

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

KAREN B. OWENS
CHIEF JUDGE



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August 14, 2025

VIA CM-ECF

Counsel to David Dunn, as Trustee for the Zohar Litigation Trust-A
Counsel to the Patriarch Stakeholders

Re: *David Dunn, as Litigation Trustee for Zohar Litigation Trust-A v. Patriarch Partners, LLC, et al.*, Adv. Proc. No. 20-50534 (Bankr. D. Del.)

Dear Counsel:

This letter is my ruling on the remaining issues of *David Dunn Litigation Trustee for the Zohar Litigation Trust-A's Motion to Compel* (the "Motion").¹ The Zohar Litigation Trust-A (the "Trust") filed the Motion to, among other things, compel the production of documents from certain Defendants ("Patriarch") and Anchin, Block & Anchin LLP ("Anchin") that were alleged to be improperly withheld pursuant to the work product doctrine and the limited extension of the attorney-client privilege to third-party documents recognized in *U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1961). For purposes of this letter, I will refer to the documents withheld under the work product doctrine as the "Work Product Documents" and those withheld under the *Kovel* doctrine as the "*Kovel* Documents" (collectively, the "Withheld Documents").

In support of their application of the *Kovel* doctrine, Patriarch and Anchin submitted a declaration by Armando Gomez ("Gomez"), a partner at Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden").² Mr. Gomez explained that Skadden represented Patriarch in connection with an Internal Revenue Service audit (the "IRS Audit") and certain "check-the-box" elections (the "CTB Elections").³ Skadden retained Anchin in connection with those representations "to provide accounting analysis and related support that Skadden required to support its ability to provide legal

¹ Adv. D.I. 811.

² Adv. D.I. 847; *see also* Adv. D.I. 843, 846.

³ Adv. D.I. 847 ¶¶ 3, 5.

advice to the Clients.”⁴ Mr. Gomez’s declaration further attached Skadden’s engagement letter with Anchin.⁵ The engagement letter specifies that Anchin would report directly to Skadden⁶ and that all communications between Anchin and Skadden were confidential and solely for the purposes of assisting Skadden in providing legal advice to Patriarch.⁷ Patriarch and Anchin asked me to rely on this information to conclude that the *Kovel* Documents were protected from disclosure.

Courts recognize that certain non-lawyers are necessary to the provision of legal advice such that communications with them may be privileged under an extension of the attorney-client privilege. In *Kovel*, the Second Circuit applied this concept to accountants.⁸ The court analogized them to foreign language translators, but not just in the literal sense.⁹ “Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases.”¹⁰ Therefore, their presence “ought not destroy the privilege” when it “is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.”¹¹ This policy recognizes the realities of “complexities of modern existence [that] prevent attorneys from effectively handling clients’ affairs without the help of others[.]”¹²

Because the *Kovel* doctrine is an extension of the already-narrow attorney-client privilege,¹³ the court in *Kovel* cautioned against an overzealous use; it cannot be established by attorneys “simply . . . placing accountants . . . on their payrolls[.]”¹⁴ The privilege holder must still justify the application of attorney-client privilege. The communication must be (1) confidential; and (2) for the purpose of obtaining legal advice.¹⁵ Therefore, if the advice or service

⁴ *Id.* at ¶¶ 4–5.

⁵ *Id.*, Ex. A.

⁶ *Id.* at 1.

⁷ *Id.* at 1–2.

⁸ *Kovel*, 296 F.2d at 921 (discussing four circumstances in which a translator could assist a lawyer, including “where the attorney, ignorant of the foreign language, sends the client to a non-lawyer proficient in it, with instructions to interview the client on the attorney’s behalf and then render his own summary of the situation, perhaps drawing on his knowledge in the process, so that the attorney can give the client proper legal advice”).

⁹ *Id.*

¹⁰ *Id.* at 922.

¹¹ *Id.*; see also *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999) (interviewing investment banker to gain important information about a proposed transaction to better advise a client is not within the scope of the *Kovel* doctrine as it does not translate or interpret information to improve the comprehension of attorney-client communications).

¹² *Kovel*, 296 F.2d at 921.

¹³ *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991) (“Because the attorney-client privilege obstructs the truth-finding process, it is construed narrowly.”).

¹⁴ *Kovel*, 296 F.2d at 921.

¹⁵ *Id.* at 922.

sought is that of the third party and not the attorney, the privilege will not exist.¹⁶ As the Second Circuit acknowledged, the application of the doctrine may not be an easy one, and it requires courts to exercise a more exacting level of examination than may be common.¹⁷

The Third Circuit and the courts within have adopted the principles espoused by *Kovel* and applied them beyond accountants to third parties agents who provide specialized assistance necessary to the issuance, comprehension, and execution of counsel's legal advice.¹⁸ In *United States v. Alvarez*, for instance, the Third Circuit recognized no distinction "between the need of defense counsel for expert assistance in accounting matters and the same need in matters of psychiatry[.]" and applied the *Kovel* doctrine in the context of a psychiatrist's assistance in developing an insanity defense.¹⁹

Notwithstanding this broadened application, the doctrine as applied in the Third Circuit is still not a blanket privilege covering all third parties hired by counsel.²⁰ The third party must be

¹⁶ *Id.*

¹⁷ *Id.* at 922-23 ("We realize . . . that the line we have drawn will not be so easy to apply as the simpler positions urged on us by the parties – the district judges will scarcely be able to leave the decision of such cases to computers; but the distinction has to be made if the privilege is neither to be unduly expanded nor to become a trap.").

¹⁸ *United States v. Alvarez*, 519 F.2d 1036, 1045–46 (3d Cir. 1975); *Westinghouse*, 951 F.2d at 1424; *United States v. Antolini*, 271 F. App'x 268, 271 n.1 (3d Cir. 2008); *D'Ambly v. Exoo*, No. 20-12880, 2024 WL 4880322, at *9 (D.N.J. Nov. 25, 2024) ("It remains that to qualify for protection under *Kovel*, the third-party's role must be to translate, interpret, or 'clarify communications between attorney and client.'" (quoting *In re Am. Med. Collection Agency, Inc., Customer Data Sec. Breach Litig.*, No. 19-md-2904, 2023 WL 8595741, at *9 (D.N.J. Oct. 16, 2023), *aff'd*, No. 19-md-2904, 2024 WL 5344456 (D.N.J. July 17, 2024))); *Salvagno v. Borough of Glen Ridge*, No. 08-2992, 2009 WL 2392887, at *3 (D.N.J. Aug. 3, 2009) ("[t]he key holding of *Kovel* is that the privilege only applies in instances in which the attorney's agent is seeking information in a manner unique to the third party in order to assist the attorney in rendering legal advice"); *Cellco P'ship v. Certain Underwriters at Lloyd's London*, No. 05-3158, 2006 WL 1320067, at *4 (D.N.J. May 12, 2006) (distinguishing between mere helpful information and advice and that which is required "to interpret complex issues in order to provide competent legal advice or to facilitate the attorney client relationship"); *La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.*, 253 F.R.D. 300, 311 (D.N.J. 2008) ("The concept of the attorney-client privilege extending to third-party agents has been developed through case law and has included 'investigators, interviewers, technical experts, accountants, physicians, patent agents, and other specialists in a variety of social and physical sciences.'" (quoting Rice § 3:3; 1 Edna Selan Epstein, *The Attorney–Client Privilege and the Work Product Doctrine* 219 (5th ed. 2007))); *see also In re Federated Mut. Funds Excessive Fee Litig.*, No. 04cv352, 2010 WL 11469561, at **5-6 (W.D. Pa. Mar. 25, 2010) (concluding that strategic consulting firm retained to aid lawyer's formulation of legal positions and claim theories reliant on the complexities of a fund profit and cost analyses was akin to an interpreter); *Sunnyside Manor, Inc. v. Twp. of Wall*, No. 02-2902, 2005 WL 6569572, at *4 (D.N.J. Dec. 22, 2005) (finding engineer's analysis of plaintiff's proposals was "part and parcel of the attorney's advice to the client" and "was an integral part of the relationship, necessary for the interpretation of the information needed to effectuate communication between Defendant and their attorneys").

¹⁹ *Alvarez*, 519 F.2d at 1046.

²⁰ *See, e.g., UPMC v. CBIZ, Inc.*, No. 16-cv-204, 2018 WL 1542423, at **7–8 (W.D. Pa. Mar. 29, 2018), *on reconsideration in part*, No. 16-cv-204, 2018 WL 2107777 (W.D. Pa. May 7, 2018) ("[T]he hiring of

“intrinsic to the communication and understanding of legal advice, as opposed to acting in some other capacity.”²¹ It is not enough for the third party to convey helpful and even critical information to counsel – “the third-party’s role must be to translate, interpret or ‘clarify communications between attorney and client.’”²²

At the initial hearing on the Motion, I determined that Patriarch provided insufficient evidence to shield the *Kovel* Documents from disclosure.²³ The *Kovel* doctrine is narrowly applied and requires an individual review and assessment of each potentially relevant document. There is no dispute that Anchin provided services to Patriarch as its long-term tax advisor independent of the services it provided to Skadden. While Mr. Gomez’s declaration evinced Skadden’s retention of Anchin and explained in general fashion Anchin’s assistance,²⁴ Mr. Gomez did not provide specific document descriptions and explanations of why the *Kovel* Documents fell within the doctrine. Accordingly, there was a risk that I could too broadly apply the *Kovel* doctrine if I denied the Motion and protected the *Kovel* Documents from disclosure.²⁵

I ordered Patriarch and Anchin to further review their privilege assertions and requested the Trust and Patriarch to engage in another round of meet and confer. This process reduced the number of *Kovel* Documents but did not yield consensus.²⁶ Therefore, I ordered the production of approximately 5% of the 1,462 *Kovel* Documents for my *in camera* review.²⁷

Ernst & Young by Plaintiff’s counsel to prepare IRS filings does not automatically immunize every communication from production in discovery . . .”).

²¹ *Am. Med.*, 2023 WL 8595741, at *8.

²² *Id.* at *9 (citing *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999) and holding that despite the *Kovel* agreement, evidence revealed the third party performed investigatory role that only assisted counsel); *see, e.g., Alvarez*, 519 F.2d at 1046 n.13 (distinguishing services for diagnosis and treatment from assistance of counsel in preparing insanity defense); *D’Ambly*, 2024 WL 4880322, at *8 (“fact gathering, fact finding, and other investigatory work by a third party . . . has nothing to do with the ‘translation’ or ‘interpretation’ of information between counsel and client, which is what *Kovel* requires” (quoting *Am. Med.*, 2023 WL 8595741, at *9)); *In re G-I Holdings Inc.*, 218 F.R.D. 428, 436 (D.N.J. 2003) (determining accountant hired by in-house counsel to consult on a proposed transaction’s tax consequences was not covered by *Kovel* because accountant did not define complicated accounting concepts “to attorneys unschooled in tax and accounting”); *Cottillion v. United Ref. Co.*, 279 F.R.D. 290, 306 (W.D. Pa. 2011) (finding communication contained calculations and explanations to transmit actuarial not legal advice); *La. Mun. Police*, 253 F.R.D. at 312, 314 (finding investment banker was retained for client’s business and financial purposes, not to facilitate legal advice).

²³ Adv. D.I. 953 (Apr. 29, 2025 Hr’g Tr.) at 108:2–4.

²⁴ *See, e.g., La. Mun. Police*, 253 F.R.D. at 312–13 (relying primarily on retainer agreement indicating the non-legal nature of investment banker’s retention to determine that the *Kovel* doctrine did not apply).

²⁵ *See In re Samsung Customer Data Sec. Breach Litig.*, No. 23-3055, 2024 WL 3861330, at **12–13 (D.N.J. Aug. 19, 2024) (courts should look beyond just the engagement letter to “the actual services performed, and the documents prepared . . .”).

²⁶ Adv. D.I. 1022.

²⁷ Adv. D.I. 1096.

The documents were delivered and reviewed. To assist in my review, I consulted the declaration by Jeffrey Bowden (“Bowden”), a principal at Anchin.²⁸ Mr. Bowden explains that Anchin was retained by three different law firms (the “Law Firms”) representing certain Defendants for the IRS Audit and CTB Elections. Specifically, Morgan, Lewis & Bockius LLP and Zuckerman Spaeder LLP retained Anchin to assist them in providing confidential legal advice with respect to the IRS Audit, and Skadden retained Anchin to assist it in providing confidential legal advice related to the IRS Audit and the CTB Elections. Mr. Bowden attests that Anchin was retained “to assist the law firms in providing legal advice to the Clients by interpreting or translating the Clients Financial Information . . . so that the law firms could provide legal advice to the Clients” in connection with the representations.²⁹ The engagement letters are attached to Mr. Bowden’s declaration and confirm the nature of Anchin’s relationship to the Law Firms. Mr. Bowden states that he reviewed a sampling of the *Kovel* Documents and believes that they “were prepared and created by Anchin at the direction of the law firms that retained Anchin”³⁰

Mr. Gomez also filed a second declaration.³¹ He confirms Mr. Bowden’s testimony regarding Anchin’s relationship to Skadden and its services:

With respect to the IRS Audit Representation, Skadden required Anchin’s accounting analysis and related support to help Skadden understand the Clients’ Financial Information so Skadden could provide effective legal advice to the Clients concerning, among other things, responses to IRS Information Document Requests and other IRS inquiries, potential IRS audit adjustments, administrative protests and presentations, and potential settlement alternatives relating to the IRS examinations.

. . . .

With respect to . . . the CTB Representation . . . , Skadden required Anchin’s accounting analysis and related support to help Skadden understand the Clients’ Financial Information so Skadden could provide effective legal advice to the Clients with respect to the check-the-box elections³²

Finally, Mr. Bowden submitted a second declaration for my *in camera* review. It provides additional detail with respect to each sampled *Kovel* Document and an explanation of why he

²⁸ Adv. D.I. 1022, Ex. 1.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

believes each document was necessary to the Law Firms' IRS Audit representation and fell within the *Kovel* doctrine.³³

With this context, I conclude that the *Kovel* doctrine was correctly applied to the sampled *Kovel* Documents. I am mindful that sharing a detailed analysis would reveal protected communications. It is sufficient for this exercise to disclose that the sampled *Kovel* Documents include financial models, computations, and analyses that Anchin prepared and provided to the Law Firms at their request to assist counsels' understanding of Patriarch's complex financial information in a manner relevant to counsels' legal responses, strategy, litigation, and settlement positions. The documents indicate that the accounting knowledge and expertise of Anchin provided to the Law Firms were not merely helpful but rather a specialized and necessary component of their IRS Audit representation that could not be competently provided by counsel.³⁴ Without Anchin's expertise, neither Patriarch nor the Law Firms "would have been able to effectively determine the proper course of action."³⁵ And while Anchin performed independent accounting services to Patriarch, the sampled *Kovel* Documents are not within the scope of such work. Accordingly, the *Kovel* doctrine applies.

In addition to the sampled *Kovel* Documents, I also ordered that the remaining Work Product Documents be produced for my *in camera* review.³⁶ The work product doctrine "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case."³⁷ The party asserting the work product doctrine applies has the burden of proving its application.³⁸ Courts evaluate "whether in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."³⁹ This involves considering whether the documents were prepared or obtained in anticipation of litigation and prepared for the primary

³³ The randomly sampled Withheld Documents did not implicate the CTB Elections.

³⁴ See, e.g., *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (holding accountant workpapers privileged because the attorney's "decision as to whether the taxpayers should file an amended return undoubtedly involved legal considerations which mathematical calculations alone would not provide" and it was "clear that the accountant's aid to the lawyer preceded the advice and was an integral part of it."); *Sunnyside Manor*, 2005 WL 6569572, at *4 (finding that engineer evaluated plaintiff's proposals, performed engineering reviews on them, interpreted technical information within them, and analyzed them to facilitate the attorneys' advice to the defendant and the defendant's consideration of the settlement).

³⁵ *Sunnyside*, 2005 WL 6569572, at *4.

³⁶ Adv. D.I. 1096. Disputes over these documents are unrelated to the *Kovel* doctrine.

³⁷ *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 661–63 (3d Cir. 2003) (quoting *United States v. Nobles*, 422 U.S. 225, 238 & n.11 (1975)); accord *United States v. Rockwell Int'l*, 897 F.2d 1255, 1265 (3d Cir. 1990) ("The doctrine is designed to protect material prepared by an attorney acting for his client in anticipation of litigation."); *In re Grand Jury*, 705 F.3d 133, 151 (3d Cir. 2012).

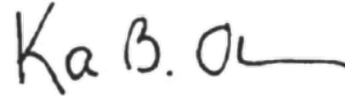
³⁸ *In re Grand Jury Subpoena*, 745 F.3d 681, 693 (3d Cir. 2014).

³⁹ *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1258 (3d Cir.1993) (quoting *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979)).

purpose of litigation.⁴⁰ Upon review, the Court agrees with Patriarch's position that the documents were created in anticipation of litigation and should be protected from disclosure.

Based upon the foregoing, I hereby deny the Trust's Motion to the extent it seeks to compel production of the Withheld Documents. Based upon my review of the sampled *Kovel* Documents, I am comfortable that Patriarch appropriately applied the *Kovel* doctrine to the remainder of the *Kovel* Documents. All of the Work Product Documents have been reviewed and are protected.

Sincerely,

A handwritten signature in black ink, appearing to read "Ka B. Owens", with a stylized flourish at the end.

Karen B. Owens

⁴⁰ See *United States v. Rockwell Int'l*, 897 F.2d 1255, 1265–66 (3d Cir. 1990).