

**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

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April 10, 2019

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Re: *Tigani v. Tigani*,  
Civil Action No. 2017-0786-KSJM

Dear Counsel and Mr. Tigani:

This letter opinion addresses Plaintiffs' Exceptions to the Special Discovery Master's Final Report.<sup>1</sup> In November 2017, Plaintiffs Christopher J. Tigani, Sr. ("Chris")<sup>2</sup> and Robert F. Tigani, Jr. ("Bobby," and with Chris, "Plaintiffs"), individually and on behalf of their minor children, filed a claim for breach of fiduciary duty against their father, Robert F. Tigani, Sr. ("Bob" or "Defendant").<sup>3</sup>

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<sup>1</sup> C.A. No. 2017-0786-KJSM Docket ("Dkt.") 153, R. & R. of the Special Disc. Master ("Report").

<sup>2</sup> This letter distinguishes the parties, who share a last name, by referring to them by their first names. The Court means no disrespect.

<sup>3</sup> Dkt. 1, Verified Compl. ("Compl.").

Thereafter, Plaintiffs filed a series of discovery motions.<sup>4</sup> In August 2018, the Court appointed a Special Discovery Master.<sup>5</sup> The parties took exceptions to certain recommendations made by the Special Discovery Master in his Report. This letter adopts in part and rejects in part the recommendations of the Special Discovery Master's Report. The reason for this determination follows.

## **I. BACKGROUND**

This dispute arises from a transaction between Defendant and non-party NKS Distributors, Inc. ("NKS"). James V. Tigani Sr. and Betty S. Tigani ("Trustors"), founded NKS in 1949.<sup>6</sup> The Trustors endeavored to keep NKS a family-owned business by transferring NKS stock to trusts for their children.<sup>7</sup> The Trustors created

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<sup>4</sup> See Dkt. 44, Mot. to Compel Doc. Produc.; Dkt. 89, Mot. to Compel Produc. of One Doc. and Conduct Forensic Inspection of Def.'s Devices; Dkt. 93, Mot. to Compel the Dep. of Mr. Paul Ruggiero and Pursuant to Rule 37(d) Sanction NKS Distribs., Inc.; Dkt. 92, Mot. to Compel Doc. Produc. and Strike Objs. of Def., N.K.S Distribs., Inc., and Bayard, P.A.; Dkt. 99, Letter Mot. for Sanctions for Disc. Abuse by Bayard P.A. and Mr. Stephen Brauerman; Dkt. 104, Mot. to Compel Def.'s Alter-Ego N.K.S Distribs., Inc. To Prod. Third-Party Docs. of Pillar Wealth Advisors, LLC ("Sixth Mot."); Dkt. 105, Mot. to Compel Dep. of Def.'s Alter-Ego NKS Distribs., Inc.; Dkt. 108, Mot. to Compel Doc. Produc. of Withum Smith & Brown and Find Stephen B. Brauerman in Contempt of Ct.; Dkt. 128, Mot. to Compel Produc. of Privileged Docs. from Richards Layton & Finger, Bayard, P.A., Gawthrop Greenwood, P.A. & NKS Distribs., Inc.

<sup>5</sup> Dkt. 131, Order Appointing Special Disc. Master.

<sup>6</sup> Dkt. 193, Def.'s Combined Ans. Br. in Opp'n to Christopher J. Tigani's Opening Br. in Supp. of his Exceptions to the Final Report of the Special Disc. Master, and Opening Br. in Supp. of His Exceptions ("Def.'s Ans. Br.") at 4.

<sup>7</sup> Compl. Ex. B ¶¶ 10–13.

a trust for Defendant (the “1986 Trust”).<sup>8</sup> Defendant is the trustee and sole lifetime beneficiary of the 1986 Trust.<sup>9</sup> The 1986 Trust holds of 72 shares of NKS stock.<sup>10</sup> Defendant also holds NKS stock in his individual capacity.<sup>11</sup>

In March 2012, NKS faced liquidity issues.<sup>12</sup> NKS’s creditors demanded that NKS secure third-party refinancing.<sup>13</sup> NKS secured refinancing through Bank of America.<sup>14</sup> Bank of America conditioned the refinancing on NKS’s ability to attract \$5 million in new capital.<sup>15</sup> To facilitate the equity infusion, Defendant, along with James Tigani (“Jim”) and Leo Renzette, formed 399 Associates, LLC (“399 Associates”).<sup>16</sup> Through a series of transactions, 399 Associates invested \$5 million

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<sup>8</sup> Def.’s Ans. Br. Ex. 1, Irrevocable Tr. for the Benefit of Robert F. Tigani dated December 16, 1986 (“1986 Trust”).

<sup>9</sup> *Id.* Art. 4. The 1986 Trust provides that Defendant may select substitute or successor trustees from the following list (in order of priority): Bob Tigani, James V. Tigani, Jr., and Bobby and Chris Tigani as co-trustees. *Id.* Art. 4(E). Defendant may also select successor beneficiaries from either Bobby, Chris, or any of their children. *Id.*

<sup>10</sup> Def.’s Ans. Br. at 5.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Id.* Ex. 4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* Ex. 6 (“BOA Agreement”).

<sup>15</sup> BOA Agreement Ex. A at 6.

<sup>16</sup> Def.’s Ans. Br. Ex. 5.

in NKS.<sup>17</sup> NKS then secured refinancing through Bank of America.<sup>18</sup> Eight months later, the NKS Board issued Bob 75 shares of NKS stock for his part in the equity infusion (“Stock Issuance”).<sup>19</sup> The Board backdated the Stock Issuance to July 13, 2012.<sup>20</sup> The Verified Complaint challenges the Stock Issuance as the product of breaches of fiduciary duties.<sup>21</sup>

## II. PROCEDURAL HISTORY

On February 6, 2017, the Court entered a scheduling order governing discovery.<sup>22</sup> Over the next six months, Chris filed nine discovery motions.<sup>23</sup> During an August 10, 2018 hearing, the Court appointed a Special Discovery Master, Anthony Rickey, Esquire (“Special Discovery Master”), to resolve the outstanding motions.<sup>24</sup> Plaintiffs withdrew their first two motions.<sup>25</sup> The Special Discovery

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<sup>17</sup> *Id.*

<sup>18</sup> Def.’s Ans. Br. at 10–11.

<sup>19</sup> *Id.* See also *id.* Ex. 10 at 2.

<sup>20</sup> *Id.* See also *id.* Ex. 2. Defendant now controls all of NKS’ issued and outstanding stock. Def.’s Ans. Br. at 4.

<sup>21</sup> Compl. ¶¶ 1–6 at pp. 28–29.

<sup>22</sup> Dkt. 52.

<sup>23</sup> See *supra* note 4.

<sup>24</sup> Dkt. 131, Order appointing Special Disc. Master and Tr. of Hr’g on Outstanding Mots. held 8-10-18.

<sup>25</sup> See Dkt. 132, Letter Withdrawing Mot. to Compel Produc. of Docs.; Dkt. 146, Order Regarding Pl. Christopher J. Tigani’s Second Mot. to Compel.

Master held oral argument on September 24, 2018, concerning the remaining seven motions.<sup>26</sup> On October 12, 2018, the Special Discovery Master issued his Report and Recommendation (“Report”).<sup>27</sup> The Special Discovery Master recommended that the Court grant Plaintiffs’ Third, Fourth, and Seventh Motions, and deny Plaintiffs’ Fifth, Sixth, Eighth, and Ninth Motions.

Both parties filed exceptions to the Report,<sup>28</sup> and Defendant later withdrew his exceptions.<sup>29</sup> The parties completed briefing on December 7, 2018.<sup>30</sup> The Court held Oral Argument on Plaintiffs’ exceptions on February 27, 2019.<sup>31</sup>

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<sup>26</sup> Report Ex. A.

<sup>27</sup> Dkt. 153.

<sup>28</sup> Dkt. 157, Pls.’ Notice of Exceptions to Special Disc. Master’s Final Report; Dkt. 158, Def., Robert F. Tigani, Sr.’s Notice of Exceptions to R. & R. of Special Disc. Master.

<sup>29</sup> Dkt. 211, Def.’s Notice of Withdrawal of His Exceptions to R. & R. of the Special Disc. Master.

<sup>30</sup> *See* Dkt. 165, Pls.’ Opening Br. in Supp. of his Exceptions to the Final Report of the Special Disc. Master, corrected at Dkt. 180; Dkt. 193, Def.’s Ans. Br.; Dkt. 201, Letter to Vice Chancellor McCormick (noting that Plaintiffs would not file a reply brief in response to Defendant’s Answering Brief). *See also* Dkt. 198, Non-Parties NKS Distributors, Inc.’s and Bayard, P.A.’s Joint Ans. Br. in Resp. to Christopher J. Tigani’s Opening Br. in Supp. of his Exceptions to the Final Report of the Special Disc. Master.

<sup>31</sup> Dkt. 223, Tr. of the February 27, 2019 Oral Arg. on the Pls.’ Exceptions to the Special Master’s Report (“Or. Arg. Tr.”).

### III. ANALYSIS

Plaintiffs challenge the Report's recommendations relating to the Fourth, Sixth, Eighth, and Ninth Motions.<sup>32</sup> Plaintiffs' exceptions focus three issues: discovery into Defendant's estate planning documents; fee-shifting in connection with the Sixth Motion; and application of the fiduciary exception to Defendant's privilege assertions.<sup>33</sup>

The Court reviews *de novo* the legal and factual findings of a Special Discovery Master's Final Report.<sup>34</sup>

#### A. Discovery into Defendant's Estate Planning Documents

Plaintiffs seek discovery of Defendant's estate-planning documents. Plaintiffs argue that these documents are relevant because Defendant's estate planning motivated certain of NKS's corporate decisions in 2017.<sup>35</sup> Plaintiffs contend that these documents are relevant because Defendant is using estate planning instruments to "mak[e] wholesale changes to the trust property."<sup>36</sup>

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<sup>32</sup> Dkt. 180, Pls.' Corrected Opening Br. ("Pls.' Opening Br.") at 14; Or. Arg. Tr. at 4:5–9, 26:8–21.

<sup>33</sup> Plaintiffs noticed exceptions to the Eighth Motion, but failed to articulate bases for the exceptions. I have reviewed the Report's analysis on the Eighth Motion and find it well-founded. I therefore adopt the Report's recommendations on the Eighth Motion.

<sup>34</sup> Ct. Ch. R. 144(a); *DiGiacobbe v. Sestak*, 743 A.2d 180, 184 (Del. 1999).

<sup>35</sup> Oral Arg. Tr. at 46:16–47:5. *See also* Report at 15.

<sup>36</sup> Pls.' Opening Br. at 45.

Plaintiffs also argue that such information might be relevant for impeachment purposes.<sup>37</sup> Defendant has represented to the Court that “he already produced to the Plaintiffs all of his estate planning documents,” such that the only documents remaining would be drafts or would concern prospective estate plans.<sup>38</sup>

The Report concluded that the draft and prospective estate planning documents are not reasonably calculated to lead to the discovery of admissible evidence.<sup>39</sup> The Report reasoned that the theory of relevance is attenuated, and that discovery into Defendant’s personal life should be avoided if possible.<sup>40</sup>

The Court concurs with the Report’s recommendation. “To be discoverable, the material must be both relevant and, at a minimum, ‘reasonably calculated to lead to the discovery of admissible evidence.’”<sup>41</sup> Plaintiff has failed to make this showing for Defendant’s prospective estate planning documents. The Court adopts the Report’s recommendation.

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<sup>37</sup> *Id.* at 49–50.

<sup>38</sup> Def.’s Ans. Br. at 18.

<sup>39</sup> Report at 15–16.

<sup>40</sup> *Id.*

<sup>41</sup> *In re Appraisal of Dole Food Co., Inc.*, 114 A.3d 541, 548 (Del. Ch. 2014); *see also* Ct. Ch. R. 26(b)(1).

**B. The Sixth Motion**

The Sixth Motion concerns a subpoena on Pillar Wealth Advisors, LLC (“Pillar”).<sup>42</sup> In response to the subpoena, Pillar produced documents and a privilege log.<sup>43</sup> The privilege log appeared to preserve *NKS*’s privilege assertions.<sup>44</sup> Thereafter, Plaintiffs moved to compel *NKS* to require Pillar to produce the documents logged as privileged.<sup>45</sup>

The Report recommends that the Sixth Motion be denied in its entirety. The Report further recommends that Chris be required to pay the fees and expenses incurred by Defendant, *NKS*, and Pillar in responding to the Sixth Motion, which the Report describes as legally frivolous.<sup>46</sup>

Plaintiffs take issue with the fee-shifting aspect of the Report’s recommendation only,<sup>47</sup> and the Court rejects this aspect of the Report’s

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<sup>42</sup> Dkt. 80, Pls.’ Subpoena Duces Tecum on Pillar Wealth Advisors for Michael Bree.

<sup>43</sup> Pls.’ Opening Br. at 52.

<sup>44</sup> Sixth Mot. Ex. D.

<sup>45</sup> Sixth Mot. at 1.

<sup>46</sup> Report at 40–41.

<sup>47</sup> Pls.’ Opening Br. at 51–52.

recommendation. It is sufficient to deny the motion. Faulting a *pro se* litigant for procedural missteps through fee-shifting would be unjust under the circumstances.<sup>48</sup>

### **C. The Ninth Motion**

The Ninth Motion seeks to compel NKS and various law firms to produce in full documents withheld as privileged or produced in redacted form.

The Special Discovery Master found the Ninth Motion procedurally and substantively deficient.<sup>49</sup>

Procedurally, the Report faults Chris for serving the Ninth Motion by email on non-parties Richards, Layton & Finger, P.A. and Gawthrop Greenwood, P.A.,<sup>50</sup>

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<sup>48</sup> Ct. Ch. R. 37(a)(4)(A) (“[T]he Court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in obtaining the order, including the attorney’s fees, unless the Court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.”); *In re Estate of Wolhar*, 2018 WL 721417, at \*11 (Del. Ch. Feb. 6, 2018), *adopted sub nom. In re Wolhar v. Wolhar* (Del. Ch. Feb. 21, 2018) (holding that *pro se* plaintiffs should be granted leniency in discovery disputes).

<sup>49</sup> Report at 54–56.

<sup>50</sup> Report at 54. The Special Discovery Master notes that “[t]he Court instructed [him] to deny those motions based on informal requests rather than formal . . . demands or document requests under the rules.” *Id.* at 12. The Court of Chancery Rules do not allow email service. *See* Ct. Ch. R. 4(d), 5(b); Ct. Ch. Operating Procedures (II)(4)(ii).

who did not accept service by email.<sup>51</sup> Chris does not challenge this aspect of the Report's recommendation,<sup>52</sup> and the Court adopts it.

Substantively, the Report concludes that neither the fiduciary nor crime-fraud exceptions apply to the documents at issue.<sup>53</sup> In support of the fiduciary exception, Chris cites to *Riggs National Bank v. Zimmer*, in which the Court granted a motion to compel filed by beneficiaries of a trust as to privileged information prepared for their benefit.<sup>54</sup> The Report declined to apply the rule of *Riggs* to require production of the documents Chris now seeks.<sup>55</sup> In reaching this conclusion, the Report relied on this Court's 2010 holding in prior litigation between the present parties,<sup>56</sup> in which the Court held that "Chris cannot be deemed the ultimate client of [Bayard], but, rather, more closely resembled an adverse party."<sup>57</sup> The 2010 decision distinguished *Riggs* on other grounds as well, but Chris's adverse posture was the primary distinction.

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<sup>51</sup> Report at 54, 56.

<sup>52</sup> Pls.' Opening Br. at 39–43, 52–54.

<sup>53</sup> Report at 55–56.

<sup>54</sup> 355 A.2d 709, 710 (Del. Ch. 1976).

<sup>55</sup> Report at 55.

<sup>56</sup> *N.K.S. Distribs., Inc. v. Tigani*, 2010 WL 2011603, at \*1 (Del. Ch. May 7, 2010).

<sup>57</sup> *Id.*

I decline to apply the Court’s 2010 holding that “Chris resembled an adverse party” for all time. It is reasonable to conclude that Chris might have been differently situated in connection with the advice reflected in the documents he now seeks. There was no pending litigation between the parties from August 2011 to September 2017, and the documents Plaintiffs request were created during this period of peace.<sup>58</sup>

In *Riggs*, the Court observed that “whether or not disclosure of the document in question should be allowed . . . must be determined in light of the purpose for which it was prepared.”<sup>59</sup> To determine the purpose for which the documents Chris seeks were prepared, *in camera* inspection is appropriate. I therefore order that the documents sought in connection with the Ninth Motion be produced to the Court within five business days.

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<sup>58</sup> See C.A. No. 4640-VCP Dkt. 365 (stipulation of dismissal with prejudice granted July 25, 2012); C.A. No. 2017-0786-KJSM, Dkt. 1 (complaint filed November 3, 2017). Defendants allege that Plaintiffs threatened litigation in September 2017. Def.’s Opening Br. at 12 (Plaintiffs sent “Bob increasingly stern demands, culminating in threats of litigation against Bob and/or N.K.S. on September 25, September 26, and October 3, 2017”); *Id.* at Ex. 12; Or. Arg. Tr. 69:13–17 (“[T]here was adversity between the trustee and the beneficiaries as of September 18th of 2017 when that letter was sent, because all the communications in which the trustee sought advice as trustee took place after that date.”). Plaintiffs sent Defendants a demand for accounting on September 18, 2017. See Dkt. 144, Def.’s Opp’n to Pl. Christopher J. Tigani’s Mot. to Compel Produc. of Privileged Docs. from Richards Layton & Finger, P.A., Bayard, P.A., Gawthrop Greenwood, P.A., and NKS Distribs., Inc. at Ex. B.

<sup>59</sup> *Riggs*, 355 A.2d at 711.

Plaintiffs argue that production of these documents is also appropriate under the crime-fraud exception expounded in *Buttonwood v. R.L. Polk & Co., Inc.*<sup>60</sup> The Special Discovery Master analyzed these claims under *Buttonwood* and determined that Plaintiffs' argument lacks merit.<sup>61</sup> The Report's reasoning on the application of *Buttonwood* is appropriate, and I need not repeat that analysis, which I adopt.<sup>62</sup>

#### **IV. CONCLUSION**

For the foregoing reasons, the Special Discovery Master's Report and Recommendations as to the Fourth, Sixth, Eighth, and Ninth Motions are confirmed and adopted by the Court, except that Plaintiffs are not responsible for fees in connection with the Sixth Motion, and documents shall be produced for *in camera* inspection in connection with the Ninth Motion. The remaining recommendations of the Report are adopted in their entirety.

The stay entered by the Court is hereby lifted. For quite some time, Chris has indicated his intent to file an amended pleading. Any amended pleading must be

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<sup>60</sup> 2018 WL 346036, at \*8 (Del. Ch. Jan. 10, 2018).

<sup>61</sup> Report at 55.

<sup>62</sup> *In re Xura, Inc. S'holder Litig.*, 2019 WL 581386, at \*1 (Del. Ch. Feb. 13, 2019) (“[B]elieving the [Special Discovery] Master to have dealt with the issues in a proper manner and having articulated the reasons for [his] decision well, there is no need for me to repeat [his] analysis.” (third and fourth alterations in original) (quoting *In re Erdman*, 2011 WL 2191680, at \*1 (Del. Ch. May 26, 2011))).

*Tigani v. Tigani*  
C.A. No. 2017-0786-KSJM  
April 10, 2019  
Page 13

filed on or before April 30, 2019. After April 30, 2019, the parties are instructed to confer on an appropriate schedule for moving this litigation forward.

Very truly yours,

*/s/ Kathaleen St. J. McCormick*

Kathaleen St. J. McCormick

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