STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

EMIL P. KONDRA individually, and as Trustee of the Emil P. Kondra Revocable Trust, EMIL P. KONDRA, LLC, EMIL P. KONDRA FAMILY TRUST, EILEEN SAXTON AND DOUGLASS E. KONDRA, as Trustees of the Emil P. Kondra Family Trust, DOUGLASS E. KONDRA, HELEN PERRY, and LAWRENCE F. D' ALESSIO,

Plaintiffs,

vs.

ROBERT A. NITSCH and VERONICA G. NITSCH, Individually, and as Trustees of the Amended and Restated Veronica G. Nitsch Revocable Trust and the Amended and Restated Robert A. Nitsch Revocable Trust,

Defendants.

Civil Action No. 2012-CP-23-06209

REPORT AND RECOMMENDATION BY DISCOVERY REFEREE

John M. Campbell, Jr., Esq.,

Plaintiff,

vs.

ROBERT A. NITSCH and VERONICA G. NITSCH, Individually, and as Trustees of the Amended and Restated Veronica G. Nitsch Revocable Trust and the Amended and Restated Robert A. Nitsch Revocable Trust,

Defendants.

Civil Action No. 2012-CP-23-06211

These matters are before me by Order of the Honorable Edward W. Miller dated February 12, 2015, appointing me Discovery Referee for certain discovery issues which arose in this case. After receiving extensive briefing by the parties, reviewing the documents which are

central to this dispute, and considering argument from counsel on April 1, 2015, I submit the following:

INTRODUCTION

On July 31, 2008, Ellcon-National, Inc. ("Ellcon"), a closely-held corporation in the business of manufacturing rail car brakes and other railway equipment, merged with a subsidiary of Faiveley Transport USA, Inc. ("Faiveley"). Two of Ellcon's shareholders, Robert and Veronica Nitsch, claim they received inadequate consideration in the merger transaction.

On September 11, 2012, the Nitsches filed a demand for arbitration before the American Arbitration Association ("AAA") (Case No. 16 125 Y 00529 12), and alleged various tort and fraud claims against the Plaintiffs (the "Kondra Plaintiffs") in this action and John M. Campbell, Jr., who served as outside general counsel to Ellcon. On September 26, 2012, the Kondra Plaintiffs and Mr. Campbell filed a Motion asking that the arbitration action be stayed, and a Complaint against Robert and Veronica Nitsch (the Nitsches) seeking a declaratory judgment as to the proper ownership of the shares of Ellcon. After a hearing on December 13, 2012, the Honorable G. Edward Welmaker granted Plaintiffs' Motion to Stay Arbitration by Order dated February 2, 2013. On February 25, 2013, the Nitsches filed their Answer and Counterclaims, essentially alleging that the Ellcon corporate stock records inaccurately showed that the Kondra Plaintiffs owned more shares than they had purchased, and consequently that the Nitsches received less consideration from the merger than they were entitled. On May 15, 2013, this case was transferred to Business Court before the Honorable Edward W. Miller, where it is currently pending.

On April 10, 2014, Mr. Campbell filed a Motion for Protective Order and Motion for Sanctions requesting that that the Nitsches return the documents in their possession which were taken from the home office of Emil Kondra and which are protected by the attorney-client

privilege. The Motion for Protective Order also requested that the Nitsches be prohibited from using the documents in the litigation of this case, and that they be required to file affidavits with the Court affirming they have complied with the Order of this Court. On April 17, 2014, the Kondra Plaintiffs filed a Motion to Join the Motion for Protective Order and Motion for Sanctions filed by Mr. Campbell.

On April 29, 2014, the Court heard the Motion for Protective Order and Motion for Sanctions, and determined that a review process was appropriate to determine the privilege issues before the Court. On July 25, 2014, the Nitsches filed a Motion to Appoint Discovery Referee to determine the privilege issues, which motion was heard on January 20, 2015. Following the hearing, Judge Miller issued an Order dated February 12, 2015 appointing me as Discovery Referee to: (1) determine the privilege issues set forth in Defendants' Motion to Appoint Discovery Referee; (2) consider the issues raised in Plaintiffs' Motion for Protective Order and Motion for Sanctions filed on April 17, 2014; and (3) consider Plaintiffs' Motion to Compel Defendants' Responses to Plaintiffs' Third Set of Requests for Production of Documents filed on September 5, 2014.[1]

In evaluating these various issues, I have considered voluminous material, including briefs, documents submitted for my review, arguments of counsel at a hearing held before me on April 1, 2015 and the parties' written responses to questions posed after the hearing. Everyone has had all the time they have asked for to respond. My recommended findings of fact and conclusions of law are as follows:

[1] Plaintiffs' Motion to Compel Defendants' Responses to Plaintiffs' Third Set of Requests for Production of Documents was resolved by counsel during the April 1, 2015 hearing before Discovery Referee.

FINDINGS OF FACT

I. Background.

In 1964, the shareholders of Ellcon decided to sell the company to some of its younger shareholders, which included Emil Kondra and Robert Nitsch. From 1964 until the merger in 2008, Mr. Kondra and Mr. Nitsch were officers of Ellcon, members of its Board of Directors, and part of its executive group who governed and controlled Ellcon.

In 2008, Ellcon and its affiliate, Ellcon-Drive, LLC, entered into a Merger Agreement with Faiveley to sell both companies to Faiveley in the form of a merger. At the meeting of the Ellcon Board of Directors in which it recommended the merger with Faiveley to the Ellcon shareholders, Mr. Nitsch made the motion to approve the merger. He did this after he and his wife Veronica Nitsch had retained New York attorneys to perform their own due diligence on the merger.

II. The "Disputed Documents."

At the core of the issues referred to me are a group of 105 documents that I have chosen to refer to as the "Disputed Documents." The Disputed Documents are a subset of a larger group of over 4,600 pages of documents that were taken by Helen Kondra from Emil Kondra's home office to Mrs. Nitsch. (See generally Emil P. Kondra Aff. (May 17, 2013), attached as **Exhibit A.**) Among the 4,600 documents were Mr. Kondra's personal and confidential notes, letters, and attorney-client communications, concerning both his estate planning and other corporate matters of Ellcon. (See id. at ¶ 3.)

There is no dispute that the Nitsches came into possession of these documents when "[c]ommencing in and around late 2005 and ending in and around early 2008, Helen Kondra, Emil Kondra's wife and an Ellcon Shareholder, gave [Veronica Nitsch] several black plastic

trash bags filled with documents that had been in Emil Kondra's possession . . ." (Veronica P. Nitsch Aff. 2, ¶ 2 (Oct. 2, 2013), attached as **Exhibit B.**) There is no dispute that Veronica Nitsch made and retained photocopies of these documents. (See id. at ¶ 4.)

Mr. Kondra neither authorized nor consented to the removal of the documents from his office, nor was he aware of Mrs. Nitsch's possession of the documents (See Emil Kondra Aff. 2, ¶ 4-6 (May 17, 2013).) Mrs. Nitsch does not contend that she ever spoke to Mr. Kondra or somehow alerted him to the fact that she had possession of the documents. She does not contend that Mr. Kondra gave her permission to possess or read the material. The fact that Mrs. Kondra had access to his home office, and that the documents were stored with other personal documents, does not mean Mr. Kondra had no expectation of privacy with regard to these documents, as urged by the Nitsches. The Nitsches' intention to use these documents in this litigation became known to the Kondra Plaintiffs and Mr. Campbell when the Nitsches served supplemental discovery responses on December 20, 2013.

A. Efforts to have the Documents Returned.

After reviewing the Nitsches' supplemental discovery responses, counsel for the Kondra Plaintiffs sent a letter dated May 3, 2013 requesting that the 4,600 documents taken from Mr. Kondra's home office be returned. At a hearing held on September 18, 2013, this issue was briefly taken up by the Court. During the hearing, counsel for the Nitsches agreed to return any original documents in their possession to counsel for the Kondra Plaintiffs. (Hr'g Tr. 77:20-79:1 (Sept. 18, 2013).) Subsequently, counsel for the Nitsches notified counsel for the Kondra Plaintiffs and Mr. Campbell that the original documents had been returned to Helen Kondra. However, counsel for the Nitsches did not return or destroy any of the copies of the 4,600 documents which remained in their possession and the possession of their clients, but instead continued to use the documents in this litigation.

Counsel for the Nitsches attempted to question Mr. Campbell using some of these documents during his deposition taken on February 11, 2014. Following the deposition, counsel for Mr. Campbell emailed counsel for the Nitsches requesting return of all privileged documents in their possession. After this request was refused, the Kondra Plaintiffs and Mr. Campbell filed the Motion for a Protective Order and Motion for Sanctions regarding the Nitsches' retention of privileged documents which were the property of Emil Kondra. These motions were heard on April 29, 2014, during which the Court cautioned counsel for the Nitsches that "[i]f you're in possession of privileged documents that were stolen, you need to give them back." (Hr'g Tr. 78:11-79:1 (Apr. 29, 2014).)

Also during this hearing, Judge Miller directed the Kondra Plaintiffs and Mr. Campbell to provide a list of documents to counsel for the Nitsches which they claimed were protected by the attorney-client privilege. By letter dated May 15, 2014, the Kondra Plaintiffs and Mr. Campbell provided a list of 149 documents to the Nitsches. By letter dated June 3, 2014, counsel for the Nitsches responded that "most of the 149 documents are either not privileged or, even if privileged, any applicable privilege has been waived." While the Nitsches did not concede that a single document identified by the Kondra Plaintiffs and Mr. Campbell was privileged, they did agree to destroy their copies of 44 of the documents and not use them in this litigation. This left the 105 Disputed Documents which I reviewed to determine this privilege dispute.

B. Description of the Disputed Documents.

Generally, the Disputed Documents can be classified as: (1) Mr. Kondra's personal letters and papers, documents connected with his estate planning, and a number of documents to or from Mr. Campbell; and (2) corporate documents related to the business of Ellcon, including many communications with Mr. Campbell and his law firm. Many of these privileged documents concern corporate succession, corporate governance, shareholder rights, and estate

planning. Because Mr. Kondra was Ellcon's long-term Chairman of the Board of Directors and its majority shareholder, such issues necessarily involved his family and Ellcon and were of mutual interest to these parties.

C. Concerns over Disputed Documents.

Mrs. Nitsch obtained the Disputed Documents under suspicious, if not reprehensible, circumstances. The Disputed Documents were stored in Mr. Kondra's home office and fell into the hands of a person to whom they were not addressed. The Disputed Documents are in the nature of communications between an attorney and his clients regarding either matters that concerned Mr. Kondra personally, or that were intertwined with, and of mutual interest to, Ellcon. Many of the Disputed Documents on their face are protected by the attorney-client privilege and they were taken without Mr. Kondra's knowledge and consent. That the Disputed Documents may have been stored with the Kondras' other personal documents or that Mr. Kondra did not keep them under lock and key is of no consequence to my findings and, as is addressed in greater detail below, does not serve as a waiver of the attorney-client privilege.

Relying upon the Fifth Amendment protections afforded to her at her deposition, Mrs. Kondra refused to explain why she took the Disputed Documents to Mrs. Nitsch. However, it is clear that Mr. Kondra did not participate in, or have any knowledge of, the delivery of the Disputed Documents to Mrs. Nitsch. The fact that Mrs. Kondra gave the documents to Mrs. Nitsch does not excuse Mrs. Nitsch's acceptance, retention, detailed review, and use of these documents in the instant litigation against the Kondra Plaintiffs and Mr. Campbell. The affidavits submitted to me demonstrate that Mrs. Nitsch had no reason to believe that Mr. Kondra knew what was occurring, much less condoned it. Accordingly, I have serious concerns about the circumstances under which the Nitsches came to possess the Disputed Documents.

D. Use of the Disputed Documents in this Litigation.

Beginning in 2005 and continuing into 2008, Mrs. Nitsch has had in her possession, and has gained intimate knowledge from, the Disputed Documents. By her own admission, Mrs. Nitsch did not merely photocopy the documents, but sorted, organized, analyzed, kept the documents to pursue claims the Nitsches would later bring against the Kondra Plaintiffs and Mr. Campbell, and provided them to several attorneys over the years. (See generally Veronica Nitsch Aff. (May 12, 2015), attached as **Exhibit C.**) Revelation of Mrs. Nitsch's intrusion into Mr. Kondra's personal and privileged documents may not have come to light, but for the Nitsches and their current counsel's decision to use the Disputed Documents in this litigation.

Moreover, the Nitsches' submissions to me establish that they have sought legal advice from numerous fine attorneys regarding their claims against the Kondra Plaintiffs, and have shown the Disputed Documents to some of these attorneys prior to retaining Defendants' current counsel. (See e.g., id. at ¶ 7.) Mrs. Nitsch discussed these documents and provided copies of at least some of the documents to her attorneys, but none of these attorneys used the documents to pursue claims against the Kondra Plaintiffs and Mr. Campbell.

On September 11, 2012, the Nitsches filed a demand for arbitration through Blair Fensterstock, of Fensterstock & Partners, LLP. Of the several attorneys who had dealings with the Nitsches, the only one to make use of the Disputed Documents was the Fensterstock firm. The Nitsches' demand for arbitration discussed documents which are part of the Disputed Documents. Three days after filing the arbitration demand, Mr. Fensterstock filed a verified petition seeking discovery in aid of the arbitration in the Supreme Court for the State of New York which again discussed the Disputed Documents.

On February 11, 2014, counsel for the Nitsches then proceeded to use several of the Disputed Documents during the deposition of Mr. Campbell. Two of the documents which Mr.

Fensterstock attempted to introduce and question Mr. Campbell about were attorney-client communications and were made on Mr. Campbell's law firm's letterhead.

My finding that the Nitsches and their counsel have improperly used the Disputed Documents in this litigation is supported by the lack of any evidence that counsel for the Nitsches ever approached any court in any jurisdiction in an effort to obtain a ruling on counsel's ethical obligations concerning their possession of the Disputed Documents. Litigation counsel should always be wary of documents obtained outside the discovery process, particularly when they are taken without the knowledge and consent of the owner. Instead, the Nitsches and their counsel proceeded to use documents received under suspicious circumstances, privileged on their face, to support claims in this litigation. In short, counsel for the Nitsches failed to comply with their ethical obligations.

CONCLUSIONS OF LAW

I. The Attorney-Client Privilege Applies to the Disputed Documents.

I find that the Disputed Documents are protected by the attorney-client privilege. "The attorney-client privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained." Wilson v. Preston, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008); State v. Love, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980) (noting the South Carolina Supreme Court has "long recognized the attorney-client privilege against disclosure of confidential communications by a client to his attorney").

In order to establish the attorney-client privilege, "it must be shown that the relationship between the parties was that of attorney and client and that the communications were of a confidential nature." Love, 275 S.C. at 59, 271 S.E.2d at 112. "In general, the burden of

establishing the privilege rests upon the party asserting it." Id. (noting the judge is to consider all facts and circumstances in determining whether a communication is privileged). "The privilege belongs to the client and, unless waived by him, survives even his death." State v. Doster, 276 S.C. 647, 651, 284 S.E.2d 218, 219 (1981) (citing S.C. State Highway Dep't v. Booker, 260 S.C. 245, 254, 195 S.E.2d 615, 620 (1973)).

A number of facts support this finding. These documents on their face are in the nature of confidential communications, notes, and documents prepared by Ellcon's counsel concerning legal advice and services affecting the business of Ellcon and Mr. Kondra's estate. Since Mr. Kondra was the majority owner of Ellcon, how his holdings were to be handled after his death was obviously of vital importance to Ellcon. Many of the documents are on Nelson Mullins letterhead, or consist of internal memoranda between Nelson Mullins attorneys that directly concerned legal advice relating to Ellcon matters such as split dollar life insurance, shareholder rights, and Emil Kondra's estate and succession planning. (See Sample of Privileged Communications, attached as **Exhibit D**.)

Some of the Disputed Documents are also protected by the attorney-client privilege belonging to Ellcon. Ellcon held a corporate privilege because many of the documents concern corporate issues for Ellcon officers and directors to consider. Ellcon's control group was comprised of board members and officers, to whom the privilege extended. See Dunlap Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974).

Emil Kondra, Robert Nitsch, Larry D'Alessio, Helen Perry, and Douglass Kondra were officers and members of Ellcon's Board of Directors. They were part of the control group who would have been privy to certain privileged communications belonging to Ellcon. Following the merger, the privilege transferred to, and is now held by, Faiveley, who has not waived the privilege in any respect. See Tucker v. Honda of South Carolina Mfg., Inc., 354 S.C. 574, 577,

582 S.E.2d 405, 407 (2003). Contrary to the Nitsches' position, Mr. Nitsch's receipt of privileged documents in his capacity as an officer and director of Ellcon prior to July 31, 2008 in no way abrogates or waives the privilege held by Faiveley. See Commodity Futures Trading Com'n v. Weintraub, 471 U.S. 343, 349 (1985). While Mr. Nitsch has not been heard from in this dispute, the record before me establishes that he never received the Disputed Documents in his individual capacity.

Emil Kondra and Ellcon shared a common interest in these legal matters. See Hanson v. U.S. Agency for Int'l Dev., 372 F.3d 286 (4th Cir. 2004) (the common interest doctrine applies when two or more parties consult or retain an attorney concerning a legal matter in which they share a common interest; in this context the communications between each of the clients and the attorney are privileged against third parties, and it is unnecessary that there be actual litigation in progress for the privilege to apply). Privileged communications regarding corporate matters such as split dollar life insurance and shareholder rights, and estate and succession planning between Emil Kondra and John Campbell were only shared with Mr. Nitsch and other directors because they impacted the business of Ellcon. This is evident on the face of these documents.

For the reasons stated above, I find that the Disputed Documents are protected by the attorney-client privilege.

II. There Was No Waiver of the Attorney-Client Privilege.

The Nitsches argue that the attorney-client privilege was waived as to the Disputed Documents. The Response relies upon hearsay statements allegedly made by Helen Kondra to Mrs. Nitsch to attack this finding on the ground that "[b]cause Mr. Kondra gave Mrs. Kondra permission to review the documents with a third party, he waived the privileged." (Response 2.) Specifically the Nitsches argue that Mr. Kondra waived the privilege by relying upon Mrs. Nitsch's affidavit testimony that Helen Kondra "told me" that Mr. Kondra had given Helen

Kondra permission to review the documents and consult with anyone she wanted to about the documents. (Veronica G. Nitsch Aff. 2, ¶ 4 (May 12, 2015).)

This argument fails for two reasons. First, Mrs. Nitsch's affidavit testimony to the extent it refers to Mrs. Kondra's alleged statements is inadmissible because it is not based upon her personal knowledge but instead upon inadmissible hearsay statements allegedly made by Helen Kondra. See Engler Inc. v. Netherlands Ins. Co., 315 S.C. 300, 304-305 (1993). Second, even if Mrs. Nitsch's affidavit testimony regarding this point were admissible, Mr. Kondra's direct affidavit testimony that he never authorized anyone to take the Disputed Documents from his home is not contradicted by component evidence. (Emil P. Kondra Aff. ¶ 4 (May 17, 2013.) Specifically, Mr. Kondra's affidavit unequivocally states that Helen Kondra took the documents to Mrs. Nitsch without his permission or authorization. (Id. at ¶ 6.) I do not hesitate to find that Mr. Kondra's affidavit testimony, which is supported by the circumstances under which Mrs. Nitsch received the documents, and the fact that many of the Disputed Documents are on their face protected by the attorney-client privilege, is credible whereas Mrs. Nitsch's affidavit testimony on this point is not.[2] I address these arguments below.

A. There Was No Waiver Because the Disputed Documents Were Kept in Emil Kondra's Home Office.

I find that the fact the Disputed Documents were kept alongside other documents in Mr. Kondra's home office and that his wife had access to his office does not constitute a waiver of the attorney-client privilege. Mr. Kondra had a reasonable expectation of privacy to documents stored in his home office and there is no evidence that he intended or knowingly consented to their removal. There is also no evidence to suggest that Mr. Kondra intended or knowingly

[2] It is also worth noting that Mr. Kondra's affidavit was made at the outset of this dispute. Mrs. Nitsch's May 12, 2015 affidavit, by contrast, was submitted after the close of briefing and hearing on this issue. Further, this affidavit is the only one of Mrs. Nitsch's three affidavits submitted in this matter which alleges that Mr. Kondra gave Helen Kondra permission to review the Disputed Documents and/or share them with third parties.

consented to Mrs. Nitsches' possession of documents removed from his home office without his knowledge.

B. There Was No Waiver Because Certain of the Disputed Documents Were Shared With Robert Nitsch (or Other Members of the Board).

The fact that certain members of the Ellcon Board of Directors, including Douglass Kondra, Larry D'Alessio, Helen Perry, and Robert Nitsch, were privy to certain privileged communications does not constitute a waiver of the attorney-client privilege. The Disputed Documents are in the nature of confidential communications, notes, and documents prepared by Emil Kondra and his attorneys concerning legal advice and services affecting his estate and the business of Ellcon. As majority shareholder of Ellcon, these matters were intertwined and of common interest to Emil Kondra, his family, and Ellcon. See Hanson v. U.S. Agency for Intern. Development, 372 F.3d 286 (4th Cir. 2004). Mr. Kondra's estate and succession planning naturally and necessarily affected Ellcon as well as Mr. Kondra's family.

Ellcon held a corporate privilege because documents concerning Emil Kondra's estate planning and corporate succession, shareholder rights, and life insurance policies for which Ellcon paid the premiums were legitimate corporate issues requiring discussion among Ellcon management. Ellcon's control group comprised of board members and officers held this privilege. See Dunlap Corp., 397 F. Supp. 1146. During the time that Emil Kondra, Robert Nitsch, Larry D'Alessio, Helen Perry, and Douglass Kondra were officers of Ellcon and members of Ellcon's Board of Directors, they were part of the control group who would have been included in certain privileged communications belonging to Ellcon.

Any communications from Emil Kondra and/or John Campbell were received when Mr. Nitsch was an officer and director of Ellcon. Documents received within the corporate privilege are subject to the duty that "managers [of the corporation] must exercise the privilege in a

manner consistent with their fiduciary duty to act in the best interest of the corporation and **not themselves as individuals.**" Weintraub, 471 U.S. at 348-49 (emphasis added). When Mr. Nitsch received the documents as a member of Ellcon's control group, he had a fiduciary duty to Ellcon. The argument that sharing certain privileged communications with Mr. Nitsch waived the privilege fails to recognize the difference between Mr. Nitsch's receipt of those documents in his capacity as an officer and director of Ellcon, and his receipt of those documents in his individual capacity. See Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct., 331 P.3d 905, 913 (Nev. 2014) (relying on the Weintraub line of cases in holding that the district court erred in deciding that a former fiduciary of a corporation could access and use privileged information in subsequent litigation solely based on his or her former fiduciary role is entirely inconsistent with the purpose of the attorney-client privilege). I find that communications shared with Mr. Nitsch in his capacity as an officer and director of Ellcon do not waive the privilege.

C. Faiveley Has Not Waived Its Privilege.

I find that Faiveley, as the current holder of what was Ellcon's corporate privilege prior to the merger, has not waived the privilege. Following the merger, Ellcon's privilege transferred to and is now held by Faiveley, who has not waived the privilege held by Ellcon as it pertains to the attorney-client communications in which Ellcon shared a common interest with Emil Kondra. See Tucker, 354 S.C. at 577, 582 S.E.2d at 407. Further, "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well." Weintramb, 471 U.S. at 349. There is no evidence in the record that Faiveley has waived its attorney-client privilege to any of the Disputed Documents or any other privileged communications shared with Ellcon's officers and directors prior to the merger.

Therefore, I conclude that the attorney-client privilege was not waived as to the Disputed Documents.

III. Counsel for the Nitsches Failed to Live Up to Their Ethical Obligations in Dealing With the Disputed Documents.

When the Fensterstock firm received the Disputed Documents from Mrs. Nitsch, it surely must have occurred to the attorney that Mrs. Nitsch probably had wrongfully obtained the documents under suspicious, if not reprehensible, circumstances. Counsel for the Nitsches' submissions to the Discovery Referee, including Mrs. Nitsch's affidavits dated March 19, 2015 and May 12, 2015, establish that it was known that the Disputed Documents were delivered to Mrs. Nitsch in trash bags without Mr. Kondra's knowledge or consent since well before the Fensterstock firm filed the demand for arbitration. Counsel for the Nitsches failed to live up to their ethical obligations upon receiving the Disputed Documents under such circumstances. They should have brought the matter to the court and there likely would have been an early resolution of the issue and without as much attorney time being required. Certainly there would have been a dispute and no doubt a hearing. However, the fact that there was not an approach to the court likely followed by a hearing, rests with the Fensterstock firm.

The majority rule among courts facing this issue is that counsel must either notify the opposing party or the Court immediately after receipt of documents under such circumstances. See e.g., Maldonado v. New Jersey ex rel. Admin. Office of Courts – Prob. Div., 225 F.R.D. 120, 141-42 (D.N.J. 2004) (holding that an attorney who receives privileged documents has an ethical duty to cease review of the documents, notify the privilege holder, and return the documents); Forward v. Foschi, No. 9002/08, 2010 WL 1980838, at *25-26 (Sup. Ct. May 18. 2010) (ordering the plaintiffs to return all wrongfully obtained emails in their possession, provide a list of those who had received the emails, and ordering that the offending party could not directly or indirectly use any of the information gained through the emails); Castellano v. Winthrop, 27 So. 3d 134, 137 (Fla. Dist. Ct. App. 2010) (disqualifying counsel for reviewing and using stolen

documents obtained by their client and ordering return of all documents). Because counsel for the Nitsches did not cease their review of the Disputed Documents and notify either counsel for the Kondra Plaintiffs, counsel for Ellcon, or the Court, they failed to meet their ethical responsibilities. Most troubling is that counsel for the Nitsches maintains that these privileged documents are relevant and central to the Nitsches' claims. (See e.g., Hr'g Before Special Referee Tr. 107:6-24 (April 1, 2015).) While I find that there is no scenario under which counsel should retain possession of documents such as the Disputed Documents without first seeking a ruling on their ethical duties, even greater concerns are raised when counsel views the documents as an important element of their client's case and proceeds to use them without regard for their ethical obligations.

Further magnifying counsel for the Nitsches' failure to live up to their ethical obligations is the fact that the Disputed Documents are on their face protected by the attorney-client privilege. A lawyer is never entitled to review documents of his adversary which are protected by the attorney-client privilege. That prohibition is not removed because the privileged documents were obtained by his client and then given to him. Once a lawyer is aware that he is in possession of privileged documents, then he has the obligation to take immediate steps to remediate the problem. Counsel for the Nitsches chose to use the documents in this litigation, claiming that the documents were either not privileged or any privilege had been waived. The problem with this approach is that it violates the fundamental rule that the Court decides issues concerning application of the privilege and waiver, **not the parties and their attorneys**. Love, 275 S.C. at 59, 271 S.E.2d at 112 ("[w]hether a communication is privileged is for the trial judge to decide in the light of a preliminary inquiry into all the facts and circumstances and this determination by the trial judge is conclusive in the absence of abuse of discretion.") (emphasis added).

Counsel for the Nitsches argue that they had no such ethical obligations because they did not receive the documents "through inadvertence" and "there is no allegation that any of the Disputed Documents contains work product." (See Response 3-4.) These arguments demonstrate that counsel have a fundamental misconception regarding their responsibilities and the rules governing discovery. Further, counsel for the Nitsches can cite no authority which condones an attorney's retention and use of privileged documents obtained under such circumstances.

The Response's attempt to distinguish the applicable case law on the ground that Mrs. Nitsch did not receive the documents "inadvertently" does not show error in the Proposed Report. First, common sense undercuts the Nitsches' focus on whether Helen Kondra "intentionally" or "inadvertently" gave the documents to Mrs. Nitsch. The issue is not Helen Kondra's "intent." The issue is the intent of Mr. Kondra, who was the owner of the documents. As set forth above, the record establishes that Mr. Kondra did not intentionally give the documents to the Nitsches or allow them to be given to the Nitsches. I reject the notion that Mrs. Nitsch thought for one moment that she received documents transported in black trash bags with Mr. Kondra's permission. If she had permission why did she not go to the Kondra's home to review documents? The answer is because she had no permission.

Second, contrary to the Response's focus on the inadvertent disclosure requirement of Model Rule 4.4(b), the applicable law cited in the Proposed Report describes appropriate conduct by attorneys when in receipt of documents obtained under wrongful or suspicious circumstances outside the discovery process. See e.g., Maldonado v. New Jersey ex rel. Admin. Office of Courts – Prob. Div., 225 F.R.D. 120, 138-39 (D.N.J. 2004) (stating that "[i]t should be noted that the Court is not relying on the opinions of the ABA or the New Jersey Ethics Committees as precedent"); see also Chamberlain Group, Inc. v. Lear Corp., 270 F.R.D. 392,

398 (N.D. Ill. 2010) (stating that "many courts, this Court included, fail to see why this same duty to disclose should cease where confidential documents are sent intentionally and without permission. If anything, the duty to disclose should be stricter when a party obtains the documents outside legitimate discovery procedures"). I agree.

For this reason, counsel for the Nitsches' attempt to justify their conduct under Model Rule 4.4.(b) and ABA Formal Opinion 06-440 fails. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Opinion 06-440 (2006) ("the Rules do not exhaust the moral and ethical considerations that should inform a lawyer"); see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Opinion 11-460 (2011) ("in several cases, courts have found that Rule 4.4 or its underlying principle requires disclosure in analogous situations, such as when "confidential documents are sent intentionally and without permission'... [t]o say that Rule 4.4(b) and other rules are inapplicable is not to say that courts cannot or should not impose a disclosure obligation in this context pursuant to their supervisory or other authority... [p]ursuant to their supervisory authority, courts may require lawyers in litigation to notify the opposing counsel when their clients provide an opposing party's attorney-client confidential communications...").

Also, the applicable law does not turn on whether the documents at issue are work product or whether they are relevant. Despite the fact that many of the Disputed Documents could be construed as work product prepared in anticipation of potential litigation, it is the manner in which the Disputed Documents were obtained which should have triggered counsel for the Nitsches' ethical obligations. It is unnecessary to distinguish between attorney-client privileged communications, work product, or simply private information because counsel for the Nitsches unilaterally determined they were rightfully in possession of the documents and used them in this litigation. In doing so, they failed to meet their ethical obligations, regardless of the nature of the privilege or relevance of the documents. See Maldonado, 225 F.R.D. at 135 ("[i]t is

the general abuse of the discovery process being conducted under the authority of this court and the ability to punish the perpetration of fraud upon the court that must be sanctioned. It is not necessary to demonstrate that the purloined letter was relevant to this lawsuit. Rather, it is the conduct that must be recognized as an interference with the judicial process and the orderly and fair administration of justice"). Accordingly, the Response's attempts to distinguish the applicable law show no error in the Proposed Report's findings.

Counsel for the Nitsches' failure to live up to their ethical obligations plays a role in my decision regarding sanctions in this case.

IV. The Statute of Limitations Has Run on the Claims of the Nitsches.

As a logical progression in my analysis of the issues referred to me by Judge Miller, I find the applicable statute of limitations on the Nitsches' claims began to run no later than 2005. I make this finding because, if the Nitsches' claims are barred by the statute of limitations, my other findings regarding discovery issues would be moot.

The Nitsches assert the following claims against the Kondra Plaintiffs and Mr. Campbell in this case: fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, unjust enrichment, breach of fiduciary duty, negligence, and conversion. Defendants allege four (4) separate fraud claims against different combinations of Plaintiffs in their Answer.[3] The applicable statute of limitations for all of Defendants' claims is three (3) years.[4]

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[3] Defendants' first counterclaim alleges fraudulent misrepresentation against all Plaintiffs ("Claim One") (Answer p. 21–22); Defendants' third counterclaim alleges fraudulent concealment against Douglass Kondra ("Claim Two") (Answer p. 23–24); Defendants' fourth counterclaim alleges fraudulent concealment against Helen Perry and Lawrence D'Alessio ("Claim Three") (Answer p. 24–25); and Defendants' fifth counterclaim alleges fraudulent concealment against Emil Kondra, Emil P. Kondra, LLC, Emil P. Kondra Revocable Trust, and Emil P. Kondra Family Trust ("Claim Four") (Answer p. 25–26).

[4] See Turner v. Milliman, 381 S.C. 101, 109–10, 671 S.E.2d 636, 640 (Ct. App. 2009) (applying three-year statute of limitations in fraud action); S.C. Code Ann. § 15-3-530 (5) (three (3) year

Under the discovery rule, "the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." Burgess v. Am. Cancer Soc'y, S.C. Div., Inc., 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989) (emphasis in original). "[A]lthough a party claims ignorance of existing facts and circumstances, the same result follows if such facts and circumstances could have been known to the party through the exercise of ordinary care and reasonable diligence." Id. at 186-87, 386 S.E.2d at 800. "In other words, the clock starts running when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist." Gibson v. Bank of Am., N.A., 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009).

The standard for determining "when the limitations period begins to run is objective rather than subjective." Burgess, 300 S.C. at 186, 386 S.E.2d at 800. Similarly, "[u]nder the doctrine of laches, if a party who knows his rights does not timely assert them, and by his delay, causes another party to incur expenses or otherwise detrimentally change his position, then equity steps in and refuses to enforce those rights." Richey v. Dickinson, 359 S.C. 609, 612, 598 S.E.2d 307, 309 (Ct. App. 2004).

In this case, counsel for the Nitsches submitted three (3) affidavits by Mrs. Nitsch dated October 2, 2013, March 19, 2015 and May 12, 2015, which support my finding that the applicable statute of limitations began to run no later than 2005. Specifically, Mrs. Nitsch's

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statute of limitations for tort actions, such as negligent misrepresentation, fraud, and unjust enrichment); S.C. Code Ann. § 33-8-300(e) (three (3) year statute of limitations for breach of fiduciary duty claims against a director); S.C. Code Ann § 33-8-420 (three (3) year statute of limitations for breach of fiduciary duty claims against an officer); S.C. Code Ann. § 15-3-530 (4) (three (3) year statute of limitations for conversion).

affidavit dated May 12, 2015 states, "[b]eginning in the early 2000's and continuing through 2007, Helen Kondra . . . came to my home ... provided me with stacks of unorganized (simply tossed into the bags) Ellcon documents for my review. Specifically, Helen Kondra provided me with multiple large black plastic trash bags filled with documents." (Veronica Nitsch Aff. at 2, ¶¶ 2–3 (May 12, 2015).) Mrs. Nitsch further averred that she "photocopied the documents and Helen Kondra returned to my home to collect the originals." (Id. at 2, ¶ 2.) Mrs. Nitsch further states, she "kept copies of the disputed documents to sort and organized them," and she also "kept the documents to pursue any claims my husband and I might have against those individuals . . . ." (Id. at 5, ¶ 11.) Mrs. Nitsch's affidavit dated March 19, 2015 states, that from 2004 to 2008, she created certain documents, "[m]ost of them are spreadsheets in which [she] evaluated Ellcon's balance sheets and other financial records. I created these documents to aid my attorneys in evaluating my claims against Plaintiffs." (Veronica Nitsch Aff. at 4, ¶ 5 (Mar. 19, 2015), attached as **Exhibit E**.) (Emphasis added.)

Mrs. Nitsch's affidavit dated May 12, 2015 further avers that she sought legal advice from the following attorneys during the following years to evaluate claims against Plaintiffs and that Mrs. Nitsch "gave some or all of the documents [she] received from Helen Kondra to at least the following [attorneys]: Snow Becker Krauss; Merline & Meacham; Hutton Law Group; Blake Harper; Fensterstock & Partners and Gibbes Burton." (Veronica Nitsch Aff. at 4-5, ¶ 8 (May 12, 2015).) Even though Mrs. Nitsch states she did not receive the Disputed Documents until the early 2000's, she indicates that from 1998 to 1999, she and Mr. Nitsch met with Leatherwood, Walker, Todd & Mann "[t]o review Emil Kondra & John Campbell documents." (Id. at 2, ¶ 2; 4, ¶ 7.) She further stated, "[t]o the best of my knowledge, at least the following attorneys kept copies of some or all of the documents I received from Helen Kondra: Snow Becker Krauss; Merline & Meacham; Fensterstock & Partners and Gibbes Burton." (Id. at 5, ¶ 9.)

The statements contained in Mrs. Nitsch's sworn affidavits evidence that starting no later than 2005, Mrs. Nitsch carefully photocopied and catalogued the mass of documents taken from Emil Kondra and incorporated them into spreadsheets that she "created . . . to aid [her] attorneys in evaluating [her] claims against Plaintiffs." Based on this testimony, I find that the statute of limitations began running no later than 2005, and likely began running much earlier.

The Nitsches assert that I, as Discovery Referee, am without authority to make findings which would moot the discovery issues referred to me but this ignores the reasons for the appointment of a discovery referee and judicial economy. The Court appointed a Discovery Referee to review and analyze discovery issues and make a recommendation to the Court as to how they should be decided. During the course of this process, multiple affidavits were submitted by Mrs. Nitsch which demonstrated that the statute of limitations has expired on these claims. (See Veronica G. Nitsch Affidavits dated march 19, 2015 and May 12, 2015.) These submissions show that the Nitsches had sufficient concerns regarding alleged actions by the Kondra Plaintiffs to trigger the statute prior to the merger. The Court has the discretion to reject the findings contained herein, and consistent with the notion of judicial economy, I have stated my findings on the statute of limitations, which results from my review of the record pursuant to the Order of the Court. Therefore, I believe these findings regarding the statute of limitations are proper.

Based on the above, I find that the applicable three (3) year statute of limitations on the Nitsches' claims has expired.

V. Sanctions against the Nitsches are Appropriate.

Based upon my review of the record and the submissions by the parties, I find that sanctions are appropriate because of the misconduct of Mrs. Nitsch. Counsel for the Nitsches' failure to abide by their ethical obligations also plays a role in this finding. The Nitsches and

their counsel proceeded to use the Disputed Documents to prosecute their claims in this litigation without seeking guidance from this Court, despite the circumstances under which they were received, and despite the ethical obligation which counsel knew, or should have known, existed.

My finding is consistent with the Court's inherent power and authority to supervise and oversee discovery. This power includes the authority to award sanctions against parties for discovery abuses and misconduct in civil litigation. It is well established that South Carolina courts have an "inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice." Ex parte Cannon, 385 S.C. 643, 661, 685 S.E.2d 814, 824 (Ct. App. 2009) (quoting Miller v. Miller, 375 S.C. 443, 455, 652 S.E.2d 754, 760 (Ct. App. 2007)). Likewise, courts have the inherent power to formulate rules of procedure where justice demands it. Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmty., Inc., 397 S.C. 348, 371–72, 725 S.E.2d 112, 125 (Ct. App. 2012) (quoting Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009)).

The decision of whether or not to award sanctions is left to the sound discretion of the trial court. See QZO, Inc. v. Moyer, 358 S.C. 246, 255, 594 S.E.2d 541, 546 (Ct. App. 2004); Fields v. Reg'l Med. Ctr. Orangeburg, 354 S.C. 445, 457, 581 S.E.2d 489, 495 (Ct. App. 2003) rev'd in part on other grounds, 363 S.C. 19, 609 S.E.2d 506 (2005). Therefore, an appellate court will not interfere with the trial court's decision to award sanctions unless the circuit court abused its discretion. See Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003); Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). When determining the appropriate sanction, "the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 199, 511 S.E.2d 716, 719 (Ct. App. 1999). "Whatever sanction is imposed should serve to

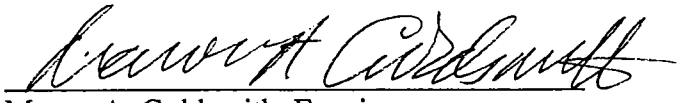
protect the rights of discovery provided by the rules." Orlando v. Boyd, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996). The South Carolina Supreme Court has held that sanctions are appropriate when discovery is not conducted using a cautious approach consistent with the trial court's previous pronouncements concerning an issue. Ex parte Bland, 380 S.C. 1, 8-9, 667 S.E.2d 540, 544 (2008).

Based upon my findings, I recommend that the Court award the following sanctions:

1. The Disputed Documents may not be used in this case for any purpose and the subject matters raised in the documents must be excluded from the trial of this case. In conjunction with this sanction, Mrs. Nitsch, Fensterstock & Partners, LLP, and Gibbes Burton, LLC shall submit separate affidavits to the Court proving that all copies of the Disputed Documents in their possession and copies disseminated to any third party have been destroyed. This sanction appropriately addresses the privileged nature of the documents and the manner by which they were obtained. Additionally, it is not unduly harsh because, while the Nitsches maintain the Disputed Documents are important to their claims, after reviewing the documents, I do not see how they can be relevant to this case.

2. An award of fees to the Kondra Plaintiffs and Mr. Campbell, to be paid by the Nitsches, for their time spent in requesting return of the documents obtained from Mr. Kondra's home office, motions filed regarding the documents, and proceedings before the Discovery Referee. Simultaneous with this proposed Order, Nelson Mullins shall prepare a summary of the fees and expenses for the work described above which will be separately submitted to the Court.

Finally, I recommend that my fees as Discovery Referee be split equally between the Kondra Plaintiffs/Mr. Campbell and the Nitsches.



Mason A. Goldsmith, Esquire

6/24, 2015
Greenville, South Carolina