IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CIM URBAN LENDING GP, LLC, CIM URBAN LENDING LP, LLC and CIM URBAN LENDING COMPANY, LLC,	:	
Plaintiffs,	:	
v	:	Civil Action No. 11060-VCS
CANTOR COMMERCIAL REAL ESTATE SPONSOR, L.P. and CANTOR FITZGERALD, L.P.,	:	
Defendants.	:	
and	:	
CANTOR COMMERCIAL REAL ESTATE COMPANY, L.P.,	:	
Nominal Defendant.	:	

(Caption Cont'd) ...

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Chancery Courtroom No. 12B
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Thursday, May 19, 2016
1:03 p.m.

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BEFORE: HON. JOSEPH R. SLIGHTS III, Vice Chancellor.

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ORAL ARGUMENT ON PLAINTIFFS' MOTION TO COMPEL DISCOVERY FROM DUFF & PHELPS, LLC AND DEFENDANT CANTOR COMMERCIAL REAL ESTATE SPONSOR, L.P.'S MOTION TO COMPEL DISCOVERY RELATED TO MOSS ADAMS LLP and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0522

... (Caption Cont'd)

CANTOR COMMERCIAL REAL ESTATE SPONSOR, L.P.,	:	
Counterclaim-Plaintiff,	:	
v	:	Civil Action No. 11060-VCS
CIM URBAN LENDING GP, LLC,	:	
Counterclaim-Defendant.	:	

APPEARANCES:

DANIEL B. RATH, ESQ.
Landis, Rath & Cobb LLP
-and-
ROBERT A. SACKS, ESQ.
of the California Bar
Sullivan & Cromwell LLP
for Plaintiffs

SRINIVAS M. RAJU, ESQ.
TRAVIS S. HUNTER, ESQ.
Richards, Layton & Finger, P.A.
-and-
ADAM B. STERN, ESQ.
of the New York Bar
Kirkland & Ellis LLP
for Defendants Cantor Commercial Real Estate Sponsor, L.P. and Cantor Commercial Real Estate Company, L.P.

SUZANNE H. HOLLY, ESQ.
Berger Harris, LLC
for Duff & Phelps, LLC

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THE COURT: Good afternoon. All right. I'm ready to proceed, Mr. Rath.

MR. RATH: Good afternoon, Your Honor. Daniel Rath, Landis Rath & Cobb, on behalf of the plaintiffs. I wanted to introduce to you Robert Sacks of Sullivan & Cromwell, who will be making the argument this afternoon.

THE COURT: Good afternoon. Welcome.

MR. SACKS: Good afternoon, Your Honor.

THE COURT: Any introductions on the --

MR. RAJU: Good afternoon, Your Honor. Srinivas Raju on behalf of the defendants. Sitting with me at counsel table are Travis Hunter of my office and Adam Stern of Kirkland & Ellis in New York.

THE COURT: Good to see you.

MR. RAJU: Also at counsel table is Suzanne Holly of Berger and Harris, who represents Duff & Phelps.

THE COURT: Very well. Good afternoon. I'm ready to proceed.

MR. SACKS: Good afternoon, Your Honor. Again, Robert Sacks from Sullivan & Cromwell

on behalf of the plaintiffs. It's odd for me to announce that I am appearing on behalf of a plaintiff, since I'm usually sitting at the other side of the table in this court.

Since this is our first appearance in this case since it was reassigned to Your Honor, perhaps let me give a little context for the motion, which is a fairly narrow discovery motion, but let me give some context to the motion so you understand why we're here.

This is a case involving a limited partnership in which the controlling or the operating general partner is Cantor Fitzgerald, sitting on the defendants' side. My client is the nonoperating partner of this partnership, one of the nonoperating. It's a general partner, and there are some other partners, but it does not operate the partnership.

The limited partnership agreement -- this is a commercial mortgage-backed securities company headquartered in New York. The limited partnership agreement requires approval of related-party transactions, and the issue today, and the issue in the lawsuit, relates to fees charged for related-party transactions. The partnership agreement

allows Cantor Fitzgerald to use its affiliates for related-party transactions if, but only if, the fees charged are competitive rates charged by first-class unaffiliated providers and, two, that they receive my client's approval to do so on an annual basis.

The substance here involves -- the core of the case in front of Your Honor that we will try involves about $50 million in fees that were charged by Cantor Fitzgerald to the partnership. And our allegation is essentially they were not properly disclosed or not approved and are not arm's-length fees.

Factually, this was brought to my client's attention in early 2014, when they were informed by the management of the partnership that they believed these fees were not appropriate. My client objected. An agreement couldn't be reached. There was a dispute. It went on. The details will be fleshed out when we see Your Honor at trial. It's a classic factual dispute. And at one point, Cantor Fitzgerald sent to my client a report that they had commissioned from Duff & Phelps. And that Duff & Phelps report purported to opine and offer various conclusions about the fees that were charged.

In this litigation, Cantor Fitzgerald affirmatively relies on that report. They have asserted a counterclaim and allege that my client's failure to approve the fees was unreasonable and in breach of the LPA, and they base that, in substantial part, upon the failure to approve the fees after they delivered that Duff & Phelps report to my client. They say it was to demonstrate that CF&Co.'s fees are consistent with the terms of the partnership agreement. That's the allegation in the pleading.

So what we're here on today is not the production of the report -- because the report was provided, in the ordinary course, prelitigation -- but the refusal of Cantor Fitzgerald and, importantly, Duff & Phelps -- and I will get to that in a minute, Your Honor, because we served a subpoena to Duff & Phelps. Duff & Phelps never served proper -- they never served a timely objection, they never served a proper objection, they never logged a single document. And they never asserted the word "work product" or "attorney-client privilege" anywhere in their objections. But I will get to that in a second.

THE COURT: I gather on that there was correspondence, at least, from counsel on behalf of

Duff & Phelps?

MR. SACKS: Duff & Phelps sent a letter objection four days after the -- we served the subpoena a month in advance. The time to comply came and went with not a word. Four days later, they sent a letter, four lines -- it's in the record, Your Honor -- "We object to the subpoena on grounds of overbreadth and burden. But notwithstanding that, we've looked through our files, we found everything we have, and we've given it to counsel for Cantor Fitzgerald. Thank you very much."

Mr. Rath twice reached out to counsel for Duff & Phelps and said, "This is not adequate. Can we meet and confer to talk about it?" The response he got was nothing. They just ignored both reach-outs from him. So that's the record as to Duff & Phelps and the subpoena.

Then when we get into it, Your Honor --

THE COURT: Let me just ask a couple of quick questions --

MR. SACKS: Sure.

THE COURT: -- at this stage so I'm clear on our procedural posture.

Your motion to compel at the moment, you are looking for the documents. Whether those documents come from Duff & Phelps, whether they come from the defendants here, at the end of the day, you want the documents.

Duff & Phelps says they've given the documents to the defendants. So if the defendants give them, in turn, to you, we're done?

MR. SACKS: We're copacetic. That's fine.

THE COURT: So your motion, though, at the moment is directed not only to the third party, but also to the party here?

MR. SACKS: Correct.

THE COURT: Seeking the same information?

MR. SACKS: Correct, Your Honor. And we did request them from the -- what they had in their possession through ordinary document requests in the course of discovery that are also in there that they have objected to.

THE COURT: All right. And then to just make sure I'm clear where we are -- and then, by all means, tell me what you need to tell me --

MR. SACKS: Sure.

THE COURT: -- are we in a slightly different posture now that it appears that Duff & Phelps will serve as an expert witness in this case? I mean, typically, in that circumstance, a party to litigation would not be directing subpoenas at the retained expert unless there was some particular reason to do that.

MR. SACKS: We are and we are not. And let me explain. Yes, at some point in time, Duff & Phelps will be questioned, if they do propose to have Duff & Phelps testify as an expert. They've said they will. We don't know that they will ultimately decide to do that. But assuming they do, yes, we will have that opportunity.

But the limitations and the standard stipulation on expert discovery are a little different. And since they are putting the Duff & Phelps report in as a factual matter, not as just an expert matter -- and if it were just an expert matter, I wouldn't care, Your Honor. And if they were to say "We backtrack from our allegations. The allegation in our complaint that you acted unreasonably by not doing what Duff & Phelps said you should do is not a basis

for our substantive claim as a factual matter in this case," I would stand down and say, "Your Honor, I will depose them during the course of expert discovery."

But that's not what this is about. They are relying upon this not just as an expert opinion at trial, but as an underlying factual predicate for the substantive claim that in 2014, after we received that report, we were unreasonable in not doing something. And so I think there is a slight difference that we are entitled to, in order to test the factual allegations -- and it's very much like the iPad case in California that we cite to Your Honor -- in order to test the factual allegations, we need to be able to question them about the report and the circumstances and the timing of it, things that really don't relate to what they opine at in trial when they offer a trial opinion in some trial report, and the like, on some subject as an expert.

Here, they're factual. What did you do? Who asked you to do it? When did you do it? What information did you have when you gave that report? What role did the lawyers have? What did they tell you they really wanted you to do in that report when they did it? Did they limit you? Did you

get other information? Things about that report that won't necessarily -- who drafted that report that was sent on? That we wouldn't get in expert discovery because the standard stip doesn't give you that sort of stuff.

THE COURT: All right. So on this question of whether your client's consent was withheld reasonably or not -- and I understand your position that this report is a basis, if not a principal basis, of the contention that once you got it, you read it, you should have, at that moment, understood that our fees were reasonable and you should have given us your consent or authorization. Help me understand why, in the at-issue exception that you are advancing here, the truthful resolution of that issue requires production of information that Duff & Phelps did not rely upon, information that might have been circulating but wasn't relied upon, communications that occurred between counsel and Duff & Phelps that have nothing to do ultimately with the report that your client received and that they now contend your client should have adopted as fact?

MR. SACKS: Well, certainly, Your Honor, those -- that information bears upon that

report. It bears upon what that report was. Right? Our view is that that report is nonsubstantive and it was just a mouthpiece for Cantor Fitzgerald's views that they had expressed previously to be able to demonstrate the manner in which that --

THE COURT: Aren't you able to do that in a way that is typical of any attack on an expert opinion? Couldn't you say, "Look" -- because at some point, let's say either as expert witness or as fact witness, or both, you are going to have the opportunity to depose Mr. Finkel, at least for starters. You, I'm sure, have gathered information that you believe suggests that those fees were not reasonable. You would then have the opportunity to confront him with that information and say, "Why didn't you consider this?" "Why didn't you consider that?" "How can you reach this opinion without having at least considered this very important information that is nowhere mentioned in your report and, therefore, we assume not a basis for the conclusions you reached in that report?" Why couldn't you do that without getting into all this peripheral attorney-consultant communication that your motion seeks?

MR. SACKS: Undoubtedly, Your Honor, what you suggest will be part of an attack on Mr. Finkel. A question of whether it's an attack on what he offers at trial, as opposed to what factually the predicate is. But to understand the context in which the report was rendered, offered, and given as a factual underpinning for a claim that somebody acted unreasonably, I think that we are not properly limited to what we can dredge out from elsewhere to ask why he didn't consider.

So, for example, again -- and it's different if it's an expert report at trial and we have all agreed that we are not going to go into the attorney-expert process of drafting. This is something that's the substantive basis for a claim. Let's assume hypothetically it turns out that this was drafted not by Mr. Finkel, but, in fact -- he put his name on it -- but substantially by in-house counsel at Cantor Fitzgerald. Wouldn't that be directly relevant to the question of what this document is?

THE COURT: In an expert deposition, is it your position that the law in Delaware is that you would not be entitled to ask an expert who wrote the report that has been produced to you?

MR. SACKS: I believe that's correct, Your Honor. That's the stipulation that is the standard stipulation that I believe we were entering into in this case that limits inquiry into issues like that.

THE COURT: Inquiry as to whether or not the expert, him or herself, actually wrote or participated in the drafting?

MR. SACKS: Not participated, but the process of drafting. Who did this draft? Who did that draft? Who wrote this? Who did that?

THE COURT: I'm not talking about drafts, because, I agree, you don't get into drafts. We don't do that.

But you have a final report that's been issued. And your position is that the standard Chancery expert stipulation, or the one that you have entered into here, would prevent you from asking that expert: "Did you write this report that you have signed?"

MR. SACKS: That's -- I'm not sure that that question, in that form, because an expert always is going to say, "This is my report. I accept this report. I stand behind its conclusions." The

process by which the words got into that form is something that we generally stipulate to be off limits.

THE COURT: I don't necessarily disagree that the process that gets you there. But the point of whether or not the expert is endorsing those words as his own or whether someone else has fed them to him, I'm not sure that that's off limits.

But, in any event --

MR. SACKS: I don't disagree with that, Your Honor. "Is this your report? Do you stand behind its conclusions?"

"Yes. Yes, I do."

Standard questions that would be asked then. But to get into "How much input did you have into the drafting? Who else was involved in the drafting? Whose words were put on this paper?" and that sort of thing, that would be off limits. And my suggestion is we do that for a sensible purpose, to facilitate what everyone understands expert testimony to be in a case, that it is part of the presentation of the case. Ultimately, the opinions have to be the expert's, but the way in which they are presented for trial purposes has input of counsel, and we don't want

to get into that.

This is a totally different thing, and I think it's wrong to look at this as an expert report. And I guess that's where I deviate from the notion that this is some presumed expert report. This is a document that Cantor Fitzgerald solicited not for purposes of trial. They solicited it for the express purpose of giving it to my client prior to trial to try to cause my client to do something.

There is no work product -- it's not work product, in the first instance. There is no work product protection for that, first. Second, they haven't asserted an attorney-client objection to any of the things we've sought. They haven't logged a document in the logs that are in the record on attorney-client grounds. Again, Duff & Phelps logged nothing. But Cantor Fitzgerald documents have a small subset of documents that they say are work product. But this isn't work product. Work product is something that's prepared for purposes of trial. This was prepared for purposes of inducing action in the course of normal back and forth of a commercial agreement.

So the idea that we are in the realm,

in talking about this, because they intend to call this person as an expert in trial sort of misses the point. Again, if they hadn't said in their pleading that "You got this report and, because of this report, you didn't act and you're liable," we wouldn't be here today. I would agree that if they don't rely on the -- if they don't call the man at trial, it's their work product. But they did it, and they used it for a different purpose. And that purpose for which they use it is one where they have injected it into the case, they have injected it as a factual predicate -- not an expert predicate, but a factual predicate -- for the case, and they need to make discovery available on that report if they intend to rely upon it as a factual predicate for their case.

So, again, if they want to withdraw that allegation, I will stand down and we can all be out of your courtroom right now. But they haven't withdrawn that allegation. And if they want to rely on the allegation that it was unreasonable for us to not approve the fees once that document was sent to my client, they have to make that document the subject of underlying factual discovery.

THE COURT: On the question of

reasonableness, ultimately what I anticipate is that your argument is going to be "The report is wrong. It's not well-founded. And, therefore, our refusal to accept it as fact was not unreasonable."

MR. SACKS: Well, Your Honor, the report comes after two and a half years of fees that were never properly disclosed or approved. And so it doesn't, in our mind, relate to the issue in a proper way. They had already charged $35 million in fees at that point.

But, yes, not only is the report, or what's in it, substantively wrong, not only does it not address the right issues, not only does it not -- all the things that you would expect from someone who is trying to say that this is an expert, but I think we would also like the ability to show the manner in which it was solicited and induced, and the purpose for which it was done, was specifically to reach and justify a specific conclusion to articulate to us. And we believe that discovery factually will disclose that.

And that is something that is relevant, again, to the factual predicate, not whether at trial Mr. Finkel wants to come on the stand, offer

a report, explain his conclusions, and we attack them in the normal way. "Well, why didn't you consider this? Why didn't you consider that?" That is one way to look at the report and say it was not unreasonable. But in the factual predicate here of what happened, which was that management objected to the fees of the partnership. Then they turned around, and we thought about it, they then fired somebody from management. Right? Then all of a sudden the remainder of management said, "Oh, no, no. Their fees are fine again." So we have a very -- and then six weeks later this report is delivered to us. So there's an entire factual predicate here and context in which this report arrived that I think is important to understand it in context.

I think Your Honor understands the basic law. I'm not going to belabor the basic law for Your Honor. But just fundamentally, one, we don't think this is work product at all. Two, if it was work product, it was waived. They have not relied on attorney-client privilege; they have only argued work product. But clearly, if it was work product, they waived it by putting it in issue. There are many cases that say that. And, three, again, if the rules

of the Court mean anything for the way parties need to preserve their objections, nobody has done it here. Cantor didn't do it, and Duff & Phelps didn't do it. And to just sort of come in after the fact and say, "We're not giving it to you, when we never properly objected, we never properly scheduled these documents to have an individual discussion," is just flouting the rules, and we think that they have waived it in that way as well.

Final point. What they argue, effectively, is tit for tat. If we get this, then you have something. But what we have is not what they have. We don't have an expert report. We don't have a report from somebody who is going to testify at trial. We don't have a report that we say they have -- we gave to them. We never gave this report to them. We never told them what this expert's conclusions were specifically.

This was a consultant who was retained by us for purposes of investigating and preparing this case for trial, exactly what you are supposed to hire a consultant for. And the fact that somebody says, based on the work that our consultant and our lawyers have done, "We think the fees are unreasonable and

we're going to sue," that's not a waiver of a privilege any more than it is -- the filing of a complaint is a waiver of a privilege to articulate a position which reflects legal advice in the grossest sense. People form views.

So it's not a tit for tat. It's a totally different situation. They are alleging factual liability for a claim, based upon a report they prepared, and their argument is "Because you used the consultant in preparing your -- to get ready for trial, we should get what you get if you get what we get." They are entirely different situations. They are not the same. They are not comparable. And we think Your Honor should direct them to produce this information and deny their -- what appears to be a cross-motion.

We, of course, preserved our objections. We did log them properly, unlike them. And, in addition, they never even raised this issue with us until after we made our motion. It was never even a gleam in their eyes, showing what it is is retaliatory and not substantive.

Thank you, Your Honor.

THE COURT: Thank you.

MR. RAJU: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. RAJU: Let me just address the context of this case. Mr. Sacks went through it a bit, and I think it's helpful to have the context of this case in considering these cross-motions to compel and really what is at issue here.

At issue here is payments made to affiliates of Cantor Fitzgerald for valuable services that they provide to CCRE. The parties are in disagreement over that. If you look at the agreement, the CCRE partnership agreement, it permits affiliates to be hired, it permits affiliates to provide services, including the underwriting services that are the subject matter of this current dispute. And it subjects it to -- there's two basic requirements. And these aren't just obligations on our side. There's obligations on CIM's side as well.

And the two standards -- and they are two distinct issues if you go through the agreement. And it's found in Section 9.8 of the CCRE agreement. The first issue is whether the fees paid by CCRE to the Cantor affiliate were consistent with competitive market rates charged by first-class unaffiliated

service providers. Let's just call that the market rate requirement, okay. So whatever fees, they have to be at market rates.

The second issue is that CIM, as the nonoperating partner, does have a veto right. It's, frankly, the best of all worlds. You have no responsibility to operate it, but you have got this great negative veto right.

So here you have Cantor providing very valuable services, should be reimbursed, should be compensated for the valuable services. CIM has no operating responsibility. It can just sit back and say, "No. We don't approve. We don't approve. We don't approve." But here's the thing. The parties protected against this type of conduct in the agreement. The consent -- the consent right and their ability to not consent is not unfettered. Rather, the agreement says that that consent cannot be unreasonably withheld, conditioned, or delayed. So there's a reasonableness requirement. So that's the background for this dispute.

Let's talk first about Moss Adams, because I want to get back to -- let's talk first about Moss Adams and what this relates to CIM's

conduct with respect to consenting. Because at issue is whether or not CIM's refusal to consent was reasonable or unreasonable. And this was attached in several places in the record, but the one place it was certainly attached in the record is in the Hunter affidavit filed March 24th, 2016, Exhibit 2. It's the New Year's Eve letter from Mr. Richard Ressler to the head of Cantor Fitzgerald, Mr. Howard Lutnick. And it's quite a letter to receive on New Year's Eve, an eight-page, single-spaced letter. And it makes prominent mention of Duff & Phelps and of Moss Adams. Moss Adams is mentioned 11 times.

The reason that -- you know, Mr. Sacks said, "You sent us the Duff & Phelps, the Finkel report." That is true, we did. There is a reason we did. CIM wasn't consenting to the fees. Here we are providing these services, and we are not -- they are objecting to our fees. The status quo of us not providing anything, they'll just say, "Well, you didn't provide us any information. We are not approving fees."

At some point, you are providing services to an ongoing business. It's a successful business. You are trying to grow it. You are trying

to get profits. You would like to keep providing these valuable services and grow the business, but you have someone with their finger on the treasury saying, "No, you can't get compensated for the services you are providing."

So, you know, it's very easy for CIM to take the position, "Hey, you are trying to have your cake and eat it, too. You provided the report." Well, let's think about the context. The context was we were trying to get approval to get paid for the actual services we were providing. So that's the context in which the report was given.

And as Mr. Sacks said -- and I agree with him -- this issue is not about the report. The report is fair game. I mean, so the report is there. It can be used for whatever purpose people would like to use it for. But here's the thing. In this New Year's Eve letter, Duff & Phelps and the report is prominently mentioned. Moss Adams is also mentioned. Moss Adams is mentioned 11 times. And if you go --

THE COURT: Show me, though, in the December 31 letter where Mr. Ressler expressly references any opinions reached or conclusions reached by Moss Adams.

MR. RAJU: He doesn't. Your Honor, he does not specifically mention a specific opinion reached by Moss Adams. But here is the issue. The issue that this December 31st letter -- and, frankly, it's not the Duff & Phelps reports that's the basis of our counterclaim; it's this letter, for example, that's the basis of the counterclaim.

In this letter, here's what we have. We have, on page 6, we have lots of mention of Moss Adams, lots of mention of Duff & Phelps, who reviewed the materials. "You haven't assuaged our concerns. We are still concerned. We think it's above market rates." And it basically says, based on our review and our conclusions -- this is on page 6, right after the bullet points. "In view of all of the above" -- and this is after citing all of the, you know, back and forth and review of documents -- "the CIM General Partner cannot and does not approve the underwriting fee arrangement between CCRE and CF & Co." So this letter itself constitutes a withholding of -- they basically said we are refusing your consent.

THE COURT: And my anticipation is that this will be front and center at trial.

MR. RAJU: Absolutely, Your Honor.

And here is the interesting thing.

THE COURT: But what I'm hearing is what won't be front and center at trial is any testimony that "We, CIM, declined to give our consent because our consultant told us we shouldn't because our consultant told us that the fees were not reasonable."

MR. RAJU: Your Honor --

THE COURT: And, obviously, any effort to go there would be problematic to the extent that I deny your motion to compel.

MR. RAJU: I agree, Your Honor. And let me just explore that a bit. Because this is what we're trying to avoid. This is precisely what we're trying to avoid. We've said their refusal was unreasonable. We said they refused because they said they had no information. We gave them some information. They still refused. What are they going to say at trial? That's what we are trying to anticipate and protect ourselves against.

I am assuming they are not going to go to trial and say, "Oh, yeah, we just arbitrarily said no because we don't like Cantor," okay. They are going to have a defense. What is that defense going

to be based on? What are they going to offer based on the reasonableness of their refusal? Is there reasonable -- Moss Adams -- if you look at this December 31st letter, presumably the basis they are going to offer is going to go chapter and verse into some of the things highlighted in this December 31st letter. And if any of the stuff or the contents or the information or the points made in the December 31st letter are going to form the basis of their defense for why their actions were reasonable, it's hard to see how Moss Adams isn't integrally involved with respect to that defense. You can't parse it out. It cannot be teased out from what we see in this letter.

THE COURT: Has Mr. Ressler been deposed?

MR. RAJU: No. I believe he's being deposed next week.

MR. SACKS: Next Tuesday.

THE COURT: All right. And that actually is a pivot for me to just try to get a lay of the land on where you are in discovery. And I meant to ask Mr. Sacks this. Obviously, you can weigh in if you want to agree or disagree with either view.

MR. RAJU: I will let Mr. Sacks.

MR. SACKS: I'm probably more up to speed than Mr. Raju is on the scope of discovery, Your Honor.

So we're in the midst of hot-and-heavy depositions at the moment. I believe there are -- there's a deposition occurring today, and I believe there are four more depositions still left to be taken. And then Mr. Finkel, whether he gets deposed now or later as expert discovery. But fact discovery, I believe there are four or five more. The last one -- there is one who had to be rescheduled due to the illness of one of the Kirkland & Ellis lawyers. But the last one now is scheduled on June the 7th, the Tuesday of that week. And I believe the one that had to be rescheduled will be scheduled for later that week. So I think it's the hope that we will be done with fact depositions the end of the week of June 6th, I think is the Monday, if I have got it about right. So around then.

THE COURT: And I should have this in front of me. So what does your schedule say about expert and then trial?

MR. SACKS: So that -- well, that's a

subject that I thought might come up today, but I thought maybe Mr. Leon -- maybe Mr. Raju can talk about it or not.

Our schedule does not -- we, of course, got pushed out a little bit, and so the dates for experts and stuff don't work in our current schedule. And the parties have agreed, is something they did agree on, we have agreed that we would, when we figured out when the end of the last deposition would be, figure out what the right dates would be for that and try to slot it in without, hopefully, having to request Your Honor move the trial date.

THE COURT: And when is our trial date?

MR. SACKS: November -- middle of November, like the 16th, or something like that.

MR. RAJU: I don't remember the dates. I do remember middle of November.

THE COURT: It sounds like it's a fairly fact-intensive dispute, so I'm not anticipating that there will be at least substantial summary judgment motion practice.

MR. SACKS: I never like to say "never," but I don't think this is a summary judgment

case, even -- I just don't see how you wouldn't just say "no" or that we're going to have to hear some testimony in trial here.

THE COURT: So your experts, as of yet -- I know we have gotten some preview in the papers here, but your experts, as of yet, have not even been disclosed?

MR. SACKS: Correct.

MR. RAJU: Correct.

THE COURT: All right.

MR. SACKS: But as I've said, we are not going to be using Moss Adams as an expert in this case.

THE COURT: But you are not committing that you won't have some expert?

MR. SACKS: I'm not committing we won't have some expert; but it will be a trial expert, not an expert who was involved in the underlying factual issues.

THE COURT: Understood.

MR. SACKS: Correct.

THE COURT: Thank you.

MR. RAJU: Going back to the issues here --

THE COURT: So let me pick up where I was leaving off. And every now and then I'm able to do that. Not as much these days as I would like.

So you've got this letter. You're going to be speaking with Mr. Ressler --

MR. RAJU: Yes.

THE COURT: -- next week.

MR. RAJU: Yes.

THE COURT: If Mr. Ressler provides testimony that suggests that this letter is based on information that he received from Moss Adams, I'm guessing that, depending on what happens today, there may be some objections raised about him sharing the content of that information. But in terms of, you know, "What were you relying upon when you said this?" that's probably a fair question, and he's going to have to give some response to that.

If his response indicates and previews for you that the concern you are mentioning is, in fact, a legitimate concern that may creep up at trial, don't we have the right to revisit Moss Adams' role and the ability to revisit Moss Adams' role here?

MR. RAJU: Yes, we absolutely do, Your Honor. We're trying to be -- to certainly protect

against that. But if, for efficient resolution of these issues, if the better way to proceed is to see what happens at Mr. Ressler's deposition and revisit it, we understand the efficiency associated with that type of a sequencing.

You know, the one thing I would say is that the concern we have -- let me address one more thing, and that's the at-issue exception. There has been a lot of talk about the at-issue exception, and I just want to talk about that. Because the Duff & Phelps, the Finkel report, and the Moss Adams work product, depending, once again, on how it's used, are very differently situated.

Because with respect to the first standard, which is that the rates be market rates, that's an objective standard. Whatever Mr. Finkel did, it's just some person's view, after the fact, of looking at a fact pattern and saying, "Okay. I think these are market rates. I don't think they are market rates." There is no context by anyone, no allegation by anyone that Cantor ever relied on Duff & Phelps in setting market rates, that they considered -- that they had the Duff & Phelps information in setting market rates, that they are relying on it, that they

are going to say, "Oh, it may not have been market rates, but we relied on them in good faith in believing they were market rates." It doesn't matter. It's an objective market rates standard. It has no component of subjective intent or state of mind or anything. It's something that Your Honor, sitting in trial in November 2016, with all the factual and expert testimony, can ultimately make a determination, an objective determination as to whether something is market rates or not.

The second standard, CIM's obligation, is different, because their consent cannot unreasonably be withheld, conditioned, or delayed. Let's say we contend that on December 31st, 2014, they unreasonably withheld or delayed their consent. What an expert says in front of Your Honor in November 2016 at trial, could it be, perhaps, probative of whether they -- their actions were reasonable or unreasonable? Sure, it might be probative. But you know what's going to be a lot more important? What's going to be a lot more important is the information that CIM and Mr. Ressler had in their possession, or easily obtainable, at the time they took the affirmative position under the contract that "We are not

consenting."

And the information that we know Mr. Ressler had at that time is the Duff & Phelps report. The internal Duff & Phelps work papers, the internal Cantor work product Mr. Ressler didn't have. We're not claiming he had it. He can't possibly be held responsible for what that says or doesn't say. It doesn't help him or hurt him. It's irrelevant to what Mr. Ressler had in his mind or CIM had in its mind when it made that decision.

But if the universe of information that CIM had, when taking their position December 31st, including Moss Adams' work product, and they are going to rely on any independent analysis that they cooked up or they did or they relied on, we need full information. Because if we don't get that information, that is exactly what the at-issue exception is meant to prohibit, that the use of cherry-picking -- you get ten pieces -- you know, it's like if a board of directors in a fiduciary duty case, you know, has an advice/reliance-on-counsel defense. There's ten pieces of legal advice they received. You know, and for -- the one piece of advice they received that suits them for litigation purposes they disclose

and say, "Okay. The rest of it, we are not relying on that." Well, no. You get to test that if you are doing reliance on counsel.

Well, the probative thing with respect to CIM's consent is whether it was reasonable. It's temporally limited to the time, because it can't be withheld or delayed. The information Mr. Ressler or CIM had at that time is very relevant to that analysis. And that's why, frankly, the Moss Adams information is far more at issue in this case than any internal work product at Cantor Fitzgerald or Duff & Phelps that has no bearing on what CIM knew or what Your Honor's assessment as to competitive market rates will be at trial in November.

THE COURT: Let me stop you there and focus in on what you just said, which is the work product, the Duff & Phelps work product.

The contention here is, first and foremost, there is no privilege, there's no immunity, there's no other bases to protect this information, because Duff & Phelps was engaged simply as a means to convince CIM that their withholding consent was not reasonable. So in the course of the ongoing dispute, as it surfaced and then was being negotiated by the

parties in advance of any litigation, your client engaged Duff & Phelps as the, quote, further information or the additional information to convince them that they were wrong.

MR. RAJU: Yes.

THE COURT: So if that is the context, help me understand where the protection of their internal -- I won't call it work product. Their internal documents or your client's documents as submitted to them, where does that come from?

MR. RAJU: It comes from the fact, by any factual -- objective factual analysis, this does qualify as work product because litigation was reasonably anticipated.

Page 2 of the Duff & Phelps report -- or page 3, I should say, other than the cover page, the second page with text on it -- says Kasowitz Benson, the Kasowitz Benson firm hires Duff & Phelps. They were outside counsel to the Cantor Fitzgerald GP entity. You know, subsequently Kirkland & Ellis has taken that role, but it's outside counsel. Why would you have an outside counsel particularly known for litigation in New York hire the expert if you weren't reasonably anticipating litigation?

And there is a lot of stories here. There is a lot of background. As Mr. Sacks said, we will have plenty of time to get into that. But here is the thing. The issue wasn't, "Hey, you know, you're asking for this $50,000. Give me some information about it. Oh, here is an invoice. Here is the services you provided. Can you prove it?"

That wasn't the context. Mr. Sacks said it when he was up here. They were challenging the 35 million that had been paid over the previous years. If somebody is challenging $35 million already paid that were already, you know, in the mix, guess what? This isn't a minor thing. This isn't, "Hey, can you help me paper the record? Give me some information." It clearly was -- litigation was clearly anticipated.

THE COURT: Either give us your consent or we're going to sue you.

MR. RAJU: Right. I mean, so that's why -- like I said, I think this is evident from the fact that Kasowitz, you know, outside firm for Cantor Fitzgerald GP, is the one that hired Duff & Phelps. So I think it does meet the work product, in the first instance. And, frankly, I think Moss Adams does, too.

We're not contending that -- you know, at this time, I think litigation was anticipated, given, you know, the communications back and forth, the positions being taken, the positions hardening. It was pretty clear litigation was anticipated. So I think they both qualify for work product.

The question is: Has work product been waived pursuant to the at-issue exception? And like I said, what Cantor thought as to the -- they didn't rely on Duff & Phelps. It doesn't form the basis for any of the actions they took in this action. So we just don't think it's been put at issue. Whereas the Moss Adams stuff very well probably, we believe, based on the December 31st letter, was put in issue in CIM satisfying its reasonableness obligation.

Let me hit just two quick things, and these are just points that Mr. Sacks made I just want to briefly respond to.

First is the subpoena on Duff & Phelps, that Duff & Phelps didn't respond. Listen, we're going to take responsibility on all this. It's our documents. It's our work product. Duff & Phelps was the agent of our outside counsel. And they did what we believe was appropriate. It's, frankly -- you

know, there is a letter from Mr. Sacks' partner, Mr. Ben Walker, on August 27th, 2015, that memorialized a conversation had two days earlier on August 25, 2015, between Eric Leon at Kirkland & Ellis and Mr. Walker, where he said "You said you have asserted the work product with respect to the Finkel report." They knew our position. This isn't a late position. We didn't waive it. We've been -- in the responses to the document requests, we said "work product."

They said, "It's at issue."

"Fine. File a motion to compel."

Well, they got around to it eventually, but our position has been clear. When someone has been identified as your expert, as your attorney work product, hired by counsel as a consultant -- and I understand it's not a testifying expert. That decision hasn't -- you know, that hasn't happened yet. But nevertheless, it's highly unusual to then do a subpoena -- issue a subpoena against someone that you know the parties are asserting work product. And Duff & Phelps, through its counsel, responded. They said, "We have given all the documents to Kirkland & Ellis. They are counsel to

Cantor Fitzgerald, so take it up with them." And we have always engaged them on this issue. So that's number one.

With respect to -- one other -- oh, one other thing. We have, as of March -- on March 30th -- as we sit here today, all the Duff & Phelps material has either been produced or specifically identified, document by document, in a privilege log. So the production, you know, once we got the information and once they finally engaged with us, we reviewed it. As of March 30th, we made the production of all the Duff & Phelps -- we went through the Duff & Phelps materials, our materials. Everything that we thought should be produced, we produced it as of March 30th. And as of April 15th, a month ago, we have supplemented our privilege log to include, line by line, document by document, we logged it on the privilege log, both as to attorney-client and work product, with respect to the Duff & Phelps documents that are being withheld.

Thank you, Your Honor.

THE COURT: Thank you.

MR. SACKS: I will be very brief, Your Honor.

Just on this last point, I understand some new privilege log came in the day before yesterday. Nobody -- I don't know what's on it. It came in the day before yesterday. So these privilege logs are like that (indicating). But nobody has pointed out and said these are new entries that relate to Duff & Phelps, to my knowledge, because my associate would have told me that before I came down here.

I think we have beaten this to death, but let me just make two or three very quick points.

Work product. You asked Mr. Raju the question of how is this work product. That's the first fundamental question. And he said, "Well, because the litigation was anticipated." Well, that's one prerequisite for work product, but there's a second prerequisite, which is that the parties intend there to be confidentiality and that the information not be shared with your adversary. When you create a document, a report, if you will, for the express purpose of giving it to your adversary, it is, by definition, not confidential work product.

So while I might not disagree with Mr. Raju, given that for three and a half years they

never sought CIM's consent to these fees that they are now saying, three and a half years later, CIM unreasonably withheld its consent to and that there were millions of dollars at issue, that one might think that there is a substantial dispute between the parties. There was. That doesn't mean that when you create something for the express purpose of giving it to the other party, that you are creating work product. And even if it's done with an attorney's involvement, if the purpose of doing it is you are giving it to the other side, it's not work product. So I don't think that there is work product.

THE COURT: Does that net capture everything?

MR. SACKS: It does as it relates to what you are providing to the other side, yes.

THE COURT: Even if what --

MR. SACKS: When they put it at issue, Your Honor.

THE COURT: Right. So the report goes out, and everything -- now you are looking for what went into that report.

MR. SACKS: Correct. So I would --

THE COURT: What about stuff that was

peripheral, administrative, or didn't go into that report?

MR. SACKS: So I think there are two aspects of the analysis. The first aspect is that the work product and the process -- I'm sorry. The report -- I will use -- refer to it as a report because they do. I don't really think it's a report. But the Duff & Phelps document and the process by which that was created I believe are not work product, because it was created for the express purpose of being given to the adversary at that point in time. Whether there are, around the periphery, things that might be work product standing alone, that's possible. However, when they put the report at issue, not just by giving it to the other side, by turning around and filing a counterclaim based upon the provision of the report, they certainly waived those things around the periphery by putting them at issue.

And the notion -- I have to say, it's creative, but the idea that by doing nothing we have put something at issue just because my client had an accounting firm that did it -- collected factual information for it and a law firm that helped analyze things, that we have put that at issue, we haven't put

that at issue.

Mr. Ressler clearly had views. And he will explain, when he's deposed, the factual basis for his views. Principally, they will find out, I believe, they are based upon the fact that the management of the company had said to them that these fees are not unreasonable, before they flip-flopped when they were all concerned about being fired, and that they also -- everyone else who provided underwriting services in these same transactions charged zero, unlike Cantor Fitzgerald, which charged 29 basis points only to this partnership, but not to the other companies that also contributed loans.

Those will be, in and of themselves, enough, I think, to suggest that CIM's conclusion was reasonable. But there is other factual information that Mr. Ressler will be happy to testify about. But what he's not going to say -- and I agree that there would be a basis to come in and say, "I concluded they weren't reasonable because Moss Adams opined to me they were not reasonable." He's not going to say that. He's not going to testify to that. He's -- we're not putting Moss Adams, whatever they did, at issue in this case. So the idea that that's at issue

because they want to claim that what my client did was unreasonable is wrong.

And when you go to trial -- there are two prongs under the LPA. And, again, these are interested party, related-party transactions. And the approval right isn't just something that you just do by back of the hand. It's there to protect people because they are conflicted. They are inherently conflicted by what they are doing. This Court often -- I mean, conflicts are at the core of many of the cases in this Court. This is about conflicts. And my client's approval right is because they can't negotiate at arm's length with one another -- and you're going to hear about that at trial, how this was never negotiated and it was never at arm's length. But putting that aside, the idea that because my client had a right that couldn't unreasonably be withheld, that by definition my client's work, that it didn't disclose to anyone, is at issue by virtue of that is backwards, Your Honor.

I mean, the only person who has put something at issue in this case is Cantor. They gave it to my client, and it's an allegation in their pleading. We don't allege that Moss Adams'

conclusions require them to do anything, justify doing anything, or anything of the sort.

Thank you, Your Honor.

THE COURT: All right. Anything further? Certainly we are together, so I want to give everyone a chance to say whatever you need to say.

MR. RAJU: Your Honor, I'm happy to address the rebuttal points on both the confidentiality aspect and -- I mean, I'm happy to address it if Your Honor would like me to.

THE COURT: No, I don't have any further questions.

MR. RAJU: Thank you, Your Honor.

THE COURT: All right. This is not the perfect way to render decisions, but you are in the midst of pretty hot-and-heavy discovery, and while these motions haven't been pending for a while, they have been pending long enough that I think it would be helpful for you to get my guidance today. And, as I say, it won't be perfect, but hopefully it will be good enough to let you know where you stand going forward.

To do that, though, I do want to take just a second to digest what I've heard here this

afternoon and to collect my thoughts. It won't take long, maybe about five minutes or so. So if we can stand in recess, and then I will return and give you my decision.

(A brief recess was taken from 1:57 to 2:18 p.m.)

THE COURT: All right. Thanks for your patience. Sorry that it took a little longer than I anticipated.

I'm not going to get into a detailed factual background. I think the Court has already written some opinions in this case, and the facts are recounted there. But there are some facts that I think help set this current discovery dispute in some context, so I am going to kind of walk through that so that my analysis hopefully will make some more sense.

The plaintiff, CIM Urban Lending GP, LLC, which I will refer to as either "CIM", the "CIM General Partner," or "plaintiffs," and the defendant, Cantor Commercial Real Estate Sponsor, L.P., which I will refer to as "CF" or the "CF General Partner" or perhaps occasionally "defendant," are each a general partner of Cantor Commercial Real Estate Sponsor, L.P., which I will refer to consistently -- at least I

hope -- as "CCRE." CF manages CCRE's day-to-day operations, and CIM has certain oversight rights and responsibilities with respect to that management.

The dispute at issue here arises under Section 9.8(b) of the operative limited partnership agreement, which allows CF to retain its affiliates to provide "... securities underwriting and financial advisory services ..." to CCRE, "... provided that any compensation paid to such service provider will be at competitive market rates charged by first-class unaffiliated service providers."

In accordance with this provision, CF engaged an affiliate, Cantor Fitzgerald & Co., to provide financial and underwriting services to CCRE for fees in excess of $40 million. I will refer to these fees as the Cantor Fitzgerald fees.

Section 9.8(c) of the LPA provides that "... any services provided by Affiliates of the CF General Partner ... shall be subject to the review and approval of ... the CIM General Partner, on an annual basis, such approval not to be unreasonably withheld, conditioned or delayed."

CIM alleges it did not authorize the Cantor Fitzgerald fees. CF alleges that CIM has

unreasonably withheld its authorization.

In April 2014, CIM began investigating CCRE's finances, focusing on related-party fees, including the Cantor Fitzgerald fees, and hired the accounting firm Moss Adams LLP to assist with the investigation. In that capacity, Moss Adams conducted an "on-site inspection of CCRE's books and records." As part of the investigation, CIM requested that CF provide information demonstrating the consistency of the disputed fees with market rates. In response, on June 27, 2014, CF provided a document authored by James K. Finkel of Duff & Phelps. And I will refer to this document, for ease of reference, as "the Finkel report." I know there is some dispute as to whether it is or isn't a report, but that's just how I'm going to refer to it today. In the Finkel report, Mr. Finkel concludes that the Cantor Fitzgerald fees were "... in line with 'competitive market rates charged by a first-class unaffiliated service provider.'"

To support its conclusion, the Finkel report relies, in part, upon a summary of research conducted by Cantor Fitzgerald & Co. and also "refers to conversations with industry professionals regarding

market rates for underwriting services." CIM requested this supporting information, but CF did not provide it.

This litigation was commenced on May 22nd, 2015. On June 15th, 2015, plaintiffs served their first request for the production of documents, requesting information regarding the Finkel report, including "... all documents provided to Mr. Finkel, relied upon by Mr. Finkel, or referenced in his June 2014 report ...." Defendants responded by producing some documents and lodging objections grounded, in part, on the work product immunity and the attorney-client privilege.

On August 20, 2015, CF served its document requests on the plaintiffs requesting, in pertinent part, "... all documents concerning the CIM General Partner's 2014 'on-site inspection of CCRE's books and records' and all documents 'relating to the work performed by [Moss Adams] concerning fees charged by ... Cantor Fitzgerald ... to CCRE!" Plaintiffs responded in a similar fashion, objecting to the production of certain documents, including those on which Moss Adams relied in its investigation, and asserted as grounds the work product immunity and the

attorney-client privilege.

Plaintiffs issued a subpoena duces tecum to Duff & Phelps on November 13th, 2015, seeking the same Duff & Phelps documents they sought from CF. Duff & Phelps lodged its objections in a letter from their counsel about a month later. Thereafter, the parties conferred regarding these issues, but to no avail.

The plaintiffs filed their motion to compel discovery from Duff & Phelps on February 29th, 2016, including a request for fees and expenses relating to the motion. And CF responded on March 24th of 2016 opposing that motion and cross-moving to compel discovery related to Moss Adams.

Before turning to the specifics of the motions to compel, I want to offer just a few observations. There is a trend, perhaps even a movement, in discovery to redirect parties in litigation to seek out information that really matters; to encourage a more focused search for evidence that will lead to a truthful resolution of the parties' dispute. That trend has been especially gaining traction in the context of expert discovery,

where parties historically have gotten off track. That is true both in the context of testifying experts and nontestifying experts.

And in this regard, I would commend to the parties' reading an excellent law review article on this topic that I have read and considered by Professor Gwen Stern that is in last year's Drexel University Law Review. And in that article, Professor Stern states -- and I quote -- "The point of an adversarial system is to arrive at the truth. To accomplish this goal, the focus of discovery should delve into the merits of the expert's opinions rather than collateral issues as to whether draft reports were developed and communications were exchanged between the expert and counsel. The discovery should focus on the inquiry into what facts and data the expert actually relied upon. This inquiry can be satisfied through the use of interrogatories before trial begins and does not require an investigation into the distracting collateral issues of whether there were pretrial communications between the expert and attorney. Discovering who said what to whom or how many drafts were exchanged does nothing to advance the discovery of the merits of the expert's opinion"

or the search for the truth.

My second observation flows directly from our Rule 26(b). Like the federal rules, our rules treat discovery of information relating to testifying expert witnesses differently than information from nontestifying expert consultants. That distinction is significant here, as CF has disclosed its intent to call Mr. Finkel as an expert witness at trial, while CIM has stated that Moss Adams' role has been, and will continue to be, limited to prelitigation expert consultant.

So with that, I will turn first to plaintiffs' motion to compel that seeks documents and information from Duff & Phelps on which Mr. Finkel relied to substantiate his conclusions regarding the propriety of the Cantor Fitzgerald fees and any other information that he gathered or was supplied during the course of his investigation, including communications with counsel.

In support of the motion, the plaintiffs argue that CF and Duff & Phelps both have failed properly to assert any privilege, have failed to log their allegedly privileged documents or raise proper objections and have waived any privilege by

placing the Finkel report at issue. And then, alternatively, they argue that given Mr. Finkel's designation, or soon-to-be designation as an expert witness, information regarding his opinion is discoverable under Rule 26(b)(4).

I'm not going to reach the arguments regarding the privilege logs or the quality of the objections. What I will say on this front, at least for now, in this case, given what I view as a very limited scope of documents and my ruling on the other issues, to the extent one is needed, I'm going to give the defendant a mulligan here and allow a supplement to the privilege log to be prepared within ten days of today. I'm not saying it's needed. I haven't really focused on it. It sounds like one was recently produced. Perhaps that adequately addresses the concerns.

What I will say, for now, is that any rulings I make here are not based on any finding on my part that the logs are not up to Chancery standards. I'm going to trust that the parties, on a go-forward basis, will ensure that their logs are up to those standards. To the extent parties continue to have concerns about that, as you are winding down fact

discovery and entering into expert discovery, I would ask you to get those concerns to me pronto, with a real focus on the logs themselves, so that we can have a more thoughtful discussion about that. But I'm not sure that that's needed, really, right now, given where I think we're going.

So turning to the motion to compel on the merits, first, I am satisfied that the documents at issue here that have not already been produced were prepared by either defense counsel or Duff & Phelps in anticipation of litigation and with the intent that they remain confidential. They are, therefore, entitled to work product protection.

Pursuant to our Rule 26(b)(3), discovery of documents "... prepared in anticipation of litigation ... [is permitted] only upon a showing that the party seeking discovery has substantial need of the materials ... and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

The plaintiffs assert that the at-issue doctrine provides an exception to that work product immunity. And as this Court noted in ISN Software, the "at issue" waiver applies where, first,

"... a party injects the privileged communications themselves into the litigation, or [second] a party injects an issue into the litigation, the truthful resolution of which requires an examination of confidential communications." The Court will find a waiver of opinion work product, at least in this jurisdiction, only in extraordinary cases.

According to CIM, CF has relied heavily upon the Finkel report as a basis to claim that CIM's refusal to approve the Cantor Fitzgerald fees, even after receiving the Finkel report, "... itself constituted a breach of the LPA." And I'm referring to their submissions to me in connection with this motion. In other words, according to CIM, CF has placed the Duff & Phelps documents directly at issue.

After reviewing the counterclaims here, I agree, but not to the full extent that CIM has argued. Certainly the Finkel report is at issue, and that has been produced. I'm also satisfied that any information that Mr. Finkel either considered or upon which he relied to reach his conclusion that the Cantor Fitzgerald fees were, according to him, "in line with competitive market rates charged by a

first-class unaffiliated service provider" likewise would be at issue.

On the other hand, I see no basis to conclude that information supplied to or uncovered by Duff & Phelps that was not either considered or relied upon by Mr. Finkel in reaching his conclusions would be helpful, much less required, for the truthful resolution of the CF counterclaims.

In this regard, I reject CIM's argument that "Information on which [Duff & Phelps] chose not to rely in the Finkel Report ... will ... be important to both Plaintiffs' and the Court's assessment of whether, as Defendants claim, the Report was so demonstrably correct as to foreclose good-faith disagreement with its conclusions." That's also a quote from their papers.

If there is information out there that CIM believes Mr. Finkel should have considered but did not, CIM is certainly free to confront Mr. Finkel with that information at the appropriate time as a means to challenge the extent to which his opinions are or are not demonstrably correct. The extraneous communications with counsel, the terms of engagement, all of the rest really don't address that fundamental

question as to whether his ultimate conclusions are or are not demonstrably correct. It's the bases for the opinion that matters.

There is another reason to compel production of this information. As acknowledged in the response brief that CF has filed, CF anticipates -- and I'm now quoting from their papers -- "... anticipates utilizing Mr. Finkel as an expert witness in this case ...." That is not something they were obliged to do yet, from what I gather, in the sequence of the parties' discovery here, as anticipated in the scheduling order, but it's out there.

As an alternative basis to compel discovery, 26(b)(4) provides for the production of "... the substance of the facts and opinions to which an expert is expected to testify and a summary of the grounds for each opinion." In my view, and has historically been the case in this court and all courts in Delaware, that provision of 26(b)(4) renders discoverable all information upon which Mr. Finkel relied in drafting the Finkel report.

I want to draw one subtle but perhaps important distinction here. I think Rule 26(b)(4)

would, at least arguably, be limited to production of information that Mr. Finkel actually decided to incorporate into his final opinion. My view of the at-issue exception and my ruling with regard to that is slightly broader in the sense that I believe if there was information that he considered, substantive information that he considered but chose not to rely upon that information, that that would also be incorporated within the scope of my order compelling production of that information. And that's a subtle but, I'm sure, perhaps significant distinction. And that broader scope, I don't want my ruling to be misconstrued as being captured by 26(b)(4), because I'm not confident that it is. But that rule would at least require production of what he actually relied upon and incorporated in his final conclusions.

So with all that said, plaintiffs' motion to compel is granted with respect to documents and information on which Duff & Phelps relied and considered in forming its conclusions as presented in the Finkel report. It is denied as to any additional documents and information that fall within the plaintiffs' request for documents that are not captured within the ruling I just made.

CF has also filed a motion to compel. And that motion seeks discovery related to Moss Adams in tandem with its response to plaintiffs' motion to compel. CF's arguments are essentially that plaintiffs put Moss Adams' opinions at issue, thereby waiving plaintiffs' claims of work product and any other privilege.

Based on the record I have before me right now, I disagree. The plaintiffs engaged Moss Adams to assist in reviewing CCRE's finances as part of their investigation to determine whether CF breached the LPA. Accordingly, Moss Adams' work product falls within the scope of Section 26(b)(3)'s work product protection. Again, really for the same reasons I found the Duff & Phelps records fit that description.

CF has argued that if it placed the Duff & Phelps work product at issue, then certainly CIM has done the same with respect to the Moss Adams work product. It argues that the plaintiffs relied on Moss Adams in the same way that the defendant relied on Finkel, by "... repeatedly cit[ing] the views of Moss Adams in attempting to justify their basis for withholding approval of the underwriting fees." That

comes from their opposition brief at page 18.

This attempt to invoke the so-called "good for the goose good for the gander" rule, in my view, falls short on several grounds. First, while CF intends to call Finkel as an expert and, thereby, has invoked 26(b)(4), plaintiffs have no such intent with respect to Moss Adams. And that is a key distinction, as I've already mentioned.

Second, and probably more relevant to the at-issue doctrine, I'm satisfied from the record I have right now that Moss Adams' involvement consisted merely of providing plaintiffs' counsel with prelitigation assistance in conducting an after-the-fact investigation of a suspected breach of the LPA, particularly in gathering relevant documents.

To support its at-issue argument, CF points to a December 31, 2014, letter which is attached to the Travis Hunter affidavit at Exhibit 2, among other places. And plaintiffs sent this letter to the defendants apparently for, among other reasons, the purpose of rebutting the Finkel report.

This letter does mention the Moss Adams involvement on several occasions, but principally what it says is that Moss Adams inspected

CCRE's books and records at the direction of counsel and that Moss Adams reviewed the Finkel report. The letter does not claim that Moss Adams has offered any opinion on whether the disputed fees violated the LPA, nor did it state that the plaintiffs were relying on Moss Adams in any way as a basis to withhold their consent to the Cantor Fitzgerald fees.

In contrast, it appears that plaintiffs' disagreement with the Finkel report's conclusions will be a basis upon which CF will argue that CIM breached the LPA by unreasonably withholding its approval of the Cantor Fitzgerald fees. One side relies heavily on the expert report. The other, at least on the current record, does not.

CF also has contended that there's no meaningful difference between the plaintiffs' disclosure of Moss Adams' conclusions to other limited CCRE partners and CF's disclosure of the Finkel report to plaintiffs. And here again, the Court must disagree.

First, CF has not identified one conclusion expressed by Moss Adams that plaintiffs have relied upon or shared with others. As noted, the December 2014 letter merely states that Moss Adams has

assisted plaintiffs' counsel in investigating defendants' potential breach of the LPA. It does not set forth Moss Adams' conclusions with respect to whether a breach occurred.

Second, disclosure of work product alone is not sufficient to forego the disclosing party's right to protection. To relinquish the right to protect work product, the party must "... knowingly and voluntarily disclose[] it, with 'either the intention or practical result that the opposing party may see the documents.'" And that's a quote directly from this Court's opinion in the Saito case.

While CF disclosed the Finkel report directly to plaintiffs, plaintiffs sent the December 2014 letter only to CCRE limited partners, none of whom are parties to this litigation.

For these reasons, I'm satisfied that the Moss Adams documents are protected work product and that no extraordinary grounds exist to compel plaintiffs to produce these documents to their adversary. On this record, therefore, CF's motion to compel is denied.

I continue to emphasize "on this record." I gather there is a deposition that will be

taken of the author of the December 31, 2014, letter, Richard Ressler, next week. I expect that Mr. Ressler will be questioned at length about the bases for the various statements that he's made in this letter. I think he can be legitimately asked whether Moss Adams formed the bases of any of these statements without getting into the content of any information supplied by Moss Adams that might have formed the bases of the statements or conclusions raised in this letter. If that comes up, then I expect the parties will be back here again to readdress the extent to which Moss Adams is "at issue" in this case. If it's, as expected, that that's not testimony he will give, then I think we move on from here with this ruling intact. But I note that record is not before me because that record has not yet been developed.

All right. Finally, there is a request for fees and expenses. And on this, I will be brief. Rule 37(a)(4)(A) requires the Court to award the movant its fees and expenses when it obtains an order that provides relief on a motion to compel unless the Court finds that the opposition to the motion was substantially justified.

MR. RATH: Your Honor, I apologize for

interrupting.

THE COURT: Are you withdrawing your request for fees?

MR. RATH: We are, Your Honor. And we had intended to say so at the conclusion of our argument, and we neglected to do so. I apologize.

THE COURT: For whatever it's worth, I was going to deny the request, in any event. So well done.

All right. So with all of that said, I think where we are is the plaintiffs' motion to compel is granted in part and denied in part. The defendants' motion to compel for now is denied, without prejudice to renew it in the event there is a basis to do so in the to-be-developed record. I underscore that. I don't want to revisit this ruling on the current record unless there's a proper motion to reargue filed.

I am mindful of the fact that you are now moving at some pace here through discovery. And your very fulsome briefing has been helpful to me on this issue, and privilege issues tend to require that. With that said, my usual view, especially in a case where we've got a trial coming up in a few months, is

less substantial papers and more direct access to the decision-maker is helpful to the parties. And I certainly want to be available to you, to the extent that additional issues come up, so that we don't lose that trial date, because I would like, given the age of the case, to get you to that finish line as quickly as we can.

So if you have got discovery disputes that come up, I think a motion is helpful, as opposed to correspondence, but it doesn't have to be fully briefed. Talk about an expedited schedule to get it teed up for me and submitted, and I will either give you a quick teleconference or, if we need to, we can come together on a more expedited basis. But I don't want anything that I'm doing to be a basis for you to need to ask me to postpone the trial.

All right. Any questions or anything further we can take up?

MR. RAJU: Nothing from us, Your Honor.

THE COURT: All right. Thank you very much for the excellent briefs and the excellent arguments today.

Have a good day.

(Court adjourned at 2:50 p.m.)

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CERTIFICATE

I, DEBRA A. DONNELLY, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Merit Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 69 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 49 through 69, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 23rd day of May 2016.

/s/ Debra A. Donnelly

Debra A. Donnelly
Official Court Reporter
Registered Merit Reporter
Certified Realtime Reporter
Delaware Notary Public