

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

PRESENT: BERNARD J. FRIED  
*Justice*

PART 60

**FBEM**

Aaron Brett Charney,

Plaintiff,

- v -

Sullivan & Cromwell, LLP,

Defendant.

INDEX NO. 100625/2007

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**

Cross-Motion:  Yes  No

APR 30 2007

NEW YORK  
COUNTY CLERK'S OFFICE

NYS SUPREME COURT  
REVIEWED  
APR 30 2007  
E-FILING DEPT.

This motion has been decided in accordance with the accompanying memorandum decision.

Dated: 4/30/07

Bernard J. Fried  
**BERNARD J. FRIED**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIV. PART 60

**FBEM**

----- X  
AARON BRETT CHARNEY,

Plaintiff,

- against -

Index No. 100625/2007

SULLIVAN & CROMWELL LLP,

Defendant.  
----- X

APPEARANCES:

For Plaintiff:

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Sullivan & Cromwell, LLP  
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New York, NY 10004  
(David H. Braff, Esq.)

**FILED**  
APR 30 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**FRIED, J.:**

Defendant Sullivan & Cromwell ("S&C") has moved to dismiss the complaint by Plaintiff Aaron Brett Charney with prejudice on the ground that it improperly discloses secrets or confidences of S&C's clients and of S&C, in violation of Charney's ethical duties as an attorney under Code of

Professional Responsibility DR 4-101 (22 NYCRR 1200.19), and of his contractual obligations to S&C. In the alternative, S&C asks me either to dismiss the complaint with leave to replead or to strike certain portions as irrelevant and prejudicial. The factual background of this case is described more fully in the memorandum decision and order filed today in the related action, *Sullivan & Cromwell, LLP v Charney*, Index No. 600333-2007 (the “related action”).

Charney’s complaint identifies nine S&C clients: Adelphia Communications Corp.<sup>1</sup>, Merrill Lynch & Co.<sup>2</sup>, Eastman Kodak Co.<sup>3</sup>, Inco Ltd.<sup>4</sup>, Unitedhealth Group Inc.<sup>5</sup>, USB AB<sup>6</sup>, Wachovia Corp.<sup>7</sup>, Goldman, Sachs & Co.<sup>8</sup>, and Prudential Financial, Inc.<sup>9</sup>, as well as five corporate deals involving some of those clients. It also identifies S&C attorneys who worked on some of these deals. For instance, it states that S&C partner Alexandra Korry, another named partner, and Charney worked on the sale of Adelphia to Time Warner Cable and Comcast Corp.<sup>10</sup> It states that S&C partner John J. O’Brien worked on the BlackRock, Inc. merger with Merrill Lynch Investment

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<sup>1</sup> (Charney Compl. ¶¶ 57-59.)

<sup>2</sup> (*Id.* ¶¶ 88, 90-95.)

<sup>3</sup> (*Id.* ¶¶ 99-103, 115-21, 124-25, 127-41; Annex C.)

<sup>4</sup> (*Id.* ¶ 105.)

<sup>5</sup> (*Id.* ¶ 105.)

<sup>6</sup> (*Id.* ¶¶ 106-07.)

<sup>7</sup> (*Id.* ¶ 118.)

<sup>8</sup> (*Id.* ¶¶ 134, 143.)

<sup>9</sup> (*Id.* Annex B.)

<sup>10</sup> (*Id.* ¶¶ 57-59.)

Managers.<sup>11</sup> It reports that S&C partners Stephen M. Kotran and James C. Morphy, Charney, and two other named associates worked on a deal involving Kodak's sale of its health group to Onex<sup>12</sup>. It alleges that Korry worked on UBS AB's acquisition of a division of ABN AMRO Bank N.V.<sup>13</sup> An annexed internal S&C email indicates that Kotran, with two named associates, represented Prudential in its acquisition of Allstate's variable annuity business.<sup>14</sup> Charney's complaint also alleges statements between S&C attorneys and clients praising S&C associates for doing good work<sup>15</sup>.

The complaint also alleges in paragraph 105 that S&C removed a lawyer from a matter involving a named client, and replaced him with an attorney that S&C intended to fire. Paragraph 143 alleges that S&C tried to persuade another named client to deny employment to a person who witnessed alleged acts of discrimination against Charney (and implies that the client acceded to its persuasion). Paragraph 137 and Annex C, an internal S&C email, quote a S&C partner describing a named client's deal as "lengthy and cumbersome," and Annex C refers to a named client's ongoing concerns about S&C's legal fees. The complaint also alleges discrimination against attorneys of Canadian national origin. Finally, it describes in part and attaches S&C's partnership agreement.

When a court is presented with a motion to dismiss pursuant to CPLR 3211 (a) (7), the complaint must be construed liberally, the facts alleged therein accepted as true, and the plaintiff

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<sup>11</sup> (*Id.* ¶¶ 88, 90-95.)

<sup>12</sup> (*Id.* ¶¶ 99 et al.)

<sup>13</sup> (*Id.* ¶¶ 106-07.)

<sup>14</sup> (*Id.* Annex B.)

<sup>15</sup> (*Id.* ¶¶ 134, 139)

accorded the benefit of every possible favorable inference (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Richbell Info. Servs., Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 [1st Dept 2003]). The court is not, however, required to accept factual allegations that are negated beyond substantial question by documentary evidence or allegations consisting of bare legal conclusions (*Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]; *Blackgold Realty Corp. v Milne*, 119 AD2d 512, 513 [1st Dept 1986], *affd* 69 NY2d 719 [1987]; *Jordan v UBS AG*, 11 AD3d 283, 285 [1st Dept 2004]; *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Code of Professional Responsibility DR 4-101, entitled “Preservation of confidences and secrets of a client,” provides in pertinent part:

(a) Confidence refers to information protected by the attorney-client privilege under applicable law, and secret refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(b) Except when permitted under section 1200.19(c) of this Part, a lawyer shall not knowingly:

- (1) reveal a confidence or secret of a client;
- (2) use a confidence or secret of a client to the disadvantage of the client; and
- (3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

\* \* \*

(d) A lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by subdivision (c) of this section through an employee.

(22 NYCRR 1200.19.)

S&C argues that Charney’s complaint violates DR 4-101, because it identifies “specific information about S&C’s clients, their activities, and transactions.” S&C has objected in principle to every reference to S&C’s clients in the complaint, as well as to the attachment of S&C’s partnership agreement and two internal S&C emails as exhibits.

“[N]ot all communications to an attorney are privileged. In order to make a valid claim of privilege, it must be shown that the information sought to be protected from disclosure was a ‘confidential communication’ made to the attorney for the purpose of obtaining legal advice or services” (*Matter of Priest v Hennessy*, 51 NY2d 62, 69 [1980]; *see also U.S. Bank Nat. Ass'n v APP Intl. Finance Co.*, 33 AD3d 430, 431 [1st Dept 2006] [“the communication must have been made for the purpose of facilitating the rendition of legal advice or services in the course of a professional relationship and have been primarily or predominantly of a legal rather than a commercial nature”]).

The courts of New York have uniformly held that fee arrangements between attorneys and clients are not protected by the attorney-client privilege, because they are considered not to be directly relevant to legal advice that may be given (*In re Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003*, 4 NY3d 665, 678-79 [2005]; *Matter of Priest*, 51 NY2d at 69; *People v Stewart*, 230 AD2d 116, 120 [1st Dept 1997]; *Oppenheimer v Oscar Shoes, Inc.*, 111 AD2d 28, 29 [1st Dept 1985]; *People v Belge*, 59 AD2d 307, 308 [4th Dept 1977]; *In re Grand Jury Subpoena of Stewart*, 144 Misc 2d 1012, 1017 (Sup Ct, NY County), *affd* 156 AD2d 294 [1st Dept 1989]).

Applying these principles, I conclude that there is nothing in or annexed to Charney’s complaint that discloses attorney-client privileged material. In particular, an in-house counsel’s exhortation to S&C to keep its fees down on a legal matter and conversations between a S&C attorney and a client in which an associate was praised for doing good work are not directly relevant to legal advice.

DR 4-101 forbids more than just privileged disclosures, however; it also forbids the disclosure by an attorney of any information that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client. S&C has

pointed to no authority holding that “client secret” is broad enough, as a matter of law, to include the names of clients or the attorneys staffed on particular transactions, attorney reviews, or conversations between attorneys and clients regarding attorney performance, barring a specific request by a client that this information be kept secret. Consequently, the determination that a client secret has been disclosed would ordinarily depend on issues of fact. Based on the documents submitted on this motion, however, it appears that the clients have acquiesced in the publication of the fact that they were represented by S&C and of S&C’s staffing on these deals. Consequently, I conclude that the identification of nine S&C clients and the references to five corporate deals in the complaint cannot be considered client secrets.

According to documents submitted by Charney in opposition to S&C’s motion<sup>16</sup>, S&C’s own website identifies each of these clients as clients of S&C. Four of the five deals -- the BlackRock, Inc. merger with Merrill Lynch Investment Managers, Prudential Financial’s acquisition of Allstate’s variable annuity businesses, UBS AB’s acquisition of a division of ABN AMRO Bank N.V., and the sale of Adelphia to Time Warner Cable and Comcast -- are featured on S&C’s website. The fifth -- Kodak’s sale of its health group to Onex -- was announced by Kodak itself in a press release on May 4, 2006. The remaining four clients -- Goldman Sachs, Kodak, Wachovia, and Inco -- are referred to in connection with other transactions on S&C’s website.

S&C’s website also features biographies of the partners named in Charney’s complaint, which list the partners’ clients and some of the deals they have worked on. For instance, Kotran’s biography reports that he represented Prudential in its acquisition of Allstate’s variable annuity

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<sup>16</sup> (See generally Eisenberg Affirm. Exs. C–BB.) At oral argument, S&C did not challenge the authenticity of these documents.

business. The fact that Kotran, Charney, and Grinberg worked on the Kodak deal was independently reported by the New York Lawyer two days after Charney's complaint was filed.<sup>17</sup> The New York Lawyer reported on April 28, 2005 that Alexandra Korry and 23 other named attorneys at S&C worked on the Adelphia sale.<sup>18</sup> I note that the New York Law Journal also reported that S&C partner John J. O'Brien, along with 22 other partners, special counsel and associates at S&C, worked on the Merrill Lynch--Blackrock deal (Kennedy, *New Deals: Lawyers on Major Transaction*, NYLJ, Feb. 23, 2006, at 5, col 4). The New York Law Journal also reported that S&C partner Alexandra Korry, along with three other named S&C attorneys, represented UBS AB in its acquisition of a division of ABN AMRO Bank N.V. (Brown, *New Deals: Lawyers on Major Transaction*, NYLJ, Oct. 2, 2003, at 5, col 4). In addition, the identity of associates who staffed any of the deals must have been known to the other participants in the deal. S&C has offered no explanation as to how the disclosure of this information in Charney's complaint is likely to be detrimental or embarrassing to its clients.

Based on the documents before me, I cannot conclude as a matter of law that S&C is entitled to strike the above references to clients and deals from Charney's complaint based on DR 4-101.

However, based on the record before me, which has not yet been fully developed, it appears that some of the allegations in Charney's complaint are either irrelevant to Charney's causes of actions, do not comply with CPLR 3014's requirement that every allegation in the complaint be stated briefly and concisely, or could potentially implicate DR 4-101. For instance, Charney's complaint alleges discrimination against Canadians and attaches S&C's partnership agreement, both

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<sup>17</sup> (Eisenberg Affirm. Ex. V, Friend, *NY Partners and Associates Working on Billion Dollar Deals*, NYLJ, Jan. 18, 2007.)

<sup>18</sup> (Eisenberg Affirm. Ex. U, Flatow, *NY Partners and Associates Working on \$17.6 Billion Dollar Deal*, NY Lawyer, Apr. 28, 2005.)

of which appear to be irrelevant to Charney's claims. Paragraph 105, which arguably implies the allegation that S&C did not value one of its clients, and paragraph 143, which arguably implies that another client cooperated with S&C to deny employment to an individual who witnessed the alleged discrimination, could potentially implicate DR 4-101. The description of the named client's transaction in paragraph 137 and Annex C as "lengthy and cumbersome," and the references to a named client's concerns about S&C's legal fees in Annex C, contain material that is either irrelevant to Charney's claims or could potentially implicate DR 4-101.

S&C has also contended that Charney's complaint should be dismissed because it discloses confidences of S&C and its clients in violation of his contractual obligations to S&C. As I noted *supra*, no attorney-client privileged material was disclosed in Charney's complaint. S&C's Office Manual, which may have imposed other obligations on S&C's legal personnel, was not submitted in S&C's motion papers. Consequently, this contention is rejected. S&C's other assertions have been considered and do not require further discussion.

Rather than sifting through Charney's complaint and attachments to strike the inappropriate material, I will strike the entire complaint and grant Charney leave to replead in accordance with this order. In light of my decision dismissing Charney's complaint, I will not sign a discovery order until an amended complaint is served and filed.

For the foregoing reasons, it is:

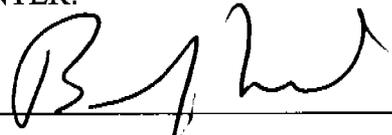
**ORDERED** that defendant Sullivan & Cromwell's motion to dismiss (Mot. Seq. No. 001) is granted; and it is further

**ORDERED** that plaintiff Charney's complaint is dismissed in its entirety without prejudice; and it is further

**ORDERED** that plaintiff Charney may serve and file an amended complaint in accordance with this order within twenty (20) days of service of a copy of this order with notice of entry.

Dated: April 30, 2007

ENTER:

  
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J.S.C.

**BERNARD J. FRIED**  
**J.S.C.**

**FILED**  
APR 30 2007  
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