

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

Case No. 50-2018-CA-004190-XXXX-MB

GEORGE W. SCHAEFFER, an
individual; GEORGE W. SCHAEFFER
AS TRUSTEE OF THE GEORGE W.
SCHAEFFER LIVING TRUST DATED
DECEMBER 16, 2008, AS AMENDED;
and GWS 2, INC., a Florida corporation,

Plaintiffs,

v.

DOWLING & HALES, LLC,

Defendant/Third Party Plaintiff,

v.

PEOPLE'S TRUST INSURANCE COMPANY,

Third Party Defendant.

**DOWLING & HALES, LLC'S SUPPLEMENTAL MEMORANDUM OF LAW ON
PLAINTIFFS' OBJECTION TO NOTICES OF PRODUCTION FROM NON-PARTIES**

Defendant Dowling & Hales, LLC ("Dowling Hales") respectfully submits this Supplemental Memorandum of Law, pursuant to the Court's invitation at the March 21, 2019 hearing on Plaintiffs' Objection to Defendant's Notices of Production from Non-Parties.

Dowling Hales submits this Supplemental Memorandum of Law to specifically address the issues listed in the Argument sections below.

FACTUAL BACKGROUND

In the proposed subpoenas directed to Plaintiff George W. Schaeffer's California accountants (Vinesh Nathu and PricewaterhouseCoopers), Dowling Hales seeks the following records:

All communications with George W. Schaeffer, **between January 1, 2010 and January 25, 2014**, relating to, concerning, or regarding the value of People's Trust Holdings, LLC, People's Trust Insurance Company, People's Trust MGA, LLC, GS Two, LLC, or GS Deerfield, LLC.

All communications with George W. Schaeffer, **between January 1, 2010 and January 25, 2014**, relating to, concerning, or regarding the value of George W. Schaeffer's interest in (whether directly or through any affiliated persons or entities) People's Trust Holdings, LLC, People's Trust Insurance Company, People's Trust MGA, LLC, GS Two, LLC, or GS Deerfield, LLC.

All documents sent by George W. Schaeffer, **between January 1, 2010 and January 25, 2014**, relating to, concerning, or regarding the value of People's Trust Holdings, LLC, People's Trust Insurance Company, People's Trust MGA, LLC, GS Two, LLC, or GS Deerfield, LLC.

All documents sent by George W. Schaeffer, **between January 1, 2010 and January 25, 2014**, relating to, concerning, or regarding the value of George W. Schaeffer's interest in (whether directly or through any affiliated persons or entities) People's Trust Holdings, LLC, People's Trust Insurance Company, People's Trust MGA, LLC, GS Two, LLC, or GS Deerfield, LLC.

See Exhibits 1 and 2 to Plaintiffs' Objection (emphases added).

ARGUMENT

I. California Lacks Any Accountant-Client Privilege

At the hearing on Plaintiffs' Objection, the Court questioned counsel whether California law recognizes any accountant-client privilege. To be clear, California does not recognize any such privilege. *See* Cal. Evid. Code §§ 930-1063 (titled "Chapter 4. Particular Privileges"); *see also Platypus Wear, Inc. v. K.D. Co., Inc.*, 905 F. Supp. 808, 813 (S.D. Cal. 1995) ("California law contains no accountant-client privilege.").

II. Residency of the Plaintiffs in this Action

At the hearing on Plaintiffs' Objection, the issue of Plaintiffs' Florida residency also arose. To be clear, at all relevant times for purposes of the proposed subpoenas directed to the California accountants, Mr. Schaeffer resided in California. *See* Complaint, ¶ 14 (noting that Mike Gold passed away unexpectedly on January 26, 2014); *see* Deposition of Vinesh Nathu at 167:17 to

168:3, attached as Exhibit 1 to Dowling Hales' Response dated 3/18/2019 (noting that Schaeffer moved to Florida after Mike Gold passed away). The proposed subpoenas to Schaeffer's accountants seek records only until January 25, 2014 – the day before Mike Gold passed away. See Exhibits 1 and 2 to Plaintiffs' Objection.

As to the other Plaintiffs:

- George W. Schaeffer as Trustee of the George W. Schaeffer Living Trust Dated December 16, 2008, as amended
 - This is a trust “validly existing under California law.” See Complaint, ¶ 3.
- GWS 2, Inc.
 - This is a Florida corporation established on July 16, 2014, which is after the final date of records sought in the proposed subpoenas. See **Exhibit 1**, attached hereto.

III. Burden to Establish Privilege

Plaintiffs bear the threshold burden to establish that an accountant-client privilege applies. See *Cone v. Culverhouse*, 687 So. 2d 888, 892 (Fla. 2d DCA 1997); see also *Florida Sheriffs' Self-Ins. Fund v. Escambia County*, 585 So. 2d 461, 463 (Fla. 1st DCA 1991). Only after Plaintiffs meet that burden, does the burden shift to Dowling Hales to prove that an exception or waiver applies.

Here, there is no issue about an exception or waiver. The only issue is the threshold legal determination about whether a privilege applies at all. As such, Plaintiffs bear the burden to establish the privilege applies, and they have failed to meet it.

IV. Section 139(1) of the Restatement (Second) of Conflicts of Laws

Section 139(1) of the Restatement (Second) of Conflict of Laws states that:

Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.

Id. “The evidence will not, however, be admitted in those *rare* instances where its admission would be contrary to the strong public policy of the forum.” Restatement (Second) of Conflict of Laws § 139, Comment on Subsection (1) (emphasis added).

The Second Restatement provides the following Illustration, in order to further explain Subsection (1):

In state X, A, a business man doing business in X, gives certain information to B, an accountant, which is not privileged under X local law. The information would, however, be privileged under the local law of state Y, and in the trial of an action brought in Y, A claims that evidence of his conversation with B should be excluded. The evidence will be received.

Restatement (Second) of Conflict of Laws § 139, Comment on Subsection (1), Illustration 1.

The situation described in the Illustration above is nearly identical to the situation in the present case, as demonstrated by inserting the relevant party and State names in place of X, Y, A, and B:

In state [California], [George Schaeffer], a business man doing business in [California], gives certain information to [Vinesh Nathu/PricewaterhouseCoopers], an accountant, which is not privileged under [California] local law. The information would, however, be privileged under the local law of state [Florida], and in the trial of an action brought in [Florida], [George Schaeffer] claims that evidence of his conversation with [Vinesh Nathu/PricewaterhouseCoopers] should be excluded. The evidence will be received.

As a result, the present case is not the *rare* case where the strong public policy of the forum State (Florida) trumps the privilege law of the State with the most significant relationship to the communication (California). In fact, under the circumstances presented here, applying the privilege law of the State with the most significant relationship to the communication (California) is expressly approved by the Second Restatement.

V. Various Jurisdictions Have Adopted Section 139, And The Court Should Do So Here

Various States and jurisdictions have adopted Section 139:

- Colorado: *People v. Thompson*, 950 P.2d 608, 611 (Colo.App.1997) (concluding that section 139 provided the appropriate framework for analyzing the issue of marital privilege).
- Delaware: *3Com Corp. v. Diamond II Holdings, Inc.*, 2010 WL 2280734, *5 (Del. Ch.2010 May 31, 2010) (not reported) (applying section 139 to an attorney-client privilege issue).
- District of Columbia: *Independent Petrochemical Corp. v. Aetna Cas. and Sur. Co.*, 117 F.R.D. 292, 295–296 (D.D.C.1987) (because the District of Columbia typically applies an “interest analysis” approach and relies on the Second Restatement for other choice of law matters it would likely adopt section 139 for privilege matters).
- Illinois: *Allianz Ins. Co. v. Guidant Corporation*, 869 N.E.2d 1042, 1048–1049 (Ill.App.2007) (section 139 governs issue of attorney-client privilege); *Sterling Finance Management, L.P. v. UBS PaineWebber, Inc.*, 782 N.E.2d 895, 903–904 (Ill.App.2002) (same).
- Iowa: *State v. Eldrenkamp*, 541 N.W.2d 877 (Iowa 1995) (looking to section 139 for guidance on privilege issue).
- Kentucky: *Saleba v. Schrand*, 300 S.W.3d 177, 181–183 (Ky.2009) (applying section 139 to privilege issue).
- Maine: *State v. Lipham*, 910 A.2d 388, 392 n. 3 (Me.2006) (considering section 139 when assessing choice of law issue regarding marital privilege).
- Ohio: *Woefling v. Great–West Life Assur. Co.*, 285 N.E.2d 61, 221 n. 2 (Ohio App.1972) (finding that Illinois physician-patient privilege controlled and citing to § 139).
- Minnesota: *State v. Heaney*, 689 N.W.2d 168, 175–177 (Minn.2004) (applying the most significant relationship approach of section 139 to privilege choice of law analysis).
- New York: *Brandman v. Cross & Brown Co. of Florida, Inc.*, 479 N.Y.S.2d 435, 436–437 (N.Y.Sup.1984) (referencing section 139 and stating that the attorney-client privilege is substantive for purposes of choice of law and New York courts will apply the law of the state with the more significant contacts); *see also Mazella v. Philadelphia Newspapers, Inc.*, 479 F.Supp. 523 (D.C.N.Y.1979) (Neaheer, J.) (applying New York choice of law principles; considering section 139 and applying Pennsylvania privilege law because the communication was centered in Pennsylvania).

- Pennsylvania: *James Talcott, Inc. v. C.I.T. Corp.*, 14 Pa. D & C.3d 204, 206 (Pa.Com.Pl.1980) (referencing section 139 and applying the accountant-client privilege law of the state with the most significant relationship to the communication) (**Exhibit 2**, attached hereto); *see also Samuelson v. Susen*, 576 F.2d 546, 551 (3d Cir. 1978) (Pennsylvania courts have adopted the “interest analysis” approach to conflict questions and therefore would apply the privilege law of the state with the most significant relationship to the privileged communication—particularly when there was no connection between the communication and the forum).
- Puerto Rico: *Mitsui & Co. (U.S.A.) Inc. v. Puerto Rico Water Resources Authority*, 79 F.R.D. 72 (D.C. Puerto Rico 1978) (considering relevant case law and section 139 of the Restatement; concluding that New York law governed the issue of accountant privilege because New York was the state with the most significant relationship to the privileged communication).
- Texas: *Alez v. State*, 45 S.W.3d 101, 103–106 (Tex.Crim.App.2001) (applying section 139 to privileged communication issue).
- Washington: *State v. Donahue*, 18 P.3d 608, 611 (Wash.App.Div.2001) (applying section 139 to physician-patient privilege).
- Wisconsin: *State v. Kennedy*, 396 N.W.2d 765, 769–770 (Wis.App.1986) (relying on section 139 of the Restatement (Second) and concluding that Wisconsin’s physician-patient privilege controlled).

Based on the authorities set forth above, the authorities presented in Dowling Hales’ prior Response, and the arguments presented at the March 21, 2019 hearing, the Court should overrule Plaintiffs’ Objection and allow Dowling Hales to issue its proposed subpoenas to George Schaeffer’s California accountants.

CARLTON FIELDS, P.A.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Courts' ePortal to all counsel of record on March 28, 2019.

/s/ Michael D. Sloan

Michael D. Sloan

EXHIBIT 1



[Department of State](#) / [Division of Corporations](#) / [Search Records](#) / [Detail By Document Number](#) /

Detail by Entity Name

Florida Profit Corporation

GWS 2, INC.

Filing Information

Document Number	P14000060115
FEI/EIN Number	47-1487419
Date Filed	07/16/2014
Effective Date	07/16/2014
State	FL
Status	ACTIVE

Principal Address

18 PEOPLE'S TRUST WAY
DEERFIELD BEACH, FL 33441

Mailing Address

18 PEOPLE'S TRUST WAY
DEERFIELD BEACH, FL 33441

Registered Agent Name & Address

FRANKEL, BRETT R
18 PEOPLE'S TRUST WAY
DEERFIELD BEACH, FL 33441

Name Changed: 02/27/2015

Officer/Director Detail

Name & Address

Title DIR

SCHAEFFER, GEORGE W
18 PEOPLE'S TRUST WAY
DEERFIELD BEACH, FL 33441

Title DIR

SCHAEFFER, IRINA
18 PEOPLE'S TRUST WAY
DEERFIELD BEACH, FL 33441

Title CHIEF LEGAL OFFICER

FRANKEL, BRETT R.
18 PEOPLE'S TRUST WAY
DEERFIELD BEACH, FL 33441

Annual Reports

Report Year	Filed Date
2016	04/07/2016
2017	02/01/2017
2018	04/06/2018

Document Images

04/06/2018 -- ANNUAL REPORT	View image in PDF format
02/01/2017 -- ANNUAL REPORT	View image in PDF format
04/07/2016 -- ANNUAL REPORT	View image in PDF format
02/27/2015 -- ANNUAL REPORT	View image in PDF format
07/16/2014 -- Domestic Profit	View image in PDF format

EXHIBIT 2

14 Pa. D. & C.3d 204
Court of Common Pleas of
Pennsylvania, Allegheny County.

James Talcott, Inc.

v.

C.I.T. Corporation

No. G.D. 79-316.

|

February 26, 1980

Attorneys and Law Firms

William M. Wycoff, for plaintiffs.

Michael D. Fox, for deponent.

Opinion

WETTICK, J.

****1** As part of their discovery in litigation pending in Arizona, plaintiffs have scheduled in Allegheny County the oral deposition of Robert J. Kavanaugh, an accountant working in the Pittsburgh office of Arthur Andersen and Co., and have subpoenaed for the deposition records concerning Kincoa, Incorporated (Kincoa) and Kino Springs, Incorporated (Kino Springs). Kavanaugh and Arthur Andersen have requested this court to quash this subpoena or to order that Mr. Kavanaugh not be required to testify or produce documents concerning any matter within the scope of the Pennsylvania accountant-client privilege, including financial statements, income statements, balance sheets, third-party ***205** communications, etc., prepared or received by Arthur Andersen in connection with any work performed for Kincoa and Kino Springs.

The necessary facts to decide this motion are not in dispute. Kavanaugh is an accountant presently working in the Pittsburgh office of Arthur Andersen and Co. Previously he worked in its Massachusetts office. While working in the Massachusetts office he provided accounting services to Kincoa and Kino Springs, and any information and records which Kavanaugh can provide derives from these accounting services provided in Massachusetts. Several years after these accounting services were provided, Kincoa and Kino Springs were adjudicated bankrupt by final decree entered in the

Federal District Court of Massachusetts. Furthermore these corporations presently have no place of business and the charters of both corporations were voided effective March 1, 1976 for failure to pay the Delaware franchise tax.

Kavanaugh contends that disclosure of the information which plaintiffs seek is barred by The C.P.A. Law of May 26, 1947, P.L. 318, as amended, **63 P.S. § 9.11a**. For the reasons set forth herein, we reject this contention and consequently deny the motion to quash the subpoena or for a protective order.

I

The information which plaintiffs seek was obtained by Mr. Kavanaugh in the course of providing accounting services to Kincoa and Kino Springs in Massachusetts. Consequently, the expectations of the parties as to the confidentiality of the communications would be based upon Massachusetts ***206** law. Therefore, the scope of the accountant-client privilege in this case should not be broader than that provided by Massachusetts law. Any other result would deprive the parties to the litigation of information which may produce a more just result without strengthening the accountant-client relationship.

****2** Massachusetts law does not protect from disclosure in court proceedings communications between accountants and clients. Therefore Mr. Kavanaugh cannot refuse to disclose the information which plaintiffs seek on the ground that it constitutes a privileged communication.

This result is supported by section 139 of the [Restatement, 2d, Conflict of Laws, §139](#). This section provides that evidence that is not privileged under the local law of the state which has the most significant relationship with the communication should be admitted even though it would be privileged under the local law of the forum unless the admission of such evidence would be contrary to the strong public policy of the forum.¹ To illustrate this rule, the comments to this section describe the situation in which a businessman doing business in State X gives information within that state to an accountant that is not privileged under X's laws. According to the illustration, evidence of the communication with the accountant

should be received in a trial in State Y even though the communication, if made in State Y, would be privileged.

Kavanaugh contends that [*207 section 5326 of the Judicial Code, 42 Pa.C.S.A. §5326](#), requires this court to apply the Pennsylvania accountant-client privilege to his deposition. This section (which authorizes any court within the Commonwealth to order any person found within this Commonwealth to give testimony or to produce documents for use in litigation pending in another state) provides that “the practice and procedure [for taking the testimony or producing the documents] shall be in accordance with that of the court of this Commonwealth issuing the order.” This provision requires only that the court issuing the order use the same practices and procedures that would apply to litigation pending in this court. And because we have ruled that a Pennsylvania court in litigation pending within this Commonwealth would be governed by the Massachusetts law defining the scope of the accountant-client privilege, [section 5326](#) does not support Kavanaugh's motion.

II

Even if we concluded that Pennsylvania local law determined the scope of discovery, we would reject Kavanaugh's claim that any information regarding the affairs of Kincoa and Kino Springs is protected by the Pennsylvania accountant-client privilege. Admittedly, the information which plaintiffs seek is excluded from discovery by the language of the Act of May 26, 1947, as amended. However, the accountant-client privilege belongs only to the client: [Ernst & Ernst v. Underwriters National Assurance Co., 381 N.E. 2d 897 \(Ct. App. Ind. 1978\)](#), and because both Kincoa and Kino Springs have been adjudicated bankrupt, have had their corporate charters voided and conduct no business, there is no entity whose interests would be protected by the accountant-client privilege.

Footnotes

- 1 According to the comments to this section, a strong public policy exists where the state of the forum has a substantial relationship to the party and the transaction and a real interest in the outcome of the case or where the court may consider the privilege to be sacrosanct. Thus the public policy exception is not applicable to this case.

****3 *208** Consequently, there exists no reason to prevent discovery of information relevant to this litigation.

This result is mandated by [Cohen v. Jenkintown Cab Co., 238 Pa. Superior Ct. 456, 357 A. 2d 689 \(1976\)](#), which held that the attorney-client privilege does not bar testimony of an attorney who reveals the substance of a confidential communication where clients' rights or interests cannot be adversely affected. The standards developed in [Cohen v. Jenkintown Cab Co.](#) to determine the scope of an attorney-client privilege that is absolute on its face clearly govern the accountant-client privilege.² See Note, [Privileged Communications -- Accountants and Accounting, 66 Mich. L. Rev. 1264, 1275 \(1968\)](#). This privilege -- unlike the attorney-client privilege -- is only statutory and traditionally has been more narrowly construed: [Greenfield Foundation v. Bankers Securities Corp., 7 Pa. D. & C.3d 535 \(1978\)](#); [Ernst & Ernst v. Underwriters National Assurance Co., supra](#), and cases cited therein. Moreover, the broad exclusion in the Act of May 26, 1947 from the privilege of information required to be disclosed by the standards of the profession in reporting on the examination of financial statements in contrast to the absolute privilege afforded the attorney-client relationship shows a legislative intent to provide fewer protections to the accountant-client relationship.

For these reasons we enter the following

***209 ORDER**

On February 26, 1980, it is hereby ordered that the motion to quash subpoena or for a protective order of Arthur Andersen and Co. and Robert J. Kavanaugh is hereby denied.

All Citations

14 Pa. D. & C.3d 204, 1980 WL 800

- 2 The attorney-client privilege is embodied statutorily in [42 Pa.C.S.A. §5928](#) which provides that: “In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.”

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