Herman v Herman
2015 NY Slip Op 31205(U)
July 13, 2015
Supreme Court, New York County
Docket Number: 650205/2011
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ROSEMARIE A. HERMAN, et al.,

Index No. 650205/2011

Plaintiffs,

DECISION & ORDER

-against-

JULIAN MAURICE HERMAN, et al.,

Defendants.

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JULIAN MAURICE HERMAN,

Third-Party Plaintiff,

-against-

JOSEPH ESMAIL and SOLITA N. HERMAN,

Third-Party Defendants.

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SHIRLEY WERNER KORNREICH, J.

Motion Sequences 021, 023 & 025 are consolidated for disposition.

Defendant Maurice Herman moves (Motion Sequence 021) for a protective order relating to allegedly privileged documents turned over to plaintiffs by defendant Michael Offit. Plaintiffs oppose. The motion is denied in part on substantive grounds, and the balance is denied as moot.

Plaintiffs move (Motion Sequence 023) for 1) a default judgment against Maurice as a sanction for his failure to provide discovery and/or spoliation; 2) to compel Maurice to comply with a January 20, 2015 decision and order of the court (Jan 20 Order, Doc 986[1]) and to produce unredacted email solely between Maurice and Offit;[2] all communications between Maurice and

[1] Defined terms used in the Jan. 20 Order, and the court's decisions on the motion to dismiss (Doc 60) and to reargue (Doc 420) are incorporated here.

[2] Bate stamps MO 023824 through MO 25984.

his accountant, Kaufman; and Maurice's personal tax returns for 1997 through 2003; and 3) to remove the confidentiality designation by Maurice on emails between him and Offit, which had previously been marked confidential in discovery pursuant to the parties' Confidentiality Stipulation. Maurice opposes, except for the motion to disclose his communications with Kaufman. The motion regarding communications with Kaufman is granted without opposition, the motion for a default judgment against Maurice and part of the motion to compel production is granted, and the balance of the motion is denied as moot.

Additionally, plaintiffs move (Motion Sequence 025) for 1) a default judgment based on Maurice's failure to comply with the self-executing conditional January 2015 Order, which required Maurice to comply with a contemporaneous compliance conference order (Jan 20 Compliance Order, Doc 985); and 2) to compel Maurice to produce the documents on his privilege logs, dated February 20, 2015 and May 5, 2015. Maurice opposes. The motion for a default judgment is granted, and the balance is denied as moot.

Further, this opinion addresses emails submitted by Offit for *in camera* review on December 22, 2014. Offit shall produce the emails to plaintiffs.

Background

The reader's familiarity with prior written decisions of this court in this action is assumed, and the facts will be repeated here only as necessary.

The gravamen of the action is the charge that, in a 1998 Transaction, Maurice's wholly-owned entity, Consolidated, paid Rosemarie's Trusts too little, $8 million, for 50% of the LLCs owned by Maurice and the Trust. Prior to the 1998 Transaction, the LLCs owned six Herman Properties, valuable Manhattan apartment buildings, which were inherited half by Rosemarie in trust and half by Maurice outright, from their father. Offit, as Trustee, agreed to the 1998

Transaction on behalf of Rosemarie's Trusts. Four years later, in a 2002 Transaction, Consolidated and Maurice sold five of the LLCs to Maurice Mann for $100 million (Transferred LLCs). The one LLC that Mann did not buy was defendant NY Windsor, the predecessor to defendant DE Windsor (with NY Windsor, Windsor Plaza entities, with Maurice, Herman Defendants), which was formed in 2002, and which Maurice still owns. The Windsor Plaza entities own, or owned, 952 5th Avenue.

Offit and Maurice have claimed throughout this litigation that in 1998, $8 million was a fair price for the Trusts' fifty percent of the LLCs. Rosemarie disagrees and has claimed throughout that Offit and Maurice concealed the 1998 Transaction from her. Contemporaneously with the 1998 Transaction, Offit, Rosemarie's trustee, and Maurice signed a Confidentiality Agreement, in which they agreed not to disclose the 1998 Transaction to anyone, including Rosemarie. The 2002 Transaction contract contained a confidentiality provision.

This action was commenced on January 25, 2011. Doc 1. In September 2011, plaintiffs served a first document demand requesting production of communications between Maurice and Offit. 3/2/15 Avedesian Affirmation, Doc 1053, ¶3. On December 5, 2011, the parties entered into a stipulation (Preservation Stipulation) for the preservation of electronically stored information (ESI). Doc 51.[3]

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[3] The Preservation Stipulation provided, in pertinent part, as follows:
For the relevant periods relating to the issues in this litigation, ***each party shall take all reasonable steps (including suspending aspects of ordinary computer processing and/or backup of data*** that may compromise or destroy [ESI]), necessary ***to, maintain and preserve*** such ***ESI*** as may be (i) relevant to the parties' claims and/or defenses, or (ii) reasonably calculated to lead to the discovery of admissible evidence, including but not limited to all such ESI data generated by and/or stored on the party's computer system(s) and/or any computer system and storage media (i.e., internal and external hard drives, hard disks, floppy disks, memory sticks, flash drives and backup tapes), under the party's possession, custody and/or control. ***The failure to comply herewith may result in appropriate sanctions*** or such other relief as the court may be authorized to impose or award, ***including*** but not limited to precluding use of evidence, taking adverse inferences, and/or

Part 54's Individual Practices require (and have required since 2011) that, when responding to a document demand, if a document has been withheld or redacted to protect privileged information, a document log must be served with the response. This rule was designed to implement CPLR 3122, which provides that an objection to document production must be made within 20 days in a notice containing the following information for each document not produced: the ground for withholding, unless divulging it would disclose privileged information; the document type; its general subject matter; its date; and other information sufficient to identify it for a subpoena duces tecum.

In a joint letter, dated July 24, 2014, the Herman Defendants agreed that they had produced all responsive documents in their possession, custody or control relating to the LLCs (referred to in the joint letter as the 1997 LLCs and Delaware Windsor). Doc 731. On August 16, 2014, all of the Herman Defendants' scope and relevancy objections to plaintiffs' document demands were resolved either by agreement of counsel or court order. Docs 731 & 748.

The subsequent Jan 20 Order largely dealt with Maurice's failure to search boxes containing documents responsive to Plaintiffs' document demands that were in the custody of the Loeb firm and one of its attorneys, Alan Tarr, Maurice's former counsel. Doc 986. Tarr had drafted pivotal documents relating to this action, including the agreement for the 1998 Transaction, when he was at the firm of Parker Chapin, prior to joining Loeb. *Id.* The Jan 20 Order found that Maurice lied to the court in an affidavit and that his lawyer, Darren Traub, had submitted a false affirmation, when they swore that they had searched seven boxes in Loeb's custody before Maurice made his initial document production in 2011. *Id*; *see also* 6/6/14

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rendering judgment in whole or part against the offending party (ies)...." Doc 51 [emphasis supplied].

Affidavit of Maurice Herman (Maurice Affidavit), Doc 691 & Transcript, Doc 750, pp 10-15 & 20-24. Traub later admitted that Loeb had found 2 more boxes. Jan 20 Order, Doc 986, p 8, citing 11/3/14 Traub Email, Doc 835. In the May 2014 Maurice Affidavit, he swore to the court that "in response to plaintiffs' First and Second Document Requests," he had "searched all documents and files ***and email*** accounts in my possession, custody or control ...." [emphasis supplied] Doc 691, ¶¶2 & 3. The Maurice Affidavit also promised that he would comply with the ESI protocol when it was agreed upon. *Id.* The Jan 20 Order found that he had not done so. Doc 986, p 9. Traub admits in his opposition to Motion Sequence 023 that, after the Jan 20 Order, Maurice produced "additional documents" that were contained in the seven Loeb boxes, as well as the two boxes that later were found in Loeb's possession. 3/19/15 Traub Affirmation, Doc 1098, ¶4.

The Jan 20 Order sanctioned Maurice for false statements that had delayed this action. It contained a self-executing conditional order, which stated:

> the answer, counterclaims and third-party complaint of J. Maurice Herman ***are stricken unless*** he complies with this order and the January 20, 2015 Order [the Jan 20 Compliance Order].

Doc 986, p 17 [emphasis added]. It is with this history in mind that the court considers the current motions.

Discussion

A. Email Communications between Maurice & Offit

As previously noted, Maurice swore in the Maurice Affidavit of May 2014, that in response to plaintiffs' First and Second Document Requests, he searched email accounts in his possession, custody or control. Doc 691, ¶¶2 & 3. However, on August 15, 2014, he first served a privilege log, which logged email between himself and Offit (Maurice's 1st Log). Doc 879.

Maurice's 1st Log included email in which he and Offit were the exclusive parties to the communication. *Id.* Offit also filed a log of documents that logged email solely between him and Maurice, which was prepared on September 17, 2014 (Offit's Log). Doc 878 & Doc 1023, ¶¶ 2, 3 & 6. For ease of reference, the logged email exclusively between Offit and Maurice will be referred to as Exclusive EM; the Exclusive EM that Offit logged will be referred to as Exclusive Offit EM; and the Exclusive EM that Maurice logged in Maurice's 1st Log will be referred to as Exclusive Maurice EM.

Maurice claims, and Offit's attorney, Mr. Gulati, agrees, that they had a joint defense agreement (JDA). Doc 1007, ¶3 & Doc 1023, ¶3. Maurice's attorney, Traub, avers that the JDA was effective on January 25, 2011. Doc 1007, ¶3. He attaches an unexecuted document effective on that date, which he says he signed without retaining an executed copy and returned to Offit's former counsel, the firm of Katten Munchin Rosenman LLP (Katten Firm), on March 9, 2011, ***after Maurice had approved it***.[4] *Id*, ¶4 & Doc 1008. As plaintiffs point out, Traub does not say that the Katten Firm signed the JDA. Doc 1007, ¶3 & Doc 1008. Traub avers that at all times, as counsel for Maurice, he acted pursuant to the JDA. Doc 1007, ¶4. Maurice's memorandum of law, which is unsworn, states that the JDA ended in March 2014. Doc 1017, p 2. In an email submitted for *in camera* review, dated March 22, 2014, Traub stated that Maurice was withdrawing from the JDA. See Part B of this opinion below.

Some of the Exclusive Offit EM ***predates the alleged effective date of the JDA and the date that Maurice approved it***. Doc 878. It spans the period from January 9, 2011 through March 5, 2014. Some of it predates the December 5, 2011, Preservation Stipulation. Compare

[4] The court is aware that the Katten Firm has asserted a retaining lien on various papers, due to Offit's failure to pay their legal bill.

Doc 51 & Doc 878. Indeed, before the Preservation Stipulation, Maurice had an obligation to preserve ESI, since the obligation to preserve ESI begins when litigation is reasonably anticipated. *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 46 (1st Dept 2012). The destruction of ESI after litigation begins is "grossly negligent, if not intentional." *Id.* Maurice's obligation to preserve the Exclusive EM began, at the latest, when this action was filed on January 25, 2011. Virtually all of the Exclusive Offit EM is dated after this action was filed.

On November 24, 2014, plaintiffs served an amended cross-motion to Motion Sequence 017 (Cross-Motion) seeking to compel production of Exclusive EM on Offit's Log and Maurice's 1st Log. Doc 876. The Cross-Motion was filed more than a month after Offit's Log of September 17, 2014. Offit's counsel, Sunish Gulati, avers that on the morning of December 3, 2014, he spoke to Traub, and told him: 1) that the Exclusive Offit EM included "e-mails in which Maurice and/or Offit forwarded their communications with [their separate] counsel without copying counsel, as well as communications between Maurice and Offit in which they discussed the advice of their counsel;" and 2) that Offit would not oppose Maurice's legal position concerning the applicability of the JDA. Doc 1023, ¶8. Maurice filed his opposition that evening and did not oppose the Cross-Motion. Doc 894.

As previously noted, the Jan 20 Order granted the Cross-Motion and directed Maurice and Offit to produce the Exclusive EM by January 27, 2015, ordering that unless Maurice complied, his pleadings were stricken. Doc 986. It is undisputed that Maurice did not comply. Compare 3/2/15 Affirmation of Craig Avedesian, Doc 1053, ¶21 & 3/19/15 Affirmation of Darren Traub, Doc 1098. Traub does not contradict Avedesian's assertion that Maurice did not,

and has not, produced the Exclusive Maurice EM. *Id.* Offit produced the Exclusive Offit EM on the January 27, 2015 deadline (Exclusive EM Deadline).

After Offit produced the Exclusive Offit EM, for the first time, Maurice raised privilege objections to its production. Traub now says that he was never given an opportunity to review it. Doc 1098, ¶24. He says that what the Offit Log described as Exclusive EM was either the last email in a chain that forwarded attorney client communications, or it commented on or discussed attorney communications, and Offit produced all of it. However, Traub does not deny the conversation with Gulati on December 3, when Gulati told him that the Exclusive Offit EM forwarded communications from counsel and discussed communications with counsel without including counsel on the email. Doc 1023. Nor does Traub explain why he couldn't have reviewed the Exclusive Offit EM after Offit logged it on September 17, 2014. Offit's Log put Maurice on notice that the Exclusive Offit EM fell within the alleged JDA period, which Maurice now relies on to establish privilege. Doc 878.

Most importantly, Maurice either withheld or destroyed the Exclusive Offit EM, of which he was either an author or recipient. According to Offit's Log, almost all of it was generated after this action commenced. Compare Docs 1 & 878. There is no explanation of why Maurice did not log or produce it. The record is bereft of a denial of plaintiffs' allegation that Traub admitted that Maurice has had a practice of deleting his email every 30 days, in violation of his preservation obligation. 3/2/15 Avedesian Affirmation, Doc 1027, ¶¶ 4 & 5 & Doc 51. Traub does not deny making the statement, and Maurice submits no affidavit contradicting it.

The court concludes that Maurice deleted Exclusive Offit EM in violation of his obligation to preserve ESI. The court draws an adverse inference from Maurice's failure to deny that he deleted it. *Noce v Kaufman*, 2 NY2d 347, 353 (1957) ("where an adversary withholds

evidence in his possession or control that would be likely to support his version of the case, the strongest inferences may be drawn against him which the opposing evidence in the record permits").

The court also finds that before the Exclusive EM Deadline, Traub could have reviewed the Exclusive Offit EM. Further, Maurice was a party to the communications, and Traub would have been able to review the Exclusive Offit EM if Maurice had not either deleted it or hidden it from his own lawyer, like he did with the seven boxes.

Nevertheless, the other parties generously consented to give Maurice another chance to serve a privilege log and make a motion regarding privilege concerning the Exclusive Offit EM. Plaintiffs agreed not to review it until determination of the motion. The agreement was reflected in a January 28, 2015 compliance conference order that was entered on January 29 (Jan 29 Compliance Order), which stated that it ***should not be construed as leave to reargue*** the prong of the Cross-Motion to compel production of Exclusive EM. Doc 1000. The purpose of the Jan 29 Compliance Order was not to give Maurice an opportunity to raise relevancy objections, which he now raises for the first time. *Id.* The Jan 29 Compliance Order required Maurice to log the Exclusive Offit EM by January 30, 2015. *Id.*

Maurice violated the Jan 29 Compliance Order by failing to log the Exclusive Offit EM. Instead of a log, Traub tardily sent an email on February 3, 2015 (Maurice's Purported Log). Doc 1057. It was not a log by any standard. It was a list of bates numbers without further description and contained notations as to whether Traub agreed to production or asserted a right to redact or withhold entirely on the ground of attorney/client or work product privilege. Maurice's Purported Log of the Exclusive Offit EM was insufficient to comply with CPLR 3122, Commercial Division Rule 11-b, which suggests categorical logging of documents, or this

court's individual practice rule regarding logging of privileged documents. CPLR 3122; 22 NYCRR 202.70.[5] It violated the Jan 29 Compliance Order, which required service of a log.

To summarize, Maurice violated the conditional January 20 Order by not producing the Exclusive Maurice EM, he violated the Jan 29 Compliance Order by not logging the Exclusive Offit EM, and he either destroyed or withheld Exclusive Offit EM in violation of the Preservation Stipulation and his preservation obligation. Traub had an opportunity to review the Exclusive Offit EM, but chose not to. Lastly, relevancy objections were not raised on the Cross-Motion.

The court denies Maurice's motion for a protective order to the extent that he seeks to assert privilege for Exclusive EM and its relevancy because it is in reality a reargument motion, and he offers nothing that could not have been raised in opposition to the Cross-Motion. Reargument should be granted where the movant demonstrates that the court "misconstrued relevant facts or misapplied governing law." *DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 (1st Dept 2005). It should not be a vehicle to advance new arguments or present different evidence that was available at the time of the original application. *James v Nestor*, 120 AD2d 442 (1st Dept 1986); *Foley v Roche*, 68 AD2d 558 (1st Dept 1979). Further, Maurice

[5] The court's Individual Practices in Part 54 provide: "If a party objects to a disclosure demand on the ground of privilege, with its response to the demand, the party asserting the privilege shall serve on all other parties a privilege log of the responsive documents that are not being disclosed and a copy of the redacted documents, bate-stamped. The privilege log shall identify all redacted and completely withheld documents by bate-stamp numbers, dates, authors and recipients, the general subject matter of the document if it will not waive the privilege, and shall state the privileges being asserted. Failure to serve a privilege log and redacted documents with the party's response to a disclosure demand will, absent good cause, be deemed a waiver of the party's objection on the ground of privilege. Following service of a privilege log, the parties shall confer in an attempt to reach agreement on whether the asserted privileges apply. If agreement cannot be reached, the parties shall call the court Clerk to schedule a conference." The rule is available at the following link: www.nycourts.gov/courts/comdiv/ny/PDFs/Practices_in_Part_54.pdf.

agrees that Exclusive EM is not subject to a common interest or joint defense privilege, which is why he did not oppose the Cross-Motion.[6] Maurice had opportunity before responding to the Cross-Motion to review the Exclusive Offit EM and raise both the issues of privilege and relevance. He chose not to do so.

To the extent that Maurice's motion raises work product and attorney/client privileges with respect to Exclusive Offit EM that forwarded communications from or to counsel (Forwarded EM), the motion is denied with respect to email dated before March 9, 2011, and the balance is denied as moot. Prior to March 9, 2011, there was no JDA. There is no point in reviewing the balance of the Forwarded EM *in camera* to determine whether the asserted privileges apply because the court is dismissing Maurice's pleadings. See Part F of this opinion below. Hence, Maurice shall produce Exclusive EM on Maurice's 1st Log, plaintiffs may review the Exclusive Offit EM and pre-JDA Forwarded EM on Offit's Log, and plaintiffs shall return the balance of the Fowarded EM to Offit.

B. In Camera Review of Email Submitted by Offit on December 22, 2014

Gulati alleges that he told Traub that he found a number of email communications between Offit and Maurice that he did not put on Offit's Log because he believed they were not covered by the JDA and/or were not privileged (Offit Unlogged Email). Doc 1023, ¶4. On September 18, 2014, he wrote to all counsel stating that he was providing the Offit Unlogged Email to Traub so he could review it. *Id.* Traub agreed that all but 2 of the Offit Unlogged

[6] Traub's affirmation states, "Plaintiffs previously moved to compel the production of responsive email communications that were solely between Maurice and Offit on the basis that if no attorney was on the communication, the email was not protected by the joint-defense privilege. ***Maurice does not disagree with this position and, therefore, did not dispute that relevant communications between Maurice and Offit should not be withheld on the grounds of joint privilege.***" [emphasis supplied] 3/19/15 Traub Affirmation, Doc 1098, ¶22.

Email documents were not privileged and the two in question were submitted for *in camera* review (In Camera Email) on December 22, 2014. *Id.*

The attorney/client privilege shields confidential communications between lawyer and client made during the course of a professional relationship ***for the purpose of facilitating the rendition of legal services***. *Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d 371, 377-378 (1991). Where there is a joint defense agreement, it protects only communications that are intended to further the free flow of information ***about the legal matters made in the course of an ongoing common enterprise***. *United States v Schwimmer*, 892 F2d 237, 243-244 (2d Cir 1989); *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 124 AD3d 129, 132 (1st Dept 2014).

Here, the first chain begins with an email, dated March 21, 2014, authored by Maurice and sent to Dan Abrams, of Balestriere Fariello & Abrams, who represented Offit in an arbitration concerning his fee dispute with the Katten Firm. For purposes of the arbitration, Maurice, Offit and their counsel entered into a joint prosecution agreement on October 15, 2013 (JPA). Doc 1010. All of the email in the chain at issue concerns a dispute over the return of Maurice's documents given to Abrams pursuant to the JPA, which Abrams refused to return. Arguments between Maurice and Offit's attorneys about whether Abrams was required to return documents are not communications made for the purpose of pursuing a common legal strategy about this case or the arbitration case. The chain has nothing to do with joint legal strategy or the rendition of legal advice and must be disclosed.

The second email chain also must be disclosed by Offit because Maurice waived the privilege after the JDA ended on March 22, 2014. The chain contains various emails, all dated July 3, 2014, discussing this action. Except for the final email, they are communications between Traub and Maurice, in which Maurice asks for legal advice and Traub gives it. The

emails between Maurice and Traub would have been privileged, except that Maurice forwarded them to Offit in the final email in the chain. The attorney/client privilege only applies to confidential communications between lawyer and client. *Spectrum Sys. Int'l Corp. v Chem. Bank, supra.* Maurice waived the privilege for his communications with Traub by sharing them with Offit after the JDA ended. *Baumann v Steingester*, 213 NY 328 (1915); *People v Harris*, 57 NY2d 335 (1982); *Ambac, supra.*

C. Destruction of Maurice's Wills

In a May 27, 2014 order (May 27 Order), the court directed Maurice to produce for *in camera* review "his wills and any trusts in which he is a fiduciary or beneficiary that mention Offit or any member of his family from 1997 to the present." Doc 657. The relevance of this production was that plaintiffs alleged that Maurice rewarded Offit for his complicity in the 1998 Transaction by naming him in his wills and trusts. Maurice had not submitted them by July 10, 2014 (July 10 Order), and the court gave him a deadline of July 31, 2014. Doc 683. In a decision and order, dated September 5, 2014 (September 5 Order), the court noted that Maurice had not complied with the July 10 Order in that he had submitted 2 unsigned wills, one of which was incomplete, an unsigned, incomplete third amended trust agreement, and a signed 2002 Trust, but no second amended trust agreement. Doc 759, p 5. The September 5 Order gave Maurice two more weeks to comply with the July 10 Order.

Maurice admitted that he destroyed his wills after he was ordered to produce them for *in camera* review. On October 15, 2014, Maurice submitted an affidavit, sworn to on October 13, 2014 (Will Affidavit), averring:

> ... ***when my Third Amended Trust Agreement was finalized, I destroyed all copies of my prior wills***....

[emphasis supplied] Doc 814, ¶5. He admits that this occurred after the court directed him to turn over copies of his wills:

> ***At the time the Court directed me to turn over copies of my wills, I was in the process of finalizing my Third Amended Trust Agreement***, a process that I started over a year ago. ***Now that the Third Amendment has been finalized, it is attached hereto for the Court's in camera inspection.***

[emphasis supplied] Doc 814, ¶6. To repeat, Maurice admitted he was in the process of finalizing the third amended trust, which he submitted unsigned before the July 10 Order, when he was ordered to produce his wills and he destroyed them when that process was completed, prior to October 13, 2014, when he signed the Will Affidavit. He claims that he did this on the advice of estate counsel. *Id.* The Will Affidavit strongly suggested that Offit was mentioned in the destroyed wills, although Maurice avoided an explicit admission:

> As this case progressed, I decided to further amend my estate planning to, among other things, completely remove Offit from my estate, including as trustee and other administrative roles.

Doc 814, ¶4.

The court finds that, instead of turning over wills that benefitted Offit, Maurice defied the court's three orders for their production (May 27, July 10 & September 5, 2014 Orders). In opposing plaintiffs' current motion, based in part on destruction of wills, Traub's affirmation does not address that subject. Doc 1098. As Maurice did not submit an affidavit stating that Offit was not named as a fiduciary or beneficiary in the destroyed wills, the court will draw an adverse inference that he was. *Noce v Kaufman*, 2 NY2d 347, 353 (1957) ("where an adversary withholds evidence in his possession or control that would be likely to support his version of the case, the strongest inferences may be drawn against him which the opposing evidence in the

record permits"). Maurice's destruction of the wills was a violation of the court's May 27, July 10 and September 5, 2014, orders for the production of wills that mentioned Offit or his family.

D. Failure to Log Documents

Maurice also violated the Jan 20 Compliance Order by not logging the Loeb iManage documents. Plaintiffs' Cross-Motion sought an order compelling Maurice to "provide … a log of documents that he is withholding from production on any grounds other than privilege as required by this Court's Order dated April 29, 2014[7] …." The Jan 20 Order and accompanying Jan 20 Compliance Order granted this prong of the Cross-Motion. Doc 986, pp 14 & 16 (2d Decretal Paragraph) & Doc 985. It required Maurice to produce or log responsive Loeb iManage documents, and to log all responsive hard copy and ESI Loeb documents by February 20, 2015 (Log Deadline). Doc 985. Loeb's iManage documents are client electronic documents that are maintained forever and are catalogued by client name and matter. Jan 20 Order, p 7, citing EBT of Loeb's record custodian, Sheehan, Doc 836, pp 38-39. As previously noted, the Jan 20 Order was a self-executing conditional order. Doc 986.

Loeb's iManage documents contained potentially important evidence that Defendants relied on, such as draft notices to the tenants of 36 Gramercy after the 2002 Transaction, that allegedly put Rosemarie on notice and commenced the running of the statute of limitations for fraud and breach of fiduciary duty. Defendants claim that the notice stated that the owner and managing agent had changed. Plaintiffs contend that it only said that there was a new managing agent. Loeb drafted the notice. In addition, Loeb (or Tarr before he was at Loeb) drafted the

[7] The April 19, 2014 order reflected that the parties agreed that they did not have to log or produce their communications with litigation counsel in this action from May 28, 2010 onward, which was defined in the Jan 20 Order as the Litigation Counsel Exception. Doc 644, Item #4 & Doc 986, p 3.

1998 Transaction documents. Maurice failed to meet the Log Deadline for Loeb's iManage documents. Traub, admits that he "inadvertently" neglected to timely serve the iManage log, which he provided almost a month late, on March 17, 2015. Doc 1098, p7, fn 2.[8]

In Motion Sequence 025, plaintiffs complain that the February 20, 2015 log of Loeb's allegedly privileged email was missing information that should be on a privilege log, such as general subject matter and authors. In addition, plaintiffs urge that Maurice improperly claimed attorney/client privilege for documents that were sent to Mann's counsel and documents that do not identify the alleged client. Finally, plaintiffs object that Maurice claimed privilege for documents without specifying which privilege he was asserting. In response to Motion Sequence 025, Maurice does not claim that the logs he served were sufficient.

Boilerplate claims of privilege that do not comply with CPLR 3122 are insufficient as a matter of law. *Anonymous v High School for Envtl. Studies*, 32 AD3d 353, 359 (1st Dept 2006). Where a party violates a self-executing conditional order, it becomes absolute. *Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827, 830 (2008). Maurice's failure to serve proper and timely privilege logs rendered the self-executing conditional Jan 20 Order absolute. *Id.* As the court is striking Maurice's pleadings, the court will not address the privilege issues raised.

E. The LLCs' Tax Returns & Maurice's Personal Returns

The value of the LLCs[9] at the time of the 1998 Transaction is the central issue in this case. The crux of the action is whether 50% of the six Herman Properties were worth the $8 million that Consolidated paid the Trusts in 1998, given that five of them were sold to Mann four

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[8] Plaintiffs allege that Maurice did not log documents in the Loeb boxes and the documents of Maurice's separate tax counsel, Serote & Permutt; Traub avers that Maurice did not withhold any of those documents on the ground of privilege. 3/19/15 Traub Affirmation, ¶¶ 5 & 7, Doc 1098.

[9] The parties' submissions refer to the LLCs as the "1997 LLCs".

years later for $100 million. The LLCs' returns (Returns) were prepared by Kaufman, who has been at all relevant times the accountant for Maurice personally and for his entities. He also is (and was) the accountant for Mann and his entities and was the accountant for Rosemarie and her Trusts until 2010. Moreover, Kaufman was Offit's personal accountant. Part of plaintiffs' case is that, to hide the 1998 Transaction from Rosemarie, Offit and Maurice had Kaufman alter the tax designation of the Trusts, so that income from the LLCs would be reported on fiduciary tax returns sent to Offit's address, as opposed to on Rosemarie's personal returns, which she signed.

For over a year, Maurice has opposed the production of his personal tax returns. Doc 651, Joint Letter. The court has agreed that the relevant inquiry was the value of the LLCs, which bears on the fairness of the 1998 Transaction purchase price. The court ordered that Maurice did not have to produce his personal returns, if the LLCs' Returns could be produced and contained Maurice's K-1s.[10]

Plaintiffs first requested the Returns in their 2011 document demands. Doc 954. On March 1, 2012, the court ordered that, by March 16, 2012, the K-1s for the LLCs involved in the 1998 Transaction were to be turned over. Doc 58.[11] That was more than three years ago. On May 6, 2014, Maurice swore that in response to plaintiffs' first and second document requests, he "***searched all documents, files, and email accounts in my possession, custody, or control, including requesting relevant files from … Savastano, Kaufman & Company, LLC.***" Maurice Affidavit, dated May 6, 2014, Doc 691.

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[10] The disclosure of tax returns is not favored. *Berger v Fete Cab Corp.*, 57 AD2d 784 (1st Dept 1977), citing 3A Weinstein-Korn-Miller, *NY Civ Prac*, par 3101.10 & *Fugazy v Time*, 24 AD2d 443 (1st Dept 1965); *see generally Holme v Global Mins. & Metals Corp.*, 90 AD3d 423 (1st Dept 2011). However, they can be ordered to be produced in special circumstances, including where it is overly burdensome to obtain the information from another source. *Berger*; *NY Civ Prac, supra.*

[11] It appears that the Return for Mayfair was erroneously not mentioned in the order.

On May 14, 2014, the Herman Defendants were ordered again to turn over the Returns for the period 1998 to 2002. Doc 657, Item 9. On May 16, 2014, in the Joint Letter, the Herman Defendants agreed that plaintiffs were entitled to the Returns for the years 1999 and 2000. Doc 651, p 4. However, plaintiffs sought the Returns for the period 1997 through 2002, including K-1s. *Id.* The 1997 and 1998 Returns were material to the issues in the case because, as plaintiffs argued, Defendants had taken the position that the 1998 Transaction price reflected anticipated future expenses for needed capital projects and repairs, low income from rent regulated apartments, and tenant litigation. Doc 651, p 4. The court independently recalls that Defendants relied on those factors, and a market downturn, to justify the $8 million purchase price that Consolidated paid to the Trusts.

A subsequent May 27 Order, with respect to the Returns, provided as follows:

> 8) Maurice's personal tax returns are not discoverable unless the LLC tax returns are unavailable and/or do not annex Maurice's K-1s, or unless plaintiffs show that the personal returns would contain relevant information not available from any other source;
> 9) tax returns of the LLCs from 1998 through December 31, 1992 shall be produced as the extreme difference in sales price between 1998 and 2002 is a central issue.

May 27, 2014 Order, Doc 657.

In an order dated August 6, 2014, the court noted that, although Kaufman was unwilling to produce the Returns, Rosemarie did not need to subpoena them from Kaufman for the period before the 1998 Transaction, when her Trusts owned half of the LLCs, because she was entitled to them. 8/6/14 Order, Doc 748, p 3. Kaufman, however, refused to turn them over without a court order.

On October 8, 2014, the court granted an order for the issuance of an open commission to enable a subpoena to be served on Kaufman. Docs 812 & 813. The subpoena duces tecum

requested the Returns for 1997 through 2003, as the court had learned that the 2002 Transaction closed in 2003. Kaufman Subpoena, Doc 956. Kaufman's attorney accepted service on October 23, 2014. Doc 958.

Nonetheless, Kaufman failed to produce, *inter alia*, the Returns. In January 2015, plaintiffs moved to hold Kaufman in contempt. Doc 953. Plaintiffs' attorney submitted an affidavit in support of the motion, which stated that plaintiffs had first requested the Returns in their October 2011 first document request; that Maurice had claimed that Mann had these LLC Returns; that Mann had said that Kaufman had them; and that it was undisputed that Kaufman is Mann's accountant. 1/5/15 Avedesian Affirmation, ¶3, Doc 954. None of this was denied by the Herman Defendants.

Maurice and Kaufman each submitted an affidavit in response to the contempt motion. Maurice's affidavit stated, "I have not seen nor have access to ... Mr. Mann's tax returns ...." 1/8/2015 Maurice Herman Affidavit, ¶10, Doc 973. This calculated evasion avoided the issue, which was the LLCs' Returns, not Mann's. Further, Maurice did not say whether he had the Returns and did not deny that he had said that Mann had them. The court notes that before the 2003 closing, Mann did not own the LLCs. Consequently, Kaufman prepared the sought-after Returns when the LLCs were owned by the Trusts, Maurice and Consolidated.

On January 13, 2015, Kaufman submitted an affidavit in which he swore that, in late 2014, well after his repeated refusals to turn over the Returns, he had been asked by Mann's comptroller for the LLCs' Returns for the years 1998 through 2002. 1/13/15 Kaufman Affidavit, ¶3, Doc 978. Kaufman said that he "unequivocally" told him that he "was not in possession of these tax records." *Id.* A veritable three-card monte. Further, Kaufman's attorney, Michael Cannon, submitted an affirmation stating that there was no contempt because Kaufman was

assiduously attempting to respond and would do so by January 30, 2015. 1/13/15 Cannon Affirmation, ¶14, Doc 974. He also agreed that he had accepted service of the contempt application for Kaufman and that plaintiffs had given Kaufman an extension, until December 12, 2014, to complete e-discovery, a deadline that had come and gone. *Id*, ¶8 & 10. As Kaufman agreed to provide all requested documents by January 30, 2015, the court issued an order stating that the contempt motion was granted unless Kaufman fulfilled his promise. 1/28/15 Order, Doc 999.

In opposition to Motion Sequences 021 and 023, Traub states, after the years of requests and orders, that Kaufman "may have located the entities [sic] tax returns in an archived server that is not readily accessible by their e-discovery vendor," that Kaufman is "diligently working to search the archived file," and that plaintiffs are endeavoring to get them from the IRS and New York State. 3/19/15 Traub Affirmation, ¶25. He concludes that plaintiffs' request for Maurice's personal returns "is improper at this time as it appears that the requested information ***may be*** available from other sources." *Id.* [emphasis supplied]

After Motions Sequences 021 and 023 were submitted, the court was informed that Kaufman's e-discovery vendor did find unsigned copies of the LLCs' Returns for 1998 through 2002 in Kaufman's archived files and that DE Windsor's Return for 2003 had been produced (it is not clear whether it was signed). The archived, unsigned 1998 through 2002 Returns were given to plaintiffs on April 9 and 10, 2015. Plaintiffs informed the court that Offit also had given them some Returns and that Offit's Returns were not identical to the archived, unsigned copies produced by Kaufman.

At the very least, the above facts demonstrate that Maurice did not comply with his ESI obligations to search "diligently" for the requested and ordered documents and instruct Kaufman,

in whose custody Maurice had the Returns, to produce them. While plaintiffs have withdrawn the prong of Motion Sequence 023 seeking the Returns due to the belated discovery of Kaufman's archived copies, the chronicle of the Returns bears on Maurice's attitude toward his obligation as a litigant to obey this court's orders and his litigation conduct.

Subsequently, the court entered a series of orders regarding the production of the Returns, authorizations to obtain signed copies of them, and, in the event that signed copies were not obtained, directed Maurice to sign an affidavit concerning whether he had his personal returns and to attempt to obtain his personal returns from the taxing authorities. Docs 1111, 1155, & 1157. The court also directed Kaufman to submit an affidavit concerning whether the unsigned LLC Returns were the same as the ones that were filed and whether he had copies of Maurice's personal returns. *Id.*

The directives regarding Maurice's personal returns were made because it appeared that it had become overly burdensome to obtain signed copies of the LLCs' Returns, which would have been a special circumstance requiring the production of Maurice's personal returns in redacted form, due to the lack of another reasonably available alternative source. *Berger v Fete Cab Corp.*, 57 AD2d 784 (1st Dept 1977), citing 3A Weinstein-Korn-Miller, *NY Civ Prac*, par 3101.10. The court had hoped that Maurice would stipulate to the authenticity of the unsigned Returns found by Kaufman, if signed ones were not obtained, but he stipulated only to their admissibility and gave plaintiffs authorizations to obtain the LLCs' Returns from the taxing authorities. Docs 1111, 1157 & 1159.

On May 26, 2015, Maurice filed an affidavit stating:

> After searching my files and records, I affirm that I do not have copies in my possession, custody, or control of my personal tax returns that were filed in 1997, 1998, 1999, 2000, 2001, 2002, or 2003, between 12 and 18 years ago. Indeed, it is my usual custom

> and practice, absent a litigation hold directive, to not maintain copies of files.

Compare Docs 951 & 1160. Kaufman, by affidavit, said that he could not attest to the accuracy of the unsigned LLC Returns. Doc 1156. Also, he said that he had found Maurice's personal returns for the years 1998-2003, unsigned, on his auto-archive server, but not his 1997 return. *Id.* Maurice's affidavit said that he had not "seen or reviewed" the unsigned personal returns Kaufman found. Doc 1160.

At this point, the unsigned LLC Returns are not a reasonably available other source that substitutes for relevant portions of Maurice's personal returns. *Berger v Fete Cab Corp.*, 57 AD2d 784 (1st Dept 1977), citing 3A Weinstein-Korn-Miller, *NY Civ Prac*, ¶3101.10. This is particularly so given the differences between some of the unsigned Returns and the Returns turned over by Offit. Although the court is granting the motion for a default judgment against Maurice, portions of the tax returns relating to the LLCs must still be produced, as they relate to damages, an issue on which Maurice can present evidence at an inquest. *Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728 (1984). Maurice has not agreed to the authenticity of the unsigned LLC Returns.

Hence, Maurice shall produce the portions of his unsigned personal returns in Kaufman's custody that report income, expenses, deductions, loans, losses, interest, management fees and/or any other benefit he received or deduction he took related to the LLCs in 1998 through 2003, including the K-1s issued to him. Maurice may redact information on his personal returns that is unrelated to the LLCs, except he shall not redact the tax year, the taxing authority's information, his name, his address, the preparer's information, the date, the signature lines and/or any part of the tax form (as opposed to entries thereon). The unsigned LLC Returns should be compared with relevant portions of Maurice's personal returns, as Maurice may contest authenticity. In the

event that Maurice does not produce the redacted personal returns in accordance with this order, he is precluded from contesting damages at the inquest.

F. Motion for a Default Judgment against Maurice

CPLR 3126 provides as follows:

> Penalties for refusal to comply with order or to disclose
>
> ***If any party***, or a person ***who at the time*** a deposition is taken or an examination or ***inspection is made is an*** officer, director, member, employee or ***agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed*** pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:
>
> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
>
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
>
> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

In discussing the statute, the Court of Appeals has explained that:

> If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a "court may make such orders ... as are just," including dismissal of an action (CPLR 3126). Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully.

See Kihl v Pfeffer, 94 NY2d 118, 123 (1999), citing CPLR 3126; *see also*, *Reynolds Secur., Inc. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 571-572 (1978) (court "more than eminently justified" in striking answer where party disobeyed four court orders to appear for deposition); *Lasidi, S. A. v Financiera Avenida*, S. A., 73 NY2d 947, 951 (1989) (pleading struck for refusal to appear for deposition); *Zletz v Wetanson*, 67 NY2d 711, 713 (1986) (complaint dismissal well within court's discretion for plaintiff's failure to answer interrogatories and other strategies designed to yield one-sided disclosure); *Hall v Integrity Real Estate Props, Inc.*, 124 AD3d 1270, 1271 (4th Dept 2015) (trial court did not abuse discretion is dismissing complaint where plaintiff's failure to comply with discovery was willful and contumacious). In *Kihl*, the plaintiff's complaint was stricken for flouting two court orders to answer interrogatories concerning the alleged design defect for approximately a year and three months; the plaintiff had served an interrogatory response that was not meaningful.

A trial court has discretion to strike pleadings under CPLR 3126 when a party's repeated noncompliance is "dilatory, evasive, obstructive and ultimately contumacious." *CDR Creances S.A.S. v Cohen*, 23 NY3d 307, 318 (2014). As noted in *CDR*, quoting *Kihl*, "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity." The sanction under CPLR 3126 "covers refusal to comply with a discovery order or a willful failure to disclose," which is not the same as spoliation of evidence. *Strong v City of New York*, 112 AD3d 15, 21 (1st Dept 2013).

The court also has inherent power to impose sanctions for actions that undermine truth seeking and the integrity of courts:

> Apart from CPLR 3126, a court has inherent power to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice. "Courts of justice are universally

> acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution."

CDR Creances S.A.S. v Cohen, supra, citing *Anderson v Dunn*, 19 US 204 (1821); *see also*, *Baba-Ali v State of New York*, 19 NY3d 627, 634 (2012) (withholding of evidence is fraud on the court); *Henderson-Jones v City of New York*, 87 AD3d 498 (1st Dept 2011).

The ultimate penalty of striking pleadings is an extreme, harsh remedy to be used with restraint and discretion. *CDR*, *supra*, at 321. The following factors are appropriately considered and warrant striking the answer: 1) whether the conduct prejudiced the plaintiff by impeding its ability to obtain true discovery and forcing plaintiff to spend enormous amounts of money and time to prove his or her case; 2) whether misconduct was not isolated and defendants did not attempt to correct it; and 3) whether in considering a lesser sanction, the court concluded that the wrongdoing would continue if the lawsuit was allowed to proceed. *Id* at 323. A default judgment may be granted where conduct is particularly egregious; designed to conceal critical matters; and perpetrated repeatedly and wilfully. *Id* at 321. Where a party's conduct is not "central to the success of the scheme to hide information from the court and the plaintiffs," the drastic sanction should not be imposed. *Id* at 324. When granting a default judgment, "the court should note why lesser sanctions would not suffice to correct the offending behavior." *Id* at 322.

In addition to the foregoing recitation of orders that Maurice disobeyed and the evidence he destroyed, two other pieces of evidence are in the record of this action, and a related action over which the court presided, which bear on the issue of "why lesser sanctions would not suffice to correct the offending behavior." *Id.* Maurice failed to contradict an affidavit submitted by Offit, which avers that Maurice said that he does not intend to produce documents harmful to

him in this case because there is no penalty, and that Maurice threatened to retaliate against Offit if he did:

> 3. At various times prior [to August 2014], Maurice Herman informed me that he does not generally produce documents that may be harmful to his position in civil litigation. Referring to the Plaintiffs in the above-captioned action, Mr. Herman has also instructed me at various times to "give them nothing," and stated that in his opinion and experience "there is no penalty" for failure to comply with discovery orders in civil litigation, pointing to the lack of any additional sanctions against him in his air rights easement case with the United States Internal Revenue Service for having created and backdated a false transfer document. Mr. Herman further has instructed me repeatedly not to produce anything harmful to him, under threat of, among other things, disavowing his indemnity.
>
> 4. At various times prior to [August 2014], Maurice Herman also informed me that he did not intend to produce documents that may be harmful to his position in the above-captioned action, consistent with his views stated above.

1/13/15 Offit Affidavit (Offit Aff), Doc 1037.

The second piece of evidence was submitted for *in camera* review, in an action by Offit against Maurice to enforce a purported settlement of this action.[12] Maurice sent an email to Rosemarie, dated January 22, 2014, which crystallized his litigation strategy:

> you have directly, and/or indirectly paid out several million dollars in fees for lawsuits that have, in almost four-years-time, done nothing more than have one motion to dismiss decided. In the end, the appeals courts will ultimately decide all these cases. There will likely be two levels of appeals for every single claim made in all the cases, and considering we're probably over a year away from any trial (and probably way longer than that once all the various motions for summary judgment get filed, then decided, and then appealed), ***I think it's safe to say litigation is going to be a big part of your life for at least the next decade, and probably much longer than that.***

[12] Part of the email was sealed, but not the part quoted here.

Michael Offit v Julian Maurice Herman, Sup Ct, NY Co Index No, 157768/2014 (MOU Action), Doc 24, Ex A to 9/10/14 Affirmation of Stanley Shlesinger. In other words, Maurice threatened Rosemarie that this action and the related cases would drag out for a decade or more. Certainly, his strategy of disobeying the court's discovery orders and destroying and/or secreting material discovery, as well as the court's repeated provision of second and third chances, has already prolonged the case for years.

The court finds that Maurice has evinced a pattern of willful, contumacious, and egregious refusal to obey discovery orders to produce documents; has destroyed documents; has lied to the court; has delayed the action; has impeded plaintiffs' access to discoverable material, and increased plaintiffs' expenses. His conduct was repeated, not isolated. It was "central to the success of the scheme to hide information from the court and the plaintiffs." *See CDR Creances S.A.S. v Cohen, supra.*

Maurice did not turn over everything in the seven Loeb boxes, even though he swore that he had. Docs 759 & 691. He was ordered three times to produce wills and trusts that mentioned Offit, produced some unsigned, and then admitted in the Will Affidavit that he had destroyed his prior wills after being ordered to produce them. Docs 657, 683, 759 & 814. He did not produce Exclusive Maurice EM as required by the Jan 20 Order and Jan 20 Compliance Order. Docs 985 & 986. He deleted Exclusive Offit EM and does not deny his practice of deleting email, despite his preservation obligation. When given a second chance to log Exclusive Offit EM, he did not file a proper log and failed to log the Loeb iManage documents by the Log Deadline set by the January 29, 2015 Order. Doc 1000. His failure to produce proper logs rendered the self-executing conditional Jan 20 Order absolute. He avoided producing the LLCs' Returns, when Kaufman had copies of them all along, after Maurice and Kaufman had sworn that they searched

Kaufman's records. Maurice wasted everyone's time arguing against producing his personal returns, when he later claimed did not have them.

The court does not believe that a lesser sanction than striking his pleadings will deter Maurice. He was sanctioned for lying about the Loeb boxes, yet he failed to comply with later discovery orders. The sanction did not cause him to alter his behavior. There is uncontradicted evidence that he believes he can refuse to produce documents with impunity and will not produce anything that harms his case. He repeatedly acted in accordance with that belief and expressed his intention to have the action last a decade or more. He is incorrigible. Accordingly, it is

ORDERED that Julian Maurice Herman's motion for a protective order (Seq 021) is denied; Maurice shall produce Exclusive EM on Maurice's 1st Log; plaintiffs may review the Exclusive Offit EM and Forwarded EM dated before March 9, 2011 on Offit's Log; and plaintiffs shall return the balance of the Fowarded EM to Offit; and it is further

ORDERED that the prong of plaintiffs' motion (Seq 023) for a default judgment against defendant Julian Maurice Herman (Maurice) is granted, his answer, counterclaims, cross-claims and third-party claims are hereby stricken, and an assessment of damages against him is directed; the prong of the motion to compel production of Maurice's communications with Kenneth Kaufman and his accounting firm, Savastano Kaufman & Company, LLC, is granted in the absence of opposition and Maurice shall produce said communications; the prong of the motion to compel production of Maurice's personal tax returns is granted to the extent that his unsigned personal returns for the years 1998 through 2003 shall be produced redacted in accordance with this opinion; and unless Maurice produces said redacted personal returns by the deadline, he is

precluded from contesting damages at the inquest; and the balance of the motion is denied as moot; and it is further

ORDERED that Motion Sequence 025 is granted to the extent of granting a default judgment against Maurice on liability, and the balance is denied as moot; and it is further

ORDERED that Offit shall turn over the In Camera Email to plaintiffs; and it is further

ORDERED that all documents ordered to be produced herein shall by produced within 20 days after this decision and order is filed in the New York State Courts Electronic Filing System; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry on the Trial Support Clerk at genclerk-ords-non-mot@nycourts.gov, who is directed, upon plaintiffs' filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment of damages hereinabove directed.

Dated: July 13, 2015

ENTER:

_____

J.S.C.