UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

10 Civ. 00457 (GLS/DRH)

MCGINN, SMITH & CO., INC.
McGINN, SMITH ADVISORS, LLC,
McGINN, SMITH CAPITAL HOLDINGS CORP.,
FIRST ADVISORY INCOME NOTES, LLC,
FIRST EXCELSIOR INCOME NOTES, LLC,
FIRST INDEPENDENT INCOME NOTES, LLC,
THIRD ALBANY INCOME NOTES, LLC,
TIMOTHY M. MCGINN, AND
DAVID L. SMITH, LYNN A. SMITH,
DAVID M. WOJESKI, Trustee of the David L.
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,
GEOFFREY R. SMITH, LAUREN T. SMITH, and
NANCY MCGINN,

Defendants,

LYNN A. SMITH, and
NANCY MCGINN,

Relief Defendants, and

DAVID M. WOJESKI, Trustee of the David L.
and Lynn A. Smith Irrevocable Trust U/A 8/04/04,

Intervenor.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' OPPOSITION TO FINRA'S MOTION TO QUASH SUBPOENAS

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Rules

Timothy M. McGinn and David L. Smith (the "Defendants"), by and through their undersigned attorneys, oppose the motion of the Financial Industry Regulatory Authority ("FINRA") to quash subpoenas as follows:

PRELIMINARY STATEMENT

FINRA's to quash is nothing more than an attempt to cover up its misconduct which violated the Defendants' Fifth Amendment right against self incrimination by compelling testimony under a threat of loss of their livelihood. The Defendants are parties to this action brought by the Securities and Exchange Commission ("SEC") and are entitled to use the discovery tools available pursuant to the Federal Rules of Civil Procedure to assist in their defense. The subpoenas *duces tecum* served upon FINRA and its employees are not meant to circumvent FINRA's discovery rules; rather, they are designed to expose FINRA's state action and provide Defendants with the evidence they need to exclude certain evidence relied upon by the SEC.

FINRA has engaged in state action. It obtained information from Defendants under the guise of a private investigation, when it was really acting for the SEC. Defendants can demonstrate a *prima facie* case that such coordination was occurring. The SEC never interviewed the Defendants and it never requested a single document from them, even though it was authorized to do so by the beginning of January 2010. Instead, at the urging of the SEC, FINRA continued to delve into issues well beyond the scope of its disciplinary complaint against the Defendants. The additional compulsory discovery formed the basis for the SEC's complaint against the Defendants.

Assuming Defendants are correct, the testimony FINRA obtained to support the SEC's case was taken in flagrant violation of the Defendants' Fifth Amendment privilege against self incrimination. In that instance, the exclusionary rule may be invoked to suppress the evidence illegally obtained. Accordingly, the Defendants respectfully request that the Court deny FINRA's motion to quash the subpoenas *duces tecum*.

FACTS

For a detailed recitation of the relevant facts, the Defendants refer the Court to the Facts section of their Motion to Compel the Plaintiff to Answer Interrogatories and the supporting Declaration of Martin P. Russo, Esq. dated November 15, 2010 together with exhibits annexed thereto, Docket No. 189 ("First Russo Decl."). The procedural background to this motion is set forth in the parties' joint letter to the Court dated November 22, 2010, Docket No. 196.

ARGUMENT

I. FINRA'S MOTION SHOULD BE DENIED BECAUSE THE INFORMATION SOUGHT IS RELEVANT AND REASONABLY CALCULATED TO LEAD TO ADMISSIBLE EVIDENCE

The Court should deny FINRA's motion to quash because the information Defendants seek is relevant to their defense of the instant action. Subpoenas issued pursuant to Rule 45 of the Federal Rules of Civil Procedure are subject to the relevance requirements of Rule 26. *Heller v. City of New York*, No. 06 CV 2842(NG), 2008 WL 2965474, *2 (E.D.N.Y. April 11, 2008). Relevance in the context of discovery "'is an extremely broad concept.'" *Copantitla v. Fiskardo Estiatorio, Inc.*, No. 09 Civ. 1608(RJH)(JCF), 2010 WL 1327921,*9 (S.D.N.Y. April 5, 2010) (quoting *Condit v. Dunne,* 225 F.R.D. 100, 105 (S.D.N.Y. 2004). The information sought by subpoena must be relevant, but "need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." FRCP 26(b)(1).

The subpoenas Defendants served seek relevant information that specifically relate to their defense in the instant action that FINRA conducted its investigation as a state actor and violated their Fifth Amendment privilege against self incrimination. The privilege against self-incrimination is a fundamental right and "marks an important advance in the development of our liberty." *Kastigar v. U.S.*, 406 U.S. 441, 445, 92 S.Ct. 1653, 1655 (1972). "It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Id.* One may invoke the privilege to protect oneself against disclosure that reasonably believed could be used against oneself, or lead to evidence that could be used against oneself in a criminal prosecution. *See id.*

Generally, FINRA is a private, not a state actor. *See generally, D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002). Thus, one cannot assert one's Fifth Amendment right against self incrimination when providing testimony to FINRA. *Braun, Gordon & Co., v. Hellmers*, 502 F.Supp. 897, 902 (S.D.N.Y. 1980). Consequently, providing testimony to FINRA may risk "exposure to criminal liability." *D.L.Cromwell, Inc.*, 279 F.3d at 162.

FINRA's conduct, however, may be considered state action under certain circumstances. The Fifth Amendment restricts the conduct of not only the government, but also a private entity's conduct found to be "'fairly attributable'" to the government. *Id.* at 161 (citing *Lugar v. Edmonson Oil Co.*, 457 U.S.922, 937, 102 S.Ct. 2744 (1982)). "Actions of a private entity are attributable to the State if 'there is a sufficiently close nexus between the State and the challenged action of the . . . entity so that the action of the latter may be fairly treated as that of the State itself.'" *U.S. v. Stein*, 541 F.3d 130 (2d Cir. 2008) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449 (1974)) (holding that KPMG LLP was a state actor that

deprived employees' of their Sixth Amendment right to counsel). The nexus can be shown where the state has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice in law must be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 102 S.Ct. 2777, 2786 (1982). The nexus may also be shown where "the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'" *Id.* (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357, 95 S.Ct. 449, 456 (1974)). "'A nexus of state action exists . . . when the private actor operates as a *willful participant in joint activity* with the State or its agents, is controlled by an agency of the State, has been delegated a public function by the state, or is *entwined with governmental policies*.'" *Stein*, 541 F.3d at 147. (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 187 (2d Cir. 2005)).

Even the SEC has recognized that where there is a claim that FINRA is a state actor, the defendant should be allowed to conduct discovery and to present evidence of the issue at an evidentiary hearing. *In re Application of Justin F. Ficken,* Securities Act Release No. 34-54699 (Nov. 3, 2006) (remanding NASD decision barring respondent from industry for violation of Rule 8210 where NASD refused to allow discovery regarding NASD's interaction with state and federal agencies including the SEC and DOJ) (First Russo Decl. ¶ 51, Exhibit WW); *see also, In the Matter of Quattrone*, Securities Exchange Act Release No. 53547 (March 24, 2006) (remanding NASD decision barring respondent from industry for Rule 8210 violation where NASD failed to provide evidentiary hearing on state actor issue involving cooperation between NASD and SEC) (First Russo Decl., ¶ 50, Exhibit VV). Since its decision in *Quattrone*, the SEC has consistently remanded proceedings once the state actor issue is raised to allow for discovery and an evidentiary hearing on the issue. *In re Application of Gregg Heinze*, Securities Exchange

Release No. 34-56100 (July 19, 2007) (The SEC found that "Heize has identified specific evidence that warrants a further opportunity to develop and present his state actor claim.") (¶10, Exhibit F to the Declaration of Martin P. Russo, Esq. dated December 1, 2010 ("Second Russo Decl.")); *In re Application of Warren E. Turk*, Securities Exchange Release No. 34-55942 (June 22, 2007) (While noting that Turk had not identified evidence to establish his burden on a state action claim, the SEC found "[n]evertheless . . . he should have a further opportunity to develop and present his state action claim. Because the evidence presented to date might be the product of more than cooperation.") (Second Russo Decl. ¶ 11, Exhibit G).

Here, the nexus of state action exists because FINRA likely was taking direction from the SEC when it took testimony from the Defendants under the guise of the FINRA investigation. The established pattern of taking testimony on new subjects of interest to the SEC (after the conclusion of the FINRA examination and referral to the SEC), forwarding them to the SEC on a rolling basis just in time for the SEC to file a complaint without an investigation is too powerful to deny. FINRA makes much about the fact that its disciplinary proceeding is more limited than the SEC's complaint as evidence of the organizations' lack of coordination. To the contrary – that point is exactly the reason this Court should believe that FINRA was a "willful participant in joint activity" with the SEC. FINRA's investigation was virtually completed by October 2009 when the staff had referred its investigation to its enforcement division and the compliance conference with McGinn Smith had occurred.[1] First Russo Decl. ¶ 11, Exhibit J.

Once FINRA referred the matter to the SEC in December 2009, it began a new investigation of issues it had previously not explored – relating to the Trusts and the Defendants'

[1] FINRA's claim that there was a separate continuing Enforcement investigation which directly resulted in its disciplinary action is unpersuasive. All of FINRA's requests for testimony and information were made under the same routine examination file number – 20811752.

personal financial information (the latter of which is a highly unusual topic in FINRA investigations). It is clear that FINRA had no real interest in these matters since its April 2010 disciplinary proceeding against the Defendants include only allegations of purported violations relating to FIIN, FEIN, FAIN and TAIN. First Russo Decl. ¶ 37, Exhibit II. In contrast, the SEC's complaint includes the same allegations, in addition to alleged violations of the securities laws relating to the Trusts. Docket Nos. 1 and 100. Interestingly, the SEC never conducted one interview or deposition of the Defendants. The only explanation for FINRA's continued investigation into the Defendants relating to their personal assets and the Trusts is that it was doing so at the behest of the SEC.

Accordingly, there is *prima facie* evidence that FINRA was a state actor and its investigation violated the Defendants' Fifth Amendment rights against self incrimination. He documents and information Defendants seek are highly relevant to the state actor issue and reasonably calculated to lead to the discovery of admissible evidence. Thus, the Court should deny FINRA's motion to quash the subpoenas in its entirety.

II. THE COURT SHOULD DENY FINRA'S MOTION TO QUASH THE SUBPOENAS BECAUSE IT IS PREMATURE

a. FINRA'S MOTION TO QUASH SHOULD BE DENIED BECAUSE FINRA DOES NOT KNOW WHAT QUESTIONS WILL BE ASKED OF THE FINRA EMPLOYEES AT THE DEPOSITIONS

The Court should deny FINRA's motion to quash because it is without any basis and is premature. It is entirely improper to refuse to produce a witness for a deposition on the basis of a purported privilege. *EEOC v. Sterling Jewelers Inc.*, No. 08-cv-00706 (A)(M), 2010 WL 2803017 * 2 (W.D.N.Y. July 15, 2010) (denying a motion seeking a protective order prohibiting a party from deposing an EEOC representative). Where there are concerns about the possibility of revealing privileged material at a deposition, the proper way to address the issue is to allow

the deposition to continue and to assert privilege objections during the course of the examination. *See id.* United States District Court in the Southern District of New York Local Rule 26.2 ("SDNY Local Rule 26.2") provides that the proper method of objecting to a deposition question on the basis of privilege is at the time of the deposition .[2] "'Unless and until Defendants actually ask a question at the deposition that intrudes upon . . . [an] alleged applicable privilege, the Court finds that the . . . objections are premature.'" *Sterling Jewelers Inc.*, 2010 WL 2803017 at * 2 (quoting *EEOC v. LifeCare Management Services LLC*, 2009 WL 772834 *2 (W.D. Pa. 2009)).

In the *Sterling Jewelers Inc.*, case, the EEOC objected to producing a representative for a deposition claiming that it was being used to reveal privileged information. *See id.* Since no deposition had taken place and no questions had been asked, the court could not "address these issues in the abstract." *Id.* ("[A]t this stage, I cannot conclude that there are no permissible areas of questioning.")

Similarly here, FINRA has put the Court in the position of disadvantage because it is objecting to depositions that have not yet taken place. While FINRA speculates what questions will be posed to its employees, no inquiry has been put on the record for the Court to review. FINRA cannot assume that every question that will be asked and every subject matter that will be covered will relate to a purportedly privileged matter. FINRA is improperly asking the Court to make a ruling based on pure conjecture. Unless and until those questions are presented to FINRA at depositions and objected to by counsel, there is no basis for the instant motion to

[2] "Where a claim of privilege is asserted during a deposition, and information is not provided on the basis of such assertion, the information set forth in paragraph (a) above shall be furnished (1) at the deposition, to the extent it is readily available from the witness being deposed or otherwise, and (2) to the extent the information is not readily available at the deposition, in writing within fourteen (14) days after the deposition session at which the privilege is asserted, unless otherwise ordered by the court." Local Rule 26.2(b). Since the subpoenas were issued out of the United States District Court for the Southern District of New York, the issuing court's local rules should apply. FRCP 45(a)(2) ("A subpoena must issue as follows . . . (B) for attendance at a deposition, from the court for the district where the deposition is to be taken."))

quash. Moreover, the Court is without the critical information it needs – an actual record of a deposition – to assess whether an objection based on privilege is proper. Accordingly, FINRA's motion to quash the subpoenas must be denied in its entirety.

b. THE QUESTIONS THE DEFENDANTS INTEND TO ASK ARE NOT RELATED TO PRIVILEGED MATERIAL

FINRA's motion to quash is improper and should be denied because the categories of questions the Defendants intend to ask at the deposition will not relate to privileged matters. As set forth above, even if FINRA believes that some of the questions seek privileged information, it can state the proper objection on the record at the time of the depositions.

Deposition questions relating to factual information about how an agency conducts an investigation and the facts learned during the investigation do not tread on privileged information. *EEOC v. American International Group, Inc.*, No. 93 Civ. 6390 (PKL)(RLE), 1994 WL 376052 *3 (S.D.N.Y. July 18, 1994) (holding that deposition questions asked of an EEOC investigator relating to the way the EEOC conducted its investigation and the factual information learned through the investigation did not implicate an applicable privilege and compelling answers to such questions). "[K]nowing who was interviewed does not intrude upon the mental impressions of the attorney." *Id.* In the same way, asking what was done as opposed to why it was done is different and does not lead to privileged information. *See generally id.*

Here, the Defendants do not intend to request information that could qualify as privileged. By way of example, questions seeking information relating to the date, time, and frequency of the FINRA employees' communications with the Defendants, investors of McGinn Smith, or the SEC and the facts they learned during those communications do not seek privileged information. Requesting whether or not notes were taken during any of those communications

also does not seek privileged information.[3] Defendants are simply seeking what information was exchanged with whom, and when, not FINRA's impressions or opinions. Since the depositions have yet to occur and questions have yet to be asked, FINRA's motion to quash is entirely disingenuous and should be denied in its entirety.

III. THE COURT SHOULD DENY FINRA'S MOTION TO QUASH THE SUBPOENAS AND ORDER FINRA TO PRODUCE PRIVILEGE LOGS AS REQUIRED BY THE FRCP 45 AND SDNY LOCAL RULE 26.2

a. FINRA'S MOTION TO QUASH SHOULD BE DENIED BECAUSE IT FAILED TO PRODUCE A PRIVILEGE LOG AS REQUIRED UNDER RULE 45 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE SDNY LOCAL RULE 26.2

FINRA had an obligation to provide a privilege log pursuant to Rule 45 of the Federal Rules of Civil Procedure and SDNY Local Rule 26.2, and failure to provide such a log is sufficient basis to deny its instant motion to quash. Rule 45 of the Federal Rules of Civil Procedure provides in relevant part:

> A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:
> (i) expressly make the claim; and
> (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

FRCP 45(d)(2). This rule requires that the party claiming the privilege provide a detailed privilege log. *In re Application for Subpoena to Michael I. Kroll*, 224 F.R.D. 326, 328 (E.D.N.Y. 2004) (denying the motion to quash because the moving party refused to provide a privilege log pursuant to FRCP 45 and "effectively deprived the Court of the ability to determine whether the documents requested in the subpoena are protected by a privilege."). SDNY Local Rule 26.2 also supports the requirement of a privilege log. *American Savings Bank, FSB v. UBS*

[3] In fact, the Defendants have already been informed by FINRA that the notes of communications with McGinn Smith investors have been improperly withheld on purported privilege grounds. *See* Second Russo Decl. at ¶ 2.

Painewebber, Inc., No. M8-85, 2002 WL 31833223 *1 (S.D.N.Y. Dec. 16, 2002) (holding that the "wholesale refusal to produce a log and assertion of a blanket privilege an unreasonable course of action" by a party subject to a subpoena.). The Rule provides, in pertinent part, as follows:

> (a) Where a claim of privilege is asserted in objecting to any means of discovery or disclosure . . .
>
> (1) The attorney asserting the privilege shall identify the nature of the privilege (including work product) which is being claimed and, if the privilege is governed by state law, indicate the state's privilege rule being invoked; and
>
> **********
>
> (A) For documents: (i) the type of document, *e.g.*, letter or memorandum; (ii) the general subject matter of the document; (iii) the date of the document; and (iv) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressees of the document, and any other recipients shown in the document, and, where not apparent, the relationship of the author, addressees, and recipients to each other . . . .

Local Rule 26.2(a). The privilege log is necessary so that the demanding party may make a determination as to which documents it needs the asserting party to produce. *American Savings Bank, FSB,* 2002 WL 31833223 at *1. The failure to produce a log also makes it effectively impossible for the Court to determine whether the information withheld is properly within the scope of an applicable privilege. *In re Application for Subpoena to Michael I. Kroll*, 224 F.R.D. at 328. Moreover, the failure to comply with Local Rule 26.2 "'will be considered presumptive evidence that the claim of privilege is without factual or legal foundation.'" *Allstate Life Ins. Co. v. First Trust Nat. Assoc.*, No. 92 Civ. 4865 (SWK), 1993 WL 138844 *2 (S.D.N.Y. April 27, 1993) (holding that the failure to supply an adequate privilege log waived the privilege asserted).

Requiring a privilege log "deters parties from asserting the privilege haphazardly." *American Savings Bank, FSB*, 2002 WL 31833223 at *2. Courts have found that the failure to

provide a privilege log may even waive the privilege. *In re Air Crash at Belle Harbor, NY on Nov. 12, 2001*, 241 F.R.D. 202, 204 (S.D.N.Y. 2007) (granting a motion to compel and holding that the failure of a subpoenaed party to provide a privilege log waived any purported privilege); *Allstate Life Ins. Co. v. First Trust Nat. Assoc.*, 1993 WL 138844 at *2 (holding that the flagrant failure to comply with the Local Rule and provide a privilege log waived the privilege); *In re Application for Subpoena to Michael I. Kroll*, 224 F.R.D. at 328 ("Failure to submit a privilege log may be deemed a waiver of the underlying privilege claim.").

FINRA's motion to quash the subpoenas should be denied because the failure to provide a privilege log has deprived both the Court and Defendants of the ability to adequately asses the privileges being claimed. Prior to filing the instant motion, the Defendants suggested that FINRA provide a log so that the parties could address claims of privilege in an orderly manner. Second Russo Decl. ¶¶ 3-4. It refused, and instead filed the instant motion. *Id.* A proper log made pursuant to FRCP 45 and SDNY Local Rule 26.2, however, would have provided the Defendants with the tools necessary to determine what documents they needed FINRA to produce. Had FINRA provided the Defendants with the privilege log, the parties might have been able to resolve their issues amicably rather than burden the Court with motion practice.

Moreover, a privilege log would have provided the Defendants with the information they need to assess whether the privilege assertion is proper, and argue against it where FINRA's reliance is objectionable. Likewise, the privilege log would have given the Court the crucial information it needs to make a determination on privilege with respect to the instant motion. A proper privilege log should set forth the types of documents being withheld, the general subject matter, dates, and other identifying information such as the author, addressees, and other recipients of the documents. Without the log, neither the Defendants nor the Court have the

necessary tools to consider whether privilege attaches to the documents in dispute. Furthermore, FINRA cannot in good faith maintain that providing a privilege log is burdensome because: (1) it has admitted that the universe of documents being withheld on privilege grounds is relatively limited; and (2) it already created a privilege log to present to the SDNY, and now claims a willingness to provide the log to this Court (but continues to refuse to provide the log to the Defendants). Notably, the SEC has agreed to provide a privilege log to the Defendants relating to its communications with FINRA. Second Russo Decl. ¶¶5-7, Exhibits A-C. Accordingly, FINRA's refusal to provide a log to the Defendants only demonstrates that there is no factual or legal foundation upon which it can assert any privilege it may claim and its motion to quash should be denied.

b. **THE COURT SHOULD DENY FINRA'S MOTION BECAUSE FINRA DID NOT PRODUCE ANY DOCUMENTS IN RESPONSE TO THE SUBPOENA AND IT IS IMPOSSIBLE THAT ALL OF THE DOCUMENTS REQUESTED ARE PRIVILEGED**

FINRA's motion to quash should be denied because the Defendants are not seeking documents protected by attorney client, work product, or other privilege doctrine. The Defendants do not deny the possibility that certain documents responsive to their requests could be privileged, but they are certain that all of the documents responsive to their requests cannot be subject to an applicable privilege.

By way of example, documents such as correspondence between FINRA and the SEC are not privileged. The SEC is not FINRA's client, so no attorney-client privilege exists with respect to their communications. The SEC also cannot be said to have created documents in anticipation of litigation for FINRA, so no work product could protection could attach. And FINRA claims that its investigation was independent of the SEC, so they cannot claim a common interest privilege. FINRA has already asserted in its papers that it withheld from production in

the FINRA action a limited universe of documents in which there were communications with the SEC that contained privileged attachments. Thus, FINRA waived any privilege which might have attached to those documents, and cannot withhold them based on privilege. In addition, FINRA has already provided Defendants with some of the correspondence it sent to the SEC. If there are other such documents, they should be produced. Any purported privilege has already been waived by the prior production. Notably, the SEC has not sought to intervene here or obtain a protective order. **In its recent filing in opposition to Defendants' motion to compel answers to interrogatories, the SEC only objects on the basis of relevance and never once asserts any privilege with respect to its communications with FINRA.** Docket No. 205.

This analysis applies equally to correspondence with the Department of Justice,[4] investors of McGinn Smith and others. In no case was there an attorney client relationship, a litigation involving FINRA and the third party, or a joint investigation. The same holds true for notes of conversations with McGinn Smith investors, which have been improperly withheld. Second Russo Decl. ¶ 2. There is no privilege which attaches to those conversations since the investors are not FINRA's clients. Moreover, to the extent that the notes reflect any impressions of a lawyer, such sections can be redacted.

FINRA's assertion of a blanket privilege with respect to all of the document requests is fatuous and should not be countenanced by this Court. At the very least, FINRA should be ordered to produce a privilege log identifying those responsive documents which are purportedly protected by privilege. Accordingly, the Defendants respectfully request that FINRA's motion to quash be denied in its entirety.

[4] Mr. Shorris claims in his Supplemental Affidavit that he does not know whether FINRA has any written communications with the Department of Justice regarding the FINRA disciplinary proceeding. Defendants request that FINRA searched its records and if no such documents exist in its possession, custody and control, provide an affirming declaration. Otherwise, Defendants demand that such documents be produced.

c. FINRA'S COMMUNICATIONS WITH THE SEC ARE NOT PRIVILEGED BECAUSE FINRA CLAIMS ITS INVESTIGATION OF THE DEFENDANTS WAS SEPARATE FROM THAT OF THE SEC

FINRA's motion to quash the subpoena must be denied since it waived any conceivable privilege by sharing documents with the SEC – a party with which FINRA vehemently denies coordinating efforts on its investigation of the Defendants. Disclosure to a third party of a party's communications with his attorney eliminates whatever privilege the communication might have possessed. *New York v. Salazar*, 701 F.Supp.2d 224, 239 (N.D.N.Y. 2010) (discussing attorney client privilege and waiver, and holding that the privilege log provided was insufficient to determine whether the documents withheld were subject to attorney-client privilege); *Bower v. Weisman*, 669 F.Supp. 602, 604 (S.D.N.Y. 1987) (holding that the attorney client privilege was waived where copies of documents containing attorney's notes reflecting attorney-client communications were shared with a third party). That disclosure may "effect a waiver of privilege not only as to that communication, *but also as to other communications . . . made at other times about the same subject.*" *Id.* (quoting *U.S. v. Aronoff*, 466 F. Supp. 855, 862 (S.D.N.Y. 1979) (emphasis in the original). The protection provided under the doctrine of work product is waived where a party discloses the work product in a way that it will likely be produced to the party's adversary. *Overton v. Todman & Co., CPAS, P.C.*, No. 05 Civ. 7956(DAB), 2009 WL 3154296 *3 (S.D.N.Y. Sept. 24, 2009).

Certainly, FINRA waived any possible attorney-client privilege when it relayed information it uncovered in its investigation of the Defendants to the SEC, a third party. In addition, FINRA could not possibly expect that its work product would continue to be protected after it was shared with the SEC. FINRA knew that the SEC intended to commence a civil litigation against the Defendants in federal court. FINRA must have realized that Rule 26 of the

Federal Rules of Civil would confer discovery obligations upon the SEC that would likely result in the disclosure of information FINRA shared with the SEC. FINRA's claim of privilege at this stage is nothing more than a feeble attempt to undo its past waivers. Accordingly, its motion to quash should be denied it its entirety.

d. THE COURT SHOULD ORDER THAT FINRA PRODUCE DOCUMENTS WHICH ARE RESPONSIVE BUT NOT DUPLICATIVE AND TO WHICH THEY DO NOT ASSERT A CLAM OF PRIVILEGE

FINRA's motion to quash should be denied and FINRA should be ordered to produce non-privileged responsive documents which are not duplicative of the documents FINRA has already produced. The Defendants are not seeking to burden FINRA with their requests and recognize that some of the documents sought might have already been produced to them in FINRA's disciplinary action. The Defendants have already raised this issue with FINRA and informed it that there was no need to produce documents which it has already produced. Second Russo Decl. ¶ 3. Rather than working with the Defendants in an amicable way, FINRA elected to engage in motion practice and use judicial resources. Accordingly, the motion to quash the subpoenas should be denied and FINRA should be ordered to produce responsive non-privilege documents which it has not yet produced.

IV. THE COURT SHOULD DENY FINRA'S MOTION AND ORDER THAT THE DOCUMENTS AND INFORMATION TO BE PRODUCED BECAUSE FINRA HAS FAILED TO ASSERT THE INVESTIGATIVE PRIVILEGE

A. THE COURT SHOULD ORDER FINRA TO PRODUCE THE DOCUMENTS AND INFORMATION REQUESTED BECAUSE FINRA HAS FAILED TO PROPERLY ASSERT THE INVESTIGATIVE PRIVILEGE BASED ON THE SHORRIS AFFIDAVIT

FINRA has failed to properly assert the investigative privilege, and thus its motion to quash should be denied. The law enforcement or investigative privilege is "a qualified privilege meant 'to prevent disclosure of law enforcement techniques and procedures, to preserve the

confidentiality of sources, to protect witnesses and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.'" *SEC v. Chakrapani*, Nos. 09 Civ. 325(RJS), 09 Civ. 1043(RJS), 2010 WL 2605819 *13 (S.D.N.Y. June 29, 2010) (quoting *U.S. v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995) (holding that the assertions by the government and SEC of the law enforcement privilege failed because the refusal to disclose the documents was motivated by tactical considerations).

The party asserting the privilege has the burden of establishing the existence of the investigative privilege, and at the very least it must meet certain minimum standards.[5] *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341-1342 (D. C. Cir. 1984) (reversing and remanding the district court's decision denying enforcement of subpoenas based on investigative privilege because the CFTC did not sufficiently assert the privilege). Simply providing an affidavit from the organization's department head and making generalized claims of privilege is not sufficient to satisfy the prerequisites set forth above. *Friedman*, 738 F.2d at 1342. The department head must have actually personally reviewed the documents and "'formed the view that on the grounds of public interest they ought not to be produced' and state with specificity the rationale of the claimed privilege." *Id.* (quoting *Kerr v. N.D.Ca.*, 511 F.2d 192, 198 (9th Cir.). In addition, the assertion of the claim must specifically identify the documents which are privileged and the basis for the privilege, "'especially where the nature of the requested documents does not reveal an obviously privileged matter.'" *Id.*

[5] "There are three prerequisites to the assertion of the privilege: (i) the head of the department having control over the information requested must assert the privilege; (ii) the official in question must do so based on actual personal consideration; and (iii) he or she must specify the information purportedly covered by the privilege, and accompany the request with an explanation as to why such information falls within the scope of the privilege." *In re Adler, Coleman, Clearing Corp.* v. *Mishkin*, No. 95-08203 JLG, 1999 WL 1747410,*3 (S.D.N.Y. Dec. 8, 1999).

Unless and until the asserting party has met its obligations in properly claiming the privilege, the demanding party's duty to demonstrate its need for disclosure has not been triggered. *See id.* Until FINRA's burden has been met, the Court "is not equipped to engage in the task of identifying and weighing the competing interests" of the parties relating to the documents and information at issue. *Id.*

In the *Friedman* case, the court held that the district court erred in determining that the law-enforcement privilege applied because there was no "deliberate and precise invocation of the claim of qualified privilege." *Id.* at 1345. In the proceeding below, the parties moved on an expedited schedule and the CFTC generally claimed privilege by representing that the disclosure would reveal law enforcement techniques, discourage witnesses from testifying, and other purported public interest concerns warranting the privilege. *Id.* at 1342. No official of the CFTC had personally considered and reviewed the documents sought by the subpoena. *Id.* at 1340. The court found there was no proper assertion of the investigative privilege. *Id.*

In the instant case, FINRA's motion must be denied because like the *Friedman* case, it has failed to meet its threshold burden in asserting the privilege. The Shorris affidavit (which actually is not an affidavit at all, but a document in the form of a declaration bearing the title "affidavit), does not meet the prerequisites required to assert the investigative privilege. The Shorris affidavit fails to establish that Shorris himself reviewed the documents in question. He never claims that he is familiar with the documents or has personal knowledge of the facts asserted in his affidavit. He does not even state that he learned about the documents upon information and belief. Shorris also fails to specify that the information he alleges is covered by the privilege beyond stating general categories of information. And he does not provide any explanation as to why the information is privileged!

Shorris' Supplemental Affidavit does little to cure these defects.[6] In his supplemental affidavit (again, presented in the form of a declaration), Mr. Shorris only makes a rote declaration of his familiarity with the documents. He again generally states that certain categories of information are privileged and assigns a privilege label to each category without much more explanation. Accordingly, the Court should deny FINRA's motion to quash because FINRA has not met its burden in asserting the investigative privilege.

Finally, to the extent that FINRA relies upon *DGM Investments, Inc. v NY Futures Exchange, Inc.*, 224 F.R.D. 133, 140 (S.D.N.Y. 2004) for the proposition that the prerequisites are applied less rigorously to a self-regulatory organization, the argument is meritless. The court in that case did not decide the issue of whether the investigative privilege had been asserted because the adequacy of the assertion had not been challenged. *Id.* The court merely observed speculatively in *dicta* that "these requirements appear to have been applied less rigorously, if at all." *Id.* (emphasis added). The cases that court cited for that proposition also do not address whether the test enumerated in *In re Adler* was applied or met at all. Concluding that the burden on the government in asserting the investigative privilege is greater than that of an SRO based on such *dicta* is analytically deficient. It makes no sense that the burden on law enforcement claiming the investigative privilege would be greater than that of a private party. Accordingly, the Court should deny FINRA's motion because it has not properly asserted the investigative privilege.

[6] Notably, Mr. Shorris supplemented his affidavit only after the parties briefed the SDNY Motion and the Defendants highlighted the deficiency in their opposition papers).

B. FINRA'S MOTION SHOULD BE DENIED SINCE IT HAS FAILED TO DEMONSTRATE ANY HARM IT MIGHT SUFFER IF THE DOCUMENTS SOUGHT ARE PRODUCED

FINRA's motion to quash should be denied because it does not allege it will suffer any harm from disclosure. The asserting party also has the burden to present a "specific showing of harm by the agency if the information were disclosed." *SEC v. Thrasher*, No. 92 Civ. 6987, 1995 WL 46681, *10 (S.D.N.Y. Feb., 7, 1995) (holding that the SEC's claim of law enforcement privilege could not be sustained for certain documents because generalized claims of harm was not a sufficient showing of harm to assert the privilege). The asserting party must show "'*what interests* [of law enforcement . . .] would be harmed, *how* disclosure . . . would cause the harm, and *how much* harm there would be.'" *Id.* at *11 (emphasis in the original) (quoting *Kelly v. City of San Jose,* 114 FRD 653, 669 (N.D. Ca. 1987)). If the asserting party does not make such a showing, the court cannot undertake the proper analysis. *Id.*

In the *Thrasher* case, the court held that the SEC's statement that the law enforcement privilege was being asserted because the production of the documents sought "could impair the Commission's future enforcement efforts in this and other matters" did not support its claim of potential harm. 1995 WL 46681 at * 11. The court stated that "this conclusory assertion of general and speculative harm is inadequate to meet even the most liberal definition of the Commission of proof." *Id.*

Similarly, the conclusory claims here by Shorris in both his original and supplemental affidavits are insufficient to support the showing of harm necessary for the investigative privilege to apply. The original Shorris affidavit claims that disclosure would "impair" FINRA's disciplinary case and risk a "negative precedential effect" on future FINRA investigations (unrelated to the instant matter) is not sufficient. It also suggests that production of documents

and information will prematurely give Defendants notice of the nature and direction of FINRA's case. In Mr. Shorris' supplemental affidavit, he generally describes the same categories of documents for which FINRA seeks protection of the investigative privilege that he addressed in his original affidavit.

As an initial matter, FINRA has already filed its disciplinary action against the Defendants. Consequently, they are aware of the "nature and direction of FINRA's case" alleged against them and they are not requesting documents which would reveal FINRA's strategy.

Second, Mr. Shorris' general statement that witness interviews and communications with customers and investors should be protected to "allow such persons to talk frankly and openly with investigators" is entirely without merit because witnesses who provide testimony to FINRA have no expectation of confidentiality. FINRA Rule 9253 is far more broad than 18 U.S.C. § 3500 relating to witness statements and provides that any witness testimony provided to FINRA may be produced in a disciplinary proceeding. FINRA Rule 9253. Second Russo Decl.¶ 20. Moreover, FINRA may not withhold any evidence which is exculpatory. FINRA Rule 9251(b)(2) ("Nothing in paragraph (b)(1) authorizes the Department of Enforcement or the Department of Market Regulation to withhold a Document, or a part thereof, that contains material exculpatory evidence."). Second Russo Decl.¶21. In addition, FINRA already selectively produced its communications with witnesses, thereby waiving any purported privilege it may claim. FINRA cannot pick and choose at will which documents it deems privileged.

Third, Mr. Shorris'claim that internal communications, analysis, memoranda, spreadsheets, and documents in connection with the FINRA action should be protected by privilege is equally unavailing because factual data considered discoverable information. He

claims that these documents should not be produced because they would reveal FINRA's opinions and analyses and would reveal how FINRA conducts its investigations and forms legal strategy. While it may be true that some of the documents in this category of information may be privileged, it cannot be that all of those documents are privileged. By way of example, factual data is not privileged and is discoverable. *Ross v. Bolton*, 106 F.R.D. 22, 24 (S.D.N.Y. 1985). Any factual or statistical data contained in FINRA's internal reports, memoranda, spreadsheets, and communications should be produced. And, even if such information were somehow considered privileged, its production to third parties such as the SEC would waive such claim of privilege. FINRA waived any conceivable privilege by providing the SEC with the privileged attachments to their communications. It should be noted that the supplemental affidavit simply states that "documents" should be protected without further description. Identifying "documents" as a category of privileged material is just too broad to evaluation without the benefit of a privilege log. In addition, if these internal documents disclose FINRA's state action, FINRA cannot hide its misconduct by claiming privilege. If any privilege could have attached, it was waived by FINRA's violative acts.

Fourth, Mr. Shorris' claim in his supplemental affidavit that communications between FINRA and the SEC regarding the investigation of Defendants should be protected "to allow FINRA to communicate and transfer information to the SEC in furtherance of and to facilitate FINRA's referral" is also without basis because there is no harm since the referral has already been made and a case has been filed. Moreover, any conceivable privilege protecting such communications was waived when FINRA produced some of its referral correspondence with the SEC. FINRA produced some of its communications to the SEC, but did not produce any of the SEC's communications to it. FINRA has no right to assert privilege to the SEC's

communications to it. FINRA's assertion of privilege to the SEC's authored communications should be rejected because the SEC itself has not asserted any claim of privilege with respect to its communications with FINRA. Docket No. 205. As discussed above, no work product or attorney client privilege can attach to the communications FINRA shared with the SEC or vice versa.

Finally, the burden FINRA complains of in responding to the subpoenas is equally specious. The Defendants have already agreed that documents previously produced need not be produced again, and FINRA admits that there are only a limited number of documents being withheld.

Accordingly, the Court should deny FINRA's motion to quash because FINRA has not met its burden in stating the harm it would suffer from disclosure.

V. IN THE EVENT THE COURT FINDS THAT THE PRIVILEGE HAS BEEN ASSERTED, THE COURT SHOULD DENY THE MOTION BECAUSE DEFENDANTS' NEED FOR THE INFORMATION SOUGHT TO PROTECT THEIR FIFTH AMENDMENT CONSTITUTIONAL RIGHTS OUTWEIGHS THE PURPORTED INVESTIGATIVE PRIVILEGE

Assuming arguendo that the Court determines that FINRA has met its threshold burden and has asserted the investigative privilege (which it has not), the burden shifts to the Defendants to show that their need for the information outweighs the purported harm claimed by FINRA in producing the documents. *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d at 1342 (stating that "the duty of the demanding party to show his or her need for disclosure" is not "triggered" until the claim of privilege has been properly asserted). In balancing the needs of the parties, the courts look at multiple factors.[7] *See DGM Investments, Inc. v. NY Futures Exchange, Inc.*, 224 F.R.D. 133, 140 n.5 (S.D.N.Y. 2004).

[7] The ten factors the courts usually consider are: "(1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have

Here, the balancing of the factors weighs in favor of the disclosure because the Defendants' are seeking information to demonstrate a violation of their Fifth Amendment rights against self incrimination by FINRA which will have a substantial impact on their ability to defend themselves in the instant action. As discussed in Part I *supra*, there is a *prima facie* evidence that FINRA was a state actor and violated the Defendants' Fifth Amendment privilege against self incrimination when it conducted its investigation. Defendants need for the information in order to demonstrate FINRA's violation of their Constitutional rights outweighs any investigative privilege FINRA may attempt to assert. Accordingly, FINRA's motion to quash should be denied in its entirety.

VI. DEFENDANTS ARE NOT REQUIRED TO EXHAUSE ADMINISTRATIVE REMEDIES BECAUSE THEY SEEK THE INFORMATION IN THE FEDERAL CASE, NOT THE ADMINISTRATIVE ACTION

FINRA's motion to quash the subpoenas must be denied because Defendants properly sought information from nonparties by subpoena pursuant to the Federal Rules of Civil Procedure and were not required to exhaust their administrative remedies in the FINRA proceeding. A subpoena issued pursuant to Rule 45 of the Federal Rules of Civil Procedure is the only way to obtain documents and information from a nonparty to a litigation. FRCP 34(c) ("As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection."); FRCP 30 (a)(1)("A party may, by oral questions, depose any person . . . [t]he deponent's attendance may be compelled by subpoena under Rule 45.")

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given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case." *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973); *see also DGM Investments, Inc.*, 224 F.R.D. at 140 n.5 (reviewing a similar variation of the ten factors).

The one case FINRA relies upon for the claim that Defendants have failed to exhaust their administrative remedies is inapposite. In *McLaughlin, Piven, Vogel, Inc. v. NASD*, the plaintiff was being investigated by the NASD and requested from the NASD a list of its ex-employees who were complaining about the plaintiff to the NASD. 733 F. Supp. 694, 696 (S.D.N.Y. 1990). When the NASD refused, the plaintiff filed a complaint in federal court effectively seeking to compel the NASD to produce list rather than first attempting to obtain the information through the NASD's administrative channels. *Id.*

Here, unlike the plaintiff in the *McLaughlin, Piven, Vogel, Inc.* case, the Defendants are parties to a separate federal litigation to which FINRA is not a party. To obtain information from a non-party, they were required to issue a subpoena pursuant to Rule 45 of the Federal Rules of Civil Procedure. They had no other recourse to get discovery from FINRA for use in the instant case. This is not a case where Defendants are interrupting the administrative proceeding and interfering with the agency's ability to correct its prior decisions. *Contra id.* at 696. Defendants have sought the information from FINRA in a totally separate action with is governed by different rules and procedures. FINRA's withholding of documents in its disciplinary action against Defendants has a different impact than its failure to produce them in the instant action. In the FINRA proceeding, whether or not FINRA was a state actor is of less import since FINRA is not required in the usual course to allow a witness the opportunity to assert his Fifth Amendment privilege against self-incrimination.

In this action, however, FINRA acted as an agent of the SEC in conducting the investigation which ultimately led to the instant litigation. In that context, FINRA was obligated to give the Defendants an opportunity to assert their Constitutional rights. Such a rights violation should result in the exclusion evidence the SEC obtained from FINRA and relied upon to file the

complaint in this case.[8] Since Defendants are seeking the information in a separate federal action and properly relying upon the discovery tools and procedures available to them, they were not required to "exhaust their administrative remedies" prior to issuing the subpoenas and FINRA's motion to quash should be denied in its entirety.

CONCLUSION

For the reasons set forth above, David L. Smith and Timothy M. McGinn respectfully request that the Court deny FINRA's motion to quash the subpoenas in its entirety.

Dated: New York, New York
December 1, 2010

GUSRAE, KAPLAN, BRUNO & NUSBAUM PLLC

By: /s/Martin P. Russo,
Martin H. Kaplan, Esq.
Martin P. Russo, Esq.
Alison B. Cohen, Esq.
120 Wall Street
New York, New York 10005
Tel: (212) 269-1400
Attorneys for Timothy M. McGinn and David L. Smith

[8] A court should exclude evidence which was surreptitiously obtained in a civil proceeding where the defendants were not allowed the notice and opportunity to assert their Constitutional protections. *See generally US v. Parrott*, 248 F. Supp. 199 (D.D.C. 1965) (holding that the government improperly obtained testimony of subjects in a civil SEC investigation by failing to give the proper warnings or advising of a parallel criminal proceeding and then providing that testimony to the criminal prosecution. The court further held that it would have been inclined to grant a motion to suppress evidence had the government not engaged in additional misconduct warranting a complete dismissal of the criminal indictment against the defendants). Moreover, where investigations are comingled rather than conducted in a parallel manner, the evidence obtained in violation of a defendant's Constitutional rights must be suppressed. *See US v. Scrushy*, 366 F. Supp. 1134, 1140 (N.D. Alabama 2005).

CERTIFICATE OF SERVICE

I, Alison B. Cohen, hereby certify that on this 1st day of December 2010, I served a copy of this Opposition to FINRA's motion to quash subpoenas by email upon the following:

Seth T. Taube
Richard B. Harper
BAKER BOTTS L.L.P.
30 Rockefeller Plaza
New York, NY 10112-4498
Phone: 212.408.2500
Fax: 212.259.2475
Seth.taube@bakerbotts.com
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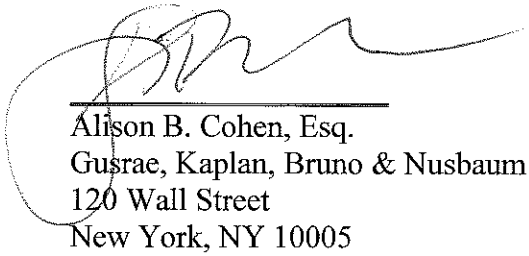
Attorneys for FINRA



Alison B. Cohen, Esq.
Gusrae, Kaplan, Bruno & Nusbaum PLLC
120 Wall Street
New York, NY 10005

Attorneys for Timothy M. McGinn and David L. Smith

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION *Plaintiff,* vs. MCGINN, SMITH & CO., INC. McGINN, SMITH ADVISORS, LLC, McGINN, SMITH CAPITAL HOLDINGS CORP., FIRST ADVISORY INCOME NOTES, LLC, FIRST EXCELSIOR INCOME NOTES, LLC, FIRST INDEPENDENT INCOME NOTES, LLC, THIRD ALBANY INCOME NOTES, LLC, TIMOTHY M. MCGINN, AND DAVID L. SMITH, LYNN A. SMITH, DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, GEOFFREY R. SMITH, LAUREN T. SMITH, and NANCY MCGINN, *Defendants,* LYNN A. SMITH, and NANCY MCGINN, *Relief Defendants, and* DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, *Intervenor.*	10 Civ. 00457 (GLS/DRH)

DECLARATION OF MARTIN P. RUSSO, ESQ. IN SUPPORT OF DEFENDANTS' OPPOSITION TO FINRA'S MOTION TO QUASH SUBPOENAS

I, Martin P. Russo, Esq., declare the following:

1. I am a member of the firm of Gusrae, Kaplan, Bruno & Nusbaum PLLC, attorneys for defendants David L. Smith and Timothy M. McGinn (the "Respondents"). I am admitted to practice in the State of New York and the United States District Court in the Southern District of

New York. I have personal knowledge of the matters set forth herein, except for those matters set forth upon information and belief.

2. In or around August 2010, Michael Newman, a FINRA attorney in its disciplinary proceeding against Defendants informed me that FINRA was withholding, among other things, notes of conversations with McGinn Smith investors.

3. On or about September 20, 2010, I received a telephone call from Richard Harper, counsel for FINRA regarding the subpoenas. I informed him that FINRA did not have to produce documents it had already produced to the Respondents in the DOE Action to reduce FINRA's burden in responding to the subpoenas. I also suggested that FINRA produce documents, and if it had a claim of privilege, it produce a privilege log identifying the documents to which it was asserting a privilege. Mr. Harper replied that he would confer with his client and get back to me.

4. On or about September 24, 2010, I had a second telephone conversation with Mr. Harper in which he said that his clients would not produce any documents or a privilege log. Instead, he would be filing a motion to quash the subpoenas. I again suggested that we address any claims of privilege in an orderly manner through the production of a privilege log. He said he would present it to his client. We then discussed and agreed upon a briefing schedule.

5. On or about October 25, 2010, David Stoelting, Esq. represented to me by email that two weeks from the date of that email, the SEC would provide a privilege log with respect to all documents it is withholding from its document production on the basis of a privilege. A true and complete copy of the October 25, 2010 email is annexed hereto as Exhibit A.

6. On or about November 11, 2010, Mr. Stoelting sent me an email stating that the SEC would be able to provide the privilege log it promised by November 19, 2010. A true and complete copy of the November 11, 2010 email is annexed hereto as Exhibit B.

7. On or about November 18, 2010, Mr. Stoelting sent me another email claiming that the SEC unable to provide the privilege log by November 19, 2010, but would likely provide it the week after the Thanksgiving holiday. A true and complete copy of the November 18, 2010 email is annexed hereto as Exhibit C.

8. A true and complete copy of opinion in the case captioned *Heller v. City of New York*, No. 06 CV 2842(NG), 2008 WL 2965474 (E.D.N.Y. April 11, 2008) is annexed hereto as Exhibit D.

9. A true and complete copy of opinion in the case captioned *Copantitla v. Fiskardo Estiatorio, Inc.*, No. 09 Civ. 1608(RJH)(JCF), 2010 WL 1327921 (S.D.N.Y. April 5, 2010) is annexed hereto as Exhibit E.

10. A true and complete copy of the SEC opinion captioned *In re Application of Gregg Heinze*, Securities Exchange Release No. 34-56100 (July 19, 2007) is annexed hereto as Exhibit F.

11. A true and complete copy of the SEC opinion captioned *In re Application of Warren E. Turk*, Securities Exchange Release No. 34-55942 (June 22, 2007) is annexed hereto as Exhibit G.

12. A true and complete copy of opinion in the case captioned *EEOC v. Sterling Jewelers Inc.*, No. 08-cv-00706 (A)(M), 2010 WL 2803017 (W.D.N.Y. July 15, 2010) is annexed hereto as Exhibit H.

13. A true and complete copy of opinion in the case captioned *EEOC v. American International Group, Inc.*, No. 93 Civ. 6390 (PKL)(RLE), 1994 WL 376052 (S.D.N.Y. July 18, 1994) is annexed hereto as Exhibit I.

14. A true and complete copy of opinion in the case captioned *American Savings Bank, FSB v. UBS Painewebber, Inc.*, No. M8-85, 2002 WL 31833223 (S.D.N.Y. Dec. 16, 2002) is annexed hereto as Exhibit J.

15. A true and complete copy of opinion in the case captioned *Allstate Life Ins. Co. v. First Trust Nat. Assoc.*, No. 92 Civ. 4865 (SWK), 1993 WL 138844 (S.D.N.Y. April 27, 1993) is annexed hereto as Exhibit K.

16. A true and complete copy of opinion in the case captioned *Overton v. Todman & Co., CPAS, P.C.,* No. 05 Civ. 7956(DAB), 2009 WL 3154296 (S.D.N.Y. Sept. 24, 2009) is annexed hereto as Exhibit L.

17. A true and complete copy of opinion in the case captioned *SEC v. Chakrapani*, Nos. 09 Civ. 325(RJS), 09 Civ. 1043(RJS), 2010 WL 2605819 (S.D.N.Y. June 29, 2010) is annexed hereto as Exhibit M.

18. A true and complete copy of opinion in the case captioned *In re Adler, Coleman, Clearing Corp.* v. *Mishkin*, No. 95-08203 JLG, 1999 WL 1747410 (S.D.N.Y. Dec. 8, 1999) is annexed hereto as Exhibit N.

19. A true and complete copy of opinion in the case captioned *SEC v. Thrasher*, No. 92 Civ. 6987, 1995 WL 46681 (S.D.N.Y. Feb., 7, 1995) is annexed hereto as Exhibit O.

20. A true and complete copy of FINRA Rule 9253 is annexed hereto as Exhibit P.

21. A true and complete copy of FINRA Rule 9251 is annexed hereto as Exhibit Q.

22. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 1, 2010.

Martin P. Russo

EXHIBIT A

Alison Cohen

From: Stoelting, David [StoeltingD@SEC.GOV]
Sent: Monday, October 25, 2010 4:21 PM
To: Martin P. Russo; Mehraban, Lara; McGrath, Kevin
Cc: acohen@gkblaw.com; Martin H. Kaplan
Subject: RE: Discovery Responses

Marty – We see no reason to amend the interrogatory responses. In addition, your email below incorrectly states that we have taken the position that the names and contact information of persons that communicated with the SEC have been withheld. In fact, in our interrogatory responses we provided the names and contact information for more than 50 people with whom we communicated. If you mean to say that we did not provide a list of the FINRA employees that we talked to, then you should explain the relevance of such a list. We will provide a privilege log in 2 weeks.

On a separate point, we plan to proceed with our review of the materials on the hard drives we produced to you on Sept. 2. Nearly two months have passed since we provided these hard drives to you with the electronic images from the search. At the time, we agreed to your request to conduct a privilege review of the drives, and we agreed not to review the drives ourselves pending your privilege review. We also said that we would try to obtain a custodian list from the USAO, but we have not yet received the custodian list and we do not know if or when we will receive it.

Under these circumstances, we must proceed with our review. There is an evidentiary hearing on the trust/annuity issues on November 16, and our exhibit list in due November 12, so it is important that we review the drives for material relevant to the hearing. In addition, you have had 8 weeks to conduct a privilege review, which seems more than fair.

From: Martin P. Russo [mailto:mrusso@gkblaw.com]
Sent: Monday, October 25, 2010 2:46 PM
To: Stoelting, David; Mehraban, Lara; McGrath, Kevin
Cc: acohen@gkblaw.com; 'Martin H. Kaplan'
Subject: Discovery Responses

Lady and Gentlemen:

Please call me this afternoon to discuss the SEC's position with respect to Smith and McGinn's interrogatories and document requests. We have attempted to call each of you, but were unsuccessful. We would like to meet and confer on two issues so that we can include them on tomorrow's conference call with Judge Homer if necessary. I am sure the Court would appreciate the efficiency of not having to hold another conference. With respect to the former, our position is that the names and contact information of persons with whom the SEC has discussed our clients or the subject matter of this litigation is not privileged in any way. Please advise whether you will amend your responses to provide this information. With respect to the latter, Rule 26 requires that a party asserting privilege as a ground for not producing a document provide a privilege log so that the requesting party and the Court may assess the claim of privilege. You have failed to provide a log at this time. Please advise whether you will provide one shortly.

Best,

Marty

Martin P. Russo, Esq.
GUSRAE KAPLAN BRUNO & NUSBAUM PLLC
120 Wall Street, 11th Floor
New York, New York 10005
(212) 269-1400
www.gkblaw.com

EXHIBIT B

Alison Cohen

From: Stoelting, David [StoeltingD@SEC.GOV]
Sent: Thursday, November 11, 2010 2:24 PM
To: mrusso@gkblaw.com; Mehraban, Lara; McGrath, Kevin
Cc: acohen@gkblaw.com; mkaplan@gkblaw.com
Subject: Re: Discovery Responses

Marty - We also will need your privilege log at the same time. If your log will be ready then, we can exchange logs one week from tomorrow.

Sent from my BlackBerry Wireless Handheld

From: Martin P. Russo
To: Stoelting, David; Mehraban, Lara; McGrath, Kevin
Cc: acohen@gkblaw.com ; 'Martin H. Kaplan'
Sent: Thu Nov 11 13:51:03 2010
Subject: RE: Discovery Responses

David,

When can we expect to receive the privilege log you promised in your October 25, 2010 email below?

Best,

Marty

Martin P. Russo, Esq.
GUSRAE KAPLAN BRUNO & NUSBAUM PLLC
120 Wall Street, 11th Floor
New York, New York 10005
(212) 269-1400
www.gkblaw.com

From: Stoelting, David [mailto:StoeltingD@SEC.GOV]
Sent: Monday, October 25, 2010 4:21 PM
To: Martin P. Russo; Mehraban, Lara; McGrath, Kevin
Cc: acohen@gkblaw.com; Martin H. Kaplan
Subject: RE: Discovery Responses

Marty – We see no reason to amend the interrogatory responses. In addition, your email below incorrectly states that we have taken the position that the names and contact information of persons that communicated with the SEC have been withheld. In fact, in our interrogatory responses we provided the names and contact information for more than 50 people with whom we communicated. If you mean to say that we did not provide a list of the FINRA employees that we talked to, then you should explain the relevance of such a list. We will provide a privilege log in 2 weeks.

On a separate point, we plan to proceed with our review of the materials on the hard drives we produced to you on Sept. 2. Nearly two months have passed since we provided these hard drives to you with the electronic images from the search. At the time, we agreed to your request to conduct a privilege review of the drives, and we agreed not to review the drives ourselves pending your privilege review. We also said that we would try to obtain a custodian list from the USAO, but we have not yet received the custodian list and we do not know if or when we will receive it.

Under these circumstances, we must proceed with our review. There is an evidentiary hearing on the trust/annuity issues on November 16, and our exhibit list in due November 12, so it is important that we review the drives for material relevant to the hearing. In addition, you have had 8 weeks to conduct a privilege review, which seems more than fair.

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To: Stoelting, David; Mehraban, Lara; McGrath, Kevin
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Lady and Gentlemen:

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Best,

Marty

Martin P. Russo, Esq.
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New York, New York 10005
(212) 269-1400
www.gkblaw.com

EXHIBIT C

Alison Cohen

From: Stoelting, David [StoeltingD@SEC.GOV]
Sent: Thursday, November 18, 2010 10:44 AM
To: mrusso@gkblaw.com; acohen@gkblaw.com
Cc: McGrath, Kevin; Mehraban, Lara
Subject: SEC v. McGinn Smith

Marty - With the 3 pending motions we're responding to we will not be able to provide a privilege log tomorrow. We'll get the log to you as soon as we can, but probably will be the week after Thanksgiving.

Sent from my BlackBerry Wireless Handheld

EXHIBIT D

Not Reported in F.Supp.2d, 2008 WL 2965474 (E.D.N.Y.)
(Cite as: 2008 WL 2965474 (E.D.N.Y.))

H
Only the Westlaw citation is currently available.

United States District Court,
E.D. New York.
Arthur HELLER, Plaintiff,
v.
CITY OF NEW YORK, et al., Defendants.
No. 06 CV 2842(NG).

April 11, 2008.

Louis L. Nock, Kucker & Bruh, LLP, New York, NY, for Plaintiff.

Jordan Michael Smith, Stuart E. Jacobs, New York City Law Department, Michael Chestnov, Assistant Corporation Counsel, The City of New York Law Department, New York, NY, for Defendants.

REPORT AND RECOMMENDATION

CHERYL L. POLLAK, United States Magistrate Judge.

*1 On June 6, 2006, plaintiff Arthur Heller commenced this action against the City of New York, the New York City Police Department, Police Officer Jesus Rodriguez, Sergeant Alfred Ricci, Detective Donald Resko, and "John Doe # 's 1-8," unknown police officers, in their individual and official capacities, seeking damages based on alleged violations of plaintiff's constitutional rights pursuant to 42 U.S.C. § 1983. (*See* Compl.[FN1]). Following preliminary discovery, plaintiff filed an amended complaint on March 20, 2007, replacing "John Doe # 's 1-8" with defendant Captain Jeffrey Fallon, in his individual and official capacity. (*See* Am. Compl .[FN2] ¶ 6).

FN1. Citations to "Compl." refer to plaintiff's Complaint, filed June 6, 2006.

FN2. Citations to "Am. Compl." refer to plaintiff's Amended Complaint, filed March 20, 2007.

Plaintiff's Complaint sets forth fifteen causes of action: (1) conspiracy to violate plaintiff's constitutional rights and engage in an alleged "cover-up;" (2) use of unreasonable and excessive force; (3) false arrest, false imprisonment, and malicious prosecution; (4) failure to protect plaintiff while in custody; (5) supervisory liability and failure on the part of police supervisors to intercede on plaintiff's behalf; (6) deprivation of plaintiff's First and Fourteenth Amendment rights to access and redress in the courts; (7) deprivation of plaintiff's Sixth and Fourteenth Amendment rights to a speedy trial; (8) violation of plaintiff's Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment; (9) common law negligence and intentional and negligent infliction of emotional distress; [FN3] (10) claims of *respondeat superior* as against the City of New York and the New York City Police Department; (11) common law assault and battery; (12) common law false arrest and false imprisonment; (13) common law *prima facie* tort; (14) common law negligence in the hiring, training, and supervision of police officers; and (15) municipal liability under *Monell v. Dep't of Soc. Servs. of The City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). (*See* Am. Compl.).

FN3. By letter dated February 21, 2008, plaintiff withdrew his claim for intentional and negligent infliction of emotional distress.

On November 2, 2007, plaintiff filed a motion *in limine* seeking in part to preclude defendants' use at trial of the file of Dr. Judith S. Rose, M.D., one of plaintiff's treating psychiatrists, on the basis of the psychotherapist-patient privilege. ("Pl.'s 11/2 Motion"). In a Report and Recommendation dated January 7, 2008, this Court recommended the denial of plaintiff's motion on the grounds that, because plaintiff had not yet withdrawn his claim for dam-

ages based on the infliction of emotional distress, plaintiff's motion presented a hypothetical question on the application of the privilege, and thus was not ripe for review. Plaintiff subsequently withdrew his claim for emotional distress.

DISCUSSION

By letter dated March 25, 2008, plaintiff now moves for a protective order pursuant to Rule 26 of the Federal Rules of Civil Procedure to prevent further discovery related to Dr. Rose. Fed.R.Civ.P. 26(c)(1). Specifically, plaintiff moves pursuant to Rule 45 to quash the subpoena served on Dr. Rose by defendants' counsel, which notices her deposition, Fed.R.Civ.P. 45(c)(3)(A)(iii), and to preclude the use of Dr. Rose's file at trial. In response to plaintiff's Motion, defendants argue that the psychotherapist-patient privilege does not shield the communications between plaintiff and Dr. Rose from discovery because plaintiff waived any privilege that might have attached through the production of Dr. Rose's file to defendants during discovery. (*See* Defs.' 11/26 Opp.[FN4] at 9). In addition, plaintiff testified about Dr. Rose's treatment during his deposition. (*See* Pl.'s 11/2 Motion, Exs. C, K; *see also id.,* Ex. L). Indeed, Heller filed his mental health records as an exhibit in support of his motion for a protective order. (*See id.,* Ex. K at 175-76). Finally, defendants contend that questions regarding admissibility should be reserved until the time of trial. (*See* Defs.' Opp.[FN5] at 7).

FN4. Citations to "Defs.' 11/26 Opp." refer to defendants' Memorandum of Law in Opposition to Plaintiff's Motion to Preclude the Use of Certain Materials at Trial and Concerning Discovery, filed November 26, 2007, and resubmitted in support of defendants' Opposition to Plaintiff's Motions to Quash a Subpoena Directed to Dr. Rose and for a Protective Order, dated April 2, 2008.

FN5. Citations to "Defs.' Opp." refer to defendants' Memorandum of Law in Opposition to Plaintiff's Motions to Quash a Subpoena Directed to Dr. Rose and for a Protective Order, filed April 2, 2008.

***2** By letter dated February 6, 2008, plaintiff also moves for a protective order prohibiting the disclosure of non-party witness Terri Netach's address and other personal information to the police and other defendants, and directing defendants' counsel not to turn over Ms. Netach's contact information in any form to anyone beyond the attorneys of record from that office, and to redact the present record accordingly.

A. *Standards*

Rule 26 of the Federal Rules of Civil Procedure permits the discovery of "any nonprivileged matter that is relevant to any party's claim or defense." Fed.R.Civ.P. 26(b)(1). Indeed, the information need not be admissible as long as it is reasonably calculated to lead to the discovery of admissible evidence. *Id.* Rule 26 does allow a court to issue an order to protect parties and persons from "annoyance, embarrassment, oppression, or undue burden or expense." Fed.R.Civ.P. 26(c)(1). In order to invoke the benefit of this rule, the party moving for a protective order must cite particular and specific facts rather than conclusory allegations to establish good cause for protection. *Rofail v. United States,* 227 F.R.D. 53, 55 (E.D.N.Y.2005). However, only "a party or any person from whom discovery is sought may move for a protective order," Fed.R.Civ.P. 26(c)(1), because of the general prohibition against litigants raising another person's legal rights. *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984).

Rule 45 requires the issuing court, on timely motion, to quash a subpoena that "requires disclosure of privileged or other protected matter, if no exception or waiver applies." Fed.R.Civ.P. 45(c)(3)(A)(iii). Subpoenas issued under Rule 45 are also subject to the relevance requirement of Rule 26

. *In re Flag Telecom Holdings, Ltd. Sec. Litig.,* No. 02 CV 3400, 2006 U.S. Dist. LEXIS 69140, at *5-6 (S.D.N.Y. Sept. 13, 2006). A party may move to quash a subpoena of a non-party where the party has " 'a sufficient privacy interest in the confidentiality of records pertaining to their personal financial affairs so as to give them standing to challenge the subpoenas.' " *Id.* at *5 (quoting *Sierra Rutile Ltd. v. Katz,* No. 90 CV 4913, 1994 U.S. Dist. LEXIS 6188, at *6 (S .D.N.Y. May 11, 1994)); *see Chazin v. Lieberman,* 129 F.R.D. 97, 98 (S.D.N.Y.1990) (finding a party had standing to challenge a subpoena served on non-party financial institutions based on privacy grounds).

The Supreme Court in *Jaffee v. Redmond* recognized a privilege that protects confidential communications between a psychotherapist and her patient. 518 U.S. 1, 9-10, 116 S.Ct. 1923, 135 L.Ed.2d 337(1996). Waiver of the psychotherapist-patient privilege by disclosure of privileged information to third parties waives the privilege as to the information disclosed. *See id.* at 15 n. 14 (noting that "[l]ike other testimonial privileges, the patient may of course waive the protection"); *Carrion v. City of New York,* No. 01 CV 2255, 2002 U.S. Dist. LEXIS 5991, at *6-7 (S.D.N.Y. Apr. 8, 2002) (allowing plaintiff to pursue discovery, including the deposition of one of defendant's physician's treatment during the time period for which information about treatment had been disclosed). Indeed, the waiver of a privilege is broader than the disclosed documents or testimony themselves. *Id.* at *7. The Court may allow depositions to discover information for which the privilege has been waived. *Id.* at *9-10. *See also Magee v. Paul Revere Life Ins. Co.,* 172 F.R.D. 627, 634, 647 (E.D.N.Y.1997) (granting defendant's motion to reopen the deposition of plaintiff's treating psychologist and psychiatrist because plaintiff waived the psychotherapist-patient privilege by putting his mental health at issue); *Equal Employment Opportunity Comm'n v. Kidder, Peabody & Co., Inc.,* No. 92 CV 9243, 1993 U.S. Dist. LEXIS 10212, at *2-4 (S .D.N.Y. July 27, 1993) (ordering plaintiff to produce the requested deposition authorizations for claimant's treating physicians after plaintiff waived the physician-patient privilege when claimant testified in detail at deposition about the nature and extent of her physical and psychological treatments and plaintiff's counsel failed to object at any time).

B. *Application*

1. *Discoverability of Communications with Dr. Rose*

***3** In this case, defendants contend that plaintiff's communications with Dr. Rose are relevant to factual questions in the case, including plaintiff's motivations to tell the truth about the incident that gave rise to the instant lawsuit, including (1) plaintiff's financial motivation to tell the truth about the incident and his damages; (2) whether plaintiff told the truth in statements made during his Section 50-h testimony while being represented by former counsel (*see* plaintiff's statutory General Municipal Law § 50-h testimony, N.Y. Gen. Mun. Law § 50-h (McKinney 2008) [FN6]); and (3) whether he struggled with the police during the incident on January 11, 2006. (*See* Defs.' Opp. at 5). Defendants contend that plaintiff admitted to Dr. Rose that he struggled with the police but now denies making such a statement. (*See id*).

> FN6. N.Y. Gen. Mun. Law § 50-h (McKinney 2008) provides, in relevant part, that a city against whom a claim is brought may demand an examination of the claimant relative to the injuries or damages for which the claim is made, upon oral examination or stipulation of the parties, and may include a physical examination.

Plaintiff contends that the essential inquiry hinges on the fact that plaintiff has withdrawn his claim for emotional distress, which, plaintiff contends, vitiates the implied waiver of psychotherapist-patient privilege created by the claim of emotional distress. (*See* Pl.'s Reply [FN7] at 3-12). Plaintiff

cites a number of cases for this proposition. *See, e.g., Ruhlmann v. Ulster County Dep't of Soc. Servs.,* 194 F.R.D. 445, 448-49 (N.D.N.Y.2000) (collecting cases and distinguishing between the narrow view of the privilege, where plaintiffs asserting the psychotherapist-patient privilege affirmatively use their mental condition versus the broader view of the privilege, which holds that seeking emotional damages alone is sufficient to bring emotional condition into issue). However, in none of the cases cited by plaintiff had the plaintiff already disclosed the records at issue before withdrawing their claims for emotional distress, as in this case. Even under the standard described in *Ruhlmann,* whereby plaintiffs must affirmatively use their mental condition, plaintiff here would be unable to assert the privilege, because he has testified to and produced the records at issue on various occasions, ostensibly to affirmatively use those records as a means of providing a factual basis for his claims of emotional distress. Indeed, it is well-settled that a plaintiff may not use a privilege as a sword as well as a shield by introducing the substance of otherwise privileged communications into the litigation while concurrently seeking the protection of the privilege. *Id.* at 450 (citing *Sarko v. Penn-Del Directory Co.,* 170 F.R.D. 127, 130 (E.D.Pa.1997)).

> FN7. Citations to "Pl.'s Reply" refer to plaintiff's Reply Brief in Further Support of Plaintiff's Motion for a Protective Order and to Quash Subpoena and to Preclude the Use of Plaintiff's Psychiatrist's File at Trial, filed April 8, 2008.

Through plaintiff's answers to interrogatories and testimony in deposition, plaintiff has disclosed not only the fact of Dr. Rose's treatment, but also the substance of her treatment, by producing her treatment notes during the course of discovery and by filing the notes as an exhibit to a motion before the Court. Having waived the privilege through prior disclosure of Dr. Rose's notes, and the Court having determined that the notes provide relevant impeachment material, the Court finds that plaintiff has waived the psychotherapist-patient privilege as to all communications between plaintiff and Dr. Rose during the course of her treatment of plaintiff, regardless of the fact that plaintiff has withdrawn his claim for emotional distress.

*4 Accordingly, plaintiff's motion seeking a protective order to prevent further discovery related to Dr. Rose and to quash the subpoena served on Dr. Rose by defendants' counsel is hereby DENIED.

With respect to questions as to the admissibility of Dr. Rose's file, defendants argue that such questions should be reserved until the time of trial. This Court agrees and therefore plaintiff's motion to preclude the use of Dr. Rose's file at trial is denied without prejudice to renew at the time of trial.

2. *Non-Party Witness Terri Netach's Personal Information*

Plaintiff also moves for a protective order prohibiting the disclosure to the police and other defendants of non-party witness Terri Netach's address and other personal information. Plaintiff also seeks an Order directing defendants' counsel not to turn over Ms. Netach's contact information in any form to anyone beyond the attorneys of record from that office, and to redact the present record accordingly. (PL's Ltr [FN8] at 2). Defendants contend that plaintiff lacks standing to seek this relief, and in any case, that plaintiff fails to cite particular and specific facts on which to base entry of such a protective order. (Defs.' Ltr [FN9] at 2).

> FN8. Citations to "Pl.'s Ltr" refer to plaintiff's letter motion seeking a protective order prohibiting the disclosure of Ms. Netach's personal information, filed February 6, 2008.
>
> FN9. Citations to "Defs.' Ltr" refer to defendants' opposition to plaintiff's letter motion seeking a protective order prohibiting the disclosure of Ms. Netach's personal information, filed February 7, 2008.

The proper standard to be applied in evaluating whether a party has standing to request a protective order on behalf of a third-party is the same as that which is applied in the context of efforts by parties to quash subpoenas directed to non-parties. *See Israel v. Carpenter,* No. 95 CV 2703, 2002 U.S. Dist. LEXIS 11792, at *1-5 (S.D.N.Y. June 28, 2002) (denying defendant's motion for a protective order seeking to relieve non-parties of the obligation to comply with certain subpoenas). " 'In the absence of a claim of privilege, a party usually does not have standing to object to a subpoena directed to a non-party witness' " unless the party has a sufficient privacy interest in the confidentiality of the records sought. *ADL, LLC v. Tirakian,* No. 06 CV 5076, 2007 U .S. Dist. LEXIS 46198, at *6-7 (E.D.N.Y. June 26, 2007) (finding that defendants had a sufficient privacy interest in the confidentiality of the documents sought to have standing to challenge the subpoenas issued to non-party witnesses) (quoting *Laneford v. Chrysler Motor Co.,* 513 F.2d 1121, 1126 (2d Cir.1975)); *see Nova Prods., Inc. v. Kisma Video, Inc.,* 220 F.R.D. 238, 241 (S.D.N.Y.2004).

In this case, plaintiff claims that he has an interest in protecting Ms. Netach's personal information from disclosure based on the assumption that, because of the trauma of witnessing a vicious beating, Ms. Netach is now in fear of the recklessness of certain police officers who are the subject of her deposition and prospective trial testimony. (*See* Pl.'s Reply Ltr [FN10] at 2). However, plaintiff does not cite any particular and specific facts on which to base a protective order. Rather, plaintiff simply concludes that Ms. Netach will be intimidated by "the recklessness of certain police officers who are the very subject of her deposition and prospective trial testimony" if her address and personal information are not shielded from the police, which "chilling effect" will have an "adverse impact on plaintiff's case." (*See id.*). However, plaintiff presents no evidence of police intimidation and merely characterizes defense counsel as being resolved to present Ms. Netach's address and personal information to the defendant officers for the purpose of intimidating Ms. Netach. (*See id.*).

> FN10. Citations to "Pl.'s Reply Ltr" refer to plaintiff's reply to defendants' letter in opposition to plaintiff's letter motion seeking a protective order prohibiting the disclosure of Ms. Netach's personal information, filed February 8, 2008.

***5** The Court finds that plaintiff has not demonstrated either a privacy interest in the confidentiality of the records at issue here-Ms. Netach's address and other personal information-nor has plaintiff articulated particular and specific facts on which to base a protective order, and therefore plaintiff lacks standing to make this request.

Accordingly, plaintiff's request for a protective order preventing the disclosure of Ms. Netach's personal information is hereby DENIED. However, the Court reminds defendants and defendants' counsel that misuse of the witness' personal information will result in the imposition of sanctions.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with a copy to the undersigned, within ten (10) days of receipt of this Report. Failure to file objections within the specified time waives the right to appeal the District Court's order. *See* 28 U.S.C. § 636(b)(1); Fed. R Civ. P. 6(a), 6(e), 72(b); *Small v. Sec'y of Health and Human Servs.,* 892 F.2d 15, 16 (2d Cir.1989).

SO ORDERED.

E.D.N.Y.,2008.
Heller v. City of New York
Not Reported in F.Supp.2d, 2008 WL 2965474 (E.D.N.Y.)

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EXHIBIT E

Slip Copy, 2010 WL 1327921 (S.D.N.Y.)
(Cite as: 2010 WL 1327921 (S.D.N.Y.))

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Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
Ricardo COPANTITLA, Diego Diaz La Vega, Ignacio Garcia, Freddy Guachun, Julio Lantigua, Manuel Lizandro, Martin Lopez, Sebastian Lopez, Augustin Maldonado, Henry Matute, Joelito Melendez, Aussencio Ramirez, and Jose Luis Vargas,
Plaintiffs,
v.
FISKARDO ESTIATORIO, INC. d/b/a Thalassa Restaurant, George Makris, Julia Makris, and Steve Makris, Defendants.
No. 09 Civ. 1608(RJH)(JCF).

April 5, 2010.

MEMORANDUM AND ORDER

JAMES C. FRANCIS IV, United States Magistrate Judge.

***1** Ricardo Copantitla, Diego Diaz De La Vega, Ignacio Garcia, Freddy Guachun, Julio Lantigua, Manuel Lizandro, Martin Lopez, Sebastian Lopez, Augustin Maldonado, Henry Matute, Joelito Melendez, Aussencio Ramirez, and Jose Luis Vargas bring this action against Fiskardo Estiatorio, Inc. ("Fiskardo") d/b/a Thalassa Restaurant ("Thalassa"), George Makris, Julia Makris, and Steve Makris. The plaintiffs, who are current and former employees at Thalassa, seek damages and injunctive relief under the Fair Labor Standards Act (the "FLSA"), New York Labor Law ("NYLL"), New York State statutory and common law, and New York City law for alleged violations arising out of their employment.

The plaintiffs now move pursuant to Rules 15(a) and 20(a) of the Federal Rules of Civil Procedure for leave to file a Second Amended Complaint. They seek to add Fantis Foods, Inc. ("Fantis Foods") as a defendant. They also wish to include additional allegations concerning the defendants' violations of a specific section of the NYLL as well as language regarding the defendants' status as employers within the meaning of the New York State Human Rights Law and the New York City Administrative Code. The plaintiffs also move pursuant to Rule 37(a) of the Federal Rules of Civil Procedure for an order compelling discovery from the defendants. Specifically, they seek information regarding nonparty employees, including those they believe may be managers; financial information from the defendants in order to determine damages; and information regarding governmental investigations into Thalassa's labor practices or tax-reporting practices. Finally, the defendants move pursuant to Rule 45(c)(3) of the Federal Rules of Civil Procedure to quash subpoenas that were served on two nonparties, Fantis Foods and Fantis Transfer Corp. Inc. ("Fantis Transfer").

For the reasons set forth below, the plaintiffs' motion to amend is granted and their motion to compel is granted in part and denied in part. The defendants' motion to quash is granted in part and denied in part.

Background

A. *Facts*

Fiskardo is a New York Corporation that has operated as Thalassa, a restaurant located in Manhattan. (Amended Complaint ("FAC"), ¶¶ 20, 22-23). According to the plaintiffs, Julia Makris has been Chairman or Chief Executive Officer of Thalassa (FAC, ¶ 25), and George and Steve Makris have been owners of the restaurant. (FAC, ¶¶ 24, 26). For various time periods from January 2002 through the present, the plaintiffs have worked at the restaurant as dishwashers, busboys, polishers, runners, barbacks, servers, and expediters. (FAC, ¶¶ 7-19, 32).

In their first Amended Complaint, the plaintiffs allege that the defendants did not properly compensate them, in violation of both federal and state law. (FAC, ¶ 43). They contend, among other things, that they were paid below the minimum wage, were not paid for some of the hours they worked, and were not properly compensated when they worked overtime. (FAC, ¶¶ 46-50, 54). The plaintiffs also allege that the defendants did not allow employees to receive gratuities intended for them. They report that the defendants kept for themselves one quarter of Thalassa's required twenty-percent gratuity for banquets and pre-planned parties (the "Service Fee"). (FAC, ¶¶ 73-83). The plaintiffs also contend that Thalassa's management insisted that wait-staff pool their tips and that the managers then distributed the proceeds to restaurant personnel, including managers and polishers, who are not eligible for these tips under the FLSA and NYLL. (FAC, ¶¶ 84-91). Furthermore, the plaintiffs complain that the defendants deducted the cost of their required uniforms from their paychecks and refused to reimburse them for the costs of cleaning and maintaining the uniforms. (FAC, ¶¶ 92-100).

***2** In addition, the plaintiffs claim that the defendants retaliated against them when they complained about labor law violations. (FAC, ¶¶ 101-103). The alleged retaliation consisted of intimations that they would lose their jobs if they continued to complain, threats of physical harm, a drastic reduction of their hours of work, the termination of Mr. De La Vega, Mr. Garcia, and Mr. Lantigua, and the constructive discharge of Mr. Lizandro and subsequent interference with his ability to obtain a new job. (FAC, ¶¶ 104-110).

The plaintiffs further contend that on October 2, 2008, the day after one of them tried to deliver a letter to the defendants notifying them of violations of federal and state labor laws, Mr. Vargas was interrogated in the restaurant's basement office by Steve Makris and "other agents of Defendants" "about the contents of the letter and the names of the workers who had registered complaints." (FAC, ¶¶ 111-115). They claim that two people in the office identified themselves as police officers and displayed badges. (FAC, ¶ 116). According to the plaintiffs, Steve Makris then summoned bona fide police officers to arrest Mr. Vargas, and although the police responded, they did not make an arrest. (FAC, ¶ 118).

Lastly, Mr. Diaz De La Vega and Mr. Melendez claim that they "were subjected to repeated and severe sexual harassment" by Kemal Kurt, one of Thalassa's managers. (FAC, ¶¶ 120-123). Mr. Diaz De La Vega alleges that he was fired from the restaurant as a result of his refusal "to engage in sexual acts" with Mr. Kurt, and Mr. Melendez states that he resigned from his position because Mr. Kurt repeatedly touched him in a sexually provocative manner. (FAC, ¶¶ 122-123).

B. *Procedural History*

The Complaint in this action was filed on February 20, 2009. On September 16, 2009, the plaintiffs filed an Amended Complaint that added Mr. Guachun and Mr. Ramirez as plaintiffs. On November 4, 2009, the Honorable Richard J. Holwell, U.S.D.J., set January 8, 2010 as a final deadline for the joinder of parties or amendment of pleadings. [FN1] (Memorandum Endorsement dated Nov. 4, 2009). On December 7, 2009, the plaintiffs served document and deposition subpoenas on Fantis Foods and Fantis Transfer. After the defendants moved to quash these subpoenas, the plaintiffs moved for leave to file a Second Amended Complaint on January 8, 2010. And, finally, on February 4, 2010, the plaintiffs filed a motion to compel certain discovery from the defendants. On March 25, 2010, I heard oral argument on these three motions.

FN1. The plaintiff's letter that Judge Holwell endorsed lists the date as January 8, 2009, which is clearly a typographical er- ror.

Discussion

A. *The Motion to Amend*

In their proposed Second Amended Complaint, the plaintiffs name Fantis Foods as an additional defendant. They also insert language alleging that all of the defendants are employers within the meaning of the New York State Human Rights Law and the New York City Administrative Code (the "Status Language"). (Second Amended Complaint ("SAC"), ¶¶ 29-33). This language is added to their previous assertion in their Amended Complaint that the defendants were employers under the FLSA and the NYLL. (FAC, ¶¶ 27-30). The plaintiffs contend that they added this language in order to "further clarif[y] that Plaintiffs intend to hold all Defendants liable for the sexual harassment claims, though that point should already be clear in the First Amended Complaint." (Memorandum of Law in Support of Plaintiffs' Motion for Leave of Court to File Plaintiffs' Second Amended Complaint ("Pl.Amend.Memo.") at 3).

***3** Furthermore, the plaintiffs seek to include additional allegations concerning the defendants' violations of NYLL § 196-d (the " § 196-d Allegations"). The First Amended Complaint alleges that "Thalassa Restaurant's owners regularly demanded and retained approximately one quarter" of the Service Fee in violation of § 196-d. (FAC, ¶¶ 73-74, 83, 164). The Second Amended Complaint broadens this accusation, by alleging that all of the defendants "regularly demanded and retained a significant portion" of the Service Fee and "failed to distribute significant portions" of the Service Fee to the waitstaff. (SAC, ¶ 87). It also asserts that in addition to retaining one quarter of the Service Fee, the defendants sometimes used other portions of the Service Fee to pay restaurant expenses, including employees' wages and compensation owed to the "banquet manager." (SAC, ¶¶ 88-89). The defendants oppose each of the changes, and Fantis Foods filed a separate response, arguing that it should not be joined in the action.

1. *Standard for Amendment*

A motion to amend is generally governed by Rule 15(a) of the Federal Rules of Civil Procedure, which states that "[t]he court should freely give leave when justice so requires." Fed.R.Civ.P. 15(a)(2). Notwithstanding the liberality of the general rule, "it is within the sound discretion of the court whether to grant leave to amend." *John Hancock Mutual Life Insurance Co. v. Amerford International Corp.,* 22 F.3d 458, 462 (2d Cir.1994); *accord Krumme v. WestPoint Stevens Inc.,* 143 F.3d 71, 88 (2d Cir.1998). Regarding the use of this discretion, the Supreme Court has stated:

> In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave should ... be freely given.

Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (internal quotation marks omitted).

Where, as here, a proposed amendment adds new parties, the propriety of amendment is governed by Rule 21 of the Federal Rules of Civil Procedure. *Momentum Luggage & Leisure Bags v. Jansport, Inc.,* No. 00 Civ. 7909, 2001 WL 58000, at *1 (S.D.N.Y. Jan. 23, 2001). That rule states that a party may be added to an action "at any time, on just terms." Fed.R.Civ.P. 21. In deciding whether to permit joinder, courts apply the "same standard of liberality afforded to motions to amend pleadings under Rule 15." *Soler v. G & U, Inc.,* 86 F.R.D. 524, 528 (S.D.N.Y.1980) (quoting *Fair Housing Development Fund Corp. v. Burke,* 55 F.R.D. 414, 419 (E.D.N.Y.1972)); *accord Smith v. P.O. Canine Dog Chas,* No. 02 Civ. 6240, 2004 WL 2202564, at *12 n. 11 (S.D.N.Y. Sept. 28, 2004); *Momentum Luggage,* 2001 WL 58000, at *2; *Clarke v. Fonix Corp.,* No. 98 Civ. 6116, 1999 WL 105031, at *6

(S.D.N.Y. March 1, 1999). Thus, joinder will be permitted absent undue delay, bad faith, prejudice, or futility. Joinder may be denied as futile if the proposed pleading would not withstand a motion to dismiss pursuant to Rule 12(b)(6). *See Oneida Indian Nation of New York v. City of Sherill,* 337 F.3d 139, 168 (2d Cir.2003), *rev'd on other grounds,* 544 U.S. 197, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005); *Smith v. CPC International, Inc.,* 104 F.Supp.2d 272, 274 (S.D.N.Y.2000). To overcome objections of futility, the moving party must merely show that it has "at least colorable grounds for relief." *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc.,* 748 F.2d 774, 783 (2d Cir.1984) (citation omitted); *see also Kaster v. Modification Systems, Inc.,* 731 F.2d 1014, 1018 (2d Cir.1984).

2. *Fantis Foods*

***4** In the Second Amended Complaint, the plaintiffs allege that Fantis Foods, a company located in Carlstadt, New Jersey, is wholly owned by members of the Makris family, including George Makris and Steve Makris. (SAC, ¶¶ 28, 137). They assert that at least during some of the time period of which the plaintiffs complain, George Makris was Chairman or Chief Executive Officer of Fantis Foods. (SAC, ¶ 138). They also claim that during that time, Steve Makris was not an employee of Fiskardo and received no salary from Fiskardo, but rather was Chief Operating Officer of Fantis Foods, and in that capacity, "had significant authority over the terms and conditions of the Plaintiffs' employment, including the power to set wages, hire and fire." (SAC, ¶¶ 139-140).

Further, the plaintiffs allege that Tommy Ziotas, a corporate officer of Fiskardo, also worked for Fantis Foods as General Manager and was the person primarily responsible for managing Thalassa's payroll. (SAC, ¶¶ 141-144). They assert that during part of the time that Mr. Ziotas helped to manage Thalassa's payroll, he was employed only by Fantis Foods and not by Fiskardo. (SAC, ¶ 142). The plaintiffs contend that some of Thalassa's payroll documents "were routinely sent to the Fantis offices" in New Jersey, and that Mr. Ziotas and Fantis Foods "regularly had custody and control over most or all of" the payroll documents. (SAC, ¶¶ 143-144). Finally, the plaintiffs claim that some of the payroll documents issued to them during their employment at Thalassa identified "Fantis" under a heading titled "co." (SAC, ¶ 145).

Based on these assertions, the plaintiffs allege that Fantis Foods was the plaintiffs' employer within the meaning of the FLSA, the NYLL, the New York State Human Rights Law, and the New York City Administrative Code. (SAC, ¶ 33). They claim that Fantis Foods "through its agents, had sufficient authority over the Plaintiffs' employment at Thalassa Restaurant as to render it an employer, and subject it to joint and several liability for the labor law violations." (SAC, ¶¶ 33, 146).

The defendants and Fantis Foods oppose this amendment on the basis of futility. Fantis Foods states that the plaintiffs' motion is "based solely on a misstatement of facts." (Proposed Defendant Fantis Foods, Inc.'s Brief in Opposition to Plaintiffs' Motion for Leave to File a Second Amended Complaint ("Fantis Response") at 1). In support of this contention, Fantis Foods submitted affidavits from Mr. Ziotas and Jerry Makris, the Vice President of Fantis Foods, stating that "Fantis does not manage Thalassa's payroll" and that "Fantis has never been in the business of operating a restaurant." (Affidavit of Tommy Zibtas dated Jan. 22, 2010, ¶ 6; Affidavit of Jerry G. Makris dated Jan. 22, 2010, ¶ 13).

Because Fantis Foods currently is not a party to this action, its standing to contest the plaintiffs' motion "is, at best, dubious." *Vasquez v. Summit Women's Center, Inc.,* No. 301 CV 955, 2001 WL 34150397, at *1 n. 1 (D.Conn. Nov. 16, 2001); *accord State Farm Mutual Automobile Insurance Co. v. CPT Medical Services, P.C.,* 246 F.R.D. 143, 146 n. 1 (E.D.N.Y.2007) (non-parties proposed as new defendants lack standing to challenge motion to amend). However, the defendants, who obviously

have standing, also rely on the affidavits of Mr. Ziotas and Jerry Makris in their response to the plaintiffs' motion.

***5** Nevertheless, I decline to consider these affidavits. Because determinations of futility on a motion for leave to amend are subject to the same standards as motions under Rule 12(b)(6), "[f]utility is generally adjudicated without resort to any outside evidence." *Wingate v. Gives,* No. 05 Civ. 1872, 2009 WL 424359, at *5 (S.D.N.Y. Feb.13, 2009) (citing *Nettis v. Levitt,* 241 F.3d 186, 194 n. 4 (2d Cir.2001) ("Determinations of futility are made under the same standards that govern Rule 12(b)(6) motions to dismiss.")); *accord Cecilio v. Kang,* No. 02 Civ. 10010, 2004 WL 2035336, at *17 (S.D.N.Y. Sept.14, 2004) ("Normally, a motion for leave to amend is adjudicated without resort to any outside evidence ."); *Dipace v. Goord,* 308 F.Supp.2d 274, 278 (S.D.N.Y.2004) (same); *Durabla Manufacturing Co. v. Goodyear Tire and Rubber* Co ., 992 F.Supp. 657, 661 n. 4 (S.D.N.Y.1998) ("The Court declines to consider the deposition testimony submitted by defendants in opposition to plaintiff's motion for leave to amend the Complaint."). Accordingly, a decision regarding whether the inclusion of Fantis Foods as a defendant is futile must be based solely on the allegations in the Second Amended Complaint, with all inferences drawn in favor of the plaintiffs. *See Neshewat v. Salem,* 365 F.Supp.2d 508, 516 (S.D.N.Y.2005).

The FLSA defines an employer as one who "suffers or permits" an employee to work. 29 U.S.C. § 203(g). "This definition is necessarily a broad one, in accordance with the remedial purpose of the FLSA." *Zheng v. Liberty Apparel Co.,* 355 F.3d 61, 66 (2d Cir.2003). "An entity 'suffers or permits' an individual to work if, as a matter of 'economic reality,' the entity functions as the individual's employer." *Id.* (citing *Goldberg v. Whitaker House Cooperative, Inc.,* 366 U.S. 28, 33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961)). "The regulations promulgated under the FLSA expressly recognize that a worker may be employed by more than one entity at the same time." *Id.* (citing 29 C.F.R. § 791.2).

To determine if an entity is, as a functional matter, a joint employer for the purposes of the FLSA, "[t]he Second Circuit has declined to circumscribe [a court's] analysis to a precise set of factors, recognizing up to ten common factors while noting that a district court is 'free to consider any other factors it deems relevant to its assessment of the economic realities.' " *Lin v. Great Rose Fashion, Inc.,* No. 08 CV 4778, 2009 WL 1544749, at *12 (E.D.N.Y. June 3, 2009) (quoting *Zheng,* 355 F.3d at 71-72); *accord Herman v. RSR Security Services Ltd.,* 172 F.3d 132, 139 (2d Cir.1999) ("[A]ny relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition."). The goal of the economic-realities test "is to determine whether the employees in question are economically dependent upon the putative employer." *Lopez v. Silverman,* 14 F.Supp.2d 405, 414 (S.D.N.Y.1998).

The circuit has noted that in deciding whether an entity is a joint employer, "different sets of relevant factors" apply "based on the factual challenges posed by particular cases." *Barfield v. New York City Health and Hospitals Corp.,* 537 F.3d 132, 142 (2d Cir.2008). Some of the factors that the *Zheng* Court found important for consideration-for example, "the extent to which plaintiffs performed a discrete line-job that was integral to [the putative joint employer's] process of production," 355 F.3d at 72-were specific to the nature of the job at issue in that case, garment manufacturing. However, other *Zheng* factors are useful in this case, including: (1) whether the putative joint employer's premises and equipment were used for the plaintiffs' work; (2) the degree to which putative joint employer or its agents supervised the plaintiffs' work; and (3) whether the plaintiffs worked exclusively or predominantly for the putative joint employer. *Id.* at 72; *Barfield,* 537 F.3d at 138 n. 4.

***6** The plaintiffs rely on *Lin* in support of the contention that Fantis Foods is a joint employer here because it is "significantly entwined with"

Thalassa. (Omnibus Reply in Support of Motion for Leave to File a Second Amended Complaint ("Pl.Amend.Reply") at 4). In *Lin,* which involved the working conditions at a garment factory, the defendants moved to dismiss on the basis that the plaintiffs lacked standing pursuant to the FLSA.2009 WL 1544749, at *11. The court denied the motion, holding, among other things, that "[d]iscovery [was] needed to determine whether a functional employment relationship existed between the Plaintiffs and Great Wall [(one of the defendants)] under the *Zheng* factors." *Id.* at *15. The court explained that "[n]early every aspect of [the two businesses at issue] was intertwined" and found that "Defendants' dubious uses of the corporate form and the interlocking relationships between the Defendant Corporations are pertinent to the joint employer inquiry in this case." *Id.* at *16. The court pointed out that (1) evidence had already established that the purported agents of Great Wall supervised the plaintiffs' work in the factory; (2) "[t]he ownership of the premises and the equipment used in the Factory could be imputed to Great Wall, given the tangled leasing relationships" at issue and "the fact that the Factory's space was distinguished from Great Wall's space by nothing more than a pile of paper boxes;" and (3) garments manufactured in the factory were made exclusively for Great Wall. *Id.* at *15.

While the facts alleged in this case may not support joint employer status as strongly as those in *Lin,* the plaintiffs have pled enough to survive a motion to dismiss. Most compellingly, they have asserted that Steve Makris, while receiving a salary solely from Fantis Foods, supervised the plaintiffs and had the power to set their wages as well as hire and fire them. (SAC, ¶¶ 139-140). Likewise, they claim that Mr. Ziotas, the primary person responsible for managing Thalassa's payroll, was also at some point only employed by Fantis Foods, not Fiskardo. (SAC, ¶¶ 141-142). Finally, they allege that Fantis Foods often had custody and control over Thalassa's payroll documents and that some of the payroll documents provided to them listed "Fantis" under the heading of "company." (SAC, ¶¶ 143-145). None of these factors is dispositive, but taken together, they provide enough for the plaintiffs to establish Fantis Foods' joint employer status for the purposes of a motion to amend. Although-in their response papers and at oral argument-the defendants and Fantis Foods vigorously objected to the plaintiffs' characterization of the facts, the appropriate time for such objections is in a motion for summary judgment, when the plaintiffs have had an opportunity for discovery.

3. *The § 196-d Allegations and the Status Language*
The plaintiffs also seek to add language that claims that all of the defendants are employers under the New York State Human Rights Law and the New York City Administrative Code (the Status Language) as well as additional allegations under § 196-d that the defendants, on occasion, used portions of the Service Fee to pay restaurant expenses, including employees' wages and the banquet manager's compensation (the § 196-d Allegations).

*7 The defendants contest these changes. They argue that the plaintiffs' request has been unduly delayed because when they filed the Complaint or Amended Complaint, the plaintiffs "knew or should have known" to include the Status Language and also should have been aware of the facts upon which the § 196-d Allegations are based. (Defendants' Brief in Opposition to Plaintiffs' Motion for Leave to File a Second Amended Complaint ("Def.Amend.Response") at 10). They further claim that the plaintiffs have failed to provide a reason for their delay. (Def. Amend. Response at 10). In opposing the plaintiffs' desire to add the Status Language, the defendants insist that "[h]aving made a strategic decision not to include that language, plaintiffs should not be allowed to do so now." (Def. Amend. Response at 10).

The plaintiffs' request, however, comes within the deadline set by Judge Holwell for the amendment of pleadings. Moreover, delay, absent bad faith or prejudice, is not a sufficient basis for denying leave

to amend. *See Parker v. Columbia Pictures Industries,* 204 F.3d 326, 339 (2d Cir.2000); *Block v. First Blood Associates,* 988 F.2d 344, 350 (2d Cir.1993); *Richardson Greenshields Securities, Inc. v. Lau,* 825 F.2d 647, 653 n. 6 (2d Cir.1987); *Lawrence v. Starbucks Corp.,* No. 08 Civ. 3734, 2009 WL 4794247, at *3 (S.D.N.Y. Dec. 10, 2009); *In re Horizon Cruises Litigation,* 101 F.Supp.2d 204, 215 (S.D.N.Y.2000). The defendants do not assert that they are prejudiced by these proposed amendments. And, in light the modest scope of the additions, [FN2] there is no reason to believe that they would be.

> FN2. In fact, as the plaintiffs pointed out at oral argument, they do not necessarily have to add the § 196-d Allegations because they have already asserted a claim under § 196-d, but they are doing so in an abundance of caution in order to ensure that the defendants have notice of the extent of their claim. (Transcript of Proceeding on March 25, 2010 ("Tr.") at 9-10).

In addition, the defendants have failed to show bad faith. While they deem the plaintiffs' decision not to include the Status Language "strategic," it is difficult to imagine why such a decision would be tactical. Instead, it is more likely that the omission of this language was an oversight. *See Larkins v. Selsky,* No. 04 Civ. 5900, 2006 WL 3548959, at *11 (S.D.N.Y. Dec. 6, 2006) ("[T]he Court finds it likely that Plaintiff inadvertently omitted these allegations from his Second Amended Complaint. In the interest of justice, he should be permitted to correct his oversight ."); *Braunscheidel v. Buffalo Carpenters Pension Plan,* No. 89 CV 356, 1993 WL 30935, at *3 (W.D.N.Y. Jan. 28, 1993). Furthermore, the plaintiffs explain that the facts underlying the § 196-d Allegations were revealed as they reviewed documents produced to them by the defendants in October 2009, after they had filed the Amended Complaint. (Pl. Amend. Reply at 6). Specifically, they assert that those documents indicated that the defendants used portions of the Service Fee to pay restaurant expenses, including the wages of other employees and the compensation of the banquet manager. (Pl. Amend. Memo. at 3).

Because these additions are hardly delayed and because the defendants have failed to show prejudice or bad faith, the plaintiffs are permitted to amend their complaint to include the Status Language and § 196-d Allegations.

B. *Motion to Quash*

***8** The defendants moved to quash document and deposition subpoenas served on Fantis Foods and Fantis Transfer (collectively, the "Fantis Companies"). [FN3] Fantis Transfer owns the building in which Thalassa is located and appears to be operated at least in part by George Makris. (Affirmation of David W. Field dated Dec. 17, 2009 ("Field Aff."), ¶ 4; Entity Information Form from New York State Department of State, Division of Corporations, attached as Exh. E to Declaration of Marc D. Ashley dated Dec. 24, 2009). The subpoenas seek the identical information from the companies. With regard to documentary evidence, the subpoenas request:

> FN3. The plaintiffs challenge the defendants' standing to object to the subpoenas. (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Quash Subpoenas Served on Non-Parties Fantis Food, Inc. and Fantis Transfer Corp., Inc. ("Pl.Response") at 5-6). "Generally, absent a claim of privilege, a party does not have standing to object to a subpoena served on a non-party." *In re Flag Telecom Holdings, Ltd.,* No. 02 Civ. 3400, 2006 WL 2642192, at *2 (S.D.N.Y. Sept. 13, 2006) (citing *Langford v. Chrysler Motors Corp.,* 513 F.2d 1121, 1126 (2d Cir.1975)). "However, a party may have 'a sufficient privacy interest in the confidentiality of records pertaining to their personal financial affairs so as to give them standing to chal-

> lenge the subpoenas.' " *Id.* (quoting *Sierra Rutile Ltd. v. Katz,* No. 90 Civ. 4913, 1994 WL 185751, at *2 (S.D.N.Y. May 11, 1994). The defendants here contend that they have standing because the subpoenas seek personal information about the individual defendants, including their business, financial, and employment relationship with other members of the Makris family and the Fantis Companies. (Defendants' Reply Brief in Further Support of Their Motion to Quash Plaintiffs' Subpoenas Served on Non-Parties Fantis Food, Inc. and Fantis Transfer Corp., Inc. at 2). I agree. Although not all of the plaintiffs' requests seek such information, the fact that some of them do is sufficient. Moreover, given the overlap in ownership between Fiskardio and the Fantis Companies, dismissing the defendants' motion would only cause delay because the Fantis Companies likely would raise the same objections in their own motions to quash.

(1) "All documents concerning the business, financial, employment, and/or any other relationship between" the Fantis Companies and Fiskardo;

(2) "All documents concerning the business, financial, employment, and/or any other relationship between George Makris, Julia Makris, and/or Steve Makris," including the sharing of funds between the individual defendants and the Fantis Companies;

(3) "All documents concerning the business, financial, employment, and/or any other relationship between" the Fantis Companies;

(4) "All documents constituting correspondence between" the Fantis Companies, including documents concerning Thalassa's "employee check and payroll questions and concerns;"

(5) All documents concerning the plaintiffs;

(6) "All documents concerning complaints against and/or investigations of" the Fantis Companies "regarding minimum wages, overtime, distribution of tips, uniforms, sexual harassment, and/or other employment practices, including complaints resulting in any legal or regulatory actions against" the Fantis Companies;

(7) "All documents concerning any steps taken by [the Fantis Companies] ... to learn about minimum wage and overtime requirements under the U.S. Fair Labor Standards Act, New Jersey Statutes and/or New York Labor Law, or to encourage or secure compliance with these laws ...;" and

(8) "All documents concerning the employment practices or policies at Thalassa Restaurant, including records concerning compensation of Thalassa Restaurant employees, Thalassa Restaurant revenues, the collection and distribution of gratuities and service charges, and private parties (or banquets) held at Thalassa Restaur- ant."

(Schedule A of Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises to Fantis Foods, Inc., attached as part of Exh. A to Field Aff.; Schedule A of Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises to Fantis Transfer Corp., Inc., attached as part of Exh. B to Field Aff.). Except for Requests Numbers 6 and 7, which do not limit the time period for the documents that are sought, the other requests seek documents from January 1, 2002 to the present.

The deposition subpoenas ask the Fantis Companies to identify and produce people knowledgeable regarding the following matters:

***9** (1) "The corporate structure, nature of business, capital structure, ownership, organization, incorporation, governance, and current legal status of" the Fantis Companies;

(2) The relationship between the Fantis Compan-

ies and Fiskardio; [FN4]

FN4. This is the only request whose wording varies between the two subpoenas. In the subpoena to Fantis Foods, the plaintiffs suggest that these documents should include "without limitation the business, financial, employment, and/or any other relationship between Fantis Foods, Inc. and Thalassa Restaurant." (Schedule A of Subpoena to Testify at a Deposition or to Produce Documents in a Civil Action to Fantis Foods, Inc. ("Fantis Foods Dep. Subpoena"), attached as part of Exh. A to Field Aff., ¶ 2). In the plaintiffs' subpoena to Fantis Transfer Corp., they add to this list "without limitation the structure and amount, if any, of rent paid by Thalassa Restaurant to Fantis Transfer Corp." (Schedule A of Subpoena to Testify at a Deposition or to Produce Documents in a Civil Action to Fantis Transfer Corp., Inc. ("Fantis Transfer Dep. Subpoena"), attached as part of Exh. B to Field Aff., ¶ 2).

(3) The relationship between the Fantis Companies and George Makris, Julia Makris, Steve Makris, and/or Tommy Ziotas;

(4) "Any bookkeeping, payroll or other services [the Fantis Companies] provide[ ] in connection with Thalassa Restaurant's employment of workers;"

(5) "Complaints against and/or investigations of [the Fantis Companies] ... regarding minimum wages, overtime, distribution of tips, uniforms, sexual harassment, and/or other employment practices ...;"

(6) "Any steps taken by [the Fantis Companies] ... to learn about the minimum wage and overtime requirements of the U.S. Fair Labor Standards Act, New Jersey Statutes, and/or New York Labor Law, or to encourage or secure compliance with these laws ...;"

(7) All records maintained by the Fantis Companies that relate to Thalassa; and

(8) "The relationship between Fantis Transfer Corp. and Fantis Foods, Inc., including without limitation the business, financial, employment, and/or other relationship between [them]."

(Fantis Foods Dep. Subpoena; Fantis Transfer Dep. Subpoena). As with the requests for documents, these requests limit the relevant time period to after January 1, 2002, except for numbers 5 and 6, which are not restricted in time.

On December 9, 2009, the defendants wrote to the plaintiffs objecting to the subpoenas as overbroad and requested that they be withdrawn and replaced with "[s]ubpoenas narrowly construed to address the relevant issues of the action." (Letter of Stephanie L. Aranyos dated Dec. 9, 2009, attached as Exh. C to Field Aff., at 1-2). By letter dated December 11, 2009, the plaintiffs deemed the subpoenaed information "relevant and material to the case" and refused to withdraw the subpoenas. (Letter of Bernadette K. Galiano dated Dec. 11, 2009, attached as Exh. D to Field Aff, at 1-2). These letters were the only communication that the parties had over the subpoenas prior to the defendants' filing of the instant motion to quash; the parties never met and conferred regarding the scope of the subpoenas. (Tr. at 21, 26).

1. *The Scope of Discovery*

Generally, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense[.]" Fed.R.Civ.P. 26(b)(1). "Although not unlimited, relevance, for purposes of discovery, is an extremely broad concept." *Condit v. Dunne,* 225 F.R.D. 100, 105 (S.D.N.Y.2004); *see Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978); *Convolve, Inc. v. Compaq Computer Corp.,* 223 F.R.D. 162, 167 (S.D.N.Y.2004); *Melendez v. Greiner,* No.

01 Civ. 7888, 2003 WL 22434101, at *1 (S.D.N.Y. Oct.23, 2003). "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). The burden of demonstrating relevance is on the party seeking discovery. *See Mandell v. Maxon* Co., No. 06 Civ. 460, 2007 WL 3022552, at *1 (S.D.N.Y. Oct. 16, 2007).

***10** Once relevance has been shown, it is up to the responding party to justify curtailing discovery. *Condit,* 225 F.R.D. at 106; *Melendez,* 2003 WL 22434101, at *1. "[T]he court must limit the frequency or extent of discovery" when:

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed.R.Civ.P. 26(b)(2)(C). Similarly, a subpoena may be quashed or modified if, among other things, it "subjects a person to undue burden," Fed.R.Civ.P. 45(c)(3)(A)(iv), or requires "disclosing a trade secret or other confidential, research, development, or commercial information." Fed.R.Civ.P. 45(c)(3) (B)(I).

In assessing these considerations, "special weight [should be given] to the burden on non-parties of producing documents to parties involved in litigation." *Travelers Indemnity Co. v. Metropolitan Life Insurance Co.,* 228 F.R.D. 111, 113 (D.Conn.2005) ; *see also Fears v. Wilhelmina Model Agency, Inc.,* No. 02 Civ. 4911, 2004 WL 719185, at *1 (S.D.N.Y. April 1, 2004) ("[T]he Court should be particularly sensitive to weighing the probative value of the information sought against the burden of production on [a] nonparty."); *Concord Boat Corp. v. Brunswick Corp.,* 169 F.R.D. 44, 49 (S.D.N.Y.1996) ("[T]he status of a witness as a nonparty to the underlying litigation 'entitles [the witness] to consideration regarding expense and inconvenience.' " (alteration in original)). Of course, "discovery should not simply be denied on the ground that the person or entity from whom it is sought is not a party to the action.... A better approach is for the court to take steps to relieve a nonparty of the burden of compliance even when such accommodations might not be provided to a party." *Wertheim Schroder & Co. v. Avon Products, Inc.,* No. 91 Civ. 2287, 1995 WL 6259, at *6 (S.D.N.Y. Jan.9, 1995).

> An evaluation of undue burden requires the court to weigh the burden to the subpoenaed party against the value of the information to the serving party. Whether a subpoena imposes an "undue burden" depends upon "such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed."

Travelers Indemnity Co., 228 F.R.D. at 113 (quoting *United States v. International Business Machines Corp.,* 83 F.R.D. 97, 104 (S.D.N.Y.1979)); *accord Bridgeport Music Inc. v. UMG Recordings, Inc.,* No. 05 Civ. 6430, 2007 WL 4410405, at *2 (S.D.N.Y. Dec. 17, 2007); *Night Hawk Ltd. v. Briarpatch Ltd.,* No. 03 Civ. 1382, 2003 WL 23018833, at *8 (S.D.N.Y. Dec. 23, 2003). The subpoenas at issue here may now be analyzed in light of these principles.

2. *The Fantis Companies' Status in the Litigation*

***11** As a result of my decision on the plaintiffs' mo-

tion to amend, Fantis Foods will soon be joined as a defendant in this action. As a result, the plaintiffs are no longer required to request documents and deposition testimony from the company via subpoena. However, the dispute over the scope of the plaintiffs' requests is not mooted. At oral argument, defense counsel stated that if I determined that Fantis Foods could be added as a defendant in this action, the defendants would continue to contest the requests to Fantis Food as overbroad. Therefore, I will construe the document subpoena to Fantis Foods as a request for the production of documents and the deposition subpoena as a notice of deposition under Rule 30(b)(6) of the Federal Rules of Civil Procedure.

During the oral argument, defense counsel argued that "if Fantis was joined it would be joined under this limited issue of a joint employer and [the plaintiffs] could take discovery with respect to what they believe are joint employment issues." (Tr. at 22). Defense counsel further noted that the plaintiffs had no interactions with Fantis Foods and that "no torts happened over in Cartlstadt, New Jersey," and thus "there would be no reason to go rummaging around there." (Tr. at 23).

The plaintiffs have listed three reasons for the so-called "rummaging": (1) to determine if either of the Fantis Companies is a joint employer (Pl. Response at 8-9; Tr. at 20, 24); (2) to investigate whether the individual defendants' violations of the labor law in this case were "willful" based on whether they acquired knowledge of the labor law through their other family businesses (Pl. Response at 8; Tr. at 24); and (3) to gather any documents held by the Fantis Companies relating to the plaintiffs' employment at Thalassa. (Tr. at 25).

a. *Information Related to Joint Employment*

Document Requests Nos. 1, 2, 3, and 8 as well as Deposition Topics Nos. 1, 2, 3, and 7 appear to fall within the first category identified by plaintiffs' counsel-they seek information intended to determine whether the Fantis Companies are joint employers of the plaintiffs. Even though I have granted the plaintiffs' motion to add Fantis Foods as a defendant in this action on the basis that they have pled facts sufficient to show that Fantis Foods may be a joint employer of the plaintiffs, there is no question that the plaintiffs have a right to discovery on this issue in order to support their contention during summary judgment or at trial. The issue, of course, is the appropriate scope of that discovery.

As they stand, the plaintiffs' requests are grossly overbroad, and I decline to rewrite them. Thus, in order to receive this information, the plaintiffs must serve on Fantis Foods new discovery requests narrowly tailored to information regarding Fantis Foods' potential status as a joint employer. I note that the requests in the subpoenas were restricted to the time period of January 2002 to the present, which appears to be an appropriate restriction, since this is the period in which the plaintiffs worked.

***12** With respect to Fantis Transfer, plaintiffs' counsel have acknowledged that they "are fishing" for information that could support its joint employment status, but they contend that they "have a basis to fish which is the relationship between the corporations." (Tr. at 20). Perhaps, but the plaintiffs' current requests to Fantis Transfer are far too expansive. If they wish, the plaintiffs may reserve subpoenas on Fantis Transfer limited to requests directed at the narrow issue of determining whether Fantis Transfer is a joint employer. Information regarding the landlord-tenant relationship between Fantis Transfer and Fiskardio is entirely irrelevant to this action and should be explicitly excluded.

b. *Prior Experience with Labor Laws*

During the oral argument, plaintiffs' counsel conceded that the second purpose of their discovery requests-to determine if the defendants' violations were "willful"-may become "unnecessary" if they were to ask the individual defendants during their

depositions whether they had prior experience with the labor laws and, if so, from where that experience stems. (Tr. at 25). If George, Julia, or Steve Makris admitted that he or she had such experience as the result of work related to the Fantis Companies, a request for documents relating to the incidents and further deposition testimony may be appropriate. In light of the over-inclusiveness and potential intrusiveness of Document Requests Nos. 6 and 7 and Deposition Topics Nos. 5 and 6, the defendants' objections to these requests are sustained.

c. *Information Relating to Employment at Thalassa*

The plaintiffs' requests for information relating to employment at Thalassa can be divided into two categories. First, Document Request No. 5 seeks information specifically relating to the plaintiffs' employment. The relevance of this request is axiomatic; to the extent the Fantis Companies possess documents concerning the plaintiffs, they should be produced.

Second, in Document Request Nos. 4 and 8 and Deposition Topic Nos. 4 and 7, the plaintiffs seek information that concerns Thalassa generally. Because they pertain to the defendants' employment practices and are limited in time to the period when the plaintiffs worked, Document Request Nos. 4 and 8 as well as Deposition Topic No. 4 are plainly relevant. Deposition Request No. 7, which requests deposition testimony concerning "any and all records kept and maintained by [the Fantis Companies] that refer or relate to Thalassa ..." is overinclusive, especially in view of the landlord-tenant relationship between Fiskardio and Fantis Transfer. It is difficult to imagine that the Fantis Companies possess documents relating to Thalassa that are relevant to this action aside from those addressed in the other document and deposition topic requests. However, if the plaintiffs believe they do, they must submit more specific requests to the Fantis Companies.

C. *Motion to Compel*

***13** The document requests and interrogatories at issue in the plaintiffs' motion to compel can be grouped into three broad categories-information relating to employees, to Thalassa management, and to liability and damages.

1. *Employees*

The plaintiffs seek "[a]ll documents reflecting the names of any persons employed at Thalassa Restaurant, their positions and work schedules." (Responses and Objections to Plaintiffs' First Request to Defendants for the Production of Documents ("Def.Doc.Response"), attached as Exh. C to Affirmation of Stephanie L. Aranyos dated Feb. 15, 2010 ("Aranyos Aff."), Request No. 6). Similarly, they request that the defendants "[i]dentify all persons employed at Thalassa Restaurant during the Time Period,[FN5] including their positions and dates of employment." (Responses and Objections to Plaintiffs' First Set of Interrogatories to Defendant Julia Makris ("J. Makris Inter. Response"), attached as Exh. D to Aranyos Aff., Interrogatory No. 9). The plaintiffs have also requested the production of "[a]ll documents assigning employee numbers, or referencing employees by such numbers or nicknames." (Def. Doc. Response, Request No. 55).

> FN5. The parties' submissions do not explain how "Time Period" was defined by the plaintiffs.

In documents turned over to the plaintiffs containing this information, the defendants redacted the information regarding employees other than the plaintiffs. (Tipped Employee Payroll, attached as Exh. 3 to Declaration of David A. Colodny dated Feb. 19, 2010 ("Colodny Decl."); Employee Time Card and Job Detail, attached as Exh. 4 to Colodny Decl.; Payroll Time Register/Payroll Register, attached as Exh. 5 to Colodny Decl.; Payroll Journal, attached as Exh. 6 to Colodny Decl.; Paycheck, attached as Exh. 7 to Colodny Decl.). The plaintiffs

have agreed to the redaction of the social security numbers of non-party employees, but contest the redaction of other information-including names, positions, and tip amounts. (Memorandum of Law in Support of Plaintiffs' Motion to Compel Disclosure ("Pl. Compel Memo.") at 7).

The plaintiffs argue that this information is relevant for a number of reasons. First, it will help them locate witnesses who can testify to their "work hours, uniform requirements," and Thalassa's" practices relating to customer accounts, banquets, and tips." (Pl. Compel Memo. at 7). Next, other employees' names, positions, and tip amounts are critical to their claim that the restaurant distributed tips to employees who were not eligible to receive them and necessary to calculate their damages stemming from the improper tipping practices. (Pl. Compel Memo. at 7; Reply Memorandum of Law in Further Support of Plaintiffs' Motion to Compel Disclosure ("Pl. Compel Reply") at 5). The plaintiffs acknowledge that some of the documents that have been produced by the defendants identify the workers by category, but they note that such categorization is insufficient for their purposes because the workers may have been mislabeled. (Pl. Compel Reply at 5 n. 5). As an example, they explain that Thalassa categorized persons who polish glasses and silverware as "busboys" and had them share in the tips, in violation, they claim, of federal and state law. (Pl. Compel Reply at 5 n. 5). The plaintiffs therefore contend that without knowing the names of those included in the busboy category, they cannot determine how much money was given to the polishers, which they deem "critical" to demonstrating violations of § 196-d and federal and state minimum wage laws. (Pl. Compel Reply at 5 n. 5).

***14** Moreover, the plaintiffs assert that the defendants' redaction of other employees' time cards "make[s] it impossible to tell which individual employees were required to 'clock in' and which were considered managers." (Pl. Compel Memo. at 7). They insist that they need this information in order to determine if Mr. Kurt was considered a manager and, "[b]ecause Plaintiffs also allege [that] their paystubs often stated a lower number of hours than the number of hours that Plaintiffs actually worked, time cards should be produced in their entirety to ensure that information about the Plaintiffs' hours was not improperly redacted." (Pl. Compel Memo. at 7). In addition, the plaintiffs note that the information they seek is specifically covered by the Confidentiality Order dated January 25, 2010 and therefore will protect the privacy of Thalassa employees. (Pl. Compel Memo. at 4-6).

The defendants contend that the Confidentiality Order insufficiently ensures the safety of Thalassa employees. They offer testimony from a recent National Labor Relations Board ("NLRB") hearing by Manuel Segundo Paguay, a busboy at Thalassa, that late one night, he was confronted by representatives from the Restaurant Opportunities Center of New York. (NLRB Tr.,[FN6] attached as Exhs. H, I to Aranyos Aff., at 588-90, 377). The defendants describe this organization as one with which several, if not all, of the plaintiffs have met in an attempt to organize the workers at the restaurant. (Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel ("Def. Compel Response") at 6 n. 4). Mr. Paguay stated that the group followed him, telling him to sign something in order to "win a lot of money" from a lawsuit. (NLRB Tr. at 590-91). He testified that in order to try to lose them, he went into a market for 15 or 20 minutes, but when he exited, the group returned. (NLRB Tr. at 591). Mr. Paguay said that the group followed him onto a subway train and that he only escaped when he left the train car just as the doors were closing. (NLRB Tr. at 591-93).

> FN6. "NLRB Tr." refers to the transcript of the hearing before the NLRB.

The defendants argue that in light of Mr. Paguay's testimony, the discovery of employees' names should be limited to protect Thalassa's employees from "harassment-or worse." (Def. Compel Response at 7). The plaintiffs contend that the defendants' argument is simply a delaying tactic. (Pl.

Compel Reply at 4). They note that this is the first time that the defendants have cited concerns about their employees' safety as a reason not to disclose the information requested by the plaintiffs; previously, the plaintiffs assert, the defendants had expressed concern about "privacy suits" being filed by third parties. (Pl. Compel Reply at 2-3; Tr. at 27).

Additionally, the defendants challenge these discovery requests on the basis that they are being used to recruit more plaintiffs. (Def. Compel Response at 5, 9). The plaintiffs respond that such an allegation is unfounded as the deadline to amend the complaint in order to add additional plaintiffs passed on January 8, 2010. (Pl. Compel Reply at 7).

***15** The plaintiffs also request the production of Thalassa's internal payroll schedule, arguing that it is necessary in order for them to conduct a comparison of cash tips, charged tips, and banquet tips among employees in the tip pool and to determine who was included in the tip pool and what, if any, deductions were made from the plaintiffs' paychecks. (Pl. Compel Reply at 6).

The plaintiffs are entitled to receive documents showing the names, positions, work schedules, and tip amounts of all people employed at Thalassa from January 2002 through the present (as requested by Request No. 6), as well as any documents assigning numbers or referencing employees by numbers or nicknames (as requested by Request No. 55). This information is clearly relevant, as it will allow the plaintiffs to locate witnesses and to investigate their claims regarding the allocation of tips. The plaintiffs have demonstrated that they require the names of nonparty employees; simply knowing their "numbers" or categories of employees is inadequate. In order to address the defendants' concern that current and former employees of Thalassa may be harassed as a result of the release of their names and contact information, the social security numbers of the employees shall be redacted and any contact information-addresses and phone numbers, for example-will be released for attorneys' eyes only. In addition, the defendants need not respond to Interrogatory No. 9, which asks the defendants to list all employees who worked at Thalassa during the Time Period, because the plaintiffs have proffered no explanation why this information is not already covered by Requests Nos. 6 and 55. *See* Local Civil Rule 33.3(b)(1) (interrogatories disfavored where information available through documents or depositions).

The plaintiffs are also entitled to unredacted copies of time cards, job detail reports, payroll records, payroll documents from Paychex, and Thalassa's internal payroll schedule. The documents produced shall be limited to those created on or after January 1, 2002. These documents are relevant to the plaintiffs' claims regarding the improper distribution of tips, failure to pay for certain hours worked and for overtime, unjustified deductions from paychecks, and violation of minimum wage laws.

2. *Thalassa Management*

The plaintiffs also move to compel the production of all documents concerning Raphael Abrahante, Sait [FN7] Dogan, and Tommy Ziotas, "including but not limited to [their] personnel file, performance records, warnings, and contemplated discipline or actual discipline." (Def. Doc. Response, Requests Nos. 44, 46, 47). Mr. Ziotas is the Vice President of Thalassa (Affidavit of Tommy Ziotas dated Jan. 22, 2010, ¶ 1); Mr. Dogan was Thalassa's maitre d' (Tr. at 34); and Mr. Abrahante is the restaurant's chef. (Tr. at 33-34). At oral argument, the plaintiffs agreed to withdraw their request for documents from the personnel files of Mr. Abrahante and Mr. Ziotas. (Tr. at 36). They further stated that the only documents they required from Mr. Dogan's file were those regarding his authority that he had at Thalassa, which they deem relevant to determining if he improperly received tips. (Tr. at 37). The plaintiffs also agreed that such information could be found in Mr. Dogan's job description and similar documents and that his entire personnel file need not be turned over. (Tr. at 37-38).

FN7. The plaintiffs incorrectly listed Mr. Dogan's first name as "Said."

***16** Accordingly, the defendants shall produce all documents relating to Mr. Dogan that indicate the positions that he held at Thalassa, his responsibilities at the restaurant, and whether or not he received money from the tip pool. In addition, the defendants shall produce any information in Mr. Dogan's file relating to his compensation. This is relevant for purposes of comparing his compensation to that of Mr. Kurt to help determine if Mr. Kurt was a manager. The documents produced shall be limited to the time period from January 2002 through the present.

3. *Discovery Relating to Liability and Damages*

a. *Document Request No. 40*

The plaintiffs seek production of "[a]ll documents concerning the assets, liabilities and net worth of each Defendant, including without limitation (i) ownership of any real or personal property; (ii) appraisals of any real or personal property; (iii) bank and investment statements; (iv) mortgage records; or (v) insurance." (Def. Doc. Response, Request No. 40). They assert that this information relates to a determination of punitive damages, which they claim they are entitled to under New York Executive Law § 293 and NYLL § 215. (Pl. Compel Memo. at 8). The defendants argue that Document Request No. 40 is premature and overbroad. (Def. Compel Response at 10). They insist that this private information should not be disclosed until they are found liable on any of the claims for which the plaintiffs seek punitive damages. (Def. Compel Response at 11). Courts in this circuit are split on the issue of allowing pretrial disclosure of financial information relevant to a determination of punitive damages. Some permit it. *See Wade v. Sharinn & Lipshie, P.C.,* No. 07 CV 2838, 2009 WL 37521, at *1 (E.D .N.Y. Jan. 7, 2009); *Hazeldine v. Beverage Media, Ltd.,* No. 94 Civ. 3466, 1997 WL 362229, at *2-3 (S.D.N.Y. June 27, 1997); *Open Housing Center, Inc. v. Kings Highway Realty,* No. 93 CV 0766, 1993 U.S. Dist. LEXIS 15927, at *3-8 (E.D.N.Y. Nov. 8, 1993); *Tillery v. Lynn,* 607 F.Supp. 399, 402-03 (S.D.N.Y.1985). Others have found that such disclosure is premature. *See Agudas Chasidei Chabad of United States v. Gourary,* No. 85 CV 2909, 1989 WL 38341, at *1-2 (E.D.N.Y. April 12, 1989); *Davis v. Ross,* 107 F.R.D. 326, 327-38 (S.D.N.Y.1985).

At this point in the litigation, I decline to grant the plaintiffs access to this information. It is conceivable that upon a summary judgment motion, some of the defendants or some of the plaintiffs' claims will be dismissed, abrogating the need for disclosure of part, or all, of this highly confidential information. *See Uebelacker v. Paula Allen Holdings, Inc.,* No. 06 C 326, 2006 WL 6021169, at *1 (W.D.Wis. Jan. 3, 2006) (delaying decision on motion to compel defendants' financial status until pending summary judgment motion decided). Therefore, the plaintiff's motion to compel a response to Document Request No. 40 is denied without prejudice to renewal at a later time.

b. *Document Request No. 25*

***17** In addition, the plaintiffs have requested "[a]ny documents reflecting, referring or relating to financial statements of Thalassa Restaurant during the Time Period, whether formal or informal, audited or unaudited, including but not limited to profit/loss statements, documents containing information revenues, balance sheets, and tax returns relating to both income tax and sales tax." (Def. Doc. Response, Request No. 25). In response to this request, the defendants produced redacted versions of the first page of its tax returns during the Time Period. (Def. Doc. Response, Response to Request No. 25; Pl. Compel Memo. at 11). The plaintiffs, however, request Schedule K of the defendants' tax returns, arguing that these would identify the company's shareholders, which is relevant to the issue of individual liability. (Pl. Compel Memo. at 11). The defendants do not appear to dispute that dis-

closing the company's shareholders is relevant to the action; instead, they contend that they have already agreed to produce the corporate documents for Thalassa, which identify its shareholder. (Def. Compel Response at 13). If the defendants have properly provided the plaintiffs with such information, the plaintiffs' request is duplicative.

The plaintiffs also assert that the tax returns should be produced in unredacted form in order to reveal Thalassa's gross profits, which they claim are relevant to a determination of damages. The defendants argue that by providing the plaintiffs with the redacted tax returns and by allowing them inspection of thousands of pages of documents that include Thalassa's receipts, they have already given the plaintiffs the information responsive to their request. (Def. Compel Response at 13). Because the plaintiffs have not articulated how their request relates to damages other than punitive damages, they have not sufficiently demonstrated the relevance of this documents and will not be granted access to them.

c. *Document Request No. 48*

Finally, the plaintiffs previously sought "[a]ll documents reflecting, referring, or relating to any investigations conducted by any governmental authority into the labor practices or tax reporting practices of any Defendant," not restricted to the Time Period. (Def. Doc. Response, Request No. 48). They have since agreed to limit their request to documents from defendant Thalassa. (Pl. Compel Memo. at 11). In response to this request, the defendants produced documents concerning the unfair labor practice charges filed by some of the plaintiffs with the NLRB. (Def. Doc. Response, Response to Request No. 48; Pl. Compel Memo. at 11). The plaintiffs argue that "[a]ny other government investigations are also relevant to whether the violations of the labor and employment laws in this action were willful, whether defendants have a good faith defense to these violations, and as to the amount of damages if the tax return is improper." (Pl. Compel Memo. at 11). Apparently in response to the last point, the defendants state that they have produced "all relevant payroll documents, receipts, and banquet documents" and therefore their "tax returns should not be considered the best evidence to base calculation of damages on." (Def. Compel Response at 13-14).

***18** The plaintiffs are entitled to documents regarding any investigations into Thalassa's labor practices, not only those brought by the plaintiffs. And, because such information can be used to establish that the defendants had notice of the labor laws, it shall not be restricted to the period of the plaintiffs' employment. With regard to investigations into Thalassa's tax reporting practices, the defendants shall produce documents that relate to any investigations that may be applicable to this action-for instance, investigations concerning tip credits. However, investigations about tax-related matters that have no relevance to this action-the underreporting of income taxes, for example-need not be provided to the plaintiffs.

D. *Costs*

The plaintiffs request an award of the expenses they incurred, including attorneys' fees, in bringing the motion to compel. If a motion to compel discovery is granted, "the court must, after giving an opportunity to be heard, require the party ... whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed.R.Civ.P. 37(a)(5)(A) . However, the court must not order this payment if "the opposing party's nondisclosure, response, or objection was substantially justified" or "other circumstances make an award of expenses unjust." Fed.R.Civ.P. 37(a)(5)(A)(ii)-(iii). Because their motion has been granted in part and denied in part, and because the defendants' arguments were, on the whole, substantially justified, the plaintiffs will not be awarded their costs. *See Nimkoff v. Dollhausen,* 262 F.R.D. 191, 196 (E.D.N.Y.2009).

Conclusion

As set forth in detail above, each of the pending motions is resolved as follows:

1. The plaintiffs' motion for leave to file a second amended complaint is granted.

2. The defendants' motion to quash the subpoenas served upon Fantis Foods and Fantis Transfer is denied with respect to Document Reguests Nos. 4, 5, and 8 and Deposition Topic 4. In all other respects. the motion is granted.

3. The plaintiffs' motion to compel is denied without prejudice with respect to (a) Interrogatory No. 9; (b) information on Thalassa's internal payroll schedule regarding non-party employees except for information regarding the tips they received; (c) Reguests Nos. 44, 46, and 47 except for information in Mr. Dogan's personnel file that relates to the positions he held at Thalassa, his responsibilities at Thalassa, whether he received money from the tip pool, and documents regarding his compensation that could aid the plaintiffs in determining if Mr. Kurt was a manager; (d) Reguest No. 40; (e) Reguest No. 25; (f) Reguest No. 48 to the extent it seeks documents relating to tax investigations that are irrelevant to the claims at issue in this action. In all other respects, their motion is granted. However, the social security numbers of non-parties contained on any documents produced to the plaintiffs will be redacted, and the contact information of these parties will only be shared among attorneys. The plaintiffs' request for costs is denied.

***19** Compliance with all aspects of this Order shall be effected within 30 days.

SO ORDERED.

S.D.N.Y.,2010.
Copantitla v. Fiskardo Estiatorio, Inc.
Slip Copy, 2010 WL 1327921 (S.D.N.Y.)

END OF DOCUMENT

EXHIBIT F

C

Release No. 56100, Release No. 34-56100, 91 S.E.C. Docket 243, 2007 WL 2066445 (S.E.C. Release No.)

S.E.C. Release No.
Securities Exchange Act of 1934

SECURITIES AND EXCHANGE COMMISSION (S.E.C.)

IN THE MATTER OF THE APPLICATION OF GREGG HEINZE
FOR REVIEW OF DISCIPLINARY ACTION TAKEN BY THE NEW YORK STOCK EXCHANGE, INC.
c/o Paul R. Grand, Esq.
Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C.
565 Fifth Avenue
New York, NY 10017

ADMINISTRATIVE PROCEEDING FILE 3-12461

July 19, 2007

SUMMARY

Former associated person of member firm and member of national securities exchange asserted the privilege against self-incrimination in response to association's request for testimony. Exchange found that Heinze failed to comply with requests by the NYSE that Heinze provide testimony in connection with an NYSE investigation concerning matters that occurred while he was a specialist at Bear Wagner, in violation of NYSE Rule 476, and that Heinze was, therefore, subject to discipline pursuant to NYSE Rules 476(a) and 477. Heinze argues, however, that he could not be forced to testify before the NYSE because he was entitled to invoke the Fifth Amendment's right against self-incrimination. It is ordered that this disciplinary proceeding with respect to Gregg Heinze be, and it hereby is, remanded to the New York Stock Exchange, Inc. for further consideration.'

REGULATION

17 C.F.R.240

Appeal filed: October 23, 2006
Last brief received: January 30, 2007

APPEARANCES:
Paul R. Grand and Andrew J. Schell, of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., for Gregg Heinze.
Susan Light, Virginia J. Harnsich, Allen D. Boyer, and Kwame Anthony for the New York Stock Exchange, Inc.

OPINION OF THE COMMISSION
NATIONAL SECURITIES EXCHANGE — REVIEW OF DISCIPLINARY PROCEEDING

Failure to Provide Requested Testimony

Former associated person of member firm and member of national securities exchange asserted the privilege against self-incrimination in response to association's request for testimony. Held, the proceeding is remanded for further consideration.

I.

Gregg Heinze, a former specialist with New York Stock Exchange, Inc. ("NYSE" or the "Exchange") member firm Bear Wagner Specialists LLC ("Bear Wagner"), [FN1] appeals from NYSE disciplinary action. The Exchange found that Heinze failed to comply with requests by the NYSE that Heinze provide testimony in connection with an NYSE investigation concerning matters that occurred while he was a specialist at Bear Wagner, in violation of NYSE Rule 476, and that Heinze was, therefore, subject to discipline pursuant to NYSE Rules 476(a) and 477. [FN2] The NYSE censured Heinze and permanently barred him from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization. For the reasons given below, we have determined to remand the proceeding to the Exchange for further consideration consistent with this opinion. To the extent we make findings, we base them on an independent review of the record.

II.

On November 2, 2004, our Division of Enforcement (the "Division") issued a subpoena to Heinze, requesting information and testimony in connection with the Division's investigation of NYSE specialists. [FN3] Shortly thereafter, on November 19, 2004, the NYSE Division of Enforcement ("NYSE Enforcement") requested documents from Heinze as part of its investigation of "allegations of improper trading by specialists on the Floor of the Exchange that resulted in violations of Exchange Rules and Federal Securities Laws." In a letter dated December 3, 2004, Heinze responded to NYSE Enforcement's document request, stating, "As we discussed during our telephone conference earlier this week, Gregg Heinze does not have any documents responsive to your November 19, 2004 letter."

On January 12, 2005, Heinze responded to the Division's subpoena by a written, sworn declaration, in which he asserted the Fifth Amendment privilege against self-incrimination as to all questions posed by the Division. [FN4] Also on January 12, 2005, NYSE Enforcement requested that Heinze appear on February 3, 2005, for testimony in connection with NYSE Enforcement's investigation of "allegations that during [Heinze's] employment as a registered specialist with Bear Wagner Specialists LLC, he may have violated Exchange rules and federal securities laws in connection with his trading of Exchange listed securities." Subsequently, Heinze informed the NYSE that he would not appear for testimony as requested. [FN5]

***2** On February 28, 2005, as a result of Heinze's failure to comply with the Exchange's request for testimony, NYSE Enforcement charged that Heinze "violated Exchange Rule 476 in that he failed to comply with requests by the Exchange that he provide testimony concerning matters which occurred prior to the termination of his employment with a member organization, and he is, therefore, subject to discipline pursuant to Exchange Rule 476(a) and 477." The parties submitted briefs and, before the NYSE Hearing Panel, NYSE Enforcement requested summary judgment on the question of whether Heinze had committed the violations the Exchange charged. The Hearing Panel granted NYSE Enforcement's request for summary judgment and found Heinze guilty of violating NYSE Rule 476 and then heard arguments regarding sanctions. The NYSE Hearing Panel later issued its decision censuring and barring Heinze. [FN6]

On March 24, 2006, subsequent to Heinze's hearing, we issued our opinion in Frank P. Quattrone, in which we

observed that a self-regulatory organization ("SRO"), such as the Exchange, although generally not a "state actor," can become subject to the Fifth Amendment under certain circumstances when, through its significant involvement with a government investigation, it can be deemed to have engaged in "state action." [FN7] Following our decision in Quattrone, Heinze requested that the NYSE Hearing Panel set aside its decision and re-open the record to permit Heinze to introduce evidence to support his claim that "the Exchange and the S.E.C., by their own admission, conducted a joint investigation into the conduct of various specialist firms and individual specialists such as Mr. Heinze." Among other things, Heinze noted that there was significant regulatory interest in the trading activities of NYSE specialists at Bear Wagner and other firms during this time period. [FN8] The NYSE Hearing Panel, however, denied Heinze's request to re-open the hearing, finding that the "information submitted on behalf of Mr. Heinze does not rise to the level of specific facts required to re- open the record. They constitute mere conclusory allegations or speculation insufficient to re-open this matter."

On July 3, 2006, Heinze requested review of the Hearing Panel decision by the NYSE Board of Directors. The NYSE Board set oral argument for Heinze's appeal on October 3, 2006. By letter dated September 29, 2006, however, Heinze informed NYSE Enforcement that he was then willing to testify in connection with the Exchange's underlying investigation and requested that, accordingly, oral argument before the NYSE Board be postponed. [FN9] On October 2, 2006, the NYSE denied Heinze's request that the oral argument be postponed. [FN10] On October 4, 2006, following oral argument, the NYSE Board issued a one-sentence decision affirming the decision of the NYSE Hearing Panel in all respects. This appeal followed.

III.

*3 Heinze acknowledges that he failed to appear for testimony, as found by the Exchange. Such a failure establishes a prima facie violation of NYSE Rules 476 and 477. [FN11] Heinze argues, however, that he could not be forced to testify before the NYSE because he was entitled to invoke the Fifth Amendment's right against self-incrimination. Heinze argues that the right against self-incrimination applied to the NYSE because of evidence that "show[ed]," according to Heinze, "that NYSE Enforcement had been working jointly with the SEC when it sought Mr. Heinze's testimony and thus had engaged in state action." On appeal, Heinze requests that his case be remanded to the NYSE "for further fact-finding on the issue of whether NYSE Enforcement engaged in state action in its investigation of Mr. Heinze." [FN12]

Heinze supports his claim of state action by pointing to comments he claims were made by NYSE Enforcement staff during their investigation of him. According to Heinze, during a conversation regarding "what misconduct [Heinze] had engaged in," Heinze's lawyer "was told by a [NYSE] staff attorney that the Stock Exchange was, the words were, conducting a joint investigation with the SEC and that the SEC was taking the lead on certain aspects. And if it weren't a joint investigation, he could tell me more about what the accusations were against my client." Heinze claims that this alleged statement by an NYSE attorney "impl[ies] that the SEC was forcing NYSE Enforcement to restrict the flow of information."

Heinze also asserts that, on January 12, 2005, the same day that Heinze asserted his Fifth Amendment privilege in connection with the Commission investigation, "In a telephone conversation with [Heinze's counsel], one or more NYSE attorneys revealed that he/they knew Heinze had informed the SEC he would assert his privilege and decline to testify." According to Heinze, his decision to assert his Fifth Amendment privilege before the Commission was "information that [NYSE Enforcement] could only have learned from the SEC." Heinze argues, "The fact that NYSE Enforcement, upon learning this information, immediately requested Mr. Heinze's testimony indicates that the request was the result of joint planning with the SEC, or caused by coercion, or at

the very least, strong encouragement, from the SEC." In addition to these assertions, Heinze cites a March 30, 2004, Commission press release announcing the settlement of enforcement actions against five NYSE specialist firms, including Bear Wagner, for violations involving "executing orders for their dealer accounts ahead of executable public customer or 'agency' orders," which described the action as the product of a "joint investigation" and stated, "The NYSE and SEC will continue to coordinate in the investigation of individual responsibility for the violative conduct that is the subject of the enforcement actions announced today." [FN13]

***4** The Exchange contends that the evidence Heinze presented is insufficient to establish state action. At most, the NYSE asserts, the evidence suggests regulatory coordination between Commission staff and NYSE Enforcement which, according to the Exchange, "clearly does not establish state action." In particular, the NYSE disputes the veracity of Heinze's claim that an NYSE attorney told Heinze's counsel that the NYSE had been instructed by the Commission not to provide Heinze with additional information about the NYSE investigation, arguing that, "if it were true, Heinze's counsel clearly would have raised the issue at his hearing in July 2005, which he did not." The NYSE also characterizes as "merely erroneous speculation" Heinze's claim that the NYSE's knowledge of Heinze's assertion of the Fifth Amendment before the Commission shows significant cooperation and "strong encouragement" between the Commission and the NYSE.

IV.

In three recent opinions, we have addressed the question of whether an SRO, although not generally a state actor subject to the Fifth Amendment, can, under certain circumstances, engage in "state action" such that it becomes subject to the right against self-incrimination. In Quattrone, we set aside on procedural grounds NASD action barring an associated person who had refused to testify in an NASD investigation because he was then subject to criminal prosecution. [FN14] We observed in Quattrone that "[a]pplicable law indicates that cooperation between the Commission and NASD will rarely render NASD a state actor, and the mere fact of such collaboration is generally insufficient, standing alone, to demonstrate state action." [FN15] However, we also noted there that precedent indicates that a private entity such as an SRO may, under certain circumstances, engage in state action, observing that the Fifth Amendment restricts only governmental conduct and will constrain a private entity only insofar as its actions are found to be "fairly attributable" to the government. [FN16] We also noted in Quattrone that the Supreme Court has held that private parties' actions may constitute state action if there is such a "close nexus between the State and the challenged action" that the seemingly private behavior "may be fairly treated as that of the State itself." [FN17]

In Justin F. Ficken, where NASD had also barred an associated person who had refused to testify in an NASD investigation because he was the subject of both a Commission investigation and a criminal investigation of the same subject matter, we determined to remand the case to NASD for further development of the record because, among other things, the applicant had been limited in his ability to introduce evidence on the question of whether NASD had engaged in state action. [FN18] In remanding Ficken, we noted that the case had been considered by NASD prior to the issuance of our decision in Quattrone. As part of our discussion of the relevant legal precedent, we observed in Ficken that the Supreme Court has identified certain facts "that can bear on the fairness of such an attribution [that a private entity engaged in state action]," such as whether a challenged activity "results from the State's exercise of its 'coercive power'"; whether "the State provides 'significant encouragement, either overt or covert'"; or whether "a private actor operates as a 'willful participant in the joint activity with the State or its agents.'" [FN19]

***5** More recently, in Warren E. Turk, [FN20] the applicant, like Heinze the subject of Commission and, poten-

tially, criminal investigations, had been barred based on his failure to testify before the NYSE. Like Heinze, Turk sought unsuccessfully to develop a record before the Exchange regarding possible state action by the NYSE Enforcement staff. As in Ficken, we determined to remand the proceeding. We found that the evidence Turk had presented in support of his state action claim did not meet the burden of "demonstrating joint activities sufficient to render an SRO a state actor." [FN21] "Nevertheless," we held there that, "while the evidence Turk identifies is insufficient to establish state action, he should have a further opportunity to develop and present his state action claim." [FN22]

We have similarly determined here that Heinze should have a further opportunity to develop and present his state action claim. The evidence Heinze has presented raises questions about whether the Exchange's coordination with Commission staff made the Exchange a state actor in its investigation of Heinze. The assertions made by Heinze — (1) that his counsel was told by an NYSE attorney that the Division had instructed the NYSE to limit the amount of information about his investigation that the Exchange provided to Heinze and (2) that NYSE attorneys told Heinze's counsel that they were aware of Heinze's assertion of his Fifth Amendment privilege before the Commission on the same day he so informed the Commission - appear to warrant further development of the record in order to assess their credibility. If Heinze's assertions were found to be credible, they would suggest the possibility that the Division exercised significant control and influence over the NYSE's investigation of Heinze, which would be relevant to a state action inquiry. [FN23]

Although, as noted in Turk, the burden of demonstrating joint activities sufficient to render an SRO a state actor is high, and that burden falls on the party asserting state action, [FN24] we believe that Heinze has identified specific evidence that warrants a further opportunity to develop and present his state action claim. Under the circumstances and because the NYSE considered Heinze's case without the full benefit of all of our recent decisions on this issue, [FN25] we believe it is appropriate to remand this proceeding for full consideration of this evidence. [FN26] We do not intend to suggest any view on the outcome of this remand.

An appropriate order will issue. [FN27]

By the Commission (Commissioners ATKINS, CAMPOS, NAZARETH, and CASEY); Chairman COX not participating.

Nancy M. Morris
Secretary

FN1. Heinze voluntarily resigned from Bear Wagner on December 23, 2004.

FN2. NYSE Rule 476(a) provides that NYSE members and employees of NYSE members who violate any provision of any NYSE rule are subject to the imposition of disciplinary sanctions, including a censure and bar, by the Exchange. NYSE Rule 477 states that NYSE members, or employees of NYSE members, who do not comply with an NYSE request to provide testimony, while they are a member or an employee of an NYSE member and during the one-year period after the termination of membership or employment by an NYSE member, are subject to the imposition of disciplinary sanctions, including a bar.

FN3. The subpoena is not in the record. However, the record does include the cover letter, dated November 2, 2004, accompanying the subpoena, sent by a Division attorney to Heinze's counsel. The subject line of the letter is " *In the Matter of Certain Specialist Trading - New York Stock Exchange.* " The letter does not otherwise detail the scope of the Division's investigation.

FN4. The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The record indicates that the declaration, dated January 7, 2005, was hand-delivered to the Commission staff on January 12, 2005.

FN5. The way in which Heinze informed the NYSE that he would not testify as requested and the substance of what he told the Exchange are unclear. However, in Heinze's April 15, 2005, response to the NYSE's charge memorandum, Heinze's counsel stated, "We received the Exchange's request calling for Mr. Heinze's testimony only after the commencement of both an investigation by the United States Attorney's Office and an investigation by the Securities and Exchange Commission.... At the time we received the Exchange's request for our client's testimony, we had already received a subpoena from the S.E.C. and had explained to the S.E.C. that, because of the pendency of the criminal investigation and of the S.E.C.'s refusal to identify the transactions they were accusing our client of having engaged in, we had advised Mr. Heinze to rely on his constitutional right not to be a witness against himself."

FN6. Under the Hearing Panel decision, Heinze received a thirty-day period to testify before his bar would become permanent. Heinze continued to decline to testify during this thirty-day period.

FN7. Securities Exchange Act Rel. No. 53,547, 87 SEC Docket 2155 (Mar. 24, 2006). Before the NYSE Hearing Panel, NYSE Enforcement had cited NASD's decision barring Quattrone (before the Commission set it aside) to support its argument that "the Fifth Amendment did not apply in the disciplinary proceeding."

FN8. On April 12, 2005, a press release was issued announcing the settlement of a Commission enforcement action against the Exchange, "finding that the NYSE, over the course of nearly four years, failed to police specialists, who engaged in widespread and unlawful proprietary trading on the floor of the NYSE." On April 12, 2005, the Commission instituted proceedings against several NYSE specialists, including two Bear Wagner specialists, but not Heinze, charging the specialists with violations of the antifraud provisions of the securities laws by interpositioning orders in their firms' proprietary accounts between customer orders and by trading ahead of customer orders using their firms' proprietary accounts. Also on April 12, 2005, the Exchange announced the issuance of charges resulting from its investigation of other NYSE specialists, including two Bear Wagner specialists, but not including Heinze. On April 15, 2005, the United States Attorney for the Southern District of New York brought criminal charges relating to improper trading in proprietary accounts against fifteen NYSE specialists, including two Bear Wagner specialists, but not Heinze.

FN9. Heinze's counsel stated, "I am writing to inform you that recent developments in the specialists investigation - including two acquittals and a declination of prosecution - have led me to re-assess my previous advice to Gregg Heinze that he not testify before the Exchange. Based on my re-assessment, Mr. Heinze has decided that he may now follow through on his long-standing desire to provide the Exchange with testimony."

FN10. Despite Heinze's offer to testify, which remains outstanding, Heinze has never provided testimony to NYSE Enforcement.

FN11. See, e.g., Louis F. Albanese, 53 S.E.C. 294, 297-98 (1997) (sustaining NYSE disciplinary action for violation of NYSE Rule 477 where respondent failed to cooperate immediately with NYSE investigation); Wallace E. Lin, 50 S.E.C. 196 (1990) (sustaining NYSE findings of violation of Rule 477 where respondent refused to testify in Exchange investigation); cf. Justin F. Ficken, Exchange Act Rel. No. 54,699, 89 SEC Docket 685, 690-91 (Nov. 3, 2006) ("The failure to respond to NASD's requests for testimony demonstrates a prima facie violation of [analogous NASD Rule].").

FN12. Alternatively, Heinze asks that we order the NYSE to terminate Heinze's permanent bar within thirty days. Heinze argues, "In our opening brief, we asked for an order that the permanent bar on Mr. Heinze's membership be lifted once he testifies. However, out of a concern that such an order may result in a de facto permanent bar simply because NYSE Enforcement never asks for Mr. Heinze's testimony, we ask for an order lifting the bar within 30 days of the issuance of the Commission's order. This will provide NYSE Enforcement with ample time to take Mr. Heinze's testimony, but will ensure that the bar is lifted even if NYSE Enforcement chooses not to take the testimony."

FN13. Although, as noted above, the record contains limited information about the Division's underlying investigation of Heinze, the investigation of Heinze appears to be related to the same subject matter as the enforcement actions discussed in the March 30, 2004, press release.

FN14. In Quattrone, we concluded that NASD's grant of summary disposition on the issue of liability against Quattrone was inappropriate and not in accordance with its rules. Quattrone, 87 SEC Docket at 2166.

FN15. 87 SEC Docket at 2165 (citing Scher v. NASD, 386 F. Supp. 2d 402, 408 (S.D.N.Y. 2005)). As the Second Circuit has held, in articulating a standard that would apply equally to other SROs, including the Exchange, "The NASD is a private actor, not a state actor. It is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any NASD board or committee." D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 162 (2d Cir. 2002)(citing Desiderio v. National Ass'n of Secs. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999), cert. denied, 531 U.S. 1069 (2001)).

FN16. 87 SEC Docket at 2163 n.22 (citing D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 161 (2d Cir. 2002) (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

FN17. Id. (citing Brentwood Acad. v. Tennessee Secondary Sch. Ath. Ass'n, 531 U.S. 288, 296 (2001)).

FN18. Exchange Act Rel. No. 54,699 (Nov. 3, 2006), 89 SEC Docket 695, 696.

FN19. 89 SEC Docket at 692 (citing Brentwood, 531 U.S. at 296). Some courts have described this last fact pattern as the "joint action" test, and have focused on inquiries such as whether "the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity" or whether "the particular actions challenged are inextricably intertwined with those of the government." See, e.g., Kirtley v. Rainey, 326 F.3d 1088, 1093, 1094 (9th Cir. 2003) (stating that "joint action" test and "government compulsion" test are separate tests for establishing state action and under the former considering whether "the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity" and under the latter considering whether "the coercive influence or significant encouragement of the state effectively converts the private action into a government action").

FN20. Exchange Act Rel. No. 55,942, __ SEC Docket __ (June 22, 2007).

FN21. __ SEC Docket at __.

FN22. Id. In Turk, we found that, on the record that had been developed, we were not able to make each of the findings required by Section 19(e) of the Securities Exchange Act of 1934 to sustain disciplinary action by an

SRO. See Exchange Act Section 19(e)(1), 15 U.S.C. § 78s(e)(1). We also are unable to make such findings here, as discussed below.

FN23. See, e.g., Brentwood, 531 U.S. at 295-96 (citing, among the factors that contribute to a determination of when a private actor engages in state action, whether a challenged activity "results from the State's exercise of its 'coercive power'" and whether "the State provides 'significant encouragement, either overt or covert'").

FN24. See Turk, __ SEC Docket at __ (citing Ficken, 89 SEC Docket at 695).

FN25. As noted in Turk, we expect that, in the future, parties will seek to introduce any evidence related to the state action issue during the initial evidentiary hearing, so that the record is fully developed in the first instance when the case is before the SRO.

FN26. On remand, the Exchange should carefully consider whether Heinze should be given a new hearing to present additional evidence regarding his state action claim. It appears, as indicated, that such a hearing will be necessary, at a minimum, to assess the credibility of Heinze's assertions about what his lawyers were told regarding the level of coordination between the NYSE Enforcement and Division staff in their investigations of Heinze. Nevertheless, in seeking such a hearing, Heinze will be required to state "the precise manner in which [the facts he does possess] support[] his claims," explain "why he needs additional discovery," "state with some precision the materials he hope [s] to obtain with further discovery," and explain "exactly how" the further information would support his claims. See Ficken, 89 SEC Docket at 695-96 n.37 (citing Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1442-1443 (5th Cir. 1993)). To the extent that Heinze meets this burden, the NYSE will be expected to give due consideration to any requests Heinze makes for additional discovery. See id., 89 SEC Docket at 696.

FN27. We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

In the Matter of the Application of GREGG HEINZE c/o Paul R. Grand, Esq. Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C. 565 Fifth Avenue New York, NY 10017

For Review of Disciplinary Action Taken by the the New York Stock Exchange, Inc.

ORDER REMANDING DISCIPLINARY PROCEEDING TO NATIONAL SECURITIES EXCHANGE

***6** On the basis of the Commission's opinion issued this day, it is

ORDERED that this disciplinary proceeding with respect to Gregg Heinze be, and it hereby is, remanded to the New York Stock Exchange, Inc. for further consideration.

By the Commission.

Nancy M. Morris
Secretary

Release No. 56100, Release No. 34-56100, 91 S.E.C. Docket 243, 2007 WL 2066445 (S.E.C. Release No.)
END OF DOCUMENT

EXHIBIT G

H

Release No. 55942, Release No. 34-55942, 90 S.E.C. Docket 2541, 2007 WL 1800481 (S.E.C. Release No.)

S.E.C. Release No.
Securities Exchange Act of 1934

SECURITIES AND EXCHANGE COMMISSION (S.E.C.)

IN THE MATTER OF THE APPLICATION OF WARREN E. TURK
c/o Lawrence Iason, Esq.
Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C.
565 Fifth Avenue
New York, NY 10017
FOR REVIEW OF DISCIPLINARY ACTION TAKEN BY THE NEW YORK STOCK EXCHANGE, INC.

ADMINISTRATIVE PROCEEDING FILE 3-12404

June 22, 2007

SUMMARY
Former associated person of member firm and member of registered securities association asserted the privilege against self-incrimination in response to association's request for testimony. Held, the proceeding is remanded for further consideration. The NYSE found that Turk failed to comply with requests by the NYSE that Turk provide testimony in connection with an NYSE investigation concerning matters that occurred while he was a specialist at Van der Moolen, in violation of NYSE Rule 477, and that Turk was, therefore, subject to discipline pursuant to NYSE Rules 476(a) and 477. The NYSE censured Turk and permanently barred him from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization. Turk argues that the right against self-incrimination applied to the NYSE because the Exchange is a 'state actor' generally or, alternatively, because, under the particular circumstances of this case, the Exchange engaged in 'state action' in conducting its investigation of Turk. While the evidence Turk identifies is insufficient to establish state action, he should have a further opportunity to develop and present his state action claim. Turk will be required on remand to state 'the precise manner in which [the facts he does possess] support[] his claims,' to explain 'why he needs additional discovery,' to 'state with some precision the materials he hope[s] to obtain with further discovery,' and to explain 'exactly how' the further information would support his claims. SEC does not intend to suggest any view on the outcome of this remand. An appropriate order will issue.'

REGULATION

17 C.F.R.240.10b-5

APPEARANCES:
Lawrence Iason and Kristy Watson Milkov, of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., for Warren E. Turk.

Susan Light, Julie Han Broderick, Marianne Paoli, and Allen D. Boyer, for the Division of Enforcement, New York Stock Exchange, Inc. Appeal filed: August 14, 2006 Last brief received: November 27, 2006

OPINION OF THE COMMISSION
NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY PROCEEDING

Failure to Provide Requested Testimony

Former associated person of member firm and member of registered securities association asserted the privilege against self-incrimination in response to association's request for testimony. Held, the proceeding is remanded for further consideration.

I.

Warren E. Turk, a former member of the New York Stock Exchange, Inc. ("NYSE" or the "Exchange") and a former specialist with NYSE member firm Van der Moolen Specialists USA LLC ("Van der Moolen"), appeals from NYSE disciplinary action. The NYSE found that Turk failed to comply with requests by the NYSE that Turk provide testimony in connection with an NYSE investigation concerning matters that occurred while he was a specialist at Van der Moolen, in violation of NYSE Rule 477, and that Turk was, therefore, subject to discipline pursuant to NYSE Rules 476(a) and 477. [FN1] The NYSE censured Turk and permanently barred him from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization. For the reasons given below, we have determined to remand the proceeding to the NYSE for further consideration consistent with this opinion. To the extent we make findings, we base them on an independent review of the record.

II.

On September 17, 2004, the NYSE Division of Enforcement ("NYSE Enforcement") requested that Turk appear for testimony in connection with NYSE Enforcement's investigation into allegations of improper trading practices by NYSE specialists during the period from 1999 to 2003. Turk initially agreed to testify before NYSE Enforcement, and his testimony was scheduled for November 22, 2004. Our Division of Enforcement also issued a subpoena to Turk in connection with a Commission investigation of improper trading practices by NYSE specialists. On November 8, 2004, Turk appeared before Commission staff and testified. According to Turk, he "testified for a full day before the SEC and answered every question he was asked."

On November 12, 2004, Van der Moolen informed Turk that it was removing him from the NYSE trading floor and placing him on administrative leave. According to Turk, a Van der Moolen official told Turk that Van der Moolen was acting at the request of the office of the United States Attorney for the Southern District of New York (the "United States Attorney"). Soon thereafter, Turk informed the NYSE that he would not be appearing for testimony as scheduled. On November 19, 2004, Turk's counsel sent an email to an NYSE staff attorney that read, in its entirety, "I am writing to confirm that Warren Turk will not appear for testimony on Monday, November 22, 2004." [FN2]

*2 On April 12, 2005, the Commission instituted proceedings against Turk and nineteen other NYSE specialists, charging Turk with violations of the antifraud provisions of the securities laws by inter-positioning orders in Van der Moolen's proprietary account between customer orders and by trading ahead of customer orders using Van der Moolen's proprietary account. [FN3] Also on April 12, 2005, the NYSE announced the issuance of charges resulting from its investigation of Turk. [FN4] The NYSE press release stated, "The illegal conduct en-

gaged in by the specialists, namely inter-positioning and trading ahead of customer orders, resulted in public-customer orders being disadvantaged and a riskless profit for their firms' dealer accounts." [FN5] By letter dated December 21, 2006, Turk informed the NYSE that, because it "now appears" that no criminal charges will be brought against Turk, he would be willing to "appear before NYSE Enforcement and testify on the record." [FN6]

III.

In order to sustain disciplinary action by a self-regulatory organization ("SRO") such as the NYSE, we must determine whether Turk engaged in the conduct found by the NYSE, whether the conduct violated the NYSE rules he was found to have violated, and whether those rules were applied in a manner consistent with the purposes of the Exchange Act. [FN7] As discussed below, we have concluded that we are unable to make all of the findings required to sustain the NYSE's action against Turk and have determined, therefore, to remand the case to the NYSE for further proceedings.

Turk acknowledges that he failed to appear for testimony, as alleged and found by the Exchange. Such a failure establishes a prima facie violation of NYSE Rules 476 and 477. [FN8] Turk argues, however, that he could not be forced to testify at the NYSE because he could invoke the Fifth Amendment's right against self-incrimination. [FN9] Turk argues that the right against self-incrimination applied to the NYSE because the Exchange is a "state actor" generally or, alternatively, because, under the particular circumstances of this case, the Exchange engaged in "state action" in conducting its investigation of Turk.

According to Turk, the NYSE and other SROs are state actors, subject to the right against self-incrimination, because "Congress has effectively required that anyone who wants to work in the securities business must be a member of a self-regulatory organization or must be employed by a member of a self-regulatory organization." Numerous courts and we have repeatedly held, however, that the SROs generally are not state actors, and we see no basis for deviating from that established precedent. [FN10] As the Second Circuit has held, in articulating a standard that would apply equally to other SROs, including the Exchange, "The NASD is a private actor, not a state actor. It is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any NASD board or committee." [FN11]

*3 Alternatively, Turk argues that the NYSE engaged in state action under the circumstances of this specific case because, according to Turk, "NYSE Enforcement has worked in concert with the SEC and the United States Attorney's office in investigating specialists and coordinating the civil and criminal charges brought against them." We recently addressed the question of whether an SRO, although not generally a state actor, can, under certain circumstances, engage in state action such that it becomes subject to the right against self-incrimination. In Frank P. Quattrone, [FN12] where we set aside NASD's action based on procedural deficiencies, we noted that the Fifth Amendment restricts only governmental conduct, and will constrain a private entity only insofar as its actions are found to be "fairly attributable" to the government. [FN13] A violation of the Fifth Amendment, therefore, requires "state action" on the part of the private entity whose actions are being challenged. [FN14]

Although SROs are not, as discussed above, generally state actors, under certain limited circumstances, they may engage in state action. As we noted in Quattrone, the Supreme Court has held that private parties' actions may constitute state action if there is such a "close nexus between the State and the challenged action" that the seemingly private behavior "may be fairly treated as that of the State itself." [FN15] According to the Court, "no one fact can function as a necessary condition across the board for finding state action; nor is any one set of cir-

cumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." [FN16] The Court has identified certain facts "that can bear on the fairness of such an attribution," such as whether a challenged activity "results from the State's exercise of its 'coercive power'"; whether "the State provides 'significant encouragement, either overt or covert'"; or whether "a private actor operates as a 'willful participant in the joint activity with the State or its agents.'" [FN17] Some courts have described this last fact pattern as the "joint action" test, and have focused on inquiries such as whether "the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity" or whether "the particular actions challenged are inextricably intertwined with those of the government." [FN18]

In D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., the court found that NASD Enforcement issued certain requests for information "as a product of its private investigation" and accepted NASD testimony that "none of the demands [for information] was generated by governmental persuasion or collusion ...." [FN19] However, the court also observed that, although NASD Enforcement had not acted in concert with government regulators when NASD Enforcement issued its information requests in that case, NASD could nevertheless, in certain circumstances, be deemed a state actor. The court noted that NASD's Criminal Prosecution Assistance Unit, which, at the time, was a self-contained group within NASD Enforcement, "was in fact working with the government, and when it does it may well be a state actor." [FN20]

***4** In another recent decision involving the question of whether NASD can become subject to the right against self-incrimination by engaging in state action, Justin F. Ficken, we determined to remand the case to NASD for further development of the evidentiary record where the applicant had been limited in his ability to introduce evidence on that question. [FN21] In remanding that case to NASD, we noted, among other things, that the case had been considered by NASD prior to the issuance of our decision in Quattrone.

Turk argues that our decisions in Quattrone and Ficken support setting aside the Exchange's action against him or, at a minimum, justify remanding the case to the Exchange for further proceedings. The record shows that the parties did not litigate extensively the issue of state action before the Exchange and introduced only limited evidence regarding this issue. Turk notes, however, that the evidentiary hearing in this case occurred before either Quattrone or Ficken had been decided.

The evidence Turk identifies to support his contention that the Exchange engaged in state action includes: (1) that the Commission and the NYSE requested Turk's testimony concerning his activities as a specialist within one month of each other; (2) that the Commission and the NYSE brought charges in connection with their respective investigations of NYSE specialists on the same day in April 2005 and that the United States Attorney brought criminal charges against other NYSE specialists three days after the Commission and the NYSE brought their proceedings; [FN22] (3) that press releases issued by the Commission, the NYSE, and the United States Attorney in connection with their investigations indicated that the regulators cooperated with and assisted each other; [FN23] and (4) that Van der Moolen told Turk, at the time that Van der Moolen informed Turk that it placed him on administrative leave, thus removing him from the NYSE trading floor, that it was acting upon a request by the United States Attorney's office. Turk has also indicated at various points in the proceeding that he hoped to develop additional unspecified evidence beyond what he has cited on appeal if the proceeding were remanded to the NYSE for further fact-finding.

We have held that the burden of demonstrating joint activities sufficient to render an SRO a state actor is high, and that burden falls on the party asserting state action. [FN24] The evidence Turk has presented to date does

not meet that standard. That evidence by itself indicates that, in investigating Turk, government and NYSE personnel cooperated to some extent. We have observed previously that cooperation and information sharing between the Commission and an SRO will rarely render the SRO a state actor, and the mere fact of such cooperation is generally insufficient, standing alone, to demonstrate state action. [FN25] We also note that the court in D.L. Cromwell found no state action where NASD and government regulators "pursued similar evidentiary trails" in their parallel investigations because "their independent investigations were proceeding in the same direction ...." [FN26]

***5** Nevertheless, while the evidence Turk identifies is insufficient to establish state action, he should have a further opportunity to develop and present his state action claim. Because the evidence presented to date might be the product of more than cooperation, and because Turk's NYSE evidentiary hearing occurred before the issuance of our decisions in Quattrone and Ficken, [FN27] we believe it is appropriate to provide Turk an opportunity to develop a full evidentiary record on the state action question.

On remand, Turk may seek discovery in connection with his efforts to prove that the NYSE engaged in state action. As we noted in Ficken, a party must be afforded "a full opportunity to conduct discovery" to obtain the "affirmative evidence" that is "essential to his opposition" to summary judgment, [FN28] but he "may not use the discovery process to go on a fishing expedition in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory." [FN29] Not every defense of state action deserves discovery and a hearing. A respondent must provide a reasonable and credible basis to conclude that the SRO's relationship with the government in the case suggests such a "close nexus between the State and the challenged action" that the seemingly private behavior "may be fairly treated as that of the State itself." [FN30]

Turk will be required on remand to state "the precise manner in which [the facts he does possess] support[] his claims," to explain "why he needs additional discovery," to "state with some precision the materials he hope[s] to obtain with further discovery," and to explain "exactly how" the further information would support his claims. [FN31] Turk must be able to satisfy these standards to obtain discovery in opposition to a properly supported motion for summary judgment. To the extent that Turk meets this burden, the NYSE will be expected to give due consideration to any requests Turk makes for additional discovery. [FN32] We do not intend to suggest any view on the outcome of this remand. An appropriate order will issue. [FN33]

By the Commission (Chairman COX and Commissioners ATKINS, CAMPOS, NAZARETH and CASEY).

Nancy M. Morris
Secretary

FN1. NYSE Rule 476(a) provides that NYSE members and employees of NYSE members who violate any provision of any NYSE rule are subject to the imposition of disciplinary sanctions, including censure and bar, by the NYSE. NYSE Rule 477 states that NYSE members, or employees of NYSE members, who do not comply with an NYSE request to provide testimony, while they are a member or an employee of an NYSE member and during the one-year period after the termination of membership or employment by an NYSE member, are subject to the imposition of disciplinary sanctions, including a bar.

FN2. It is unclear how or when Turk first informed the NYSE that he would not testify, or whether he told the NYSE that he would not testify because, as Turk asserts here, Van der Moolen's action "ma[de] it clear to Mr. Turk that he was a focus of the government's investigation." Van der Moolen subsequently filed a Form U-5 Uniform Termination Notice for Securities Industry Registration pertaining to Turk, in which it stated that

Turk's date of termination from Van der Moolen was December 31, 2004.

FN3. The Commission's Order Instituting Proceedings charged Turk with violations of Section 17(a) of the Securities Act of 1933, Sections 10(b) and 11(b) of the Securities Exchange Act of 1934, and Exchange Act Rules 10b-5 and 11b-1, 15 U.S.C. § 77q(a), 15 U.S.C. § 78j(b), 15 U.S.C. § 78k(b), 17 C.F.R. § 240.10b-5, and 17 C.F.R. § 240.11b-1, respectively.

FN4. The record includes the NYSE's press release announcing the issuance of the charges against Turk and against sixteen other NYSE specialists, but does not include the charging document itself.

FN5. The NYSE charged Turk and the other specialists with violations of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and various NYSE Rules.

FN6. As Turk's letter indicates, the United States Attorney has not brought criminal charges against Turk, although the United States Attorney did bring criminal charges against fifteen other NYSE specialists on April 15, 2005. In a January 10, 2007 letter to Turk's counsel, the NYSE staff acknowledged, but did not accept, Turk's offer to testify, describing the offer as "empty and illusory." In that letter, NYSE Enforcement stated that "the relevant investigation has been completed." According to Turk, "both [the Commission and NYSE] proceedings have been stayed pending resolution of the criminal proceedings." There is nothing else in the record regarding the current status of the Commission and NYSE proceedings against Turk based on allegations of interpositioning and trading ahead of customer orders.

FN7. See Exchange Act Section 19(e)(1), 15 U.S.C. § 78s(e)(1); Justin F. Ficken, Securities Exchange Act Rel. No. 54,699 (Nov. 3, 2006), 89 SEC Docket 685.

FN8. See, e.g. Louis F. Albanese, 53 S.E.C. 294, 297-98 (1997) (sustaining NYSE disciplinary action for violation of NYSE Rule 477 where respondent failed to cooperate immediately with NYSE investigation); Wallace E. Lin, 50 S.E.C. 196 (1990) (sustaining NYSE findings of violation of Rule 477 where respondent refused to testify in Exchange investigation). Cf. Ficken, 89 SEC Docket at 690-91 ("The failure to respond to NASD's requests for testimony demonstrates a prima facie violation of [analogous NASD Rule]").

FN9. The Fifth Amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. U.S. Const. amend. V.

FN10. See United States v. Solomon, 509 F.2d 863, 869 (2d Cir. 1975) ("NYSE's inquiry ... was in pursuance of its own interests and obligations, not as an agent of the SEC. It is not enough to create an agency relationship that Solomon's conduct violated both a rule of NYSE, thereby subjecting him to disciplinary action by that body, and federal law, with consequent liability to civil and criminal enforcement proceedings by the Government"); Marchiano v. National Ass'n of Secs. Dealers, Inc., 134 F. Supp.2d 90, 95 (D.D.C. 2001) ("[T]he court is aware of no case ... in which NASD Defendants were found to be state actors either because of their regulatory responsibilities or because of any alleged collusion with criminal prosecutors"); Vladislav Steven Zubkis, 53 S.E.C. 794, 797 n.2 (1998) (stating that privilege against self-incrimination does not apply in SRO disciplinary proceedings).

FN11. D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 162 (2d Cir. 2002) (citing Desiderio v. National Ass'n of Secs. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999), cert. denied, 531 U.S. 1069 (2001)). See also Perpetual Secs., Inc. v. Tang, 290 F.3d 132, 138 (2d Cir. 2002) (citing Desiderio and stating, "It is clear

that NASD is not a state actor ...").

Turk further argues, "The Supreme Court of the United States has repeatedly ruled that a witness cannot be deprived of his or her employment for declining to provide testimony that could be used against the witness in a criminal prosecution," citing Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Lefkowitz v. Turley, 414 U.S. 70 (1973); Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Assoc. v. Comm'r of Sanitation, 392 U.S. 280 (1968); Garrity v. State of New Jersey, 385 U.S. 493 (1967); and Spevack v. Klein, 385 U.S. 511 (1967). However, those cases all involved the government, rather than a private entity such as the NYSE, forcing an individual to choose between testifying and losing his employment. This precedent has possible relevance to the NYSE only to the extent that it engages in state action.

FN12. Exchange Act Rel. No. 53547 (Mar. 24, 2006), 87 SEC Docket 2155.

FN13. Id., 87 SEC Docket at 2163 n.22 (citing D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 161 (2d Cir. 2002) (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982))).

FN14. Id.

FN15. Brentwood Acad. v. Tennessee Secondary Sch. Ath. Ass'n, 531 U.S. 288, 295 (2001).

FN16. Id. at 295-296.

FN17. Id. at 296.

FN18. See, e.g., Kirtley v. Rainey, 326 F.3d 1088, 1092, 1094 (9th Cir. 2003) (stating that "joint action" test and "government compulsion" test are separate tests for establishing state action and under the former considering whether "the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity" and under the latter considering whether "the coercive influence or 'significant encouragement' of the state effectively converts the private action into a government action"); Bass v. Parkwood Hospital, 180 F.3d 234, 241-242 (5th Cir. 1999) (similar); Mathis v. PG&E, 75 F.3d 498, 503, 504 (9th Cir. 1996) (in discussing "inextricably intertwined" inquiry, stating, in dicta, that had a private entity's internal investigation produced a coerced confession and been conducted in close co-operation with a county task force, that would likely support a finding of state action on a joint action theory); cf . People v. Sporleder, 666 P.2d 135, 138-39 & n.3 (Col. 1983) (stating, in dicta, that the installation of a pen register on defendant's telephone line by a telephone company in the context of a joint investigation by the telephone company and the district attorney's office of harassing telephone calls strongly suggested state action).

FN19. D.L. Cromwell, 279 F.3d at 163.

FN20. Id.

FN21. Ficken, 89 SEC Docket at 696. In Quattrone, we concluded that NASD's grant of summary disposition on the issue of liability against Quattrone was inappropriate and not in accordance with its rules. Quattrone, 87 SEC Docket at 2166.

FN22. As noted above, the United States Attorney has not brought charges against Turk.

FN23. The press releases to which Turk refers were issued on April 12, 2005. The Commission's press release, announcing the institution of proceedings against twenty NYSE specialists including Turk, states, in relevant

part, "The staff acknowledges the assistance of the U.S. Attorney's office, the FBI, and the NYSE Division of Enforcement." The NYSE press release states, in relevant part, "NYSE Regulation worked cooperatively in this matter with the U.S. Department of Justice and the U.S. Securities and Exchange Commission. The Exchange acknowledges their substantial support and assistance." In its press release announcing the indictments of fifteen NYSE specialists (as noted, not including Turk), the United States Attorney's office thanked the NYSE, "which has been cooperating with the Government in its continuing investigation." Turk included these press releases as exhibits to his reply brief to us. NYSE Enforcement has submitted no objection to the inclusion of the press releases in the record, nor has NYSE Enforcement sought to question the authenticity of the press releases Turk has adduced. We have therefore determined to include the press releases in our consideration of Turk's appeal.

FN24. Ficken, 89 SEC Docket at 695.

FN25. Quattrone, 87 SEC Docket at 2165. See also Scher v. NASD, 386 F. Supp. 2d 402, 408 (S.D.N.Y. 2005) (finding, where an NASD investigator shared information with the district attorney's office with which he once worked approximately one year after plaintiff's testimony, that "such collaboration," which ultimately led to plaintiff's criminal prosecution, "does not in itself demonstrate that a 'close nexus' existed between the challenged conduct of the NASD and a state actor").

FN26. D.L. Cromwell, 279 F.3d at 162-63.

FN27. We wish to observe that, as noted, the burden of establishing state action is on the applicant and that, normally, an applicant's failure to introduce sufficient evidence on this point will justify the dismissal of his appeal if a claim of state action represents his sole defense. We nevertheless have determined to remand here because of the unusual posture of this appeal. Moreover, we expect that, in the future, parties will seek to introduce any evidence related to the state action issue during the initial evidentiary hearing, so that the record is fully developed in the first instance when the case is before the SRO.

FN28. Ficken, 89 SEC Docket at 695 n. 35 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 250 n.5 & 256-257 (1986)).

FN29. Id. at 695 n. 36 (citing G.K. Scott & Co., Inc., 51 S.E.C. 961, 973 (1994); accord John Montelbano, Exchange Act Rel. No. 47227 (Jan. 22, 2003), 79 SEC Docket 1474, 1493).

FN30. See supra note 15.

FN31. Ficken, 89 SEC Docket at 695-96 n. 37 (citing Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1442-1443 (5th Cir. 1993)).

FN32. See Ficken, 89 SEC Docket at 696.

FN33. We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

In the Matter of the Application of WARREN E. TURK
c/o Lawrence Iason, Esq.
Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C.
565 Fifth Avenue
New York, NY 10017

For Review of Disciplinary Action Taken by the New York Stock Exchange, Inc.
ORDER REMANDING DISCIPLINARY PROCEEDING TO NATIONAL SECURITIES EXCHANGE

*6 On the basis of the Commission's opinion issued this day, it is

ORDERED that this disciplinary proceeding with respect to Warren E. Turk be, and it hereby is, remanded to the New York Stock Exchange, Inc. for further consideration.

By the Commission.

Nancy M. Morris
Secretary

Release No. 55942, Release No. 34-55942, 90 S.E.C. Docket 2541, 2007 WL 1800481 (S.E.C. Release No.)
END OF DOCUMENT

EXHIBIT H

Slip Copy, 2010 WL 2803017 (W.D.N.Y.)
(Cite as: 2010 WL 2803017 (W.D.N.Y.))

H

Only the Westlaw citation is currently available.

This decision was reviewed by West editorial staff and not assigned editorial enhancements.

United States District Court,
W.D. New York.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
STERLING JEWELERS INC., Defendant.
No. 08-CV-00706(A)(M).

July 15, 2010.

Margaret Ann Malloy, Nora E. Curtin, Ami T. Sanghvi, Elizabeth Grossman, U.S. Equal Employment Opportunity Commission New York District Office, New York, NY, Jeffrey A. Stern, Lawrence Mays, U.S. Equal Employment Opportunity Commission, Cleveland, OH, Judith Ann Biltekoff, Equal Employment Opportunity Commission, Buffalo, NY, for Plaintiff.

Brian Daniel Murphy, David Bennet Ross, Gloria Galant, Lorie E. Almon, Gerald L. Maatman, Jr., Richard Ira Scharlat, Seyfarth Shaw LLP, New York, NY, Britt J. Rossiter, Stephen S. Zashin, Zashin & Rich Co., L.P.A., Cleveland, OH, Scott Patrick Horton, Jaeckle Fleischmann & Mugel LLP, Buffalo, NY, William F. Dugan, Seyfarth Shaw, Chicago, IL, for Defendant.

DECISION AND ORDER

JEREMIAH J. McCARTHY, United States Magistrate Judge.

***1** This case was referred to me by Hon. Richard J. Arcara for supervision of pretrial proceedings, including preparation of a decision on non-dispositive motions [22].[FN1] Before me are the motion of plaintiff Equal Employment Opportunity Commission ("EEOC") for a protective order to prohibit a Fed.R.Civ.P. ("Rule") 30(b)(6) deposition of its representative, to strike certain discovery requests propounded by defendant Sterling Jewelers Inc. ("Sterling") and to permit it to participate in the depositions occurring in the parrallel arbitration of *Jock, et al. v. Sterling Jewelers Inc.*, AAA Case No. 1 160 00655 08 (the "arbitration") [109], and the motion of the arbitration claimants to intervene for the limited purpose of inclusion in the protective order governing the confidentiality of the discovery to be exchanged in this case [125]. Oral argument was held on June 8, 2010 and July 9, 2010.

FN1. Bracketed references are to the CM/ECF docket entries.

For the following reasons, I order that the EEOC's motion for a protective order be granted in part and denied in part, and that the arbitration claimants' motion to intervene be granted.

BACKGROUND

The EEOC commenced this gender discrimination action pursuant to Sections 706 and 707 of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e-5(f)(1) and (3) and 2000e-6). The complaint alleges that "since at least January 1, 2003, Sterling has engaged in unlawful employment practices throughout its stores nationwide ... by maintaining a system for making promotion and compensation decisions that is excessively subjective and through which Sterling has permitted or encouraged managers to deny female employees equal access to promotion opportunities and the same compensation paid to similarly situated male employees" ([1], ¶ 7(a)), and by "maintain[ing] a system for making promotion and compensation decisions that is excessively subjective and that has a disparate impact on female retail sales employees". *Id.*, ¶ 8(a).

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(Cite as: 2010 WL 2803017 (W.D.N.Y.))

Despite the age of this case, it is essentially at its infancy with respect to the exchange of discovery. To date, there remains a pending motion to bifurcate discovery [85] and no Case Management Order has been implemented.

Following a series of informal conferences with the parties to resolve their preliminary discovery disputes, I directed the EEOC to file this motion addressing the issues which could not be resolved [101]. The EEOC's motion seeks a protective order prohibiting Sterling from conducting a Rule 30(b)(6) deposition of the EEOC's representative, striking certain of Sterling's document requests and interrogatories, and permitting the EEOC to participate in the depositions occurring in the arbitration [109]. Thereafter, the arbitration claimants moved to intervene for the limited purpose of being included in the protective order governing the confidentiality of the discovery to be exchanged in this case [125].[FN2]

FN2. The arbitration claimants' motion arises from Sterling's motion for entry of a protective order [103]. I have directed the parties to meet and confer in an attempt to reach agreement on the terms of a stipulated protective order. Thus, Sterling's motion is not addressed in this decision.

ANALYSIS

A. The EEOC's Motion for a Protective Order

1. Sterling's Right to a Rule 30(b)(6) deposition

***2** The EEOC seeks to "prohibit Sterling ... from proceeding with its proposed deposition of EEOC, which rather than being an effort to obtain any relevant or admissible evidence, is an effort to depose EEOC's attorney's and otherwise intrude on privileged matters". EEOC's Memorandum of Law [110], p. 1. In response, Sterling argues, *inter alia,* that the proper method for addressing the EEOC's concerns is to allow the EEOC to assert its objections, as appropriate, at the deposition. Sterling's Memorandum of Law [117] p. 9. I agree with Sterling.

I cannot address these issues in the abstract. "Unless and until Defendants actually ask a question at the deposition that intrudes upon the deliberative process privilege or any other alleged applicable privilege, the Court finds that the EEOC's objections are premature". *Equal Employment Opportunity Commission v. LifeCare Management Services, LLC,* 2009 WL 772834, *2 (W.D.Pa.2009); *Equal Employment Opportunity Commission v. California Psychiatric Transitions,* 258 F.R.D. 391, 398 (E.D.Cal.2009) ("To preclude the deposition at this junction is premature"); *Equal Employment Opportunity Commission v. Albertson's LLC,* 2007 WL 1299194, *2 (D.Colo.2007) (same); *Equal Employment Opportunity Commission v. Corrections Corporation of America,* 2007 WL 4403528, *1 (D.Colo.2007) (same).[FN3]

FN3. *Compare with Equal Employment Opportunity Commission v. McCormick & Schmick's Seafood Restaurants, Inc.,* 2010 WL 2572809, *5 (D.Md.2010) (In granting the EEOC's motion for a protective order precluding a Rule 30(b)(6) deposition of its representative, the court noted that "the attendant objections as to individual questions during the deposition on attorney-client privilege and work product grounds would likely involve recourse to this Court and a significant burden on this Court's time that would be lessened by other means of discovery").

Although the EEOC is concerned about the Rule 30(b)(6) deposition being used to reveal privileged material, at this stage I cannot conclude that there are no permissible areas of questioning for Sterling to inquire at the Rule 30(b)(6) deposition. *See Corrections Corp. of America,* 2007 WL 4403528 at *1 ("EEOC is not exempt from a Rule 30(b)(6) deposition"); *Equal Employment Opportunity Commis-*

sion v. American International Group, Inc., 1994 WL 376052, *3 (S.D.N.Y.1994) ("The disclosure of who was interviewed, what the deponent did to refresh his recollection of the facts in the case, and what facts EEOC considered concerning the defendants' defenses] does not reveal the agency's trial strategy or its analysis of the case. For example, knowing who was interviewed does not intrude upon the mental impressions of the attorney. Presumably, the interview process in an investigation includes people and information which will be discarded as the attorney begins the analysis and plans strategy. Similarly, what information a witness reviews in preparation for a deposition does not reveal the thought processes of the attorneys. Documents are reviewed by a deponent for many reasons. There is a distinct difference between asking what was reviewed as opposed to why it was reviewed"); *LifeCare Management Services, LLC,* 2009 WL 772834 at *2 ("The deliberative process privilege only protects the opinions, recommendations, and deliberations of the EEOC, not the underlying factual information").[FN4] At this stage, it is also impossible for me to conclude that all of the categories of inquiry listed in the Rule 30(b)(6) deposition notice (Malloy Declaration [109-2], Ex. 5) pertain only to privileged matters.

> FN4. *Compare with U.S. Equal Employment Opportunity Commission v. Pinal County,* --- F.Supp.2d ----, 2010 WL 2194441, *4 (S.D.Cal.2010) ("asking ... any EEOC representative, to even set forth the selected facts which constitute the factual basis of the probable cause finding would infringe on the deliberative process privilege as it would reveal the EEOC's evaluation and analysis of the extensive factual information gathered by the agency").

***3** Moreover, Sterling alleges that it seeks to depose the "EEOC on the parameters of its administrative investigation." Sterling's Memorandum of Law [117], p. 10. Such inquiry may be highly relevant to its potential defenses in this case because "it is well settled that the EEOC's investigation must occur within the 'scope of the charge'-that is, it must reasonably grow out of the charge underlying it. It is also well settled that a lawsuit must be like or reasonably related to the underlying EOC [*sic*] charge". *Equal Employment Opportunity Commission v. Jillian's of Indianapolis,* 279 F.Supp.2d 974, 979 (S.D.Ind.2003). For example, in *Jillian's of Indianapolis,* the EEOC sought to prosecute a nationwide class, but the court dismissed these claims and limited the suit to Jillian's Indianapolis facility, which was the only facility investigated by the EEOC. 279 F.Supp.2d at 980-81.

"The fact that the EEOC has turned over its complete administrative file does not relieve the Agency of its obligation under Fed.R.Civ.P. 30(b)(6) to provide a witness to answer questions about the documents for purposes of clarification and interpretation". *Little v. Auburn University,* 2010 WL 582083, *2 (M.D.Ala.2010). *See California Psychiatric Transitions,* 258 F.R.D. at 396 (same); *LifeCare Management Services., LLC,* 2009 WL 772834 at *2 (same).[FN5] This is especially true here where, as the EEOC concedes, there is "little investigative material in the files beyond the charges". EEOC's Memorandum of Law [110], p. 15. *See Albertson's LLC,* 2007 WL 1299194 at *1 ("Albertson's may ask what documents were reviewed in the course of the EEOC investigation and what documents evidence that there is discrimination at the distribution center; or Albertson's might ask the identity of persons the EEOC believes have knowledge about the claimed discrimination. The answers to these questions may or may not be in the investigation file, or the information in the investigation file may not be complete").

> FN5. *Compare with American International Group, Inc.,* 1994 WL 376052 at *2 (With respect to the allegations of the complaint, "the defendants contend that they merely seek facts. However, they essentially have the investigative file. Under

> these circumstances, the defendants seek to discover how the EEOC 'intends to marshall the facts, documents and [statements] in its possession, and to discover the inferences that [the EEOC] believes properly can be drawn from the evidence it as accumulated' "); *McCormick & Schmick's Seafood Restaurants, Inc.*, 2010 WL 2572809 at *6 ("Defendants have already received much of the factual information generated by EEOC's investigation.... EEOC has produced its investigative file exceeding six boxes of records, including all witness statements contained therein and job advertisements. Defendants have complete access to their own payroll, personnel and applicant data for purposes of statistical analysis of their employee selection patterns by their own expert. Defendants' deposition subjects are not asking for clarification of this factual data, but rather for how EEOC's counsel has marshalled the facts learned during its investigation in support of its case. All of the subject areas are likely to require testimony of EEOC counsel or a proxy prepared by counsel. Thus, an invasion of attorney work product would be inevitable"); *Pinal County*, 2010 WL 2194441 at * 4 ("Respondents have made no showing that Mr. Green possesses relevant, non-privileged information that is not cumulative or duplicative to the information contained in the EEOC investigative file, which has already been produced to Respondents and which, in the Court's view, is likely the best source of the information presently sought by Respondents").

Even some of the cases upon which the EEOC relies indicate that Sterling is entitled to a Rule 30(b)(6) deposition. For example, in *American International Group, Inc.*, 1994 WL 376052 at * 1-2, the defendant moved to compel responses to certain questions posed at a Rule 30(b)(6) deposition. Although the court denied the defendant's motion to the extent it sought to compel responses to its inquiries concerning the allegations of the complaint and the EEOC's damage claims, it granted the defendant's motion to the extent it sought the deponent to answer questions concerning how it conducted its investigation. *Id.* at *2-3. *See also Equal Employment Opportunity Commission v. Automall Imports, Ltd.*, No. CV-08-3986 (E.D.N.Y. April 13, 2009) (granting the EEOC's motion to quash the defendants' 30(b)(b) subpoena without prejudice to renewal upon completion of fact discovery noting that "maybe there is some relevance to taking ... an investigators deposition. But it should be the last choice, rather than the first").[FN6]

> FN6. Unreported transcript of oral ruling attached as Ex. 18 to Malloy declaration [109].

2. Responses to Sterling's Document Requests and Interrogatories

a. Document Requests

*4 The EEOC's challenges to Sterling's first set of document requests fall into three categories: 1) documents used in preparing the complaint (Request no. 3); 2) communications with or affidavits/statements of current/former employees (whether represented by the EEOC or not) or any person concerning the allegations of the complaint (request nos. 10-14, 29-30); and 3) documents related to the investigation undertaken by the EEOC in commencing this case (request no. 16). Maatman Declaration [117-2], Ex. E. The EEOC argues that these "requests ... explicitly call for communications squarely protected by the attorney-client privilege, common interest privilege, work product doctrine, and the Mediation Agreement", and that it "should not be required to respond to [these] improper discovery requests ... even by providing a privilege log". EEOC's Memorandum of Law [110], pp. 17, 21.

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"The burden is on the party resisting discovery to clarify and explain precisely why its objections are proper given the broad and liberal construction of the discovery rules found in the Federal Rules of Civil Procedure." *Obiajulu v. City of Rochester, Department of Law,* 166 F.R.D. 293, 295 (W.D.N.Y.1996) (Feldman, M.J.). On their face, I do not find that the requests seek only privileged material. If the EEOC believes that responsive documents are privileged, it should-as it has done-produce a privilege log of these documents.[FN7]

> FN7. The EEOC has produced an amended privilege log responding to Sterling's first set of interrogatories and request for production. Maatman Declaration [177-2], Ex. D Because "the governmental deliberative process privilege may only be asserted by the head of a governmental agency or by a designated high-ranking subordinate", the EEOC has also submitted the Declaration of Jacqueline Berrien [122], Chair of the EEOC, in support of its withholding of certain documents under the deliberative process privilege. *Kaufman v. City of New York,* 1999 WL 239698, *3 (S.D.N.Y.1999).

b. Interrogatories

The EEOC also seeks a protective order with respect to the following interrogatories: 1) the identity of the person(s) who provided information or assisted in answering the interrogatories (interrogatory no. 1); 2) the efforts undertaken to determine the identity of any current or former employees of Sterling who allege that they were discriminated against because of their gender and identity of each person (interrogatory no. 3); and 3) identify each current or former employee of Sterling who the EEOC has taken a statement from or exchanged correspondence with, including the details and subject matter of such communications (interrogatory no. 4). Malloy Declaration [109-2], Ex. 4. The EEOC argues that "each of these interrogatories reflects a blatant effort to invade the boundaries of attorney work product". EEOC's Memorandum of Law [110], p. 20.

Addressing the interrogatories individually, I conclude that Sterling is entitled to the identity of the individuals that assisted in preparation of the interrogatory responses (interrogatory no. 1). *See Omega Engineering, Inc. v. Omega, S.A.,* 2001 WL 173765, *3 (D.Conn.2001) (finding interrogatory requesting to "identify each person who participated in the preparation of the answers to any interrogatory" to be proper).[FN8]

> FN8. *Compare with Weiss v. National Westminster Bank, PLC,* 242 F.R.D. 33, 62 (E.D.N.Y.2007) ("NatWest's motion to compel a response to Interrogatory No. 5 is denied because it seeks information regarding individuals who assisted plaintiffs' counsel with the preparation of their interrogatory responses, which is protected work product").

With respect to interrogatory no. 3, I find that Sterling is not entitled to know how the EEOC identified the individuals that were allegedly discriminated against as protected work product, but that it is entitled to the identity of these individuals. The identities of the individual claimants is essential to Sterling's ability to defend itself. *See Serrano v. Cintas Corp.,* 2010 WL 746430, * 1 (E.D.Mich.2010) ("Cintas maintains that it has the right to know the identity of each individual who has agreed to participate in this action, and who the EEOC alleges is entitled to back pay and other damages. The relevance of that information is self evident, and not contested by the EEOC").

***5** There is conflicting authority as to whether Sterling is entitled to the identity of each current or former employee with whom the EEOC has received statements or exchanged correspondence, including the dates of such communications and the subject matter (interrogatory no. 4). *Compare Serrano,* 2010 WL 746430 at *9 (ordering the EEOC

to provide the identity of the persons to whom the EEOC sent letters and questionnaires and copies of all completed questionnaires returned to the EEOC); *Equal Employment Opportunity Commission v. Jewel Food Stores, Inc.*, 231 F.R.D. 343, 346-350 (N.D.Ill.2005) (finding interrogatories seeking the "identify[ ][of] the individuals whom [Jewel] has interviewed and ... the facts it obtained from them" to be discoverable), *with Equal Employment Opportunity Commission v. Collegeville/ Imagineering Ent.*, 2007 WL 1089712, * 1 (D.Ariz.2007) ("Where a party does not seek to learn of witnesses with knowledge about the case, and instead seeks to learn who has been contacted by opposing counsel, work product concerns arise. Such discovery requests seek to track the steps of opposing counsel and their witness interview choices. Such requests focus on the actions of lawyers rather than the knowledge of witnesses").

Faced with this conflicting case law, I agree with Magistrate Judge Payson that "the better reasoned decisions ... are those that draw a distinction between discovery requests that seek the identification of persons with knowledge about the claims or defenses (or other relevant issues)-requests that are plainly permissible-and those that seek the identification of persons who have been contacted or interviewed by counsel concerning the case". *Tracy v. NVR, Inc.*, 250 F.R.D. 130,132 (W.D.N.Y.2008) (Payson, M .J.). [FN9] I also find that any witness statements obtained by the EEOC are protected work product and need not be produced to Sterling absent a showing a substantial need. *See Equal Employment Opportunity Commission v. Scrub, Inc.*, 2010 WL 2136807, *9 (N.D.Ill.2010) ("completed questionnaires and any interview notes of communications between prospective class members and EEOC counsel are ... protected from disclosure"); *Equal Employment Opportunity Commission v. Carrols Corp.*, 215 F.R.D. 46, 51-52 (N.D.N.Y.2003) (denying the defendant employer's motion to compel production of completed questionnaires mailed to employees and prepared by the EEOC under the work product doctrine, but ordering the EEOC, at its suggestion, to provide the defendant with witness summaries); *Equal Employment Opportunity Commission v. International Profit Associates, Inc.*, 206 F.R.D. 215, 221 (N.D.Ill.2002) ("IPA does not have a substantial need for the post-suit interview notes, nor would it undergo an undue hardship in collecting similar information").[FN10]

FN9. *Compare with Wilson v. City of New York*, 2008 WL 824284, *2 (E.D.N.Y.2008) ("Given the large number of non-party witnesses to the events in question in this action ..., it is neither efficient nor practical for the defendant to attempt to locate and depose all of them. It is fair to assume that the plaintiff will actually call at trial witnesses from whom statements were obtained. Thus, in order to prevent unfair surprise at trial and to permit the defendants the opportunity to obtain the substantial equivalent of any such statements, cf. Fed.R.Civ.P. 26(b)(3)(A)(ii) , the plaintiff is directed to disclose the identities and most recent addresses of the two witnesses from whom statements were obtained, as well as the identities and most recent addresses of any other non-party witnesses from whom statements have been obtained").

FN10. *Compare with Young v. California*, 2007 WL 2900539, *1 (S.D.Cal.2007) ("Questionnaires completed by third persons are not work product.... The documents at issue are the verbatim statements of witnesses. They are the factual observations of percipient witnesses, not the thoughts or impressions of counsel").

3. The EEOC's Participation in the Depositions Occurring in the Arbitration

The EEOC argues that "Sterling should not be permitted to oppose reasonable efforts to coordinate

discovery in this case with the parallel arbitration proceeding". EEOC's Memorandum of Law [110], p. 22. Thus, it seeks permission to participate in the depositions of the named plaintiffs in the arbitration, who are also the charging parties in this case. *Id.* at p. 23.

***6** This motion seeks the same relief I previously denied, namely coordination of discovery between this case and the parallel arbitration [97]. For the same reasons the EEOC's initial motion was denied, this motion is also denied. Although the EEOC questions how Sterling will be able to use these depositions in this case without allowing the EEOC to participate (EEOC's memorandum of law [110], p. 22), this issue is for Sterling to resolve and does not bear on the EEOC's right to attend the depositions.

B. The Arbitration Claimants' Motion to Intervene

The arbitration claimants seek to intervene in Sterling's motion for the entry of a protective order in order to argue that the protective order should "permit access to information designated as Confidential Information to: 'private arbitration plaintiffs and their attorneys (a) to the extent that the same material have been produced or will be produced in the Arbitration; (b) as the EEOC finds necessary to effectively prepare its case and permit the private arbitration plaintiffs to represent their interests in this action; or (c) to the extent that deposition transcripts are relevant to the Arbitration.' " Arbitration claimants' Memorandum of Law [126], Ex. 2.

As a threshold issue, I must determine whether the arbitration claimants should be permitted to intervene for purposes of addressing Sterling's motion for a protective order. *See In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation,* 255 F.R.D. 308, 317 (D.Conn.2009) ("modification [of the protective order] is a separate inquiry from the threshold decision to grant intervention"). Permissive intervention is permitted when the movant "has a claim or defense that shares with the main action a common question of law or fact". Rule 24(b)(1)(B). In exercising my discretion I "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights". Rule 24(b)(3).

Sterling does not dispute that the arbitration claimants timely moved to intervene and that the arbitration involves questions of law and fact common to this action. Instead, Sterling argues that it will be prejudiced if the arbitration claimant's motion to intervene is granted because "the Arbitration Claimants seek to have this Court rewrite the protective order entered in the arbitration prohibiting confidential documents and information from being discussed outside the arbitration". Sterling's Response [130], pp. 1-2.

This argument misses the mark. First, the EEOC and the arbitration claimants are not seeking to share discovery exchanged in the arbitration, but rather are seeking permission for the EEOC to share discovery disclosed in *this case* with the arbitration claimants. Second, the EEOC has already requested the inclusion of the arbitration claimants in the protective order and thus, this issue is before me whether or not the motion to intervene is granted. Arbitration claimants' Reply [133], p. 2. Under these circumstances, I grant the claimant's motion to intervene for the limited purpose of addressing Sterling's motion for entry of a protective order. "Whether [they] will be permitted to modify the protective order, and to what extent, is a separate issue". *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation,* 255 F.R.D. at 317.

CONCLUSION

***7** For these reasons, the EEOC's motion for a protective order is granted in part and denied in part [109] as set forth herein, and the arbitration claimants' motion to intervene [125] is granted. The parties, including the arbitration claimants, shall confer in an attempt to reach a stipulated protective order. If the parties are unable to reach an agree-

ment, they shall identify the areas that remain in dispute by July 30, 2010, and a conference to discuss the disputed areas is set for **August 5, 2010 at 11:00 a.m.** The parties may participate via telephone upon advance notice to chambers. The court will initiate the call.

SO ORDERED.

W.D.N.Y.,2010.
Equal Employment Opportunity Com'n v. Sterling Jewelers Inc.
Slip Copy, 2010 WL 2803017 (W.D.N.Y.)

END OF DOCUMENT

EXHIBIT I

Not Reported in F.Supp., 1994 WL 376052 (S.D.N.Y.)
(Cite as: 1994 WL 376052 (S.D.N.Y.))

United States District Court, S.D. New York.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
AMERICAN INTERNATIONAL GROUP, INCORPORATED, and Morefar Estates, Defendants.
No. 93 CIV. 6390 (PKL) RLE.

July 18, 1994.

MEMORANDUM AND ORDER

ELLIS, United States Magistrate Judge:

***1** By notice and memorandum dated May 11, 1994, the defendants seek an order from this court:

(a) compelling production of a designee or designees fully complying with defendants' Rule 30(b)(6) request at the EEOC's expense on a date or dates set by defendants with at least seven (7) days' notice to the EEOC;

(b) compelling the EEOC to produce the investigative memorandum, the attorney letter of determination review and the investigation plan improperly withheld under the governmental deliberation process privilege;

(c) requiring the EEOC to pay defendants their costs, including travel expenses and attorney fees, incurred in taking the deposition of José Dennis, on April 1994;

(d) compelling the EEOC to produce complete, unredacted copies of the documents it produced with improper redactions based on the governmental deliberative process privilege;

(e) admonishing the EEOC that failure to comply with this order shall result in dismissal with prejudice, and an award of defendants' attorneys' fees and costs;

(f) precluding the EEOC from taking any depositions until defendants' Rule 30(b)(6) deposition has been completed; and

(g) imposing any other sanction against the EEOC that this court finds just and proper.

The EEOC contends that what the defendants really seek are "the EEOC's contentions, conclusions, and mental impressions which are protected by either the attorney work product privilege, the governmental deliberative privilege, or the attorney client privilege." The Plaintiff's Motion [sic] in Opposition to the Defendant's Motion to Compel Discovery ("EEOC's Opposition") at 7. Briefs were filed on June 9, 1994, and June 16, 1994, and a hearing was held before the court on June 29, 1994.

The dispute in this case arose after the defendants sought to have the EEOC designate a witness pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. The defendants also asked that certain documents be produced in conjunction with the deposition. The EEOC designated José Dennis, the supervisor of the investigator assigned to the underlying individual charges. Claiming governmental deliberative process privilege, the EEOC withheld three documents:

(1) an investigative memorandum;

(2) an attorney letter of determination review; and

(3) the investigation plan.

In addition, portions were redacted from four (4) documents produced.

The defendants assert that the EEOC has not properly raised the governmental deliberative process privilege and that, even if the privilege had been properly raised, the balance of interests supports disclosure in this case. The defendants' complaints

Not Reported in F.Supp., 1994 WL 376052 (S.D.N.Y.)
(Cite as: 1994 WL 376052 (S.D.N.Y.))

with respect to the 30(b)(6) witness fall into two (2) categories. Firstly, the defendants claim that the witness was improperly instructed not to answer questions during the depositions. Secondly, the defendants claim that, because the witness could not answer certain questions, he was not properly prepared or was simply too lacking in knowledge to be an appropriate 30(b)(6) witness.

PRIVILEGED DOCUMENTS

***2** The EEOC seeks to withhold three (3) documents as protected by the governmental deliberative process privilege. This is a qualified privilege which only protects information which is predecisional and deliberative. *Hopkins v. United States Dep't of Hous. and Urban Dev.,* 929 F.2d 81, 84 (2d Cir.1991). It does not protect factual findings or factual material which may be severed from the deliberative portion of a report. *Adams v. United States,* 686 F.Supp. 417, 420 (S.D.N.Y.1988); *EPA v. Mink,* 410 U.S. 73, 87-88 (1993). The claim of deliberative process privilege must be raised by the head of the agency after personally considering the material in question. *Mobil Oil Corp. v. Dep't of Energy,* 102 F.R.D. 1, 5 (N.D.N.Y.1983). In addition, the agency must submit sufficient information about the material to allow the court to determine if it is privileged. *Resolution Trust Corp. v. Diamond, supra,* 137 F.R.D. at 634, 642 (S.D.N.Y.1991). Here, the EEOC has attempted to describe the materials on five (5) separate occasions:

(1) through letters from counsel on February 4, March 1, and March 4, 1994;

(2) in its opposition to the Motion of Compel; and

(3) through a declaration from the Chairman of the EEOC.[FN1]

These explanations are sufficient for the court to determine that the materials meet the standards for the deliberative process privilege.[FN2]

DEPOSITION RESPONSES

The EEOC contends that it properly directed the 30(b)(6) witness, José Dennis, not to answer because the information was protected by the attorney work product, attorney client and deliberative process privileges. ("EEOC's Opposition") at 7. The EEOC identifies the following areas of inquiry as objectionable:

1. allegations in the complaint;

2. how the EEOC conducted its investigation; and

3. questions relating to the EEOC's contentions concerning damages.

Although at times it was unclear which privilege was being asserted, if one or more of the privileges is properly asserted, the EEOC's position will be sustained.

In general, questions in the areas identified by the EEOC are not objectionable. However, here the EEOC asserts that it has provided the defendants with all non-privileged relevant documents in this case. The EEOC thus contends that the defendants have all of the facts and further inquiries are only designed to "intrud[e]" upon EEOC's trial strategies, mental impressions, and lines of proof. ("EEOC's Opposition") at 8.

With respect to the allegations in the complaint, the EEOC's position has merit. The defendants contend that they merely seek facts. However, they essentially have the investigative file. Under these circumstances, the defendants seek to discover how the EEOC "intends to marshall the facts, documents and [statements] in its possession, and to discover the inferences that [the EEOC] believes properly can be drawn from the evidence it as accumulated." *SEC v. Morelli,* 143 F.R.D. 42, 47 (S.D.N.Y.1992). Work product includes an attorney's intended lines of proof and his ordering of the facts. *Id.*

***3** The inquiries into the Complaint, proposed by the defendants, should more appropriately be pur-

sued through "contention interrogatories" under Rule 33(b), Federal Rules of Civil Procedure. *Id.* at 48.

The second problem area identified by the EEOC, *i.e.,* how it conducted the investigation includes three components: (1) who was interviewed; (2) what the deponent did to refresh his recollection of the facts in the case; and (3) what facts EEOC considered concerning the defendants' defenses. The disclosure of this information does not reveal the agency's trial strategy or its analysis of the case. For example, knowing who was interviewed does not intrude upon the mental impressions of the attorney. Presumably, the interview process in an investigation includes people and information which will be discarded as the attorney begins the analysis and plans strategy. Similarly, what information a witness reviews in preparation for a deposition does not reveal the thought processes of the attorneys. Documents are reviewed by a deponent for many reasons. There is a distinct difference between asking what was reviewed as opposed to why it was reviewed.

In contrast, questions seeking to discover what facts were considered with respect to the defendants' defenses face the same problem as questions about the allegations in the complaint. The defendants have the file. They know what facts are in the file and which facts they consider relevant on the defenses. Deposition inquiries concerning the EEOC's view of the relevant facts can only be designed to explore the EEOC's determinations of how it intends to order its proof.

Finally, the defendants seek information on how the EEOC made its estimate of monetary damages. The EEOC asserts that it has already provided this information in responding to recent interrogatories. To the extent that the defendants already have the objective calculations performed by the EEOC, they have no right to further inquiry.

APPROPRIATENESS OF RULE 30(B)(6) DESIGNEE

In addition to being directed not to answer, deponent Dennis was simply unable to answer certain questions. The defendants contend that he had an obligation to prepare himself by searching files and interviewing witnesses so that he could fully and completely answer all questions. Rule 30(b)(6) is not designed to be a memory contest. It is not reasonable to expect any individual to remember every fact in an EEOC investigative file. Subject to its asserted privileges, EEOC has provided the defendants with the investigative file. Under these circumstances, the defendants do not have a legitimate need to inquire into facts contained in the file.

CONCLUSION

IT IS HEREBY ORDERED that the defendants' Motion to Compel is denied, except that the plaintiff, EEOC, shall be required to have its Rule 30(b)(6) deponent answer questions concerning: 1) interviews conducted during the investigation and 2) documents and other material reviewed by the deponent in preparation for the deposition.

***4** IT IS FURTHER ORDERED that the parties appear for a status conference on October 14, 1994, at 10:00 a.m.

SO ORDERED.

FN1. At the argument, counsel for defendants sought to have the declaration stricken, apparently on the basis that the submission from the agency head must be an affidavit. The unsworn declaration of the Chairman is sufficient. (28 U.S.C. § 1846)

FN2. During the argument on the Motion, counsel for the EEOC suggested that her various positions could also be sustained by either work product or attorney client privileges. Indeed, one of the documents withheld is a memorandum prepared by the

> trial attorney, and signed by the Regional Attorney, to the Investigative Supervisor who is the subject of the Rule 30(b)(6) designation. This document, as described, meets the criteria for attorney-client privilege. Similarly, it appears that the other documents may be work product.

S.D.N.Y.,1994.
Equal Employment Opportunity Comm'n v. American Intern. Group, Inc.
Not Reported in F.Supp., 1994 WL 376052 (S.D.N.Y.)

END OF DOCUMENT

EXHIBIT J

Not Reported in F.Supp.2d, 2002 WL 31833223 (S.D.N.Y.), 31 Media L. Rep. 1444
(Cite as: 2002 WL 31833223 (S.D.N.Y.))

H

United States District Court,
S.D. New York.
AMERICAN SAVINGS BANK, FSB, Plaintiff,
v.
UBS PAINEWEBBER, INC. Defendant.
No. M8-85.

Dec. 16, 2002.

Background: Customer brought suit against brokerage, alleging misrepresentation and other claims arising out of its investment in certain collateralized loan obligations (CLOs). Customer moved to enforce subpoena against credit rating agency for rating information provided to brokerage for fee. Agency cross-moved to quash subpoena.

Holding: The District Court, Keehan, J., held that requested information was not protected under New York shield law by journalist's privilege.

Motions granted in part and denied in part.

West Headnotes

[1] Privileged Communications and Confidentiality 311H ⚿22

311H Privileged Communications and Confidentiality
311HI In General
311Hk22 k. Privilege Logs. Most Cited Cases
(Formerly 410k222)

Privileged Communications and Confidentiality 311H ⚿404

311H Privileged Communications and Confidentiality
311HVII Other Privileges
311Hk404 k. Journalists. Most Cited Cases
(Formerly 410k222)
Burden of preparing privilege log did not justify credit rating agency's refusal to produce privilege log for subpoenaed documents and its blanket assertion that subpoenaed documents were all shielded from discovery by journalist's privilege. Fed.Rules Civ.Proc.Rule 45(d)(2), 28 U.S.C.A.

[2] Privileged Communications and Confidentiality 311H ⚿404

311H Privileged Communications and Confidentiality
311HVII Other Privileges
311Hk404 k. Journalists. Most Cited Cases
(Formerly 410k196.1)
Under New York law, credit rating agency, which was engaged primarily in business of rating financial instruments for fee at request of issuers or investment bankers, was not entitled to assert journalist's privilege to avoid subpoena of research and rating information provided for fee to broker, even though agency sometimes functioned as newsgatherer and disseminated some information to both subscribers and general public on website; agency was not engaged in newsgathering when it procured subpoenaed information for fee, nor was it primarily engaged in newsgathering generally. McKinney's Civil Rights Law § 79-h(a)(6).

[3] Privileged Communications and Confidentiality 311H ⚿404

311H Privileged Communications and Confidentiality
311HVII Other Privileges
311Hk404 k. Journalists. Most Cited Cases
(Formerly 410k196.1)
Any qualified journalist's privilege that credit rating agency was potentially entitled to assert under New York shield law in financial research and rating information provided to brokerage for fee was overcome, where customer of brokerage demonstrated that information was crucial to its misrepresentation

and other claims against brokerage from which it purchased securities and that discovery from rating agency was only available source for certain communications between broker and agency. McKinney's Civil Rights Law § 79-h.
Esanu Katsy Korins & Siger, LLP, New York, New York, Adrienne B. Koch. for Plaintiff, of counsel.

Cleary, Gottlieb, Steen & Hamilton, New York, New York, Evan A. Davis, Gabrielle S. Friedman, for Non-Party Fitch, Inc., of counsel.

OPINION AND ORDER

KEENAN, J.

***1** Before the Court is motion of plaintiff American Savings Bank, FSB ("ASB") to enforce a subpoena served on non-party Fitch, Inc. ("Fitch") and Fitch's cross-motion to quash the subpoena. The underlying action is pending in the District of Hawaii. That lawsuit asserts state law claims for misrepresentation, breach of warranty, breach of fiduciary duty and negligence against UBS PaineWebber, Inc. ("PaineWebber") based on PaineWebber's alleged unlawful scheme to induce ASB to make certain investments. As ASB's investment broker, PaineWebber makes investment recommendations to ASB. PaineWebber contends that it made representations to ASB concerning marketing investments in three Collateralized Loan Obligations ("CLOs") based on information received from Fitch. ASB purchased certain Trust Certificates in which PaineWebber "embedded" an interest in the equity tranche of those CLOs.

Fitch is a credit rating agency based in New York engaged in collecting, analyzing, and publishing information on securities and various types of debt. Brown Aff. ¶ 2. Fitch gathers information and provides ratings that are published, either to the general public or to certain segments of it, to assist investors in making informed investment decisions. ASB acknowledges that Fitch did not rate the specific Trust Certificates at issue in the lawsuit. ASB still seeks information from Fitch because in the course of creating and marketing those CLOs and the related Trust Certificates, PaineWebber communicated with Fitch about a variety of important issues related both to the structuring of the CLOs and to the related Trust Certificates. *See* Alston Aff. ¶ 13. The subpoenas seek information and documents concerning the communications between PaineWebber and Fitch on these matters.

ASB served subpoenas on Fitch to obtain information it claims is (1) highly relevant to ASB's claims and PaineWebber's alleged defenses and is (2) unavailable from PaineWebber or any other source. ASB claims to have learned through discovery that the records from PaineWebber of communications with Fitch are incomplete and ASB can only acquire the missing materials through these subpoenas. Although the relevant witnesses from PaineWebber have been deposed and the relevant documents have been requested, ASB has been unable to obtain complete information concerning these communications. Alston Aff. ¶ 13.

On August 26, 2002, ASB served on Fitch subpoenas seeking documents and testimony relevant to Fitch's communications with PaineWebber on these issues. Fitch has objected to producing any documents or providing testimony on the grounds that all responsive documents or testimony would be protected by the journalist privilege.

DISCUSSION

I. *Privilege log*

ASB argues that Fitch's failure to produce a privilege log results in Fitch waiving any privilege objections.

[1] Federal Rule of Civil Procedure 45(d)(2) requires that any claim of privilege be "supported by a description of the nature of the documents, communications or things not produced that is sufficient to enable the demanding party to contest the

claim." Fed.R.Civ.P. 45(d)(2). This rule is further supported and specified by Local Civil Rule 26.2(a)(2)(A) which requires that documents objected to on the basis of privilege be identified by type, general subject matter and other identifying criteria such as the date of creation. The burden of establishing privilege is on the party asserting it to show that the information they have withheld is privileged. *See von Bulow v. von Bulow,* 811 F.2d 136, 144 (2d Cir.1987). To do so, Fitch must identify the material in question with specificity to demonstrate that it relates to newsgathering.

***2** While Fitch's claim that creating a log would be as burdensome as producing the requested documents may be true, without the log ASB cannot determine which items, if any, it needs Fitch to produce. Further, the burdensome nature of producing the log deters parties from asserting the privilege haphazardly. The Court finds Fitch's wholesale refusal to produce a log and assertion of a blanket privilege an unreasonable course of action. Nevertheless, the Court does not consider it a waiver of Fitch's privilege claims and will evaluate Fitch's assertion of the journalist privilege.

II. *Journalist privilege*

Fitch claims its work is protected by the journalist privilege under the United States and New York State Constitutions, and Section 79-h of the New York Civil Rights Law, 8 N.Y. Civ. Rights Law § 79-h ("the Shield Law"). Fitch argues that ASB's attempt to obtain discovery here violates the protections accorded Fitch as a member of the financial media and the subpoenas should be quashed.

[2] The Shield Law defines a professional journalist as "one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing ... of news intended for a newspaper, magazine, news agency, press association, or wire service or other professional medium or agency which has as one of its functions the processing and researching of news intended for dissemination to the public." 8 N.Y. Civ. Rights Law § 79-h(a)(6). News is defined as "written [or] oral ... information or communication concerning local, national, or worldwide events or other matters of public concern or public interest or affecting the public welfare." *Id.* § 79-h(a)(8). To fall within the protected group here Fitch must demonstrate that it was engaged in newsgathering with the intent "to disseminate information to the public and that such intent existed at the inception of the newsgathering process." *von Bulow,* 811 F.2d at 144; *Pan Am Corp. v. Delta Air Lines, Inc.,* 161 B.R. 577, 580 (S.D.N.Y.1993).

In *Pan Am Corp.,* Judge Preska considered this issue regarding a competitor of Fitch, Standard & Poor's ("S & P"), under the First Amendment and held that S & P functions as a journalist when gathering information for its ratings. *Pan Am Corp.,* 161 B.R. at 586. S & P gathered and analyzed the data for communication to the public through its publications including *CreditWeek, HighYield Quarterly,* and *Ratings Handbook. Id.* at 579. These periodicals have a regular circulation to a general population. Therefore, the court found that because S & P publishes for the benefit of the general public and it had the requisite newsgathering intent from the beginning of the process, it is entitled to the protection afforded the press. *Id.; see also In re Scott Paper Co. Sec. Litig.,* 145 F.R.D. 366, 369 (E.D.Pa.1992) (holding the same). Critical to the analysis here is whether Fitch acquired the information sought by the subpoena as party of its newsgathering process with the intent to disseminate this information to the public. *Pan Am Corp.,* 161 B.R. at 583 (citing *von Bulow,* 811 F.2d at 144).

***3** Fitch emphasizes that its employees gather information about the companies Fitch rates to publish commentary and ratings on its website, which functions as Fitch's primary means of disseminating information to both its subscribers and the general public. In contrast to S & P, Fitch does not operate publications with complete circulation to the general public. Fitch performs its ratings based on a private contractual agreement. *See Nat'l Med. Care,*

Inc. v. Home Med. of Am., Inc., Index No. 103030/02, 2002 WL 146179 (N.Y.Sup.Ct. May 20, 2002). Fitch rates transactions at the request of issuers or investment bankers for a fee. Fitch rarely rates transactions without a fee. Koch Reply Aff. Exh. L at 48-51. ASB acknowledges that Fitch sometimes functions as a "news-gatherer"; however, ASB argues that in this case it has not subpoenaed any information that could fall within the protection of the journalist privilege. ASB emphasizes that research conducted for a fee cannot be journalism.

The journalist privilege is a qualified one. Fitch is not primarily engaged in newsgathering generally, nor was it doing so when procuring the information sought by the subpoenas. The Court finds that Fitch is not entitled to the protections afforded by the journalist privilege.

[3] Assuming *arguendo* that Fitch were entitled to the protection of the privilege, ASB has overcome the privilege. The journalist privilege can be overcome by a clear and specific showing that the information sought is (1) highly material, (2) critical to the maintenance of the claim, and (3) not otherwise available. *O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 528 N.Y.S.2d 1, 523 N.E.2d 277 (1998). Fitch contends that ASB has not satisfied this three-prong test because the material sought is not highly relevant and critical because Fitch did not rate any of the securities that ASB purchased from PaineWebber. Basically, the debt that Fitch did rate is not at issue in the underlying lawsuit and Fitch did not gather information on the securities that ASB purchased. Fitch claims that the connection ASB draws to the information sought and the underlying case is "tenuous at best" and cannot meet the relevance standard of the Shield Law.

However, ASB has demonstrated that this information is material and crucial to ASB's claims and PaineWebber's alleged defenses. Further, ASB has conducted discovery sufficient to determine that Fitch is the only available source of these communications necessary to the litigation against PaineWebber. Having sought the information elsewhere, ASB must now turn to Fitch. Any privilege to which Fitch would potentially be entitled has been overcome by this showing.

CONCLUSION

The Court rules in favor of ASB and directs Fitch to comply with the subpoenas served upon it on August 26, 2002.

SO ORDERED.

S.D.N.Y.,2002.
American Savings Bank, FSB v. UBS Painewebber, Inc.
Not Reported in F.Supp.2d, 2002 WL 31833223 (S.D.N.Y.), 31 Media L. Rep. 1444

END OF DOCUMENT

EXHIBIT K

Not Reported in F.Supp., 1993 WL 138844 (S.D.N.Y.)
(Cite as: 1993 WL 138844 (S.D.N.Y.))

C
Only the Westlaw citation is currently available.

United States District Court, S.D. New York.
ALLSTATE LIFE INSURANCE COMPANY, et al., Plaintiffs,
v.
FIRST TRUST NATIONAL ASSOCIATION, Defendant.
No. 92 CIV. 4865 (SWK).

April 27, 1993.

Gibson, Dunn & Crutcher by Mitchell A. Karlan, New York City, for plaintiffs.

Oppenheimer Wolff & Donnelly by Herbert C. Ross, New York City, for defendant.

MEMORANDUM OPINION AND ORDER

KRAM, District Judge.

***1** Defendant First Trust National Association ("First Trust") and its attorneys, Oppenheimer Wolff & Donnelly ("Oppenheimer") (collectively "defendants") appeal a discovery ruling made by Magistrate Judge Lee during her supervision of pretrial discovery in this case.[FN1] Oppenheimer contends that the Magistrate Judge's determination, requiring defendants to produce various documents sought by plaintiff Allstate Life Insurance Company ("Allstate"), is in error. Specifically, defendants object to Paragraph 4 of the Endorsed Memorandum issued by Magistrate Judge Lee on March 2, 1993, wherein the Magistrate Judge found that "[a]ll objections on grounds of privilege are waived in the absence of compliance with local Civil Rule 46(e)."

BACKGROUND

This is an action by former bondholders against their former indenture trustee for breach of the indenture and of the trustee's fiduciary duties. Relevant to this motion, at the outset of this litigation, plaintiffs served a document request upon First Trust seeking, among other things, documents from the files of First Trust's attorneys, Oppenheimer. On August 26, 1992, after First Trust refused to produce its attorneys' files, plaintiffs subpoenaed documents from Oppenheimer directly. The August 26, 1992 subpoena was, in substance, identical to the document request originally served on First Trust.[FN2]

On September 10, 1992, Oppenheimer served a written response to the subpoena objecting to the documents' production on the grounds that (1) the documents were privileged; (2) production would be overly burdensome; and/or (3) copies of the documents had been previously produced. Upon receipt of Oppenheimer's objections, plaintiffs agreed to (1) limit the scope of the request to documents dated or created before March 10, 1992; and (2) exclude from the request all documents filed in bankruptcy court and all documents that were duplicate copies of items already produced. Plaintiffs also notified Oppenheimer, however, that with respect to those documents claimed to be privileged, Oppenheimer had failed to comply with local Civil Rule 46(e)(2), which states, in relevant part:

> [w]here a claim of privilege is asserted in objecting to any ... document demand ... (i) the attorney asserting the privilege shall ... identify the nature of the privilege (including work product) which is being claimed ... and (ii) [identify] (1) the type of document; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressee of the document, and, where not apparent, the relationship of the author and addressee to each other.

In response, Oppenheimer indicated that it was not required to comply with local Civil Rule 46(e) and "had no intention of producing the documents ... or produc[ing] a list." *See* Letter from Robert Gust to Mitchell A. Karlan of 9/23/92, annexed to the Affidavit of Mitchell A. Karlan, sworn to on March 29, 1993, as Exhibit "G". Oppenheimer replied further that "references to the New York Local Rules do not support [the] contention that we are required to provide a list ... [nor is it] appropriate to require lawyers to index their respective files and disclose that information to the adversary." *See* Letters from Robert Gust to Mitchell A. Karlan of 9/23/92 and 9/25/92 (the "Gust Letters"), annexed to the Affidavit of Mitchell A. Karlan, sworn to on March 29, 1993, as Exhibits "G" and "H". Thereafter, Oppenheimer refused to produce or even identify the documents in question.

***2** On February 26, 1993, both parties submitted a joint letter to Magistrate Judge Lee setting forth a wide variety of discovery disputes that remained unresolved, including Oppenheimer's failure to produce the requested documents or comply with local Civil Rule 46(e). Thereafter, on March 2, 1993, the Magistrate Judge issued her Order, finding that, "all objections on grounds of privilege are waived in the absence of compliance with local Civil Rule 46(e)." The Magistrate Judge also denied First Trust's request for a stay of the March 2, 1993 Order.

On March 15, 1993, two weeks after the Order, Oppenheimer served Allstate with a list of withheld documents, but refused, and continues to refuse, to produce a single document. Oppenheimer now argues that the Magistrate Judge did not hold that privilege objections were waived, but only that Oppenheimer should serve a privilege list. Thus, Oppenheimer requests that the Court vacate Paragraph 4 of the Endorsed Memorandum and remand this case to the Magistrate Judge for further consideration. In the alternative, defendant asks that the Court rule that the privilege list produced to plaintiffs on March 15, 1993, satisfies Oppenheimer's obligations.

In response, plaintiffs assert that Paragraph 4 of the Order constitutes a blanket waiver of all objections and privilege assertions raised by Oppenheimer in response to the subpoena. Plaintiffs contend that these documents should be produced without further delay.

DISCUSSION

As an initial matter, the Court recognizes that "a magistrate's resolution of pretrial discovery disputes is entitled to substantial deference and may not be disturbed by a District Court in the absence of a finding that the magistrate's order was 'clearly erroneous or contrary to law.' " 28 U.S.C. § 636(b)(1)(A); Fed.R.Civ.P. 72(a); *see also United States v. District Council of New York City and Vicinity of United Brothers of Carpenters and Joiners of America,* 782 F.Supp. 920, 922 (S.D.N.Y.1991); *Carte Blanche (Singapore) v. Diners Club Int'l, Inc.,* 130 F.R.D. 28, 30-31 (S.D.N.Y.1990). Thus, the Court will consider the instant discovery dispute in light of this deferential standard.

Local Civil Rule 46(e) is clear in its provision that "the attorney asserting the [attorney-client] privilege shall in the objection to the ... document demand ... identify (1) the type of document; (2) general subject matter of the document; (3) the date of the document; [and] (4) ... where appropriate, the author of the document, the addressee of the document, and, where not apparent, the relationship of the author and addressee to each other." *See* local Civil Rule 46(e)(2)(i) and (ii). "Failure to comply with the explicit requirements of Rule 46(e) will be considered presumptive evidence that the claim of privilege is without factual or legal foundation." *Grossman v. Schwarz,* 125 F.R.D. 376, 386-87 (S.D.N.Y.1989); *see also Carte Blanche (Singapore) v. Diners Club Int'l, Inc.,* 130 F.R.D. at 32 ("the importance of local rules should not be taken so lightly. The local rules supplement the federal rules governing civil proceedings ... Accordingly, their importance should not be diminished by skirting their application when the results prove

harsh to a party.").

***3** In the case at hand, the fact that Oppenheimer failed to supply plaintiffs with sufficient description of the documents at issue is not disputed. In fact, despite repeated warnings that it was not satisfying the requirements of the Court's local rules, counsel refused, quite flagrantly, to make any meaningful compliance until faced with the prospect of sanctions. *See* Gust Letters (noting that Oppenheimer "had no intention" of complying with local Civil Rule 46(e)). Thus, having failed to comply with local Civil Rule 46(e), First Trust, through its attorneys Oppenheimer, waived both attorney-client and work product immunity for the documents in question.

Moreover, the Court is not persuaded that Oppenheimer's subsequent production of a privilege list satisfies Magistrate Judge Lee's March 2, 1993 Order. The production of a list of privileged documents, two weeks after the Order found "[a]ll "objections on ground of privilege ... waived," in no way cures Oppenheimer's deliberate unwillingness to abide by local Civil Rule 46(e). Having waived the documents' immunity, Oppenheimer cannot now resurrect their allegedly privileged status, by simply complying with the rules.

Furthermore, a cursory review of the list supplied by Oppenheimer to plaintiffs indicates that certain documents do not appear to be truly privileged. For example, the attorney-client privilege does not protect (1) fee arrangements and expenses (*see* Documents Nos. 901966-80, 903456-71, 905254-59A-C, 905283-300); (2) facsimile transmittal letters (*see* Documents Nos. 900923-24, 901978-90, 902675-81, 904031-45); (3) communications intended to be disclosed in pleadings (*see* Documents Nos. 904150-78, 904438-46, 905786-95); (4) memos from attorneys to their files or documents simply found in the attorney's files with no indication of a communication either to or from the client [FN3]; or (5) communications relating to business, as opposed to legal, advice (*see* Documents Nos. 901053-65, 903958, 905584-600). [FN4] Thus, much to the Court's chagrin, Oppenheimer appears to be still attempting to skirt the rules.

CONCLUSION

In conclusion, having evaluated the full record, the Court finds that the Magistrate Judge's March 2, 1993 Order, waiving Oppenheimer's objections to discovery on the grounds of privilege, was not clearly erroneous. Accordingly, Oppenheimer's motion to overturn Magistrate Judge Lee's March 2, 1993 Order is denied. The parties are directed to appear before this Court at a conference scheduled for Friday, July 9, 1993 at 2:00 p.m.

SO ORDERED.

FN1. This case was referred by order dated September 23, 1993, to Magistrate Judge Lee for pretrial supervision.

FN2. In substance, the subpoena *duces tecum* requested production of all documents and communications, generated since January 1, 1987 to the present, regarding Oppenheimer's representation of First Trust in connection with its role as indenture trustee for debentures issued by Community Newspapers, Inc. ("CNI").

FN3. Examples include documents with Bates stamp numbers 901846-48, 901851, 902946-49, 905020 (memos to the file) and 900218-22, 900242, 900245-51, 900777-99, 900852-70, 900953-58, 900967-83, 901044-45, 901828, 901830-33, 901957, 901963-64, 902114-24, 902199-202, 902490-503, 902544-47, 902819-20, 903126-29, 903175-77, 903180-92, 903214-15, 903269-71, 903273, 903345-46, 903383-85, 903394-95, 903451-53, 903486-88, 903521-22, 904227-30 (attorney's notes).

FN4. For cases, *see United States v. Gold-*

berger & Dubin, P.C., 935 F.2d 501, 505 (2d Cir.1991); *Macmillan, Inc. v. Federal Ins. Corp.*, 141 F.R.D. 241, 243 (S.D.N.Y.1992); *Department of Economic Dev. v. Arthur Andersen & Co. (U.S.A.)*, 139 F.R.D. 295, 300 (S.D.N.Y.1991); *United States v. Davis*, 132 F.R.D. 12, 15 (S.D.N.Y.1990); *Grossman v. Schwarz*, 125 F.R.D. 376, 386 (S.D.N.Y.1989); *P. & B. Marina, Ltd. Partnership v. Logrande*, 136 F.R.D. 50, 54 (E.D.N.Y.1991), *aff'd*, 983 F.2d 1047 (2d Cir.1992).

S.D.N.Y.,1993.
Allstate Life Ins. Co. v. First Trust Nat. Ass'n
Not Reported in F.Supp., 1993 WL 138844 (S.D.N.Y.)

END OF DOCUMENT

EXHIBIT L

Slip Copy, 2009 WL 3154296 (S.D.N.Y.)
(Cite as: 2009 WL 3154296 (S.D.N.Y.))

H

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
David OVERTON and Jerome I. Kransdorf,
Plaintiffs,
v.
TODMAN & CO., CPAS, P.C. and Trien, Rosenberg, Rosenberg, Weinberg, Ciullo & Fazzari, LLP,
Defendants.
Todman & Co., CPAs, P.C. and Trien, Rosenberg, Rosenberg, Weinberg, Ciullo & Fazzari, LLP,
Third-Party Plaintiffs,
v.
Direct Brokerage, Inc., Thomas Flynn, Eniko Henits, Lisa Boutote, Peggy Chiat, Paul Freed, and Paychex, Inc., Third-Party Defendants.
No. 05 Civ. 7956(DAB).

Sept. 24, 2009.

MEMORANDUM & ORDER

DEBORAH A. BATTS, District Judge.

***1** Plaintiffs David Overton and Jerome I. Kransdorf (collectively, "Plaintiffs") bring the above-captioned action against Defendants Todman & Co., CPAs, P.C., and Trien, Rosenberg, Rosenberg, Weinberg, Ciullo & Fazzari, LLP (collectively, "Todman" or "Defendants") for securities fraud, breach of contract, professional negligence, common law fraud, and negligent misrepresentation. Plaintiffs are former investors in broker-dealer. Direct Brokerage, Inc. ("DBI"), and charge Defendants with performing deficient audits for DBI that allowed DBI to hide its payroll tax obligations, resulting in significant losses to Plaintiffs. Defendants have brought a third-party action against DBI, its directors and officers, and Paychex, Inc., a payroll administrator contracted to work with DBI.[FN1] Now before the Court is a Motion by DBI's former attorney, non-party George Brunelle, Esq., to Quash Defendants' Subpoena, Deposition Notice, and Demands for Document Production ("Motion to Quash"). For the reasons set forth below, Brunelle's Motion to Quash is GRANTED in its entirety.

FN1. Paychex, Inc. is dismissed from this action by a separate Memorandum & Order of the Court of today's date.

I. BACKGROUND

This is Defendants' second attempt to obtain documents and information concerning DBI's dealings with Defendants and Paychex, Inc. from non-party George Brunelle, Esq., DBI's former attorney. (*See* George Brunelle's Memorandum of Law in Support of Motion to Quash, dated July 18, 2008, ("Brunelle's Mem.") at 1; Defendants' Memorandum of Law in Opposition to Motion to Quash, dated August 15, 2008, ("Defs.' Opp.") at 1.) Defendants' first attempt, a Motion to Compel the production of certain documents, resulted in an April 17, 2008 Order ("April 17, 2008 Order") by Judge John E. Sprizzo, to whom this case was previously assigned. In that Order, Judge Sprizzo denied in part Defendants' Motion to Compel, reasoning that DBI properly had invoked the protections of the attorney-client privilege and the work product doctrine, and had not waived these privileges by entering into an Assignment and Forbearance Agreement with Plaintiffs. The Court reserved decision, pending *in camera* review, on any challenged documents that might not be covered by the work product doctrine due to the nature of the documents themselves. (*See* April 17, 2008 Order.)

Based on the continued unavailability of DBI to respond to discovery or a subpoena. Defendants have launched a second attempt to obtain documents and testimony from Mr. Brunelle, arguing in this instance that the relevant privileges have been waived by DBI's provision of the purportedly confidential

documents to a third-party, namely Plaintiffs. (*See* Defs.' Opp. at 2.) Specifically, Defendants refer the Court to an August 2, 2007 [FN2] meeting between Third-Party Defendants Eniko Henits ("Henits"), DBI's former President and Tom Flynn ("Flynn"), a director of DBI, and Plaintiffs' counsel, Eric S. Hutner ("Hutner"), during which Ms. Henits produced a series of purportedly confidential documents to Plaintiffs' counsel. (Affidavit of Eric S. Hutner, Aug. 12, 2008 ("Hutner Aff."), ¶¶ 3-5.) Defendants argue that Ms. Henits' provision of the documents to Mr. Hutner, a third party, effectively waived any privileges to these documents that could be asserted by DBI.

> FN2. Plaintiffs' counsel attests to the August 2, 2007 date of the meeting at which the documents were disclosed. (*See* Affidavit of Eric S. Hutner, Aug. 12, 2008 ("Hutner Aff."), ¶ 3.) Although, Henits avers that she "[thought] it was earlier than the August 2007 date mentioned by Mr. Hutner," (Affidavit of Eniko Henits, June 18, 2008 ("Henits Aff."), ¶ 5), she provides no alternative date, nor evidence of an earlier date. Thus, the Court accepts August 2, 2007, as the date that the meeting occurred.

***2** Brunelle, supported by the Affidavit of Ms. Henits dated June 18, 2008 ("Henits Aff.") contends that Henits' provision of documents to Plaintiffs' counsel did not waive DBI's privileges to those documents, as the documents were exchanged in the context of the Assignment and Forbearance Agreement (the "Agreement") previously executed between the Parties, and the common interests of the Parties in this litigation. Henits attests that Plaintiffs' counsel visited her home and obtained the documents at issue upon her understanding that he represented DBI and the interests DBI shared with Plaintiffs. (*See* Henits Aff.; Brunelle Mem. at 3.) Specifically, Henits attests that Hutner, who represented Plaintiffs as Assignees of DBI's interests under the Agreement, "informed me that the case would be made stronger if he could also maintain the action on behalf of DBI. Mr. Hutner led me to believe that he represented DBI for that purpose." (Henits' Aff., ¶ 5.) Henits alleges that she furnished the documents to Plaintiffs' counsel based on the understanding that he was representing DBI's interests, and would preserve its legal privileges. (Henits Aff., ¶ 6.) Hutner insists that Ms. Henits was aware, before and during their meeting, that Plaintiffs' counsel did not and could not represent DBI because he represented Plaintiffs. (*See* Hutner Aff., ¶¶ 3, 8-9.)

The Assignment and Forbearance Agreement, executed by DBI and Plaintiffs on May 3, 2005, among other provisions, provided that DBI would keep Plaintiffs informed about any claims asserted by DBI against Defendants. The Agreement explicitly provided that documents provided by DBI to Plainiffs would be kept confidential. Specifically, the Agreement stated that:

> "DBI shall promptly notify the Assignees of its assertion of or any fact or circumstance which in good faith may provide grounds for its assertion of an Assigned Claim and shall promptly provide the Assignees [Plaintiffs] with any and all documents and information concerning such claim(s) as the Assignees may reasonably request, which documents and information shall be kept confidential by the Assignees and their respective advisers other than in connection with evaluation and pursuit of the Assignees' claim."

(Assignment and Forbearance Agreement at 2, at Affidavit of Jordan Sklar, Aug. 15, 2008 ("Sklar Aff."), Ex. D.)

II. DISCUSSION

In support of his Motion to Quash, DBI's former attorney, Brunelle argues that under the law of the case. Defendants are precluded from relitigating the privilege issue based on Judge Sprizzo's April 17, 2008 Order. In response to Defendants' new waiver

argument, which was not presented previously to Judge Sprizzo, Brunelle argues that DBI disclosed the confidential documents at issue to Plaintiffs' counsel with the understanding that counsel represented Plaintiffs' and DBI's common legal interests. As such, Brunelle contends, the privileges were preserved under the "common interest" doctrine, an extension to the attorney-client privilege. (*Id.*)

***3** Motions to quash subpoenas are "entrusted to the sound discretion of the district court." *In re Fitch, Inc. v. UBS PaineWebber, Inc.,* 330 F.3d 104, 108 (2d. Cir.2003) (citations omitted). Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that parties may obtain discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed.R.Civ.P. 26(b)(1). When seeking the protection of the attorney-client privilege or the work product doctrine, the party invoking the privilege bears the burden of establishing its applicability. *See In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002,* 318 F.3d 379, 384 (2d Cir.2003). With respect to the attorney-client privilege, "disclosure to a third party by the party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed." *In re Horowitz,* 482 F.2d 72, 81 (2d Cir.1973). Such disclosure "may effect a waiver of privilege not only as to that communication, but also as to ... communications made at other times about the same subject." *Bower v. Weisman,* 669 F.Supp. 602, 604 (S.D.N.Y.1987) (citations omitted). Waiver of work product protection, however, "will be found only if the party has voluntarily disclosed the work-product in such a manner that it is likely to be revealed to his adversary." *Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. 465, 479 (S.D.N.Y.1993). Generally, "[p]rivileges should be narrowly construed and expansions cautiously extended." *See, e.g., United States v. Weissman,* 195 F.3d 96, 100 (2d Cir.1999).

"[A]n extension of the attorney-client privilege", the "common interest" rule

> "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel. Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected."

United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir.1989) (internal citations and quotation marks omitted). "The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial." *Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc.,* 215 F.R.D. 466, 471 (S.D.N.Y.2003) (citation omitted). A party invoking the protection of the common interest rule must show that "the communication in question was given in confidence and that the client reasonably understood it to be so given." *Schwimmer,* 892 F.2d at 244.

Given the attestations of Ms. Henits, the Court finds that DBI has met its burden, sufficient to warrant the protection of the "common interest" doctrine over the documents at issue. The Assignment and Forbearance Agreement between DBI and Plaintiffs explicitly established a common legal interest between the Parties by contract, and provided for the *confidential* exchange of documents in furtherance of that interest. Particularly given the backdrop of that Agreement, the Court finds entirely reasonable Ms. Henits' attested impression that Plaintiffs' counsel had entered her home and obtained confidential documents from DBI's files in furtherance of Parties' common legal interest, and would keep those documents confidential. Whether or not Plaintiffs' counsel explicitly represented DBI, Ms. Henits or Mr. Flynn is irrelevant. That Ms. Henits understood that Mr. Hutner was representing the *common interest* shared by DBI and Plaintiffs insulates the exchanged documents under the "common interest" doctrine.

***4** With regard to the portion of the subpoena requesting Mr. Brunelle's deposition, it is well-

established that "depositions of opposing counsel are disfavored." *United States v. Yonkers Bd. of Ed.*, 946 F.2d 180, 185 (2d Cir.1991). While Brunelle no longer represents DBI, it is not clear to the Court at this time why his testimony is necessary. Defendants may renew their subpoena of Brunelle's testimony, if necessary, at the close of discovery, with an appropriate offer of proof to the Court.

III. CONCLUSION

For the reasons stated above, Brunelle's Motion to Quash is hereby GRANTED in its entirety.

SO ORDERED.

S.D.N.Y.,2009.
Overton v. Todman & Co., CPAs
Slip Copy, 2009 WL 3154296 (S.D.N.Y.)

END OF DOCUMENT

EXHIBIT M

Slip Copy, 2010 WL 2605819 (S.D.N.Y.)
(Cite as: 2010 WL 2605819 (S.D.N.Y.))

C
Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.
SECURITIES and EXCHANGE COMMISSION,
Plaintiff,
v.
Ramesh CHAKRAPANI, Defendant.
Securities and Exchange Commission, Plaintiff,
v.
Nicos Achilleas Stephanou, et al., Defendants.
Nos. 09 Civ. 325(RJS), 09 Civ. 1043(RJS).

June 29, 2010.

West KeySummary
Federal Civil Procedure 170A 1700

170A Federal Civil Procedure
170AXI Dismissal
170AXI(A) Voluntary Dismissal
170Ak1700 k. Grounds and Objections. Most Cited Cases
Dismissal without prejudice was warranted where dismissal would not result in substantial prejudice to defendant. Defendant did not submit evidence that, if this civil case was dismissed without prejudice, defendant would be in a better position to gain employment. Defendant was suspended by his employer when the civil and criminal complaints were initiated against him. The letter defendant submitted from his former employer only stated that employer would "consider" rehiring defendant if the civil and criminal cases were closed. Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

OPINION & ORDER

RICHARD J. SULLIVAN, District Judge.

*1 In the above-captioned, related cases, the Securities and Exchange Commission ("SEC") alleges that Defendants participated in a wide-ranging insider trading scheme. Various criminal cases have arisen out of the same alleged misconduct. On February 11, 2010, the Court heard oral argument on three motions: a motion brought by the SEC to dismiss its actions against Defendant Ramesh Chakrapani without prejudice, a motion brought by Defendant Joseph Contorinis to compel discovery, and the renewed motion of the United States Attorney's Office (the "government") for a limited stay of discovery. For the following reasons, the SEC's motion to dismiss is granted, Contorinis's motion to compel is granted in part and denied in part, and the government's renewed motion to stay is denied.

I. BACKGROUND

On January 13, 2009, the government filed a criminal complaint charging Chakrapani with criminal conspiracy and securities fraud related to an alleged insider trading scheme that included Contorinis, Nicos Achilleas Stephanou, Michael Koulouroudis, and others. On the same day, the SEC filed a parallel civil action, the first of the above-captioned cases, against Chakrapani based upon the same conduct. On February 5, 2009, the SEC filed a second civil complaint charging Stephanou, Chakrapani, Contorinis, Koulouroudis, and others with securities fraud and conspiracy in the second of the above-captioned civil actions. Shortly thereafter, Stephanou began cooperating with the government and SEC. The government dismissed its criminal complaint against Chakrapani without prejudice on April 24, 2009. Stephanou pled guilty to six counts of conspiracy and one count of securities fraud in a May 6, 2009 plea. On July 29, 2009, the Court denied the government's request for a stay of discovery pending the resolution of the parallel criminal action. The Court based its ruling primarily on the fact that Chakrapani was not a party to the criminal proceeding and would be prejudiced by a stay of the civil proceedings for the duration of the criminal action. The SEC requested leave to file its motion to dismiss against Chakrapani on November

9, 2009. On the next day, Koulouroudis pled guilty to one count of conspiracy to commit securities fraud and one count of securities fraud. Contorinis's criminal case remains ongoing.

The crucial fact underlying all of these motions is that Stephanou, the government's and SEC's co-operator, has pled guilty and is expected to be a witness for the government in its criminal case against Contorinis. (SEC's Br. Mot. Dismiss at 4.) Thus, the SEC asserts: "Stephanou's counsel has indicated that Stephanou plans to assert his Fifth Amendment privilege at least through the completion of the Contorinis criminal trial. On September 1, 2009, Stephanou formally asserted that privilege in response to interrogatories served on him in the civil actions by Chakrapani." (*Id.*)

II. MOTION TO DISMISS

The SEC moves to voluntarily dismiss without prejudice all of its claims against Chakrapani under Federal Rule of Civil Procedure 41(a)(2). It purportedly does so "because the unavailability of certain witnesses substantially undermines the [SEC's] ability to successfully prosecute its claims against Chakrapani at this time." (*Id.* at 1.) Chakrapani opposes a dismissal without prejudice. For the following reasons, the SEC's motion is granted.

A. Legal Standard

***2** The Federal Rules of Civil Procedure provide that, once a defendant has answered, "an action may be dismissed at the plaintiff's request only by a court order, on terms that the court considers proper.... Unless the order states otherwise, a dismissal under this paragraph ... is without prejudice." Fed.R.Civ.P. 41(a)(2).

Although dismissal under Rule 41(a)(2) is squarely within the Court's discretion, there is a presumption in favor of dismissing without prejudice "absent a showing that defendants will suffer substantial prejudice as a result." *A.V. by Versace, Inc. v. Gianni Versace S.p.A.*, 261 F.R.D. 29, 31 (S.D.N.Y.2009) (internal citation omitted). In *Zagano v. Fordham University,* the Second Circuit set forth a non-exclusive list of five factors to assist a court in evaluating whether substantial prejudice would result from a dismissal without prejudice. 900 F.2d 12, 14 (2d Cir.1990). These factors include

> [1] the plaintiff's diligence in bringing the motion; [2] any undue vexatiousness on plaintiff's part; [3] the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; [4] the duplicative expense of relitigation; and [5] the adequacy of plaintiff's explanation for the need to dismiss.

Id. The Court will analyze each of these factors individually, but no one factor is dispositive. The crucial inquiry remains whether Chakrapani will suffer substantial prejudice as a result of a dismissal without prejudice.

B. Analysis

1. Diligence

The SEC has been mindful of the potential unavailability of Stephanou and perhaps other witnesses since almost the inception of these cases. In a July 9, 2009 submission responding to the government's first motion to intervene and for a stay of discovery, the SEC notified the Court that Stephanou "plans to assert his Fifth Amendment rights during discovery" and "at least through the completion of the criminal trial of Koulouroudis, and that of Contorinis, assuming the [government] pursues the case against him." (SEC's Resp. to Gov.'s Mot., Docket No. 24, at 2.).

Nonetheless, it is puzzling that the SEC waited until November 9 to request leave to file its motion to dismiss. The SEC claims that it only realized on November 5, 2009-the day of Contorinis's indictment-that "it [was] very likely that Stephanou

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(Cite as: 2010 WL 2605819 (S.D.N.Y.))

[would] remain unavailable to testify for the foreseeable future." (SEC's Br. Mot. Dismiss at 7.) This explanation rings hollow in light of the fact that Stephanou was expected to testify at the criminal trial of Koulouroudis, who was indicted on April 30, 2009 and scheduled to go to trial on November 16, 2009. Indeed, prior to Koulouroudis's guilty plea on November 10, the government was prepared to produce Stephanou's statements. (*See, e.g.,* Nov. 6, 2009 letter from Sarah E. Light to the Court (describing the parties' attempt to reach an agreement regarding the production of Stephanou's statements "in light of the imminent production of 3500 material in *United States v. Koulouroudis"*)). Accordingly, the Court finds that the first Zagano factor favors Chakrapani.

2. Vexatiousness

***3** Courts define "undue vexatiousness" to mean that the plaintiff acted with "ill-motive" in bringing or maintaining its claims. *Versace,* 261 F.R.D. at 32 . "As with the diligence factor, courts find 'ill-motive' where plaintiffs have assured the court and the defendants that they intended to pursue their claims prior to seeking a dismissal." *Id.* (citations omitted). The Court has no evidence that the SEC's claims are baseless or brought with ill-motive.

Defendant Chakrapani relies heavily on *Securities & Exchange Commission v. Oakford Corp.,* in which Judge Rakoff found that the SEC had acted vexatiously in not seeking to dismiss its action against the plaintiff sooner. 181 F.R.D. 269 (S.D.N.Y.1998). Judge Rakoff explained that the SEC "never had any intention of providing discovery in this case but nonetheless permitted the case to proceed, thereby seeking the advantage of filing its charges without having to support them." *Id.* at 271. The Court finds this case to be distinguishable from *Oakford* because, here, the SEC gave no explicit assurances such as those made by the SEC to Judge Rakoff.

Furthermore, as a general matter, there can be no dispute that the government and the SEC have independent obligations to investigate and prosecute instances of insider trading. As a result, it is often the case that individuals are named in both criminal actions commenced by the government and civil actions commenced by the SEC for the same alleged misconduct. That the actions are frequently brought simultaneously or announced at the same time is hardly surprising and cannot be attributed to "ill-motive." Moreover, the fact that the criminal proceedings typically proceed ahead of the civil ones does not, at least as a general matter, support the inference that the SEC "never had any intention of providing discovery in this case" or that the SEC merely sought "the advantage of filing its charges without having to support them." *Id.* On the record before it, the Court finds no evidence of ill-motive by the SEC. Accordingly, the second *Zagano* factor favors the SEC.

3. Progress of the Action

"The general rule is settled ... that a plaintiff possesses the unqualified right to dismiss his complaint ... unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter." *Jones v. Sec. & Exch. Comm.,* 298 U.S. 1, 19, 56 S.Ct. 654, 80 L.Ed. 1015 (1936). An exception exists, however, when "the cause has proceeded so far that the defendant is in a position to demand on the pleadings an opportunity to seek affirmative relief and he would be prejudiced by being remitted to a separate action." *Id.* at 20. These actions have not progressed past fact discovery, which has been stayed since October 28, 2009. Prior to the stay, no depositions had been taken, and the parties had not begun expert discovery. All of these factors are weighted in favor of granting dismissal without prejudice.[FN1] *See, e.g., In re Fosamax Prods. Liab. Litig.,* No. 06 MDL 1789(JFK), 2008 WL 5159778, at *4 (S.D.N.Y. Dec.9, 2008).

FN1. Notably, Chakrapani's legal expenses

"have exceeded $800,000," which the Court recognizes is a significant sum. (Def.'s Opp. Mot. Dismiss at 10.) Although Chakrapani does not provide a breakdown of the fees, he asserts that "they have been incurred largely since the criminal complaint against him was dismissed" on April 24, 2009. (*Id.*) As discussed below, given that Chakrapani will be able to utilize the fruits of these fees should the SEC or the government renew their actions against him, the Court finds that the relatively insubstantial progress of these actions outweighs Chakrapani's significant expenses. Thus, this third *Zagano* factor also favors the SEC.

4. Expense of Relitigation

***4** "The mere prospect of a second litigation is insufficient to rise to the level of legal prejudice." *Versace,* 61 F.R.D. at 33 (citation omitted). The "bulk" of Chakrapani's legal expenses were incurred through "document collection, organization, and the review of nearly one million pages of documents obtained from the SEC and from the many non-parties subpoenaed by Mr. Chakrapani." (Def.'s Opp. Mot. Dismiss at 10.) Such work surely can be reused in a future criminal or civil action. Accordingly, the prospect of duplicative litigation expenses is slight. Thus, this factor also weighs in the SEC's favor.

5. Adequacy of Plaintiff's Explanation

The SEC asserts that it needs to dismiss these actions against Chakrapani because the unavailability of Stephanou and other relevant witnesses will deprive the SEC of its strongest evidence against Chakrapani. The Court finds that the SEC's explanation is inadequate because it is unclear whether Stephanou is actually unavailable in this action.

On May 7, 2009, Stephanou signed a cooperation agreement with the government. (Epner Aff., Ex. E.) The agreement provides that Stephanou must "cooperate fully with [the government], the Federal Bureau of Investigation, the Securities and Exchange Commission, and any other law-enforcement agency designated by [the government]." (*Id.* at 3.) Accordingly, Stephanou may not choose to make himself unavailable to the listed agencies, including the SEC, and remain in compliance with the terms of his agreement. Furthermore, on June 23, 2009, Stephanou signed a separate consent agreement with the SEC. That agreement also requires Stephanou "to appear and be interviewed by [SEC] staff at such times and places as the staff requests upon reasonable notice" and to "accept service by mail or facsimile transmission of notices or subpoenas issued by the [SEC] for documents or testimony at depositions, hearings, or trials, or in connection with any related investigation by Commission staff." (*Id.* at Ex. F at 4.)

To date, the SEC has not sought to compel Stephanou's testimony in accordance with the terms of his cooperation agreements. To the contrary, the SEC appears to have passively accepted Stephanou's selective assertion of his Fifth Amendment privilege even when it threatens to undermine the SEC's case against Chakrapani. Because the SEC has elected to dismiss these actions against Chakrapani without even attempting to explore Stephanou's availability as a witness-by at least alerting Stephanou to the consequences flowing from his breach of the cooperation agreements (*see, e.g., United States v. Iqbal,* 117 Fed. Appx. 155, 158 (2d Cir.2004))-the Court finds the SEC's explanation for its need to dismiss to be inadequate or, at best, premature.[FN2] Accordingly, this factor favors Chakrapani.

FN2. Naturally, the government's refusal to enforce its own agreement may be a subject for Stephanou's cross-examination at Contorinis's criminal trial.

* * *

As explained above, three of the five *Zagano* factors favor the SEC and two favor Chakrapani.

The *Zagano* factors, however, need not be weighted equally because their purpose is "to make certain that a district court, in making a determination ultimately reserved to its discretion, expressly considers those concerns identified by the Court of Appeals as inherently relevant." *Oakford,* 181 F.R.D. at 273. The Court's most significant concern is "whether the dismissal will substantially prejudice the defendant[ ]." *Id.* The SEC, therefore, prevails on its motion not merely because the Court has found three of the five *Zagano* factors to be in its favor. Rather, the SEC prevails because Chakrapani has failed to show that, if the Court dismisses this case without prejudice, substantial prejudice to him will result.

***5** As the Court summarized at the November 18, 2009 conference, Chakrapani's "prejudice argument turns on whether or not [he] is employable under different scenarios." (Conf. Tr. 21:11-13, Nov. 18, 2009.) The Court explained, "if there is an ongoing criminal investigation, whether or not the civil case is dismissed with or without prejudice, it seems at least plausible that future employers are going to be skeptical or reluctant to hire [him] until the criminal investigation is over." (*Id.* at 21:14-18.) The Court has no evidence before it that, if this civil case were dismissed with prejudice, Chakrapani would be in a better position to gain employment. Blackstone, Chakrapani's former employer, suspended him when the parallel civil and criminal complaints were initiated. (Def.'s Opp. Mot. Dismiss at 19.) Chakrapani now submits a letter from Blackstone's chief legal officer asserting that "[i]f the SEC suit is dismissed with prejudice, *and if we can satisfy ourselves that the U.S. Attorney will not reinstate its proceedings against Mr. Chakrapani,* we want to *consider* having him at our firm." (Epner Aff., Ex. O (emphasis added).) Not only does this letter state that Blackstone will just "consider" rehiring Chakrapani, but it also makes clear that such consideration is premised on the closure of the government's investigation. The government has unambiguously stated that Chakrapani remains under investigation. (Grupe Decl. ¶ 14.) Chakrapani, therefore, has given the Court no indication that employment at Blackstone or any other job opportunity depends upon these cases being dismissed with prejudice.

For this reason, as well as the foregoing analysis of the *Zagano* factors, Chakrapani cannot meet his burden of demonstrating that substantial prejudice would ensue from a dismissal without prejudice. The Court, thus, grants the SEC's motion and dismisses all of the SEC's actions against Chakrapani without prejudice.

II. MOTION TO COMPEL DISCOVERY

On November 23, 2009, Contorinis requested, pursuant to the *Touhy* regulations of the Department of Justice ("DOJ"), "[a]ll documents ... related to statements made by defendant Nicos Achilleas Stephanou to any government official or entity." (Finzi Decl., Ex. C at 5.) The government refused to comply with Contorinis's request and asked Contorinis to withdraw his subpoena. (*Id.* at Ex. D.) On December 4, 2009, Contorinis filed this motion to compel discovery.

Under Rule 37(a) of the Federal Rules of Civil Procedure, "a party may move for an order compelling disclosure or discovery" from the other party. "A court should grant a Rule 37(a) motion to compel only after determining that the discovery sought is (1) relevant to any party's claim or defense, *see* Fed.R.Civ.P. 26(b)(1); (2) does not violate Rule 26(b)(2)(C), *see* Moore's Federal Practice and Procedure § 37.22[a],[d]; and (3) does not fall under [any applicable privilege], *see id.* at § 37.22[c]." *Kiobel v. Royal Dutch Petroleum Co.,* No. 02 Civ. 7618(KMW), 2009 WL 1810104, at *5 (S.D.N.Y. June 25, 2009). In this case, the discovery Contorinis seeks is clearly relevant under Rule 26(b)(1) and does not violate Rule 26(b)(2)(C). The Court, however, must analyze whether the discovery sought falls under any applicable privilege. As explained in detail below, the SEC and the government argue that the law-enforcement and work-

product privileges shield the discovery from being produced.

*6 For the following reasons, Contorinis's motion to compel discovery is granted in part and denied in part.

A. Law-Enforcement Privilege

The government seeks to withhold the FBI 302s and the documents listed on its October 7, 2009 privilege log on the basis of the law-enforcement privilege. (Gov.'s Opp. Mot. Compel at 5.) The privilege log includes documents such as a memorandum regarding Stephanou's cooperation agreement, notes of an Assistant United States Attorney ("AUSA") regarding impressions of the Stephanou proffer, an annotated version of the cooperation agreement, and AUSA chronologies of events and analyses of proof. (Johnson Decl. Ex. A.) The SEC also asserts the law-enforcement privilege with respect to the documents listed on its privilege log of October 5, 2009. (SEC Opp. Mot. Compel at 1.) These documents consist of "emails written by staff members who attended or participated in the Stephanou Proffer Sessions (or who authored emails relaying information from such staff members) relating to those sessions." (*Id.* at 7.)

1. Legal Standard

The law-enforcement privilege affords the government a qualified privilege meant "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witnesses and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." *United States v. Amodeo,* 44 F.3d 141, 147 (2d Cir.1995). "[T]he party asserting the law enforcement privilege bears the burden of showing that the privilege applies to the documents in question." *In re City of New York,* No. 10 Civ. 0237, 2010 WL 2294134, at *14, (2d Cir. June 9, 2010).

2. Analysis

Neither the government nor the SEC has met its burden in establishing that the requested documents, *in their redacted form,* are protected by the law-enforcement privilege. In its brief and supporting affidavits, the government argues that releasing the documents will reveal information identifying individuals under investigation, permit individuals to craft their testimony in the parallel criminal proceeding, and allow individuals to thwart investigative efforts. (Johnson Decl. ¶¶ 21-23; Grupe Decl. ¶¶ 16-20). The SEC argues that releasing the information "could interfere with ongoing law-enforcement investigations." (Murphy Decl. ¶ 4.)

The government's and the SEC's arguments prove unpersuasive in the context of this case. Because Stephanou is a known cooperator, there is no concern about revealing his identity. As for other potential informants or cooperators, their names can be redacted out of the documents. The concern that other subjects or potential subjects of the government and SEC's ongoing investigation may flee or conceal assets is also unpersuasive. Not only can their names be redacted from the documents, but they are likely to have already recognized the implications that flow from Stephanou's very public cooperation. The SEC and government have pursued charges against a number of defendants related to the alleged insider trading scheme at the heart of this action. Thus, it seems likely that the associates of current or past defendants have heard about the defendants' legal woes and Stephanou's cooperation. If these associates wanted to flee or conceal assets, they presumably would have already done so.

*7 Finally, the argument that releasing this information will thwart investigative efforts or Contorinis's truthful testimony is implausible. First, all information regarding government tactics and investigative strategies may be redacted from the documents.[FN3] Given such redactions, the assertion of the law-enforcement privilege becomes more attenuated: "the protection afforded by the law enforce-

ment privilege is somewhat weaker ... with respect to withholding simple interview materials, as contrasted with confidential law enforcement methods and tactics." *Wells v. Connolly,* No. 07 Civ. 01390(BSJ)(DF), 2008 WL 4443940, at *2 (S.D .N.Y. Sept. 25, 2008). Second, Contorinis will receive Stephanou's statements in the form Jencks material, pursuant to 18 U.S.C. § 3500, prior to his criminal trial anyway. Indeed, the government was prepared to turn over such material in Koulouroudis's trial, which was scheduled before Contorinis was even indicted. The fact that Koulouroudis pled guilty before trial, thus obviating the need to turn over the § 3500 material, cannot obscure the limited prejudice that will flow from such disclosure. Thus, even assuming for the sake of argument that Contorinis would craft his testimony or falsely testify in his criminal trial, the Court does not believe that possessing the documents for a longer period of time will have a significant effect on how well he can craft or lie.

> FN3. At oral argument, Contorinis's counsel clearly stated that he is uninterested in the government's investigative strategies, mental impressions, or subjects of investigation other than Contorinis. (Oral Arg. Tr. 5:3-5:23, Feb. 11, 2010.)

Clearly, the government's refusal to disclose these documents is motivated by tactical considerations. Namely, due to the discrepancy between the criminal and civil discovery rules, the government fears that the "premature release of these documents would ... prematurely reveal the [government's] criminal case." (Gov.'s Opp. Mot. Compel at 14.) While that statement may in fact be true, such purely tactical concerns are not a recognized basis for withholding otherwise discoverable documents under the law-enforcement privilege. The Court, furthermore, is not particularly moved by the government's plight in this context. Surely, the government was well aware of the discrepancy between the civil and criminal discovery rules when it, along with the SEC, chose to initiate parallel proceedings against Contorinis. Before doing so, the government and SEC could have engaged in a cost-benefit analysis that weighed the benefits of simultaneously initiating civil and criminal proceedings against the cost of possibly losing the government's tactical discovery advantage in the criminal case.

In any event, the discovery advantage enjoyed by the government under Rule 16 of the Federal Rules of Criminal Procedure is not a right guaranteed or even recognized by Rule 26 of the Federal Rules of Civil Procedure. Thus, the government's assertion that "[d]iscovery in a civil proceeding may not be used to circumvent the limitations on discovery in a criminal action" is simply incorrect.[FN4] (*Id.* at 7.) Furthermore, as the Court stated at the July 29, 2009 conference, Contorinis is entitled to receive discovery in this civil proceeding. (Oral Arg. Tr. 26:22-25, July 29, 2009.) *See also SEC v. Saad,* 229 F.R.D. 90, 92 (S.D.N.Y.2005) ("But the defendants are not just facing a criminal indictment; they are also facing a very serious SEC civil action, and they are thus fully entitled to the timely discovery that federal law grants them in defending such an action.")

> FN4. The government is also incorrect that *SEC v. Chestman,* 861 F.2d 49 (2d Cir.1988), supports its claim that "courts have repeatedly emphasized that liberal civil discovery processes should not be allowed to undermine the criminal processes." (Gov.'s Opp. Mot. Compel 8.) In fact, the *Chestman* opinion states that "[t]he government had a discernible interest in *intervening* in order to prevent discovery in the civil case from being used to circumvent the more limited scope of discovery in the criminal matter." 861 F.2d at 50 (internal quotation marks omitted) (emphasis added). The quoted language explains why the government had a sound rationale to *intervene.* The opinion says nothing about the government having a right to receive a stay in civil discovery in

> order not to lose its advantage in criminal discovery. *See SEC v. Cioffi,* No. 08 Civ. 2457(FB), 2008 WL 4693320, at *1 (E.D.N.Y. Oct.23, 2008) (interpreting *Chestman* to support only the government's interest in intervening, not its interest "[w]ith respect to a stay of discovery.")

***8** Accordingly, the Court rejects the government's and SEC's invocations of the law-enforcement privilege in this action.

B. Work-Product Privilege

The government argues that the documents listed on its October 7, 2009 privilege log may also be withheld on the basis of the work-product privilege. (Gov.'s Opp. Mot. Compel at 5.) The SEC likewise asserts that the work-product privilege applies to the documents on its October 5, 2009 privilege log. (SEC Opp. Mot. Compel at 1.)

1. Legal Standard

The Federal Rules of Civil Procedure establish the requirements for shielding documents under the attorney work-product privilege. The rule states that "documents ... prepared in anticipation of litigation or for trial by or for another party or its representative" are ordinarily undiscoverable. Fed.R.Civ.P. 26(b)(3)(A). "[T]he party invoking [the] privilege bears the burden of establishing its applicability to the case at hand." *In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002,* 318 F.3d 379, 384 (2d Cir.2003). Although both facts and opinions may be protected by the work-product privilege, the moving party's burden becomes more difficult when seeking to assert the privilege over facts, rather than opinions. *See In re Grand Jury Subpoena Dated Oct. 22, 2001,* 282 F.3d 156, 161 (2d Cir.2002).

Moreover, the work-product privilege is a qualified privilege. Thus, privileged documents may still be discoverable if they are "otherwise discoverable" under Rule 26(b)(1) *and* the opposing party "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed.R.Civ.P. 26(b)(3)(A). If the opposing party makes such a showing and the Court orders production, then the Court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed.R.Civ.P. 26(b)(3)(B).

2. Analysis

The documents on the government's and SEC's privilege logs were obviously prepared in anticipation of litigation. All of the materials were created in relation to the dual investigations of the alleged insider trading scheme, and thus all qualify as work product within the meaning of Rule 26(b)(3)(A). Contorinis does not argue otherwise.

Contorinis does argue, however, that his need for the documents should overcome the government's and SEC's work-product privileges. The Court disagrees. The documents listed on the SEC's privilege log are all emails between SEC staff members regarding their investigation into the alleged insider trading scheme involving Contorinis. These emails contain the mental impressions, conclusions, opinions, or legal theories of SEC attorneys and staff. The documents listed on the government's privilege log are also mostly internal government documents that likewise contain the mental impressions, conclusions, opinions, or legal theories of AUSAs. In *Upjohn Co. v. United States,* the Supreme Court indicated that opinion work product "cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." 449 U.S. 383, 401, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). If these documents were discoverable, therefore, all opinion work product would have to be redacted from them. The Court finds that, with respect to the documents in their redacted form, Contorinis can "without undue hard-

ship, obtain their substantial equivalent by other means." Fed.R.Civ.P. 26(b)(3). Specifically, he will have the FBI 302s, which are akin to the primary source of the information that he seeks. The documents on the SEC's and government's privilege logs are akin to secondary sources-replete with mental impressions, conclusions, opinions, and legal theories-for which Contorinis has no substantial interest.

***9** Accordingly, the Court agrees with the government and SEC that the work-product privilege applies.

C. *Touhy* Request

"The Federal Housekeeping Statute, 5 U.S.C. § 301 , authorizes government agencies ... to adopt regulations regarding the custody, use, and preservation of [agency] records, papers, and property. *U.S. Envtl. Prot. Agency v. Gen. Elec. Co.,* 197 F.3d 592, 595 (2d Cir.1999) (internal quotation marks omitted). In *United States ex rel. Touhy v. Ragen,* the Supreme Court affirmed that agency employees must refuse to provide subpoenaed agency records when their production would violate the agency's housekeeping regulations. 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951). Agencies, therefore, refer to such requests as *"Touhy* requests."

On November 23, 2009, Contorinis made a *Touhy* request on the DOJ for "[a]ll documents ... related to statements made by ... Stephanou to any government official or entity." (Finzi Decl., Ex. C.) The DOJ's internal regulations, which are codified in 28 C.F.R. § 16.21 *et seq.,* require that the DOJ determine the nature of the information requested and then evaluate whether to grant the request based upon the type of requested information. *See* 28 C.F.R. § 16.26. In other words, the statute gives the government varying degrees of discretion to grant or deny such requests depending on the type of information involved. In this case, the government denied Contorinis's *Touhy* request and withheld (1) the FBI 302s on the basis of law-enforcement privilege and (2) the documents listed on the government's privilege log on the basis of the law-enforcement and work-product privileges. (Gov.'s Opp. Mot. Compel at 5.) The Court has already found that the work-product privilege shields the documents listed on the SEC and government's privilege logs from production, so the Court will only review the government's denial of Contorinis's *Touhy* request with respect to the FBI 302s.

The Second Circuit has not yet articulated the correct standard of review for a denial of a *Touhy* request. *See U.S. Envtl. Prot. Agency v. Gen. Elec. Co.,* 212 F.3d 689, 690 (2d Cir.2000). Contorinis argues that the government's denial of his *Touhy* request should be reviewed under Federal Rules of Civil Procedure 26(b)(2) and 45(c)(3), which require the Court to ask whether it would be an undue burden for the government to produce the requested documents. *See, e.g., Exxon Shipping Co. v. U.S. Dep't of Interior,* 34 F.3d 774 (9th Cir.1994); *Lidner v. Calero-Portocarrero,* 251 F.3d 178 (D.C.Cir.2001). The government argues that Section 706 of the Administrative Procedure Act ("APA") should apply. That statute requires the Court to uphold an agency's decision unless it is arbitrary and capricious. *See, e.g., COMSAT Corp. v. Nat. Sci. Found.,* 190 F.3d 269, 277 (4th Cir.1999); *Moore v. Armour Pharm. Co.,* 927 F.2d 1194, 1197 (11th Cir.1991).

Because the Court would reach the same result under either standard, it is unnecessary to decide which standard of review is applicable. For the sake of its analysis, the Court will review the DOJ's denial of the request for the FBI 302s using the APA's more deferential "arbitrary and capricious" standard. Section 706 dictates that "[t]he reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "The scope of review under this provision of the APA is a narrow one. In reviewing the agency's explanation of its actions, we must consider whether the decision was based on a consider-

ation of the relevant factors and whether there has been a clear error of judgment." *City of N.Y. v. Shalala* 34 F.3d 1161, 1167 (2d Cir.1994) (citations omitted).

***10** Despite the deference the standard gives to the government, the Court finds that the government's decision not to produce the FBI 302s is unsupported by the law-enforcement privilege and is arbitrary and capricious. The government was prepared to produce the requested FBI 302s as § 3500 material in the Koulouroudis trial and had agreed to produce copies to the civil defendants in this case shortly thereafter. It was only when Koulouroudis's guilty plea eliminated the need to produce the § 3500 material that the government reasserted its refusal to produce the FBI 302s. Naturally, this chronology raises the question: Why could the government safely produce the documents to Koulouroudis and not to Contorinis? To date, the government has provided no satisfactory answer. Furthermore, Stephanou is a known informant and Contorinis has consented to the redaction of sensitive information that might implicate any interests of the law-enforcement privilege. Thus, the Court finds no credible reason why the government cannot produce these documents in their redacted form. As stated above, the government's invocation of the law-enforcement privilege seems like a pretext to preserve the government's tactical advantage in its criminal trial against Contorinis. The government's interest in preserving its tactical advantage, while understandable, does not outweigh Contorinis's interest in obtaining evidence-perhaps the most important evidence against him-which he is entitled to receive in this civil proceeding under the Federal Rules of Civil Procedure. The Court, therefore, finds that the government's denial of Contorinis's *Touh* y request as to the FBI 302s was arbitrary and capricious. Accordingly, Contorinis's motion to compel discovery, with respect to the FBI 302s, is granted.

III. MOTION TO STAY DISCOVERY

On July 2, 2009, the government filed motions in both of the above-captioned actions seeking to stay all discovery directed at Stephanou and all discovery directed at determining the investigative strategies of the DOJ. On July 29, 2009, the Court denied the request principally because Chakrapani was not a party to the criminal proceeding and would be disadvantaged by a stay in the civil action. Given the SEC's dismissal of its action against Chakrapani, the government now renews its motion for a stay of discovery "regarding Nicos Stephanou's statements until such time as documents are produced in *United States v. Contorinis.*" (Gov. Opp. Mot. Compel at 1.)

When considering whether to grant a stay, courts balance five factors: "(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest." *Volmar Distributors, Inc. v. N.Y. Post Co.,* 152 F.R.D. 36, 39 (S.D.N.Y.1993). Prejudice to the parties is by far the most important of the five factors. *Id.*

***11** The first two factors-essentially, prejudice to the parties-clearly favor proceeding with discovery. Contorinis obviously wants to proceed with discovery because he filed a motion to compel discovery, and the SEC has not joined the government's motion to stay discovery. (Oral Arg. Tr. 22:1-3, Feb. 11, 2010 ("Your Honor, the Department of Justice has moved for the stay; that's not something that we have moved for.").) The third factor-the interest of the courts-likewise supports expeditious discovery in the civil action. *See, e.g., Travelers Cas. & Sur. Co. v. Vanderbilt Group, LLC,* No. 01 Civ. 7927(DLC), 2002 WL 844345, at *4 (S.D.N.Y. May 2, 2002) ("[T]he Court's interest in the expeditious resolution of cases before it weighs against granting a stay.")

The government's motion to stay discovery principally relies on the same privilege arguments made in

response to Contorinis's motion to compel. In essence, the government asserts that its interest in preserving its cooperating witness for the criminal trial is synonymous with factors four and five: the interests of persons not parties to the civil litigation and the public interest. However, as discussed above, the Court finds the government's privilege arguments to be largely unpersuasive. The Court reiterates that it is unaware of any legal requirement entitling the government to preserve its cooperators from examination before trial. What the government deems to be a right is, in fact, a litigator's preference to avoid cross-examination and related impeachment of prized witnesses. At oral argument, in fact, the government acknowledged, "it's no secret we would rather have [Stephanou] not subjected to extensive cross-examination in advance of the criminal trial." (Oral Arg. Tr. 66:17-19, Feb. 11, 2010.) The reality, however, is that prized witnesses often must testify more than once in both civil and criminal proceedings. The government's cooperation agreement with Stephanou contemplated exactly this situation. The fact that criminal trials typically precede civil trials does not elevate the preservation of a cooperator's testimony into a government right.

Moreover, if Stephanou is to adhere to his cooperation agreement and earn his sentencing reduction, one would expect his testimony to be the same whether first given at a criminal trial or at a civil one. Where, as here, there is minimal fear that his testimony will compromise the integrity of government investigations or the safety of others, there is little to justify the government's jealous protection of its cooperating witness.

In short, the Court finds that the government has failed to demonstrate that a stay of discovery is warranted in this case. Of course, if Contorinis or other relevant witnesses invoke their Fifth Amendment privileges not to participate in civil discovery, the Court's analysis regarding the propriety of a discovery stay might well be altered. In other words, the Court, the public, and non-parties-namely, alleged victims of the insider trading scheme-have a clear interest in open and full discovery in this matter. To the extent that process is compromised by the legitimate invocation of constitutional privileges during discovery, the balance of interests could turn in favor of a discovery stay pending completion of Contorinis's criminal trial, which is currently scheduled to begin on September 20, 2010 before this Court. *See, e.g., Saad,* 229 F.R.D. at 91 (granting a stay because of the "high likelihood that invocations of the Fifth Amendment privilege [would] play havoc with the orderly conduct of ... depositions."). Because Contorinis and other relevant witnesses have not yet invoked their Fifth Amendment privileges in connection with discovery, [FN5] the Court declines to speculate on the merit of potential stay applications.[FN6]

> FN5. The Court is aware that Contorinis has already invoked his Fifth Amendment privilege in his answer to the SEC's complaint. (Docket No. 66.)
>
> FN6. In the event of such changed circumstances, the Court notes that there is no need for the government to intervene, yet again, to vindicate interests that the SEC is fully capable of representing on its own.

***12** Accordingly, the Court denies the government's motion for a stay of discovery.

IV. CONCLUSION

For the foregoing reasons, the SEC's motion to voluntarily dismiss its actions against Chakrapani without prejudice is granted; Contorinis's motion to compel discovery is granted in part and denied in part; and the government's motion to stay discovery is denied.

Accordingly, the government shall produce all documents attached to Peter Grupe's Declaration of October 7, 2009 and any FBI 302s that have been finalized since October 7, 2009. The parties are directed to confer and then submit to the Court a pro-

posed protective order regarding the production and use of these documents. Before producing the documents to Contorinis, however, the government shall highlight all parts of the documents it deems, pursuant to this opinion, to be appropriately redacted and then shall send the documents to chambers within two weeks of the date of this opinion. After the Court approves the proposed redactions and protective order, the government shall produce the documents in their redacted form to Contorinis. *See In re City of New York,* 2010 WL, at *19 ("If the district court determines that the law enforcement privilege does not protect the documents at issue, the documents must be disclosed. In an effort to minimize the effects of disclosure, however, the district court may order that the documents be 'revealed only in a specified way.' ") (quoting Fed.R.Civ.P. 26(c)(1)(G)).

The Clerk of the Court is directed to terminate the motions located at docket numbers 101 and 103 in 09 Civ. 1043 and docket number 58 in 09 Civ. 325. Additionally, the Clerk of the Court shall mark Ramesh Chakrapani as a terminated Defendant in 09 Civ. 1043 and mark 09 Civ. 325 as closed.

SO ORDERED.

S.D.N.Y.,2010.
S.E.C. v. Chakrapani
Slip Copy, 2010 WL 2605819 (S.D.N.Y.)

END OF DOCUMENT

EXHIBIT N

Not Reported in F.Supp.2d, 1999 WL 1747410 (S.D.N.Y.)
(Cite as: 1999 WL 1747410 (S.D.N.Y.))

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Only the Westlaw citation is currently available.

United States District Court, S.D. New York.
In re ADLER, COLEMAN, CLEARING CORP., Debtor.
FIERO BROTHERS, INC., Plaintiff,
v.
Edwin B. MISHKIN, SIPC Trustee for Adler, Coleman Clearing Corp., and the National Securities Clearing Corporation, Defendants.
No. 95-08203 JLG.

Dec. 8, 1999.

Gusrae, Kaplan & Bruno, New York, New York, for Fiero Brothers, Inc.

National Association of Securities Dealers, Inc., Washington, D.C ., Defendant, pro se.

John T. Moran, Delray Beach Florida, Milbank, Tweed, Hadley & McCloy, New York, New York, for National Securities Clearing Corp.

Cleary, Gottlieb, Steen & Hamilton, New York, New York, for Trustee.

MEMORANDUM DECISION ON PLAINTIFF'S MOTION TO COMPEL

GARRITY, Bankruptcy J.

***1** Fiero Brothers, Inc. ("Fiero") moves for the entry of an order pursuant to Rules 9014 and 7037 of the Federal Rules of Bankruptcy Procedure and Rule 37(a)(2) of the Federal Rules of Civil Procedure ("Fed. R. Civ.P.") (a) compelling Cameron Funkhauser, Esq., an employee of the National Association of Securities Dealers ("NASD"), to appear for a duly noticed deposition, or alternatively, directing the NASD to make Funkhauser available for deposition, (b) directing Funkhauser and the NASD to pay costs incurred by Fiero in connection with this motion, and (c) compelling John T. Moran to answer certain questions that he refused to answer during the course of a deposition held on January 30 and 31, 1996. We deny the motion as to the NASD and Funkhauser and grant it as to Moran.

Facts

The following facts are undisputed. On February 27, 1995 (the "Filing Date"), the Securities Investor Protection Corporation ("SIPC") commenced a liquidation proceeding under Section 78eee(b) of the Securities Investors Protection Act, 15 U.S.C. § 78eee(b), against Adler, Coleman Clearing Corp. (the "Debtor") in the United States District Court for the Southern District of New York. District Judge Loretta A. Preska ordered that the liquidation proceeding be removed to this Court, appointed Edwin B. Mishkin as trustee (the "Trustee") to liquidate the Debtor's remaining assets, and authorized the Trustee to retain the law firm Cleary, Gottlieb, Steen & Hamilton ("Cleary, Gottlieb") as counsel.

Fiero is a registered broker/dealer of securities. By complaint dated March 20, 1995, Fiero and Joseph Roberts & Co., Inc. jointly commenced an adversary proceeding against the Trustee, the National Securities Clearing Corporation and Cleary, Gottlieb. Fiero was severed from that action pursuant to a stipulation so ordered by this Court on September 29, 1995. It commenced this adversary proceeding by complaint dated September 12, 1995 (the "Complaint"). In the Complaint, Fiero seeks an award of consequential damages resulting from the named defendants' alleged wrongful manipulation of securities prices in connection with the Trustee's liquidation of the Debtor's assets.

On January 23, 1996, Fiero caused a subpoena to be served on Mr. Funkhauser directing him to appear at a deposition on February 6, 1996. *See* Affirmation of Martin H. Kaplan in Support of Motion to Compel, dated March 4, 1996 (the "Kaplan Af-

firm.") ¶ 2. By letter dated January 31, 1996 (the "January Letter"), Thomas P. Moran, Esq., an attorney in the Office of the General Counsel of the NASD (who is not related to John T. Moran), objected to the subpoena and informed Fiero's counsel that Funkhauser would not appear at the scheduled deposition because his testimony is protected by the attorney-client, attorney work product and law enforcement privileges. *See* Kaplan Affirm. Ex. B. Funkhauser has been involved in an ongoing NASD investigation into trading by Fiero in certain securities underwritten by Hanover Sterling & Co. ("Hanover"). *See* NASD's Memorandum in Opposition to Motion to Compel, dated March 22, 1996 (the "NASD Mem.") at p. 3. Fiero disputes the NASD's assertion that Fiero is a target of the investigation. Kaplan Affirm. ¶ 7.[FN1] By letter dated February 1, 1996, Fiero asked the NASD to reconsider its position, explaining that Fiero did not seek privileged information because Funkhauser would be called on to testify only as to factual matters relating to his contacts or discussions with Hanover, the Securities and Exchange Commission ("SEC"), the Trustee, the New York Stock Exchange ("NYSE"), the SIPC and certain other third parties, rather than his analysis or opinion. Kaplan Affirm. Ex. C. Funkhauser did not appear at the scheduled deposition, and the NASD failed to seek either a protective order from this Court pursuant to Fed.R.Civ.P. 26(c) or an order quashing the subpoena pursuant to Fed.R.Civ.P. 45.

> FN1. In fact, we understand that in a complaint filed in or about April 1998, the NASD alleged that Fiero and three other brokerage houses made $6.4 million in illegal profits by selling short stocks for which Hanover made a market.

***2** Pursuant to a subpoena issued by Fiero, John T. Moran appeared *pro se* at a deposition held on January 30 and 31, 1996. During that deposition, Moran refused to answer various questions propounded to him concerning the identity of certain individuals or entities with whom he may have discussed matters that are the subject of an ongoing NASD investigation. Kaplan Affirm. ¶ 8; Kaplan Affirm. Ex. E. In doing so, he did not assert any privilege, and has not sought a protective order.

Discussion

We base our subject matter jurisdiction of this matter on 15 U.S.C. §§ 78eee(b)(2)(A) and (b)(4) and the district court's February 27, 1995 order referring and removing the Debtor's case to this court. This motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

Motion to Compel Deposition of Funkhauser

Fed.R.Civ.P. 26(b) provides that a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Fed.R.Civ.P. 26(b). Notwithstanding the assertions in the January Letter, the NASD does not contend that the attorney client privilege is applicable herein. It does claim that the information sought by Fiero from Funkhauser concerns matters relating to an active, ongoing NASD investigation and is insulated from discovery under both the "investigative file privilege" and the attorney work product doctrine.

The party seeking to invoke a privilege bears the burden of establishing "those facts that are the essential elements of the privileged relationship." *In re Grand Jury Subpoena Dated Jan. 4, 1984,* 750 F.2d 223, 224 (2d Cir.1984). This burden cannot be " 'discharged by mere conclusory or ipse dixit assertions." ' *Id.* at 225 (quoting *In re Bonanno,* 344 F.2d 830, 833 (2d Cir.1965)). Once this burden has been satisfied, it is incumbent upon the party seeking discovery to demonstrate that its need for the information and the harm that it would suffer as a consequence of non-disclosure outweigh the injury that disclosure would cause either to the other party or the interests cited by it. *Apex Oil v.. DiMauro,* 110 F.R.D. 490, 496 (S.D.N.Y.1985); *see also In re Sealed Case,* 856 F.2d 268, 272 (D.C.Cir.1988)

(interest in non-disclosure must be balanced against the need of the party seeking discovery for access to the information sought); *Black v. Sheraton Corp. of America,* 564 F.2d 531, 545 (D.C.Cir.1977); *Securities and Exchange Commission v. Thrasher,* No. 92 Civ. 6987, 1995 WL 46681, at *10 (S.D.N.Y. Feb. 7, 1995), *aff'd,* No. 92 Civ. 6987, 1995 WL 456402 (S.D.N.Y. Aug. 2, 1995).

The attorney work product doctrine is set forth in Fed.R.Civ.P. 26(b)(3), which provides in relevant part as follows:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without due hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

*3 Fed.R.Civ.P. 26(b)(3). Thus, in appropriate circumstances, the doctrine prevents disclosure of materials generated in anticipation of litigation, *see, e.g., Hickman v. Taylor,* 329 U.S. 495, 511-13 (1947), as well as the mental impressions, conclusions, opinions or legal theories of an attorney concerning litigation. *See, e.g., Upjohn Co. v. United States,* 449 U.S. 383, 399-401 (1981); *John Doe Corp. v. United States (In re John Doe Corp.),* 675 F.2d 482, 493 (2d Cir.1982).

The "investigatory privilege" is a qualified common law privilege protecting civil as well as criminal law-enforcement investigatory files from civil discovery. *See Friedman v. Bache Halsey Stuart Shields, Inc.,* 738 F.2d 1336, 1341 (D.C.Cir.1984); *Black,* 564 F.2d at 541-42; *Frankel v. Securities and Exchange Commission,* 460 F.2d 813, 817 (2d Cir.), *cert. denied,* 409 U.S. 889 (1972); *United States v. American Telephone & Telegraph Company,* 86 F.R.D. 603, 639 (D.D.C.1979). It is predicated on a "public interest in minimizing disclosure of documents that would tend to reveal law enforcement investigative techniques or sources." *Black,* 564 F.2d at 545. The privilege applies to both investigatory files and testimony concerning their contents. *See Sealed Case,* 856 F.2d at 271 ("It would make little sense to protect the actual files from disclosure while forcing the government to testify about their contents").

The privilege has been extended to quasi-governmental or non-governmental entities, like the NASD, entrusted with the enforcement of rules of conduct and procedure promulgated by self-regulating industries. *See Ross v. Bolton,* 106 F.R.D. 22, 23 (S.D.N.Y.1985) (motion to compel production of NASD files denied where NASD had already agreed to produce factual data and remaining documents, including chart of trading activities and transcripts of unsworn deposition testimony taken during NASD investigation, represented staff analyses of data or opinions such that they were protected by investigatory privilege); *see also Thrasher,* 1995 WL 46681, at *12 (disclosure of documents of Chicago Board of Exchange and New York Stock Exchange in possession of SEC barred by investigatory privilege); *Apex Oil,* 110 F.R.D. at 497 (protecting investigative files of New York Mercantile Exchange).

There are three prerequisites to the assertion of the privilege: (i) the head of the department having control over the information requested must assert the privilege; (ii) the official in question must do so based on actual personal consideration; and (iii) he or she must specify the information purportedly covered by the privilege, and accompany the request with an explanation as to why such informa-

tion falls within the scope of the privilege. *Sealed Case,* 856 F.2d at 270 (citing *Black,* 564 F.2d at 542-43; *Friedman,* 738 F.2d at 1341-42). Once these conditions are satisfied, the information sought will not be disclosed unless the party seeking disclosure establishes that its need for the information outweighs the public interest in preventing disclosure. *See Raphael v. Aetna Casualty & Surety Co.,* 744 F.Supp. 71, 74 (S.D.N.Y.1990) (where qualified common law privilege invoked to defeat discovery, balancing of competing interests required).

***4** The NASD claims that application of the investigatory privilege bars Funkhauser's deposition because Funkhauser's testimony "will reveal, directly or indirectly, to Fiero, a target of the investigation, what information confidential sources are supplying to the NASD and the direction the [NASD] investigation is, or is not, taking." NASD Mem. at p. 5. It also asserts that "premature disclosure of investigatory information, with all its attendant dangers of witness intimidation or retaliation and the conforming tainting of testimony, may potentially prevent the NASD from presenting its strongest case if formal disciplinary action is deemed necessary, thereby frustrating the important public interest in vigorous enforcement of the securities laws." *Id.* Fiero counters that it seeks to depose Funkhauser as a "fact witness" rather than for his "work product" or for "inside information". *See* Reply Affirmation of Martin H. Kaplan in Support of Motion to Compel (undated) (the "Reply Affirm.") ¶ 9.

Neither the investigatory privilege nor the attorney work product doctrine ordinarily precludes discovery of factual or statistical information, as opposed to mental impressions or opinions, even if such information is embodied in privileged materials or serves as the basis for opinions of the investigator or attorney involved. *See Hickman,* 329 U.S. at 507, 513 (noting that "either party may compel the other to disgorge whatever facts he has in his possession" but finding that facts learned by attorney from survivors in tugboat mishap in action against tugboat company were not discoverable under work-product doctrine where information was readily available elsewhere); *Ross,* 106 F.R.D. at 24 (factual or statistical information not protected by investigative privilege); *Ford v. Philips Electronics Instruments Co.,* 82 F.R.D. 359, 360 (E.D.Pa.1979) (work product doctrine furnishes no shield against discovery of facts that adverse party's lawyer has learned or existence or nonexistence of documents, even if documents themselves may not be subject to discovery); *Xerox Corp. v. International Business Machines Corp.,* 64 F.R.D. 367, 381-82 (S.D.N.Y.1974) ("[a] party should not be allowed to conceal critical, non-privileged, discoverable information, which is uniquely within the knowledge of the party and which is not obtainable from any other source, simply by imparting the information to its attorney and then attempting to hide behind the work product doctrine after the party fails to remember the information"); *Banks v. Lockheed-Georgia Co.,* 53 F.R.D. 283, 285 (N.D.Ga.1971) (denying discovery of written opinions and conclusions of defendant's "research" team, which included attorney, under work product doctrine, but ordering defendant to provide plaintiffs with any factual or statistical information that was available to team).

However, when disclosure of facts would effectively reveal the mental impressions or opinions of an attorney, those facts have been protected from disclosure pursuant to the attorney work product doctrine. *See Shelton v. American Motors Corp.,* 805 F.2d 1323, 1329 (8th Cir.1986) (work product doctrine barred deposition of opposing counsel where mere acknowledgment of existence of documents selected in process of compiling documents from among voluminous files in preparation for litigation would reveal mental impressions); *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.,* 117 F.R.D. 83, 85-86 (M.D.N.C.1987) ("even seemingly innocent questions, such as the existence or nonexistence of documents or queries concerning which documents counsel has selected in preparing a witness for deposition may implicate opinion

work product").

***5** This concept was addressed in *Securities and Exchange Commission v. Morelli,* 143 F.R.D. 42 (S.D.N.Y.1992). In that case, the defendants in an insider trading action sought to depose the SEC or a member of its litigation team under Fed.R.Civ.P. 30(b)(6) in an effort to discover factual information upon which the SEC's allegations were predicated, including the time and place of the defendants' alleged receipt of the inside information, the source and substance of the information and the identity of other individuals to whom the information was allegedly transmitted. *Id.* at 44. The SEC moved for a protective order, claiming, among other things, that the information was protected by the work product doctrine. *Id.* In finding that the proposed deposition constituted an impermissible attempt by the defendants to inquire into the mental processes and strategies of the SEC, the court stated:

> Given plaintiff's sworn, uncontroverted statement that all relevant, non-privileged evidence has been disclosed to the defendants, the Court is drawn inexorably to the conclusion that [defendants'] Notice of Deposition is intended to ascertain how the SEC intends to marshall the facts, documents and testimony in its possession, and to discover the inferences that plaintiff believes properly can be drawn from the evidence it has accumulated.

Id. at 47.

The same concerns that motivated the court in *Morelli* to deny deposition discovery because it threatened the sanctity of mental impressions, opinions or strategic deliberation under the work product doctrine are present in this case. Premature disclosure of factual information to the target of a pending NASD investigation could impair the NASD's ability to investigate its members, thereby defeating the important "public interest in maintaining the integrity of effective industry self-regulation." *See Ross,* 106 F.R.D. at 23 (noting "strong public interest" in finding that investigatory privilege precluded discovery of NASD file materials constituting opinion and analysis).

This argument is rendered no less compelling merely because *Morelli* involved an attempt to depose opposing counsel, and the court's decision was accordingly influenced in part by the general disapprobation with which this practice is viewed due to its adverse effect upon the efficacy of the adversarial process and the significant risk that the attorney will be forced to reveal his theory of the case or strategy to an opponent. 143 F.R.D. at 47. Although the NASD is not a party to this proceeding, it is potentially adverse to Fiero in any disciplinary action arising as a consequence of its investigation. *See* NASD Mem. at pp. 7-8. Thus, whether it consists of revealing an attorney's legal theories developed in anticipation of a disciplinary proceeding or prematurely disclosing the strategy driving an ongoing investigation, the risk is equally significant. We accordingly find that the scope of the investigative privilege should be extended to encompass the information sought by Fiero in this case.

***6** Fiero contends that its need to obtain the information from Funkhauser outweighs any public interest in preventing disclosure because allegedly contradictory deposition testimony by John Corsiglia, Esq. (then, a Cleary, Gottlieb attorney) calls into question the veracity of the testimony given by Moran, and Funkhauser's testimony is therefore necessary to determine whether Moran is telling the truth. Reply Affirm. ¶ 13. However, Fiero does not identify the relevant Corsiglia testimony, and the record is otherwise devoid of any evidence whatsoever to support a finding that Moran has been anything other than truthful in his testimony. Fiero's unsupported allegations are inadequate to overcome the important public interest served by maintaining the confidentiality of the NASD's investigative files.

Apex Oil, 110 F.R.D. at 490, is instructive on this point. In denying access to investigative files maintained by the New York Mercantile Exchange, the court stated:

> [P]laintiff argues that it needs the information in question to assess the accuracy and truthfulness of previously obtained deposition testimony. In this regard, plaintiff argues that any witness statements made shortly after the events in question will be more detailed and accurate than deposition testimony long after those events, and that the statements might, in any event, diverge from the testimony offered in pre-trial discovery. On balance, I conclude that plaintiff has not made an adequate showing of need. Plaintiff's principal argument-that statements made to the Exchange investigators may differ from testimony given by the same witnesses in pre-trial depositions-if accepted would eliminate any requirement of a particularized showing of need. There is always a possibility of divergent testimony, and if such a mere possibility were sufficient to waive any protection for the investigative files, it would necessarily do so in every case. Speculation of this sort is simply inadequate to justify overcoming the presumptive protection accorded the investigative files.

Id. at 498 (footnote omitted). Moreover, Fiero has not demonstrated that it is unable to obtain the information it seeks from other sources (*e.g.*, the Trustee, the SIPC, the NYSE, the SEC or "other third parties"). *See Friedman,* 738 F.2d at 1341 (whether information is available from other sources is factor in determining degree of litigant's need to obtain it); *Collins v. Shearson/American Express, Inc.,* 112 F.R.D. 227 (D.D.C.1986) (denial of motion to compel production of Commodities Futures Trading Commission files where documents were privileged, CFTC asserted that disclosure could harm investigation in progress and plaintiffs made only weak showing of need or that documents unavailable elsewhere).

Citing Fed.R.Civ.P. 37(d), Fiero also seeks to impose reasonable costs (including attorneys' fees) incurred in connection with the Motion upon Funkhauser and the NASD. Although the NASD should have moved for a protective order or for an order quashing Funkhauser's subpoena, we find that because the NASD's position was substantially justified, both Fiero and the NASD must bear their own costs and expenses incurred in connection herewith.

Compelling Moran to Testify

***7** Fed.R.Civ.P. 30(c) states that all objections made at the time of a deposition shall be noted and that evidence with respect to which an objection has been interposed will be taken subject to the objection. Fed.R.Civ.P. 30(c). Under Fed.R.Civ.P. 30(d)(1), "[a] party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion" seeking to limit the scope of a deposition conducted in bad faith or in an unreasonably annoying, harassing or oppressive manner. Fed.R.Civ.P. 30(d)(1). "[A]bsent a claim of privilege" or one of the other bases stated in the rule, "instructions not to answer questions at a deposition are improper." *Gould Investors, L.P. v. General Insurance Co. of Trieste & Venice,* 133 F.R.D. 103, 104 (S.D.N.Y.1990) (citing *Nutmeg Ins. Co. v. Atwell, Vogel & Sterling, Div. of Equifax Services, Inc.,* 120 F.R.D. 504, 508 (W.D.La.1988)).

If a deponent fails to answer a question propounded at a deposition, the discovering party may move for an order compelling the deponent to respond. Fed.R.Civ.P. 37(a)(2)(B). This rule applies whether or not a party is represented by counsel. Parties appearing *pro se,* although afforded special solicitude, are subject to the compulsion and sanction mechanisms set forth in Fed.R.Civ.P. 37. *See McDonald v. Head Criminal Court Supervisor Officer,* 850 F.2d 121 (2d Cir.1988); *Maleski v. Landberg,* No. 93 Civ. 5318, 1996 WL 63043, at *1 (S.D.N.Y. Feb. 13, 1996); *Baker v. Ace Advertisers' Service, Inc.,* 153 F.R.D. 38, 40 (S.D.N.Y.1992); *Rivera v. Simmons,* 116 F.R.D. 593, 596 (S.D.N.Y.1987).

No evidentiary limitations have been imposed by

this Court that would relieve or prevent Moran from responding to the questions posed by Fiero. Also, there is no evidence to suggest that Moran's refusal to testify is premised upon any allegation that his deposition was being conducted in bad faith or in an unreasonably annoying, harassing or oppressive manner.

Construing the entire record before us in a way favorable to Moran, the only conceivable justification for his refusal to answer is that any testimony concerning the issues in question is in some way privileged because it is or may be the subject of a pending grand jury investigation. *See* Transcript of Deposition of John T. Moran held on January 30, 1996 at p. 129, l. 9 (annexed as Ex. E. to Kaplan Affirm.). Moran acknowledges, however, that he is not aware of any pending grand jury investigation of the matters involved. *Id.* Even if Moran had testified before a federal grand jury, he would not be precluded from revealing either that he testified or the nature of his testimony. *See* Rule 6(e)(2) of the Federal Rules of Criminal Procedure; *In re Application of Eisenberg,* 654 F.2d 1107, 112 n. 9 (5th Cir.1981). We find, therefore, that Moran has not stated any applicable privilege or other legally cognizable basis for his refusal to answer the questions propounded to him by Fiero.

Conclusion

***8** We deny the motion as to Funkhauser and the NASD and grant it as to Moran.

SETTLE ORDER.

S.D.N.Y.,1999.
In re Adler, Coleman, Clearing Corp.
Not Reported in F.Supp.2d, 1999 WL 1747410 (S.D.N.Y.)

END OF DOCUMENT

EXHIBIT O

Not Reported in F.Supp., 1995 WL 46681 (S.D.N.Y.)
(Cite as: 1995 WL 46681 (S.D.N.Y.))

United States District Court, S.D. New York.
SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,
v.
Hugh THRASHER, et al., Defendants.
No. 92 Civ. 6987 (JFK).

Feb. 7, 1995.

Peter Goldstein, Robert Knuts, Lee Larson, SEC, New York City.

David Meister, Asst. U.S. Atty., S.D.N.Y., New York City.

Lloyd S. Clareman, New York City.

Richard Ben-Veniste, Weil, Gotshal & Manges, Washington, DC.

Barry Levin, Los Angeles, CA.

Michael Bachner, New York City.

Stanley S. Arkin, Chadbourne & Parke, New York City.

John B. Harris, Stillman, Friedman & Shaw, P.C., New York City.

Leon Borstein, New York City.

Mark Kaplan, Schulte, Roth, Zabel, New York City.

Gary E. Eisenberg, Monroe, NY.

Jerry D. Sparks, Chicago, IL.

David T. Miyamoto, Graham & James, Los Angeles, CA.

Barry S. Pollack, Arkin, Schaffer & Supino, New York City.

Bobby C. Lawyer, Pettit & Martin, San Francisco, CA.

MEMORANDUM & ORDER

MICHAEL H. DOLINGER, United States Magistrate Judge:

***1** Three defendants have moved to compel production of assertedly privileged documents from the plaintiff. For the reasons that follow, the motions are granted in part.

Background

This lawsuit was commenced by the Securities and Exchange Commission to pursue claims of improper use of so-called insider information by a host of individual investors. The information concerned the intended purchase of the Motel 6 chain by a French corporation in 1989. The complaint named a corporate insider, Hugh Thrasher, as the original source, and it alleged that the information was disclosed to a variety of individuals, who allegedly utilized it to make timely purchases of Motel 6 stock, and some of whom allegedly passed the news on to other potential investors.

Discovery was temporarily stayed in June 1993, at the request of the United States Attorney, while criminal proceedings were instituted against some of the civil defendants as well as other individuals. That stay was vacated in 1994, when the criminal defendants entered guilty pleas, and discovery has again been underway for a number of months.

In the course of those resumed discovery efforts, it became apparent that the Commission was asserting a variety of privileges to block disclosure of a broad array of documents to the defendants. This stance has led defendants Hugh Thrasher, Jonathan Hirsh and Ezra Chammah to seek court intervention

on their behalf.

Of particular concern are documents that reflect dealings between the Commission and some of the individuals who were not only allegedly tippees, but also tippers to some of the defendants in this case. This concern is particularly acute, according to the moving defendants, because the Commission's case against them must rest substantially on what those defendants' alleged tippers and tippees have told the Commission or other law enforcement authorities. According to defendants, many of these individuals have not been available for depositions, and hence the defendants' only realistic avenue for learning the basis of the allegations against them is through the Commission.

The documents principally at issue on the current motions are notes taken by Commission representatives during the course of interviews of these cooperating individuals. Defendants also seek copies of any cooperation agreements between these individuals and either the Commission or the United States Attorney, written communications with counsel for the cooperators, documents received from the Chicago Board of Exchange ("CBOE") and the New York Stock Exchange ("NYSE"), documents generated in a parallel Commission investigation of trading in Motel 6 stock by other investors, and any documents reflecting communications with the physicians for one cooperator, who died during the course of the Commission's investigation. In addition, defendants seek an order compelling the Commission to answer certain of their interrogatories, and further request enforcement of an order issued by Judge Keenan on May 3, 1993 directing the Commission to prepare an affidavit summarizing what one cooperator told the Commission concerning the events underlying the Commission's complaint. Finally, defendants complain about the adequacy of various entries on the Commission's privilege log, and seek either an order requiring disclosure of the documents improperly described on the log or a direction to the Commission to prepare a proper log.

***2** In opposing these motions, the Commission relies principally on its assertion that most of the documents are protected from disclosure by the work-product rule or by some variant of a law-enforcement privilege. Plaintiff also argues that some of the documents sought are not relevant to the case, or are not in its possession.

ANALYSIS

To facilitate disposition of the issues raised by these motions and the Commission's proffered defenses, I first address the standards governing each of the privilege issues and then apply those standards to the categories of documents at issue. The remaining issues are discussed in the last section of this Memorandum and Order.

A. *General Criteria*

We start by noting that the proponent of a privilege bears the burden " 'to establish those facts that are the essential elements of the privileged relationship.' " *von Bulow v. von Bulow,* 811 F.2d 136, 144 (2d Cir.), *cert. denied,* 481 U.S. 1015 (1987) (quoting *In re Grand Jury Subpoena Dated Jan. 4, 1984,* 750 F.2d 223, 224 (2d Cir.1984)). This burden requires proof not merely of the privileged relationship itself, but of all essential elements of the privilege. *See, e.g., United States v. Schwimmer,* 892 F.2d 237, 244 (2d Cir.1989); *In re Horowitz,* 482 F.2d 72, 82 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973); *Fletcher v. Atex, Inc.,* 156 F.R.D. 45, 49 (S.D.N.Y.1994). To meet that requirement, the party must make an evidentiary showing based on competent evidence, *see, e.g., von Bulow v. von Bulow,* 811 F.2d at 144; *In re Minebea Co.,* 143 F.R.D. 494, 503 (S.D.N.Y.1992), an obligation that cannot be "discharged by mere conclusory or ipse dixit assertions." *von Bulow v. von Bulow,* 811 F.2d at 146 (quoting *In re Bonanno,* 344 F.2d 830, 833 (2d Cir.1965)); *In re Grand Jury Subpoena Dated Jan. 4, 1984,* 750 F.2d at 224-25; *Redvanly v. NYNEX Corp.,* 152 F.R.D. 460, 465

(S.D.N.Y.1993).

As for the governing law, we look to the law applicable to the pertinent claims and defenses asserted in the underlying action. *See* Fed.R.Evid. 501. Since the Commission asserts claims arising under federal law, and defendants' response is also grounded on federal law, the substantive rules governing any asserted privileges as well as work-product immunity must also be found in federal law.[FN1]

B. *Work-Product Immunity*

Rule 26(b)(3) defines a qualified immunity from discovery for documents "prepared in anticipation of litigation or for trial." This rule applies both to documents and to testimony concerning the substance of such work product. *See, e.g., Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. at 471 (citing cases). The rule does not, however, protect from disclosure the underlying facts known to the party or his counsel, even if acquired in anticipation of litigation. *See, e.g., United States v. District Council of New York City & Vicinity,* 1992 U.S.Dist. LEXIS 12307, at *17-18 (S.D.N.Y. Aug. 18, 1992) (citing *Hickman v. Taylor,* 329 U.S. 495, 501, 507, 511 (1947)); *Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. at 471.

***3** In applying Rule 26(b)(3), the courts have generally ruled that it "applies only to documents prepared principally or exclusively to assist in anticipated or ongoing litigation." *Martin v. Valley Nat'l Bank,* 140 F.R.D. 291, 304 (S.D.N.Y.1991). *See, e.g., Binks Mfg. Co. v. National Presto Indus., Inc.,* 709 F.2d 1109, 1118-19 (7th Cir.1983); *In re Grand Jury Investigation,* 599 F.2d 1224, 1229 (3d Cir.1979); *Hardy v. New York News, Inc.,* 114 F.R.D. 633, 644 (S.D.N.Y.1987). Consequently, "if a party prepares a document in the ordinary course of business, it will not be protected even if the party is aware that the document may also be useful in the event of litigation." *Bowne of New York, Inc. v. AmBase Corp.,* 150 F.R.D. at 471. *See, e.g., Binks Mfg. Co. v. National Presto Indus., Inc.,* 709 F.2d at 1119; *Hardy v. New York News, Inc.,* 114 F.R.D. at 644; *Joyner v. Continental Ins. Cos.,* 101 F.R.D. 414, 415-16 (S.D.Ga.1983).

Even if the information at issue comes within the scope of the work-product rule, the immunity afforded by the rule is conditional, since its protection may be set aside if the discovering party can demonstrate a sufficiently compelling need for the information. *See, e.g., Bowne of New York, Inc. v. AmBase Corp.,* 150 F.R.D. at 471; *Golden Trade, S.r.L. v. Jordache,* 143 F.R.D. 508, 510 (S.D.N.Y.1992). As defined by Rule 26(b)(3), production of work product may be ordered if the inquiring party "has [a] substantial need of the materials in the preparation of [his] case and ... [he] is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *See, e.g., Horn & Hardart Co. v. Pillsbury Co.,* 888 F.2d 8, 12 (2d Cir.1989).

Judged by these standards, we see several deficiencies in the Commission's invocation of the work-product rule to block production of an array of documents sought by defendants. Some may be remediable, but others are not.

The initial problem is that the Commission makes no effort to meet its burden of proffering competent evidence establishing the basis of its work-product claim. Its two declarants and one affiant address a variety of matters, but they do not offer testimony with regard to the interview notes, much less establish the precise purpose of the notes, whether a decision had been made to litigate at the time that they were created, whether the Commission was contemplating other alternatives at the time, and whether their notes were treated with the requisite confidentiality. The absence of such a showing precludes us from upholding the work-product claim at this time. *See, e.g., Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. at 472.

Although its position is not clearly articulated, the Commission appears to assume that its notes of witness interviews created in the course of an investig-

ation are automatically work product. Although some support for that proposition might be drawn from a decision by Judge Leval in *SEC v. Navarre,* 92 Civ. 3719 (PNL), Memorandum & Order at 2 (S.D.N.Y. July 13, 1993),[FN2] that conclusion is not self-evident. As Judge Leval noted, the purpose of the Commission's investigation is to determine whether there were violations of the securities laws. If it finds none, presumably no litigation would ensue. Moreover, even if the Commission determines that there is evidence of one or more violations, it might choose to proceed by administrative sanctions rather than litigation. *See id.* at 2.

***4** It is thus at least arguable that some or all of the interview notes were not prepared principally or exclusively to assist in anticipated litigation, although such a determination might turn on when the notes were prepared and the timing of any decisions by the Commission that violations had been committed and that litigation was a likely option under the circumstances. Indeed, Judge Sprizzo apparently relied on that precise distinction in declining to uphold the Commission's claim of work product for notes of interviews "taken by the SEC while conducting a fact gathering investigation and prior to the Commission's determination to institute litigation against the ... defendants." *SEC v. Stratton Oakmont, Inc.,* 1992 WL 226924, at * 1 (S.D.N.Y. May 22, 1992).

This approach is consistent with caselaw applying the work-product rule in analogous contexts. Thus, for example, in *Martin v. Valley Nat'l Bank,* 140 F.R.D. at 308, this court rejected a very similar work-product claim by the Division of Investigation of the Department of Labor. In that case the Division had sought protection for all of its investigative documents without regard to when it had decided either that a violation had taken place or that litigation was a potential next step. As noted in *Martin,* "[m]any courts have insisted on proof of 'objective facts establishing an identifiable resolve to litigate prior to the investigative efforts resulting in the report before the work product doctrine becomes applicable.' " *Id.* at 308 (quoting *Janicker v. George Washington Univ.,* 94 F.R.D. 648, 650 (D.D.C.1982)). *Accord, e.g., Redvanly v. NYNEX Corp.,* 152 F.R.D. at 464-65 (citing cases). Moreover, even the courts that have applied a more liberal standard for protection have repeatedly noted that, "[a]t the very least, the proponent of the work-product rule must show that 'some articulable claim, likely to lead to litigation, [has] arisen.' " *Martin v. Valley Nat'l Bank,* 140 F.R.D. at 308 (quoting *Binks Mfg. Co. v. National Presto Indus., Inc.,* 709 F.2d at 1119; *Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854, 865 (D.C.Cir.1980)).[FN3] The Commission has not made such a showing with respect to the documents that it seeks to withhold on this basis.

That failing is not the only problem with the Commission's position. Even if we assume that plaintiff could establish the requisite anticipation of litigation for some or all of the documents, we have no indication as to whether any, some or all of the documents were given the confidential treatment that is required to maintain their protected status. For example, if any were shown or otherwise disclosed to counsel for any of the tippees, a strong argument could be made that the work-product immunity was thereby lost, since voluntary disclosure of a document by a party in such a manner that it is likely to be revealed to its adversary constitutes waiver. *See generally Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. at 479-80 (citing cases). While we may speculate that the Commission staff did not engage in such disclosure, speculation is an impermissible basis on which to uphold a claim of privilege or work-product immunity.

***5** The next difficulty, and one less subject to remediation than the foregoing gaps in plaintiff's showing, involves the Commission's contention that the interview notes consist entirely of materials reflecting the mental processes of its attorneys. The point of this assertion is to invoke the generally recognized principle that so-called "mental process" or "opinion" materials are to be protected from dis-

closure even more stringently than what might be labelled factual work product. *See, e.g., Upjohn Co. v. United States,* 449 U.S. 383, 402 (1981); *In re Martin Marietta Corp.,* 856 F.2d 619, 625-26 (4th Cir.1988), *cert. denied,* 490 U.S. 1011 (1989); *In re John Doe Corp.,* 675 F.2d 482, 492 (2d Cir.1982). As noted in *Upjohn,* work product reflecting the attorney's mental processes may be ordered disclosed, if at all, only on a strong showing "of necessity and unavailability by other means." 449 U.S. at 402. *See, e.g., In re John Doe Corp.,* 675 F.2d at 492. *See also* Fed.R.Civ.P. 26(b)(3) (if court orders disclosure of work product, it "shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.")

Although easily articulated, the line between so-called factual work product and opinion work product is not free from ambiguity in its application. Obviously, many litigation-related activities of an attorney will, upon analysis, yield some insight into the attorney's thought processes concerning the case. For example, in this case the very fact that Commission staff interviewed certain individuals indicates that they suspected that these individuals may have been involved in the transmission of insider information or had some first-hand knowledge of such disclosures, and that their testimony could assist the Commission in making its case against some or all of the defendants. That inference does not, however, justify the conclusion that any document reflecting the fact that the Commission interviewed specified individuals thereby constitutes opinion work product. *See, e.g., Appeal of Hughes,* 633 F.2d 282, 289-90 (3d Cir.1980); *Apex Oil Co. v. DiMauro,* 110 F.R.D. 490, 498 (S.D.N.Y.1985).

Similarly, a transcript of a formal investigative deposition conducted by the Commission or notes of an informal witness interview are likely to be replete with insights as to the staff attorneys' views concerning whom to question, what general subjects to probe and what specific questions are likely to elicit the most helpful information from the Commission's perspective. This does not mean, however, that the transcript of such testimony or the notes of such an interview are necessarily classifiable as opinion work product and thus unavailable even on a showing of both "substantial need" and an inability "without undue hardship to obtain the substantial equivalent of the materials by other means." Fed.R.Civ.P. 26(b)(3).[FN4]

***6** This precise point was made by the Second Circuit in *In re John Doe Corp.,* 675 F.2d at 493, in which the Court addressed the same argument that interview notes constituted opinion work product. Based on its *in camera* review of the notes, the Court rejected that assertion. Observing that the notes simply "recite[d] in a paraphrased, abbreviated form, statements of [the interviewee] relating to events" relevant to a grand jury investigation, the Court concluded that their disclosure "will not trench upon any substantial interest protected by the work-product immunity." *Id.* at 493. Significantly, in drawing the line between factual and opinion materials, the Court acknowledged that the notes could provide some indication of the lawyers' "thinking", since one could deduce their questions from the witness's statements, but it nonetheless found the notes not to be entitled to heightened protection since "those inferences merely disclose the concerns a layman would have as well as a lawyer in these particular circumstances, and in no way reveal anything worthy of the description 'legal theory.' " *Id.* at 493.

This approach to attorneys' notes has been generally followed within this circuit. *See, e.g., Redvanly v. NYNEX Corp.,* 152 F.R.D. at 467-69 (citing cases). Thus, at least to the extent that the notes constitute summaries of what a party or witness has stated to the attorney or his representative, it is treated as factual work product and analyzed under the standards articulated in Rule 26(b)(3). *See, e.g., SEC v. Militano,* 1991 U.S.Dist. LEXIS 17953, at *2-4 (S.D.N.Y. Dec. 12, 1991). *See also Xerox Corp. v. Int'l Business Machines Corp.,* 64 F.R.D. 367, 381-82 (S.D.N.Y.1974).

Applying these standards, the court has conducted an *in camera* review of documents withheld by the Commission that constitute notes of interviews with witnesses or conversations with their attorneys. Although the Commission has asserted that these notes constitute opinion work product, in the sense that their production would disclose the opinions, theories and analysis of Commission attorneys, I find that a number of the documents do not match that description. These consist, for the most part, of abbreviated recapitulations of what a witness has said during his or her interview.[FN5] Moreover, some of the brief entries in these notes are surrounded by quotation marks, thus indicating that they are direct quotes from the witness. A fair reading of these summaries does not yield any significant insights into the strategy, tactics or theories of the Commission's attorneys. They simply reflect the fact that the Commission was seeking the type of information that any attorney investigating whether insider information had been disclosed would pursue. Thus, application of the criteria used in *In re John Doe Corp.* yields the conclusion that these interview notes should be treated as factual work product under Rule 26(b)(3).[FN6]

*7 There remains for consideration the hotly contested question of whether the defendants have made an adequate demonstration of need to overcome the protection normally afforded such work product. To assess this issue I briefly summarize who is seeking which witnesses' statements and why.

Defendant Thrasher is alleged to have been the original source of the inside information. According to plaintiff, Thrasher was a Motel 6 vice president, and in his corporate capacity learned of an impending acquisition of Motel 6 by a French corporation known as Accor. The complaint alleges that he then tipped his friend Carl Harris, who is now deceased. The Commission charges that Harris in turn disclosed the information to eight others-Angelo Petrotto, Gregg Shawzin, Jeffrey Sanker, Michael Newman, Ira Gorman, William Gomez, Leonard Schaen and David Schaen-and these individuals in turn transmitted the information to fourteen others. Defendant Hirsh is alleged to have received the information from Jeffrey Sanker. As for defendant Chammah, he assertedly received it from a Mark Shawzin, who had previously received it from his brother Gregg Shawzin.

In his letter motion Thrasher seeks production of notes reflecting discussions between Commission staff members and Harris's attorney, Gorman and his attorney, Newman and his attorney, one or both Shawzins and their attorneys, Petrotto, Gomez's attorney and Sanker. Hirsh seeks notes concerning discussions with Sanker and Petrotto. Chammah asks for production of notes concerning discussions with Gregg and Mark Shawzin and Gregg Shawzin's attorney, as well as with Chammah's broker. In addition defendants ask for notes reflecting contacts by the Commission with physicians treating Harris before he died from AIDS.

In seeking to justify his request for witness interview notes, Thrasher observes that the one person whom he is alleged to have tipped-Harris-is dead, and hence statements made by Harris to the Commission or to those individuals whom he directly tipped could be crucial to Thrasher's defense since Harris was presumably the only person to have had direct knowledge as to who was his source. Because the Commission did not take any testimony or statements from Harris before his death, presumably the only current sources of such information are statements made by his attorney and by his alleged tippees. Thrasher notes that the Commission did not take formal testimony from the tippees and thus points to the notes of informal interviews as the only ready source of information as to the basis for the Commission's case.

As for Hirsh and Chammah, they seek a portion of the same body of information. Since Hirsh allegedly was tipped by Sanker, he seeks notes of Commission discussions with Sanker. He also seeks notes of contacts with Petrotto, who was assertedly the roommate of Harris. As for Chammah, he re-

quests notes concerning the Shawzins because Mark Shawzin allegedly tipped him after receiving the information from Gregg Shawzin. Alternatively, since the Commission's privilege log reflects no notes of conversations with Mark Shawzin, Chammah asks that the Commission be required to prepare an affidavit summarizing the substance of discussions with Mark Shawzin.

***8** Ordinarily a party in the movants' situation might be told to take depositions of these individuals, since they are presumably in a position to provide to the defendants in this case the same information as they previously provided to the Commission. In response to this point, Thrasher asserts that, as a practical matter, they are unavailable. Harris is indisputably dead. As for the other tippees, Thrasher represents, without contradiction, that six have previously invoked their Fifth Amendment immunity to decline to testify. (*See* Harris letter at 4). He further documents the fact that counsel for Sanker and Gomez have recently confirmed that their clients would continue to invoke their Fifth Amendment rights. (*See id.* at 4 & Exhs. B & C). In addition, Thrasher notes, without contradiction, that the Commission has conceded that Gorman's whereabouts are unknown. He also represents, again without contradiction, that Petrotto has defaulted in both this and a parallel private lawsuit and has departed for Italy, that he has been unable to contact Gregg Shawzin either directly or through his criminal defense counsel, and that Newman is similarly unreachable. (*Id.*)

In further support of this point, Hirsh represents that the expense of seeking to locate and depose Petrotto in Milan, Italy, where he is apparently now residing, would be prohibitive for him, even if-as seems unlikely-Petrotto were willing to cooperate. (*See* Hirsh Memorandum at 8-9). Similarly, Chammah notes that Gregg Shawzin previously invoked the Fifth Amendment, and he suggests that there is no reason to assume that his position will change in this respect before the close of discovery. (*See* Jan. 12, 1995 letter to the court from Martin L. Perschetz, Esq., at 11). He also argues that in any event he should have any prior statement in order to determine whether the witness, if he testifies, has previously made any inconsistent statements. (*Id.*)

In opposing these requests, the Commission simply asserts in general terms that the movants have not adequately demonstrated that these witnesses are truly unavailable. It does not explain precisely what showing should be required, but it appears that plaintiff would argue that defendants should now locate and subpoena each of these individuals to determine whether they will still invoke the Fifth Amendment.

The meritlessness of this argument is apparent if we revert to the language of Rule 26(b)(3), which authorizes production of factual work product "upon a showing that the party seeking discovery has substantial need of the materials ... and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." There is no question that the movants have a substantial need to learn what the identified witnesses have told the Commission and would state under oath about their knowledge of the movants' role in the transmission and receipt of insider information. The remaining Rule 26(b)(3) requirement is that movants demonstrate that they cannot obtain this information from other sources "without undue hardship."

***9** This language does not mean that the movants must prove that obtaining the information elsewhere is absolutely impossible or that they must prove the required element beyond a reasonable doubt. All that is needed is a showing that it is likely to be significantly more difficult, time-consuming or expensive to obtain the information from another source than from the factual work product of the objecting party. *See, e.g., United States v. Davis,* 131 F.R.D. 391, 395-96 (S.D.N.Y.1990). When a witness has previously invoked the Fifth Amendment, that "hardship" requirement is generally satisfied absent a showing that he has subsequently changed his mind and

agreed to waive the privilege. *See, e.g., SEC v. Militano,* 1991 U.S.Dist. LEXIS 17953, at * 2-4; *United States v. Davis,* 131 F.R.D. at 396.

The movants have met their burden in this respect, and the Commission offers no indication that any of the witnesses identified by defendants as previously having invoked the Fifth Amendment are now prepared to testify at a deposition. The same conclusion follows for those witnesses whose whereabouts are currently unknown or who have simply refused to respond to or otherwise cooperate with the parties to this action. Similarly, the fact that a potential witness has departed for another continent after defaulting in this case is sufficient demonstration that obtaining the required information from him will involve undue hardship. *See generally id.* at 396.

The Commission's position on this issue is further undercut by its own conduct in this case. It has delayed until late in the discovery period disclosing its position on these matters; indeed, it failed without explanation or excuse to meet the court's initial schedule for responding fully to defendants' discovery requests. At the same time it has pressed the notion that it wishes to expedite the completion of discovery, which is now scheduled to end in less than two months. It is difficult to reconcile these actions with its current position that defendants must now undertake efforts to depose the scattered and apparently uncooperative witnesses-a process that will be time-consuming, expensive and in all likelihood futile-before they can have access to the Commission's interview notes.

In short, I conclude that, for purposes of Rule 26(b)(3), the movants have amply established their need for access to any notes summarizing statements by or on behalf of Messrs. Harris, Gorman, Newman, Petrotto, Gomez, Sanker and Gregg Shawzin.[FN7] Subject to any other privilege assertion,[FN8] those notes must be produced.[FN9]

As noted, there are several other narrow categories of documents affected by the Commission's work-product claim. Specifically, movants seek notes of any conversations with physicians for Harris prior to his demise, and Chammah asks for notes of conversations with a Mr. Mossari, who was his broker.

The movants seek notes of conversations with Harris's doctors to buttress their contention that the Commission knew that Harris was mortally ill and deliberately avoided taking his testimony, which would have been highly significant in view of his key role as the only direct tippee of Thrasher. The notes are obviously significant for this purpose since they will reflect what the Commission knew of Harris's condition and when it acquired that knowledge.

***10** The Commission's work-product claim in the face of this request is difficult to fathom. The notes reflect what the doctors had to say about their patient's condition, but they contain absolutely no information about plaintiff's counsel's strategy, tactics or legal theories.[FN10] Their only significance in this respect is that they confirm that the Commission was concerned about Harris's medical condition, a concern that would appear self-evident even absent the notes, and that is in any event confirmed by the very concession that the notes exist, irrespective of their specific contents. Although it is possible that defendants could undertake to depose the doctors, this process is likely to be extended and costly, particularly compared to production of the notes. Moreover, the movants' central concern is not how sick Harris was at any given time, but rather what the Commission knew about that subject during the relevant time period, and that information is far more readily obtained from the Commission than from the doctors unless those physicians took equivalently detailed notes of their conversations with the Commission staff members. In sum, the notes must be produced.[FN11]

As for Chammah's broker, if we assume, for the sake of the argument, that the Commission's notes are work product, then production would not be required since Chammah demonstrates no pressing need for them.[FN12] It is not clear, however, wheth-

er such notes exist and, if so, whether they are in fact work product. Hence the Commission must promptly confirm whether it has such notes, and, if so, must make the necessary showing that they come within the scope of Rule 26(b)(3).

C. *Law-Enforcement Privilege*

In support of its refusal to produce certain documents, the Commission invokes what it refers to as a law-enforcement privilege. This theory is cited to block disclosure of several categories of information, including cooperation agreements with tippees, notes of conversations with counsel for one of the potential cooperators, anonymous written communications from members of the public apparently concerning trading in Motel 6 stock or the disclosure of insider information concerning the Accor acquisition, and materials provided to the Commission by the CBOE and the NYSE. The Commission also originally withheld documents generated by a separate but related investigation into other possibly suspect trading in Motel 6 stock, but it has apparently relented, at least in part, with regard to these documents, apparently because the investigation has come to an end.

The general privilege theory espoused by the Commission has been recognized in various forms as a law-enforcement privilege, investigatory file privilege, official information privilege, executive privilege and informant privilege. *See, e.g., In re Dep't of Investigation of City of New York,* 856 F.2d 481, 484 (2d Cir.1988); *Friedman v. Bache Halsey Stuart Shields, Inc.,* 738 F.2d 1336, 1341 (D.C.Cir.1984); *United States v. Davis,* 131 F.R.D. at 395. What unites these slightly disparate but overlapping principles is that the protection they afford a governmental body is conditioned on a specific showing of harm by the agency if the information were disclosed. *See, e.g., Friedman v. Bache Halsey Stuart Shields, Inc.,* 738 F.2d at 1341-43; *see also King v. Conde,* 121 F.R.D. 180, 188-90 (E.D.N.Y.1988); *Burke v. New York City Police Dep't,* 115 F.R.D. 220, 228-29 (S.D.N.Y.1987); *Crawford v. Dominic,* 469 F.Supp. 260, 263-65 E.D.Pa.1979 (citing cases).[FN13] Moreover, irrespective of the precise label placed on the asserted privilege, it offers only a qualified protection to the agency, and thus can be overcome by a showing on the part of the requesting party that his need for the information outweighs the purported harm cited by the agency. *See, e.g., Friedman v. Bache Halsey Stuart Shields, Inc.,* 738 F.2d at 1342-43 (citing *Frankenhauser v. Rizzo,* 59 F.R.D. 339, 344 (E.D.Pa.1973)); *Raphael v. Aetna Cas. & Sur. Co.,* 744 F.Supp. 71, 74-75 (S.D.N.Y.1990); *King v. Conde,* 121 F.R.D. at 190-91; *Kinoy v. Mitchell,* 67 F.R.D. 1, 12 (S.D.N.Y.1975). *See also Apex Oil Co. v. DiMauro,* 110 F.R.D. at 496-98.

***11** In this case the Commission argues principally that disclosure of the assertedly privileged documents would interfere with its ability to conduct enforcement investigations because it would reveal its investigatory techniques.[FN14] This argument is intended to cover cooperation agreements, documents provided to the Commission by the CBOE and the NYSE, and what are described as "[a]nonymous letters containing tips concerning potential illegal trading activities." (Declaration of Peter Goldstein, Esq., Exh. C-Declaration of Jonathan G. Katz, executed Dec. 27, 1994, at ¶ 3).

The obvious difficulty with the Commission's argument is its complete failure-except with regard to some of the CBOE documents-to offer any meaningful evidence in support of its claim of potential harm. In asserting a law-enforcement privilege for Commission documents, plaintiff relies solely on one sentence contained in the declaration of the Commission's Secretary, Jonathan G. Katz, in which he states:

> The law enforcement privilege is being asserted as to these documents because they contain law enforcement investigatory materials, production of which could impair the Commission's future enforcement efforts in this and other matters.

(*Id.* at ¶ 4).

Plainly this conclusory assertion of general and speculative harm is inadequate to meet even the most liberal definition of the Commission's burden of proof. *See, e.g., Resolution Trust Corp. v. Diamond,* 137 F.R.D. 634, 641 (S.D.N.Y.1991); *King v. Conde,* 121 F.R.D. at 189. *See also Friedman v. Bache Halsey Stuart Shields, Inc.,* 738 F.2d at 1342-43 ("generalized claim" of harm is inadequate).[FN15] As Judge Weinstein has observed:

> The government must specify "which documents or class of documents are privileged and for what reasons." *Kerr v. United States District Court, supra,* 511 F.2d [192] at 198 [(9th Cir.1975)]. This threshold showing must explain the reasons for nondisclosure with particularity, so that the court can make an intelligent and informed choice as to each requested piece of information. "Unless the government, through competent declarations, shows the court *what interests* [of law enforcement ...] would be harmed, *how* disclosure under a protective order would cause the harm, and *how much* harm there would be, the court cannot conduct a meaningful balancing analysis." *Kelly* [*v. City of San Jose*], *supra,* 114 F.R.D. [653] at 669 [N.D.Cal.1987] (emphasis in original). If the police make no such showing, the court has "no choice but to order disclosure." *Id.; see also Johnson v. McTigue,* [122 F.R.D. 9 (S.D.N.Y.1986)] (ordering direct disclosure without *in camera* review); *Martin v. New York City Transit Authority,* No. CV-83-3991, slip op. (S.D.N.Y. Oct. 17, 1983) (same).

King v. Conde, 121 F.R.D. at 189 (emphasis and third brackets in original).

The Commission makes no such showing of harm. Moreover, there is strong reason to doubt that it could do so, at least with regard to cooperation agreements. Indeed, in criminal cases such agreements are routinely produced to the defendant, *United States v. Molina,* 1991 WL 60368, at *2 (S.D.N.Y. Apr. 9, 1991), and they typically form a central basis for cross-examination of the cooperating witness. It is no secret that the Commission, as well as federal prosecutors' offices, seek to elicit cooperation from suspected wrongdoers, and thus it can scarcely be said that disclosure of the agreements in this case will interfere with future law-enforcement efforts by disclosing a government strategy or investigative technique. There is also no basis for inferring that disclosure will harm an ongoing investigation, since it appears that the investigation concerning the Motel 6 matter has been completed. *Compare, e.g., United States v. Lang,* 766 F.Supp. 389, 403-04 (D.Md.1991) (noting interference with continuing investigation); *Raphael v. Aetna Cas. & Sur. Co.,* 744 F.Supp. at 74-75 (same). *See generally National Labor Relations Board v. Robbins Tire & Rubber Co.,* 437 U.S. at 225-33, 236-40 (distinguishing between continuing and completed investigations). There is also nothing in the record suggesting that the Commission gave any assurance to cooperating witnesses that their cooperation would be kept secret; indeed, their identities appear to be conceded. Finally, I note that the terms of any such cooperation agreements would plainly be of major potential significance if any cooperators testified for the Commission since those terms may impact substantially and adversely on the witnesses' credibility.

***12** The Commission also seeks to withhold notes of discussions with Gregg Shawzin or his attorney on the basis of the law-enforcement privilege. We have already rejected the invocation of the work-product rule to block production of this material. Plaintiff's effort to utilize the law-enforcement privilege to obtain the same result is even more threadbare since the patently inadequate Katz declaration, which purports to invoke that privilege, does not even mention this category of documents, much less attempt to justify the withholding of these notes.

Plaintiff may have a potentially stronger basis for resisting production of anonymous notes sent to it, since it may rely on such sources of information in opening investigations, and it is at least conceivable that disclosure of such communications in civil

cases may pose a danger that the writers' identities will be discovered, which may deter future assistance of this kind. *See generally In re United States,* 565 F.2d 19, 22-23 (2d Cir.1977), *cert. denied,* 436 U.S. 962 (1978) (discussing parameters of informant privilege). On the current record, however, we are reduced to unvarnished speculation on this matter, and thus cannot uphold an argument that the Commission itself does not articulate in any competent manner.

As for the documents received by the Commission from the Chicago Board of Exchange and the New York Stock Exchange, the governing analysis is somewhat different. We start from the premise that investigatory materials of these non-governmental self-regulating bodies may, in some respects, be subject to a qualified privilege upon competent proof of harm if the documents are disclosed. *See, e.g., Apex Oil Co. v. DiMauro,* 110 F.R.D. at 496-97; *Ross v. Bolton,* 106 F.R.D. 22, 23-25 (S.D.N.Y.1985). Insofar as the CBOE is concerned, it makes a sufficient showing to justify its partial withholding of requested documents. (*See* Affidavit of Patricia Sizemore, executed Dec. 28, 1994, at ¶¶ 7-12). The objections are justified because production of investigative reports might well compromise the ability of the CBOE to carry out its statutorily assigned function as a self-regulatory organization. *See, e.g., Apex Oil Co. v. DiMauro,* 110 F.R.D. at 496-97 & n. 8. Moreover, I note that the CBOE does not object to production of the underlying business records that it has gathered and transmitted to the Commission, except to the extent that the documents identify customers. Deletion of that information is entirely proper and does not unfairly burden defendants' discovery efforts.

The Commission's effort to withhold NYSE documents is not supported by any equivalent showing. Moreover, given the generality of the Katz declaration, we have no indication as to the nature of the documents that have been withheld, much less the harm that might be caused by their disclosure. In view of the current record-or the lack of such a record-this aspect of the Commission's privilege claim cannot be upheld. Nonetheless, in view of the fact that the privilege asserted may be said to belong to the NYSE, caution must be observed before ordering production, since the failure of proof may be attributable simply to sloppiness on the part of the Commission. Accordingly, plaintiff will be given one more opportunity to make an adequate showing of privilege with regard to the NYSE documents.

D. *Remaining Matters*

***13** The movants have presented a variety of other discovery-related issues for resolution by the court. I briefly address each of them.

Thrasher seeks to override Commission objections to his interrogatories numbered 8 and 9. These requests seek principally a disclosure of communications with Gregg Shawzin, Sanker, Gomez, Petrotto, Newman, Gorman and an individual named Heinz Grein. The Commission had objected in part on the basis of privilege and in part on the basis that the interrogatories exceed the scope of questions permitted under S.D.N.Y. Civil Rule 46. We have addressed the work-product claim with regard to each of these individuals except Grein. As for Rule 46, it permits the use of interrogatories if they are more efficient than any other form of discovery. In this case, for reasons already noted, efforts to depose these individuals will plainly be far more inefficient than the use of these narrowly tailored interrogatories.

The only uncertainty with regard to these witnesses is whether the Commission's interview notes constitute a complete answer to the questions. If so, then the Commission may provide a Rule 33(c) response.[FN16]

The status of Mr. Grein is less clear. Movants do not specifically address the question of whether he is, as a practical matter, unavailable for deposition. At the same time, as noted, plaintiff makes no

showing to demonstrate that any interviews with him meet the relevant standard for application of the work-product rule. Since it is plaintiff that bears the initial burden insofar as it relies on the work-product rule, it is to answer the interrogatories with respect to Mr. Grein unless it promptly furnishes adequate proof that the interviews were undertaken in contemplation of litigation. If it attempts to offer such proof, Thrasher may respond with a showing that he has a sufficient need for the information to overcome the work-product immunity.

Chammah complains about the refusal of the Commission to answer five of his interrogatories, numbered 16, 22, 24, 25 and 27. Two of these interrogatories-16 and 27-are contention interrogatories. Under Rule 46(c), such inquiries are presumptively to be made at the conclusion of discovery, although there may be occasions when contention interrogatories are most sensibly answered earlier in the discovery period. In this case neither of these interrogatories seeks information that is crucial for Chammah to be able to conduct his discovery at this time, and both address matters that the Commission is more likely to know about after fact depositions have been conducted. Accordingly, there is no reason to ignore the order of discovery defined by Rule 46.

As for the other interrogatories, the Commission's objections are baseless. [FN17] Number 22 seeks identification of agreements between the Government and the Shawzins. For the reasons noted, this information is not privileged. Moreover, it is plainly relevant. Accordingly plaintiff is to supply an answer either by proffer of the documents, if they are available, or by a textual answer.

***14** Interrogatory 24 seeks a listing of the occasions on which the Shawzins provided testimony on the matters referred to in the Complaint. This inquiry is not beyond the scope of Rule 46 since it calls, in effect, for an identification of documents, that is, transcripts. It is also far more efficient a method than attempting to seek this information from the Shawzins by deposition.

Interrogatory 25 seeks a listing of all meetings between Government representatives and the Shawzins. This inquiry need not be answered for Gregg Shawzin since the Commission is being required to identify any statements made by him to the Commission. As for Mark Shawzin, as earlier noted, there are no listed notes of interviews with him. Since, however, the Commission has not demonstrated that its interviews, if any, were in contemplation of litigation, there is no privileged basis to refuse to answer the interrogatory with respect to him, and there is no reason to assume that a deposition of Mark Shawzin will be a more efficient method of obtaining the requested information.

On the subject of Mark Shawzin, Chammah also asks that the Commission be required to prepare an affidavit setting forth the substance of any statement made by him since there are apparently no notes of those interviews. This approach parallels that originally taken by Judge Keenan with regard to Jeffrey Sanker (*see* Order dated May 3, 1993), and in view of the failure of the Commission to sustain its work-product claim, there is no principled basis for declining equivalent relief. Nonetheless, the preferred approach is to require the Commission to answer in the form of an interrogatory answer, so that the response will, in substance, be that of the Commission, rather than that of a compelled individual witness. *See generally United States v. District Council of New York City & Vicinity,* 1992 U.S.Dist. LEXIS 12307, at *33-42 (refusing to order Rule 30(b)(6) deposition of Government agent).

The movants also ask that I direct the Commission to comply with Judge Keenan's May 3, 1993 order that it supply an affidavit summarizing any statements made by Sanker. That order is the subject of an application by the Commission for reconsideration, and Judge Keenan will address the matter. [FN18]

The parties are also in disagreement as to the obligation of the Commission to produce documents that are assertedly solely in the possession of the United

States Attorney's Office. The principal focus of concern is apparently on the cooperation agreements that some of the tippees apparently entered into with the prosecutor.

The parameters for answering this question are found in Rule 34, which requires a party to produce documents only if it has possession of the documents or "control" over them. The traditional definition of this term requires that the party have "the legal right to obtain the documents requested on demand." *Searock v. Stripling,* 736 F.2d 650, 653 (11th Cir.1984). *See generally* 4A James W. Moore *et al., Moore's Federal Practice* ¶ 34.17 at 34-69 to 72 & nn. 5-9 (2d ed. 1994). Despite the stringency of this definition, in practice the courts have recently interpreted it more loosely "to require production if the party has the practical ability to obtain the documents from another, irrespective of his legal entitlement to the documents." *Golden Trade, S.r.L. v. Lee Apparel Co.,* 143 F.R.D. 514, 525 (S.D.N.Y.1992). *See, e.g., Arkwright Mut. Ins. Co. v. National Union Fire Ins. Co.,* 1994 WL 510043, at * 3; *Manildra Milling Corp. v. Ogilvie Mills, Inc.,* 1991 WL 17610, at *5 (D.Kan. Jan. 31, 1991); *Scott v. Arex, Inc.,* 124 F.R.D. 39, 41 (D.Conn.1989). *See also M.L.C., Inc. v. North American Philips Corp.,* 109 F.R.D. 134, 136 (S.D.N.Y.1986).

***15** In this case there is some indication in the record that the Commission and the United States Attorney conducted investigations that were, in certain respects, coordinated. Thus, it appears that interviews of some witnesses were conducted jointly by the representatives of both the United States Attorney and the Commission. It is also apparent that the two agencies shared at least some documents and other information.

In short, there is some evidence to permit the inference that the Commission is in a position to obtain copies of witness cooperation agreements from the United States Attorney. Under the circumstances, the Commission may fairly be directed at least to request the documents from the United States Attorney's Office. *See, e.g., Golden Trade S.r.L. v. Lee Apparel Co.,* 143 F.R.D. at 525-26 (citing *Hercules Inc. v. Exxon Corp.,* 434 F.Supp. 136, 158 (D.Del.1977)). If there prove to be insurmountable legal or practical obstacles to the Commission obtaining the documents, these difficulties can be documented, and defendants can then choose another approach. Since, however, the record contains some evidence supporting defendants' contention that the Commission has access and the Commission does not directly address this issue, as now defined, it must bear the burden of attempting to obtain the requested documents in the first place.

Finally, the movants complain that the privilege logs of the Commission are inadequately detailed. This contention is accompanied by a listing of a few items from the logs, but no explanation of the specific inadequacies. I note as well, however, that in submitting documents for *in camera* review, the Commission states that it has recently discovered still more documents, which it proffers to the court. Upon review of the newly updated, and hopefully completed, privilege logs, the defendants may have some specifically defined complaints about specified listings. If so, they are to attempt to resolve the matter first with the Commission, and if that effort is unavailing, they may return to court with a more specifically defined set of complaints.

CONCLUSION

Based upon the foregoing, I conclude that the Commission's invocation of the work-product rule and the law-enforcement privilege cannot be sustained and that plaintiff must produce documents and answer interrogatories to the extent indicated. That task is to be accomplished within seven days. Moreover, insofar as plaintiff is being permitted, as specified above, to make a supplemental showing of the factual basis for withholding certain documents, it is to do so within seven days.

Because the Commission' position on the current motion was, in large measure, unjustified, I further

conclude that, pursuant to Fed.R.Civ.P. 37(a)(4), the movants are presumptively eligible for an award of the expenses of their motions, including reasonable attorney's fees. *See, e.g., Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. at 493-94. Accordingly, within seven days movants may serve and file affidavits with contemporaneous time records to document their motion expenses. The Commission may serve responding papers within seven days thereafter.

***16** SO ORDERED.

FN1. Even if this case involved state-law claims and defenses, the work-product issues would be governed by federal law. *See, e.g., United Coal Companies v. Powell Constr. Co.,* 839 F.2d 958, 966 (3d Cir.1988); *Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. 465, 471 (S.D.N.Y.1993).

FN2. That two-page decision is annexed as Exhibit E to the declaration of Peter D. Goldstein Esq., executed December 28, 1994.

FN3. A similar, although not identical, analysis is reflected in the courts' treatment of work-product claims by insurance companies to protect their investigative files. As a general matter, the courts have declined to hold such documents to be protected if they predate a decision by the insurance carrier to decline coverage, since such pre-decisional investigations are conducted in the ordinary course of business, and litigation does not become a sufficiently serious prospect until the carrier has made a decision to decline a claim. *See, e.g., Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co.,* 1994 WL 510043 at *5 (S.D.N.Y. Sept. 16, 1994); *Janicker v. George Washington Univ.,* 94 F.R.D. 648, 650 (D.D.C.1982); *Fine v. Bellefonte Underwriters Ins. Co.,* 91 F.R.D. 420, 422 (S.D.N.Y.1981); *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.,* 61 F.R.D. 115, 118 (N.D.Ga.1972).

FN4. Indeed, we are informed that in this case the Commission has produced to defendants the testimonial transcripts of more than thirty witnesses. (*See* Dec. 21, 1994 letter to the Court from John B. Harris, Esq., at 2).

FN5. Several constitute summaries that are described as a proffer by the witness.

FN6. The documents that come within this generally described category include the following: Privilege List I-nos. 33-37, 38 (handwritten notes), 39, 48, 122, 182, 183; Privilege List II-nos. 142, 150, 184, 195-97; Privilege List III-nos. 14, 112, 289-91. The Commission has also proffered an undifferentiated mass of recently discovered documents, some of which also come within this category of factual summaries of witness statements. *See* "Summary-Michael Newman Proffer", dated 9/20/91; Memo. dated Nov. 11, 1991 from Ilana R. Marcus to file re "Newman tippees"; Sept. 2, 1992 Memo. to File re: "Jeffrey Sanker".

FN7. It is not clear whether Mark Shawzin has invoked his Fifth Amendment privilege, and in any event the Commission has not listed any notes reflecting interviews of him. I address below the question of whether plaintiff should, in these circumstances, be compelled to prepare an affidavit concerning any interviews of him or otherwise provide equivalent discovery.

FN8. As will be noted, the Commission has also belatedly asserted a so-called law-enforcement privilege for some of these notes. I address that claim in the next section of this decision.

FN9. Any segregable portions of such documents that contain attorney analysis may be redacted. I note, however, that the documents listed in note 6, *supra,* do not appear to contain any such opinion work product.

FN10. I base those conclusions on my review of documents 30 and 31 from Privilege List III.

FN11. The Commission appears to argue that this line of defense will be deemed meritless at trial. It is not, at this stage, so self-evidently meritless as to justify denying production.

FN12. Chammah's general argument that he needs interview notes, irrespective of witness availability, to determine whether the witness has made inconsistent prior statements cuts too broad a swath. It would effectively eviscerate the factual work-product rule for any interview notes. The argument may have some basis if there are circumstances suggesting a possible weakness of memory on the part of the witness or some other reason to suspect that the witness is hostile or has changed his story, but Chammah makes no such showing concerning his broker.

FN13. We must note a distinction in this respect between cases in which the privilege is asserted in order to block discovery by a party and cases brought under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* ("FOIA"), in which the Government invokes the so-called law-enforcement exception to required disclosure. *See* 5 U.S.C. §§ 552(b)(7)(A), (E). Although the statute embodies in general terms the common-law privilege, the Supreme Court has held that in FOIA litigation under sub-section 7(A) (referring to law-enforcement files the disclosure of which would "interfere with enforcement proceedings"), the Government need not demonstrate harm on a document-by-document basis since Congress intended to apply that particular provision to all documents that fit into generic categories of law-enforcement files that are inherently sensitive. *See, e.g., National Labor Relations Board v. Robbins Tire & Rubber Co.,* 437 U.S. 214, 223-36 (1978). *See also* 5 U.S.C. § 552(b)(7)(E) (referring to disclosure of "investigative techniques and procedures"). In contrast to the cases under FOIA-in which the plaintiff cannot invoke his own particularized need for a document otherwise protected under FOIA, *see, e.g., EPA v. Mink,* 410 U.S. 73, 86 (1973)-in ordinary civil litigation the court must consider the discovering party's need for the document for purposes of trial preparation, and therefore the party resisting discovery must make a particularized showing of harm when invoking any qualified privilege, including any variant of the law-enforcement privilege. *See, e.g., Apex Oil Co. v. DiMauro,* 110 F.R.D. at 496 (citing cases). *See generally Frankel v. Securities & Exchange Commission,* 460 F.2d 813, 818 (2d Cir.) (noting distinction between analysis under FOIA and privilege analysis in ordinary civil litigation), *cert. denied,* 409 U.S. 889 (1972).

FN14. As noted, plaintiff originally also withheld documents generated by a continuing investigation because disclosure might thwart that inquiry. It appears that the Commission no longer makes this assertion. (*See* Memo. of Law in Opp'n to Motions of Defs. Hirsh and Thrasher to Compel Production of Documents, at 25-26).

FN15. It is also inadequate in that it appears that the official invoking the privilege did not review the documents at is-

sue. *See, e.g., Resolution Trust Co. v. Diamond,* 137 F.R.D. at 641 (official invoking privilege may do so only after "personal consideration of the allegedly privileged material.") (citing *Mobil Oil Corp. v. Dep't of Energy,* 102 F.R.D. 1, 5 (N.D.N.Y.1983)). Mr. Katz carefully asserts only that the General Counsel gave "personal consideration to the matter." (Katz Decl. at ¶ 3).

FN16. From a review of at least those notes submitted for *in camera* review, it appears that the documents are too abbreviated and, in some respects, too cryptic to serve as a substitute for a textual interrogatory answer.

FN17. There appears to be an error in the Commission's formal interrogatory response. It lists interrogatory 22 but then supplies an objection labelled as "Response to Interrogatory 23." (*See* Perschetz letter, Exh. D at 17). I assume that the response is intended to address interrogatory 22, although the next listed interrogatory is numbered 24.

FN18. I note that the factual circumstances have changed since the original order. Thus, it appears that there are some Commission notes reflecting statements by Sanker, although the Commission has resisted their production on the current mo- tion.

S.D.N.Y.,1995.
S.E.C. v. Thrasher
Not Reported in F.Supp., 1995 WL 46681 (S.D.N.Y.)

END OF DOCUMENT

EXHIBIT P

FINRA

Print

9253. Production of Witness Statements

(a) Availability

Notwithstanding the provisions of Rule 9251(b),

(1) A Respondent in a disciplinary proceeding may file a motion requesting that the Department of Enforcement or the Department of Market Regulation produce for inspection and copying any statement of any person called or to be called as a witness by the Department of Enforcement or the Department of Market Regulation that pertains, or is expected to pertain, to his or her direct testimony and which is "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement," as that phrase is used in 18 U.S.C. § 3500(e)(2).

(2) A Respondent in a disciplinary proceeding may also file a motion requesting that the Department of Enforcement or the Department of Market Regulation produce for inspection and copying any contemporaneously written statement made by an Interested FINRA Staff member during a routine examination or inspection about the substance of oral statements made by a non-FINRA person when (a) either the Interested FINRA Staff member or non-FINRA person is called as a witness by the Department of Enforcement or the Department of Market Regulation, and (b) that portion of the statement for which production is sought directly relates to the Interested FINRA Staff member's testimony or the testimony of the non-FINRA witness.

(b) Failure to Produce — Harmless Error

In the event that a statement required to be made available for inspection and copying by a Respondent is not provided by the Department of Enforcement or the Department of Market Regulation, there shall be no rehearing of a proceeding already heard, or issuance of an amended decision in a proceeding already decided, unless the Respondent establishes that the failure to provide the statement was not harmless error. The Hearing Officer, or upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the National Adjudicatory Council, shall determine whether the failure to provide any statement was not harmless error, applying applicable FINRA, SEC, and federal judicial precedent.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Amended by SR-NASD-99-76 eff. Sept. 11, 2000.
Amended by SR-NASD-97-81 eff. Jan. 16, 1998.
Adopted by SR-NASD-97-28 eff. Aug. 7, 1997.

Selected Notices: 00-56, 08-57.

EXHIBIT Q

FINRA

Print

9251. Inspection and Copying of Documents in Possession of Staff

(a) Documents to be Available for Inspection and Copying

(1) Unless otherwise provided by this Rule, or by order of the Hearing Officer, the Department of Enforcement or the Department of Market Regulation shall make available for inspection and copying by any Respondent, Documents prepared or obtained by Interested FINRA Staff in connection with the investigation that led to the institution of proceedings. Such Documents include but are not limited to:

(A) requests for information issued pursuant to Rule 8210;

(B) every other written request directed to persons not employed by FINRA to provide Documents or to be interviewed;

(C) the Documents provided in response to any such requests described in (A) and (B) above;

(D) all transcripts and transcript exhibits; and

(E) all other Documents obtained from persons not employed by FINRA.

(2) The Department of Enforcement or the Department of Market Regulation shall promptly inform the Hearing Officer and each other Party if, after the issuance of a complaint, requests for information under Rule 8210 are issued under the same investigative file number under which the investigation leading to the institution of disciplinary proceedings was conducted. If Interested FINRA Staff receives Documents pursuant to a request for information under Rule 8210 after Documents have been made available to a Respondent for inspection and copying as set forth in paragraph (a), and if such Documents are material and relevant to the disciplinary proceeding in which such Respondent is a Party, the additional Documents shall be made available to the Respondent not later than 14 days after the Interested FINRA Staff receives such Documents. If a hearing on the merits is scheduled to begin, Interested FINRA Staff shall make the additional Documents available to the Respondent not less than ten days before the hearing. If Interested FINRA Staff receives such Documents ten or fewer days before a hearing on the merits is scheduled to begin or after such hearing begins, Interested FINRA Staff shall make the additional Documents available immediately to the Respondent.

(3) Nothing in paragraph (a)(1) shall limit the discretion of the Department of Enforcement or the Department of Market Regulation to make available any other Document or the authority of the Hearing Officer to order the production of any other Document.

(b) Documents That May Be Withheld

(1) The Department of Enforcement or the Department of Market Regulation may withhold a Document if:

(A) the Document is privileged or constitutes attorney work product;

(B) the Document is an examination or inspection report, an internal memorandum, or

other note or writing prepared by a FINRA employee that shall not be offered in evidence;

(C) the Document would disclose (i) an examination, investigatory or enforcement technique or guideline of FINRA, a federal, state, or foreign regulatory authority, or a self-regulatory organization; (ii) the identity of a source, including a federal, state, or foreign regulatory authority or a self-regulatory organization that furnished information or was furnished information on a confidential basis regarding an investigation, an examination, an enforcement proceeding, or any other type of civil or criminal enforcement action; or (iii) an examination, an investigation, an enforcement proceeding, or any other type of civil or criminal enforcement action under consideration by, or initiated by, FINRA, a federal, state, or foreign regulatory authority, or a self-regulatory organization; or

(D) the Hearing Officer grants leave to withhold a Document or category of Documents as not relevant to the subject matter of the proceeding, or for other good cause shown.

(2) Nothing in paragraph (b)(1) authorizes the Department of Enforcement or the Department of Market Regulation to withhold a Document, or a part thereof, that contains material exculpatory evidence.

(c) Withheld Document List

The Hearing Officer may require the Department of Enforcement or the Department of Market Regulation to submit to the Hearing Officer a list of Documents withheld pursuant to paragraphs (b)(1)(A) through (D) or to submit to the Hearing Officer any Document withheld. Upon review, the Hearing Officer may order the Department of Enforcement or the Department of Market Regulation to make the list or any Document withheld available to the other Parties for inspection and copying. A motion to require the Department of Enforcement or the Department of Market Regulation to produce a list of Documents withheld pursuant to paragraph (b) shall be based upon some reason to believe that a Document is being withheld in violation of the Code.

(d) Timing of Inspection and Copying

The Hearing Officer shall determine the schedule of production of documents pursuant to this Rule. Unless otherwise ordered by the Hearing Officer, the Department of Enforcement or the Department of Market Regulation shall commence making Documents available to a Respondent for inspection and copying pursuant to this Rule not later than 21 days after service of the Respondent's answer or, if there are multiple Respondents, not later than 21 days after the last timely answer is filed. If a Respondent in a multi-Respondent case fails to answer, the Department of Enforcement or the Department of Market Regulation shall make Documents available to all other Respondents not later than the later of:

(1) 21 days after the filing date of the last timely answer, or

(2) the expiration of the second period provided for filing an answer as set forth in Rule 9215(f).

(e) Place and Time of Inspection and Copying

Documents subject to inspection and copying pursuant to this Rule shall be made available to the Respondent for inspection and copying at FINRA office where they are ordinarily maintained, or at such other FINRA office as the Hearing Officer, in his or her discretion, shall designate, or as the Parties otherwise agree. A Respondent shall be given access to the Documents at FINRA's offices during normal business hours. A Respondent shall not be given custody of the Documents or be permitted to

remove the Documents from FINRA's offices.

(f) Copying Costs

A Respondent may obtain a photocopy of all Documents made available for inspection. A Respondent shall be responsible for the cost of photocopying. Unless otherwise ordered, charges for copies made at the request of a Respondent shall be at a rate to be established by the FINRA or FINRA Regulation Board.

(g) Failure to Make Documents Available — Harmless Error

In the event that a Document required to be made available to a Respondent pursuant to this Rule is not made available by the Department of Enforcement or the Department of Market Regulation, no rehearing or amended decision of a proceeding already heard or decided shall be required unless the Respondent establishes that the failure to make the Document available was not harmless error. The Hearing Officer, or, upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the National Adjudicatory Council, shall determine whether the failure to make the document available was not harmless error, applying applicable FINRA, SEC, and federal judicial precedent.

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