UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.	CASE NO. 96-61376 Chapter 11
Debtors	Substantively Consolidated

RICHARD C. BREEDEN, Trustee of THE BENNETT FUNDING GROUP, INC.

Plaintiff

vs. ADV. PRO. NO. 98-70484A

ARKIN, SCHAFFER & SUPINO, ARKIN, SCHAFFER & KAPLAN, LLP, SUPINO & MICHAUD, et al.

Defendants

APPEARANCES:

SAPERSTON & DAY, P.C. Attorneys for Plaintiff 1109 M&T Center Three Fountain Plaza Buffalo, New York 14203	KAREN KACZMARSKI, ESQ. Of Counsel
PETERSON & ROSS Attorneys for Defendants One Battery Park Plaza 22nd Floor New York, New York 10004	BARBARA A. SHEEHAN, ESQ. Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Richard C. Breeden ("Trustee"), as Chapter 11 Trustee of the substantively consolidated estates of The Bennett Funding Group, Inc.(“BFG”), commenced an Adversary Proceeding

against the defendants, Arkin, Schaffer & Supino[1] ("Arkin, Schaffer") on March 27, 1998, alleging causes of action the Trustee posits arise under §§ 541, 542, 544, 547, 548 and 550 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). Under consideration by the Court is a motion filed in that Proceeding by Arkin, Schaffer for a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), incorporated by reference in Rule 7026 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), preventing the deposition of certain witnesses within Arkin, Schaffer's control from taking place until the Trustee complies with Arkin, Schaffer's outstanding discovery requests. *See generally*, Fed.R.Civ.P. 26 and Fed.R.Bankr.P. 7026. The Trustee has filed a cross-motion pursuant to Fed.R.Civ.P. 37, incorporated by reference in Fed.R.Bankr.P. 7037, seeking an order compelling the depositions of the Arkin, Schaffer witnesses to take place forthwith. *See generally*, Fed.R.Civ.P. 37 and Fed.R.Bankr.P. 7037. Oral argument was heard on July 13 and August 17, 2000 in Utica, New York after which the matter was submitted for decision.

JURISDICTIONAL STATEMENT

An Adversary Proceeding is non-core if it has "little or no relation to the Bankruptcy Code, do[es] not arise under the federal bankruptcy law and would exist in the absence of a bankruptcy case." *J. Baranello & Sons, Inc. v. Baharestani (In re J. Baranello & Sons, Inc.)*, 149 B.R. 19, 24 (Bankr. E.D.N.Y. 1992). While the issue of jurisdiction has not been addressed by

[1]The Defendants, Arkin, Schaffer & Kaplan, LLP successor to Arkin, Schaffer & Supino, Anthony M. Supino, Esq., Stanley S. Arkin, Esq., Hyman L. Schaffer, Esq., and Jeffrey M. Kaplan, Esq. are collectively referred to herein as "Arkin, Schaffer."

any party to this motion, some of the causes of action the Trustee is prosecuting on behalf of the bankrupt estate in this Adversary Proceeding, to wit, legal malpractice, breach of fiduciary duty, breach of contract and unjust enrichment, consist of pre-petition claims which would exist independently of this bankruptcy case. *See Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld LLP*, 201 B.R. 635 (S.D.N.Y. 1996) (holding that Adversary Proceeding instituted by corporate-debtor's Chapter 11 Trustee against debtor's former law firm alleging legal malpractice, breach of fiduciary duty and breach of contract for pre-petition acts is "clearly" non-core). The Court concludes that the within adversary proceeding, at least to the extent that the Trustee asserts the foregoing causes of action, invokes the non-core, related to jurisdiction of this Court.

Although 28 U.S.C. § 157(c)(1) and Rule 9033(a) of the Fed.R.Bankr.P. limit the bankruptcy court to submitting proposed findings of fact and conclusions of law to the district court before final orders can be entered in non-core "related to" matters, implicit jurisdiction is conferred on bankruptcy courts to enter interlocutory orders in such matters without submission to the district court. *See*, *Lesser v. A-Z Associates (In re Lion Capital Group)*, 46 B.R. 850, 854 (S.D.N.Y. 1985) (holding that interlocutory orders in non-core proceedings are not final orders within the meaning of 28 U.S.C. § 157 and need not be submitted to the district court); *Crysen/Montenay Energy Co. v. Shell Oil Company and Scallop Petroleum Company (In re Crysen/Montenay Energy Co.)*, 240 B.R. 166, 171 (S.D.N.Y. 1999) (holding that a bankruptcy judge's power should not be construed so narrowly as to exclude power to enter interlocutory order compelling arbitration in non-core proceeding); *One-Eighty Investments, Ltd. v. First International Bank of San Antonio, N.A. (In re One-Eighty Investments, Ltd.)*, 72 B.R. 35, 36 (N.D. Ill. 1987) (agreeing with other courts that have held that only final orders need to be

entered in non-core proceedings by an Article III judge, but interlocutory orders are to be issued by bankruptcy judges); *Greene v. Creative Equity Corp. (In re Hoffman Advertising Group, Inc.)*, 62 B.R. 823, 829 n.2 (Bankr. S.D.N.Y. 1986) (stating that transfer of venue motion in non-core proceeding was interlocutory, non-final order, and within the power of the bankruptcy court); *Elkins v. X-Alpha Int'l, Ltd. (In re Kennedy)*, 48 B.R. 621 (Bankr. D. Ariz. 1985) (holding that remand of non-core proceeding to state court was interlocutory order which may be granted by bankruptcy court without submission to the district court).

FINDINGS OF FACT

In November 1995, BFG and its subsidiary companies were, by all outward appearances, seemingly profitable upstate New York companies investing in, among other things, commercial and municipal office equipment lease contracts. At the tail-end of BFG's fictitious prosperity and prior to BFG's bankruptcy filing, Arkin, Schaffer asserts that it was commissioned by BFG's management and in-house legal staff to investigate possible wrongdoing and/or malfeasance in the company's leasing practices. Arkin, Schaffer contends that immediately prior to its retention by BFG, it had been discovered that within most of BFG's lease portfolios there were commercial and municipal lease contracts that had been "double pledged," that is to say that some of the lease contracts had either been sold to more than one investor, sold to one investor and contemporaneously pledged as collateral to secure a loan to BFG, or sometimes both sold to more than one investor *and* used as collateral. Specifically, Arkin, Schaffer maintains that it was retained "to investigate whether the double pledging of certain lease contracts by the company

was intentional or the result of an innocent error, and to recommend appropriate remedial measures." Arkin, Schaffer's Affidavit in Support of Motion to Quash or Modify Subpoena and for a Protective Order ("Arkin, Schaffer Affidavit"), ¶ 4.

Arkin, Schaffer asserts that it commenced an investigation in late November 1995 and issued its "Final Report" regarding the double pledging on March 7, 1996 ("Arkin Report"). The Arkin Report concluded, among other things, that the double pledging had, in fact, taken place and that there was "considerable circumstantial evidence supporting the view that the double pledging was intentional" but that there had been no direct evidence of wrongdoing, that in "complex commercial endeavors, suspicious-seeming but nonetheless innocent errors do occur..." and that "no identifiable person or group of people can be held responsible for the manner in which the system [of double pledging] ultimately developed." Arkin Report, at 28, 29-30. The Arkin Report also suggested remedial measures which might cure the problems resulting from BFG's double pledging system.

Three weeks after Arkin, Schaffer issued the Arkin Report, BFG's investment scheme collapsed. On March 28, 1996, the U.S. Attorney for the Southern District of New York filed a criminal complaint against Patrick Bennett, the chief financial officer of BFG. On the same day the Securities and Exchange Commission filed a civil complaint against BFG on the heels of a three-year long investigation into BFG's investment practices. The next day, March 29, 1996, BFG (and several of its affiliate companies) filed for protection under Chapter 11 of the Code.

The Plaintiff in this action was appointed Chapter 11 Trustee on April 18, 1996 and immediately assumed the management of BFG. After an eight-month investigation, the Trustee issued a Report pursuant to Code § 1106 on December 31, 1998 ("1106 Report"). The Trustee's

1106 Report, which chronicled a clandestine "financial superweb" of double-dealing taking place amongst the various BFG-controlled companies, is a subject of the motions presently before the Court. *See Breeden v. Bennett (In re Bennett Funding Group, Inc.)*, 220 B.R. 743, 747 (N.D.N.Y. 1997). Many of those responsible for the widespread peculation at BFG, including Patrick Bennett, were indicted and either convicted or pled guilty to charges arising from their participation in what was revealed to be one of the largest "Ponzi" schemes in U.S. history. *See Breeden v. Manufacturers and Traders Trust Co. (In re the Bennett Funding Group, Inc.)*, 146 F.3d 136, 137 (2d Cir. 1998).

Through his participation in the administration of BFG's bankruptcy estate, the Trustee has filed a myriad of adversary proceedings; the instant action being one such proceeding. At issue in the Adversary Proceeding underlying the motions pending before the Court is the retention of Arkin, Schaffer to investigate and advise BFG on the particular leasing practices in question and the results borne out of that relationship, to wit, the Arkin Report. *See* Trustee's Second Amended Complaint to Recover Damages for Legal Malpractice and Other Claims ("Complaint"). The Trustee, as legal representative of BFG, specifically alleges that the Arkin Report, while identifying possible improprieties, nonetheless, "ignored the clear and unmistakable evidence of illegality and criminal activity" allowing the Ponzi scheme to continue resulting in, among other claims, legal malpractice, breach of fiduciary duty, breach of contract and unjust enrichment. Complaint, ¶¶ 33, 41-97.

The course of discovery in this Proceeding has led to a number of disputes involving discovery sequence, witness production, document review and claims of both work-product and attorney-client privilege, along with a barrage of tangential bickering and antagonistic wordplay

between the parties' attorneys. Although the parties have generally agreed to resolve some of the document production disputes themselves, they are unable to come to a meeting of the minds over the sequence and timing of the depositions in question and the Trustee's claim of privilege.

ARGUMENTS

In the instant Proceeding, Arkin, Schaffer requests relief in the form of a protective order pursuant to Fed.R.Civ.P. 26(c), incorporated by reference in Fed.R.Bankr.P. 7026, preventing the deposition of witnesses within Arkin, Schaffer's control from taking place until the Trustee complies with outstanding discovery requests. At oral argument before the Court on August 17, 2000, the parties agreed to resolve several of the outstanding document discovery disputes on their own accord. What remains at issue are Arkin, Schaffer's interrogatory requests that the Trustee "identify each person interviewed by the plaintiff [Trustee] regarding the double pledging...and the date of each interview" and "[i]dentify each person interviewed by the plaintiff [Trustee] regarding the investigation conducted by the defendants [Arkin, Schaffer] and the date of each interview." Arkin, Schaffer's First Set of Interrogatories, ¶¶ 68, 69. The Trustee resists answering the same, asserting that the information requested is immune from disclosure because it constitutes attorney-client communication and/or attorney work-product. *See generally*, Fed.R.Civ.P. 26(b)(1), (3), (5). The Trustee contends that "any interviews or work done by the Trustee and his attorneys have clearly been in anticipation of litigation" and are, thus, privileged and not subject to disclosure. Trustee's Affidavit in Support of Trustee's Cross-Motion for Protective Order and to Compel Disclosure and Discovery ("Trustee's Affidavit"), ¶ 30. Arkin,

Schaffer argues that the Trustee's invocation of a blanket privilege fails on several grounds. First, Arkin, Schaffer asserts that the Trustee's distribution of the 1106 Report constitutes a waiver of any privileged information underlying the Report. *See* Arkin, Schaffer's Memorandum of Law in Support of Motion to Stay Proceedings, to Compel Disclosure and/or Issue Sanctions and for a Protective Order ("Arkin, Schaffer Memo"), at 14. Second, Arkin, Schaffer asserts that the Trustee's privilege claim fails because "in accordance with the applicable rules, the implicated privilege must be specifically identified" and the Trustee has failed to do so. *Id.* Finally, Arkin, Schaffer maintains that the Trustee is required to provide Arkin, Schaffer with a privilege log identifying withheld discovery, but has also failed to do so. *Id.* at 14-15.

In response to Arkin, Schaffer's motion, the Trustee has filed a cross-motion pursuant to Fed.R.Civ.P. 37, incorporated by reference in Fed.R.Bankr.P. 7037, seeking an order compelling the depositions of the Arkin, Schaffer witnesses to take place without further delay. The Trustee claims that Arkin, Schaffer has "repeatedly delayed and obstructed the scheduling of those depositions" and that "[t]here is no legitimate reason not to proceed with those depositions." Trustee's Affidavit, ¶ 38. Arkin, Schaffer contends that ordering the depositions to take place prior to the satisfaction of the outstanding discovery requests would frustrate both the discovery proceedings and Arkin, Schaffer's litigation strategy. Arkin, Schaffer's Affidavit in Support of Motion to Stay Proceedings, to Compel Disclosure and/or Issue Sanctions and for a Protective Order, ¶ 49.

Both motions are addressed herein.

DISCUSSION

A. Sequence of Discovery

Fed.R.Bankr.P. 7026 incorporates by reference Fed.R.Civ.P. 26(d), which states, *inter alia*, that the "methods of discovery may be used in any sequence and the fact that another party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery." Fed.R.Civ.P. 26(d). As a general rule, "parties [to an adversary proceeding] are free to engage in discovery in any sequence they choose." *KeyBank Nat'l Assoc. v. Mann (In re Mann)*, 220 B.R. 351, 355 (1998) *citing* Fed.R.Civ.P. 26(d). However, since priority is no longer given to the party who wins the race to serve notice on opposing counsel, the court is free to establish priority of discovery on a case by case basis. *See* Fed.R.Civ.P. 26(d) advisory committee's notes ("The principal effects of ...[26(d)]...are, first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case."). *See generally*, 48 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2047 (1993). Generally, it is left to the court's discretion "upon motion and by order [to] grant priority in a particular case." Fed.R.Civ.P. 26(d) advisory committee's notes. *See also*, *Meisch v. Fifth Transoceanic Shipping Co. Ltd.*, 1994 WL 582960 (S.D.N.Y 1994).

In addition, it is well settled in the Second Circuit that "[a] trial court enjoys wide discretion in its handling of pre-trial discovery, and its rulings with regard to discovery are reversed only upon a clear showing of an abuse of discretion. *Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir. 1992) *citing Robertson v. National Basketball Ass'n*, 622 F.2d 34, 35-36 (2d Cir.1980) *and Lehigh Valley Indus., Inc. v. Birenbaum*, 527 F.2d 87, 93 (2d Cir.1975). *See*

also, B.F. Goodrich v. Betkoski, 99 F.3d 505, 523 (2d Cir. 1996) ("[a] trial court necessarily has wide discretion in managing pre-trial discovery.") *citing Cruden*, 957 F.2d at 972; *M.B. v. Reish*, 119 F.3d 230, 232 (2d Cir. 1997) ("We have held that a 'trial court enjoys wide discretion in its handling of pre-trial discovery, and its rulings with regard to discovery are reversed only upon a clear showing of an abuse of discretion.'") *quoting Cruden*, 957 F.2d at 972; *Stagl v. Delta Airlines, Inc.*, 52 F.3d 463, 474 (2d Cir. 1995) ("Discovery rulings fall within the discretion of the district court and, as a general matter, we will not disturb them on appeal absent an abuse of that discretion.") *citing Hollander v. American Cyanamid Co.*, 895 F.2d 80, 84 (2d Cir.1990). This discretion includes "reasonable latitude and discretion to establish a priority or to fashion an appropriate sequence of the discovery to be performed in each case." *Baker v. Orleans County*, 1997 WL 436703, at *1 (W.D.N.Y. 1996) *citing Occidental Chemical Corp. v. OHM Remediation Services*, 168 F.R.D. 13, 14 (S.D.N.Y. 1995) *citing Cruden*, 957 F.2d at 972. *See also*, *Occidental Chemical Corp.*, 168 F.R.D. at 14 ("...Rule 26(d) authorizes the court to order the sequence of discovery upon motion...[and such]...[a]n order regarding the sequence of discovery is at the discretion of the trial judge.") *citing Cruden*, 957 F.2d at 972.

Accordingly, increased complexity of any particular case affords the court the even broader authority to reign-in non-cooperative adversaries through the use of "time limits, schedules for discovery, and limitations on deposition discovery..."should the court foresee "a wildfire of unwarranted discovery." *B.F. Goodrich*, 99 F.3d at 523.[2] *See generally*, MANUAL

[2]It should be noted that the *B.F. Goodrich* case was a complex, multi-litigation CERLCA action which dwarfs the complexity of the instant Adversary Proceeding. It is, nonetheless, illustrative of the Second Circuit's position on judicial control in disputed discovery matters and bears import on the present Proceeding. *See generally, B.F. Goodrich v. Betkoski*, 99 F.3d 505, 523 (2d Cir. 1996)

FOR COMPLEX LITIGATION § 21.422 (3d ed. 1995) ("The court may establish periods in which particular parties will be given exclusive or preferential rights to take depositions...[s]ometimes "common" discovery is ordered to proceed in a specified sequence..."). Consequentially, *Cruden* and its progeny have decidedly conferred upon this Court broad authority to oversee the sequence and manner of discovery, especially where, as is evident herein, the discourse between the parties' counsel has degenerated to nothing but acrimonious rhetorical volleying.

A protective order under Fed.R.Civ.P. 26(c) "may wholly preclude the discovery, or provide for limitations as necessary to protect the moving party."[3] *Hasbrouck v. BankAmerica Housing Services*, 187 F.R.D. 453, 455 (N.D.N.Y. 1999) *citing* Fed.R.Civ.P. 26(c). However, "[g]ood cause must be established ***by particular and specific facts*** rather than conclusory assertions" before a Rule 26(c) protective order will be granted. *Hasbrouck*, 187 F.R.D. at 455 (emphasis added) *citing Wendt v. Walden Univ., Inc.*, 1996 WL 84668, at *2 (D. Minn. 1996); *Blum v. Schlegel*, 150 F.R.D. 38, 41 (W.D.N.Y. 1993); *Palomba v. Barish*, 1986 WL 8484, at *2 (E.D. Pa. 1986); *Waltzer v. Conner*, 1985 WL 2522, at *1 (S.D.N.Y. 1985).[4] Moreover, "the party seeking protection from disclosure has the burden of making a particular and specific demonstration of fact, as distinguished from general, conclusory statements, revealing some injustice, prejudice, or consequential harm that will result if" if the protective order is denied. *Blum*, 150 F.R.D. at 41 *citing In re Agent Orange Product Liability Litigation*, 104 F.R.D. 559,

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[3]Fed.R.Civ.P. Rule 26(c) states, in pertinent part, that "[T]he court...may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense..." Fed.R.Civ.P. Rule 26(c).

[4] *See generally*, *Hasbrouck v. BankAmerica Housing Services*, 187 F.R.D. 453, 455 (N.D.N.Y. 1999) for a complete analysis on differing standards of cause under Fed.R.Civ.P. 26(c), none of which are applicable to the instant action.

571 (E.D.N.Y.1985). Finally, if the party seeking the protective order establishes the "good cause" requirement, "the court may balance the countervailing interests to determine whether to exercise discretion and grant the order." *Hasbrouck*, 187 F.R.D. at 455 *citing Sheppard v. Beerman*, 1999 WL 389894, at *3 (E.D.N.Y. 1999); *Wendt*, 1996 WL 84668, at *2; *Brown v. City of Oneonta*, 160 F.R.D. 18, 20 (N.D.N.Y. 1995); *Blum*, 150 F.R.D. at 41; *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163, 169 (E.D.N.Y. 1988), *aff'd by Solarex Corp. v. Arco Solar, Inc.*, 870 F.2d 642 (Fed. Cir. 1989); *New Castle County v. Hartford Accident & Indemnity Co.*, 1987 WL 10736, at *2 (S.D.N.Y. 1987); *Laxalt v. McClatchy*, 116 F.R.D. 455, 458 (D. Nev.1986); *Tavoulareas v. Washington Post Co.*, 111 F.R.D. 653, 660 (D.D.C. 1986); *Palomba*, 1986 WL 8484, at *2 (E.D. Pa. 1986); *Lincoln American Corp. v. Bryden*, 375 F.Supp. 109, 112 (D. Kan. 1973).

In the Adversary Proceeding presently before the Court, neither the Trustee nor Arkin, Schaffer have provided ***any*** demonstration of fact, much less a "particular and specific demonstration of fact" supporting good cause to issue a Rule 26 (c) protective order. *Blum*, 150 F.R.D. at 41. What seems apparent, vis-a-vis the deluge of post-submission correspondence to the Court by both parties, is that each party simply seeks to win the "war of words" by way of a protective order under Fed.R.Civ.P. 26(c) without going to the trouble of providing the Court with any substantive reasons for the issuance of such an order.[5] Particularly, the Trustee, who is seeking an order compelling depositions, has submitted no less than three attorney-sworn

[5]The Court will not address the propriety of the parties' post-submission arguments to the Court except to say that such post-submission attempts to "substantiate its position...[constitutes a]...procedurally improper submission...[and this Court is not]...disposed to consider such" submissions. *Kahn v. Taco Bell Corp.*, 1993 WL 313055, at *6 n.2 (S.D.N.Y. 1993).

affirmations and no less than three post-submission letters to the Court supporting its position and has yet to provide the Court with any substantive reasons why good cause exists to issue an order compelling the depositions. Moreover, when pressed in Court to demonstrate good cause, the Trustee's counsel offered no supplementation of its previous position, rather, the Trustee's counsel simply parroted the rationale provided in it's supporting affidavits that the depositions "have been repeatedly delayed." Trustee's Affidavit, ¶ 38.

If good cause reasonably exists as to why the depositions should be compelled to take place prior to the completion of the interrogatories and the continuing document discovery, the Trustee has failed to present such rationale to the Court. Moreover, it has not escaped the Court that conducting the deposition of the Arkin, Schaffer witnesses after the initial document discovery is completed may encourage more cooperative document discovery from the Trustee. Thus, absent a showing of good cause, the Court is not inclined to compel the depositions to take place prior to the completion of the initial document discovery which seems the more appropriate, if not more logical, progression of discovery.[6]

B. Attorney-Client/Work-Product Privilege

Fed.R.Bankr.P. 7026 incorporates by reference Fed.R.Civ.P. 26(b)(1), which states, *inter*

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[6]*See generally,* Lawrence J. Zweifach, *Taking and Defending Depositions in Commercial Cases*, in DEPOSITION STRATEGY IN THE FRAMEWORK OF AN OVERALL DISCOVERY PLAN 1998, at 7, 15-16 (PLI Litig. & Admin. Practice Course Handbook Series No. 585, 1998) ("One traditional approach to discovery is...[where]...the adverse party would be deposed only after all relevant documents and answers to the principal interrogatories have been received. This approach enables the attorney to maximize her ability to take a thorough deposition of the adverse party and to avoid duplicative discovery" and "[i]n most cases, it will be extremely difficult to take a useful deposition without first having had an opportunity to examine relevant documents.")

alia, that the scope of discovery shall include "any matter, ***not privileged***, which is relevant to the subject matter involved in the pending action...." Fed.R.Civ.P. 26(b)(1)(emphasis added). Fed.R.Civ.P. Rule 26(b)(3) provides a "presumptive protection [from disclosure] for documents 'prepared in anticipation of litigation or for trial...'" *Gramm v. Horsehead Ind., Inc.*, 1990 WL 142404, at *2 (S.D.N.Y. 1990) (footnote omitted) *quoting* Fed.R.Civ.P. 26(b)(3). When a party refuses to disclose material otherwise discoverable under a claim of privilege "the party shall make the claim expressly and shall describe the nature of the...things not produced or disclosed in a manner that...will enable other parties to assess the applicability of the privilege or protection." Fed.R.Civ.P. 26(b)(5). Withholding materials "without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection." Fed.R.Civ.P 26(b)(5) advisory committee notes. Moreover, it has been noted in the Southern District of New York that privileges are "disfavored and generally to be narrowly construed" because the "enforcement of a claim of privilege acts in derogation of the overriding goals of liberal discovery and adjudication on their merits." *Granite Partners v. Bear, Stearns & Co., Inc.*, 184 F.R.D. 49, 52 (S.D.N.Y. 1999) *citing Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 473 (S.D.N.Y. 1993).

The party resisting discovery by asserting either the attorney-client or work-product privilege bears the burden of establishing facts demonstrating the existence of such privilege in the particular case. *See Gramm v. Horsehead Industries, Inc.*, 1990 WL 142404, at *2 (S.D.N.Y. 1990) *citing von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987), *cert. denied*, *Reynolds v. von Bulow by Auersperg*, 481 U.S. 1015, 107 S.Ct. 1891 (1987). "This burden requires an evidentiary showing by competent evidence and cannot be 'discharged by

mere conclusory or *ipse dixit* assertions.'" *Gramm*, 1990 WL 142404, at *2 (internal citation omitted) *quoting In re Grand Jury Subpoena Dtd. January 4, 1984*, 750 F.2d 223, 224 (2d Cir.1984) *quoting In re Bonanno*, 344 F.2d 830, 833 (2d Cir.1965).

1. Attorney-Client Privilege

"It is axiomatic that the burden is on a party claiming the protection of a privilege to establish those facts that are the essential elements of the privileged relationship." *von Bulow by Auersperg v. von Bulow*, 811 F.2d at 144, *cert. denied*, 481 U.S. 1015, 107 S.Ct. 1891 (1987) *quoting In re Grand Jury Subpoena Dtd. January 4, 1984*, 750 F.2d at 224. The essential elements of the privileged attorney-client relationship are that (1) there was a communication between attorney and client, (2) that was intended to be and was, in fact, kept confidential, and (3) was prepared for the purpose of obtaining or providing legal advice. *See U.S. v. Construction Products Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) *citing Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577 (1976); *U.S. v. Adlman*, 68 F.3d 1495, 1499 (2d Cir. 1995); *U.S. v. Abrahams*, 905 F.2d 1276, 1283 (9th Cir.1990). Furthermore, the party asserting a claim of privilege bears the additional burden of demonstrating that the privilege has not been waived. *Granite Partners*, 184 F.R.D. at 52 *citing von Bulow by Auersperg*, 811 F.2d at 144 *cert. denied*, 481 U.S. 1015, 107 S.Ct. 1891 (1987); *Smith v. Conway Org.*, 154 F.R.D. 73, 77 (S.D.N.Y. 1994); *Nikkal Indus., Ltd. v. Salton, Inc.*, 689 F.Supp. 187, 191 (S.D.N.Y. 1988).

2. Attorney Work-Product

"Privileged documents are exempt from disclosure." *Construction Products Research, Inc.*, 73 F.3d at 473 *citing U.S. v. Morton Salt Co.*, 338 U.S. 632, 642-43, 70 S.Ct. 357, 364

(1950). A party invoking the attorney work-product privilege must, generally, "show that the documents were prepared principally or exclusively to assist in anticipated or ongoing litigation." *Construction Products Research, Inc.*, 73 F.3d at 473 *citing* Fed.R.Civ.P. 26(b)(3); *Bowne of New York City, Inc.*, 150 F.R.D. at 471. *See also*, *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459, 462 (S.D.N.Y. 1996). To do so, the invoking party "has the burden to prove the factual underpinnings of its work- product claim and must do so by competent evidence." *Id. citing Construction Prods. Research, Inc.*, 73 F.3d at 473; *von Bulow by Auersperg*, 811 F.2d at 144 *cert. denied*, *Reynolds v. von Bulow by Auersperg*, 481 U.S. 1015, 107 S.Ct. 1891 (1987).

3. Trustee's Privilege Claims

Although the Trustee's claim of privilege may indeed have some underlying merit, the Court cannot evaluate such merit as his invocation of the privilege fails in several respects.

First, the Trustee clearly fails to establish the essential elements of the privileged relationship. *See Construction Products Research, Inc.*, 73 F.3d at 473. In fact, aside from bald assertions that the requested discovery is privileged, the Trustee makes no effort to argue in what respects the requested discovery may be privileged. Second, the Trustee makes absolutely no evidentiary showing by ***any*** evidence, much less competent evidence, establishing facts demonstrating the existence of the privilege in this case. *See Gramm*, 1990 WL at *2. Point of fact, the Trustee never establishes in what context he is invoking the privileges or how they apply to the requested discovery. Third, the Trustee has not demonstrated non-waiver of the privileges if they do, in fact, exist. *See Granite Partners*, 184 F.R.D. at 52. The Trustee makes no attempt to demonstrate non-waiver except to make the unsupported assertion that the 1106 Report "was

compelled by statute and the Trustee has not waived any...privilege." Trustee's Affidavit, ¶¶ 29. And, finally, regarding the Trustee's work-product privilege claim, the Trustee has failed to make any demonstration that the 1106 Report was prepared principally to assist in anticipated litigation. *See Construction Products Research, Inc.*, 73 F.3d at 473. Again, aside from the austere claim that "any interviews done by the Trustee and his attorneys have clearly been in contemplation of litigation," the Trustee makes no substantive showing before the Court that the interviews in question were, in fact, conducted in contemplation of litigation. Trustee's Affidavit, ¶¶ 30.

This Court will not allow the Trustee to stand on his mere innuendo and *ipse dixit* assertions of privilege without substantiating in what context the privileges are invoked. Because the Trustee has provided the Court with a "claim that is skeletal, to say the least..." the Court cannot recognize the requested discovery as privileged when the clear standard in the Second Circuit requires a showing of proof on the Trustee's part. Gramm, 1990 WL at *2.

Based on the foregoing, it is hereby

ORDERED that Arkin, Schaffer's motion pursuant to Fed.R.Bankr.P. 7037, incorporating by reference Fed.R.Civ.P. 26(c), for a protective order staying all depositions until the first set of interrogatories and the initial document discovery are completed is granted; and it is further

ORDERED that the Trustee's cross-motion pursuant to Fed.R.Bankr.P. 7037, incorporating by reference Fed.R.Civ.P. 37, for an order compelling depositions is denied; and it is further

ORDERED that Arkin, Schaffer's motion pursuant to Fed.R.Bankr.P. 7037, incorporating by reference Fed.R.Civ. P. 37, to compel disclosure of the identity of each person interviewed

by the Trustee regarding the double pledging of lease contracts and the date of each interview and the identity of each person interviewed by the Trustee regarding Arkin, Schaffer's investigation and the date of each interview is denied upon the condition that the Trustee's counsel serve upon Arkin, Schaffer's attorney's within forty-five (45) days of the date of this Order a privilege log, which log shall specifically set out a factual and legal basis for the assertion of a privilege as to ***each*** document, conversation, interview or identity for which Arkin Schaffer's counsel seeks discovery, and it is further

ORDERED, that in the event the Trustee's counsel fails to serve the required privilege log, Arkin, Schaffer's counsel may then file a motion requesting the appropriate sanctions pursuant to Fed.R.Civ.P. 37 and Fed.R.Bankr.P. 7037.

Dated at Utica, New York

this 30th day of October 2000

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge