NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK

DONALD LEWIS,

Plaintiff,

-against-

PIERCE BAINBRIDGE BECK PRICE & HECHT LLP, JOHN MARK PIERCE, DENVER G. EDWARDS, CAROLYNN K. BECK, LITTLER MENDELSON, P.C., SYLVIA JEANINE CONLEY, PUTNEY TWOMBLY HALL & HIRSON LLP, MICHAEL YIM and JANE DOE,

Defendants.

Index No. 155686/2019

Motion Seq. No. 5

Hon. J. Andrea Masley

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER TO SHOW CAUSE SEEKING TO COMPEL DISCOVERY AND TO UNSEAL PLEADINGS IN A RELATED CASE

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Defendants Pierce Bainbridge Beck Price & Hecht LLP ("PB" or "the Firm"), John Mark Pierce ("Pierce"), Denver G. Edwards ("Edwards"), and Carolynn K. Beck ("Beck") (collectively the "PB Defendants") respectfully submit this Memorandum of Law in support of their opposition to Plaintiff's Motion for an Order to Show Cause (Motion #5).

PRELIMINARY STATEMENT

Plaintiff asks this Court, now for the second time, to compel the PB Defendants to make an expedited and early production of an investigative report (the "Putney Report") prepared by outside counsel hired by the Firm to investigate an employee's claims of sexual misconduct against Plaintiff. Plaintiff's request should be denied because he has failed to establish that the Putney Report "contains facts essential to justify" his opposition to the PB Defendants' motion to dismiss (which is fully briefed and awaiting argument), as required by CPLR 3211(d). Even if he could meet the required showing, the Putney Report is plainly protected from disclosure by the attorney-client and/or the work product privilege. Nor has the Firm waived the privilege by what is at most, a limited, isolated disclosure of certain conclusions contained in the Putney Report.

Plaintiff also asks the Court to unseal the pleadings filed by the Firm in an action it commenced in May 2019 in an effort to protect the disclosure by Plaintiff of sensitive and confidential client and business information, including information about a client's lawsuit, the monetary value of certain client actions, and information about the Firm's finances and internal management. That action (the "Sealing Action") sought an ex parte order directing Plaintiff to file his first action against the Firm ("*Lewis I*") under seal. However, mere hours after the Firm took preliminary steps in initiating the Sealing Action, Plaintiff publicly filed the *Lewis I* complaint. Thus, the Firm's attempt to seal the *Lewis I* case was rendered moot and the Firm abandoned its efforts to pursue the Sealing Action. Although pleadings in the Sealing Action were physically

brought to the Clerk's office on May 15, 2019, they were not loaded onto the Court's ECF system until August 22, 2019, when the Clerk's office requested that the Firm file documents in the Sealing Action on ECF in order to alleviate a technical issue that arises in the Court's electronic filing system when an index number is not accompanied by any documents.

Because there is no pressing public interest in unsealing an action that was never pursued; in fact, where the action was discontinued and abandoned, and because Plaintiff himself has copies of all of the pleadings, his request to unseal that action should be denied. But if the Court is inclined to grant that prong of the motion, it should grant appropriate protective relief directing that those pleadings be used only for litigation in this matter and not for litigation by press release. As we show below, Plaintiff has repeatedly and improperly litigated this case in the press in violation of Rule 3.6 of the New York Rules of Professional Conduct and, unless appropriate protections are imposed by this Court, there is little doubt that he will do so again. Accordingly, the Court should grant appropriate protective relief directing that Plaintiff limit his use of the sealed pleadings solely for this litigation and not for purposes prohibited by the applicable Rules of Professional Conduct.

PROCEDURAL BACKGROUND

A. The Sealing Action

On the evening of May 14, 2019, Jeanine Conley of Littler Mendelsohn LLP, the Firm's outside counsel who led negotiations to resolve Lewis's threatened lawsuit in the *Lewis I* case, notified PB partner Denver Edwards that Lewis intended to file the *Lewis I* complaint on May 15, 2019, at or before 11:00 a.m., if the Firm did not agree to mediation with the floor for any award set at $1 million. *See* Affidavit of Denver G. Edwards ("Edwards Aff.) at ¶ 3. Conley called Plaintiff's counsel on May 15, 2019, to continue discussions to avoid litigation. *Id.*

Before 9:00 a.m. on May 15, 2019, Edwards learned that Plaintiff's counsel refused to delay filing the complaint if the Firm did not agree to mediation on the terms demanded by Lewis and that a filing was imminent. *Id.* In an effort to protect disclosure of confidential client and business information that was contained in the *Lewis I* complaint, the Firm had drafted: (1) a Sealing Order, (2) an Order to Show Cause; (3) a Temporary Restraining Order to Seal the *Lewis I* complaint; (4) a Memorandum of Law in Support of the Temporary Restraining Order; and (5) two Affidavits, one by Denver Edwards and one by Christopher LaVigne, in support of the Sealing Order (collectively, the "Sealed Pleadings"). *Id.* ¶ 4.

That same morning, Edwards arrived at New York State Supreme Court (New York County) before Lewis's stated deadline for filing the *Lewis I* complaint and purchased an index number (154910/2019) and obtained a Request for Judicial Intervention. *Id.* ¶ 5. Edwards also physically submitted the Sealed Pleadings to the Court's Ex Parte Office. *Id.* At or around 11:00 a.m., while Edwards waited for the Ex Parte Office to assign a judge to hear argument on the Sealed Pleadings, he received notice from the Firm that Lewis had filed the *Lewis I* complaint. *Id.* ¶ 6.

Edwards continued to wait to be heard on the Firm's ex parte motion, now seeking an Order directing that the Complaint in *Lewis I* be sealed retroactively. *Id.* ¶ 7. However, by early afternoon he received notice that media had contacted the Firm for comment on Lewis's complaint. *Id.* Thus, the Firm determined that the attempt to seal the *Lewis I* complaint was moot and Edwards returned to the Firm. *Id.* At that point, the Firm took no further steps to pursue the action and deemed it to be a nullity. *Id.*

In or around mid-August 2019, a New York Supreme Court clerk telephoned Edwards' office and asked whether the Firm had submitted the Sealed Pleadings for filing on the Court's

ECF system. *Id.* ¶ 8. Edwards described the events stated above to the clerk, who required that the Firm e-file "slipsheets" labeled "Filed Under Seal" – even if the Firm had discontinued its efforts to seal the Sealed Pleadings – so that the Clerk's Office did not have an "orphaned" index number within its system. *Id.* Edwards immediately enlisted a Firm employee to follow the clerk's direction to file the Sealed Pleadings, which was done on August 22, 2019. *Id.* at ¶ 9.

B. *Lewis II*

Plaintiff filed his first Complaint in this case on June 7, 2019. On July 26, 2019, Plaintiff filed an Amended Complaint, adding five new defendants and three new causes of action. The PB Defendants filed a Motion to Dismiss the Amended Complaint on September 5, 2019 (the "PB Motion to Dismiss"). NYSCEF Doc. No. 32. That motion has been fully briefed, and oral argument is scheduled for February 3, 2020.

On October 21, 2019, Plaintiff filed a motion for leave to file a Second Amended Complaint (the "Motion to Amend"), seeking to add eleven new PB partners as defendants and two new causes of action. NYSCEF Doc. No. 58. Among other things, Plaintiff's proposed Second Amended Complaint includes allegations that Edwards and a second PB partner made false statements in affidavits prepared in connection with the Sealing Action. *See* NYSCEF Doc. No. 60 at ¶ 3. The Motion to Amend has also been fully briefed and is awaiting notification by the Court of an argument date.

C. Plaintiff's Prior Request For The Same Relief

On August 8, 2019, Plaintiff filed a letter in the *Lewis I* case asking that the Court hold a discovery conference seeking the same relief he now seeks here: an order directing production of the Putney Report. *Lewis I*, NYSCEF Doc. No. 62. In that letter, Plaintiff complained that the Firm used the report's "credible" finding to defame him in the press and in a complaint that the Firm filed against Lewis in California (the "California Complaint") and that the investigation

conducted by Putney Twombly was a "farce." *Id.* at 1-2. Plaintiff's request was denied by this Court on August 26, 2019. *See id.* at Doc. No. 72. Specifically, the Court held:

> Plaintiffs request to compel production of a 2018 Investigative Report, is premature as all defendants have filed pre-answer motions to dismiss the complaint – one of which is fully-briefed and scheduled for oral argument in September . . . . [A] stay of discovery is in effect under the Part 48 Rules and Procedures. Plaintiff has already filed his opposition papers to both motions and does not contend that he needs the Report to oppose the motions; further, plaintiff specifies neither exigent circumstances demonstrating that the stay should be lifted nor any urgency necessitating expedited production of the Report.

Id. Additionally, the Court held that "[t]o the extent that plaintiff seeks the Report in connection with a separate action filed in Los Angeles, California, his request for relief should instead be directed to that court." *Id.*[1]

On November 4, 2019, Plaintiff filed this motion and on November 13, 2019, the Court signed the Order to Show Cause.

ARGUMENT

I. Plaintiff's Request For an Order Seeking Disclosure of the Putney Report Should be Denied

A. Plaintiff Has Failed to Meet the Showing Required By CPLR 3211(d)

Plaintiff contends that the PB Defendants should be required to produce the Putney Report pursuant to CPLR 3211(d) because without it, he is "unfairly handicapped in responding" to the PB Motion to Dismiss. Pl. Memo of Law at 4.

CPLR 3211(d) provides:

> Should it appear from affidavits submitted in opposition to a motion [to dismiss] that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits

[1] Plaintiff's counsel states in his affirmation in support of the order to show cause motion that "[t]here has been no previous application to this Court in this case for the relief requested herein." NYSCEF Doc. No. 97 at ¶ 2. While it is perhaps technically true that Plaintiff did not previously apply to the Court in *this* case for the relief requested, it is clear that Plaintiff previously sought, and was denied, the exact same relief concerning the Putney Report in *Lewis I*.

> to be obtained or disclosure to be had and may make such other order as may be just.

"However, if the complaint fails to state a cause of action as a matter of law and no amount of discovery can salvage the claim, it must be dismissed and no discovery is warranted." *Herzog v. Town of Thompson*, 216 A.D.2d 801, 803–04 (3d Dep't 1995); *see also Lancaster v. Colonial Motor Freight Line, Inc.*, 177 A.D.2d 152, 155 (1st Dep't 1992) (a plaintiff's 3211(d) request was denied when the plaintiff "failed to demonstrate the necessary possibility that further disclosure would reveal facts" that would support its position); *Hoheb v. Pathology Assocs. of Albany, P.C.*, 146 A.D.2d 919, 921 (3d Dep't 1989) (3211(d) request denied when "plaintiff failed to demonstrate how a continuance for further discovery would have salvaged his claims").

Here, Plaintiff claims that he is entitled to production of the Putney Report because the PB Defendants' used the report's "credible" finding "as an anchor" to defame him and because "the purported content of the Report is a centerpiece" of the PB Motion to Dismiss. Pl. Memo of Law at 3-4. As an initial matter, this argument is based on improper speculation that the PB Defendants have lied about the contents of the report. *See Cracolici v. Shah*, 127 A.D.3d 413, 413 (1st Dep't 2015) (the "mere hope" that discovery will uncover helpful information "does not warrant denial" of a motion to dismiss).

Additionally, as explained in the memorandum of law in support of the PB Motion to Dismiss, all of the claims in the Amended Complaint fail as a matter of law. *See* NYSCEF Doc. No. 32. Indeed, even if Plaintiff's conjecture about the contents of the Putney Report was true – and it is not – he has failed to explain how he would be able to salvage his claims against the PB Defendants as a result. For instance, as established in the PB Motion to Dismiss, statements made during the course of judicial proceedings are absolutely privileged from defamation claims, and allegations that a defendant made false statements in a pleading do not give rise to liability under

Judiciary Law § 487. *See id.* at 8, 14; *cf Weinstein v. City of New York*, 103 A.D.3d 517, 517-18 (1st Dep't 2013) ("[P]laintiff failed to show that he has a valid claim for defamation; he may not use discovery – either pre-action or pretrial – to remedy the defects in his pleading.").

Plaintiff has thus failed to meet the showing required by CPLR 3211(d) and his motion should be denied.

B. The Putney Report is Protected by the Attorney-Client And/or the Work Product Privilege

Plaintiff's motion should also be denied because the Putney Report is protected by the attorney-client and/or the work product privilege and is therefore not discoverable by Plaintiff.

When assessing whether a report prepared by outside counsel is privileged, "[t]he critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client." *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 379 (1991). In *Spectrum*, a law firm was hired by Chemical Bank "to perform an investigation and render legal advice to Chemical regarding possible fraud by its employees and outside vendors, and to counsel Chemical with respect to litigation options." *Id.* at 375. The Court of Appeals found that the firm's final report was privileged, concluding that factual investigations conducted by law firms are privileged if the facts form the basis of legal advice:

> That nonprivileged information is included in an otherwise privileged lawyer's communication to its client – while influencing whether the document would be protected in whole or only in part – does not destroy the immunity. In transmitting legal advice and furnishing legal services it will often be necessary for a lawyer to refer to nonprivileged matter . . . . Here we conclude that facts were selected and presented in the [firm's] report as the foundation for the law firm's legal advice, and that the communication was primarily and predominantly of a legal character.

Id. at 378-79; *see also City of Almaty, Kazakhstan v. Ablyazov*, No. 15CV05345, 2019 WL 2865102, at *4 (S.D.N.Y. July 3, 2019) ("[B]ecause the first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the

legally relevant, factual investigations conducted or directed by an attorney fall within the attorney-client rubric." (citation omitted)).

Indeed, courts have applied both the attorney-client privilege and work product privilege to internal investigation materials. *See, e.g.*, *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, No. 17CV1642, 2019 WL 1574806, at *10-11 (E.D.N.Y. Apr. 11, 2019) (both doctrines applied when outside counsel was hired to conduct an internal investigation concerning potential FCPA violations); *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 531-32 (S.D.N.Y. 2015) (both doctrines applied to outside counsel's witness interview notes and related memoranda); *Spectrum*, 78 N.Y.2d at 381 (noting that the work product privilege might apply but finding that such analysis was unnecessary since the report was covered by the attorney-client privilege). Additionally, the privilege is strengthened when an investigation is conducted by outside counsel. *See In re Gen. Motors*, 80 F. Supp. 3d at 528 ("[A]lthough the investigation here was conducted by outside counsel rather than in-house counsel, that difference . . . strengthens rather than weakens [the] claim to the privilege.").

Here, Putney Twombly was retained by the Firm to investigate the veracity of an employee's sexual misconduct claims against Plaintiff in order to provide advice to the Firm concerning the appropriate legal course of action. In other words, Putney Twombly was hired to "ascertain[] the factual background and sift[] through the facts" with the aim of providing legal advice to the Firm. *See City of Almaty*, 2019 WL 2865102, at *4. Thus, the Putney Report is protected from disclosure by the attorney-client and/or work product privilege.[2]

[2] The PB Defendants will of course make the Putney Report available to the Court for *in camera* review if so requested.

C. The Firm Has Not Waived Privilege

Plaintiff claims that any privilege attached to the Putney Report was waived by the Firm's disclosure that the report contains a "credible" finding and by the Firm's inclusion of certain limited aspects of the report in the Edwards Affidavit, that was never publicly filed in an action that was commenced but almost immediately discontinued and abandoned.

A "limited disclosure" of information contained in a privileged report does not waive the report's privilege. *See In re Vecco Instruments, Inc. Sec. Litig.*, No. 05 MD 1695, 2007 WL 210110 (S.D.N.Y. Jan. 25, 2007). In *In re Vecco*, Vecco Instruments Inc. ("Vecco") hired outside counsel to conduct an internal investigation concerning potentially improper accounting transactions. *Id.* at *1. Upon the conclusion of the investigation, the plaintiffs argued that Vecco waived the work-product privilege through two disclosures: i) a press release that "announced to investors that Vecco had completed its internal investigation and concluded that the improper accounting entries were made by a single individual," and ii) a letter from Vecco to the Securities and Exchange Commission that stated that "there were not sufficient facts to come to a conclusion on whether the improper accounting entries were made intentionally." *Id.* at *2. The court disagreed, holding that the disclosures did not waive privilege because they "merely summarized the findings and conclusions of the internal investigation and did not quote, paraphrase or reference any of the specific documents at issue in support of its conclusions." *Id.*; *see also In re Dayco Corp. Derivative Sec. Litig.*, 99 F.R.D. 616, 619 (S.D. Ohio 1983) ("Dayco did not release a 'significant part' of the special committee report. It merely released the findings of the report. . . . Thus, no waiver of the privilege which might cover the report herein occurred by use of the press release."); *Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. P'ship*, 154 F.R.D. 202, 211-12 (N.D. Ind. 1993) (a one-page press release concerning a consulting firm's conclusions did not waive privilege with respect to the underlying report because the press release "did not begin to

recite all of [the firm's] studies, factual findings or conclusions" and thus "did not constitute a significant part of the privileged matter so as to work a waiver").

In contrast, a public statement that not only revealed the conclusions of the report but also provided a summary of evidence and "proclaim[ed] the thoroughness and professionalism with which" the investigation was conducted, was held to waive privilege. *Westmoreland v. CBS, Inc.*, 97 F.R.D. 703, 706 (S.D.N.Y. 1983); *see also Loudon House LLC v. Town of Colonie*, 123 A.D.3d 1409, 1411 (3d Dep't 2014) ("[O]utside counsel appeared at a June 2012 public meeting and made an extensive oral presentation – apparently at the Town Board's behest – in which counsel set forth his legal analysis of the zoning issues involved. To the extent that the oral presentation parrots the analysis set forth in the report, it may well constitute a waiver of the privilege protecting the contents of the report."); *In re Grand Jury Proceedings Oct. 12, 1995*, 78 F.3d 251, 254 (6th Cir. 1996) (attorney-client privilege was waived when clients gave information to investigators that detailed specific legal advice and "revealed their attorney's legal conclusions and the facts on which those conclusions were based").

Here, like in *Vecco*, the Firm has disclosed an extremely limited aspect of the Putney Report. The Firm simply revealed that the Putney Report determined that the allegations against Plaintiff are "credible," and an affidavit prepared in connection with the Sealing Action set forth a few limited additional factual findings. In other words, the Firm "did not begin to recite all of [Putney Twombly's] . . . factual findings or conclusions." *See Hartford Fire Ins. Co.*, 154 at 211-12. Moreover, while Plaintiff argues that the Firm should not be entitled to "use the Report as a sword, and then claim privilege to shield it from disclosure" (*See* Pl. Memo of Law at 15), the cases to which he cites are easily distinguishable from the issue before this Court. *See Gottwald v Sebert*, 2017 N.Y. Misc. LEXIS 3197, at *12 (Sup. Ct. NY. Cty. 2017) (communications were not

privileged when they "were made purely for public relations purposes"); *Tupi Cambios, S.A. v. Morgenthau*, 989 N.Y.S.2d 572, 575 (Sup. Ct. N.Y. Cnty. 2014) (a client might waive the privilege when it relies on an advice of counsel defense); *Deutsche Bank Tr. Co. of Americas v. Tri-Links Inv. Tr.*, 43 A.D.3d 56, 68 (1st Dep't 2007) (*rejecting* an argument that the plaintiff used privilege "as a sword and shield" in the context of an advice of counsel defense).

Therefore, the Firm did not waive the privilege attached to the Putney Report and the report is not discoverable by Plaintiff.[3]

II. Plaintiff's Request For an Order Requiring the Sealing Action to Be Unsealed Should Be Denied

A. The Sealing Action Was Discontinued and Plaintiff Does Not Need the Sealed Pleadings to Support His Claims in the Amended Complaint

Plaintiff claims that the Sealing Action was a "secret" that the Firm "tried to keep . . . from everyone." Pl. Memo of Law at 19; *see also id.* (claiming that the Firm "engaged in a dizzying array of dishonesty, deception and deceit"). This is an entirely inaccurate characterization. As explained in the Edwards Affidavit, while pleadings in the Sealing Action were physically brought to the Clerk's office on May 15, 2019, they were not loaded onto the Court's ECF system at that time. *See* Edwards Aff. ¶¶ 5, 9. The Firm declined to pursue the Sealing Action once its intended purpose became moot, and only electronically filed the Sealed Pleadings to comply with a request that the Clerk's Office made to the firm months later in order to avoid having an "orphaned" index number in the Court's computer system. *Id.* at ¶¶ 8-9. Thus, while judicial proceedings generally "are matter of legitimate public concern," *see Matter of Hofmann*, 284 A.D.2d 92, 94 (1st Dep't 2001), that logic is simply inapplicable to a case that was never pursued, wherein documents were only filed to address a technical glitch.

[3] The PB Defendants also adopt the arguments contained in Putney Twombly's opposition concerning metadata. *See* NYSCEF Doc. No. 117.

Moreover, Plaintiff fails to explain why he needs the Sealing Action to be unsealed in order to support his claims in this case. While Plaintiff claims that the Sealed Pleadings "will enable [him] to properly oppose the instant motions to dismiss, as well as prosecute and defend the ongoing related actions" (*see* Pl. Memo of Law at 19), the only pending motions to dismiss in this case are addressed to the Amended Complaint, which is not premised on any allegations concerning the Sealing Action. Indeed, the Amended Complaint was filed *before* Plaintiff learned about the Sealing Action. *See id.* at 1 n.1. Plaintiff presumably wants to obtain the Sealed Pleadings to support his proposed Second Amended Complaint; however, the Court has not yet ruled on Plaintiff's Motion to Amend. Thus, Plaintiff's request will be moot if the Court denies his Motion to Amend, and at the very least, it is premature until such ruling is issued.

The Court should therefore deny Plaintiff's request for an Order requiring the Sealing Action to be unsealed.

B. If The Court Orders the Sealing Action to Be Unsealed, An Appropriate Protective Order Should Be Granted

Pursuant to Rule 3.6(a) of the New York Rules of Professional Conduct:

> A lawyer who is participating in or has participated in a criminal or civil matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

22 NYCRR 1200.0, Rule 3.6(a). A statement "is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury" and it relates to "the character, credibility, reputation or criminal record of a party." 22 NYCRR 1200.0, Rule 3.6(b)(1).

During the course of this litigation, Plaintiff and his counsel have made numerous statements to the press that have done precisely what the Rules of Professional Conduct prohibit.[4]

[4] Copies of such articles are attached to the affirmation of Marc L. Mukasey ("Mukasey Aff.").

For example, in an article titled "Law Firm for Don Lemon Accused of Racism and 'Potential Perjury'" which appeared on September 16, 2019, in an on-line publication called "Black News," Plaintiff and counsel, who is expressly identified as the Press Contact for Plaintiff, claim that the very affidavits which they seek to be unsealed will establish that Edwards and LaVigne "lied in sworn affidavits to obliterate [Plaintiff's] reputation and destroy [Plaintiff's] career" and that the "fallout" for them "could be devasting" and result in felony charges. *See* Mukasey Aff. Ex. A. These are precisely the kind of statements that the Rule defines as likely to materially prejudice an adjudicative proceeding because they relate to the character, credibility, or reputation of a party. In other examples, Plaintiff and counsel claim that defendant Pierce "is drowning in personal debt and booze, and relying on his con-man's gift of gab to induce others to willfully participate in his gross malfeasance" and that a number of PB partners who are defendants in the *Lewis I* case have "displayed their remarkably poor character" and that "their decisions will see the light of day." *See id.* at Ex. C & D. Again, such statements clearly relate to the character, credibility, or reputation of a party.

In sum, if the court is inclined to unseal the filings made in the Sealing Action, it should enter an appropriate protective order that directs Plaintiff (as a lawyer) and his counsel to abide by the requirements of Rule 3.6.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Motion for an Order to Show Cause and should grant such other and further relief as is just.

Dated: New York, New York
November 25, 2019

Respectfully submitted,

Mukasey Frenchman & Sklaroff LLP

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COMMERCIAL DIVISION RULE 17 WORD COUNT CERTIFICATION

Marc L. Mukasey, an attorney admitted to practice before the New York State Courts, certifies, in accordance with and pursuant to 22 NYCRR 202.70(g)(17), that: the foregoing Memorandum in Opposition to Plaintiff's Motion for an Order to Show Cause dated November 25, 2019, contains 4,410 words, exclusive of the caption, table of contents, table of authorities and signature block; and the certification as to the foregoing relies upon the word count of the word-processing system used to prepare the document, Microsoft Word.

Dated: New York, New York
November 25, 2019

/s/ Marc L. Mukasey
Marc L. Mukasey