SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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HAHN & HESSEN, LLP,

Plaintiff,

against

IAN PECK, individually and as Executor of the Estate of Joan Peck, ART CAPITAL GROUP, LLC, ART CAPITAL GROUP, INC., FINE ART FINANCE, LLC, ACG CREDIT COMPANY, LLC, ACG CREDIT COMPANY II, LLC, and ACG FINANCE COMPANY, LLC,

Defendants.

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ART CAPITAL GROUP, LLC, ART CAPITAL GROUP, INC., FINE ART FINANCE, LLC, ACG CREDIT COMPANY, LLC, ACG CREDIT COMPANY II, LLC, and ACG FINANCE COMPANY, LLC,

Counterclaim Plaintiffs,

against

HAHN & HESSEN, LLP,

Counterclaim Defendant.

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Index Number 603122/2008E
Mot. Seq. Nos. 009, 010, 011

DECISION AND ORDER

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For the Defendants:
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212-600-2085

E-filed papers considered in review of these discovery related motions:

	PAPERS	E-FILING DOCUMENT NUMBER:
Mot. Seq. 009	Order to Show Cause	124, 136

	Affirmation, exhibits in support	*not uploaded into NYSCEF system*[1]
	Supplemental Affirmation	125
	Affirmation in Opposition, exhibits A,B	135, 135-1, 135-2
	Reply Affirmation, Memorandum of Law in Reply	138, 139
Mot. Seq. 010	Notice of Motion, Affirmation, exhibits, Memorandum in Support	128, 128-1 - 128-3
	Memorandum in Opposition, Affirmation, exhibits,	133, 134
	Memorandum in Reply, Affirmation, exhibits	137, 137-1 - 137-3
	Transcript of Oral Argument	140
Mot. Seq. 011	Notice of Motion, Affirmation, exhibits A, B	142, 142-1 - 142-3
	Affirmation in Opposition	143
	Affirmation in Reply	144

PAUL G. FEINMAN, J.:

Motions bearing sequence numbers 009, 010, and 011 are consolidated for the purposes of decision.

In motion sequence number 009, brought by order to show cause (Doc. 126), plaintiff seeks an order striking defendants' counterclaims and defenses.

In motion sequence number 010 (Doc. 128), defendants/counterclaim plaintiffs seek an order compelling plaintiff/counterclaim defendant to produce specified documents described in its privilege log produced to them on about June 10, 2011.

In motion sequence number 011 (Doc. 142), defendants seek an order vacating the note of issue.

For the reasons which follow, the motion by plaintiff (009) is granted to the extent that defendants shall pay plaintiff $5,000.00 as costs of the motion and is otherwise denied. The motion by defendants to compel (010) is granted in part and otherwise denied. The motion by defendants to vacate the note of issue (011) is granted.

BACKGROUND

[1]Movant is directed to upload a copy of the papers supporting its motion brought by order to show cause, under this index number and motion sequence number, within seven (7) days of entry of this decision and order.

This is a litigation brought by a law firm against its former clients. Plaintiff law firm claims it is owed approximately $870,000 from defendants for legal services consisting of litigation, corporate, and trust and estate matters performed on their behalf primarily between April and June 2008. According to plaintiff, defendants repeatedly "aggregated invoices and then demanded a discount" before paying their legal fees (Doc. 133, Pl. Memo in Opp. p. 4). Throughout its representation of these clients, the firm engaged in "numerous negotiations" in an attempt to resolve the nonpayment (Doc. 133, Pl. Memo in Opp. pp. 4-5). Defendants promised on more than one occasion to pay the invoices within 30 days of issue, but "failed to do so," and this ultimately led to the firm's withdrawal as counsel (Doc. 133, Pl. Memo in Opp. pp. 4, 5). Even after it withdrew as counsel in July 2008, the firm continued to negotiate with defendants, "trying to get paid for the substantial and significant work performed during the months at issue and offering transitional services" (Doc. 133, Pl. Memo in Opp. p. 5).

Defendants[2] are various companies and a corporation, all of which are owned by defendant Peck (together the Art Capital Group defendants); his companies are a third-generation client of the law firm (Doc. 70-1, Ver. Ans. and 1st Am. Counterclaims, pp. 8-9, ¶¶ 2-7. 9). The Art Capital Group defendants counterclaim that beginning in about 2005, the size of the legal bills received from the law firm "began to significantly exceed" their expectations, and although Peck was assured that costs would be controlled, "the problem continued" (Doc. 70-1, Ver. Ans. and 1st Am. Counterclaims p. 10 ¶¶ 18-19). Until Spring 2008, Peck was able to discuss with an attorney from the law firm what he believed to be variances in the bills, and after a new amount

[2]Although defendants are also counterclaim plaintiffs, and plaintiff is the counterclaim defendant, for simplicity's sake, the parties will generally be referred to only as "defendants" and "plaintiff."

was agreed to, the Art Capital Group defendants would pay the adjusted lower amount (Doc. 70-1, Ver. Ans. and 1st Am. Counterclaims p. 11 ¶¶ 21-22). This changed in Spring 2008 when the firm informed Peck that his companies would need to pay their bills in full, within 30 days of receipt (Doc. 70-1, Ver. Ans. and 1st Am. Counterclaims pp. 11 ¶¶ 24-26). Peck "agreed that Art Capital Group would pay its bills promptly," but he also advised that "he would not simply pay the face amount of H&H's bills without review and consideration as to whether the charges were appropriate" (Doc. 70-1, Ver. Ans. and 1st Am. Counterclaims pp. 11-12 ¶ 27). Peck's review of the April and May 2008 invoices found "what appeared to be an extraordinary amount of overcharging" (Doc. 70-1, Ver. Ans. and 1st Am. Counterclaims p. 12 ¶ 31). He was unsuccessful in working out the matter with the law firm which at one point agreed to a lower figure and then withdrew its offer and demanded $723,471 from the Art Capital Group defendants "immediately," or stated it would withdraw as counsel (Doc. 70-1, Ver. Ans. and 1st Am. Counterclaims pp. 14-15 ¶¶ 39-44). The Art Capital Group defendants terminated their relationship with the law firm on July 29, 2008, after which the law firm allegedly held the legal files as "ransom" for full payment of the balance outstanding (Doc. 70-1, Ver. Ans. and 1st Am. Counterclaims p. 16 ¶¶ 47, 50). According to defendants, the firm's withdrawal without consent prejudiced more than one "hotly contested matter[ ]" involving the Art Capital Group (Doc. 70-1, Ver. Ans. and 1st Am. Counterclaims p. 18, ¶ 58).

In their counterclaims, defendants allege three instances of malpractice. One involves the settlement of an amount owed to the Art Capital Group based on the terms of a note (the "Tunkl Settlement"); although explicitly reminded that the note provided for payment of attorney's fees and expenses, the law firm allegedly settled the matter without including the payment of nearly

$400,000 in attorney's fees owed by the Art Capital Group defendants (Doc. 70-1, Ver. Ans. and 1st Am. Counterclaims pp. 20-21 ¶¶ 61-66). The second involves the law firm's alleged mishandling of "the SageCrest Settlement," which has exposed the Art Capital Group to "potential millions in damages," with the legal work done for that matter being the "primary subject of the over billing" in this litigation (Doc. 70-1, Ver. Ans. and 1st Am. Counterclaims pp. 20 ¶ 67). The third involves a fee-splitting arrangement between one of the law firm's attorneys and the personal injury lawyer to whom Peck was referred to handle his deceased mother's litigation; Peck did not know about the arrangement and contends he would not have consented to it had he known (Doc. 70-1, Ver. Ans. and 1st Counterclaims p. 28-29 ¶¶ 88-90).

This litigation was commenced in October 2008. Defendants served their answer with counterclaims in December 2008 and amended it in July 2010. The litigation has been plagued by recalcitrance in the discovery process by both sides.

MOTION SEQUENCE NUMBER 009

Plaintiff seeks an order striking defendants' counterclaims and defenses based on repeated failures to comply with disclosure rules as well as court orders and stipulations between the parties (Doc. 126). Most specifically, it points to the tardy and allegedly insufficient response by defendants to the order of July 6, 2011, which resolved plaintiff's earlier motion to compel. That order provided that July 27, 2011 was the deadline by which defendants were to provide the outstanding discovery. None of that discovery was produced on or before that deadline (Doc. 138, Weintraub Reply Affirm. ¶ 4). Only on August 9, 2011, the day this motion was served on defendants, did they produce an initial 2,392 pages of disclosure, with another 19,000 + pages produced by August 12, 2011 (Doc. 138, Weintraub Reply Affirm. ¶ 5). Plaintiff had less than a

week to digest these documents before conducting the court-ordered August 16, 2011 deposition of Ian Peck, thus prejudicing it. On September 7, 2011, defendants turned over 718 additional pages of discovery (Doc. 138, Weintraub Reply Affirm. ¶ 11). In addition, plaintiff argues that the production by defendants on August 11, 2011 of a privilege log in response to plaintiffs' request for the settlement documents pertaining to the "Subsequent SageCrest Litigation" is improper as they had waived any privilege to withhold the documents based on the terms of the July 6, 2011 so ordered stipulation (Doc. 138, Weintraub Reply Affirm. ¶¶ 20-21).[3] It also argues that defendants have not produced documents that were referenced by Peck in his deposition, and have instead claimed the documents do not exist. Plaintiff argues that defendants, in addition to this most recent example, have "repeatedly refused to comply with discovery requests, and court orders governing discovery" (OSC, Weintraub Affirm. ¶ 9). Plaintiff's counsel describes several instances in 2011 where defendants did not produce or comply with the agreed upon terms as set forth in several so ordered stipulations, requiring plaintiff more than once to seek help from the court (OSC, Weintraub Affirm. ¶ 3). Plaintiff now seeks an order striking the defendants' defenses and counterclaims (CPLR 3126 [e]).

CPLR 3126 provides that where a party refuses to obey an order to disclosure or willfully fails to disclose information which the court finds ought to have been disclosed, the court may take appropriate measures to sanction the offending party, including striking pleadings or portions thereof. Defendants argue in opposition that they have now complied with the court's

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[3]The July 6, 2011 so ordered stipulation provides that the parties "will produce all documents agreed to be produced or otherwise not objected to on or before July 27, 2011." (OSC Weintraub Affirm. ex. C; see also Doc. 120). In addition, "All documents responsive to Plaintiff's Supplemental D&I (3/4/11), # 1 and 2, relating to the subsequent SageCrest litigations shall be produced by July 27, 2011 by Defendants, to the extent that documents are in possession of defendants" (OSC Weintraub Affirm. ex. C; see also Doc. 120).

order, and have "gone above and beyond the requirements of the C.P.L.R. in producing documents responsive to" plaintiff's requests (Doc. 135, Epstein Affirm. in Opp. ¶ 2). Their attorney states that the documents in defendants' "possession, custody or control" have been produced" (Doc. 135, Epstein Affirm. in Opp. ¶ 5). His affirmation sets forth in detail what plaintiff still requests and explains that the documents have been produced, do not exist, or have been properly withheld from production (Doc. 135, Epstein Affirm. in Opp. ¶ 6). Defendants also argue that plaintiff too has had a history in this litigation of failing to timely produce documents (Doc. 135, Epstein Affirm. in Opp. ¶ 4).

The excuse that the untimeliness was due to new counsel taking over the case is not terribly persuasive, given that the new counsel appeared at the July 6, 2011 compliance conference and even signed the so ordered stipulation setting forth the agreed-upon deadlines (OSC, Weintraub Affirm., ex. C; see also Doc. 120). That defendants only began to produce the documents requested of them on the day this motion was served, is not acceptable. Moreover, because the documents were produced late, plaintiff was prejudiced by having to conduct defendant Peck's deposition without sufficient time to review the documents beforehand.

Nonetheless, striking the defenses and counterclaims is an unduly harsh penalty, given the general history of delay in this litigation, and there being no clear showing that defendants' failure to comply with the court's discovery orders was actually willful or contumacious (*see Delgado v City of N.Y.*, 47 AD3d 550, 550 [1st Dept 2008]). CPLR 3126 allows the court latitude in crafting a suitable sanction (*see Trabanco v City of N.Y.*, 81 AD3d 490, 492 [1st Dept 2011]). Accordingly, defendants are directed to pay plaintiff's attorney $5,000.00 as costs of the motion, within 30 days of service of notice of entry of this order, and the motion is otherwise denied.

Should defendants fail to make payment, or to pay untimely, plaintiff may renew its motion. which will then be granted (*see Advanced Fertility Servs., P.C. v Yorkville Towers Assoc.*, 61 AD3d 472 [1st Dept 2009] [motion to dismiss the complaint for noncompliance granted unless the plaintiff paid defendants' attorney $5,000 within 30 days]).

MOTION SEQUENCE NUMBER 010

As directed previously by the court, plaintiff law firm prepared a privilege log, emailed to opposition counsel on June 10, 2011, describing 410 documents that it describes as internal law office communications which are privileged and not discoverable (Doc. 128-2, Roth Affirm., ex. A [Priv. Log]). These documents are deemed responsive to the demand by defendants for documents concerning the reasonableness of the firm's invoices, and the firm's discussions and resolutions of questioned invoices. According to the log, the documents at issue were created between February 6, 2006 and September 24, 2008. Plaintiff argues that the documents are all privileged, as they are either attorney-client communications, attorney work product, prepared in anticipation of litigation, or are materials for law office review (Doc. 128-2, Roth Affirm., ex. A [Priv. Log]).

Defendants move for an order compelling plaintiff to produce the documents listed as numbers 1 through 352 (Doc. 128). At oral argument, the court directed the firm to submit the documents in question for an in camera review. The documents have been provided. They are not Bates-stamped or otherwise numbered in accordance with the privilege log enumerations, however they appear to be in order by date, which corresponds to the manner the documents are listed in the privilege log. The documents consist of the original message and then each response and reply concerning the same subject matter, thus some of them cover more than one day and

may include responses by more than one recipient.

In general, there shall be "full disclosure of all matter material and necessary" to prosecute or defend an action (CPLR 3101[a]). Discovery procedures are to be liberally construed (*Rios v Donovan*, 21 AD2d 409, 412 [1st Dept 1964]). The words "material and necessary" have been interpreted to "require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and the "test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co*, 21 NY2d 403, 406 [1968]; *Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009]). Moreover, a client has "presumptive access to the attorney's entire file on the represented matter, subject to narrow exceptions" (*Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn LLP*, 91 NY2d 30, 37 [1997]).

The law creates only three categories of protected materials: privileged matter which is absolutely immune from discovery (CPLR 3101[b]; attorney work product, also absolutely immune from discovery (CPLR 3101[c]); and trial preparation materials, which are conditionally immune (CPLR 3101 [d] [2]); see *Barber v Town of Northumberland*, 88 AD2d 712, 712-713 (3d Dept 1982]). The burden of demonstrating an immunity from discovery is on the party asserting the immunity (*Koump v Smith*, 25 NY2d 287, 294 [1969]). Of course, the use of such designations is not conclusive in the court's analysis (*Graf v Aldrich*, 94 AD2d 823 [3rd Dept. 1983]; *Aetna Cas. & Sur. Co. v Certain Underwriters at Lloyd's, London*, 176 Misc 2d 605, 609 [Sup. Ct., New York County 1998]). In any event, whether a particular document is protected is fact specific and often requires in camera review (*Horizon Asset Mgt., Inc. v Duffy*, 82 AD3d 442, 443 [1st Dept 2011]).

Plaintiff's arguments that the documents are either attorney-client communications or were made in anticipation of litigation are not borne out by the court's review. Communications made between an attorney and his or her client in the course of professional employment, the purpose of which is to "facilitat[e] the rendition of legal advice or services," are absolutely privileged under the attorney-client privilege (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377, 378 [1991], quoting *Rossi v Blue Cross and Blue Shield of Greater New York*, 73 NY2d 588, 593 [1989]; CPLR 4503 [a]). Here, the emails are between various attorneys of the law firm, with a last group consisting of a couple of emails between the law firm and the succeeding counsel for the Art Capital Group. None of them are attorney-client communications, although some of them incorporate communications to and from defendant Peck. To the extent plaintiff argues that its attorneys were writing both as the client and the firm's self-represented counsel when the outstanding invoice issue was coming to a head, such an argument is not persuasive given the content of the emails (Doc. 134, Cavallaro Affirm. in Opp. ¶ 11).

Nor were the documents created in anticipation of litigation (CPLR 3101 [d] [2]), given that this litigation only commenced in the fall of 2008 and the emails date as early as 2006. In addition, the contents of those emails written in the spring and early summer of 2008 also show no anticipation of litigation. Plaintiff does not meet its burden of showing that the emails were prepared solely in anticipation of litigation or trial (*see Sigelakis v Washington Group, LLC*, 46 AD3d 800, 800 [2d Dept 2007]).

An attorney's work product is, defined narrowly as those documents created by an attorney which could only have been created by a lawyer, and which contain the attorney's analysis and strategy, and such documents are absolutely privileged (*see, Doe v Poe,* 244 AD2d

450, 451 [2d Dept 1997]; CPLR 3101[c]). Work product applies to "documents prepared principally or exclusively to assist in anticipated or ongoing litigation" rather than in the ordinary course of business (*Matter of Stenovich v Wachtell, Lipton, Rosen & Katz*, 195 Misc 2d 99, 116 [Sup Ct New York County 2003]). It encompasses materials that consist of "'interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible things'" (*Acwoo Intl Steel Corp. v Frenkel & Co.*, 165 AD2d 752, 752 [1st Dept 1990], quoting *Victory Markets, Inc.* v *Purer*, 51 AD2d 895 [1st Dept 1976], *citing Hickman* v *Taylor*, 329 US 495 [1947]).

Here, the emails were written by and sent to attorneys within plaintiff's office. The emails were clearly meant to be confidential and were communicated to only a small group of attorneys and staff. Although they do reveal the attorneys' strategies in attempting to negotiate with their client, and some of the communications assess the value of the firm's legal work provided to defendants, it cannot be held that the emails were prepared to assist in litigation. Rather, they concern the business end of the law firm's existence, the collection of moneys owed and not the ensuing litigation of those fees. Therefore, the documents do not qualify as attorney work product.

The last argument plaintiff puts forth for withholding production is that the documents are materials for internal law office review. Materials for internal law office review will sometimes be held not discoverable. In *Matter of Sage Realty Corp. v Proskauer Rose Goetz & Mendelsohn, LLP,* the Court of Appeals held that "nonaccess would be permissible as to firm documents intended for internal law office review and use," because of the "need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate

representation." (91 NY2d 30, 37-38 [1997]). *Sage Realty* posits that such documents might include "documents containing a firm attorney's general or other assessment of the client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation." (*Id*).

Plaintiff contends that many of the e-mails were created and intended for law office review only and comment on the firm's impressions or assessment of defendants and their character (Doc. 134, Cavallaro Affirm. in Opp. ¶ 12). It also argues that the internal communications were made in the course of its self-representation (Doc. 133, Pl. Memo of Law in Opp. pp. 6-7). Among other cases it cites in its support is *In re Refco Securities Litigation*, 759 F Supp 2d 342, 346 (SDNY 2011), which held that the "internal musings and idle chatter" of the law firm's partners were not subject to disclosure as they are "work product" as described in *Sage Realty* (Doc. 133, Pl. Memo of Law in Opp. pp. 9-10). At issue in *Refco Securities* was an e-mail the contents of which were described by the court as "internal musings," "just partners chatting about something," and "musings between counsel and partners at the firm as to how litigation might shape or whatever" (759 F Supp 2d at 346). The e-mail was held to be privileged as work product and also irrelevant to the issues in the litigation at hand (759 F Supp 2d at 345). Plaintiff argues that so too with the e-mails at issue here, the contents are essentially conversations among the firm's partners setting forth their impressions "of the legal or factual issues presented in the representation." (Doc. 133, Memo of Law in Opp. pp. 9-10).

Both sides refer to *Bolton v Weil, Gotshal & Manges*, 2005 NY Slip Op. 52329U, 836 NYS2d 483 (Sup Ct NY County, 2005), a legal malpractice action. In *Bolton*, the court applied

Sage Realty in assessing various documents described in the law firm defendant's privilege log as concerning "outstanding fees"; the defendant had sought to protect them under the work product privilege. *Bolton* directed that the law firm was to provide the internal documents to the plaintiffs, in part because certain of the documents were directly relevant to the issues in the action, and because those documents described in the privilege log as concerning "outstanding fees" were not exceptions to the general rule that information about fees paid by a client is not privileged (*id*, citing *Priest v Hennessy*, 51 NY2d 62, 69 [1980]; *see also Brandman v Cross & Brown Co. of Florida, Inc*, 125 Misc 2d 185, 188 [Sup. Ct., Kings County 1984] [reiterating the holding that the amounts, fee arrangements, and communications concerning the fee to be paid are collateral matters and not privileged]).

Plaintiff attempts to distinguish *Bolton* from the instant matter, arguing that here the claim is for breach of contract for nonpayment of fees rather than legal malpractice; the plaintiff law firm "was representing itself' in its billing disputes with defendants; and the internal communications concerning the nonpayment are confidential and privileged (Doc. 133, Memo of Law in Opp. pp. 12-13). This overlooks the counterclaims alleging breach of fiduciary duty and legal malpractice, and the relevance to defendants of these documents.

In sum, although the emails are certainly written for the eyes of the recipients only, they do not fall within the category of materials for internal law office review as defined in *Sage Realty*, and to the extent they do, defendants demonstrate a need for their production that negates any privilege. Accordingly, defendants' motion to compel is granted. However, to the extent certain of the e-mails may contain any extraneous comments about the attorneys' own personal lives, these can be redacted as irrelevant "musings" pursuant to *Refco Securities Litigation*, 759

F Supp 2d 342. Furthermore, to the extent that the emails contain a firm attorney's "general or other assessment of the client," as described in *Sage Realty*, these comments too may be redacted. However, the writers' comments about the situation and the history of the relationship between the firm and the client are not to be redacted.

These documents shall be produced by plaintiff within twenty (20) days of service of a copy of this order together with notice of its entry.

MOTION SEQUENCE NUMBER 011

Defendants seeks an order vacating the note of issue based on the existence of outstanding discovery (Doc. 142), namely the e-mails at issue in motion sequence 010. They argue that plaintiff filed the note of issue notwithstanding the existence of their motion to compel production of the documents described in the privilege log discussed above; they further argue that the note of issue and certificate of readiness contain false statements as to the case's readiness for trial (Doc. 142-1, Epstein Aff. in Supp. ¶¶ 7-10).

The note of issue was filed by plaintiff on February 28, 2012 (Doc. 141). The date of February 28, 2012 was assigned by the court at the parties' compliance conference held on September 7, 2011, as set forth in the so ordered stipulation filed on October 18, 2011 (Doc. 142-3, Epstein Aff. in Supp. ex. B). Because of the parties' past histories of initial noncompliance with disclosure agreements, it was made clear at the September 7, 2011 compliance conference that although the case was very much beyond the court's standards and goals for readying a case for the trial calendar, the note of issue needed to be extended yet again, so as to allow the parties to adequately prepare or trial. Plaintiff defends its action in filing the note of issue based on the deadline imposed by the court, although in fact, discovery is not yet completed in this action.

Noticeably, it does not appear that either plaintiff nor defendants sought input from the court as the date for filing approached.

Defendants' motion must be granted. They are correct that a significant number of e-mails have been wrongly withheld by plaintiff. Defendants' attorney posits that one or more depositions may be needed based on review of the documents. The parties shall appear for a compliance conference to determine whether any depositions are sought. The court will provide specific dates for the depositions and the failure to hold the deposition(s) on the date(s) selected shall result in sanctions against the offending party, upon motion notice to the other side.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion (009) seeking an order striking defendants' counterclaims and defenses is granted on to the extent of directing defendants to pay the plaintiff $5,000.00 as costs of the motion within 30 days of entry of this order and otherwise denied; and it is further

ORDERED that defendants' motion (010) to compel certain discovery is granted to the extent plaintiff is directed to produce e-mails and documents as described above within 20 days of service of a copy of this decision and order together with notice of its entry; and it is further

ORDERED that defendants' motion (011) to vacate the note of issue is granted and the note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that all parties are directed to appear for a compliance conference on June 27, 2012 at 2:15 p.m. in Room 212, 60 Centre Street, New York, NY 10007 and said conference may not be adjourned, even on consent of the parties; and it is further

ORDERED that failure to comply with the court's directives contained herein may result in an order issuing at the June 27, 2012 striking an offending party's pleadingsd it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office (Room 119), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that plaintiff shall contact the Part 12 Clerk, Mr. Michael Kasper, at (646) 386-3273 to arrange for retrieval by May 25, 2012 of the file folder containing the documents reviewed in camera by the court.

This constitutes the decision and order of the court.

Dated: May 18, 2012
New York, New York

Paul G. Feinman
J.S.C.