FILED: NEW YORK COUNTY CLERK 11/08/2017 04:08 PM INDEX NO. 653118/2014
NYSCEF DOC. NO. 1137 RECEIVED NYSCEF: 11/08/2017

# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
*Justice*

Index Number : 653118/2014
GOTTWALD, LUKASZ
vs.
SEBERT, KESHA ROSE
SEQUENCE NUMBER : 036
COMPEL PRODUCTION

INDEX NO. ______
MOTION DATE 11/3/17
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____, were read on this motion to/for ______

| | |
|---|---|
| Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1090-1093 |
| Answering Affidavits — Exhibits | No(s). 1094-1117 |
| Replying Affidavits | No(s). 1118-1135 |

Upon the foregoing papers, it is ordered that this ~~motion~~ is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

Dated: 11/8/17

______, J.S.C.
SHIRLEY WERNER KORNREICH J.S.C.

1. CHECK ONE: .................... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..........MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .................... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----------------------------------------------------------------X

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC,

Plaintiffs,

-against-

KESHA ROSE SEBERT p/k/a KESHA,

Defendants.

-----------------------------------------------------------------X

KESHA ROSE SEBERT p/k/a KESHA,

Counterclaim-Plaintiff,

-against-

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC, KEMOSABE ENTERTAINMENT, LLC, KEMOSABE RECORDS, LLC, SONY MUSIC ENTERTAINMENT, LLC and DOES 1 – 25, inclusive,

Counterclaim-Defendants.

-----------------------------------------------------------------X

Index No.: 653118/2014

**DECISION & ORDER**

SHIRLEY WERNER KORNREICH, J.:

## *I. Introduction*

By order dated August 25, 2017, the court, *inter alia*, ordered non-party Sunshine Sachs, a public relations firm hired by Mr. Geragos on behalf of Kesha, to produce documents responsive to plaintiffs' subpoena. *See* Dkt. 1020 (the August Order).[1] The court held such documents to be relevant, and overruled Kesha's privilege objections on the ground they were premature. *See id.* at 3-4 ("[Kesha's] assertion of privilege is premature. The proper course is for the parties to craft an ESI protocol, review documents for responsiveness to the subpoena, and log those that are purportedly privileged."). Relatedly, in another portion of the August

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Familiarity with this action is assumed, and all capitalized terms not defined herein have the same meaning as in the August Order.

Order concerning Mr. Geragos' privilege objections (which the court overruled on the merits), the court held that the attorney-client privilege does not extend to communications whose predominant purpose was public relations. *See id.* at 9. ("Mr. Geragos' communications were made purely for public relations purposes – and not for the purpose of providing legal advice in connection with this action. While he may have attempted to try this case in the press, that is not the same as actually trying the case. Communications in furtherance of the former are ***not*** made solely and exclusively for litigation purposes and, therefore, are not privileged.") (emphasis in original; internal citations and quotation marks omitted).

Further court intervention was necessary to resolve the parties' ESI disputes, and in mid-October, Sunshine Sachs' ESI was finally produced and then, belatedly, Kesha served two privilege logs of withheld and redacted ESI (respectively, the Withheld Log and the Redacted Log; collectively, the Logs), some of which involves another public relations firm, 42 West. On October 24, 2017, plaintiffs moved by order to show cause to compel production of the documents on the Logs. Plaintiffs contend that such documents are not exempt from disclosure because any privilege that may have otherwise applied was waived by virtue of the presence of a non-lawyer – Sunshine Sachs – on the emails. Kesha opposed the motion, arguing that Sunshine Sachs' interfacing with her lawyers was necessary for the provision of legal advice. She argues that the nature of her public relations campaign, which admittedly was for the purpose of putting public pressure on Gottwald to settle and to generally affect the public's view of her case, amounts, as a matter of law, to the provision of legal services. Ergo, according to Kesha, communications with a non-lawyer concerning a public relations campaign related to forthcoming and pending litigation are privileged, even those principally designed to pressure

plaintiffs to settle out of fear of negative publicity and the (related) prospect of the decimation of one's professional career (i.e., considerations having nothing to do with the legal merits).

To resolve this dispute and being mindful of the First Department's procedural preferences,[2] the court reviewed all of the withheld and redacted emails *in camera*. After holding oral argument and reserving on the motion,[3] the court finds that most of the logged documents ***are not*** privileged. Thus, for the reasons that follow, plaintiffs' motion to compel is granted in part and denied in part.

## *II. Legal Standard*

As the court explained in the August Order:

> New York law mandates "full disclosure of all evidence material and necessary in the prosecution or defense of an action." *Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d 371, 376 (1991), quoting CPLR 3101(a). "By the same token, the CPLR establishes three categories of protected materials ...: privileged matter...; attorney's work product ... and trial preparation materials." *Id.* at 376-77 (internal citations omitted). **"[T]he burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed**; and its application must be consistent with the purposes underlying the immunity." *Id.* at 377, citing *Priest v Hennessy*, 51 NY2d 62, 69 (1980); *see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 (2016) ("Despite the social utility of the privilege, it is in obvious tension with the policy of this State favoring liberal discovery. Because the privilege shields from disclosure pertinent information and therefore constitutes an obstacle to the truth-finding process, it must be narrowly construed.") (citations and quotation marks omitted").

---

[2] In a case involving the fiduciary exception to the attorney-client privilege, the First Department held that careful *in camera* review was necessary to determine the nature of the communications. *See Nama Holdings, LLC v Greenberg Traurig LLP*, 133 AD3d 46 (1st Dept 2015); *see also Kenyon & Kenyon LLP v SightSound Techs., LLC*, 151 AD3d 530 (1st Dept 2017) (ordering *in camera* review to assess applicability of common interest doctrine). Here, too, the court carefully reviewed and considered each of the communications *in camera* before reaching the conclusions set forth herein. That said, as discussed at oral argument, while Kesha's counsel took exception to the court reading from one of the documents, the court had, at that point, carefully reviewed that document and conclusively determined it was not privileged.

[3] *See* Dkt. 1136 (11/1/17 Tr.)

August Order at 8 (emphasis added).

There is no dispute that the attorney-client privilege is not automatically vitiated merely by virtue of the involvement of a public relations firm. *See Pecile v Titan Capital Group, LLC*, 119 AD3d 446, 446-47 (1st Dept 2014). On the contrary, the First Department has held that the attorney-client privilege may apply to communications between an attorney and a public relations firm if such communications otherwise are protected by the privilege. *See id.* Yet, in *Pecile*, the First Department reversed a trial court's order that permitted a party to withhold "production **of any press release or other communication** between defendants and members of the press or public relations firms that relates to this lawsuit or plaintiffs' claims." *See id.* (emphasis added). The ***only*** subset of such communications the First Department permitted to be withheld were those "protected by the attorney work product doctrine or attorney-client or other applicable privilege." *See id.* The First Department, however, did not explain how to determine if a communication with a public relations firm is indeed privileged. *See id.* Nonetheless, and perhaps recognizing the dearth of New York state cases on this issue, the *Pecile* court cited to a case from a New York federal district court, where there is significant persuasive authority on the subject. *See id.*, citing *In re Copper Mkt. Antitrust Lit.*, 200 FRD 213, 215 (SDNY 2001).[4]

---

[4] To be clear, while *Pecile* did not address how to differentiate between privileged and non-privileged public relations communications, this court views *Pecile*'s citation to a federal case as an indication that the First Department approves of the analysis typically employed by the federal courts (and particularly those of the Southern District of New York). It also should be noted that the facts in *Copper* are distinguishable from those here (e.g., the client did not speak English well enough to communicate with the media, the communications involving the public relations firm were for the purpose of obtaining legal advice, and the documents withheld were not prepared for business purposes). *See id.* at 215. Indeed, even in that case (which, unlike many of the other federal cases discussed herein, applied federal common law, and not New York privilege law, which is somewhat different), the court noted "that the attorney-client privilege protects communications between lawyers and agents of a client **where such communications are for the purpose of rendering legal advice**." *See id.* at 217 (emphasis added); *see also id.* at 218 ("The Supreme Court's functional approach in [*Upjohn Co. v United*

A review of the numerous, thoughtful decisions of New York federal judges reveals a clear approach they employ in this context. A good starting point is Judge Kaplan's ruling in *In re Chevron Corp.*, 749 FSupp2d 141, 164-65 (SDNY 2010), *aff'd sub nom. Lago Agrio Plaintiffs v Chevron Corp.*, 409 FAppx 393 (2d Cir 2010), where he explained:

> A party invoking the attorney-client privilege has the burden of showing, as to each allegedly privileged communication, that the communication was (1) between counsel and client, (2) intended to be and remained confidential, and (3) made for the purpose of providing or obtaining legal advice. **The "predominant purpose" of a communication must involve legal advice.** A court should determine predominant purpose of a communication "dynamically and in light of the advice being sought or rendered, as well as the relationship, **between advice that can be rendered only consulting the legal authorities and advice that can be given by a non-lawyer.**" A lawyer's "dual legal and non-legal responsibilities may bear on whether a particular communication was generated for the purpose of soliciting or rendering legal advice."

*Chevron*, 749 FSupp2d at 164-65 (emphasis added).[5] When weighing whether a lawyer that engaged in a public relations campaign may invoke the attorney-client and work product

---

*States*, 449 US 383 (1981)] looked to whether the communications at issue were by the Upjohn agents who possessed relevant information **that would enable Upjohn's attorney to render sound legal advice**.") (emphasis added). Moreover, the *Copper* court made clear that its privilege holding was based on the fact that "**legal ramifications and potential adverse use of [the] communications** were material factors in the development of the communications" and that "RLM employees were aware that the communications **were for the purpose of obtaining legal advice** from Paul Weiss and/or Sumitomo's in house attorneys." *See id.* at 219 (emphasis added). As discussed herein, for the most part, that is not the case with Sunshine Sachs. *See Abu Dhabi Commercial Bank v Morgan Stanley & Co.*, 2011 WL 4716334, at *5 (SDNY Oct. 3, 2011) ("the present facts are far different from [*Copper*], .... Here, **CMA's sub-advisor role had nothing to do with litigation assistance and there is nothing to support a finding that CMA was retained to assist in the rendition of legal services**.") (emphasis added), *report & recommendation adopted*, 2011 WL 4716335 (SDNY Oct. 7, 2011) (Scheindlin, J.) ("the disclosures to or communications with CMA employees reflected in the documents reviewed by the Special Master in camera do not appear to have been necessary for SEI to obtain informed legal advice.").

[5] Judge Kaplan also explained the policy behind these standards:

> These procedures serve vitally important purposes. The attorney-client privilege and the work product doctrine can serve to conceal highly relevant evidence that

protections over communications concerning such campaign, Judge Kaplan noted that the lawyer's "efforts have been concentrated heavily in media and public relations, lobbying, and political activism" and that "the attorney-client privilege does not apply to communications with respect to many of the activities in which [that lawyer] has engaged." *See id.* at 165 (collecting cases).[6] Regarding how the work product doctrine applies in this context, Judge Kaplan explained that it "is not intended … to obscure what [i]s essentially a lobbying and political effort, even one undertaken by a lawyer." *See id.* (citation omitted). Thus, "[i]f a lawyer happens to act as a lobbyist [or in some other capacity], matters conveyed to the attorney for the purpose of having the attorney fulfill the lobbyist [or other] role do not become privileged by virtue of the fact that the lobbyist has a law degree or may under other circumstances give legal

---

> may be important to the just resolution of a controversy. The burden of establishing their applicability therefore rests with the party asserting them. Moreover, the adverse party has the right to challenge such assertions by pointing to a failure to satisfy their prerequisites or establishing waiver or some other reason for disclosure of otherwise protected evidence.

*Chevron*, 749 FSupp2d at 167.

[6] Those cases are (the parenthetical descriptions are Judge Kaplan's): *NXIVM Corp. v O'Hara*, 241 FRD 109, 130 (NDNY 2007) (when an attorney is "wearing multiple hats and ... advising ... on anything and everything other than legal services, whether business, media, public relations, or lobbying, there is no attorney-client privilege"); *Haugh v Schroder Inv. Mgmt. North Am. Inc.*, 2003 WL 21998674, at *3 (SDNY 2003) ("A media campaign is not a litigation strategy. Some attorneys may feel it is desirable at times to conduct a media campaign, but that does not transform their coordination of a campaign into legal advice."); *In re Grand Jury Subpoenas dated March 9, 2001*, 179 FSupp2d 270, 274, 290 (SDNY 2001) (communications with lawyers acting as lobbyists not privileged); *City of Springfield v Rexnord Corp.*, 196 FRD 7, 9 (D Mass 2000) (documents prepared to respond to media inquiries not privileged); *Burton v R.J. Reynolds Tobacco Co.*, 170 FRD 481, 487 (D Kan.1997) ("The fact that the client chose to channel the work through an attorney rather than perform the work with non-legal personnel does not provide the basis for a claim of privilege."). *See Chevron*, 749 FSupp2d at 165 n.142.

advice to the client, including advice on matters that may also be the subject of lobbying [or other non-legal] efforts." *See id.* at 166 (citations omitted; brackets in original).[7]

Most federal judges that apply New York privilege law appear to approach attorney communications with public relations firms within the framework of the agency exception to the general rule that communications with non-parties waives the privilege. *See People v Osorio*, 75 NY2d 80, 84 (1989).[8] In a defamation action involving similar privilege issues, the court explained:

> In order for the agency exception to apply, the party claiming privilege must demonstrate that the client: (1) had a reasonable expectation of confidentiality under the circumstances, and (2) **[that] disclosure to the third party was necessary for the client to obtain informed legal advice**. [T]he 'necessity'

[7] It should be noted that the sharing of work product with a public relations firm is less likely to result in waiver than with the attorney client privilege. *In re Pfizer Inc. Secs. Lit.*, 1993 WL 561125, at *6 (SDNY 1993) (Buchwald, J.) ("it is not automatically waived by any disclosure to third persons."); *see Kingsway Fin. Servs., Inc. v Pricewaterhouse-Coopers LLP*, 2008 WL 4452134, at *10 (SDNY 2008) (Berman, J.) ("Work-product protection … is only waived when the disclosure is to an adversary or materially increases the likelihood of disclosure to an adversary.") (citation and quotation marks omitted). Nonetheless, the only *litigation* work product on the Logs is material on which the court already ruled, in orders dated January 3 and March 10, 2017, and found subject to disclosure (i.e., the draft California complaints, some of which may have been spoliated by Mr. Geragos). *See* Dkts. 619 & 795. Below, Kesha's current counsel is directed to explain why their withholding and logging of such draft complaints was proper in light of the court's prior orders on the matter.

[8] The agency exception set forth in *Osorio* includes the well known standard set forth in *United States v Kovel*, 296 F2d 918 (2d Cir 1961), which extended the privilege to attorneys' communications with experts. Experts often are needed to explain complex subject matter to an attorney where the attorney lacks the requisite expertise but where such expertise is essential to the litigation (e.g., a forensic accountant explaining complex financial documents). While the parties have indicated their intention to rely on public relations experts in this case, the documents the court reviewed *in camera* do not resemble the sort of advice protected by *Kovel*. Rather than provide expert analysis to aid in Kesha's litigation, Sunshine Sachs merely sought to advise Mr. Geragos on how to best spin the information for public relations and business purposes. It was not providing expert advice to aid in the litigation itself and, therefore, the advice is not privileged. That said, as identified specifically in the ordering language below, some of the communications requested legal clarification that was necessary for Sunshine Sachs to do its job (e.g., questions about legal proceedings or meaning of contracts). Those are privileged.

> element means more than just useful and convenient, but rather requires that **the involvement of the third party be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications**. Thus, where the third party's presence is merely useful but not necessary, the privilege is lost.

*Fine v ESPN, Inc.*, 2015 WL 3447690, at *10 (NDNY 2015) (emphasis added; internal citations and quotation marks omitted). In holding that the privilege did not apply, the court held that:

> the correct legal standard-that is, in order for the agency exception to apply, the communications disclosed to a third party **must be necessary to facilitate attorney-client communications and for the provision of legal advice. If public relations support is merely helpful, but not necessary to the provision of legal advice, the agency exception does not apply.** Courts vary in their application of this rule, often based on an assessment of whether a public relations professional in fact facilitated legal counsel, or merely provided ordinary public relations advice. [*See, e.g., Egiazaryan v Zalmayev*, 290 FRD 421, 431-32 (SDNY 2013), (rejecting applicability of *In re Grand Jury Subpoenas Dated Mar. 24, 2003*, 265 FSupp2d 321, 323 (SDNY 2003) (Kaplan, J.) where public relations firm provided ordinary public relations advice in high profile case, rather than assisting directly with a "lawyer's public advocacy on behalf of the client" that "was necessary to achieve a circumscribed litigation goal"); *NXIVM Corp. v O'Hara*, 241 FRD 109, 141 (NDNY 2007) (stating the rule that the attorney-client privilege does not extend to communications involving a public relations firm where the firm "simply provided ordinary public relations advice and assisted counsel in 'assessing the probable public reaction to various strategic alternatives, as opposed to enabling counsel to understand aspects of the client's own communications that could otherwise be appreciated in the rendering of legal advice.'") (citation omitted)].

*Fine*, 2015 WL 3447690, at *11 (emphasis added).

Similarly, Judge Cote held in *Haugh v Schroder Inv. Mgmt. N. Am. Inc.*, 2003 WL 21998674 (SDNY 2003), that:

> Plaintiff has not shown that Murray performed anything other than standard public relations services for Haugh, and more importantly, she has not shown that her communications with Murray or Murray's with Arkin were necessary so that Arkin could provide Haugh with legal advice. ... **The documents transmitted from plaintiff to Murray and the one document from Murray to Arkin are consistent with the design of a public relations campaign**. Plaintiff has not shown that Murray was performing functions materially different from those that any ordinary public relations advisor would perform.

*Haugh*, 2003 WL 21998674, at *3 (emphasis added; internal citation and quotation marks omitted). Notably, like a number of other judges, Judge Cote distinguished *In re Grand Jury Subpoenas*, a case heavily relied on by Kesha:

> That decision does not assist Haugh. Judge Kaplan held that the privilege applied to a public relations consulting firm hired to assist counsel to create a climate in which prosecutors might feel freer not to indict the client. He concluded that this was an area in which counsel were presumably unskilled and that the task constituted "legal advice." There is no need here to determine whether *In re Grand Jury Subpoenas* was correctly decided. **Haugh has not identified any legal advice that required the assistance of a public relations consultant**. For example, she has not identified any nexus between the consultant's work and the attorney's role in preparing Haugh's complaint or Haugh's case for court. **A media campaign is not a litigation strategy. Some attorneys may feel it is desirable at times to conduct a media campaign, but that decision does not transform their coordination of a campaign into legal advice**. Since Haugh has failed to show that the communications were made for the purpose of obtaining legal advice from her attorney as opposed to public relations advice from Murray, the communications are not protected by the attorney-client privilege.

*Haugh*, 2003 WL 21998674, at *3 (emphasis added; internal citation and quotation marks omitted); *see also Bloomingburg Jewish Education Ctr. v Vill. of Bloomingburg, N.Y.*, 171 FSupp3d 136, 145-46 (SDNY 2016) (Forrest, J.). (distinguishing *In re Grand Jury Subpoenas* on similar grounds).[9]

Perhaps most persuasively, in a case cited favorably by many federal judges,[10] Judge Rakoff in *Calvin Klein Trademark Trust v Wachner*, 198 FRD 53 (SDNY 2000),

---

[9] Kesha seeks to analogize the situation in *In re Grand Jury Subpoenas*, which involved an attempt to influence the decision of a prosecutor not to bring a criminal action by alleviating public pressure on him to do so through a media campaign, to the instant case. However, no court has relied on *In re Grand Jury Subpoenas* for the proposition advocated by Kesha – that communications designed to influence the public and vital business associates to pressure a civil litigant to settle are privileged. The analogy is particularly inept here where the communications revealing her media strategy bear directly on motive and malice. The argument is incompatible with the persuasive caselaw cited herein and, in this court's view, would be bad public policy.

[10] *See, e.g., Bloomingburg*, 171 FSupp3d at 144-47.

explained why public relations communications similar in nature to those at issue here are not privileged:

> [E]ven assuming arguendo that somewhere hidden in the voluminous documents here in issue are nuggets of client confidential communications that were originally made for the purpose of seeking legal advice, their disclosure to RLM waives the privilege, since inspection of the documents here in question clearly establishes that RLM, far from serving the kind of "translator" function served by the accountant in [*Kovel*], is, at most, simply providing ordinary public relations advice so far as the documents here in question are concerned. … **The possibility that such activity may also have been helpful to BSF in formulating legal strategy is neither here nor there if RLM's work and advice simply serves to assist counsel in assessing the probable public reaction to various strategic alternatives, as opposed to enabling counsel to understand aspects of the client's own communications that could not otherwise be appreciated in the rendering of legal advice**.
>
> [I]t must not be forgotten that the attorney-client privilege, like all evidentiary privileges, stands in derogation of the search for truth so essential to the effective operation of any system of justice: therefore, the privilege must be narrowly construed. Yet plaintiffs' [here, Kesha's] approach would, instead, broaden the privilege well beyond prevailing parameters. On any fair view of the materials submitted for the Court's in camera inspection, RLM does not appear to have been performing functions materially different from those that any ordinary public relations firm would have performed if they had been hired directly by CKI (as they also were), instead of by CKI's counsel, BSF. Nothing in the policy of the privilege suggests that attorneys, simply by placing accountants, scientists, or investigators [or, here, a public relations firm] on their payrolls ... should be able to invest all communications by clients to such persons with a privilege the law has not seen fit to extend when the latter are operating under their own steam. **It may be that the modern client comes to court as prepared to massage the media as to persuade the judge; but nothing in the client's communications for the former purpose constitutes the obtaining of legal advice or justifies a privileged status**.
>
> Turning to the assertion of "work product," it is obvious that as a general matter public relations advice, even if it bears on anticipated litigation, falls outside the ambit of protection of the so-called "work product" doctrine … **That is because the purpose of the rule is to provide a zone of privacy for strategizing about the conduct of litigation itself, not for strategizing about the effects of the litigation on the client's customers, the media, or on the public generally**.

*Calvin Klein*, 198 FRD at 54-56 (emphasis added; internal citation and quotation marks omitted).

*III. Discussion*

The court's *in camera* review of the logged documents reveal a public relations strategy that may well bear on motive and malice. The goal of that strategy, as Kesha's counsel admitted in open court, was to induce Gottwald to quickly settle, and to seek to influence the prospective jury pool.[11] *See, e.g.*, Dkt. 1136 (11/1/17 Tr. at 15-17). It is not this court's place to opine on the merits or effectiveness of a public relations strategy. This court, however, is well suited to distinguish between a public relations strategy and a legal strategy. Most of the withheld documents reflect the former. To be sure, some of the communications do indeed reflect Kesha's counsel's legal advice and mental impressions, which ordinarily would be privileged. However, by discussing such matters with a public relations firm primarily for the purpose of advancing a public relations strategy – and not for the purpose of developing or furthering a legal strategy – most of the legal advice discussed with Sunshine Sachs lost the protection of the attorney-client privilege.

In contrast, if (like a publicly traded company concerned with federal securities laws), counsel and the public relations firm needed to coordinate to ensure that public statements do not expose the client to further liability (e.g., further defamation liability), and the communications' purpose was to craft statements with a view toward that concern, the privilege indisputably would apply. But that is not what Mr. Geragos and Sunshine Sachs were doing. Rather, their

[11] In one of the redacted emails (Redacted Log No. 8), Mr. Geragos discusses how he targeted a radio interview, not only at the potential jury pool in the (now discontinued) California case, but also at the potential judges. Leaving aside the jury selection implications of such a strategy, it is the duty of this court to render decisions purely based on its views of the correct legal result, without regard to any public relations implications. It would behoove counsel to focus more on persuading this court than the court of public opinion.

focus was to play the public relations angle of every development in the case. That is not coordination to facilitate legal advice.[12] Hence, with limited exceptions set forth below (e.g., where Sunshine Sachs' legal questions were necessary to its job, such as understanding the contracts), Sunshine Sachs' involvement was not necessary (let alone indispensable) for Kesha to seek legal advice from her lawyers or for her lawyers to provide her with legal advice. Simply put, for the most part, Mr. Geragos coordinated with Sunshine Sachs to ensure that the legal developments of the case were being given their desired media spin.[13] To this court's knowledge, no court has ever held such types of communications to be privileged.

This court will not be the first to do so. The attorney-client privilege is meant to facilitate a client's ability and willingness to communicate frankly with a lawyer to maximize the lawyer's capacity to competently provide legal advice. Extending the privilege over communications merely meant to further media spin of a case is not consistent with the policy behind the privilege. Since the privilege hinders the truth-seeking process, there must be compelling grounds to keep truth-revealing evidence from the finder of fact. Holding that a public relations campaign designed to impel settlement is not privileged does not impair a client's ability to obtain competent legal advice. Such a holding should not chill candid communication between

[12] It should be noted that the court comes to this conclusion despite the contentions in the affidavits of Mitchell Schwenz and David Falkenstein of Sunshine Sachs, who merely provide general descriptions of their involvement, and do not provide an email-by-email explanation of their need to be privy to legal advice. *See* Dkts. 1096 & 1097.

[13] Some of the communications have nothing directly to do with the case itself, as opposed to media matters (e.g., interview preparation) geared to promoting Kesha' public image. That Kesha's counsel has made public relations a feature of their strategy does not mean that all of Kesha's public relations efforts are privileged. Kesha's counsel concedes as much by virtue of the ESI from Sunshine Sachs they did not include on the Logs. Moreover, privilege designations cannot turn on the harmfulness of a document to one's case, but on the distinctions between legal and non-legal advice.

the lawyer and client, nor should it impair a lawyer's ability to seek expert advice when necessary.

Finally, while it should go without saying, the court has not made any determination regarding the truth of Kesha's allegations. Without a careful review of the record evidence and without the ability to assess the witnesses' credibility at trial, it is impossible to do so. It would be improper to judge the merits based on snippets of evidence cherrypicked from the record, and it is submitted that attempts to influence the public in a similar manner is, likewise, of little truth-seeking (as opposed to public relations) value. For this reason, the court declines to consider the volume of evidence submitted by Kesha that is utterly irrelevant to the legal issues on this motion. Without intending any callous connotation, while the question of whether Kesha was indeed assaulted is paramount in this case, it is not relevant to the question of whether her counsels' public relations communications are privileged any more so than if the case turned on a garden-variety question of breach of contract. While it appears that Kesha desires to put much of the discovery record into the public domain, she cites no authority for the proposition that a litigant may vitiate a discovery confidentially agreement by submitting evidence into the public record that is utterly irrelevant to a non-dispositive motion. Kesha's deposition transcript and medical records, while certainly relevant to the merits of her case, are not relevant to the privilege dispute.

To be sure, when this case proceeds to the summary judgment phase (likely by the middle of next year at the latest) – as any litigant before this court will attest – much of the discovery record will be made public.[14] It is a bedrock principal of our judicial system that the public has a presumptive right of access to court records. *See Maxim, Inc. v Feifer*, 145 AD3d 516, 517 (1st

[14] For instance, this part's rule requires complete copies of contracts and transcripts to be publicly filed (i.e., the filing of selective excerpts is prohibited).

Dept 2016). Sealing is the exception, not the rule. *Id.*; *see* 22 NYCRR § 216.1. Nonetheless, since it is clear that the primary reason much of the discovery record was sought to be made public in connection with the instant motion was (somewhat ironically) for public relations purposes, and since such material is irrelevant to the issues on this motion, the court grants plaintiffs' sealing application. Those documents "filed under seal" (i.e., placeholders in lieu of the actual exhibits, which, as will be discussed prior to the summary judgment phase, is not ordinarily the proper procedure) shall remain filed as-is (the same is true of the parties' publicly filed redacted papers) and are hereby stricken from the record on the instant motion. *See Daily News, L.P. v Wiley*, 126 AD3d 511, 512 (1st Dept 2015) ("Decisions to seal or disclose records fall within the inherent power of the court to control the records of its own proceedings. While a court must guarantee that the defendant receives a fair trial, it must do so in a manner that balances the interests of the defendant, jurors, witnesses, attorneys and the public at large.") (internal citation and quotation marks omitted). Counsel should not expect, however, to keep the evidence in this case from the public when it is time to decide the case on the merits. Accordingly, it is

ORDERED that plaintiffs' motion to compel defendants to produce all documents on the Logs is granted in part to that extent that, except for those documents listed below, defendants shall produce all of the other logged documents to plaintiffs within 24 hours of the entry of this order on NYSCEF; and it is further

ORDERED that the following documents, identified by their entries on the Withheld Log, are privileged and need not be produced: 25, 95, 98, 101, 156, and 276; and it is further

ORDERED that the following documents, identified by their entries on the Withheld Log, must be produced, but the following portions may be redacted: 151 (only the first three

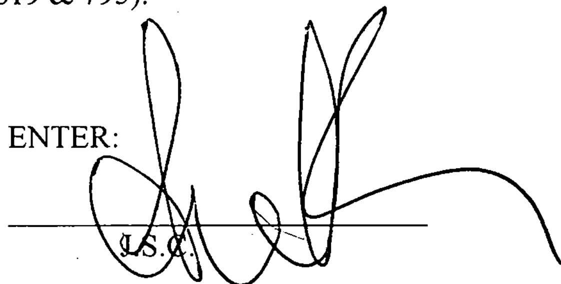
lines in the top email), 168 (only the top email), 169 (only the text in subsection "(2)"), 176 (only the top 2 emails), 187 (only the top 2 emails), 188 (only the top email), 189 (only the top 2 emails), 206 (only the first paragraph in the top email), and 269 (the first line in the top email and the entirety of the second and fourth emails from the top); and it is further

ORDERED that redacted portions of the following documents, identified by their entries on the Redacted Log, are privileged and need not be unredacted: 5, 6, 17, 22, 32, 33, 39 (only the first sentence of the third email from the top; the other portions must be unredacted), 47, 60, 62, 63, 64, 66, 97, and 101 (the latter two, to be clear, do not appear privileged but clearly are irrelevant and impact non-parties); and it is further

ORDERED that within one week of the entry of this order on NYSCEF, Kesha's counsel shall initiate an unscheduled telephone conference and be prepared to explain why the withholding and logging of draft California complaints was consistent with the court's orders dated January 3 and March 10, 2017 (Dkts. 619 & 795).

Dated: November 8, 2017

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.