Deutsche Bank AG v Sebastian Holdings, Inc.
2019 NY Slip Op 30062(U)
January 2, 2019
Supreme Court, New York County
Docket Number: 161079/13
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55
---X
Deutsche Bank AG,

Plaintiff,

- against -

SEBASTIAN HOLDINGS, INC.,

Defendant.

Index No. 161079/13
Mot. Seq. Nos. 005, 006
---X
Deutsche Bank AG,

Plaintiff,

- against -

ALEXANDER VIK, CARRIE VIK, AS AN INDIVIDUAL AND AS TRUSTEE OF THE CSCSNE TRUST, IVAN GONELL SANTANA AS TRUSTEE OF THE CSCSNE TRUST, THE CSCSNE TRUST, C.M. BEATRICE, INC., AND SEBASTIAN HOLDINGS, INC.,

Defendants.

Index No. 161257/13
Mot. Seq. Nos. 008, 009
---X

Hon. James E. d'Auguste

Motion Sequence Nos. 005 and 006 filed under Index No. 161079/2013 (the first action) and Motion Sequence Nos. 008 and 009 filed under Index No. 161257/2013 (the second action) are hereby consolidated for disposition.

In both actions, plaintiff Deutsche Bank AG (Deutsche Bank) moves for an order: 1) directing defendants Sebastian Holdings, Inc. (SHI), the CSCSNE Trust (the Trust), and Alexander Vik (Vik) to produce documents responsive to Deutsche Bank's first request for the production of documents, dated December 19, 2013; 2) directing defendants C.M. Beatrice, Inc. (Beatrice) and the Trust to designate a suitable witness for a deposition concerning the topics

noticed in the subpoena served upon Beatrice, dated November 8, 2016; 3) directing Per Johansson (Johansson), SHI's representative and not a party in his own capacity, to appear for a continuation of his deposition and to retract his privilege claims or to produce a detailed privilege log; 4) allowing Deutsche Bank to use discovery materials produced by Johansson in these two actions in related actions; and 5) appointing a special master to preside over the continued depositions of Beatrice, SHI, and Johansson, and other depositions as may arise (Mot. Seq. No. 006 in the first action and Mot. Seq. No. 008 in the second action).

In the first action, SHI moves for an order quashing Deutsche Bank's information subpoena, dated March 29, 2017, and for a protective order (Mot. Seq. No. 005).

In an action in the United Kingdom (the UK action),[1] a UK court found that SHI incurred losses in the hundreds of millions in foreign exchange trading through accounts set up at Deutsche Bank and that, in order to prevent Deutsche Bank from recouping the trading losses, Vik caused approximately $1 billion in assets to be transferred from SHI in 2008. At that time, Vik was SHI's sole shareholder and director. Deutsche Bank alleges that the transferees of SHI's assets were companies owned or controlled by Vik or members of his family. In November 2013, the UK court awarded Deutsche Bank a judgment of $243 million against SHI. Since then, Deutsche Bank has attempted to collect the judgment by bringing actions in New York, Connecticut, Delaware, Europe, and the Turks and Caicos Islands (TCI). SHI and Beatrice are TCI corporations.

Deutsche Bank brought the first action in November 2013 in the form of a motion for summary judgment in lieu of complaint seeking recognition and enforcement of the UK

[1] *Deutsche Bank AG v. Sebastian Holdings Inc,* (2013) EWHC 3463 (Comm), 2013 WL 5905024 (Queen's Bench Division, Commercial Court, November 8, 2013) (for full decision, click on "official transcript").

judgment. Deutsche Bank's motion was granted, and the judgment was entered in May 2016. Deutsche Bank brought the second action in December 2013, seeking to hold Vik, his wife Carrie Vik, Beatrice, and the CSCSNE Trust (the Trust) liable for the judgment against SHI on the grounds of alter ego liability and fraudulent conveyance.

I. SHI's motion to quash the subpoena dated March 29, 2017

Deutsche Bank served a deposition subpoena and an information subpoena on SHI in September 2016. After SHI's motion to quash was denied in February 2017, SHI answered the information subpoena and Deutsche Bank served a follow-up information subpoena, dated March 29, 2017, on SHI. SHI moves to quash the follow-up subpoena on the grounds that it is overbroad, harassing, irrelevant, and intended to assist Deutsche Bank in the other related actions.

SHI alleges as follows. The March 29, 2017 subpoena contains 20 questions, the first 19 of which are substantive. Except for questions 9 and 14, each substantive question is based on, or gathered from, information and/or documents which Deutsche Bank has had in its possession since 2014/2015, and as to which Deutsche Bank has already questioned witnesses in depositions in the UK and Connecticut actions. SHI alleges that Deutsche Bank could have posed these questions long before serving the subpoena. The information sought is not relevant to the satisfaction of the judgment. The subpoena seeks a vast breadth of information about non-party assets and valid debts or transfers going back many years and would not lead to assets applicable in satisfaction of the judgment. The subpoena seeks detailed and obscure information that is difficult if not impossible to locate. The subpoena places an undue burden on SHI. Deutsche Bank aims to harass SHI to obtain material for the other actions.

Deutsche Bank responds as follows. Via subpoenas addressed to non-parties, Deutsche Bank discovered relevant information about SHI, including the existence of several SHI accounts and an October 2008 transfer from SHI to Alexander and Carrie Vik. SHI admits that this transfer was not disclosed during previous discovery. SHI's answers to the initial information subpoena consisted largely of references to information previously disclosed in other litigations between SHI and Deutsche Bank.

Listing each question from the first information subpoena, Deutsche Bank points out how SHI's answer did not discuss various transfers, amounts owned to SHI, and other information, some of which Deutsche Bank found out through other sources. Deutsche Bank states that, to the extent that the follow-up subpoena addresses subjects touched on by SHI's previous disclosures or in previous depositions, the reason is that SHI's answers, including the answers to the first information subpoena, were vague and incomplete. The follow-up subpoena asks about transfers to or from SHI, its investments and accounts, and sources who could provide more information in areas where SHI gave incomplete answers.

CPLR 3101 mandates that there shall be full disclosure of all material and necessary matters in an action. The words "material and necessary" must "be interpreted liberally 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." *Allen v. Crowell Collier Publ. Co.,* 21 N.Y.2d 403, 406 (1968). Parties are entitled to discover "information reasonably calculated to lead to relevant evidence." *Cronin v. Gramercy Five Assocs.,* 233 A.D.2d 263, 264 (1st Dep't 1996) (internal quotation marks and citation omitted).

CPLR 5223 provides that a judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment. Judgment creditors are entitled to broad disclosure in aid of judgment enforcement through the judgment debtor or any third person with knowledge of the debtor's property. *ICD Group v. Israel Foreign Trade Co. (USA),* 224 A.D.2d 293, 294 (1st Dep't 1996). All matters relevant to satisfying the judgment are discoverable and "the public policy is to put no obstacle in the path" of those seeking to enforce a judgment. *Siemens & Halske GmbH. v. Gres,* 77 Misc. 2d 745, 745 (Sup. Ct. N.Y. County 1973), *aff'd* 43 A.D.2d 1021 1st Dep't 1974) (internal quotation marks and citation omitted); *see U.S. Bank N.A. v. APP Intl. Fin. Co., B.V.,* 100 A.D.3d 179, 183 (1st Dep't 2012). A judgment creditor may serve an information subpoena if it reasonably believes that the subpoena recipient possesses information that will assist the creditor in collecting its judgment. CPLR 5224(a)(3); *Lupe Dev. Partners, LLC v. Pacific Flats I, LLC*, 2013 NY Slip Op 31891(U), *4 (Sup. Ct. N.Y. County 2013), *aff'd* 118 A.D.3d 645 (1st Dep't 2014). At the same time, courts have discretion "under CPLR article 52, to control and regulate the enforcement of a money judgment in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice." *Gryphon Dom. VI, LLC v. APP Intl. Fin. Co.,* 58 A.D.3d 498, 498 (1st Dep't 2009).

Deutsche Bank shows that its investigations of third parties led Deutsche Bank to entertain a reasonable belief that SHI is in possession of undisclosed information relevant to the satisfaction of the judgment. Deutsche Bank shows that SHI did not fully answer the initial subpoena, which is why Deutsche Bank served the follow-up subpoena.

A motion to quash a subpoena should be granted when it is obvious that the discovery sought is totally irrelevant or that nothing will be discovered. *Matter of Kapon v. Koch,* 23 N.Y.3d 32, 38 (2014). The burden of making this showing rests on the movant. *Id.* As long the information sought is relevant to the prosecution or defense of an action, it should be provided.

Id. SHI fails to show that the information sought is irrelevant or improper or that Deutsche Bank's request is unreasonable. SHI's motion to quash the follow-up subpoena dated March 29, 2017 is denied.

In addition, as discussed below, SHI agreed that the information that it produces may be used in related actions.

II. Deutsche Bank's motion to compel disclosure from Beatrice

Deutsche Bank moves to compel Beatrice to provide an adequate witness for deposition and to reply properly to document requests.

Allegedly, until the end of October 2008, Vik was Beatrice's sole shareholder and director. In that month, Vik transferred $730 million from SHI to Beatrice, and then transferred Beatrice to the Trust. Now, the Trust is allegedly the sole owner of Beatrice. Members of Vik's family are the beneficiaries of the Trust and Carrie Vik used to be the trustee of the Trust.

In response to Deutsche Bank's request, Beatrice produced 13 pages of documents, most of which are publicly available, according to Deutsche Bank, and Beatrice stated that it did not have a practice of retaining documents. Deutsche Bank subpoenaed Beatrice to be deposed on Beatrice's document retention and destruction policies dating from January 1, 2008 to the present, and on the efforts undertaken by Beatrice to locate documents responsive to Deutsche Bank's request. For deposition, Beatrice produced Ivan Gonell Santana (Santana), who, at the time, had been the trustee of the Trust for a few months. At his April 2017 deposition, Santana testified that he knew nothing about Beatrice's documents or practices thereof, and that he knew nothing about Beatrice except that it was owned by the Trust. Deutsche Bank moves to compel Beatrice to produce a deponent who can testify about Beatrice's practices regarding documents.

Beatrice claims that Deutsche Bank has already received voluminous documents about Beatrice's relations with SHI. Beatrice claims that it did not have a practice of maintaining its own files because it relied on financial advisors, including Deutsche Bank, to keep its records, and that many of Beatrice's records are in Deutsche Bank's possession. This last claim appears to be based on the fact that, in 2008, Beatrice opened a trading account with Deutsche Bank. The account was never funded.

While Deutsche Bank shows that Beatrice did not properly respond to disclosure requests, Beatrice alleges, in a cursory fashion, that documents which may be in Deutsche Bank's possession are responsive to Deutsche Bank's document requests. Beatrice fails to show that it provided Deutsche Bank with the requested information. Deutsche Bank is entitled to Beatrice's records of its dealing with SHI and other records responsive to Deutsche Bank's request. If such records do not exist or cannot be found, Beatrice

> is directed to provide an affidavit from the custodian of records setting forth, at a minimum (1) the qualifications of the affiant; (2) a description of the diligent and reasonable efforts made to locate and produce such records; (3) a meaningful explanation as to why such records are not now available; (4) the identity of the person generating the records and persons in the authorized chain of custody, and if unknown, an explanation should be provided; (5) the identity of the last known possessor of the records, and, if unknown, an explanation should be provided; (6) the locations where such records were kept; and (7) copies of any applicable document retention policies.

Roland's Elec., Inc. v. USA Illumination, Inc., 90 A.D.3d 483, 485 (1st Dep't 2011).

After Beatrice produces this statement, Deutsche Bank may depose the persons identified therein.

III. Deutsche Bank's motion to compel disclosure from Johansson, SHI, and Vik

Deutsche Bank moves to compel SHI and Vik to produce documents responsive to

Deutsche Bank's first request for the production of documents dated December 19, 2013 in the second action.

A. Whether disclosure is stayed for SHI and Vik - SHI and Vik contend that the court stayed disclosure in the second action. The action that Deutsche Bank commenced in Connecticut makes the same claim as the first cause of action in Deutsche Bank's complaint in the second action, namely, that SHI is Vik's alter ego. The first cause of action in Deutsche Bank's complaint was stayed in July 2016, because it appeared that the Connecticut action was likely to resolve that question before the New York action could resolve it. The parties were ordered to proceed with discovery, except as to that one cause of action based on alter ego. The stay operates only as to the one cause of action, not the entire complaint.

As of the date of this decision, the Connecticut action is pending and the alter ego claims have not been resolved. Deutsche Bank seeks information about SHI's property and transfers to and from SHI, and, at this time, no information on the alter ego claim. SHI and Vik must respond to Deutsche Bank's requests. Even if some information disclosed in response to Deutsche Bank's request reveals something about the alter ego claim, such inadvertent overlap is not a reason to stall disclosure.

B. Deutsche Bank's and Johansson's contentions - Allegedly, Johansson has worked for Vik and Vik's family since 2000 in various capacities and is a long-time confidante of Vik. Currently, Johansson is a salaried employee of Ashton Capital, a company owned by Carrie Vik. Johansson says that he has been a litigation consultant to SHI and Vik in connection with disputes involving Deutsche Bank, since October 2008. He works with attorneys around the globe on legal proceedings arising out of the relations between Deutsche Bank and SHI.

Deutsche Bank alleges that Johansson witnessed myriad fraudulent transfers relevant to Deutsche Bank's efforts to collect the judgment from SHI. Deutsche Bank subpoenaed SHI in the first action. SHI designated Johansson as its corporate representative to testify on its behalf. Then Deutsche Bank subpoenaed Johansson for a deposition in his individual capacity in the second action. In May 2017, he was deposed as both a corporate witness of SHI in the first action and as a non-party fact witness in the second action, simultaneously. According to Deutsche Bank, Johansson was evasive and non-responsive during the deposition. He refused to answer questions about certain transfers from SHI to companies related to him and to Vik, on the ground that answering would cause him prejudice in another action pending in TCI. Johansson refused to answer questions and produce documents, on the ground that he is a litigation consultant who is protected by the attorney-client privilege. Johansson contends that Deutsche Bank may use his documentary evidence only in connection with the second action and his deposition testimony only in connection with the first and second actions. Deutsche Bank wants to use Johansson's evidence in all of the actions between it and SHI.

During the deposition, Deutsche Bank states, Johansson testified that he did not know who served as SHI directors at a time when SHI was transferring assets. He said that he did not recall if he was involved with certain transfers. Since then, Deutsche Bank states, it has learned that Johansson was a former director of SHI, and that he was involved in the transfers. Deutsche Bank argues that Johansson should be compelled to testify about his compensation from Ashton Capital, so that the court can assess the risk of bias in his testimony. Johansson says that his compensation from Ashton Capital is nominal, and that Deutsche Bank knows this from prior deposition testimony.

Deutsche Bank wants to continue deposing Johansson to ask him about transfers of SHI's assets and his compensation. Johansson objects to being further deposed. He says that he was deposed in 2013 in the UK action, in 2015 in the Connecticut action, and for two days in May 2017 in the instant actions. He has had to retain counsel in Connecticut, in New York, and in Colorado, where he lives. He says that, if he is directed to testify again, Deutsche Bank should pay his expenses.

C. Whether Johansson enjoys attorney-client privilege - Deutsche Bank takes issue with Johansson's claim that he is a litigation consultant who is not obligated to produce certain documents and reveal certain conversations. Deutsche Bank contends that, if he is, he should be ordered to produce a detailed privilege log.

Johansson asserts that the Connecticut court already decided that he was a litigation consultant, and that the communications between him and Vik were privileged. The record shows that the Connecticut court determined that Johansson was a litigation consultant and that the attorney-client privilege covered communications between Johansson and SHI's counsel. Ramesh Aff. Exs. 26 and 27. No decision was made about communications between Johansson and Vik. Also, the Connecticut court determined that, if Deutsche Bank thought that SHI's document production was insufficient and was not satisfied with the claims that certain documents were privileged, the court would entertain a motion to compel SHI or Johansson to produce a privilege log.

Federal law is cited here, as attorney-client privilege under New York law and federal law is "substantially similar," and New York courts have often look to federal case law for guidance. *See HSH Nordbank AG N.Y. Branch v. Swerdlow,* 259 F.R.D. 64, 70 n 6 (S.D.N.Y.

2009); *U.S. Bank N. A. v. APP Intl. Fin. Co.*, 33 A.D.3d 430, 431 (1st Dep't 2006).

The party asserting attorney-client privilege bears the burden of proof, and the protection afforded by the privilege is narrowly construed. *148 Magnolia, LLC v. Merrimack Mut. Fire Ins. Co.*, 62 A.D.3d 486, 487 (1st Dep't 2009).

The CPLR establishes three categories of protected materials: privileged matter, absolutely immune from discovery (CPLR 3101(b)); attorney's work product, also absolutely immune (CPLR 3101(c)); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means (CPLR 3101(d)(2)). Defendants claim protection under all categories.

The attorney-client privilege applies to confidential communications between attorneys and their clients made in the course of professional employment for the purpose of providing or obtaining legal advice. CPLR 4503 (a); *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 593 (1989); *Gottwald v. Sebert,* 58 Misc. 3d 625, 630 (Sup. Ct. N.Y. County 2017), *aff'd* 161 A.D.3d 679 (1st Dep't 2018). The predominant tenor of the communication between client and attorney must involve legal advice; not every communication between attorney and client is protected. *Brooklyn Union Gas Co. v. American Home Assur. Co.*, 23 A.D.3d 190, 191 (1st Dep't 2005); *Gottwald,* 58 Misc. 3d at 630. The attorney-client privilege is waived when the client shares that communication with a third-party, because that indicates that confidentiality is no longer intended. *In re Horowitz,* 482 F.2d 72, 81 (2d Cir), *cert denied* 414 US 867 (1973); *La Suisse, Societe d'Assurances Sur La Vie v. Kraus*, 62 F.Supp.3d 358, 363 (S.D.N.Y. 2014). An exception is made when the third party is "serving as an agent of either attorney or client" because generally in those situations there is an expectation of confidentiality. *People v. Osorio*,

75 NY2d 80, 84, 550 (1989); *Robert V. Straus Prods. v. Pollard,* 289 A.D.2d 130, 131 (1st Dep't 2001). Imparting the attorney-client communication to the agent of the client or the attorney does not waive the privilege. *Id.* The exception privileges only communications made in confidence for the purpose of seeking legal advice or for the purpose of facilitating the provision of legal services to the client. *Delta Fin. Corp. v. Morrison,* 15 Misc. 3d 308, 317 (Sup. Ct., Nassau County 2007); *see La Suisse,* 62 F.Supp.3d at 363; *Gama Aviation Inc. v. Sandton Capital Partners, L.P.,* 99 A.D.3d 423, 424 (1st Dep't 2012).

Deutsche Bank claims that the attorney-client privilege attaches to third-party communications only where the third party's participation is necessary to facilitate the provision of legal advice. *Gottwald,* 58 Misc. 3d at 632; *Don v. Singer*, 19 Misc. 3d 1139(A), 2008 NY Slip Op 51071(U), *5 (Sup. Ct. N.Y. County 2008). The necessary element consists of more than usefulness and convenience; the third party's involvement must be "nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications." *Narayanan v. Sutherland Global Holdings Inc.,* 285 F.Supp.3d 604, 611 (W.D.N.Y. 2018), quoting *Allied Irish Banks v. Bank of Am., N.A.*, 240 F.R.D. 96, 103 (S.D.N.Y. 2007); *IDX Capital, LLC v. Phoenix Partners Group LLC,* 2009 NY Slip Op 31735(U), *5 (Sup. Ct. N.Y. County 2009). This rule is not always followed. *Lehman Bros. Intl. v. AG Fin. Prods., Inc.,* 2016 NY Slip Op 30187(U), *10-11 (Sup. Ct. N.Y. County 2016) (noting First Department cases not applying the necessary standard); *TC Ravenswood, LLC v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2013 NY Slip Op 31335(U), *4-5 (Sup. Ct. N.Y. County 2013). This court finds that the "necessary standard seems unnecessarily restrictive and harsh." 1 Attorney-Client Privilege: State Law New York § 4:2 (Westlaw ed)) and will not employ it.

Johansson alleges the following in his affidavit. All of his "relevant communications" on behalf of SHI, with Vik or anyone else, including the attorneys "concerning this litigation matters, have been in connection with actual litigation and/or legal proceedings or in anticipation of litigation." Johansson Aff. ¶ 5. He says that such communications have stemmed from or related to advice from litigation counsel, and that each and every such communication was done with the reasonable anticipation of confidentiality. Johansson's allegations are cursory and short on probative detail; however, he offers better evidence in the form of Deutsche Bank's closing submission in the UK case against SHI. Excerpts from Deutsche Bank's closing submission in the UK case support Johansson's claim that he acted as SHI's litigation consultant. Deutsche Bank's submission alleged that Johansson was "intimately involved with the day-to-day management of this litigation since its inception." Zaroff Aff. Ex. 25, ¶ 19. Deutsche Bank's submission stated that Johansson testified that he assisted SHI's legal advisers in compiling SHI's disclosures, reviewed Deutsche Bank's disclosures, provided instructions to SHI's counsel on various aspects of the case, reviewed SHI's pleadings in the UK and New York cases, and reviewed Vik's witness statements and assisted him in preparing to testify. Johansson was a "professional litigator" intimately involved in SHI's defense. *Id.*, ¶ 36. Although Deutsche Bank did not allege that the attorneys gave advice to Johansson which he passed on to SHI, it is easy to surmise that such was indeed the case, given the extent of his involvement with the attorneys and the case. Given that involvement, it is also easy to surmise that Johansson was privy to confidential information and that SHI expected that communications with its counsel would be held in confidence. The evidence submitted by SHI shows that Johansson acts as a litigation consultant on SHI's behalf.

Neither Vik, nor Johansson, claim that the latter is Vik's litigation consultant. The memorandum of law seems to allege so, but that is not evidence. Unsworn statements made by counsel in memoranda of law lack probative value.

The person who claims the privilege for the corporate client may also retain a separate attorney in his or her individual capacity, and a personal attorney-client privilege can attach to that person's communications with personal counsel, even if the legal advice relates to corporate activities. Attorney-Corporate Client Privilege § 2:10. Johansson has an attorney in his personal capacity (which he shares with Beatrice). SHI and Vik are represented by another attorney. Thus, confidential communications between Johansson and his own attorney concerning SHI's legal posture are privileged.

Communication between Johansson, acting for SHI, and Vik can be privileged under the common interest or joint defense doctrine. According to the common interest rule, "an attorney-client communication that is disclosed to a third party remains privileged if the third party shares a common legal interest with the client who made the communication and the communication is made in furtherance of that common legal interest" in pending or anticipated litigation (*Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 620 (2016)). The common interest doctrine can extend to parties with separate representation, as long and there is a joint legal strategy, but the best indication of a common interest is dual representation (*American Re-Ins. Co. v. United States Fid. & Guar. Co.*, 40 A.D.3d 486, 491 (1st Dep't 2007)). The common interest doctrine can apply where the communication at issue is between two parties who are co-defendants outside the presence of attorneys. *Gucci Am., Inc. v. Gucci*, 2008 WL 5251989, *1 (S.D.N.Y. 2008); *Millenium Health, LLC v. Gerlach*, 2015 WL 9257444, *2

S.D.N.Y. 2015).

Hence, as SHI and Vik share counsel and have undertaken a joint defense effort and strategy, they have a common interest. Communications between the clients themselves without an attorney can be privileged as well as communications between one or both clients and their attorney.

D. Refusal to answer questions due to attorney-client privilege - While a confidential communication of a legal character is protected, the facts underlying that communication are not. *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 NY2d 371, 377 (1991); *New York State Joint Commn. on Pub. Ethics v. Campaign for One N.Y., Inc.*, 53 Misc. 3d 983, 994 (Sup Ct, Albany County 2016); *IMO Indus. v. Anderson Kill & Olick,* 192 Misc. 2d 605, 608 (Sup. Ct. N.Y. County 2002). "The attorney-client privilege protects only the content of the communication between privileged persons, not the knowledge of privileged persons about the facts themselves. Although a client cannot be required to testify about communications with a lawyer about a subject, the client may be required to testify about what the client knows concerning the same subject." Restatement (Third) of the Law Governing Lawyers '69, Comment *d.* Facts in a client's possession are not insulated from discovery simply as a result of being reported to counsel (*see Rossi,* 73 NY2d at 594; *Don,* 19 Misc. 3d 1139(A), 2008 NY Slip Op 51071(U), *3); nor is information a client obtained through his or her lawyer's work. *Kenford Co., Inc. v. County of Erie,* 55 A.D.2d 466, 471 (4th Dep't 1977). Personal and business communications are not protected. *Yemini v. Goldberg,* 12 Misc. 3d 1141, 1144 (Sup. Ct., Nassau County 2006).

At his deposition, Johansson would not answer questions related to these matters due to attorney-client privilege: 1) the content of some conversations with Vik, some in the presence of

counsel and some not (Ramesh Aff., Ex. 7, at 25); 2) whether Johansson and Vik discussed Vik's desire to separate from SHI "in the context" of SHI's debt to Deutsche Bank (*id.* at 155); 3) Johansson's "understanding of the purpose of," or "the circumstances of" transfers to and from SHI (*id.* at 266; Ex. 8, at 19); 4) the recipient of or the purpose of a transfer from SHI (Ex. 8, at 48); 5) the purpose of certain transfers to SHI, although he did say that they were probably for the purpose of litigation expenses (*id.* at 74); 6) the purpose of transfers from Beatrice to SHI. *Id.* at 81.

These questions seek factual information and Johansson must answer them as fully as possible without revealing communications made for the purpose of facilitating the rendition of legal advice or services that are predominantly of a legal nature. *See GUS Consulting GmbH v. Chadbourne & Parke LLP,* 20 Misc. 3d 539, 541(Sup. Ct. N.Y. County 2008). Discussions with Vik about transfers and business matters are not protected, even if communicated to counsel.

E. Work product and trial preparation privileges - Attorney work product consists of "documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." *Brooklyn,* 23 A.D.3d at 190-191; *ACWOO Intl. Steel Corp. v. Frenkel & Co.,* 165 A.D.2d 752, 753 (1st Dep't 1990). Defendants incorrectly assert that Johansson can create a protected work-product. This would be the case if Johansson was working under a lawyer's direction, which he does not allege. *See Delta,* 15 Misc. 3d at 319 (litigation consultant hired by counsel); *see MBIA Ins. Corp. v. Countrywide Home Loans, Inc.,* 35 Misc. 3d 1205(A), *5, 2011 NY Slip Op 52505(U) (Sup. Ct. N.Y. County 2011), *aff'd* 93 A.D.3d 574 (1st Dep't 2012). Johansson is not the agent or employee of an attorney. *See*

Montgomery Ward Co. v. City of Lockport, 44 Misc. 2d 923, 925 (Sup. Ct., Niagara County 1964).

In the memorandum of law, defendants state that any document bearing the imprint of Johansson's work is likely to be intimately entwined with attorney work-product. A document made in the regular course of business is not made privileged by being attached to or sent with a privileged document. *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 55 Misc. 3d 544, 557-558 (Sup. Ct. N.Y. County 2016). To be privileged, the document must be predominantly a communication of a legal character. *Brooklyn,* 23 A.D.3d at 191.

A non-attorney such as Johansson can create trial preparation material. CPLR 3101(d)(2) accords privilege to any writing or thing created by or for a party or its agent in preparation for litigation, including: (1) the trial preparations of an attorney, or of those working for the attorney, that are not classified as attorney's work product, that is, that do not involve revelation of legal analysis and strategy; (2) material created by the client at the lawyer's request; and (3) materials prepared in contemplation of litigation by non-lawyers and lawyers acting in a non-legal capacity. *Beller v. William Penn Life Ins. Co. of N.Y.,* 15 Misc. 3d 350, 356 (Sup. Ct., Nassau County 2007). The trial preparation privilege applies to materials created "primarily if not solely for litigation." *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 157 A.D.2d 444, 448 (1st Dep't 1990), *aff'd as modified* 78 NY2d 371 (1991); *MBIA,* 35 Misc. 3d 1205(A), 2011 NY Slip Op 52505(U), * 7). Documents created with multiple motivations, such as for both business and for litigation, are discoverable, unless prepared primarily if not solely for litigation. *Christie's v. Zirinsky,* 17 Misc. 3d 1123(A), 2007 NY Slip Op 52125(U) (Sup. Ct. N.Y. County 2007).

Whether a particular document is or is not protected by the attorney-client privilege is a fact-specific determination most often requiring in camera review (*Spectrum,* 78 NY2d at 378). Defendants must produce a privilege log. Johansson says that, since 2008, there have been multiple daily communications such as those that Deutsche Bank mentions in its moving papers, possibly amounting to tens of thousands of emails. To review all of those and prepare a privilege log would be an overwhelming costly burden. Nonetheless, since Johansson and SHI claim the privilege, they must prove it.

F. Use of evidence provided by Johansson - Deutsche Bank seeks to use Johansson's evidence in all the proceedings between the parties. Two agreements address the use of evidence. In April 2015, Deutsche Bank and SHI entered into an agreement allowing the use of confidential information in all the actions between the parties here and abroad. In January 2017, the court so-ordered this agreement. In March 2017, Deutsche Bank and Johansson signed an agreement that all evidence provided by Johansson would be used only in the second action, and that, if Deutsche Bank wanted to use the information in other actions, Deutsche Bank would seek an order of the court.

Thus, Deutsche Bank and Johansson agreed that Deutsche Bank could move to change the terms of the agreement. Deutsche Bank is so moving and the motion is granted. In the interest of expeditiousness, the information gathered in one action should be shared in the others. The actions have the same parties, the same background, and seek the same relief, Deutsche Bank's recovery of the judgment against SHI.

G. Johansson's refusal to answer questions - This question is addressed above as it relates to attorney-client privilege. Otherwise, Johansson's reason for limiting the use of

information, and also for not answering certain questions, is that prejudice may accrue to him in an action pending in TCI, in which SHI, Deutsche Bank, Vik, and Johansson are parties, among others. According to the statement of claim, the purpose of the TCI action is "to enforce by way of equitable execution against certain valuable assets of SHI," so that Deutsche Bank can recover a "US$309 million unpaid judgment."

CPLR 4501 sets forth the rule against self-incrimination. While the statute does not require a witness in a civil case to give an answer which will tend to accuse itself of a crime or to expose it to a penalty or forfeiture, the statute does not excuse a witness from responding to relevant questions that establish "that he owes a debt or is otherwise subject to a civil suit." *Busshart v. Park,* 112 A.D.2d 787, 787 (4th Dep't 1985); *Garcia v. New York City Tr. Auth.*, 121 Misc. 2d 1012, 1014 (Sup. Ct. N.Y. County 1983). Johansson does not claim that answering questions relating to the TCI action will involve him with a crime or penalty.

The "Uniform Rules for the Conduct of Depositions," which is part of the Uniform Rules for Trial Courts, requires deponents to answer all questions at a deposition, except: (i) to preserve a privilege or right of confidentiality; (ii) to enforce a limitation set forth in an order of a court; or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. 22 NYCRR 221.2. Under the liberal standard for discovery favored by New York, unless a deponent can articulate significant prejudice, or the questions are grossly irrelevant or unduly burdensome, he or she should answer the questions. *White v. Martins*, 100 A.D.2d 805, 805 (1st Dep't 1984); *Lunt v. Mt. Sinai Hosp.*, 2010 NY Slip Op 32468(U) (Sup. Ct. N.Y. County 2010). A question causing significant prejudice has been defined as a question seeking a legal or factual conclusion, a question upon an argumentative matter, a question related

to a party's understanding of his or her ultimate legal contentions, and a question seeking the witness to draw inferences from facts. *Hildebrandt v. Stephan,* 42 Misc. 3d 719, 723 (Sup Ct, Erie County 2013). Johansson does not establish the impropriety of any question, nor does he explain how any question would, if answered, cause significant prejudice.

During the deposition, Johansson would not clearly answer questions about what steps SHI took to preserve documents. Ramesh Aff. Ex. 7, at 37-42. The court agrees that Johansson was evasive and should answer properly.

When asked if he was aware of any emails relating to SHI that he had deleted, he answered that it was possible that he had deleted emails and that he did not remember (*id.* at 52-53). He testified that a company identified as Rand was the sole shareholder of SHI (*id.* at 112-113). He did not know who the directors of Rand were (*id.* at 111-112). A witness cannot answer what he does not know or does not remember.

Johansson testified that Vik had expressed a desire to "separate" from SHI. When asked if Vik's sentiment related to SHI's liabilities, Johansson answered yes (*id.* at 151-152). This question has been answered. Johansson cannot be expected to state that Vik wanted to separate from SHI because Vik did not want SHI to pay the debt to Deutsche Bank.

Johansson testified that he had discussed SHI with Rand. *Id.* at 166. The discussion was about appointing new counsel and "so forth." *Id.* at 169-170. Asked if he had provided a certain document to Vik, he said that he could have but that he did not remember that specific one, as he had provided many. *Id.* at 176-177. There is no point in asking these same questions again.

In regard to the kind of work that he had done with Vik since the time of Johansson's 2015 deposition, Johansson said that he had been litigation consultant. *Id.* at 200. He was asked

if he had provided financial advice to SHI separate from litigation matters and he did not answer directly. *Id.* at 201. Deutsche Bank can ask that question again.

Johansson said that SHI had paid money to another company in 2013; he did not know where that money was today. *Id.* at 215. Asked if any of that money had "made its way to you personally" he said that he had not received any dividends or salary from the recipient. *Id.* at 217. Asked if he had received any compensation for his work for SHI over the past eight or nine years, he said "those monies went to [the recipient], not to me personally." *Id.* at 218-219. He then said that the recipient was a "family company of which I am a minority shareholder" and that he would receive money from it, if it declared dividends, which it has not. *Id.* at 219. Since the answers were evasive, Deutsche Bank can ask again about Johansson's compensation. Also, Johansson should divulge how much Ashton Capital pays him. There is no justification for not divulging that information.

Deutsche Bank's motion to resume the deposition of Johansson is granted. It can be scheduled after Deutsche Bank has examined the privilege logs.

H. Deutsche Bank's motion to appoint a special master is granted - In view of the difficulty and complexity of disclosure in these cases, it is appropriate to appoint a special master or referee to supervise the continued examination of Johansson and other discovery. The discovery referee shall have the authority to set the date, time, and place for all hearings determined by the referee to be necessary, to direct the issuance of subpoenas, to preside over hearings, to take evidence, and to rule on objections, motions, and other requests made during the course of the hearing, and to decide questions related to the privilege log which Johansson must produce.

In accordance with the foregoing, it is hereby

ORDERED that in action index No. 161079/13 (Mot. Seq. No. 006) and in action index No. 161257/2013 (Mot. Seq. Nos. 008 and 009), the motions by plaintiff Deutsche Bank for an order 1) directing defendants Sebastian Holdings, Inc. and Alexander Vik (Mot. Seq. 008) and the CSCSNE Trust (Mot. Seq. 009) to produce documents responsive to Deutsche Bank's first request for the production of documents dated December 19, 2013; 2) directing defendants CSCSNE Trust and C.M. Beatrice, Inc. to produce to plaintiff an affidavit as described in this decision and afterward to designate a suitable witness for a deposition concerning the topics noticed in the subpoena served on C.M. Beatrice, Inc., dated November 8, 2016; 3) directing Per Johansson, in his capacity as the representative of defendant Sebastian Holdings, Inc, to appear for a continuation of his deposition and to produce a privilege log; 4) allowing plaintiff to use discovery materials produced by Per Johansson in these two actions in related actions; and 5) appointing a special master to preside over the continued depositions of defendants are granted; and it is further

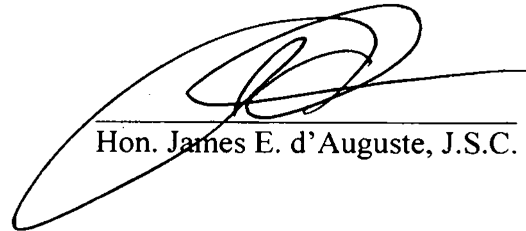
ORDERED that a Judicial Hearing Officer or Special Referee shall be designated to supervise discovery in the above-titled actions and to hear and determine any and all discovery motions and disputes relevant to discovery in these actions; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part, which in accordance with the Rules of that Part, shall assign this matter at the initial appearance to an available Judicial Hearing Officer or Special Referee; and it is further

ORDERED that in action index No. 161079/2013 (Mot. Seq. No. 005) the motion by defendant Sebastian Holdings, Inc. to quash plaintiff's information subpoena dated March 29, 2017 and for a protective order is denied.

This constitutes the decision and order of this Court.

Dated: January 2, 2019



Hon. James E. d'Auguste, J.S.C.