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September 24, 2019

By Hand & NYSCEF

Honorable O. Peter Sherwood
Supreme Court of the State of New York
New York County
60 Centre Street, Room 605
New York, New York 10007

Re: Perella Weinberg Partners LLC, *et al.* v. Kramer, *et al.*, Index No. 653488/2015

Dear Justice Sherwood:

We have been retained by, and write on behalf of, Weil, Gotshal & Manges LLP ("Weil") in response to Defendants Michael Kramer and Derron Slonecker's September 18, 2019 letter to Your Honor.[1] As the Court is aware, Weil had represented Perella Weinberg Partners LLC ("PWP") in this case. Weil filed a notice of motion to withdraw its representation on September 16, 2019, with a return date of October 4, 2019 (Dkt. 312). Should the Court require additional information before granting Weil leave to withdraw, I would welcome the opportunity to provide that information *in camera* and *ex parte*.[2]

Introduction

This case concerns whether Defendants are entitled to deferred compensation. Relying on an unauthorized disclosure of confidential and privileged communications of opposing counsel, Defendants' letter contrives an argument that they were misled about a "fact" supposedly integral to this case – that is, how the IRS would have treated their deferred

[1] The law firm of Boies Schiller Flexner LLP currently represents Plaintiffs in this case. Accordingly, this letter is being filed solely on Weil's behalf. At this time, as I am not representing any party in this litigation, I do not intend to file a motion for admission *pro hac vice*. However, I am prepared to do so should the Court deem it necessary. Further, I note that Defendants' counsel listed me as a "cc" on her September 18, 2019 letter to the Court.

[2] All of the information contained in this letter comes from public sources. In this letter, Weil does not, and does not intend to, disclose any PWP privileged or confidential information.

compensation had they received it. The "fact" that Defendants assert was withheld is actually the date on a schedule attached to their Deferred Compensation Agreements ("DCAs") – documents they have possessed for more than 12 years, repeatedly quoted from and characterized in this litigation, and attached to court pleadings. Defendants are chargeable with facts evident on the face of the documents on which they repeatedly rely, even if they did not have actual knowledge of the date set forth – which would be unbelievable given Defendants' many pleadings that reflect direct knowledge of this issue. Moreover, as the Court is aware, this case involves whether Defendants are entitled to deferred compensation, not the hypothetical tax treatment of transactions that did not occur. The at-best marginal relevance of Weil's protected, purported, mental impressions of possible tax treatment suggests that Defendants are attempting to capitalize on a press story to divert attention from the issues in this case into an unjustified attack on trial counsel. In any event, it has never been the law that litigants are entitled to the mental impressions of opposing counsel on issues of law, and certainly not on opposing counsel's thought processes and legal judgments about the possible reaction of federal tax authorities. Finally, Defendants should not be permitted to utilize obviously privileged and confidential information in a submission to this Court to mount attacks on counsel.

The basic facts are not in dispute: Defendants entered into Deferred Compensation Agreements in 2007 deferring compensation for five years, and they then extended those agreements in 2011. In 2012, PWP terminated Defendants for cause, resulting in the forfeiture of their deferred compensation. Defendants' entitlement to deferred compensation thus turns on two determinations: (1) whether termination for cause results in a forfeiture of Defendants' deferred compensation under their agreements; and (2) whether Defendants properly were terminated for cause in 2012. Defendants' letter addresses neither issue. Instead, it focuses on whether the 2011 re-deferrals jeopardized a hoped-for tax treatment, which is not the issue presented in Defendants' counterclaims or, as far as we can determine, any other claim in this case.

Even assuming that the tax treatment of contract rights that the Defendants never received is an issue in this case, Defendants' letter still has no merit. Defendants claim, at 1, that factual information was "concealed" and "misrepresentations" made to courts in violation of New York Rule of Professional Conduct 3.3(a)(1), which proscribes a knowing "false statement of fact or law to a tribunal." That is demonstrably wrong. The substance of the supposedly concealed information – the date on the DCA schedules – was obvious and available to Defendants at all relevant times. Indeed, the information allegedly withheld is evident from the face of the documents attached to Defendants' own pleadings in this case. And the purported misrepresentations to courts reflect the same arguments Defendants themselves repeatedly advanced throughout this litigation. There is nothing sanctionable about making arguments that Defendants themselves advanced based on the same corpus of available information.

Argument

First, it is critical to emphasize what Defendants' letter does *not* concern: it does not concern any withholding of historical "facts." The underlying *factual information* that Defendants complain about was evident on the face of documents possessed by Defendants since 2007 and their attorneys at all relevant times. Defendants' complaint arises out of their assertion that in meetings in 2015 after this case was filed, a Weil attorney expressed a view that the May 2011 re-deferral of compensation was invalid because it was not made more than a year before the original deferred compensation was due to be paid to Defendants in January 2012. The factual predicate for this complaint is two-fold: 1) the schedules to the May 2007 Deferred Compensation Agreements identified "January 1, 2007" as the "Effective Date" and, therefore, the "Payment Date" (defined by the DCAs as five years after the Effective Date) as January 1, 2012; and 2) the May 2011 re-deferral Election Forms were executed on May 31, 2011. But the fact that the May 31, 2011 re-deferral is less than a year before a January 1, 2012 Payment Date is evident from the documents. Defendants executed these documents and were on notice of their contents, and they and their counsel had copies of these documents at all relevant times. This information has been available and obvious to Defendants since May 2011, and to their attorneys since at least 2015. Indeed, Defendants' counsel deposed PWP's Chief Financial Officer two years ago in September 2017 and questioned him at length about these very issues. A reading of that transcript makes clear that Defendants and their counsel have been aware of the material facts and focused on their legal and tax significance for at least the past two years.

Second, unable to assert that any historical fact or information was withheld, Defendants complain about a Weil attorney's supposed preliminary mental impression in December 2015 concerning the tax consequences of the facts and information evident from the face of documents that all parties possessed. Again, this is the only new information that gives rise to Defendants' letter. And this impression purportedly was from an attorney who neither drafted the 2007 or 2011 agreements nor represented PWP in the litigation. Rather, the impression purportedly was expressed in a conversation in December 2015 – after this litigation was filed. Weil had no obligation to share with opposing litigants its views on possible IRS reactions to known facts. There is no such duty to disclose. Moreover, no opposing party is entitled to inquire into counsel's thought processes and work product in defending this case. Defendants should not be able to overcome that rule simply by accusing the lawyer of misconduct based on improperly-disclosed privileged or work product information. What one Weil attorney may have thought or said at first blush about a legal issue is not relevant to Weil's obligation to make appropriate arguments to advance its client's position.

The assertion that those PWP partners who have not forfeited their DCAs may still receive section 409A tax benefits from their 2011 re-deferral was and is a reasonable legal position based on analyses performed by Weil and others. If required to defend its basis for making that legal argument, Weil is amply prepared to do so, but it should be *ex parte* and *in camera*.

Indeed, a review of the pleadings reveals that Defendants, looking at the same three-page documents available to Weil, have characterized the transaction essentially identically. In particular, Defendants have asserted that (1) the parties agreed to a June 1, 2012 Payment Date, and (2) Defendants extended their DCAs more than a year before that date. Thus, in their Counterclaim, Dkt. 12, ¶ 213 (Nov. 9, 2015), Defendants state that the "Deferred Compensation Agreements obligate PWP to pay over to Kramer and Slonecker certain 'compensation in addition to all compensation previously agreed upon' *on the fifth anniversary of the agreements' Effective Date, or June 1, 2012*, in consideration for the provision of five years of service on the part of Kramer and Slonecker" (emphasis added). And in their motion for summary judgment, Dkt. 17, at 1 (Nov. 20, 2015), Defendants state that, "[i]n the section entitled 'Payment Date,' the DCAs provided that such amounts would be due in a lump sum on the earlier of (i) *the 'fifth anniversary' of the DCA (i.e., June 1, 2012)*; or (ii) upon 'the Partner's separation from service with the Company without Cause'" (emphasis added). *See also id.* at 3 n.3 (Defendants state that, "[a]lthough the DCA defines its 'Effective Date' as January 1, 2007, the 'Date of the Agreement' is defined as May 30, 2007. *The Payment Date was ultimately set at June 1, 2012*") (emphasis added); *id.* at 7 (Defendants refer to "the June 1, 2012 Payment Dates"); Defs.' Reply in Supp. of Mot. for Summ. J., Dkt. 84, at 8 (Dec. 31, 2015) (Defendants refer to the "Payment Date defined by the DCA as June 1, 2012"). In other words, with the benefit of the relevant historical facts and documentation, Defendants repeatedly have represented to this Court that the Payment Date for the DCAs was June 1, 2012. Defendants now claim it is sanctionable for Weil to assert that the Payment Date for the DCAs was June 1, 2012, but that is exactly what Defendants themselves repeatedly asserted. It is unfair for Defendants to accuse Weil of misrepresentations when Defendants made the same factual assertions.

Defendants also have argued that the May 2011 re-deferral was effective notwithstanding the original January 1, 2012 Payment Date. For example, in their summary judgment motion, Dkt. 17, at 4, Defendants stated that "[i]n 2011 – one year before the Payment Date on the DCAs – Perella [] asked its partners (including Kramer and Slonecker) to agree to delay the payment date provided for by the DCAs." In their brief to the First Department, at 5, Defendants stated that "[o]ne year prior to the payment date of January 1, 2012, [] PWP [] requested that its employees (including Kramer and Slonecker) agree to defer receipt of the amounts due to them." Def.-Appellants' Appeal Br., at 4 (Dec. 12, 2016); *see also* Def.-Appellants' Appeal Br., at 16 (Dec. 12, 2016) (Defendants stating that "[t]hese payments were initially due no later than January 1, 2012 (such that the payment date was coextensive with the conclusion of the five years of service provided for by the DCAs); however, *PWP's payment obligation was later deferred pursuant to the PWP-drafted deferral agreements* until the earlier of (i) June 1, 2017 or (ii) a mere 'separation from service'") (emphasis added). Defendants cannot credibly – and certainly not fairly – criticize Weil for arguing that the May 2011 re-deferral was effective notwithstanding the original January 1, 2012 Payment Date when Defendants made that very same assertion.

Third, the issue Defendants focus on – the IRS's potential tax treatment of whatever deferred compensation Defendants may receive – is irrelevant for another reason. That is not an

issue to be resolved in this case; that determination is for the IRS, if it ever becomes ripe. Whether a participant in PWP's deferred compensation program ultimately receives the tax benefits of deferral under section 409A may be decided years from now by the IRS, but that has no effect on Defendants' claim here. The issue in this case is whether Defendants are entitled to deferred compensation.

As discussed above, Defendants' entitlement to deferred compensation turns on (1) whether termination for cause results in a forfeiture of Defendants' deferred compensation under their 2007 and 2011 agreements, and (2) whether Defendants properly were terminated for cause. The first question considers whether the for-cause termination forfeiture clause of the May 2007 DCAs survives the May 2011 Election Form; the second considers the propriety of the for-cause termination. Neither involves determining the tax status of deferred compensation; neither concerns whether, if Defendants are entitled to receive deferred compensation, a certain tax treatment follows. In short, Defendants complain about a purported preliminary, privileged impression of one Weil attorney on an issue not even before this Court. Whatever the status of Defendants' tax benefit, the fact remains that Defendants undisputedly agreed both in 2007 and 2011 to defer their compensation, and that re-deferral both was effective and delayed payment. What any particular attorney within Weil personally thought, preliminarily or otherwise, about the tax implications of the re-deferral is legally irrelevant.

Fourth, none of the four alleged misrepresentations set forth in Defendants' letter, at 4, was false, nor were the arguments made frivolous.

(1) Contrary to Defendants' *ipse dixit* assertion, it was neither false nor an attempt to "conceal the truth" to state that Defendants were "not entitled to any payment" and that "incentive compensation was never owed to them." Ltr. at 4 (quoting Dkt. 67 at 5-6). That is Plaintiffs' basic position in this litigation – that Defendants are not entitled to any deferred compensation because they were terminated for cause. That is a non-frivolous, legal position, and Plaintiffs are fully entitled to assert it.

(2) The legal argument that "the deferral of their tax obligations" was "ample consideration" for Defendants' 2011 agreement to re-defer payment, Ltr. at 4 (quoting PWP's Appeal Br., at 27 (Feb. 1, 2017)), was not frivolous; indeed, it is likely to be proven correct. *First*, as set forth in Plaintiffs' Opposition brief on summary judgment, at 12, "New York law does not require" any "additional consideration. By statute, '[a] written, signed agreement to discharge or modify an existing obligation is not rendered invalid because of the absence of consideration.' *GG Managers, Inc. v. Fidata Trust Co. New York*, 626 N.Y.S.2d 488, 490 (1st Dep't 1995) (citing N.Y. Gen. Oblig. Law § 5-1103 (McKinney 2007)); *see also Deutsche Bank Sec., Inc. v. Rhodes*, 578 F. Supp. 2d 652, 660-61 (S.D.N.Y. 2008) (under New York law, '[m]odifications to a contract need not be supported by additional consideration when the modification is in writing and signed by the party against whom it is sought to be enforced' (citation omitted))." *Second*, even if New York law required consideration for the re-deferral, a substantial likelihood of receiving a tax benefit would suffice. Moreover, as set forth in

Plaintiffs' summary judgment Opposition, at 12-13, tax deferral was just one benefit Defendants received, as they also "receive[d] interest on their incentive compensation" during the re-deferral period.

(3) Nor was it a misrepresentation to assert that the 2011 re-deferral was completed "one year" before the original payment date, "consistent with the applicable tax laws." Ltr. at 4 (quoting Dkt. 61 at 3, 5). As set forth above, Defendants themselves repeatedly made the same assertion based on the same underlying information. Moreover, ample evidence demonstrates that the parties intended the Payment Date to be June 1, 2012, and Defendants undisputedly elected to re-defer their compensation more than a year before that date. Further, there is a good faith basis to assert that it is more likely than not that the 2011 re-deferral complied with section 409A.

(4) It was not a misstatement to assert that Defendants received a "tax advantage" and "didn't have to pay taxes on the income." Ltr. at 4 (quoting Hr'g Tr., Mar. 31, 2016, at 13:10-16). The 2011 re-deferral more likely than not complied with section 409A. Had Defendants not been fired for cause and received their deferred compensation, they more likely than not would have received a tax benefit from the re-deferral. And Defendants to date have never had to pay taxes on their deferred, and then forfeited, income.

Fifth, Defendants' letter improperly is predicated on privileged and confidential information disclosed in clear violation of the rules of privilege, work product, and New York Rule of Professional Conduct 1.6 requiring confidentiality. Defendants' letter is based on a press report that Defendants attach to their letter. This press report purports to contain the preliminary thoughts of a Weil attorney from December 2015 – *i.e.*, after this litigation was filed. That is classic work product. *See, e.g., Corcoran v. Peat, Marwick, Mitchell & Co.*, 151 A.D.2d 443, 445 (1st Dep't 1989) ("mental impressions and personal beliefs procured in the course of litigation are deemed to be an attorney's work product"); *ACWOO Int'l Steel Corp. v. Frenkel & Co.*, 165 A.D.2d 752, 753 (1st Dep't 1990) ("work product encompasses 'materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy'") (quoting *Hoffman v. Ro-San Manor*, 73 A.D.2d 207, 211 (1980)). In New York, opinion work product (as compared to ordinary work product) receives absolute protection, *see* N.Y. C.P.L.R. § 3101(c) (2014), and courts must "protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney," *id.* § 3101(d)(2).

The law in New York, as elsewhere, is that the unauthorized disclosure of privileged matter does not waive privilege. *See* 1 EDNA SELAN EPSTEIN, ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE, THE ATTORNEY-CLIENT PRIVILEGE, 1.IV.J (6th ed. 2017); *see N.Y. Times v. Lehrer McGovern Bovis, Inc.*, 300 A.D.2d 169, 172 (1st Dep't 2002) (no waiver of privilege after inadvertent disclosure where privilege holder "intended for [the] memorandum to remain confidential"). That is true whether the disclosure of the privileged material results from: (1) a "[p]urposefully disloyal disclosure by a subordinate," Epstein, *supra*; (2) theft, *Sackman v.*

Liggett Grp., Inc., 173 F.R.D. 358, 365 (E.D.N.Y. 1997) ("The assertion of privilege . . . is not waived through public disclosure of a stolen privileged document"); (3) seizure and disclosure by a government authority, *In re Parmalat Secs. Litig.*, 2006 WL 3592936, at *4 (S.D.N.Y. Dec. 1, 2006) (privilege not waived when documents were seized by foreign government and disclosed to plaintiff); or (4) unauthorized conduct of unknown origin, *see Baptiste v. Cushman & Wakefield, Inc.*, 2004 WL 330235, at *3-4, *6 (S.D.N.Y. Feb. 20, 2004) (e-mail anonymously left on plaintiff's desk privileged and must be returned to defendant); *see also In re Dayco Corp. Deriv. Secs. Litig.*, 102 F.R.D. 468, 469-70. (S.D. Oh. 1984) ("Absent any indication that [defendants] voluntarily gave the diary to the *Dayton Daily News*, publication of excerpts of same should not be considered a waiver of the privilege").

Defendants' reliance on a second-hand, press report of plainly privileged matter disclosed without permission is not appropriate. *See* Epstein, *supra*, 1.IX.G ("[I]f you are an honest person (an officer of the court) and purloined documents come into your possession, you cannot make use of the stolen goods. If the court so finds, the privileged documents will not be admissible as evidence and the receiving attorney may even be sanctioned."); *see also Dayco*, 102 F.R.D. 469-70 (motion to compel production of privileged materials denied, even after a journalist "obtained [the materials] from an unidentified source, and quotes extensively from the same"). Such privileged matter is not admissible, does not give rise to any discovery, and provides no basis for sanctions. Indeed, it would be completely contrary to the spirit of the Rules of Professional Conduct and privilege for an unauthorized release of privileged client information to set into motion a chain of events that requires the disclosure of confidential material in response.

* * *

Defendants' reliance on a press report that purports to divulge privileged matter to request sanctions should not be permitted. No historical factual information was withheld from Defendants, and Defendants are not entitled now or previously to privileged and confidential mental impressions of opposing counsel, no matter how they acquire them. The notion that this press report alerted Defendants to the possible tax issues is belied by the fact that two years ago Defendants vigorously examined a witness in deposition based on these very facts. The issue that has prompted this unwarranted filing is not even presented here, and it may never be presented. And, finally, Weil assures the Court that it possesses support, consistent with New York Court Rule 130-1.1 and New York Rules of Professional Conduct 3.1 and 3.3(a), for the legal assertion that the section 409A benefits remain available to those participants who participated in PWP's deferred compensation plan.

We thank Your Honor for your attention to this matter.

Respectfully submitted,

John K. Villa

cc: All Counsel of Record (by NYSCEF)