SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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EDWARD BERMAN, ELLEN BERMAN, ANNIE BERMAN

Plaintiffs,

- v -

HOLLAND & KNIGHT LLP,

Defendant.

INDEX NO. 652466/2015

MOTION DATE 11/08/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 53, 54, 55, 56, 57

were read on this motion to COMPEL DISCOVERY.

This is a fraud case. Plaintiffs Edward L. Berman, Ellen L. Berman, and Annie S. Berman ("Plaintiffs") claim that their former attorneys, Defendant Holland & Knight LLP ("Defendant" or "Holland & Knight"), lured them into investing millions of dollars in a bogus tax shelter scheme by giving them knowingly false legal advice in opinion letters (*see* Compl. ¶1). The opinion letters advised that the tax shelter strategy, known as "Derivium," would "more likely than not" defer recognition of certain capital gains for tax purposes (*id.*). But Plaintiffs allege that Holland & Knight knew at the time that Derivium was illegal, and therefore the opinions contained in the letters were "false and falsely held" (*see id.* ¶¶3-4, 32). According to the Complaint, Defendant's aim was to induce unwitting clients to invest in Derivium in order to generate fees for the firm (*id.* ¶4). Plaintiffs invested a total of $8.3 million in the alleged Derivium scheme (*id.* ¶¶1, 29).

According to the Complaint, Derivium eventually collapsed under a barrage of lawsuits (*id.* ¶¶52-58; *see United States v Cathcart*, C 07-4762 PJH (JCS), 2010 WL 1048829, at *1 [ND Cal Feb. 12, 2010], report and recommendation adopted, C 07-4762 PJH, 2010 WL 807444 [ND Cal Mar. 5, 2010] [enjoining Charles Cathcart, the owner of Derivium, from "[o]rganizing, promoting, marketing, selling, or implementing" the scheme or any similar scheme]). Plaintiffs then were "hauled into" Tax Court by the IRS, which sought to recharacterize the Bermans' $8.3 million investment in Derivium as taxable gains (*id.* ¶59). Based on discovery from Holland & Knight that they obtained in the Tax Court proceeding, Plaintiffs filed the instant action.

Following the First Department's decision and order dated December 5, 2017, granting in part Defendant's motion to dismiss, what remains in this case is a single cause of action for "actual fraud" (*Berman v Holland & Knight, LLP*, 156 AD3d 429 [1st Dept 2017] [sustaining claim for actual fraud and dismissing claim for constructive fraud]). Discovery is, apparently, ongoing.[1]

At issue here is Plaintiffs' Interrogatory No. 2, which requests that Defendant "[i]dentify all persons to whom you provided any advice or services, including legal services, in connection with Derivium and/or any Derivium Transaction, and for each state the date and nature of such advice or services" (NYSCEF 55 at 7 [Pls.' First Set of Interrogatories]). Plaintiffs define the term "identify" to require disclosure of:

a. [The client's] full name;

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[1] This case was recently assigned to this Part. But Plaintiffs filed the Complaint over six years ago. The First Department's Decision and Order was issued over four years ago. The interrogatory in question in this motion was propounded over three years ago. Indeed, NYSCEF shows no activity on the case docket between January 12, 2018, and October 24, 2021, when this motion was filed. As noted at the conclusion of this Decision and Order, a status conference is necessary to ascertain the current status of the case.

b. Present or last known and business address;

c. Present or last known occupation, position, business affiliation, title and job description; and

d. His or her occupation, position, business affiliation, title and job description at the time relevant to the Interrogatory to which the response is propounded.

(*id.* at 4-5).

Defendant objected to the interrogatory on grounds of privilege and relevance (NYSCEF 50 at 5 [Def.'s R&O to Pls.' First Set of Interrogatories]). Plaintiffs now move to compel disclosure. For the reasons set forth below, Plaintiffs' motion is **denied**.

A. The Information Sought is Privileged.

"[P]rivileged matter shall not be obtainable" in discovery (CPLR 3101 [b]; *Spectrum Sys. Intern. Corp. v Chem. Bank*, 78 NY2d 371, 376 [1991] [privileged materials "absolutely immune from discovery"]). The attorney-client privilege "exists to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment" (*Priest v Hennessy*, 51 NY2d 62, 67-68 [1980]). Because "the attorney-client privilege constitutes an 'obstacle' to the truth-finding process," however, its invocation "should be cautiously observed to ensure that its application is consistent with its purpose" (*Matter of Jacqueline F.*, 47 NY2d 215, 220 [1979]). Application of the privilege depends on "the circumstance of each case" (*In re Kaplan*, 8 NY2d 214, 219 [1960]).

Under the circumstances here, disclosing the information sought by Interrogatory No. 2 would invade the attorney-client privilege. "[A]bsent other circumstances," the attorney-client privilege insulates a client's identity from disclosure where, as here, "the latter is not a party to a

pending litigation" (*Matter of Jacqueline F.*, 47 NY2d 215, 220 [1979]; *Matter of D'Alessio v Gilberg*, 205 AD2d 8, 11 [2d Dept 1994] ["conclud[ing] that the client's identity does constitute a confidential communication, and therefore cannot be revealed by the attorney without the client's consent"] [denying motion to compel]; *Allen v W. Point-Pepperell Inc.*, 848 F Supp 423, 431 [SD NY 1994] ["indicat[ing] that absent other compelling circumstances, a client's identity need not be disclosed where the client is not a party to the pending litigation"] [denying motion to compel identities of attorney's clients]; *Elliott Assoc., L.P. v Republic of Peru*, 176 FRD 93, 99 [SD NY 1997] ["The grounds for exempting a client's identity or location from the scope of the attorney-client privilege rarely apply where, as here, the client is a non-party."] [denying motion to compel the address and telephone numbers of former clients as "potential witnesses who may testify about [attorney's] past conduct"]).

Interrogatory No. 2 seeks more than just the identities of Holland & Knight clients; it seeks the identities of a sub-set of clients, based on whether those clients received certain advice from the firm. Revealing the identities of clients Holland & Knight advised about Derivium, as well as the "nature" of such advice, would disclose the substance of privileged requests for legal advice (*People v Osorio*, 75 NY2d 80, 84 [1989] ["The attorney-client privilege . . . enables one seeking legal advice to communicate with counsel for this purpose . . . ."]). Worse, it does so without giving the client the opportunity to assert the privilege. As an end-run around the protections of the privilege, Interrogatory No. 2 is invalid.

The First Department's decision in *Nab-Tern-Betts v City of New York*, 209 AD2d 223 [1st Dept 1994], is not to the contrary. In *Nab-Tern-Betts*, the court ruled that the defendant had "failed to meet its burden of establishing the attorney-client privilege" over certain documents for which the defendant "ha[d] neglected, inter alia, to identify the affiliations of and the

relationships between the parties" (*id.*). The problem here, by contrast, is that Defendant cannot fully respond to Interrogatory No. 2 *without* disclosing the names of clients or former clients, because the Interrogatory asks for the identities of persons to whom the law firm provided "advice or services, including legal services" (NYSCEF 50 at 5).

What's more, "giving out the client's name would serve no necessary purpose but on the contrary would make public the very fact as to which the client desired and was entitled to secrecy" (*In re Kaplan*, 8 NY2d 214, 218 [1960]). Context is important here. A client who, like the Bermans, sought advice from Holland & Knight about the legality of the Derivium tax shelter 20 years ago presumably did so with the expectation of confidentiality. And the confidentiality interest enshrined in the attorney-client privilege would mean very little if the attorney could later divulge, without the client's consent, the subject of the advice as part of a lawsuit in which the client is not even involved.

It is true that "notwithstanding the absence of a pending litigation to which an attorney's client is a party, disclosure may also be compelled where an attorney's assertion of the privilege is a cover for co-operation in wrongdoing" (*Matter of Jacqueline F.*, 47 NY2d at 220; *In re Kaplan*, 8 NY2d 214, 219 [1960]). But that exception does not apply here. In *Matter of Jacqueline F.*, the Court ordered an attorney to disclose the whereabouts of his client because the client was suspected of hiding in Puerto Rico to evade a child custody decree in New York (47 NY2d at 220-221; see *Matter of Beiny*, 129 AD2d 126, 140 [1st Dept 1987]). Here, by contrast, Defendant's clients or former clients are the alleged victims, not the alleged wrongdoers. And Plaintiffs do not allege any ongoing or impending wrongdoing that disclosure would help protect against. Withholding the personal information sought by Interrogatory No. 2, therefore, does not amount to "co-operation in wrongdoing."

Likewise, Plaintiffs' appeal to the crime-fraud exception is unavailing. The crime-fraud exception eliminates privilege over communications with counsel that were "in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct" (*Art Capital Group LLC v Rose*, 54 AD3d 276, 277 [1st Dept 2008]). But "[i]t is ***the client's*** intent to engage in criminal activity, not counsel's, that is relevant" (*Knopf v Sanford*, 65 Misc. 3d 463 [Sup Ct, New York County 2019] [emphasis added] [internal citation omitted]; *see also Linde v Arab Bank, PLC*, 608 F Supp 2d 351, 357 [ED NY 2009] [crime-fraud exception applies "[w]hen clients seek advice from counsel about future wrongdoing" and "ensures that clients do not benefit from the protective cloak of these doctrines when seeking counsel's assistance in committing future offenses"]). Here, Plaintiffs do not assert that any Holland & Knight client had the intent to commit fraud – again, Plaintiffs' argument is that the clients were the ones defrauded. The crime-fraud exception does not apply.

B. The Information Sought is Not Relevant to Plaintiffs' Fraud Claim.

In any event, the information sought by Interrogatory No. 2 is not relevant to Plaintiffs' claim for actual fraud. "The CPLR directs that there shall be 'full disclosure of all evidence material and necessary in the prosecution or defense of an action'" (*Spectrum Sys. Intern. Corp.*, 78 NY2d at 376, quoting CPLR 3101 [a]). The burden to show that the requested information is "material and necessary" falls on the party seeking disclosure (*see, e.g.*, *Haron v Azoulay*, 132 AD3d 475, 475 [1st Dept 2015] [rejecting motion to compel where party "merely speculated" about allegations and "failed to establish that the requested documents are material and necessary"]).

Plaintiffs fail to meet that burden here. To prove its claim for fraud, Plaintiffs must establish the existence of a material misrepresentation, scienter, reliance, and injury (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 57 [1999]; *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011] [to maintain a claim of fraudulent inducement, a complaint must allege "a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made justifiably relied on it and was damaged."], citing *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]). Plaintiff's theory of fraud hinges entirely on the specific opinion letters Defendant issued to them. Underscoring this, the Complaint asserts that Defendant "made a series of false statements ***to Plaintiffs***" (Compl. ¶59 [emphasis added]), knowing "***these statements*** were false" (*id.* ¶60 [emphasis added]), on which "***Plaintiffs*** reasonably relied" (*id.* ¶62 [emphasis added]), causing injury ***to Plainiffs*** (*id.* ¶63). None of the elements needed to prove fraud, therefore, depend on Defendant's representation of any other clients.[2]

The invasive personal information sought by Plaintiffs here – not only the names and addresses of possible Holland & Knight clients, but also details about their past and current job titles and business affiliations – serves no valid purpose. Despite what Plaintiffs contend, the personal information itself does not help prove the element of scienter, "that is, the requirement that the defendant knew of the falsity of the representation being made to the plaintiff[s]" (*Houbigant, Inc. v Deloitte & Touche LLP*, 303 AD2d 92, 98 [1st Dept 2003]). Plaintiffs insist that "the existence of a number of these other clients would go toward establishing the extent of

[2] Accordingly, Interrogatory No. 2 also runs afoul of the Commercial Division rules governing the scope of interrogatories: the persons identified would not be "witnesses with knowledge of information material and necessary to the subject matter of the action" (Comm. Div. R. 11-a).

Defendant's involvement in the broader Derivium fraud scheme," and "[t]he scope of a defendant's involvement in a broader scheme is directly relevant to establishing scienter" (NYSCEF 47 at 3-4). But this reasoning does not add up. To begin with, Defendant's responses to the Interrogatory would not show whether any of the clients had actually been defrauded. A client may have received legal advice about Derivium, for example, without ever investing in the scheme. And even if the number of persons listed in the Interrogatory response did, somehow, correlate with the number of additional fraud victims, the existence of "a large number of other persons" (*id.*) is not a stand-in for scienter.

The one case Plaintiffs cite for this leap of logic, *Basis Pac-Rim Opportunity Fund (Master) v TCW Asset Mgmt. Co.*, 40 Misc. 3d 1240(A) [Sup Ct, New York County 2013], says no such thing. In *Pac-Rim*, a securities fraud case, the court denied a motion to dismiss and permitted a theory of scienter to proceed based on "an alleged conspiracy with [a non-party]" (*id.* at *6). *Pac-Rim* did not opine on the scope of permissible discovery; it did not compel disclosure of names, addresses, and job titles of alleged fraud victims who are not parties to the litigation; and it did not suggest that the existence of "a large number of other persons" establishes scienter in a specific transaction.[3]

Interrogatory No. 2 is, at bottom, a reconnaissance mission. Plaintiffs argue that the information sought is relevant because "[t]he other clients know whether they were given the same bogus advice as Plaintiffs" (NYSCEF 47 at 3). That statement reveals the true end game

[3] Plaintiffs add that the existence of other clients who received advice about Derivium is relevant to the total amount of fees earned by Defendant in the overarching fraud. But again, Plaintiffs are only seeking to recover in this case for their own injury. And "the motive to earn fees alone is, without more, insufficient for the court to infer scienter under CPLR 3016(b)" (*Pac-Rim*, 40 Misc. 3d 1240(A), *5).

here. With the identifying information in hand, Plaintiffs can then contact current and former Holland & Knight clients to question them about their own communications with the law firm. There are a couple of serious problems with this plan, starting with client privacy (also discussed *supra*). A person who turned to Holland & Knight seeking advice about the legality of a tax shelter 20 years ago presumably did so with the expectation of confidentiality. Even setting those privacy concerns aside, Plaintiffs' attempt to canvass non-parties about sensitive, privileged communications still runs into the basic problem of relevance. This is not a class action. While the Complaint mentions, vaguely, "other victims" of Defendant's alleged fraud (*id.* ¶61), Plaintiffs do not purport to stand in those victims' shoes or to vindicate those victims' rights. And "[t]he court will not allow discovery in this case to be used as an investigative tool for future potential lawsuits" (*Pac-Rim*, 40 Misc 3d 1240(A), *7).

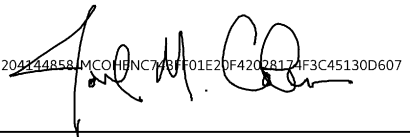
* * * *

Accordingly, it is

ORDERED that Plaintiffs' motion to compel is DENIED; and it is further

ORDERED that the parties appear for a remote status conference on **February 22, 2022 at 9:30 a.m.**, with the parties circulating dial-in information in advance to Chambers at SFC-Part3@nycourts.gov.

This constitutes the decision and order of the Court.



2/4/2022
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION		
	☐	GRANTED	☒ DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE