Matter of Brown
2026 NY Slip Op 31467(U)
April 10, 2026
Surrogate's Court, New York County
Docket Number: File No. 2010-2056/A
Judge: Rita Mella

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of Radio Drama Network, Inc. Seeking Relief Regarding the Himan Brown Revocable Trust Created By

HIMAN BROWN,

Grantor.

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DECISION and ORDER
File No.: 2010-2056/A

M E L L A, S.:

The court considered the following submissions in determining the instant motion (*see* CPLR 2219[a]):

Documents Considered	Numbered
Richard L. Kay's Notice of Motion to Compel; Affirmation of David F. Lisner, Esq., in Support, with Exhibits; Memorandum of Law in Support	1-3
RDN's Memorandum of Law in Opposition to Motion to Compel; Affirmation of Judith M. Wallace, Esq., in Opposition, with Exhibits	4-5
Reply Memorandum of Law	6
Affirmation of Judith M. Wallace, Esq., in Further Opposition, with Exhibit	7
Richard L. Kay's Memorandum of Law Pursuant to the Court's November 5, 2025 Order	8
Office of the NYS Attorney General's Memorandum of Law Pursuant to the Court's November 5, 2025 Order	9
RDN's Memorandum of Law Pursuant to the Court's November 5, 2025 Order	10

In this reformation proceeding (Reformation Proceeding) commenced by Radio Drama Network, Inc. (RDN), Respondent Richard L. Kay (Kay) moved to compel RDN's disclosure of certain documents and an audio recording (Recording) of an RDN Board meeting held on

November 20, 2015 (Board Meeting). After oral argument on September 26, 2025, the court granted the motion in part and denied it in part as to the documents, but reserved decision as to the production of the Recording. Specifically, the court found that one document had been properly withheld by RDN and that the rest of the documents had to be produced to Kay either in their entirety or with redactions. The court also directed RDN to provide further documents to the court (if such documents existed) for in camera review. The following memorializes the court's determination from the bench and its resolution of all other issues relating to the motion.

I. Background

Familiarity with the facts and procedural background of the Reformation Proceeding are presumed at this time, having been described in various decisions issued by the court (*see, e.g.*, *Matter of Brown*, NYLJ, July 23, 2019, at 22, col 3 [Sur Ct, NY County]). As pertinent here, RDN, a charitable corporation established by Himan Brown (Himan) in 1984, was the original remainder beneficiary of the Revocable Trust established by Himan in 2002. Himan's granddaughters, Barrie Brown (Barrie) and Melina Brown (Melina), are RDN directors. Kay, who was Himan's long-time lawyer, is a former director of RDN and the sole trustee of the Revocable Trust. Pursuant to a 2004 restatement of the Revocable Trust, Himan dropped RDN as the remainder beneficiary and named in its place the Himan Brown Charitable Trust (HBCT), which would be established upon Himan's death (which occurred in 2010 at age 99). Kay is also the sole trustee of HBCT.

During the Board Meeting, which RDN did not allow Kay (who was still an RDN director at the time) to attend, RDN considered whether proceedings should be commenced against Kay. One month later, RDN commenced the Reformation Proceeding. In the Reformation Proceeding, RDN alleges, inter alia, that Kay inserted certain revisions into the

Revocable Trust instrument to trick Himan into changing the Revocable Trust's remainder beneficiary from RDN to HBCT, thereby giving Kay more control over Himan's substantial funds. According to RDN, Kay induced Himan to sign off on the revisions through fraud and undue influence and by failing to disclose to Himan their impact on Himan's testamentary plan. It seeks, among other relief, the imposition of a constructive trust on the assets of HBCT for the benefit of RDN.

In August 2019, Kay filed a petition asking the court to construe the in terrorem clause contained in Article TENTH of the Revocable Trust as requiring forfeiture of all bequests that Barrie and Melina received under the Revocable Trust (specifically, $3 million each, as well as real property in Melina's case) as a result of their actions in authorizing, commencing, and prosecuting the Reformation Proceeding. By Decision and Order dated October 3, 2024, this court granted Barrie and Melina's motion to dismiss the petition, noting that they personally would "gain nothing from RDN's challenge to the Revocable Trust," and concluding that "by asserting positions on behalf of RDN in their fiduciary capacities, [Barrie and Melina] did not 'indirectly' contest the Revocable Trust" (*Matter of Brown*, NYLJ, Oct. 7, 2024, at 30, col 4 [Sur Ct, NY County]).

To meet its discovery obligations in the Reformation Proceeding, RDN produced a lengthy privilege log on March 11, 2025, asserting that the Recording and various documents were withheld from Kay based on attorney-client privilege, attorney work product doctrine, and/or the common interest doctrine. A dispute then arose over these designations. Despite multiple meet-and-confers, the parties were unable to reach an agreement on whether the Recording and 11 of the documents designated as privileged by RDN should be produced to Kay. The instant motion to compel followed, and the court reviewed the Recording and

documents in camera. Subsequently, RDN produced one of the disputed documents to Kay. Therefore, with respect to the documents listed on RDN's privilege log, only 10 were the subject of oral argument on the motion to compel.

During oral argument, the court was alerted to the fact that, if minutes of the Board Meeting existed, they had not been provided to Kay and were not listed on RDN's privilege log. The court advised the parties that it was reserving decision with respect to the Recording and directing RDN to file and serve an affirmation indicating whether formal minutes of the Board Meeting exist and whether RDN Board resolutions other than the two attached to RDN attorney Pamela Mann's February 22, 2016 email to Kay's attorneys, Michael Kramer and Gary Freidman, were adopted during the Board Meeting. The court further stated that if the minutes existed and if there were additional resolutions, all such documents were to be filed with the court as attachments to the affirmation, for purposes of an in camera review. The court then set October 8, 2025 as the deadline to serve and file the affirmation. RDN complied with the directive, submitting an affirmation as well as Board minutes reflecting the adoption of multiple resolutions at the Board Meeting.

Thereafter, by order dated November 5, 2025, the court directed all parties to submit, no later than November 28, 2025, memoranda of law addressing the following issues: 1) whether the RDN Board's November 20, 2015 decision to engage in litigation against Kay constituted a "related party transaction" within the meaning of New York's Not-for-Profit Corporation Law (N-PCL) 715 and relevant caselaw, and 2) whether in any case, any basis exists for withholding from Kay the Recording, the related minutes, and the resolutions adopted during the Board Meeting. All parties complied with the court's November 5, 2025 direction.

II. Discussion

In the context of discovery, it is well-settled that "[t]he burden of establishing any right to [privilege-based] protection is on the party asserting it, and the protection claimed must be narrowly construed" (*Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 191 [1st Dept 2005]).

As noted in *People v Osorio* (75 NY2d 80, 84 [1989] [citation omitted]), "[t]he attorney-client privilege, which is codified in CPLR 4503 (a), enables one seeking legal advice to communicate with counsel for this purpose secure in the knowledge that the contends [sic] of the exchange will not later be revealed against the client's wishes." This privilege "extends to communications of one serving as an agent of either attorney or client" (*Hudson Ins. Co. v Oppenheim*, 72 AD3d 489, 489 [1st Dept 2010] [internal quotation marks omitted]), and "attaches if information is disclosed in confidence to the attorney for the purpose of obtaining legal advice or services" (*People v Osorio*, 75 NY2d at 84).

By contrast, "[a]n attorney's work product encompasses materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy" (*ACWOO Intl. Steel Corp. v Frenkel & Co.*, 165 AD2d 752, 753 [1st Dept 1990] [internal quotation marks omitted]). The First Department has stated that "[t]he work product privilege is waived upon disclosure to a third party only when there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality" (*Bluebird Partners v First Fid. Bank, N.J.*, 248 AD2d 219, 225 [1st Dept 1998]).

A. Documents Other than the Email Chains

With respect to the five disputed documents that are not emails,[1] RDN cites attorney-client privilege and/or attorney work product doctrine. Applying the principles discussed above, the court concluded that RDN properly withheld the document denominated in RDN's privilege log as CTRL 44127 based on the attorney work product doctrine. The court found that the document clearly reflects legal expertise and strategy and is characterized as attorney work product on the document itself. Moreover, "there is no evidence that the confidentiality of [the document] was in any way compromised or intended to be so with respect to this litigation" (*id.*).

However, the court determined that the document RDN denominated as CTRL 44128 must be disclosed. RDN's counsel admitted in an affirmation dated September 18, 2025, that the document, which is a June 3, 2015 memorandum prepared by Pamela Mann, was previously produced to Kay under a different CTRL number. Accordingly, assuming any privilege would otherwise have attached, the court found that the privilege had been waived.

As for the remaining documents denominated as CTRL 44129, CTRL 44130, and CTRL 44131, which reflect track changes to the Revocable Trust amendments, the court determined that those documents must also be disclosed. The court found that RDN failed to provide any evidence that either the attorney-client privilege or the attorney work product doctrine applies to these documents. Indeed, RDN did not even identify the author(s) of the documents (*see New York State Joint Commn. on Pub. Ethics v Campaign for One N.Y., Inc.*, 53 Misc 3d 983, 995 [Sup Ct, Albany County 2016] [attorney work product doctrine inapplicable where party

[1] Although Kay characterizes all five documents as "attachments" based on a March 27, 2025 letter from RDN's counsel, the letter only states that "RDN identifies documents as emails or attachments in the 'docext' column, *i.e.*, 'eml' for email and 'pdf' for PDFs" (Kay Ex. 2). Two of the disputed documents (CTRL 44127 and CTRL 44128) have neither designation and are instead listed on the privilege log as .docx.

opposing disclosure merely asserted that the documents contained attorney work product, listed the documents' subject matter, and "made no attempt to demonstrate that they contain[ed] analysis and trial strategy that could only be prepared by an attorney"]).

B. The Email Chains

The other five documents at issue are email chains reflecting correspondence to and/or from RDN's counsel, Doug Sansted (Sansted), and Alix Carrington-Ramirez (Carrington-Ramirez) in November 2015. At all relevant times, Sansted, an attorney, was Barrie's former spouse and the Chief Legal Officer of Crystal Run Healthcare LLP (Crystal Run). Sansted acted as Barrie's personal attorney during this period,[2] and, according to RDN, Carrington-Ramirez was Sansted's legal assistant. The latter claim is supported by language in the email chains, wherein Carrington-Ramirez, who used a Crystal Run email address at all times, is identified as a Legal Executive Assistant at Crystal Run.

RDN asserted that the five documents are protected not only by the attorney-client privilege and the attorney work product doctrine, but also by the common interest doctrine, which is an exception "to the general rule that the presence of a third party destroys any claim of privilege" (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 625 [2016]). More specifically, "where two or more clients separately retain counsel to advise them on

[2] The court found unpersuasive Kay's argument that Sansted, who testified under oath during a deposition that he was acting as Barrie's personal attorney (Kay Ex. 4), was not actually Barrie's personal attorney. Even if no formal engagement letter was signed and Sansted estimated that he devoted only three hours to the matter, these facts do not establish the absence of an attorney-client relationship (*see Talansky v Schulman*, 2 AD3d 355, 358 [1st Dept 2003] [observing that "[f]ormality is not essential to create a legal services contract"]; *Gardner v Jacon*, 148 AD2d 794, 795 [3d Dept 1989] [stating that "an attorney-client relationship may exist in the absence of a retainer or fee"]; *Rodeo Family Enters., LLC v Matte*, 31 Misc 3d 1227[A], 2011 NY Slip Op 50883[U] [Sup Ct, Nassau County 2011] [disqualification of attorney was warranted based on attorney-client relationship that lasted only 3.8 hours]). Moreover, based on the court's in camera review of the Recording and disputed documents, it is clear that the services provided by Sansted to Barrie were legal in nature.

matters of common legal interest, the common interest exception allows them to shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest" (*id.* [emphasis and footnote removed]). As explained by the Court of Appeals,

> "Disclosure is privileged between codefendants, coplaintiffs or persons who reasonably anticipate that they will become colitigants, because such disclosures are deemed necessary to mount a common claim or defense, at a time when parties are most likely to expect discovery requests and their legal interests are sufficiently aligned that 'the counsel of each [i]s in effect the counsel of all.' When two or more parties are engaged in or reasonably anticipate litigation in which they share a common legal interest, the threat of mandatory disclosure may chill the parties' exchange of privileged information and therefore thwart any desire to coordinate legal strategy. In that situation, the common interest doctrine promotes candor that may otherwise have been inhibited" (*id.* at 628 [citation omitted]).

In addition, it has been stated that "[t]he party asserting the common interest rule bears the burden of showing that there was an agreement, though not necessarily in writing, embodying a cooperative and common enterprise towards an identical legal strategy" (*see Matter of Riverkeeper Inc. v Port Auth. of N.Y. & N.J.*, 66 Misc 3d 250, 256 [Sup Ct, NY County 2019], *affd* 187 AD3d 557 [1st Dept 2020] [internal quotation marks omitted]). Moreover, like all protections against disclosure, the doctrine must be narrowly construed (*see Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d at 191).

The parties vigorously disputed the applicability of the common interest doctrine to this matter. Kay noted that in a prior motion in which RDN sought discovery from him, RDN argued that parties must have identical or nearly identical legal interests for the common interest exception to apply. He posited that no identical legal interests exist here.

In opposition, RDN insisted that RDN, Melina, and Barrie have common legal interests with respect to RDN's decision to commence the Reformation Proceeding. More specifically, RDN argued that "while Barrie and Melina have no personal interest in [the Reformation

Proceeding], both *do* have an interest in not being sued as individuals for their actions as directors, and RDN has an interest in not having the litigation obstructed by threats and retaliation against its directors because of RDN's litigation" (Mem. In Opp. at 9 [emphasis in original]).

In reply, Kay observed that "RDN does not assert that Barrie in her personal capacity was ever a litigant or reasonably anticipated becoming a litigant in this proceeding, or that RDN would become or reasonably anticipated becoming a litigant in a proceeding involving Barrie in her personal capacity" (Reply Mem. at 5). He opined that RDN's asserted common interest does not comport with applicable law.

Following review of the documents in camera, and upon consideration of the applicable principles and the parties' contentions, the court found that RDN had failed to establish that the common interest doctrine applies to these communications. Specifically, RDN failed to show that Barrie and RDN have a common legal interest within the meaning of *Ambac* (27 NY3d 616). RDN did not set forth any circumstance in which it could be anticipated that RDN and Barrie in her *individual* capacity would be co-defendants or co-respondents, or that a situation would arise in which they would need to mount a common claim or defense.

In reaching this decision the court considered that while both Barrie as an individual and Barrie as an RDN director had concerns about what actions Kay might take, these concerns stemmed from different sources. For Barrie as an individual, the concern was that Kay would attempt to claw back her inheritance from Himan (and indeed, Kay made such an attempt by filing the now dismissed petition regarding construction of the in terrorem clause). For Barrie as a director, the concern was that Kay would obtain access to charitable funds that, in Barrie's view, he should not have been able to access. Those disparate concerns are front and center in

different legal proceedings, and involve different claims and defenses. None of RDN's cases supports the proposition that the common interest exception applies under these circumstances.

In light of the court's determination as to the common interest doctrine, the court also found that RDN's contention that the five email chains must be withheld based on attorney-client privilege is without merit. Even assuming that the withheld documents would otherwise be protected from disclosure by the attorney-client privilege, the privilege did not apply here due to the absence of a common interest between RDN and Barrie in her individual capacity.

However, "[w]ork product is a separate and distinct source of immunity from the attorney-client privilege and waiver of the attorney-client privilege does not necessarily result in waiver of the protection afforded under the work product category" (*Matter of Pretino*, 150 Misc 2d 371, 373 [Sur Ct, Nassau County 1991]; *see Charter One Bank, F.S.B. v Midtown Rochester*, 191 Misc 2d 154, 159 [Sup Ct, Monroe County 2002] [similar]). Here, the court found that RDN is entitled to redact portions of the withheld documents based on the attorney work product doctrine, as the relevant portions involve the legal research, analysis, conclusions, theories, and strategies of attorneys acting in a legal capacity (*see ACWOO Intl. Steel Corp. v Frenkel & Co.*, 165 AD2d at 753).

Contrary to Kay's contention, the protection of the attorney work product doctrine was not waived. There was little likelihood that the material disclosed by Sansted and RDN in the email chains would be revealed to Kay (*see Bluebird Partners, L.P. v First Fid. Bank, N.J.*, 248 AD2d at 225; *Perkins v State of New York*, NYLJ, Jan. 30, 2025, at 17, col 1 [Ct Cl 2025] [rejecting argument that documents were protected by the common interest doctrine and attorney-client privilege, but finding that the attorney work product doctrine had not been waived despite certain disclosures]). Moreover, given the absence of any evidence that Crystal Run or

any other entity viewed the email chains, the use of Sansted's and Carrington-Ramirez's Crystal Run email addresses for purposes of communications with RDN "does not, standing alone, constitute a waiver of attorney work product protections" (*see Peerenboom v Marvel Entertainment, LLC*, 148 AD3d 531, 532 [1st Dept 2017], citing *Bluebird Partners, L.P. v First Fid. Bank, N.A.*, 248 AD2d at 225).[3]

Accordingly, the court granted the motion to compel with respect to the withheld documents denominated as CTRL 16128, CTRL 16129, CTRL 16269, CTRL 16270, and CTRL 16271, and directed RDN to produce those documents in their entirety, but with the following exceptions. In each document, the November 17, 2015 email of Pamela Mann sent at 11:43 AM shall be redacted from the sentence beginning with the phrase "Meanwhile, we have" to the sentence ending with the phrase "not with me." In each document, the November 4, 2015 email from Pamela Mann sent at 12:28 p.m. shall be redacted from the sentencing beginning with the phrase "I'm a bit" to the sentence ending with the phrase "or voting." In each document, the November 4, 2015 email from Douglas Sansted sent at 9:12 a.m. shall be redacted from the sentence beginning with the phrase "Pamela, Barrie has" to the sentence ending with the phrase "at that time."

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[3] Kay cites two news articles (without providing hard copies to the court) discussing a federal investigation into certain political campaign finance activities involving Crystal Run and notes Sansted's deposition testimony (Kay Ex. 4) that he and others affiliated with Crystal Run were subjected to an investigation concerning campaign finance issues (Sansted testified that he was not charged). However, Kay's counsel acknowledged during oral argument that he did not know whether the email chains at issue—which do not concern campaign finance in any manner—were actually viewed by anyone, including the federal investigators. Moreover, the news articles suggest that the Crystal Run investigation did not begin until years after the emails at issue were circulated.

C. The Recording[4]

As noted above, at the conclusion of the September 26, 2025 proceedings, the court reserved decision on whether RDN could withhold the Recording. The purpose of the Board Meeting was to determine whether RDN would pursue legal remedies against Kay. Pursuant to N-PCL 715(h) (section 715(h)), "[n]o related party may participate in deliberations or voting relating to a related party transaction in which he or she has an interest." Based on this provision, RDN excluded Kay from the Board Meeting and withheld the Recording from him.

Kay states that he is aware of no caselaw supporting the contention that a decision to commence litigation against a fellow board member constitutes a "related party transaction,"[5] that section 715(h) does not expressly prevent a related party from accessing information regarding deliberations and voting or even from attending a board meeting, and that in any event, "RDN has failed to establish that Kay does not fall within the circle of privilege for the recording of this board meeting" since Kay was an RDN director when the Board Meeting occurred (Kay's Mem. in Supp. at 11). Kay insists that he needs the Recording to defend himself in the Reformation Proceeding. He asserts that at the very least, RDN should be required to provide a redacted transcript of the Recording.[6]

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[4] The arguments summarized below encompass the contentions set forth in the parties' motion papers (other than RDN's arguments concerning the common interest doctrine, as those contentions are now academic in light of the court's bench ruling) as well as those made in the supplemental memoranda submitted by the parties in response to the court's November 5, 2025 order.

[5] In its supplemental submission, the New York State Attorney General's Office concurs with Kay's assertion that current case law does not answer the question of whether RDN's decision to commence litigation against Kay constitutes a related party transaction.

[6] Although Kay requested redacted Board "minutes" as opposed to a redacted transcript of the Recording (Kay's Mem. in Supp. at 13), based on context, both the court and RDN interpreted the request to be for a redacted transcript of the Recording.

For its part, RDN opines that related party transactions are broadly defined to include RDN's decision to commence suit against Kay, and that Kay was therefore properly excluded from the Board Meeting pursuant to section 715(h). It reasons that because Kay was properly excluded, the fact that he is a former RDN director does not entitle him to the Recording. RDN contends that a contrary rule would have a chilling effect on a corporation's ability to consult with counsel regarding suspected misconduct of sitting directors. It further asserts that Kay allegedly failed to offer adequate support for his contention that the Recording would reveal evidence necessary to his defense in the Reformation Proceeding. As for Kay's request for a transcript with all privileged information redacted, RDN argues that no basis exists to compel the production of same due to the attorney work product doctrine, and claims that "it would be prejudicial and exceedingly burdensome if not impossible to parse and redact the board meeting transcript" (Mem. In Opp. at 20).

In reply, Kay rejects RDN's claims of prejudice and undue burden on the ground that RDN "agreed to submit the recording to court for an in camera review so that the Court may determine what is and is not privileged" (Reply Mem. at 9).

The court finds that Kay, as an RDN director, was a "related party" for purposes of section 715(h) (*see* N-PCL 102[a][23] [defining a "related party" as, inter alia, "any director, officer of key person of the corporation"]). Moreover, "related party transactions" are broadly defined in N-PCL 102(a)(24) to include "any transaction, agreement or *any other arrangement* in which a related party has a financial interest and in which the corporation . . . is a participant" (emphasis added). The court finds persuasive RDN's contention that under the unique circumstances present here, the Board Meeting to discuss whether to sue Kay concerned "any other arrangement." More specifically, the Board Meeting was held due to RDN's concern that

Kay, the sole trustee of HBCT, used his role at RDN—which in RDN's opinion has a competing claim to the residuary of the Revocable Trust—to advance his personal interests at HBCT (*see People v Trump*, 62 Misc 3d 500, 517 [Sup Ct, NY County 2018] [interpreting "any other arrangement" to include "all circumstances in which self-dealing may occur, regardless of whether the circumstances are considered a typical 'transaction,'" such as when "a private individual uses a private charitable foundation to advance the individual's personal interest without payment"]; *see also New York v Vdare Found., Inc.*, 2026 NY Slip Op 31040[U], *8 [Sup Ct, NY County 2026] [observing that a "related party transaction" does not require a "direct financial benefit" to the "related party"]).

Based on the foregoing, the court concludes that section 715(h) is applicable to the Board Meeting at issue, and that Kay was properly excluded from the deliberations and voting process that necessarily occurred at the Board Meeting. Although Kay correctly observes that section 715(h) does not expressly state that a related party cannot remain in the room when the related party is the subject of a board meeting, N-PCL 715-a(b)(3) directs boards to adopt conflict of interest policies that include "a requirement that the person with the conflict of interest not be present at or participate in board or committee deliberation or vote on the matter giving rise to such conflict."

However, this is not the end of the court's inquiry. Had the Board Meeting been attended solely by RDN directors and their counsel, Kay's access to the Recording would be foreclosed by application of the attorney-client privilege (*see Barasch v Williams Real Estate Co., Inc.*, 104 AD3d 490, 494 [1st Dept 2013] [finding that the attorney-client privilege precluded the petitioner director from accessing certain communications between her codirectors and their counsel, and that a contrary determination would "prevent a corporation from freely consulting

with counsel when dealing with a dispute involving a sitting director, or seeking advice regarding a director's suspected misconduct"]).[7] Here, Sansted was present at the Board Meeting, and the court has already ruled that the common interest doctrine does not apply to RDN's communications in Sansted's presence. Thus, even if the attorney-client privilege would otherwise have applied to the Recording, Sansted's presence defeats any argument as to the withholding of the Recording based on attorney-client privilege.

Nevertheless, the court finds that substantial portions of the Recording reflect legal analysis, conclusions, or strategy protected by the attorney work product doctrine (*see ACWOO Intl. Steel Corp. v Frenkel & Co.*, 165 AD2d at 753), and that the work product portion is inextricably intertwined with the non-work product portion. Under these circumstances, the Recording need not be disclosed (*see Long Island Lighting Co. v Aetna Cas. & Sur Co.*, 2000 NY Misc LEXIS 678, *13-15 [Sup Ct, NY County 2000], *affd & mod sub nom. Long Island Lighting Co. v Allianz Underwriters Ins. Co.*, 301 AD2d 23 [1st Dept 2002] [privilege may attach to entire document where privileged and nonprivileged portions "appear to be intertwined" such that "redaction is not a viable option"]).[8]

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[7] *People v Greenberg* (50 AD3d 195 [1st Dept 2008]), relied on by Kay, is not to the contrary. As explained by the First Department in *Barasch* (104 AD3d at 493), the holding in *People v Greenberg* was that "former directors, who were clearly privy to, and participated in, legal consultations regarding the transactions, and who were not adverse to the corporation, were entitled to documents in support of an 'advice of counsel' defense." Here, Kay was not privy to the Board Meeting communications but was instead the subject of those consultations, at a time when RDN was contemplating the commencement of a lawsuit against him.

[8] The First Department understood the Supreme Court "to have made a finding in its October 2000 decision that the [document containing both privileged and non-privileged material] would be privileged in its entirety absent any waiver," and did not review that finding on appeal (*Long Island Lighting Co.*, 301 AD2d at 33).

D. The Board Minutes

The court has reviewed in camera the material submitted by RDN post-oral argument. RDN provided a single undated document, which is entitled "Minutes of a Special Meeting of the Board of Directors of Radio Drama Network, Inc." and includes various resolutions (Board Minutes). The Board Minutes are signed by Anne Gerson, an RDN attorney who was present at the Board Meeting.

In an accompanying affirmation dated October 8, 2025 (prepared by an attorney other than Gerson), RDN claims that the Board Minutes were created in February 2016, well after the Board Meeting. It states that Kay "was provided with a copy of the resolution approving payment of RDN's legal expenses for this proceeding against Kay," but "was not provided with the Minutes or any other resolutions approved at the November 30, 2015 [sic] meeting" (Wallace Aff. ¶5).

RDN argues that the Board Minutes were properly withheld from Kay because the document was prepared after the stipulated discovery cut-off date of November 30, 2015,[9] and does not discuss Himan's intentions for the disposition of his property. In addition, it asserts that both the attorney-client privilege and attorney work product doctrine prevent disclosure of the Board Minutes.

RDN's contentions are without merit. Putting aside that RDN provides no support for its claim that the Board Minutes were drafted in 2016, even if they were in fact drafted months after the Board Meeting occurred, they memorialize an event that occurred during the discovery

[9] Pursuant to a November 20, 2024 so-ordered stipulation with respect to a motion to compel filed by Kay against RDN on September 19, 2024, Melina agreed to "search for and produce all [nonprivileged] communications between her and any Person other than Himan from November 20, 1999 to November 30, 2015 concerning Himan's plans and intentions as to the disposition of his property and/or the assets held in the Revocable Trust" (Kay Ex. 3), with some exceptions not relevant here.

window, and it is clear from the Recording that the notes upon which the Board Minutes were based—which were apparently neither produced to Kay nor listed on any privilege log—were taken during the Board Meeting. Moreover, RDN's claim that the Board Minutes are not relevant is belied by language on the top of the second page of the document itself concerning Himan's intentions as to the disposition of his property, a central issue in the Reformation Proceeding.

As for RDN's claim of attorney-client privilege, RDN has not established that the Board Minutes constitute a communication primarily of a legal character, for the purpose of rendering legal advice (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 378 [1991]). Moreover, the court finds that the Board Minutes contain no evidence of "legal research, analysis, conclusions, legal theory or strategy" (*ACWOO Intl. Steel Corp. v Frenkel & Co.*, 165 AD2d at 753) found in documents entitled to protection under the attorney work product doctrine.

Under these circumstances, RDN is directed to provide Kay with an unredacted copy of the Board Minutes.

The parties' remaining contentions are either academic or without merit in light of the court's determinations.

III. Conclusion

For all of these reasons, Kay's motion to compel is granted in part and denied in part. Within 30 days of notice of entry of this Decision and Order, RDN is directed to serve unredacted copies of the documents denominated as CTRL 44128, CTRL 44129, CTRL 44130, and CTRL 44131, and the Board Minutes submitted by RDN post-oral argument, and redacted copies of the documents denominated as CTRL 16128, CTRL 16129, CTRL 16269, CTRL 16270, and CTRL 16271. RDN is not required to make any additional disclosures.

This decision, together with the transcript of the September 26, 2025 proceedings, constitutes the order of the court.

The Clerk of the Court is directed to email a copy of this Decision and Order to the attorneys listed below.

Dated: April 10, 2026

SURROGATE

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