To Be Argued By:
FREDERICK B. WARDER III

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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

KEITH STOCK,

Plaintiff-Respondent,

—against—

SCHNADER HARRISON SEGAL & LEWIS LLP
and M. CHRISTINE CARTY,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

FREDERICK B. WARDER III
JESSE A. TOWNSEND
PATTERSON BELKNAP WEBB
& TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
fbwarder@pbwt.com
jtownsend@pbwt.com

Attorneys for Defendants-Appellants

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QUESTIONS PRESENTED

1. Did the court below err in finding that the fiduciary exception to the attorney-client privilege compelled disclosure of the Privileged Communications?
2. Does the attorney-client privilege protect communications between a law firm's attorneys and the law firm's general counsel concerning legal advice regarding a current client of the firm?
3. Did the court below err in finding that the Privileged Communications did not satisfy the confidentiality requirement of the attorney-client privilege?
4. Did the court below err in finding that at-issue waiver applied to the Privileged Communications?
5. Did the court below err in finding that Appellants selectively disclosed documents regarding the same subject matter as the Privileged Communications?

PRELIMINARY STATEMENT

This appeal of first impression concerns whether attorneys with questions about professional conduct may have privileged communications with their firm's in-house general counsel about those questions. For several reasons, the IAS court erred in holding Appellants' communications with in-house counsel on such an issue—namely, being called as a fact witness by an opposing party—are not privileged.

Defendants-Appellants Schnader Harrison Segal & Lewis LLP ("Schnader") and Christine Carty (together, "Appellants") appeal from an interim order of the Supreme Court, New York County (Schweitzer, J.) (the "IAS court") dated December 5, 2014 (the "December 5 Order"). The IAS court ordered Appellants to disclose approximately 24 e-mails over which Appellants have claimed attorney-client privilege (the "Privileged Communications"). Because the IAS court's order was based on a series of legal and factual errors, the order should be reversed.

In January 2011, while representing Plaintiff-Appellee Keith Stock ("Plaintiff") in an arbitral proceeding, Carty and Theodore Hecht, also a Schnader partner who was handling the arbitration, sought the advice of Schnader's in-house general counsel on an issue of professional responsibility that arose during their representation of Schnader. The Privileged Communications concern that request

for advice.

As a general rule, the attorney-client privilege protects from disclosure the communications between an employee or member of an organization and that organization's in-house counsel seeking and providing legal advice. Law firms, like other entities which employ in-house counsel, are entitled to assert the attorney-client privilege to protect the contents of their employees' or members' discussions with in-house counsel.

In this case of first impression, the IAS court declined to afford the protection of the attorney-client privilege to a law firm where a former client sought disclosure of confidential communications between the firm's in-house general counsel and its lawyers. The IAS court denied Schnader the protection afforded by the privilege principally on the basis of New York's so-called "fiduciary exception" to the attorney-client privilege. This narrow exception, which allows beneficiaries on whose behalf a trustee seeks legal advice to access otherwise privileged material, had never before been applied in a dispute between a client and his former lawyers.

In applying the fiduciary exception in this context, the IAS court failed to consider one of the exception's threshold requirements: whether the beneficiary was the "real client" for purposes of the fiduciary's request for legal advice. The IAS court further erred by relying on clearly erroneous factual findings when

determining that Plaintiff established the requisite "good cause" for disclosure pursuant to the fiduciary exception. Finally, in rejecting the applicability of the attorney-client privilege on the grounds that a lawyer's interests could or did conflict with those of his client, the IAS court ignored a growing body of case law holding that a law firm may assert the attorney-client privilege over communications between its lawyers and its in-house counsel, even about current clients.

The IAS court also erred by relying on Carty's deposition testimony to suggest that the confidentiality requirement of the privilege was not satisfied. Because the Privileged Communications were in fact made and kept in confidence, the confidentiality requirement was satisfied.

Finally, the IAS court erred by holding that the doctrines of at-issue waiver and selective disclosure applied to the Privileged Communications. Appellants have not used or relied on the Privileged Communications to support either their defenses or Schnader's counterclaim. Likewise, Appellants have not disclosed the Privileged Communications or their contents to a third party. Accordingly, neither doctrine is applicable here.

BACKGROUND

A. Underlying Events.

In 2008, Appellants advised Plaintiff on his separation agreement from his

former employer, MasterCard International. (R. at 253.) As a result of his termination by MasterCard, Plaintiff's exercise period for certain stock options granted to him under MasterCard's Long-Term Incentive Plan ("LTIP") accelerated. (R. at 192.) Plaintiff was unaware of the accelerated expiration period, and failed to exercise his options prior to their expiration. (R. at 194.)

In January 2009, when Plaintiff realized he had allowed his vested options to expire, Plaintiff again engaged Appellants, this time to advise him about MasterCard's potential liability for his forfeited options. (*Id.*) He also sought advice about the potential liability of his broker, Morgan Stanley Smith Barney ("MSSB"). (R. at 195.) In late 2009, Plaintiff directed the Appellants to initiate a federal suit against MasterCard and a Financial Industry Regulatory Authority ("FINRA") arbitration against Smith Barney. (*Id.*)

In January 2011, Theodore Hecht, a partner at Schnader, was representing Plaintiff in the arbitral proceeding against MSSB when MSSB demanded that Carty, a Schnader partner who previously represented Plaintiff, testify in that proceeding. (*See* R. at 230.) MSSB sought to question Carty in connection with negotiations following MasterCard's termination of Plaintiff in 2008. (*See* R. at 83.) MSSB first made this demand on January 8, 2011, eleven days before the arbitration began.

Carty and Hecht sought legal advice from Schnader's in-house general

counsel, Wilbur Kipnes. (*See* R. at 101-03.) Hecht shared some of the communications with Cynthia Murray, another Schnader lawyer working on the arbitration. (R. at 37.) The communications were kept confidential and not otherwise disclosed. The e-mail correspondence among Kipnes, Carty, Hecht, and Murray, which occurred between January 10 and January 18, 2011, constitutes the Privileged Communications at issue in this appeal. (*See id*.)

The general subject matter of Carty's and Hecht's January 2011 Privileged Communications with Kipnes was the lawyer-as-witness rule. (R. at 214, 217.)[1] Neither Carty nor Hecht discussed with Kipnes, or each other, whether Plaintiff had a potential malpractice claim against Schnader, or whether Schnader had a conflict of interest with Plaintiff. (R. at 216, 218, 220, 223.)

On January 19, 2011, the day after the Schnader attorneys completed their privileged consultation with Kipnes, the arbitral hearing opened. (*See* R. at 225-27.) On January 20, 2011, the arbitral tribunal ordered Carty to testify. (R. at 229-30.) Two months later, in March 2011, Murray prepared Carty for testimony and created an examination preparation outline. (*See* R. at 163-66, 247.)

Carty testified in the arbitral proceeding on April 4, 2011. (R. at 233.) The next day, the parties delivered closing arguments. (R. at 235.) The tribunal ruled

[1] Carty and Hecht testified at their depositions in this case about the general subject matter of their consultations with Kipnes with Plaintiff's express agreement that such testimony would not constitute waiver of Schnader's attorney-client privilege. (*See* R. at 214.)

against Plaintiff two weeks later. (R. at 238-43.)

Plaintiff filed this action in April 2013. In his Amended Complaint, Plaintiff alleges that Appellants committed malpractice in their 2008 engagement in connection with his termination from MasterCard by failing to advise him about the LTIP's accelerated expiration provision. (R. at 189-90.) Plaintiff also alleges that Appellants breached their fiduciary duty to him and committed attorney deceit in violation of Judiciary Law § 487 by allegedly "attempt[ing] to cover up" (R. at 189) their alleged malpractice and "[b]y trying to blame MasterCard and MSSB for their own mistakes" (R. at 190).

B. Procedural History.

In early 2014, more than five months after Appellants had served their privilege log on Plaintiff (*see* R. at 244), and after depositions had begun, Plaintiff raised the issue of Schnader's in-house attorney-client privilege with the IAS court (R. at 12-15). Appellants responded. (R. at 16-29.) Pursuant to the instructions of the IAS court, the parties submitted a second round of letter briefs on this issue. (R. at 30; *see also* R. at 31-67, 68-73.) At an April 8, 2014 conference, the IAS court's law clerk requested that the parties supply additional briefing on the claim of at-issue waiver after the completion of depositions, if at that point Plaintiff still wished to pursue his request for disclosure of the Privileged Communications. (R. at 211.) At a November 6, 2014 conference, the IAS court set a briefing schedule

for Plaintiff's renewed request for disclosure (R. at 74), which the parties subsequently extended at Plaintiff's request (R. at 211-12, 248). The IAS court's law clerk also asked each party to submit a chart describing the roles of the Schnader attorneys and a timeline showing the chronology of events relevant to each party's arguments. (R. at 211, 245-47.) Plaintiff's renewed request was filed on November 17, 2014 (the "November 17 Request"). (R. at 248.) The IAS court ruled on December 5, 2014, before receiving Schnader's responsive filing. (R. at 6-11.)

Plaintiff's November 17 Request presented two new arguments in support of disclosure of the Privileged Communications. (*See* R. at 75-80.) First, Plaintiff argued that Carty had no subjective expectation of confidentiality. (R. at 77-78.) Second, Plaintiff argued that Appellants had notice that Plaintiff had a colorable claim of malpractice during the underlying litigations—and that such notice abrogated Schnader's privilege under New York's fiduciary exception to the attorney-client privilege. (R. at 78-80.)

On December 5, 2014, before receiving Appellants' response to Plaintiff's November 17 Request, the IAS court issued the December 5 Order compelling Appellants to disclose the Privileged Communications. (R. at 6-11.)

Plaintiff noticed entry of the December 5 Order on December 12, 2014. (R. at 6.) Appellants noticed an appeal of the December 5 Order on December 15,

2014. (R. at 4.) On the same day, Appellants moved the IAS court for leave to reargue the December 5 Order. (R. at 207.) The Honorable Melvin L. Schweitzer, the justice presiding over this case, retired as of December 31, 2014, before ruling on Appellants' motion. The New York Supreme Court has not assigned a new justice to this case.

ARGUMENT

I. THE IAS COURT ERRED IN HOLDING THAT THE ATTORNEY-CLIENT PRIVILEGE DOES NOT PROTECT THE SCHNADER ATTORNEYS' CONSULTATION WITH IN-HOUSE COUNSEL .

Prior to the IAS court's December 5 Order, no New York State court had applied the fiduciary exception solely on the basis of an attorney-client relationship, and no New York State court had held that lawyers' communications with their firm's in-house counsel were not privileged. In its Order, the IAS court failed to consider either the legal doctrines purportedly justifying such an abrogation of the privilege or the policy implications of its ruling that a law firm's attorney-client privilege must give way to the fiduciary duty owed by the firm to its clients.

A. The IAS Court Erred in Applying New York's Fiduciary Exception to the Privileged Communications.

The IAS court relied principally on the so-called fiduciary exception to hold that Schnader must produce the Privileged Documents. This decision was error on

two independent grounds. First, the IAS court erred in applying the fiduciary exception to the Privileged Communications because they concerned legal advice for Schnader's benefit, not Plaintiff's. Second, assuming *arguendo* that the fiduciary exception applied to the Privileged Communications, the IAS court made manifestly erroneous factual findings in support of its required "good cause" analysis.

1. Schnader was the "Real Client."

The fiduciary exception to the attorney-client privilege has been recognized in instances where a trustee sought legal advice on issues of trust administration for the benefit of the trust's beneficiaries; in that particular situation, the "the normal attorney-client privilege did not apply" because the trustee sought "the legal advice . . . for the beneficiaries' benefit" and obtained the legal advice "at the beneficiaries' expense by using trust funds." *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2321 (2011). The fiduciary exception was adopted in American jurisdictions starting in the 1970s, with, for example, *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), and *Riggs National Bank of Washington, D.C., v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976).

In *Apache Nation*, the Supreme Court observed that the fiduciary exception was based primarily on the concept that when a trustee obtains legal advice as a representative of a beneficiary, the beneficiary is the "real client" of the attorney.

13 S. Ct. at 2322. As the "real client", the beneficiary is entitled to disclosure from the fiduciary of the legal advice received by that fiduciary for the beneficiary's benefit and on the beneficiary's account. *Id.* The Court identified two principal factors that determined whether a trust beneficiary was the "real client" of the attorney whose counsel was sought by the fiduciary: (1) whether the trustee had a reason to seek legal advice in a personal rather than fiduciary capacity, i.e. for his own benefit rather than the benefit of the trust; and (2) whether the law firm giving advice was paid out of trust assets. *Id.* (citing *Riggs Nat'l Bank v. Zimmer*, 355 A.2d 709).

New York courts adopted the fiduciary exception to the attorney-client privilege based on the same rationale identified in *Apache Nation*: the exception applies only where the beneficiary, not the fiduciary, was the "real client" for the purposes of the communications with the attorney. In New York, the exception is inapplicable if a fiduciary consulted counsel "in order to defend itself." *Beck v. Manufacturers Hanover Trust Co.*, 218 A.D.2d 1, 17-18 (1st Dep't 1995). It is also inapplicable if the fiduciary sought the advice "in an individual capacity and at his own expense." *Hoopes v. Carota*, 142 A.D.2d 906, 910 (3d Dep't 1988) (citing *Riggs Nat'l Bank*, 355 A.2d at 711), *aff'd*, 74 N.Y.2d 716 (1989). As one court observed, "the controlling feature for the applicability of this exception is whether the legal advice was sought for the benefit of the party seeking disclosure as a

result of a fiduciary relationship," rather than for the benefit of the fiduciary itself. *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 112 (Sup. Ct., N.Y. Cnty. 2003).

The IAS court erred in applying the fiduciary exception to the Privileged Communications because the record is clear that Schnader, not Plaintiff, was the "real client" for purposes of the Schnader lawyers' consultation with the firm's general counsel. The facts are undisputed: Schnader was representing Plaintiff in the FINRA arbitration, and opposing counsel threatened to call a Schnader attorney to testify about her prior legal work for Plaintiff. (*See* R. at 38.) Schnader attorneys sought legal advice from their firm's general counsel, Mr. Kipnes, regarding the lawyer-as-witness rules. (R. at 214, 217.) Carty and Hecht, as partners of Schnader, were seeking Mr. Kipnes' legal advice in his role as counsel to their firm. (*See* R. at 101-04.)

Under the circumstances, the Schnader attorneys had their own reasons, apart from any fiduciary duty owed to Plaintiff, for seeking advice about their obligations and the firm's under Rule 3.7 of the New York Rules of Professional Conduct (the "RPC"). It was the attorneys, not Plaintiff, who would be subject to disqualification or discipline for violation of the RPC. And Schnader itself, as the law firm of the Schnader attorneys and an entity regulated by the RPC, *see* RPC 5.1(a), shared its attorneys' interest in ensuring they received appropriate

advice about their ethical duties.

Of course, every client and its lawyer or law firm generally share an interest in ensuring that the lawyers conduct themselves in accordance with their ethical obligations. However, a lawyer's obligations under the RPC may or may not coincide with the client's wishes, preferences, or instructions. For example, in this instance Schnader and its lawyers might have concluded that they must withdraw from representing Plaintiff, perhaps over Plaintiff's objections. In consulting with firm counsel, the Schnader lawyers sought advice separate from, and potentially inconsistent with, either (i) Plaintiff's desire to advance the arbitration or (ii) their overarching fiduciary duty to advance their client's interests. Because the purpose of the consultations memorialized in the Privileged Communications was to ensure that Schnader and its lawyers understood their own obligations, Schnader was the "real client" for purposes of the lawyers' consultation with in-house counsel.[2]

Finally, it is undisputed that Kipnes was serving as the firm's designated general counsel, was not working on (and had never worked on) any matter for Plaintiff, and did not record or attribute any of his time to Plaintiff. There is no

[2] Plaintiff has suggested repeatedly that the Privileged Communications actually addressed whether Schnader had a conflict of interest with Plaintiff and/or whether Carty committed malpractice during her 2008 engagement on behalf of Plaintiff. (*See* R. at 13.) Plaintiff cites no support for this assertion, and the record evidence is to the contrary. (R. at 214, 216, 217-18, 220, 223.) However, assuming *arguendo* that the Plaintiff's assertion was accurate, the Privileged Communications would then still fall outside of the fiduciary exception. Plaintiff certainly could not be the "real client" in any internal Schnader discussion concerning Schnader's potential liability to Plaintiff.

dispute that Plaintiff was not billed for Kipnes' time. The cost of Kipnes' time for consulting with and advising the Schnader attorneys was therefore borne by Schnader itself, which was appropriate given that Schnader was the "real client" for purposes of Kipnes' advice. As *Riggs National Bank* acknowledged, a party's payment for legal advice provides a "strong indication of precisely who the real clients were." 355 A.2d at 712.

Although no New York State court has considered the application of the fiduciary exception in these circumstances, several other state courts have upheld the privilege. For example, the Supreme Court of Georgia recently rejected the identical claim Plaintiff makes and upheld a law firm's assertion of attorney-client privilege over consultations with in-house counsel. *St. Simons Waterfront LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98, 108 (Ga. 2013). Considering the fiduciary exception, the court observed that "[t]he 'real client' rationale clearly does not apply to the law firm in-house counsel context," because the firm sought the advice for its own benefit, not for its client's. *Id.*

Similarly, the Supreme Judicial Court of Massachusetts recently upheld a law firm's assertion of attorney-client privilege over communications with in-house counsel over a client's claim that the fiduciary exception justified the disclosure of the communications. *RFF Family P'ship, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 715 (Mass. 2013). The court rejected the application of the

fiduciary exception to internal firm communications because "the attorney-client communications whose discovery is at issue in this case were 'for the law firm's own defense' . . . The attorneys' time was not billed to [the former client] because [the law firm] not [the former client] was the 'real client' of the in-house counsel whose legal advice was sought." *Id.* *Accord*, *Moore v. Grau*, No. 2013-CV-150, 2014 N.H. Super. LEXIS 20, at *19-*20 (Super. Ct. Dec. 15, 2014) (following *RFF Family Partnership* and *St. Simons Waterfront* in holding that "the 'fiduciary exception' doctrine should not apply when a law firm seeks advice about its own conduct, because the communications are not for the benefit for the client, but for the firm"); *Miller v. Stoel Rives, LLP*, No. CV-OC-2014-07471, at *4 (Id. Dist. Ct. Dec. 1, 2014) (in a legal malpractice case in which plaintiff sought the disclosure of communications with the defendant law firm's in-house counsel, ruling that the "fiduciary exception would not apply" because the court "follow[ed] the reasoning" of *St. Simons Waterfront* and *RFF Family Partnership*.").

Based on the record in this case, and consistent with the principles established in New York fiduciary exception cases and the reasoning of recent decisions from other jurisdictions addressing this particular application of the exception, the IAS court erred in applying the exception because Schnader, not Plaintiff, was the "real client" for the purposes of the legal advice sought in the Privileged Communications.

2. "Good Cause" for Disclosure was not Established.

In addition to requiring the beneficiary to be the "real client," New York courts also require that the beneficiary make a showing of "good cause" before requiring disclosure of privileged communications pursuant to the fiduciary exception. *Hoopes v. Carota*, 142 A.D.2d at 910; *see also In re Bank of New York Mellon*, 42 Misc. 3d 171, 178 (Sup. Ct., N.Y. Cnty. 2013) ("'good cause' [is] a prerequisite to overcoming the privilege" through the fiduciary exception.). Thus, under New York law, Plaintiff has the burden of demonstrating good cause for disclosure. "Good cause" in this context requires a finding that, *inter alia*, the information sought is "highly relevant" or was the "only evidence available" and that a beneficiary's claims of "self-dealing and conflict of interest are at least colorable." *Hoopes*, 142 A.D.2d at 910.

Although the December 5 Order did not use the term "good cause," it cited to the good cause analysis in *Hoopes v. Carota*[3] and appeared to base its finding of good cause on two separate grounds. (R. at 9-10.) The IAS court's first ground was that the Privileged Communications "directly correlate" with Plaintiff's claims "of self-dealing and conflict of interest." (R. at 9.) The IAS court's second ground

[3] The IAS court also appears to have intended to cite *In re Bank of New York Mellon* for its discussion of the fiduciary exception. (R. at 9.) However, the decision from the *In re Bank of New York Mellon* case that the IAS court cited (42 Misc. 3d 1237(A) (Sup. Ct., N.Y. Cnty. 2014)) did not discuss the fiduciary exception. *In re Bank of New York Mellon*, 42 Misc. 3d 171 (Sup. Ct., N. Y. Cnty. 2013), an interim order from the same case, discussed *Hoopes*, the fiduciary exception, and its good cause requirement extensively. *See id.* at 178-82.

for good cause was that Schnader had "a basis to conclude" that Plaintiff's claims of conflict of interest and breach of fiduciary duty were "colorable" at the time the Privileged Communications took place. (R. at 10.) Neither of the IAS court's factual findings is correct, and thus neither can establish good cause.

First, the Privileged Communications do not correlate to Plaintiff's allegations of breach of fiduciary duty and conflict of interest. Plaintiff claims that Appellants breached their fiduciary duty by attempting to "deflect blame" and "conceal [their] own prior negligence" by "convince[ing] [Plaintiff] to commence" actions against MasterCard and MSSB. (R. at 198-99.) But the Schnader attorneys have testified consistently that the Privileged Communications concerned the possibility that Carty would be required to testify at the FINRA arbitration and the applicability of the lawyer-as-witness rule. (R. at 214, 217.) The Schnader attorneys did not discuss whether Carty committed malpractice or whether Schnader had a conflict of interest in representing Plaintiff in his actions against MasterCard and MSSB. (R. at 216, 218, 220, 223.) Thus, all the evidence in the record establishes the opposite of the IAS court's conclusion: that the Privileged Communications address a topic that is separate from Plaintiff's claims and therefore do not "correlate" to those claims.[4]

[4] While the December 5 Order also cited RPC 1.7 and 1.10(a), it did not explain how the Privileged Communications or the "good cause" requirement are affected by those rules. (R. at 10.)

Second, the IAS court relied on two events to establish that Appellants "had a basis to conclude" that there was a "colorable" conflict of interest: Murray's discovery of an inadvertently transcribed arbitrator colloquy and Carty's testimony concerning the 2008 engagement. (R. at 10.) But both of these events occurred at least two months *after* the Privileged Communications were exchanged. The Privileged Communications were exchanged in January 2011. Murray discovered the transcript containing the arbitrators' colloquy in March 2011. (*See* R. at 231, 247.) Carty was prepared for her arbitration testimony in March 2011 and testified in April 2011. (R. at 231, 232-33, 247.) Events in March and April 2011 cannot support the IAS court's finding that Schnader had a "basis to conclude there was a conflict" in January 2011.

The IAS court's finding of good cause for the disclosure of the Privileged Communications lacks any support in the record. Without a finding of good cause, the fiduciary exception cannot justify the disclosure of the Privileged Communications. *Hoopes v. Carota*, 142 A.D.2d at 910.

B. <u>This Court Should not Adopt the So-Called "Current Client Exception" to the Attorney-Client Privilege</u>.

Plaintiff also urged the IAS court to reject Appellants' privilege claims on a related ground, arguing that there can be no attorney-client privilege barring a law firm's client from discovering in-firm communications relating to the client that took place while the firm was representing that client. (R. at 14, 76.) While it is

unclear whether Plaintiff urged this argument as part of the fiduciary exception or as an independent ground for disclosure, Plaintiff relied on *Bank Brussels Lambert v. Credit Lyonnais (Suisse) SA*, 220 F. Supp. 2d 283 (S.D.N.Y. 2002) (Ellis, M.J.) and similar cases as support for this so-called "current client exception" to a law firm's right to invoke its attorney-client privilege.[5]

New York State courts have not adopted, and should not adopt, this so-called "current client exception" to the attorney-client privilege. As a threshold matter, it is well established that corporate entities have a right to invoke the attorney-client privilege to protect communications between employees and in-house counsel. *Rossi v. Blue Cross & Blue Shield*, 73 N.Y.2d 588, 591-92 (1989). Moreover, courts have readily acknowledged a law firm's right to protect internal communications with its in-house counsel when the party seeking disclosure was a former client at the time the communications took place. *See, e.g., United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996) (affirming a firm's assertion of attorney-client

[5] A few decisions cited by Plaintiff, mostly from federal district and bankruptcy courts in California, applied a variation of the current client exception and held that the privilege was abrogated as to communications that post-date a law firm's awareness of a conflict between it and its client. *See, e.g., E-Pass Techs., Inc., v. Moses & Singer, LLP*, No. C 09-5967, 2011 U.S. Dist. LEXIS 96231 (N.D. Cal. Aug. 26, 2011); *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071, 2007 U.S. Dist. LEXIS 17482, at *20, 21 (N.D. Cal. Feb. 21, 2007). However, these decisions purported to apply California privilege law. *See E-Pass Techs.*, at *5; *Marland* at *15-16. These decisions appear to not be good law in light of *Edwards Wildman Palmer LLP v. Superior Court*, No. B 255182, 2014 Cal. App. LEXIS 1081 (Ct. App. Nov. 25, 2014), which held that a law firm could assert attorney-client privilege over communications with in-house counsel when the party seeking disclosure was the law firm's client at the time of the communications.

privilege in the face of a grand jury subpoena); *Hertzog, Calamari & Gleason v. Prudential Ins. Co.*, 850 F. Supp. 255 (S.D.N.Y. 1994) (affirming a firm's assertion of attorney-client privilege over communications during litigation where in-house counsel represented firm); *Lama Holding Co. v. Shearman & Sterling*, No. 89 Civ. 3689, 1991 U.S. Dist. LEXIS 7987 (S.D.N.Y. June 14, 1991).

Ignoring this case law, *Bank Brussels Lambert* held that a law firm was "in no position to claim a privilege against their client" over communications with in-house counsel. 220 F. Supp. 2d at 287. In support of its holding, *Bank Brussels Lambert* simply observed without extensive analysis that "[a]sserting the privilege against a current client seems to create an inherent conflict against that client." *Id.* *Bank Brussels Lambert* was wrong as a matter of law for two reasons: it treated the possible existence of a conflict of interest as relevant to the evidentiary law of privilege when it is not, and it assumed an inherent conflict that does not necessarily exist.

1. Violations of the Rules of Professional Conduct do not Abrogate an Otherwise Valid Privilege.

Even assuming *arguendo* that an attorney's consultation with her firm's in-house counsel constitutes an actual or potential conflict (whether inherently or due to the facts of the particular situation), that conflict would not and should not vitiate an otherwise valid evidentiary privilege. The non-controversial idea that rules of professional conduct and the law of privilege are and should remain

distinct is clear from the RPC, from case law addressing the effect of conflicts on the attorney-client privilege in other contexts, and from the growing body of case law supporting law firms' in-house attorney-client privilege.

The Preamble to the RPC sets the limits of how violations of the Rules may be used. The Preamble states that "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." RPC Preamble ¶ 12. It further states that an "antagonist in a collateral proceeding or transaction [does not have] standing to seek enforcement of the Rule" in such a proceeding. *Id.* If a client suing his former law firm could use an alleged violation of a Rule as a basis to void the firm's attorney-client privilege, then the Rules could and would be converted to procedural weapons and the law firm's adversary would have been granted *de facto* standing to enforce the Rules under the guise of evidentiary law.

In other evidentiary contexts, courts have held that the existence of a conflict of interest does not affect the validity of the attorney-client privilege. In *Eureka Investment Corp., N.V. v. Chicago Title Insurance, Co.*, 743 F.2d 932, 937-38 (D.C. Cir. 1984), the court upheld the plaintiff's assertion of attorney-client privilege despite defendant's argument that plaintiff's former counsel "should not have simultaneously undertaken to represent [plaintiff] in an interest adverse to [defendant] and continued to represent [both plaintiff and defendant] in a closely related matter." The court, relying on *Wigmore on Evidence*, held that "counsel's

failure to avoid a conflict of interest should not deprive the client of the privilege. The privilege . . . should not be defeated solely because the attorney's conduct was ethically questionable." *Id.* at 938. In *Teleglobe Communications Corp. v. BCE, Inc.*, 493 F.3d 345, 381 (3d Cir. 2007), the court followed *Eureka* in a matter between a corporate parent and insolvent subsidiaries and noted that "when an attorney errs by continuing to represent two clients despite their conflicts, the clients—who reasonably expect their communications to be secret—are not penalized by losing their privilege."

Finally, while New York courts have not had occasion to address this question directly, multiple jurisdictions have applied this same principle to communications between an attorney and her firm's in-house counsel.[6] The Supreme Court of Georgia, in considering a claim of attorney-client privilege concerning an attorney's consultation with his firm's in-house counsel, held that "the potential existence of an imputed conflict of interest between in-house counsel and the firm client is not a persuasive basis for abrogating the attorney-client

[6] *See, e.g.*, *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181 (Or. 2014); *St. Simons Waterfront LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 746 S.E.2d 98 (Ga. 2013); *RFF Family P'ship, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066 (Mass. 2013); *Edwards Wildman Palmer LLP v. Super. Court*, No. B 255182, 2014 Cal. App. LEXIS 1081 (Ct. App. Nov. 25, 2014); *MDA City Apts. LLC v. DLP Piper LLP (US)*, 967 N.E.2d 424 (Ill. App. Ct. 2012); *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523 (Ill. App. Ct. 2012); *TattleTale Alarm Sys. v. Calfee, Halter & Griswold, LLP*, Case No. 2:10-CV-226, 2011 U.S. Dist. LEXIS 10412 (S.D. Ohio Feb. 3, 2011); *Moore v. Grau*, No. 2013-CV-150, 2014 N.H. Super. LEXIS 20 (Dec. 14, 2014); *Miller v. Stoel Rives, LLP*, No. CV-OC-2014-07471 (Id. Dist. Ct. Dec. 1, 2014); *Coloplast A/S v. Spell Ples Sauro, P.C.*, Ct. File No. 27-CV-12-1260, 2013 Minn. Dist. LEXIS 45 (Dist. Ct. Nov. 25, 2013).

privilege between in-house counsel and the firm's attorneys." *St. Simons Waterfront*, 746 S.E.2d at 106.

The Supreme Court of Oregon also upheld a similar privilege claim despite arguments of a conflict, holding that "rules of professional conduct may require or prohibit certain conduct, and the breach of those rules may lead to disciplinary proceedings. But that has no bearing on the interpretation or application of a rule of evidence." *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181, 1195 (Or. 2014).

The intermediate appellate court of California also concluded that the potential existence of a conflict of interest does not abrogate a law firm's privilege over communications between its attorneys and its in-house counsel: "[i]f an attorney violates the Rules of Professional Conduct, he or she may be subject to discipline. But nothing in the Evidence Code suggests that a potential or actual conflict of interest rising under the circumstances presented here abrogates the attorney-client privilege." *Edwards Wildman Palmer LLP v. Superior Court*, No. B 255182, 2014 Cal. App. LEXIS 1081, at *30 (Ct. App. Nov. 25, 2014) (citation omitted).

The intermediate appellate court of Illinois also concluded that "while a violation of the rules [of professional conduct] may have relevance to the underlying claims, it has no relevance to the issue of whether the documents in

question are protected by the attorney-client privilege." *Garvy v. Seyfarth Shaw LLP*, 966 N.E.2d 523, 538 (Ill. App. Ct. 2012).

2. Internal Consultation does not Create an Inherent Conflict.

While a lawyer's communication with her law firm's in-house counsel on behalf of her own or her firm's interests may create a conflict with her client's interests in some circumstances (or further a pre-existing conflict), the *Bank Brussels Lambert* decision assumed that such communication creates a conflict in all cases. In fact, a lawyer's and law firm's interest in complying with the rules of professional conduct and a client's interests are not necessarily antagonistic, and may often overlap.

In direct response to the *Bank Brussels Lambert* decision, the New York State Bar Association addressed the question of whether an attorney's consultation with her firm's in-house counsel about an ethical or risk management issue pertaining to a current or former client presents an inherent conflict of interest. New York State Bar Association Committee on Professional Ethics Advisory Opinion 789 (2005) ("Opinion 789").[7] Opinion 789 considered first whether this consultation showed that the lawyer's "own . . . personal interests" would affect "the exercise of the lawyer's professional judgment." *Id.* ¶ 11. Opinion 789 explained that, to the contrary, an attorney's effort to comply with ethical

[7] Although Opinion 789 considered this issue under the New York Code of Professional Responsibility, its analysis is equally applicable under the RPC.

obligations is "not an interest that 'affects' the lawyer's exercise of independent professional judgment, but rather is an inherent part of that judgment." *Id.* ¶ 12. An attorney's interest differs from those of a client's only if it "adversely affects either the judgment or loyalty of a lawyer to a client." *Id.* ¶ 15. Opinion 789 advised that the firm's interest in complying with ethical obligations did not differ from a client's interest, because a lawyer's adherence to the rules of the profession is a required part of any lawyer's representation. In other words, all lawyers and firms have a personal interest in adhering to ethical rules, but that interest is an integral part of a lawyer's judgment, rather than an interest that is adverse to the client's. *Id.* Consequently, an in-house counsel's role in advising firm attorneys on their ethical duties is not a representation adverse to the firm's client's interest.

While no New York court has considered this question since Opinion 789, courts in a number of other jurisdictions have likewise rejected the holding in *Bank Brussels Lambert* and held instead that it is not an inherent conflict for a lawyer to consult with her in-house counsel about issues arising from a current client representation. For example, in *RFF Family Partnership*, the Massachusetts Supreme Judicial Court held that an attorney's consultation with her firm's in-house counsel did not create an inherent conflict of interest. The court first held that an attorney's need for ethical advice did not mean that her firm had interests adverse to the client's, in violation of Massachusetts Rule of Professional Conduct

1.7.[8] 991 N.E.2d 1066, 1073. As the court explained, whether a particular situation created adversity of interest may not be clear-cut, and even if adversity is clear, a lawyer would need to consider carefully how to address the situation with a minimum of harm to the client. *Id.* "The in-house counsel . . . is the logical counsel to turn to for advice as to how the firm may best comply with Rule 1.7, especially where time is of the essence." *Id.* Soliciting advice about how to comply with the rules "is not in and of itself adverse to the client, and doing so may ultimately benefit the client." *Id.*

The court also held that, in the context of an in-house counsel advising her firm on ethical or risk management issues, the courts should not impute her firm's representation of the client to the in-house counsel. *Id.* at 1078. As the court explained, rules of professional conduct impute an attorney's representation of a client to each attorney at the firm to safeguard the duty of loyalty. *Id.* "However, a law firm is not disloyal to a client by seeking legal advice to determine how best to address [a] potential conflict." *Id.* Advice of in-house counsel could promptly address any conflict between the firm's interests and the client's. Rather than create a conflict, a consultation could help end it. *See also Edwards Wildman Palmer LLP*, 2014 Cal. App. LEXIS 1081; *Coloplast A/S v. Spell Ples Sauro, P.C.*,

[8] Massachusetts Rule of Professional Conduct 1.7(b) states that, with some exceptions, a "lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."

No. 2013-CV-150, 2013 Minn. Dist. LEXIS 45, at *13 (Dist. Ct. Nov. 22, 2013) (rejecting the current client and fiduciary duty exceptions in part because the court agreed with *RFF Family Partnership* that "recognition of the privilege will often benefit the client and will likely result in increased law firm compliance with ethical obligations'"); *Moore v. Grau*, 2014 N.H. Super. LEXIS 20, at * 15 ("the court is persuaded that recognition of an in-house attorney client privilege does not create a conflict of interest.").

C. Public Policy Supports Upholding Schnader's Privilege.

Whether described as an application of the fiduciary exception or as the adoption of a "current client exception" to the privilege, the IAS court's December 5 Order strips a law firm of the protection of the attorney-client privilege in a circumstance in which any other type of entity could assert the privilege.[9] There is no policy justification for adopting such a rule. To the contrary, sound public policy supports protecting lawyers' ability to communicate confidentially with their firms' in-house counsel about ethical issues arising from work for a current client.

The function of in-house counsel is something that courts should encourage,

[9] Some courts have acknowledged that the fiduciary exception and current client exception are essentially interchangeable. "[T]he premise underlying both is that a law firm cannot assert the attorney-client privilege against a current client when self-representation creates a conflict of interest with the client, or otherwise breaches the firm's duties to the client." *Edwards Wildman Palmer LLP*, 2014 Cal. App. LEXIS 1081, at *21-*22 n.7.

because "[t]he availability of in-house counsel encourages lawyers to raise questions that they might otherwise ignore." American Bar Association Report No. 103, at 1 (Aug. 12, 2013) (citation and internal quotations omitted). The existence of in-house counsel indirectly benefits a firm's client, because such counsel "provide ready advice in response to client behavior or a lawyer's mistakes that may avoid or alleviate harm to clients." *Id.* Courts encourage frank and full communication between a firm's attorneys and its in-house counsel by recognizing that the attorney-client privilege protects such communications. *Id.* at 1-2 (citing *Upjohn v. United States*, 448 U.S. 383 (1981)). Frank and full communication, in turn, increases the likelihood that an attorney's consultation with in-house counsel will lead to prompt resolution of an ethical issue, often to a client's benefit.

Courts outside of New York have repeatedly recognized the value that consultation with in-house counsel may bring to a client. For example, in *Edwards Wildman Palmer LLP*, the California appellate court recognized that "[t]he attorney's and client's interest are likely to dovetail insofar as the attorney seeks to resolve [a] dispute to the client's satisfaction, or determine . . . what his or her ethical and professional responsibilities are in order to comply with them." 2014 Cal. App. LEXIS 1081, at *31. The federal district court for the Southern District of Ohio described the values served by applying a privilege to "loss prevention communications" as "individual lawyers who come to the realization that they

have made some error in pursuing their client's legal matters should be encouraged to seek advice promptly about how to correct the error, and to make full disclosure to the attorney from whom that advice is sought about what was done or not done, so that the advice may stand some chance of allowing the mistake to be rectified before the client is irreparably damaged." *TattleTale Alarm Sys., Inc., v. Calfee, Halter & Griswold, LLP*, Case No. 2:10-CV-226, 2011 U.S. Dist. LEXIS 10412, at *14-15 (S.D. Ohio, 2011).

The Massachusetts Supreme Judicial Court acknowledged the same concept in *RFF Family Partnership*. The court observed that "an attorney's or a law firm's duty of loyalty to a client is not always painted in bright lines." 991 N.E.2d at 1073. Seeking advice about the law firm's duties "is not in and of itself adverse to the client, and doing so may ultimately benefit the client." *Id.* The court in *RFF Family Partnership* also discussed at length the inferior outcomes that could result from denying the privilege to communications with in-house counsel. If an attorney could not consult with his in-house counsel in a privileged setting when confronted with the appearance of a conflict, he would be forced to choose from "four practical alternatives: first, he could withdraw from the representation without first consulting . . . in-house counsel; second, he could advise the client of the conflict without consulting with in-house counsel . . . third, he could confer with in-house counsel without first having withdrawn from the representation . . .

or fourth, he could retain an attorney in another firm." *Id.* After considering the consequences of each of these alternatives, the court concluded that "[n]one of these alternatives best serve the interests of the client. Consequently, [prohibiting the invocation of the privilege] would be dysfunctional, both to the client and the law firm." *Id.* at 1074.

II. THE IAS COURT ERRED IN HOLDING THAT THE PRIVILEGED COMMUNICATIONS WERE NOT CONFIDENTIAL.

The IAS court based its December 5 Order in part on its finding that the Schnader lawyers "did not expect their communications to be confidential as to their current client." (R. at 9.) The only record evidence referenced by the IAS court as a basis for this finding was a pair of excerpts from Carty's deposition testimony in this case. (*Id.*) Neither excerpt supports the IAS court's finding, and the IAS court's finding misapprehends the law applicable to the confidentiality requirement of the attorney-client privilege.

The clear rule concerning whether a communication was not confidential, such that the attorney-client privilege does not attach, is that "[t]here must be *actual disclosure*, otherwise the confidence arising from the attorney-client relationship has not been breached." *In re the Bronx Cnty. Grand Jury Investigation*, 57 N.Y.2d 66, 77 (1982) (emphasis added). Actual disclosure is the touchstone for whether a communication satisfies the privilege's requirement of confidentiality. For example, in *Rossi v. Blue Cross & Blue Shield*, the Appellate

Division concluded that a document was privileged because the document was "clearly" internal and "[n]othing indicates that anyone outside the defendant company had access to it." 140 A.D.2d 198 (1st Dep't 1988), *aff'd*, 73 N.Y.2d 588 (1989).

Neither of the deposition excerpts apparently relied on by the IAS court evidences actual disclosure of the Privileged Communications. The first deposition excerpt referenced by the IAS court concerns Carty's expectations governing disclosure of "anything she stated to Murray." (R. at 9.) Although the IAS court did not identify which testimony or statements in particular it was relying on, Plaintiff has identified the relevant testimony as concerning statements made by Carty to "Ms. Murray in connection with her testimony at the MSSB arbitration." (R. at 77.) The relevant passage in Carty's deposition testimony makes clear that these communications concerned Carty's preparation for her testimony in the FINRA arbitration, which Carty agreed could be disclosed to Plaintiff. (R. at 95, 216.) Those communications took place in March of 2011, two months after the January 2011 Privileged Communications. (*Id.*) Because they post-dated the Privileged Communications and neither evidenced nor resulted in disclosure of the Privileged Communications, Carty's communications with Murray are simply irrelevant to the confidentiality of the Privileged Communications.

The second deposition excerpt referenced by the IAS court concerned Ms. Carty's expectations about one particular Privileged Communication that she forwarded to Hecht ("the Forwarded E-Mail"). (R. at 9.) Again, the IAS court does not identify the excerpt, but Plaintiff did. (*See* R. at 77, 101-03.) In her deposition, Carty testified that she did not consider one way or another whether Hecht would share the Forwarded E-mail with Plaintiff. (*See* R. at 105.) But the communications between Carty and Kipnes took place in private, and no one outside of the privilege reviewed or was permitted to review them, thereby qualifying them as privileged *ab initio*. *In re the Bronx Cnty. Grand Jury Investigation*, 57 N.Y.2d at 76 (for purpose of determining whether the attorney-client privilege has attached, "pertinent 'confidence' arises from the attorney-client relationship and the privacy of the conversation or communication to the attorney").

Moreover, Carty's forwarding the e-mail to Hecht in no way abrogates either the Forwarded E-Mail's confidentiality or Carty's and Kipnes' expectations of privacy. Hecht, like Carty, was a partner at Schnader, and Carty's communications with Kipnes concerned the lawyer-as-witness rule implicated in the case being litigated by Hecht. Accordingly, Hecht's participation in the communication with Kipnes was necessary for the provision of legal advice to Schnader and its lawyers. (*See* R. at 101-04.) When considering the attorney-client privilege in the context

of an organization, "communications which reflect advice given by counsel to a corporation do not lose their privileged status when shared among corporate employees who share responsibility for the subject matter of the communication." *Baptiste v. Cushman & Wakefield, Inc*., 03-Civ. 2102, 2004 U.S. Dist. LEXIS 2579, at *6 (S.D.N.Y. Feb. 20, 2004); *see also FTC v. GlaxoSmithKline*, 294 F.3d 141, 147 (D.C. Cir. 2002) ("The applicable standard is . . . whether the the [sic] documents were distributed on a 'need to know' basis or to employees that were 'authorized to speak or act' for the company.") (quotation marks omitted)).

It is undisputed that Hecht did not disclose the Forwarded E-mail to Plaintiff or anyone else. The fact that the Forwarded Email was not disclosed—and not Carty's expectations about the e-mail—is all that matters under these facts. "A client's . . . *intent* to disclose to third persons the substance of the discussion held with the attorney . . . does not mitigate the privilege." *In re the Bronx Cnty. Grand Jury Investigation*, 57 N.Y.2d at 77 (emphasis added). Carty's testimony at her deposition that she simply never considered, one way or another, whether Hecht would disclose the Forwarded E-Mail to Plaintiff does not establish any lack of confidentiality vitiating the privilege, and the IAS court's reliance on such testimony as a ground for disclosure was error.

III. THE IAS COURT ERRED IN HOLDING THAT THE PRIVILEGED DOCUMENTS WERE SUBJECT TO AT-ISSUE WAIVER.

As another ground for ordering disclosure of the Privileged Communications, the IAS court found that the Privileged Communications "fall under the 'at issue' waiver" because "Schnader's continued representation of Stock has been placed at issue by both plaintiff and defendants." (R. at 10-11.) This finding is wrong as a matter of law for a number of reasons.

As this Court has explained, "at-issue waiver" occurs when the party invoking the privilege has asserted a claim or defense that "*he intends to prove by use of the privileged materials*." *Deutsche Bank Trust Co. v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 64 (1st Dep't 2007) (citations and quotation omitted) (emphasis added). The concept of at-issue waiver is sharply limited: "a privileged communication [that] contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself 'at issue.'" *Id.* This Court has cautioned against finding at-issue waiver merely because documents designated privileged are relevant to a claim; "if that were the case, a privilege would have little effect." *Id.*; *see also Veras Inv. Partners, LLC v. Akin Gump Strauss Hauer & Feld LLP*, 52 A.D.3d 370 (1st Dep't 2008); *Long Island Lighting Co. v. Allianz Underwriters Ins. Co.*, 301 A.D.2d 23, 33 (1st Dep't 2002) ("That the Report may contain information relevant to the issue of timeliness of notice does not mean that the Report itself is

at issue so as to waive any attorney-client privilege attaching thereto.").

The IAS court first relied on its finding that "Schnader's continued representation of Stock has been placed at issue" to justify its invocation of "at issue waiver." (R. at 11.) The IAS court also found that the Privileged Communications could be relevant to Plaintiff's claims and counterclaim defenses. (*Id.*) But the fact that the Privileged Communications may be relevant to Plaintiff's claims or defenses does not indicate that *Appellants*, as the party invoking the privilege, have undertaken an affirmative act that has placed the Privileged Communications at issue. *See Deutsche Bank Trust Co.*, 43 A.D.3d at 64.

The IAS court also relied on Schnader's assertion of a counterclaim for unpaid fees holding that "at-issue waver" warranted disclosure of the Privileged Communications. But Schnader's assertion of its counterclaim is not the sort of affirmative act that triggers at-issue waiver. The privilege-holder must "assert[] a claim or defense that he *intends to prove by use of the privileged materials*." *Id.* (citations and quotation omitted) (emphasis added). As Appellants repeatedly represented to Plaintiff and the IAS court, they have never referenced, relied on or used the Privileged Communications to prove Schnader's counterclaim, and have no intention of doing so. (*See* R. at 72 ("[Appellants] have said repeatedly, and again state, that they neither need nor intend to use privileged materials to support

their defenses or their counterclaim.").) A party's representation "that it will not rely on any privileged or work-product material to prove its case" demonstrates that no privilege waiver has taken place. *Deutsche Bank Trust*, 43 A.D.2d at 67; *see also id.* at 65 ("Bankers Trust forthrightly states that it will not use privileged material or attorney work product to establish the reasonableness of its defense and settlement of the WMI action.").

IV. THE IAS COURT ERRED IN HOLDING THAT PRIVILEGED DOCUMENTS WERE SELECTIVELY DISCLOSED.

Finally, the IAS court stated that Appellants had "already disclosed selective communications regarding consultations between Carty and Kipnes regarding the same issue" as the Privileged Communications. (R. at 11.) It is unclear if the IAS court intended this observation to be part of its at-issue waiver analysis or a separate justification for compelling disclosure. Under either reading, the IAS court erred because it did not identify when or to whom Appellants had made such disclosures. To the contrary, there is no record evidence that Appellants have ever disclosed the Privileged Communications, nor any communications that reveal the content of the Privileged Communications. The IAS court's finding was and remains unsupported.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the December 5 Order be reversed, and that Plaintiff's request for disclosure of the Privileged Communications be denied.

Dated: March 23, 2015
New York, New York

PATTERSON BELKNAP WEBB & TYLER LLP

By: */s/ Frederick B. Warder III*

Frederick B. Warder III (fbwarder@pbwt.com)
Jesse A. Townsend (jtownsend@pbwt.com)
1133 Avenue of the Americas
New York, New York 10036
Telephone: (212) 336-2000
Fax: (212) 336-2222

Attorneys for Defendants-Appellants

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

KEITH STOCK,

Plaintiff-Appellee,

- against -

SCHNADER HARRISON SEGAL & LEWIS LLP and M. CHRISTINE CARTY,

Defendants-Appellants.

Index No. 651250/13

PRE-ARGUMENT STATEMENT

Defendants/Appellants Schnader Harrison Segal & Lewis LLP and M. Christine Carty (collectively "Schnader Harrison") respectfully submit the following Pre-Argument Statement pursuant to Section 600.17(a) of the Rules of the Supreme Court of the State of New York, Appellate Division, First Department.

1. The complete title of the action is as set forth above.

2. The full names of the original parties are as they appear above.

3. Counsel for Schnader Harrison are:

   Frederick B. Warder III
   Jesse A. Townsend
   YiLing Chen-Josephson
   Patterson Belknap Webb & Tyler LLP
   1133 Avenue of the Americas
   New York, NY 10036
   (212) 336-2000

4. Counsel for Plaintiff/Appellee Keith Stock are:

   Jordan M. Kam
   Richard A. Roth
   The Roth Law Firm, PLLC

295 Madison Avenue, 22nd Floor
New York, New York 10017
(212) 542-8882

5. This appeal is taken from the Interim Order of the Honorable Melvin L. Schweitzer of the Supreme Court of New York, County of New York, dated December 5, 2014, and entered on December 8, 2014. A copy of the Decision and Order with Notice of Entry is attached as Exhibit A.

6. The nature and object of the causes of action alleged in Stock's Amended Complaint are legal malpractice, breach of fiduciary duty, and violation of New York Judiciary Law § 487.

7. The trial court issued an Interim Order, dated December 5, 2014, ordering Schnader Harrison to produce copies of all the documents listed on its privilege log. Schnader Harrison appeals that Order.

8. The grounds for seeking reversal are that the Supreme Court erred as a matter of fact, erred as a matter of law, and/or abused its discretion in granting Stock's application to compel disclosure because, among other reasons:

    a. The Order's finding that Schnader Harrison attorneys' communications with their in-house counsel were not protected by the attorney-client privilege, which is a matter of first impression in New York State courts, was erroneous.

    b. The Order erroneously applied existing precedent governing New York's fiduciary exception to the attorney-client privilege.

    c. The Order erroneously applied the doctrine of "at issue" waiver of the attorney-client privilege.

d. The Order erroneously applied the doctrine of "selective disclosure" waiver of the attorney-client privilege.

e. The Order misapprehended the factual record underlying its application of the fiduciary exception, the at-issue waiver doctrine, and the selective disclosure doctrine.

Dated: December 15, 2014
New York, New York

PATTERSON BELKNAP WEBB & TYLER LLP

By: */s/ Frederick B. Warder III*

Frederick B. Warder III (fbwarder@pbwt.com)
Jesse A. Townsend (jtownsend@pbwt.com)
YiLing Chen-Josephson (ychenjosephson@pbwt.com)
1133 Avenue of the Americas
New York, New York 10036
Telephone: (212) 336-2000
Fax: (212) 336-2222

Attorneys for Defendants

TO: Jordan Kam, Esq.
Richard Roth, Esq.
The Roth Law Firm, PLLC
295 Madison Avenue, 22nd Floor
New York, NY 10017

Attorneys for Plaintiff