Point II(B) *supra*, the Court already rejected this argument in the November 2019 Order. The Special Referee, and the parties, are therefore bound by the Court's order.

However, Plaintiffs correctly point out that Motion No. 010 does not include an affirmation of good faith demonstrating that the movants complied with their obligation under 22 NYCRR § 202.7(a)(2) to attempt to resolve their dispute, in good faith, without motion practice. 22 NYCRR § 202.7(a)(2) requires that a party filing a discovery-related motion submit "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort

to resolve the issues raised in the motion" or otherwise "indicat[e] good cause why no such communications occurred." 22 NYCRR § 202.7(a)(2); *Murphy v. Cty. of Suffolk*, 115 A.D.3d 820, 820 (2d Dep't 2014).

Good cause exists where the moving party demonstrates that the requisite meet and confer would be futile. *See Scaba v. Scaba*, 99 A.D.3d 610, 611 (1st Dep't 2012) ("this Court has excused compliance with [22 NYCRR § 202.7(a)(2)] where, as here, any effort to resolve the dispute non-judicially would have been futile"); *N. Leasing Sys., Inc. v. Estate of Turner*, 82 A.D.3d 490 (1st Dep't 2011) (rejecting defendants' argument that the plaintiff's failure to file an affirmation of good faith is fatal to plaintiff's cross-motion for sanctions because "[t]he record indicates that plaintiff attempted, both under the auspices of the court and out of court, to reach an accommodation with defendants" and "'[u]nder the unique circumstances of this case,' any further attempt to resolve the dispute non-judicially would have been futile") (citations omitted).

Courts view 22 NYCRR § 202.7(a)(2) as more than a mere formality, concluding that non-compliance therewith warrants denial of the requested relief. *See, e.g. Kelly v. New York City Transit Auth.*, 162 A.D.3d 424, 424 (1st Dep't 2018) ("Defendant's motion was properly denied because it related to discovery, and defendant failed to submit an affirmation demonstrating its good faith effort to resolve the issues raised in the motion or that there was "good cause why no such conferral...was held"); *Perez v. Stonehill*, 121 A.D.3d 960, 961 (2d Dep't 2014) ("defendants' failure to submit an affirmation of the parties' good faith effort to resolve the disclosure dispute pursuant to 22 NYCRR 202.7(a)(2) in connection with their motion *required* the denial of the motion") (emphasis added).

In this case, Motion No. 010 does not include the requisite affirmation, in form or substance. In the Reply Letter in Support of Motion No. 010, Blitstein's and Mainstay's

counsel[11] specifically opposes Plaintiffs' argument that non-compliance with 22 NYCRR § 202.7(a)(2) warrants dismissal. In this Reply letter, Blitstein's and Mainstay's counsel does not argue that conferencing with Plaintiffs' counsel regarding the issues identified in Motion No. 010 would be futile; rather, he suggests that there was no "meet and confer" because Plaintiffs' counsel never responded to one email requesting a conference. NYSCEF Doc. No. 352. This email, however, sent ten days before Motion No. 010 was filed, merely states: "will you agree that any other granting, in whole or in part, Wells Fargo's motion will apply to all other subpoenas?" *Id.* In the Special Referee's view, one unanswered email does not constitute good cause as to why the parties never made a good faith effort to resolve the underlying discovery dispute without motion practice.

However, assuming arguendo that Motion No. 010 did, in fact, comply in sum and substance with 22 NYCRR § 202.7(a)(2), the Special Referee would have nonetheless denied Motion No. 010 based on mootness and on the merits. Insofar as Motion No. 010 concerns the Other Bank Subpoenas, *and not the Wells Fargo Subpoena* (addressed in Point II(B)(2) *supra*), it is moot based on Plaintiffs' uncontested claim that the disclosure sought from those other non-party banks was already produced without objection.

Insofar as Motion No. 010 seeks a protective order barring disclosure from other non-parties, in general, it is without merit. The only grounds for the requested protective order stem from arguments contesting the Wells Fargo Subpoena (discussed and decided in Point II(B) *supra*), and those grounds do not warrant a broad protective order barring all non-party discovery. The request for a protective order barring Plaintiffs from engaging in discovery beyond the scope of the remaining claims is also unwarranted. The parties in this action are all

[11] As discussed previously, ASH, Petersen, and SAC have joined in Motion No. 010.

bound by the disclosure obligations and limitations set forth in the CPLR and are only entitled to disclosure that is material and necessary to the prosecution or defense of the action. *See* Point II(A) *supra*. The Special Referee need not and shall not issue a protective order stating as much.

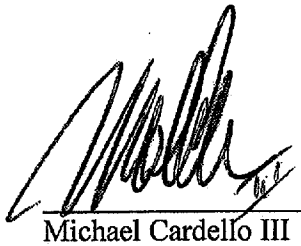
Accordingly, the Special Referee denies the relief requested in Motion No. 010.

CONCLUSION

For the foregoing reasons, the Special Referee denies Motion No. 009 and directs Wells Fargo to provide the documents and communications sought in the Wells Fargo Subpoena within twenty days of the date hereof. The Special Referee further denies Motion No. 010.

The foregoing Order by the Special Referee is not an appealable paper as set forth in CPLR § 5512. Accordingly, exceptions, if any, to this Decision may be taken to the Honorable Timothy S. Driscoll. A Notice of Exception and an opening brief in support thereof, not to exceed a total of four (4) pages, together with an appendix containing the record on which Special Referee's Order was made (e.g., discovery requests, relevant briefing, and the Order) must be filed electronically and served within ten (10) days of the date hereof. An answering brief, which must not exceed four (4) pages, must be filed and served within seven (7) days after receipt of the Notice of Exception. The time for filing exceptions and briefs may be enlarged or shortened only by the Special Referee or the Court. Any party may request oral argument, which shall be held in the discretion of the Court.

SO ORDERED this 16 day of October of 2020.



Michael Cardello III
Special Referee

2353851v2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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NAME,

Plaintiff(s),

CONFIDENTIALITY STIPULATION AND ORDER
__CV_____ ( ) (JMW)

-against-

NAME,

Defendant(s).
----------X

It is hereby stipulated and agreed among the parties, and hereby approved by the Court, that the following provisions shall govern claims of confidentiality in these proceedings:

(a) The following documents and information may be designated as "confidential," provided such documents are not public and have not previously been disclosed by the producing party to anyone except those in its employment or those retained by it [check all that apply]:

____Sensitive Commercial Data, such as confidential or proprietary research, development, manufacturing, or commercial or business information, trade secrets, special formulas, company security matters, customer lists, financial data, projected sales data, production data, matters relating to mergers and acquisitions, and pricing data.

___Sensitive Personal Data, such as personal identifiers, financial information, tax records, and employer personnel records.

___Medical and Legal Records, including medical files and reports.

___Non-public criminal history.

(b) If any party believes a document not described in the above paragraph should nevertheless be considered confidential, it may make application to the Court. Such application shall only be granted for good cause shown.

(c) An attorney for the producing party may designate documents or parts thereof as confidential by stamping the word "confidential" on each page.

If such information is provided in an answer to an interrogatory, the attorney may separately append the information to the main body of the interrogatory responses, mark such appendices "confidential," and incorporate by reference the appended material into the

responses.

At the time of a deposition or within 10 days after receipt of the deposition transcript, a party may designate as confidential specific portions of the transcript which contain confidential matters under the standards set forth in paragraph (a) above. This designation shall be in writing and served upon all counsel. No objection shall be interposed at deposition that an answer would elicit confidential information. Transcripts will be treated as confidential for this 10-day period. Any portions of a transcript designated confidential shall thereafter be treated as confidential in accordance with this Order. The confidential portion of the transcript and any exhibits referenced solely therein shall be bound in a separate volume and marked "Confidential Information" by the reporter.

(d) Documents designated "confidential" shall be shown only to the attorneys, parties, experts, actual or proposed witnesses, court personnel and other persons necessary to review the documents for the prosecution or defense of this lawsuit. Each person who is permitted to see confidential documents shall first be shown a copy of this Order and shall further be advised of the obligation to honor the confidential designation. Each person who is permitted to see confidential documents, who is not a party or an attorney for a party, shall be required to sign an agreement to be bound by this Order, attached hereto as Exhibit A. The parties agree that any confidential discovery material produced in this litigation may only be used in connection with this litigation.

(e) If a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited." Application for relief from this restriction against copying may be made to the court, with notice to counsel so designating the document.

(f) Review of the confidential documents and information by counsel, experts, or consultants for the litigants in the litigation shall not waive the confidentiality of the documents or objections to production.

(g) The inadvertent, unintentional, or *in camera* disclosure of a confidential document and information shall not generally be deemed a waiver, in whole or in part, of any party's claims of confidentiality. If at any time prior to trial, a producing party realizes that some portion(s) of the discovery material that the party produced should be designated as "confidential," the party may so designate by apprising all parties in writing, and providing that the material has not already been published or otherwise disclosed, such portion(s) shall thereafter be treated as confidential under this Order.

(h) If a party believes that a document designated or sought to be designated confidential by the producing party does not warrant such designation, the party shall first make a good-faith effort to resolve such a dispute with opposing counsel. In the event that such a dispute cannot be resolved by the parties, either party may apply to the Court for a determination as to whether the designation is appropriate. The burden rests on the party seeking

confidentiality to demonstrate that such designation is proper.

(i) If another court or an administrative agency subpoenas or orders production of stamped confidential documents that a party has obtained under the terms of this order, such party shall promptly notify the party or other person who designated the document as confidential of the tendency of such subpoena or order.

(j) Additional Parties to Litigation. In the event additional parties are joined in this action, they shall not have access to Discovery Material as "CONFIDENTIAL" until the newly joined party, by its counsel, has executed and, at the request of any party, filed with the Court, its agreement to be fully bound by this Protective Order.

(k) Subject to the Federal Rules and Evidence, stamped confidential documents and other confidential information may be offered in evidence at trial or any court hearing, provided that the proponent of the evidence gives five days' advance notice to counsel for any party or other person that designated the information as confidential. Any party may move the court for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The court will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information at the trial.

(l) The parties shall comply with the Eastern District of New York's Steps for E-Filing Sealed Documents in Civil cases, located at https://www.nyed.uscourts.gov/sites/default/files/forms/EfilingSealedCV.pdf, if they wish to move to file a document under seal.

(m) Within a reasonable period after the conclusion of the litigation, all confidential material shall be returned to the respective producing parties or destroyed by the recipients.

(n) In any application to the Court referred to or permitted by this Order, the Court may exercise discretion in determining whether the prevailing party in such a dispute may recover the costs incurred by it and, if so, the amount to be awarded.

(o) This Court shall retain jurisdiction over all persons subject to this Order to the extent necessary to enforce any obligations arising hereunder.

Dated:

Counsel for _____

Dated:

Counsel for _____

SO ORDERED:

Dated: Central Islip, New York
_____, 20___

_____
James M. Wicks
United States Magistrate Judge

EXHIBIT A

I have been informed by counsel that certain documents or information to be disclosed to me in connection with the matter entitled:_____have been designated as confidential. I have been informed that any such documents or information labeled "confidential" are confidential by Order of the Court.

I hereby agree that I will not disclose any information contained in such documents to any other person. I further agree not to use any such information for any purpose other than this litigation.

_____ DATED: _____

[Signature]

Signed in the presence of:

_____

(Attorney)

INDIVIDUAL PRACTICE RULES OF MAGISTRATE JUDGE JAMES M. WICKS

United States District Court
Eastern District of New York
100 Federal Plaza, Courtroom 1020
Central Islip, New York 11722
Chambers: (631) 712-5620
Fax: (631) 712-5627
Courtroom Deputy: Grisel Ortiz:
Tel.: (631) 712-5625
Law Clerks: Scott Sanders / Tracy Weinstein
Wicks_Chambers@nyed.uscourts.gov

Effective April 26, 2021, reflecting changes as of October 12, 2021

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Unless otherwise ordered, all matters before Judge Wicks shall be conducted in accordance with the following practice rules:

1. Communications with Chambers

A. Telephone Calls

Telephone calls to Chambers are permitted so long as counsel for all parties are on the line, subject to the rules set forth below in Rule 1.D. All questions regarding docketing, scheduling or criminal matters should be directed to the Courtroom Deputy, Grisel Ortiz. Other questions should be directed to the Law Clerks at the main Chambers number above. Parties appearing *pro se* should not call Chambers, but rather should call the *pro se* office ((631) 712-6060) with any inquiries.

B. Letters

All letters sent to the Court are to be filed via ECF (*see* Rule 2 below) unless otherwise directed by the Court. There shall be no *ex parte* submissions to the Court, with the exception of the confidential settlement materials outlined in Rule 5.B, *infra.*

C. Faxes

Faxes to Chambers are not permitted without prior authorization.

D. Requests for Adjournments or Extensions of Time

All requests for adjournments or extensions, absent an emergency, shall be made **in writing at least two (2) business days prior to the scheduled appearance**. Further, all requests for adjournments or extensions of time must state: (1) the original date, (2) the number of previous requests for adjournment or extension, (3) whether those previous requests were granted or denied, (4) **the reason(s) why an adjournment or extension is necessary**, and (5) whether all parties consent (including reasons why any party is withholding consent). Both requests for adjournments and for extensions of time **must** be filed through ECF as "MOTIONS." If the requested adjournment or extension affects any other scheduled date, a proposed revised date(s)/briefing schedule must be provided.

2. Electronic Case Filing ("ECF")

A. Regardless of the District Judge assigned, **all documents** directed to Magistrate Judge Wicks in civil actions MUST be filed electronically, with a limited exception as stated in Rule C below. ECF procedures are available on the Court's website

[http://www.nyed.uscourts.gov]. Questions regarding ECF filing or training should be directed to Lisa Florio in Central Islip at (631) 712-6011, or Evelyn Levine in Brooklyn at (718) 260-2312.

B. Hard copies or courtesy copies *generally* do not need to be sent to Chambers, with the following exceptions: (1) where a letter motion with exhibits or attachments exceeds 20 pages, or (2) motions referred from District Court Judges or motions on notice made to Magistrate Judge Wicks. All such papers must be clearly marked "Courtesy Copy" and indicate that the original was filed by ECF.

C. The following documents are exempt from electronic filing and should only be filed in hard copy:

1. Documents filed subject to a court-ordered confidentiality agreement.

2. *Ex parte* settlement or mediation statements submitted in accordace with Rule 5.B, *infra*.

3. Litigants proceeding *pro se* are exempt from ECF requirements. Parties represented by counsel, however, must file documents electronically, even in *pro se* cases. Counsel must also provide copies of any electronically filed documents to *pro se* litigants. *Pro se* litigants are directed to make any filings via hand delivery or U.S. mail to the designated "*Pro Se* clerk" in the Clerk's office, to the attention of Magistrate Judge Wicks and the appropriate District Judge, *and* by delivering a copy to the attorney for the opposing party. Court orders will be provided to *pro se* litigants by U.S. mail at the current address listed on the docket sheet. *Pro se* litigants must keep current contact information on file with the Court, or risk dismissal of claims or other sanctions. All *pro se* litigants and represented parties opposing *pro se* litigants are directed to the relevant Local Civil Rules, including 12.1, 33.2, and 56.2

3. Motions

A. Discovery or Other Non-Dispositive Motions

Discovery or other **non-dispositive motions** may be made by letter motion, pursuant to Local Civil Rules 37.1 and 37.3, and filed electronically as a "MOTION." No pre-motion conference is required. Unless the Court orders otherwise, the length of the papers shall be as follows: Letter motions shall not exceed three pages in length, exclusive of attachments. A response not exceeding three pages in length, exclusive of attachments, must be served and filed within four (4) days of receipt of the letter motion. **Replies are not permitted on letter motions**. Parties must make a good faith effort, pursuant to Local Civil Rule 26.4 and 37.3(a), to resolve disputes **before** making

a motion. There will be no oral argument on letter motions unless the Court orders otherwise. Any motion seeking (i) a **stay of discovery** or (ii) the **sealing** of court documents shall be made in accordance with Rule 3.C, *infra,* and not by letter motion under this rule.

B. Dispositive Motions

Dispositive motions must be made to the presiding District Judge in conformance that Judge's Individual Rules, unless the parties have consented to Magistrate Judge Wicks for all purposes in accordance with 28 U.S.C.§ 636 (c)(1). For any dispositive motion that is to be made before Judge Wicks -- either for a Report and Recommendation or for all purposes in a consent case -- service of the pre-motion letter motion within the time requirements of Fed. R. Civ. P. Rules 12 or 56 shall constitute timely service of a motion made pursuant to those provisions.

C. General Motion Practices for Motions Made on Notice (Not Letter Motions)

1. Service and filing:

A. No motion papers shall be filed until the motion has been fully briefed. That is, the parties shall serve each other with moving papers, opposition papers and reply, if any. Once motion is fully briefed (all papers served), then each party must file its own papers on ECF on the date the last paper was served. This Rule is subject to Rule 3.E, *infra.*

B. The parties are to set their own briefing schedule which is then to be submitted to the Court for approval. No revisions to the schedule will be made without the Court's approval. Such applications for further revisions shall be made pursuant to Rule 1.D, *supra.*

C. Each party shall be responsible for filing its own motion papers via ECF on the date the reply brief is scheduled to be filed or any return date stated in the approved briefing schedule. Parties are to confer to ensure that all papers are being filed on the same day.

2. Memoranda of Law

Unless prior permission has been granted, memoranda of law in support of and in opposition to motions on notice are limited to 25 pages, and reply memoranda are limited to 10 pages. All memoranda shall contain both a table of contents and a table of authorities. The page limitations are exclusive of tables of contents and authorities. Case citations must

contain pinpoint cites. All memoranda of law must use one-inch margins, double spacing, and 12-point font. Legal arguments must be set forth in a memorandum of law; affidavits or declarations containing legal argument will be rejected. *See* EDNY Local Civil Rule 7.1. **Any memoranda, affidavits, or declarations not complying with the requirements set forth herein will be rejected.**

3. Courtesy Copies

After electronic filing, one hard copy of the motion papers, marked as "Courtesy Copy," should be submitted to Magistrate Judge Wicks, unless the Court orders otherwise. Courtesy copies of dispositive motions made to the District Judge should **not** be provided to the Magistrate Judge.

4. Oral Argument on Motions

Where the parties are represented by counsel, oral argument may be held on motions made on notice (as opposed to Letter Motions, *see* Rule 3.A), if either party requests oral argument or the Court orders oral argument. Within one week of filing fully briefed motions, the parties are to confer with each other and contact the Court to set a mutually acceptable date for oral argument.

D. Submission of Dispositive Motions in Cases Where the Parties Have Consented to Have Magistrate Judge Wicks for All Purposes

1. No pre-motion conference is required. However, prior to filing such a motion, the movant is required to submit a letter of no more than two pages in length (a) briefly stating the relief sought by the motion, **and** (2) setting forth a briefing schedule that has been agreed upon by the parties. The briefing schedule is subject to approval by the Court and no papers may be filed until such approval is given. No opposing letter shall be filed, unless relief is being sought by that party through a cross-motion, in which case the letter must be filed within two (2) business days of the movant's letter.

2. All motions for summary judgment must comply with Rule 56 of the Federal Rules of Civil Procedure as well as Local Civil Rule 56.1 ("Rule 56.1"). If the non-movant is proceeding *pro se*, the movant must also comply with Local Civil Rule 56.2.

E. Motions Implicating Fed. R. App. P. 4(a)(4)(A) or Similar Time-Limiting Rules

If any party concludes in good faith that delaying the filing of a motion, in order to

comply with any aspect of these individual practices (*see* Rule 3.C1.A, *supra*) will deprive the party of a substantive right, the party may file the motion within the time required by the Federal Rules of Civil and/or Appellate Procedure, together with an explanation of the basis for the conclusion.

F. Motions for Admission "Pro Hac Vice"

A motion for admission *pro hac vice*, together with a proposed order admitting the attorney *pro hac vice*, shall be served and filed electronically at least seven (7) days prior to the return date designated in the notice of motion. Although there is no need to file a memorandum of law, **this motion must comply with Local Civil Rule 1.3.** These motions will be on submission. If any party objects to the motion, opposition papers must be served and filed at least two (2) days prior to the return date. No reply papers are permitted. Failure to comply with this or Local Civil Rule 1.3 will result in denial of the motion.

4. Depositions

A. If contested issues arise during the course of a deposition, the parties must first make a good faith attempt to resolve the dispute among themselves. If a resolution cannot be achieved thus necessitating court intervention, then pursuant to Local Rule 37.3(b), the parties are directed to contact the Court immediately by telephone. If the deposition is being conducted virtually, the Court *may* request the parties to forward a link to join. The Court will either resolve the issue during the deposition or reserve and possibly require letter briefs. In the event the Court is unable to join the call, then the parties shall have the court reporter mark the transcript where the dispute arose, and the parties shall move on to further topics. Under no circumstances may the parties discontinue the deposition without first attempting to contact the Court.

B. If depositions are to be taken virtually or remotely pursuant to Fed. R. Civ. P. 30(b)(4), the counsel are directed to the Court's template for a Stipulation and [Proposed] Order for the Protocol on the Conduct of Remote Depositions for guidance. Conducting in-person depositions is not always feasible. This template is an example of a stipulated order the parties can use in connection with arranging for and conducting remote depositions. The form can also be adapted for use in connection with depositions conducted by telephone. The parties are of course free to agree on whatever terms they see fit, consistent with the Federal Rules of Civil Procedure and the Local Rules of this Court. Accordingly, the template may be modified to suit the needs of the parties and the case.

5. Settlement Conferences

A. ***Requests for Settlement Conference.*** Magistrate Judge Wicks is available to conduct settlement conferences at any stage of the case. If the parties desire a

settlement conference, then a joint letter should be filed requesting a conference. The letter should contain three dates when all counsel AND party representatives are available, and the Court will advise of the scheduled date. All settlement conferences will be held in person or remotely depending on the circumstances.

B. ***Confidential Submissions.*** At least seven (7) days prior to the scheduled settlement conference, the parties shall submit confidential *ex parte* settlement statements no longer than ten (10) pages addressing the following five areas:

1. Brief recitation of the facts, referencing ECF docket entries where appropriate.

2. Legal position, with hyperlinks to any authority cited. No need for string cites.

3. History of settlement efforts, if any.

4. Any perceived impediments to settling (*e.g.,* monetary/non-monetary/emotional, etc.)

5. Realistic settlement position.

To the extent key documents are relied upon that have not already been filed on ECF, then the documents should be provided to the Court with the settlement statement. All settlement statements and supporting documents shall be emailed to the Court at Wicks_Chambers@nyed.uscourts.gov, and **NOT shared** with the adversary and **NOT filed on ECF.**

6. Pretrial Procedures in Cases Assigned to Magistrate Judge Wicks for All Purposes

A. ***Joint Pretrial Orders***. The parties shall submit a joint pretrial order 5 business days prior to the pre-trial conference, unless otherwise specified in the scheduling order, which includes the following:

1. the full caption of the action;

2. the names (including firm names), addresses telephone (office and cell) and email addresses of trial counsel;

3. a brief statement by plaintiff as to the basis of subject matter jurisdiction, and a brief statement by each other party as to the presence or absence of subject matter jurisdiction. Such statements shall include citations to all statutes relied on and relevant facts as to citizenship and jurisdictional amount;

4. a brief summary by each party of the claims and defenses that party has asserted which remain to be tried, without recital of evidentiary matter, but including citations to all statutes on which the party is relying. The parties shall also list all claims and defenses previously asserted that are not to be tried;

5. a statement by each party as to whether the case is to be tried with or without a jury, and the number of trial days needed;

6. a description of whether the parties intend to utilize electronic presentation of evidence or exhibits;

7. any stipulations or statement of facts that have been agreed to by all parties;

8. a witness list identifying all percipient or fact witnesses and expert witnesses whose testimony is to be offered in its case in chief, with an indication of whether such witnesses will testify in person or by deposition. Only listed witnesses will be permitted to testify except for good cause shown;

9. a designation by each party of deposition testimony to be offered in its case in chief, with any cross-designations and objections by any other party; and,

10. a list of exhibits to be offered in evidence and, if not admitted by stipulation, the party or parties who will be offering them. The parties must list and briefly describe the basis for any objections that they have to the admissibility of any exhibits to be offered by any other party. Parties are expected to attempt to resolve before trial all evidentiary issues. Only the exhibits listed will be received in evidence except for good cause shown. All exhibits must be pre-marked for the trial and exchanged with the other parties at least ten days before trial. Where exhibits are voluminous, they should be placed in binders with tabs.

B. ***Filings Prior to Trial.*** Unless otherwise ordered by the Court, each party shall electronically file the following items prior to the commencement date of trial as set forth below:

1. For *Jury Trials:* The following shall be filed with the Court ten (10) days prior to trial: proposed *voir dire* questions; proposed jury charges; final witness lists; exhibit lists, including demonstratives; and any stipulations of fact;

2. For *Non-Jury Bench Trials:* The following shall be filed with the Court ten

(10) days prior to trial: pre-trial memoranda of law (including the legal authority relied upon in support of the claims and defenses to be tried); final witness lists; exhibit lists, including demonstratives; marked pleadings; and any stipulations of fact;

3. Motions *in Limine*: all motions addressing any evidentiary or other issue which should be resolved *in limine* are to be filed twenty (20) days prior to trial, with a courtesy copy to Chambers. Opposition, if any, shall be filed ten (10) days prior to trial, with a courtesy copy to Chambers. Replies, if any, should be made in the same manner five (5) days prior to trial. The form of papers in support of and opposing *in limine* motions shall be made by letter motion in accordance with Rule 3A above.

7. Conferences

A. Initial Conferences:

Parties shall comply with Fed. R. Civ. P. 26(f) and submit their proposed discovery plan to the Court, along with the Discovery Plan Worksheet no later than 7 days prior to the scheduled Initial Conference date.

B. Final Pre-Trial Conferences:

In cases that are *not* assigned to Judge Wicks for all purposes, the final pre-trial conference will be held in person in courtroom 1020. If the assigned District Judge requires one, a proposed joint pretrial order in compliance with that Judge's requirements and signed by counsel for each party must be filed by ECF five (5) days prior to the conference. In consent cases assigned to Judge Wicks for all purposes, the parties shall comply with Rule 6, *supra.*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
,

Plaintiff(s),

STIPULATION AND ORDER REGARDINGTHE FORMAT OF ELECTRONICALLY STORED INFORMATION AND DOCUMENT PRODUCTION

v. Civil Action No.:

,

Defendant(s).
----------X

WICKS, Magistrate Judge:

This Stipulation and Order shall govern the format and procedure for the production of electronically stored information ("ESI") and related document production in this action.

I. DEFINITIONS

[The Parties should agree to and describe in detail definitions and/or parameters for at least each of the following terms: Timeframe; Custodians; Devices and Sources of ESI to be Searched; and Search Terms. This of course is not an exhaustive list, and the parties should consider additional terms to be defined depending upon the facts and circumstances of each case.]

II. GENERAL PROVISIONS

To the extent not unduly burdensome, the parties shall produce documents and electronically stored information ("ESI") in this Action in accordance with the agreed-upon specifications set forth below.

III. PRODUCTION OF ESI

A. **Native and Color Productions.** Except as specified in this section, the Parties shall produce all documents and ESI as single-page, black-and-white Group IV Tagged Image File Format ("TIFF") image files, as described in Section III.B below.

1. Upon written request, and for good cause shown, the parties shall produce color images for a reasonable number of selected documents and ESI. Documents and ESI produced in color shall be produced as JPEG images with Exif compression, 300 dpi or higher, and 24-bit color depth. Each color image file shall be named with the unique production number for the first page of the document or ESI in question followed by the file extension "JPG."
2. For documents and ESI whose native format is MS Excel, MS PowerPoint, MS Access, QuickBooks, other database formats, multi-media files (audio or video), and any other file type that cannot be converted to TIFF, the original native files shall be produced in addition to a single-page TIFF placeholder. The provisions of this Section III.A.2 notwithstanding, the Parties shall not be required to produce in the first instance an original native file of such documents and ESI if a claim of attorney-client privilege, attorney work product protection and/or any other privilege, protection or immunity from disclosure necessitates the application of redactions to such documents and ESI. Upon written request, and for good cause shown, the parties shall produce in native format, with any applicable redactions applied natively, documents and ESI documents that necessitate the application of redactions to such documents and ESI.
3. "Native" files refer to electronic files in the same format in which they were originally collected from custodians or other sources. Native file productions shall include extracted text, metadata, and a single page TIFF image indicating that the associated file was produced in native form. Each produced native file

shall be named with a unique production number (e.g., [Party Abbreviation]_SMT0000000 I.XLS) that is assigned to that specific record in the production. Native Files should be provided in a self-identified Natives directory. A "NativeLink" entry for each Native File should be included in the .DAT load file indicating the relative file path to each Native File on the production media. Any metadata fields for redacted documents that would reveal privileged information may be excluded.

4. To the extent any such native files are used in any pretrial motion or proceeding, those files will be referred to by the production number assigned during processing.

B. **TIFF Productions**

1. **Image Production Standard.** Except as provided herein, the parties shall produce all non-database ESI and hard copy documents in TIFF format. All TIFF formatted documents will be single page, black and white, Group 4 TIFFs at 300 x 300 dpi resolution and 8 1/2 X 11 inch page size. If a party requests that a document be imaged at a higher resolution or different page size in order to adequately understand the contents of a specific document(s), the producing party shall make reasonable efforts to reproduce the document(s) in the different format.

   Each page should be branded with a production number and confidentiality designation, if any, on the face of the image. Original document orientation should be maintained (i.e., portrait to portrait and landscape to landscape).

   All TIFF images shall be produced in a folder named "IMAGES," which shall contain sub-folders named "0001," "0002," etc. Each sub-folder shall

contain no more than 3,000 images. Images from a single document shall not span multiple sub-folders.

2. **Load Files.** The parties' document productions shall include Concordance-compatible Load Files, including a Concordance DAT file and an Opticon delimited file, that indicate document breaks of the TIFF images and additional fields as identified in this Section B below. All Load and Cross-reference files shall be produced in a folder named "DATA."
3. **File Name.** Each document image file shall be named with the unique production number of the first page of the document in question followed by the file extension "TIF."
4. **Document Unitization.** If a document is more than one page, the unitization of the document and any attachments and/or notes shall be maintained as they existed in the original document.
5. **System Files.** Common system and program files as defined by the NIST library (which is commonly used by e-discovery vendors to exclude system and program files from document review and production) need not be processed, reviewed, or produced.
6. **Parent-Child Relationships.** Parent-child relationships (the association between an attachment and its parent document) should be preserved and appropriately reflected in the metadata. Production numbering of a parent document and any attachments shall be sequential such that a parent document has the lowest value production number when compared to its attachment(s).
7. **Metadata Fields and Processing.** Each of the metadata and coding fields that

can be extracted from an electronic document shall be produced for that document. The parties are not obligated to populate manually any of the fields that cannot be extracted from a document, with the exception of the following: (1) BegDoc, (2) EndDoc, (3) BegAttach, (4) EndAttach, (5) Custodians, (6) NativeLink, (7) Confidentiality fields, (8) TextLink, and (9) Record Type (which may be populated by the party or the party's vendor). The parties shall include the metadata fields in a searchable fielded data file, regardless of the production format (unless otherwise specified, time- and date-related metadata will reflect Greenwich Mean Time). A party shall produce additional metadata, if any, for a reasonable number of specific documents upon the other party's request.

8. **Redactions.** If any party makes any redactions on the ground of the attorney-client privilege, the attorney work product doctrine, or any other claim of privilege, protection or immunity from disclosure, these redactions will be listed on a Privilege Log. In the event a document is redacted, the redaction will be marked by either a box that covers the protected text and/or the term "Redacted." The extracted text described above will not be delivered for that document; rather, in place of extracted text, OCR output will be delivered based on the redacted images, to the extent reasonably feasible. Redacted documents may be produced in TIFF format.

C. **Searchable Text.** In addition to TIFF images and/or Native files, each production will include text files corresponding to the TIFF image or Native files described above.

1. **Hard Copy Documents.** Hard copy documents shall be scanned using Optical

Character Recognition ("OCR") technology and searchable ASCII text (or Unicode text if the text is in a language requiring characters outside of the ASCII character set) files shall be produced. Each file shall be named with the unique production number of the first page of the corresponding TIFF document followed by the extension "TXT."

2. **Extracted Text or OCR Text for TIFF Images and Native Files.** To the extent practicable, each individual document based on an electronic file shall be accompanied by one corresponding text file with text that is extracted from the electronic file. The Extracted Text shall be provided in searchable ASCII text format (or Unicode text format if the text is in a language requiring characters outside of the ASCII character set) and shall be named with the unique production number of the first page of the corresponding TIFF document followed by the extension "TXT." When there is no extractable text or when an Electronic Document has been redacted, OCR text will be provided. For the avoidance of doubt, redacted text need not be provided. The production of relevant ESI in searchable, full text format is limited to those forms of ESI that have text (in other words, any non-text formats [e.g., .wav and .jpeg] would not produce any corresponding text files).

3. **All Extracted Text and OCR files shall be produced in a folder named "TEXT."** The Concordance load file will contain a link to the extracted text or OCR text file if applicable. The text should not be included in the Concordance.DAT load file.

D. **Confidentiality Designations.** If a party reduces Native Files or other ESI designated

"Confidential" or "Highly Confidential" to hardcopy form, it shall mark the hardcopy with the appropriate designation. The failure of a party to mark such hardcopy documents with the appropriate designation shall not affect such document's designation as "Confidential" or "Highly Confidential."

E. **De-Duplication of Productions.** To the extent that exact duplicate documents (based on email threading, MD5 hash values) reside within a party's ESI data set, the party may produce only a single copy of a responsive document. Exact duplicate shall mean documents containing identical content. For exact duplicate documents, the metadata described in Section III.B herein shall be produced for the produced copy. De-duplication shall be done at the document family level, such that where any exact duplicate documents have attachments, hash values must be identical for both the document-plus-attachment (including associated metadata) as well as for any attachment (including associated metadata) standing alone. Identical ESI may be de-duplicated vertically *(i.e.,* by custodian) and horizontally (*i.e.,* globally across custodians).

IV. PROSCESSING OF THIRD-PARTY DOCUMENTS

A. A party that issues a non-party subpoena after the date this Stipulation is entered by the Court ("Issuing Party") shall include a copy of this Stipulation with the subpoena and request that the non-party produce documents in accordance with the specifications set forth herein. If a party issued a non-party subpoena prior to the execution of this Stipulation, that party shall promptly forward a copy of this Stipulation to the non-party and request that the non-party produce documents in accordance with the specifications set forth herein.

B. The Issuing Party is responsible for producing to all other parties to the Action any documents obtained pursuant to a subpoena. If a non-party fails to produce documents in accordance with the specifications set forth herein, the Issuing Party shall undertake reasonable efforts to conform the non-party's production to the specifications described herein, and shall assign a unique identification number to each document. Nothing in this Stipulation is intended to or should be interpreted as narrowing, expanding, or otherwise affecting the rights of the parties or third-parties to object to a subpoena.

V. MISCELLANEOUS PROVISIONS

A. This Stipulation is intended solely to address the format of document productions. Nothing in this Stipulation is intended to affect the rights of any party to object to any requests or demand for production. Nothing in this Stipulation shall constitute, or operate as, a waiver of any rights of any party to object to, or to avoid, discovery or disclosure, in whole or in part, under the laws of the United States, the Federal Rules of Civil Procedure, the Local Rules of the United States District Court for the Eastern District of New York, this Court's Individual Rules and Practices, or any other applicable law, rule, or order.

B. Nothing in this Stipulation establishes any agreement as to either the temporal or subject matter scope of discovery in the Action or as to the relevance or admissibility of any document. Nothing in this Stipulation shall be interpreted to require disclosure of irrelevant information or relevant information protected by the attorney-client privilege, work product doctrine, or any other applicable privilege, protection or immunity from disclosure. The parties do not waive any objections as to the production, discoverability, admissibility, or confidentiality of hard-copy documents

or ESI.

C. The Parties shall make good faith efforts to comply with and resolve any differences concerning compliance with this Stipulation. If a producing party, notwithstanding their good faith efforts, cannot comply with any material aspect of this Stipulation or if compliance with such material aspect would be unreasonable, such party shall inform the receiving party in writing as to why compliance with the Stipulation is impossible or unreasonable as soon as reasonably practicable. No Party may seek relief from the Court concerning compliance with the Stipulation unless it has first conferred with the other Party.

D. Nothing in this Stipulation shall affect, in any way, a producing party's right to seek reimbursement for costs associated with collection, review, and/or production of documents or ESL That the Court has so-ordered this Stipulation shall not be construed to indicate that the Court has made any finding regarding whether there is any basis for shifting of costs.

E. Nothing herein is intended to, nor shall be construed to, diminish or otherwise affect any Party's discovery obligations.

F. Any application to the Court regarding this Stipulation shall be made pursuant to the Federal Rules of Civil Procedure, the Local Rules of the United States District Court for the Eastern District of New York, and this Court's Individual Rules and Practices.

G. The Court will not retain jurisdiction after conclusion of the Action for enforcement of this Stipulation.

[Party Signature Blocks]

Dated: _____

S O O R D E R E D:

JAMES M. WICKS
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

Case No. _____(___) (JMW)

Plaintiff(s),

v.

STIPULATION AND [PROPOSED]ORDER FOR PROTOCOL ON THE CONDUCT OF REMOTE DEPOSITIONS

Defendant(s).

----------x

Plaintiff(s)_____and Defendant(s)_____ (together, the "Parties") jointly stipulate and request the Court order the following protocol for conducting depositions via remote means in this action, in light of the COVID-19 pandemic and consistent with Fed. R. Civ. P. 30(b)(4):

1. All depositions shall be conducted remotely using videoconference technology, and each deponent shall be video-recorded.

2. The Parties agree to use **[insert vendor name]** for court reporting, videoconferencing, and remote deposition services. The Parties agree that a [**insert vendor name]** employee may attend each remote deposition to video record the deposition, troubleshoot any technological issues that may arise, and administer the virtual breakout rooms.

3. The Parties agree that these video-recorded remote depositions may be used at a trial or hearing to the same extent that an in-person deposition may be used at a trial or hearing, and the Parties agree to not object to the use of these video recordings on the basis that the deposition was taken remotely. The Parties reserve all other objections to the use of any deposition testimony at trial.

4. The deponent, court reporter, interpreter if one is necessary, and counsel

for the Parties will each participate in the videoconference deposition remotely and separately. Each person attending the deposition shall be visible to all other participants, their statements shall be audible to all other participants, and they should each strive to ensure that their environment is free from noise and distractions.

5. Consistent with Local Rule 30.4, no counsel shall initiate a private conference, including through text message, electronic mail, or the chat feature in the videoconferencing system, with any deponent while a question is pending, except for the purpose of determining whether a privilege should be asserted.

6. During breaks in the deposition, the Parties may use the breakout room feature, which simulates a live breakout room through videoconference. Conversations in the breakout rooms shall not be recorded.

7. Remote depositions shall be recorded by stenographic means consistent with the requirements of Rule 30(b)(3), except that the court reporter will not be physically present with the witness whose deposition is being taken. The Parties agree not to challenge the validity of any oath administered by the court reporter, even if the court reporter is not a notary public in the state where the deponent resides.

8. The court reporter will stenographically record the testimony, and the court reporter's transcript shall constitute the official record. **[Insert vendor name]** will simultaneously videotape the deposition and preserve the video recording.

9. The court reporter may be provided a copy of the video recording of any videotaped deposition for the purposes of reviewing the video recording to improve the accuracy of any written transcript.

10. The Parties agree that the court reporter is an "Officer" as defined by Federal Rule of Civil Procedure 28(a)(2) and shall be permitted to administer the oath to the witness via the videoconference. The deponent will be required to provide government-issued

identification satisfactory to the court reporter, and this identification must be legible on the video record.

11. The Party that noticed the deposition shall be responsible for procuring a written transcript of the remote deposition.

12. The Party that noticed the deposition shall provide the court reporter with a copy of this Stipulation and [Proposed] Order at least twenty-four hours in advance of the deposition.

13. At the beginning of each deposition, consistent with Rule 30(b)(5)(A) of the Federal Rules of Civil Procedure, the person responsible for video-recording the deposition shall begin the deposition with an on-the-record statement that includes: (i) the officer's name and company affiliation; (ii) the date, time, and place of the deposition; (iii) the deponent's name; (iv) the officer's administration of the oath or affirmation; and (v) the identity of all persons present.

14. At the beginning of each segment of the deposition, consistent with Rule 30(b)(5)(B) of the Federal Rules of Civil Procedure, the person responsible for video-recording the deposition shall begin the segment of the remote deposition by reciting: (1) the officer's name and business address; (ii) the date, time and place of the deposition; and (iii) the deponent's name.

15. The Parties agree to work collaboratively and in good faith with the court reporting agency to assess each deponent's technological abilities and to troubleshoot any issues at least 48 hours in advance of the deposition so any necessary adjustments can be made. The Parties also agree to work collaboratively to address and troubleshoot technological (including audio or video) issues that arise during the deposition and make such provisions as are reasonable under the circumstances to address such issues. This provision shall not be interpreted to compel any Party to proceed with a deposition where the deponent cannot hear or understand the other participants or where the participants cannot hear or understand the deponent.

16. Every deponent shall endeavor to have technology sufficient to appear for a videotaped deposition (*e.g.*, a webcam and computer or telephone audio), and bandwidth sufficient to sustain the remote deposition. Counsel for each deponent shall consult with the deponent prior to the deposition to ensure the deponent has the required technology. If not, counsel for the deponent shall endeavor to supply the required technology prior to the deposition. In the case of third-party witnesses, counsel noticing the deposition shall supply any necessary technology that the deponent does not have.

17. The Parties agree that this Stipulation applies to remote depositions of non-parties under Rule 45 and shall work in a collaborative manner in attempting to schedule remote depositions of non-parties. The Party noticing any third-party deposition shall provide this Stipulation to counsel for any non-party under Rule 45 at a reasonable time before the date of the deposition.

18. The Parties agree that any of the following methods for administering exhibits, or any combination of such methods, may be employed during a remote deposition:

(i) Counsel noticing the deposition may choose to send physical copies of documents that may be used during the deposition to the deponent, the deponent's counsel, the other Party's counsel, and the court reporter. In that event, noticing counsel shall so inform the deponent's counsel, the other Party's counsel, and the court reporter prior to mailing the documents and shall provide tracking information for the package. Such documents shall be delivered by 12:00 pm ET the business day before the deposition. Counsel for the deponent, the other Party's counsel, and the court reporter shall confirm receipt of the package by electronic mail to Counsel noticing the deposition. If physical copies are mailed, every recipient of a mailed package shall keep the package sealed until the deposition begins and shall only unseal the package

on the record, on video, and during the deposition when directed to do so by the counsel taking the deposition. This same procedure shall apply to any physical copies of documents any other counsel intends to use for examining the witness.

(ii) Counsel noticing the deposition may choose to send a compressed .zip file of the documents to be used during the deposition via electronic mail to the deponent, the deponent's counsel, the other Party's counsel, and the court reporter. The .zip file shall be delivered by 12:00 pm ET the business day before the deposition. Counsel for the deponent, the other Party's counsel, and the court reporter shall confirm receipt of the .zip file by electronic mail to Counsel noticing the deposition. The .zip file shall be password protected, and counsel taking the deposition shall supply the password via electronic email immediately prior to the commencement of the deposition. Every recipient of a .zip file shall not open the .zip file until the deposition begins and when directed to do so by the counsel taking the deposition. If sending documents by electronic mail, counsel will be mindful of file size limitations, which presumptively should be less than 50 MB.

(iii) Counsel may introduce exhibits electronically during the deposition, by using the Lexitas LegalView document-sharing technology, by using the screen-sharing technology within the videoconferencing platform, or by sending the exhibit to the deponent and all individuals on the record via electronic mail.

19. All deponents receiving documents before or during a deposition, pursuant to Paragraph 18(i) above, shall return the documents to the counsel who sent them originally, within two business days following the completion of the deposition, and shall not retain them in any manner. Counsel noticing the deposition shall include a pre-paid return shipping

label in any package of documents mailed to a deponent.

20. Counsel for the Parties may keep any document or exhibit used during the deposition, and shall return any documents not used during the deposition to the counsel who sent them originally, within two business days following the completion of the deposition, and shall not retain them in any manner.

21. Counsel noticing the deposition shall provide any counsel for third-party witnesses with a copy of the Parties' Stipulated Protective Order to the extent the parties entered into such an Order. Counsel for third-party witnesses may keep any document used during the deposition in accordance with the Stipulated Protective Order, and shall return any documents not used during the deposition to the Counsel who sent them originally, within two business days following the completion of the deposition, and shall not retain them in any manner.

Dated: _____

Counsel for Plaintiff(s):

_____

Counsel for Defendant(s):

_____

SO ORDERED:

_____
Hon. James M. Wicks
United States Magistrate Judge

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, et al.	:	Index No. 653090/2013
Plaintiffs,	:	~~PROPOSED~~ **AMENDED STIPULATION AND ORDER APPOINTING MICHAEL CARDELLO III AS SPECIAL REFEREE PURSUANT TO CPLR § 3104(B)**
-against-	:	
AT&T CORP.; AT&T INC.; ALCATEL-LUCENT USA, INC., et al.,	:	
Defendants.	:	

WHEREAS, by Stipulation and Order So Ordered by the Honorable Eileen Bransten on April 3, 2017 (the "Original Order"), Michael Cardello III ("Special Referee Cardello") was appointed as Special Referee with respect to the resolution of disputes over the assertion of privilege and disputes related to documents designated as Highly Confidential in *Certain Underwriters of Lloyd's London, et al. v. AT&T Corp., et al.* (the "Action"); and

WHEREAS, each of the parties in the Action agree to broaden the scope of the Original Order to permit Special Referee Cardello to assist the Court and the parties in conducting and completing discovery in an orderly and efficient manner, and the Original Order is hereby superseded.

NOW, THEREFORE, it is hereby STIPULATED and ORDERED that, pursuant to CPLR §§ 3104 and 4301, the scope of Special Referee Cardello's appointment as Special Referee is expanded as set forth below:

1. Special Referee Cardello is appointed as Special Referee to supervise discovery matters that may arise in this action.

2. Special Referee Cardello shall have the duty and the power to supervise discovery

disputes of the parties and non-parties as follows:

a) Special Referee Cardello shall have the duty and the power: (i) to resolve discovery disputes; (ii) to resolve disputes during depositions; (iii) to resolve discovery motions filed by the parties or non-parties; and (iv) to rule on all issues relating to privilege logs of all parties which cannot be resolved by the parties.

b) Special Referee Cardello shall have the power to take all measures which are necessary and proper for the performance of these duties.

3. Special Referee Cardello shall hear, resolve and make determinations regarding all disputes regarding discovery (Section 2(a) above) and when appropriate, issue decisions setting forth his rulings. In addition, the Court may refer non-dispositive discovery motions to Special Referee Cardello pursuant to this Stipulation and Order.

4. Special Referee Cardello shall have the duty and authority to: (i) require the submission of briefs regarding discovery and expert motions; (ii) hold disclosure conferences; (iii) conduct hearings, including evidentiary hearings; (iv) hold oral arguments on motions; and (v) issue decisions relating to discovery matters; and (vi) and issue decisions relating to other discovery matters designated for his decision by the Court.

5. Special Referee Cardello and the parties shall follow the procedures set forth in Appendix A for disclosure conferences and the handling of discovery disputes (the "Special Referee Procedures").

6. Special Referee Cardello may hold disclosure conferences in-person in the County of New York or by telephone conference at his sole discretion.

7. All hearings and oral arguments on motions before Special Referee Cardello shall be held at a location in the County of New York. Oral argument on any motion shall be heard by

Special Referee Cardello either in person or by telephone conference at Special Referee Cardello's sole discretion. The moving party shall arrange for a court reporter at all hearings and oral argument on motions and shall provide Special Referee Cardello with a copy of the transcript of the hearing or oral argument promptly thereafter.

8. All decisions on motions of Special Referee Cardello shall be in writing and shall be accompanied by supporting reasons, except that Special Referee Cardello may state at a hearing, oral argument or deposition that an oral ruling, as reflected in the transcript, shall constitute the decision. All written decisions shall be provided by Special Referee Cardello to the Court for filing and simultaneously transmitted to counsel for the parties. The parties shall follow the procedures set forth in the Special Referee Procedures in Appendix A for Motions Heard by Special Referee Cardello.

9. Exceptions to any decision made by Special Referee Cardello may be made by motion practice or Order to Show Cause and pursuant to the rules of the Commercial Division; any motion or Order to Show Cause shall also include a Memorandum of Law. A Notice of Exception, an opening brief in support thereof, together with an appendix containing the record on which Special Referee Cardello's decision was made (e.g., discovery requests, related motions and briefs, transcript of argument and Special Referee Cardello's decision) must be filed and served within fifteen (15) business days of the date of Special Referee Cardello's written decision, which decision shall be delivered by electronic mail and by U.S. Mail to counsel. If a decision is reflected only in a transcript of a hearing, the time for filing of exceptions shall run from the date of the receipt of the transcript by the excepting party's counsel. An answering brief must be filed and served within ten (10) business days after receipt of the Notice of Exception. The time for filing exceptions and briefs may be enlarged or shortened only by Special Referee

Cardello or the Court. Any party may request oral argument, which shall be held in the discretion of the Court.

10. Review of any decision of Special Referee Cardello shall be de novo on the record unless otherwise provided by the Court's rules or by statute.

11. Unless a party files a Notice of Exception pursuant to Section 9 above, any decision by Special Referee Cardello shall have the same force and effect as if issued by the Court. The time for filing an appeal of a decision by Special Referee Cardello for which an Exception has been filed shall start to run as of the date the Court issues an Order on the Exception.

12. Special Referee Cardello may use other persons to provide clerical, secretarial and legal assistance as may be necessary. Such persons shall be under the supervision and control of Special Referee Cardello, who shall take appropriate action to insure that (where applicable) such persons preserve the confidentiality of matters submitted to Special Referee Cardello for review including confidential, trade secret or proprietary information or information subject to a Court's protective order.

13. Special Referee Cardello shall be compensated as follows:

a) Special Referee Cardello shall be compensated at the hourly rate of $425.00. Other lawyers and paralegals assisting Special Referee Cardello shall be billed at their usual hourly rates, but no more than $300.00 per hour. Special Referee Cardello's fees shall be billed no more often than monthly, for services rendered, and he also shall be reimbursed for all reasonable and necessary expenses and costs.

i. With regard to discovery issues of general application, Special Referee

Cardello's compensation shall, as of now, be shared amongst the following parties as follows: (a) Plaintiffs shall collectively pay 30% of Special Referee Cardello's compensation; (b) Defendants AT&T Corp. and AT&T Inc. together shall pay 16.7% of Special Referee Cardello's compensation; (c) Defendant Alcatel-Lucent USA Inc. shall pay 16.7% of Special Referee Cardello's compensation; and (d) all Defendant Insurers shall collectively pay 36.6% of Special Referee Cardello's compensation, divided by the number of Defendant Insurers who are in the case at the time the fee is calculated. However, all Parties, including the Defendant Insurers, have agreed that Zurich American Insurance Company and Arrowood Surplus Lines Insurance Company, insurer defendants named in this action, are not responsible for any allocation of Special Referee Cardello's fees. The aforementioned shall hereinafter be collectively called the "Obligated Parties."

ii. The parties have the right to apply to Special Referee Cardello for an allocation other than the fee allocation set forth in Section 13(a)(i) above for particular disputes submitted to Special Referee Cardello.

b) Any Obligated Party who does not pay the required amount within sixty (60) days of billing by Special Referee Cardello may be subject to an appropriate Order of Enforcement by this Court.

c) Special Referee Cardello shall submit itemized statements to the parties and copies to the Court for payment for fees, expenses and costs stating the total amount of time spent and the type of services and work performed during such

time. Expenses and costs shall be itemized. Each payment to Special Referee Cardello for services and expenses shall be approved by the Court. Prior to the Court's approval of Special Referee Cardello invoices, the Obligated Parties shall have fifteen (15) days from billing by Special Referee Cardello to file with the Court, an objection to an invoice. (Each of the Obligated Parties would have such a right.) If no objections are filed within fifteen (15) days, the Court in its discretion may issue an order approving the invoice for payment.

14. This Order may be amended by the Court, or for good cause upon application by a party.

It is SO ORDRED.

Dated: June ___, 2018

Honorable Eileen Bransten
Justice of the Supreme Court
County of New York, Commercial Division

For Certain Underwriters at Lloyd's, London; Certain London Market Insurance Companies; AIU Insurance Company; American Home Assurance Company; Continental Casualty Company; Columbia Casualty Company; Continental Insurance Company; Granite State Insurance Company; Illinois National Insurance Company; Lexington Insurance Company; National Union Fire Insurance Company Of Pittsburgh, Pa.; OneBeacon America Insurance Company; Starr Indemnity & Liability Co.; Stonewall Insurance Company:

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Colleen A. Connolly, Esq.
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For Alcatel-Lucent USA Inc.:

Lisa A. Szymanski/ns

Ann V. Kramer
Lisa A. Szymanski
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For AT&T Corp. and AT&T Inc.:

Lisa A. Szymanski/ns

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Elise Smith, Esq.
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For Associated Electric & Gas Insurance Services Limited:

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George D. Kappus, Esq.
Robert Tugander, Esq.
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For Century Indemnity Company, for itself and as successor to CCI Insurance Company, as successor to Insurance Company of North America, itself a successor to Indemnity Insurance Company of North America, and Century Indemnity Company as successor to CIGNA Specialty Insurance Company, formerly known as California Union Insurance Company (sued herein as Century Indemnity Company, for itself and as successor in interest to Indemnity Insurance Company of North America, Insurance Company of North America, and California Union Insurance Company):

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For Allstate Insurance Company (as successor in interest to Northbrook Excess & Surplus Insurance Company, formerly Northbrook Insurance Company):

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For Arrowood Indemnity Company (as successor in interest to Royal Indemnity Company); Arrowood Surplus Lines Insurance Company (as successor in interest to Royal Surplus Lines Insurance Company); Zurich American Insurance Company; Zurich Insurance Company Ltd.; and Zurich International (Bermuda) Ltd.:

Elise A. Smith

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For Arrowood Indemnity Company (as successor in interest to Royal Indemnity Company); Arrowood Surplus Lines Insurance Company (as successor in interest to Royal Surplus Lines Insurance Company); Zurich American Insurance Company:

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Elise Smith, Esq.
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Brian G. Fox, Esq.
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Tel: (856) 380-8902

For Everest Reinsurance Company (formerly known as Prudential Reinsurance Company); Mt. McKinley Insurance Company (formerly known as Gibraltar Casualty Company); Fairmont Premier Insurance Company; North River Insurance Company; TIG Insurance Company (as successor-in-interest to International Insurance Company, and as successor to Transamerica Insurance Company); and U.S. Fire Insurance Company:

7/16/2018

Michael J. Smith, Esq.
Michael Murphy, Esq.
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For Travelers Casualty and Surety Company (formerly known as The Aetna Casualty and Surety Company)(improperly pleaded as Travelers Casualty and Surety Company (as successor in interest to Aetna Casualty & Surety Company)), The Travelers Indemnity Company (improperly pleaded as Travelers), Travelers Property Casualty Corp. (formerly known as Constitution State Insurance Company)(improperly pleaded as The Travelers Indemnity Company, Travelers Property Casualty Corp. (f/k/a Constitution State Insurance Company)(improperly pleaded as Travelers Indemnity Company (as successor in interest to Constitution State Insurance Company)), St. Paul Surplus Lines Insurance Company, and St. Paul Fire and Marine Insurance Company (improperly pleaded as The Travelers Insurance Company (as successor in interest to St. Paul Fire and Marine Insurance Co.)):

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So ORDERED:

8/15/2018

HON. EILEEN BRANSTEN
J.S.C.

APPENDIX A
SPECIAL REFEREE PROCEDURES

I. Disclosure Conferences:

a) Special Referee Cardello may issue oral directives at disclosure conferences.

b) Within five (5) business days of an oral directive during a disclosure conference, the parties shall submit to Special Referee Cardello, a joint proposed decision setting forth the resolutions reached and directives issued at the disclosure conference.

c) If the parties are unable to agree upon an appropriate form of proposed decision, they shall so advise Special Referee Cardello so that Special Referee Cardello can direct an alternative course of action.

II. Discovery Disputes:

a) When a discovery dispute arises, counsel shall first meet and confer with all other counsel involved in the discovery dispute and attempt to resolve the discovery dispute.

b) If after the meet and confer the discovery dispute is not resolved, a party may submit a letter to Special Referee Cardello detailing the dispute, highlighting the legal and factual issues and stating whether the parties have met and conferred prior to submission of the letter (the "Initial Dispute Letter"). Within five (5) business days of receipt of the Initial Dispute Letter, any other party may submit a letter response (the "Response Letter"). Special Referee Cardello may request reply and sur-reply letters. The letters shall be no more than three (3) pages in length and must be electronically filed and e-mailed to Special Referee Cardello (mcardello@moritthock.com) and all counsel of record.

c) Special Referee Cardello will then schedule a telephonic disclosure conference.

i. If the discovery dispute is resolved during the telephonic disclosure conference, the parties are to follow Special Referee Procedure I (Disclosure Conferences).

ii. If a resolution is not reached during the telephonic disclosure conference:

1. Special Referee Cardello may require that the parties formally brief the issue(s) and will set a briefing schedule. The parties are to comport with Special Referee Procedure III (Motions Heard by Special Referee Cardello).

2. Special Referee Cardello may issue an oral directive, which should be memorialized in accordance with Special Referee Procedure I (Disclosure Conferences).

III. Motions Heard by Special Referee Cardello.

a) The form and length of all motion papers must comply with the Rules of the Commercial Division of the Supreme Court and the Honorable Eileen Bransten's Rules.

b) Motions should be electronically filed.

c) Courtesy copies of all motion papers shall be mailed via overnight mail or electronic mail to Special Referee Cardello's office: Moritt Hock & Hamroff LLP, Attention Michael Cardello III, 400 Garden City Plaza, Garden City, NY 11530. Copies should also be e-mailed to Special Referee Cardello at mcardello@moritthock.com

d) Any party may request oral argument and the decision to hold oral argument will

be at the sole discretion of Special Referee Cardello.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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NEXT MILLENNIUM REALTY LLC, ET AL.,

Plaintiffs,

- against -

TRAVELERS CASUALTY AND SURETY COMPANY, ET AL.,

Defendants.

----------X

Index No.: 600996/2016

SPECIAL REFEREE'S AMENDED DECISION AND ORDER ON THE MOTION TO COMPEL A CERTAIN SETTLEMENT AGREEMENT

This matter is before the undersigned, Michael Cardello III, Esq., as a result of an Order of Reference dated March 31, 2017, signed by Justice Vito M. DeStefano, appointing him Special Referee pursuant to New York Civil Practice Law and Rules ("CPLR") Sections 4301 and 4317(b) and Rule 4311 for the purpose of assisting the Court and the parties in conducting and completing discovery in an efficient manner.

Currently before the Special Referee is a discovery motion (the "Motion") filed by all defendants in this action except for defendant Commerce and Industry Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA (sued herein as National Union Insurance Company) (collectively, "C&I Defendants"). More specifically, the Motion was filed by Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company; The Travelers Indemnity Company; St. Paul Fire and Marine Insurance Company; United States Fidelity and Guaranty Company; Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America; Ace Property & Casualty Insurance Company, formerly known as Cigna Property & Casualty Insurance Company, formerly known as Aetna Insurance Company; Federal Insurance Company; Greater New York Insurance Company; Arrowwood Indemnity Company; Continental Casualty Company; National

Fire Insurance Company of Hartford; the Continental Insurance Company, as successor-in-interest to certain liabilities of General Fire and Casualty Company (sued herein as General Fire and Casualty Co.); and United States Fire Insurance Company (collectively, "Moving Defendants") seeking an order pursuant to CPLR Section 3124 to compel plaintiffs Next Millennium Realty LLC ("Next Millennium"); 101 Frost Street Associates, L.P. ("Frost LP"); the Estate of Emily Spiegel, individually and as trustee, by Alan Eidler, Lise Wilks, and Pamela Sanders as co-executors; the Estate of Jerry Spiegel, individually, as trustee, and d/b/a Designed Industrials, Inc., and Jerry Spiegal Associates, by Alan Eidler, Lise Wilks, and Pamela Sanders as co-executors; Bancroft Construction Corp.; Hauppauge Building Corp; Venimore Building Corporation; Pence Construction Corp; and K.B. Co. (collectively, "Plaintiffs") to produce a copy of a Settlement Agreement dated September 8, 2016[1] (the "Settlement Agreement") which was referenced in an Assignment of Beneficial Interest in Insurance Policies dated September 8, 2016 (the "Assignment") and entered into by some of the Plaintiffs, specifically, Next Millennium; Frost LP; Lisa Wilks and Pamela Sanders, each individually, as co-executors of the Estates of Emily Spiegel and Jerry Spiegel (collectively, the "Estates"), and as trustees of any trusts ("Trusts") created under the Last Wills and Testaments and Codicils of Emily Spiegel and Jerry Spiegel (collectively, the "Wills"); and Alan Eidler, as co-executor of the Estates and trustee under the Wills.

[1] The Amended Notice of Motion states that Moving Defendants seek to compel Plaintiffs "to produce the September 16, 2016 Settlement Agreement referenced in the [Assignment]." Doc. No. 205. However, as indicated on Page 1 of the Assignment (defined hereinafter and annexed as Exhibit A to the Affirmation of Jeffrey A. Novack, Esq. dated December 1, 2017 and submitted in connection with the Motion ("Novack Affirmation")), the Settlement Agreement was executed on September 8, 2016. The November 1, 2017 letter submitted by Moving Defendants in advance of this Motion also seeks permission to "compel Plaintiffs to produce the September 8, 2016 'Settlement Agreement . . . .'" (*See* Novack Affirmation, Exhibit B). Accordingly, the Special Referee assumes that Moving Defendants' reference to the Settlement Agreement dated September 16, 2016 was a typographical error and Moving Defendants intend to seek the production of the Settlement Agreement dated September 8, 2016. (Nevertheless, as mentioned below, the Settlement Agreement produced by Plaintiffs to the Special Referee for an in camera review was undated.)

For the reasons set forth below, the Special Referee grants the Motion, in part, and denies the Motion, in part, directing Plaintiffs to produce a redacted version of the Settlement Agreement as set forth herein.

I. BACKGROUND

Familiarity with the factual and procedural background of this case is presumed and will not be repeated herein unless deemed necessary by the Special Referee.

A. The Pleadings

Plaintiffs commenced this action by filing a Summons and Complaint on February 14, 2016. Plaintiffs subsequently filed an Amended Complaint on March 22, 2017 (the "Amended Complaint"). In the Amended Complaint, Plaintiffs seek a declaration that all defendants (C&I Defendants and Moving Defendants) have a duty to defend and indemnify them for certain regulatory, enforcement and litigation proceedings and costs incurred in connection with remediation, investigation or activity concerning a certain Superfund site, and further seek money damages stemming from all defendants' (C&I Defendants' and Moving Defendants') breach of certain insurance policies (the "Insurance Policies"). (Amended Complaint, Attachment A).

B. Discovery Bifurcation and Protocol

By letter dated March 17, 2017, Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company, The Travelers Indemnity Company, St. Paul Fire and Marine Insurance Company and United States Fidelity and Guaranty Company (collectively, "Travelers Defendants") requested that the Special Referee bifurcate discovery into two phases ("Travelers Defendants' Bifurcation Letter"). Travelers Defendants proposed that Phase 1 would cover the "primary threshold issue" as to the "existence, terms, conditions and exclusions" of the Insurance

Policies while Phase 2 would cover "site-specific discovery," "the historical operations of plaintiffs and their tenants at the Frost Street Properties [e.g. those properties at issue in this action]," and "the origin and causes of the releases(s) [sic], migration and movement (if any) of the contamination at issue." (Travelers Defendants' Bifurcation Letter at pp. 1-2, 4-5). Travelers Defendants proposed that between Phase 1 and Phase 2, the parties would have the opportunity to file dispositive motions, if, for instance, there was insufficient evidence of the existence or content of the Insurance Policies. (*Id.* at pp. 1-2).

By letter dated March 24, 2017, Plaintiffs opposed Travelers Defendants' Bifurcation Letter, arguing that Travelers Defendants' proposal would delay resolution and increase costs.

By letter dated April 3, 2017, the Special Referee granted Travelers Defendants' request to bifurcate discovery ("Special Referee's Bifurcation Letter") to the extent that the Special Referee held that Phase 1 would "address the existence, terms, conditions and exclusions of any insurance policies that may exist" and "include discovery related to whether the plaintiffs are insureds, named insureds or additional insureds under any established policies as well as whether the three commercial properties at issue in this case are insured locations under any established policies," while Phase 2 would "address whether coverage is available under any insurance policy established in [P]hase 1." (Special Referee's Bifurcation Letter at p. 2).

By letter dated April 28, 2017 ("Dispute Protocol Letter"), the Special Referee set forth protocol, involving the submission of letters, for the parties to follow for any future discovery dispute (the "Dispute Protocol"). After receiving such a letter, the Special Referee would hold a conference call whereon the parties would either resolve their dispute or agree on a schedule to formally brief the issue for adjudication.

C. Pre-Motion Submissions and Conference

In conformity with the Dispute Protocol, Moving Defendants submitted a letter dated November 1, 2017 requesting the relief set forth in the Motion. ("Moving Defendants' November 1, 2017 Letter"). Moving Defendants argued that they learned of the Assignment when deposing Plaintiffs' representative and thereafter, upon request, Plaintiffs produced a copy of the Assignment on October 2, 2017. (*Id.* at p. 1). According to Moving Defendants, the Assignment "purports to assign the beneficial interests of Lise Wilks, Pamela Sanders, and Alan Eidler under all available insurance policies to Plaintiffs Next Millennium . . . and [Frost LP]" and "expressly references the Settlement Agreement many times." (*Id.* at pp. 1-2). Moving Defendants argue, based on this, that the Settlement Agreement is "material and necessary for determining who exactly had, and currently has or claims to have ownership of any beneficial interests in available insurance policies," and "not only speaks directly to the Phase 1 issue of 'whether the plaintiffs are insured, named insureds or additional insureds under any established policy,' but it also addresses the threshold issue of standing." (*Id.*) Moving Defendants assert that the Settlement Agreement is necessary to understand "[t]he breadth and context of the Assignment." (*Id.*)

By letter dated November 8, 2017, Plaintiffs opposed Moving Defendants' request for a copy of the Settlement Agreement ("Plaintiffs' November 8, 2017 Letter"). Plaintiffs asserted that the Settlement Agreement contains "information [that] is personal, confidential and obviously unrelated to Phase 1 insurance litigation" and is not needed to understand the Assignment. (Plaintiffs' November 8, 2017 Letter at p. 1). In Plaintiffs' November 8, 2017 Letter, Plaintiffs aver that they reproduced the "only [two] provisions in the [Settlement Agreement] addressing insurance in any matter," both of which were referenced in the Whereas clauses of the Assignment and required, inter alia, that; (1) Next Millennium and Frost LP

maintain a segregated bank account to be funded with proceeds, recoveries, funds, or receipts (defined as "Proceeds") "in connection with and/or relating to the Environmental Obligations of Next Millennium and [Frost LP] . . . and/or any Proceeds from insurance policies;" and (2) the signatories "execute an assignment of beneficial interests under all available policies of insurance to Next Millennium or [Frost LP]." (*Id.* at p. 2). Plaintiffs assert that these provisions "have nothing to do with Phase I discovery" and "[t]he issues of whether the Assignees are proper parties or whether the assignments are valid, are not relevant to Phase I and are Phase II issues." (*Id.*)

On November 20, 2017, the Special Referee held a conference call whereon Plaintiffs and Moving Defendants reiterated their respective positions. When Plaintiffs and Moving Defendants were unable to resolve their dispute, the Special Referee set a briefing schedule for the Motion.

II. THE PARTIES' SUBMISSIONS IN CONNECTION WITH THE MOTION

A. The Motion

On December 1, 2017, Moving Defendants filed the Motion, seeking to compel Plaintiffs to produce the Settlement Agreement. The Motion consists of a Notice of Motion, the Novack Affirmation, and a Memorandum of Law ("Motion Memo"). For the most part, the Motion reiterates the arguments set forth in Moving Defendants' November 1, 2017 Letter. Specifically, Moving Defendants argue that (i) the Settlement Agreement is relevant and Plaintiffs waived any right to withhold the Settlement Agreement when quoting select provisions therefrom in Plaintiffs' November 8, 2017 Letter; (ii) the requested disclosure is within the scope of Phase I discovery; and (iii) the Special Referee can redact any "non-relevant, confidential information" therein if necessary. (Motion Memo at pp. 6-9).

B. Opposition to the Motion

On December 8, 2017, Plaintiffs filed opposition to the Motion in the form of a two page memorandum of law ("Opposition"). Plaintiffs' Opposition states "[o]ther than what has been said in the November 8, 2017 letter from Plaintiffs' counsel to the Special Referee, Plaintiffs have nothing more to add to this argument." (Opposition at p. 1). Plaintiffs reiterate that the Motion should be denied because the Settlement Agreement: (i) involves assignees, not insureds, named insureds, or additional insureds under the Insurance Policies and, as such, is not a proper subject for Phase I discovery, and (ii) is not relevant to this action. (*Id.* at p. 2). When submitting the Opposition, Plaintiffs provided the Special Referee with a copy of the Settlement Agreement to perform an in camera review.

C. Reply in Support of the Motion

On December 20, 2017, Moving Defendants filed a reply in support of the Motion ("Reply").[2] In the Reply, Moving Defendants assert that Plaintiffs fail to rebut their "showing that New York courts mandate production of relevant documents like the Settlement Agreement in circumstances similar or identical to those presented here" or their position that partial disclosure mandates more extensive disclosure. (Reply at pp. 2-3).[3] Moving Defendants contend that Plaintiffs' claim that the Settlement Agreement "only deals with the 'validity' of 'successor rights'" is essentially an admission that the requested disclosure falls within the realm of Phase 1 since "the Settlement Agreement dictates the treatment of various Plaintiffs' interests in insurance policies that purportedly have been transferred . . . ." (*Id.* at p. 4).

Moving Defendants did not request oral argument (Reply at p. 4) and Plaintiffs' Opposition and C&I Defendants' Joinder are silent in this regard. Accordingly, the Special

[2] That same day, C&I Defendants also filed joinder supporting Moving Defendants' Motion.
[3] The Special Referee notes that Plaintiffs' Opposition cites no case law or other legal authority.

Referee decided the Motion based upon the briefs submitted and an in camera review of the Settlement Agreement.

III. ANALYSIS AND RULING

A. Legal Standard

CPLR Section 3101(a) 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 . . . ." N.Y.C.P.L.R. § 3101(a) (2017). The Court of Appeals has explained that:

> The words, "material and necessary", are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.

Allen v. Crowell-Collier Publ'g Co., 21 N.Y.2d 403, 406 (1968). The party seeking a document bears the burden to show that its request "will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims." *D'Alessandro v. Nassau Health Care Corp.*, 137 A.D.3d 1195, 1196-97 (2d Dep't 2016) (quoting *Crazytown Furniture, Inc. v. Brooklyn Union Gas Co.*, 150 A.D.2d 420, 421 (2d Dep't 1989)). This standard applies to the specific scenario where a non-settling party seeks the disclosure of a settlement agreement entered by a settling party. *Mahoney v. Turner Constr. Co.*, 61 A.D.3d 101, 104 (1st Dep't 2009). If there is any uncertainty concerning the relevance of such a settlement agreement, the Court can perform an in camera inspection. *Id.* at 105. If the Court thereafter determines that only a portion of the settlement agreement is relevant and/or is concerned about the settling parties' interest in confidentiality, it can direct disclosure of only certain portions and/or limit disclosure to the non-settling parties and their counsel. *Id.* at 105.

B. Phase I Discovery

Before addressing whether the Settlement Agreement is "material and necessary" to this action, the Special Referee must first determine, as a threshold matter, whether Moving Defendants' request falls within the purview of Phase I discovery and is properly made at this time. Moving Defendants argue that the Settlement Agreement will determine who had and/or currently has a beneficial interest in the Insurance Policies, what that interest is (if any), and whether the assignment thereof is valid. (Motion Memo at p. 6). Moving Defendants contend that the foregoing "not only speaks directly to the Phase I issue of 'whether the plaintiffs are insureds, named insureds or additional insureds under any established policies,' but it also addresses the threshold issue of standing." (*Id.* at p. 6). Plaintiffs, by contrast, argue that Moving Defendants' request is improper at this time since they admit that Next Millennium and Frost LP are not insureds, named insureds, or additional insureds but rather they are assignees with successor rights to the Insurance Policies. (Opposition at p. 2). Based on this, Plaintiffs assert that "the validity of these rights is a Phase II issue." (*Id.*)

As stated in the Special Referee's Bifurcation Letter, Phase 1 concerns "the existence, terms, conditions and exclusions of any insurance policies that may exist" and "whether the plaintiffs are insureds, named insureds or additional insureds under any established policies . . ."; meanwhile, Phase 2 concerns "whether coverage is available under any insurance policy established in [P]hase 1." (Special Referee's Bifurcation Letter at p. 2). While assignments of the Insurance Policies from insureds, named insureds, or additional insureds to others, including but not limited to Plaintiffs, are not expressly mentioned as a Phase 1 issue, it is clear that the point of Phase 1 is to identify those with an interest in the Insurance Policies, to identify (if possible) the terms and conditions of the missing Insurance Policies, and to address all threshold

matters. Similarly, it is clear that the point of Phase 2 is to gather documents and information bearing upon whether or not coverage is appropriate under the Insurance Policies since, at that time, the interested parties and the terms and conditions of those policies will have been confirmed. Given the basis for Phase 1 and Phase 2, and the clear intent of each, the issue as to whether Assignees are proper parties and whether the assignments are valid more appropriately falls into Phase I discovery than Phase 2 discovery.

Additionally, while Phase 1 centers on the existence and terms of the Insurance Policies, standing is a threshold matter that would justify dispositive motion practice and (if successful) obviate the need for further discovery at least with respect to the parties who do not have standing. The Special Referee bifurcated discovery in this action to promote efficiency. If the Special Referee delayed these issues to Phase 2 and then determined that Plaintiffs, or any one of them, lacked standing in this action, the parties, the Special Referee, and the Court would have engaged in an exercise of futility – wasting everyone's time and resources. The Special Referee therefore finds that whether or not the Settlement Agreement should be produced is a Phase 1 discovery issue that is properly before him at this time.

C. Relevance

The Special Referee must now determine whether the Settlement Agreement is "material and necessary" such that it "will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims." *D'Alessandro*, 137 A.D.3d at 1196-97.

Moving Defendants argue that since the previously disclosed Assignment "purports to establish the rights of entities to the very insurance contracts at issue in this case" and references the Settlement Agreement, it "can only be understood and interpreted by reference to the

undisclosed Settlement Agreement." (Motion Memo p. 3). Moving Defendants contend that the Settlement Agreement is necessary to interpret the Assignment where, for instance, the merger clause therein confirms no party thereto has relied on any representation not otherwise included but then provides an "unusual qualifier" stating "except as provided in the Settlement Agreement and related instruments." (*Id.*)

In this regard, the Special Referee notes that even if some portions of the Settlement Agreement are necessary to interpret the Assignment that does not mandate wholesale disclosure. *Mahoney*, 61 A.D.3d at 106 (confirming the court can "shield from disclosure those portions of [a settlement agreement] that are not [material and necessary]"). Moving Defendants seemingly agree with this overarching principle, recognizing that the Court can redact "non-relevant, confidential information" and stating that, "at a minimum," a "non-exhaustive list of easily identifiable, relevant portions of the Settlement Agreement . . . should be produced." (Motion Memo at p.7). This non-exhaustive list includes: introductory provisions, definitions, Paragraph 10h (referenced in Plaintiffs' November 8, 2017 Letter), signature pages, the excerpt identifying the effective date, the excerpt identifying the parties thereto, exhibits referring to the Insurance Policies, or the Assignment, and "[s]uch other portions of the Settlement Agreement that the Special Referee deems relevant to Phase I." (*Id.*)

Moving Defendants further argue that "New York courts mandate production of such demonstrably relevant documents in circumstances similar or identical to those presented herein." (Motion Memo at p. 3; Reply at p.3). However, the only New York court case cited in support of this broad statement is *Luppino v. O'Brien*, 59 A.D.3d 991 (4th Dep't 2009). (*Id.*) In *Luppino*, a medical malpractice action, plaintiff estate administrator sought four documents referenced in a contract between defendant hospital and a medical services company which

detailed policies concerning patient treatment and were therefore deemed relevant. The only similarity between the dispute in *Luppino* and in the instant case is that, in both, a party sought the disclosure of document(s) referenced in a previously produced document. *Luppino* does not establish, as Moving Defendants argue, that the Settlement Agreement herein is "demonstrably relevant" and does not involve "similar or identical" circumstances to those herein where a settlement agreement between two parties is withheld from a non-settling party. The additional cases cited by Moving Defendants are similarly limited in their applicability to this case.

Moving Defendants further argue that Plaintiffs essentially acknowledged the relevance of the Settlement Agreement and waived any right to withhold the document when quoting portions thereof in Plaintiffs' November 8, 2017 Letter. (Motion Memo at pp. 4-5). To support this proposition, Moving Defendants cite *Clark-Fitzgerald, Inc. v. Long Island R. R. Co.*, 162 A.D.2d 577, 578 (2d Dep't 1990). In *Clark-Fitzgerald, Inc.*, the Appellate Division for the Second Department ruled that defendants waived any right to withhold documents *as privileged* since they "failed to exercise due diligence and reasonable care to protect the confidentiality of [those] documents by allowing one of them to be utilized during a deposition and the other to be expressly referred to and quoted from in various litigation papers and briefs filed." *Id.* at 578. Moving Defendants contend that "the case for production is even more compelling than in *Clark-Fitzpatrick*, since Plaintiffs here have never claimed attorney-client privilege or work product protection over the Settlement Agreement." (Motion Memo at p.5).

However, the disclosure of relevant portions of a document does not make irrelevant portions of the same document *de facto* relevant and/or *ipso facto* subject to disclosure. *See, e.g.*, *Kaplan v. S.A.C. Capital Advisors, L.P.*, 141 F. Supp. 3d 246 (S.D.N.Y. 2015) (rejecting defendant's claim that "[p]laintiffs' partial disclosure has waived their objections to full

disclosure of the agreement, and thus full disclosure is warranted"); *Travelers Cas. & Sur. Co. v. ALFA-LAVEL, Inc.*, No. 650667/09, 2011 N.Y. Misc. Lexis 6659 (Sup. Ct. N.Y. Cnty. Nov. 18, 2011) (defendant insurance carrier did not need to produce the full settlement agreement entered into with defendant insured in a Virginia action even though it was partially disclosed in the Virginia action because the particular terms thereof were irrelevant to this action - all that mattered was the agreement obligated defendant insurance carrier to make payments to defendant insured).

Here, Plaintiffs seemingly attempted, in good faith, to advance discovery and cooperate when producing what they deemed to be relevant portions of the Settlement Agreement. Although the disclosure was incomplete (as set forth below), to find, in this context, that Plaintiffs waived their right to withhold irrelevant and/or confidential portions of the Settlement Agreement by making such a partial disclosure would contravene principals of fairness, disregard basic tenets of justice, and discourage cooperation among litigants. This is especially the case where Plaintiffs overtly couched their partial disclosure with the caveat that all remaining portions were confidential and irrelevant. Accordingly, the Special Referee finds that Plaintiffs did not waive their right to withhold confidential and irrelevant portions of the Settlement Agreement.

Notwithstanding all of the foregoing, Plaintiffs' conclusive statement that "there is nothing vaguely related to the subject matter of this litigation in the 572 page [Settlement Agreement]" is of limited value. (Opposition at p. 2). The only way in this case to determine whether the Settlement Agreement is, in fact, material and necessary to understand the Assignment, as Moving Defendants' allege, is through an in camera review of the document, which the Special Referee has conducted. *See Utica Mut. Ins. Co. v. Fireman's Fund Ins. Co.*,

No. 6:09-CV-853, 2013 U.S. Dist. LEXIS 196220, at *4-6 (N.D.N.Y. 2013) (where plaintiff insurance company sued defendant reinsurer over umbrella policies issued to non-party insured and plaintiff sought disclosure of a settlement agreement reached between defendant reinsurer and non-party insured, the Court conducted an in camera review of the document and ultimately directed defendant to produce a partially redacted copy); *Mahoney v. Turner Constr. Co.*, 61 A.D.3d 101 (1st Dep't 2009) (the court can resolve any doubts concerning relevance of a settlement agreement by performing an in camera review thereof).

Based upon the in camera review, the Special Referee has determined that a number of pages in the Settlement Agreement are relevant or will likely lead to relevant information in that, for example, some pages of the Settlement Agreement relate to who has authority to act on behalf of Next Millennium, Frost LP, and the Estates in connection with Next Millennium and Frost LP. For instance, Paragraph 1.b.i. provides that, following execution of the Settlement Agreement, Alan Eidler would resign as Executor of the Estates and Trustee of the Trusts. If the Settlement Agreement was executed before the Amended Complaint was filed on January 31, 2017[4] *and* after Eidler resigned as Executor and Trustee, he may not have standing in this action to act, in a representative capacity, for the Estates as the caption indicates. As another example, Paragraph 10.a., Paragraph 10.a.i., and Exhibit 9 provide that Lise Wilks would transfer all interests in Next Millennium's and Frost LP's properties to Pam Sanders. The aforementioned examples may raise an issue with regard to the standing of a number of parties identified in the Amended Complaint.

The Special Referee finds that the following redacted provisions and/or exhibits of the Settlement Agreement are relevant or may lead to relevant information and, as such, should be

[4] The Special Referee notes that while the Assignment indicates that the Settlement Agreement was dated September 8, 2016, the Settlement Agreement itself, at least the one produced by Plaintiffs for an in camera review, was undated.

produced to Moving Defendants and C&I Defendants within ten (10) days of the entry of this decision: the preamble to the Whereas clauses (p.1); the Whereas clauses (pp. 1-2); Paragraph 1.b. (the first line of the paragraph up to and including romanette (i); and romanette (iv) through the end of the sentence); Paragraph 1.b.i. (the first three sentences); Paragraph 2.c. (p. 14); Paragraph 10.a. (p. 44), 10.a.i. (p. 44), 10.h. (p. 49), 10.h.ii. (p. 50); the signature pages, counter-executed (e.g. two copies of p. 75); Exhibit 9 (redacted to reveal only the title of the document and "101 Frost Street Associates L.P. / 101 Frost Street Corp." and "Next Millennium Realty LLC"); Exhibit 31; Exhibit 32; and the definitions for any defined terms used in the above-identified provisions or exhibits. The Special Referee notes that some of the documents identified above were undated or unsigned in the version produced for in camera review. To the extent Plaintiffs are in possession of a dated, signed copy of these documents, they should produce them in lieu of the unsigned copies. The portions of the Settlement Agreement identified above and directed to be produced do not appear to contain confidential or particularly sensitive information. As such, the Special Referee does not find it necessary to circumscribe who may or may not bear witness to the disclosed materials.

The Special Referee finds that the remaining portions of the Settlement Agreement are not material and/or necessary for the prosecution or defense of this action and do not pertain to the properties at issue herein. Therefore, the Special Referee declines to direct the production of the remaining portion. The Motion is therefore granted, in part, and denied, in part, pursuant to the terms set forth herein.

Dated: January 15, 2018

SO DIRECTED:

MICHAEL CARDELLO III
Court-Appointed Special Referee

ENTERED
JAN 22 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE

1325105v3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

NEXT MILLENNIUM REALTY LLC, ET AL.,

Plaintiffs,

- against -

TRAVELERS CASUALTY AND SURETY COMPANY, ET AL.,

Defendants.

----------X

Index No.: 600996/2016

SPECIAL REFEREE'S DECISION AND ORDER ON PLAINTIFFS' MOTION TO COMPEL

motion seq # 008 & 009

This matter is before the undersigned, Michael Cardello III, Esq., as a result of an Order of Reference dated March 31, 2017, signed by Justice Vito M. DeStefano, appointing him Special Referee pursuant to New York Civil Practice Law and Rules ("CPLR") Sections 4301 and 4317(b) and Rule 4311 for the purpose of assisting the Court and the parties in conducting and completing discovery in an efficient manner.

Currently before the Special Referee is a motion filed by plaintiffs Next Millennium Realty LLC; 101 Frost Street Associates, L.P.; the Estate of Emily Spiegel, individually and as trustee, by Alan Eidler, Lise Wilks and Pamela Sanders as co-executors; the Estate of Jerry Spiegel, individually, as trustee, and d/b/a Designed Industrials, Inc., and Jerry Spiegal Associates, by Alan Eidler, Lise Wilks and Pamela Sanders as co-executors; Bancroft Construction Corp.; Hauppauge Building Corp; Venimore Building Corporation; Pence Construction Corp; and K.B. Co. (collectively, "Plaintiffs") seeking an order pursuant to CPLR Section 3124 to compel defendants Travelers Casualty and Surety Company formerly known as The Aetna Casualty and Surety Company; The Travelers Indemnity Company; St. Paul Fire and Marine Insurance Company; United States Fidelity and Guaranty Company; Commerce and Industry Insurance Company; National Union Fire Insurance Company of Pittsburgh, PA (sued

herein as National Union Insurance Company);[1] Continental Casualty Company; National Fire Insurance Company of Hartford; Federal Insurance Company; Ace Property & Casualty Insurance Company, formerly known as Cigna Property & Casualty Insurance Company, formerly known as Aetna Insurance Company; United States Fire Insurance Company; Arrowwood Indemnity Company, formerly known as Royal Globe Insurance Company; Greater New York Insurance Company; and the Continental Insurance Company, as successor-in-interest to certain liabilities of General Fire and Casualty Company (sued herein as General Fire and Casualty Co.)[2] (collectively, "Defendants")[3] to respond to certain document demands and interrogatories (the "Motion"). For the reasons set forth below, the Special Referee grants the Motion, in part, and denies the Motion, in part.

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[1] *See* Counsel Andrew Warner's letter dated July 25, 2017 stating that "National Union Fire Insurance Company of Pittsburgh, PA" was "misidentified as National Union Insurance Company."

[2] *See* Counsel Frank Winston's letter dated July 25, 2017 stating that "'The Continental Insurance Company, as successor-in-interest to certain liabilities of General Fire and Casualty Company' was incorrectly sued herein as 'General Fire and Casualty Co.'"

[3] Plaintiffs' Notice of Motion and Amended Notice of Motion both included an incorrect caption. Further, the Motion did not include a definition for "Defendants." The Special Referee presumes that the Motion is seeking relief against all Defendants pursuant to the above definition which aligns with the defendants identified in the Amended Complaint (subject to footnotes 1 and 2 above) except that it does not include four defendants against whom this action has been or will be discontinued, specifically Factory Mutual Insurance Company ("Defendant Factory"), Fireman's Mutual Insurance Company ("Defendant Fireman's Mutual"), Lumber Mutual Insurance Company ("Defendant Lumber"), and Century Indemnity Company, as successor to CCI Insurance Company, as successor to Insurance Company of North America ("Defendant Century").

By email to the Special Referee dated October 9, 2017, Plaintiffs confirmed that they settled the action with Defendant Factory and Defendant Lumber. On October 13, 2017, Plaintiffs filed a Stipulation of Discontinuance reflecting as such. Neither Plaintiffs' email nor the Stipulation of Discontinuance referenced Defendant Fireman's Mutual. However, pursuant to the Amended Complaint, Defendant Factory "acquired or otherwise owns the assets and liabilities of . . . Firemen's Mutual Insurance Company." (Amended Complaint ¶ 46). Defendant Factory further confirmed that it is the "successor in interest to . . . Firemen's Mutual Insurance Company." (Defendant Factory's Answer to Amended Complaint at p. 1). The Special Referee assumes that Firemen's Mutual Insurance Company, as referenced in the body of the Amended Complaint and Defendant Factory's Answer to the Amended Complaint, is the same entity as Defendant Fireman's Mutual, as referenced in the caption of the Amended Complaint. In light of the foregoing, the Special Referee assumes that Plaintiffs intend to discontinue the action against Defendant Fireman's Mutual. Further, pursuant to Counsel Kevin Maldonado's email to the Special Referee dated November 6, 2017, Plaintiffs withdrew the Motion insofar as it sought relief from Defendant Century.

I. BACKGROUND

Familiarity with the factual and procedural background of this case is presumed and will not be repeated herein unless deemed necessary by the Special Referee.

A. The Pleadings

Plaintiffs commenced this action by filing a Summons and Complaint on February 14, 2016. Plaintiffs subsequently filed an Amended Complaint on March 22, 2017 (the "Amended Complaint"). The Amended Complaint seeks:

> (1) a Declaration that Defendants have a duty to defend the Plaintiffs in the United States Environmental Protection Agency ('EPA') regulatory, enforcement and litigation proceedings concerning the National Priorities List ('NPL') site known as the New Cassel/Hicksville Ground Water Contamination Superfund Site ('EPA OU-1 ROD'); (2) a Declaration that Defendants are obliged to indemnify Plaintiffs for all expenses, costs, or liabilities incurred or to be incurred by the Plaintiffs for remediation, investigation or activity at the Site ('Site Costs'); and (3) money damages for Defendants' breach of the insurance policies issued to Plaintiffs requiring Defendants to defend and indemnify the Plaintiffs against claims related to the liability associated with three properties in the Town of Hempstead, 89 Frost Street, 101 Frost Street and 770 Main Street (collectively, the 'Frost Street Properties'), located upgradient of the Site that are and were owned by Plaintiffs subjecting them to liability under the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. Section 9601 et seq. ('CERCLA') for the Site Costs.

(Amended Complaint ¶ 2). The Amended Complaint includes an attachment ("Attachment A") which identifies the alleged policies issued by Defendants that provide the disputed coverage. (*Id.*, Attachment A). Plaintiffs allege that they "have identified insurance policies and secondary evidence of insurance coverage for approximately 98 insurance policies issued for the properties identified by the Environmental Protection Agency as being responsible for organic solvent contamination in the EPA Operable Unit I site in Hicksville, New York." (Motion, Affirmation of Kevin Maldonado dated September 8, 2017 ("Maldonado Affirmation") ¶¶ 3-4). Plaintiffs

allege that Defendants erroneously denied coverage and their duty to defend under these policies. (Amended Complaint ¶ 6).

B. Initial Discovery and Phase I Discovery

On or about October 17, 2016, Plaintiffs served document demands on all Defendants, except for defendant Commerce and Industry Insurance Company ("Defendant Commerce") and defendant National Union Fire Insurance Company of Pittsburgh, PA sued herein as National Union Insurance Company ("Defendant National Union") (collectively, "C&I Defendants"). (Maldonado Affirmation, Exhibits X-AG and n. 1). All Defendants, except C&I Defendants, served responses and objections to these document demands on or around November 16, 2016. (Maldonado Affirmation, Exhibits AH-AQ).

As a result of numerous discovery disputes, by letter dated April 3, 2017, the Special Referee advised the parties that discovery would be divided into two phases ("Discovery Bifurcation Letter"). Phase 1 would "address the existence, terms, conditions and exclusions of any insurance policies that may exist" and "include discovery related to whether the plaintiffs are insureds, named insureds or additional insureds under any established policies as well as whether the three commercial properties at issue in this case are insured locations under any established policies." (Discovery Bifurcation Letter at p. 1). Phase 2 would "address whether coverage is available under any insurance policy established in [P]hase 1." (*Id.* at p. 2). The Discovery Bifurcation Letter informed the parties that the Special Referee would issue an order, setting forth all dates pertaining to Phase 1 discovery, at a preliminary conference on April 21, 2017. (*Id.* at p. 3).

At the preliminary conference held telephonically on April 21, 2017, the parties agreed to a majority of the dates pertaining to Phase 1 discovery; the final dates were memorialized in an

order ("Phase 1 PC Order").[4]

By letter dated April 28, 2017, the Special Referee further set forth protocol, involving the submission of detailed letters, for the parties to follow in the event of a discovery dispute ("Dispute Protocol Letter"). Pursuant to the Phase 1 PC Order, on or about May 31, 2017, Plaintiffs served interrogatories on Defendants. (Maldonado Affirmation, Exhibits B-L). Between June 29, 2017 and July 20, 2017, Defendants served responses and objections to these interrogatories. (*Id.*; Maldonado Affirmation, Exhibits M-W).[5]

C. Plaintiffs' July 2017 Letter and Defendants' Responses

Pursuant to the Dispute Protocol Letter, Plaintiffs submitted a letter ("Plaintiffs' July 2017 Letter") to the Special Referee regarding alleged deficiencies in Defendants' responses to certain document demands ("Document Demands") and interrogatories ("Interrogatories"). According to Plaintiffs, all Defendants were served with "largely identical" discovery demands and "asserted similar objections and refusals to produce requested documents and answer interrogatories." (Plaintiffs' July 2017 Letter at pp. 1-2). Plaintiffs' July 2017 Letter identified seven categories of requested information in dispute concerning: (1) rating bureau information; (2) policies issued to other insureds; (3) pollution exclusions in liability policies issued; (4) alpha numeric codes in policies; (5) training manuals; (6) prior coverage litigation files; and (7) documents establishing exclusions and endorsements relied upon by Defendants. (*Id.* at pp. 1-3).

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[4] The Phase 1 PC Order was so-ordered by Judge DeStefano on July 18, 2017 and entered on July 25, 2017.

[5] Plaintiffs' Motion only included Defendant Lumber's responses and objections to Interrogatory Nos. 1-11, omitting responses to Interrogatory Nos. 12-21 and the signature page. (Motion, Exhibit U). However, since the action has been discontinued against Defendant Lumber, the Special Referee will not give this issue, whether caused by Plaintiffs or Defendant Lumber, any consideration. Further, Plaintiffs' Motion included an unsigned certification page accompanying C&I Defendants' response to the Interrogatories. (Motion, Exhibit W). C&I Defendants' opposition to the Motion includes a signed certification page. (C&I Defendants' Opposition, Exhibit 2). Since Plaintiffs do not challenge the validity or timeliness of this signed certification page, the Special Referee will not give this issue, whether caused by Plaintiffs or C&I Defendants, any consideration.

Plaintiffs asserted that this information "is admissible and necessary to the prosecution of the case." (*Id.* at p. 3).

On July 25, 2017, Counsel Frank Winston submitted a responsive letter on behalf of defendants Travelers Casualty and Surety Company formerly known as The Aetna Casualty and Surety Company ("Defendant Travelers Casualty"), The Travelers Indemnity Company ("Defendant Travelers Indemnity"), St. Paul Fire and Marine Insurance Company ("Defendant St. Paul") and United States Fidelity and Guaranty Company ("Defendant USF&G") (collectively, "Travelers Defendants"), among other Defendants,[6] arguing that Plaintiffs' request should be denied because, in sum, the discovery demands were overly broad, unduly burdensome, and had no bearing on the existence, terms, and conditions of the alleged missing or incomplete polices and/or the requested information was already provided.

In addition, Counsel Douglas Steinke submitted a letter on behalf of Defendant U.S. Fire reiterating Travelers Defendants' arguments and further asserted that the Document Demands contravened the Rules of the Commercial Division of the Supreme Court ("Commercial Division Rules") which require proportionality in discovery. Counsel Andrew Warner also submitted a letter on behalf of C&I Defendants stating that Plaintiffs did not serve them with the Document Demands and, as such, they should not be required to respond. Mr. Warner nevertheless joined in Counsel Frank Winston's arguments.

[6] Mr. Winston also submitted this letter on behalf of Defendant Century; defendant Ace Property & Casualty Insurance Company, formerly known as Cigna Property & Casualty Insurance Company, formerly known as Aetna Insurance Company ("Defendant Ace"); defendant Federal Insurance Company ("Defendant Federal"); defendant Greater New York Insurance Company ("Defendant GNY"); defendant Arrowwood Indemnity Company, formerly known as Royal Globe Insurance Company ("Defendant Arrowwood"); defendant Continental Casualty Company ("Defendant Continental Casualty"); defendant National Fire Insurance Company of Hartford ("Defendant National Fire"); defendant The Continental Insurance Company, as successor-in-interest to certain liabilities of General Fire and Casualty Company, incorrectly sued herein as General Fire and Casualty Co. ("Defendant Continental Insurance"); and defendant United States Fire Insurance Company ("Defendant U.S. Fire").

On August 17, 2017, the Special Referee held a conference call regarding the foregoing arguments and set a briefing schedule for the Motion.

II. THE PARTIES' SUBMISSIONS

A. The Motion to Compel

Plaintiffs made the Motion to the Special Referee on September 8, 2017.[7] The Motion, seeking to compel disclosure pursuant to CPLR Section 3124, consists of a Notice of Motion, the Maldonado Affirmation, and a Memorandum of Law ("Motion Memo"). Plaintiffs seek to compel Defendants, except for C&I Defendants, to respond to the following Document Demands:

> Document Demand No. 2: All Additional Policies issued by [You];
>
> Document Demand No. 4: All Documents that Refer or Relate to Additional Policies issued by [You];
>
> Document Demand No. 6: All Documents received from a Rating Bureau by You, or sent to a Rating Bureau by You concerning liability coverage during the Relevant Period;
>
> Document Demand No. 7: Any third-party liability part [sic], policy jacket and/or declarations that were issued by You to a New York domiciled commercial insured during each year of the Relevant Period. To the extent that more than one form of third-party liability part [sic], policy jacket and/or declarations were issued by You to a New York domiciled commercial insured during each year of the Relevant Period exists, provide a third-party liability part [sic], policy jacket and/or declarations issued for each form for each year of the Relevant Period;
>
> Document Demand No. 8: Any broad form coverage endorsement that was attached by You to a liability policy issued to a New York domiciled commercial insured during each year of the Relevant Period. To the extent that more than one form of broad form

[7] The Motion was filed with the Court on September 12, 2017 and September 13, 2017. Doc. Nos. 157-62. The Notice of Motion filed on September 12, 2017 was "returned for correction." Doc. No. 157. Plaintiffs filed an Amended Notice of Motion on September 25, 2017. Doc. No. 182.

> coverage endorsement that was attached by You to a liability policy issued to a New York domiciled commercial insured during each year of the Relevant Period exists, please provide a broad form coverage endorsement issued for each form for each year of the Relevant Period;
>
> Document Demand No. 9: Any additional insured endorsement that was attached by You to a liability policy issued to a New York domiciled commercial insured during each year of the Relevant Period. To the extent that more than one form of additional insured endorsement was attached by You to a liability policy issued to a New York domiciled commercial insured during each year of the Relevant Period exists, please provide each form of any additional insured endorsement utilized for each year of the Relevant Period;
>
> Document Demand No. 10: All documents that describe the meaning and use of the alpha-numeric elements of the policy numbers identified on Attachment A for policies issued by [You] for the Relevant Period;
>
> Document Demand No. 13: All training manuals produced by [You] or Rating Bureaus for employees concerning liability policies during the Relevant Period;
>
> Document Demand No. 14: All Documents, including pleading, policies, and litigation files for any coverage litigation commenced against You by any party for liability coverage for any policy issued by You during the Relevant Period.[8]

(Maldonado Affirmation, Exhibits X-AG).[9] With the exception of C&I Defendants who were not served with the Document Demands, Plaintiffs contend that "[t]he Document Demands served on each Defendant are identical." (Maldonado Affirmation at n. 1; Motion Memo at p. 10).

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[8] While Plaintiffs included Document Demand No. 14 in the Motion Memo, they did not include it in the Amended Notice of Motion. The Special Referee assumes that this was an inadvertent error and will address whether or not Defendants should be compelled to respond to this demand as well.

[9] The Document Demands include a number of definitions for the terms used therein. "Additional Policies" is defined as "policies in the possession of [You] not listed on Attachment A." (Maldonado Affirmation, Exhibits X-AG). "Rating Bureau" is defined as "National Bureau of Casualty Underwriters, the Insurance Ratings Board, the Insurance Services Office, the Mutual Insurance Ratings Board, the Mutual Alliance or any other rating bureau that You belonged as a member or subscribed to during the Relevant Period." (*Id.*). "Relevant Period" is defined as "[t]he period between January 1, 1955 and December 31, 1982." (*Id.*).

Plaintiffs also seek to compel responses to certain Interrogatories. According to Plaintiffs, "[t]he substance of the disputed Interrogatory Requests served on each Defendant are identical" but the numbering of the Interrogatories served on Defendant Federal, Defendant U.S. Fire,[10] and Defendant GNY[11] differs from the numbering of the Interrogatories served on the remaining Defendants. (Motion Memo at p. 11).

Plaintiffs seek to compel responses to the following Interrogatories:

> Interrogatory No. 11 (as served on Defendant Federal, Defendant U.S. Fire, and Defendant GNY, Interrogatory No. 9): Identify in detail any relationship, contractual or otherwise, between [You] and any Rating Bureau, including the nature of the relationship, the duration of the relationship, name(s) of the Rating Bureau and the terms of the relationship ("Interrogatory No. 11");
>
> Interrogatory No. 12 (as served on Defendant Federal, Defendant U.S. Fire, and Defendant GNY, Interrogatory No. 10): Identify the terms of any membership subscription [You] had with a Rating Bureau ("Interrogatory No. 12");
>
> Interrogatory No. 13 (as served on Defendant Federal, Defendant U.S. Fire, and Defendant GNY, Interrogatory No. 11): Did [You] utilize any form liability policy, endorsements or exclusion provided by a Rating Bureau during the Relevant Period. If yes, identify in detail the terms, conditions and exclusions contained in any form liability policy identified in this interrogatory and produce a copy of all form liability policies identified ("Interrogatory No. 13");
>
> Interrogatory No. 16 (as served on Defendant Federal, Defendant U.S. Fire, and Defendant GNY, Interrogatory No. 14): Identify in detail the terms of all broad form endorsements for a New York

[10] Plaintiffs state that the numbering on the Interrogatories differ for, among others, "United States Insurance Company;" however, there is no defendant in this action known as "United States Insurance Company." (Amended Notice of Motion at n. 2; Motion Memo at n. 7). Further, the Interrogatories were served on defendant United States Fire Insurance Company, referred to herein as Defendant U.S. Fire. (Maldonado Affirmation, Exhibit H). Accordingly, the Special Referee assumes that Plaintiffs intended to reference Defendant U.S. Fire when discussing this numbering issue.

[11] Plaintiffs also state that these alternate numbered Interrogatories were served on Defendant Lumber; however, since Defendant Lumber is no longer a party to this action, as set forth in footnote 3 above, the Special Referee will omit future reference thereto in this Decision.

> domiciled commercial insured that was attached by You to a commercial liability policy during each year of the Relevant Period ("Interrogatory No. 16");
>
> Interrogatory No. 17 (as served on Defendant Federal, Defendant U.S. Fire, and Defendant GNY, Interrogatory No. 15): Identify the terms of all additional endorsements for a New York domiciled commercial insured that were attached by You to commercial liability policy during each year of the Relevant Period ("Interrogatory No. 17"); and
>
> Interrogatory No. 21 (as served on Defendant Federal, Defendant U.S. Fire, and Defendant GNY, Interrogatory No. 19): [Have You] been a party to any other coverage litigation for commercial liability policies issued to other parties during the Relevant Period? If the answer is yes, provide: (a) the names of the parties to the action; (b) the nature of the dispute; (c) the index number of the action; (d) the name of plaintiffs' counsel in the action ("Interrogatory No. 21").

(Maldonado Affirmation, Exhibits B-L).[12]

Finally, Plaintiffs seek to compel Defendant Ace to respond to Interrogatory Nos. 6 and 23. (Motion Memo at pp. 19-20). Those Interrogatories are as follows:

> Interrogatory No. 6: Specify in detail all steps taken by You to locate the Listed Polices or Additional Policies issued by the Ace Related Companies during the Relevant Period; and
>
> Interrogatory No. 23: Describe in detail the document retention policies for each Ace Related Policy for documents generated, including insurance policies, during the relevant period. To the extent the policy changed between 1970 and 2016, describe each document retention policy.

(Maldonado Affirmation, Exhibit C).[13]

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[12] The definitions for "Rating Bureau" and "Relevant Period" in the Interrogatories are the same as those provided in the Document Demands.

[13] The Interrogatories served on Defendant Ace define the capitalized terms included therein. "Listed Policies" is defined as "[a]ll policies listed on Attachment A." (Maldonado Affirmation, Exhibit C). "Additional Policies" is defined as "[p]olicies in the possession of the Ace Related Companies not listed on Attachment A concerning the Frost Street Properties." (*Id.*). "Ace Related Companies" is defined as "ACE Property and Casualty Insurance Company, CIGNA Property & Casualty Insurance Company, and Aetna Insurance Company." (*Id.*).

Plaintiffs assert that the Document Demands and Interrogatories are "directly relevant to the core issue of what the terms and conditions of the missing policies are." (Motion Memo at p. 4). According to Plaintiffs, "[c]ost and burden is no justification for a refusal to turn over documents . . . and to answer interrogatories related to material and necessary issues in the case." (*Id.*). Plaintiffs' specific assertions regarding each of the Document Demands and Interrogatories at issue are discussed in Point III below.

B. Opposition to the Motion to Compel

All Defendants opposed the Motion arguing, *inter alia*, that the Document Demands and Interrogatories are overly broad, unduly burdensome, and/or do not seek relevant information.

On September 22, 2017, Travelers Defendants filed opposition to the Motion which included a Memorandum of Law ("Travelers Defendants' Opp."), an affidavit from Julio C. Velez ("Velez Affidavit") and an affidavit from Brent Fowler ("Fowler Affidavit"). Mr. Velez, on behalf of Defendant Travelers Indemnity and Defendant Travelers Casualty, states that he has been a Legal Specialist in Defendant Travelers Indemnity's Environmental Litigation Group for the past twenty-one years and, before that, he worked in a similar capacity for Defendant Travelers Casualty. (Velez Affidavit ¶¶ 3-4). Mr. Velez confirms that he is familiar with both entities' record-keeping methods and historical filing systems. (*Id.* ¶ 4). Mr. Fowler states that he is a Records Management Consultant employed by Defendant Travelers Indemnity but submits an affidavit on behalf of Defendant USF&G and Defendant St. Paul, stating that he "began working at St. Paul in 1996 and ha[s] managed, and continue[s] to manage, the records of USF&G since St. Paul became affiliated with USF&G in 1998." (Fowler Affidavit ¶ 3). Mr. Fowler verifies that he is familiar with how Defendant St. Paul and Defendant USF&G currently and historically store, index, retrieve, and review their records. (*Id.*). Mr. Fowler does not set

forth the relationship between his employer, Defendant Travelers Indemnity, on the one hand, and Defendant St. Paul or Defendant USF&G, on the other hand.

Defendant Ace, Defendant Century,[14] and Defendant Federal (collectively, "Chubb Defendants") filed opposition to the Motion which included: an affirmation from Brian Fox ("Fox Affirmation"), an affidavit from Jennifer McCurnin ("McCurnin Affidavit"), and a Memorandum of Law ("Chubb Defendants' Opp."). Ms. McCurnin represents that she is "[a] Senior Legal Assistant for Century Indemnity Company" and "[a]s part of [her] employment responsibilities, [she] has access to and [is] familiar with the Chubb Defendants' relevant business records." (McCurin Affidavit ¶¶ 1, 3).

C&I Defendants filed opposition to the Motion which included: an affirmation from Andrew Warner ("Warner Affirmation"), an affidavit from Michael DiDonato ("DiDonato Affidavit"), and a Memorandum of Law ("C&I Defendants' Opp."). Mr. DiDonato represents that he is a Complex Director employed by AIG Claims, Inc. and that C&I Defendants are "direct, wholly-owned (100%) subsidiaries of AIG Property Casualty U.S. Inc., which is a wholly-owned (100%) subsidiary of AIG Property Casualty, Inc., which is a wholly-owned (100%) subsidiary of AIUH LLC, which is a wholly owned (100%) subsidiary of American International Group, Inc. which is a publicly-held corporation." (DiDonato Affidavit ¶¶ 1, 2). Mr. DiDonato does not set forth the relationship between his employer, AIG Claims, Inc., on the one hand, and either C&I Defendants or American International Group, Inc., on the other hand. Mr. Didonato represents that he has "[k]nowledge of the organization and search capabilities of C&I Defendants' computerized claim records." (DiDonato Affidavit ¶ 4).

[14] As set forth in footnote 3, Defendant Century is no longer subject to this Motion.

Defendant U.S. Fire filed opposition to the Motion which included: an affirmation from Douglas J. Steinke ("Steinke Affirmation") and an affidavit from Rickey G. Glover ("Glover Affidavit"). Mr. Glover represents that he is an Associate General Counsel for RiverStone Claims Management LLC, the authorized representative of Defendant U.S. Fire, and that he is familiar with searching for the documents at issue. (Glover Affidavit ¶¶ 2, 4).

Defendant GNY filed opposition to the Motion which included: an affirmation from Jay Weintraub ("Weintraub Affirmation"), an affidavit from Gerard Ragusa ("Ragusa Affidavit"), and a Memorandum of Law ("Defendant GNY's Opp."). Ragusa is "[t]he Executive Vice President for Claims" at Defendant GNY and confirms that he is aware of GNY's document retrieval capabilities. (Ragusa Affidavit ¶¶ 1, 3).

Defendant Arrowwood ("Defendant Arrowwood") joined in the arguments set forth by Travelers Defendants ("Defendant Arrowwood's Joinder") and submitted an affidavit from Trent Proctor ("Proctor Affidavit"), a Claim Litigation Director for Defendant Arrowwood. (Proctor Affidavit ¶ 1).

Defendant Continental Casualty, Defendant National Fire, and Defendant Continental Insurance (collectively, "Continental Defendants") also joined in the arguments set forth by Travelers Defendants ("Continental Defendants' Joinder"). Continental Defendants' Joinder is supported by an affidavit from Thomas Barriball ("Barriball Affidavit"), Vice President of Direct Claims for Resolute Management Inc. since 2010 who "administers certain insurance claims on behalf of [the Continental Defendants]" and states that he is "[p]ersonally familiar with Continental's storage practices." (Barriball Affidavit ¶¶ 1-2).

Defendants' specific arguments for opposing each of the Document Demands and Interrogatories at issue will be addressed in Point III below.

C. Plaintiffs' Reply

In the reply memorandum of law submitted in further support of the Motion (the "Reply"), Plaintiffs argue that their discovery demands are neither overly broad nor unduly burdensome. (Reply at p. 5). Plaintiffs claim that the requested disclosures are proportionate, considering "the needs of the case, the amount in controversy, and the parties' respective resources." (*Id.* at p. 7 (citation omitted)). Plaintiffs assert that the Court retains discretion to remedy any defect identified in the Document Demands or Interrogatories. (*Id.* at p. 9). Plaintiffs' specific responses to Defendants' arguments regarding each of the Document Demands and Interrogatories at issue will be addressed in Point III below.

Upon receiving and analyzing the Motion, Defendants' opposition papers, and the Reply, the Special Referee held oral argument on October 24, 2017 ("Oral Argument").

III. ANALYSIS AND RULING

A. Legal Standard

CPLR Section 3101(a) 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 . . . ." N.Y.C.P.L.R. § 3101(a) (2017). The Court of Appeals has explained that:

> The words, "material and necessary", are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.

Allen v. Crowell-Collier Publ'g Co., 21 N.Y.2d 403, 406 (1968).

Notwithstanding the above, litigants do not have the right to "uncontrolled and unfettered disclosure" and cannot invoke CPLR Section 3101(a) to justify "a fishing expedition." *JP Morgan Chase Bank, N.A. v. Levenson*, 149 A.D.3d 1053, 1054 (2d Dep't 2017); *Latture v.*

Smith, 304 A.D.2d 534, 536 (2d Dep't 2003). Rather, the party seeking documents or information bears the burden to show that its request "will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" and "unsubstantiated bare allegations of relevancy are insufficient to establish the factual predicate regarding relevancy." *D' Alessandro v. Nassau Health Care Corp.*, 137 A.D.3d 1195, 1196-97 (2d Dep't 2016); *Crazytown Furniture, Inc. v. Brooklyn Union Gas Co.*, 150 A.D.2d 420, 421 (2d Dep't 1989). The documents and information sought must also be specified with "reasonable particularity." *Fascaldi v. Fascaldi*, 209 A.D.2d 578, 579 (2d Dep't 1994).

The trial court has significant discretion to supervise discovery and, in this regard, can issue a protective order "'denying, limiting, conditioning or regulating the use of any disclosure device' to 'prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.'" *Accent Collections, Inc. v. Cappelli Enters., Inc.*, 84 A.D.3d 1283, 1283 (2d Dep't 2011) (quoting N.Y.C.P.L.R. § 3103(a) (2017)). That being said, when a disclosure device is overbroad, unduly burdensome, lacks specificity, or calls for irrelevant information, "the appropriate remedy is to vacate the entire demand rather than to prune it." *Bell v. Cobble Hill Health Ctr., Inc.*, 22 A.D.3d 620, 621 (2d Dep't 2005); *H.R. Prince, Inc. v. Elite Envtl. Sys., Inc.*, 107 A.D.3d 850, 850 (2d Dep't 2013).

When resolving discovery disputes, as set forth in the Commercial Division Rules, the Court should be "mindful of the need to conserve client resources, encourage proportionality in discovery, promote efficient resolution of matters, and increase respect for the integrity of the judicial process." (Uniform Rules of Trial Court, Section 202.70).

B. <u>Interrogatories in Dispute with Respect to Defendant Ace Only</u>

In the Motion, Plaintiffs seek to compel Defendant Ace to respond to Interrogatory Nos.

6 and 23, alleging that the response provided to Interrogatory No. 6 "[d]oes not adequately describe steps to locate policy [sic] taken by the insured" while the response to Interrogatory No. 23 "[i]s not responsive and not sufficient." (Motion Memo at pp. 19-20). Defendant Ace maintains that this dispute is not properly before the Court because it was not included in Plaintiffs' July 2017 Letter and Plaintiffs failed to mention this relief in their Notice of Motion in accordance with CPLR Section 2214. (Chubb Defendants' Opp. at p. 4, n. 3). Nevertheless, Defendant Ace acknowledges these interrogatories "request[] information that is arguably both potentially relevant to Phase 1 issues and not overly burdensome to provide" and, as such, confirms that it supplemented its response thereto. (*Id.* (citing Fox Affirmation ¶ 11, Exhibit 2). Plaintiffs' Reply does not address this supplemental response. Accordingly, because Plaintiffs have not raised any issue with the supplemental response provided, the Special Referee denies, as moot, the Motion seeking responses to Interrogatories Nos. 6 and 23 from Defendant Ace.

C. Document Demands and Interrogatories in Dispute with Respect to Multiple Defendants

In the Motion, Plaintiffs contend, without citation to any authority, that "[w]hen insurance policies are missing and incomplete, courts routinely permit the use of secondary evidence, such as the secondary evidence requested by Plaintiffs['] discovery, to prove the terms and conditions of the missing or partial policies." (Motion Memo at p. 13). Plaintiffs group the disputed Document Demands and Interrogatories, seeking such secondary evidence, into seven (7) categories:

> (1) Rating Bureau information regarding liability coverage policies (Document Demand No. 6 and Interrogatory Nos. 11, 12, and 13, as served on Defendant Federal, Defendant U.S. Fire, and Defendant GNY, Interrogatory Nos. 9, 10, and 11 ("Interrogatory Nos. 11, 12, and 13"));
>
> (2) Policy documentation issued to other New York domiciled

commercial insureds (Document Demand No. 7);

(3) Broad form endorsements issued to New York domiciled commercial insureds (Document Demand Nos. 8 and 9 and Interrogatory Nos. 16 and 17, as served on Defendant Federal, Defendant U.S. Fire, and Defendant GNY, Interrogatory Nos. 14 and 15 ("Interrogatory Nos. 16 and 17"));

(4) Additional insurance policies issued to Plaintiffs not included on Attachment A (Document Demand Nos. 2 and 4);

(5) Alpha-numeric codes on policies identified on Attachment A (Document Demand No. 10);

(6) Training manuals concerning liability policies (Document Demand No. 13); and

(7) Prior coverage litigation on commercial cases (Document Demand No. 14 and Interrogatory No. 21, as served on Defendant Federal, Defendant U.S. Fire, and Defendant GNY, Interrogatory No. 19 ("Interrogatory No. 21")).

(*Id.*). The Special Referee will address each category, seriatim, except for categories 2, 3 and 4 which the Special Referee will address collectively.

As a preliminary matter, mentioned above, Plaintiffs acknowledge that they did not serve the Document Demands on C&I Defendants. (*Id.* at p. 10; Maldonado Affirmation at n.1). On this basis, C&I Defendants state that, "[t]o the extent Plaintiffs assert C&I Defendants must respond to document demands or otherwise produce documents, such a request should be denied." (C&I Defendants' Opp. at p. 5). The Special Referee agrees. To the extent Plaintiffs seek to compel C&I Defendants to respond to the Document Demands, the Motion is denied.[15]

[15] In light of this ruling, C&I can disregard all references herein to "Defendants" insofar as they concern the Document Demands.

1. **Plaintiffs' Requests for Rating Bureau Information regarding Liability Coverage Policies (Document Demand No. 6 and Interrogatory Nos. 11, 12, and 13)**

a. The Parties' Arguments

In the Motion, Plaintiffs seek any and all documents exchanged with Rating Bureaus along with certain information in connection therewith. In attempts to lay a foundation for these requests, Plaintiffs recount the history of the insurance industry, citing minimal authority.[16] Plaintiffs state, without citing any source, that:

> [i]t was common practice for the insurers during the relevant time period to rely upon the Rating Bureaus to draft form policies that would meet the requirements of the various laws and regulations promulgated by the various states, including New York State. This form policy would then be filed with the state an insurer desired to issue a policy and would be incorporated into each policy issued in the state. This was particularly true of New York State which had a very aggressive enforcement policy on the filing and approval process for policies issued in New York State.

(Motion Memo at p. 9). Plaintiffs further assert, again without citing any source, that "at various times, certain carriers signed contractual commitments with the Rating Bureaus to use only the form policies produced by the Rating Bureau." (*Id.* at p. 14). Based on this, Plaintiffs allege that "Defendants were members, subscribers or had other affiliations with the Rating Bureaus at all relevant times" and argue that they are entitled to all documents and specimen policies Defendants received from, or sent to, a Rating Bureau. (*Id.* at pp. 7-9). Plaintiffs cite *Kleenit, Inc. v. Sentry Ins. Co.*, 486 F. Supp. 2d 121 (D. Mass 2007) for the proposition that "[c]ourts have permitted the use of Rating Bureau form polices and other information from the Rating

[16] Plaintiffs only cite two sources to support their recitation of the insurance industry's historical practices. First, in a footnote, Plaintiffs cite to "Proving Standard Policy Language of Missing Insurance Policies, D.L. Talley, JD, IRMI Risk and Insurance, June 2011" to support the proposition that the Insurance Services Office took over the Mutual Insurance Rating Bureau, formerly known as the American Mutual Insurance Alliance in 1971. (Motion Memo at p. 7, n. 1). Second, Plaintiffs cite Insurance Law Sections 3102 and 2307 in support of their statement that "Pursuant to New York State Law, at all relevant times, virtually all insurance contracts delivered or issued in New York State required approval by the New York Insurance Department." (*Id.* at p. 9).

Bureau as secondary proof of the terms and conditions of coverage of a policy when the type of policy is known." (Motion Memo at p. 14).

In opposition, Travelers Defendants[17] assert that the existence of forms or Rating Bureau memberships do not establish "whether any such forms or endorsements were used in any of the policies alleged to be at issue." (Travelers Defendants' Opp. at pp. 17-18). Travelers Defendants maintain that Plaintiffs' reliance on *Kleenit* is misplaced because, in that case, the Court granted summary judgment to the insurance company and ruled that "[b]ecause insurance policies are often customized or manuscripted, the use of a standard form in one policy is not by itself proof that it was included in a different policy." (*Id.* at p. 18 (citing *Kleenit*, 486 F. Supp. 2d at 133-35)). Mr. Winston argues that Defendant USF&G conducted "reasonable searches of available company records" and has no responsive documents. (Travelers Defendants' Opp. at p. 17). Mr. Winston further argues that it would be excessively burdensome for his other clients to secure the documents and information sought in this category. (*Id.*). Specifically, it would take Defendant Travelers Indemnity and Defendant Travelers Casualty years and Defendant St. Paul six months to compile and review the documents and information to determine if they are responsive. (*Id.*).

Defendant U.S. Fire asserts that Plaintiffs have no rational justification for the documents sought in this category, it would be an enormous expense to secure such documents, and *Kleenit* does not support such disclosure. (Steinke Affirmation ¶ 16 (citing Glover Affidavit)).

Chubb Defendants argue that the Document Demands and Interrogatories in this category are overly broad because they "are not limited to policy forms prepared by Rating Bureaus and utilized by [them], or even policy forms submitted by [them] to Rating Bureaus" but, rather,

[17] As set forth above, Defendant Arrowwood and Continental Defendants adopted Travelers Defendants' arguments.

"seek any and all documents exchanged between [them] and Rating Bureaus over a 28-year period." (Chubb Defendants' Opp. at p. 12). Chubb Defendants note that the discovery is "entirely irrelevant and amounts to an unwarranted fishing expedition" since the use of Rating Bureau forms do not confirm the existence of the policies identified on Attachment A or establish that the policies contained such Rating Bureau forms. (*Id.* at pp. 12-13).

C&I Defendants assert that the discovery in this category is overly broad because Plaintiffs seek disclosure regarding their relationship with any Rating Bureau during a 28 year period even though the policy allegedly issued by Defendant Commerce was only in effect from 1972-1975 and the policy allegedly issued by Defendant National Union was "indicated as cancelled flat, and then only in 1966."[18] (C&I Defendants' Opp. at p. 6). C&I Defendants argue that Interrogatory No. 13, seeking to identify any form liability policy, endorsement, or exclusion provided during the "Relevant Period," is not narrowly tailored because, for instance, a form policy for auto or homeowner's insurance and an exclusion issued in Virginia in 1955 would be responsive, albeit, irrelevant. (*Id.*).

Defendant GNY contends that the Document Demands and Interrogatories in this category are improper because they are not limited to forms prepared by Rating Bureaus and utilized by Defendant GNY or forms submitted by Defendant GNY to Rating Bureaus, and Plaintiffs have not established a nexus between the information sought and the prima facie elements of their claims. (Defendant GNY's Opp. at pp. 13-14). Defendant GNY, like the Chubb Defendants, asserts that "[w]hether or not any of GNY may have utilized Rating Bureau policy forms in certain policies issued to other insured, whether GNY submitted policy forms to Rating Bureaus, whether GNY had a relationship, membership, or subscription with any Ratings

[18] This statement is unclear. Attachment A indicates that Policy Number 2225064, issued by Defendant National Union, was "Cancelled 9/9/64."

Bureaus . . . has no relevance to whether [] [Defendant] GNY issued any of the alleged policies identified in Attachment A . . . or . . . whether the alleged policies contained forms [sic] were prepared by a Rating Bureau." (*Id.* at p. 14).

In Reply, Plaintiffs maintain that "[t]he Rating Bureau information that Plaintiffs have requested would constitute secondary proof of the disputed policies' terms and conditions." (Reply at p. 8 (citing *Kleenit,* 486 F. Supp. 2d at 125-26)).

b. Analysis and Ruling

As an initial matter, the Special Referee cannot rely on Plaintiffs' recitation of the insurance industry's history since Plaintiffs fail to provide sufficient authority in support thereof. Nevertheless, case law suggests that some courts have acknowledged that specimen forms, in particular, but not all documents exchanged between an insurance carrier and a Rating Bureau, can be used as secondary evidence in a lost policy case. *Coltec Indus. v. Am. Motorists Ins. Co.*, No. 99 C 1087, 2000 U.S. Dist. LEXIS 22944, at *5 (N.D. Ill May 26, 2000); *Monsanto Co. v. Aetna Casualty & Sur. Co.*, No. 88C-JA-118, 1993 Del. Super. LEXIS 461, at *12-16 (Del. Super. Ct. Dec. 21, 1993); *Cent. Ill. Light Co. v. Home Ins. Co.*, 342 Ill. App. 3d 940, 962 (App. Ct. Ill. 2003); *Gold Fields Am. Corp. v. Aetna Cas. & Sur. Co.*, 661 N.Y.S.2d 948 (Sup. Ct. N.Y. County 1997) ("*Gold Fields II*"); *Chickasha Cotton Oil Co. v. Houston Gen. Ins. Co.*, No. 5-00-01789-CV, 2002 Tex. App. LEXIS 5692, at *10-11 (Ct. App. Tex. Aug. 6, 2002).

In the sole case relied upon by Plaintiffs, *Kleenit,* the District Court of Massachusetts recognized that "a putative insured may seek to create a trial worthy dispute of fact by introducing evidence that standard policy forms or specimen forms reasonably supply the terms of the lost policy." *Kleenit*, 486 F. Supp. 2d at 132. The *Kleenit* Court cited to multiple cases, both in and outside of Massachusetts, condoning the use of specimen forms at the summary

judgment stage. *Id.* at 132-33. At least one New York State court made a similar determination. In *Gold Fields II*, an insured sought indemnification from insurance companies based on lost policies. When denying the insurance companies' motion for summary judgment, the New York State Supreme Court, New York County, stated that:

> Plaintiff contends without contradiction that Home was a member of the National Bureau of Casualty Underwriters (NBCU) in the 1950's and 1960's. The NBCU issued specimen forms for CGL policies during the periods at issue. Plaintiff offers proof that Home had, on occasion, used specimen forms that followed the NBCU forms for CGL policies. Home has offered no proof to the contrary. Plaintiff asserts that the use of the specimen forms is some proof that the policies issued to it were written on those forms. Those courts that have considered the question appear to have permitted the use of specimen policies to show what the terms of the policy at issue were . . . This court finds that it is reasonable to use the proffered proof to raise an issue of fact for trial.

Gold Fields II, 661 N.Y.S. 951 (emphasis added) (internal citations omitted). While the plaintiff in that case set forth more than specimen forms to defeat summary judgment, including checks, pay stubs, and audit invoices, among other proof, the decision, at bottom, acknowledged the relevance of such forms.

A number of other courts outside of New York have similarly found, at the summary judgment stage, that specimen policies (but again, not all documents exchanged with Rating Bureaus) are relevant and/or discoverable where an insured seeks coverage under a lost policy. *See, e.g., Monsanto Co.*, 1993 Del. Super. LEXIS at 461, at *12-16 (confirming secondary evidence including specimen forms, policy jackets, bulletins, and testimony can establish an issue of material fact); *Cent. Ill. Light Co.*, 342 Ill. App. 3d at 962 (finding the trial court erred when denying plaintiff's motion to compel production of "sample policy language" used from 1948 to 1957 and 1974 to 1985 since it "is highly relevant" and "may aid [plaintiff] in

establishing the essential terms of its missing policies"); *Chickasha Cotton Oil Co.*, 2002 Tex. App. LEXIS 5692, at *10-11 (determining that the state's mandatory insurance forms and the insurer's specimen policies "constitutes some evidence" of the terms of the missing policies). At least one court has upheld this finding in the specific context of a motion to compel. *Coltec Indus.*, 2000 U.S. Dist. LEXIS 22944, at *5 (requiring insurer to produce all "Comprehensive General Liability [] policy forms and endorsements that it adopted and used" during the six effective years of the missing policies, two years before the start of the first policy, and two years after the expiration of the last policy).

Travelers Defendants, among others, attempt to distinguish *Kleenit* (and presumably would attempt to distinguish the majority of the foregoing cases), by emphasizing that these cases acknowledged that standardized forms alone cannot defeat summary judgment in a lost policy case. The Special Referee finds this argument unpersuasive. What is important at this stage of the litigation is that case law supports the argument that specimen forms may, with other evidence, demonstrate the terms of a lost policy.

Notwithstanding the foregoing case law acknowledging the relevance of specimen forms, with respect to Document Demand No. 6, which seeks "[a]ll Documents received from a Rating Bureau by You, or sent to a Rating Bureau by You concerning liability coverage during the Relevant Period," the Special Referee finds that this demand is overly broad and lacks sufficient specificity. Document Demand No. 6 calls for the production of every single document ever exchanged between each defendant and any Rating Bureau over a 28 year period – not merely the production of specimen policies actually utilized during a time period individually modified for each defendant (a concept discussed further below). Plaintiffs fail to establish how or why all documents exchanged between Defendants and a Rating Bureau will result in the disclosure of

relevant evidence or are reasonably calculated to lead to the discovery of information bearing on the claims asserted.[19] In light of the above, the Special Referee denies the Motion to compel a response to Document Demand No. 6.

With respect to Interrogatory Nos. 11, 12, and 13, the Special Referee finds that the information requested therein is relevant and grants the Motion subject to the Temporal Modification as well as Substantive Modification No. 1 and Substantive Modification No. 2 (collectively, the "Substantive Modifications"), each of which are defined and discussed below.

The Special Referee agrees with Defendants that the information sought in Interrogatory Nos. 11, 12, and 13 would not establish whether the policies identified in Attachment A exist; however, it may provide probative evidence of the terms in any such policies. Several Defendants argue that Plaintiffs have failed to establish a nexus between the utilization of Rating Bureau forms and the policies in this case, but then fail to respond to the Interrogatories that could provide the requisite nexus, if one exists. Defendants cannot assert that Plaintiffs failed to demonstrate that they used Rating Bureau forms while simultaneously refusing to provide any information regarding their relationship with Rating Bureaus, including the use/nonuse of forms.

Notwithstanding such relevance, Interrogatory Nos. 11, 12, and 13 are overly broad and must be modified. Interrogatory No. 11 asks Defendants to "[i]dentify in detail any relationship, contractual or otherwise, between [You] and any Rating Bureau, including the nature of the relationship, the duration of the relationship, name(s) of the Rating Bureau and the terms of the relationship." Interrogatory No. 12 asks Defendants to "[i]dentify the terms of any membership

[19] The Special Referee has the discretion to strike Document Demand No. 6, which is unquestionably overly broad, or, in the interests of efficiency, modify Document Demand No. 6 so as to direct only the disclosure of specimen forms provided by Rating Bureaus and utilized by Defendants, which the Special Referee has acknowledged are relevant. Admittedly though, the latter option would essentially involve re-writing Document Demand No. 6, which the Special Referee is loathe to do. However, given that the Special Referee's ruling with respect to Plaintiff's' Motion to compel a response to Interrogatory No. 13 provides for the limited disclosure of specimen forms, the Special Referee finds that it need not consider whether or not to modify Document Demand No. 6 at this juncture.

subscription [You] had with a Rating Bureau." While the information sought in these two interrogatories can be relevant for the reasons set forth above, as drafted, they are overly broad, unlimited by any time period whatsoever. Interrogatory No. 13 asks Defendants "[d]id [You] utilize any form liability policy, endorsements or exclusion provided by a Rating Bureau during the Relevant Period. If yes, identify in detail the terms, conditions and exclusions contained in any form liability policy identified in this interrogatory and produce a copy of all form liability policies identified." While this interrogatory, unlike Interrogatory Nos. 11 and 12, is limited to "the Relevant Period," defined as January 1, 1955 to December 31, 1982, it is still too broad.

Attachment A sets forth the insurance policies at issue that allegedly covered Plaintiffs and generally denotes, among other information, policy periods for each, which often differ dramatically. For instance, on the one hand, Plaintiffs identify twenty-nine policy numbers associated with Defendant USF&G reflecting policy periods ranging from October 5, 1959 to January 1, 1971. (Amended Complaint, Attachment A). On the other hand, Plaintiffs identify only one policy number associated with Defendant Commerce which was in effect from November 1, 1972 to November 1, 1975. (*Id.*). Plaintiffs provide no justification for seeking information, subject to the same time parameters, from these Defendants. In fact, Plaintiffs' counsel admitted that the discovery requests were too broad when acknowledging a "definitional problem" and agreeing that a more appropriate time period would be limited to the year when the disputed policies were issued. (Oral Argument Transcript at 11:18-12:13).

Accordingly, the Special Referee grants the Motion with respect to Interrogatory Nos. 11, 12, and 13 but limits the time frame as it relates to each of the Defendants based on the policy periods listed on Attachment A and explained further below (the "Temporal Modification").

For example, since the only policy pertaining to Defendant Commerce was in effect from November 1, 1972 through November 1, 1975, Defendant Commerce's response shall be limited to that specific time period. Where Attachment A only lists the date a specific policy expired or was cancelled, then the time period shall be limited to the full year prior to cancellation. For example, according to Attachment A, the only policy allegedly issued by Defendant National Union is Policy Number 2225064 which was cancelled on September 8, 1964. Therefore, Defendant National Union's response shall be limited from September 8, 1963 to September 8, 1964. Where Attachment A does not list a policy period or expiration/cancellation date for a particular policy, Plaintiffs and the relevant Defendant shall meet and confer within ten (10) days of this Decision to discuss a reasonable time period to use. The parties shall send a letter to the Special Referee within five (5) days of the meet and confer either advising of the agreed upon time frame or that no agreement has been reached. If no agreement has been reached, the Special Referee will schedule a conference call with the parties to discuss the issue.

In addition to the Temporal Modification, the Special Referee acknowledges C&I Defendants' argument that Interrogatory No. 13 is overly broad because, for example, a form auto or homeowner's policy and exclusion issued in Virginia in 1955 would be responsive but would not be relevant. (C&I Defendants' Opp. at p. 6). The Special Referee agrees with C&I Defendants and recognizes that the same logic applies to Interrogatory Nos. 11 and 12. Therefore, the Special Referee clarifies that, insofar as it is granting the Motion to compel responses to Interrogatory Nos. 11, 12, and 13, Defendants need only provide responses regarding their relationships, memberships, policies, exclusions, or endorsements that concern the types of coverage and policies listed on Attachment A, not auto, home, or other insurance policies which clearly are not implicated by the causes of action in the Amended Complaint

("Substantive Modification No. 1").

The Special Referee further acknowledges both Plaintiffs' and C&I Defendants' representation that each State has its own form policies. (Oral Argument Transcript at 56:15-57:13; DiDonato Aff. ¶ 15). The remaining Defendants do not address or dispute this assertion. Accordingly, when responding to Interrogatory No. 13, in specific, C&I Defendants and all other Defendants (to the extent they take a similar position) need only take into account form liability policies, endorsements, or exclusions used in New York State ("Substantive Modification No. 2").

Unlike Document Demand No. 6 discussed above, the Special Referee finds that Interrogatory Nos. 11, 12, and 13 are not so broad as to strike altogether and it is within his discretion, prioritizing efficiency, to impose the Temporal Modification and Substantive Modifications.

The Special Referee notes that the decision with respect to Interrogatory Nos. 11, 12, and 13 has taken into account any potential burden alleged by Defendants and discussed individually below of responding thereto. As a preliminary matter, the Special Referee does not read Interrogatory No. 13's request for "all form liability policies identified"[20] as a request for *every* policy issued utilizing a standardized or specimen form from a Rating Bureau during the modified time period; rather, the Special Referee interprets this language to request only the *one* standardized or specimen form policy, exclusion, and endorsement provided by the Rating Bureau and used by Defendants *for each year* of the relevant time period, as modified.

[20] Insofar as Interrogatory No. 13 calls for the production of "any form liability policy, endorsements or exclusion provided by a Rating Bureau," the Special Referee acknowledges that this is permissible. CPLR § 3131 ("[i]nterrogatories may require copies of such papers, documents or photographs as are relevant to the answers required, unless opportunity for this examination and copying be afforded"); Weinstein Korn & Miller ¶ 3131.04 (2017) ("[t]he court has full power under CPLR 3101 to make such orders as would be just in the particular situation").

Supporting this interpretation, Plaintiffs' counsel specifically stated at Oral Arguments, in response to the Special Referee's question as to whether there "could [] have been many, many different form policies approved by the State of New York Department of Insurance for usage by Travelers or others," that "[t]he answer is no . . . they put together their general form and that general form was presented to the insurance departments on their behalf, got approval and they used that as a starting point . . . They may have attached exclusions and other endorsements to [a] policy, but the terms and conditions of [a] policy in [a specific year] were the same for every insured in New York State." (Oral Argument Transcript at 56:15-57:13).

To the extent that any Defendants cannot locate or produce the exact standardized or specimen form policy, exclusion, or endorsement received from a Rating Bureau and used, the Defendants can produce any such policy, exclusion, or endorsement issued to an insured, in redacted form, which utilized the standardized or specimen form and is therefore representative thereof. To the extent that any Defendants reasonably determine, based on their knowledge and obligation to conduct discovery in good faith, that more than one such standardized or specimen form policy, exclusion, and/or endorsement exists for any year of the relevant period, as modified – a point which none of the Defendants address in the affidavits submitted – they should, if necessary, follow the protocol set forth in the Dispute Protocol Letter to resolve any dispute about what documents to produce.

Tellingly, many Defendants do not assert any burden directly in connection with responding to Interrogatory Nos. 11, 12, and 13. The Special Referee notes, however, that any direct or indirect arguments concerning the burden of responding to Interrogatory Nos. 11, 12, and 13 do not outweigh the relevance of the information requested, especially when taking into account the Temporal Modification, the Substantive Modifications and the Special Referee's

above interpretation of the documents requested in connection with Interrogatory No. 13.

Chubb Defendants, Continental Defendants, Defendant Arrowwood, Defendant GNY, and Defendant U.S. Fire all similarly assert that they do not maintain a centralized, searchable document management system to review nearly three decades worth of documents and, as such, would need to perform a burdensome manual review of documents stored at off-site facilities, on different databases, and/or on different mediums to respond to the Document Demands and Interrogatories. (McCurnin Affidavit ¶¶ 10, 11, 21, 33; Barriball Aff. ¶¶ 9-11, 14; Proctor Affidavit at ¶¶ 7, 16-17; Ragusa Aff. ¶ 28; Glover ¶ 7). The fact that these Defendants do not maintain a central document system does not demonstrate that Interrogatory Nos. 11, 12, and 13 are unduly burdensome. Interrogatory Nos. 11 and 12 do not seek the production of any specific documents and do not require Defendants to review warehoused documents associated with any particular policyholder. Rather, Interrogatory Nos. 11 and 12 merely call for Defendants to describe their relationship with, and subscriptions to, Rating Bureaus, something which can be obtained through institutional knowledge or resources.

Further, Interrogatory No. 13, as interpreted and modified, only requires Defendants to produce the one single form policy, exclusion, and endorsement used for each year of a narrowly tailored time period and thereby obviates the need for Defendants to review every file in storage. Defendants can merely turn to the policy numbers or files for any longstanding insured to locate policies, endorsements, and exclusions that utilized the specimen forms if they are not otherwise available. Accordingly, the Special Referee finds that any burden, stemming from the lack of a centralized database, of responding to and/or providing documents in connection with Interrogatory Nos. 11, 12, and 13, as modified, is manageable and proportionate to the needs of the case.

Several Defendants, specifically Defendant Arrowwood and Defendant U.S. Fire, further argue that producing responsive documents would be unduly burdensome because it would result in confidentiality issues. (Proctor Affidavit ¶ 18; Glover Affidavit at ¶ 13). The Special Referee finds this argument unavailing since Interrogatory No. 13, as interpreted herein, merely calls for template forms received by a Rating Bureau and used by Defendants or, if not available, a manageable number of redacted policies that utilized such template forms.

Defendant GNY also argues that the document demands concerning Rating Bureaus are unduly burdensome because they "are not limited to policy forms prepared by Ratings Bureaus and utilized by GNY . . ." (Ragusa Affidavit at ¶ 28). Insofar as this argument extends to producing documents under Interrogatory No. 13, the Special Referee notes that Interrogatory No. 13, as interpreted herein and explained above, rectifies any such concern since it distinctly limits any production to template forms prepared by a Rating Bureaus and utilized by Defendants subject to the Temporal Modification.

C&I Defendants do not specifically address Interrogatory Nos. 11, 12, and 13. However, C&I Defendants' representative, Michael DiDonato asserts that "Documents related to . . . policies prior in or about 2003 are stored off-site through third-party vendors," he "inquired regarding the search capability of the underwriting system in place for C&I Defendants," he "was informed that it is impossible to undertake a search for ratings bureau documents or endorsements because each state has its own process for adopting forms," and "[i]t is likely that any records no longer exist because of existing record retention policies." (DiDonato Aff. ¶¶ 14-15). The fact that policies are stored off-site does not demonstrate sufficient undue burden to respond to Interrogatory Nos. 11, 12, and 13 and Mr. DiDonato's representation as to C&I Defendants' ability to search for and locate form policies is unsupported hearsay. Further, while

Mr. DiDonato avers that C&I Defendants' "records are not organized or indexed in a way to segregate Defendants' records from the records of other AIG member insurance companies," given that Interrogatory No. 13, as interpreted and modified herein, only requires C&I Defendants to produce the single form policy, exclusion, and endorsement for each year of a narrowly tailored time period, irrespective of the policyholder, any burden asserted would not outweigh the relevance of the information sought. (*Id.* ¶ 6).

Defendant Travelers Indemnity and Defendant Travelers Casualty oppose Interrogatories Nos. 16 and 17 but are generally silent as to Interrogatories Nos. 11, 12, and 13.[21] Nevertheless, the Special Referee acknowledges their position that "[w]ithout opening and reviewing an individual file or policy for a particular policyholder, it is impossible to know the time period during which the policy(ies) issued to that policyholder were underwritten" and "[m]any historical files . . . have been moved from the branch offices to off-site storage." (Velez ¶ 12). Defendant USF&G and Defendant St. Paul, by contrast, directly address Interrogatory Nos. 11, 12, and 13 and argue that "[i]n order to respond to the requests, St. Paul would be required to search hundreds of rolls of microfilm" and "[r]easonable searches of available company records for USF&G have been conducted, and no documents responsive to these requests for the 1955 to 1982 period have been located." (Fowler Affidavit ¶¶ 12, 13, 32). With regard to this latter assertion, Defendant St. Paul fails to explain why answering questions concerning its relationship with Rating Bureaus would require it to review "hundreds of rolls of microfilm" and Defendant USF&G fails to describe these "reasonable searches" or explain what constitutes "available company records." Ultimately, though, the fact that all of the foregoing Travelers Defendant would only need to answer questions (without producing documents) concerning their historical

[21] While Travelers Defendants' counsel addresses Interrogatories Nos. 11, 12, and 13 in the Memorandum of Law submitted, the Velez Affidavit fails to do so. (Travelers Defendants' Opp. at p. 17).

interactions with Rating Bureaus and produce the one single form policy, exclusion, and endorsement for each year of the narrowly tailored time period, the Special Referee finds that the relevance of the information sought pursuant to Interrogatory Nos. 11, 12, and 13, as modified and interpreted herein, outweighs any burden to respond thereto.

In sum, for the reasons set forth above, the Motion, with respect to Document Demand No. 6 is denied. The Motion, with respect to Interrogatory Nos. 11, 12, and 13, is further granted subject to the Temporal Modification and Substantive Modifications. Defendants shall respond to these Interrogatories within thirty (30) days of this Decision.

2. Plaintiffs' Request for Policies and Related Documents Not on Attachment A, as well as Policies, Broad Form Endorsements, and Additional Insured Endorsements Issued to Other New York Domiciled Commercial Insureds (Document Demand Nos. 2, 4, 7-9; Interrogatory Nos. 16-17)

a. The Parties' Arguments

With respect to Document Demand Nos. 2 and 4, Plaintiffs argue that they are entitled to additional policies and related documents not listed on Attachment A. In support of this argument, Plaintiffs cite *Township of Haddon v. Royal Ins. Co. of Am.*, No. 95-701, 1996 U.S. Dist. LEXIS 14101, at *10 (D.N.J Sept. 19, 1996) and *Century Indem. Co. v. Aero-Motive Co.*, 254 F. Supp. 2d 670, 692 (W.D. Mich. 2003) for the proposition that renewal policies can evidence the terms of missing policies. (Motion Memo at p. 17).

With respect to Document Demand No. 7, Plaintiffs argue that they are entitled to "all commercial liability policies issued in the State of New York," specifically any "third-party liability part [sic], policy jacket and/or declarations," because the terms and conditions therein are "direct evidence of the terms and conditions of the missing or partial policies." (*Id.* at p. 15). Plaintiffs state that:

> For example, if one of the Defendants locates 100 commercial general liability policies it issued in 1980 in New York and all 100 contain the same general terms and conditions and are similar to the policies filed and approved with the New York Insurance Department, this is persuasive evidence as to what the terms and conditions of the missing policies were. This is particularly true when combined with the secondary evidence of coverage Plaintiffs maintained from their business records.

(*Id.* at pp. 15-16). Plaintiffs do not cite any statute or case law in the section of the Motion Memo on this issue. (*Id.* at Section B(2)).

With respect to Document Demand Nos. 8 and 9 (seeking broad form coverage endorsements and additional insured endorsements issued to New York domiciled commercial insureds) and Interrogatory Nos. 16 and 17 (seeking the terms of broad form coverage endorsements and additional insured endorsements for New York domiciled commercial insureds), Plaintiffs maintain that such endorsements are "material and necessary and direct proof of what the terms and conditions enumerated in broad form endorsements attached to missing or incomplete policies were." (*Id.* at p. 16). Plaintiffs contend, without citing any authority, that "each insurer developed and utilized broad form insurance endorsements that were attached to liability policies between 1955 and 1982" and "carriers had a standard endorsement form that would be attached to commercial policies for additional insureds." (*Id.*).

In opposition, Defendants contend that the document demands and interrogatories in this category should be stricken since they are unduly burdensome and seek irrelevant information. Travelers Defendants argue that obtaining documents and information concerning other New York domiciled insureds' files, as requested in Document Demand Nos. 2, 4, and 7-9 and Interrogatory Nos. 16-17, is unduly burdensome and would produce material irrelevant to the action. (Travelers Defendants' Opp. at pp. 4-12). Regarding Document Demand Nos. 2 and 4, Travelers Defendants specifically note that "it is difficult to ascertain exactly what Plaintiffs are

seeking" since the demands request documents relating to every policy issued by them but the Motion indicates that these demands merely request additional policies "issued to Plaintiff as an insured or additional insured." (*Id.* at p. 10). According to Travelers Defendants, even the latter, narrower request, would be unduly burdensome.

When addressing this burden, Travelers Defendants claim that their physical records (maintained in paper form or on microfiche and microfilm) are not organized or coded based on the policyholder's domicile and are stored in 2.7 million plus cubic feet of off-site records contained in over 2.2 million containers located around the county. (*Id.* at pp. 4-11 (citing Velez Affidavit ¶¶ 14-15; Fowler Affidavit ¶¶ 14-16) and n. 6). While Travelers Defendants assert that they "basically searched for all records under the name Jerry Spiegel," Travelers Defendants admit that they do not have the capability to perform an electronic search to locate additional policies where Plaintiffs may be identified as an additional insured, opposed to a primary insured. (Travelers Defendants' Opp. at p. 10 (citing Velez Affidavit ¶ 8; Fowler Affidavit ¶ 7); Oral Argument Transcript 14:11-14:14, 21:21-21:23). As such, Travelers Defendants claim that they would need to conduct a page by page review of these files which would be "extremely disruptive and costly to routine business operations" since employees would need to "divert their attention from their normal job duties" and counsel would need to confirm that the production of any identified documents would not violate a protective order or confidentiality requirement. (Travelers Defendants' Opp. at pp. 6-7) (citing Velez Affidavit ¶ 18; Fowler Affidavit ¶ 19)).

Because of this burden, Travelers Defendants assert that "numerous courts in New York and elsewhere addressing insurance coverage cases have denied requests that would require a review of other policy holder files." (Travelers Defendants' Opp. at pp. 8-9) (citing *Gold Fields Am. Corp. v. Aetna Cas. & Sur. Co.*, No. 19879/89, 1994 N.Y. Misc. LEXIS 709 (Sup. Ct. N.Y.

County Mar. 3, 1994) ("*Gold Fields I*") and *Convermat Corp. v. St. Paul Fire & Marine Ins. Co.*, No. 06-CV-1045, 2007 U.S. Dist. LEXIS 69102 (E.D.N.Y. Sept. 18, 2007)).

Defendant Arrowwood joins in Travelers Defendants' arguments and asserts that it does not have a central collection of files and uses off site storage facilities; as such, "[i]t would be a tremendous undertaking of time, expense and labor to try to locate such documents." (Trent Affidavit ¶¶ 7, 10, 17). Defendant Arrowwood states that:

> . . . other policyholder files and coverage litigation files for a period of 28 years will not show the terms and conditions of a policy issued in 1974 as policy terms changed over those years. Moreover, these documents will not show that Plaintiff Spiegel was an additional insured under any policy potentially issued to Marvex Processing & Finishing Corp. A specific policy endorsement is necessary to show that Spiegel was an additional insured. Even if an additional insured endorsement contains standard language, the plaintiff would still need to fill in the blanks regarding the additional insured's name and site location, which simply cannot be obtained from sample policy forms.

(Trent Affidavit ¶13).

Continental Defendants join in Travelers Defendants' arguments, adding that their files are confidential and providing the requested information would be unduly burdensome because, *inter alia*: (a) most of the material requested is likely in hard copy form due to age and these physical files are stored at facilities nationwide; (b) they cannot perform key word searches to identify responsive documents; and (c) they do not have any way to search for the policy forms and broad form endorsements requested. (Barriball Affidavit ¶¶ 5-6, 9-17).

Defendant GNY argues that Document Demand Nos. 2 and 4 are overbroad and seek irrelevant information. (Defendant GNY Opp. at pp. 8-9). With respect to Document Demand Nos. 7, 8, and 9, Defendant GNY asserts that it would be unduly burdensome and disproportionate to Plaintiffs' needs to require it to track down every liability policy issued to a

New York domiciled insured between 1955 and 1982, in addition to related documents. (*Id.* at p. 10). Defendant GNY does not index its documents according to specific properties, the type of coverage provided, specific provisions, or the domicile of the insured, and thus, it would need to engage in a laborious manual review to identify each and every liability policy issued to a New York domiciled commercial insured from 1955 to 1982. (*Id.* (citing Ragusa Affidavit ¶¶ 18-20)). Defendant GNY also argues that the policies issued to other insureds have no relevance to the policies on Attachment A and the information sought is confidential. (Defendant GNY Opp. at p. 11).

Defendant U.S. Fire argues that information from other policyholders is irrelevant and courts "have uniformly rejected such requests." (Steinke Affirmation ¶14). Defendant U.S. Fire states that its authorized representative, RiverStone Claims Management LLC, does not have a centralized document management system, and therefore, it would need to search thousands of boxes of documents warehoused in multiple locations (and manually review documents on microfiche) to identify possible responsive documents. (Glover Affidavit ¶¶ 8, 9). According to Defendant U.S. Fire, the shipping costs to review these boxes would be $6,000,000.00, while the single U.S. Fire policy in this action purportedly has a coverage limit of $150,000.00. (*Id.* ¶ 10). Defendant U.S. Fire further contends that other policyholder files are commercially sensitive and contain confidential and/or privileged information. (*Id.* ¶ 12).

Chubb Defendants argue that Document Demand Nos. 2 and 4 are overbroad based upon the definition of "Additional Policies" and it would be unduly burdensome for them to compile, review, and produce every policy they ever issued. (Chubb Defendants' Opp. at pp. 7-8). With respect to Document Demand Nos. 7, 8, and 9 and Interrogatory Nos. 16 and 17, Chubb Defendants argue that it would be both unduly burdensome and disproportionate to Plaintiffs'

needs to require them to track down and produce every liability policy issued to a New York domiciled commercial insured between 1955 and 1982, which would, at a minimum, be 650,000 policies. (*Id.* at pp. 8-9 (citing McCurin Affidavit ¶¶ 9, 22)). Chubb Defendants assert that their records are not indexed according to the type of coverage provided, the type of insured or the domicile of the insured and, as such, it would take 50,000 hours and hundreds of thousands (if not millions) of dollars to search for potential responsive documents. (Chubb Defendants' Opp. ¶¶ 18, 19; p. 9 (citing McCurin Affidavit ¶¶ 21-25)). Chubb Defendants also assert that the information sought is irrelevant and seeks non-public information of companies that have an interest in maintaining confidential business affairs. (Chubb Defendants' Opp. at p. 9).

C&I Defendants argue that obtaining the information sought in Interrogatory Nos. 16 and 17 would be burdensome as its claim system does not allow for searches by state, domicile, or specific forms or endorsements, and thus, it would require a page by page analysis. (C&I Defendants' Opp. at p. 7 (citing DiDonato Affidavit ¶ 8)). C&I Defendants challenge the relevance of any endorsements related to policies during years in which they did not allegedly cover the Frost Street Properties. (C&I Defendants' Opp. at p. 7). C&I Defendants claim that any response would be duplicative of information that Plaintiffs or their expert already possess. (*Id.* at p. 8).

In their Reply, Plaintiffs argue that "[c]ontrary to certain Defendants' exaggerated assertions, Plaintiffs do not seek 'documents relating to all policies ever issued by Defendants to anyone at any time . . . Rather, Plaintiffs seek only documents relating to third party liability policies issued by Defendants in New York during the Relevant Period." (Reply at p. 6). Plaintiffs argue that "[t]he fact that Defendants have elected to store their records in various off-site facilities and index them in particular ways does not relieve them of their obligations to

disclose all material and necessary matter." (Reply at pp. 6-7 (citing *Wynmoor Cmty. Council, Inc. v. QBE Ins. Corp.*, 280 F.R.D. 681, 686 (S.D. Fla. 2012) and *LG Display Co., Ltd. v. Chi Mei Optroelectronics Corp.*, No. 09CV2408-L(POR), 2009 U.S. Dist. LEXIS 6362 (S.D. Cal. Jan 28, 2009)). Plaintiffs acknowledge that the Commercial Division Rules require proportionality in discovery but assert that "[t]he amount in controversy is substantial, the Relevant Period spans several decades, and the adverse parties are sophisticated insurance companies that are well-versed in the practices of commercial litigation." (Reply at p.7). Plaintiffs claim that they are "[e]ntitled to any of Defendants' policies for which any Plaintiff is an insured or additional insured, as the terms of policies issued before or after the missing policy are evidence of the missing policies' content." (*Id.* at p. 8).

b. Analysis and Ruling

Regarding Plaintiffs' request for Additional Policies and documents referring or relating to Additional Policies (Document Demand Nos. 2 and 4, respectively), some courts in lost policy cases have acknowledged that renewal policies can constitute probative evidence of the terms and conditions in an original policy. *See, e.g., Estee Lauder Inc. v. Onebeacon Ins. Group, LLC*, No. 602379/05, 2012 N.Y. Misc. LEXIS 902, at *4 (Sup. Ct. N.Y. County Feb. 29, 2012) (acknowledging the presumption, in a lost policy case, that "the terms of a renewal policy are the same as the terms of the policy that it renewed"); *Kleenit, Inc.*, 486 F. Supp. 2d at 131 ("It is true that some cases have held that the material terms of a missing policy can be established through competent testimony suggesting that a later policy was probably a renewal of the earlier policy"). Thus, to the extent policies were issued to Plaintiffs as insured or additional insureds, which would cover the damage alleged in the Amended Complaint, such policies may constitute evidence of the terms and conditions in the policies on Attachment A. Notwithstanding the

above, Document Demand Nos. 2 and 4 bear a number of defects.

First, whereas Plaintiffs defined "Additional Policies" in their Interrogatories as "policies in the possession of the [insurance carrier] not listed on Attachment A concerning the Frost Street Properties," they defined "Additional Policies" in their Document Demands much more broadly as "policies in the possession of the [insurance company] not listed on Attachment A." Although Plaintiffs may have intended to seek only policies, or documents involving policies, that name them as an insured or additional insured with respect to the Frost Street Properties (e.g. renewal policies), Document Demand Nos. 2 and 4 call for the production of many more documents. As written in the Document Demands, Additional Policies would mean every single policy issued during a twenty-eight year period. Such a demand would encompass documents that clearly have no relevance or no bearing on the claims in this case.

Second, Plaintiffs impose the same time periods on all Defendants, notwithstanding the fact that they each allegedly issued policies during different time periods.

Third, Document Demand Nos. 2 and 4 fail to specify the documents sought with reasonable particularity and the Special Referee cannot glean from the Motion which documents Plaintiffs intended to target. Some Defendants advised that they can only search their document management system by insured and policy number, not by additional insured or location. (Oral Argument Transcript at 21:18-21:23 (Travelers Defendants can identify policies where Plaintiffs were named as additional insureds if Plaintiffs provide the name of the primary policyholder)). While it is true that Plaintiffs should not be penalized for the manner in which Defendants have maintained their non-digitized files, Plaintiffs have an obligation to identify the documents sought with some degree of particularity so as not to go on a fishing expedition, and in the Special Referee's view have failed to do so here, for instance, by limiting the demand to obtain

policies issued to enumerated primary policyholders who listed (or likely listed) them as additional insureds.

Whereas the Special Referee has discretion to modify or narrow document demands, it is not the Special Referee's responsibility or role to rewrite document demands, in *toto* and the Special Referee has no way of knowing who listed (or likely listed) Plaintiffs as additional insureds in connection with the Frost Street Properties. Accordingly, the Motion is denied with respect to Document Demand Nos. 2 and 4.

Document Demand Nos. 7, 8, and 9 and Interrogatory Nos. 16 and 17 all seek information concerning terms specifically included in policies issued to other New York domiciled commercial insureds.[22] As set forth below, the Special Referee denies each of these Document Demands and Interrogatories since Plaintiffs have failed to demonstrate that responses thereto will result in the disclosure of relevant evidence or are reasonably calculated to lead to the discovery of information bearing on the claims asserted, they are overly broad, and they are duplicative.

Initially, it should be noted that it is unclear in Document Demand Nos. 7, 8, and 9 whether Plaintiffs are seeking specimen forms used in connection with New York domiciled commercial insureds (or information therein) or actual executed documents issued to these other insureds. The first sentence in Document Demand No. 7 makes no reference to forms and seeks "third-party liability part [sic], policy jacket and/or declarations that were issued by You to a New York domiciled commercial insured;" however, the second sentence begins with "to the extent that more than one form of third-party liability part [sic], policy jacket and/or declarations

[22] Document Demand No. 7 seeks, in part, "third-party liability part[s]." Plaintiffs do not define this term. Nevertheless, based on the description of this Document Demand in the Motion (*see* Amended Notice of Motion; Motion Memo at p. 3), the Special Referee assumes, for purposes of this Decision, that this was a typographical error and Plaintiffs intended to seek "third-party liability policies."

were issued . . . provide a third-party liability part [sic], policy jacket and/or declarations issued for each form . . . ." Document Demand Nos. 8 and 9 are similarly worded.

Assuming Plaintiffs are seeking actual executed documents issued to other insureds, the Special Referee finds that such disclosure is of questionable relevance and is overly broad. The Special Referee will not allow, as Travelers Defendants note, Plaintiffs to "stack up enough policies" to arrive at a "Jerry Spiegel Policy." (Oral Argument Transcript at 58:13-58:18).

The only authority Plaintiffs cite to establish that such other policies can even evidence the terms and conditions of missing policies is *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 106 (D.N.J. 1990). However, in *Nestle*, unlike in this case, the plaintiff did not seek coverage under a lost policy but rather sought coverage where defendant insurance carriers insisted that the language used in the identified policies did not cover specific environmental damage. *Id.* The case centered on interpreting language within located policies. *Id.* at 103, 106. Even still, taking into account relevance and burden, the Court only directed defendants to produce their "ten earliest and ten most recent underwriting files concerning environmental pollution claims." *Id.* at 107. The Court reasoned that such a sampling would demonstrate whether "defendants have acted in an inconsistent manner in resolving claims where similar policies were involved" and "could undermine defendants' position that the language in question is clear and unambiguous." *Id.* at 106. The *Nestle* Court did not direct the production of an unlimited number of files held by policyholders in the same state as the plaintiff insured so that the plaintiff insured could determine the terms of a policy.

The cases cited by Travelers Defendants in this regard are similarly distinguishable, where, like *Nestle*, they are outside of the lost policy context – focusing on interpreting language in a located policy; nevertheless, they all deny discovery of other insureds' files, declining to

direct the production of even a fixed number of files, based on the minimal relevance and/or massive burden it would impose on the insurer. *See, e.g., Leksi, Inc. v. Federal Ins. Co.*, 129 F.R.D. 99, 105-106 (Dist. N.J. 1989) (denying plaintiff's request for "information regarding the manner in which the insurers have applied the policy language to claims similar to [its own] made by other insureds" "[b]ecause although it may be considered remotely relevant, its production would be unduly burdensome and disproportionate to this litigation"); *Convermat Corp.*, 2007 U.S. Dist. LEXIS 69102 at *13 (denying discovery concerning defendant's denial of non-party claims where plaintiff and non-parties alike asserted losses stemming from the same natural disaster); *First Horizon Nat'l Corp. v. Houston Cas. Co.*, No. 2:15-cv-2235, 2016 U.S. Dist. LEXIS 142330, at *26 (W.D. Tenn. Oct. 5, 2016) ("discovery of other claims is not relevant to interpretation of the policy or the Plaintiffs' bad faith claims against the Defendants"); *Gold Fields I*, 1994 N.Y Misc. LEXIS 709, at *10 (noting that "[e]ven if a relative handful of other claim files were disclosed by each defendant . . . [t]hat total would lead as the night does to the day to extensive, exhaustive and no doubt exhausting debates about whether each other case was really the same as this one" and, as such, denied the disclosure since it would be "insupportably burdensome and expensive and produce intolerable delay").

Assuming Plaintiffs are seeking specimen forms of documents issued to other insureds or information in connection therewith under Document Demand Nos. 7, 8, and 9 and Interrogatory Nos. 16 and 17, the Special Referee finds that such documents and information could theoretically be relevant, along similar lines as those specimen forms issued by a Rating Bureau and discussed in connection with Document Demand No. 6 and Interrogatory No. 13 above. However, Plaintiffs admit that there is only one "general form" which would have been "put together" by a Rating Bureau and approved by "the insurance departments on [Defendants']

behalf." (Oral Argument Transcript at 56:15-57:13). If, as Defendant GNY's counsel points out, "all the forms are the same," it is unclear why Plaintiffs are seeking forms provided by Rating Bureaus (as requested in Interrogatory No. 13) "*and* hundreds of other policies." (Oral Argument Transcript at 78:14-78:19) (emphasis added).

Further, Document Demand Nos. 7, 8, and 9 and Interrogatory Nos. 16 and 17 are overly broad in that they all apply the same time period regardless of any individual policy's effective date. Based on the foregoing, the Motion is denied with respect to Document Demand Nos. 7, 8, and 9 and Interrogatories Nos. 16 and 17.

3. Plaintiffs' Request for Documents Describing Alpha-Numeric Codes on the Policies Identified on Attachment A (Document Demand No. 10)

a. The Parties' Positions

Pursuant to Document Demand No. 10, Plaintiffs seek "All documents that describe the meaning and use of the alpha-numeric elements of the policy numbers identified on Attachment A for policies issued by [You] for the Relevant Period." (Maldonado Affirmation, Exhibits X-AH). Plaintiffs allege that "[a]lpha numeric codes were used between 1955 and 1982 by the insurers to differentiate between different types of coverages" and "[c]ourts have recognized that alpha-numeric codes may be useful in establishing the nature of coverage." (Motion Memo at pp. 17-18) (citing *Kleenit, Inc.*, 486 F. Supp. 2d at 121)).[23] Plaintiffs recognize that some

[23] *Kleenit* only mentioned alpha-numeric codes briefly in footnote 11, which stated, in full:

> It may be, for example, that the prefix 'ND' is significant. *See* Barry R. Ostrager & Thomas R. Newman, 2 Handbook on Insurance Coverage Disputes (13&t;th&t; ed. 2006) (noting that "[a]lpha-numeric designations or policy number prefixes may be of assistance in establishing the nature of coverage"). The Court notes that [defendant insurance company] appears to have characterized the 1967-1970 policy as one for 'comprehensive general liability.' (# 106, Exh. E at 2) But in the absence of any evidence suggesting that it was more likely than not that the terms in the two policies were the same, a jury would be left only to speculate as to the relationship between the two numbers.

Defendants have answered Interrogatories regarding alpha-numeric codes. (Motion Memo at p. 18).

In opposition, many Defendants assert that they have already provided sworn information explaining the meanings of the alpha-numeric codes in their responses to Interrogatories. (Travelers Defendants' Opp. at n. 7; Chubb Defendants' Opp. at p. 13; Proctor Affirmation ¶ 14; Barriball Affidavit at n. 1). While these Defendants set forth certain objections to Interrogatory No. 20 (as served on Defendant Federal, Defendant U.S. Fire, and Defendant GNY, Interrogatory No. 18), which stated that "[f]or [Defendant's] Related Policies with alpha-numeric codes on Attachment A to the Complaint, what do the alpha-numeric codes on Attachment A mean," at least some responded with an explanation of the alpha-numeric codes. (Maldonado Affirmation, Exhibits M at Interrogatory No. 20 (providing responses for Defendant Travelers Casualty and Defendant USF&G), Exhibit N at Interrogatory No. 20 (providing a response for Defendant Ace), Exhibit O at Interrogatory No. 20 (providing a response for Defendant Century), Exhibit P at Interrogatory No. 18 (providing a response for Defendant Federal), Exhibit R at Interrogatory No. 20 (providing a response for Defendant Continental Casualty and Defendant National Fire), Exhibit T at Interrogatory No. 18 (providing a response for Defendant GNY), and Exhibit V at Interrogatory No. 20 (providing a response for Defendant Arrowwood).

Chubb Defendants further argue that even assuming the relevance of Document Demand No. 10, Plaintiffs do not need "'all documents' describing the meaning of the alpha-numeric elements of the policy numbers identified on Attachment A," and the production of these documents is not "material and necessary to Plaintiffs' case as required by CPLR 3101(a), nor have Plaintiffs described the documents requested with 'reasonable particularity' as required by CPLR 3120(2)." (Chubb Defendants' Opp. at pp. 13-14).

Defendant GNY asserts that it already produced a document describing the meaning of the alpha-numeric policies allegedly issued by it (Weintraub Affirmation, Exhibit D) and Plaintiffs have no need for further discovery. (Defendant GNY's Opp. at p. 15).

Defendant US Fire does not address Document Demand No. 10.

Plaintiffs respond to the foregoing arguments, in their Reply, merely by stating that they are "entitled to information concerning Defendants' use of alpha-numeric codes during the Relevant Period, as they may help establish the nature of Plaintiffs' coverage." (Reply at p. 8).

b. Analysis and Ruling

Plaintiffs have not demonstrated the need for Defendants to respond to Document Demand No. 10 and provide "all documents" describing the meaning and use of these alpha-numeric codes. Plaintiffs have failed to show that documents, other than the key or legend defining the alpha-numeric codes used, will result in relevant evidence or are reasonably calculated to lead to information bearing upon the claims asserted. For instance, Plaintiffs have not argued, let alone substantiated an argument, that Defendants used alpha-numeric codes in a manner that would contravene the plain language or deviate from the ordinary use thereof. Further, like in other demands considered, the "Relevant Period" is too broad in that it fails to take into account the effective dates for each policy at issue.

At most, Plaintiffs have demonstrated the need for Defendants to respond to Interrogatory No. 20 (as served on Defendant Federal, Defendant U.S. Fire, and Defendant GNY, Interrogatory No. 18), which solely seeks the meaning of the alpha-numeric codes assigned to the policies listed on Attachment A. However, Plaintiffs did not move to compel responses to this interrogatory and the Special Referee will not compel disclosures that are not requested in

the Motion.[24] Accordingly, the Motion to compel a response to Document Demand No. 10 is denied.

4. Plaintiffs' Request for Training Manuals (Document Demand No. 13)

a. The Parties' Arguments

Pursuant to Document Demand No. 13, Plaintiffs request "All training manuals produced by [You] or Rating Bureaus for employees concerning liability policies during the Relevant Period." In efforts to justify this demand, Plaintiffs assert, without any support, that "[e]ither independently or working in conjunction with Rating Bureaus, the insurers produced training manual[s] [sic] for their employees and agents involved with the underwriting of commercial liability policies." (Motion Memo at p. 18). Plaintiffs maintain that "[u]pon information and belief, these manuals contain information on the content of form commercial policies and state requirements for commercial policies." (*Id.*).

In opposition, Travelers Defendants argue that Plaintiffs have failed to demonstrate how training manuals, to the extent they exist, establish the existence, terms, or conditions of the specifically alleged policies. (Travelers Defendants' Opp. at p. 19 (citing Velez Affidavit ¶ 29; Fowler Affidavit ¶ 33)). Travelers Defendants assert that, despite reasonable searches, they have not located any training manuals in effect between 1955 and 1982. (Travelers Defendants' Opp. at p. 19 (citing Velez Affidavit ¶ 29; Fowler Affidavit ¶ 33)). (*But see* Oral Argument Transcript at 53:3-53:15 (counsel is unable to confirm whether Travelers Defendants conducted an electronic search or a manual search of physical documents to locate these manuals)).

[24] To the extent that Plaintiffs believe Defendants, or any one of them, have not sufficiently responded to Interrogatory No. 20 (as served on Defendant Federal, Defendant U.S. Fire, and Defendant GNY, Interrogatory No. 18), Plaintiffs' counsel should meet and confer with the appropriate opposing counsel and, if the issue is not resolved, seek leave from the Special Referee to file a motion to compel a response thereto.

Defendant Arrowwood and Continental Defendants join in Travelers Defendants' arguments. (Defendant Arrowwood's Joinder at p. 1; Continental Defendants' Joinder at p. 2). Defendant Arrowwood further alleges that it does "not have a central collection of files where the information sought regarding 'training manuals' if any issued over a 28-year span could be easily retrieved" and, as such, "[r]esponding to this request would require searching through multiple systems, as well as manually searching through thousands of files." (Proctor Affidavit ¶ 15).

Chubb Defendants and Defendant GNY argue that Plaintiffs failed to demonstrate a nexus between the training manuals and the existence, issuance, terms, and conditions of the policies at issue. (Chubb Defendants' Opp. at p. 14; Defendant GNY's Opp. at p. 16). They argue that Document Demand No. 13 is overly broad, is unduly burdensome, does not seek documents that are material and necessary to the case, and seeks documents that are beyond the scope of Phase 1 discovery. (*Id.*).

Defendant U.S. Fire similarly argues that "[a]side from the extreme expense, time and burden such a request would impose on [it] (see the accompanying Glover Affidavit), Plaintiffs have offered no rational justification for compelling the production of such items." (Steinke Affirmation ¶16).

Plaintiffs respond to the above arguments by asserting that "[D]efendants[']' training manuals from the Relevant Period may include information concerning the content of Defendants' form commercial policies . . . ." (Reply at p. 8).

b. Analysis and Ruling

Plaintiffs' argument assumes, based solely on information and belief, that Defendants provided training manuals to their employees between January 1, 1955 and December 31, 1982

and such manuals addressed the content of form policies. Plaintiffs' counsel specifically stated at Oral Argument, "I don't know what's in the training manuals, but I'd like to know" and "I don't know, again, what these training manuals look like . . . that's what discovery is about." (Oral Argument Transcript at 75:17-75:19). While discovery may be about finding relevant documents to support a claim, a litigant bears the obligation to show that the requested disclosure will result in relevant evidence or is reasonably calculated to bear on the claims asserted. *D' Alessandro*, 137 A.D.3d at 1196.

Plaintiffs provide no basis to support their request for training manuals. At Oral Argument, Plaintiffs' counsel conclusively stated that "My expert tells me that these training manuals would have been produced for training of, say, an agent issuing commercial liability policies, as part of these manuals there would be, according to my expert, detailed information about what the policies contained" and "[i]n some cases they would have copies of the forms that were negotiated on their behalf with the ratings bureaus and various other information." (*Id.* at 88:23-89:10). However, Plaintiffs' counsel did not submit any expert affidavit in support of the Motion and the Special Referee cannot afford this hearsay testimony any weight. The Special Referee will not order Defendants to search nearly thirty years of records, especially in light of the undue burden each Defendant has articulated, based solely on conclusory assertions related to relevance. Document Demand No. 13 is further overly broad where it imposes the same relevant time period on all Defendants, regardless of when the policies that pertain to them were in effect. Therefore, the Special Referee denies the Motion with respect to Document Demand No. 13.

5. Documents and Information Concerning Prior Coverage Litigation (Document Demand No. 14 and Interrogatory No. 21)

a. The Parties' Arguments

Plaintiffs seek, through Document Demand No. 14, "All documents, including pleading,

policies, and litigation files for any coverage litigation commenced against You by any party for liability coverage for any policy issued by You during the Relevant Period." Plaintiffs further seek, through Interrogatory No. 21, information as to whether Defendants have "been a party to any other coverage litigation for commercial liability policies issued to other parties during the Relevant Period." (Maldonado Affirmation, Exhibits B-L, X-AG). Plaintiffs do not provide any explanation for why the document demand is limited to instances where Defendants are sued, unlike the interrogatory, and why the document demand extends to all policies, unlike the interrogatory which is limited to commercial policies. Plaintiffs maintain that this discovery is material and relevant because:

> [t]he litigation files in other matters contain highly relevant information concerning standard policy terms, names of potential witnesses, testimony of insurer employees and experts on standardization policies and form policies, information on spoliation of evidence by insurers, relationship with Rating Bureaus, drafting histories of form policies, filing of form polices with state insurance bureaus, and other proof of content of missing policies.

(Motion Memo at p. 19).

In opposition, Travelers Defendants assert that Plaintiffs' argument is speculative and the disclosure requested is overly burdensome (for the same reasons discussed in Point III(C)(2) above) since they would have to (1) identify and review all claim and legal files from 1955 to the present to determine which dealt with policies issued between 1955 and 1982; (2) identify and contact thousands of law firms utilized in connection with these legal files; and (3) comply with and/or seek to modify existing protective orders prior to producing responsive documents. (Travelers Defendants' Opp. at pp. 13-15 (citing Velez Affidavit ¶¶ 22-27 and Fowler Affidavit ¶¶ 24-31)). Travelers Defendants maintain that providing the requested documents and information would take years and impose a substantial cost. (Travelers Defendants' Opp. at p. 15

(citing Velez Affidavit ¶ 27 and Fowler Affidavit ¶ 31)). Travelers Defendants state that courts in New York, as well as in other jurisdictions, have rejected analogous requests "because of the sheer irrelevance and undue burden such a fishing expedition would impose." (Travelers Defendants' Opp. at pp. 15-16 (citing, among other cases, *Gold Fields I*, 1994 N.Y Misc. LEXIS 709, at *5-6)).

Defendant Arrowwood joins in Travelers Defendants' arguments and states that "[t]he documents plaintiffs are requesting from other policyholder files and coverage litigation files for a period of 28 years will not show the terms and conditions of a policy issued in 1974 as policy terms changed over those years." (Proctor Affidavit ¶ 13).

Continental Defendants also join in Travelers Defendants' arguments and state that "[g]iven that there is no index that would enable Continental to identify only those coverage litigation files involving polices issued during the 1955-1982 period, the only way to identify such materials would be to manually review ***ALL*** files in Continental's possession pertaining to any coverage lawsuits to which it was ever a party." (Barriball Affidavit ¶ 12 (emphasis in original)).

Chubb Defendants and Defendant GNY argue that the discovery sought in this category is irrelevant, routinely denied by courts, and would be extremely burdensome to obtain. (Chubb Defendants' Opp. at pp. 9-11 (citing *Brown v. Paul Revere Life Ins. Co.*, No. 00 Civ. 9110, 2001 U.S. Dist. LEXIS 16626 (S.D.N.Y. Oct. 11, 2001) and *Adams v. Allstate Ins. Co.*, 189 F.R.D. 331, 333 (E.D. Pa. 1999); Defendant GNY's Opp. at pp. 11-13 (citing same cases)). In terms of burden, both Chubb Defendants and Defendant GNY state that they cannot search their databases specifically for lawsuits involving coverage claims under policies issued between January 1, 1955 and 1982, their databases are not exhaustive and they would need to perform a manual

review to provide the discovery sought, and counsel's assistance would be needed to review every file for confidential and privileged documents. (Chubb Defendants' Opp. at p. 11 (citing McCurin Affidavit ¶¶ 28-32); Defendant GNY's Opp. at pp. 12-13 (citing Ragusa Affidavit ¶¶ 22-28)).

C&I Defendants argue that Interrogatory No. 21 is not reasonably designed to produce relevant information and it would be unduly burdensome to review every claim made regarding polices issued in a twenty-eight year period to determine if litigation resulted. (C&I Defendants' Opp. at p. 8 (citing DiDonato Affidavit ¶ 7)). C&I Defendants note that while their electronic system identifies declaratory judgments, they would need to search their entire database since there is no guarantee that their electronic system would pick up every declaratory judgment action and a search filtered by date of loss for the relevant period already revealed 320 claims files. (C&I Defendants' Opp. at p. 9 (citing DiDonato Affidavit ¶¶ 8-13).

Defendant U.S. Fire argues that courts have routinely denied requests like these. (Steinke Affirmation ¶ 14 (citing a number of cases including *Cantor v. Equitable Life Assur. Soc'y of the U.S.*, No. CIV. A. 97-5711, 1998 U.S. Dist. LEXIS 8435 (E.D. Pa. June 9, 1998), *Fidelity & Deposit Co. v. McCulloch*, 168 F.R.D. 516 (E.D. Pa. 1996), and *North River Ins. Co. v. Greater N.Y. Mut. Ins. Co.*, 872 F. Supp. 1411 (E.D. Pa.1995))). Defendant U.S. Fire maintains that it would be unduly burdensome to comply with Document Demand No. 14 because:

> [i]t would first need to identify all such litigations and then determine where any such files are stored. Such files are often stored by RiverStone's outside counsel, who would need to perform their own searches for documents to determine whether the documents sought are subject to a protective order issued by the court presiding over the litigation, as well as screen such documents for privilege and prepare a privilege log.

(Glover Affidavit ¶ 11).

In their Reply, Plaintiffs argue that Document Demand No. 14 and Interrogatory No. 21 are not overbroad because the Motion does not seek "every coverage litigation in which [Defendants] have ever been involved," but rather "expressly cabins [sic] this request to litigation files from the Relevant Period." (Reply at p. 6). Plaintiffs maintain that "[t]he requested litigation files may contain, among other things, critical information concerning standard policy terms, the name of potential witnesses, and the testimony of Defendants' employees and experts on policy standardization." (*Id.* at p. 8).

b. Analysis and Ruling

As a preliminary matter, Plaintiffs have failed to provide any legal support, in the form of case law or otherwise, that would justify the requested disclosure. By contrast, Defendants have cited case law, albeit, outside of the lost policy context, establishing that discovery requests for coverage disputes and litigation involving other policyholders are routinely denied. *E.g. Radicia v. Aetna Casualty & Surety Co.*, 145 A.D.2d 994 (4th Dep't 1988); *Gold Fields I*, 1994 N.Y. Misc. LEXIS 709 at *3; *Retail Ventures, Inc. v. Nat'l Union Fire Ins. Co.*, No. 2:06-cv-443, 2007 U.S. Dist. LEXIS 83425, at *15 (S.D. Ohio Nov. 8, 2007); *Fidelity & Deposit Co.*, 168 F.R.D. at 525-26; *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, No. 88-9752, 1991 U.S. Dist. LEXIS 12959, at *11 (E.D. Pa. Sept. 16, 1991); *Monsanto Co. v. Aetna Cas. & Sur. Co.*, No. 88C-JA-118, 1990 Del. Super. LEXIS 494, at *11 (Super. Ct. Del. May 30, 1990).

In many of these cases, even where the plaintiff insured requests such information for the narrow purpose of supporting a policy interpretation and identifying a prior inconsistent statement by the insurer, the court has denied the request because it is overly broad, seeks irrelevant information, and/or is unduly burdensome. *See, e.g., Gold Fields I*, 1994 N.Y. Misc. LEXIS 709 at *3 (acknowledging defendant's treatment of other insureds may have "some

marginal relevance" but denying the request based on the heavy burden of culling the documents, the desire to ensure that discovery remains proportional to the needs of the case, and the fact that even requiring a small production of files would "expand discovery into a myriad of small, tangential universes of dispute"); *Retail Ventures, Inc.*, 2007 U.S. Dist. LEXIS 83425, at *15 ("this court is not persuaded that information related to other policyholders' claims and complaints is relevant"); *Fidelity & Deposit Co.*, 168 F.R.D. at 525-26 (finding an interrogatory seeking information about litigation concerning other policyholders irrelevant and overbroad); *Monsanto Co.*,1990 Del. Super. LEXIS 494, at *11 (excluding discovery of other policyholders' information because "there are simply too many variables to render the information relevant or meaningful" and the burden imposed overrides any arguable relevance).

Cases cited by Defendants involving bad faith or fraud claims against insurance carriers are in accord. *See, e.g., Rhone-Poulenc Rorer, Inc.*, 1991 U.S. Dist. LEXIS 12959, at *11 (acknowledging that other courts "have ruled that other lawsuits filed against a party are not reasonably calculated to lead to the discovery of admissible evidence" and such disclosure "not only involves enormous inconvenience and management difficulties, but also entails a frightening potential for spawning unbearable side litigation which . . . defeats the purpose of spirit of the discovery rules themselves"); *Radicia*, 145 A.D.2d at 994 ("[i]nformation with respect to disputes with other policyholders is neither material nor necessary to this action because plaintiffs' allegation of bad faith relates only to defendant's disclaimer of coverage on their claim").

The Special Referee finds the above case law persuasive in this context. Further, Document Demand No. 14 and Interrogatory No. 21 are defective on a number of grounds.

First, Document Demand No. 14 and Interrogatory No. 21 are overbroad in time and

scope. Plaintiffs' argument that they are narrowly tailored because they are limited by a twenty-eight year period is unavailing where, as discussed numerous times above, the policies identified on Attachment A all pertain to different years. Further, despite the plain language of Document Demand No. 14 and Interrogatory No. 21, Plaintiffs admit that they are "not looking to get a Texas litigation file on a Texas policy." (Oral Argument Transcript at 40:4-40:6). In this regard, the Special Referee acknowledges Travelers Defendants' frustration that Plaintiffs have "become a bit of a moving target . . . because [Mr. Maldonado] says what he wants . . . but what he asks for [on paper] is everything." (*Id.* at 44:4-44:7).

Second, Plaintiffs have failed to substantiate their claim that the materials found in other litigation files are relevant to the claims in this action or will likely contain the critical information alleged. Plaintiffs even admit that they do not know what the requested litigation files will contain. (*Id.* at 42:11-42:12 ("I just don't know what's going to be in those files")). The Special Referee will not, to coin Defendants Travelers' reference, open "a pandora's box" creating a "tremendous side show of litigation." (*Id.* at 44:8-44:16).

Considering the minimal (if any) relevance of unrelated coverage litigation and the heavy burden of responding to such discovery requests, some courts have ruled that, to the extent a plaintiff insured seeks unrelated coverage litigation documents or information, it can perform its own review on Lexis or Westlaw. *See, e.g., Fidelity & Deposit Co.*, 168 F.R.D. at 526; *Cantor*, 1998 U.S. Dist. LEXIS 8435, at *10.

The Special Referee agrees and finds that the discovery requests in this category are overly broad, seek irrelevant information, impose an undue burden, and are disproportionate to the instant action. Accordingly, the Special Referee denies Plaintiffs' Motion with respect to Document Demand No. 14 and Interrogatory No. 21.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs' Motion is denied in part and granted in part as follows:

1) Plaintiffs' Motion to compel responses to Document Demand Nos. 2 and 4 are denied;

2) Plaintiffs' Motion to compel responses to Document Demand No. 6 is denied;

3) Plaintiffs' Motion to compel responses to Interrogatory Nos. 11, 12, and 13 (as served on Defendant Federal, Defendant U.S. Fire, and Defendant GNY, Interrogatory Nos. 9, 10, and 11) is granted subject to the Temporal Modification and Substantive Modifications set forth herein and Defendants shall have thirty (30) days to provide such responses;

4) Plaintiffs' Motion to compel responses to Document Demand Nos. 7, 8, and 9 and Interrogatories Nos. 16 and 17 (as served on Defendant Federal, Defendant U.S. Fire, and Defendant GNY, Interrogatory Nos. 14 and 15) is denied;

5) Plaintiffs' Motion to compel responses to Document Demand No. 10 is denied;

6) Plaintiffs' Motion to compel responses to Document Demand No. 13 is denied; and

7) Plaintiffs' Motion to compel responses to Document Demand No. 14 and Interrogatory No. 21 is denied.

Dated: December 1, 2017

SO DIRECTED:

MICHAEL CARDELLO III
Court-Appointed Special Referee

SHORT FORM ORDER

INDEX NO.: 622609-18

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Honorable Elizabeth H. Emerson

x

PREFERRED CONSTRUCTION, INC., ROBERT DALE AND SANDRA DALE,

Plaintiffs,

-against-

PATRIOT ORGANIZATION INC., PATRIOTS ORGANIZATION II, INC., AND JONATHAN SINGER,

Defendants.

x

MOTION DATE: 5-5-21
SUBMITTED: 5-6-21
MOTION NO.: 008-MOT D

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Upon the following papers read on this motion to compel ; Notice of Motion and supporting papers 159-162 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 163 ; Replying Affidavits and supporting papers ; it is,

ORDERED that the branch of the motion by the defendants which is pursuant to CPLR 3104 (d), for review of a decision of Special Master Michael Cardello III, Esq., dated March 26, 2021, is granted; and it is further

ORDERED that the motion is otherwise denied.

Upon reviewing the papers submitted in support of and in opposition to the motion, the court finds that the decision of the Special Master that the plaintiffs' document production complied with CPLR 3122 is not clearly erroneous or contrary to law (*see*, **Connors, Practice Commentaries**, McKinney's Cons Laws of NY, Book 7B, CPLR C3104:1A at 207, *citing* **CIT Project Fin. Credit Suisse First Boston LLC**, 7 Misc 3d 1002 [A]). Accordingly, the branch of the motion which is for an order compelling the plaintiffs to comply with CPLR 3122 is denied.

Dated: May 13, 2021

Elizabeth H. Emerson

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PREFERRED CONSTRUCTION, INC., ROBERT DALE and SANDRA DALE,	:	Index No. 622609/2018
Plaintiffs,	:	**DECISION ON IDL NUMBER 2**
-against-	:	
PATRIOT ORGANIZATION INC., PATRIOTS ORGANIZATION II, INC., and JONATHAN SINGER,	:	
Defendants.	:	

Currently before Michael Cardello III, Esq. as a result of an Order of Appointment, So Ordered by the Honorable Elizabeth H. Emerson on November 24, 2020, appointing him as Special Master (the "Special Master"), pursuant to New York Civil Practice Laws and Rules Sections 3104 and 4301 (the “Order of Appointment”), to supervise discovery in the above-mentioned action (the "Action") is Initial Dispute Letter #2 (the "Dispute Letter") submitted by Patriot Organization, Inc. ("Patriot I"), Patriot Organization II, Inc. ("Patriot II"), and Jonathan Singer ("Singer", collectively with Patriot I and Patriot II, the "Defendants") dated February 12, 2021.

Also before the Special Master, and in reply to the Dispute Letter, is the Response to the Dispute Letter (the "Response Letter") submitted by Preferred Construction, Inc. ("PCI"), Robert Dale, and Sandra Dale (Robert Dale, Sandra Dale and PCI are collectively referred to as the "Plaintiffs") dated February 22, 2021.

For the reasons set forth in detail below, and after consideration of the Dispute Letter and the Response Letter, the Special Master finds the following:

A. Defendants' request for an Order compelling PCI to amend its document production to comply with CPLR 3122 is **denied** without costs and fees. PCI's document production, as described and set forth in the Dispute Letter, complies with CPLR 3122.

B. Defendants' request for an Order directing PCI to respond to supplemental interrogatories to explain the methodology used in producing documents as part of its production is **denied** without costs and fees. Defendants have not satisfied their burden entitling them to conduct discovery solely relevant to PCI's document production.

C. Defendants' request for an Order directing PCI to respond to supplemental interrogatories to explain why documents were omitted from its production is **denied** without costs and fees.

D. Defendants are permitted to file a motion to compel the production of relevant, responsive documents they claim were requested and have not been produced as part of, or have been omitted from PCI's document production. Upon request, a briefing schedule will be scheduled.

A. Defendants' Request for an Order Compelling PCI to Comply with CPLR 3122

Defendants assert in the Dispute Letter that PCI[1] produced six (6) electronically stored information ("ESI") productions. In contrast, Plaintiffs state that only one ESI production was made. In any event, Defendants raise an issue with two aspects of PCI's document production, which Defendants describe as: "1. May 2020 Bates Numbered Production" and "3. Preferred Electronic Production", both identified on Exhibit 1 to the Dispute Letter. Defendants assert that both parts of the production are not "organized and labeled to the categories" in the Defendants' request, and that PCI's production is unsorted and noncompliant with CPLR 3122. Accordingly, Defendants seek an order compelling PCI to reorganize and reproduce these two parts of PCI's production to comply with CPLR 3122.

[1] Defendants' Dispute Letter seeks an Order compelling discovery and information from PCI only, and does not appear to be directed against Robert Dale or Sandra Dale.

In the Response Letter, Plaintiffs assert that the Defendants have failed to demonstrate non-compliance with CPLR 3122 because PCI has produced documents as they are kept in the regular course of business, which is permissible under CPLR 3122(c). Plaintiffs further assert, and Defendants do not contest, that PCI produced ESI "in native electronic format, with attachments, with metadata preserved, and as they are stored within the respective custodians' Outlook accounts." (Response Letter, p.2-3). The Plaintiffs also contend that PCI organized and labeled its productions as corresponding to categories cross-referencing the Defendants numbered requests. (Response Letter, p.3).

N.Y. CPLR 3122(c) provides that "[w]henever a person is required pursuant to such notice or order to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request." Although "no specific state statute addresses ESI, courts have interpreted the CPLR so as to be virtually parallel to the Federal provision set forth in Rule 34 of the Federal Rules of Civil Procedure." *Dartnell Enterprises, Inc. v. Hewlett Packard Co.*, 33 Misc.2d 1202(A), *4, 938 N.Y.S.2d 226 (Sup. Ct. Monroe Cnty. 2011) (internal quotations omitted) citing *Mosley v. Conte*, Index. No. 110623/2008, *13, 2010 WL 3536810 (Sup. Ct. N.Y. Cnty. 2010); *Delta Financial Corp. v. Morrison*, 13 Misc.3d 604, 608, 819 N.Y.S.2d 908, 911-12 (Sup. Ct. Nassau Cnty. 2006). Thus, generally producing ESI in its electronic native format satisfies the "regular course of business" provision of CPLR 3122(c). *See Dartnell Enterprises, Inc.*, 33 Misc.2d at *4.

A party complies with CPLR 3122(c) when its document production is organized and labeled in such a way that the requesting party can "know and understand" which documents apply to the separate discovery requests. *See H.P.S. Management Co. Inc. v. St. Paul Surplus*

Lines Ins. Co., 127 A.D.3d 1018, 1019 (2d Dep't 2015); *Big Bear LLC v. Yaghoubian*, Index No. 159087/2015, 2016 WL 2101422, *1-2 (Sup. Ct. N.Y. Cnty. 2016) (despite plaintiff requesting documents be produced as they are kept in the usual course of business, defendants still needed to provide appropriate responses and indicate which documents correspond to plaintiff's request); *see also NGL Contracting Ltd. V. Toyota*, Index No. 652039/2017, 2019 WL 5266846, *2 (Sup. Ct. N.Y. Cnty. 2019).

The PCI production at issue in the Dispute Letter, as evidenced by Defendants' Dispute Letter and the exhibits to the Dispute Letter, complies with CPLR 3122(c) in that (1) PCI produced e-mails in electronic and native format, with metadata and attachments with descriptive file folders, and as the electronic documents were stored within each custodian's electronic account and (2) PCI organized its production in a way for the Defendants to ascertain and understand which folders contained documents responsive to each category of the Defendants' demands.

Accordingly, the submissions of both Plaintiffs and Defendants demonstrate that the two aspects of PCI's production as described in the Dispute Letter, complies with CPLR 3122(c). The Defendants request for an Order compelling PCI to comply with CPLR 3122 is denied without costs and fees.

B. Defendants' Request for an Order Directing PCI to Respond to Supplemental Interrogatories Explaining their Method of Production

Defendants request that PCI should be ordered to respond to supplemental interrogatories concerning the method and manner of PCI's document production, including an explanation of how it was prepared, who prepared it, what emails were omitted and "other foundational information" concerning how the document production was "collected, searched and produced." (Dispute Letter, p.3) However, the referenced supplemental interrogatories have not been served

nor are they annexed to the Dispute Letter. Accordingly, the determination of Defendants' request for such relief is based upon Defendants' characterization of such supplemental interrogatories.

Notwithstanding the foregoing, any "supplemental interrogatories" as described in the Dispute Letter that are directed solely to the sufficiency of PCI's document production would constitute "discovery on discovery." A party requesting "discovery on discovery" has the burden of demonstrating a specific discovery deficiency or facts suggesting that a production is deficient. *See Freedman v. Weatherford Int'l*, No. 12 Civ. 2121, 2014 WL 4547039, *2 (S.D.N.Y 2014); The Sedona Principles, Third Ed., 19 Sedona Conf. J. 1, Principle 7. Unless Defendants can demonstrate the foregoing, PCI is best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing its own electronically stored information, and such "discovery on discovery" is not necessary. (*See Id.,* Principle 6). The court in *Orillaneda v. French Culinary Institute* stated that:

> Courts supervising discovery are often confronted by the claim that the production made is so paltry that there must be more that has not been produced or that was destroyed. Speculation that there is more will not suffice; if theoretical possibility that more documents exist sufficed to justify additional discovery, discovery would never end.

No. 07 Civ. 3206, 2011 WL 4375365, *6 (S.D.N.Y. 2011) (internal quotations omitted) (internal citations omitted).

A party must point to the existence of additional responsive material or be able to deduce that additional material exists based on documents already produced. *Id*. In terms of document culling and production, perfection is not required, nor is the use of the "best tool", but rather the production results must be reasonable and proportional. *See Freedman*, 2014 WL 4547039 at *3; *Hyles v. New York City*, 10 Civ. 3119, 2016 WL 4077144 (S.D.N.Y. 2016). In addressing

previously cited arguments by Defendants, PCI's choice not to employ search terms during the culling process of their production alone is not a deficiency.

Like the movant in *Orillaneda*, the Defendants have failed to demonstrate a deficiency in PCI's document production or any facts suggesting the production is likely deficient warranting discovery solely relevant to the sufficiency of PCI's document production. *See Orillaneda*, 2011 WL 4375365 at *6, *9. Like in *Freedman*, the Defendants' request should be denied where Defendants have not identified any document deficiencies and the failure to produce responsive documents. *See Freedman*, 2014 WL 4547039 at *3. Thus, Defendants' request for an order compelling Plaintiffs to respond to supplemental interrogatories explaining the methodology used to make their production is denied.

In addition, Defendants have failed to demonstrate the incomplete production of responsible documents or facts sufficient to require PCI to respond to supplemental interrogatories concerning the PCI email addresses not searched, including the referenced email addresses of PCI project managers. Nor have Defendants demonstrated the need for supplemental interrogatories concerning the cover pages to previous submissions to counsel/the Court that may have been produced with certain job files. With respect to Defendants' request for responses to supplemental interrogatories concerning the identification of all credit cards and all bank accounts, Defendants have not demonstrated facts sufficient to warrant the requested relief. In fact, Defendants expressly state that "[b]efore these issues of the manner of the production can be addressed, the universe of credit cards which may be used by PCI in this action needs to be identified." (Dispute Letter, p.3-4). Likewise, Defendants also state, "[b]efore this issue can be addressed, PCI should respond to a supplemental interrogatory… ".

Id. Accordingly, Defendants' request for an Order compelling Plaintiffs to respond to such supplemental interrogatories is denied without costs and fees.

C. Defendants' Request for PCI to Explain Missing Documents and the Production of Additional Documents

Inasmuch as Defendants seek an order directing PCI to respond to supplemental interrogatories regarding the manner of production PCI employed to determine, assemble and produce responsive documents and/or the organization and labeling of such responsive documents, the Defendants request for is denied without costs and fees for the above-mentioned reasons.

Defendants also contend that there are specific documents "missing" from PCI's production and provides examples at pages 4-5 of its Dispute Letter. Defendants assert that PCI's production of responsive documents must be supplemented. PCI disputes Defendants' contentions, and further objects, among other things, to the production of documents and relevant to the order of which, according to PCI, Defendants have produced.

If the Defendants believe that responsive documents relevant to this Action have not been produced by PCI and should have been produced as part of PCI's production, then the Defendants must submit a motion to compel. Upon request by the Defendants, a briefing schedule shall be set regarding the same.

SO ORDERED this 26th day of March, 2021

Michael Cardello III
Michael Cardello III
Special Discovery Master