UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

-against-

ORDER
06-CR-0550 (JS)

SANDRA HATFIELD, DAVID H. BROOKS,
PATRICIA LENNEX,

Defendants.
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SEYBERT, District Judge:

Pending before the Court is Defendants David Brooks' and Sandra Hatfields' motions to dismiss the Indictment, or, in the alternative, suppress certain evidence, based on alleged violations of the attorney-client privilege and attorney work-product doctrine. On February 23-26, 2009, the Court held an evidentiary hearing on this matter. On November 13, 2009, the Court issued preliminary findings. See U.S. v. Hatfield, 06-CR-0550, 2009 WL 3806300 (E.D.N.Y. 2009).[1] Now, after extensive further hearings, the Court is able to reach the following final determinations.

DISCUSSION

I. Defendants' Privilege Claims

A. The Huron Documents

Preliminarily, the Court found that: (1) Mintz Levin originally retained Huron on Mr. Brooks' behalf; and (2) on April

[1] This opinion assumes familiarity with that Order, and will not repeat its findings and conclusions verbatim.

10, 2006, Huron's engagement with Mintz Levin terminated, and Huron began working for DHB directly. Based on those findings, the Court preliminarily held that: (1) Mr. Brooks can assert privilege and/or work-product protection for Huron-created material generated before April 10, 2006, unless he has waived these rights; (2) likewise, Mr. Brooks can assert privilege with respect to otherwise privileged communications between Mintz Levin, himself, and/or Huron that took place before April 10, 2006; but (3) Mr. Brooks cannot assert privilege or the work product doctrine for any Huron work performed on or after April 10, 2006.

Nothing presented during the second evidentiary hearing changed the Court's mind concerning the nature and timing of Huron's engagement. Thus, the Court still finds that: (1) pre-April 10, 2006, Huron worked for Mintz Levin on Mr. Brooks' behalf; and (2) beginning on April 10, 2006, Huron's client changed to DHB. That being said, as seen below, the evidence presented during the second evidentiary hearing completely refutes Mr. Brooks' position that he can assert privilege or work product protection over the Huron material.

1. Mintz Levin did not Retain Huron Pursuant to a Kovel Relationship

As an initial matter, the Court finds that, although Mr. Brooks' attorneys retained Huron, they did not do so pursuant to a

valid Kovel Relationship.[2] In United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961), the Second Circuit recognized that, in certain situations, an accountant assisting a lawyer can fall within the scope of the attorney-client privilege. But the Second Circuit did not bless all attorney-accountant relationships as privileged. Instead, it distinguished between accountants hired to aid attorneys in understanding "[a]ccounting concepts," and those hired to perform "only accounting service." Id. In the former case, accountants function much like translators, enabling attorneys to comprehend the "foreign language" of accounting. Id. In the latter, the advice being sought is "the accountant's rather than the lawyer's," meaning that no privilege attaches. Id. Here, the evidence irrefutably establishes that Mintz Levin retained Huron to provide DHB with corporate "accounting service[s]," thereby assisting Rachlin, DHB's independent auditors, in preparing DHB's public filings. Id; (2nd Hearing Tr. 452-54, 790, 792-93). Conversely, there is no evidence that Mintz Levin used Huron as "translators" or litigation consultants in preparing Mr. Brooks' defense. Thus, from the outset, Huron's work did not fall within the attorney-client privilege or the work-product doctrine.

True, Mr. Gotkin did testify that Huron was retained to "help us out with the litigation." (2nd Hearing Tr. 876). But,

[2] The Court's statements to the contrary (see 2nd Hearing Tr. 485) were preliminary and based upon an incomplete record and consideration of the relevant facts. They are a nullity.

despite two lengthy evidentiary hearings and thousands of pages of briefing and exhibits, Mr. Brooks has submitted no evidence concerning how Huron "helped" with the litigation. And Mr. Brooks has likewise submitted no evidence indicating which documents Huron prepared to "help" with litigation, as opposed to the documents it created to assist Rachlin and DHB in preparing DHB's SEC filings.

In his reply brief, Mr. Brooks appears to argue that, because Mintz Levin retained Huron, in part, to "help" with litigation, the work product immunity shields all of Huron's work papers, citing U.S. v. Aldman, 134 F.3d 1194 (2d Cir. 1998). But Mr. Brooks misreads the law. In Aldman, the Second Circuit distinguished between documents created "because of" litigation, and documents "that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." Id. at 1202. While the latter kind of documents "might also help in preparation for litigation, they do not qualify for protection because it could not fairly be said that they were created 'because of' actual or impending litigation." Id. Here, Huron worked principally to assist DHB's independent auditor in assembling the information it needed to enable DHB to file its 10-K. This is classic corporate accounting work that every public company undertakes "in the ordinary course of business." If Mintz Levin did not retain Huron, DHB would still have needed "essentially similar" work before it could have filed

its 10-K – and would have either directed its own in-house accountants to engage in this kind of analysis, or would have retained an outside accounting firm itself. Id. And, had DHB retained Huron (or another accounting firm) directly, there would be no question that neither privilege nor the work product doctrine would protect the resulting accounting work. Indeed, once DHB directly retained Huron, Huron's work "no longer ha[d] attorney client and work product privileges." (HU0011; Def. Ex. 18). Huron's inexplicable retention by Mr. Brooks' personal lawyers, rather than the Company, cannot magically transform routine corporate accounting work into a protected Kovel relationship. Indeed, if Mr. Brooks succeeded at this gambit, every public company would soon use similarly bizarre retention arrangements to shield their accounting findings from discovery.

Accordingly, the Court finds that Huron did not function as Kovel accountants or consultants. Thus, their work was neither privileged nor protected by the work product doctrine.

2. Even if Kovel Originally Protected Huron's Work, Mr. Brooks Waived these Protections by Instructing Huron to Share its Work Product with DHB's Independent Auditors

Even if Mr. Brooks somehow established that Mintz Levin retained Huron pursuant to a Kovel relationship, Mr. Brooks' privilege and work product claims would still fail. The evidence demonstrates that, consistent with its role in aiding Rachlin, Mr. Brooks' attorneys instructed Huron to meet with Rachlin and share

with them its work product, and that Huron then did so. (2nd Hearing Tr. 457, 476-77, 493, 920-21). True, Mr. Brooks' attorney, Jerome Gotkin, disputes this account. (2d Hearing Tr. at 794). But the Court cannot credit Mr. Gotkin's testimony on this point. First, it directly conflicts with then-Huron Managing Director John Sullivan's testimony that Mintz Levin instructed Huron to provide Rachlin with "[w]hatever our work product was."[3] (2nd Hearing Tr. 457). And second, Mr. Gotkin's version of events is not plausible. Mr. Gotkin acknowledged that Huron was retained to help Rachlin "get the 10-K filed and to get the audit done." (2nd Hearing Tr. at 793). But Mr. Gotkin could not explain how he expected Huron to do that without sharing its work product. (2d Hearing Tr. at 793-94).

However, even if Mr. Gotkin testified accurately that Mintz Levin never expressly instructed Huron to share its work product, Mr. Brooks' work product argument would still fail. A party who wishes to assert the work product immunity must take "reasonable precautions" to ensure the confidentiality of the protected material. See In re Natural Gas Commodity Litigation, 229 F.R.D. 82, 87 (S.D.N.Y. 2005) (inadvertent disclosure of work

[3] Mr. Brooks contends that Huron Managing Director John Sullivan "did not recall any Huron work product being shared with Rachlin." (Brooks Reply Br. at 9). This is incorrect. Mr. Sullivan testified that there were a "lot of phone calls back and forth, and e-mails, in terms of providing them information. (2nd Hearing Tr. 476). In addition, Mr. Sullivan testified that he worked on numerous "additional items" that Rachlin needed, although he could not recall what "the specific items were." (2nd Hearing Tr. 476-77).

product did not waive privilege because party took reasonable precautions against such disclosure); Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp., 00-CV-9212, 2002 WL 31729693, *12 (S.D.N.Y. 2002) (requiring party claiming work product to set forth "all facts relevant to the question of whether it took reasonable precautions to protect the confidentiality of its work product"). Here, Mintz Levin engaged Huron to work collaboratively with an independent auditor in performing, essentially, corporate accounting work. If Mr. Brooks or Mintz Levin did not want Huron's "assistance" to Rachlin to include providing its work product, they should have clearly instructed Huron concerning the limits of the assistance it should provide. But Huron Managing Director John Sullivan testified that he did not recall any "specific discussions about confidentiality" and was "not given any restrictions" about what work product Huron could share with Rachlin. (2nd Hearing Tr. 478-79, 490). Consequently, consistent with the Court's prior Order, the Court finds that Huron's sharing of its work papers with DHB's independent auditor waived Mr. Brook's work product immunity rights. See U.S. v. Hatfield, 06-CR-0550, 2009 WL 380630 (E.D.N.Y. Nov. 13, 2009) (citing Medinol, Ltd. v. Boston Scientific Corp., 214 F.R.D. 113, 116 (S.D.N.Y. 2002)).

Mr. Brooks disputes this holding, correctly noting that most courts have concluded that disclosure to an independent auditor

does not waive the work product immunity.[4] But, at least on the facts presented here (and without any binding Second Circuit authority), the Court chooses to apply Medinol's holding. As Medinol recognized, "the independent auditor assumes a public responsibility transcending any employment relationship with the client." Medinol, 214 F.R.D. at 116. Thus, although DHB hired Rachlin, Rachlin owed its "ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public." Id. Consequently, Rachlin's "'public watchdog' function," as DHB's independent auditor, required it to "maintain total independence from the client at all times and requires complete fidelity to the public trust." Id. Indeed, Rachlin Partner Morrie I. Hollander testified as such during the hearing, stating that Rachlin's "primary client" during its DHB engagement was "the public, the investing public." (2nd Hearing Tr. 916). Thus, although Rachlin's interests were not necessarily adversarial to DHB or to Mr. Brooks, Rachlin was – at a minimum – not "allied in interest" and did not share "litigation objectives in common" with them. Medinol, 214 F.R.D. at 115. Furthermore, because Rachlin's interests allied with the truth while Mr. Brooks' legal interests aligned with whatever

[4] See, e.g., International Design Concepts, Inc. v. Saks Inc., 05-CV-4754, 2006 WL 1564684, *3 (S.D.N.Y. 2006); American S.S. Owners Mut. Protection and Indem. Ass'n, Inc. v. Alcoa S.S. Co., Inc., 04-CV-4309, 2006 WL 278131, *1-2 (S.D.N.Y. 2006); Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc., 229 F.R.D. 441, 446-47 (S.D.N.Y. 2004).

was best for Mr. Brooks, Rachlin was always potentially adverse to him, as the possibility always existed that its investigation would reveal that he acted fraudulently or negligently. And, on the facts present here, this possibility was more than academic: in March 2006, Rachlin informed DHB that it was "no longer willing to rely on the representations of [DHB's] management at that time." (2nd Hearing Tr. 919).

Accordingly, the case for applying Medinol's rule is especially strong here. The evidence indicates that, prior to retaining Huron, Mr. Brooks knew, or should have known, that Rachlin had both: (1) concerns regarding DHB's management; and (2) a responsibility to publicly reveal the truth. Then, by asking Huron to cooperate with Rachlin, Mr. Brooks provided Rachlin with some of the very information it used to make findings detrimental to his interests. Sharing potentially inculpatory information with an entity dedicated to uncovering financial irregularities is entirely inconsistent with the "zone of privacy" that "underlie[s] the work product doctrine." Medinol, 214 F.R.D. at 114-15. And it "substantially increase[d] the opportunity for potential adversaries" to obtain it -- as, in fact, happened. Id. at 115 (internal quotation and citation omitted). Thus, the Court finds that Huron's sharing of its work papers with Rachlin waived whatever work product protection Mr. Brooks may have been entitled to claim.

3. Huron's Subsequent DHB Engagement also Waived Privilege

Even if Mr. Brooks could somehow establish that Huron's sharing of its work product with Rachlin was completely unexpected and unauthorized, that he took reasonable steps to prevent it, or that Medinol was wrongly decided, his privilege and work product claims would still fail. On April 10, 2006, Mr. Brooks' representatives permitted Huron to cease its engagement on his behalf, and start a substantively similar, and expressly non-privileged, engagement for DHB. (HU0011; Def. Ex. 18). As Mr. Brooks agrees, this subsequent engagement heavily depended upon Huron's pre-April 10, 2006 work. There is no evidence that Mr. Brooks explicitly authorized this transfer and sharing of work product. But there is ample evidence that he neglected to take "reasonable precautions" to protect his work product from being used. In re Natural Gas Commodity Litigation, 229 F.R.D. at 87; Bovis Lend Lease, 2002 WL 31729693 at *12. Specifically, it is undisputed that Huron performed $374,380 of work on his behalf, and then went on to perform very similar non-privileged work for DHB based on many of the same underlying corporate records. (2nd Hearing Tr. 296-97). Mr. Brooks' attorneys not only failed to object to this arrangement, they expressly permitted it to happen. (HU0011; Def. Ex. 18). And, in so doing, there is no evidence that they took reasonable precautions to preserve his work product rights. For instance, although Mr. Gotkin instructed Huron that

"some" "prior communications" "may" remain privileged, there is no evidence that he, or anyone else, ever clearly instructed Huron to not rely upon its pre-April 10 work during the DHB engagement. Likewise, there is no evidence that Mr. Brooks' representatives asked Huron to prohibit persons who worked on the Mintz Levin engagement from working on the Huron engagement, or asked Huron to "wall off" the pre-April 10 material from its personnel working for DHB.

Thus, even if the work product doctrine originally shielded Huron's work for Mintz Levin (a dubious proposition), Mr. Brooks waived the work product immunity by failing to take steps to prevent Huron from using this work product during its subsequent, expressly non-privileged DHB engagement.[5]

Consequently, the Court finds that none of the Huron-created documents are privileged or protected by the work product doctrine.

B. Mintz Levin Documents Produced By Huron

In addition to Huron's own documents, Huron also gained

[5] The joint defense agreement between Mr. Brooks and DHB cannot save his work product claims concerning the Huron material. There is no evidence that Mr. Brooks permitted Huron to work for DHB as part of the joint defense agreement. On the contrary, Mr. Brooks' representatives agreed that Huron's work for DHB would not enjoy the protections of privilege and the work product doctrine. (HU0011; Def. Ex. 18). And, in any event, the evidence indicates that Huron performed non-privileged accounting work for DHB, not legal consulting work pursuant to a Kovel relationship.

possession of several SEC deposition summaries that Mintz Levin prepared for Mr. Brooks, which Huron then produced to the Government. The Court received conflicting evidence on when Huron received these documents. Then-Huron employee Richard Pimentel testified that he received the summaries directly from Mintz Levin during Huron's DHB engagement. (2nd Hearing Tr. 124; 389). But Mintz Levin attorney Jerome Gotkin testified that he sent most of the summaries to Huron during Huron's Mintz Levin engagement, and one summary to DHB pursuant to the joint defense agreement. (2nd Hearing Tr. 656-58). Although it is a close call, the Court credits Mr. Gotkin's testimony on this point. Consequently, the Court finds that the work product immunity shielded these documents.[6]

C. Mintz Levin Documents Produced by DHB

Mr. Brooks' privilege log identifies a few DHB-produced Mintz Levin invoices. These invoices contain information which is work product (i.e., descriptions of various tasks that Mintz Levin engaged in). In its November 13, 2009 Order, the Court directed Mr. Brooks to introduce evidence indicating that DHB's possession of

[6] In so doing, the Court draws a distinction between Mintz Levin's work product and Huron's. Huron performed corporate accounting work, which it then shared with independent or potentially adversarial entities, such as Rachlin. The SEC summaries are attorney work product, drafted for litigation purposes. And, although Mintz Levin did not retain Huron for Kovel purposes, it retained Huron nevertheless – meaning that, at the time, Huron was neither independent nor potentially adversarial. Moreover, sending the SEC summaries amounted to "communications," which Mr. Gotkin specifically asked Huron to protect even after its engagement ended. (HU0011; Def. Ex. 18).

them did not waive their protected status. Mr. Brooks has done so. Defense Exhibit 148 establishes that Mr. Brooks provided these invoices to DHB pursuant to the joint defense agreement.

D. Schlam Stone/Stroz Friedberg Documents

In April 2004, Mr. Brooks retained the law firm of Schlam Stone to represent him. Schlam Stone, in turn, retained the Stroz Friedberg accounting firm to assist in Mr. Brooks' representation. At the first evidentiary hearing, James Sherwood, a Schlam Stone Partner, identified 59 documents as being either Schlam Stone's or Stroz Friedberg's work product. (First Hearing Tr. 27-67). At the second hearing, Mr. Sherwood testified that an additional eight documents were privileged or protected by the work product doctrine. (Def. Ex. 501)

The Government raises numerous objections to Mr. Brooks' privilege and work product claims over these documents. Specifically, the Government claims that: (1) the allegedly poor quality of Schlam Stone's and Stoz Friedberg's work somehow eliminates privilege; (2) Ms. Schlegal did not enter into a joint defense agreement with Mr. Brooks because, Victor Rocco, her attorney for only three hours, could not remember such an agreement and an "uncounselled third party" cannot participate in a joint defense agreement; and (3) Mr. Brooks waived privilege because his personal attorney did not double-check DHB's privilege review. The Government cites no authority to support any of these arguments.

And they are without merit. Contrary to the Government's claims, privilege and work product protections do not dissolve simply because an attorney or Kovel accountant does an inadequate job.[7] In addition, as joint defense agreements exist between the parties, not the attorneys, unrepresented individuals can enter into and benefit from these kinds of agreements. See, generally, HSH Nordbank AG New York Branch v. Swerdlow, 259 F.R.D. 64, 71 (S.D.N.Y. 2009) (unrepresented parties can participate in common interest agreements). And, in any event, Mr. Brooks' joint defense agreement with DHB included Ms. Schlegal, in her corporate capacity as DHB's CFO. Finally, the Government concedes that Mr. Brooks' attorneys asked DHB's counsel to conduct a privilege review on his behalf, and DHB's counsel agreed. (Gov. Br. 19; 2nd Hearing Tr. 734). The Court sees no reason to require corporate employees to retain (and pay for) personal representation simply to double-check a privilege review that their company's counsel has already performed. And it will certainly not grant the Government's request that it invent such a requirement (apparently never before recognized by any court), and then impose it ex post facto on Mr. Brooks.

[7] The Court expresses no opinion as to whether Schlam Stone's or Stroz Friedberg's work was, in fact, inadequate. The Court notes only that the Government's reasoning is faulty and without legal support. Indeed, if the Court adopted the Government's position, a client who has the misfortune of retaining an incompetent attorney would be penalized twice: first through his attorney's ineptitude, and second by losing his rights to protect attorney-client communications and attorney work product.

Consequently, the Court affirms its previous holdings that the Schlam Stone and Stroz Friedberg documents were originally privileged and/or protected under the work product doctrine, and that Mr. Brooks did not waive those privileges by maintaining these documents on his DHB computer, or by sharing them with Ms. Schlegal pursuant to a joint defense agreement. See Hatfield, 2009 WL 3806300 at *7-12. That being said, as discussed below, Mr. Brooks did waive his privilege and work product rights by failing to raise prompt objections to these documents' privileged status.

The question now turns to the Schlam Stone/Stroz Friedberg documents found on Christine Callahan's hard drive, (Bates labeled "CXC"), Teddy Tawil's hard drive (Bates labeled "TXT"), and DHB's New York computer server (the "NYS" Bates label). Neither Ms. Callahan nor Mr. Tawil recognized the documents stored on their respective hard drives, nor could they explain how they got there. (Def. Exs. 504, 505). The Court notes, however, that these documents pre-date Ms. Callahan's and Mr. Tawil's employment at DHB by more than one year. It is likely then that Ms. Callahan and Mr. Tawil simply inherited DHB hard drives which contained the privileged and work product protected documents, and that DHB failed to erase these hard drives before providing them to Ms. Callahan and Mr. Tawil. The Court has even less information concerning the "NYS" server documents. Given this paucity of information, the Court does not make any privilege or work product determinations with respect

to Mr. Tawil's documents and the NYS server documents. Instead, as discussed below, the Court finds that – even if Mr. Brooks could originally assert privilege or work product protection over them – he waived these rights by failing to promptly object to the Government's possession of them.

The Court does not have that luxury with respect to Ms. Callahan's documents. After much consideration, the Court finds that Ms. Callahan's possession of these documents did not waive Mr. Brooks' privilege and work product rights. There is no way to tell who possessed Ms. Callahan's computer before she did. But the evidence indicates that Mr. Brooks disclosed these kinds of documents to DHB personnel pursuant to the joint defense agreement. (Def. Exs. 446-453). Conversely, there is no evidence that Mr. Brooks simply passed these documents around as if they were the Sunday comics. Thus, although it is a close call, the Court finds that the evidence, and the inferences therefrom, tip towards a finding that Mr. Brooks, or his representatives, provided these documents to a DHB employee pursuant to the Brooks-DHB joint defense agreement, and that DHB then failed to clean this employee's computer before passing it along to Ms. Callahan. This series of events did not waive privilege.

E. Milbank, Tweed, Hadley & McCloy, LLP Documents

Mr. Brooks' privilege log also identifies several documents created by Milbank, Tweed, Hadley & McCloy, LLP ("Milbank

Tweed"). In its initial Order, the Court concluded that Mr. Brooks had put forth sufficient evidence to show that one of these documents was privileged (Def. Ex. 222), but had failed to show that privilege or work product protected any of the other documents. Neither Mr. Brooks nor the Government introduced any evidence concerning the Milbank Tweed documents at the second hearing. Thus, the Court's initial findings stand: Defense Exhibit 222 is privileged; the other Milbank Tweed documents are not. That being said, Mr. Brooks has since waived his privilege claims over Defense Exhibit 222, because he failed to promptly raise privilege objections to the Government's possession of it.

F. Alleged Joint-Defense Communications Between Mr. Brooks and/or his Attorneys and Other Persons or Entities

Mr. Brooks' privilege log identifies several documents as privileged under unwritten joint defense agreements he reached with several other parties. Mr. Brooks, however, has supplied the Court with copies of only a few of these documents.

Defense Exhibit 145 is a June 20, 2004 e-mail from DHB's attorney, Leslie Lepow, to Mr. Brooks, Mr. Brooks' attorney, Nancy Grunberg, and Stephen Crimmins, who represented DHB's Audit Committee. Mr. Brooks contends that this document is joint defense privileged, based on an alleged joint defense agreement Mr. Brooks entered into with DHB's Audit Committee. The Court is not persuaded. True, Mr. Lepow did testify to the existence of such an agreement. (2nd Hearing Tr. 30-31). But Mr. Riopelle and Ms.

Grunberg, Mr. Brooks' personal counsel at the time, rejected that any such joint defense agreement existed. (1st Hearing Tr. 185, 290). Indeed, when asked that question at the initial hearing, Ms. Grunberg replied "absolutely not." (1st Hearing Tr. 290). The Court credits Mr. Riopelle's and Ms. Grunberg's testimony, which is much more consistent with an audit committee's function of uncovering the truth and ferreting out corporate wrongdoing. This function is so well-recognized that, in the past, courts have held that audit committees can enter into "common interest" agreements with the S.E.C. and the U.S. Attorneys' Office. See In re Cardinal Health, Inc. Securities Litigation, 04-CV-0575, 2007 WL 495150, *9 (S.D.N.Y. 2007). Conversely, Mr. Brooks has pointed to no authority suggesting that audit committees can enter into joint defense agreements with the very corporate executives they are supposedly investigating, and the Court's own research could find none.[8] Consequently, the Court rejects Mr. Brooks' privilege claims with respect to Defense Exhibit 145.

Defense Exhibit 148 is an e-mail between Mr. Brooks' counsel, Mintz Levin, and DHB, made pursuant to a valid joint

[8] In drafting this opinion, the Court has not refreshed its recollection regarding the specifics of DHB's public filings during the relevant period. But, if DHB represented its Audit Committee as being "independent" of the Company and its executives, when, in fact, the Audit Committee was assisting the Company and its executives to coordinate a "joint defense," then DHB's representations concerning the Audit Committee's "independence" might constitute grounds for an additional securities fraud count.

defense agreement. The Court sustains Mr. Brooks' privilege claims concerning this document. The Court notes, however, that this e-mail does not discuss any legal strategy or set forth any legal theories.

DHB-DOJ-NYS-110678 (identical to DHB-DOJ-CXC-071099) was provided to the Court under seal. The Court does not reach this document's privileged status because, even if it was once privileged, Mr. Brooks failed to raise prompt objections to the Government's possession of it.

DHB-GJ-2082226-2082228, provided to the Court under seal, is an e-mail chain concerning suggested revisions to a public statement that DHB intended to make to the New York Times. It is joint defense privileged. But it is substantively identical to DHB-DOJ–NYS-112520-112522 and DHB-DOJ-NYS-130615-130617, with only minor stylistic differences. As discussed below, Mr. Brooks had the "NYS" documents in his possession for a significant period of time but failed to raise prompt privilege objections regarding them.

Finally, Defense Exhibit 301 is a memoranda prepared by Rachlin containing handwritten notes from Mr. Brooks' personal counsel. (2nd Hearing Tr. 713-14). Thus, at least initially, it was privileged and/or work product. But, as discussed below, Mr. Brooks waived his right to assert privilege or work product, because he failed to promptly object to the Government's possession of it.

G. Vance Material

In June 2008, the Court modified Mr. Brooks' bail conditions to require Mr. Brooks to employ a private, Government-approved security firm to monitor his telephone calls and faxes, except for attorney-client communications. Vance was selected for this role. Although Vance was instructed not to hand privileged materials over to the Government, Mr. Brooks alleges that it improperly did so, and that the Government failed to return these materials to him. The Government takes no position regarding whether these materials are privileged, but has agreed to return them, in their entirety, to Mr. Brooks. (Gov. Letters dated Jan. 30, 2009, Feb. 6, 2009, Feb. 11, 2009). The Government has further proffered that "the Vance materials were never reviewed in any context by anyone in the Government." (Gov. Letter dated Jan. 30, 2009). Mr. Brooks provided no evidence to the contrary. Thus, the Court rejects Mr. Brooks' request that the Court impose some kind of remedy based upon the Government's former possession of these documents.

H. Venable LLP Documents

Mr. Brooks also asserts privilege with respect to certain documents prepared by Venable on his behalf. The Court previously held that the documents contained within Defense Exhibit 702 were privileged. That being said, as discussed below, Mr. Brooks failed to promptly object to the Government's possession of these

documents. Thus, Mr. Brooks waived his right to assert privilege over them.

Mr. Brooks also asserts privilege over Motion Exhibit 50, alleging that Venable prepared this document on his behalf. But Mr. Brooks has introduced no evidence to support this contention. Thus, the Court finds that Mr. Brooks has failed to meet his burden in establishing this document's privileged status.

I. Documents Not Presented to the Court

This Court held two lengthy privilege hearings, during which the parties introduced dozens of exhibits. It has also received numerous submissions that attached even more exhibits. But, despite all these opportunities to introduce evidence (which have now ceased), Mr. Brooks neglected to provide the Court with copies of many of the documents that he claims privilege or work product rights over. And Ms. Hatfield failed to identify any specific documents as privileged or protected by the work product doctrine, and certainly never presented such documents to the Court. The Court cannot hold that a document is privileged without having seen it. Consequently, the Court finds that Mr. Brooks has failed to meet his initial burden with respect to documents listed on his privilege log but not presented to the Court for its review. And Ms. Hatfield has likewise failed to meet her burden with respect to documents she claims as privileged or work product.

II. Laches

The Court has concluded that the following documents were protected by privilege or the work product immunity, at least initially: (1) the Mintz Levin summaries of SEC testimony, produced by Huron; (2) the Mintz Levin invoices, produced by DHB in a grand jury production; (3) the Schlam Stone and Stroz Friedberg documents, produced by DHB to the Government; (4) the Milbank Tweed legal strategy outline (Defense Exhibit 222), produced by DHB to the Government; (5) Defense Exhibit 148, produced by DHB in a grand jury production; (6) DHB-GJ-2082226-2082228, produced by DHB in a grand jury production; and (7) Defense Exhibit 301, produced by DHB to the Government. Mr. Brooks once enjoyed privilege or work product protections over these documents, and did not authorize Huron or DHB to produce them. Nevertheless, they were produced.

The parties have not directed the Court to any case law concerning how promptly a party must raise privilege claims when a third party commits an unauthorized production of that party's privileged documents. But the Court believes it appropriate to analogize to the law used when inadvertent (as opposed to unauthorized) productions occur. In those circumstances, whether waiver occurs depends upon: (1) the reasonableness of the precautions taken by the producing party to prevent inadvertent disclosure of privileged documents; (2) the volume of discovery versus the extent of the specific disclosure issue; (3) the length of time taken by the producing party to rectify the disclosure; and

(4) the overarching issue of fairness. See HSH Nordbank AG New York Branch v. Swerdlow, 259 F.R.D. 64, 74-75 (S.D.N.Y. 2009); United States v. Rigas, 281 F. Supp. 2d 733, 738 (S.D.N.Y. 2003). Here, the Court believes that: (1) Mr. Brooks took sufficient precautions to prevent Huron and DHB from producing his privileged and work product protected documents; and (2) the volume of discovery was absolutely massive. The Court thus turns to factors (3) and (4), viewing these factors in light of the massive quantity of documents produced.

Ordinarily, the third factor concerns the not "the time the inadvertent disclosure is made, but rather . . . the time it is discovered." Fuller v. Interview, Inc., 07-CV-5728, 2009 WL 3241542, *4-5 (S.D.N.Y. 2009). But at least some courts have measured the relevant timeframe from when the party "should have learned" of the improper discloses "if they had but looked at [the relevant] document production[s]." Clarke v. J.P. Morgan Chase & Co., 08-CV-2400, 2009 WL 970940, *6 (S.D.N.Y. 2009). As the Court has previously stated, it is appropriate to do so here. See Hatfield, 2009 WL 3806300 at *14 (framing the inquiry as when "Mr. Brooks knew, or had reason to know, that these unauthorized disclosures were made"). Indeed, as a practical matter, the Court believes that the fourth factor, "fairness," requires it to consider when Mr. Brooks should have learned about the improper disclosures. It is fundamentally unfair to permit a criminal defendant to sit for

years on a document production while the Government carefully constructs its case, only to swoop in near the eve of trial and declare privilege based upon recent "discoveries" of privileged documents.

Here, Mr. Brooks received the DHB-DOJ-DHB, DHB-DOJ-NYS, and the Teddy Tawil documents (hereafter, "Waived DHB Documents") by January 18, 2008 – at the latest. It is likely, though not certain, that Mr. Brooks had these documents by October 25, 2007. (Gov. Ex. 113). And Mr. Brooks may have received these documents as early as June 2007, if not before. (Docket No. 686, Letter from Mr. Riopelle to Mr. Brooks' counsel enclosing "hard drives" and Venable-produced DVDs). Yet Mr. Brooks did not complain to the Court about the Government's possession of these materials until December 2008. And Mr. Brooks did not file this privilege motion until January 12, 2009 – meaning that Mr. Brooks had the Waived DHB Documents in his possession for at least 360 days, and probably many more, before seeking this relief. Mr. Brooks has introduced no evidence to explain this delay, which suggests one of two things: (1) Mr. Brooks' counsel failed to review documents it had within its possession for a year or more – despite spending many millions of dollars on his defense;[9] or (2) Mr. Brooks' counsel discovered these

[9] In this regard, it should be noted that Mr. Brooks elected to change counsel multiple times during the relevant time frame. The list of Mr. Brooks' prior attorneys reads like a "Who's Who" of New York criminal defense attorneys: Paul Shechtman, Terminated 3/25/2008; Edward S. Nathan, Terminated 9/29/2008;

privileged documents but failed to object to them. Neither possible explanation is excusable, or consistent with Mr. Brooks' obligation to promptly raise privilege concerns. And, to the extent that this delay caused the Government to rely on these privileged documents in preparing its prosecution, suppressing them now (just a few weeks before trial) would prove grossly unfair. Consequently, the Court finds that Mr. Brooks forfeited his privilege and work product rights over the Waived DHB Documents.

Mr. Brooks did receive some DHB documents later on. The Government did not produce the Schlam Stone and Stroz Friedberg documents produced from "CXC" until June 27, 2008. (Gov. Ex. 108). It did not make the Mintz Levin deposition summaries produced by Huron available for photocopying until July 31, 2008, and the photocopying itself took some time (Gov. Ex. 109; Brooks Reply Br. at 14). It did not make DHB-GJ-2082226-2082228 available for photocopying until September 12, 2008. (Gov. Ex. 110). It did not

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Aidan P. O'Connor, Terminated 9/29/2008; Stephen Michael Plotnick, Terminated 9/29/2008; Mark W. Rufolo, Terminated 9/29/2008; Herbert J. Stern, Terminated 9/29/2008; Kenneth Michael Breen, Terminated 1/08/2009; William H. Murphy, Jr., Terminated 1/5/2010. And this list excludes several other attorneys who have not formally withdrawn but appear to have ceased any activity on Mr. Brooks behalf, including John Meringolo, or who previously represented Mr. Brooks in some capacity, including Mr. Gotkin, Ms. Grunberg, Mr. Sherwood, Peter R. Schlam, Henry Mazurek and numerous other firms pre-indictment plus other attorneys who have not filed a Notice of Appearance. Mr. Brooks chose to repeatedly change his counsel, and he must incur the consequences which followed – including, apparently, a less-than-smooth document review.

produce the Mintz Levin invoices and Defense Exhibit 148 until October 21, 2008. (Gov. Ex. 112). And, as far as the Court knows, it did not produce the Schlam Stone and Stroz Friedberg documents contained within the 3500 material until the 2nd Privilege Hearing itself. (Def. Exs. 446-453). Thus, with respect to these documents, Mr. Brooks' legal team did not wait a year or more to review them and raise privilege concerns. Instead, Mr. Brooks' team objected to them only months after first receiving them from the Government. Given the many millions of pages produced to Mr. Brooks' defense, the fact that it took Mr. Brooks' team several months to review, identify and object to these documents is not unreasonable. Accordingly, the Court sustains Mr. Brooks' privilege and/or work product claims over these documents.

III. Remedy

A. The Mintz Levin Summaries

The Mintz Levin summaries are found in Def. Ex. 303-308. The summaries summarize numerous witnesses' SEC testimony in an overwhelmingly straightforward and factual manner. In so doing, the summaries are classic attorney work product. By condensing hundreds of pages of transcripts and exhibits into short memorandums, the summaries provide "easy access" to a large quantity of information – enabling Mr. Brooks' attorneys to quickly refresh their recollections regarding these witnesses' testimony, without needing to memorize the transcripts in their entirety. And, as they appear

on Mintz Levin letterhead, the Government should have flagged these summaries as privileged and returned them to Mr. Brooks. The Government failed to do so, and has provided no excuse for its failure.

That being said, although the summaries are work product, they contain practically no opinion or analysis of the summarized testimony. Thus, they provide, at most, only minimal insight into Mr. Brooks' legal strategy. In addition, the Government had equal access to the underlying information summarized: the relevant SEC transcripts. Thus, while the summaries might have rescued the Government from the burden of summarizing the SEC testimony itself, it is unlikely that their improper disclosure resulted in any actual prejudice to Mr. Brooks.

The question thus turns to the question of remedy. Suppression by itself would be inadequate, as it would fail to sanction the Government for its failure to promptly return documents that were obviously protected by the work product immunity (as evidenced by their contents and the Mintz Levin letterhead), and enable the Government to retain, without penalty, whatever procedural "benefit" it received from not having to summarize the SEC testimony itself. At the same time, given the lack of substantive prejudice, the remedies that Mr. Brooks suggests are much too severe: dismissal of the Indictment or disqualification of the present prosecution team. After balancing the need to impose

some kind of actionable sanction with the desire to avoid an unjust windfall to Mr. Brooks, the Court has decided to order the following: (1) the Government must destroy all copies of the Mintz Levin summaries that it has in its possession, or return these copies to Mr. Brooks; (2) the Government is forbidden from introducing, or mentioning, these summaries at trial; and (3) the Government is ordered to reimburse Mr. Brooks for half the legal fees he incurred for Mintz Levin's work in preparing these summaries. The Court believes this is fair, given that the Government – as a practical matter – has benefited equally from Mintz Levin's work in summarizing the SEC testimony.

Pursuant to this Order, within seven (7) days, Mr. Brooks shall submit paperwork documenting the legal fees he paid Mintz Levin for drafting Defense Exhibits 303-308. The money that Mr. Brooks receives pursuant to this Order shall be used to pay any outstanding legal fees he owes. As a result, Mr. Brooks is directed to serve a copy of this Order on Mr. Gotkin. Any disputes concerning the amount of these legal fees, and the Government's obligation to pay them pursuant to this Order, are hereby REFERRED to Magistrate Judge E. Thomas Boyle.

B. The Mintz Levin Invoices and Defense Exhibit 148

This Court has previously noted that, "while [the Mintz Levin] documents might constitute work product," "Mintz Levin's descriptions of the various tasks performed are so general that .

. . it is difficult to see how the Government could use them to its advantage." Hatfield, 2009 WL 3806300 at *6 n.7. The Court now finds that Defense Exhibit 148 falls into the same category. Consequently, although the Court finds that the work product immunity protects these documents, the Court does not believe that their improper disclosure prejudiced Mr. Brooks or benefited the Government in any way. Thus, the Court considers the following remedy more than appropriate: (1) the Government is directed to destroy all copies of the Mintz Levin invoices and Defense Exhibit 148 that it has in its possession, or return these copies to Mr. Brooks; (2) the Government is forbidden from introducing these documents at trial; and (3) at trial, the Government is forbidden from mentioning, or alluding to, the information that these documents contain, unless the Government can trace this information to an admissible source.

C. Schlam Stone and Stroz Friedberg Documents

Most of the Schlam Stone and Stroz Friedberg documents are found in the Waived DHB Documents. As discussed above, Mr. Brooks failed to promptly object to these documents' improper disclosure, and thus waived his right to assert privilege and the work product immunity. But some of the Schlam Stone and Stroz Friedberg documents are found either on the "CXC" hard drive (Def. Exs. 104-117, 165; portions of Def. Exs. 99, 103), or in the recently disclosed 3500 material (Def. Exs. 446-453).

Of these documents, the Stroz Friedberg spreadsheets are Mr. Brooks' work product and, in some cases, joint defense privileged. But they are not obviously so. On its face, only Def. Ex. 446 can be identified as originating from Stroz Freidberg. And, while a few of them do contain an "attorney work product" designation, there is nothing to identify Mr. Brooks' counsel, or any valid Kovel relationship, as the source of this purported "attorney work product." This is especially so, given that these documents did not originate from Mr. Brooks' own hard drive. Furthermore, as seen in the Huron documents, accountants often stamp everything "work product," even when it clearly is not. Thus, while the Government could have – and should have – more carefully screened DHB's productions for privilege, the Court does not assign it much fault for failing to sequester and return the Stroz Friedberg spreadsheets. Instead, the Court focuses solely on the prejudice this improper disclosure caused Mr. Brooks. The Court concludes that any such prejudice was minimal. The Stroz Friedberg spreadsheets found in CXC and the 3500 material are thematically and, in many cases, substantively identical to the Waived DHB Documents. Stroz Friedberg also shared many of its final conclusions (albeit not its preliminary work product) with FTI, DHB's independent auditor – further lessening this prejudice. And, neither the CXC documents nor the 3500 material was presented to the grand jury.

The Schlam Stone documents are work product, attorney-client privileged and, in some instances, joint defense privileged. Indeed, as they consist of draft legal memorandums exchanged between Mr. Brooks and his attorney, they are at the core of what the attorney-client privilege should protect. Thus, the Government should have promptly returned these documents to Mr. Brooks, and its failure to do so is inexplicable. That being said, the Court cannot decipher any tangible benefit the Government received from the Schlam Stone documents found in the CXC and 3500 material sources. These drafts are substantively identical to draft Schlam Stone memorandums found in the Waived DHB Documents, with only minor stylistic or typographical differences that do not appear to reflect any legal strategy. And, as a whole, the Schlam Stone memorandums, including those found in the Waived DHB Documents, raise the same arguments that Venable made on Mr. Brooks' behalf in a submission to FTI, DHB's independent auditor. See Docket No. 630 Ex. 1. Thus, the Schlam Stone drafts found on CXC and in the 3500 material do not provide the Government with any insight into Mr. Brooks' defense that the Government would not have obtained from non-privileged sources.

The 3500 Material also includes a few e-mails between Ms. Schlegal and Stroz Friedberg. Def. Exs. 451, 452. Although protected by the joint defense privilege, these e-mails are exceedingly general, or convey only factual information. To the

extent that the Government's possession of these e-mails prejudiced Mr. Brooks, such prejudice is minimal.

Accordingly, the Court finds that, although the Government improperly received certain Schlam Stone and/or Stroz Friedberg documents protected by privilege, the work product doctrine, and/or the joint defense privilege, these improper disclosures neither prejudiced Mr. Brooks nor benefited the Government in any meaningful way. As a result, the Court imposes only the following remedy: (1) the Government is directed to destroy (or return to Mr. Brooks) all copies of the Schlam Stone and Stroz Friedberg documents listed on Mr. Brooks' privilege log which originated from the CXC hard drive or the 3500 material; (2) the Government is forbidden from introducing these documents at trial; and (3) at trial, the Government is forbidden from mentioning, or alluding to, the information that these documents contain, unless the Government can trace this information to an admissible source.[10]

D. DHB-GJ-2082226-2082228

This is a joint defense privileged document. It is, however, substantively identical to several documents found within the Waived DHB Documents, including DHB-DOJ-NYS-112520-112522.

[10] This is a very light burden, given the similarities between the documents protected by privilege or the work product doctrine and numerous other non-privileged or protected documents, such as the Waived DHB Documents, FTI documents, and internal DHB accounting documents.

Indeed, only minor stylistic and typographical differences exist between these two versions. Thus, much like with the Schlam Stone and Stroz Friedberg documents discussed above, the Court suppresses this document, orders the Government to destroy all copies of it within its possession (or return those copies to Mr. Brooks), and forbids the Government from introducing it at trial. But the Court imposes no other remedy.

IV. The Government's Advice of Counsel Motion In Limine

On December 15, 2009, the Government filed a motion in limine demanding that Mr. Brooks and Ms. Hatfield disclose whether they intend to rely on an advice of counsel defense. Neither Mr. Brooks nor Ms. Hatfield have opposed this motion. This motion is GRANTED. By January 11, 2010, Mr. Brooks and Ms. Hatfield must disclose whether they intend to rely on an advice of counsel defense. If Mr. Brooks or Ms. Hatfield make such a disclosure, they are directed to disclose all documents concerning their intended advice of counsel defense by January 18, 2010. See U.S. v. Cooper, 283 F. Supp. 2d 1215, 1225 (D. Kan. 2003) (defendant ordered to provide advise of counsel discovery two weeks before trial). This disclosure should include not only those documents which support Mr. Brooks' and/or Ms. Hatfield's defense, but also all documents (including attorney-client and attorney work product documents) that might impeach or undermine such a defense.

In addition, if either Mr. Brooks or Ms. Hatfield intends

to offer such a defense, then, on January 14, 2010, all parties may file a letter (not to exceed five pages) setting forth their respective positions as to whether the assertion of the advice of counsel defense impacts the privilege determinations made in this Order. To the extent that this Order requires the Government to destroy documents or return them to Mr. Brooks, those portions of this Order are STAYED until further notice.

CONCLUSION

Mr. Brooks' privilege motion is GRANTED IN PART AND DENIED IN PART. Ms. Hatfield's privilege motion is DENIED. The Government's motion in limine to compel disclosure of an advise of counsel defense is GRANTED.

The Government is ORDERED to reimburse Mr. Brooks for half the attorney fees he incurred having the Mintz Levin SEC summaries prepared. Any dispute concerning these fees, and the Government's obligation to pay them, is REFERRED to Magistrate Judge E. Thomas Boyle.

SO ORDERED.

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Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
January 8, 2010