SUPREME COURT OF NEW YORK
NEW YORK COUNTY

PURSUIT CREDIT SPECIAL OPPORTUNITY FUND, L.P., Plaintiff, - against - KRUNCHCASH, LLC, KC PCRD FUND, LLC, JEFFREY HACKMAN, and SEAN MCGHIE PLC Defendants.	:	Index No. 651070/2022

MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE

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Through counsel, Slarskey LLC, Plaintiff Pursuit Credit Special Opportunity Fund, L.P. ("Pursuit") submits this Memorandum of Law in support of motion for a protective order and for sanctions assessed against Robins Kaplan LLP and Defendants KrunchCash LLC ("KrunchCash"), KC PCRD Fund LLC ("KC PCRD"), Jeffrey Hackman ("Hackman"), and Sean McGhie PLC ("McGhie") (collectively "Defendants") in this action.

PRELIMINARY STATEMENT

Pursuit seeks urgent and immediate intervention to clawback confidential and privileged documents obtained by Defendants and their counsel through unauthorized access to Pursuit's corporate records. The relief Pursuit seeks reflects the gravity and seriousness of Defendants' transgression. Defendants were given the opportunity to do the right thing, and instead, they flouted ethical rules and flagrantly violated the Court's protective order, to gain improper tactical advantage in this action. The extent and nature of the transgression, coupled with the Defendants' and their counsel's demonstrated disregard for the rules, make clear that undoing the harm in this case requires *returning* Pursuit's confidential files and sanctioning Defendants and their counsel.

Defendants and their attorneys used a link they found in an email produced by a non-party to gain unauthorized access to Pursuit's confidential and privileged corporate files, all of which were maintained in a password-protected, encrypted Dropbox storage account. The disclosure at issue was obviously inadvertent. Pursuit did not produce the link Defendants used to surreptitiously gain access to Pursuit's confidential materials. Rather, it was in a document produced by Pursuit's fund administrator, an individual subject to confidentiality restrictions, and the link was sent to that individual in 2019, years *before* the privileged documents accessed by Defendants even existed. And Defendants and their attorneys knew better than to download

and use those obviously confidential and privileged materials. The folders in the Dropbox provided clear indications that the contents in those files belonged to Pursuit, not the producing party, and contain confidential, privileged, and sensitive information.

Defendants try to use Pursuit's effort to assign confidentiality designations to the non-party production *after* the documents were produced as cover for their improper behavior, but the fact is they accessed and reviewed Pursuit's privileged and confidential materials starting on November 4, one week *before* Pursuit provided its narrow confidentiality designations by stamping the non-party production. Immediately upon accessing the link, it should have been apparent to Defendants' and their counsel that any documents in the "Pursuit Credit Special Opportunity Fund LP" Dropbox folder were confidential and, in the case of "Legal" files, likely privileged.

Instead of alerting Pursuit to the Dropbox vulnerability, Defendants surreptitiously accessed, downloaded, and reviewed Pursuit's confidential and privileged materials 67 times over *ten days* before notifying Pursuit. And even *after* Pursuit designated the non-party production Highly Confidential - Attorneys' Eyes Only ("AEO") under the protective order (the "Protective Order") (Doc. 113), but *before* disclosing the unauthorized access to Pursuit, Hackman himself continued to access and review materials in Pursuit's Dropbox for *an entire week*, in direct violation of the terms of the Protective Order.

Pursuit only learned of the unauthorized access on November 14, 2022, when Berg sent a menacing letter bragging about his firm's unauthorized access to Pursuit's Dropbox files and threatening Pursuit to dismiss the action, or else. Pursuit immediately shut down the stale link and began to investigate the damage. And notwithstanding opposing counsel's patently unethical threats and nonsensical characterizations of the documents they reviewed, Pursuit

presented Defendants with the opportunity to unwind the inadvertent and unauthorized disclosure and stop their apparent, improper use of Pursuit's confidential and privileged information. Instead, they doubled down. Defendants' counsel not only refused to sequester Pursuit's files, he brazenly turned around and gloated about his plans to use them.

This is not the first time. Hackman and his counsel have a long, sordid history of threatening opponents, engaging in vexatious litigation tactics, and acting unprofessionally in dealings with counsel. And prior efforts to rein in this behavior, including a court order disqualifying Berg's prior firm from representing a Hackman entity based on a finding of unethically obtained and used confidential information, have failed to temper such conduct. In the context of this pattern of unethical behavior, and coupled with Hackman's flagrant violation of the Protective Order, lesser remedies will not right this wrong.

BACKGROUND FACTS

A. The Parzygnat Production

One month ago, Pursuit demonstrated to this Court how Hackman, using KrunchCash and the KC PCRD entity, perpetrated an investment fraud on Pursuit, by presenting Pursuit with false and misleading information regarding the nature of the investments ("Advances"), misrepresenting the status of repayments, and manufacturing paper profits by presenting Pursuit with manual accounting that purported to show profitable investments with consistent, timely returns. (Doc. 63 (Mem. ISO Motion to Compel); Doc. 114 (Tr. Sept. 28, 2022 Proceeding).) The Court ordered Defendants to produce bank records (Doc. 108) which were finally obtained through non-party First Citizen Bank. Pursuit was not disappointed with what those records revealed. In due course, Pursuit will present this Court with its findings, which confirm Pursuit's theory of investment fraud, and are further supported through additional

evidence obtained from cooperating third parties who have also had the misfortune of being involved in the saga of Hackman's unraveling.

With Pursuit closing in, on September 16, 2022, Defendants subpoenaed Kenneth Parzygnat ("Parzygnat"), Pursuit's fund administrator, to attempt to exploit what they perceive as an opportunity at a defense. (Doc. 95.) The subpoena sought various documents and communications from 2019 concerning Parzygnat's work for Pursuit and a financial review Defendants mistakenly believe he completed. (Bea Aff. ¶ 8.) Hackman is fixated on the idea that "every penny" that Pursuit invested, and "every penny" of illusory profit that Hackman and KrunchCash paid out to KC PCRD (each time collecting 50% of false profits for himself) was accounted for, and believes that Parzygnat's work assisting and outside accounting firm's efforts to attempt to review Pursuit's 2018 financials—the review Hackman insists was a completed audit—is the key to his defense theory. (*See* Doc. 114 (Tr. Sept. 28, 2022) at 8:10-10:23, 14:16-15:03.)

But Hackman's theory misses the point. There is no dispute that Pursuit invested more than $10 million through KrunchCash or KC PCRD. (Am. Compl., Doc. 14 ¶ 1-5.) And there is no dispute that Hackman made the investments *appear* profitable for quite some time. (*Id.*) Hackman's detailed "accounting" misrepresented *actual* returns and concealed the underperformance of the investments from Pursuit—and he did the same thing to others involved. Hackman prepared a lot of "accounting" for a lot of different parties, but when you compare all those elaborate, detailed, "accountings" purporting to show "to the penny" amounts investors put in, amounts advanced, amounts owed, and amounts repaid by advance recipients, it simply does not add up. (Doc. 63 at 14-19; Doc. 91 (Rogers Aff.) ¶ 1-39.)

Preoccupied with this theory of their case, Defendants badgered Parzygnat, who was not represented by counsel, to produce information relating to a financial review performed at Pursuit's request in 2019. (Bea Aff.[1] ¶ 8-20; Ex. 1; Doc. 95.) After being subjected to counsel's aggressive assertions of his purported non-compliance with the subpoena, Parzygnat over-produced virtually all his communications with Pursuit over several years—including tax returns, investor records (containing SSNs), bank records and account numbers, patently AEO materials, and swaths of irrelevant documents concerning Pursuit's non-KrunchCash investments. (Bea Aff. ¶ 8-20; Ex. 2-3.) Parzygnat is not a true "third party" as Defendants assert. Parzygnat, and his firm V1 Fund Services, are contracted under an Administration Agreement and a Nondisclosure Agreement to provide essential fund administration services to Pursuit. (Turner Aff. ¶ 7-8; Bea Exs. 10-11.) Parzygnat provides the type of prudent, independent, external fiduciary controls that were lacking in Hackman's one-man operation. (*Id.*)

Upon realizing the overbreadth of Parzygnat's production, on November 7, Pursuit provisionally designated the production as AEO and proposed to Berg that it would provide document-by-document designations. (Bea Aff. ¶ 19-22; Ex. 3.) Pursuit loaded Parzygnat's production on a review platform, reviewed some 1,500 documents solely for purposes of assigning confidentiality designations, and re-produced them on November 10, with bates and confidential or AEO stamps. (Bea Aff. ¶ 23-24.)

Unbeknownst to Pursuit or Pursuit's counsel at the time, certain emails among those documents contained live Dropbox links which, although the links were stale and

[1] References to "Bea Aff." and "Ex." refer the Affirmation of Renee Bea, and exhibits attached thereto, concurrently filed with this motion. References to "Turner Aff." and "JST Ex." refer to the Affidavit of J. Scott Turner, and exhibits attached thereto, concurrently filed with this motion.

generated in 2019, apparently they allowed Defendants and their counsel to gain unauthorized access to Pursuit's *current password-protected* corporate files including: (i) a folder entitled "Legal," and a sub-folder entitled "Slarskey LLC," containing attorney-client privileged documents, (ii) folders and files relating to investments that are unrelated to KrunchCash, (iii) highly sensitive tax documentation, and, (iv) sensitive financial information related to Pursuit's limited partners not relevant to this dispute. Neither Pursuit, nor our firm, were aware, at this point, of the access point through the Dropbox link. (Bea Aff. ¶ 25; Turner Aff. ¶ 15.) Plainly, Pursuit did not intend, by not interfering with Parzygnat's disclosures, to provide Defendants with unfettered, backdoor access to its otherwise password-protected, *current* corporate files through a stale Dropbox link. Of course, by the time Pursuit and our firm learned of the breach, it was already too late, as Defendants had used the time to furiously review and download Pursuit's Dropbox files. (Bea Aff. ¶ 25, Ex. 8.)

B. Counsel Threatens Pursuit and Refuses to Clawback Materials

Defendants' counsel did not provide Pursuit with immediate notice upon discovering the link providing unauthorized and inadvertent access to Pursuit's corporate files. Instead, Berg apparently perused every corner of Pursuit's *current* corporate files, and waited *nearly a week* before revealing, in a threatening letter detailing his supposed findings, that he had discovered a Dropbox link in the production that provided him inadvertent access to Pursuit's files. (Ex. 4.) In the letter, counsel documents the unauthorized access, stating the Dropbox link was discovered in one of Parzygnat's emails from several years ago, and bragging that he

accessed and used that link to download Pursuit's materials, and claims he is "entitled to use every document in it in this litigation."[2] (*Id.*)

The letter presents an incredible, self-serving contortion of the information in the Dropbox—wildly out of context—into a series of "gotchas," suggesting that Pursuit—the party whose $10 million investment disappeared, seemingly overnight, under Hackman's watch—was in the wrong for not having uncovered Berg's client's complex, multi-year fraud sooner. For example, Berg asserts the "ledgers" Hackman prepared, which Pursuit now knows were false and misleading, and KC PCRD bank statements somehow crack open a defense for the KrunchCash Parties. (Ex. 4.) But Pursuit has consistently pointed to those documents as instruments of Hackman's fraud, used to create an appearance that Advances were performing and returns were profitable when, in fact, they were not. (*See* Doc. 63 (Mot. to Compel) at p. 2, 8, 16; Doc. 114 (Tr. Sept. 28, 2022) at 10:20-10:23, 15:18-21 ("[our experts] have looked at the redacted KrunchCash records and the KC PCRD bank records.").) And the fact that Pursuit engaged an outside accounting firm, Gerson, Preston, Robinson, Klein, Lips & Eisenberg, P.A. ("Gerson"), to perform a financial review of Pursuit's 2018 financials is no secret either (Doc. 63 at p. 15), but Berg conflates Pursuit's effort to account for profits *reported* by KrunchCash and Hackman as an endorsement of those supposed "profits" which, as it turns out, were illusory—falsely manufactured by Hackman to create the appearance of profits and performance to solicit additional investment from Pursuit. Gerson did not perform an audit, (Ex. 12, Doc. 110) and it was never even able to complete a less exacting financial review because, lacking sufficient

[2] Berg's attempt to characterize the inadvertent disclosure as a disclosure deficiency (*see* Ex. 4) is particularly rich in light of Defendants' repeated efforts to thwart disclosure in this action, and failure to produce *a single page* of disclosure, despite the fact that Pursuit's demands have been outstanding since June.

information regarding the transactions between *KrunchCash* and advance recipients, they could not achieve a level of confidence to issue an opinion. (Doc. 63 at 15.)

Far from absolving Defendants of their fraudulent and irresponsible management of Pursuit's assets, the information in Pursuit's possession, and the evidence amassed since the action was commenced, only confirms Pursuit's allegations. The evidence, including unrebutted preliminary expert analysis, already demonstrates that (i) Pursuit is out $10 million, (ii) Hackman perpetrated a "false profits" scheme, through fabricated Excel "ledgers" and transactions made to create the appearance that investments were performing to induce Pursuit to invest millions more, (iii) Hackman paid himself over $3 million in "profit-share" that Pursuit now knows was illusory, (iv) Hackman did not use investors' capital to fund Advances, but rather, Hackman used one investor's money to pay off others—trading and churning the same collateral across investors to generate profit-share commission, and (v) Hackman presented false evidence to courts, representing specific figures he claimed KrunchCash funded, and were owed to KrunchCash. (Doc. 91 (Rogers Aff.) ¶¶ 1-39) Berg's bluster and threats lodged at Pursuit and our firm are little more than an effort to intimidate Pursuit to prevent truth from coming to light.

Pursuit goes to great lengths to ensure its confidential and privileged materials are secure. Its files are maintained on a password-protected, encrypted Dropbox environment, access to which was restricted to just three individuals: the CEO, the COO, and the fund administrator.[3] (Turner Aff. ¶ 9-11.) The links in question were shared with Parzygnat, who had already been granted secure access as Pursuit's fund administrator, and who was under strict confidentiality

[3] Berg's suggestion that "Dropbox is not secure in any event," is incredible. (Ex. 5.) His prior firm, Kennedy Berg LLP, used Dropbox to store its own files, and Defendants also maintain files on Dropbox, managed by Hackman and previously shared with Pursuit, including the bank records they now assert are so sensitive they must be afforded AEO treatment such that Pursuit's principals cannot review them. (Turner Aff. ¶ 8-18.)

restrictions. (Bea Aff. ¶ 52; Ex. 10-11; Turner Aff. ¶ 9-11.) Upon learning of the breach, Pursuit took immediate steps to secure the Dropbox and demanded the clawback and sequester of the documents obtained from the Dropbox. (Bea Aff. ¶ 26; Ex. 5; Turner Aff. ¶ 17.) Counsel refused. (Bea Aff. ¶ 27; Ex. 5.)

Pursuit now knows that counsel downloaded numerous files, including the entire "Pursuit Credit Special Opportunity Fund LP" directory *nine times* which contained obviously confidential and privileged subfolders. (Bea Aff. ¶ 42, Ex. 8.) Among them was a folder labeled "Legal" which, in turn, held subfolders clearly identified with the name of various law firms or legal consultants (e.g. "Slarskey LLC" or "Baker Donelson (MD)") containing attorney-client privileged, work product, and common-interest materials concerning this dispute. (Bea Aff. ¶ 43.) Hackman also personally downloaded several files, including bank statements from 2021 and privileged common interest materials. (Bea Aff. ¶ 43; Ex. 8.)

Upon receipt of the letter, Pursuit immediately wrote to Defendants and requested that counsel sequester all the documents pending further review and clawing back the privileged documents. (Ex. 2.) Pursuit also informed Defendants that it intends to begin producing *relevant* documents from Pursuit's corporate files this week, negating any need for Defendants to retain otherwise privileged or irrelevant confidential information. (*Id.*) Counsel for Defendants refused, instead insisting that the inadvertent disclosure constituted a waiver of privilege. (*Id.*) After counsel refused to sequester the documents—asserting, instead, an intent to use them—Pursuit wrote to this Court for intervention, (Doc. 116), and this Court granted leave to file a motion. It was only in response to the Court that Berg retreated, assuring the Court and Pursuit that, "[w]e are not reviewing the documents in dispute or using them for any purpose." (*Id.*)

C. *Hackman* and Berg Reviewed AEO and Privileged Documents, Even After Assuring Pursuit of AEO Treatment

After that interaction, Pursuit investigated further. We reviewed the original access to Parzygnat's production and activity logs for Pursuit's Dropbox, and learned that: (i) Robins Kaplan LLC provided Hackman with unfettered, direct access to the Parzygnat productions before counsel for either party were provided any opportunity to review them, and he personally downloaded the entire production; (ii) *Hackman* gained direct, unauthorized access to, and viewed and downloaded, Pursuit's Dropbox beginning on November 4, 2022, within minutes of Parzygnat's first production; (iii) and Hackman, Berg, and IP addresses from New York, Minneapolis, Stamford, and other locations accessed, reviewed, and downloaded Pursuit's files—privileged *and* AEO materials—repeatedly between November 4 and November 14, which explains the level of detail in counsel's letter.[4] (Bea Aff. ¶ 30-38; Ex. 8.)

It is thus unmistakably clear that Defendants and their counsel breached the Protective Order in this action, with Hackman himself repeatedly accessing AEO materials multiple times for ***an additional week*** *after* they were so designated and *after* his counsel assured us the materials would be afforded AEO treatment on November 7. (Bea Aff. ¶ 35, 38; Ex. 8.) By then, Hackman had already *directly downloaded* both Parzygnat's production *and* the entire contents of Pursuit's Dropbox. (Bea Aff. ¶ 42; Ex. 8.) This is especially hazardous under these circumstances. Hackman's willingness to submit false and misleading materials *under oath* to other courts (*see* Doc. 91 (Rogers Aff.) ¶¶ 5, 18, 29, 38) underscores the need for an attorney to act as a gate-keeper.

[4] The duplicity of any argument Defendants make that such materials are not patently confidential, privileged, or deserving of AEO treatment cannot be understated. Hackman personally reviewed Pursuit's bank records, among other files, even as he and his counsel assert that bank records he has repeatedly published on *public dockets* in this and other proceedings warrant AEO treatment. (Doc. 121 (Rule 14 Letters re: Bank Records Designations); Ex. 8, Doc. 98.)

D. Hackman's and Counsel's Pattern of Similar Offenses and of Bullying

This is not the first time Berg's firm violated ethical rules concerning confidentiality in representing Hackman. Last year, Kennedy Berg LLP ("KB"), Berg's firm until just a few months ago, was disqualified from representing Hackman-controlled entities. (Ex 13 (Minute Order: *Ocean Thermal Energy Corp. v. C. Robert Coe, III, et. al.*, Case 2:19-cv-05299 (C.D. Cal. July 29, 2020)); Ex. 14 (Mot. Disq. and Sanctions).) In that incident, KB communicated with, and obtained confidential information from, another creditor in a receivership who was adverse to Hackman's entity, after approaching that creditor and assuring him that privilege protected the disclosures. (*Id.*) The presiding court found KB's "actions [] raise serious ethical concerns," *i.e.,* violations of Rule 1.18 for having extracted confidential information from adverse parties for Hackman's benefit. There, "the public trust in the administration of justice and the integrity of the bar require[d] [KB's] disqualification."

Nor is counsel's aggressive behavior isolated to these two incidents. Counsel has repeatedly threatened Pursuit's counsel multiple times with baseless accusations of, *inter alia,* fraud on the court (Ex. 4), "teetering on the ethical line precluding threats of criminal misconduct in a civil matter," (Ex. 15), "violating its duty of candor to this Court" (Doc. 98), and defamation, (Doc. 59), and lodged other bizarre attacks at counsel. (Ex. 16 (G. Berg to E. Fried) ("In response, Pursuit hired you, a lawyer whose relationship to his own law firm is deliberately obscured (are you a partner, associate, or of counsel to Slarskey, LLC?), to demand such a fee agreement based on a series of threats to sue KrunchCash. I could not envision worse instincts after costs have been kept low because of the Kennedy Berg-KrunchCash relationship.").)[5] Our

[5] Pursuit's statements to Berg are truthful and in good faith and, in any event, are absolutely privileged as in-litigation statements pertinent to the dispute. *Weeden v. Lukezic*, 201 A.D.3d 425 (1st Dep't 2022). To the extent Defendants brought a claim for defamation, it would be

firm directed Berg, in writing, to cease threatening our firm, noting the rules barring such behavior. (Ex. 17 (Aug. 19, 2022 R. Bea to G. Berg).) The behavior continues. Bullying and throwing around unfounded charges of unprofessionalism, and taking overly-aggressive stances is apparently Berg's *modus operandi*, and this behavior has been repeatedly on display in his defense of Hackman in the Default Actions. (*See, e.g.,* Ex. 18 (Hackman Dep. Tr. Excerpts) at 196:02-06 ("I hate unethical lawyers and I hate unethical practice, …", "really slick and unethical," accusing of "unethical," "hideous practice,"); Ex. 11 (Eleventh Circuit decision reinstating abuse of process claims arising out of KrunchCash's filing confessions of judgment under Berg's supervision); Ex. 20 ("Since you are afraid to speak to me because of how badly you are performing in this case, …"); Ex. 21 (seeking disqualification of Berg, which was denied); Ex. 22 ¶ 47 (naming Berg as a defendant in the Default Actions and accusing Berg of "bullying" and violating the 'automatic stay' in Bankruptcy cases),[6] and elsewhere.[7] Berg's spurious accusations are vexatious, childish, obstructionist, and inappropriate.

Finally, Hackman has independently demonstrated willingness to misuse and misrepresent materials, presenting the very hazard the Protective Order and this motion are meant to prevent. The very litigious Hackman has threatened bar complaints against Pursuit's firm. (Ex. 23 (2022.01.07 Cohen note to file).) Hackman has directly tried to intimidate Pursuit's principals with threats to interfere with Pursuit's investor relationships, asserting that he is not

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immediately dismissed, and sanctionable pursuant to New York's anti-SLAPP law. *See* N.Y. Civ. Rights L. § 70-a(1).

[6] On information and belief, the action was dismissed and is now on appeal.

[7] KB, in a *pro se* matter involving claims for fees and counterclaims for breach of fiduciary duty, recently attempted to have opposing counsel (a reputable New York firm) representing KB's former client; the application was summarily denied. *See Kennedy Berg LLP v. Space Race, LLP*, Index No. 651687/2020 (Sup. Ct. N.Y. Cty. 2021), Doc. 25, Doc. 38.

bound by the same ethical rules as his counsel. (Ex. 24 (Hackman stating he is "not bound by any ethical rules" and threatening to use Pursuit's investors against Pursuit to gain leverage in his dispute with Pursuit).) And Pursuit's expert has already identified irreconcilable inconsistencies between the "accounting" Hackman prepared and declared, under oath, showed monies funded, repaid, and owed in the "Advances," spreadsheets Hackman prepared for investors concerning those same Advances, and the *actual* performance of those Advances—*i.e.,* that Hackman "overstate[d] the amounts owed to KrunchCash," in his presentation to the court. (Doc. 91 (Rogers Aff.) ¶¶ 5, 18, 29, 38.)

Meanwhile, Pursuit has played by the rules—notwithstanding having had to endure a long history of obstruction, delay, and unfounded threats of bar complaints, defamation lawsuits, ethical violations, allegations of fraud on the court, and other bizarre and overly-aggressive behavior by Defendants and their counsel, Pursuit has abided by its ethical obligations and complied with this Court's orders. (*See* Bea Aff. ¶ 1-39.) Pursuit's principals have been forced to standby and watch as Hackman uses Pursuit's investment capital and proceeds, indisputably owed to Pursuit, to defend its fraud against Pursuit and support vexatious and wasteful litigation tactics against the Advance recipients on the other side of Pursuit's investments. Pursuit requests that this Court begin to restore order to the dispute resolution process by granting this motion.

ARGUMENT

I. The Court Should Grant a Protective Order Concerning the Dropbox Account

New York law recognizes that a party does not waive protections, and a Court may issue a protective order pursuant to CPLR 3103, where documents are inadvertently disclosed to opposing parties. *See TC Ravenswood, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 2014 N.Y. Slip Op. 30235 (Sup. Ct. N.Y. Cty. 2014) (granting a protective order

where the disclosing party showed that they intended to maintain confidentiality of the documents, took reasonable steps to prevent disclosure and promptly took steps to rectify the error upon discovery, and the opposing party would not be prejudiced if a protective order was issued). The same standard applies to the inadvertent disclosure of privileged material. *New York Times Newspaper Div. of New York Times Co. v Lehrer McGovern Bovis, Inc.*, 300 A.D.2d 169, 172 (1st Dep't 2002).

And contrary to Defendants' letter to the Court, those privilege immunities are extended to Parzygnat, as Pursuit's agent and accountant, who is under a non-disclosure agreement with Pursuit, and who has assisted Pursuit in its investigation of Hackman's fraud and this litigation. *See Spicer v. GardaWorld Consulting (UK) Limited*, 181 A.D.3d 413, 414 (1st Dep't 2020) (holding disclosure of privileged communications to financial advisor did not waive privilege); *Gama Aviation Inc. v. Sandtron Capital Partners, L.P.*, 99 A.D.3d 423 (1st Dep't 2012) ("the affidavit of Gama's principal shows that Ittahadieh was acting as Gama's agent and that Gama had a reasonable expectation that he would keep the communication confidential").

Accordingly, a protective order is warranted here.

A. Pursuit's Dropbox Account Was Intended to Remain Confidential

Here, the disclosure of the Dropbox materials was an inadvertent disclosure of confidential, and privileged, documents. *See TC Ravenswood*, 2014 WL 284241 at *2. Pursuit, whose confidential and privileged documents were accessed via the Dropbox link, never intended for the contents of the Dropbox to be accessible to Defendants or their counsel. The document containing the link shows that it was intended for Parzygnat, who was bound by confidentiality, and no one else. (Ex. 9; Turner Aff. ¶ 13-14.)

Pursuit's Dropbox account is a secure, password-protected, and encrypted cloud storage environment, and access has been limited to only three individuals: Pursuit's CEO, COO, and fund administrator. (Turner Aff. ¶ 6-18.) Pursuit's fund administrator's access to the account was subject to two confidentiality agreements. (Ex. 10-11.) Moreover, any Dropbox link provided to Parzygnat in 2019 necessarily provided access at a time when many of the materials reviewed and described by Defendants counsel in the letter simply did not exist, including documents that are privileged or common interest materials. (Turner Aff. ¶ 13-16.) Pursuit was unaware that the years-old links were in Parzygnat's files, or that they were even still active, until he produced them and Defendants' counsel alerted our firm to the access point. (Turner Aff. ¶ 15; Bea Aff. ¶ 41.) Moreover, the scope of the original subpoena was sufficiently narrow such that Pursuit had no reason to anticipate the scope of Parzygnat's eventual production would include the volume of AEO material that was provided, or seek a protective order in advance of that production. (Bea Aff. ¶ 8.)

The folders in the Dropbox were clearly labeled in a manner that should have alerted Defendants and their counsel to the fact that they contained privileged or highly confidential information. (Bea Aff. ¶ 43.) For example, documents in the "Legal" and "Slarskey LLC" folders are attorney-client, work product, and common interest privileged documents. Likewise, documents contained in folders labeled "Tax" and "Banking" and "Deals" should have immediately alerted Defendants and their counsel to the contents of those folders, and the likelihood that they contain confidential, competitive, and highly sensitive information. (Turner Aff. ¶ 8; Bea Aff. ¶ 43.) Particularly where, as here, Defendants have asserted that even bank records that were previously disclosed to Pursuit, and published on the docket in this action, are nonetheless AEO materials. (*See* Doc. 98.)

And it is similarly clear that Parzynat did not intend to provide unfettered access to Plaintiff's current business documents and legal communications, which were accessed by Defendants using a link buried in a several-years-old email. (Turner Aff. ¶ 13.) Defendants served their subpoena on a legally unsophisticated fund administrator, who they were aware was not advised by counsel, as to what compliance the subpoena required. (Ex. 1.) Defendants then badgered Parzygnat with various menacing emails demanding that he scale up and expedite his production of documents in response to the subpoena. (*See id*.) The haste and nature of Parzygnat's production is self-evident, and cannot be used to impute an intention on the part of Pursuit to disclose the Dropbox's contents.

B. Pursuit Took Reasonable Steps to Prevent Disclosure

Pursuit took reasonable steps to prevent the disclosure of the documents, including by: maintaining its files in a restricted, password- protected cloud environment on Dropbox; implementing stringent password requirements; clearly labeling folders relating to "Legal" or litigation matters; requiring Parzygnat to sign an agreement to maintain confidentiality prior to being provided access to Pursuit's confidential information; and, immediately shutting down the link upon discovering the unauthorized access by Berg. (Turner Aff. ¶ 17-18.) Pursuit also immediately responded to Berg's threatening letter, directing him to sequester and discontinue use of the documents. *Enterprise Architectural Sales, Inc. v. Magnetics Bldrs. Group, LLC*, 193 A.D.3d 411, 412 (1st Dep't 2011) (affirming protective order and finding reasonable steps to protect against disclosure).

Pursuit has also conducted an investigation to assess the scope of the unauthorized access to its Dropbox files, implemented additional steps to further secure its files, and documented that breach for this Court. (Bea Aff. ¶ 26-30; Turner Aff. ¶ 12-18.)

C. Defendants Will Not Be Prejudiced by Returning Privileged and Irrelevant Sensitive Materials They Accessed Without Authorization

Moreover, there can be no prejudice to ordering Berg, or his clients (who *never* should have reviewed AEO documents in any event) to destroy and return those documents because, as Pursuit has already explained to Defendants, Pursuit intends to produce documents from Pursuit's corporate files in the near future. (Bea Aff. ¶ 45-50.) Pursuit's production of *relevant* documents will include various categories of documents that Berg identified in his letter, but *will not* include irrelevant materials concerning Pursuit's ongoing business activities and unrelated investments, or highly sensitive and equally irrelevant documents concerning Pursuit's limited partners. (Bea Aff. ¶ 49-50.) *Enterprise Architectural Sales, Inc.*, 193 A.D.3d at 412 ("The proper inquiry is whether the act of restoring immunity to an advertently disclosed document would be unfair to the party in receipt of the material under the facts of each case. Under the facts of this case, there would be no prejudice by the grant of a protective order."). Indeed, Pursuit was already in the process of reviewing and producing documents from Pursuit's Dropbox files, and the contents of Pursuit's Dropbox files reflects the fact that Pursuit took responsible steps early in the litigation to preserve even *potentially* relevant information. (Bea Aff. ¶ 45-46.) But it should be Pursuit, and not Defendants or their counsel, who are afforded the opportunity to review and produce from those files in the first instance. *See Enterprise Architectural Sales, Inc.*, 193 A.D.3d at 412, and Argument § III *infra*. This is especially true here because Berg's dismiss-or-else threat letter, filled with baseless accusations and an express threat of "public" disclosure coupled with a demand, shows exactly the improper purpose for which Defendants counsel intends to use the inadvertently disclosed information. Moreover, Hackman is a bully, and cannot be trusted with confidential information without proper

gatekeeping by counsel, which has also not occurred. *Heritage Auctioneers & Galleries, Inc. v. Christies's, Inc.*, 2018 WL 1672756, *1-5 (Sup. Ct. N.Y. Cty. Apr. 6, 2018).

The Court should grant a protective order instructing Defendants and their counsel to return, destroy, and refrain from using the inadvertently produced materials.

II. The Court Should Grant Sanctions for Defendants' and Counsel's Breach of the Protective Order

The proper remedy where a party has breached a confidentiality order is the grant of attorneys' fees, costs, and sanctions. *See Heritage Auctioneers & Galleries, Inc. v. Christies's, Inc.*, 2018 WL 1672756, *1-5 (Sup. Ct. N.Y. Cty. Apr. 6, 2018) (finding "[s]uch cavalier conduct flouting a protecting order and court rules cannot be countenanced without consequences," referring a breach to special referee for attorneys' fees, charges, expenses, and all costs).

The Court so-ordered the Protective Order, (Doc. 113), which contains an "AEO" designation. Upon learning that Parzgynat had over-produced documents, on November 7, 2022, Pursuit's counsel provisionally designated the entire production AEO, and undertook the process provided for in the Protective Order to review those documents in order to provide document-by-document designations concerning confidentiality—non-confidential, confidential, and AEO. (Ex. 3.) Berg acknowledged that designation, and assured Pursuit he was "instruct[ing his] side accordingly." (*Id.*) Pursuit reviewed the documents expeditiously and, upon completion, provided various AEO designations. (Bea Aff. ¶ 22-24.) Notably, unlike *Defendants*—who designated *each and every* bank statement produced by a non-party as AEO, though none are—Pursuit was selective. (*See* Background § B.)

Defendants did not respect the designation. Rather, counsel apparently provided the Parzygnat materials directly to Hackman—the alleged fraudster—without any prior review,

and with those AEO materials in his possession, he continued to access Pursuit's confidential and privileged documents *despite* knowing that Pursuit had designated materials as AEO. (Bea Aff. ¶ 35-39; Exs. 2, 8.) Most egregiously, ***after* Berg's represented to Pursuit had he had "instructed [his] side accordingly**," (Ex. 3) on November 7, 2022, ***Hackman continued to access the Dropbox and download documents***. (Bea Aff. ¶ 35-38, Ex. 8, 2.) Presumably, that is why Berg's letter smacks of being co-authored or reviewed by Hackman—because it can be reasonably inferred that Hackman provided material input, using the AEO and privileged documents. (*See* Ex. 4.) That is flouting—and such pernicious conduct requires a strong response. *Heritage Auctioneers*, 2018 WL 1372756, *8-9.

Also flouting is that Hackman has a demonstrable history of providing false evidence, in the Default Actions and in this case, to attempt to bully counterparties and mislead. (*See* Background § D.) Hackman has proven particularly dangerous when provided the opportunity to marshall evidence to courts. He isn't even shy about it. Hackman has previously threatened to leverage Pursuit's investors against Pursuit, and has ***threatened Pursuit*** that he is "not bound by any ethical rules." (Ex. 24.) Which is why counsel's responsibility to act as a gate-keeper in presenting evidence to this Court is particularly important. (Doc. 63 at 14-19; Doc. 91 (Rogers Aff.) ¶ 5, 18, 29, 38 (Hackman's tables to the court were inflated).) Putting materials in the hands of such an unscrupulous actor, and one who has indicated he is not bound by ethical rules, is flouting. *Heritage Auctioneers*, 2018 WL 1672756, *1-5.

And it is both ironic and "flouting" that *Defendants* emphasized the need for a Protective Order as grounds to obstruct disclosure of bank records and the subsequent review of those bank records, (Doc. 98)—which Pursuit had absolutely respected. Counsel's permitting Hackman to review both AEO *and* attorney-client privileged documents—and simultaneously,

hypocritically, using the Protective Order to obstruct and delay *Pursuit's* access to disclosure is quintessentially flouting. Defendants thus "*cavalier[ly]* flout[ed] a protective order." *Heritage Auctioneers*, 2018 WL 1372756, *8-9 (emphasis added).

"[F]louting of a protective order and court rules cannot be countenanced without consequences." *Id.* Where, as here, "the confidentiality agreement has no stated penalty, the court [should] find[] that an award of attorneys' fees incurred in making the OSC and costs associated in protecting the documents is an appropriate and proportionate response." *Id.* (granting costs and assigning a special referee to hear and report with recommendations as to sanctions). Pursuit respectfully requests the opportunity to present this Court, directly or through a referee, with its legal costs and expenses incurred as a result of these recent events, and for Pursuit's remedial measures.

III. Counsel Should be Jointly and Severally Liable for the Sanctions

Counsel has both failed to abide by the Protective Order (*see* Section II *supra*) and failed to refrain from reviewing or return inadvertently disclosed privileged materials.

As noted, "flouting of a protective order and court rules cannot be countenanced without consequences." *Heritage Auctioneers*, 2018 WL 1372756, *8-9. And "when receiving a communication or an e-mail which [a] lawyer knows or should reasonably know contains privileged material, the attorney is obligated to 'promptly notify the sending attorney' thereof, to refrain from further review of the communication, and [] to return or destroy it as requested." *Massey v. Anand*, 2012 WL 2396515 (citing ABA Model Rule of Prof. Resp. Rule 4.4(b), ABA Ethics 2000 Comm'n Report, Feb. 5, 2002, Ass'n of the Bar of the City of New York, Committee on Prof. and Jud. Ethics, Opinion No. 2003-04, 2004 WL 837937, and New York County Lawyers Ass'n, Committee on Prof. Ethics, Opinion No. 730, 2992 WL 31962702). Berg should share the sanctions with his clients. *Massey*, 2012 WL 2936515 (discussing remedies

available where an attorney has violated an ethical rule). Gleefully reviewing materials for *ten* days and preparing a point-by-point summary of one's supposed findings to threaten an opponent blows way past the bounds that basic, ethical rules impose on counsel to uphold the justice system.

First, it is Berg that enabled, and failed to stop, Hackman's access to the documents. Berg granted Hackman unfettered access to the AEO materials, and plainly did not restrict his access or take sufficient steps to prevent Hackman from continuing to access those materials *after* assuring Pursuit of his "instruct[ion to his] side." It is also obvious, on the face of the November 14 letter, which smacks of Hackman's obsession with the "to the penny" accounting he claims absolves him of fraud, that Berg discussed how to use the AEO Dropbox materials to threaten Pursuit, with Hackman. Berg breached the AEO designation in the most hazardous way: providing AEO materials to a client credibly accused of fraud, and shown to have misrepresented the amounts advanced to and repaid by Advance recipients to investors and courts, *for him* to dictate their use. (*See, e.g.,* Doc. 91 (Rogers Aff.) ¶ 1-39.) Instead of overseeing Hackman's actions, Berg weaponized Hackman, permitting *Hackman* to play lawyer—this time, in direct violation of the Protective Order.

Second, Berg knows better. (*See* Ex. 13-14, *Ocean Thermal*, Case 2:19-cv-05299.) Berg failed to promptly notify Pursuit that, not only had Berg accessed the Dropbox, but that he and Hackman accessed a folder—entitled "Legal" and folders such as "Slarskey LLC," obviously containing privileged, work product, and common interest documents concerning the dispute with Defendants. *Massey*, 2012 WL 2396515. Worse, Berg brandished the materials, threatening Pursuit and counsel with a warped interpretation of those documents, and attempting to strong-arm Pursuit into discontinuing the action. (Ex. 4.) As in *Ocean Therman*, Berg obtained

from an adversary materials which he knows should be treated as immune from disclosure. (Ex. 13 at 4 ("Tulk was concerned about sending the documents because, inter alia, his claim … was adverse to Kennedy's client Jeffrey Hackman".) As in *Ocean Thermal*, Berg used those materials against their origin—scathingly accusing Pursuit of fraud on the court. (*See id.* at 12.) And as in *Ocean Thermal*, Berg did it after *assuring* Pursuit he would respect confidentiality: *Defendants* obstructed disclosure of bank records until the Protective Order was entered, *Defendants* insisted—wrongly—on over-designation of their own records, and *Defendants* supposedly "instructed [his] side" to respect Pursuit's AEO designations. (*See id.* at 13 ("Tulk provided several documents to Kennedy after receiving Kennedy's assurance that they would be kept confidential").)

This is to say nothing of the patent impropriety of accessing digitally stored records maintained in the Dropbox environment. Berg (and Hackman) know full well that corporate records maintained in a password-protected Dropbox environment, are meant to be confidential. Despite Berg's quip that, "Dropbox is not secure in any event," (Ex. 5) his own firm, KB, used Dropbox to maintain privileged and confidential information, as is evidenced by his own download of KrunchCash's files to his own Dropbox, under his KB email address, in 2021. (*See* JST Ex. 3.) And as an attorney, Berg is charged with knowing that unauthorized access to cloud storage environments, such as Dropbox, Google Docs, and BOX, is recognized as unlawful, even in circumstances where the person who accesses the information *was previously* granted access. *See, e.g., Spec Simple, Inc. v. Designer Pages Online LLC*, 54 N.Y.S.3d 837, 843 (N.Y. Sup. Ct. 2017); 18 U.S.C. § 1030 (Computer Fraud and Abuse Act); N.Y. Penal Law §156.10(2). Here, Berg *knew* that neither he, nor his client, were authorized by Pursuit—the obvious owner of the data and files—to access the data.

Third, absent a consequence, Berg's actions are likely to worsen. Both Pursuit, and our firm, have fielded endless, baseless threats of ethical impropriety and defamation throughout this dispute.[8] (*See* Background § D.) Even after we requested that Berg cease the questioned behavior—putting it in writing to attempt to avoid a motion like this—Berg persisted. (Ex. 17.) There is a demonstrable pattern here, which mimics similar behavior in other cases related to this dispute. (*See* Background § D (outlining myriad similar incidents).) Berg's behavior goes far beyond the bounds of zealous advocacy, and Pursuit only makes this motion after having exhausted extra-judicial remedies. *See Principe v. Assay Partners*, 154 Misc.2d 702, 706 (Sup. Ct. N.Y. Cty. May 7, 1992) ("[s]eeking sanctions from this court is not a display of an inability to overlook obnoxious conduct, but an indication of the commitment to basic concepts of justice and respect for the mores of the profession of law.")

Finally, and especially dangerous, Berg acts at the behest of his already-unhinged client, who baselessly threatens bar complaints against us, (*See, e.g.,* Ex. 23 (Jan. 1, 2022 M. Cohen Letter to File)), and has proudly proclaimed that he is not bound by attorney ethics rules. (Ex. 24.) Hackman is incredibly vexatious and litigious, as is evidenced by the endless wave of litigation central to this dispute, where Berg has similarly threatened other attorneys, and in Hackman's other endeavors. Hackman has demonstrated a willingness to use misuse materials and to be dishonest in his representations to courts. (*See, e.g.,* Doc. 91 (Rogers Aff.) ¶ 1-39.) Berg needed to act as a gatekeeper, but instead he enabled a volatile client. Berg made his choice, and should share the consequences with his client.

[8] Berg, of course, has inverted the rules: it is unethical for an attorney to threaten disciplinary action against another attorney to gain a strategic advantage in a civil action. *See* N.Y. Rules of Professional Conduct 3.1(b), 4.4(a), *and* N.Y. Committee on Professional Ethics' Formal Opinion 2015-5 (June 2015).

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's relief.

New York, NY
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